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August 25, 1980

NOTE TO ECONOMIC POWERS WORKING GROUP

SUBJECT: Supplementary Briefing Material

Attached is an updated and expanded version of the supplementary briefing package originally prepared in Vancouver.

It should be noted that most of the updating of the S.121 material is limited to incorporation of addition points raised during the committee discussions. Except where stated explicitly, it does not reflect revisions to the proposed legislative text.

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POWERS OVER THE ECONOMY: SUPPLEMENTARY BRIEFING MATERIAL

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* Revised from, or added to, July 21 version.

POUVOIRS D'IMPOSITION

Problématique

Dans quelle mesure le nouvel article 121 limiterait-il les pouvoirs fiscaux des provinces?

Réponse

Le nouvel article 121 interdirait toute mesure d'imposition discriminatoire, qu'elle soit fédérale ou provinciale, lorsqu'elle serait fondée, directement ou indirectement, sur un des trois critères énoncés au paragraphe 121(1) et qu'elle entraverait de manière abusive le fonctionnement de l'union économique canadienne. Toutefois, le nouvel article ne limiterait aucunement le pouvoir d'une législature de définir comme elle l'entend l'assiette ou la base d'un impôt provincial , même si cette définition devait être radicalement différente de celle prescrite par d'autres législatures, et d'en fixer les taux au niveau qu'elle juge approprié pour toute catégorie de contribuables, sans égard aux taux ayant cours dans d'autres provinces, pourvu que la même assiette, la même base et les mêmes taux s'appliquent sans égard à la province de résidence ou de résidence antérieure d'un contribuable, ou à la province d'origine ou de destination des biens, des services ou des capitaux visés. Cependant, pour qu'une mesure fiscale discriminatoire soit jugée invalide, il faudrait en outre établir qu'elle entrave abusivement le fonctionnement de l'union économique.

Signalons que des différences d'assiette ou de taux d'imposition peuvent constituer, en elles-mêmes, des entraves à la mobilité économique, mais être justifiées par d'autres objectifs gouvernementaux ou par les besoins particuliers des diverses provinces. Mais c'est par des aménagements politiques et administratifs entre gouvernements,

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plutôt que par une disposition générale de la Constitution, que les entraves fiscales non-discriminatoires pourraient être réduites avec le discernement qui s'impose.

Le Parlement fédéral serait assujetti aux mêmes contraintes que les provinces, mais pourrait y déroger conformément aux dispositions du paragraphe 121(3), sans toutefois pouvoir lever des douanes aux frontières provinciales, ce qui serait strictement interdit par 121(4).

Le nouvel article invaliderait donc les déductions, dégrèvements ou crédits d'impôt consentis par une province dont l'application serait assujettie à des conditions relatives à la province de résidence des propriétaires de l'entreprise en cause, et à l'origine ou la destination des biens, services ou capitaux visés, etc. Ainsi, toute taxe sur la place d'affaires, la prestation d'un service ou le transfert d'un avoir financier devrait s'appliquer de manière non-discriminatoire, selon la définition de 121(1). Tout dégrèvement visant à favoriser la transformation sur place des ressources devrait s'appliquer uniformément aux entreprises appartenant à des non-résidants et à des résidants, et sans égard à l'origine des matières à transformer ou à la destination des produits transformés.

Un cas d'espèce: L'épargne-actions au Québec

Objet

Le Québec adoptait en 1979 une loi accordant un dégrèvement fiscal aux contribuables québécois à l'égard d'investissements qu'ils feraient dans certaines entreprises.

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Investissements éligibles

Il s'agit d'achat d'actions votantes émises par l'une des catégories de corporations suivantes:

- une corporation dirigée au Québec;
- une corporation dont plus de 50% des salaires versés le sont à des résidents du Québec;
- une corporation du type S.O.D.E.Q.
- une corporation détenue à plus de 50% par un organisme régis par la Loi des caisses d'épargne et crédit.

L'investissement doit avoir été fait par un contribuable résidant au Québec.

Caractère du régime et sa validité

Ce régime est nettement discriminatoire au sens du nouvel article 121 proposé en regard des investissements éligibles. Il pourrait demeurer valide en regard du texte proposé si la province démontrait que sa mise en oeuvre n'entrave pas de manière abusive le fonctionnement de l'union économique canadienne.

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SUBSIDIES

a) Issue

- what would be the effect of the proposed section 121 on the use by provincial governments of grants and other expenditure incentives, such as those in support of industrial and area development.

b) General Applicability

- As proposed, section 121 would not limit the capacity of provincial governments or bodies to provide incentives designed to promote particular industries, groups or areas within the province. It would, however, prohibit discrimination in access to or treatment relating to such incentives on the basis of province of residence of the interested economic agents.

c) Specific Implications

- It would permit exclusive or differential access to provincial subsidies based on:
  - designated location within the province
  - disadvantaged or other selected groups within the province
  - specified economic sectors.
- It would prohibit exclusive or differential access to provincial subsidies based on:
  - province of residence of persons
  - province of residence of owners of capital or enterprise
  - province of headquarters of enterprise
  - province of origin of supply
  - province of destination of products.
- A 1979 IT&C review found very few provincial barriers of this kind affecting business mobility, other than for financial and agricultural businesses, which are described elsewhere.
- One example was a restriction for qualification for a loan guarantee under the Quebec Industrial Assistance Act to publishing companies with more than 50% of the shares owned in the province.
- Provincial student loan programs which discriminate against out-of-province residents would appear to offend the general provision, but might pass either a qualitative test of undue impediment or a political derogation test, if either of these were to be included.
- It is recognized that this coverage leaves considerable scope for sub-provincial differentiation, which will of course be governed by policy advisability and political accountability. This scope would be further broadened if section 121 were to include a "political" derogation clause.

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Public Procurement

The notes below consider how several aspects of public procurement might be affected by the newly proposed section 121.

Provincial laws, regulations or practices which:

- barred the purchase of goods or services from sources in other provinces in Canada would seem to be counter to the new section 121.
- specified qualities or characteristics which happened to be available only in the province would not seem to be counter to the new section 121, but might be open to challenge.
- permitted, generally, the payment of higher prices or fees respecting good or services from a source in the province, or from a firm having a local office (as opposed to one which did not) would appear to be counter to the new section 121.
- permitted payments of higher prices for goods or services offered by those in, for example, particular parts of the province that were economically depressed, would not seem to be counter to the new section 121.
- permitted a policy of "reasonable area of search" in which invitations for local work would be made locally, or tenders advertised only locally, would not seem to be counter to the new section 121, provided "outsiders" were free to set up business in a local area and then compete.

- permitted local tenders only with bids to be received from locally-owned firms only, would appear to be counter to the new section 121 (but would probably be acceptable as not unduly impeding the economic union if the practice were allowed in smaller centres only and if the new s.121 allows for reasonable provincial derogations).
- required that a provincial crown enterprise be the sole source of certain goods or services, would likely not be counter to the new section 121 provided that comparable private enterprises within the provinces were as much excluded from the business as private enterprises from outside the province.

In appreciating all of these situations, it seems reasonable to assume that the courts would pay close attention to the scale of the activity in question when they judge whether the activity is unduly impeding the economic union. With the deletion of the "unduly impeding" provision from our draft, however, this assumption depends on a new provision being worked out for handling "reasonable" provincial derogations.

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AGRICULTURAL MARKETING BOARDS

Q. What would be the impact of the proposed Section 121 on agricultural marketing boards which are engaged in supply management?

A. Efforts by provincial marketing boards designed to restrict the importation of agricultural commodities by other provinces would likely be prohibited by Section 121. However, to a large degree this provision would have the effect simply of changing the basis for constitutional prohibition rather than of increasing the scope for it, as explicit attempts to impede the interprovincial flow of agricultural commodities have, in the past, been found ultra vires because of the federal trade and commerce power.

National marketing agencies have been established principally to reduce interprovincial rivalry and hence increase stability and efficiency, but do involve the administration of markets on a provincial basis. CDA advises that national marketing agencies, as presently operated (establishing provincial quotas, determining price differentials and collecting levies) would likely require a derogation based on "overriding national interest".

Background

There are currently over 100 agricultural marketing boards, most of which operate under provincial authority. Many of these are organized under the federal Agricultural Products Marketing Act as well, which gives them the power to regulate the sale of their produce in interprovincial and international markets under delegation.

Those provincial marketing boards responsible for eggs, chickens, turkeys and industrial milk, are further organized under national supply management marketing boards, which allocate provincial quotas on an agreed sharing of the national market (determined principally on the basis of historical production levels).

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le 21 juillet 1980

EDUCATION

Problématique

Dans quelle mesure le nouvel article 121 pourrait-il limiter l'exercice des compétences provinciales touchant l'éducation?

Réponse

Le nouvel article ne vise pas l'éducation, service public à caractère quasi universel, tout au moins aux niveaux élémentaire et secondaire, offrant peu d'occasions de traitement discriminatoire et n'affectant que très indirectement le fonctionnement de l'union économique. Le nouveau libellé de 121 ne limiterait pas, par exemple, la capacité d'une province de définir les programmes d'études s'appliquant dans un territoire, le choix des manuels scolaires, les conditions d'admissibilité à diverses institutions d'enseignement, les qualités requises pour exercer la profession d'enseignant, etc., pourvu que les lois ou règlements pertinents ne contiennent aucune clause discriminatoire fondée sur la province de résidence ou de résidence antérieure des personnes. Ainsi, une loi ou un règlement provincial, ou un contrat collectif de travail, ne pourrait proscrire l'embauche d'une personne d'une autre province satisfaisant aux exigences professionnelles pertinentes.

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Il va sans dire que le nouvel article n'interdirait pas les programmes spéciaux visant à favoriser la promotion sociale des groupes ethniques (i.e., les autochtones) ou socio-économiques défavorisés puisque, dans le premier cas, la distinction de traitement ne serait pas fondée sur la province de résidence et que, dans le deuxième cas, elle serait fondée sur le lieu de résidence à l'intérieur d'une province (quartier défavorisé d'une ville, collectivité pauvre ou isolée, etc.).

Qu'en serait-il des conditions d'accès à l'enseignement universitaire, en particulier les frais de scolarité et les prêts et bourses à la disposition des étudiants?

D'abord, il nous semble que les conditions d'admissibilité aux universités devraient être les mêmes pour tous, sans égard à la province de résidence, sujet à l'équivalence des diplômes et qualifications antérieures.

Ensuite, il nous semble que le nouvel article n'empêcherait pas une province d'exiger des frais de scolarité plus élevés d'étudiants non résidants, et de restreindre l'accès à ses programmes de prêts et bourses aux résidents car il serait fort douteux qu'on puisse faire la preuve que ces distinctions entravent abusivement le fonctionnement de l'union économique.

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A cet égard, la jurisprudence américaine n'est pas sans intérêt: les tribunaux ont interprété le paragraphe 2 de l'article IV ainsi que le 14^{e} amendement de la Constitution des États-Unis, qui sont autrement plus contraignants que ne le serait le nouvel article 121 comme autorisant les États à assortir le niveau des frais de scolarité et avantages connexes d'une exigence de durée de résidence.

Un cas d'espèce: le Chapitre VIII de la Charte de la langue française du Québec

Le Chapitre VIII de ladite Charte (articles 73 et suivants) restreint l'accès à l'école anglaise au Québec aux enfants dont un des parents a reçu son éducation élémentaire en anglais au Québec ainsi qu'aux enfants résidants ou de résidents déjà inscrits à l'école anglaise. Tous autres enfants doivent fréquenter l'école française.

Bien que cette distinction ne soit pas fondée directement sur la province de résidence, elle pourrait être interprétée comme contrevenant indirectement au critère pertinent énoncé au premier paragraphe de l'article 121(1). Un tribunal pourrait en outre juger que pareille discrimination entrave abusivement le fonctionnement de l'union économique canadienne par ses effets sur la mobilité de la main-d'oeuvre; mais il devrait tenir compte, ce faisant, des exceptions touchant les résidents temporaires pouvant être faites sous l'empire de l'article 85 de la Charte et qui visent précisémment à faciliter les déplacements de personnel.

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RÉGLEMENTATION LINGUISTIQUE

Problématique

Dans quelle mesure le nouvel article 121 limiterait-il la capacité d'une province à légiférer en matière linguistique?

Réponse

Aucunement, sauf si les lois pertinentes et les règlements qui en émanaient s'appliquaient différemment aux résidents et aux non-résidents, aux biens, services et capitaux d'origine ou de provenance de la province en cause et d'autres provinces. Soit dit en passant, seul le Chapitre VIII de la Charte de la langue française pourrait être remis en cause par le nouvel article 121.

Ainsi, une province aurait toute latitude pour prescrire les exigences linguistiques que requiert, à son jugé, l'exercice d'un métier, d'une profession ou de toute autre activité économique.

De même, une province pourrait prescrire que tout affichage, règlement, annonce, ou information destinés au consommateur se fassent dans une ou les deux langues officielles ou si elle jugeait que l'intérêt public le commande.

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Il va sans dire que, pour être conforme à l'article 121, les lois et règlements pertinents ne devraient pas comporter de distinction du type proscrit par l'article 121, sauf par dérogation en vertu de 121(2).

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Labour Relations

The notes below consider how several aspects of labour relations might be affected by the proposed section 16 of the Charter which deals with Mobility Rights.

Provincial laws or regulations which:

- specify generally that companies or the provincial public service must not hire persons from outside the province would be counter to the new Charter section on Mobility Rights.
- specify that companies or the provincial public service must give preference to the hiring of qualified local persons in areas within a province which are, for example, economically depressed, would not be counter to the Charter.
- specify that companies and the public service generally give preference to qualified provincial residents, would not run counter to the Charter provided that, when such residents are not available, qualified residents from other provinces can be hired.
- specify that a position holder in the province must also live in that province would be counter to the Charter, but such laws or regulations could require a person to live near his work for practical reasons which might incidentally require the employee to move to the province of his work.
- specify that a professional or other class of worker from another province pass the same tests before becoming employed as are required of provincial residents, would not run counter to the new Charter; special tests intended to make employment more difficult for "outsiders" would run counter.

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- specify unreasonable periods of residence before former non-residents would be eligible to apply for public service or other jobs in a province would run counter to the new Charter.
- specify a capacity in one or both of Canada's two official languages as a condition for employment in various types of work would not be counter to the Charter.

It might be noted that Quebec's law governing the construction trades, which restricts hiring between regions of the province in the interest of an orderly sharing of the work, would be "on the border line" and its fate before the courts would depend on the wording finally chosen in the Charter to describe the kinds of provincial derogations that are to be permitted.

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Provincially-owned monopolies

Issue

Would the proposed section 121 interfere with the creation or continuation of provincially-owned monopolies such as:

- utilities - Ontario Hydro, Manitoba Telephones, Saskatchewan Power Corporation, etc.
- Saskatchewan Government Insurance Office (vis-à-vis sale of compulsory basic automobile insurance)
- provincial liquor boards in all provinces.

Comment

1. When a province decides to create a publicly owned monopoly, it is deciding that an activity or enterprise ought to be in the public sector, not the private sector. It can only so decide with respect to that portion of such activity or enterprise as is carried on within the province, and it can only commit its own public institutions to that ownership, not those of other provinces who have no governmental function within its territory. Such a legislative decision is therefore not designed to discriminate against non-residents but rather to implement a policy of public ownership within the province. In short

   (a) non-resident private investors are not discriminated against, because resident private investors are also precluded from participation in this activity or enterprise;

   (b) "non-resident governments" (i.e., other provinces or territories - the federal government is surely "resident" everywhere) are not discriminated against in terms of public ownership, because they enjoy no governmental power outside their own boundaries and are in the same role there as a would-be private owner.

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2. There is an analogy in the 1977 Supreme Court decision in Canadian Indemnity Corporation v. Insurance Corporation of B.C. The general rule has always been that a federally-incorporated (private) company cannot be denied legal existence by a province, and thus cannot be discriminated against, but it is subject to all provincial "laws of general application". In that case federally-incorporated companies attacked the B.C. law excluding all private companies from the automobile insurance business, on the basis that this law was directed against their status and capacity. The court rejected this argument and said that they were subject to the same laws as natural persons and provincially-incorporated companies, all of whom were equally barred from the automobile insurance business in B.C. Similarly, one could assume that if the Saskatchewan compulsory insurance scheme were attacked on the basis of a new section 121, non-resident insurance companies could not argue that they were discriminated against in being deprived access to that market, because resident insurers are equally barred.

3. Questions may be asked about the right of a province to require a provincial monopoly (e.g., a Hydro-electric Commission) to satisfy provincial needs first. These questions may also however be applied to provincial control over private as well as public companies, whether monopolies are not. See the section on "Resource Management".

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LES CORPORATIONS PUBLIQUES PROVINCIALES À CARACTÈRE NON MONOPOLISTIQUE

Problématique:

L'article 121 proposé empêcherait-il une province de faire commerce par le biais d'une corporation dont elle serait l'actionnaire principal?

Réponse:

L'article 121 proposé ne contient aucune prohibition visant la capacité d'un corps législatif provincial de créer des corporations, et le droit d'un gouvernement de s'engager dans une activité commerciale. Ce que cet article vise ce sont les lois et usages discriminatoires qui entravent d'une manière abusive le fonctionnement de l'union économique. Encore faut-il que le caractère discriminatoire d'une loi ou d'un usage soit fondé sur la résidence pour les personnes sur l'origine ou la destination pour les biens, les services et les capitaux.

A titre d'exemple, la loi du Québec créant la Société Générale de financement, S.R.Q. 1977, c S-17, serait inattaquable à partir du texte de l'article 121 proposé, à l'exception de la disposition traitant de la résidence des administrateurs de la Société.

Corrollaire:

Si une province utilise une telle corporation pour acquérir de gré à gré ou par voie d'expropriation des entreprises exercées par des non-résidants, cette façon d'agir pourrait-elle devenir un usage soumis au contrôle du nouvel article 121?

Il nous apparaît que cet usage serait ni discriminatoire, ni une entrave au fonctionnement de l'union économique canadienne si le mode d'acquisition assure au vendeur ou à l'exproprié une indemnité fondée sur la valeur de l'entreprise acquise. Le nouvel article 121 ne vise pas à empêcher les provinces à faire commerce ou à assurer une plus grande participation de leurs citoyens à une activité économique quelconque. Ce droit est corollaire à la souveraineté déjà attribuée par ailleurs aux provinces et comprend le droit d'une province de choisir pour des fins politiques propres, d'investir dans un secteur de l'activité économique qu'elle considère comme névralgique dans le cadre de son développement, par exemple. Ce que le nouvel article 121 prohibiterait c'est de traiter injustement des non-résidants. Il nous apparaît qu'un usage comportant l'acquisition d'entreprises exercées par des non-résidants contre versement d'une indemnité fondée sur la valeur des biens acquis, ne constituerait pas un traitement injuste de non-résidants. En conséquence, cet usage constituerait ni une entrave, ni une discrimination au sens du nouvel article 121.

A titre d'exemple, la loi québécoise créant la Société Nationale de l'amiante laquelle comporte des dispositions visant l'acquisition ou l'expropriation d'entreprises oeuvrant dans ce secteur d'activité, ne serait pas invalide en regard du nouvel article 121.

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PROVINCIAL LAND OWNERSHIP LAWS

Issue: Would the proposed section 121 preclude provinces from limiting or precluding the acquisition by non-residents of land in the province, whether privately owned or Crown-owned?

In this connection it should be noted that P.E.I. has a law (upheld by the Supreme Court) that prohibits any non-resident of the province from buying over 10 acres of land without the consent of the provincial Cabinet. Saskatchewan has limitations on how much farm land a non-resident can own. (Alberta, instead, imposes restrictions on acquisitions by aliens.)

Comment:

1. Discrimination based on residence would be involved here and, assuming we are talking about land for investment (and not just land for personal residential or recreational use), the mobility of capital would be hindered and the operation of the economic union would be impeded. Whether the impediment would be "undue" could be debatable depending on the nature and amount of property affected. Its acceptance or rejection by the courts would depend on the eventual arrangements for provincial derogation which may be specified in the final version of section 121. If, on the other hand, we are talking about recreational land for personal use, or land for a second residence, the provisions of the Mobility Rights (Section 16 of the Charter) would preclude discrimination based on province of residence.

2. It must be asked why provinces pursue discriminatory land policies. Generally they justify them as means to:

(a) limit speculation;

(b) ensure that land is used for economically beneficial purposes, is kept in production, etc.

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(c) ensure that property is maintained in good order and not ignored by an absentee owner.

However, there is no logical connection between the province of residence of the owner and the achievement of these objectives. Owners within the province may also be speculators, uninterested in production from or maintenance of, the property, etc. The residency test is used as a politically easy and administratively simple solution, but the means bear no direct relationship to the ends sought.

In fact provinces have developed other means for land use management -- e.g., laws in B.C. and Quebec protecting farm lands from non-agricultural use.

3. It is now legally possible for provinces to exclude or limit acquisitions by non-Canadians. While the Citizenship Act provides generally that aliens have the same right to hold property as citizens, it was amended in about 1976 to allow provinces to limit the rights of aliens to own land. Alberta has taken advantage of this provision.

4. It may be necessary at some point in the future to reconsider whether our proposed section 121 might have to be narrowed to permit some degree of discrimination by a province in its disposition of Crown lands. As owner, arguably, it should have more discretion as to whom it sells or gives Crown lands than it should have as legislator in controlling the market in privately owned land.

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RESOURCE MANAGEMENT

Q. What effect would the proposed revision to Section 121 have on provincial resource management policies and practices?

A. Section 121 would not constrain non-discriminatory provincial resource management, through such measures as conservation, development and processing policies, as well as the exercise of provincial proprietary rights where applicable. (Indeed, parallel proposals under the heading "resource ownership and interprovincial trade" would clarify and broaden provincial powers in this regard). However, as proposed, Section 121 would prohibit provinces using their legislative powers to achieve:

- discriminatory interprovincial pricing of resource commodities (relieving the federal government of the need to intervene in this regard under the trade and commerce power); and

- discriminatory interprovincial resource allocation (requiring equal access to provincial processing incentives and fair treatment of out-of-town province customers).

It would not appear to affect provincial jurisdiction over the rate of resource extraction or harvesting; hence the need to retain adequate declaratory powers.

Background

It is recognized that, in practice, there would be a number of grey areas within this field of action. For example:

- fair treatment would appear to rule out absolute denial of supply to out-of-province users, but could leave room for first call on limited supplies to provincial users (e.g., electricity);

- would a degree of preferential pricing of non-alienated resources be regarded as non-discriminatory in cases where it could be argued as a form of return to residents as owners?

It is important to distinguish between the legislative powers to regulate and proprietary or ownership rights with respect to natural resources. In the latter instance provinces can act more freely, including the fixing of minimum sale prices for provincially-owned resources going into interprovincial or international trade, subject to overriding federal legislation. Currently, provincial Crown ownership accounts for over 90% of the forest lands allocated to wood production in Canada outside the Territories, and provinces have shown an inclination to increase their direct mineral holdings as well, such as for potash in Saskatchewan, asbestos in Quebec and oil in Alberta.

CONFIDENTIEL

le 21 juillet 1980

REGLEMENTATION PROVINCIALE DES INSTITUTIONS FINANCIERES

Problématique

Le nouvel article 121 empêcherait-il les provinces de réglementer les institutions financières?

Réponse

Le nouvel article 121 ne traite pas de cette question directement. La réglementation provinciale s'appuie sur leur compétence sur le commerce local et l'incorporation. Elle vise surtout à protéger ceux qui transigent avec les institutions financières soit à titre d'investisseurs, soit à titre de prêteurs, soit à titre de commerçants surtout. Les corporations étrangères à une province doivent se conformer à la réglementation provinciale et, dans la plupart des provinces, obtenir une licence afin d'y faire affaire.

Le nouvel article 121 n'invaliderait pas cette réglementation si elle n'est pas dicriminatoire au sens du paragraphe (1) du texte proposé. Une province pourrait continuer à exiger qu'une corporation étrangère issue d'une autre province obtienne l'autorisation de faire affaire dans la mesure où les conditions imposées ne sont différentes à l'égard de ces corporations étrangères que celles imposées aux corporations résidentes.

Evidemment, toute condition visant à restreindre le droit d'être actionnaire ou de détenir des titres dans une corporation qui serait fondée sur la résidence du détenteur ou de l'origine du capital, serait prohibée à moins que la province ne puisse convaincre le tribunal que la condition n'entrave pas le fonctionnement de l'union économique canadienne de manière abusive.

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A titre d'exemple si le Québec utilisait sa loi de 1978 visant l'acquisition de certaines compagnies de prêts hypothécaires de manière à empêcher l'achat d'actions par des Canadiens non résidents au Québec, cet usage serait attaquable, mais la province pourrait tenter de démontrer qu'il ne s'agit pas d'une entrave abusive au fonctionnement de l'union économique canadienne.

CONFIDENTIEL

LA RÉGLEMENTATION DES COMPAGNIES D'ASSURANCES PAR LES PROVINCES

Problématique

L'article 121 proposé empêcherait-il une province de réglementer la structure financière des compagnies d'assurances?

Réponse:

Certaines provinces réglementent non seulement les contrats d'assurance, mais aussi la structure financière des corporations en faisant le commerce. Cette législation vise deux aspects surtout, à savoir la capitalisation que doivent détenir ces corporations et la qualité de leurs portefeuilles de placements.

Dans la mesure où la législation en cause ne restreint pas le droit de tout Canadien d'investir dans une telle corporation, quelque soit l'origine du capital, le nouvel article 121 ne constituerait pas une entrave à la réglementation de la capitalisation des compagnies d'assurance.

Quant à la qualité du portefeuille, le nouvel article 121 permet de limiter la valeur des placements faits à l'extérieur de la province si une telle réglementation a pour objet de s'assurer de la qualité du placement. Il est connu que la législation provinciale relative aux institutions financières et au commerce des valeurs mobilières n'est pas uniforme à travers le Canada. Une province pourrait donc limiter l'achat de titres dans une province par une compagnie d'assurances afin d'assurer la qualité de son portefeuille

et, de la sorte, mieux protéger le public assuré. Le nouvel article ne ferait pas obstacle à une telle mesure.

Enfin, le nouvel article 121 n'empêcherait pas une province de réglementer quant à la garde des titres sur son territoire afin de s'assurer qu'on puisse s'en emparer au bénéfice des assurés dans l'éventualité ou la corporation serait en défaut à leur endroit.

CONFIDENTIAL

A.14

August 21, 1980

PROVINCIAL FINANCIAL ASSETS

1. To the extent that provincial financial assets are used in a way that discriminates on the basis of provincial borders such use would be prevented by the new section 121 (providing the discrimination met the test of undue).

2. Thus a provincial heritage fund which loaned money at a more favourable rate to borrowers within the province, merely because they lived within rather than outside the province, could be prevented from engaging in this discriminatory activity. However loans at lower rates to certain segments of the provincial population, because they were in a particularly needy position, or for the purpose of developing certain economically disadvantaged areas of the province could not be prevented.

3. A provincial industrial development corporation which loaned capital only to ventures operating within the province or a provincial scheme for making high risk venture capital available only to within province enterprizes would not be discriminatory since they would be available to all business ventures in the provinces. What would be discriminatory would be the loaning of such capital only to such business ventures that were owned by provincial residents, or that had their head office in the province, or that used only provincial goods or services in their enterprize. (Argumentation similar to that applicable to subsidies.)

4. Whether it would be legal if a certain percentage of the monies in a public service superannuation fund were required to be invested within the province cannot easily be answered in the abstract. To some extent it would depend upon the purpose and nature of the requirement. The general principle

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is that institutional investors could not be required to arbitrarily invest only within the province. In this regard it should be noted that public service superannuation funds are not government funds, they are the property (or at least a property right) of the individual civil servant. At the same time requirements for in-province investment related to some valid purposes, such as the protection of claims, would be justified (refer: argumentation on restraints on insurance companies to retain sufficient assets within the jurisdiction to protect claims potentially arising therein). The test of undue would be significant here. It seems unlikely that that text would be met.

5. Saskatchewan asked "suppose that a province wished to expand the operation of its publicly owned mining company (for example, Potash Corporation of Saskatchewan) and for that purpose issued revised extraction licenses. Suppose that at the same time it declined to increase the rate of extraction permitted to privately owned mining companies, all of which were owned by non-residents of the province. Would this be discrimination on the basis of the province of origin of capital?"

If the primary purpose of the change were to increase the public ownership of the mining sector at the expense of privately owned then the activity should not offend section 121. The argument would be analogous to those relating to provincially owned monopolies. The fact that all the privately owned companies were in fact owned by non-residents of the province could be incidental and not the main interest of the legislation.

6. If a province wished to expropriate part of an industrial sector and chose to expropriate that part owned by non-residents, would that be impermissible discrimination?

Such action probably would offend section 121 if the sole operative criteria was ownership by non-residents. Such

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legislation would have as its purpose the prevention of business enterprizes in the province by non-residents merely because they were non-resident. Section 121 would not prevent expropriation based on other criteria which would apply to residents and non-residents alike. Nor, as noted above, would it prevent expropriation of non-residents when they owned almost the entire industry.

CONFIDENTIAL

Revised, August 20, 1980

"Is the Problem Serious?"

Several provinces have suggested that the problem is not serious, that there is no real threat to the Canadian economic union. The federal government holds the opposite view, that there is an increasing trend which sees provincial governments applying or threatening to apply discriminatory measures which run sharply counter to the principles of the economic union. This trend, if continued, could destroy the value of the union, and in the long run could destroy Canada itself.

Annex A to the Government of Canada's paper on Securing the Economic Union (Doc. 830-81/036 of July 9) listed a great number of measures taken by governments (including the federal government itself) which have threatened to a greater or lesser extent the viability of the Canadian economic union. Most of these measures have been justified on grounds which, in themselves, seemed reasonable. Few, however, would seem to have been adopted with adequate consideration for their potential effect on the economic union.

It is not a new problem. The Safarian study of 1969 expressed many of the concerns the federal government then felt. The intervening years, as evidenced by Annex A mentioned above, heightened that concern. The worries of the federal government are shared in many respects by important authorities who have commented on the question, including the Task Force on Canadian Unity (Pepin-Robarts) 1979, the Canadian Bar Association (Committee on the Constitution) 1978, the Ontario Advisory Committee on Confederation, 1979, and the Constitutional Committee of the Quebec Liberal Party, 1980.

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The federal government recognizes that, in a federation, and in a country as vast as Canada, there are bound to be differences in the way things are done, in the ways the local economies are handled. At the same time, the benefits of the Canadian economic union can only be obtained if the economy is open and free flowing in its essential characteristics.

A reasonable balance is essential and constitutional "ground rules" seem clearly the most certain way to ensure that balance. That there is a problem today is perhaps demonstrated most strikingly by the great concern that a number of provinces are now expressing that the new anti-discrimination clauses in the Constitution, as proposed by the federal government, may interfere with current or future provincial legislation.

The longer action to solve the problem is postponed, the more extensive it will be and the more deeply rooted will have become the many practices and measures which now menace the effectiveness and security of our economic union. The longer we go without constitutional ground rules, and without the means to enforce them, the more the very absence of such rules becomes a licence for discrimination by any government or for retaliation by others.

CONFIDENTIAL

Revised, August 20, 1980

"If the Problem exists, an Administrative Solution is best"

The present problem has developed despite the existence over many years of the best administrative arrangements that could be devised by the Government of Canada and the governments of the provinces. Our governments have for years tried to use these arrangements in their attempt to find solutions to all kinds of problems affecting the economic union. The lack of success is demonstrated by the growing list of measures which threaten the union. Annex A to the Government of Canada Paper on Securing the Economic Union (Doc. 830-81/036 of July 9) is evidence of this.

A good example of administrative arrangements can be found in the tax collection agreements which have long been a feature of the Canadian scene, to the advantage of business and Canadians generally. These agreements are now being rejected by two more provinces, it would seem, principally because they seek greater flexibility to discriminate in favour of their own residents and against outsiders from the rest of Canada.

Administrative arrangements would seem to be of little help when many governments and two orders of government are involved, particularly when each is responsible for a number of the important levers which can ensure the success or failure of the economic union.

All our experience tells us that something more is needed: the setting out of the basic "ground rules" in the Constitution and the means for their enforcement. With that done, governments can work together in the knowledge that the Constitution itself leads the way in providing the broad definition of the fundamental and reasonable balance between local and national interests in the operation of the Canadian economic union.

CONFIDENTIAL

Revised August 21, 1980

B. Preliminary Legal Examination and Commentary on Proposed Section 121

Section 121 (1)

The general purpose of the new Section 121 (1) is to prevent federal and provincial governments and their emanations from creating barriers to interprovincial trade either by law or through discriminatory practices. Discrimination would be prevented not only with respect to the movement of persons, but also with respect to the movement of goods, services and capital across Canada.

1. The new Section 121 does not give additional legislative power to Parliament. It is not a section which confers legislative powers on any level of government. It places restrictions on powers presently held by both levels in the same way that a Charter of Rights would place restrictions on both. A Charter of Rights would not mysteriously increase federal legislative jurisdiction. The derogations in subsections (2) and (3) do not confer on Parliament or on provincial legislatures additional powers to those they now have. The two derogation clauses are parallel. Both subsections describe circumstances in which the respective legislatures could continue to exercise their existing legislative powers, or in the case of Parliament, those newly conferred by an amended 91.2, even though such exercise was contrary to the restrictions imposed by subsection (1).

2. It is extremely important to understand that the draft section 121 does not apply to the movement of persons, goods, services and capital within a province but merely between provinces. Therefore, provincial governments will be able to maintain all of their programs and policies which create differentiation within the province as long as these programs and policies do not discriminate against non-residents more than they discriminate against residents.

The word "territory" in the draft refers to the Northwest and the Yukon Territories, not to a territory within a province. This is consistent with the use of the term in the mobility rights section of the Charter and with the use of the word in the B.N.A. Act 1871. Also, section 20 of the Charter of Rights expressly states that the use of the word province in certain sections of the Charter includes the northern territories; thus elsewhere where province is used it does not include the territories and they must be expressly mentioned.

3. The conduct prohibited is that which discriminates in a manner that unduly impedes the operation of the Canadian economic union (on the basis of province of residence ...). Thus, not all discriminatory legislation would be prohibited. Student loans granted only to the residents of a province, social welfare legislation applicable only to the residents of a province would not fall within the category. Equally, legislation for the protection of cultural or historic property would arguably not fall within the section. (Arguably the draft is not clear on this last aspect).

4. The conduct prohibited is that which discriminates in a manner that unduly impedes the operation of the Canadian economic union (on the basis of province of residence ...). Unduly is probably a fairly stringent test. Some guidance as to its meaning can be gleaned from its use in combines legislation where it has been interpreted by the courts as meaning "oppressively, excessively, inordinately", (recent sugar case - Atlantic Sugar Refineries et al v A.G.)

The word unduly has been put into the section to ensure that programs and policies such as affirmative action are not caught in the net of discriminatory practices. "Unduly" will allow the courts to look at the intent of legislation and interpret it in a flexible way. This should be considered a protection for the provinces.

In other words, for a law or practice to be struck down, it must both discriminate on the basis of province of residence or province of origin or destination of goods, services and capital and must do so in a way that unduly impedes the operation of the Canadian economic union.

An argument is made that unduly also contains a quantitative requirement so that discrimination by small municipalities would not be caught but that larger ones would. Comparison to the use of this concept in combines legislation would indicate that this is so (e.g. rarely have prosecutions in that field been successful unless over 60% of the market was restricted). But whether a comparable quantitative interpretation would be imported into its use in s. 121 is speculative at best.

5. By law or practice

- the section would prevent discriminatory laws (statutes, regulations, and subordinate legislation) and government practices (e.g. purchasing policies),
- the section is intended to encompass not merely legislatures but all subordinate bodies, tribunals, judicial bodies, crown corporations, crown agents and proprietary corporations, municipalities, etc. The draft is arguably not clear on this point, although it was intended that the words Canada and province should include all subordinate bodies of whatever nature.

6. Directly or indirectly

- these words are intended to describe the type of discriminatory mechanism which might be used; they are not intended to sweep into the prohibited category impediments however indirect.
- an analogy could be drawn to the concept of direct and indirect control of corporations,

- the draft may not accurately reflect what was intended; we may want to redraft or to drop the reference completely.

7. Section 121 (2)

The wording follows that of the proposed Charter of Human Rights and is designed to ensure that public authorities will not have their hands tied by section 121(1) in the case of emergencies relating to disease or public disorder. If this section creates difficulties with the provinces, we are very willing to modify it as there is nothing of fundamental principle in it.

Section 121(3)

This section does not give new economic power to Parliament. It reocgnizes that Parliament, because of its national obligations, must pass laws which differentiate between provinces. There are countless examples of such laws, e.g. equalization, DREE, various farm programs, the Borden Line. This derogation to the principle of non-discrimination takes into account the need for economic intervention across the country by the Government of Canada just as section 121(1) does not prohibit provincial governments from pursuing different policies in different regions within a province. In fact, Parliament will have to declare its differentiated policies to be in the national interest other than in the case of equalization while provinces will not have to declare their differentiated policies to be in the provincial interest.

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- there is no need for an express derogation to allow provincial policies promoting regional development since discrimination within a province is not prevented by the prohibition in subsection (1);
- the derogation clauses (2) and (3) allow laws but not practices to discriminate in contravention of the principle because it is thought that as a policy matter derogations should only be allowed by means of express legislation.
- we are not convinced that there is a need to include a derogation with respect to international obligations and, therefore are prepared to drop this subsection.

Section 121(4)

This section extends the present section 121 to services and capital as well as to goods. It prevents the establishment of tariff barriers but does not deal with non-tariff barriers. In itself, it is not a sufficient extension of the present section 121 to create the proper foundations for the Canadian economic union.

CONFIDENTIAL

Revised, August 18, 1980

C. THE ROLE OF THE COURTS

Issue:

Provinces worry that to have the possibility for the courts to interpret a constitutional provision like section 121 will be dangerous because, apparently:

(a) it "transfers powers to the courts" on economic and social issues;

(b) the results would be unpredictable; and

(c) the courts will probably hold against provincial powers.

Comment:

1. The role of the courts here would be exactly what it has been in relation to the present s.121 and the rest of the Constitution since Confederation -- to interpret its meaning in relation to particular laws of Parliament or legislatures. More generally, it is a role courts play in interpreting any law, written or unwritten, whether it is the Constitution, the Criminal Code, a provincial highways Act prohibiting driving "without due care and attention", or the common law of tort with its standard of "the reasonable man". Therefore, to be against possible interpretation and enforcement of the law by the courts is to be against the rule of law as we have known it -- "a government of laws and not of men".

2. In respect of constitutional interpretation by the courts, it is a wild exaggeration to say that judges replace legislators as law makers. One must recognize that the judicial process is carefully confined and controlled.

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(a) Courts do not sit as "revolutionary councils" dispensing rules and orders at a whim, over any area of activity; instead, they only deal with such issues as private parties or governments happen to bring before them, and their decisions must be confined to those issues;

(b) Courts generally are bound by previous decisions of the same or a higher court. While the Supreme Court considers itself no longer bound by this rule of stare decisis, it would clearly be a rare case in which the Court would reverse itself. Thus courts only develop new interpretations to fill in "gaps" where they must apply the text of the Constitution to a new problem not previously considered by them;

(c) The Canadian judicial tradition has been much more cautious than that of the U.S. Supreme Court. One needs only look at the narrow interpretation given by our courts to the Canadian Bill of Rights.

3. There is no basis for assuming that judicial interpretation will generally work against provincial powers. It has certainly not been the history of the interpretation of our Constitution. While the provinces have not always won, it should be remembered that it was the courts who decided for example that:

(a) the words "regulation of trade and commerce" in s.91 of the B.N.A. Act do not include the power to regulate intraprovincial trade and commerce (1881);

(b) Parliament could not enact Unemployment Insurance legislation, even in the Depression (1937);

(c) Parliament cannot implement Canada's international obligations under treaties if the subject matter otherwise falls within provincial jurisdiction (1937;

or more recently

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(d) that the trade and commerce power does not enable Parliament

- to authorize private lawsuits for unfair business practices (MacDonald v. Vapor (1976));
- to prescribe standards for beer in relation to certain labelling (Labatt's case, 1979);
- to prescribe grades for apples, where they are sold both locally and interprovincially (Dominion Stores case, 1979);

(e) that Parliament's power to amend the "Constitution of Canada" does not include the power to alter the Constitution of the Senate (Senate Reference, 1979).

These same courts have over the years upheld a vast array of provincial laws, giving the maximum scope to "property and civil rights" and minimizing limitations on provincial powers such as the requirement that taxation be "direct". The same Supreme Court that held invalid Saskatchewan's so-called "royalty" in C.I.G.O.L. in 1977 upheld as a direct tax -- against any economic logic -- Saskatchewan's retail sales tax on materials being incorporated into houses built for resale. (Cairns Construction case (1960)).

August 21, 1980

CLARIFYING SECTION 91(2) TO EXPRESSLY INCLUDE SERVICES

1. It is our view that explicitly making the federal trade and commerce power include services would have no substantial effect on existing jurisdiction since it would merely be an express definition of the existing situation. It will merely clarify what we already think is within federal legislative competence (in the same way that subsection (2) of the resources draft merely clarifies what is already within provincial jurisdiction.

2. However, this will be open to dispute since almost all the jurisprudence has dealt with commodities (most frequently the marketing of farm products: potatoes, pigs, milk, eggs, wheat) not with services or capital, more recently with some resources (oil, potash). (See note on Saskatchewan paper quoted in note re: Capital.)

3. In the United States, that country's commerce clause has been interpreted to include services and although we have separate categories for interprovincial and international transportation and communications services, which the U.S. Constitution does not, there may be some guidance in that jurisprudence.

4. In the Winner case, Mr. Justice Rand indicated that transportqtion services would come under the trade and commerce clause if there had not been an independent head of jurisdiction available. (And in the Capital Cities case, Mr. Justice Pigeon indicated that the importation of broadcast signals came within that head of jurisdiction.)

5. In general, services are local in nature, so they seldom fall within the category of interprovincial or international trade and commerce.

6. As with capital, we argue that expressly including services in section 91(2) would not change the existing situation and that it would allow Parliament to regulate the interprovincial or international trade and commerce in services; for example, when trade sanctions are taken against a country (e.g., Iran), Parliament may prevent the trade in services (architects, engineers, etc.) as well as commodities to that country. Another area we would claim would come within Parliament's jurisdiction under this heading is the regulation of interprovincial and international computer services.

Consequently, we would expect a trade and commerce power defined to include services, should have little effect on the present jurisdiction respecting:

(1) Professions

- the regulation of the professions as such is not a matter of interprovincial or international trade and commerce;

- such regulation usually involves setting of qualifications, rules of conduct sometimes including fee-setting and administration by a governing body;

- to the extent that such regulation constitutes the regulation of commerce at all, it is clear from the case law that it is the regulation of local commerce, of a business within the province; since Parliament's jurisdiction will continue to be limited to the regulation of interprovincial and international trade and commerce, regulation of the professions would not fall within it.

(2) minimum wage and labour unions

- the same arguments apply as for the professions;

- these are not matters falling within regulation of extraprovincial trade and commerce;

- they are matters of a local nature within the province (matters of contract and property rights within the province and thus under provincial jurisdiction pursuant to section 92(13));

- the Snider case and the Labour Conventions case clearly decided that employment was a "matter" which came within "property and civil rights in the province" and there was no bifurcation based on whether the industry was engaged in extraprovincial trade or not;

- reference could be made to the Carnation case, a 1968 Supreme Court decision which held that provincial legislation regulating the sale of raw milk by farmers to the Carnation company which processed the milk was valid even when Carnation in fact shipped the bulk of its product out of the province - the provincial law was held to be "in relation to" intra-provincial trade; it merely "affected" inter-provincial trade.

August 21, 1980

D.2

CLARIFYING SECTION 91(2) TO EXPRESSLY INCLUDE CAPITAL

1. It is our view that explicitly making the federal trade and commerce power include capital would have no substantial effect on existing jurisdiction since it would merely be an express definition of the existing situation. It will merely clarify what we already think is within federal legislative competence (in the same way that subsection (2) of the resources draft merely clarifies what is already within provincial jurisdiction).

2. However, this will be open to dispute since almost all the jurisprudence has dealt with commodities (most frequently the marketing of farm products: potatoes, pigs, milk, eggs, wheat) not with services or capital, more recently with some resources (oil, potash).

   Note: Saskatchewan admits in its paper that the words are not an extension of federal power, although at the same time it fears a court might treat them as such: "We admit that the words are not expansionary on their face, but we suspect that the greater specification of federal power will be read by the courts as an invitation to expand the concept of general trade throughout Canada".

3. In the United States capital transactions have been held to fall within that country's commerce clause, and while our trade and commerce clause is not interpreted in the light of that country's Constitution, it is reasonable to expect that the U.S. decisions on this aspect could be influential.

4. Our clause is not drafted to refer only to "trade and commerce in commodities"; therefore, we should not assume the courts would interpret it that way.

5. In at least one case, the Alberta Bank Taxation case of 1938, the Supreme Court indicated that the regulation of trade and commerce included the regulation of financial transactions.

6. Consequently, we would expect a trade and commerce power defined to include services and capital, should have little effect on the present jurisdiction respecting:

   (1) provincial borrowing

   - insofar as provincial borrowing is within the province, it would not be affected by a redrafted trade and commerce clause since it would not be an interprovincial or international transaction;

   - insofar as the borrowing was outside the province, we would argue Parliament can regulate that now pursuant to its trade and commerce power, its jurisdiction over aliens and the peace, order and good government clause;

   - reference might be made to Foreign Exchange Controls during the war.

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(2) credit unions

- insofar as they carry on interprovincial or international financial transaction, the regulation of that transaction would be within federal jurisdiction - as we claim it is now;
- the regulation of the credit union itself would not be within federal jurisdiction pursuant to the trade and commerce power anymore than a wholesale enterprise dealing in local and extraprovincial trade in commodities is within federal jurisdiction;
- it is the regulation of the extraprovincial commerce of the business that is within federal jurisdiction not the regulation of the business generally;
- of course, insofar as the credit unions carry on the business of banking that is now subject to federal jurisdiction pursuant to section 91(1), even though Parliament has not regulated it.

7. We can expect particular arguments directed at jurisdiction with respect to securities and perhaps financial institutions, such as insurance companies. It is our position that our draft does not give us any additional jurisdiction in these areas that we do not now have. We claim to have jurisdiction over interprovincial and international trading in securities, but not over purely provincial trade.

Provinces may argue that the jurisprudence on securities indicates that this is a field of provincial jurisdiction even when the regulation of transactions having significant interprovincial aspects are involved. (Thus, unlike trade in commodities, it does not fall under the trade and commerce power). In Gregory v. Quebec Securities Commission, a 1961 Supreme Court decision, the Quebec Securities Act was held to apply to a broker operating in the province whose business was confined to customers outside the province. (Officially the Court did not deal with the constitutional issue since the proper procedure for doing so had not been followed and thus the comments have only the status of dicta). In R. v. W. MacKenzie Securities Ltd., a 1966 Manitoba Court of Appeal decision, the Manitoba Securities Act was held applicable to a broker operating outside the province but selling stock to customers inside the province.

The provinces can be expected to argue that if federal jurisdiction over trade and commerce includes power over capital, these cases should have been decided as were the marketing cases, i.e., incidents of an interprovincial operation could only be regulated federally. In both cases the courts expressly stated that the marketing cases were not relevant.

In response, we would argue that:

(1) one case (the Gregory case) did not deal with the constitutional issue;

(2) in any event, the cases do no more than hold valid provincial legislation aimed at the regulation of local matters in its incidental application to extraprovincial aspects of the market (an interpretation consonant with the recent jurisprudence on the trade and commerce power as it relates to commodities);

(3) these cases did not deal with the validity of federal legislation; thus, the most they can be taken to mean is that in the absence of federal legislation this kind of provincial legislation is valid.

Professor Hogg, Constitutional Law in Canada, at p. 314: "The trade and commerce power would certainly authorize the regulation of interprovincial dealings in securities, despite the recent holdings of concurrent provincial power".

8. Provinces may also argue that the insurance cases indicate by implication that the federal trade and commerce power does not extend to the regulation of capital. The insurance cases did not, however, hold federal legislation unconstitutional on the ground that insurance was not a subject matter within the definition of trade and commerce but rather on the ground that the legislation in question was of a local matter within provincial jurisdiction over property and civil rights and not extraprovincial in nature.

The U.S. courts originally took the approach that insurance did not fall within the scope of that country's commerce clause because of the nature of insurance and this jurisprudence was available to our courts when they decided the insurance cases. Our courts never adopted that reasoning. The United States' courts have since abandoned it.

CONFIDENTIAL

August 11, 1980

COMPETITION

Q. Why does the federal government seek a specific head of power for competition?

A. There is broad agreement that the federal government should have competence in the regulation of competition ("no Canadian province has ever expressed any interest in legislating in the field of competition policy, except with respect to misleading advertising", according to C&CA).

At present, this responsibility is supported solely by the criminal law power, which is inappropriate for dealing with many kinds of market failure. Specifically, the criminal law:

- requires too stringent a basis for judgement (burden of proof beyond reasonable doubt rather than the balance of probabilities determined in civil actions);
- does not provide for civil remedies to claim damages for losses suffered (this recourse would allow greater reliance on private enforcement and less on bureaucratic intervention); and
- involves an unnecessary stigma of criminal prosecution for firms and officers (although certain practices such as price fixing would continue to be criminal offences).

Revisions to the Combines Investigation Act in 1975 which gave the Restrictive Trade Practices Commission the power to order prohibitions and which provided for civil remedies for damages may well be found outside the criminal law power if challenged. Further steps to "decriminalize" competition law (such as in the proposed stage II amendments which were not enacted) would extend this area of uncertainty.

Background

Federal jurisdiction over competition has been sustained solely on the criminal power to date, with attempts to use the trade and commerce power being unsuccessful. It is judged unlikely that peace, order and good government could be used, in view of the position taken about "aggregate subjects" in the anti-inflation reference.

Most of the recent reports and studies on constitutional reform have favoured extending federal authority over competition to provide a civil as well as constitutional basis (notably the Economic Council, the Bar Committee, the Ontario Advisory Committee and Safarian). The Joint Parliamentary Committee (1972) proposed concurrent jurisdiction with federal paramountcy, C&CA favours exclusive jurisdiction to avoid conflicting directions and potentially costly duplication, but has as its principal concern the extension to a civil power, and could accept that this be concurrent.

N.B. The revised legislative text to be tabled at the August CCMC specifies that provincial legislation not in conflict with federal legislation enacted under the new competition power would be valid. This would ensure continuation of provincial legislative authority regarding the regulation of professions, public insurance, agricultural marketing and liquor monopolies.

CONFIDENTIAL

August 12, 1980

PRODUCT STANDARDS

Q. Why does the federal government seek a specific head of jurisdiction concerning product standards?

A. One of the important characteristics of an economic union is the capacity to establish and maintain a generally consistent system of product standards within the territory. Without this capacity, the economic union is vulnerable to:

- balkanization caused by significantly different standards from one province to another;
- duplication or even conflict of standards from concurrent jurisdictions; and
- international trade problems where provincial standards deviate from international practice.

Currently, concern in this regard centres on food product standards, as recent Supreme Court decisions appear to have reduced the federal government's authority concerning the establishment of minimum food standards. Without constitutional action, co-ordinate provincial legislation may be required to maintain a consistent nation-wide system of food standards.

The federal proposal would clarify Parliament's authority with respect to product standards generally where some of the product is sold outside the province of production.

Background

The Supreme Court decisions appear to make the enforcement of standards for food products a joint responsibility. Aside from health and fraud matters, for which it still has full jurisdiction, the federal government is limited in its ability to regulate the composition and quality of food products to instances where the interprovincial and international movement of goods is a prominent factor. Provinces would have jurisdiction to set product standards (aside from health and criminal considerations) where such products move only intra-provincially.

Another field of federal product standard activity is motor vehicle safety. The Motor Vehicle Safety Act provides for the development and enforcement of related regulations and standards, but requires complementary provincial regulation for vehicles sold within the province of production.

The Motor Vehicle Transport Act delegates the regulation of interprovincial carriers to the provinces, requiring attempts to achieve uniformity across provinces through the Canadian Conference of Motor Transport Administrators.

N.B. The revised legislative text to be tabled at the August CCMC specifies that provincial legislation not in conflict with federal legislation enacted under the new product standards power would be valid. This would ensure continuation of provincial legislative authority regarding food inspection, consumer protection, and the power to set standards higher than federal ones or applying only to goods traded intraprovincially.