

POWERS OVER THE ECONOMY

AN ANALYSIS OF FEDERAL PROPOSALS TO SECURE IN THE
CONSTITUTION THE CANADIAN ECONOMIC UNION

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A analysis of the proposals submitted
by the Government of Canada to
safeguard the Canadian Economic Union
in the Constitution (Document 830-83/007)

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In this paper, we attempt to underscore the radical alterations in governmental power proposed by the federal government in s.8 of the Charter of Rights and the amendments to s.121 and s.91(2) of the British North America Act. Elsewhere, we have presented our views on how the Canadian economic union can be sustained in a manner consistent with the federal principle of equal and co-ordinate governments. Those views do not include either as large a role for judicial supervision of provincial and federal economic policies, or federal overriding responsibility for the economic union. Therefore, at a fundamental level, we disagree with the basic approach that the federal government has taken in its proposals on the regulation of the economic union. At this point, however, we wish to engage in a closer critique of the specific constitutional provisions proposed by the federal government. This critique consists of, first, the identification of limitations on provincial power which remove provincial capacity to pursue coherent economic policy, and, second, questions that we have about possible judicial interpretations of these provisions.

As a preliminary point, we acknowledge that when governments engage in constitutional reform, they will inevitably enter into a period of uncertainty about the meaning of the language which they have used to establish or limit powers. However, in our view the federal proposals contain language which will greatly increase uncertainty and the likelihood that clear rules will not be developed. Our analysis does not reflect the simple-minded belief that constitution makers can establish absolutely precise rules containing neither ambiguities nor room for debate about meaning.

S.8 CHARTER OF RIGHTS: MOBILITY RIGHTS

Our initial point is that Saskatchewan believes that it is contrary to sound democratic theory for the judiciary to be given the power to strike down legislatively determined accommodations between the freedoms of individuals and the policies of governments which are designed to benefit the people. In the first place, these accommodations are not, in mature political communities, the result of majoritarianism run wild, but are the result of a close consideration of the needs and interests of all classes of persons.

In the second place, there is no perfect balance in these issues. For these reasons we consider it undesirable to create a system in which courts substitute their views for the balances struck and policies advanced by legislatures.

In the specific context of mobility rights, we note the open-ended invitation to courts to upset legislative policies by enshrining the right to take up "residence" in any province. There are many provincial policies, short of an absolute bar to entry (absolute bars to entry are not sufficiently likely that enactment of this expansive section is warranted), which a court might declare to constitute a barrier to taking up residence. Case law from the United States leads us to believe that all residency qualifications will be suspect under this section. The power to determine in what circumstance and for what periods such qualifications are appropriate will be given to the courts. We think it is debasing to both popularly elected legislative bodies and to the traditional place and function of Canadian courts to confer this sort of general power to supervise the policies of provincial governments relating to education, social services, consumer protection, health and other areas.

Finally, in this connection we note the language of s.8(3) which would allow "reasonably justifiable" restrictions on the right to take up residence. This section, instead of alleviating anxieties about the future of provincial policies which contain residence qualification, increases them. This section offers no guidance to legislatures or courts. The judiciary will take this clause for what it is: an invitation to weigh the worth of the provincial policy being pursued. Far from providing a measure of security for provincial programs, judicial interference is guaranteed. Furthermore, the language of s.8(3) is so imprecise that judges will be forced to resort to subjective evaluations of the issue before them. The section provides judges with a formula in which to cast conclusions reached by processes unknown and inarticulable. Finally, the language of subsection (3) reveals that the federal government does not really consider that mobility is a right. For the federal government, mobility is obviously a value in social ordering which must compete with other values and goals. In this way it would appear, therefore, that Saskatchewan and the federal government do not differ, except on the basic question of whether the concept should find a place in the Charter of Rights.

In relation to s.8(2)(b), we object to the proscription of policies in some provinces which currently limit the holding of certain types of land to provincial residents. For these provinces, the ownership of land and the way in which it is used are not merely economic phenomena. In Saskatchewan, for example, the pattern of agricultural land ownership is a vital component of the social fabric of the province. Our farm ownership laws may or may not be economically efficient. They reflect the view that non-resident ownership of farmland is inappropriate for Saskatchewan, and that Saskatchewan farms should not become another investment vehicle for mutual funds, trust funds and other large capital aggregations. These are deeply held convictions and we simply are not willing to abandon them to the federal notion of mobility rights.

In connection with the right in s.8(2)(b) "to pursue the gaining of a livelihood in any province" we have the same anxieties that we have with respect to the right to take up residence. It is not clear which labour practices, mandated or approved by provincial legislation, and which professional regulations would be caught by this section. Those employment barriers which represent gross barriers to movement would be caught by the language of s.8(2)(a). Those minor impediments which are the product not of protectionism, but of legitimate policies designed to enforce standards, protect

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consumers and encourage provincial and intra-provincial economic development, should not be subject to constant court challenge.

S.121: CANADIAN ECONOMIC UNION

A: S.121(1)

We begin our discussion of s.121(1) by returning to the question of court supervision. We do not wish to repeat the general points made above about the place of wide judicial powers in democratic government, but wish to draw special attention to the language of the proscription found in s.121(1). This section forbids legislation or governmental practice which discriminates "in a manner that unduly impedes the operation of the Canadian economic union" on defined provincial bases. The use of the concept of "undue" in this definition encourages a form of judicial activism which is undesirable. Canadian experience with the judicial interpretation of the word "undue" suggests not only that it is impossible to predict what action will be caught by the section, but also that even after many years of jurisprudence the capacity to predict is not notably enhanced. "Undue" is a standard which does not lead to judicial elaboration of the

Second, it is not clear whether the only offending classifications are ones which are explicitly provincially based. We can anticipate governmental schemes which benefit or give preference to the services and goods of certain parts of a province which, while not explicitly provincially based, could be offensive to the spirit of this section. For instance, Saskatchewan has a scheme to give employment preference to residents of northern Saskatchewan. This scheme is equal as between Regina workers and Toronto workers, but not as between La Ronge workers and Toronto workers. If this is acceptable, because a provincial classification is not being used, would it also be acceptable for the Saskatchewan Legislature to condition uranium mining to the requirement that processing be done in northern Saskatchewan. This practice would be equal as between Regina processors and Port Hope processors. What about a purchasing policy of Ontario which, for reasons of economic development, preferred goods produced in the Golden Horseshoe? This scheme would not be based on provincial classifications and would be equal as between, say, Brandon producers and Kingston producers. Clearly the language of the section may be interpreted to catch some of these practices. It is likely that classifications which are something other than provincially based will be struck down. This means that even the apparent clarity of the section relating to prohibited classifications is amenable to a considerable degree of judicial elaboration.

Third, the use of the phrase "directly or indirectly" in the section means that in order for provincial laws or practice to offend the section, the policy need not be articulated in terms of preference based on provincial boundaries or sub-provincial areas. If the effect of a policy is to impede the entry of out-of-province goods, services, capital and persons, it can be brought within the language of the proscription regardless of its intent. Again the possibility for confident prediction of what economic development schemes would be tolerable is very low.

Fourth, we wonder if the idea of undue impediments actually restricts the scope of the prohibitions in s.121(1). In fact, very few of the examples which have been used in considering this topic in recent weeks (Newfoundland's employment legislation, government purchasing policies, and Saskatchewan's farm ownership law) are significant in terms of total national economic activity. On the other hand, the position being taken by the federal government, as we understand it, is that the Canadian economic union is now being disturbed and has the potential of being destroyed by various barriers. Under this view, any barrier could be interpreted to be an undue impediment since the aggregate effect of the impediments, if generally present within the national economy, would be cumulatively unacceptable.

criteria and values upon which court decisions are based. The vagueness of the proposed s.121(1) will produce two evils. Governments may be dissuaded from confronting social problems because they do not know the exact scope of the constitutional limitation and, insofar as they continue to test the scope of the section, they will face constant court challenges.

The phenomenon of repeated challenges to governmental policies is disruptive of sound regulation and leads governments to be tentative, unsure of their powers, and inconsistent.

Apart from the unfortunate implications for the relationship between courts and government, the language of the section contains further problems. First, it is not clear what "discriminate" means in this section. Does it merely mean that any law or practice which employs a classification of goods, services, capital and persons based on provinces, is per se discriminatory? Or does it require that the purpose of the law or practice must be to place extraprovincial goods, services, capital and persons at a disadvantage. In short, does "discriminate" carry some independent concept or is its use merely conclusory, describing the fact that certain forbidden classifications are present in the legislation?

Fifth, the meaning of impediment to "the Canadian economic union" is not clear. The idea that this phrase might express is that the courts are to consider whether the discrimination contributes to economic inefficiency. On the other hand the phrase may direct courts to consider only whether the goods, services, capital and persons are not moving freely across provincial boundaries. If it is the latter test, it is difficult to see how s.121(1) differs from the likely interpretation of s.121(4) (discussed below) and, indeed, it is difficult to know what the clause, in which "Canadian economic union" appears, adds to the basic proscription not to discriminate against goods, services, capital and persons moving from out of province or originating in another province.

Finally, in this section, we want to explore, by way of a few examples the likely impact of s.121(1) on policies which reflect legitimate provincial concerns.

Under services, would the section be contravened by a provincial requirement that any engineer or accountant wishing to do business in the province must be admitted to the provincial professional association? Would the section be violated if a bond were required from out-of-province engineers before undertaking the management of any construction project, if such a bond were not required from engineers resident within the province?

What would be the validity of rules requiring that out-of-province lawyers wishing to move to a province not only pass examinations testing their knowledge of provincial laws but serve under a short period of articles? Would the province be required to demonstrate that the articling requirement served the interests of competence?

If, under the authority of provincial labour legislation, construction unions in a province established a hiring hall scheme to assign jobs to members, and the hiring hall system permitted an easier transfer from local unions within the province than from locals outside the province, would this be discrimination which unduly impeded the operation of the Canadian economic union? Would the implicit sanction of this hiring hall system by legislative recognition of the unions' powers be sufficient state involvement so that a court would find that there was a provincial practice?

In relation to goods, would a provincial power company be permitted to sell natural gas to residents of the province at a subsidized rate, while at the same time, selling natural gas to out-of-province companies at a higher per unit cost? If a provincial power company chose not to sell power or natural gas out-of-province, even though there was a demand and even though there was no problem with interconnection, would the power company be discriminating in contravention of s.121(1)? If a province encourages consumers, by governmental advertising, to buy goods produced in the province, is this a practice which is in violation of subsection (1)?

Under capital our prime concern relates to possible restrictions on the dedication of public monies. If a provincial heritage fund were to lend money at a more favourable rate to borrowers within the province, would s.121(1) be violated? What if a provincial industrial development corporation were limited by legislation to lending capital only to ventures operating within the province? Or would it be legal if a certain percentage of the monies in a public service superannuation fund were required to be invested within the province? Would a provincial scheme for making high risk venture capital available only to within province enterprises be allowed? 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 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?

We feel that these and other examples need to be explored in greater detail before we embark on the constitutional revision found in s.121(1). The above

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provincial policies can, at various times, be seen as appropriate for provincial economic development and not out of keeping with the sorts of regulatory techniques which are in place in jurisdictions with responsibility for economic development.

B. S.121(2)

Our views about the delegation to courts of discretionary power which accompanies derogations of the sort found in the new s.121(2) have been made clear elsewhere in this paper. While we believe that, if there is to be legislation like s.121(1), a derogation clause is necessary, we prefer one which gives a more precise direction to courts or which places a specific political burden on legislatures. For example, we note the powers of derogation available to Parliament include the ability of Parliament to pass overriding laws if the laws are enacted pursuant to regional development or if the laws are enacted under a declaration. The standard in the former requirement gives considerably more direction to courts about the conditions that must be met than the standards of "public safety, order, health, or morals". The mechanism in the latter requirement (i.e. declaration) brings a specific form of political accountability into the legislative process and excludes court supervision (except on technical grounds). We vastly prefer this sort of political mechanism to the wide ambit for court review. The important point is that provinces must be able to avoid supervision by the courts on the question of what is tolerable economic policy. From the perspective of both accountability and competence, courts would seem to be the least appropriate agency for deciding on the soundness of provincial economic policies.

c. S.121(3)

The fundamental criticism we have of this sub-section is that Parliament may pass laws which would otherwise be invalid under s.121(1) if they were enacted pursuant to the principle, among others, of regional development. Further, under s.121(3) the federal government may unilaterally declare any of its actions to be in the "overriding national interest" and thereby exempt itself from the proscriptions of s.121(1). By this section, the federal government assumes responsibility for regional development in this country and is not, in the final analysis, bound by the proscription of s.121(1). In contrast, the capacity of provinces to participate in economic development is emasculated. While it is true that provinces could pursue policies designed to develop regions within the province, their ability to promote the economic interests of the whole province is reduced. Provincial development policies, for obvious reasons, will be defined to operate within provincial boundaries and will be designed to benefit as much of the province as possible. These schemes could often violate s.121(1). The result is that governmental intervention in the economy in aid of promoting economic development on a selective basis by these provisions, shifts towards the federal government.

It has been argued by some federal officials that the new s.121 does not shift powers to the federal government. There are at least three reasons why this would seem to allow greater room for the exercise of federal powers.

First, when provinces are precluded from the field of provincially-based regional development, the need for governmental intervention in economic development will not evaporate. The continuing need for regional development, coupled with unique federal capacity to respond to the need will inevitably expand the exercise of federal power under s.121(3). In other words, the conditions which justify the federal over-ride in s.121(3) will recur with greater frequency because of the restraints imposed on provinces by s.121(1).

Second, provinces are likely to continue to design policies of provincial development which violate the language of s.121(1) and such policies are not only going to be needed but will be widely perceived as being rational responses to economic development problems. These provincial policies could be put in place if the federal government were to accept them, legislate accordingly, and delegate their administration to provinces. We realistically expect that the federal government will pursue, at least in part, its regional development goals through this method. This means that provincial policies will be permitted only to operate on the sufferance of the federal government and on conditions imposed by the federal government. In this way, the federal government will acquire an immense discretionary power over provincial policies designed to promote provincial development.

Third, we think that it is a reasonable expectation that courts faced with the large area of proscription found in s.121(1) will begin to redefine powers enjoyed by both levels of government. Canadian constitutional jurisprudence leads us to believe that courts will, when possible, define constitutional language to limit the areas which are beyond the competence of either level of government. If this pattern holds, the federal government will be the major beneficiary of redefined federal and provincial powers. If this is doubted, we draw attention to the new language of the trade and commerce power, i.e. s.91(2). Although that language does not necessarily expand federal power beyond that enjoyed under the old s.91(2), we anticipate that courts will see in the change the implicit invitation to grant to the federal government a full-bodied trade power which can be used to support a total range of regulation which bears on trans-boundary economic activity. Apart from speculation about what might be the judicial treatment of the new s.91(2) we believe that courts in reading the whole new package of economic limitations and powers will rightly conclude that the nature of federalism in Canada has been changed so that the burden of economic regulation has been placed on the federal government. As a result, we think there will be a tendency to expand the scope of federal powers.

D. S.121(4)

The new s.121(4) provides for an area of minimum protection for interprovincial trading and commercial activity. In this way, it continues the absolute prohibition of tariffs and custom barriers between provinces and extends this protection to services and capital. We are concerned about this extension. The present s.121 has been interpreted to restrain direct costs (i.e. tariffs and customs) imposed on entry to, or exit from, a province. It has not been used to restrain other quantitative restraints on goods moving, or to restrain absolute barriers to entry, as, for instance, arise when provincial monopolies are created. This meaning of the present s.121 makes sense in relation to goods and that section serves a useful and definable purpose. However, it is highly unlikely that provinces or the federal government will be interested in imposing tariff-like restraints on the interprovincial movement of services and capital. Impediments affecting services and capital are more likely to be either absolute barriers to entry or other non-tariff barriers. If we assume that courts strive to give meaningful content to constitutional language, it is reasonable to expect that the limited reading of the present S.121 will not be continued in the courts' interpretation of the new language. The old reading does not fit well with the concept of interprovincial movement of services and capital, and, accordingly, the phrase "impedes the admission free" is likely to be read in a way which gives the section operational significance. If this

occurs, "admission free" will be read to include free from substantial impediments imposed either directly or indirectly. Although we are not absolutely confident that our fears are justified, we believe that the proposed expansion of s.121 contains unwarranted risks, in the form of the potential for a wide reading that will frustrate both provincial and federal regulation of the economy.

S.91(2) and S.91(2.1): TRADE AND COMMERCE

We have already commented on the possible judicial treatment of the proposed revisions to s.91(2). In short we think that the balance currently reached in Canadian constitutional jurisprudence would be disrupted and federal power would be expanded by the new words. We admit that these 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", to use the language of the third head of federal power as developed in Citizens Insurance v. Parsons. Since the words do not ostensibly add new powers to the federal government but may have that effect, we would suggest that the jurisprudence in this area be confirmed by the simple re-iteration of the present language of s.91(2).

In S.91(2.1) the federal government is attempting to make clear Parliament's jurisdiction over product standards and competition policy.

A. PRODUCT STANDARDS

In December, 1979, the Supreme Court of Canada limited the power of Parliament to regulate product standards. Provinces have not, to a large degree, been involved in this form of regulation and they are as inconvenienced as the federal government by the Supreme Court's action. The new s.91(2.1) would seem to offer a solution, but it is a solution which we doubt provinces will be willing to accept. By the explicit conferral on Parliament of jurisdiction over product standards necessary for the operation of the Canadian economic union, provinces are excluded from that area. Under the present arrangement, at least until December, 1979, both levels of government could enact laws and regulations relating to product standards. In the face of conflict, there was federal paramountcy, as indeed there still is insofar as the federal standards are directed at either health or commercial honesty. Under the case law relating to the operation of concurrent laws, provincial standards which supplement federal standards are valid. Thus the new s.91(2.1) would remove from provinces the significant portion of product standards jurisdiction which they now enjoy. There are less drastic alternative solutions to

this partial loss of federal product standards jurisdiction. Provinces could delegate rule-making power to federal boards, or provinces could adopt uniform product standards regulations, which could be those made by federal laws for inter-provincial trade. In any event, the situation created by the Supreme Court of Canada cases, does not require the diminution of provincial jurisdiction.

B. COMPETITION POLICY

The federal government currently pursues its competition policy in part under Parliament's criminal law power. In addition, the present Act identifies a number of reviewable trade practices and authorizes the Reviewable Trade Practices Commission to apply non-criminal remedies to the commission of these practices. It appears that the federal government relies on the federal trade and commerce power to support this aspect of its current competition legislation. The extent to which the power supports this aspect of the current legislative scheme is not free from doubt. The proposed s.91(2.1) would qualify the grant of power over competition by the phrase "where such regulation ... (is) reasonably necessary for the operation of the Canadian economic union" and by the phrase "throughout Canada".

However, we are not clear about what meaning to be given to these phrases in this context. Under s.91(2.1) federal jurisdiction over competition may involve only the general regulation of competition throughout Canada or it may include any competition to the extent that the quality of the Canadian economy is affected, thereby involving possible regulation of local trades. The latter view would lead to a considerably larger jurisdiction than the federal government can now uncontroversially claim. This result would be undesirable for one main reason. There are many provincial policies relating to regulated professions, utility monopolies, and chosen instrument enterprises which are, by strict definition, anti-competitive. Some of these anti-competitive regulatory devices and anti-competitive provincial economic choices (e.g. a preference for achieving economies of scale in an industrial sector) have been in place for long periods of time and ought not to be disrupted by an expanded federal jurisdiction over competition. We wonder, for instance, if a provincial policy to expropriate the oil extraction and processing industry within a province would be amenable to federal control under the rubric of its competition jurisdiction? If so, it is not clear why this sort of provincial economic policy should be frustrated by the imposition of a federally chosen economic model. Indeed, the mere existence of such an exclusive federal power, even if it remains unexercised, presents dangers for any provincial laws that could conceivably be characterised as being in relation to it. Also, if the federal government's competition

standards jurisdiction.
power to federal boards,
produce standards regulations,
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policy were to become one under which competition was reduced through the reduction of the number of firms in some sectors, could the federal government then commence the licensing of industrial and commercial enterprises within the province? Again, this would give rise to unacceptable levels of federal interference in intra-provincial economic activity.

In conclusion, we are concerned, first, that the federal proposals place undue responsibility for economic regulation on the courts, and, second that they substantially alter to the detriment of the provinces the balance of powers over the economy held by the federal and provincial governments.