DRAFT André Jeanne(?) Confidential

POWERS AFFECTING THE ECONOMY

1. First Ministers agreed on June 9, 1980 to include "Powers affecting the Economy" on the list of priority items to be discussed over the summer. Presumably, this item refers at least to the need to ensure the free movement of goods, services, capital and labour in order to make the Canadian common market more efficient. But in principle such an item would be much broader. It would refer to the over-all distribution of economic powers between the federal government and the provinces in a new constitution.

2. The purpose of this note is, first, to discuss the distribution of economic powers, and second, to focus on the specific subject of the maintenance of the common market.

3. The Distribution of Economic Powers

It may be useful to think in terms of the economic functions that need to be performed in Canada and then to suggest a particular distribution of powers. (The following comments are based on the thinking developed by T.K. Shoyama following the assignment given to him by the Minister of Justice.)

(i) Redistribution of income (wealth?) between regions and individuals

This function is said to be the first priority of the Minister of Justice. It is related to the idea of entrenching the principle of equalization in a new constitution, but, of course, it is much broader than that. Presumably, a new constitution would commit all governments in Canada to the reduction of regional disparities (as Bill C-60 suggested), but the objective here is to ensure that the federal government is given the taxing and spending powers necessary to carry out its responsibility in this regard. Most, if not all, constitutional proposals have recognized the redistributive function of the federal government. The Beige Paper, for instance, says in Chapter 20:

> Moreover, the central government has the responsibility of overseeing the sharing of wealth among Canadians. It accomplishes this in part through the mechanism of equalization, but it must also have the power to make direct transfers to individuals, as it does through family allowances and old age pensions.

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(Quote here other constitutional proposals?)

What should the new constitution say about the federal role with respect to redistribution? Is a statement like s.96 of Bill C-60 (attached as Annex A) sufficient to empower the federal government to make payments to individuals and regions (or to reduce taxes for redistribution purposes)? Of course, the federal government also needs broad taxing powers, as in s.91(3) of the BNA Act. In addition, it needs enough actual revenues to be able to implement redistributive measures; this is perhaps not a constitutional question: i.e. revenue sharing is not something which can be determined in a constitution. But it may be relevant to ask the following question: if a revised constitution results in a significant shift of legislative powers to the provinces, wouldn't the provinces ask that such a transfer of powers be accompanied by a transfer of revenues, via for instance a transfer of tax points (as the Beige Paper seems to imply)? If that is the case, how does the federal government retain enough revenue for purposes of redistribution?

(ii) Maintenance of the common market

This is another subject on which most constitutional proposals agree: a new constitution should somehow include provisions which would prohibit, or at least limit interprovincial barriers to the free circulation of factors of production. As indicated in paragraph 2, this particular issue will be elaborated in the second part of this note.

(iii) Stabilization Policy

The federal government's responsibility for stabilization policy is currently recognized, even though it is of course not mentioned in the BNA Act. The Fiscal Policy Division of the Department of Finance, in a paper entitled "A Review of Constitutional Powers in the Area of Macro-Economic Policy" (October 30, 1979), argued essentially that the current Constitution provides the federal government with sufficient powers to carry out its stabilization responsibilities. Assuming that becomes the federal position, what should a new constitution say about macro-economic powers? A précis prepared by the Department of Justice in May 1979, suggested that one approach would simply be "to add a very

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broad, purpose-oriented, general category to the federal list of powers; an example might be a head such as 'price stabilization and the maintenance of high levels of employment'". Another approach would be "to broaden one or more of the existing enumerated heads by means of a general statement (e.g. to broaden the trade and commerce power by rephrasing it to read 'trade and commerce and the regulation of the national economy')". It is possible that the very fact of writing such expressions into the text would in effect strengthen federal powers, since the existing constitution carries no such words. (The section of the Justice Précis from which the above quotes are drawn is attached as Annex B.)

It will also be necessary to have a view on the distribution of powers: should the federal government be solely, primarily or partially responsible for stabilization policy? (Annex C summarizes the recommendations of various groups concerning the division of powers in the area of macro-economic policy. This summary was prepared as an appendix to the Finance paper mentioned earlier. Some important proposals are not covered and will be added.) It may be helpful at this point to provide a definition of stabilization policy. In the Finance paper mentioned above, it was defined as follows:

> Macro-economic management as it is currently practiced primarily relies on the manipulation of the big levers of fiscal and monetary policy to maintain a level of demand in the economy that is sufficiently high to maintain output and employment at a high level, but not so high as to contribute to inflationary pressures. Macro-economic management is also concerned with the balance of payments and the exchange value of the Canadian dollar.

It would seem to be out of the question to suggest that the federal government should be exclusively or partially responsible for macro-economic management or stabilization policy. As several economists have pointed out, the provinces, or at least many of them, can and do conduct fiscal policy. (It is generally recognized that monetary and exchange rate policies should be exclusively federal; but in view of their close relationship with fiscal policy, this may not be an adequate statement.) If it is true that federal and provincial governments have different

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comparative advantages with respect to stabilization, then the conclusion should be that the federal government should be primarily responsible for stabilization policy, i.e., the provinces would not be excluded. What then should the constitution say about their role? Could the question of their role be covered by a statement of principles or goals similar to the commitment concerning regional disparities contained in s.4 of Bill C-60 (see Annex A), i.e., both levels of governments would commit themselves to certain economic goals?

What might those goals be? Over the years, there have been various statements on the goals of Canadian economic policy, including the White Paper on Employment and Income and the First Annual Review of the Economic Council. Clarence Barber summarized economic policy objectives as follows:

> Although government economic policy may have many and varied objectives, there is now broad agreement that primary emphasis should be given to the following three major objectives:
> 1. low levels of unemployment
> 2. reasonable stability of prices
> 3. an adequate rate of economic growth. (1)

There are of course serious problems with statements which commit government to certain objectives. For instance, a government decision taken on grounds other than economic policy and which had the effect of increasing prices, could perhaps be declared unconstitutional. One way to deal with such problems is illustrated by the Declaration of Policy in section 2 of the U.S. Employment Act of 1946:

> The Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance and cooperation of industry, agriculture, labor, and State and local governments, to coordinate and utilize all its plans, functions,

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(1) Clarence L. Barber, Theory of Fiscal Policy as Applied to a Province, a study prepared for the Ontario Committee on Taxation (no date).

> and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production and purchasing power. (underline added)

Even if a new constitution were to include a specific head concerning the federal stabilization role, the federal government would also need the necessary taxing, spending and borrowing powers. Taxing and borrowing powers present no particular problem, although there is the question whether the federal government will be left with a large enough share of public sector revenues or whether its revenues will represent a large enough share of GNP. The Finance paper mentioned above argues that the present situation is adequate. Again, assuming that is agreed to, how will it be ensured that the result of the new over-all distribution of powers will produce a similar situation? This is not unlike the question raised under the redistribution item.

Concerning the expenditure side of stabilization policy, the federal government presumably needs to have legislative powers in enough areas so that its changes in expenditures can have a meaningful macro-economic impact.

Finally, whatever the new constitution were to say about federal and provincial responsibilities with respect to economic stabilization, since it is clear that both levels of government will be involved, there is the question whether the text should say something about federal-provincial consultation or cooperation on economic matters. The existing machinery for federal-provincial economic and fiscal cooperation is quite developed. Perhaps a new constitution could simply include a commitment which would reflect current practices, although the very fact of including such a statement in the text might stimulate both levels to refine and extend existing arrangements.

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(iv) Economic Development

In order to fulfill its responsibilities with respect to stabilization policy and redistribution of income, the federal government clearly needs powers related to economic development, and therefore, in turn, several of the powers necessary to economic development have already been mentioned, i.e., taxing and spending powers. Responsibility for the tariff and the exchange rate are also essential.

In addition, the federal government needs the responsibility over such matters as competition policy and securities legislation.

Then the question is whether the constitution should include a list of areas related to the economic infrastructure, such as transportation, communications, energy, R & D, agriculture and other primary resources, etc., or whether such matters should be covered by a more general statement which would provide for concurrent powers over economic development with the qualifier that interprovincial and international matters are to be under federal jurisdiction.

With respect to the federal spending power, in the context of economic development, an important observation is that the federal government should ensure that it is given jurisdiction, not necessarily exclusive, over activities that are likely to involve significant expenditures, over, say, the next hundred years. A case in point is R & D.

(v) International Economic Relations

It is not clear whether this question is a function comparable to the first five. Rather, it may follow from them. On the other hand, including it as a separate essential function would add weight to federal arguments to justify some of the specific powers required by the federal government, such as the international aspects of economic development, the tariff, the exchange rate. And a central responsibility for international economic relations is also crucial to the maintenance of the common market.

4. MAINTENANCE OF THE COMMON MARKET

This matter differs from the others discussed so far because the basic concern is not with federal constitutional powers, but rather with limitations on provincial powers.

Clearly, despite the federal trade and commerce power, s.121 of the BNA Act and the restriction against provincial indirect taxes, there have always been restrictions on the free circulation of the factors of production. But as several observers have pointed out recently, there seems to be an increase in provincial protectionism. It is not necessary here to mention some of the more recent examples. It can be pointed out, however, that most constitutional proposals have emphasized the need to eliminate or to limit interprovincial barriers to trade. The Premiers of Ontario and B.C. have also expressed concern about such measures.

A certain amount of work on this subject has been done recently inside the federal government. Last spring, a series of papers were prepared by various departments on various aspects of barriers to trade, and more recently, work has been done in Finance and in ITC to identify the range of interprovincial barriers to trade more systematically. In addition, federal ministers have recently been expressing serious concern over the issue and two months ago, the Minister of Employment and Immigration was directed by Cabinet to tell his Nova Scotia and Newfoundland counterparts that:

> future expenditure commitments relating to employment and manpower training programs in these provinces would depend on a satisfactory resolution of the problem of provincial restrictions on employment opportunities in offshore projects. (5015-80RD(NSD))

It is not known at this point how the federal government wishes to proceed in discussing this matter with the provinces over the course of the summer. Provinces might be expecting a fairly well developed federal position, given all the recent statements of concern coming from Ministers, including the Prime Minister. Given the limited work done so

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far and the time constraint, an attempt will be made here to suggest a possible federal approach.

In introducing this item, the federal government would emphasize that it is not (necessarily?) seeking increased powers for itself. The federal minister would indicate the federal government's increasing concern over the state of the Canadian economic union. Noting this view is shared by many observers, he would point to provincial measures which impede the free flow of goods, labour, capital and services across provincial boundaries (list a few examples). There are all sorts of such measures, but the minister could single out more specifically provincial measures which discriminate between resident and non-resident factors of production. He would declare the federal government's hope that the new constitution include provisions to keep interprovincial trade barriers at a minimum. He could then say that such provisions might be based on an expanded section 121, an economic bill of rights (mainly in relation to labour mobility) and restrictions on indirect taxation. He might also mention that a clarification of the federal trade and commerce power might be necessary. A decision would have to be made whether the minister would acknowledge that constitutional restrictions might very well affect federal as well as provincial measures.

A number of questions have to be answered eventually, and not all of them can be resolved before the issue is first raised with the provinces. Here are some of those questions:

- what particular constitutional approach or combination of approaches should be selected?
- how should the above be defined, since every impediment to free movement is not necessarily unacceptable?
- how can a constitutional approach be related to possible non-constitutional measures, such as intergovernmental agreements? A note on possible constitutional language is attached as Annex D.

- what is the relationship between the common market problem and the item on resource ownership and inter-provincial trade? There is a question of substance here, and a question of strategy, i.e., the federal side may want to indicate (as was considered last fall) that it will be prepared to "make a deal" on the resource question only when the provinces have indicated a willingness to do something about barriers to trade.
- might a reformed senate have a role to play in this area?

A.J.
17.6.80

EXCERPTS FROM THE CONSTITUTIONAL AMENDMENT BILL (C-60)

II Statement of Aims of the Canadian Federation

...

4. To these ends, the stated aims of the Canadian federation shall be:

...

to pursue social justice and economic opportunity for all Canadians through the equitable sharing of the benefits and burdens of living in the vast land that is their common inheritance, through the commitment of all Canadians to the balanced development of the land of their common inheritance and to the preservation of its richness and beauty in trust for themselves and generations to come, and through their commitment to overcome unacceptable disparities among Canadians in every region including disparities in the basic public services available to them.

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IX Regional Disparities

96. Without limiting or restricting the generality of the statement of aims of the Canadian federation set forth in section 4 of this Act and without altering the legislative authority of the Parliament of Canada or of the legislatures of the provinces or the rights of any of them with respect to the exercise of their legislative authority pursuant to law, the Parliament of Canada and the legislatures of the provinces, together with the government of Canada and the governments of the provinces, are committed pursuant to the Constitution of Canada to

(a) promoting equal opportunities for social and economic well-being,

(b) assuring as nearly as is practicable the availability of essential public services of reasonable quality, and

(c) furthering economic development to reduce disparities in opportunities for social and economic well-being and in the availability of essential public services of reasonable quality

for the benefit of all individuals in Canada, wherever they may live.

SUGGESTION RE ALTERNATIVES FOR CHANGE

The above suggests, as far as changes in legislative jurisdiction are concerned, that there are two approaches which might be taken to any amendment to the Constitution for the purpose of strengthening federal economic powers. One approach would be to add a very broad, purpose-oriented, general category to the federal list of powers; an example might be a head such as "price stabilization and the maintenance of high levels of unemployment"; or to broaden one or more of the existing enumerated heads by means of a general statement (e.g., to broaden the trade and commerce power by rephrasing it to read "trade and commerce and the regulation of the national economy").

The other approach would be to broaden the existing specific heads of jurisdiction in certain very specific ways to accomplish very specific economic purposes (e.g., interest including the terms and conditions of loans relating thereto) or to add certain very specific individual heads to section 91 (e.g., securities).

Of course, both approaches can be used and with respect to different or the same subject matters. Some suggestions that have been or could be made, for example, are:

(1) broadening Parliament's power over trade and commerce so that it includes the regulation of intraprovincial trade and commerce;

(2) broadening Parliament's power over trade and commerce so that it includes the regulation of intraprovincial trade and commerce when substantially connected to the regulation of interprovincial or international trade (or when necessary in the national interest);

(3) broadening Parliament's power over trade and commerce so that it includes all forms of interprovincial transactions, covering intangibles as well as tangibles;

(4) broadening Parliament's power over trade and commerce so that it is not limited to making laws in relation to "the regulation of trade and commerce" but encompasses making laws in relation to "trade and commerce";

(5) broadening Parliament's authority to regulate banks and banking so that it includes all financial institutions - e.g., replace s. 91.16 ("savings banks") with "financial institutions";

(6) broadening Parliament's authority over banking so that it provides "banking including the total volume of credit";

(7) broadening banking so that Parliament's authority extends to "banking and the regulation of financial activities which affect the national economy";

(8) broadening Parliament's authority over interest so that it provides "interest and credit" (which would include consumer credit);

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(9) broadening Parliament's power by adding a new head entitled "capital markets";

(10) adding "the regulation of corporations" (businesses) which operate in more than one province.

In developing alternative suggestions for constitutional amendment, factors to consider in choosing an approach are:

(1) over-specification is usually a mistake in a constitutional document (it can become out of date quickly);

(2) any additional federal power will detract from provincial authority, especially if the federal power is expressed to be "exclusive"; thus the more general the description of the federal power the greater will be provincial opposition (both because of the wider scope and because the wider description will create more uncertainty as to exactly where the limits of that description lie).

Since additional federal authority will usually detract from provincial authority, an option to consider in expanding federal authority is the technique of concurrent authority. In this case, in the absence of conflicting and overriding federal legislation, provincial legislation would operate. Thus, if Parliament were given concurrent authority respecting local trade and commerce, Parliament's exclusive jurisdiction over interprovincial and international trade and commerce could remain with additional concurrent authority given to regulate local trade. Provincial legislative jurisdiction would continue unless specific pieces of provincial legislation conflicted with federal legislation on the subject. If it is expected to expand federal jurisdiction in areas where there is already considerable provincial legislation, it would probably be politically easiest to do so by means of concurrent powers.

Another technique which can be used to lessen the impact of extending federal legislative jurisdiction in an area is to make such extension subject to provincial paramountcy. In this case the grant of authority could be expressed so that federal legislation would operate only so long as there was not conflicting and overriding provincial legislation in the area.

On occasion a trade-off might be made so that Parliament's jurisdiction could be expanded and the provincial as well. For example, it has been noted above that the provincial incorporation of near-banks (e.g., caisses populaires) is on shaky ground. It has been suggested that in this area Parliament might be given exclusive legislative jurisdiction over financial institutions which operate in more than one province or outside the country, while the provinces might be given jurisdiction to incorporate financial institutions including banks which operate only in one province.

There are two other techniques for change that will be mentioned here but not considered: the first, because it is being considered in other papers; the second, because more comparative study would have to be done to develop the alternatives. The first is the placement of limitations on provincial (and federal?) governments by ensuring the free movement of goods, services, people, etc. Safeguards of this nature exist in part in the present section 121 (but not so as to restrict the federal government). Also, the Constitutions of other federal states contain comparable clauses. But, as noted above, the matter is the subject of three other papers.

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The other kind of change is one that calls for a structural change as, for example, the creation of a formalized body deciding matters especially of fiscal policy - as exists in Australia. There are difficulties with these kinds of bodies. That in Australia developed historically out of a need recognized by everyone for harmonization of borrowing. Only after the body had been established and was operating on a voluntary basis, was it constitutionally entrenched. That this kind of mechanism could be grafted on the Canadian Constitution "out of the blue" may be unrealistic but alternatives of this nature could be kept in mind.

APPENDIX

RECOMMENDATIONS OF VARIOUS GROUPS CONCERNING THE DIVISION OF POWERS IN THE AREA OF MACRO-ECONOMIC POLICY

I Task Force on National Unity

Economic Policy

31. The principal roles and responsibilities of the central government should be:

iv the management of Canada-wide economic policy (including monetary policy) and participation in the stimulation of regional economic activity

Taxing Powers

41. Both the central and provincial governments should be granted equal access to tax sources, with the exception that customs and excise taxes be an exclusive central power. The provincial right to use indirect taxation should be qualified to ensure that the impact of such taxes do not fall upon persons outside the taxing province.

Spending Powers

46. The spending power of the central government should be retained in matters of federal-provincial programs of interest to the whole of Canada, but its exercise should be subject to ratification by a reconstituted second chamber, and provinces should be granted the right to opt out of any such program, and where appropriate receive fiscal compensation.

Federal-Provincial Consultations

24. The annual conference of finance ministers should be used more actively to ensure the coordination of economic stabilization policies, by providing a common assessment of the economy and a better knowledge of the total revenues expenditures and borrowings of the Canadian public sector as a whole.

25. Meetings between the central and provincial governments and representatives from the private sector should be regularized and integrated under the general supervision of conferences of the first ministers on the economy, to be held every two or three years, with a view to framing and coordinating policies designed to achieve medium and longer-term objectives for the Canadian economy and for its main sectors of activity.

II Ontario Advisory Committee on Confederation

Stabilization

Management of the economy through the devices of fiscal and monetary policy has become a central task of contemporary government. Maintenance of the national economy requires that the federal government be mainly responsible for such economic management.

Hence, the tools of monetary policy, the central bank, currency, interest and banking generally, should remain in federal hands. The activities of provincially-chartered financial institutions should be subject to federal regulation to the extent that their operations constitute part of the national banking system.

Fiscal policy poses a more difficult problem, since the primary instruments for conducting it, taxing, spending and public borrowing and investment, are shared between federal and provincial governments. Some provinces are large enough to contemplate managing their own fiscal policies, and it is theoretically possible for the provinces collectively to undermine or frustrate a fiscal posture selected by the federal government. Indeed, in the postwar period the federal grip on the levels of fiscal power has steadily weakened as provincial fiscal capacity has grown and as we moved from a centralized tax rental system to independent taxation.

Consistency might suggest, therefore, a considerable degree of centralization here, with the federal government dominating the major tax sources, regulating provincial borrowing, especially overseas, and determining overall levels of spending. In various ways, such central fiscal control exists in several other federal countries. Such a development is clearly impossible in the present Canadian political context.

We believe that each level of government should be free to impose its own forms and levels of taxation, as set out in the existing Constitution, and would modify the present prohibition on indirect provincial taxation. Provinces should be free to use any form of taxation, so long as it is not actually borne by persons outside the province. We believe that, despite the considerable provincial fiscal leverage, the federal government does retain adequate taxing and spending power to maintain its primary responsibility for fiscal policy.

But we also suggest that much greater efforts will be needed in the future to coordinate federal and provincial fiscal policies. Recent events demonstrate that federal fiscal decisions, such as budget cuts, or tax changes, can have direct impact on provincial budgets. The same is true in reverse; for example, external provincial borrowing can affect the exchange rates, and provincial taxing decisions have a direct effect on the equalization payments Ottawa must make. This is compounded by the fact that a large proportion of federal spending is committed to transfers to the provinces. The regular meetings of federal-provincial finance ministers have made some coordination of fiscal policy possible. It could be expanded through discussion in the House of Provinces or some other more permanent forum in which informal agreement on appropriate fiscal policies could be reached. Such a "free-for-all" tax system has its dangers, as frequent disputes over revenue shares have demonstrated, but the alternatives have even more serious drawbacks. One is to allocate specified revenue sources to different levels. It poses insuperable problems of relating available resources to revenue needs. The other is to retain all major tax sources in central hands with unconditional transfers replacing provincial taxes. That implies an unacceptable degree of centralization and a serious lack of accountability.

Recommendations

The implications for the distribution of powers can be summarized as follows:

(a) Federal responsibility for monetary policy.

(b) Federal control of the central bank and of banking, and of the interprovincial banking aspects of provincially-chartered financial institutions, such as trust companies and credit unions.

(c) The federal and provincial governments should have access to all modes of taxation, subject to the proviso that no provincial tax shall be imposed on residents of another province.

(d) The sections of the constitution dealing with the machinery of intergovernmental relations should provide for mechanisms to ensure federal-provincial discussion of the sharing of tax revenues, levels of taxes, borrowing practices and the like.

III The Special Joint Committee of the Senate and the House of Commons 1972

Economic Policy

92. The Federal Parliament and Government should retain the primary responsibility for general economic policy designed to achieve national economic goals. This means that they must have sufficient economic powers to regulate the economy through structural, monetary and fiscal policies.

93. National economic policies should take more account of regional objectives through coordinating mechanisms beteen governments and through considerable administrative decentralization in the operation of the Federal Government and its agencies.

Taxing Powers

54. Generally speaking and subject to recommendation we endorse the principle that the Federal and Provincial Governments should have access to all fields of taxation. However, in order to bring about a division of revenues that may accurately reflect the priorities of each government, there should be Federal-Provincial consultations to determine the most equitable means of apportioning joint fields of taxation in the light of:

(a) the projected responsibilities of each level of government in the immediate future;

(b) the anticipated increases in their respective expenditures;

(c) economic and administrative limitations, such as preserving sufficient leverage for the Federal Government by means of its taxation system to discharge effectively its function of managing the economy.

55. Provincial legislatures should have the right to impose indirect taxes provided that they do not impede interprovincial or international trade and do not fall on persons resident in other provinces.

Federal Spending Powers

56. The power of the Federal Parliament to make conditional grants for general Federal-Provincial (shared-cost) programs should be subject to the establishment of a national consensus both for the institution of any new program and for the continuation of any existing one.

57. If a province does not wish to participate in a program for which there is a national consensus, the Federal Government should pay the Government of that province a sum equal to the amount it would have cost the Federal Government to implement the Program in the province. However, a tax collection fee of about 1 per cent, equivalent to the cost of collecting the money paid to the province should be deducted from the amount paid to non-participating provinces.

Income Controls

96. In cases of national emergency as defined by the Parliament of Canada, the provinces should delegate to the Federal Parliament all additional powers necessary to control prices, wages and other forms of income, including rent, dividends and profits, to implement its prime responsibility for full employment and balanced growth.

Financial Institutions

98. Where financial institutions (trust companies, insurance companies, finance companies, credit unions, caisses populaires) do business in more than one province, they should have to meet national standards as defined by the Federal Parliament; where they confine their activities to a single province, the provinces should retain exclusive jurisdiction.

IV Committee on the Constitution of the Canadian Bar Association

Division of Powers

11.2 The Constitution should give the federal Parliament the necessary legislative powers to regulate the national economy and inter-national trade; but the provinces should have legislative power to regulate the provincial economy and other local matters.

Taxing Powers

12.1 The Federal Parliament and the provincial legislatures should each have power to levy taxes by any means of taxation, subject to the following recommendations.

12.2 Only the Federal Parliament should have the power to levy customs duties.

12.3 Neither the federal Parliament nor the provincial legislatures should have the power to levy taxes creating barriers to interprovincial trade.

12.4 A province should not have power to impose a tax that has a tendency to be automatically passed on by the taxpayer to a person outside of the province.

12.5 Neither the federal Parliament nor the provincial legislatures should have the power to levy a property tax against the other.

The Federal Spending Powers

13.1 The Constitution should expressly provide that the federal Parliament have a general power to spend money for national purposes and the general welfare of Canada, subject to the following recommendations.

13.2 The federal government could only initiate a national shared cost program with the provinces when a national consensus exists. A national consensus could be determined by the approval of a 2/3 majority in reconstituted Upper House.

13.3 Any province could opt out of a shared cost program and such province would be entitled to compensation equal to the amount of money it would have received from the federal government under the program subject to its agreeing to provisions respecting interprovincial portability.

The Monetary System

18.1 The federal Parliament should have exclusive legislative power respecting the monetary system.

18.2 The federal Parliament should have exclusive legislative power respecting incorporation, organization and operation of financial intermediaries with federal charters, such as banks.

18.3 The provinces should have exclusive legislative power respecting the incorporation, organization and operation of financial intermediaries with provincial charters, such as provincial trust, and mortgage and loan companies, credit unions and caisses populaires.

18.4 The federal Parliament should have exclusive power respecting interest.

Government of Canada / Gouvernement du Canada

Annex D

MEMORANDUM NOTE DE SERVICE

LL/lm

SECURITY - CLASSIFICATION - DE SÉCURITÉ: CONFIDENTIAL

OUR FILE/NOTRE RÉFÉRENCE:

YOUR FILE/VOTRE RÉFÉRENCE:

DATE: June 13, 1980.

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

FROM / DE: Lisette Lafontaine LL

SUBJECT / OBJET: Constitutional Provision Regarding the Barriers Between Provinces

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

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

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

I Specific Powers

Again, it could be done in two ways:

- As a federal power:

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

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

- As a limitation to provincial powers:

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

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

II Motherhood Statement

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

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

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

or through a declaration of intention like:

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

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

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

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

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

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* Assuming the Governments are mentionned in the Constitution.