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THE POLITICAL ECONOMY OF CANADIAN
CONSTITUTION MAKING: THE
CANADIAN ECONOMIC UNION ISSUE

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Introduction and Overview

On April 17, 1982, on the lawn of Parliament Hill, Queen Elizabeth II formally proclaimed the Constitution Act, 1982. With this ceremony, Canada's century-long internal struggle to patriate the constitution finally came to an end. This royal proclamation also brought down the curtain on one of the most divisive periods in the nation's political life.¹ However, the intense debate over patriation is far from over and the literature it spawns will be a veritable academic growth industry.² The principal focus of this literature will likely relate to the many and varied political and constitutional issues that were at stake. And with good reason since redesigning the constitution has had and will continue to have implications that touch the very fibre of our nationhood:

The struggle over the constitution revealed much about the political life of the country. Canadians and their governments debated profound questions about the basic nature of their country: about how its regional and linguistic divisions should be managed; about majority rule and minority rights; about consent and legitimacy; about the roles of governments and the public in the process of democratic change. The political struggle over these issues was unparalleled in its drama and intensity. In its final stages the battle raged simultaneously on many fronts--in the byzantine world of federal-provincial negotiations, on the floors of Parliament and provincial legislatures; and in the courts. The battle even flowed beyond the nation's borders, embroiling British parliamentarians and courts

in Canadian discord. The climax finally came at the First Ministers Conference in November 1981. Against a background of high drama and intense political intrigue, nine provinces and the federal government compromised, often radically, on the future they would like to have seen for Canada, in order to reach an Accord on constitutional reform. (Banting and Simeon, 1983b, p.2)

Without attempting to downplay these political and legal perspectives, the focus of the present paper is on the economic underpinnings of the patriation process. In particular, the central thrust of the paper will deal with what surely was the most novel (and, later, I will argue perhaps the most important) aspect of the last two years of the constitutional debate, namely the federal government's attempt to secure the "Canadian economic union" in the constitution. Basically, the notion of a Canadian economic union, or an "internal common market" as it is sometimes called, has to do with ensuring that goods, services, labour and capital can move free and freely across provincial boundaries. Alternatively, one can view this as an attempt to secure a charter of economic rights for citizens to accompany the newly enshrined Canadian Charter of Rights and Freedoms. As we shall see, this initiative was not very successful in terms of its specific goal, yet the introduction into the bargaining process of this centralist concept played an important, perhaps even dominating, role in securing overall agreement on a constitutional package. Indeed, a strong case can be made that it was Ottawa's decision to back away from insisting on attaining a Canadian economic union (e.g., by allowing barriers to labor mobility for Newfoundland and indirect taxation for the West) that provided an important part of the basis for compromise leading to the final accord.

Thus, the paper will proceed on two levels. Most attention will be addressed to the narrow issue of securing the Canadian economic union in the constitution. This part of the analysis will focus, first, on the increasing tendency over the recent past for both levels of government to engage in policies that fragment the domestic common market and on the manner in which incorporating an internal common market provision in the constitution might provide an offset. Next, attention will be directed to the various ways that such a provision could be enshrined in the constitution. Part and parcel of this exercise is a comparison of the former BNA Act with the constitutions of other federalisms and even with the Treaty of Rome in order to demonstrate that the Canadian constitution was indeed deficient in this respect. The reaction of the provinces to this initiative as well as the attempt by researchers to provide estimates of the costs of any balkanization of the federation will then be highlighted. Finally, the analysis will deal with the manner in which the whole effort was effectively overwhelmed in the end, so much so that under the new constitution certain provinces actually have a constitutional right to fragment the Canadian economic union.

At the broader level, the analysis is much more speculative. In the extreme, what it argues is that the most recent round of constitution making was an attempt to reverse the on-going pressures for decentralization of power within the federation and that the Canadian economic union issue was central to this process. This is not to ignore the fact that the actual timing and characteristics of the final accord were influenced by several fortuitous factors--e.g. the re-election of the Trudeau Liberals in early 1980, the "no" victory in the Quebec Referendum, the Supreme Court challenge. Different resolutions of any or all of these may well have resulted in a very different Constitution Act or perhaps none at all. But it seems to me that this does not detract from the fact that underlying the whole process was the federal-provincial

power struggle in both the political and economic spheres. In terms of the former, this point is well recognized by many participants in the debate. Commenting on an early version of the Charter of Rights and Freedoms, UBC political scientist Alan Cairns noted:

At a more profound political level...the Charter was an attempt to enhance and extend the meaning of being Canadian and thus to strengthen identification with the national community on which Ottawa ultimately depends for support. ...The resultant rights and freedoms were to be country-wide in scope, enforced by a national supreme court, and entrenched in a national Constitution beyond the reach of fleeting legislative majorities at either level of government. The consequence, and a very clear purpose, was to set limits to the diversities of treatment by provincial governments, and thus to strengthen Canadian as against provincial identities. Rights must not be dependent on the particular place where an individual chooses to reside. (1979, p. 354, emphasis added)

And, more recently, with respect to the enshrined Charter he reiterates the point: "The language of rights is a Canadian language, not a provincial language. If the Charter takes root over time the psyche of the citizenry will be progressively Canadianized" (1984).

What I intend to argue is that the Canadian economic union issue played the same role, even more so, in terms of the distribution of economic powers between the federal government and the provinces. In part this is obvious, since one aspect of the Canadian economic union, namely securing mobility rights for individuals, was to be part of the Charter of Rights. But whereas the Charter of Rights has the potential for deflecting citizen attention toward national institutions, the Canadian economic union provisions, as initially proposed by Ottawa, had within them the seeds for undermining an incredibly broad and heretofore securely entrenched spectrum of provincial constitutional powers. Even though the attempt to secure the Canadian economic union in the constitution in some respects failed miserably, the initiative was nonetheless critical in serving the larger federal purpose of patriating the constitution replete with a Charter of Rights and Freedoms. Moreover, as will be emphasized in the final section of the paper, the federal government has not abandoned its goal of securing an internal common market. Indeed, it is far from accidental that Canada's newest Royal Commission and surely its most comprehensive to date is entitled the "Royal Commission on the Economic Union and Development Prospects for Canada."

One final bit of perspective is in order. This paper is, by design, very narrow in its treatment of the issues involved in the constitution process. For example, on the agenda in the summer of 1980 were twelve items commonly grouped into three "packages": first, a "peoples' package" consisting of the Charter of Rights, the Canadian economic union, equalization and the preamble to the constitution; second, an "institutions package" including Senate reform, the Supreme Court, and patriation and an amending formula; and third, a "division of powers package" comprising natural resources, off-shore resources,

fisheries, communications and family law. The Constitution Act, 1982, incorporates provisions relating to only some of these categories, i.e. patriation and an amending formula, the Charter of Rights and Freedoms including selected aspects of the Canadian economic union, equalization, and resources. My focus here is narrower still--to address the Canadian economic union issue in its own right but also in relation to the "division of powers package" since the former represented a potential source for centralization and the latter for enhancing provincial powers.

The Rise of Internal Barriers

When reference is made to fragmentation of the Canadian economic union, what probably comes to mind are the various impediments to the labor mobility. Several high-profile disputes--e.g., Newfoundland's preference for residents for off-shore energy jobs, Quebec's regulations relating to out-of-province construction workers--have focused public attention on the issue. However, there are other areas where the Canadian economic union is undergoing serious strain.

Taxation

While Canada is often viewed as possessing a model system of income taxation in the sense that it is at the same time very decentralized and yet very harmonized, this latter aspect of the system has been subject to considerable erosion of late. In 1979, Quebec³ introduced its Stock Savings Plan whereby Quebec residents can deduct, in computing their provincial taxable income, up to \$15,000 for purchases of new shares of Quebec-based companies. Almost immediately other provinces attempted to imitate the Quebec plan by proposing a variety of discriminatory tax credits that they wanted Ottawa to collect on their behalf. The federal response was that such measures

would fragment the intermal common market and, therefore, would violate the spirit as well as the letter of the federal-provincial tax collection agreements. Quebec was able to mount such a program since it was not a signatory to the tax collection agreements. Implicitly, Ottawa was telling the provinces to toe the line or else to withdraw from the agreements and set up their own income tax systems. Complicating all of this were several recent federal budgets that incorporated controversial tax measures that many provinces found unpalatable but were forced to parallel in their own tax systems. The provincial reactions varied, but all were in the direction of eroding the harmony of the tax system: one province pulled out of the tax collection agreements (Alberta, for corporate income taxation); several other provinces suggested that they were considering withdrawing from the agreements (British Columbia for both the personal and corporate tax, Alberta and Ontario for personal taxation since they already had their own corporate tax); some provinces introduced these discriminatory programs on the expenditure side of their budgets; and one province (British Columbia) even obtained Ottawa's agreement a few months ago to collect a "province-first" or discriminatory tax credit. It is too soon to tell whether this latter initiative will be an important precedent that will lead to further unravelling of the hitherto rather uniform and harmonious system of direct taxation in Canada. In any event, taxation was probably one of the concerns that motivated Ottawa to attempt to secure the Canadian economic union in the constitution and in this way exert some leverage (via the enforcement of constitutionalized economic norms in the courts) on provincial behavior.

The Rise of the West

With the dramatic rise in the world price of energy, the power of the Canadian west in the federation (particularly the three westernmost provinces) rose equally dramatically. Since much of the subsurface mineral rights was owned by the provinces, the spectre of massive heritage funds in provincial hands haunted the federal authorities. Their fears seemed founded as Alberta, initially at least, viewed its resource windfall as a means of industrializing and diversifying its economy even if this might mean drawing industry away, via subsidies and generally a more favourable tax climate, from other parts of the nation. Already Alberta had made it difficult for an Ontario refinery to obtain feedstock because this conflicted with Alberta's own priorities as a petrochemical centre. "Province-building" on the part of the west and retaliation by other provinces would only serve to heighten the nation's growing regionalism. In an unusual move the federal government backed several private sector challenges against provincial resource legislation in the trial and the provincial appeal courts as well as before the Supreme Court. But these were only stop-gap measures--what the country needed, Ottawa must have surmised, was to enshrine a much stronger Canadian economic union provision in the constitution to cover such items as provincial purchasing preferences, discriminatory provisions for attracting capital, prohibition of tax exporting and the like.

State Capitalism

Partly as a result of the resource boom and the heritage funds and partly because of the existence of other large pools of capital in provincial hands (e.g., the Quebec pension fund) the potential exists for a significant increase in state entrepreneurship. Most provinces have their own utilities. Saskatchewan recently acquired a large chunk of its potash industry. Quebec is in the process of nationalizing asbestos. Alberta purchased a regional

airline and promptly transferred its head office from British Columbia to Alberta. Moreover, with assets of over \$13 billion in the Alberta Heritage Fund the prospect is for more provincial ownership. British Columbia effectively, albeit temporarily, prevented an out-of-province takeover of its principal forest industry and has set up the B.C. Resources Investment Corporation whose policy appears to be the acquisition of provincial firms and resources.

There are two ways in which this activity interacts with the preservation of an internal common market. First of all, under section 125 of the constitution (which essentially says that the Crown cannot tax the Crown) there is an incentive for provincial ownership since any profits are exempt from federal corporation taxation. This implies, for example, that the \$1 billion or so of interest income that accrues annually to the Alberta Heritage Fund effectively escapes taxation. In short, this lends government ownership preferential treatment vis-à-vis private sector ownership and, by some at least, is viewed as an infringement on the economic rights of individual Canadians.

As important, provincial ownership may provide a convenient vehicle for province-building, e.g., requiring that provincially owned resource industries also do a significant amount of refining or processing within the province. The Canadian trade and commerce power (Section 91 (2)) has, as will be detailed later, been given a narrow interpretation by the courts and it is likely to be diluted further when applied to provincially-owned enterprises because it will run up against some provincial heads of power (e.g., section 125 referred to above).

Federal Impediments

The provinces are not the only governments in the fragmentation game. The federal government has a long record of mounting regionally discriminatory policies which distort resource allocation: regionally based industrial subsidies; federal personal and corporate tax credits which apply differentially

across provinces; locational incentives under the National Energy Program depending on whether the oil or gas activity takes place on provincial or federal lands; regionally differentiated benefits under the unemployment insurance program.

Recapitulation

These are just a few of the areas that may have provided justification for the federal government to introduce the Canadian economic union concept into summer 1980 constitutional deliberations. Once on the agenda, however, the economic union issue was utilized to undermine a wide range of existing provincial powers, let alone any new demands. To argue that this caught the province by surprise is surely by way of understatement since the expectation of most provinces, and most Canadians for that matter, was that Ottawa would likely tolerate some further accommodation to provincial demands. After all, only two years earlier the provinces rejected a very generous package of concessions and extra powers in return for patriation and amending formula. Moreover, during the spring 1980 Quebec Referendum debate the federal government promised a "renewed federalism" if Quebecers voted "No" to sovereignty-association. However, Ottawa's version of a renewed federalism was far from an accommodation of provincial demands. Rather it was an attempt at a substantial centralization of political and economic power. This initiative did not take the form of a direct attack on the existing allocation of powers under the constitution but instead took the indirect route of centralizing power via a Charter of Rights and Freedoms (to the extent that this included economic rights) and a concerted effort to enshrine the Canadian economic union in the constitution. To this I now turn.

Securing an Internal Market in the Constitution⁴

The Federal Position in General

The internal economic union notion was not entirely novel since the federal government had commissioned some earlier work on the issue (Safarian, 1974). What was novel, however, was to have the issue up-front and even centre-stage in

the negotiations. The notion of protecting the Canadian domestic market from being balkanized by government beggar-my-neighbour policies was appealing to a broad range of Canadians. For some the appeal was simply that they viewed this as a measure that would reverse the general drift of power towards the provinces. For others the concept of ensuring an internal common market was welcomed because they viewed it as an instrument which would curtail the activities of all governments on the economic front and in this way reverse the general trend toward increased government intervention. For the federal government, however, its appeal was as a clever strategy to trump the provinces' division-of-powers card at the bargaining table. Thus, the federal government utilized this new initiative to argue for a strengthening of either or both of sections 91 (2) of the BNA Act (the federal trade and commerce power) and section 121 (which prohibits the imposition of custom duties on goods crossing provincial borders) and for incorporating a series of "economic rights" for all citizens as part of its proposed charter of rights.

To buttress the federal government's position on this issue, the federal Justice Minister, Jean Chrétien, published an eminently readable and superficially persuasive document, Securing the Canadian Economic Union in the Constitution, (henceforth referred to as the federal background paper) which defines an economic union as follows:

An economic union is an entity within which goods, services, labour, capital and enterprise can move freely, that is, without being subject to fiscal and other institutional barriers, and which is endowed with institutions capable of harmonizing the broad internal policies which affect economic development and of implementing common policies with regard to the entity's external economic relations (Chrétien, 1980, p. 1)⁵

As its title indicates, the purpose of the document was to explore the various avenues whereby a Canadian economic union might be better secured under the Constitution. To lend some perspective and persuasion, the discussion paper also focussed on the degree to which the constitutions of other federations incorporated features that facilitated the development of an internal common market. The message that the reader comes away with is that, compared to the constitutions of most if not all other federations, the BNA Act lacks the means to secure an internal common market. Bolstering this point of view is an appendix to the study which presents a survey of actual restrictions on the interprovincial mobility of goods, services, labour and capital within Canada. Not surprisingly, perhaps, the federal position paper concludes that there are "compelling reasons for securing in the Constitution the basic operational rules of our economic union and for ensuring that both orders of government abide by these rules." (p. 29) Accordingly, the federal government outlined three possible techniques which could be employed singly or in tandem for accomplishing this:

- (i) entrenching in the Constitution the mobility rights of citizens, as well as their right to gain a livelihood and acquire property in any province, regardless of their provinces of residence or previous residence and subject to laws of general application;

- (ii) placing limitations upon the ability of governments to use their legislative and executive powers to impede economic mobility by way of general provisions, through the revision and expansion of Section 121 of the BNA Act;
- (iii) broadening federal powers so that they may encompass all matters that are necessary for economic integration, thus ensuring that the relevant laws and regulations will apply uniformly throughout Canada, or that the "test" of the public interest will be brought to bear upon derogation from uniformity (Chretien, 1980, p. 29-30).

At this level of generality, these proposals appear to be directed at both levels of government and if there is a transfer of power involved it is a transfer toward individual Canadians and away from all governments. Presumably, it is for this reason that the Canadian economic union issue was, as noted above, included in the "peoples' package" of the constitutional agenda. However, as the next section will make very clear, when these proposals were finally cast into draft sections of the new constitution, they amounted to a dramatic centralization of power in federal hands, with little or no guarantee of any increase in the economic rights of individuals.

The Federal Position: Specifics

With this as the general outline, it is appropriate to focus in turn on the provisions in the former BNA Act relating to these three areas, on the way in which other federations deal with these issues and, finally, on the manner in which the federal government proposed to alter the constitution. In terms of the comparison with other federalisms, little attempt will be made to ensure that the references will be comprehensive. However, Table 1, adapted from an excellent recent book (Hayes, 1982) does provide a more complete, although quite general, cross-federation comparison.

Table 1
INTERNAL COMMON MARKET CONSTITUTIONAL PROVISIONS:
A COMPARISON OF FIVE FEDERALISMS

	Scope of mobility rights for individuals	(1) Scope of free trade guarantees (2) Whether federal authority is bound by the guarantees.	Scope of powers directly affecting trade and mobility.	Scope of federal powers indirectly affecting mobility. (1) Compared with Canada (2) Examples.
U.S.A.	Modest	(Exclusive federal interstate jurisdiction is equivalent to a guarantee, so far as the states only are concerned.)	Exclusive federal powers over interstate trade extend well into intrastate. State trade powers largely confined to "police" regulations.	(1) Wider (2) Labour, securities, conditional grants.
SWITZERLAND	Wide	(1) Wide (2) In principle, yes, but there is federal authority to overrule the guarantee.	No inter-intra distinction. Concurrent with federal paramountcy. Wider federal powers than in Canada. State trade powers largely confined to "police" regulations.	(1) Wider (2) Civil law, labour, social security.
AUSTRALIA	Modest	(1) Wide (2) Yes, e.g., agricultural marketing and nationalization	Interstate: concurrent, with federal paramountcy. Wider federal powers than in Canada. Intrastate: exclusively state jurisdiction.	(1) Somewhat wider (2) Corporations, industrial disputes, treaties, conditional grants.
GERMANY	Wide	(Exclusive federal jurisdiction is equivalent to a guarantee, so far as the states only are concerned.)	No inter-intra distinction. Exclusive federal authority, much wider than in Canada.	(1) Much wider (2) The economy, labour, civil law, securities.
CANADA	None in BNA Act	(1) Narrow, supplemented by narrow exclusive federal trade jurisdiction. (2) Yes	Exclusively federal, but narrowly interpreted. Courts have reserved intra-provincial authority for the provinces.	

Source: Hayes, 1982, p. 24.

The "Free Trade" Clause .

Section 121 of the BNA Act reads: "All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces". This provision, as interpreted by the courts, guarantees a "customs union" since Parliament and the provincial legislatures are prohibited from levying internal border taxes and, elsewhere in the Constitution, Parliament is empowered to establish a common external tariff. But it is far from guaranteeing an internal common market. Indeed, at best it ensures an imperfect common market for goods since it probably does not prohibit non-tariff barriers to interprovincial trade nor is it clear that it prevents provincial border taxes on goods originally imported into (as distinct from produced in) other provinces. More importantly, neither as stated nor as interpreted by the courts does it apply to the movement of people, services, or capital.

In the cases of the United States and West Germany the internal common market is preserved not as much by a "free trade guarantee" (as I am interpreting Section 121) as by federal powers and mobility rights, which will be detailed later. However, Australia and Switzerland do have free-trade provisions. Section 92 of the Australian Constitution provides: "Intercourse among the states ... shall be absolutely free". This guarantee has been broadly interpreted by the courts to apply not only to goods but as well to information, persons, and investment. Moreover, it has been frequently viewed as binding on the Commonwealth as well as on the states. This interpretation has probably been encouraged by other aspects of the constitution which also restrain the Commonwealth, e.g., Section 51 (iii)

"The Parliament shall... have power to make laws... with respect to taxation; but not so as to discriminate between States or parts of States"

and Section 99:

"The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one state or any part thereof over another state or any part thereof."

As the federal background paper notes, the net effect of these provisions has been to convert section 92 from a "free border" clause to something more akin to a "free enterprise" clause: it has prevented the Australian Parliament from creating a federal monopoly for air transportation, from nationalizing banks, and it has inhibited the creation of some marketing boards. (Chrétien, 1980, p. 14) Since the Canadian central government either has engaged in, or at least is not prevented from engaging in, these sorts of derogations from a free-trade economy, it is not surprising that Ottawa was a bit skeptical of the sweeping nature of Australian provisions. It should be pointed out, however, that in terms of providing equalization-type aid to certain states, the Australian parliament managed to evade these extensive free-market restrictions by means of the rather wide interpretation given to the Commonwealth's power to make grants to the states "on such terms and conditions as the Parliament thinks fit." (Hayes, 1982, p. 43)

The case of Switzerland is considerably more complicated. Basically, however, there are two factors which promote an internal common market:

The first has greater force in Switzerland than in (most or perhaps any) other federations..the popular feeling that governments, at any level, should be given no more power (or money) than is absolutely necessary, and that government interference with the working of the economy should likewise be minimized.

The second influence, which gives legal expression to the first, consists of the guarantees contained in the federal constitution: freedom of trade and industry, which relates to goods, services, people and capital, and freedom of establishment which relates to the movement of Swiss citizens. Article 60, which requires equal treatment by each canton of all Swiss citizens, is an additional guarantee.

Therefore, both the federal and cantonal authorities, but particularly the latter, have less scope than their counterparts in Canada to introduce measures that deter free movement. (Hayes, 1982, pp. 136-7).

Two observations are relevant here. First, the Swiss federal government can depart from these principles for specific purposes. For example, the substantial government support for Swiss agriculture is written right into the Swiss constitution. According to Article 31: II, (3):

When this is justified by general interest, the Confederation is entitled to enact regulations departing, if necessary, from the principle of freedom of trade and industry in order to: ...

- b) maintain a sound peasant population,
ensure agricultural productivity and
consolidate rural land ownership.

The second point is particularly relevant. Earlier, focus was directed toward the degree to which the essential harmony of the Canadian system of income taxation was gradually being eroded. Yet, the Canadian system is a model of integration compared to the patchwork pattern of the Swiss taxation system. While there is little harmonization of the income tax laws and rates imposed by the cantons and communes, Hayes notes that it is nonetheless the case that

the constitution does give the federation authority to bring about harmonization. What prevents such a move is insufficient political support, not insufficient federal authority (Hayes, 1982, p. 137). This is important to keep in mind since a constitutional approach may not be the most appropriate for ensuring the internal common market in cases where both the federal government and the provinces are fearful of the courts' ability to take into account the complex set of social and political issues that frequently attend the existence of free trade barriers.

The Federal Proposal re: the Free Trade Provision

Drawing support from like provisions in other federations but very wary of finding itself in the Australian bind, the federal government proposed an extensive revision for section 121 (see Table 2). Although subsection (4) may be limited by subsection (6), it is clear that the former does allow the federal government considerable latitude in terms of equalization, regional development and literally anything that Parliament itself (not the courts!) declares to be an "overriding national interest". Provincial legislatures are given no equivalent flexibility, although under subsection (5) a province can designate a region of the province for special treatment provided out-of-province factors of production are treated vis-a-vis this designated region in the same manner as factors in the non-designated regions of the province. It seems to me, however, that any such designation would likely run afoul of subsection (6).

Thus, even though subsection (7) indicates that the revised section 121 does not confer any legislative authority on Parliament or a legislature, it is nonetheless the case that the overall impact would be a centralizing one since it surely would curtail the actions of the provinces more than the actions of the federal government.

Table 2

THE FREE TRADE PROVISION

1. BNA Act *

Section 121: All articles of Growth, Produce of Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

2. Initial Federal Proposals

Section 121(1): Canada is constituted an economic union within which all persons may move without discrimination based on province or territory of residence or former residence and within which all goods, services and capital may move without discrimination based on province or territory of origin or entry into Canada or of destination or export from Canada.

(2) Neither Canada nor a province shall by law or practice discriminate in a manner that contravenes the principle expressed in subsection (1).

(3) Subsection (2) does not render invalid a law of Parliament or a legislature enacted in the interests of public safety, order, health or morals.

(4) Subsection (2) does not render invalid a law of Parliament enacted (a) in accordance with the principles of equalization and regional development recognized in section ---, or

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

(5) Subsection (2) does not render invalid a law of a legislature enacted in relation to the reduction of substantial economic disparities between regions wholly within a province that does not discriminate to a greater degree against persons resident or formerly resident outside the province or against goods, services or capital from outside the province than it does against persons resident or goods, services or capital from a region within the province.

(6) Nothing in subsection (3), (4), or (5) renders valid a law of Parliament or a legislature that impedes the admission free into any province of goods, services or capital originating in or imported into any other province or territory.

(7) Nothing in this section confers any legislative authority on Parliament or a legislature.

3. Constitution Act, 1982:

No change to original BNA Act

Source: The Federal proposal is taken from the document prepared by the Government of Saskatchewan (1980).

* As of 1982, the new name for the BNA Act is the Constitution Act, 1867. I am using the former designation in this paper since it was so referred to in the time frame that these issues arose.

The "Trade and Commerce" Clause

Enshrining the principle of economic mobility in the constitution is one way to achieve an economic union. Another relates to the nature and scope of economic powers conferred on the two levels of government. The federal government's proposal with respect to the second of these was to enlarge its own authority with respect to the regulation of trade and commerce. The BNA Act gave the Parliament of Canada exclusive authority over "the Regulation of Trade and Commerce", section 91(2). Thus far, the courts have narrowly interpreted the trade and commerce clause. As the federal background paper notes:

the Privy Council's 'compartmentalizing' of the federal and provincial trade powers and its interpretation that Parliament's authority does not encompass the regulation of 'the contracts of a particular business or trade within a province' together with the broad scope of provincial legislative jurisdiction pursuant to a number of (provincial) headings but most importantly with respect to property and civil rights (92(13)) has meant that there is great capacity for provincial legislatures to create barriers to trade (Chrétien, 1980, pp. 20-1).

On the surface the U. S. commerce clause appears quite similar: "the Congress shall have power to ... regulate commerce with foreign nations, and among the several states, and with the Indian tribes". Nonetheless, over time a substantial number of powers have been judicially ascribed to the commerce clause, particularly in tandem with the "necessary and proper" clause (Article 1, section 8, para. 18):⁶

From a common market point of view, the most important feature of the United States constitution is, of course, the breadth which has been given to the commerce clause (textually limited to international and interstate commerce). It has been interpreted as supporting federal legislation relating to, among other matters, "interstate transportation and communications." (There is no specific head of jurisdiction in the U.S. constitution dealing with this.) More importantly, it has by means of the Shreveport doctrine been interpreted to allow Congress to legislate with respect to intrastate activities that affect interstate commerce. Thus, when there is some connection to interstate trade, Congress may legislate with respect to labour relations and cognate matters, hours of work, labour arbitration, retirement pensions, unemployment, local as well as interstate marketing including the fixing of prices, the production of commodities and, generally, every phase of industrial production organized on a multi-state basis.

In addition, the commerce power has been interpreted as placing a limitation on the powers of states: they may not legislate so as to place a "burden on interstate commerce." Thus the exercise of state powers, including taxing powers, may be struck down if it impedes interstate commerce (e.g., states cannot tax the out-of-state business of a local firm, and laws designed to favour local industries are unconstitutional). (Chrétien, 1980, p. 14)

This dramatic reach of the U.S. commerce clause compared to the rather limited role played by the Canadian trade and commerce clause can to a substantial degree be explained by the fact that the U.S. commerce clause did not run up against a long list of exclusive state or provincial powers that one finds in section 92 of the BNA Act.

The Australian trade and commerce power (s. 51 (1))⁷ has been given a rather wide interpretation by the Australian High Court so that it extends "far into intrastate matters." (Howard, 1972, p. 253) It covers not only the buying and selling of goods, but the transport of goods and passengers. When combined with the internal market provision cited in the previous section, it gives the Australian Commonwealth far greater jurisdiction over economic union matters than exists for the Canadian government.

In the case of the Federal Republic of Germany, there are explicit mobility provisions (outlined in the next section) which probably play a role in carving out an internal economic union. But, as the federal government's background paper emphasizes, this is moot since

exclusive legislative jurisdiction is accorded the federal government over "the unity of customs and commercial territory", "the freedom of movement" and "the exchange of goods."

In addition, the federal government has the right to legislate on matters of concurrent federal and land jurisdiction to the extent that a need for regulation by federal legislation exists because:

- a matter cannot be effectively regulated by the legislation of individual laender; or
- the regulation of a matter by a land law might prejudice the interests of other laender or of the people as a whole; or
- the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of any one land, necessitates such regulation. (Chrétien, 1980, p.16)

The Swiss situation is, as usual, more complex but in general the federal role in economic markets predominates, based largely on provisions elaborated on in the previous section. The power of the cantons to affect the location of industry and economic development is limited, not only by the constitution, but as well by the distinct features of the Swiss system which include "the processes of direct democracy, which limit the power of government at all levels, the administration of many federal laws by the cantons and a marked decentralization of power within the cantons" (Hayes, 1982, p. 129)

The Federal Proposal re: Trade and Commerce

Given the much narrower reach of the Canadian trade and commerce provision in comparison with the constitutions of other federalisms, it is not surprising that the federal government sought to strengthen this federal head of power. The draft proposal (reproduced in Table 3) extends the reach of section 91(2)--by explicitly incorporating competition policy and product standards and by defining trade and commerce to apply to services and capital as well as goods. While this revised section 91(2) could go a long way to promote an internal common market (except for persons) it would do so by shifting the division of powers to the federal government, i.e. section 91 lists the exclusive federal heads of power so that, almost by definition, they foreclose the provinces but not the Parliament of Canada.⁸

The Mobility or Economic Rights Clause

The BNA Act contained no provisions for individual mobility or for a charter of citizens' economic rights. As the federal government was quick to emphasize, this is not the case in other federations. In the United States, Section 2 of Article IV provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." and the 14th Amendment (the "equal protection" provision) states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws."⁸

Section 117 of the Australian Constitution provides: "a subject...resident in any state, shall not be subject in any other state to any disability or discrimination which would not be applicable to him if...he were resident in such other state." In the German federation mobility is guaranteed by Article II (1): "All Germans shall enjoy freedom of movement throughout the federal territory." In terms of economic rights for German citizens, Article 12 (1) is even more explicit: "All Germans shall have the right freely to choose their trade, occupation or profession, their place of work and their place of training..."

Article 45 of the Swiss Constitution states that "every Swiss citizen can settle in any place in the country." Article 60 provides that "all cantons are bound to afford Swiss citizens the same treatment as their own citizens in the fields of legislation and of judicial proceeding." Combined with Article 33 which authorizes federal legislation to govern the certification of professionals insofar as their validity throughout the confederation is concerned, this might appear to be a universal provision as far as economic rights are concerned. However, it is nonetheless the case that a canton may refuse to allow Swiss citizens to establish themselves if they are unable to work or if they are likely to be a permanent burden to public relief. (Chrétien, 1980, p. 17)

One of the federal government's major scoring points in this debate was to compare the provisions of the European Economic Community with those in the Canadian Constitution. For Canada to have provisions for economic mobility among its provinces that fall short of those among the countries of the ECC was surely evidence of a serious shortcoming in the BNA Act. From the federal background paper:

THE TRADE AND COMMERCE POWER

1. BNA Act

Section 91: "...it is hereby declared that ... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say--
2. The Regulation of Trade and Commerce.

2. Initial Federal Proposals

Section 91: Add to section 91 the following heads of jurisdiction immediately following head 91.2:

2.1 Competition

2.2 The establishment of product standards throughout Canada

(2) Add to section 91 the following new subsections:

- (2) For greater certainty, "regulation of trade and commerce" in subsection (1) includes the regulation of trade and commerce in goods, services and capital.
- (3) The authority conferred on Parliament by heads 91 (2.1) and 91 (2.2) does not render invalid a law enacted by a legislature that is not in conflict with a law of Parliament enacted under either of those heads.

3. Constitution Act, 1982:

Original BNA Act wording remains.

Source: See Table 2.

The (Treaty of Rome) sets out explicitly and rigorously the conditions for the free circulation of labour, services, capital and enterprise by:

- abolishing all discrimination based on the nationality of workers of member countries concerning employment, remuneration and other conditions of work;
- establishing the right to settle freely, including the right to engage in any economic activity and to establish or manage companies and other enterprises;
- providing for the removal of restrictions on the offering of services by insurance companies, banks, other financial institutions, wholesale and retail trades and professionals (work is continuing on the co-ordination of regulations in member countries concerning the practice of professions); and,
- removing, progressively, restrictions on the movement of capital, with some exceptions for agreed protective measures. (Chretien, 1980, p. 12)

The Federal Proposal re: Mobility Rights

To complete its three pronged initiative to secure an internal common market in the constitution, the federal government proposed a mobility or "economic rights" clause as part of the overall Canadian Charter of Rights and Freedoms. The federal proposal appears in Table 4. In terms of the

AN ECONOMIC RIGHTS PROVISION

<u>1. BNA Act</u>	None
<u>2. Initial Federal Proposals</u>	
	(1) Every citizen of Canada has the right to enter, remain in and leave Canada.
	(2) Everyone in Canada has the right (a) to move to and take up residence in any province; and (b) to acquire and hold property in, and pursue the gaining of a livelihood in, any province.
	(3) The rights specified in subsection (2) are subject to (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and, (b) any other laws referred to in subsections (4) or (5) of section 121 of the <u>British North America Act</u> .
<u>3. Constitution Act, 1982:</u>	
	Section 6 of the Canadian Charter of Rights and Freedoms:
	<u>Mobility Rights</u>
	6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
	(2) Every citizen of Canada and every person who has the status of a permanent resident has the right (a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province.
	(3) The rights specified in subsection (2) are subject to (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
	(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Source: See Table 2

overall thrust of the paper the most significant aspect of this mobility rights provision is subsection 3(b) which, in effect, means that the provision is really only binding on the provinces. That this is so is rather obvious once one notes that subsection 4 of section 121 (see Table 2) provides that Parliament can legislate a) in accordance with the principle of equalization and economic development and b) in relation to a matter that is declared by Parliament to be of an overriding national interest.

The Federal Arguments for an Internal Common Market

While the federal government does have sweeping powers that could have been brought to bear on the common market issue (e.g. the right of disallowance and reservation with respect to provincial laws, the "Peace, Order and Good Government" provision, the control over appointments of provincial superior, district and county circuit judges as well as Supreme Court justices, the spending power, the declaratory power and so on) the chosen route was to propose the three-fold package. Since the above enumerated powers already existed and had some elements of tradition associated with when and how they were likely to be applied, they were not nearly as useful to confront provincial aspirations at the bargaining table as was the common market thrust. Moreover the very integrative and complementary nature of the federal initiatives, and the demonstration that they are currently **lacking** in Canada in comparison with other federal constitutions bestowed a certain amount of added credibility if not status to the federal thrust.

However, the federal arguments for securing the internal market went beyond a comparative evaluation of federal constitutions. As one might expect, one strand of the federal position was to emphasize the economic gains that would accompany a more integrated domestic market. The arguments were straightforward: larger markets would provide a greater scope for both diversi-

fication and specialization; competition would be enhanced; scale economies could emerge; resources could be allocated more efficiently. In principle, at least, these gains are measurable and, hence, can be evaluated. Indeed, an attempt to quantify selected aspects appears later in the paper.

Much more difficult to evaluate, and much more troublesome for the provinces, were the political arguments that the federal government made for its economic union initiatives:

To be a citizen of Canada must be a dynamic reality rather than a static abstraction, a reality that extends beyond the realm of political and legal institutions to the vital aspects of one's material existence. ...To the extent compatible with federalism, this basic equality of all citizens must apply to economic affairs, under provincial law as well as under federal law. Wherever they may have been born or have chosen to reside in the country, Canadians should be free to take up residence, to acquire and hold property, to gain a livelihood, to invest their savings, to sell their products and purchase their supplies in any province or territory of Canada, provided they abide by the laws of general application of that province or territory.

...the freest possible access to the national market should be inherent in Canadian citizenship, and therefore secured in the Constitution. Any provincial authority should bear in mind that whenever it discriminates against the residents of other provinces, it exposes its own residents to retaliatory discrimination by the governments of these other provinces; and whenever it seeks to retain the ability to restrict the mobility of other provinces' residents, it simultaneously argues that the freedom of its own residents should be subject to curtailment by nine other governments. As for the federal authority, while it would be imprudent to limit its ability to meet the varying needs and aspirations of different parts of the country through differentiated policies, it should always be aware that such use of its powers can be contentious since it inevitably raises difficult problems of interpersonal and interregional equity. (Chrétien, 1980, p. 2, Emphasis added).

As the underlined portion of this quotation indicates, Ottawa's view is that it should be allowed to do some of the very things that it desires to prevent the provinces from doing. One is left with the very distinct impression that provincial actions in the economic sphere almost by definition lead to the fragmentation of the economic union --whereas similar federal initiatives, again almost by definition, are in the national interest. From the point of view of "political legitimacy" this is probably the case:

Suppose a province enacts a preferential purchasing provision which discriminates against all out-of-province suppliers. Compare this to a federal-initiated policy which bestows roughly the same privilege on the producers in this particular province. In the former case the out-of-province producers who are hurt by this action have no official forum for mounting their point of view and the provincial politicians who enacted the legislation are not accountable to these suppliers. In the latter case, even if one assumes that the same costs are inflicted on these out-of-province suppliers, they do have an official forum (the Parliament of Canada) and the legislators who enact the measure are accountable politically to these firms. Thus, it would appear that a much greater degree of political legitimacy attends the erection of centrally induced barriers than is the case with similar provincially induced measures. (Courchene, 1983)

Thus, even though the economic costs of these two actions would be identical the provinces found themselves in a very delicate position in making such a case partly because they would appear as intent upon inhibiting the free movement of goods, services, people and capital within the country and partly because the whole notion of securing an internal economic union, particularly as it related to the Charter of Rights and Freedoms, garnered widespread popular support.

This awkward provincial position was highlighted on the opening day of the televised First Ministers Conference in the fall of 1980. After each premier had his say, it was the Prime Minister's turn:

...if we look at the agenda...there are eight items of the twelve where the provinces are either attempting to increase their powers or to reduce the federal ones, and this...in the most decentralized federal form of government in the world. Now against these eight items ...where the provinces are asking for more power for themselves there is one item, the one called Powers over the Economy [effectively the Canadian Economic Union issue, T.J.C.] where, respectfully we are not asking for more powers for ourselves, the federal Canadian government, we are just asking that the constitution reflect what all of us wish and many of you said you wished-- to have in Canada a common economic market.

(Trudeau, 1980, p. 95)

However, the provinces' concerns with the common market issue went well beyond coping with beguiling rhetoric: nothing less than the overturning of the division of powers in the federation was at stake. The next section looks at this in more detail.

Reaction of the Provinces

An Extension of the 1879 National Policy

Among the provinces, only Ontario was fully behind Ottawa's initiative to ensure an internal common market.⁹ Indeed, this was probably a large part of the reason why Ontario backed the federal constitutional position right from the outset. From an economic standpoint, free access to provincial markets for its manufactures was clearly in Ontario's interests. This was also the case

with respect to the major energy-related projects that would likely be undertaken in the west. Policies such as local purchasing preferences for these major projects would obviously put Ontario-based industries at a severe disadvantage. To some of the other provinces, Ontario's support for the federal position appeared very much as policy of self-interest. Indeed, as Laval's Raymond Hudon points out, "the representatives of other provinces...seem...convinced that centralization could only protect further the 'economic rights' of Ontarians." (Hudon, 1983, p. 141). This view was given greater credence by virtue of the fact that while Ontario was arguing for a freer internal market it was at the same time advocating, implicitly if not explicitly, a "buy Canadian" approach which would place the province in an advantageous position vis-à-vis the Americans.

To the western provinces, at least, this rekindled visions of Macdonald's National Policy of 1879. Moreover, most of these provinces had little interest in reducing barriers since they relied more on exports of basic products to other countries than they did on shipments to other provinces. Given a choice, they would have a clear preference for freer international trade than freer internal trade and certainly looked askance at a policy designed to favour the latter at the expense of the former.

It might appear that Quebec would join Ontario in welcoming greater domestic free trade, given its manufacturing base. Certainly the so-called "Beige Paper" on the constitution, produced by the Quebec Liberal Party¹⁰ recommended greater mobility rights for Canadians. The federal government utilized this document to the fullest in forwarding its own position after the Spring 1980 Quebec Referendum. However, Quebec maintained certain abiding concerns relating to any enhanced degree of national integration and

centralization: it had followed the route of government intervention and local preferences much further than any other province; Quebec was fearful of a rationalization of internal economic activity, given the degree that it depended on tariff and quota protection for its textile, clothing, hosiery and footwear industries; Quebec wanted a greater say in such matters as monetary and trade policy whereas the thrust of the internal common market provisions was precisely the opposite, etc. (Hudon, 1983)¹¹

These provincial positions were, of course, known to Ottawa. And it is precisely because of this provincial reluctance that the federal government preferred to secure an internal common market via a constitutional route instead of, say, via a federal-provincial agreement. However, this general concern of the provinces became far more crystallized once Ottawa put forth its draft provisions relating to the Canadian economic union. To this I now turn.

The Canadian Economic Union and the Division of Powers

John Hayes provides a general overview position of the majority of the provinces to the federal proposals:

The position of the other provinces [other than Ontario] generally was that the existing or potential problems for free movement were not serious enough to warrant new constitutional provisions; that the federal proposals would unduly increase federal powers; that most barriers are better handled by interprovincial negotiation than by court interpretation of constitutional guarantees; and that the effect of increased federal powers and strengthened guarantees would be to reduce substantially their powers to intervene in the economic life of their particular province. (Hayes, 1982, p. 13)

Rather than outline the concerns of the several provinces,

I will focus on the response of the one province--Saskatchewan--which provided the most detailed rejoinder. While many of the points made by the province are really in the nature of a defence for its existing range of policies, some of which were obviously discriminatory, they are reproduced in order to provide a flavour of the province's concern (and no doubt on occasion the concern of other provinces as well):

With respect to "mobility rights", the province argued:¹²

- legislative schemes for social support often require some residency period and this residency period might violate the mobility provision.
- provincial priority in jobs or capital investment would likely be outlawed.
- only the federal government would have the power to derogate from mobility rights.
- the right to acquire and hold property in any province would run counter to Saskatchewan's existing restrictions on ownership of farms by non-residents. Land policy is interwoven with social and cultural values basic to the way of life in Saskatchewan.
- legitimate provincial policies to establish standards, protect consumers and encourage provincial development might have been struck down.

With respect to section 121, the extension of the common market provision:

- . some provisions, while "discriminatory", may have little or no economic significance. This means that the provision is too far reaching--some notion of economic cost should be involved.
- . for "goods", would a provincial advertising program to buy provincial goods be allowed? Could a provincial power company give preference to provincial consumers in times of shortage?
- . for "services", do provincial restrictions on activities of professional people from outside the provinces contravene the provision?
- . for "capital", could a provincial development company make high-risk venture capital loans available only to provincial enterprises? Could the government request that a certain portion of the provincial public service superannuation fund be invested within the province?
- . under subsection 4, Ottawa has the right to act by declaring the enactment to be in the "overriding national interest." Why not allow provincial action in regard to an "overriding provincial interest"? If not, this would result in a substantial accretion of power to the federal government at the expense of the provinces.

With respect to section 91(2):

- . the grant of increased federal power here is completely unqualified and therefore would permit the federal government to regulate purely local industries in the interests of competition. This would result in a significant shift in jurisdiction from the provinces to the federal government and would seriously impair provincial capacity to deal with local economic, social cultural matters.

Saskatchewan also raised two more general issues, both of which are rather significant. The first essentially argues that in all of this the federal government is missing the forest for the trees:

Surely the levels of corporate, personal and other taxes in any province have a far greater impact on the mobility of resources than some of the barriers such as purchasing policy that are apparently under attack.

Surely, the national tariff and transportation policies have an immeasurably greater impact on relative prices, rates of return and ultimately the location choice for capital and labour.

We see the federal aim being taken at the explicit barriers that obviously impede movements among the provinces. The "big" economic levers such as tax rates, tariff and transportation policies, would not be brought into question. But, these major economic levers are precisely the forces having the greatest impact on the mobility of resources and products in Canada. And, the richest provinces have the greatest capacity to use such instruments to attract business away from other provinces. The only defence available to a small province may be to take action which creates barriers to protect their com-

petitive position within the economic union--and these would be struck down instantly by the proposed section 121.

The only obvious safeguard is to maintain a continuing sense of co-operation in Canada. Providing "safeguards" against some explicit barriers only changes the rules of the game--in favour of some--but it does little to safeguard the economic union. (Romanow, 1980)

The second Saskatchewan point derives from the last paragraph of the above quotation. The courts should not be the arbiter of securing an internal economic union. Not only would this place an undue burden on the courts but more importantly they are ill-equipped to make the "complicated economic trade-offs between ofttime conflicting economic objectives of responsible governments " (Romanow, 1980, p.8) Saskatchewan preferred to enshrine in the Constitution a "statement of commitment" by both levels of government to the effective operation of the economic union. In more detail

this commitment would include a reference to an on-going review by federal and provincial Ministers to enhance our economic union. Such an approach would not only deal with the explicit barriers to mobility, on which the federal approach concentrates, but also with governmental spending, taxation and structural policies that serve to influence the mobility of resources in our federation. (Romanow, 1980, p. 8)

Whether this particular approach found willing supporters in the other provinces is not entirely clear. What is clear, however, is that the provinces recognized a) the potential for a dramatic centralization of power under the federal proposals and b) the substantial support of Canadians for a more integrated domestic market, with the consequence that all the provinces eventually were

prepared to agree to the insertion of a non-binding statement of principles and cooperation in the Constitution. (Hayes, 1980, p. 14). From Ottawa's vantage point, this was not enough. However, it is likely that it would have been vastly preferable to what was finally achieved in the Accord on the Constitution.

The Canadian Economic Union and the Constitution Act, 1982

In the fall of 1980, after the abortive First Ministers Conference on the constitution, the federal government moved unilaterally to patriate and amend the constitution. A rough outline of what then transpired appears in footnote 1. While it would be foolhardy to argue that the eventual accord in the fall of 1981 (with only Quebec dissenting) can be explained largely in terms of Ottawa's backing off these economic union proposals, it would be equally foolhardy to deny that this was a key factor. Consider the following observations.

...With one exception (natural resources, discussed later) the long-standing provincial demands for increased power in the federation were effectively side-tracked by Ottawa's clever and timely deployment of the Canadian economic union issue. To maintain even their present powers under this counterattack would be challenging indeed.

. The federal government completely backed off the revision of section 91(2). See the third panel of Table 3. This would have been the most injurious (to the provinces) avenue for securing the internal market in the constitution since it would have been accomplished via a likely unqualified increase in a federal head of power.

. Ottawa also backed off its proposed revision of the free trade clause (see the third panel of Table 2). With its provision for the federal government to legislate in the event of an "overriding national interest", this too would have meant a substantial centralization of power.

. The mobility rights clause went forward as part of the Canadian Charter of Rights and Freedoms but in a much watered-down form. (see the third panel of Table 4).

Four changes are of particular importance:

1. The right "to acquire and hold property" in any province was deleted. Presumably this was done in order to satisfy Saskatchewan and Prince Edward Island who currently have discriminatory policies toward ownership of land.
2. The enshrined mobility clause allows for "reasonable residence requirements"(3(b)) whereas the initial federal proposal did not.
3. The right of the federal government to derogate from the provisions for regional development purposes and for any legislation with an "overriding national interest" (section 3(b) of the federal proposal) is no longer included. This makes the provision more binding on the federal government than was the case for the initial proposal.

4. Provinces with a rate of employment lower than the national average can, as a constitutional right, erect barriers to mobility on behalf of their citizens who are socially or economically disadvantaged. Apparently, this provision was intended to pacify Newfoundland and its desire to give its long-time residents preferential access to off-shore resource employment and perhaps to enable some provinces to mount affirmative action programs for such groups as native peoples. However, as it is written, its scope may extend much farther afield. Commenting on this "mobility rights escape clause", Hayes claims that such a provision is "unknown in other federations and in the EEC" and that "it will confer respectability on measures that are generally regarded as incompatible with the notion of common citizenship" (1982, pp. 7-8)

. The provinces obtained the right to mount indirect taxes with respect to their natural resources, but not such as to discriminate between production exported to the rest of Canada and production designed for sale within the province. Just how much additional power this gives the provinces will have to be determined by the courts, e.g., would section 91(2) and 121 override this provincial head? Ottawa's decision to allow

this additional provincial power can be traced to several influences. First of all, this initiative was necessary to get the federal New Democratic Party on side vis-a-vis the overall constitutional package. Second, some such measure was a long-standing demand of the resource producing provinces. Moreover, virtually all of the many provincial, private sector, and even federal proposals for securing greater economic union recognized that the provinces should have some greater access to indirect taxation. (How they reconciled this with an internal common market was never very clear, although some of them added a rider that any such tax should not impede international and interprovincial trade and should not fall on persons resident in other provinces!) It is the case, however, that whatever weight the courts decide to place on this new provision such weight would have been less in the face of the original federal common market proposals. This provision also has no counterpart in other federations. AS Hayes points out:

"other federations, including those where resources are important have no special provincial trade powers relating to natural resources. The provinces' request for such powers and the federal government's acquiescence can be understood only in terms of realpolitik (1982, p. 8)

. Finally the enshrining of the principle of equalization payments in the constitution presumably helped bring the Atlantic provinces on side. Moreover, as part of this provision Parliament and provincial legislatures are committed to "furthering economic development to reduce disparity in opportunities". This might be interpreted to mean that provinces are allowed to mount within-province regional development policies--the probability that they would have been able to do this with the original federal proposals was considerably lower.

In short, therefore, while the provinces may not have accomplished much in terms of garnering any new powers from the overall patriation process, they came out immeasurably better than would have been the case if the original federal proposals had been enshrined in the constitution. Even though the opposing provinces found much to object to in the first unilateral federal package (fall, 1980), there was surely a considerable sense of relief among them that the Canadian economic union package, except for some mobility rights, had been dropped. Had it been there and had the federal government persisted, it is doubtful that the 1981 Accord would have occurred. Thus, while the federal prospects for securing an internal economic union in the constitution now lie in shambles, the case is fairly strong that the brilliant federal initiative in the summer of 1980 was critical to the process of repatriating and redesigning the Canadian constitution.

The Canadian Economic Union Issue: An Assessment

Until this point, I have directed little attention toward the analytic underpinning of the Canadian economic union issue. Most of the above material has been of the descriptive nature. The purpose of this section is three-fold: 1) to focus on the likely costs of the present set of internal barriers; 2) to address the issue of whether greater centralization of power is likely to lead to fewer common-market distortions; and 3) to present some personal reflections on the desirability of attaining greater internal economic integration.

The Cost of Internal Barriers

In order to lend perspective to the foregoing analysis it is necessary to attempt to put some numbers on the likely costs of the current barriers or impediments to the Canadian economic union. If these numbers are very small, then much of the economic (but not necessarily the political) argument for securing an internal common market in the constitution falls by the wayside. However, as soon as one attempts such an exercise, the problem of defining just what constitutes a barrier or a distortion arises. First of all, the essence of the economic theory of federalism is that welfare can be increased by providing a range of locally produced public goods that reflect the preferences of individuals in the particular locale instead of requiring them to consume a uniform bundle of centrally provided public goods. Hence, provided that citizens have the right of exit from and entry into various provinces or regions, different bundles of locally produced public goods cannot be construed as constituting barriers to an internal common market.

The situation is complicated by the fact that not all types of government intervention affecting resource allocation automatically fall under the umbrella of common market distortions. This derives from the theory of the second best. An interesting application of this principle arises in connection with Canada's system of equalization payments. Energy royalties accrue, in large measure, to provincial treasuries. They are not taxed by the federal level nor do they enter the incomes of provincial residents for tax purposes. However, they are used to provide public services, thereby lowering the tax price of these public services to provincial residents. If these resource-related fiscal benefits become large enough,¹³ citizens may move from non-resource provinces to resource provinces to take up jobs^{even} at lower market wages. This is because their overall income or welfare may increase--the combination of this lower market income plus the net public sector benefits in the resource province could be larger than the market income they were receiving in their origin provinces. To the extent that this is the case, it represents inefficient migration since national output will fall. Thus, a system of equalization payments designed to ensure that migration is motivated principally by market factors would enhance efficiency. To be sure, this analysis presumes a great deal about such things as the degree of capitalization of these energy rents and the design of the equalization system. Nonetheless, under a reasonable set of assumptions, it would be wrong to view the bulk of equalization payments as a barrier to the efficient functioning of an internal common market.

A third set of problems relates to the fact that it is not always clear which level of government should be associated with a given impediment. Consider provincial marketing boards which influence interprovincial trade. Initially, they were restricted by the courts to intra-

provincial trade. However, in 1957 the federal government amended the Agricultural Products Marketing Act in such a manner that it could authorize provincial boards to impose the equivalent of indirect taxes and, therefore, to regulate some aspects of the interprovincial movement of products. Do these fall under provincial barriers? Or should they be viewed as federal barriers since the latter level of government passed the enabling legislation?

While recognizing these and other problems associated with measuring common market distortions in a federalism, John Whalley and Michael Trebilcock have recently completed an ambitious attempt at quantifying the costs of such barriers (Trebilcock et al, 1983, Ch. 4-6). They define as a barrier any policy which results in resources being allocated either within or between provinces in such a way as to reduce potential national real income. They also distinguish between explicit distortions (ones where the policy in question explicitly discriminates on the basis of province, e.g. preferential purchasing policies) and implicit distortions (like the tariff, which does have interregional resource implications but is not province specific in its legislation). The background material for their estimates consists, where available, of data relating to interprovincial flows of goods, services, people and capital. For example, with respect to goods and services, interprovincial trade in 1974 amounted to \$43 billion compared with \$33 billion for international trade. For goods alone, the figures are roughly equal. Obvious patterns emerge (e.g. the West is more dependent on international trade than on interprovincial trade while the opposite is true for Ontario) which, not surprisingly, are generally consistent with the provincial positions on the Canadian economic union issue.

The results of Whalley and Trebilcock are rather striking. Only some \$3 billion of the \$43 billion of interprovincial trade activity falls within those categories highlighted as embodying major discriminatory policies. Hence, one implication that they draw from this is that the significance of interprovincial barriers to trade may have been overplayed in recent policy debates. For example, under the assumption that the internal distortions are of the order of 10 percent (roughly comparable to the magnitude commonly used for estimates of international distortions) the annual costs of federal and provincial distortions to interprovincial trade flows came out significantly less than 1 percent of GNP per year. Moreover, of this total the impact of federal distortions (often of the implicit variety) exceeds that of provincial distortions. Overall the view that comes through is that the Canadian economic union issue is a "tempest in a teacup".

However, the authors recognize that their results are not likely to be the final word. They do not incorporate the cost of deploying resources to maintain or obtain preferences (i.e. rent seeking) as part of the static efficiency costs. Nor do they consider the dynamic costs (including viewing the provinces as narrow special interest groups, à la Olson, 1982). Finally, with the recent trend, documented earlier, towards proliferation of internal market barriers, the issue is what governments might do in the future if the present constraints are weakened further. Incorporating these considerations may still generate cost estimates that will be deemed to be small. Even though much of the recent attention directed toward these impediments arises from a political (bargaining) rationale, my view is that the economic implications are sufficiently serious to warrant such attention.

Federalism as a Degenerate Case of Economic Union

An implicit message running through the federal government's background document and certainly underlying the federal government's draft constitutional proposals with respect to the Canadian economic union is that

decentralization is synonymous with balkanization. This is far from evident. What is clear is that the more decentralized the federalism and the more fiscally autonomous are the provincial governments the greater is the potential that the provinces will engage in mounting barriers to free trade. On the other hand, it seems equally clear that the greater the constitutional scope of the central government the fewer are the constraints likely to be on the ability of this level of government to mount geographically distorting policies.

Were the federal government's implicit assumption correct, one would expect to observe that unitary states have much freer internal markets than do federations. Perhaps this is true for some unitary states, but certainly not for all. For example, there is nothing in the Canadian federation that inhibits mobility to the degree that exists with the local authorities' housing policies in the United Kingdom. Further, the U. K. regional policies, including the system of differentiated regional employment premia and the differentiated regional development grants are probably more distorting than the combined regional policies of both government levels in Canada. Therefore, there is no direct association between federalism and the fragmentation of the internal economic union.

Indeed, one can go further and argue that there typically exists a series of checks and balances in federal system that does not exist in unitary states. As I have noted, the constitutions of several federal states act as a check on both levels of government. However, even in federations like Canada that have a more permissive constitution and where government intervention is a more accepted phenomenon there exist some natural checks and balances. It is true that the central government has a rather free hand to engage in regionally discriminatory policies such as regional-specific location grants. However, it is also true that the provinces have a relatively free hand to mount off-setting subsidy programs. In one sense, this compounds the problem--firms

will be subsidized wherever they locate. In another, it probably ensures that the scale of any such program will be quite small, since they quickly become negative sum exercises with the benefits accruing to entrepreneurs, often foreign. Much the same is true of regionally or provincially differentiated federal income tax credits (which are constitutionally acceptable in Canada unlike the case of federations like the U.S. and Australia). The ability of the provinces with their own personal and/or corporate tax systems to counter such an initiative coupled with the likelihood that other provinces would then opt to establish their own tax systems severely curtails the federal government's ability to act in a discriminatory way.

Even at the level of the provinces, the very openness of the provincial economies (i.e. the substantial mobility of labour and capital) as well as the likelihood of retaliation, provides considerable checks and balances respectively on the deployment of province-first measures. This does not mean, of course, that Canada's internal markets are "free." Most of the checks and balances cited here exist in other federations and even internationally, often with more force, but this has not prevented an escalation of zero sum and negative sum games. Nonetheless, it does suggest that there are a series of factors that mitigate against an escalation of barriers to the Canadian economic union.

This notion of "balance" is crucial to evaluating the federal common market proposals. In effect, Ottawa desired to alter this balance rather dramatically by restricting provincial actions without at the same time limiting the freedom for action of the federal government. This was clear from the

federal background document when it argued that Ottawa could use the "surplus" arising from increased integration and channel it so as to enhance the prospects of the poorer regions of the nation. (Chrétien, 1980, pp. 4-5). Several points are relevant here. First of all, this so-called "surplus", particularly if the reference is to any static gains, is likely to be quite small as the previous section pointed out. Secondly, it appears clear that the federal government intends to engage in the very same activities that it wants to restrict the provinces from doing. In this sense, it is likely that as a result the Canadian economic union would become more not less balkanized. Finally, if the recent move toward more protectionist policies vis-à-vis the rest of the world continues, the spectre arises of a more integrated domestic market at the expense of a less integrated world market, in which case the likely result will be an overall fall in real income. In this sense, Saskatchewan's concerns on these matters were justified.

Recapitulation

To this point, it might appear that I have taken a rather dim view of any attempt to facilitate the functioning of the Canadian economic union. This is not the case. Rather, what the above analysis reflects is a concern about the manner in which Ottawa proposed that the Canadian economic union ought to be secured in the constitution. To hamstring the provinces and to give free reign to the federal government to indulge itself would in all likelihood imply greater impediments to efficient resource allocation, given Ottawa's proclivity to intervene in the system and its nationalist bent. For example, the generous regional benefits under the federal unemployment insurance scheme which provide substantial incentives for unemployed workers to remain in high-unemployment areas is certainly not conducive to optimal resource allocation. An extension of these sorts of policies would hardly qualify as facilitating the Canadian economic Union. The analogy that comes to mind is the U.S.

"necessary and proper" clause. It seems to be the case that the federal government views a series of roadblocks to provincial action as "necessary and proper" in order that its own brand of regional and interventionist policies be made more effective. As I have already noted, it is far from clear that this will enhance the Canadian economic union.

This said, it is important to recognize that there are serious economic issues at stake here. In terms of rectifying the situation two general issues arise: 1) What should be the nature of the common market provisions? and 2) What is the appropriate institutional framework? In terms of the latter, most of the discussion in this paper assumed that enshrining the Canada economic union in the Constitution was the way to proceed. There are other avenues available, **however**. For example, the federal government could assume the role of policeman, perhaps even via a reformed Senate whose role would be, in part, to act as a watchdog over the internal economic union. A further alternative would be a federal-provincial policeman, roughly along the lines of the Saskatchewan proposal. Not only does each of these institutional approaches have its own set of merits and drawbacks (Simeon, 1983) but the choice among them will depend on what goal the common market provisions are intended to serve. Along these lines, the following observations seem appropriate from an economic perspective.

Not all internal market barriers can or should be eliminated. For many of these barriers the costs of removing them would exceed the benefits. This is in line with the Saskatchewan observation that notes that some barriers, while discriminatory, have little economic significance. Hence, some notion of economic cost should be incorporated in any provision. In this context it should also be pointed out that many of the federations with seemingly effective

constitutional provisions for ensuring their internal common market do, nonetheless, have significant internal barriers. In the U.S., for example, purchasing preferences, including instate value added preferences, have been growing rather rapidly in recent years. Presumably, at some point Congress or the Administration will take corrective action, but the mere existence of these barriers suggests that there probably are significant costs associated with policing these activities. From the political vantage point, of course, there is the possibility that any iron-clad provision could convert Canada into a veritable unitary state, in effect homogenizing the regional diversity which has been a hallmark of our federation. These considerations may argue for a federal-provincial monitoring system as against a constitutional provision in the sense that under the latter the courts may have a difficult time sorting out the jurisprudential from the political economy aspects of any internal distortion.

Somewhat relatedly, securing a Canadian economic union should be viewed in terms of some larger economic perspective. Canada's national market is simply too small for a domestic common market to be an end in itself. Of the various broader perspectives that one might adopt, the openness of the Canadian economy and its dependence on world trade suggests the following: Secure those aspects of the internal economic union that will facilitate increased Canadian penetration in world markets.¹⁴ This too might be better served by a federal-provincial body than by sole reliance on the courts.

Finally, freeing up the internal market should proceed along lines that are consistent with overall wealth maximization and optimal resource

allocation. This aspect might argue for the enshrining of private sector economic rights in the Constitution since it would be important that limitations be placed on the activities of both levels of government. Or, if one would go the federal-provincial route, it would suggest that some private sector representation be included. This relates to a more general point. Too often when Ottawa and the provinces focus on the division of powers, whether in specific terms or more generally in terms of securing the internal common market, there is precious little reference to any third parties who might also be privy to some of the spoils--e.g., individual citizens, whose concerns are missing from this paper just as they were from the whole Canadian economic union debate.

Conclusion

The central thrust of this paper is that the Canadian economic union issue played a critical background role in the process of redesigning the Canadian constitution. This is not to claim that it necessarily featured prominently in the series of late-night deliberations that led to the nine provinces and Ottawa coming to the November 5, 1981, Accord on the constitution. However, even here, some last-minute concessions by Ottawa on the mobility rights probably facilitated the eventual compromise.

Despite the fact that the Constitution Act, 1982, may in some respects represent a backward step in terms of securing an internal common market, the issue is far from dead. The Senate of Canada recently tabled a bill that would prohibit a provincial government or any of its agencies from acquiring more than 10% control in any company involved in interprovincial transportation. The specific rationale for the bill was to prevent the Quebec pension fund from acquiring a sizeable share position in Canadian Pacific.

The underlying rationale was to prevent federal jurisdiction over transportation from being undermined by provincial ownership--ownership that would presumably be used to divert companies' activities in a direction that served the special interests of the province.

Over the longer horizon another set of forces will come into play. Specifically, the new Canadian Charter of Rights and Freedoms may well transform the nature of the parliamentary system. The British tradition of the supremacy of parliament no longer holds with respect to these fundamental rights: there are certain areas where no legislature can infringe on the rights and freedoms of Canadians. In this sense the Charter may play the role of "republicanizing" the Canadian polity and correspondingly erode the set of customs and traditions associated with the parliamentary system. If this is indeed the case, then these same citizens may quickly come to realize that both levels of government are abridging their "economic rights." Hence, the pressures for a more integrated economic market will likely intensify. Moreover, these pressures are apt to be directed against all levels of government so that any eventual lessening of internal barriers will not only be binding at the provincial level. Already there is a broadly-based move afoot to amend the Constitution in order to reinsert the right to hold and acquire property as part of the mobility rights provision.¹⁵ Finally there may well be a sleeper or two in the Canadian Charter of Rights and Freedoms that will have implications for securing the Canadian economic union. For example, the equality rights section of the Charter ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination...") may be construed in a way that would, for example limit the ability of the federal government to discriminate regionally with respect to personal income taxation.

In the immediate future, the Canadian economic union issue will occupy centre stage in terms of the deliberations of the Royal Commission on the Economic Union and Development Prospects for Canada. In the words of Prime Minister Trudeau, the terms of reference "are perhaps the most important and far-reaching that have ever been assigned to any commission in our history." (Trudeau, 1982). In addition to mounting a massive research effort, the Commission will be undertaking public hearings across the country. Running throughout its terms of reference is the theme of adjusting existing institutional and governmental arrangements so as to meet the challenges of the future and at the same time preserving the integrity of the Canadian economic union, e.g.,

The study includes an examination of and a report on
...the integrity of the Canadian economic union as it
relates to the unity of Canada and the ability of all
Canadians to participate in increased economic
prosperity. (Government of Canada, 1982)

In a very real sense, therefore, the Constitution Act, 1982, represents only the beginning of what promises to be an intense national dialogue on the Canadian economic union--a dialogue which has the potential for redefining what it means, in economic terms, to be a Canadian and for fundamentally altering the nature of the Canadian federation.

ENDNOTES

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1. A selected chronology of the two-year period prior to the proclaiming of the Constitution Act amply bears this out: February 1980, Pierre Trudeau and the Liberals return to power; May 20, 1980, the Parti Quebecois loses the referendum on Sovereignty-Association; Summer 1980, extensive cross-country federal-provincial discussions on constitutional reform, culminating in an abortive week-long televised First Minister's Conference in September; October 2, 1980, Prime Minister Trudeau announces unilateral action to request patriation with a charter of rights, amending formula, and other items; October 4, 1980, five provinces challenge the legality of the proposals in the courts--only Ontario and New Brunswick back the federal initiative; November 1980, Hearings of Special Joint Committee of Senate and Commons begin (reports in February); February, 1981, Manitoba Court of Appeal supports Ottawa 3 to 2; March, 1981, unanimous Newfoundland Court of Appeal decision against Ottawa; April 1981, week-long "bell-ringing" filibuster in House of Commons to withhold approval of proposals until after the Supreme Court decision; April 13, 1981, Parti Quebecois returned to power; April 15, 1981, Quebec Court of Appeal supports Ottawa 4 to 1; April 12, 1981, House of Commons votes on final amendments to constitution package; April 18 - May 4, 1981, Supreme Court hearings, September 28, 1981, Supreme Court judgement--proposal deemed technically legal but action was unconstitutional in a "conventional" sense, also asserted that while con-

vention required "substantial consent" of the provinces, this did not imply unanimity; November 2 - 5, 1981, First Ministers Conference on the constitution with all but Quebec agreeing to a compromise Accord; November 24 and 26, 1981, further amendments relating to sexual equality and aboriginal rights; December 2, 1981, House of Commons approves final constitutional resolutions; December 8, 1981, Senate gives its approval; April 17, 1982, Queen proclaims Constitution Act, 1982. This chronology is adapted from Cairns (1984).

2. Already a collection of essays by a distinguished group of Canadian political scientists and lawyers has appeared (Banting and Simeon, 1983a) and its title (And No One Cheered...) is fairly reflective of citizen response to the entire patriation process.
3. Quebec is the only province with a separate personal income tax system. The other nine provinces and Ottawa share a joint federal-provincial system where Ottawa collects, free of charge, the taxes for the provinces and where the provinces have to adopt the federal tax structure. The provinces' flexibility consists in setting their own tax rates (as a percent of federal tax payable) and in implementing non-discriminatory tax credits. For more detail see Ontario Economic Council (1983)
4. Some parts of this section are adopted from T.J. Courchene (1983).
5. The reference in this quotation to implementing common external economic policies is more important than it might at first appear. Because power is so decentralized in the Canadian federation, the central government can often find itself constrained in international negotiations since the issues under discussion may well be the responsibilities of the provinces. Moreover, the provinces were demanding a greater say in matters of trade and commercial policy. Important as this overall issue is, it will not be highlighted in the present paper.

6. Article 1, section 8, paragraph 18 of the U. S. Constitution reads: "The Congress shall have power ... to make all laws which shall be necessary and proper for carrying into execution the foregoing powers ..." which would, of course, include the commerce power. This clause was particularly important in the Shreveport Case in 1914 where the courts decided that Congress may regulate local transport (i.e. it was "necessary and proper" to regulate local transport) in order to make its control over interstate transport really effective.
7. Section 51(1) reads: "The Parliament shall...have power to make laws for the peace, order, and good government of the commonwealth with respect to: 1) Trade and Commerce with other countries, and among the states."
8. Section 91 (3) (the last provision in Table 3) may have mitigated against the exclusivity re 91 (2.1) and (2.2). However, it is likely to have done little to protect provincial laws from being struck down as laws "in relation to" a federal matter such as competition or product standards.
9. The Ontario Ministry of Industry and Tourism went as far as issuing its own position paper on preserving the Canadian economic union. (Grossman, 1981).
10. (Constitutional Committee of the Quebec Liberal Party, 1980). The Liberal Party is the opposition party in the Quebec Legislature.
11. The Hudon article is directed entirely towards Quebec's reaction to the internal common market proposal, although the views expressed in the article probably reflect those of some of the other provinces as well.

12. The points in this and the following two paragraphs are adapted from Government of Saskatchewan, (1980).
13. With assets of over \$13 billion, just the annual interest income component, let alone the stock or annual inflows, of the Alberta Heritage Fund would equal roughly \$500 per Albertan.
14. I am indebted to Peter Leslie for bringing this point to my attention.
15. Now that the Constitution provides for an amending formula requiring a measure of provincial consent and also provides for an "opting out" provision, achieving an amendment to secure the Canadian economic union will be difficult and even if it is successful its application may not be uniform. This is in sharp contrast to the situation in 1980.

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