THE MARKET AND THE CONSTITUTION

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Writing in 1947, Bora Laskin, former Chief Justice of Canada, wrote that the Canadian constitution did not "enshrine any particular economic theory". That observation may have been of dubious accuracy then:[1] it certainly would no longer be true if the recent constitutional proposals tabled by the federal government regarding the Canadian common market become entrenched in the constitution. While the proposed guarantee to entrench a *Charter* right to property has attracted much attention, the common market clause has attracted less, and generally favorable, press. Yet the common market proposal may be able to do much of the work of a right to property clause and much more — it could have wide-ranging impact on the constitutional limits to which Canadians may govern themselves.

The common market clause would guarantee the free movement of persons, goods, services, and capital across provincial and territorial boundaries. Any laws or practices, whether federal or provincial, which act as a restriction or barrier on that mobility would be of no force or effect. The common market principle would not be absolute. Exceptions would be federal laws regarding equalization or regional development, provincial laws which promote regional development within the province but do not treat other regions in the province any more favourably than other provinces, and those federal or provincial laws which are declared to be in the "national interest" by Parliament together with the approval of the governments of at least seven of ten provinces representing more than fifty percent of the Canadian population. Dissenting provinces may not otherwise opt out of the operation of the common market.

A companion proposal would grant the federal government a broad power to legislate "in relation to any matter that it declares to be for the efficient functioning of the economic union". Such laws will also require the approval of the governments of at least seven provinces with more than fifty percent of the population, likely acting through the new Council of the Federation. Dissenting provinces may opt out of the operation of the federal law for a non-renewable three year period. Neither the declaration of laws in the "national interest" nor the passage of laws "for the efficient functioning of the economic union" may be easily accomplished: the consent of more than a majority of provinces representing a majority of the Canadian population must be obtained — similar conditions must be met to amend most parts of the constitution.

The common market proposal is offered as a means to correct, and make more efficient, the operation of the free market system. It is argued that, in the era of globalization, Canadian business must be prepared to compete nationally in order to meet the demands of international competition. By targeting government practices which artificially prop up certain enterprises, economies of scale will result which, in turn, will permit the Canadian economy to compete more effectively in the international marketplace. Practices[2] such as provincial government procurement policies which favour in-province goods, services, and labour have been targeted by the drafters of the proposals. Preferential beer and wine pricing by provincial liquor boards have been identified as culprits to the inter-provincial mobility of alcoholic goods. Marketing boards which set quotas or prices on the production of agricultural goods, and provide farmers with a set price and the right to supply a specific share of the market, also are likely caught by the proposed amendment.

These consequences alone are quite significant. But the language of the common market proposals is not limited to such matters and potentially could have much wider implications for the provincial and federal regulation of the marketplace. Economists have identified a number of "distortions"[3] of the marketplace which act as barriers to the free flow of capital and labour, goods and services. Those distortions include provincial government pools of capital, such as the Alberta Heritage Trust Fund and Québec's Caisse de Dêpots et Placement, which have made available to local enterprises favourable fin-

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1. The *Constitution Act, 1867*, together with judicial interpretation, guaranteed a customs union together with an "imperfect" common market for goods, capital and enterprise. See T. J. Courchene, "Analytical Perspectives on the Canadian Economic Union" in M.J. Trebilcock, J.R.S. Prichard, T.J. Courchene and J. Whalley, *Federalism and the Canadian Economic Union* (Toronto: University of Toronto Press for the Ontario Economic Council, 1983) at 65. To this may be added federal-provincial and inter-provincial agreements and the *Canadian Charter of Rights and Freedoms* which reinforce aspects of the economic union. See T.J. Courchene, *In Praise of Renewed Federalism* (Toronto: C.D. Howe Institute, 1991) at 12-13.

2. These are identified in the federal document, *Canadian Federalism and the Economic Union: Partnership for Prosperity* (Ottawa: Supply and Services, 1991) at 19 and 43-45.

3. According to Whalley, economists use the term "distortion" as a popular synonym for "barrier." But most use the term distortion"to describe a policy that is discriminatory, in the sense that it treats participants in transactions differently." See John Whalley, "Induced Distortions of Interprovincial Activity" in M.J. Trebilcock *et al.*, *supra*, note 1 at 162-63.

ancing at below-market rates.[4] Some provinces impose restrictions on investment by insurance companies, such as restricting investment in real estate, in part, to property within the province.[5] The proposed common market generally would not permit such preferential investment at the local level. Natural resource policies in some provinces are designed to ensure that processing of the resource occurs within the province,[6] or set up regulatory regimes to ensure that the resource needs of the province are met before export is allowed.[7] Provinces which choose to limit resource processing and exports, likely will be offending the principle of the economic union.

A wide variety of less obvious barriers to trade may also be caught.[8] Corporate tax rates may vary from province to province, as do labour standards,[9] and that variety can distort the free flow of capital. Provinces which choose to impose greater corporate tax rates,[10] or labour standards such as pay equity, which may increase the costs of doing business in the province and thereby distort the allocation of commercial resources, could be seen as barriers or restrictions to the free movement of capital in the common market. Packaging standards may vary, and rogue provinces which require differing and more onerous standards, such as the requirement of french language packaging in Québec, may have set up a restriction on the free movement of goods that could be challenged in the courts.[11] Environmental standards also may act as a barrier or restriction.[12] The province of Alberta has, in practice, refused admission into the province of hazardous wastes from Ontario or Québec which may have been destined for disposal at the Swan Hills waste facility plant. This practice, which restricts the free passage of hazardous goods into the province of Alberta, may not survive the constitutionalizing of the common market.[13]

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It may seem curious that the federal government has proposed constitutional amendments to guarantee the common market when there are a number of other large, and more pressing, matters on the constitutional agenda, such as accommodating Québec's distinctiveness, aboriginal self-government, and Senate reform. And, as the 1980 federal Liberal government discussion paper on "Securing the Canadian Economic Union" acknowledged, despite some barriers to inter-provincial trade, Canada has attained a "highly integrated economic union nonetheless."[14] The proposal is even more curious when we are advised, according to most economic forecasts, that the cost of these barriers and restrictions to the Canadian public are quite modest (under 1 percent) when compared to Canada's gross domestic product.[15] But the proposal has a distinguished pedigree, which can be traced back to section 121 of the *Constitution Act, 1867* which guarantees that "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". The section rarely has been the subject of litigation and, as a consequence, judicial treatment. The section has been limited to catching only those fiscal measures which act as barriers between provinces rather than to any measures which regulate the marketplace within the provinces.[16] It was because of the limited effect given to section 121 that, in 1978, the Canadian Bar Association recommended constitutional amendments to this section to guarantee the free mobility of goods, services, labour and capital, which would enable any affected individual or corporation to attack in court any barriers to that movement.[17] This same proposal was made in the 1979 Pepin-Robarts' Report,[18] the 1980 Liberal party of Québec "Beige Paper,"[19] and the 1980 federal Liberal document

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4. See M.J. Trebilcock, J. Whalley. C. Rogerson, and I. Ness, "Provincially Induced Barriers to Trade in Canada" in M.J. Trebilcock *et al.*, *supra*, note 1 at 294-295 and 302-304.
5. See the *Alberta Insurance Act*, R.S.A. 1980, c.I-5, s.94(3) and Trebilcock *et al.*, *ibid.* at 299.
6. As in the province of Saskatchewan. See Trebilcock *et al.*, *ibid.* at 261.
7. See the Alberta *Gas Resources Preservation Act*, R.S.A. 1980, c.G-3.1, ss.8-9.
8. A "barrier to the economic union includes any initiative that alters the wage/rental rate or the leisure/labour choice or the tax price of public goods on a geographical basis." See T.J. Courchene, *In Praise of Renewed Federalism*, *supra*, note 1 at 14.
9. Although a 1979 federal study concluded that there is "little evidence to suggest that their impact is a *major barrier* to labour mobility." Discussed in Trebilcock *et al.*, *supra*, note 4 at 286.
10. See Trebilcock *et al.*, *ibid.* at 314.
11. Trebilcock *et al.*, *ibid.* at 285-286.
12. According to the federal government document on the economic union, impediments to mobility include unintentional policies such as "non-harmonized regulation of environmental standards." See *Canadian Federalism and the Economic Union*, *supra*, note 2 at 17.
13. I am grateful to Professor Elaine Hughes for this example.
14. See "Powers Over the Economy: Securing the Canadian Economic Union in the Constitution" in A. Bayefsky, *The Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) at 607.
15. See *Canadian Federalism and the Economic Union*, *supra*, note 2 at 19.
16. See *Gold Seal Ltd.* v. *A.G. Alberta* (1921) 62 S,C,R. 424 and *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128. Broader interpretations can be found in *Murphy v. C.P.R.*, [1958] S.C.R. 626, *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 per Laskin CJ, and *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591.
17. Canadian Bar Association Committee on the Constitution, *Towards a New Canada* (Montreal: The Canadian Bar Foundation, 1978) at 85ff.
18. The Task Force on Canadian Unity, *A Future Together* (Ottawa: Supply and Services, 1979) at 67-70.
19. The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal: Quebec Liberal Party, 1980) at 105.

"Powers over the Economy: Securing the Canadian Economic Union in the Constitu-tion" tabled by then Minister of Justice Jean Chretien.[20] The MacDonald Commission on Economic Union, the intellectual springboard for the Canada-U.S. free trade agreement, also recommended the removal of inter-provincial trade barriers, both by strengthening section 121 and by instituting a code of economic conduct to cover those practices which an amended section 121 might not reach.[21]

The call for an unimpeded common market was renewed, more significantly, in the Liberal Party of Québec's "Allaire Report".[22] The Report declared the economy of Canadian federalism a failure and called for the radical decentralization of federal power together with a common market with the rest of Canada. In briefs and testimony before the Bélanger-Campeau Commission on the Political and Constitutional Future of Québec, the Québec business community, speaking through the Chambre de commerce du Québec, called for the rejection of any restrictions on the "free movement of individuals, goods and capital" throughout Canada.[23] There were no calls for a new corresponding economic power for the federal government.

There also has been some political movement in this direction in recent years. Both the western and maritime Premiers have agreed in principle to abandon preferential procurement policies which discriminate against out-of-province businesses within their respective regions. In August, all of the provincial premiers agreed to end preferential procurement policies for goods in excess of $25,000. [24] Together with the apparently anomalous situation of a free trade agreement in place with the United States, and no equivalent agreement amongst all of the provinces, and international pressures at global trade talks to remove certain barriers to trade, the time may have appeared opportune to constitutionalize the market model.[25]

Yet, throughout this debate, not enough attention has been given to the Australian experience of almost 90 years with a similar common market clause.[26] The Australian constitution guarantees in section 92 that "customs, trade, commerce, and intercourse among the states ... shall be absolutely free". The clause, according to law Professor Peter Hanks, has "posed a serious obstacle to any government which undertook to regulate commercial activity in Australia".[27] Courts have been faced with the perplexing task of reconciling this free market clause with public demands for state intervention and regulation.[28] The Australian Advisory Committee on Trade and National Economic Management, in its report to the Constitutional Commission, described the impact of section 92 jurisprudence in this way:[29]

> interstate trade is almost entirely free from taxation, banks and airlines cannot be nationalised, interstate transport cannot be made subject to discretionary licensing, and most marketing schemes must exempt interstate traders. It is doubtful that this interpretation of s.92 was intended: the section was to provide a guarantee of free trade, not of free enterprise.

This cautionary tale about constitutionalizing free market enterprise is particularly resonant in the Canadian context because of the change in language proposed by the federal government: from the constitutional directive that goods "be admitted free" into each of the provinces (directed at customs duties) to the declaration that "Canada is an economic union within which persons, goods, services and capital may move freely without barriers or restrictions based on provincial or territorial boundaries" (directed at unrestricted movement).[30] This change of language would be an important signal to the courts, moving us clearly in the direction of the Australian experience.

The constitutionalizing of the common market also has important implications for the role of the judiciary in constitutional litigation; courts will be called upon to test the economic impact of regulatory measures to determine whether they act as "barriers or restrictions" or are saved by the equally vague "equalization" or "regional

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20. *Supra*, note 14. A useful history of this proposal is found in Annex B to 616-619.

21. See Royal Commission on the Economic Union and Development Prospects for Canada, *Report*, Vol. 3 (Ottawa: Supply and Services, 1985) at 136-140. Calls for an economic union were also made in the Report of the Group of 22, *Some Practical Suggestions for Canada* (Montreal: le Groupe Columbia, June 1991) at 20; Canadian Manufacturers Association, "'Canada 1993': A Plan for the Creation of a Single Market in Canada" (April 1991); and Canada West Foundation, "Time for Action: Reducing Interprovincial Barriers to Trade" (May 1989).

22. Report of the Constitutional Committee of the Quebec Liberal Party, *A Quebec Free to Choose* (January 28, 1991) at 36.

23. Richard Fidler, trans. & ed., *Canada, Adieu? Quebec Debates Its Future* (Vancouver & Halifax: Oolichan Books & Institute for Research on Public Policy, 1991) at 84.

24. See *Canadian Federalism and Economic Union*, *supra*, note 2 at 21.

25. These, and other reasons, are discussed in K. Norrie, R. Simeon, and M. Krasnick, *Federalism and the Economic Union in Canada* (Toronto: University of Toronto Press, 1986) at 249-251.

26. Some discussion can be found in J.A. Hayes, *Economic Mobility in Canada: A Comparative Study* (Ottawa: Supply and Services, 1982) and A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa: Information Canada, 1974).

27. Peter Hanks, *Australian Constitutional Law: Materials and Commentary*, 4th ed. (Sydney: Butterworths, 1990) at 689.

28. See *Uebergang v. Australian Wheat Board* (1980), 145 C.L.R. 226 at 300.

29. (Australian Government Publishing Service, 1987) at 206.

development" exemptions. The 1978 Canadian Bar Association report was sanguine about this prospect: "the courts would find sufficient leeway, as they have done under section 121, to allow for departures from the principle of free movement when need be..."[31] Again, The Australian experience is instructive. The High Court of Australia wrote in 1988 that:[32]

> judicial exegesis of the section [92] has yielded neither clarity of meaning nor certainty of operation. Over the years the court has moved uneasily between one interpretation and another in its endeavours to solve the problems thrown up by the necessity to apply the very general language of the section to a wide variety of legislative and factual situations. Indeed, these shifts have been such as to make it difficult to speak of the section as having achieved a settled or accepted interpretation at any time since federation.

As it would seem that, *prima facie*, any regulatory measure is intended to "distort" the operation of the free market, most measures would be *prima facie* challengeable under the proposed section 121.[33] While the courts are unlikely to strike down every such measure, there will be a great deal of uncertainty in regard to many measures and some that we value likely will not survive. More importantly, this has significant implications for democratic politics; legislators may be less likely to intervene in the marketplace and, when they do, they may choose to "harmonize downwards"[34] so as to level the playing field. Rather than risk litigation, and under pressure to retain their competitive advantage vis à vis other provinces,[35] governments would be inclined to favour the free market, rather than "distort" it. As Peter Leslie describes it, this version of economic liberalism calls for "shrinking of the role of government altogether. It is a response to the voices calling for minimal interference in the allocation of resources through market forces."[36] This may be seen as a valuable outcome for some: for others, it valorizes capitalism over democratic self-rule. The sovereignty of the people acting through their democratically elected representatives will be severely diminished.[37] The saving of laws by declaring them to be in the national interest and the new proposed federal power to make laws for the efficient functioning of the economic union, requiring the stringent amending formula standard of 7 and 50, are strait-jacketing substitutes for the free operation of the democratic process.[38]

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The common market proposals sustain the perception that this round of constitutional negotiations is one for all of Canada, not just for Québec. The federal strategy appears to have been to load up the constitutional plate with a variety of wide-ranging proposals, each of which could have substantial implications for the future of the country, united or not. With only five months before the Parliamentary committee is mandated to report back to Parliament, the Canadian public legitimately is entitled to ask who wins and who loses according to the economic proposals. At the very least, with the removal of agricultural marketing boards and subsidies on the prairies, it "is most likely that western Canada would lose a large number of farm communities and farm operations...One would expect much bigger farm operations and fewer farm/rural towns."[39] If there are significant losses, we might wish to buffer that economic loss, as the de Grandpré commission which looked into the effects of Canada-U.S. free trade ultimately recommended in regard to the FTA.[40] Even then, the federal government failed to act. Indeed, Canadians would be justified in asking, given their far-reaching implications, why the common market proposals are part of a package with a very tight time frame which restricts opportunity for in-depth consideration.

To whatever extent barriers to interprovincial trade deserve to be addressed, that should be attempted at the

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30. A.E. Safarian, *supra*, note 26 at 20.
31. See *Towards a New Canada*, *supra*, note 17 at 88.
32. See *Cole v. Whitfield* (1988), 78 ALR 42 at 48.
33. See T. Lee and M.J. Trebilcock, "Economic Mobility and Constitutional Reform" (1987) 37 U.T.L.J. 268 at 312.
34. See Ontario, *A Canadian Social Charter: Making Our Shared Values Stronger* (Toronto: Ministry of Intergovernmental Affairs, 1991) at 8.
35. According to Peter Leslie, "the presence of the US on our doorstep requires adaptive behaviour by Canada; efforts to buck continental trends will be damaging and counter-productive" in *The European Community: A Political Model for Canada?* (Ottawa: Supply and Services, 1991) at 31.
36. *Ibid.* at 33.
37. See *Citizen's Forum on Canada's Future, Report to the People and Government of Canada* (Ottawa: Supply and Services, 1991) at 132, where the "Spicer Commission" found Canadians look to their governments to play a role in redressing market imperfections and supplementing market initiatives.
38. The same problems do not arise when the federal government invokes its s.91(2) power over "trade and commerce". But there is no discussion in the federal proposals about how this power may be exercised in conjunction with the new s.91A power. Might the federal government be legally, if not morally, obliged to obtain the consent of a majority of provinces before it exercises the general trade and commerce power it previously could exercise unilaterally?
39. W. H. Furtan, "Agriculture in a Restructured Canada" (Western Centre for Economic Research: The Economics of Constitutional Change Series, Art.#3, June 1991) at 7.
40. See Report of the Advisory Council on Adjustment, *Choosing to Win* (Ottawa: Supply and Services, 1989).

inter-governmental, and not the constitutional, level.[41] Parliamentary and legislative committees should be commissioned to look into a code of conduct designed to address the specific barriers which act as socially indefensible impediments to trade. Redress for unjustifiable barriers should be had before bodies other than courts.

Although part of the "national unity" package, the constitutionalizing of the free market model marks another turn toward the kind of class conflict that characterized the free trade debate. The Business Council on National Issues, the Fraser and C.D. Howe Institutes, and the Canadian Manufacturing Association will be pitted against the labour movement, and those who are unable to participate freely in the market such as women and the poor.

The proposals may have another interesting effect. Much of the support for sovereignty within Québec has been led by the new economic elites, who gained financially by the upsurge in Québec economic activity in the 1970s and 1980s.[42] Coupled with the green light from Wall Street that Québec could go it alone economically, they, rather than the poets, musicians, and academics, have calmly been leading public opinion in Québec in the march towards sovereignty. The common market proposals are both a lure and a challenge to those elites. Either they will choose the federalist option, with its promise of economic prosperity in a common market, or they will choose to maintain "Québec Inc.", where the national assembly maintains its close ties to economic development in the province, unhampered by constitutional prohibitions against provincial intrusion into the marketplace. If they choose the former, the federal strategy may have succeeded in dismembering the sovereignist alliance. If they choose the latter, the bargaining power of Québec's nationalist movement will have been weakened.[43] Canadians outside of Québec may then be led, perhaps dangerously, to the brink where rhetoric and reality may not be readily distinguishable.

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41. The Manitoba Constitutional Task Force recently recommended that political action be taken to remove inter-provincial economic barriers. See *Report of the Manitoba Constitutional Task Force* (October 28, 1991) at 52-54.

42. See Charles Macli, "Duelling in the Dark" *Report on Business Magazine* (April 1991) 29.

43. Quebec's ability to negotiate a new free trade agreement with the United States may also be impaired. See T.J. Courchene, *In Praise of Renewed Federalism*, *supra*, note 1 at 30-31.

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Sopinka J. rejected the contention that there was no impediment to prevent Parliament from legislating but that the government was constrained by the doctrine from introducing the Bill before Parliament. Relying on W. Bagehot, *The English Constitution* (2nd ed. 1872) the Court held that a restraint on the executive in the introduction of a bill was a fetter on the sovereignty of Parliament.

The Court did not deal with an argument put forth by Ontario, supported by Alberta and Saskatchewan, that there was, with respect to federal-provincial cost-sharing agreements, a convention that neither Parliament nor the legislatures could use their legislative authority to alter their obligations unilaterally. Sopinka J. wrote that, since Question 2 did not relate to conventions, the issue would not be addressed.

The Supreme Court of Canada briefly dealt with a "manner and form" argument put forward by the Native Council of Canada and the United Native Nations of British Columbia. The Court held that there was no indication of an intention on the part of Parliament to have bound itself by the Plan and, further, that manner and form restrictions could only relate to non-substantive matters in statutes of a constitutional nature. The Court also briefly disposed of an argument by Manitoba that Parliament lacked legislative jurisdiction to make changes to the Plan.

In sum, the result in this case is the product of a conservative tradition with respect to Parliamentary sovereignty. It could be argued that Bagehot, relied upon by the Court, is of little relevance as he wrote about a 19th century unitary state without a history of cooperative federalism.

The Court has, however, left open a door. Although it held that the "formulation and introduction of a bill" would not be meddled with, it left aside:

> ... the issue of review under the *Canadian Charter of Rights and Freedoms* where a guaranteed right may be affected.[15]

Further, the issue regarding the existence of conventions in the realm of shared-cost agreements between Canada and the provinces is still unresolved.

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15. *Ibid.*