NAFTA AND THE CONSTITUTION: DOES *LABOUR CONVENTIONS* REALLY MATTER ANY MORE?

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By virtue of the Crown prerogative, the federal government has the power to negotiate and enter into binding international agreements.[1] Where, however, the *performance* of obligations under international agreements requires domestic legislation, such legislation must nevertheless be within the legislative authority of Parliament.[2]

Since the NAFTA purports to be an international trade agreement, the natural beginning point of a constitutional analysis is to consider the scope of the federal government's trade and commerce power, as set out in section 91(2) of the *Constitution Act, 1867.* Early jurisprudence on the trade and commerce power resulted in the bifurcation of this power into two "branches": the power to regulate international and interprovincial trade and commerce, and "the general regulation of trade affecting the whole dominion."[3] We will consider each of these branches separately.

INTERNATIONAL TRADE AND COMMERCE

It is rather obvious that, taken as a whole, the NAFTA is an agreement that concerns the regulation of international trade and commerce. However, many of the matters covered by NAFTA, and the corresponding actions that may be required to perform NAFTA obligations, would not traditionally have been considered as part and parcel of the regulation of international trade and commerce — for instance, NAFTA contains strictures on product standards, the domestic regulation of service industries, policies on investment, monopolies, and expropriation.

Early jurisprudence on the international and interprovincial branch of the trade and commerce power tended to confine narrowly its scope to direct regulation or control of the transboundary "flow" of goods.[4] More recent decisions have suggested that the regulation of international or interprovincial trade and commerce may encompass internal non-border measures, where these are incidental to regulation of flows of goods across provincial or national boundaries.[5] Nevertheless, it seems that such non-border measures (for instance, commodity marketing schemes or product standards) must be targeted at, or at least their impact must be largely confined to, products that cross provincial or national boundaries.

As a student of international trade law, I would have little hesitation in characterizing even those provisions of NAFTA that deal with non-border measures as an integral part of the regulation of international trade and commerce in our times. The NAFTA addresses these issues from the perspective of their impact on *international trade*. Successive rounds of GATT negotiations having succeeded in substantial tariff reductions and strict limitations on many other border measures, it is entirely natural that more recent trade negotiations — both regional and multilateral (i.e. the Uruguay Round) — would focus on internal policies that have effects on trade.

As a student of Canadian federalism, however, I cannot feel entirely comfortable with the notion that the scope of the federal trade and commerce power is infinitely expandable, depending on how broadly the trade negotiating agenda is cast at a given point in time. This would mean that the division of powers in the Canadian constitution would, in significant

respects, be at the mercy of factors beyond the control of Canadians. At the same time, the federal Government's ability to exercise the *traditional core* of the trade and commerce power, i.e. to negotiate and conclude agreements concerning border measures, would be seriously attenuated if the government could not also make credible commitments with respect to the new agenda items that implicate an increasing range of domestic policies, both federal and provincial.[6] One response would be that the federal government can still exercise the power, but where provincial jurisdiction is implicated, must obtain the cooperation of the provinces. However, this kind of rider on the exercise of legitimate federal powers forms no part of the existing constitutional architecture of the Canadian federation, however dear it might have been to some of the architects of the recently failed "Canada Round" constitutional proposals.

In my view, the best answer to the dilemma is not to freeze the "pith and substance" of trade and commerce at an earlier period of international economic relations, but rather to protect the federal balance through an approach that bears close affinities to the "subsidiarity" concept in the law of the European Community. Under this approach, federal action pursuant to the trade and commerce power would only be deemed constitutional where it trenched on provincial jurisdiction to the minimum extent necessary to achieve the trade objectives in question.

This kind of approach has already been deployed by the Supreme Court in its jurisprudence concerning the "general" branch of the trade and commerce power.

THE GENERAL TRADE POWER

In *General Motors*,[7] Dickson C.J. (writing for a unanimous Court) elaborated the following criteria for determining whether a federal regulatory scheme that infringes provincial jurisdiction can be sustained as "a general regulation of trade affecting the whole dominion": 1) the legislation must be part of a general regulatory scheme; 2) the scheme must be monitored by a regulatory agency; 3) the scheme must not constitute the regulation of a single industry or trade; 4) the matter of the legislation must be such that joint action by the provinces would be constitutionally impossible; 5) refusal of one or more provinces to participate in a joint federal-provincial regulatory effort would put the whole scheme in jeopardy.

Once a legislative scheme has met these criteria, the court must consider the extent of the intrusion into provincial jurisdiction and its justification in terms of the scheme's objectives. In *General Motors*, Dickson C.J. distinguishes between minor and major intrusions into exclusive provincial jurisdiction. In the case of a minor intrusion, the federal Government would be required only to show that a rational fit existed between the interference with provincial jurisdiction and the national purposes reflected in the regulatory scheme as a whole. By contrast, where an intrusion could be considered as "major," a close fit would be required between the particular intrusive feature of the scheme being impugned and the national purposes of the whole scheme. This evokes the notion that a significant intrusion into provincial jurisdiction must be strictly necessary to achieve the national objectives at issue.

One way of addressing the constitutionality of federal action to implement NAFTA would be to accept a broad scope for the *international* branch of the trade and commerce power, but impose the kinds of limits with respect to intrusiveness into provincial jurisdiction adopted in *General Motors* with respect to the *general* branch of the trade and commerce power. Alternatively, the courts could limit the *international* branch to its traditional scope — i.e. to border measures or measures closely connected to flows of products (including both goods and services) across borders — and instead consider whether performance of NAFTA obligations that entails domestic regulatory change could be sustained under the *general* branch of the trade and commerce power.

Each approach carries with it certain risks or drawbacks. Broadening the *international* branch of trade and commerce would be largely unproblematic in the case of federal action, for instance, to ensure that regulatory measures do not treat other NAFTA Parties less favourably than they treat Canadian nationals (the "National Treatment" standard). Here the regulatory changes in question are clearly targeted at traded products, i.e. imports and exports (whether of goods, services, or capital). However, other NAFTA obligations may entail changing domestic regulations that apply both to domestic products and to imports. For instance, there is an obligation to ensure that standards do not constitute an unnecessary obstacle to trade and that new standards be based on scientific risk assessment. In theory, these obligations apply only to measures affecting imports from NAFTA partners. However, a two-tier system, where a

different (and perhaps more onerous) set of standards is imposed on domestic actors than on NAFTA partners, could unduly penalize or disadvantage domestic industry. So, the only realistic avenue is to adjust standards as they apply both to traded and non-traded products. Here, an obstacle is created by earlier jurisprudence on the international branch of the trade and commerce power, which suggests that the international branch cannot be used to sustain domestic regulation *as applicable to non-traded products* even when the overall purpose of the scheme is the regulation of traded products.[8]

With respect to the alternative of sustaining such federal action under the general trade power, there may be difficulties in meeting some of the five criteria enunciated in *General Motors*. While it might be plausible to characterize the NAFTA on the whole (or, alternatively and perhaps more precisely, the framework for federal implementation) as a regulatory scheme, the NAFTA is not, in the traditional sense, under the control of a regulatory agency, although at the transnational level it does entail an institutional framework for monitoring and enforcement. Some of the other *General Motors* criteria seem more obviously applicable, especially provincial incapacity. The provinces, either individually or together, simply lack the constitutional capacity to conclude binding agreements on international trade. It is also easy to see how a failure of one or more provinces to participate could undermine an approach to trade negotiations based upon federal-provincial cooperation. If a particular province or provinces were able to opt out of a trade agreement, the value of concessions to our trading partners would be reduced, resulting in fewer benefits to the opt-in provinces (i.e. in the form of reciprocal concessions from trading partners).[9]

PEACE, ORDER, AND GOOD GOVERNMENT

Another possible basis for sustaining comprehensive federal implementation of NAFTA would be the "national concern" branch of the Peace, Order, and Good Government power (POGG), as revived in the *Crown Zellerbach*[10] decision. In *Crown Zellerbach*, the Supreme Court found that the POGG power could be invoked by the federal government to deal with a matter of national concern. According to LeDain J. for the majority:[11]

> [f]or a matter to qualify as a matter of national concern . . . it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.

In clarifying the concept of "singleness, distinctiveness and indivisibility," LeDain J. placed emphasis on the consequences of "a provincial failure to deal effectively with the control or regulation of the intra-provincial aspect of the matter" (provincial incapacity). In addition, LeDain J. established an apparently strict test for the intensity of federal intervention: "a national dimension justifies no more federal intervention than is necessary to fill the gap in provincial powers."[12]

In *Crown Zellerbach*, the issue was the constitutionality of federal legislation regulating marine pollution in *intraprovincial* waters. While existing constitutional doctrine permitted the federal government to regulate pollution within the province to the extent necessary to prevent the flow of pollution between provinces,[13] the legislation in question was much broader than this in scope, extending as it did to all intraprovincial marine waters.

What then would be the "extraprovincial effects" of a provincial failure to regulate *all* intraprovincial marine pollution, if the federal government possessed in any case sufficient authority (apart from the POGG power) to regulate actual spillovers or externalities across provincial boundaries? LeDain J.'s response hinged upon the fact that marine pollution is treated as a single, indivisible subject in an international convention of which Canada is a member (*The Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*).[14] By implication, the failure of any province to regulate intra-provincial pollution of marine waters could compromise Canada's adherence to the obligations of this international agreement, which benefits the entire country.

Just as in the case of the general branch of the trade and commerce power, it is clear that a strong argument for provincial incapacity to regulate international trade could be made under the national concern branch of POGG. With respect to singleness and indivisibility of subject-matter, it is true that full performance of NAFTA obligations could potentially result in changes to dozens of federal and provincial statutes that deal with a wide variety of subject

matters. However, these subjects are treated together within a single international agreement (a seemingly decisive factor in *Crown Zellerbach*) and from a unified perspective — that of effects on trade.

GAUGING THE EXTENT OF IMPACT ON PROVINCIAL JURISDICTION

A plausible *prima facie* case can thus be made for sustaining federal action to perform NAFTA obligations under either the international branch of the trade and commerce power, the general branch of the trade and commerce power, or the national concern branch of the POGG power. Whichever of these quite broad heads of power is invoked to sustain implementation of NAFTA, the federal government should have to show that provincial jurisdiction is impaired to the minimum extent necessary to achieve the national objectives. As we have seen, such a minimal impairment test is already implicit in the concern about "fit" in *General Motors* and, in *Crown Zellerbach*, is explicitly set out with respect to the "national concern" branch of POGG. Such a test would also be appropriate to protect the federal balance were the Court to broaden the scope of the international branch of the trade and commerce power to encompass the wide sweep of the contemporary trade agenda (extending, as it does, even into areas like environmental regulation and labour rights).

A logical beginning point for gauging the impact of the performance of NAFTA obligations on provincial jurisdiction is to consider the extent to which the federal government is bound, by the terms of NAFTA itself, to assure provincial compliance. Article 105 of NAFTA states that "the parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments." On its face, this provision is stronger than the comparable GATT obligation to take "such measures as may be available" to ensure compliance of sub-national governments.[15]

Article 105 is, however, not the whole story. Various particular provisions of NAFTA contain exceptions to this rather strict requirement to ensure provincial compliance. For instance, in the case of investment, services in general and financial services in particular, sub-national governments are able (albeit through a federally-coordinated mechanism) to lodge reservations with respect to existing measures that may be in conflict with NAFTA. This is subject to the requirement that such measures not become more trade-restrictive in the future. In the case of government procurement, "parties shall endeavour to consult with their state and provincial governments with a view to obtaining commitment on a voluntary and reciprocal basis to include within this chapter procurement by state and provincial government entities and enterprises."(Art. 1024(3)). This clearly falls far short of the general Article 105 obligation to take all necessary measures to ensure provincial compliance.

In the case of the labour and environmental side-agreements to NAFTA, Canada is to provide a list of provinces that are to be bound under these agreements "in respect of matters within their jurisdiction." However, unless declarations are forthcoming from a substantial number of provinces, representing a significant part of the Canadian workforce or economy, Canada's ability to make complaints against other Parties under the side-agreements will be significantly limited.[16]

The federal *NAFTA Implementation Act* is almost exclusively concerned with ensuring the compliance of *federal* statutes, regulations and administrative action with the obligations in *NAFTA*. The one clear exception is contained in the provisions on alcoholic beverages, where the federal government does assert the authority to override provincial measures where necessary to ensure compliance with NAFTA obligations.

It is clear that, with respect to the vast majority of NAFTA obligations that affect the provinces, the federal government does not intend to pursue a strategy of pre-empting provincial jurisdiction. Instead, the federal government will wait until provincial measures are found by a dispute panel to be in violation of the NAFTA, and at that point seek to obtain from the provinces agreement to a solution that is satisfactory from the perspective of the complaining Party or Parties (this is precisely what has happened in the recent past with respect to provincial violation of GATT and FTA provisions on alcoholic beverages). Ultimately, should a province fail to agree, the complaining Party may, under NAFTA, be authorized to retaliate against Canada by withdrawing trade concessions to Canada. It would usually be in the complaining Party's interest to withdraw concessions

so as to have a maximum impact on the economy of the offending *province*.

Much of the pressure for provincial compliance with NAFTA will, therefore, only come on a case-by-case basis, and may result more from the ultimate threat of retaliation than from explicit attempts to override provincial jurisdiction through federal legislative or regulatory action.[17] On the whole, then, the federal government's current approach to provincial compliance seems to constitute a genuine effort to minimize the extent to which unilateral federal action is needed to ensure performance of NAFTA obligations. It is certainly far removed from any sweeping attempt to use NAFTA as a pretext to gratuitously pre-empt provincial jurisdiction or to occupy provincial fields.

This being said, the impact of NAFTA on provincial jurisdiction may, in the long run, nevertheless prove to be quite substantial, as individual instances of non-compliance cumulate or as provincial policy options are narrowed or constrained by the concern to avoid retaliation. One cannot ignore the fact that, as a consequence of the federal government's adhesion to NAFTA — as opposed to any domestic legislative or regulatory action to *implement* the agreement — the possibility of trade retaliation hangs over future provincial policy-making in a wide variety of areas. Of course, it might be argued that trade retaliation could be directed against individual provinces even in the absence of NAFTA, through the use of unilateral trade remedy laws. This abstracts from the fact that the NAFTA *invites* and *legitimates* such retaliation in the case of non-compliance with its strictures. If one subscribes to the general juridical principle that what cannot be done directly cannot be done indirectly, then the impact on provincial jurisdiction from exposure to retaliation should somehow be taken into account in applying the "minimum impairment" test, *even if this impact results from adhesion to NAFTA itself rather than from any federal implementing legislation*. This would be tantamount to saying that the federal government may not use its treaty-*making* power (derived from the Crown prerogative) to circumvent the division of *legislative* powers in the constitution.

Yet even if the broader, cumulative impact on provincial jurisdiction through the threat of retaliation were taken into account, I am far from certain that the overall federal approach would fail the "minimum impairment" test. Here, there are two important factors that may loom large in a judicial analysis of the level of impairment of provincial jurisdiction. The first is that the provinces were extensively consulted throughout the NAFTA negotiations. They had regular, formal opportunities to comment on issues that implicated provincial jurisdiction. And, if there are instances where the federal government chose to override their concerns, or reject their suggestions, these have certainly not been widely publicized. The second factor, which may in part explain the relatively quiet stance of the provinces during the negotiation of NAFTA, is that the NAFTA's vision of liberal trade is not in collision with an alternative, inward-oriented "province-building" strategy with broad salience among the provinces. This is quite different from the clash of "province-building" and "nation-building" visions behind some of the division of powers litigation in the 1970s and early 1980s. As it is, the provinces traditionally most aggressive in their assertion of adequate jurisdictional space for province-building, Alberta and Québec, seem entirely comfortable with NAFTA. British Columbia and Ontario, the two provinces that appear to be considering a constitutional challenge to NAFTA's implementation, are themselves aggressively pursuing a vision of provincial economic development that emphasizes the importance of foreign trade and investment (witness the forays of Premiers Harcourt and Rae on trade missions to Asia and elsewhere). Finally, if there were no NAFTA, many of the same constraints on provincial policies would be entailed in the Uruguay Round GATT, which deals with a largely similar range of new-era trade issues. And Premier Rae, at least, has spoken in praise of the achievements of the Uruguay Round.

This is not to say that more fundamental conflicts might occur in future between federal and provincial visions, particularly if there is a move towards comprehensive trade constraints on the use of spending instruments such as subsidies or on cultural policies.

The underlying issues of constitutional principle raised by the potential impact of trade liberalization on provincial autonomy are sufficiently important for Canadian constitutionalism that addressing them in a court challenge at the present juncture would seem premature and, even from the provincialist perspective, may well be counter-productive. Faced with a challenge to NAFTA that may appear to have the character of a symbolic posture for a political audience, and does not at any rate reflect a deep and immediate clash of visions about the future of Canada, the Supreme Court is likely only to reinforce the tendency in its recent decisions to take an expansive

view of the appropriate scope of the federal general powers in an era of global economic interdependence.❑

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On the issues discussed in this paper I have learned much from work by Ivan Bernier, Doug Brown, Scott Fairley, Armand de Mestral and John Whyte.

Endnotes

1. See, generally, A. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968).

2. *A.-G. Can.* v. *A.-G. Ont.*, [1937] A.C. 326, 1 D.L.R. 673 (P.C.) [hereinafter, *Labour Conventions*].

3. *Citizens Insurance Co.* v. *Parsons* (1881-82), 7 A.C. 96 (P.C). It would be more than a century later, however, before federal legislation was sustained by a majority of the Supreme Court entirely on the basis of the second branch of the Trade and Commerce power. See the discussion of *General Motors*, *infra*.

4. *The King* v. *Eastern Terminal Elevator*, [1925] S.C.R. 434.

5. *Murphy* v. *C.P.R.*, [1958] S.C.R. 626; *Caloil* v. *A.G. Canada*, [1971] S.C.R. 543.

6. I have developed this theme further in R. Howse, "The Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations" (1990) 16 Can. Bus. L.J. 160 at 170-171.

7. *General Motors of Canada Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641.

8. See, generally, *Dominion Stores* v. *The Queen*, [1980] 1 S.C.R. 844.

9. See R. Howse, *supra* note 6 at 182.

10. *R.* v. *Crown Zellerbach*, [1988] 1 S.C.R. 401.

11. *Ibid.* at 432.

12. *Ibid.* at 433.

13. See *Fowler* v. *R.*, [1980] 2 S.C.R. 213.

14. 26 U.S.T. 2403, T.I.A.S. No. 8165 (December 29, 1972).

15. However, in recent GATT Panel jurisprudence, the provision in question has been interpreted as imposing a rather stringent obligation on the federal government. See, for example, *Canada — Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* (*United States* v. *Canada*) (1992), GATT Doc. DS17/R, 39th supp. BISD (1991-92) 27.

16. The actual provisions are quite technical and cannot be discussed here in detail. See Annex 46 of the labour side-agreement (*North American Agreement on Labour Cooperation*, 13 September 1993) and Annex 41 of the environmental side-agreement, (*North American Agreement on Environmental Cooperation*, August 1993).

17. Here, I have benefited from remarks by my colleague Michael Trebilcock: see M. Trebilcock, Address (Canada in an Interdependent World: Panel on International trade and the Constitution, Conference on Law and Contemporary Affairs, University of Toronto, February 1994) [unpublished].