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Résumé de l'article

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Toutefois, ceci ne signifie pas qu'il n'existe pas de cadre juridique des politiques d'achats. Les dispositions de la *Loi constitutionnelle de 1867* relatives au commerce interprovincial et international, de même que les droits à l'égalité et à la mobilité enchâssés dans la *Loi constitutionnelle de 1982*, servent de cadre juridique minimal aux politiques d'achats.

À ces normes s'ajoutent les obligations internationales du Canada à l'intérieur du cadre de l'*Accord général* du G A TT et, pour le Gouvernement fédéral, le *Code des marchés publics* adopté lors du *Tokyo Round*.

La mise en oeuvre de l'Accord de libre-échange canado-américain viendra apporter une nouvelle limite à l'autonomie des initiateurs de politiques d'achats publics.

Legal Issues Arising From Protectionist Government Procurement Policies in Canada and the United States

Denis LEMIEUX *

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1. Introduction

The needs of goods and services by public agencies, including government departments, crown corporations, hospitals, schools and local government are enormous. In Canada, total purchase spending amounts to approximately 60 $ billion annually [1]. There are several ways to measure government expenditure but the most commonly used covers "exhaustive expenditures", the total value of all resources consumed to produce the goods and services that governments provide. Based on this measurement, government procurement in Canada amounts to about 18% of the Gross Domestic Product whereas it is assessed at about 16% in the United States.

Furthermore, the contracting-out process is seen as a more flexible and efficient way for governmental authorities to implement administrative policies. In fact, the granting of contracts stimulates the development of needed technology in key industries, helps to train and employ the labour force, is a tool to end discrimination in employment and favours the industrial development of less affluent regions of the country.

For political reasons, to ensure stability and economic growth in the country and to protect domestic industries against growing import competition, Canada, like many other countries, has adopted various preferential policies to regulate its contracting-out procedure. How will these "Buy-Canadian" and their counterpart "Buy-American" practices be affected by free trade?

As this study will illustrate, these protectionist policies are widespread among public agencies in Canada and the United States. They are also difficult to reconcile with any substantial free trade agreement. Moreover, this study purports to examine the legality of these measures in Canada and the United States with respect to their respective relevant constitutional and international provisions. Within each country, interprovincial or interstate trade, mobility rights and equality rights impose limitations upon preferential policies. At an international level, international jurisdiction over trade and foreign affairs and international agreements pertaining to free trade also restrain governments' power to enact protectionist measures. Compliance with these numerous obligations is necessary to ensure the validity of preferential policies. However, these considerations require a preliminary observation on the nature, content and forms of these policies.

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1. Reference taken from A.R., MOROZ, *Some observations on non-tariff barriers and their use in Canada in Canada-United States Free Trade*, Toronto, U. of T. Press, 1986, 239, p. 251.

1.1. The concept of protectionism in the awarding of government contracts

The term "preferential purchasing policy", the Canadian counterpart of "Buy American" law refers to any statute, administrative regulation, or provision in a public contract which has the effect of limiting the procurement by a government of any manufactured goods or raw materials to those manufactured goods or raw materials which are produced in Canada or in any province. These policies may be implicit, for example by using administrative discretion, or explicit. They may also be a matter of policy or a matter of law[1.1].

In Canada, at both provincial and federal levels, governments have adopted preferential purchasing policies for the procurement of goods and services. The provincial governments' objective is to favour their own products and thereby develop their provincial economy. The federal department of Supply and Services has also an internal policy which provides for the purchase of goods and services to the closest point of consumption.

1.2. Socio-economic reasons behind protectionist policies

The major justification for interprovincial trade barriers appears to be the desire to build provincial economies. More specifically, they reduce the growing problems due to economic recession and unemployment. Secondary industry as well as small and medium-size business benefit from these policies. Not only do they maximize the effects of development and revenue but they also offer the effect of preferential policies practiced by other governments. Through retaliative measures, governments neutralize the negative effect of other governments' policies and reassure provincial manufacturers and organized labour as to the increasing presence of foreign interests on provincial markets.

However, these policies may not necessarily be more economically advantageous. The government's decision to implement them is often based on sentiment rather than reason[2]. In fact, economic reasons rarely form an essential part of that decision-making process. As stated by H. Jackson:

1.1 J. OLSON, "Federal Limitations on State 'Buy-American' Laws", 21 *Colum. J. Transnatl, L.* 177 (1982), note 1.

2. I. BERNIER, "L'économie québécoise face à la concurrence extérieure: les fondements scientifiques de la politique d'achat préférentiel du Québec", *Études internationales*, vol. XV, nº 1, mars 1984, p. 92.

"Discrimination in favor of local products sometimes seems to be one of the basic human urges"[3].

Nevertheless, a few objections can be expressed as to the legitimacy of these policies. Above all, preferential procurement policies violate the general principle of international free trade and comparative economic advantage in international markets. They increase consumer prices by preventing the sale of products produced by countries who can most economically manufacture them. Retaliative action by other provinces or countries against their products can ensue as a result of these policies. A taxpayer is also disadvantaged since he has to pay higher taxes when a provincially-made product is chosen over a cheaper foreign product. Within a country, provincial preferential policies reduce national efficiency and pose a threat to greater economic integration and economic prosperity of the country.

1.3. Protectionism in the awarding of government contracts in Canada

Discrimination in favour of domestic products has long been part of federal and provincial purchasing policies. Different devices have been elaborated at all levels of the procurement process to ensure preferential treatment to domestic products. The discrimination may be explicit or implicit in these procedures. Furthermore, governments have used different forms to implement these policies.

In their bid for government procurement contracts, outside suppliers are subject to various laws, regulations and administrative rules and practices which contain protectionist policies

1.3.1. Content of protectionist policies

Discrimination in the award of supply contracts appears in two different forms. In some instances, procurement decisions are the object of visible and open discrimination. Foreign suppliers may also be subject to less visible forms of discrimination at different stages of the government procurement process.

3. J.H. JACKSON, *World Trade and the Law of G.A.T.T.*, Indianapolis, Bobbs-Merrill, 1969, p. 274.

1.3.1.1. Visible, open discrimination in relation to procurement decisions

Governments may choose to impose discriminatory requirements for the award of supply contracts. Procurement decisions have therefore to be in accordance with government purchasing policies that require a total or partial prohibition on the purchase of imported products or that preference be given to domestic suppliers. The United States *Buy American Act* contains such a form of discrimination.

1.3.1.2. Less visible forms of discrimination resulting from the operation of the government procurement procedures

a) First stage: invitation to participate

Depending upon the tendering procedure used, foreign suppliers may be excluded from the procurement process as early as at the first stage. In the case of public tendering, the notice of tender may be inadequately publicized. Notices are not always published in a readily available source. Foreign suppliers are therefore not always aware of pending purchases.

Government may also choose to proceed by selective tendering on the basis of a pre-established list of qualified suppliers. The criteria of admissibility to this list may be vague and unclear and thereby discriminatory. Foreign suppliers who are excluded from the list will not be invited to tender. Furthermore, not all suppliers included on the list are necessarily invited to bid. The governmental authority may exercise this discretion to discriminate against foreign suppliers. Finally, the government may simply elect to invite suppliers to tender for a particular purchase. These invitations could be tainted with discrimination.

Invitation to participate may also be done by single tendering. Without proceeding by tender, this procedure consists in contacting and negotiating with a chosen supplier. Foreign suppliers are particularly vulnerable to discrimination since the discretionary selection process can be exercised in favour of domestic suppliers.

b) Second stage: obstacles preventing out-of-province suppliers from submitting a responsive bid

Although he may be invited to participate, the out-of-province supplier may still be prevented from submitting a bid. Thus, inadequate information

in the notice of tender on such matters as the products to be purchased, the time limits to submit a bid, the specifications and requirements of the product can be fatal to the out-of-province suppliers. Domestic suppliers often have the possibility of making further inquiries and of obtaining additional information due to contacts within the governmental apparatus and to easier access to information.

Purchasing authorities can also discriminate against out-of-province suppliers by granting a short time period between the notice of tender and the submission of bids. Since out-of-province suppliers are farther from the scene, they require more time to prepare and submit a bid which complies with domestic requirements. Short deadlines will necessarily have the effect of eliminating foreign suppliers from the government procurement market. Furthermore, domestic suppliers are often aware beforehand of forthcoming tenders. They therefore dispose of a clear advantage over out-of-province suppliers not only for the submission of bids within the time requirement but also for the preparation of well-structured tenders.

Discriminatory rules for qualification of suppliers may also prevent foreign suppliers from submitting a bid. The purchasing authority may impose requirements pertaining to residence, registration, local representation, financial guarantees and evidence of ability to perform the contract. Out-of-province suppliers may be unable to comply with such requirements.

Finally, technical specifications of the product can be significant barriers. For different reasons, these requirements may be more easily satisfied by domestic suppliers. For instance, foreign suppliers may be unable to comply with certain specifications of quality and type of material to be used.

c) Third stage : submission, receipt and opening of tenders ; evaluation of tenders and award of contracts

At this stage, the foreign supplier may still be discriminated against in his bid for a purchasing contract. Thus, domestic suppliers may be offered the possibility of modifying their bids. Delay of reception of his bid at the correct destination will also prejudice the out-of-province supplier. The opening of tenders in secret and the awarding of contracts on the basis of vague criteria provide the pruchasing authority with other opportunities to discriminate against out-of-province suppliers.

d) Fourth stage : information and review

Information pertaining to the procurement procedures and the reasons for the decision is often difficult to obtain from the contracting authority.

Out-of-province suppliers are therefore kept in the dark about the procurement procedures. Furthermore, complaints are often useless since a proper grievance procedure is rarely provided for. An unsuccessful out-of-province supplier has little hope of seeking redress from a discriminatory government procurement procedure.

1.3.2. Forms of protectionist policies

Governments use various instruments to grant preferential treatment to domestic suppliers. These forms may differ according to the level of government, federal or provincial. The United States' approach will also serve as comparison.

1.3.2.1 Federal barriers

There exist various ways by which the federal government grants preferential treatment to domestic suppliers. The most visible form of barrier to the free flow of international goods is the Canadian content preference. Subsection 4(1) of the *Tenders and Works Contracts By-law*[4] provides that:

> No contract for the execution of any work shall be awarded by the Corporation for an amount in excess of $ 1 million if the content of the tender of the person to whom the contract is to be awarded is not predominantly Canadian unless the Corporation obtains the approval of the Governor in Council.

In a less visible way, foreign suppliers may also be discriminated against at the first stage of the procurement process through single tendering procedures. In that respect, section 8 of the *Government Contracts Regulations*[5] provides that the contracting authority may be exempted from inviting tenders under certain circumstances and therefore may contact a single supplier.

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4. SOR/83-242, 18 March, 1983, Canada Gazette Part II, Vol. 117, nº 7 p. 1178; see also, *Halifax Tenders and Works Contract By-law*, SOR/84-417, 31 May, 1984, Canada Gazette Part II, Vol. 118, nº 12, p. 2544, sections 4(1)(b), 4(2); *Prince Rupert Tenders and Works Contract By-law*, SOR/84-420, 31 May, 1984 Canada Gazette Part II, Vol. 118, nº 12, p. 2556, sections 4(1)(b), 4(2); *Quebec Tenders and Works Contract By-law*, SOR/84-423, 31 May, 1984 Canada Gazette Part II, Vol. 118, nº 12, p. 2569, sections 4(1)(b), 4(2); *St-John's Port Corporation Tenders and Works Contract By-law*, SOR/85-991, 10 October, 1985 Canada Gazette Part II, Vol. 119, nº 22, p. 4391, sections 4(1)(b), 4(2).
5. C.R.C. 1978, Vol. VII, c. 701.

1.3.2.2. Provincial barriers

The province of Québec has adopted a wide range of laws, regulations and directives which have adverse effects on the free flow of goods between provinces. Many of these complex policies are not fully understood due in part to poor documentation and to administrative discretion used in applying them fully.

Different discriminatory measures have been enacted such as provisions pertaining to inadequate publicity of the tender [6], short time limits [7], stringent qualification requirements for foreign suppliers [8], specifications with respect to domestic materials [9] and vague criteria for awarding contracts [10].

1.3.2.3. Comparison with the U.S. situation

As a means to alleviate the economic situation and unemployment, to develop local industries and to retaliate against similar protectionist measures in other countries the United States has also enacted preferential measures for domestic products. Not only the federal government but also state governments have imposed such non-tariff barriers to trade. In fact, many of the state laws have been patterned on the federal model.

a) Federal *Buy-American Act* [11]

Enacted in 1933, the Federal *Buy-American Act* imposes a Buy-American requirement on direct acquisitions of materials by federal agencies or material used by private contractors in the construction of federal public works. However, this prohibition on the purchase and use of foreign goods is not absolute. The Act provides exceptions in cases where it is in the public interest to purchase foreign goods, where the domestic cost is unreasonable and where the domestic products are not available in sufficient and reasonable quantity and of satisfactory quality. The key provision provides as follows :

6. See *Regulation respecting government construction contracts*, R.R.Q. 1981, c. A-6, r. 7, s. 11.
7. See *Government Supply Contracts Regulation*, O.C. 2400-84, 31 October, 1984 Gazette Officielle du Québec Part II, Vol. 116, nº 48, p. 3823, s. 13.
8. See *Regulation respecting government service contracts*, R.R.Q. 1981, c. A-6, r. 8, s. 5g).
9. See *Modalités d'application de la politique d'achat dans la construction*, C.T. 149240 of March 13, 1984, s. 1.
10. See *Regulation respecting government construction contracts*, R.R.Q. 1981, c. A-6, r. 7, s. 23.
11. 41 U.S.C. § 10a–10d (1976).

> [...] [U]nless the head of the department [...] concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, [...] for use outside the United States, or if articles, [...] or the articles, [...] from which they are manufactured [...] in the United States [are not available] in sufficient and reasonably available commercial quantities and of a satisfactory quality. [12]

b) State Buy-American acts

The enactment of state Buy-American laws arose out of the same desire to relieve a sagging economy, unemployment and to develop domestic industries. There exists a widespread use of these preferential policies in bids for state government procurement contracts. State preferences can be found not only in statutes but also in administrative rules and in individual contract requirements.

Several types of Buy-American provisions can be distinguished. The absolute form prohibits any government procurement of foreign-produced goods. Price differential or availability and equality of product are not impediments to the application of this rule. In *Bethlehem Steel Corp v. Board of Commissioners* [13], a California *Buy-American Act* which had this effect was declared unconstitutional. Usually, state Buy-American policies take the limited form which gives preference to domestic products unless it is inconsistent with the public interest, the domestic cost is unreasonable or the domestic product is not available in the desired quantity and quality. Finally, some state preferences are termed limited-specific, the preferential policy being applicable only to a given product.

2. Legality of Protectionist Measures Under a Federal Constitution (Québec, Canada and the U.S.)

As territorial barriers to trade, protectionist policies are an impediment to any free trade objectives. Moreover, the legality of these practices is arguable under existing constitutional law (section 2) and international

12. *Supra*, note 11, section 10a.
13. 276 Cal. App 2d, 221, 80 Cal Rep. 800 (1969).

agreements (section 3). This section proposes to deal first with the legality of these measures with respect to a federal constitution.

Do there exist constitutional limitations on the provincial and state power to enact preferential procurement policies? On the whole, these policies affect free and competitive trade within the country. The concept of federalism implies a sharing of power, exclusive jurisdiction being vested in both levels of government according to the constitutional distribution of powers. The legality of these state and provincial protectionist measures must therefore be examined more specifically with respect to the constitutional power over interprovincial trade and with respect to mobility rights and equality rights within the country.

2.1. Interprovincial trade

The nature of the federal power over interprovincial trade may provide a basis for challenging the legality of protectionist procurement policies. As barriers to interprovincial trade, these policies have a certain effect upon the regulation of interprovincial trade.

2.1.1. The federal jurisdiction

Both American and Canadian constitutional texts have vested in their respective federal governments power over interprovincial and interstate trade. However, judicial interpretation has somewhat restricted this federal jurisdiction and granted more latitude to provincial and more even so to state governements.

2.1.1.1. In Canada

a) The principle

Subsection 91(2) of the *Constitution Act, 1867*, confers upon the federal parliament the power to make laws in relation to "the regulation of trade and commerce". Judicial interpretation has since long confined this federal jurisdiction to interprovincial or international trade and commerce and to "general trade and commerce"[14]. Power over intraprovincial trade and commerce is vested in the provincial governments in accordance with subsection 92(13) of the *Constitution Act, 1867*, which confers provincial power over "property and civil rights".

14. *Citizens' Insurance Co. v. Parsons*, (1881-82) 7 App. Cas. 96.

b) The restrictions

A provincial statute in relation to subsection 92(13) will not be invalidated if it incidentally affects interprovincial trade. [15] Therefore, it is important to determine whether the pith and substance of the act is related to a provincial power and merely affects incidentally interprovincial trade and commerce or whether it pertains to interprovincial trade and commerce.

2.1.1.2. In the U.S.

a) The principle

The commerce clause of the *U.S. Constitution* [16] authorizes Congress to "regulate Commerce [...] among the several States [...]". As the main source of congressional regulatory power over commerce, this clause also implicitly restricts state legislative power. However, it has been left to the courts to interpret the scope of permissible state regulation particularly in the absence of congressional legislation. Extreme interpretations have been rejected. In general, if the regulation related more to a state interest than constituting a burden to interstate commerce, the court will uphold the state legislation [17].

b) The restrictions

State courts have recognized a zone of immunity from commerce clause attack for states acting in a "proprietary capacity" [18]. In fact, states acting as buyer or seller of goods or services like private businesses may substantially affect interstate commerce. According to the proprietary action doctrine, states like any other individuals or businesses have a right to choose their business partners without being hampered by commerce clause restraints.

2.1.2. Application to protectionist procurement policies

In light of the federal power over interprovincial and interstate trade and the judicial limitations added to this jurisdiction in favour of the states, it is

15. *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] R.C.S. 238.
16. *U.S. Constitution*, a. 1, s. 8, cl. 3.
17. See *Nibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).
18. See *City of Denver v. Bossie*, 83 Colo, 329; 266 P. 214 (1928); *Tribune Printing & Binding Co. v. Barnes*, 7 N.D. 591; 75 N.W. 904 (1898).

important to examine how the courts have interpreted the legality of protectionist procurement policies. The objective sought by these policies and their impact upon federal jurisdiction has yet to be considered.

2.1.2.1. In Canada

The Canadian constitution is silent as to provincial governmental purchases. In general, the provincial government has the power to conclude contracts with whomever it pleases. Subsection 92(13) which confers provincial jurisdiction over "Property and Civil Rights in the Province" is the habilitating provision. The regulation of intraprovincial trade comes within the ambit of this section.

However, as barriers to trade, preferential procurement policies exceed the scope of intraprovincial trade and may encroach upon the federal power over interprovincial trade. The constitutionality of these policies has not yet been challenged in courts. The administrative nature of these policies does not prompt judicial determination. Nevertheless, the late chief justice Laskin's *obiter* in *Re Agricultural Products Marketing*[19] raises a doubt as to the constitutionality of these policies:

> [...] [T]he federal trade and commerce power also operates as a brake on provincial legislation which may seek to protect its producers or manufacturers against entry of goods from other Provinces.

2.1.2.2. In the U.S.

The constitutional validity of state Buy-American restrictions remains unresolved. The United States Supreme Court has been silent on the matter but state court decisions have directly addressed the issue. However, Supreme Court decisions on state acts impairing trade and the proprietary action doctrine with respect to the commerce clause have influenced the outcome of these cases.

a) State acts impairing trade

The Supreme Court has relied on the commerce clause to invalidate state legislation which impairs interstate commerce[20]. Under the balancing test, state regulations will be struck down if the consequences for interstate commerce are greater than the local benefits or if less restrictive measures could have been used to achieve the same ends.

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19. [1978] 2 S.C.R. 1198, p. 1267.
20. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), p. 142.

b) State's immunity from the commerce clause restraints when acting in a proprietary capacity

State courts have determined that states purchasing goods and contracting for services have the same rights as other businesses to choose their contracting partners and therefore enjoy an immunity from commerce clause attack.

In *American Yearbook Co. v. Askew*[21], a publisher engaged in the business of printing yearbooks for schools and universities but lacking printing facilities in Florida was prevented from obtaining a contract to print yearbooks for state-owned universities. A Florida statued required that "all public printing of this state shall be done in the state [...][22]. The publisher challenged this statute on the basis of the commerce clause restraints.

The federal district court applied the proprietary action doctrine to this case and dismissed any commerce clause attack. Despite out-of-state discrimination, the court ruled that the state acting in a proprietary capacity could impose conditions upon its purchases and thereby exclude companies who do not perform their printing in Florida.

In *White v. Massachusetts Council of Construction Employers*[23], the United States Supreme Court upheld an executive order issued by Boston mayor White which provided that Boston residents perform at least 50% of the work on city-financed construction projects. As a major participant in the construction project it wholly funded, the city was acting in a proprietary capacity rather than as a market regulator. Although, the executive order required private contractors to hire a certain percentage of city residents and therefore appeared to regulate parties not dealing directly with the city, the latter was sufficiently involved in the project to benefit from the market participant exemption.

2.1.3. Impact upon protectionist procurement policies

Since Canadian courts have not yet dealt with the validity of provincial preferential purchasing policies, American judicial interpretation is of valuable interest. Adapted to the Canadian context, American decisions dealing with the issue will provide a guideline. Under the traditional balancing test,

21. 339 F. Supp. 719 (M.D. Fla.) aff'd 409 U.S. 904 (1972).
22. FLT. STAT. ANN., s. 283.03 (West 1974).
23. 460 U.S. 204 (1983); see also *Reeves Inc. v. Stake*, 447 U.S. 429 (1980); *Hugues v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

provincial preferential purchasing policies which unreasonably burden the flow of interprovincial goods notwithstanding inexistant federal regulation should be held unconstitutional. However, the proprietary action doctrine provides provincial governments discriminating in favour of their citizens in markets of their own creation, with an immunity. In fact, a province acting as a market participant could, as a valid exercise of its police power, substantially affect interprovincial trade. In order to delineate the scope of the market participant exemption, one should refer to the United States Supreme Court decision in *South Central Timber Dev., Inc. v. Wunnicke*[24] and transpose it to the Canadian context:

> The market-participant doctrine permits a State to influence "a discrete, identifiable class of economic activity in which [it] is a major participant". [...] the doctrine is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity.

Subsection 91(2) of the *Constitution Act, 1867* is a strong argument for the invalidation of provincial barriers. Preferential procurement policies attempt partially to deal with economic union problems. Such a matter should be left to the federal parliament. Not only are they a significant barrier to economic integration within a federal country but they also offend individual economic rights, namely the right to mobility within a country.

2.2. Mobility rights

Within a democratic society, the right to move, to work and to take up residence is not only of economic importance but above all a fundamental right to the freedom of any person. By discriminating against out-of-province or out-of-state suppliers, preferential procurement policies are an impediment to mobility and consequently to greater integration. Suppliers are not free to move and work anywhere within the country. In that respect, the nature and extent of mobility rights may form the basis to challenge preferential procurement policies.

2.2.1. The federal jurisdiction

Mobility rights are constitutionally guaranteed both in the United States and Canada. They constitute a fundamental right to live and work anywhere in the country. However, these rights may conflict with provincial and state

24. 467 U.S. 82 (1984), p. 97.

objectives for the greater well-being of local residents and for local industrial development. The desire to strengthen these economies through preferential policies also conflicts with federal policies of national economic integration. Before considering the legality of protectionist measures with respect to mobility rights, the meaning and scope of these rights must be examined.

2.2.1.1. In Canada

a) The general rule : subsection 6(2) of the *Canadian Charter of Rights and Freedoms*

Section 6 of the *Canadian Charter of Rights and Freedoms* guarantees mobility rights to all Canadians. Subsection 6(2) states the general rule which concerns this paper :

> (2) Every citizen of Canada and every person who has the status of permanent resident of Canada 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.

Subsection 6(2) grants a constitutional right to citizens and to permanent residents of Canada. As defined in the *Canadian Citizenship Act*[25] and the *Immigration Act*[26], these terms are confined to natural persons. Consequently, corporations would therefore be excluded from the right set out in section 6[27]. However, if the term permanent resident is not defined according to the technical *Immigration Act* definition, a broader interpretation of subsection 6(2) could benefit corporations. In a few recent cases pertaining to other constitutional rights, the courts have considered corporations as "persons"[28]. Furthermore, for income tax purposes, corporations are considered residents on the basis of their incorporation in Canada or the control held by Canadian citizens. By relying on other charter rights interpretations and income tax case-law, the term "permanent resident" could therefore encompass corporations.

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25. R.S.C. 1970, c. C-19.
26. R.S.C. 1970, c. I-2.
27. *Groupe des éleveurs de volailles de l'est de l'Ontario v. Can. Chicken Marketing Agency*, (1987) 20 Admin. L.R. 91 (F.C. T.D.).
28. *Hunter v. Southam*, [1984] 2 S.C.R. 145 (applying s. 8 at suit of corporation) ; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (applying s. 2 at suit of corporation) ; *R. v. Videoflicks Ltd.*, (1984) 48 O.R. (2d) 395 (Ont. C.A.) (applying s. 2 at suit of corporation).

b) Limits to the general rule

— Subsection 6(3)(a) : Laws or practices of general application/Discrimination primarily on the basis of province of residence.

Subsection 6(3)(a) provides a limitation on the rights enacted in subsection 6(2). It states :

> (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 ; [...]

Subsection 6(3)(a) operates as an exception to subsection (2) if two conditions are met. First, the restriction to subsection 6(2) rights must be enclosed in a law or practice of general application in force in a province. This expression is broad enough to include any form of government action [29]. Secondly, the restrictions to subsection 6(2) rights must not discriminate primarily on the basis of province of residence. However, if the restrictions are related to a legitimate purpose of provincial concern which does not discriminate primarily on the basis of extra-provincial residence, then they will be upheld. Discrimination consists of any type of differential treatment. Discrimination primarily on the basis of the province of residence will constitute a *prima facie* violation of subsection (2). However, under section 1 of the Charter, the proof that the restriction prescribed by law is reasonable and "[...] can be demonstrably justified in a free and democratic society" will save the statute.

— Subsection 6(4)

Subsection (4) provides as follows :

> (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.

In the absence of a mechanism providing for the determination of the rate of employment, Statistics Canada monthly Labour Force Surveys should be relied upon. On that basis, a majority of the provinces would be allowed to establish affirmative action programs [30].

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29. See *Malartic Hygrade Gold Mines (Québec) Ltd* c. *R. (Québec)*, [1982] C.S. 1146 ; (1982) 142 D.L.R. (3d) 512.
30. J.B. LASKIN, "Mobility Rights under the Charter", (1982), 4 *Supreme Court L.R.* 89.

2.2.1.2. In the U.S.

a) The interstate privileges and immunities clause

The most significant constitutional source for protection of mobility rights in the United States is found in article 4 section 2 of the *United States Constitution* which provides as follows:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

— Interpretation

The privileges and immunities clause insures that citizens travelling to one state are conferred the same rights possessed by the citizens of that state. State legislation discriminating against out-of-state citizens is subject to the privileges and immunities clause attack. The clause was also designed to strengthen unity among states and to prevent the development of an independent union of states. As stated by Chief Justice Vinson, "The primary purpose of this clause, [...] was to help fuse into one Nation a collection of independent, sovereign States"[31].

— Scope

The right to interstate mobility is not an absolute freedom. It guarantees the right to "[...] travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement" and to "[...] migrate, resettle, find a new job, and start a new life [...]"[32]. The clause also protects the right of citizens to seek employment in any state without being restricted by unreasonably discriminatory measures[33].

— The special case of corporations

Artificial entities such as corporations do not benefit from the protection granted by this clause[34]. The term "citizens" applies to natural persons but

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31. *Tommer v. Witsell*, 334 U.S. 385 (1948), p. 395.
32. *Shapiro v. Thompson*, 394 U.S. 618 (1969), p. 629.
33. *Ward v. Maryland*, 12 Wall 418 (1871).
34. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869); *Bank of Augusta v. Eale*, 38 U.S. (13 Pet.) 519, 586 (1839).

not to artificial persons. In fact, corporations are created by the legislature and therefore are granted special privileges. They owe their existence to the state law and therefore cannot claim recognition beyond the territory where they were created. Consequently, states are entitled to discriminate against out-of-state corporations since the application of the privileges and immunities clause does not extend to corporations.

— **The test to be applied under Art. IV section 2 : "a two-step analysis"**

The first step is to determine whether the legislation affects a privilege or immunity protected under article 4. Not all forms of discrimination are secured by this provision. As stated by Justice Blackmun in *Baldwin v. Fish and Game Commission of Montana* :

> Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted ; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally. [35]

The second part of the test must also be met to invalidate a discriminatory measure. The protection granted by article 4 is not absolute. A legislation will be upheld if there is a "[...] reasonable relationship between the danger represented by non-citizens, as a class, and the [...] discrimination practiced upon them" [36]. Consequently, not only must the state establish that non-residents constitute a particular source of evil but also that the legislation is substantially related to this evil.

2.2.2. Application of the principle

It is interesting to examine how both Canadian and American courts have dealt with the mobility rights issue. Judicial interpretation is essential to delineate these rights and thus measure their impact upon provincial and state legislation. As such mobility rights are fundamental, a liberal or narrow interpretation of their scope will determine the validity of various legislations which constitute an impediment to mobility.

35. 435 U.S. 371 (1978), p. 383.
36. *Toomer v. Witsell, supra*, note 31, p. 399.

2.2.2.1. In Canada

a) Statutory enactments

Provincial preferential purchasing policies unquestionably impede inter-provincial mobility. These policies appear in statutes, regulations enacted pursuant to them, and in directives of internal management. Provinces often regulate government procurement by discriminating against out-of-province residents.

b) Cases and comments

— Under subsections 6(2) and (3)(a) of the Charter

In *Basile v. A.G. of Nova Scotia*[37], an encyclopedia salesman from the province of Québec was denied a direct seller's lience on the ground that the Nova Scotia *Direct Sellers' Licensing and Regulation Act* required a salesman to be a permanent resident of Nova Scotia to obtain such a licence. The court ruled that the regulation violated subsection 6(2) of the Canadian Charter. By preventing non-residents from carrying on business as direct sellers in Nova Scotia, the statute breached the right to interprovincial mobility. Furthermore, subsection 6(3)(a) did not save the legislation since it was not a law of general application. On the contrary, it applied specifically to one group, namely non-residents.

In the *Demaere* case[38], an air traffic controller from Fort St. John was excluded from a position in Vancouver since he did not reside in the area where the position was offered. By virtue of paragraph 3(a) of the *Public Service Employment Act*[39], the Public Service Commission was authorized to determine the area of residence of a candidate in order to be eligible for a position. The competition was therefore closed to those who did not reside in the Pacific region. Fort St. John is located in the north-western region.

The court upheld the legislation on the basis of subsection 6(3)(a). The *Public Service Employment Act* was held to be a law of general application. Federal laws come within the purview of this provision. Furthermore, the statute did not discriminate primarily on the basis of the province of residence

37. (1983) 148 D.L.R. (3d) 382 (N.S.S.C.), p. 384, inf. at 62 N.S.R. (2d) 410 (N.S.C.A.), p. 415.
38. *Demaere v. Canada*, (1984) 52 N.R. 288.
39. R.S.C. 1970, c. P-32.

but rather on the basis of employment in a region. This interpretation is arguable since it drastically narrows the scope of section 6. Discrimination affecting out-of-province residents will be upheld if the impugned legislation discriminates on a basis other than the province of residence. The effect upon out-of-province residents may however be the same.

— Under subsection 6(4) of the Charter

The short-lived history of the Canadian Charter has not yet brought before the courts the issue of affirmative programs with respect to mobility rights. Subsection 6(4) excludes from subsection 6(2) certain affirmative action programs. However, the type of affirmative action programs contemplated by this provision has yet to be determined.

2.2.2.2. In the U.S.

American courts possess an extensive experience in the interpretation of mobility rights under article IV section 2 of the *United States Constitution*. Judicial interpretation is therefore significant and has fashioned the latitude of states to interfere with mobility.

a) Statutory enactments

Discriminatory impediments to mobility are widespread in employment preference statutes. Some statutes provide preferential treatment to state or city residents for employment by state or municipal governments. Other statutes require that private contractors create a hiring preference for resident state or city workers.

Such employment preference measures are subject to article IV section 2 scrutiny. Employment is a basic and essential activity. Courts have already stated that the privileges and immunities clauses prevent "[...] a State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State [...]"[40]. The scope of this clause is also broader than that of the commerce clause. Legislation is therefore subject to closer scrutiny under the former.

40. *Baldwin v. Fish and Game Commission of Montana, supra*, note 35.

b) Cases

In *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*[41], an ordinance of the City of Camden, adopted in conformity with the New Jersey statutory provisions, required that all city contractors and subcontractors hire at least 40% of their employees from Camden residents. The court ruled that these provisions violated the privileges and immunities clause even though the discrimination was based on municipal as opposed to state residency[42]. In-state residents not living in the City who are similarly disadvantaged have no claim under this clause; they can always voice their disapproval at state elections. This fact does not prevent out-of-state residents from seeking a remedy under article 4[43].

Finally, consideration must be given to the *Hicklin v. Orbeck*[44] case. The Supreme Court struck down an affirmative action program, the "Alaska Hire" law, which required that all Alaska oil and gas leases contain a provision that qualified Alaska residents be employed by preference to non-residents. The court ruled that the statute did not bear a substantial relationship to the evil to be eliminated. In fact, assuming that a state may alleviate its unemployment problem by requiring private employers to hire in-state residents, the present unemployment problem was not due to out-of-state residents seeking employment in Alaska. The unemployment of in-state residents was due rather to their lack of education and job training and their remoteness from job opportunities. Moreover, even if the "Alaska Hire" law was aimed at eliminating an evil caused by non-residents, the statute would still be unconstitutional since the statutory employment preference is not given only to Alaska's unemployed but to all in-state residents.

2.2.3. Impact upon protectionist procurement policies

United States constitutional law is a profitable source for the interpretation of entrenched mobility rights in Canada. American constitutional texts and judicial interpretation offer an important guideline which could be used by the Canadian courts as a historical background to the interpretation of section 6 of the *Canadian Charter of Rights and Freedoms*.

41. (1984) 52 U.S. Law Week 4187, 465 U.S. 208 (1984).
42. *Id.*, p. 220.
43. *Baldwin v. Fish and Game Commission of Montana*, *supra*, note 35.
44. 437 U.S. 518 (1978).

The twofold test applied by Justice Rehnquist in the *Camden* case[45] could be usefully transposed for the purpose of subsection 6(2) and 6(3) of the Canadian Charter. In this respect, considering that not all forms of discrimination are constitutionally suspect, Canadian courts should therefore determine whether the legislation breaches a fundamental right guaranteed by section 6. However, such discriminatory legislation will not violate section 6 unless the legislation bears a substantial relationship to the evil sought to be eliminated. The last part of this test requires a close examination of the impugned legislation, of its scope and rationale.

With respect to subsection 6(4), the American case of *Hicklin v. Orbeck*[46] is of interest. In line with the court's reasoning, a provincial employment preference policy would have to benefit the unemployed and not all of the in-province residents to come within the purview of subsection 6(4). An affirmative action program must necessarily be aimed at helping the socially and economically deprived citizens of the province. It is not sufficient to simply grant an employment preference to all residents. The policy must bear a substantial relationship to job promotion for the province's unemployed who may often lack job training and education.

2.3. Equality rights

Equality rights are fundamental to any democratic society. Governmental action must therefore respect the right of every individual to equal treatment. Consequently, preferential procurement policies may be illegal in that they are directly aimed at creating a different treatment between citizens of a country. The legality of these policies depends upon the nature and scope of equality rights in a country.

2.3.1. The principle of equality

The right to equal treatment before and under the law has been entrenched in the Canadian constitution through the *Canadian Charter of Rights and Freedoms*. The short-lived history of the Charter provides little judicial interpretation of this right. The *United States Constituton* and its equal protection clause can therefore constitute a helpful guideline to interpreting the Canadian equality clause.

45. *Supra*, note 41.
46. *Supra*, note 44.

2.3.1.1. In Canada

a) Section 15 of the *Canadian Charter of Rights and Freedoms*

Section 15 of the Canadian Charter provides as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law [...] and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Not only does section 15 offer protection against the unequal application of the law but it also protects against any type of law which discriminates on the basis of equality. Section 15 has therefore a wide application.

b) Broad interpretation

The application of subsection 15(1) is not limited to the types of discrimination enumerated in that section; it is a general equality clause. The use of the words "[...] in particular [...]" favours this broad interpretation of the grounds of discrimination. Other grounds such as preferential employment treatment for provincial residents would also be subject to section 15 scrutiny.

c) "Individual"

Section 15 applies to every "individual". Originally, the term "every one" had been used but was later substituted for "individual". It is believed that this substitution may indicate an intention to exclude the application of section 15 to corporations. Professor Hogg[47] supports this position which was also adopted in a few recent cases[48].

However, the French version of section 15 lends itself well to a broad interpretation benefiting corporations. In fact, considering the term "personne" used in the French version and the liberal interpretation adopted with respect

47. P. Hogg, *Constitutional Law of Canada*, 2 nd ed., Toronto, Carswell, 1985, p. 798.
48. *Smith Kline and French Laboratories Ltd v. A.G. Can.*, (1985) 7 C.P.R. (3d) 145 (F.C.T.D.), 192 (p. 67 of the french translation), affirmed by (1986) 34 D.L.R. (4th) 584 (F.C.A.): it should be noted that the issued relating to the interpretation of the word "individual" under section 15(1) of the Canadian Charter has not been raised before the Federal Court of Appeal; *Surrey Credit Union v. Mendonca, Mendonca and Union Electric Supply Co. Ltd*, (1985) 67 B.C.L.R. 310 (B.C.S.C.), p. 311; *Mund v. Medicine Hat*, (1986) 67 A.R. 11; *Milk Board v. Clearview Dairy Farm Inc.*, (1987) 12 B.C.L.R. (2d) 116 (C.A.).

to section 15, any doubt may be resolved in favour of an application of this provision to corporations [49].

d) Affirmative action

Subsection 15(2) provides that:

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

2.3.1.2. In the U.S.

The United States has over a hundred years of experience in the interpretation of equality rights. To the extent that certain similarities exist between these Canadian and American rights, the American case-law can certainly benefit Canadian courts in their interpretation of section 15.

a) The equal protection clause (Section 1 of Amendment XIV of the Constitution

Section 1 of Amendment XIV of the Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 law; nor deny to any person within its jurisdiction the equal protection of the laws.

b) Textual differences between the Canadian and American Equality guarantees

The American and Canadian texts pertaining to equality rights differ in four significant ways. First, the 14th Amendment does not contain a specific mention of equality benefits as section 15 does.

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49. *Milk Board v. Clearview Dairy Farm Inc.*, (1986) 69 B.C.L.R. 220, p. 245 (Justice Toy); see also with respect to applicability of other provisions to corporations, *supra*, note 28. But see *Société United Docks v. Government of Mauritius*, [1985] 1 A.C. 585, where the Privy Council held that the word "individual" included corporations, when used in a constitutional provision.

Secondly, the 14th Amendment is silent with respect to affirmative action programs. American courts have therefore had to elaborate criteria for the determination of the legality of affirmative action programs. Consequently, the United States Supreme Court has required these programs to have substantial relationship, as opposed to a rational relationship, to a legitimate state objective. Affirmative action programs are explicitly mentioned in subsection 15(2) of the Canadian Charter. However, the provision imposes a lesser standard of review, namely a rational relationship standard.

Thirdly, the 14th Amendment does not indicate what types of restrictions are discriminatory and unconstitutional. The courts have had to elaborate a test to determine the validity of certain distinctions. The Canadian context is however different. Section 1 of the Canadian Charter serves as a guideline by limiting the rights and freedoms guaranteed in the Charter. Therefore, limitations on equality rights, prescribed by law, will be upheld, notwithstanding a *prima facie* violation of section 15, if they are reasonable and can be demonstrably justified in a free and democratic society.

In view of these textual differences, American cases should be referred to with circumspection for the interpretation of Canadian equality rights. However, the extensive judicial interpretation of the American equal rights clause is a formidable resource. In fact, American case-law should be viewed as a primary source for Canadian courts for defining equality rights.

c) Three possible tests to be applied

The United States Supreme Court has developed three standards of judicial review in its analysis of equal rights.

— Strict scrutiny standard

The strict scrutiny standard is used when a fundamental right such as the right to vote or to interstate travel is violated or a suspect classification is used such as race. The government must establish that the classification was justified by a "compelling state interest" and that no other means were available. Because such a heavy burden is placed upon government, there is practically a *per se* rule of unconstitutionality of such legislation.

— Minimal scrutiny standard

Laws that are not "suspect" and do not affect a fundamental right are subject to the minimal scrutiny standard. This test simply requires that the

impugned law bear a rational relationship to the objective sought to be accomplished. Economic legislation is often subject to this test of minimal scrutiny.

— Intermediate scrutiny standard

Recently the United States Supreme Court has developed an intermediate scrutiny test which offers a more flexible standard than the strict scrutiny standard but still requires that the law bear a "substantial relationship" to an "important government objective". This test is aimed at classifications which are not suspect but which are too important to be subjected to only a minimal scrutiny standard, such as classifications by sex.

This test was adopted in *Craig v. Boren*[50] where the Supreme Court struck down an Oklahoma statute which prohibited the sale of 3.2% beer to men under 21 and women under 18 to prevent road accidents due to drunkenness. This position was supported by statistics indicating a higher percentage of alcohol related car accidents by young men than young women. Although this evidence would have been sufficient to uphold the law under a minimal scrutiny standard, the court was more severe and struck down the law on the ground that it failed to meet the intermediate scrutiny test.

d) "Persons" includes corporations

Artificial entities such as corporations can claim the benefit of the equal protection clause. The term "person" used in the 14th Amendment clearly includes corporations[51].

2.3.2. Application of the principle

2.3.2.1. Section 1 and section 15 of the Canadian Charter

Different means are used by the provincial governments to provide preferential treatment to in-province suppliers in their grant of contracts. Thus, governments may impose performance requirements suited to the

50. 429 U.S. 190 (1976).

51. *Convington and L. Turnpike Road Co. v. Sandford*, 164 U.S. 578 (1896); *Smyth v. Ames*, 169 U.S. 466 (1897); *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 578 (1896); *Grosjean v. American Press Co.* 297 U.S. 233 (1936); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

capability of local producers or resort to pre-established lists from which an out-of-province supplier may find some difficulty to be added to or provide a pricing advantage to in-province bids or finally grant a preference to goods having a high provincial content.

These distinctions providing for employment preferences to in-province residents constitute clearly a *prima facie* violation of section 15. Nevertheless, such a policy may be upheld under section 1 of the Canadian Charter if the distinction prescribed by law is a reasonable one and can be demonstrably justified in a free and democratic society. Section 1 of the Canadian Charter provides that:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits [...] as can be demonstrably justified in a free and democratic society.

The onus rests on the government. However to bring about the application of section 1, the government must prove that the measure is prescribed by law. The act must therefore be authorized under the law to claim the application of section 1. According to the European Court of Human Rights [52], the phrase "prescribed by law" imposes a double requirement. First, the law must be adequately accessible to the public. Furthermore, it must be formulated with sufficient precision to enable the citizen to regulate his conduct by it. A statute, a regulation or a by-law enacted in accordance with statutory provisions as well as common law are within the purview of section 1 [53]. However, directives and guidelines which are not officially published delegated legislation do not qualify as "law" for the purpose of section 1 unless they are binding upon the officials to whom they apply [54].

Preferential procurement policies adopted by the provinces may not therefore meet the requirement standards set out in the case-law. Most of these policies are not contained in statutes or regulations but rather in directives or guidelines. Governments may not therefore rely on section 1 to save these policies. A *prima facie* finding of discrimination under section 15 should suffice to invalidate them.

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52. *Sunday Times v. United Kingdom*, (1979) 2 European Human Rights Reports 245.
53. *RWDSU v. Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573.
54. *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors*, (1984) 45 O.R. (2d) 80 (Ont. C.A.). In this case, standards contained in a pamphlet published by the Ontario's Board of Censors did not qualify as law under section 1. Even though the standards provided useful indications to a film maker as to the appreciation of the film, they had no legal force and were not binding on the Board.

2.3.2.2. Subsection 15(1)

The case-law with respect to subsection 15(1) is scarce and prompts us to refer to the American case-law as a guide to interpreting Canadian equality rights. However, the textual differences referred to earlier [55] must be understood and borne in mind. A Canadian author, Neil Finkelstein, opines that Canadian courts should adopt the minimum scrutiny test with respect to economic regulation whereas the strict scrutiny test should prevail in matters of suspect classifications. However, matters which are important but do not involve fundamental rights or suspect classifications must be considered with circumspection [56]. The minimum scrutiny standard appears not only inadequate in this instance in view of the American case of *Craig v. Boren* [57] but also in view of section 1 of the Canadian Charter which imposes a considerably higher standard of judicial review.

Consideration should be given to the American case of *Galesburg Construction Co. v. Board of Trustees* [58]. Shortly after its incorporation under the laws of Wyoming, Galesburg Corporation was refused a construction contract although it was the lowest hidder on the basis that it did not qualify as a resident under section 9-8-301 of the Wyoming Statute which required a year of residency. Since the bid of the new lowest bidder, a resident, had not exceeded the bid of Gasleburg by more than 5%, the contract was awarded to this resident as directed by section 9-8-302 of the Wyoming Statute.

The majority of the Wyoming Supreme Court refused to apply the strict scrutiny standard to section 9-8-302 since fundamental rights such as the right to travel and vote do not extend to corporations under the 14th Amendment. Furthermore, Galesburg was not a member of a suspect class since such status has never been extended to corporations. Applying therefore the minimum scrutiny test, the court held that the purpose of the statute to "encourage local industry" was a legitimate state interest. By increasing the possibility that contracts will be awarded to Wyoming resident bidders, the statute is also rationally related to the advancement of this state interest. Justice Rooney, dissenting, considered however that the minimum scrutiny standard had not being met. State interest in encouraging local industry was not furthered since long-time Wyoming residents incorporated within the year prior to the bidding were kept from doing business.

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55. See Section 2.3.1.2. b).
56. N. FINKELSTEIN, "Sections 1 and 15 of the Canadian Charter of Rights and Freedoms and the Relevance of the U.S. Experience", (1985) 6 *Advocates' Quarterly* 188, p. 200.
57. *Supra*, note 50.
58. 641 P. (2d) 745 (Wyo. 1982).

2.3.2.3. Subsection 15(2)

The American courts remain unsettled as to the constitutionality of affirmative action programs with respect to racial minorities under the equal protection clause. In *Regents of the University of California v. Bakke*[59], the U.S. Supreme Court quashed by a majority of 5 to 4 an affirmative action program to help racial minorities in university admissions. Applying the intermediate scrutiny standard, the court held that a public university may consider race as a factor in admitting students to medical school and may give positive weight to an individual applicant's membership in a racial minority, but may not impose a quota system excluding candidates on the basis of race.

The issue has never been raised under the Canadian Charter. However, in a case arising under the *Canadian Bill of Rights*, Justice Ritchie opined that affirmative action programs providing employment preference for native people would not violate Alberta's human rights legislation[60]. In fact, affirmative action programs are constitutionally valid as long as they remain within the ambit of subsection 15(2) of the Canadian Charter.

The Manitoba Court of Queen's Bench in *Manitoba Rice Farmers Association v. Human Rights Commission*[61] appears to be one of the first Canadian courts to have dealt with the issue of subsection 15(2). In this case, the Manitoba Human Rights Commission had approved a department of natural resources special "affirmative action" program under section 9 of the *Canadian Human Rights Act* granting to certain indians a first option to licence new and surrendered areas for the purpose of growing and harvesting wild rice. An association of wild rice growers applied for *certiorari* to have the commission's decision quashed. The court ruled that the program violated subsection 15(1) since non-indian citizens of Manitoba were discriminated against and treated unequally. Nevertheless, subsection 15(2) creates an exception to the general rule. To save the program, the Commission must prove that it falls within the scope of subsection 15(2), by analogy with section 1 of the Charter. The court ordered a retrial to determine the validity of the program under subsection 15(2).

In a subsequent decision[62], the Court held that the program was not saved by subsection 15(2) since it was not likely to enhance the situation of the disadvantaged group, while causing prejudice to the white farmers. The real

59. 438 U.S. 265 (1978).
60. *Athabasca Tribal Council v. Amoco Canada*, [1981] 1 S.C.R. 699.
61. (1985) 37 Man. R. (2d) 50.
62. *Apsit v. Man. Human Rights Comm.*, Court of Queen's Bench, Manitoba, november 16, 1987.

obstacles that the Indians encountered were lack of funds and technical expertise to harvest wild rice. The mere granting of licences would not remedy these obstacles.

2.3.3. Impact upon protectionist procurement policies

American case-law is of limited application to the Canadian context. The interaction of sections 1 and 15 of the Charter prompts Canadian courts to develop their own interpretation of equality rights. However, American judicial interpretation of the permissible scope of legislative classifications and the standards established to this end are undoubtedly of valuable assistance to developing a principle of equality and a method for the resolution of equality rights issues.

In respect to the interpretation of the 14th Amendment and to sections 1 and 15 of the Canadian Charter, Canadian courts could follow the *Galesburg* decision [63] and adopt the minimal scrutiny standard to economic regulation such as provincial preferential purchasing policies. The latter will likely be considered constitutional since they pursue a legitimate provincial interest and the preference given to resident bidders is rationally related to that interest.

However, Canadian courts may refuse to follow the minimum scrutiny standard and prefer to rely on the test stated at section 1 of the Canadian Charter. A preferential policy must therefore represent a reasonable limit which can be demonstrably justified in a free and democratic society. This test requires a higher degree of scrutiny which could possibly result in the invalidation of these policies.

Moreover, the government must beforehand prove that the policies are prescribed by law before applying this test of reasonability. Unless these policies are enacted in a statute, a regulation or a by-law passed within the enacting body's legislative jurisdiction, they will not benefit from section 1. In view of the case of the *Ontario Film and Video Appreciation Society* [64], a directive or a guideline issued by government departments or agencies does not qualify as "law" for the purpose of section 1. Consequently, even assuming that preferential policies are reasonable and demonstrably justified, most of them are outside section 1's coverage since they are not legally authorized.

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63. *Supra*, note 58.
64. *Supra*, note 54.

3. Legality of Protectionist Measures and International Law

The distortion in international trade resulting from government preferential purchasing policies has become more and more apparent over the years. These policies favour the development of domestic markets while closing procurement to foreign tenders. The impact of these policies upon international trade prompts us to consider their legality with respect to international relations (section 3.1.). Federal jurisdiction over international relations imposes limitations upon provincial governments' ability to regulate their own economy. Furthermore, international agreements impose upon signatory countries obligations which must be respected. The nature of these obligations and their applicability to the relevant jurisdictions within a federal country will determine the legality under international law of preferential procurement policies (section 3.2.).

3.1. Federal jurisdiction in matters of international trade and commerce

The validity of preferential measures for products within the province over those produced in other provinces is distinct from the issue of the validity of preferential measures for goods and services produced within the province over those produced in other countries. Interprovincial preference policies have already been discussed (see 2.1.). This section purports to examine the validity of the latter type of policies under the federal power in matters of international trade and commerce (3.1.1.) and under the federal power to conduct foreign affairs (3.1.2.).

3.1.1. Federal power in matters of international trade and commerce

Provincial governments' procurement policies are a simple exercise of their power to contract. However, these policies could be challenged in view of the federal jurisdiction over international trade and commerce. Provincial governments as regulators of their economy may infringe on federal powers by awarding preference to in-province suppliers and consequently by discriminating against international suppliers.

3.1.1.1. The principle

1) In Canada

a) Federal jurisdiction

Subsection 91(2) of the *Constitution Act, 1867*, confers upon the federal parliament the power to make laws in relation to "The Regulation of Trade and Commerce".

b) Interpretation

Judicial interpretation has limited the scope of the commerce power under subsection 91(2). The Privy Council in *Citizens' Insurance Co. v. Parsons*[65] while acknowledging the provincial power over intraprovincial trade and commerce under the "Property and Civil Rights in the Province" power (subsection 92(13) of the *Constitution Act, 1867*) confined the federal power to interprovincial and international trade and commerce and to general trade and commerce.

c) Application

Courts must carefully examine the pith and substance of the statute to determine if it is within the legislature's jurisdiction. Furthermore, an incidental effect upon a federal power is not sufficient to invalidate a legislation enacted within the provincial government's legislative jurisdiction.

In *Central Canada Potash v. Government of Saskatchewan*[66], the Supreme Court of Canada struck down a statute rationing and fixing the price of potash which the government of Saskatchewan claimed were conservation and management measures within provincial jurisdiction. The court held that the pith and substance of the law was rather aimed at fixing and controlling the international and interprovincial price of the product and thus intruded upon the federal jurisdiction over interprovincial and international trade and commerce under subsection 91(2).

65. (1881-82) 7 App. Cas. 96.
66. [1979] 1 S.C.R. 42.

2) In the U.S.

a) The commerce clause

Article 1 section 8 clause 3 of the *U.S. Constitution* authorizes Congress to "[...] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

b) Interpretation of the commerce clause

The commerce clause grants to Congress power over both foreign and interstate commerce. Although these powers are conferred by the same clause and in the same terms and despite early authority to the contrary [67], modern decisions indicate that the states are subject to greater limitations and closer scrutiny with respect to international commerce than to interstate commerce [68].

3.1.1.2. Application of the principle

1) In Canada

Provincial preferential purchasing policies have not yet been the subject of judicial interpretation under the federal power over interprovincial and international trade and commerce. The administrative nature of these policies do not lend themselves well to judicial scrutiny. However, the constitutionality of preferential policies has frequently been litigated in the United States. The American courts' handling of the issue and practical approach will certainly serve as a valuable guideline.

2) In the U.S.

More than half the state governments have developed preferential purchasing policies that favour in-state goods over foreign goods. Many litigations have arisen under the foreign commerce clause as a result of unsuccessful contract bids by foreigners.

In *KSB Technical Sales Corp. v. North Jersey District Water Supply Commission of N.J.* [69], the respondent commission, a government agency,

67. *Thurlow v. Massachusetts*, 46 U.S. (5 Hav.) 504, (1847) p. 578; *Pittsburgh and S. Coal Co. v. Bates*, 156 U.S. 577 (1895), p. 587.
68. *Board of Trustees of University of Illinois v. United States* 289 U.S. 48, (1933),p. 59; *Bob-Lo Excursion Co. v. People of State of Michigan*, 333 U.S. 28 (1948), p. 34-40.
69. 75 N.J. 272, 381 T. (2d) 774 (1977), cert. denied, 435 U.S. 982 (1978).

which submitted specifications to prospective bidders for the procurement of pumping equipment for a water treatment plant, required that only available American manufactured products be used in the work. This power was derived from a New Jersey Statute which imposed a Buy-American requirement on public works contracts unless materials were not of satisfactory quality or the cost would be unreasonable or it would be impracticable to impose such a requirement [70]. The plaintiff, a subsidiary of a German pump manufacturer sought an injunction restraining the appellant from opening the bids on the ground that the Buy-American provision was unconstitutional.

The court ruled that the New Jersey Statute did not violate the commerce clause. The court reiterated that the state must not attempt to regulate the activity of private parties in a way that affects interstate or foreign commerce, that the local public interest must be weighed against the burden imposed on commerce and that the availability of other less onerous measures must be considered. Nevertheless, the court ruled that the present case involved the "legal impact of the state's entry into the market place as a purchaser of goods rather than as a regulator of the commercial activities of others" [71]. The court relied on the rule stated in *Hugues v. Alexandria Scrap Corp.*:

> A state's legislation with respect to its purchase of goods and materials for its own end use, at least in the absence of federal action, is not subject to the usual commerce clause restrictions. [72]

The court added that even if the state imposes a Buy-American requirement as opposed to a Buy New Jersey requirement, it still pursues a legitimate local purpose and is also exempt from commerce clause restrictions.

Another case which presents a different approach is the case of *Japan Line Ltd. v. County of Los Angeles* [73]. In this case, a California tax was imposed upon Japanese-owned cargo containers used exclusively for international commerce and temporarily stationed in California ports. Appellant attacked the constitutional validity of the Buy-American Statute which

70. Section 52: 33-3 of the Statute provides: "Every contract for the construction [...] of any public work in this state shall contain a provision that in the performance of the work the contractor and all subcontractors shall use only domestic materials in the performance of the work; but if the head of the department or other public officer authorized by law to make the contract shall find that in respect to some particular domestic materials, it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular material, and a public record made of the findings which justified the exception".
71. *Supra*, note 69, p. 785.
72. *Supra*, note 69, p. 787.
73. 441 U.S. 434 (1979).

imposed such a tax on the basis of the foreign commerce clause. The United States Supreme Court struck down the California *Buy-American Act*. It ruled that the foreign commerce power is greater that the interstate commerce power despite the similar provision of article 1 section 8. The Supreme Court discussed the importance of principles of "unanimity" or of "speaking with one voice when regulating commercial relations with foreign countries":

> "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power". [...] "the Federal Government must speak with one voice when regulating commercial relations with foreign governments". The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations". [74]

With respect to the *KSB* case, the court's conclusion that there is no need to differentiate between foreign and interstate commerce is questionable. This position has been explicitly rejected by the Supreme Court in the *Japan Line* case. Furthermore, the court's reliance on the *Alexandria Scrap* case was erroneous since the latter concerned interstate commerce.

The principle of unanimity with respect to foreign commerce developed in the *Japan Line* case introduces a new concept in determining the constitutionality of preferential policies under the foreign commerce clause. In view of this case, these policies will clearly be subject to closer scrutiny under the foreign commerce clause.

3.1.1.3. Impact of the principle upon protectionist procurement policies

A few conclusions may be reached from the American case-law with respect to the validity of provincial preferential purchasing policies. The *KSB* case provides great support to the claim of validity of these measures. However, this position appears to be based on shaky ground in view of the decision in the *Japan Line* case. The power to affect international trade and commerce under subsection 91(2) of the *Constitution Act, 1867* appears subject to closer scrutiny and consequently to a ruling of unconstitutionality. In fact, provincial preferential purchasing policies are clearly aimed at limiting foreign competition and imports and thus have a significant effect upon foreign commerce. The federal jurisdiction over international trade and commerce justifiably indicates a desire to "speak with one voice" in matter of international trade.

Furthermore, these policies serve no legitimate provincial interest as required by the *Alexandria Scrap* case since their pith and substance is clearly

74. *Supra*, note 73, p. 448, 449.

the protection of the Canadian market as opposed to the provincial market. These policies do not merely have an incidental effect upon federal policy over trade. They constitute more than an exercise by the provinces of their police power over its own citizens. These measures are directly aimed at Canadian citizens and thus interfere with federal jurisdiction.

3.1.2. Foreign affairs power

Foreign relations are a matter of national concern which must be vested exclusively in the federal government. In fact, the federal government represents the collective interest of the nation as a whole and must therefore be entrusted with full and exclusive responsability for the conduct of foreign affairs. To maintain control, unity and effectiveness, this power cannot be shared among the different levels of government. Government preferential purchasing has the effect of destabilizing the economic union and of creating adverse effect on foreign economic policy. The foreign affairs powers may represent a strong argument for invalidating such preferential policies.

3.1.2.1. The principle

1) In Canada : the rule

The foreign affairs power falls under the international trade and commerce category stated at subsection 91(2) of the *Constitution Act, 1867*. This interpretation was developed in the case of *Citizens' Insurance Co. v. Parsons*[75].

2) In the U.S. : the rule and its attenuation

The *U.S. Constitution* makes no express grant of power to the federal government over foreign affairs. Instead, the Constitution grants specific powers related to foreign relations to political departments without covering the whole field. Article 1 section 10 of the *U.S. Constitution* provides that : "No State shall enter into any Treaty, Alliance, or Confederation ; [...] [or] without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports [...]" Implicitly, the Constitution has vested the control over foreign affairs in the federal government without sharing among the states. The U.S. Supreme Court in *U.S. v. Curtiss-Wright Export Corporation* has justly

75. *Supra*, note 65.

stated that federal power over foreign affairs "[...] did not depend upon the affirmative grants of the Constitution"[76]. It is naturally vested in the federal government since it possesses external sovereignty.

This general rule must nevertheless be attenuated. Case-law has established that state legislation may have an incidental or indirect effect on the foreign affairs power[77]. The extent of the federal jurisdiction is therefore not absolute. In fact, most exercises of state powers produce effect upon foreign affairs. Consequently, the exercise of a valid state power producing a minimal impact on federal jurisdiction is constitutionally valid.

3.1.2.2. Application of the principle

1) In Canada

Provincial preferential purchasing policies have not been constitutionally challenged with respect to the foreign affairs powers. The administrative nature of the policies does not favour judicial review. However, American courts have often been confronted with the issue. Their interpretation will likely be of valuable interest in the Canadian context.

2) In the U.S.

a) Introduction

In their determination of the legality of preferential policies, courts must closely examine the nature of these policies and their effect upon foreign affairs. The nature and importance of that effect as interpreted by the courts is of foremost value.

b) Cases

In the case of *Bethlehem Steel Corp. v. Board of Commissioners*[78], the court struck down a California Buy-American Statute which encroached on the foreign affairs power. Bethlehem Steel Corp. sought an injunction against the Department of Water and Power of the City of Los Angeles and

76. 299 U.S. 304 (1936), p. 318.
77. *Clark v. Allen*, 331 U.S. 503 (1947); *Zschernig v. Miller*, 389 U.S. 429 (1968).
78. *Supra*, note 13.

Ducummun to prevent the performance of a contract for the purchase of Japanese Steel products for use in the construction of the Los Angeles aqueduct. The lowest bid was based on the use of structural steel made in Japan. However, the California Statute required the use of American products.

The court ruled that foreign trade was a matter of national concern and thus should be left to federal instead of state regulation. Furthermore, the California *Buy-American Act* did not only have an incidental effect on foreign relations:

> Such state legislation may bear a particular onus to foreign nations since it may appear to be the product of selfish provincialism, rather than an instrument of justifiable policy (...). While the present California Statute is not as gross an intrusion in the federal domain as others might be, it has a direct impact upon foreign relations, and may well adversely effect the power of the central government to deal with those problems [79].

The *KSB* case referred to earlier [80] also determined the constitutionality of a preferential policy with respect to the foreign affairs power. The court upheld the New Jersey Buy-American Statute which required that, under certain circumstances, only manufactured products of the U.S. be used in the work [81]. The court decided that the statute did not represent the type of intrusion into foreign affairs prescribed in the *Zschernig* case [82]. The policy was not based on the foreign countries' ideologies, political climate or internal policies. Furthermore, the court distinguished this case from the *Bethlehem Steel* case in that the latter concerned a Buy-American Statute of a sweeping application. The New Jersey Statute however did not require the use of American products if the cost was unreasonable or if inconsistent with the public interest or if the policy was impracticable. The court added:

> States may property exercise their police powers and in doing so have some permissible effect on foreign trade (...) We read Zschernig (...) to permit state regulation which does not result demonstrably in a significant and direct impact upon foreign affairs [83].

c) Comments

According to professor Ivan Bernier [84], the *Bethlehem Steel* case could support a finding of unconstitutionality of provincial preferential purchasing

79. *Id.*, p. 805.
80. *Supra*, note 69.
81. *Supra*, note 70.
82. *Supra*, note 77.
83. *Supra*, note 69, p. 784.
84. I. BERNIER, "La politique d'achat du gouvernement québécois", p. 1, unpublished paper.

policies with respect to subsection 91(2). Nevertheless, this conclusion depends upon the type of policy at issue. An absolute preferential purchasing policy similar to the California *Buy-American Act* is more easily subject to invalidation. The adverse effect on the foreign affairs power is significant. A close analysis of the nature and effect of these preferential policies will therefore determine their validity.

The *KSB* decision with respect to the foreign affairs power is arguable. States should not be allowed to legislate in this area. The economic problems that are considered through these policies would be better dealt with at the federal level. Not only are the impact and effect of these policies at the international level better understood by the federal government but states also lack the necessary tools and resources. Courts should therefore impose strong limitations upon state intrusion in matters of trade policy.

3.1.2.3. Impact of the principle upon protectionist procurement policies

The analysis of American cases serves as an important model to determine the constitutionality of provincial preferential policies with respect to the foreign affairs power. American case-law has reiterated the importance of vesting exclusive jurisdiction upon the federal power without dispersion among the states[85].

The incidental or indirect effect theory is of no avail in respect to these provincial policies. The latter interfere notably with federal foreign policy. They are a product of "selfish provincialism [...] which invites retaliative restrictions"[86]. In fact, preferential purchasing is an indirect regulation of foreign trade and a disruption of the national policy with respect to trade. Moreover, the effect of the policies on foreign affairs is not merely incidental to the exercise of a perfectly valid provincial power[87]. In fact, through preferential policies, provinces seek to favour interests beyond the province's borders.

3.2. The G.A.T.T. and the G.P.C.

Canada and its trading partners have engaged in a wide range of international agreements respecting world trade. The main source of international rights and obligations in the field of international trade is the General

85. See *U.S. v. Pink*, 315 U.S. 203 (1942), p. 233.
86. *Bethlehem Steel Corp.* case, *supra*, note 13, p. 805.
87. See *Zschernig* and *Clark* cases, *supra*, note 77.

Agreement on tariffs and trade. The G.A.T.T. is a multilateral trade agreement, concluded in 1947, which emerged from early post-war negotiations. The G.A.T.T. consists of a set of rules to which 92 countries, including Canada and the United States, are contracting parties. In the United States, the G.A.T.T. is the "[...] supreme Law of the Land [...]" pursuant to article VI clause 2 of the *U.S. Constitution*. It is aimed at eliminating trade barriers in order to free the international flow of goods. The problem of government procurement policies has therefore been addressed generally within the G.A.T.T. but more particularly in the *Government Procurement Code*.

The G.P.C. emerged from the Tokyo Round of Multilateral Trade Negotiations (1973-1979). This agreement on government procurement which supplements the G.A.T.T. and provides for greater precision was ratified by Canada, the United States and dozens of other countries [88]. The agreement's main objective is to put an end to discrimination against or among the products of other signatories in purchases covered by the agreement. The provisions of the Code must be implemented in each country's laws and regulations to ensure compliance with the Code by the government purchasing entity. In the United States, the G.P.C. has been implemented through the *Trade Agreements Act of 1979* which authorized the President to waive or modify the applicability of the *Buy-American Act* with regard to suppliers of countries that are signatories to the Code or which provide reciprocal competitive government procurement opportunities to United States' products and suppliers.

3.2.1. Relevant provisions

The G.A.T.T. consists namely of a number of rules aimed at reducing the non-tariff barriers to trade such as government procurement measures. The national treatment clause is one of two main principles embodied in the agreement. This general rule and its many exceptions are of particular interest. The G.P.C. rules have extended the application of the national treatment clause to government procurement policies. However, the Code is also of limited application.

88. Agreement on government procurement, done April 12, 1979, MTN/NTM/W/211/Rev. 1, a. I, para. 1(b).

3.2.1.1. Under the G.A.T.T.

a) Prohibition to discriminate

Article 3 paragraph 4 of the G.A.T.T. provides as follows:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. [...]

The national treatment clause is one of the essential provisions of the G.A.T.T. Briefly stated, it provides that imported goods are subject within a country to the same treatment as domestically produced goods. However, this article is subject to a particular exception.

b) Exception to Art. 3 para. 4

Article 3 para. 8(a) of the G.A.T.T. provides that:

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

With respect to government procurement, the national treatment clause is of limited application. The exception is applicable where purchases are made for governmental purposes. It appears that governmental purchases for public works are covered by this exception since they are not aimed at commercial resale and constitute the exercise of a governmental function. In fact, the term "[...] governmental purposes [...]" covers a large part of government procurement.

c) Enforcement of the G.A.T.T.

The G.A.T.T. enforcement mechanism provides for the settlement of disputes which may arise out of the G.A.T.T. obligations. In this respect, article XXII provides a general obligation of consultation between the contracting parties at the request of a party. Through consultation, parties try to obtain a negotiated settlement. Where the consultation procedure has failed, article XXIII creates an enforcement procedure. It provides that written representations may be made to the party or parties concerned. If no settlement is reached within reasonable time, the matter may be referred to

the contracting parties who shall investigate and issue the appropriate recommendations or ruling. If the circumstances are serious enough, the contracting parties may authorize a party to suspend some obligations towards the offending party.

The enforcement procedure is aimed at resolving disputes through negotiation. This informal procedure is however deficient to a certain extent. First, the contracting parties have delegated to panels the task of investigating into the facts of the case. These panels lack the resources to conduct a thorough investigation. Secondly, the obligations of the G.A.T.T. do not have self-executing legal force in the party's domestic laws. Furthermore, the emphasis on negotiation and conciliation rather than adjudication often prevents the contracting parties from imposing formal and binding rulings. Settlements are left rather to the good-will of the interested parties. Finally, the dispute procedure lacks the legal character and formal organization necessary to enforce the agreement in a vigorous manner. In short, a strengthening of the dispute settlement procedure is in order to ensure compliance with G.A.T.T. obligations, enforcement of the agreement and adherence to recommendations of the panel.

3.2.1.2. Under the G.P.C.

The G.P.C. has opened a large and growing market to international trade. Its objective is to ensure greater international competition of procurement by governments. This Code completes and modifies to a certain extent the G.A.T.T. It poses the principles of tranparency, non discrimination and national treatment. The impact of the agreement is however restricted since it is intended to apply only as between its parties. Non-signatory G.A.T.T. contracting parties are therefore excluded from receiving its benefits.

a) Prohibition to discriminate

Article II(1)(b) provides that:

> Parties are to accord to the products and suppliers of each other treatment no less favourable than (...) that accorded to products and suppliers of any other party.

The provision reiterates the national treatment principle and extends its application to government procurement. Signatories to the Code do not benefit from the exception of article 3 para. 8a) of the G.A.T.T. Nevertheless, this principle is subject to certain limitations.

b) Exception to Art. II (1)(b)

— Service contracts

The principle of non discrimination in government procurement does not apply to service contracts pursuant to article I (1)(a). The G.P.C. covers only the procurement of products unless services are incidental to the supply of products. In the latter case, the value of the services must not extend beyond that of the products.

— Value of the contracts

The G.P.C. applies only to procurement contracts of a value of at least 150 000 SDR (approximately 200 000 $ U.S.). However, the threshold amount may not be used to exempt purchases from the agreement by breaking them down into a series of contracts.

— Exclusions relating to purchasing entities

The Code applies to governmental entities. They comprise government subdivisions, agencies and instrumentalities that are substantially controlled by governments (art. I (1)(c)). However, state, provincial or local entities are not covered by the Code. Only the governmental entities listed in Annex I of the G.P.C. and established by the respective signatory countries are within the Code's coverage. Thus, while Canada and United States adherence to the Code does imply a significant change in Buy-Canadian and Buy-American policy at the federal level, it is clear that the change does not affect provincial Buy-Canadian nor state Buy-American preferences. Moreover, purchases of certain products of an enlisted entity may be expressly excluded such as certain purchases by the Department of Defense in the U.S. entity list. This exception severely restrains the scope of the Code.

— General exceptions to the G.P.C.

General exceptions to the Code's coverage have been created above all for the protection of national security interest and also "to protect public morals, order or safety, human, animal or plant life or health, intellectual property, or relating to the products of handicapped persons, of philanthropic institutions or of prison labour"[89].

89. *Id.*, a. VIII, para. 2.

The broad language and discretionary nature of the national security and public interest exceptions could somewhat compromise the application of the Code.

c) Transparency

The G.P.C. provides for measures ensuring that information, practices and procedure related to the awards of government procurement contracts are made readily available to the parties to the Code.

— Invitation to participate

The Code purports to ensure that foreign suppliers are not kept, in a discriminatory fashion, from participating in the tendering procedures. An entity subject to the G.P.C. may opt for open, public or selective tendering. However, the selective tendering procedure is subject to certain requirements aimed at eliminating discrimination against foreign suppliers. Entities may select suppliers who will be invited to bid among those comprised in a pre-established list. However, every supplier included on the list shall be given equitable opportunities [90]. Every qualified supplier may request to be added on the list within a reasonable time [91] and the supplier included on the list may not be removed from this list or the list may not be terminated unless he is informed [92]. Furthermore, entities must publish the existence of the list, the conditions for inclusion to the list, the period of validity of the lists and the formalities for their renewal [93]. A notice of all purchases must also be published [94].

The Code also limits single tendering to situations i) where open or selective tendering has been unsuccessful; ii) where, for works of art or patented or copyright goods, the products can be supplied only by a particular supplier; iii) when due to urgency and insofar as strictly necessary; iv) for additional deliveries by the original supplier in order to maintain requirements of interchangeability with existing equipment; v) for research, experiment, study or original development [95].

90. *Id.*, a. V (6)(b).
91. *Id.*, a. V (2)(d).
92. *Id.*, a. V (2)(e).
93. *Id.*, a. V (6).
94. *Id.*, a. V (3).
95. *Id.*, a. V (15).

— **Obstacles preventing foreign suppliers from submitting a responsive bid**

The G.P.C. ensures that foreign suppliers are not prevented from submitting a responsive bid. In that respect, an adequate time limit must be prescribed to allow foreign as well as domestic suppliers to prepare and submit their bids [96]. Furthermore, article II(2) para. 2 provides that "entities in the process of qualifying suppliers, shall not discriminate among foreign suppliers or between domestic and foreign suppliers". The notice must also contain certain essential information such as: any delivery date; whether open tender procedures or selective tender procedures will apply; address of entity awarding the contract; any economic and technical requirements or financial guarantees and information required from suppliers; address and date for submitting application as well as any language submission requirements. Further, a summary of the notice of tender must be published in one of the official languages of the G.A.T.T. and must include contract subject matter, time limits for submitting tenders and address from which to secure documents relating to the tender [97]. Finally, the Code, recognizing that quality, safety, dimensions, packaging, labelling and conformity certification can be significant non-tariff barriers to government procurement from abroad, places restraints on government regarding technical specifications of the product which create obstacles or have the effect of creating unnecessary obstacles to international trade [98].

— **Submission, receipt and opening of tenders**

Once a foreign supplier has submitted a responsive bid, the governmental entity must not impose further discriminatory measures. Provisions of the Code regulate the form in which tenders may be submitted [99], the opportunities to correct unintentional errors between the opening of tenders and the award of a contract [100], the treatment of delayed tenders [101], the supervision of tender openings with respect to open tendering [102]. A substantial discretion is however kept by the entity for the evaluation of bids and the award of the contract [103].

96. *Id.*, a. V (9)(a).
97. *Id.*, a. V (4).
98. *Id.*, a. IV (1).
99. *Id.*, a. V (14)(a).
100. *Id.*, a. V (14)(b).
101. *Id.*, a. V (14)(c).
102. *Id.*, a. V (14)(b).
103. *Id.*, a. V (14)(f).

— **Information and review**

The Code's transparency provisions include requirements as to the availability of information and as to review procedures [104]. Furthermore, unsuccessful suppliers must be informed of certain matters at different stages of the procurement process. More specifically, information pertaining to the application must be given to a supplier who has applied to become a qualified supplier [105]. Unsuccessful tenderers must also be informed of the award of a contract [106].

Upon request, a supplier must be informed of the reasons for which he was not included on the supplier's list as required and the reasons why he was not invited or allowed to tender [107]. Still, the governmental entity must justify why a supplier's tender was not admitted, explain the characteristics and advantages of the selected tender and give the name of the selected tender [108]. Additional information on the awarded contract may also be obtained from the government of the unsuccessful tenderer [109]. In case of a complaint, a hearing and review procedure is also required [110].

d) Enforcement of the Code

The G.P.C. has designed a similar enforcement mechanism to that of the G.A.T.T. aimed primarily at obtaining a negotiated settlement.

— **Two basic types of potential non-compliance**

Non-compliance by signatory countries may result either from a *bona fide* disagreement as to the requirement of the Code or from a voluntary non-compliance by a signatory with the provisions of the Code. The former can usually be resolved through negotiation without major obstacles. However, the latter may present complicated aspects which require a more comprehensive dispute settlement mechanism.

104. *Id.*, a. VI (1).
105. *Id.*, a. V (2)(e).
106. *Id.*, a. VI (3).
107. *Id.*, a. VI (2).
108. *Id.*, a. VI (4).
109. *Id.*, a. VI (6).
110. *Id.*, a. VI (5).

— **Complaints**

Private parties such as suppliers do not have the capacity to institute an action against a governmental entity for non-compliance with the Code. Only the signatory countries to the Code are habilitated to institute enforcement procedures [111]. Enforcement procedures are therefore subject to the willingness of governments to undertake proceedings and thus dependent upon foreign policy and many other considerations.

— **Steps in any dispute resolution**

The Code first provides for consultation between the concerned parties [112]. The parties therefore have the opportunity to lay out their differences and to arrive at a negotiated settlement. If these consultations fail, the Committee on Government Procurement, composed of representatives from each party to the agreement investigates the matter in order to arrive at a mutually satisfying solution [113]. The failure of the Committee's efforts results in the establishment of a panel to examine the problem, assist the parties in finding a solution and make a statement as to the facts of the matter so that the committee may recommend or rule on the matter. The panel consists of three or five members, establishes its own procedures, affords parties an opportunity to be heard and aims to complete its work within four months after being established [114]. The final step provides for action to be undertaken within thirty days by the Committee in the form of a recommendation or a ruling. Sanctions providing for the suspension of the application of the Code may also be authorized by the Committee if its recommendations are not followed.

Although this procedure is more thorough and efficient than the G.A.T.T. enforcement procedure, the Code is still deficient in some respects. First, the procedure is subject to the good-will of the government signatory to the Code. Private suppliers who are being discriminated against must apply to their governments to seek the enforcement of the Code. The dispute settlement procedure depends upon each signatory party and its foreign policy and interest in the matter. Secondly, although the panel procedure has been improved the adjudicative role of the latter remains practically nonexistent since it acts primarily as a conciliator. This tends to weaken the impact of

111. *Id.*, a. VII.
112. *Id.*, a. VII (3)(5).
113. *Id.*, a. VII (6).
114. *Id.*, a. VII (10).

recommendations and rulings upon the party. Furthermore, the recommendations of the committee are not "self-executing" and sanctions will not necessarily ensure greater compliance. This depends rather upon the retaliative power of the countries. Finally, the settlement procedure is governed by the committee on government procurement as opposed to an independent body of the signatories. In that respect, recommendations and rulings are often of a political nature rather than of a judicial nature.

3.2.2. The precedents

3.2.2.1. Canadian cases

As signatory to the G.A.T.T. agreement on technical barriers in 1979, Canada must ensure that foreign suppliers are not discriminated against in their bid for government procurement contracts within the country. However, as a federal country, the federal parliament cannot impose upon the provinces the obligation to implement international treaties such as the G.P.C. with respect to matters within provincial jurisdiction. The failure of the federal parliament to convince provincial governments to comply with the G.P.C. rules may result in retaliative measures on the part of other signatory countries against Canada.

Canadian courts have been silent as to the impact of the G.A.T.T. and the G.P.C. on provincial preferential procurement policies. American courts will therefore once again serve as a model.

3.2.2.2. U.S. cases and comments

U.S. courts have from time to time considered the G.A.T.T. to be "self-executing" and consequently allowed individuals to rely upon the provisions of the agreement to challenge state laws. Broadly speaking, in the United States, an international agreement prevails over all inconsistent state legislation, prior or subsequent, as well as inconsistent prior federal legislation, although it does not supersede inconsistent subsequent federal legislation. However, the *Trade Agreements Act of 1979* which approved the G.P.C. and implemented it into American law does not seem to recognize its provisions as "self-executing". Besides, the protection of the *Buy-American Act* is waived only as to countries which, either by agreeing to the Code or by offering the same benefits to the United States *via* separate agreement, do not discriminate against U.S. products and suppliers. As to the validity of state Buy-American laws with respect to the G.A.T.T., the courts are divided upon the interpretation

to be given to article III para. 8a) exception to the national treatment clause stated in the G.A.T.T.

In *Baldwin-Lima-Hamilton Corp. v. Superior Court* [115], the California Court of Appeal struck down the California Buy-American Statute on the basis of the G.A.T.T. provisions. The city of San Francisco had issued an invitation to tender for the procurement of turbines and equipment for a generating station. The contract proposal required that "all material, supplies and equipment covered by this contract proposal shall be manufactured in the U.S." [116]. The contract was awarded to the lowest bidder, a supplier who intended to use foreign manufactured turbines. The appelant sought the enforcement of the Buy-American provision.

The court ruled that this provision violated the national treatment clause of article III para. 4 of the G.A.T.T. and thus "[...] the supreme Law of the Land [...]" [117]. Furthermore, the exception pertaining to government procurement stated at article III para. 8a) did not save the Buy-American provision since electricity is a commodity which can be used for commercial resale. The product is therefore not "acquired for purely governmental purposes".

The *KSB Technical Sales* case referred to earlier [118] was also ruled upon with respect to article III, para 8a) of the G.A.T.T. This case concerned the procurement of water pumps which imposed a Buy-American requirement as authorized by the New Jersey Statute [119]. The New Jersey court upheld the state Buy-American Act. Although article III para. 4 applied to this case, the New Jersey Statute entered within the purview of article III para. 8a) since the supply of water to the public is a "governmental purpose". The court relied on the fact that the New Jersey statute considers the Water Supply Commission as an "instrumentality exercising public and essential governmental functions" [120]. Furthermore, water is a common property transmitted to the public in their general interest and without regard to profit.

The *KSB* court's interpretation of article III para. 8a) is questionable. It considered the supply of water a governmental function and thus not aimed at commercial resale. This view is too narrow. Not only does article III para. 8a) exception require that procurement be for a governmental purpose but also not for commercial resale. The two requirements are not alternatives. It is not

115. 208 Cal. App. 2d 803 (1962).
116. *Id.*, p. 807.
117. A. VI, para. 2 of the *U.S. Constitution.*
118. *Supra*, note 69.
119. See *supra*, note 70.
120. N.J.S.A. 58:5-35.

sufficent for a procurement to be for governmental purpose. Furthermore, although the New Jersey Statute characterized the Water Supply Commission as exercising a governmental function, it did not ensue that the para. 8a) exception should automatically apply. Definite and judicious criteria should be used.

The term "governmental purpose" should be interpreted with regard to the foreign sovereign immunity and act of state doctrines. Immunity from suits in American courts has been granted to foreign sovereign states acting in a public capacity as opposed to a commercial or private capacity. This foreign sovereign immunity is codified in the *Foreign Sovereign Immunities Act of 1976*. The latter defines commercial activity by examining the nature of the act rather than the purpose of the act. With respect to article III para. 8a), this doctrine would therefore narrow the scope of the "governmental purpose" exception. Consequently, it is doubtful that the New Jersey Statute would have been upheld since, considering the nature of the act, the governmental entity was acting rather in a commercial or private capacity.

3.2.3. Impact of the G.A.T.T. and the G.P.C. upon protectionist procurement policies

To the extent that the competent authorities have implemented both the G.A.T.T. and the G.P.C. in their bodies of laws, these agreements entail an obligation not to discriminate within the country at least with respect to government procurement. Theoretically, many provincial preferential procurement policies clearly violate the national treatment clause. Within a federal country, a federal parliament may not impose upon the provincial governments the respect of international obligations it contracted and which concern matters of provincial jurisdiction. Nevertheless, in view of article III para. 8a), government purchases for governmental purpose and not aimed at commercial resale are exempted from the general rule. American courts remain unsettled as to the interpretation of governmental purpose. A narrower interpretation of the expression is necessary to ensure greater coverage of the general rule.

In order to ensure a wider application of the G.P.C., Canada should require that provincial governments and their agencies be added to the list of entities annexed to the Code or that the appropriate legislative body enact a statute implementing the G.P.C. in provincial laws. Otherwise, provincial preferential policies contrary to the G.P.C. will not be affected.

Conclusion

Under the present constitutional provisions, many statutory procurement policies adopted at the provincial or state and local level may be incompatible with federal jurisdiction over interprovincial or interstate trade and in some respects with jurisdiction over international relations. Such policies disrupt federal foreign trade policy, create national economic disparity and upset the domestic flow of goods. They invite retaliative action from external trading partners.

However, Canadian courts have not had so far the opportunity to deal with this question as their American counterparts have done. Legally, these policies should be constrained by the relevant constitutional texts. This situation might change with a new political environment. In fact, the political arena should intervene to reduce these non-tariff barriers to trade and to urge the harmonization of economic policy with the provinces. Stronger economic unity and strength is needed.

Mobility rights and equality rights are fundamental rights recognized to all American and Canadian citizens alike. To the extent that preferential policies purport to favour local labour or to exclude persons from bidding on contracts on the basis of place of residence or other discriminatory rights, governments should bear a heavy burden of justifying those impediments. Precedence should be granted to these constitutional rights in the absence of rigorous justification for such measures.

Safeguards for international free trade have been implemented through the G.A.T.T. and the G.P.C. However, the federal government has not yet made the necessary regulatory and statutory changes to integrate these agreements into federal law. As to the provinces, they have not, by and large, implemented the G.A.T.T. agreement.

The effectiveness of these agreements appears doubtful. The courts, especially in Canada, are reticent to take these international agreements into consideration. Furthermore, the G.A.T.T. mechanism for enforcing its obligations is largely deficient. Loopholes created by the many exceptions to G.A.T.T. rules and the failure to ensure a proper constraining compliance procedure diminish greatly the impact of these agreements on preferential policies.

Even in the context of the free trade agreement concluded between Canada and the United States on October 3, 1987, there is still room for protectionist policies. Despite the fact that the primary objective of the

accord remains the eventual dismantling of the commercial border between the world's two largest trading partners, within ten years beginning January 1989, a total elimination of these policies is nonetheless doubtful, considering the regional disparities and the political pressure which may justify both governments' desire to sustain them.

However, in order to ensure that protectionist policies do not hinder the prospect of trade liberalization, a strong and expeditious dispute settlement mechanism has been set up under the agreement. Dispute not resolved in consultation will be automatically referred to a neutral binational panel which will operate as a court of last resort.

The agreement extends to government procurement as well. Both sides have agreed to eliminate many "buy national" restrictions by lowering from 171 000 $ to 25 000 $ the threshold at which the open and competitive procedures created under the G.P.C. must be followed. Consequently, all procurements over 25 000 $ made by entities covered by the Code will be opened to Canadian suppliers. It must be kept in mind, however, that provinces and states are not listed in Annex I of the G.P.C. and thus, are not subject to this clause, relating to the acquisition of products. However, provinces are bound by chapter 14 of the Canada-U.S. Free Trade Agreement, dealing with services. But again, government procurement is excluded by subsection 14.02 of the Agreement.

In spite of the fact that this lacuna seems to impede the effectiveness of the accord, it is still possible to sustain the contention that both countries will adjust and reconsider their protectionist policies at a national level: the agreement's general objective of elimination of tariff and non-tariff trade barriers as well as the establishment of the very first international understanding over the services industries under which each side agrees to provide treatment to each other's citizens that is no less favourable than that granted to its own citizens, are likely to create a momentum inducing Canada and the United States to put their respective houses in order.