Les Cahiers de droit

Free Movement of Goods in Canada and the United States

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Volume 29, Number 2, 1988

URI: https://id.erudit.org/iderudit/042885ar
DOI: https://doi.org/10.7202/042885ar

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Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)
1918-8218 (digital)

Explore this journal

Cite this article

Soberman, D. A. (1988). Free Movement of Goods in Canada and the United States. *Les Cahiers de droit*, *29*(2), 291–322. https://doi.org/10.7202/042885ar

Article abstract

En ce qui regarde la circulation des biens, les constitutions américaines et canadiennes sont fort différentes l'une de l'autre. Le par. 91(2) de la *Loi constitutionnelle de 1867* semble attribuer au Parlement fédéral du Canada un vaste domaine de compétence économique, mais la jurisprudence, depuis les années cinquante, a interprété cette clause de façon très restrictive. Les autorités fédérales, d'autre part, ne jouissent pas d'un pouvoir explicite de mise en oeuvre des traités. En fait, il existe de nombreuses entraves, plus ou moins discutables, à la libre circulation des biens à l'intérieur même du Canada.

Aux États-Unis, en revanche, la compétence apparemment limitée du Congrès en matière commerciale a été considérée par la Cour suprême comme étant l'équivalent d'un pouvoir général de réglementation. D'autre part, la Constitution stipule expressément que les traités ratifiés par le Sénat ont force de loi, de telle façon que le Gouvernement fédéral se trouve à jouir d'un plein pouvoir en ce qui regarde la mise en oeuvre des traités.

Si l'Accord canado-américain sur le libre-échange devait être ratifié, sa mise en oeuvre ne causerait aucun problème aux États- Unis, mais elle serait susceptible d'en soulever au Canada. L'Accord ne s'applique pas à certaines questions de juridiction provinciale, comme les politiques d'achat préférentielles, les standards de qualité en matière de santé et de sécurité ou la réglementation professionnelle. Ces exclusions évitent des conflits entre le fédéral et les provinces, mais elles diminuent la portée de l'Accord. Il est peu probable que le mécanisme général prévu pour la solution des conflits fonctionne efficacement. L'arbitrage obligatoire des cas de dumping ou de droits compensatoires apparaît en revanche davantage de nature supranationale : il devrait s'avérer l'élément le plus significatif de l'Accord.

Free Movement of Goods in Canada and the United States

D.A. SOBERMAN *

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Les Cahiers de Droit, vol. 29, n° 2, juin 1988, p. 291-322
(1988) 29 *Les Cahiers de Droit* 291

There are both similarities and striking contrasts between the constitutional setting for the free movement of goods in the two North American federations. I shall divide this study into three parts : first, a brief examination of the constitutional framework with respect to trade ; second, a review of intrafederation trade to the present ; third, some speculative thoughts on the consequences of the Free Trade Agreement Between Canada and the United States of America [1].

— The Constitutional Framework : United States

Historically, the primary goal in the Constitution of the United States (as in the Canadian Constitution) was nation building, but there was also clear recognition of the importance of creating an economic union. Six provisions of the Constitution can be seen as having a direct effect on trade. In Article I, two provisions restricted the powers of both Congress and the states to burden interstate trade :

1. The Agreement was signed by both countries, January 2, 1988. At the time of writing, it has yet to be ratified and implemented.

> No tax or duty shall be laid on Articles exported from any State. [2]
> No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress. [3]

In the same article, the powers removed from the states with respect to imports were given to Congress:

> The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises [...] but all Duties, Imposts and Excises shall be uniform throughout the United States [4];

Congress was also given the power:

> To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes [5];

These powers were given added breadth in the final clause of the section, by a grant to Congress of the power:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [...] [6].

In addition, the Constitution gives the President and Senate the treaty-making power:

> [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur [...] [7]
>
> [...] all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [8]

These provisions cumulatively gave clear indication of an intention to create a single integrated market for goods: the states were effectively prohibited from levying duties, and if Congress itself levied any duties or taxes they were required to be uniform throughout the country. Moreover,

2. Section 9, cl. 5. This provision, by its location in Section 9, which deals with limits on Congress's powers, seems to place the limit on Congress rather than on the States.
3. Section 10, cl. 2.
4. Section 8, cl. 1.
5. Section 8, cl. 3.
6. Section 8, cl. 18.
7. Article II, Section 2, cl. 2.
8. Article VI, cl. 2.

when the powers of Congress to tax and to levy duties, and "[...] to regulate Commerce with foreign Nations, and among the several States [...]", were combined with the power "[...] to make Treaties [...]" that became "[...] the supreme Law of the Land [...]" binding on every state, it was evident that the federal government was granted broad powers over the nation as a whole to control both interstate and international trade.

In particular, it should be noted that, while the phrase "[...] among the several States [...]" might be expected to invite judicial limits on the federal commerce power when its exercise interfered with a state's regulation of its own *intrastate* commerce, the treaty-making power was not subject to such a qualification. That power appeared unqualified: a treaty that affected the commerce within a single state would take precedence over that state's own laws [9].

— The Constitutional Framework: Canada

In Canada, the constitutional evidence of an intention to create an economic union bears only limited similarity to the U.S. provisions. Section 121 of the *Constitution Act, 1867* states:

> All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Unlike its American analogue, this injunction against provincial restrictions on trade referred only to goods produced in a sister province and not to goods from outside Canada. However, section 122, a transitional provision, placed limits on all provincial customs and excise laws: it permitted those laws to continue in force "[...] until altered by the Parliament of Canada", thus necessarily implying that the provinces had surrendered to the federal legislature all power to legislate further with respect to customs duties on goods from other countries [10].

Section 91(3) allocated "The raising of Money by any Mode or System of Taxation" to "[...] the exclusive Legislative Authority of the Parliament of Canada [...]", including the power to levy excise taxes and duties on goods. In

9. The prevailing opinion is that once the treaty-making power is exercised in conformity with the Constitution, it may be used to validate federal legislation that would otherwise be unconstitutional. *Missouri v. Holland*, 252 U.S. 416 (1920).

10. A further transitional section 123, eliminated double taxation of goods imported, from outside Canada, to one province but destined for another province. In effect, the ultimate receiver of the goods would pay only the higher tax of that levied in the two provinces.

addition, section 91(2) gave Parliament exclusive power over, "The Regulation of Trade and Commerce". Since this last phrase contains no qualifying words analogous to the American commerce power's "[...] among the several States [...]", it might be imagined that the Canadian trade and commerce section gave greater power to Parliament than the American commerce power gave to Congress. Indeed, this view is strengthened by the closing words of section 91, which seem expressly to restrict provincial legislative powers:

> And any Matter coming within any of the Classes of Subjects enumerated in this Section [including "the regulation of trade and commerce"] *shall not be deemed to come within the Class of Matters of a local or private Nature* comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. [emphasis added].

Finally, with respect to the distribution of powers, it should be noted that the opening words of section 91 gave a general (and residual) power to the federal government, "[...] to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects [...] assigned exclusively to the Legislatures of the Provinces [...]".

With respect to treaties, we should remember that the *Constitution Act, 1867* — the first British statute to grant almost complete domestic self government to a colony — did not contemplate the establishment of an entirely independent nation. The Dominion of Canada remained a part of the British Empire and subject to control from Westminster [11]. Accordingly, it was no doubt deliberate that an express grant of power to the government of Canada to make treaties was omitted from the Constitution. I say "deliberate" because the subject of treaties was dealt with expressly in section 132 of the *Constitution Act, 1867*:

> The *Parliament and Government* of Canada *shall have all Powers* necessary or proper *for performing the Obligations* of Canada or *of any Province* thereof, as Part of the British Empire, towards Foreign Countries, *arising under Treaties between the Empire and such Foreign Countries.* [emphasis added].

11. Briefly, the legal controls were:
    a) The *Colonial Laws Validity Act, 1865*, 28-29 Vict. c. 63 (U.K.), remained in force with respect to Canada, preventing Canadian laws from taking effect so as to interfere with any Imperial statute that applied to Canada.
    b) Pursuant to sections 55 and 56 of the *Constitution Act, 1867*, the Governor General, who was the head of state appointed by the Imperial cabinet, retained the traditional colonial power of reserving assent indefinitely, at his discretion, to any Canadian statute. Moreover, even if he assented, within two years the Imperial cabinet could disallow the statute.
    c) Under the *Judicial Committee Act, 1833*, 3-4 Will. IV, c. 41 (U.K.), the Judicial Committee of the Privy Council continued to be the final court of appeal for all decisions of Canadian courts.

This section was analogous to the American treaty-making power in that it granted the central government the power to pass and implement laws — with respect to "Empire treaties" — even when the subject matter concerned provincial "obligations", that is, was within provincial jurisdiction. However, the section does not mention "Canadian treaties", and it is highly unlikely that failure to do so was an oversight. Rather, it was consistent with Canada's dependent status, that it received no treaty-making power to enable it to enter into international agreements on its own behalf. The Imperial government alone would speak for the whole of the British Empire in international relations.

An important difference from the American position arose from the fact that in the British system of government treaties are non self-executing : they require domestic legislation in order to implement any change in internal, municipal law — hence the need to give legislative power to the Parliament of Canada to implement Empire treaties. Of course, no such legislative power was granted for a non-existent Canadian treaty power.

As a result, any constraints on the provinces constitutional powers to interfere with trade seemed to depend on the scope to be given to the words of section 121, that goods of other provinces "[...] shall [...] be admitted free [...]", and to the federal power to regulate trade and commerce under section 91(2).

1. Development of Trade Regulation Within the United States

The purpose of the commerce clause is clearly stated in the following quotation from a leading American constitutional scholar, Professor Corwin :

> Unquestionably, one of the great advantages anticipated from the grant to Congress of power over commerce was that State interferences with trade, which had become a source of sharp discontent under the Articles of Confederation, would be thereby brought to an end. As Webster stated in his argument for appelant in *Gibbons v. Ogden* : "The prevailing motive was to regulate commerce ; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law". [12]

The limits of the principles enshrined in the Constitution were nonetheless frequently tested by the States. Indeed, a review of the legislative endeavours of members states of both the U.S. and Canadian federation as well as, more

12. E.S. CORWIN, *The Constitution and What it Means Today*, 14th ed. (Revised by H.W. Chase and C.R. Ducat), Princeton, Princeton University Press, 1978, p. 67.

recently, of the European Community, not surprisingly confirms a tendency in autonomous member governments to establish their own priorities and to try to protect their own interests as well as improve the lot of their citizens, in competition with other member governments and with the priorities of the central government. In federal constitutions, of course, the interests of member states as separate units receive explicit recognition as a legitimate public good ; otherwise we should have only unitary states. What ensues from the assertion of the priorities of members states is a delicate balancing process of the interests of one state with another and with the collective national interest. The striking of the balance results from an interplay of forces between the principal actors, with the highest court as umpire of the federal system.

The absorbing history of that interplay with respect to the free movement of goods in both the United States and Canada has been exhaustively recorded and well interpreted in each country. For our purposes it will be more useful to summarize briefly the history, compare the current positions, and then turn to the implications of a comprehensive trade agreement between the two nations.

There are three main legal elements in the equation governing the free movement of goods in the United States. First, are the limits that the constitution may place on the exercise of the federal commerce power. Second, are the limits put upon the states' ability to affect commerce, resulting from the constitutional fact of allocating the commerce power to Congress — frequently called the "negative" commerce clause. Third, given the paramountcy of valid federal legislation over state legislation, is the question of whether a federal legislative scheme has "preempted the field", invalidating any state legislation in the same area.

1.1 Limits of the Commerce Power

In the early years of the federation, Congress was not very active in regulating interstate commerce, especially in the period dominated by the liberal theory of the state. Congress began to intervene in order to achieve new social goals only after the passing of the fourteenth amendment [13]. In the period beginning after the Civil War and extending to 1937, important federal

13. Article XIV, Section 1 : "[...] nor shall any State deprive any person of life, liberty, or property, without due process of law [...]" (1868). While the earlier (1791) Fifth Amendment, used almost identical language that applied to the federal government, the Fourteenth amendment made clear, in terms of political philosophy, the limits on the power of all governments to interfere with rights of private property, including freedom to contract.

economic and social legislation was struck down by the Supreme Court as unconstitutional, more often because it offended individual property rights [14] than because it infringed state's rights. Even in that era, however, important economic legislation, such as the *Interstate Commerce Act, 1887* (regulation of common carriers), and the *Sherman Act, 1890* (anti-trust), were enacted and subsequently found valid [15]. The range of subjects is extremely broad, as noted by Professor Smith :

> First, an activity may constitute commerce although it be non-commercial. [...] [T]he carrying of liquor for personal use, the transportation of a woman as a mistress or as a bride, the ranging of cattle and the flight of a witness, or perhaps of a flock of birds, are commerce.
>
> Second, activity is none the less commerce because the transportation or movement involves only intangibles. Thus the transmission of information by telegraph and telephone, communication by radio waves, and the transportation or transmission of gas and electricity are commerce. [...] [Even] the passage of light rays [of a cinema projection over the Canadian border] constituted importation [...] [and was thus commerce]. [16]

The *Shreveport Rate* Case [17] marked the clear recognition of Congress's ability under the commerce power to extend its regulation over entirely intrastate activity. The Railroad Commission of Texas had set intrastate rates between Dallas and points in eastern Texas at a lower level than the reasonable interstate rates (set by the Interstate Commerce Commission) from those same eastern Texas points across the Louisiana border to Shreveport. The Texas rates gave a competitive advantage to Dallas merchants over out-of-state Shreveport merchants in shipping goods to eastern Texas. The I.C.C. ordered the carriers to desist from charging unequal rates from Dallas.

The Supreme Court, in upholding the power the I.C.C. to make such an order, said :

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14. See T. HELLER, J. PELKMANS, "The Federal Economy : Law and Economic Integration and the Positive State — The U.S.A. and Europe Compared in an Economic Perspective", in *Integration Through Law*, Vol. 1, Book 1, *A Political, Legal and Economic Overview*, (M. CAPPELLETTI, M. SECCOMBE & J. WEILER, Ed.), New York, W. de Gruyter, 1986, p. 245, p. 284, 285.
15. A substantial list of federal legislation, in the fields of : labour relations, trade regulation, transportation and communications, public morals and criminal law, and marketing, occupying some six pages of text, may be found in A. SMITH, *The Commerce Power in Canada and the United States*, Toronto, Butterworths, 1963, p. 247-253.
16. *Id.*, p. 262.
17. *Houston, E. & W. Texas Rly v. United States*, 234 U.S. 342. For a full discussion, see SMITH, *supra*, note 15, Chapter 12, and esp. p. 393-398.

> [Congressional] authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. [18]

Subsequently, the court extended the principle to many other instances, permitting Congress to regulate entirely intrastate activities because they affected the flow of interstate commerce [19].

In 1937, the watershed decision in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* [20], and other attendant cases [21], established firmly the power of Congress to regulate almost every facet of trade. Even the realm of the state's own activities, which as recently as 1976 was held to be immune to the commerce power [22], was in 1985 held to be subject to the federal power, the state's only recourse being through its political representation in Congress [23].

1.2. The Negative Commerce Clause

Beginning with *Gibbons v. Ogden* in 1824 [24], the Supreme Court was continually confronted by state legislation enacted to control trade and transportation at its borders. According to Professor Corwin:

> The commerce clause comprises [...] except for the due process of law clause of Amendment XIV, the most important basis for judicial review, in limitation of State power [...] Of the approximately 1400 cases which reached the Supreme Court under the clause prior to 1900, the overwhelming proportion stemmed

18. *Shreveport Rate* Cases, p. 351.
19. See, for example, *Stafford v. Wallace*, 258 U.S. 495 (1922) (regulation of stockyards and meatpackers); *Olsen v. Chicago Board of Trade*, 262 U.S. 1 (1923) (regulation of trading in grain futures); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) (movement by taxi of passengers in the City of Chicago between interstate trains).
20. 301 U.S. 1 (1937).
21. See CORWIN, *supra*, note 12, p. 62, 445. The most notorious judicial restriction on the powers of Congress occurred when the Supreme Court struck down use the commerce power to eliminate child labour in the production of goods bound for interstate commerce. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918). In the following twenty years, that decision was undermined, especially in *Kentucky Whip and Collar Co. v. Illinois Cent. R. Co.*, 299 U.S. 334 (1937), and finally overruled in *United States v. Darby*, 312 U.S. 100 (1941). For an exhaustive discussion, see A. SMITH, *supra*, note 15, p. 318-345.
22. *National League of Cities v. Usery*, 426 U.S. 833 (1976).
23. *Garcia v. San Antonio Metropolitan Transit Authority*, 463 U.S. 528 (1985).
24. 9 Wheat. 1 (1824).

> from State legislation [...] [T]he guiding lines in construction of the clause were initially laid down by the Court from the point of view of its operation as a curb on State power, rather than its operation as a source of national power. [25]

In *Gibbons*, the State of New York had granted an exclusive licence for steam boat service across the Hudson River. New Jersey passed retaliatory legislation, and there were threats of similar conflict breaking out elsewhere. In the opinions of the Supreme Court, delivered by Chief Justice Marshall and his associates, the New York law was unconstitutional on two grounds — first because Congress had occupied the field by passing its own federal licensing act in 1793, and second, because the Constitution had delegated the field of regulating interstate boat transportation exclusively to Congress, "leaving nothing for the state to act upon" [26].

However, the latter seemingly dogmatic exclusion of state regulation was not long sustained [27]; the court, in a long line of cases extending into the 1980's [28], moved from one test to another in determining whether state legislation asserted a vital state interest that deserved protection despite some interference with interstate commerce. The earliest test was whether the subject matter of legislation as primarily "local" (and thus valid) or "national" (invalid), the test in the middle period was whether its effects on interstate commerce was "indirect" (valid) or "direct" (invalid), and finally, since the 1930's, a balancing test of the importance of the affected state and federal interests [29].

Today, the negative commerce clause, circumscribes the legislative powers of the state's to burden interstate commerce. The primary requirement is that legislation not be discriminatory against interstate commerce; discriminatory legislation is *per se* unconstitutional, but it may be a difficult question of characterization to decide whether a statute is discriminatory. Even if not discriminatory between in-state and out-of-state goods, a statute must not burden commerce unduly, and here the court engages in balancing the regulating state's interest and the larger national interest, or sometimes the

25. CORWIN, *supra*, note 12, p. 67.
26. *Id.*, p. 227.
27. See *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829), where the Court validated Delaware's power to damn a navigable stream used by a vessel licensed under federal law.
28. *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662 (1981).
29. For an excellent analysis of this development, see D.P. KOMMERS & M. WAELBROECK, "Legal Integration and the Free Movement of Goods: The American and European Experience" in *Integration Through Law*, Vol. 1, Book 3, *Forces and Potential for a European Identity, supra*, note 14, p. 165, p. 169-197.

interest of another state [30]. Under these criteria states have been able to levy reasonable, non-discriminatory taxes and to regulate the entry of goods with respect to health and safety. As well, states have sometimes been able to give preferences to their citizens in use of their own resources [31], and to sustain government procurement preferences for their citizens [32]. While the sum total of these burdens on interstate commerce is considerable, on the whole, the negative commerce clause has placed substantial limits on the states' ability to restrict interstate commerce.

1.3. Federal Legislation Pre-empting the Field

Professor Heller states:

> It is uncontested that states may not pass legislation which directly conflicts with or contradicts national statutory controls. A broad reading of pre-emption could imply that a failure by the Federal Government to intervene in particular markets might be held to represent an affirmative decision about the desirable level of regulation in a unified national market. This implicit act of pre-emption would negate the possibility of varied local policies. However, the modern history of judicial construction of pre-emption has not usually functioned as an instrument for promoting an increasingly comprehensive centralization of government structure.
>
> [...] Contemporary pre-emption doctrine in the economic field has generally required a clear and explicit Congressional intent to void local powers. [33]

He goes on to note that, "The actual legal structure of economic regulation in the U.S. is quite mixed at the present time" and that, "[...] the best description of the overall system would emphasize the existence of concurrent regulatory jurisdiction between state and national governments" [34].

Emphasizing again the breadth of the commerce power and its paramountcy, we can see that there is little constitutional restraint on Congress to pre-empt particular fields of regulation and exclude state activity. However,

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30. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Washington challenged a North Carolina rule that effectively prevented Washington apples from being sold under the Washington state label of quality in North Carolina. The Court declared the North Carolina rule invalid. See, KOMMERS & WAELBROECK, *supra*, note 29, p. 194, 195.
31. *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1978); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). For an illuminating discussion of this subject, see W.C. GRAHAM, "Government Procurement Policies: GATT, the EEC, and the United States", in TREBILOCK *et al* (ed.), *Federalism and the Canadian Economic Union*, Toronto, U. of T. Press, 1983, p. 355, p. 375-392.
32. *Id.*, p. 389-391.
33. T. HELLER, J. PELKMANS, *supra*, note 14, p. 295.
34. *Id.*, p. 297.

as in any federation, in the United States it is considered politically expedient to permit substantial economic regulation by the members states. Nevertheless, the combination of judicial limits on state action by the negative commerce clause, and political decisions of Congress to regulate an area in the national interest keeps state regulation of the free movement of goods under control.

The treaty power may here be mentioned briefly. For a treaty to be valid, it must be passed *bona fide* (I have found no case where the good faith of Congress has been successfully challenged), and must not contradict the words of the Constitution itself. It then becomes the "[...] supreme Law of the Land [...]". Professor Corwin stated that,

> From the time of the Jay Treaty (1794) down to the present, the National Government has entered into many treaties... although [the subject matter was]... conceded to be otherwise within the exclusive jurisdiction of the States. [35]

Indeed, the extent of the treaty power provoked constitutional amendment proposals to reduce its effect on states' rights, the most well known — and almost successful — being the Bricker Amendment in 1952 [36]. With respect to any general trade agreement with Canada, then, the treaty power can be a potent instrument of the federal government in imposing a national scheme upon the states.

2. Development of Trade Regulation Within Canada

Unlike the Confederal period in American history, when conflicting state legislation on matters of trade caused serious problems [37] the pre-Confederation years in British North America were not particularly fractious with respect to trade among the colonies themselves. Indeed, with the American Civil War fresh in their minds, the Fathers of Confederation, having opted for a federal system, seemed more concerned to assure a politically strong central government [38]. To that end, the 1867 Constitution

35. CORWIN, *supra*, note 12, p. 171. See also, C.H. MCLAUGHLIN, "The Scope of the Treaty Power in the United States", 42 *Minnesota Law Review* 709 (1958), and 43 *Minnesota Law Review* 651 (1959).
36. MCLAUGHLIN, *id.*, 43 *Minnesota Law Review* 651 (1959), p. 704–713.
37. *Supra*, note 12.
38. At the Québec Conference in October of 1864, in the midst of the Civil War, John A. Macdonald stated:

> The various States of the adjoining Republic had always acted as separate sovereignties. [...] The primary error at the formation of their constitution was that each state reserved to itself all sovereign rights, save the small portion delegated. We must reverse this process by strengthening the General Government and conferring on the Provincial bodies only such powers as may be required for local purposes. All sectional prejudices and interests can be legislated for by local legislatures.

gave to the federal government crucial powers over the provinces, that the Imperial government traditionnally retained over colonies [39]. As noted earlier, the broad sweep of the federal power over "The Regulation of Trade and Commerce" appeared to be almost unlimited.

2.1. Limits of the Trade and Commerce Power

It is perhaps to be expected that whereas in the United States, with the background of trade conflict in the Confederal period, the Supreme Court should interpret a potentially narrow power of commerce among the several states increasingly broadly, in Canada, without such history of conflict, the Judicial Committee of the Privy Council should interpret a very broad initial power much more narrowly. Such may be the inherent concern of an ultimate court that as umpire of a federation it must maintain what it perceives to be an essential balance between central government and member states.

In any event, to Canadians the story of the virtual neutralizing of the trade and commerce clause is a familiar one. As Professor A. Smith has said, "[...] the subject has the allure of antithesis, of paradox. Congress has been able to do so much with so little; Parliament has been able to do so little with so much" [40]. In *Severn v. The Queen* [41], the first decision of the Supreme Court of Canada with respect to the trade and commerce power, the court held provincial legislation requiring a licence for a wholesale liquor business to be invalid as being in conflict with federal legislation under the power. The case was not appealed to the Privy Council, but subsequent decisions of the Privy Council over the next forty years steadily eroded the trade and commerce power in favour of provincial legislative authority over "Property an Civil Rights in the Province" [42].

The low point was reached in two cases in the early 1920's. First, in *Re Board of Commerce Act* [43], the federal government invoked the trade and

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As reported in G.P. BROWNE, *Documents on the Confederation of British North America*, Toronto, McClelland and Stewart, 1969, p. 94.

39. The federal government was given the power to: "appoints the executive head of each Province" and all superior and county court judges; reserve or "[...] disallow any [...] provincial legislation within one year of its passage [...]"; "declare '[l]ocal works and undertakings..., although wholly situate within the Province... to be for the general advantage of Canada'" and within federal legislative power. See D.A. SOBERMAN, "The Canadian Federal Experience — Selected Issues", in *Integration Through Law*, Vol. 1, Book 1, *supra*, note 14, p. 513, p. 515.
40. SMITH, *supra*, note 15, p. 4.
41. (1878) 2 S.C.R. 70.
42. The *Constitution Act, 1867*, s. 92 (13).
43. [1922] 1 A.C. 191.

commerce power to validate certain anticombines provisions as well provisions to deal with post First World War hoarding and price gouging. In striking down the legislation, Viscount Haldane suggested that the trade and commerce power was "merely ancillary" and could be used only in aid of some other federal authority[44]. Then, in *Toronto Electric Commissioners v. Snider*[45], the trade and commerce power was held to be ineffective to validate federal labour dispute legislation.

Subsequently, in over half a century there has been a slow, and still very tentative recovery of the trade and commerce power. In *Proprietary Articles Trade Association v. A. G. of Canada*[46], the Privy Council found certain anti-combines privisions to be a valid exercise of the federal criminal law power, and thus found it unnecessary to consider whether they might be valid under the trade and commerce power. However, Lord Atkin said :

> Their Lordships merely propose to dissociate themselves from the construction suggested in argument of a passage in the judgment in the *Board of Commerce Case* under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. The words of the statute [the Constitution Act] must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject-matter.[47]

Thus began the resuscitation of the power.

Appeals to the Judicial Committee of the Privy Council were abolished in 1949, and the Supreme Court of Canada no longer stood in its shadow. Professor Hogg asserts that, "Since the abolition of appeals to the Privy Council there has been a resurgence of the trade and commerce power"[48]. In the marketing of farm products, and especially the marketing of wheat, the Supreme Court has validated federal legislation[49]. Even so, it would seem that Hogg's use of "resurgence" is somewhat overstated. There have been several setbacks, decisions of the Supreme Court that continue to strike down federal regulatory schemes as being unwarranted attempts to infringe on

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44. See N. FINKELSTEIN, *Laskin's Canadian Constitutional Law*, 5th ed., 2 Vol., Toronto, Carswell, 1986, p. 425.
45. [1925] A.C. 396.
46. [1931] A.C. 310.
47. *Id.*, p. 326.
48. P.W. HOGG, *Constitutional Law of Canada*, 2nd ed., Toronto, Carswell, 1985, p. 443-452.
49. *Murphy v. C.P.R.*, [1958] S.C.R. 626; *The Queen v. Klassen*, (1959) 20 D.L.R. (2d) 406 (Man. C.A., leave refused before S.C.C.); *Re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198; *Caloil Inc. v. A.G. of Canada*, [1971] S.C.R. 543. The last-mentioned case created an exclusive market in part of Canada for Western Canadian oil.

"local trade", subject matter that falls under provincial property and civil rights jurisdiction. Thus two federal schemes for enforcing national product standards and labelling were found unconstitutional in 1979 [50].

A major case in the mid 1970's concerned Canada's attempt to cope with "double-digit" inflation [51]. The federal Parliament passed legislation to regulate wages in the federal public sector and in the entire private sector of the economy, including those employees ordinarily under provincial jurisdiction. In the reference, the federal government claimed three bases of valid federal power. The most vigorous claim was made under the "national dimensions" doctrine, the assertion that inflation had become a matter of longer term national importance enabling Parliament to exercise its general power of peace, order and good government in order to regulate the economy. That claim failed : the legislation was upheld by the Supreme Court on the second basis — solely as an exercise of the temporary emergency power aspect of peace, order and good government.

One might have thought that the third claim based on the trade and commerce power might have succeeded. Indeed, Professor Hogg notes that, "[...] Laskin, C.J. included one paragraph which indicated that he might have been favourably disposed to an argument that the general trade and commerce power could have sustained the Act" [52], but ultimately the Chief Justice sustained the legislation on the basis of the emergency power alone. No reference to trade and commerce is found in the other opinions in the case.

In the same year, *MacDonald v. Vapour Canada Ltd.* was decided [53]. There the Supreme Court invalidated certain provisions of the *Trade-Marks Act* dealing with unfair business practices and creating civil remedies, because the civil causes of action were found to be primarily matters within provincial jurisdiction over property and civil rights. Nevertheless, Laskin C.J. suggested a slender and essentially new basis for federal jurisdiction — if the remedies had been part of a larger, national "[...] regulatory scheme [...]" administered by a "[...] federally-appointed agency [...]" [54].

In 1976, Parliament amended the *Combines Investigation Act* by creating a number of civil remedies. As noted above, combines legislation had earlier

50. *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844 ; *Labatt Breweries of Canada Ltd. v. A.G. of Canada*, [1980] 1 S.C.R. 594.
51. *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373.
52. HOGG, *supra*, note 48, p. 451.
53. [1977] 2 S.C.R. 134.
54. *Id.*, p. 158, 165.

been validated under the federal criminal law power [55]. The new amendments marked a clear intention of Parliament to move from the criminal law power to the trade and commerce power, as with its American counterpart, the *Sherman Act*. In *A.G. of Canada v. Canadian National Transportation Ltd.* [56], the Supreme Court had to consider whether the Attorney-General of Canada was competent to initiate proceedings in a prosecution under the amended Act. Although the criminal law of Canada is federal, under section 92(14) of the *Constitution Act, 1867*, the provinces have jurisdiction over "[...] the administration of justice in the province [...]"; accordingly, criminal prosecutions had traditionally been in the hands of the provincial attorneys-general. However, the majority opinion held that the Attorney-General of Canada was competent to prosecute under the criminal law power. In a concurring minority opinion, Dickson J., as he then was, characterized the relevant provisions as valid under both the criminal law power and the trade and commerce power and that the federal Attorney-General was competent to prosecute under both heads of power. He found the legislation to be a valid exercise of the trade and commerce power on the basis of a series of test stemming from Laskin C.J.'s dicta in *Macdonald v. Vapour Canada Ltd.* [57] Dickson J, set out the following test:

> [...] [Laskin, C.J.] cites as possible *indicia* for a valid exercise of the general trade and commerce power the presence of a national regulatory scheme, the oversight of a regulatory agency and a concern with trade in general rather than with an aspect of a particular business. To this list I would add what to my mind would be even stronger indications of valid general regulation of trade and commerce, namely (i) that the provinces jointly or severally would be constitutionally incapable of passing such an enactment, and (ii) that failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country.
>
> The above does not purport to be an exhaustive list, nor is the presence of any or all of these *indicia* necessarily decisive. [58]

In what might be described as a peculiarly Canadian approach, Dickson J. seems to be fashioning a "national interest" test, when examining federal regulation, by emphasizing the impact on the national economy of conduct otherwise traditionally within provincial jurisdiction [59]. This view of the trade

55. *Supra*, note 46.
56. [1983] 2 S.C.R. 206.
57. *Supra*, note 53.
58. *A.G. of Canada v. Canadian National Transportation Ltd., supra*, note 56, 267-268. For an illuminating analysis of Dickson J.'s opinion, see J.D. WHYTE, "Constitutional Aspects of Economic Development Policy", in R. SIMEON, *Division of Powers and Public Policy*, Vol. 61, Toronto, U. of T. Press, 1985, p. 29, p. 57-63.
59. This relatively formal approach is in contrast with the functional American approach in the *Shreveport Rate* Cases, *supra*, note 18.

and commerce power seems to present the best hope for its further strengthening. At present three Court of Appeal decisions, relying on Dickson J.'s approach, have upheld the validity of civil remedies for combines violations, under the trade and commerce power. Two have been appealed to the Supreme Court but have not yet been decided [60].

2.2. The Negative Trade and Commerce Aspect

The Canadian evolution in this area is in sharp contrast to that of the United States. Once again, a tempting initial impression might be that the Canadian Constitution created more constraints on provincial power: not only were provinces prohibited from legislating customs duties and excises [61], but section 121 also states that goods of any one province shall "[...] be admitted free into each of the other Provinces". Do these oracular words simply mean "free of customs duties and excises", thus being in a sense redundant, or do they mean free of other, non-fiscal impediments? One might think that such an argument could be persuasively made, but in two cases where the argument was put it was rejected [62]. However, in a case concerning a federal marketing scheme, Mr. Justice Rand suggested that section 121 might have a broader application:

> I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. [63]

To date no case has been decided in which this view was determinative of the issue before the court.

As might be expected in light of the virtual neutralizing of the trade and commerce power, its negative aspect as a limit on provincial power to impede interprovincial trade has not been great. An important area of provincial regulation, with undoubted effects on interprovincial trade, has been the establishment of agricultural products marketing schemes. Typically, a scheme

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60. *A.G. of Canada v. Québec Ready Mix Inc.*, [1985] 2 F.C. 40 (Fed. C.A.); *City National Leasing Ltd v. General Motors of Canada Ltd.*, (1984) 12 D.L.R. (4th) 273 (Ont. C.A.), both under appeal. *BBM Bureau of Measurement v. Director of Investigation and Research*, [1985] 1 F.C. 173 (Fed. C.A.), apparently is not under appeal.
61. *Supra*, note 10 and accompanying text.
62. *Gold Seal Ltd. v. Dominion Express Co.*, (1921) 62 S.C.R. 424; *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] A.C. 550.
63. *Murphy v. C.P.R.*, *supra*, note 49, p. 642. This view was supported by four judges of nine, in *Re Agricultural Products Marketing, supra*, note 49.

creates a marketing monopoly for a provincial board. The board sets prices and quotas for producers who must sell their entire output to the board. The purpose is to stabilize farm prices and assure farmers of a reasonable market share. Such schemes, if undertaken by private-sector actors, would be conspiracies in restraint of trade since they control the market and eliminate competitors. Yet as undertakings by provincial governments they have generally been upheld by the courts [64].

Since 1971, however, several provincial schemes have been struck down as interfering directly with interprovincial trade [65]. The Supreme Court also invalidated a Government of Saskatchewan scheme for allocating and pricing potash exported from the province by individual producers [66]. Nevertheless, it is fair to say that on the whole, constraints on provincial regulatory activity on the ground that the activity interferes with interprovincial trade and commerce have not been substantial; in any event, these constraints have been much less effective than has been the negative commerce clause in the United States.

2.3. Federal Legislation Pre-empting the Field

In principle in Canada as in other federations, when a valid federal law is in direct conflict with an otherwise valid provincial law the federal law is paramount and renders the provincial law inoperative to the extent of the conflict [67]. In the absence of direct conflict, Professor Hogg has asked:

> Where the federal Parliament has enacted a law on a particular topic, does this preclude a province from enacting a different law on the same topic? If the provincial law does not contradict the federal law, but adds to it or supplements it, is the provincial law rendered inoperative by the federal law? [...] The short answer [...] is that only express contradiction suffices to invoke the paramountcy doctrine. [...]
>
> Canadian courts, by confining the doctrine of paramountcy to such a narrow compass, have rejected a "covering the field" (or negative implication) test of

64. *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708; *Re Farm Products Marketing Act (Ontario)*, [1975] S.C.R. 198; *Carnation Co. Ltd. v. Québec Agricultural Marketing Board*, [1968] S.C.R. 238; *Re Agricultural Products Marketing, supra*, note 49.
65. *A.G. of Manitoba v. Manitoba Egg & Poultry Association*, [1971] S.C.R. 689; *Burns Foods Ltd. v. A.G. of Manitoba*, [1975] 1 S.C.R. 494.
66. *Central Canada Potash Co. Ltd.* et al. *v. Government of Saskatchewan* et al., [1979] 1 S.C.R. 42.
67. *Tenant v. The Union Bank of Canada*, [1894] A.C. 31. See especially, W.R. LEDERMAN, "The Concurrent Operation of Federal and Provincial Laws in Canada", (1963) 9 *McGill L.J.* 185.

> inconsistency, which is employed by the courts of the United States and Australia.[68]

Accordingly, the existence of a federal regulatory scheme does not preclude a province legislating in the same area, so long as there is no direct conflict. And the Supreme Court of Canada has gone to extraordinary lengths to save provincial legislation by determining that there is no conflict[69].

2.4. Free Movement of Goods — An Overview

We can see that the constitutional position of the federal government and the courts in creating a common market in goods has been weak; Canadian provinces have been relatively unrestricted in their activities when compared with American states. This situation and its effect on the Canadian economic union has received increasing attention in recent years, especially after the election in 1976 of the *Parti Québécois* Government in Québec, on a platform of "sovereignty-association". That government proposed that Québec become a politically independent nation and form an economic association, similar to the EC, with the rest of Canada. Although the proposal was rejected in a referendum in May 1980, it led to an explosion of research and writing — and polemics — on every aspect of the state of the Canadian nation.

Political scientists, economists, sociologists and lawyers all contributed to the outpouring. In particular, the idea of an Québec/Canada economic association was a catalyst for those already interested in the EC to analyze Canada's economy as it was at the time and how it would be affected by the *Parti Québécois* proposals[70]. Many comparisons were made with the EC. Moreover, to counter the Québec proposals, several task forces set out to

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68. HOGG, *supra*, note 48, p. 358.
69. In *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5, the defendant was convicted of impaired driving under the federal *Criminal Code*, and pursuant to powers granted under the Code the judge prohibited him from driving for six months, "[...] except Monday to Friday, 8:00 a.m. to 5:45 p.m. in the course of employment and going to and from work" (p. 7). However, on conviction under the federal Code, the applicable provincial *Highway Traffic Act* automatically suspended his driver's licence entirely, thus completely preventing the defendant from driving. The result was to nullify the penalty carefully designed by the court for the particular defendant. Surprisingly to anyone not familiar with the Canadian jurisprudence regarding paramountcy, the Supreme Court said that there was no conflict, that the provincial law was valid, and that the defendant simply was unable to get the benefit of the "[...] indulgence granted under the federal legislation" (p. 13).
70. J.-P. CHARBONNEAU & G. PAQUETTE, *L'Option*, Montréal, Les Éd. de l'Homme Ltée., 1978; G. BERGERON, *Ce Jour-là... le RÉFÉREMDUM*, Montréal, Les Éd. Quinze, 1978.

make extensive counterproposals, and one in particular, the Task Force on Canadian Unity, was sponsored by the federal government [71]. All of these groups devoted a substantial portion of their reports to economic union questions.

There have also been a number of important economic studies of the issues [72], all showing that there are substantial barriers to interprovincial trade in Canada, in many instances more serious that in the EC. The most exhaustive studies were undertaken by the Royal Commission on the Economic Union and Development Prospects for Canada established in 1982, under the chairmanship of the Honourable Donald S. Macdonald, a former federal Minister of Finance. Its three-volume report was published in the autumn of 1985 [73], followed by seventy-two volumes of research studies [74].

The conclusions based on economic data appear to suggest that the costs of interprovincial barriers to trade do not amount to a large proportion of total interprovincial trade [75]. Indeed barriers created by federal programs and regulations are believed to create greater distortions [76]. However, there is a recognition that this quantitative data may tell us little about the dynamic effects on the economy. The Macdonald Report admits that:

> This is a field, however, where estimates are imprecise and controversial. In the foreign-trade field, for example, some recent estimates suggest that the gains

71. J.-L. PÉPIN, J.P. ROBARTS *et al., The Task Force on Canadian Unity: A Future Together*, Ottawa, Supply and Services, 1979; J. VIAU, *et al., Towards a New Canada*, Ottawa, Canadian Bar Foundation, 1978; L.G. ALLARD *et al., A New Canadian Federation*, Montréal, Québec Liberal Party, 1980.

72. A.E. SAFARIAN, *Canadian Federalism and Economic Integration*, Ottawa, Information Canada, 1974; M.J. TREBILCOCK, G. KAISER & J.R.S. PRITCHARD, "Restrictions on the Interprovincial Mobility of Resources: Goods, Capital and Labour", in *Intergovernmental Relations*, Toronto, Ontario Economic Council, 1977 p. 101; MINISTER OF JUSTICE, *Securing the Canadian Economic Union in the Constitution*, Ottawa, Supply and Services Canada, 1980; F.R. FLATTERS & R.G. LIPSEY, *Common ground for the Canadian common market*, Montréal, The Institute for Research on Public Policy, 1983; R.E. HAACK, D.R. HUGHES & R.G. SHAPIRO, *The Splintered Market*, Toronto, James Lorimer & Co., 1981.

73. Ottawa, Supply and Services Canada, 1985, hereafter called the Macdonald Report.

74. Toronto, U. of T. Press, Supply and Services Canada, 1985-86.

75. Macdonald Report, Vol. 3, p. 120:
Economic analysis typically shows that distortions of the sort we have described have a small effect on output costs. Various calculations estimate that welfare losses for 1974 fell between a low of $ 130 million, or 0.11 per cent of gross national product (GNP) and a high of $ 1750 million, or 1.54 per cent of GNP, depending on the assumptions made.
The principal study prior to the Macdonald Report is that of J. WHALLEY, "Induced Distortions of Interprovincial Activity: An Overview of Issues", in M.J. TREBILCOCK *et al.* (ed.), *supra*, note 31, p. 161.

76. *Ibid.* See also, for example, R.E. HAACK, D.R. HUGHES & R.G. SHAPIRO, *supra*, note 72, p. 58.

> from international trade liberalization may be much greater than earlier models suggested. The newer models attempt to take into account the significance of economies of scale. They might have equally dramatic effects if applied to the domestic market.
>
> [...] [T]he costs of barriers to trade may be extremely significant for individual firms, even if aggregate costs for the national economy do not appear to be large. [77]

In my view, these conclusions and the recommendations of the Macdonald report [78] do not give enough weight to the barriers. We cannot be sure about the overall effect on the economy, and in particular the effects caused by these barriers on important decisions of business leaders; removal of the more substantial barriers might make many firms much more competitive in world markets [79].

Conclusion: Some Thoughts on the Consequences of the Free Trade Agreement between Canada and the United States

— Constitutional Aspects

With respect to the United States, the main difficulty will be a political one: to win a two-thirds majority in the Senate, consenting to a treaty signed by the President. As noted earlier, there appears to be no problem in implementing the trade agreement: a treaty signed by the President and formally ratified by the Senate is "[...] the supreme Law of the Land [...]" [80]. Furthermore, any additional legislation to implement the treaty receives the same constitutional paramountcy over state law [81].

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77. Macdonald Report, Vol. 3, p. 120. The findings of the Macdonald Report appear to be influenced by the Research Study paper of N. SILZER & M. KRASNICK, "The Free Flow of Goods in the Canadian Economic Union", in M. KRASNICK, *Perspectives on the Canadian Economic Union*, Vol. 60, Toronto, U. of T. Press, 1986, p. 155, 187. I would suggest that its conclusion that, "[...] major constitutional change is not necessary at this time. Evidence of the cost of barriers is not sufficient to support a major overhaul" is too sanguine.
78. Macdonald Report, Vol. 3, p. 391-393.
79. All the studies enumerate and describe a lengthy list of provincially induced barriers to trade, among them: marketing boards; taxes equivalent to customs duties; government procurement policies; government subsidies including tax holidays; health, safety and labelling standards; government as owner-manager of natural resources; government monopoly enterprises such as liquor sales. SILZER & KASNICK, *supra*, note 77, p. 179, 180 state, "There are at the present time few constitutional constraints upon the powers of provincial governments to impede the movement of goods in the ways just described".
80. See *supra*, note 9 and accompanying text.
81. *Missouri v. Holland*, *supra*, note 9.

The Canadian treaty position is much more problematic. As discussed earlier, no express treaty-making power was granteed to the Government of Canada. The source of its power to make treaties is twofold. First, by the general principles of international law, Canada's evolution as an independent nation brought with it the power to make treaties, vested in the central government [82]. The second source is found in the *Letters Patent constituting the office of Governor General of Canada* [83], granting to the Governor General "[...] all powers and authorities lawfully belonging to [...] [the Monarch] in respect of Canada [...]". Accordingly, with respect to entering into and ratifying treaties — acts performed under English common law by the executive branch of government — there appears to be no difficulty.

We have noted that under the common law treaties are not self-executing and do not form part of the internal law of Canada. When treaty implementation requires a change in that law, ordinary legislation must be passed [84]. As stated by Professor Hogg:

> In a case where Canada's internal law is not in conformity with a treaty binding upon Canada, then Canada is in breach of its international obligations and may be liable in international law to pay damages or suffer other sanctions, but the breach of a treaty is irrelevant to the rights of parties to litigation in a Canadian court. The only concession which the Canadian courts have been prepared to make in recognition of Canada's international obligations is to interpret statutes so as to conform as far as possible with international law. [85]

Insofar as federal jurisdiction is concerned, this principle causes no more difficulty than it would in a unitary state, such as the United Kingdom, where the government that makes a treaty can obtain passage of necessary legislation through Parliament.

The problem araises where treaty implementation concerns subject matter falling under provincial jurisdiction. Without a constitutional grant of treaty power to Parliament — such exists in the United States, or as existed in Canada with respect to Empire treaties and their implementation under section 132 of the *Constitution Act, 1867* — the power to implement such treaties would seem to reside with provincial legislatures. Short of constitutional amendment, there are two possible avenues of interpretation to expand the implementation powers of the federal Parliament.

There is no reason to anticipate that the first avenue — simply to construe an inherent treaty-implementing power from the fact of full Canadian

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82. See A.E. GOTLIEB, *Canadian Treaty-Making*, Toronto, Butterworths, 1968, p. 6-10.
83. R.S.C. 1970, Appendix II, nº 35, II.
84. *Francis v. The Queen*, [1956] S.C.R. 618.
85. HOGG, *supra*, note 48, p. 246.

independence and the grant of executive power to the Governor General — is likely to be recognized by the Supreme Court. Indeed, there is a persuasive reason against such a construction. In the United States, the regional interests of the states are safeguarded by a popularly elected Senate, with each state represented by two senators regardless of its population; for a treaty to be implemented, the Constitution requires consent by a two-thirds vote of the Senate. In Canada, under its system of responsible government, the House of Commons is elected on the basis of representation by population, party discipline is much greater than in the United States, and over sixty per cent of the population is in the two central provinces of Ontario and Québec. If in these circumstances, a broad, judicially construed treaty-implementing power existed, it would be possible for the federal government to push through the House of Commons legislation that trenched upon provincial jurisdiction while ignoring the contrary wishes of the majority of the provinces [86]. It seems that just such a problem confronts Australia, where Parliament's power "'with respect to... external affairs'" has been expanded into a treaty-implementing power, but the extent of that power remains unsettled [87]. In the absence of any constitutional text as a basis for such a claim in Canada, it seems almost certain the Supreme Court would not embark on such a course.

The second avenue would be a gradually expanded interpretation of existing federal legislative powers, especially the trade and commerce power, in aid of the treaty-making responsibilities of the federal government. A legitimate basis for expanding power in this area might be found in the *bona fide*, traditional exercise of the treaty-making power by the federal government in such matters as the G.A.T.T. and free-trade with the United States. This suggestion requires some elaboration.

The leading case on Canada's lack of treaty-implementing power, *A.G. of Canada v. A.G. of Ontario* [88] *(Labour Conventions)*, was decided in 1937. In the post First World War period, Canada had adopted and ratified three treaties to guarantee minimum working conditions for all workers. A 1925 decision of the Privy Council, *Toronto Electric Commissioners v. Snider* [89], had made it clear that Parliament had no authority to legislate with respect to

86. Ontario and Québec aslo have fifty percent of the seats in the Senate and would need very little extra support to carry the Senate. Moreover, it remains unlikely that an appointed Senate would long resist the clear majority will of the elected House of Commons by refusing to pass treaty-implementing legislation. (Prospects for change in the Senate's legitimacy and powers consequent to the Meech Lake Accord, whereby the provinces would nominate senators, remain very speculative.)

87. Hogg, *supra*, note 48, p. 248-249.

88. [1937] A.C. 326.

89. [1925] A.C. 396.

labour disputes generally. Apart from industries under federal jurisdiction such as banks and interprovincial railways, labour relations jurisdiction belonged to the provinces under their authority over "Property and Civil Rights in the Province".

In the *Labour Conventions* case, Lord Atkin speaking for the Privy Council easily dismissed any suggestion that the Empire treaty-implementing section 132 could apply to treaties entered into by Canada in its own name. He also found that there was no inherent legislative power with respect to treaties as such; there were only those powers assigned to either federal or provincial legislatures according to sections 91 and 92 of the *Constitution Act, 1867*. He applied the decision in the *Snider* case, holding that the provinces had jurisdiction over labour relations. Thus it depended on them to pass implementing legislation to honour Canada's commitments under the labour conventions. Lord Atkin left us with as oft-quoted statement to describe Canada's international competence:

> While the [Canadian] ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure. [90]

However, this view of the treaty-implementing power has not gone unchallenged. In *MacDonald v. Vapour Canada Ltd.* [91], Laskin C.J., speaking for the majority, showed a willingness to reconsider the *Labour Conventions* case. After reviewing Lord Atkin's opinion and subsequent comments suggesting that the *Labour Conventions* decision might be reconsidered, the Chief Justice said:

> Although the foregoing references would support a reconsideration of the *Labour Conventions* case, I find it unnecessary to do that here because, assuming that it was open to Parliament to pass legislation in implementation of an international obligation by Canada under a treaty or Convention (being legislation which it would be otherwise beyond its competence), I am of the opinion that it cannot be said that [the section in dispute] was enacted on that basis. [92]

The opinion of Dickson, J. in *A.G. of Canada v. Canadian National Transportation Ltd.* [93], while not concerned with treaty implementation, nevertheless makes statements that are relevant to salient aspects of a free trade agreement. The tests there set out by Dickson J., his reiteration of Laskin C.J.'s criteria of, "[...] the presence of a national regulatory scheme,

90. *Labour Conventions* Case, *supra*, note 88, p. 354.
91. *Supra*, note 53, p. 168-169.
92. *Id.*, p. 169.
93. *Supra*, note 58 and accompanying text.

the oversight of a regulatory agency and a concern with trade in general rather than with an aspect of a particular business" and, in particular, Dickson J.'s addition of two factors, " [...] (i) that the provinces jointly or severally would be constitutionnally incapable of passing such an enactment, and (ii) that failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country"[94] would seem to be conditions necessarily part of a free trade arrangement with the United States. Accordingly, there may be fertile ground for growing support of Canada's commercial treaty obligations through legislation that establishes a national scheme implemented by a federal administrative body.

— Implications of Canada's Treaty-Implementing Deficiencies

At the time of writing, Canada and the United State have signed a Free Trade Agreement and its text has been published [95], but it has not been ratified by the American Senate, nor has Parliament passed implementing legislation. What role does the Agreement give to the provinces and states? Since some provinces have stated their opposition to the Agreement, will their refusal to collaborate affect its successful implementation? A quick review of those parts of the Agreement that appear to relate to provincial jurisdiction may give some tentative indications of areas of difficulty.

Article 102 states that the objectives of the Agreement are to:

a) eliminate barriers to trade in goods and services between the territories of the Parties;
b) facilitate conditions of fair competition within the freetrade area;
[...]

The first reference to the provinces follows immediately in Article 103:

> The Parties to the Agreement shall ensure that all necessary measures are taken in order to give effect to its provisions, including their observance, except as otherwise provided in this Agreement, by state, provincial and local governments.

It would seem, then, that the federal government has undertaken responsibility for dissenting and recalcitrant provinces to comply with obligations under the Agreement. What is expected of the provinces?

Article 501 incorporates G.A.T.T. rules regarding "[...] national treatment [...]" of goods that are imported from the territory of the other contracting parties; Article 502 goes on to say that a province or state shall give

94. *Id.*, p. 267, 268.
95. Ottawa, Department of External Affairs, January 1988.

"treatment no less favourable than the most favourable treatment accorded by such province or state to [...] goods [...] of the Party of which it forms part". Thus, apart from exceptions within the Agreement — and there are major exceptions — under Article 103, a breach of the requirement for national treatment by a province will be a breach by the federal government of its responsibilities.

The first major derogation from the above obligation occurs in Chapter 6 "Technical Standards". Article 601 (2) states:

> The provisions of this Chapter shall not apply to any measure of a provincial or state government. Accordingly, the Parties need not ensure the observance of these provisions by state or provincial governments.

It is generally accepted that many technical standards for manufactured goods and agricultural products, ostensibly passed as health and safety measures, amount to measures of equivalent effect to tariffs and quotas, whether or not they were deliberately designed as such. Yet Article 601 exempts provincial and state measures, no matter how severe an impact they may have as barriers to trade. Since the provinces have established a large number of technical standards, those that act as barriers to interprovincial trade [96] will remain also as barriers to bilateral trade between Canada and the United States. By contrast, within their own jurisdiction the two federal governments undertake to harmonize technical standards in order to eliminate them as barriers.

Chapter 7 of the Agreement deals with agriculture. Article 701 prohibits the introduction of export subsidies on agricultural products, or their sale below cost by government marketing agencies. In addition, Article 704 (1) prohibits quantitative import restrictions or "[...]measure[s] having equivalent effect on meat goods [...]". This Article appears to apply to provinces, and if the above words are found to include technical standards that amount to measures having equivalent effect, there may be a conflict with Article 601, which exempts provincial technical standards.

The remainder of Chapter 7 — in particular, Article 708 — obligates the two federal governments to "[...]work toward the elimination of technical regulations and standards [...]" that restrict trade in agriculture unfairly. This extensive Article requires much detailed cooperation, with the phrase "work toward" repeated a number of times. There is no mention of provinces and states.

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96. See, notes 72-79 and accompanying text.

Chapter 8 is concerned with wine and distilled spirits. Article 801 states that the national treatment requirements of Article 502 "[...]shall not apply to: a) a non-conforming provision of any existing measure [...]" or its continuation or prompt renewal. However, the remainder of Chapter 8 sets out a schedule and other details for requiring the elimination of many barriers currently maintained by provincial liquor commissions, and especially for doing away with differentials in price mark-ups for wine that originates outside the province. Accordingly, Chapter 8 requires provinces to change their current practices, and restricts their future discretion in marketing wines and distilled spirits within the province.

Article 1301 of Chapter 13, dealing with government procurement, states that, "[...] the Parties shall actively strive to achieve, as quickly as possible, the multilateral liberalization of international government procurement policies to provide balanced and equitable opportunities". The Annex to Article 1304.3 lists those entities to which the Chapter applies: they are exclusively federal government agencies. Accordingly, we must conclude that the vast array of provincial and state government agencies are left to continue their discrimination in favour of local suppliers of goods and services.

Chapters 14 to 16 inclusive, covering such important matters as freedom to provide services and make investments, create greater uncertainty. These provisions require each Contracting Party to give "like treatment" with respect to covered services[97] provided by nationals of, and investment originating in the territory of, the other contracting party. The provinces are mentioned in Article 1402 (2):

> The treatment accorded by a Party under paragraph 1 shall mean, with respect to a province or a state, treatment no less favourable than the most favourable treatment accorded by such province or state in like circumstances to persons of the Party of which it forms a part.

However, paragraph 5 of this Article is a grandfather clause exempting existing measures and their continuation or prompt renewal. A consequence might be that major modernizing and redrafting of laws governing a profession may be discouraged for fear of falling outside the exemption and thus having to surrender protectionist measures. In an attempt to encourage movement away from discriminatory exemptions, Annex 1404 (A), a sectoral annex

97. Although not all services are covered by the Agreement, Annex 1408 sets out a very large number including special services in agriculture, mining, construction, insurance and real estate, and commerce generally. These include such provincially regulated areas as insurance brokerage and real estate agencies, automotive rental and leasing, and the professions of accounting, architecture, engineering and surveying.

concerning architecture, requires the Parties to "[...] encourage their respective states and provincial governments [...]" to harmonize their laws with respect to licensing and establishing professional standards.

This cursory review of potential provincial obligations is not intended to be exhaustive but merely to indicate some problem areas. There is an area where I think that federal legislation regulating the conditions of sale of imported goods — whether it be meat goods in Article 704, or wines and spirits in Chapter 8 — is supported by the Supreme Court decision in *Caloil Inc. v. Attorney General of Canada*[98]. Paraphrasing the principle there expressed, I would suggest that "Parliament may regulate the importation of goods from foreign countries, including as part of the regulatory scheme provisions governing the distribution of goods within Canada".

In summary, there appear to be two major areas of the Agreement that relate in some manner to the provinces:

a) Those where the provinces are expressly bound and the federal government is responsible for breach (as with wines and spirits), but where federal legislative power may well prevail if a province refuses to conform to the terms of the Agreement;
b) those where the provinces are exempted expressly (as with technical standards), or by implication (as in government procurement).

In addition, there are areas of potential conflict in interpretation such as, whether the Article 601, which exempts provinces from harmonizing technical standards, thereby excuses breach of Article 704, which prohibits measures having equivalent effect to quantitative restrictions on meat goods. Moreover, the various grandfather clauses create a disincentive to major changes in existing laws, and may make it difficult to predict the consequences of any changes. Thus, even a cursory review provides evidence of uncertainty and an invitation to litigation regarding the role of the provinces under the Agreement.

Even if provinces support the Agreement on Free Trade and subsequently enter into intergovernmental arrangements with the federal government, the

98. *Supra*, note 49, p. 553. There a unanimous court upheld federal legislation regulating the distribution of imported oil within Ontario by restricting its sale to an eastern portion of the province. In a short concurring opinion, Laskin J. supported the decision, "[...] on the ground [...] that the admitted authority of Parliament to regulate importation of goods from foreign countries was validly exercised in this case in including as part of the regulatory scheme a provision restricting the area of distribution of goods within Canada by their importer".

legal status of such agreements is unclear, including the question of whether or not third parties can or should have any rights under them[99].

— The Mechanisms for Dispute Resolution and Enforcement

Since most provisions in a broad agreement on trade must be stated in general terms, they are open to conflicting interpretations; subsequent disputes between the Parties must be adjudicated by a tribunal, as in the European Community where the Court of Justice has the last word. Thus, dispute resolution and enforcement are crucial elements in a system of free trade. The provisions of the Agreement represent a serious effort to create effective mechanisms, but because of inherent difficulties in a two party arrangement, they may not be successful.

Chapters 18 and 19 contain the Institutional Provisions. Article 1802 establishes the Canada-United States Trade Commission. The principle tasks of the Commission are "[...] to supervise the implementation of the Agreement [...]" and "[...] to oversee its further elaboration [...]"; it is an administrative and policy-making body that will take decisions "[...] by consensus [...]"; without the agreement of both Parties no decision can be taken.

Article 1807, establishes a panel of arbitrators to hear disputes left unresolved before the Commission itself. The panels hear all disputes arising under the Agreement except for Financial Services (Chapter 17), which are left to negotiation, and Antidumping and Countervailing Duty Cases (Chapter 19) which have their own arbitral system, discussed below. The Chapter 18 process is sophisticated: it creates a "[...] roster of individuals [...] chosen strictly on the basis of objectivity, reliability and sound judgment [...] Panelists shall not be affiliated with or take instructions from either Party". When a panel is selected, two members shall be citizens of each country, and if neither the Commission nor the four appointed panelists can agree on a fifth panelist who shall chair the panel, the fifth shall be chosen by lot from the roster.

On first impression, this process may seem to contain a surprising concession to Canada: the United States with a population and economy more than ten times the size of Canada's, agrees to the establishment of arbitration panels that are as likely to have a majority of Canadians as they are to have a majority of Americans. However, when we examine the

99. See, N.D. BANKES, C.D. HUNT & J.O. SAUNDERS, "Energy and Natural Resources: The Canadian Constitutional Framework", in M. KRASNICK, *Case Studies in the Division of Powers*, Toronto, U. of Press, 1986, p. 53, p. 81-97, esp. p. 96-97.

procedures of Articles 1805 and 1806 the concession may not be as large as it seems.

When the Parties fail to resolve a dispute by negotiation, either Party may invoke the procedures of Articles 1805 and 1806, for "[...] binding arbitration [...]". First, the right to insist on arbitration appears to be limited; the Commission is required to refer to arbitration only those disputes concerning "[...] Emergency Action [...]" under the transitional provisions of Chapter 11 [100]; it *may* refer other disputes if it chooses. Since the Commission operates by consensus, each Party retains the option of blocking a reference to binding arbitration in all other disputes [101].

Second, Article 1806 uses the word "binding" in its traditional international law meaning rather than in the supranational sense employed by the European Community. Under Article 1806(3), an arbitral decision is binding only in the sense that if the offending Party "[...] fails to implement [...] the findings of a binding arbitration panel [...] then the other Party shall have the right to suspend the application of equivalent benefits of this Agreement to the non-complying Party" [102]. In other words, the remedy of an aggrieved Party remains retaliation, as it is without a free trade agreement, but with the blessing of the Agreement to make retaliation legitimate. In the European Community, member states have agreed to be bound by decisions of the Court of Justice. In particular, domestic courts accept Court of Justice interpretations of the treaties and domestic legislation as binding; when the

100. Articles 1101 and 1103 apply only to temporary emergency suspensions of transitional provisions by one Party.

101. A catchall provision, Article 2011 (1), creates some ambiguity. It permits a Party to invoke Article 1806, the Arbitration clause, only "[...] with the consent of the other Party [...]". It also states, "[...] [a] Party may [...] invoke the consultation provisions of Article 1804 and [...] proceed to dispute settlement *pursuant to Articles 1805 and 1807* [...]". [emphasis added]. Oddly, paragraph 2 alone of Article 1807 applies to the procedures of Article 1805. That paragraph states, "[...] the Commission, upon request of either Party, shall establish a *panel of experts to consider the matter*". [emphasis added]. There are no other references to a "panel of experts" — all other references are to arbitration panels — and no explanation of what is meant by "[...] to consider the matter". Moreover, Article 1806, the Arbitration clause, expressly incorporates paragraphs 1, 3 and 4 of Article 1807, while deliberately omitting paragraph 2 and its peculiar "panel of experts".
It would seem that the right to consideration by a panel of experts is *not* a right to arbitration.

102. Under Article 1807 (8), the Commission is not bound to accept the specific recommendations of an arbitral panel: "Upon receipt of the final report of the panel, the Commission shall agree on the resolution of the dispute, *which normally shall conform* with the recommendation of the panel. *Whenever possible*, the resolution shall be non-implementation or removal of a measure not conforming with this Agreement [...]". [emphasis added].

Court finds that a law of a member state offends a treaty obligation and should be struck down, the domestic court complies.

In a multilateral arrangement such as the G.A.T.T., retaliation by a number of aggrieved signatories might possibly be effective to convince an offending party to rescind its impugned action. However, in an ongoing and more highly structured bilateral arrangement between two unequal parties, I suggest that retaliation is an ineffective, and very likely destructive, remedy — destructive of the whole Agreement. Indeed, the strongest argument in favour of an offending party complying with the finding of an arbitral panel is that failure to do so will tend seriously to undermine the Agreement. How persuasive this argument might be in the United States Congress is another matter. Whether Congress, without the party discipline of the parliamentary system and frequently at odds with the administration, could be persuaded to comply with a panel decision by amending American law is at best highly speculative.

Chapter 19 establishes Panels for Dispute Settlement especially for Antidumping and Countervailing Duty Cases, the area most likely to produce conflict. There are strict limits on the application of this Chapter. First, Article 1901 applies only to goods; complaints with respect to allegations of dumping services cheaply and countervailing measures are not covered. Second, under Article 1902(1) and (2), "Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of the other Party [...]" and "[...] to change or modify its antidumping law or countervailing duty law [...]" subject to certain procedural requirements and consistency with G.A.T.T. provisions. The Parties undertake to work toward development of a new joint system of rules within five to seven years (Articles 1906 and 1907).

The binational panels in this Chapter are established in a manner similar to that of the arbitration panels in Chapter 18. However, pursuant to Annex 1901.2(2) and (4), in recognition of the technical and legal nature of disputes on antidumping and countervailing, the chairman and a majority of the panelists are to be lawyers.

Article 1903 gives each Party a right to refer any amendment to a current antidumping or countervailing duty statute to a panel for a "[...] declaratory opinion [...]". As in Chapter 18, the remedy when an offending Party fails to pass remedial legislation in compliance with a panel opinion is retaliation, or in the extreme case, termination of the Agreement upon 60-day written notice.

Article 1904 undertakes a considerably more ambitious step toward supranational determination of disputes with respect to decisions of domestic

tribunals on antidumping and countervail. Paragraph 1 states, "[...] the Parties shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review". Paragraphs 2 and 5 give to each Party, as well as to private parties who would be entitled to standing before a domestic body, a right to "[...] review of a final determination [of a domestic tribunal] by a panel [...]".

The panel's role is much like that of the European Court of Justice: when it disagrees with the decision of a domestic tribunal it will not issue a binding determination of its own; rather, under paragraph 8, it will remand its determination to the domestic tribunal "[...] for action not inconsistent with the panel's decision". The following paragraphs complete the powers needed to make the decisions binding:

> 9. The decision of a panel under this Article shall be binding on the Parties with respect to the particular matter between the Parties that is before the panel.
>
> 11. A final determination shall not be reviewed under any judicial review procedures of the importing Party if either Party requests a panel with respect to that determination within the time limits set forth in this Article. *Neither Party shall provide in its domestic legislation for an appeal from a panel decision to its domestic courts.* [emphasis added].

Under paragraph 15, the Parties undertake to amend their statutes and regulations in general and to make certain specified amendments in order to make the scheme workable.

If the Free Trade Agreement is ratified by both Parties and if the required amendments to domestic legislation are passed, Chapter 19 will implement a significant institutional step in establishing an ongoing supranational mechanism for dispute resolution. Indeed this may be the most important element of the Agreement.

It is difficult to predict the relative importance of the two methods of dispute resolution — the "international law" system in Chapter 18 to resolve more general issues of implementation and policy making, and the "supranational law" system in Chapter 19 to resolve disputes regarding antidumping and countervail. The experience of the European Community and the deference that judicial and quasi-judicial tribunals usually pay to a superior tribunals suggest that the Chapter 19 system of arbitration should be successful. It would be hoped that disputes under the weaker arbitral system of Article 18 would play a minor role in implementation of the Agreement. If not, non-compliance by either party might well tend to undermine the whole Agreement.