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DISCUSSION PAPER

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FEDERAL PROVINCIAL JURISDICTIONAL ISSUES FOR TRADE IN SERVICES NEGOTIATION

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INTRODUCTION:

Can provincial Premiers exercise a veto on Trade Agreements, including the Canada-U.S. Free Trade one? They certainly talk as if they can.(1) And if they cannot do so, can the provinces block the federal government's legislative initiative to implement the Agreement by a successful challenge to its jurisdiction to make such a law? These issues have emerged because of negotiating the increased interest in a Free Trade Agreement with the U.S. and contemplating a new "International Treaty on Trade in Services".(2)

Based on a belief that "we have a role", the provinces are spending considerable time assessing and discussing what that role should be. Legally, the role of the provinces in the making and implementing of treaties is uncertain and controversial. It will be even more so with respect to treaties concerning trade in services: relative to trade in goods, this area of activity is a novel one in international negotiations, and is an area not allocated in Canada's Constitution to either federal or provincial legislative jurisdiction.(3)

This paper considers the most efficacious way the federal government can proceed to negotiate, make and implement a Trade Agreement.

First, there is a review of the legal history of the federal government's power to make and implement international treaties and the competing powers of the provinces. The present state of the law concerning these powers is then summarized.

Then, special issues concerning trade in services are raised generally, and particularized in the context of two exemplary services: trust companies and the legal profession.

Next, consideration is given to the possible content of provisions in the Free Trade Agreement which will deal with trade in services.

Last, with these possible provisions in mind, the legal choices available to the federal government to implement these provisions are assessed, followed by our evaluation of which of these choices are likely to be the most efficacious.

THE FEDERAL GOVERNMENT'S POWER WITH RESPECT TO INTERNATIONAL TREATIES:

History

In discussing the federal power in respect of international treaties, the powers to make and to implement a treaty must be distinguished.

It is clear that the executive branch, not the legislative branch, of the federal government has the power to make treaties. The power is not to be found in the Constitution, but rather in Letters Patent Constituting the Office of the Governor-General of Canada, 1947.(4) In clause 2 of this document, the Governor-General is authorized to exercise all powers of the King in respect of Canada. This includes the power to make treaties for Canada. In practice, it is the federal cabinet which exercises this power, not the Governor-General.

Although the procedure is used less and less, where ratification of a treaty is required the Secretary of State for External Affairs can do so by signing the treaty.

Hence, Parliament plays no necessary role in the making or ratification of treaties. If a treaty is a particularly important one, however, the practice is to lay the treaty before Parliament for approval between its signing and

ratification. This practice is only followed if ratification is required. In these cases, Parliament does not approve the treaty in statutory form; a resolution is merely passed in the House of Commons and the Senate approving the treaty.

Once made and ratified, the treaty becomes binding on Canada in international law. Nonetheless, the treaty must be implemented in Canada, which may require a change or addition to domestic law. It is in the context of the implementation of treaties that disputes arise between the federal and provincial governments.

These difficulties are due to the separation of powers between both levels of government set out principally in ss.91 and 92 of the Constitution Act, 1867. Section 91 provides that the federal government may "make Laws for the Peace, Order and Good Government of Canada" not coming within subject matters assigned exclusively to provincial legislative jurisdiction, including but not limited to a number of enumerated subject matters. These include: the regulation of trade and commerce (91(2)); naturalization and aliens (91(25)); and the criminal law (91(27)). Section 92 lists subject matters which fall within the exclusive legislative competence of the provinces. These include: direct taxation within the province (92(2)); the incorporation of companies with provincial objects (92(11)); and property and civil rights (92(13)).

Subject to the Canadian Charter of Rights and Freedoms, the federal and provincial legislatures, when taken together, have the power to enact any law concerning any subject matter whatsoever. What has proven the source of federal-provincial disputes has been which of these levels of government is empowered to pass laws in respect of which subject matters.

The powers listed in ss.91 and 92 are far from exhaustive. Moreover, much legislation involves more than one subject matter listed therein. For example, imagine the federal government passes a law which forbids immigrants to Canada from purchasing land until they have lived in the country for two years. Is the subject matter "naturalization and aliens" (i.e., subsection 91(25)) over which the federal government has legislative competence,

or is it "property and civil rights" (i.e., subsection 92(13)) in respect of which the provinces exclusively may legislate? If it is the former, the legislation is valid; if it is the latter, the legislation is invalid or unconstitutional.

The judiciary is the forum which decides whether legislation is valid or invalid. It has the power to declare statutes enacted by the federal or a provincial legislature constitutional or unconstitutional.

The power to implement treaties is not a subject matter to which legislative competence is ascribed to either the federal government in s.91, or the provincial government in s.92. Section 132 of the Constitution Act, 1867, however, provides as follows:

> 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.

This section gives the federal government the power to implement treaties, but only those treaties entered into between England and foreign countries. At the time of Confederation, this was the only sort of treaty envisaged for Canada: it was not contemplated that Canada may one day have the power to enter into treaties with foreign countries on its own.

In 1926, however, an Imperial Conference between Great Britian and certain of its dominions including Canada, resulted in giving those dominions power to negotiate, sign and ratify their own treaties. Important treaties, however, still required approval in London, until 1947. A literal reading of s.132 leads one to conclude that it does not empower the federal government to implement any treaties entered into by it since 1947.

In the 1931 case of Reference Re Aeronautics in Canada[5], the Judicial Committee of the Privy Council was called upon to decide the constitutionality of federal legislation with respect to the control and regulation of aeronautics.

In enacting this legislation, the federal government was performing its obligations as a part of the British Empire, which was bound under England's signature to a Convention relating to the regulation of aerial navigation. The Court held that s.132 empowered the federal government to pass the legislation in question so as to implement the terms of this Convention. Aside from the treaty-implementing power in s.132, the Court held that the subject matter of aerial navigation was within the legislative competence of the federal government by virtue of certain subsections of s.91, including s.91(2) "trade in commerce", and by virtue of the power in that section for the federal government to pass laws for the peace, order and good government of Canada.

Hence, the case deals not only with the ability of the federal government to implement empire treaties, which is uncontested but no longer of any value, but also sets down the analytical process followed in the Labour Conventions case, discussed shortly. This process does not consider a treaty-implementing power per se, but rather considers the subject matter of the treaty and whether it is of federal or provincial legislative competence.

Reference Re Regulation and Control of Radio Communication(6), decided by the Judicial Committee of the Privy Council in 1932, only one year after the Aeronautics case, deals with a wholly Canadian treaty. Here, the federal government passed legislation with respect to the regulation and control of radio communication. One of the federal government's arguments in support of the validity of this legislation was that it was enacted pursuant to Canada's treaty obligations pursuant to the Radio Convention entered into by the Canadian Government and other signatory nations.

The Court had to decide whether it would take a narrow, literal interpretation of s.132, or accede to the argument of the federal government that s.132 should be read broadly so as to encompass wholly Canadian treaties.

This was a difficult decision to make. The words of s.132 are clearly confined to British Empire treaties implemented in Canada, and not wholly Canadian treaties. To hold s.132 applicable, the Court would be in effect

adding language to the section which was not there. On the other hand, the capacity of Canada to enter into treaties on its own behalf was not even considered in 1867. Clearly, the spirit of s.132 was to permit the central or national government to implement treaties.

The logic of this broad approach is compelling. Constitutions are organic documents: they form the foundation of the law of the land and, in Canada and other Western countries, are more difficult to amend than ordinary legislation. As a result, judicial interpretation of the meaning of the words in the Constitution can evolve over time to meet changing social and economic exigencies. The pre-eminent policy consideration in s.132 was likely to facilitate the quick and uniform implementation of treaties to which Canada was bound in international law. This policy consideration is applicable equally to British Empire and wholly Canadian treaties.

In the Radio Reference case, the Judicial Committee decided to defer to the narrow approach to s.132 and held that s.132 applied only to legislation passed pursuant to British Empire treaties. But recognizing that wholly Canadian treaties were not envisaged in 1867, the Court went further. It stated as follows:

> In a question with foreign powers the persons who might infringe some of the stipulations in the Convention would not be Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation.(7)

The Court implied that this policy consideration was the basis of the federal government's treaty-implementing power. It held further that since s.132 did not deal with wholly Canadian treaties, and such treaties were not dealt with in either of the lists of powers in s.91 and s.92, legislation passed to implement wholly Canadian treaties fell within the power of the federal government under s.91 to pass laws for the peace, order and good government of Canada. More succinctly, the Court held:

> In fine, though agreeing that the Convention was not such a treaty as is defined in sec. 132, their Lordships think that it comes to the same thing.(8)

The Court was also of the opinion that radio broadcasting fell within subsection 92(10)(a) which provides that the provinces have legislative jurisdiction of:

> (10) Local Works and Undertakings other than such as are of the following Classes:-
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;...

Next came the Labour Conventions case, a 1937 decision of the Judicial Committee of the Privy Council.(9) The legislation under consideration was certain federal statutes concerning labour matters: limits to the hours of work, minimum weekly rest, and minimum wage. The legislation implemented certain international obligations which the federal government had incurred in a wholly Canadian treaty. The federal government argued that its power to enact such legislation rested by implication in s.132, as well as the "peace, order and good government" clause in s.91. The province of Ontario, challenging the legislation, argued that these labour matters were subject matters in respect of which the provinces only could enact legislation, pursuant to subsection 92(13), "property and civil rights".

The Court accepted the province's argument and held the federal legislation unconstitutional. The Court rejected the federal government's argument based on s.132. It chose the narrow view of that provision: it is confined to enabling the implementation of Empire treaties, and cannot be extended so as to support federal legislation implementing wholly Canadian treaties. Contrary to the Radio Reference case, the Court did not consider the policy behind s.132 and construe a treaty-implementing power for the federal government based on its power to make laws for the "peace, order and good government of Canada". Rather, it held that apart from s.132, the Constitution provides

no treaty-implementing power, and the power to enact legislation in pursuance of a wholly Canadian treaty cannot be derived from any treaty-implementing power per se, but must be founded upon a subject matter with respect to which it, and not the provinces, has legislative jurisdiction.

In this case, the labour matters dealt with by the federal legislation were held to be within s.91(13) "property and civil rights", a subject matter within exclusive provincial legislative competence.

The upshot of this decision is that when considering the constitutionality of federal legislation implementing wholly Canadian treaties, there is no federal treaty-implementing power and the validity or invalidity of the legislation must depend solely on whether the legislation deals with a subject matter within federal legislative competence. In short, the fact that the legislation implemented international obligations incurred by Canada is of no relevance in determining the constitutionality of the legislation.

Two subsequent decisions of the Supreme Court of Canada to some extent revitalized the separate federal treaty-implementing power of wholly Canadian treaties.

The first was Johannesson v West St. Paul[10], a 1952 Supreme Court of Canada decision. Here, the legislation challenged was a provincial statute: a section of the Municipal Act of Manitoba permitted municipalities to pass bylaws for licensing and, within certain areas, preventing the erection of aerodromes. In light of the Aeronautics case, the crux of the matter before the Court was whether or not the entire field of aeronautics was within federal competence. Part of the arguments centered upon the applicability of the decision in the Aeronautics case that s.132 enabled the federal government to enact the aeronautics legislation in question. It will be recalled that the treaty in that case was a British Empire treaty. Since that decision, however, that treaty had been denounced by Canada, and effectively replaced by a new treaty which Canada entered into in its own right.

All of the judges who addressed this issue agreed that s.132 was confined to British Empire treaties, and could not be extended by implication to include wholly Canadian treaties. Two judges, Rinfret and Kellock, J.J., however, went further, citing the passage from the Radio Reference case which held that although the treaty in issue as not a British Empire treaty, the legislation implementing a wholly Canadian treaty came to the same thing. Hence, the seeds of a separate federal treaty-implementing power apart from s.132 implanted in the Radio Reference case, and then stultified in the Labour Conventions case, were given new life in the Johannesson case.

In the 1967 case of Re Off-shore Minerals Rights of B.C.(11), the Supreme Court of Canada, albeit cautiously, gave further life to this separate power. There, the Government-General in Council requested the Court for an opinion on the legislative jurisdiction of the federal government and the province of British Columbia in respect of off-shore lands adjacent to the coastline of British Columbia, and the right to explore and exploit mineral and other natural resources therein.

The Court divided its opinion into two parts: the first dealing with the territorial sea, and the second with the continental shelf. In the context of discussing the territorial sea, the Courts held that the federal government had jurisdiction with respect to this subject matter based on certain heads of power listed in s.91, as well as the "peace, order and good government" clause. Then, it supported its decision in this regard with the following words, which seem to recognize a separate federal treaty-implementing power:

> Moreover, the rights in the territorial sea arise by internationl law and depend upon recognition by other sovereign states. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign state recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea.(12)

The two most recent Supreme Court decisions on the subject are MacDonald v Vapour Canada(13), a 1977 decision, and Schneider v The Queen(14), a 1982 decision.

In the MacDonald decision, the constitutionality of a provision in the federal Trade Marks Act was in issue. One argument advanced in support of its validity was that it was enacted to implement a wholly Canadian treaty. There was, however, nothing in the legislation which indicated that it was implementing that treaty.

When the Court considered this argument it suggested that the Labour Conventions decision should be reconsidered. The Court cited a lengthy extract from the Radio Reference case, including the statement that a wholly Canadian treaty and a British Empire treaty defined in s.132 come to the same thing.

But the Court found that it was unnecessary to reconsider the Labour Conventions decision in the MacDonald case, because it could not be said that the impugned section of the Trademarks Act was passed in order to implement a treaty. Nonetheless, the Court then went on in detail, and arguably does reconsider the Labour Conventions case:

> In my opinion, assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to inference. The Courts should be able to say, on the basis of the expression of the legislation, that it is implementing legislation. Of course, even so, a question may arise whether the legislation does or does not go beyond the obligations of the treaty or convention.(15)

The Schneider case involved a consideration of the constitutionality of a British Columbia statute, the Heroin Treatment Act. The federal government challenged its constitutionality, arguing, among other things, that the subject matter with which it dealt was covered by the federal Narcotics Control Act. As part of its arguments in this connection, the federal government submitted that the Narcotics Control Act was enacted in implementation of a Canadian treaty.

The Court stated that "[a]lthough the point was left open in this Court in [the MacDonald case], the appellant's position is questionable in the face of [the Labour Conventions case]".(16) The Court went on to dismiss the argument, citing the MacDonald case as authority for the proposition that if the federal government does have a treaty-implementing power for wholly Canadian treaties, the implementing legislation must specify that it is doing so, and nothing in the Narcotic Control Act specified that it was implementing any treaty. The Court then stated:

> The Heroin Treatment Act is not legislation falling within the scope of any federal power to legislate for the implementation of international treaties.(17)

The Present State of the Law

The present state of the law concerning the federal treaty-making and treaty-implementing powers of wholly Canadian treaties appears to be as follows.

The executive branch of the federal government (i.e. the federal cabinet) has the power to make treaties. When ratification is required, the Secretary of State for External Affairs does so. Parliament plays no necessary role in the making or ratification of treaties.

Although the Schneider case expressly kept the Labour Conventions decision alive, the weight of authority suggests that a federal treaty-implementing power lurks in the shadows. The MacDonald case cites and impliedly condones the reasoning in the Radio Reference case that a wholly Canadian treaty and a British Empire treaty under s.132 come to the same thing; therefore, the federal government's power to implement wholly Canadian treaties, a concept not contemplated at Confederation, falls within the federal government's power conferred in s.91 to enact laws for the peace, order and good government of Canada.

The above-quoted extracts from the MacDonald case, however, qualify this power in two ways: first, legislation implementing a treaty must specify that it is doing so; and, second, the implementing legislation must not go beyond the

obligations incurred in the treaty in order to be considered valid legislation enacted pursuant to that power.

Accepting that there has been sufficient opportunity and time for the Courts to overrule Labour Conventions and the Courts have not done so, then it would seem that MacDonald will not stand to validate federal legislation in a wholly provincial jurisdiction. The Courts will, in our view, have to balance the importance of the totality of the Treaty with the degree of intrusiveness into provincial jurisdiction.

[It should be added that there is room for argument that the provinces have the power to make treaties with foreign countries, and implement them, provided that the subject matter with which the treaties are concerned is within provincial legislative competence. This argument has never been tested in the Courts.]

SPECIFIC PROBLEMS IN TRADE IN SERVICES

The Heterogeneity of Trade in Services

Aside from the persistent irritant of the Labour Conventions case, the federal government may feel comforted with what appears to be an emerging federal treaty-making power. To be sure, it will do its best when passing implementing legislation to state clearly that it is doing so and ensure as far as possible that the legislation does not go beyond the terms of the treaty.

But will this fledgling federal treaty-making power withstand a real test in the courts? It will be recalled that the MacDonald and Schneider cases merely postulated the existence of such a power: the legislation in question in both cases was held not to be treaty-implementing legislation. It appears that the only case in which a policy justification can be found for a federal treaty-implementing power expressed by a court of final appeal is Radio Reference. There, such a power was said to be necessary because if the whole of Canada, represented by the federal government, incurs obligations in a treaty to

foreign states, it is only that government which can and must ensure uniform compliance with those obligations across Canada.

The competing policy consideration, of course, is that expressed in the Labour Conventions case. There, the court rejected the necessity of a treaty-implementing power per se, but considered that, in a federal state, the subject matter of the legislation must be examined to determine which level of government is competent to enact laws with respect thereto, and this delicate balance of power cannot be ignored simply because the federal government has incurred obligations to foreign states.

The MacDonald and Schneider cases have not stifled this debate. It will re-emerge when real federal treaty-implementing legislation is before the courts. And surely the more the legislation encroaches upon subject matters ordinarily within provincial legislative competence, the more difficult it will be for the federal government to assert unequivocally a federal treaty-implementing power immune from the traditional analysis of whether the subject matter is of federal or provincial legislative jurisdiction.

The cases where the treaty-implementing power has been considered thus far have all involved fairly simple legislation from the point of view of characterizing the subject matter it dealt with. Aeronautics, radio communications, employment conditions and standards, offshore mineral rights, a provision of the federal Trade Marks Act, and treatment for drug abuse: all of these are homogeneous concepts which, although not specifically dealt with in either s.91 or s.92, Constitution Act, can be considered as a whole for the purpose of deciding whether the federal or provincial government has legislative jurisdiction.

The difficulty in resolving the issue would be compounded immensely if the treaty-implementing legislation was heterogeneous in subject matter.

The heterogeneity of federal treaty-implementing legislation would be subjected to the most searching consideration if the federal government passed legislation to implement a trade agreement with the U.S. concerning trade in

services. Trade in services is not only heterogeneous, but also very ill-defined.

In order to negotiate a free trade agreement with the U.S., including trade in services, the first task will be a very basic one: the identification of the services to be negotiated. In the U.S., the range of services rendered internationally is very broad:

> The official list of services supplied on an international basis is: accounting, advertising, banking and other finance, communications, data processing, education, employment agencies, engineering and construction, franchising, health care, insurance, leasing and renting, lodging, motion pictures, tourism, transportation, management consulting, public relations, law and other business, and professional, marketing and technical services.... In title III of the Trade and Tariff Act (1984), an illustrated list of services also included entertainment and wholesale and retail trade.(18)

> A North-South Institute publication has offered a useful classification of services performed internationally:

> (a) embodied in goods, e.g., films, computer tapes, musical recordings;
>
> (b) complementary to trading goods, e.g., transportation;
>
> (c) substituting for trading goods, e.g., franchising, rentals; and
>
> (d) not necessarily relating to goods, e.g., insurance, banking, telecommunications, professional services.(19)

The next task will be to identify the sources of legal restrictions on trade in services in both countries. They are indeed eclectic. They include: immigration laws, laws restricting the employment of foreigners, laws concerning the accreditation of professionals, laws restraining competition and allowing government monopolies in some services, and, most important, laws

restricting the incorporation and the right to do business in the country. This is only the beginning.

From this it can be seen that the trade in services involves a much more amorphous subject matter for international trade negotiations than does trade in goods. Goods are imported and exported. Their movement across borders can be measured statistically. Legal controls essentially take the form of customs and tariffs and other well known devices. Services, however, are much more elusive. Some move across borders in a different way: for example, a consultant in one country gives services to a client in a foreign country. Or sometimes they don't move at all: for example, where the charterer of a ship from one country pays for stevedoring services when the ship docks in a foreign country.

In short, trade in services is a much more complex topic for negotiation than trade in goods:

> What moves across the national boundary is either the capacity to provide a service, the good or person which is to be subject to the service or the income flow generated by foreign investment in the service. These items do not move through the customs shed in the same concrete manner as shirts or cars.
>
> A further implication is that policy directed towards managing services trade flows will not be like merchandise trade policy. It takes the form of regulations, quotas, local content rules, departure taxes, visa rules, and limits on foreign owned establishments. These trade policies are more complex, more obscure and therefore less amenable to consistent documentation. It is a lot of work to estimate their "tariff equivalents" for example.(20)

This last point merits further consideration. Legal controls on trade in goods are not only easier to identify, but are usually designed specifically to regulate the trade in goods. Customs and tariffs laws and regulations serve this sole purpose. Consider, however, the purpose of the laws given above as examples of how countries control trade in services. These laws

usually have other policy justifications, which are arguably more important than their restrictive effect on international trade. Immigration laws are designed to control the quality and quantity of arrivals into a country. Laws restricting the employment of foreigners in a country are designed to protect the availability of jobs for the domestic labour force, and often find a strong justification in the high domestic unemployment rate. Laws for the accreditation of professionals such as lawyers and accountants are for the protection of the public. Laws restraining competition and allowing government monopolies in some services, such as stock exchanges and the branches of the military, are also for the protection of the public. Laws restricting incorporation and the right to do business in a country are also designed for this purpose.

In this latter connection, the focus on services as an item in international trade negotiations has made more visible the methods used by countries to protect local businesses by keeping out foreign firms. And if foreign firms eventually succeed in establishing a presence in a foreign land, their competitive position is made more tenuous by local government restrictions. Decades of experience led respondents to a U.S. ITC survey to crystalize their grievances in the following categories:

(a) restrictions on a firm's right to establish branch or subsidiary operation;

(b) restrictions on exports - outright prohibition, requirements that a certain proportion of the services performed be supplied by domestic firms, limitations on the number of non-nationals permitted in the country, or the application of discriminatory regulation or taxes;

(c) restricted foreign exchange controls on the remittance of income and convertability of currency;

(d) concerns over governmental procurement, technical restrictions dealing with privacy and security, contract enforcement and general administrative requirements;

(e) impediments to trade including restrictions on imports of goods associated with the service, subsidies by foreign governments (tax benefits, direct aid), licensing restrictions, standards and other certification requirements that discriminated against the foreigner, discriminatory customs procedures, lack of patent and copyright protection and professional qualification restrictions.(19)

All of this means that not only will concluding free trade agreements that include trade in services be complicated, but that moreover, even if an agreement is reached, the federal government's power to implement the wide-ranging provisions therein with respect to trade in services will be almost certainly tested.

To simplify things, let's put possible broad general federal legislation aside for the moment. Rather, let us look at two examples which raise some of the questions that we can foresee if such an agreement is reached. The two examples illustrate matters which may be dealt with by federal legislation pursuant to its alleged treaty-implementing power: they are legislation dealing with trust companies and with lawyers.

Trust Companies

Trust companies can be constituted pursuant to legislation by any of the ten provinces or by Parliament. Each jurisdiction has the capacity to allow a trust company to be formed. Every province allows extra-provincial trust companies from other provinces to register in their jurisdiction.

If a trust company is approved for registration by a province, it then has the full capacity to operate within that jurisdiction. If the trust company incorporates at the federal jurisdiction, it can operate across Canada.

A trust company performs many functions. It takes deposits and administers estates, trust and agencies. Only provincial governments can pass legislation regulating the way that the trust business is done. Even when a trust company is federally regulated, deposits in trust companies are treated as trust

agreements between the trust company and the depositor and thus, subject to some provincial jurisdiction. So, provinces regulate provincial trust companies in two ways - regulating the company and regulating the trust relationship within the company. With respect to federal companies, it only regulates the trust company-depositor business.

It is an open constitutional question as to how far a provincial government can impose conditions upon federally incorporated trust companies that would end up restricting the company's capacity to operate.

Why choose this example? Because with respect to this aspect of the services sector, we see that there is a capacity to implement a free trade or common market agreement through incorporations at the federal level. This would increase the scope of Ottawa's authority through a constitutionally valid method.

But say the federal government wishes to keep some control over the market penetration of foreign firms. Assume the Canadian banking sector convinces the federal government to restrict foreign penetration to a percentage of the market. Say the federal government wished to include such restrictions in its new federal Trust Company Act[22] while at the same time, a province was prepared to greatly expand the rules for foreign ownership and allow 100% foreign ownership. Will Ottawa be able to set what will become the standard, presumably with international concurrence, or will provinces that want to go further, and be more open, be able to do so?

Regulation of professions is also within the legislative jurisdiction of the provinces. This authority is delegated: the legislation establishes a governing body of the profession and delineates its range of authority. For lawyers, provinces have passed legal professions legislation.[23] These Acts constitute the Benchers as the Board of Directors with the power to regulate.

The legislation sets general standards. These include citizenship, certain educational requirements, and level of expertise.[24] These provisions are amplified by regulations and rules made by the Benchers themselves.

Recently, in B.C. and Alberta, provisions requiring that firms must be owned by local members have been implemented. In this way, mergers between local firms and firms from other provinces have been outlawed.(25)

So, in looking at the potential for establishing a law practice, a lawyer from another country would have to meet the citizenship requirements, the professional qualifications, and then serve a period of indenture. Finally, under existing rules ownership must be local.

These restrictions may make it impossible for a foreign advocate to practise within the jurisdiction concerned.

So, we have here a perfect example of the types of issues that are raised in the ITC survey, noted above. There is no right of establishment. There are requirements of ownership by locals, restrictive professional qualifications, and finally, an inability to access a certain range of government work.

These barriers to entry are said to have been set up to ensure competence, reduce inter-provincial competition and efficiently allocate resources.(26)

The question facing trade negotiators is how far to delve into these practices. The question facing the law is given an attitude on the part of a provincial authority to retain these barriers, what potential is there for a federal treaty-implementing legislation to override them?

Political Realities

The example of lawyers above raises a rhetorical question: if the federal government tries to legislate pursuant to its alleged treaty-implementing power, do you think the provinces will sit idly by when that legislation touches on a subject matter otherwise of wholly provincial jurisdiction? Clearly not. The provinces will be keen to protect their legislative jurisdiction, and their legislation and policies which often protect local industry against foreign competition.

Provinces have established "Economic Development" Departments to reflect a realization that national programs designed to promote the economy were not specific enough to meet local needs. The Departments sponsor a variety of promotional activities, push provincial procurement, and subsidize local industry. These take many forms, including:

(a) provinces using their monopoly over the sale of liquor to promote local wines - benefitting grape growers;

(b) provinces using their ownership of resources to promote local processing - benefitting local sawmills;

(c) provinces establishing "Buy Locally" procurement programs - benefitting local suppliers;

(d) provinces allowing professions to impose restrictions on non-local aspirants - benefitting existing practitioners;

(e) provinces subsidizing trade missions - benefitting local exporters.(27)

As the list continues to grow in Canada and in other federal states, world exporters see that any new international agreements will have to deal with the reality of federal states - it is no use ignoring the jurisdictional powers of sub-units.

In emphasizing these political realities, care must be taken, on the other hand, not to overstate the range of powers a Canadian province can realistically exercise. Assuming the federal government were to use all the levers at its command to join a comprehensive trade arrangement, what could the provinces do?

Could they veto changes to the Autopac? No, none of it falls under provincial jurisdiction. How about the sale of foreign liquor? Not really: the provincial monopoly is only viable because Ottawa has banned interprovincial trade

in alcohol.[28] If Ottawa were to attack the monopoly and allow mail order sales as part of a U.S.-Canada free trade agreement, the impact would be to destroy any advantage to local suppliers. Could a province keep out foreign financial services? The federal government could allow a full range of foreign financial services over the objections of the provinces. Even a national stock market is constitutionally feasible.

But the provinces may deflect such international trade disputes away from legislative jurisdiction to something akin to proprietary rights if no federal treaty-implementing legislation has been passed. Professor Fairley[29] looked at the negotiation of a number of trade issues from the perspective of the provincial power with respect to international trade. In "Softwood Lumber" the issue was not legislative jurisdiction but resource ownership. Again, in "Liquor Retailing" the issue was not legislative but was the province acting as a commercial enterprise. In these instances, the relevance of something that is essentially provincial to trade is arguably tangential.

The provinces, even in the face of treaty-implementing legislation, could soften the impact of foreign competition by increased subsidization of local industries. Can the provinces be stopped from subsidizing? And can the federal government guarantee the right of establishment of professionals in a province? This puts us squarely into the area of non-tariff barriers. There are no limits on the provincial spending power (yet), and there are good reasons for the provinces to regulate the qualifications for entry into the professions.

At the treaty-making stage of the U.S. - Canada Free Trade Agreement, the federal government can try one or both of two methods to overcome provincial ire: the first is confrontational, the second is conciliatory. First, a "free movement of goods and services clause" can be negotiated, which is possibly within the ambit of federal legislative authority. A method of adjudicating disputes is also possible, and the treaty could allow for damages or findings calling for loss of reciprocal privileges. Even more radically, the treaty need not be made applicable in a provincial jurisdiction that objects: that

jurisdiction would lose the benefits and protections that the treaty would provide.

Second, a regulation-making power, involving appropriate levels of a signatory federal state's governments could be agreed upon to deal with services not covered specifically in the agreement. European nations realized that greater integration of services must proceed one step at a time. They thus continue to try and draft regulations. So, by including a regulation making power that allows provincial involvement, any remaining areas of conflict can be the subject of further discussion.

POTENTIAL AGREEMENTS

What might an Agreement contain in respect of trade in services?

The Treaty of Rome establishing the E.E.C. itself offers three potential models for dealing with services. The first model is what we can call a comprehensive agreement, which would incorporate the principles spelled out in Article 3 of the Treaty. It calls for:

(a) the elimination of customs duties and quantitative restrictions between the member states;

(b) the abolition of obstacles to the free movement of persons, services and capital;

(c) the approximation of laws to the extent required for the proper functioning of the common market.(30)

Other provisions of the Treaty provide in a general way for:

(d) guaranteed national treatment of firms in common market countries; and

(e) a right of establishment.

The E.E.C. also provides for a "Court" to serve as the dispute resolution mechanism and a commission to perform executive functions. A deliberative body, called the European Parliament, is there to comment and enhance collective legitimacy.

The second model embodied in the Treaty relates to services generally. This is delineated in Chapter 3 of Title 3.(31)

The important provisions to examine when considering services generally are: Article 60 which provides a broad definition for services, Article 63(1) which draws up a programme to abolish restrictions, and Article 65 which provides that until restrictions are abolished, distinctions on the grounds of nationality or residency are not permitted.

The third model is service specific. It is triggered by 63(2) - "in order to achieve a stage in the liberalisation of a specific service" - and requires adoption by the Council, Commission, Economic & Social Committee and now the Parliament.

For Canada, each of these three models for types of agreements are possible. The first is a fully integrated agreement with a services component, the second treats services as a sector, and the third is much more truncated. The intergovernmental implications are dramatically divergent.

Let us look down the road to a day when our federal government signs a trade agreement, any trade agreement either with the U.S. or with a group of nations.

The federal government will have to turn to the question of its ratification. It is clear to all that as a minimum, Parliament must do something! But what exactly must Parliament do? And, what role is to be assumed by the provinces? Although legally the answer is simple - the Secretary of State for External Affairs can ratify the agreement with one sweep of his pen - the political realities of such an important agreement lead one to expect some discussion of ratification with the provinces.

The potential reactions of the provinces must be factored in and a wide range of possible outcomes analyzed. We can see at one extreme, the agreement of all Canadian jurisdictions. At the other extreme, we can foresee an agreement with very little provincial support. Or most likely, a majority of the provinces may agree in principle, with a few advancing specific derogations and a minority thinking the whole idea is ludicrous.

LEGAL CHOICES FOR TREATY IMPLEMENTATION

Ratification problems aside, how can the federal government most effectively proceed to implement the agreement? The legal options are essentially three-fold.

The first option, a constitutional amendment, incorporating the treaty into the basic law of Canada would commit all Canadian jurisdictions. Second, the federal government could legislate to implement the Treaty. Third, the federal government could pass legislation relating to its areas of competence and defer ratifying the treaty until all the provinces have implemented appropriate corresponding legislation, or at least agree with the provinces concerning the division of jurisdiction before ratification.

Constitutional Amendment

(a) Procedure

The formula for amending the Constitution calls for the approval of the Senate and the House of Commons. Resolutions of the legislative assemblies of at least two-thirds of the provinces having at least 50% of the population of all of the provinces are required.(32)

One would assume that a resolution to implement the agreement must include the agreement itself. If so, the specifics of the agreement would be subject to debate before each of the legislatures and subsequent amendments to the agreement would also follow the same procedure.

Under subsection 38(2), Constitution Act, if the amendment derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province, then the resolution would not be in effect in any province which has expressed its dissent.

The process of constitutional amendment, once begun, can take no longer than three years.(33) And finally, if there is to be a transfer of powers from a province in respect of education or other cultural matters, reasonable compensation must be paid by the Government of Canada.(34)

(b) Analysis

This option raises a number of questions of concern to the federal government. First, will the Senate approve? Second, does the constitutional amendment derogate from the legislative powers, proprietary rights or other rights and privileges of the provinces? The answers depend on the terms of the agreement.

The three-year rule appears to enhance the capacity for a pocket veto to be exercised by a province. It likely raises the price of acceptance.

Moreover, if the Treaty transfer involves cultural matters, how do you measure the federal government's financial liability to the provinces? This question will need to be addressed if this option is chosen.

These problems aside, the federal government can initiate either one of the following two constitutional amendments. It could attempt to add a general treaty-implementing power to the Constitution retroactive in effect to include the Agreement, or add that agreement to the Constitution in particular.

In the former case, there would be no requirement that the legislatures adopt the agreement itself, and the agreement would be easier to amend.

There is a third alternative. In a paper entitled "Treaty Making in the Context of Canadian Politics", Szablowski(35) proposes the "establishment of a

High Commission (federal/ provincial) on Treaties and International Agreements with full power to negotiate, conclude and sign for and on behalf of Canada all treaties and international agreements dealing with any subject matter."(36)

In our context, an amendment to establish such a High Commission to deal with international trade matters would be sufficient.

Federal Treaty-Implementing Legislation

Alternatively, the federal government may seek to implement the agreement by simply enacting legislation. If, as is expected, the agreement will be broad in scope encompassing a wide range of services, there is little doubt that some of the legislation will deal with what otherwise would be subject matters within exclusive provincial legislative jurisdiction.

It may pass one omnibus law, dealing with all the services covered in the treaty in one fell swoop, or pass piecemeal amendments to existing legislation and new Acts where necessary to cover each of those services. In the former case, the provinces will argue that the provisions encroaching on provincial legislative jurisdiction are unconstitutional and are severable from the valid portions of the Act; in the latter case, they will argue that whole Acts or parts thereof which so encroach on their fields of jurisdiction are unconstitutional. They will, in either case, rely heavily on the Labour Conventions case.

In both cases, the federal government will argue that it is empowered to enact the legislation pursuant to its alleged treaty-implementing power elucidated in the Radio Reference, MacDonald, Schneider and other cases, and that in doing so it may encroach on otherwise provincial jurisdiction. Alternatively, it will justify its legislation and the encroachment on its power to regulate trade and commerce, s.91(2), and to make laws for the peace order and good government of Canada, s.91.

In either case, a court challenge to the federal legislation will follow.

Federal and Provincial Legislation or
Jurisdictional Agreement Prior to Ratification

This would be the most conservative option and would reflect a narrow initiative based on fear of the Labour Conventions case. It takes into account the worst interpretation of jurisdiction to legislate in respect of services the federal government could imagine: that services are a subject matter, like labour, falling within exclusive provincial jurisdiction. If this were the case, then the federal government would serve merely as a delegate for the provinces. Its authority over negotiating an agreement in respect of services would be equivalent to its authority in respect to negotiating an agreement in respect of the enforcement of foreign court orders.(37) Ottawa would await the unanimous approval of the provinces prior to ratifying the agreement.

Even if the federal government were not afraid of a holding that the provinces had exclusive jurisdiction over services, it may choose this cautious approach to side-step a court challenge the provinces would initiate if it tried to pass legislation encroaching on otherwise provincial jurisdiction.

EVALUATION OF CHOICES

In evaluating these three options, the federal government is faced with five factors to keep in mind in its decision making. These are:

1. If option X is selected, how certain are we that the option will be upheld in court?

2. Is it practical to assume we can obtain the consents required to implement X?

3. Will the option chosen be seen as a legitimate exercise of federal power?

4. Down the road, will the option be legally enforceable?

5. Who wins and who loses from the option chosen?

No matter which of the options is selected, over the years, the provincial governments will search out new methods to challenge the agreement. Even with constitutional amendment, the limits of the agreement will still have to be decided and the impact of the agreement on unspecified areas of provincial jurisdiction will have to be delineated.

Within this well-recognized limit, however, we can assess the advantages and disadvantages of each of the three options.

In the most general characterization of the distinctions between the options, two questions can be asked. Should the federal government be bold by passing treaty-implementing legislation and face the vagaries and complexities of the legal harangue that will follow, or should it be cautious and seek a constitutional amendment or deal with dividing up jurisdiction with the provinces prior to ratification of the agreement? If it chooses to proceed cautiously, should it seek a constitutional amendment, or divide up jurisdiction before ratification?

In the writers' view, the federal government should be bold and pass treaty-implementing legislation. The other two options will be painstakingly slow, and involve most if not all of the complexities and uncertainties that a court challenge to the legislation would entail. Only the forum would be different. Instead of a courtroom, the fight would take place at countless committee and sub-committee meetings. At least a court case can be ended in less than a decade.

To maximize its chances of a favourable court decision, the writers recommend that the federal government negotiate a broad agreement, including specifically as many services as it can, whether it feels those services are within or outside provincial jurisdiction. The implementing legislation should be executed in a single act of Parliament, which should be a mirror image of the broad provisions of the agreement.

The reason for this is simple. If the legislation is a broad scheme to deal, on a pan-Canadian scale, with a wide range of services, the provinces will be

forced to weed through the tangle of legislation, arguing that this and that provision is within provincial competence. This is exactly what the Radio Reference case decided firmly against: in carrying out Canada's international obligations, the federal government should not be stultified in its efforts by the limits of its domestic legislative jurisdictional limits.

Armed with a fledgling treaty-implementing power outlined in MacDonald and Schneider, a burgeoning trade and commerce power in s.91(2) - also elucidated in MacDonald - and a historically broad "peace order and good government" clause, the federal government seems to have every reason to forge ahead in this manner.

On the contrary, if the federal government makes a narrow, sector-specific agreement with the U.S., or chooses to pass piecemeal legislation to implement a broad agreement, the federal government's chances of upholding its legislation may be less. For example, if the provinces challenge a federal Act which implements only a provision of the agreement which allows lawyers from both countries to provide consulting services in each other's territory, it can argue that this is otherwise a matter wholly within provincial legislative jurisdiction. They do not have to argue that provincial aspects of otherwise valid federal legislation are severable and should be struck out. Moreover, the value of Labour Conventions as a precedent is higher: it will be recalled that there, too, only one subject matter, labour, was dealt with and was held to be wholly within provincial legislative competence.

If the federal government nonetheless chooses the cautious approach, the writer suggests that it proceed by way of constitutional amendment rather than attempting to divide jurisdiction between it and the provinces prior to ratifying the agreement.

The reasons for this preference are as follows. The disputed issues, complexity, and difficulty in obtaining a consensus will be the same in either process. Constitutional amendment, however, will result in something of greater value: the terms of the agreement or the treaty-implementing process (depending on which constitutional amendment is sought) will be entrenched in

Canadian law. Subsequent federal-provincial squabbles will not taint this achievement unless the Constitution is formally amended.

On the other hand, a successful agreement on dividing jurisdiction before ratifying the agreement achieves nothing which cannot be undone the next day. Even if all the agreed-upon legislation is in place, executed by both levels of government before the agreement in ratified, the squabbles can continue. The provinces, the day after ratification, could challenge the constitutional validity of the federal legislation. And vice versa. Moreover, the provinces could enact new legislation, breaching the agreement and overlapping with federal legislation. And vice versa. In our view, the best choice for the federal government is summed up in these words of Shakespeare: "But screw your courage to the sticking place and we'll not fail.".

FOOTNOTES

1. Beginning with the October 1985 First Ministers Conference, the provincial capacity to veto a Free Trade Agreement has been mooted. The latest manifestation was Premier Peterson of Ontario's statements on the Autopac.

2. The Uruguay Round began in Punta del Esta in September, 1986 and it was resolved to have parallel discussions on services, not as part of the G.A.T.T.

3. Section 91(2) of the Constitution Act, 1867 provides for federal jurisdiction with respect to trade in general, which arguably subsumes trade in services, but Section 122s allocate to the federal government jurisdiction over customs and excise. Section 122 is an important specific allocation of power which by nature applies to trade in goods only and not services.

4. R.S.C. 1970, Appendix II, No. 35.

5. [1931] 3 W.W.R. 625.

6. [1932] 1 W.W.R. 563.

7. [1932] 1 W.W.R. 563 at 566.

8. [1932] 1 W.W.R. 563 at 566.

9. A.-G. Canada v A.-G. Ontario [1937] A.C. 326

10. [1952] 1 S.C.R. 292.

11. [1967] S.C.R. 792.

12. [1967] S.C.R. 792 at 817.

13. [1977] 2 S.C.R. 124.

14. [1982] 2 S.C.R. 112.

15. [1977] 2 S.C.R. 124 at 171.

16. [1982] 2 S.C.R. 112 at 134.

17. [1982] 2 S.C.R. 112 at 135.

18. National Planning Association, U.S. Service Experts on Foreign Barriers, p.7.

19. Supra, Note 18 at p.7.

20. Findlay, Christopher, "Technology Pushes Open the Services Trade Door", Far Eastern Economic Review 2 April 1987, p.62 at 62.

21. See generally supra, Note 18 at pp.16-29.

22. Draft Trust Company legislation is forthcoming: the responsible Minister, Mr. Hockin, announced the major policy thrusts in December, 1986.

23. See for example Legal Professions Act, draft bill, Legislature of B.C., 1986.

24. See s.42, Barristers and Solicitors Act, R.S.B.C. 1979.

25. See Black v Law Society of Alberta now proceeding to the Supreme Court of Canada.

26. In B.C., there is a provision with respect to filing foreclosure actions. The actions must be filed in local courthouses. This provision was established to reduce the potential for urban law firms to poach on the business of rural firms. The urban firms have, through their relationship with the banks and trust companies and by being more highly automated, taken over the local foreclosure work. In times of recession, foreclosure work increases as conveyancing decreases. The provincial response was to ensure that the filings be locally done. This changes the economic relationship between city and county. At the same time it makes it more difficult for national law firms to centralize operations in one location in Canada.

    This type of provision is an obvious intra-provincial barrier to trade. It would be unacceptable if done in the context of a foreign trade relationship. While it is a questionable practice with respect to the Canadian Economic Union itself, because of the reality of its being wholly within the province, no remedy is available to firms who have been injured.

27. See Siezer and Krasnick in Krasnick, Perspectives on the Canadian Economic Union, Supply & Services Canada, 1985.

28. See generally, Fairly, "Constitutional Aspects of External Trade Policy" in Krasnick, Case Studies in the Division of Powers, Ministry of Supply and Services, 1985, p.25 et.seq.

29. Idem.

30. Article 3, Treaty Establishing the European Economic Committee (Rome, 1957).

31.

Article 59

Within the framework of the provisions set out below, restrictions on freedom to provide services within the

Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

Article 60

Services shall be considered to be "services" within the meaning in this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Article 62

Save as otherwise provided in this Treaty, Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of this Treaty.

Article 63

1. Before the end of the first stage, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly, draw up a general programme for the abolition of existing restrictions on freedom to provide services within the Community. The Commission shall submit its proposal to the Council during the first two years of the first stage.

The programme shall set out the general conditions under which and the stages by which each type of service is to be liberalised.

2. In order to implement this general programme or, in the absence of such programme, in order to achieve a stage in the liberalisation of a specific service, the Council shall, on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly, issue directives acting unanimously until the end of the first stage and by a qualified majority thereafter.

3. As regards the proposals and decisions referred to in paragraphs 1 and 2, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

Article 64

The Member States declare their readiness to undertake the liberalisation of services beyond the extent required by the directives issued pursuant to Article 63(2), if their general economic situation and the situation of the economic sector concerned so permit.

To this end, the Commission shall make recommendations to the Member States concerned.

Article 65

As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 59.

32. Constitution Act, 1982, s.38.

33. Idem., ss.39(2).

34. Idem., s.40.

35. In Beckton & McKay, Recurring Issues in Canadian Federalism, 1986, Supply & Services Canada.

36. Idem.

37. Supra, Note 28 at p.14.