

**NATION BUILDING VS. PROVINCE BUILDING
INTERPROVINCIAL BARRIERS TO TRADE AND THE
CANADIAN ECONOMIC UNION**

BY

KATHLEEN McCALLUM

**A Thesis submitted to the Faculty of Graduate Studies of the University of Manitoba
in partial fulfillment of the requirements of the degree of**

MASTER OF ARTS

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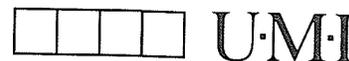
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Archéologie	0324
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Pathologie animale	0476
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Physiologie végétale	0817
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Psychométrie	0632



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By Kathleen McCallum

(2)

A Thesis presented to the University of Manitoba
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thesis requirement for the degree of

Master of Arts

Department of Political Studies, University of Manitoba

September 1993

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NATION-BUILDING V. PROVINCE-BUILDING

**INTERPROVINCIAL BARRIERS TO TRADE
AND THE CANADIAN ECONOMIC UNION**

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In Memory of my Father, Kenneth McCallum

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INTRODUCTION

It is a peculiar anomaly of Canadian political life, well illustrated by the following news stories. On page A2 of the Winnipeg Free Press, a story outlines the trade barrier battle between New Brunswick and Quebec. New Brunswick erected "tough new measures yesterday against Quebec companies, products and workers".¹ The New Brunswick government claimed that this move was a necessary retaliation for Quebec's continuing protectionist policies. It was intended to be a lesson to convince Quebec to lower its barriers.

On the opposing page of the same newspaper, a small article referring to the Parti Quebecois manifesto states that Canadians can be assured that an independent Quebec would not change the operation of the current economic union.² This is supposed to be a comforting thought.

Interprovincial barriers to trade and the Canadian economic union are not new preoccupations in Canadian politics. Since the 1930's when the Rowell-Sirois Royal Commission on Dominion-Provincial Relations was formed, to the 1992 Charlottetown Constitutional Accord which suggested entrenching the economic union in the constitution, barriers to internal trade have been the focus of much discussion and

¹Chris Morris, "N.B. won't do business with Quebec", Winnipeg Free Press, Thursday, April 22, 1993, A2.

²"Minimal change", Winnipeg Free Press, Thursday, April 22, 1993, A3.

controversy. However, there now exist more interprovincial trade barriers than at any other time in Canadian history. Both political scientists and politicians have entered into the debate on this issue.

There is a wealth of academic literature that deals with interprovincial barriers to trade and the Canadian economic union. Recently, these writings have been bolstered by the Royal Commission on the Economic Union and Development Prospects for Canada, which published its report in 1985. The Commission generated numerous volumes of research studies which have added extensively to the research on the subject to date.

The central issue in the debate over trade barriers concerns the appropriate roles of the provincial and federal governments in the economy. This is not just a debate over the necessity and rationale for government intervention; rather it addresses which level of government is better suited to advance national economic unity, and foster nation-building goals.

It is argued that provincial governments, with differing economies and constituents, also have different economic policy objectives. Therefore, they have a more narrow focus and are more inclined to institute policies based on parochial objectives, regardless of their effect upon other provinces or the country as a whole. The divergence of objectives is exacerbated by the regional diversities which exist in Canada and the rise of provincial

governments as advocates of regional interests. The result has been relatively little intergovernmental coordination or harmonization of economic policy-making. Today, there are a plethora of regulations and policies which are duplicated at both levels of government or which contradict one another. The result is a *de facto* division of powers which bears little resemblance to the formal stipulations in the constitution.

At further issue in the controversy is the extent to which internal non-tariff barriers affect Canadian economic well-being. Slower economic growth and significant welfare losses are the prices which Canadians pay for provincial actions.³ Moreover, it has been argued that these barriers result in allocative inefficiencies in the country as a whole, and this impairs Canada's international competitiveness. Regional specialization has taken precedence over the concept of national comparative advantage.

The other view is that, "... the significance of interprovincial barriers to trade in Canada may have been overplayed in recent public policy debates."⁴ Leaving aside the difficulties involved in econometric calculations, there appears to be little consensus on what constitutes 'significant'. The Macdonald Commission Report highlighted

³R.E. Haack, D.R. Hughes and R.G. Shapiro, The Splintered Market: Barriers to Interprovincial Trade in Canadian Agriculture (Toronto: James Lorimer & Company, 1981) 60.

⁴M.J. Trebilock, et al, Federalism and the Canadian Economic Union (Toronto: University of Toronto Press, 1983) 548-9.

the problems with attaching a value to these costs. While a total inefficiency cost of 1% of GNP (if, in fact, this calculation is correct) may appear insignificant, it "...is equivalent to the GDP of Newfoundland, not a trivial sum."⁵

If the economic costs of interprovincial barriers to trade are difficult to measure, then a problem arises with calculating the political costs. Barriers erected in retaliation, as in the case of New Brunswick above, serve only to increase the conflict between provinces and further isolate provinces from one another. From both an economical and a political view, it may be said that, "While it is hard to quantify the economic costs of such cutthroat behaviour, it is equally difficult to see any virtues in the process."⁶

Examining the problem within a strict constitutional framework, it is difficult to understand the rise of internal barriers to trade. Two sections of the Constitution Act, 1867 contain evidence that the Fathers of Confederation envisioned the new federal state as an economic union in which economic policies would be harmonized and largely the domain of the federal government. The enumerated powers of the federal government under Sec. 91, appear to give the federal level the necessary tools to

⁵Report. Royal Commission on the Economic Union and Development Prospects for Canada (Ottawa: Minister for Supply and Services, 1985) 120.

⁶Allan Tupper, Public Money in the Private Sector (The Institute of Intergovernmental Relations, Queen's University, 1982) 61.

carry out the functions of resource accumulation and redistribution. In addition, that Canada should constitute an economic union "...was a vital component of the social contract agreed to in 1867."⁷ It was believed that a strong national government, with attendant strong powers, was required in the new federal system to loosen regional attachments, and establish east-west economic integration and national political unity.

However, what occurred after Confederation was "... the central government's inability to withstand strong pressures for enlarged areas of provincial self-assertion."⁸ Indeed, it has been noted, in comparison with the United States, that the Canadian federal government has failed to exercise its considerably more powerful constitutional prerogatives against province-building.⁹

A serious consequence of the balkanization and fragmentation of the Canadian economic union has been the inability of the country to develop a coherent, coordinated, national industrial strategy. The years from 1974-84 have been described as, "...an era of unprecedented "competitive state-building" and mutual frustration, as new policies developed by one government, intentionally or not, frustrated the purposes of new policies developed by

⁷Haack, et al, 61.

⁸Edwin R. Black and Alan C. Cairns, "A Different Perspective on Canadian Federalism", in Canadian Federalism: Myth or Reality, J. Peter Meekison, Ed., 2nd ed. (Toronto: Methuen, 1971) 85.

⁹Alexander Smith, The Commerce Power in The United States and Canada (Toronto: Butterworth, 1963) 5.

others."¹⁰ It was exceedingly difficult for any federal government to gain the cooperation necessary to establish a national economic strategy. This has served to weaken east-west integration of the economy, and equally, political integration. New policy initiatives of the last five years, such as the Canada-United States Free Trade Agreement (FTA) and the proposed North American Free Trade Agreement (NAFTA) have further increased the decentralizing tendencies begun earlier. The capacity of the federal government to react to global economic imperatives is severely curtailed. It is difficult to advance an industrial and trade policy, "...when a common Canadian front is perforated by independent provincial action...."¹¹ And, as viewed by one observer, national disintegration will result because, "The weaker the Canadian federal state becomes, the more superfluous its few remaining functions will appear...."¹²

Over the last decade, provincial governments of all political stripes have focussed on the elimination of interprovincial barriers to trade. The federal government has currently announced the establishment of an Internal Trade Secretariat, which has been assigned the task of

¹⁰Richard Simeon and Ian Robinson, State, Society, and the Development of Canadian Federalism (Toronto: University of Toronto Press, 1990) 226.

¹¹Douglas M. Brown, "The Evolving Role of the Provinces in Canadian Trade Policy", in Canadian Federalism: Meeting the Global Challenges?, Douglas M. Brown and Murray G. Smith, eds. (Queen's University, Kingston: Institute of Intergovernmental Relations, 1991) 107.

¹²Garth Stevenson, "Canadian Regionalism in Continental Perspective", in Journal of Canadian Studies, 27

negotiating the elimination of all internal trade barriers. The Secretariat has been given a deadline of June 30, 1994, less than one year away.¹³ What separates the current exercise from past attempts is the establishment of a formal procedure within the Secretariat. However, as the example of Quebec and New Brunswick illustrates, political expediency may be more important than economic necessity. It is a reality today that provincial governments seeking re-election must be able to show their constituents that they can 'get tough' with either the federal government or other provinces when intergovernmental conflicts occur. The job of the Internal Trade Secretariat will indeed be a large one.

Thus, the subject of interprovincial barriers to trade within the theoretic framework of nation-building versus province-building has emerged as an important issue as Canadians prepare to face the economic challenges of an ever-changing global climate.

Chapter One of this thesis will explore the concepts of federal states, nation-building and province-building in more depth. An examination of constitutional jurisdictions and important constitutional challenges and decisions will reveal how the Canadian economic union has evolved over the years. In addition to judicial decisions, political decisions will also be reviewed for their impact upon our

¹³John Douglas, "Mauro to tackle trade barriers", Winnipeg Free Press, August 7, 1993, A3.

federal system and will serve to explain the rise of interprovincial trade barriers.

Chapters Two and Three will present a more thorough examination of two specific examples of interprovincial barriers to trade and their use. Agricultural marketing boards, discussed in Chapter Two, pose a serious impediment to trade between provinces, yet are an important component of the agricultural economy. Currently, the operation of supply management boards is threatened by proposed changes to the General Agreement on Tariffs and Trade (GATT). In addition, certain provisions under the Canada-United States Free Trade Agreement (FTA) will make it more difficult for the agricultural management schemes to operate as they have in the past. The challenge to Canada, therefore, is how to retain the advantages of these supply boards, while at the same time eliminating the disadvantages.

Transportation regulatory policy, specifically as it pertains to motor vehicle transport, will be the focus of Chapter Three. Unlike railways in Canada, the regulation of motor vehicle carriers has historically been the domain of provincial governments. Failure of the federal government to assume responsibility for the regulation of extraprovincial trucking has created problems for the industry, as provincial regulation impeded the movement of carriers throughout the country. In response to pressure for regulatory reform, the federal response was to deregulate certain aspects of the industry. However,

deregulation has created a new set of problems for motor carriers.

Chapter Four will analyze the challenges which currently face our economic union, as globalization forces nations to adjust to new economic realities. The recession of the 1980's and changes in world trade, resulting from globalization, made the federal government search for, and implement, new policies to develop Canada's economic potential. The impact of these changes upon the nation-building and province-building components of our federal system will be addressed. If Canada is to successfully meet these challenges without further economic and political disintegration, internal harmonization of policy objectives must be attained.

Finally, it will be concluded that, both from a political standpoint and an economic imperative, province-building and further decentralization can only interfere with the interests of a national economic and industrial strategy. Canada must reconcile its national objectives with its competing regional interests and devise a common front with which to address national economic development. Strong federal government action is needed to resist the decentralizing forces caused by internal political conflict and external economic dependence.

CHAPTER ONE: THE FEDERAL PRINCIPLE AND CANADA

Federal government systems have been, and continue to be, a fruitful area of political scientific inquiry. The very nature of a federation, whereby political authority is shared between several jurisdictions, leads to speculation about the balance of power, cooperation, and conflict and the problems which these factors may engender. The division of powers has been called an essential feature of federalism.¹ Certainly, the wealth of information currently available on Canadian federalism attests to this fact.

Students of Canadian politics are familiar with the pendulum analogy used to describe periodic shifts in the balance of power between the federal and provincial governments. The events which precipitated these shifts, the conflicts which arose, and the flexibility of the Constitution to accommodate these changes are subjects which have been dealt with extensively.

During the 1960's, greater demands from Quebec for provincial autonomy, in addition to a rise in the scope of provincial responsibilities, led to an increasing conflictual relationship between federal and provincial governments. This time has been posited as a shift away from a centralization of the Canadian federal system to

¹A.V. Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (London: MacMillan, 1961) 151.

increasing decentralization. In 1966, Edwin R. Black and Alan C. Cairns coined the term 'province-building' to describe the shift in the balance of power and the events which precipitated the shift.² Their definition of province-building has two components. The first is the growth and importance of provincial economic activities as represented in the scope and size of provincial budgets. The second, and most important according to the authors, is "...the growth of influential provincial elites in politics, administration, and resource-based industries who see the province as the main arena for the pursuit of power."³ Accordingly, as provincial elites undertake economic planning within the province, they resent and resist federal economic interventions which may interfere with provincial goals. Since the phrase was first introduced, it has gained currency with many other political scientists who have sought to understand the changes which the Canadian federation has undergone.

In an article published in 1984, Young, Faucher and Blais criticized the concept of province-building on the grounds that it is too general, its effect upon federalism has been exaggerated, and lastly, that the concept ignores the history of provincialism and in so doing, magnifies the

²Edwin R. Black and Alan C. Cairns, "A Different Perspective on Canadian Federalism", in Canadian Public Administration, Vol IX (1966), 27-45.

³Ibid., 95.

recent change.⁴ Despite the criticisms, the concept of province-building has remained an enduring focus of controversy in Canadian federalism debate. As Stevenson notes, what separates the current period of decentralization from those previous is the number of fields of government activity which are now shared by both levels of government.⁵ In contrast with other federal nations, Canada is considered one of the more decentralized.

The corollary of province-building is nation-building. As the phrase implies, it describes the activities which a government undertakes to further a nation's political and economic objectives. Leslie has described three periods of nation building in Canadian history.⁶ The first nation-building era in Canada began in 1867 with the creation of the new Dominion and the three-pronged policy of western settlement, the protective tariff, and the construction of a national railway system. The second nation-building era is posited from 1935 to a decade after the Second World War. Leslie states that the policies of this era "...were a response to the instability and inequities inherent in the operation of a market economy...."⁷ Finally, the third

⁴R.A. Young, Philippe Faucher, and Andre Blais, "The Concept of Province-Building: A Critique", Canadian Journal of Political Science, XVII:4 (December 1984) 786.

⁵Garth Stevenson, "The Division of Powers", Division of Powers and Public Policy, Richard Simeon, Research Coordinator (Toronto: University of Toronto Press, 1985) 110.

⁶Peter M. Leslie, Federal state, national economy (Toronto: University of Toronto Press, 1987) 4-10.

⁷Ibid., 5.

period identified by Leslie began in the late 1970's and continued into the early 1980's, with an emphasis on development, and achieving a mature industrial structure. However, the third era of nation-building was never completed due to the intergovernmental and interregional conflict which it generated.⁸

This chapter will examine the constitutional framework of Canada's internal economic relations and trace the growth and development of the current order as it relates to the functioning of the Canadian economic union. Judicial interpretation and political decision-making will provide a frame of reference in the understanding of the development of interprovincial barriers to trade. Various federal systems theories will be discussed with specific reference to the Canadian federation, including the bases for confederation and the choice of a federal system as opposed to a unitary state.

I. Inherent Conflicts in Federal Systems

There are many reasons why emergent nations may choose to take on a federal form over other alternatives, such as a unitary system. These are political, economic, military, social and/or geographic. Politically, a federal system refers to a single nation in which there exist two separate and autonomous levels of government. However, among

⁸Ibid., 8.

federations there are many variations in form and practice.

K.C. Wheare refers to a federal principle which is:

...a method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent.⁹

For Wheare, the Canadian constitution does not conform fully to the federal principle because the federal government has certain powers which curb the independence of the provincial governments, such as the power to disallow any provincial legislation. Moreover, the federal government appoints provincial Lieutenant Governors and Supreme Court justices. This is an important centralizing tool since the Supreme Court is the body which adjudicates the division of powers as set out in the constitution. For these reasons, Wheare states that Canada is "...quasi-federal in law".¹⁰ However, because the federal power of disallowance has fallen into disuse, and because the Supreme Court has decided for the provinces as often as for the federal government in jurisdictional disputes, it is more appropriate to state that Canada is "...predominantly federal in practice".¹¹

A contrasting definition of federalism is provided by W.H. Riker. He claims that a federal nation is essentially comprised of

...a government of the federation and a set of governments of the member units, in which both kinds of governments rule

⁹K.C. Wheare, Federal Government, 4th ed. (London: Oxford University Press, 1963) 10.

¹⁰Ibid., 20.

¹¹Ibid., 20.

over the same territory and people and each kind has the authority to make *some* decisions independently of the other. (emphasis mine)¹²

Depending upon the number of decisions each government may exercise independently of the other, as outlined in the constitutional division of powers, a federation may be described as either centralized or peripheralized. In this context, Canada is described as a more centralized federal state.

A further definition of federalism is offered by Ivo Duchacek, who states that a federal system is one in which

...political authority is territorially divided between two autonomous sets of separate jurisdictions, one national and the other provincial, which both operate directly upon the people.¹³

This description suggests the model of classical federalism whereby powers are divided into water-tight compartments, no overlap of authority occurs, and judicial decisions reinforce these divisions. While the Canadian federation followed this model at one time, it no longer applies in the modern setting.

All three definitions incorporate the idea of independence and autonomy between the two levels of government in a federal state. Too much authority at the federal level renders a nation a unitary state, while too little authority at the national level would result in a

¹²W.H. Riker, Federalism: Origin, Operation, Significance (Toronto: Little, Brown and Company, 1964) 5.

¹³Ivo D. Duchacek, Comparative Federalism: The Territorial Dimension of Politics (New York: Holt, Rinehart and Winston, Inc., 1970) 192.

loose confederation of sovereign states. The ideal federal state, therefore, would appear to be one in which there is a balance of these two extremes.

Such a balance, while necessary, is difficult to achieve because different and conflicting interests are inherent in federal systems. For example, Wheare suggests that there are valid reasons to form a single nation, such as defence, economic advantage, similar political and social backgrounds, and geographic proximity.¹⁴ But there are also factors which compel the sub-unit governments to remain separate. These may include prior status as distinct entities, divergence of economic interests, geographical isolation of regions, differences of language, race and religion, and dissimilarity of social institutions.¹⁵ Combined, these factors encourage both unity and diversity.

For these reasons, political change is an inherent feature of federalisms. Duchacek believes that federal nations are 'unfinished' nations. That is, once the national objectives for federalism have been met, the original diversity which embodies conflicting interests will remain. "The result is a compromise between two territorial forces pulling in opposite directions: one toward national unity...and the other toward diversity..."¹⁶ These forces keep federalisms in flux and contribute to the wide

¹⁴Wheare, 37.

¹⁵Ibid., 40-2.

¹⁶Duchacek, 194.

variations which may be found among them. These factors also pose problems in neatly defining federalism.

Usually the division of powers between the two levels of government in a federal state is formally acknowledged in the country's constitution. But because of the dual political authority inherent in political systems this division of powers can be problematic. Some jurisdictional areas are readily classified as national objectives, such as defence. Other areas logically fall to the state or provincial level of government, for example property and civil rights or education. Many government responsibilities however are nebulous, which may lead to overlapping or blurring of boundary lines. Even where the powers have been explicitly divided into watertight compartments, the wording and intent are subject to judicial interpretation and adaptation to changing political and/or economic realities. The constitutional recognition of jurisdiction may not reflect what is in fact the practice - what Duchacek refers to as the "extraconstitutional reality".¹⁷ For example, using Riker's definition, the United States is a less centralized federation than Canada, according to the constitutional division of powers. While there have been no major constitutional amendments which would alter this legal interpretation¹⁸, Canada has, in practice, become

¹⁷Ibid., 227.

¹⁸There has been debate in Canada over the effect of the 1982 Constitution Act on the federation. Because provinces were granted further rights with respect to natural resources, some argue that it had a decentralizing effect.

increasingly more peripheralized and the U.S. has moved in a more centralist direction.¹⁹

Thus, federalisms defy a singular definition and may display an infinite variety of practicable balance of powers regardless of the stipulations in their formal constitutions. Changes in practice from constitutional intent can lead to competition and conflict between the two levels of government. Canada provides an instructive example in this regard.

II. The Division of Powers in the Canadian Constitution

It is evident that the framers of the Constitution Act, 1867 intended Canada to be not only a political union, but an economic union as well, with the federal government having the principle jurisdiction over trade and fiscal matters. Within Sec. 91, the federal government has the fuller powers of taxation, while the provinces are limited to imposing only direct taxes. The federal government, by virtue of Sec. 91(2), is solely granted the power over regulation of trade and commerce, monetary policy (Sec. 91(14) to (21)), and powers in relation to customs and excise (Sec. 122). Furthermore, in areas of concurrent jurisdiction, such as agriculture and immigration (Sec. 94), federal law has paramountcy. Finally, the residual power

However, it is also argued that the Charter of Rights and Freedoms, contained in the same act, is a centralizing document.

¹⁹Robert C. Vipond, "Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada", in Canadian Journal of Political Science XVIII:2 (June 1985) 290.

contained in Sec. 91 gives the federal government power to enact laws for the peace, order and good government of the country.

The evidence that Canada was intended to be a common market is contained in Sec. 121 of the Constitution Act, 1867 which states that

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

Sec. 121 was not only framed to eliminate tariffs which existed at the time of Confederation, but to prevent their future imposition. Currently, this section is one of the weakest safeguards of the economic union because there is no provision for the free movement of services, labour and capital in the country. In addition, there is nothing in the wording of Sec. 121 to prevent the imposition of interprovincial non-tariff barriers to trade.²⁰

Despite constitutional provisions, the current reality in Canada is that the provinces have become increasingly involved in economic matters. It can be argued whether in fact Canada constitutes an economic union.²¹ Although

²⁰F.R. Flatters and R.G. Lipsey, Common Ground for the Canadian Common Market (Montreal: The Institute for Research on Public Policy, 1983) 9.

²¹For purposes of clarity, the term economic union is defined as one in which there are "...varying degrees of harmonization of state economic policies in order to remove discrimination arising from disparities in these policies." J. Robert S. Prichard with Jamie Benedickson, "Securing the Canadian economic union: federalism and internal barriers to trade", Federalism and the Canadian Economic Union, 3-50, M.J. Trebilock, et al, eds. (Toronto: University of Toronto

prevented from erecting tariff barriers under Sec. 121, provinces have undertaken regulatory activity which, in effect, produces significant non-tariff barriers to interprovincial trade. As the economic power of the provinces has grown, the power of the federal government to eliminate interprovincial non-tariff barriers and secure an economic union has been eroded.

Wheare refers to the federal government's jurisdiction with respect to the regulation of trade and commerce as "...a wide grant of power".²² But he further notes that it has not been employed to its fullest extent; rather its scope has been significantly narrowed. In a comparison of the trade and commerce power of the government of the U.S. with that of Canada, Alexander Smith noted that

Congress has been able to do so much with so little; Parliament has been able to do so little with so much.²³

Wheare argues that federal powers were constricted by early constitutional decisions rendered by the then highest court of appeal, the Judicial Committee of the Privy Council (JCPC). In cases where Dominion regulation of trade interfered with provincial commercial activity, the JCPC generally decided in favour of the provinces. In this way, the federal trade and commerce power was reduced in scope,

Press, 1983) 7. Additionally, the term 'common market' will be used interchangeably with economic union in application to Canada.

²²Wheare, 130.

²³Alexander Smith, The Commerce Power in Canada and the United States (Toronto: Butterworths, 1963) 4.

while the provincial power over property and civil rights was given increased stature.²⁴ Smith concurs with this view of the JCPC. He argues that the problem was the tendency of the justices to view legislation in the abstract and not in the larger context.²⁵ This narrow view prompted decisions which protected provincial autonomy in the area of property and civil rights.

Frederick Vaughan asserts that it was the manner in which the Judicial Committee approached jurisdictional questions that effectively enlarged provincial authority at the expense of federal powers. The justices would first canvass the provisions of Sec. 92 respecting provincial jurisdiction. As Vaughan argues: "The BNA Act [sic] is so drafted that if one "goes in" by way of 92 one will "come out" on the side of 92."²⁶ If the JCPC had employed the reverse method and utilized Sec. 91 in questioning competency, there existed the possibility that a majority of provincial legislation could be overridden by the peace, order and good government clause - a possibility which the justices sought to guard against.²⁷

The *Parsons* case is illustrative of the difficulties in divided jurisdictions and the JCPC's penchant for protecting provincial rights. The 1881-82 appeal to the Judicial

²⁴Wheare, 131.

²⁵Smith, 159.

²⁶Frederick Vaughan "Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation", Canadian Journal of Political Science, XIX:3 (Sept. 1986) 516.

²⁷Ibid., 517.

Committee in *Citizens Insurance Company v. Parsons*²⁸ was the first instance in which the federal trade and commerce power was in conflict with provincial jurisdiction over property and civil rights. The action questioned whether or not insurance and the issuing of policies was a matter falling under the trade and commerce power of the federal government and therefore, *ultra vires* the legislative competence of the Ontario government. The Supreme Court of Canada had ruled the legislation *intra vires* on the basis of a double aspect rule.

This rule recognizes that a subject which in one aspect and for one purpose falls within federal authority, may, in another aspect and for another purpose fall within provincial authority.²⁹

Therefore, the Supreme Court ruled that the Ontario law could co-exist with, and not conflict with, any existing federal legislation. The judgment did not diminish the power and authority of the federal government over trade and commerce.

The case was appealed to the JCPC, which upheld the Supreme Court ruling. However, in its judgment, the JCPC chose to comment on the scope of the two powers in order to determine under whose purview "contracts" should fall. In commenting on property and civil rights the Court found that

The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract and such rights are not included in

²⁸(1881-82) App. Cas. 96.

²⁹As cited in Smith, 37.

express terms in any of the enumerated classes of subjects in S.91.³⁰

In determining whether or not the Ontario legislation was in conflict with the provisions of S.92, the Judicial Committee noted that if the regulation of trade and commerce was intended to be taken in an unlimited sense, other items pertaining to trade and commerce would not have been specified individually in that same section. As Smith contends, it was "... the invocation of the canon of construction, *expressio unius est exclusio alterius*" which prevented the trade and commerce clause from receiving a much broader interpretation.³¹ In effect the JCPC had limited the trade and commerce power of the federal government to applications of general regulation of international and interprovincial trade.

The residual power of the federal government in the peace, order and good government clause was also circumscribed by the Judicial Committee in 1896 with its decision in *Local Prohibition*.³² The case involved whether or not a province could legislate prohibition for districts which were not already legislated under the federal temperance law. The JCPC ruled that the general power could not be used to encroach upon any of the enumerated powers in Sec. 92.

³⁰Decision delivered by Sir Montague Smith, as reproduced in John D. Whyte and William R. Lederman, Canadian Constitutional Law (Toronto: Butterworths, 1975) 93.

³¹Smith, 176.

³²*Attorney General of Ontario v. Attorney General of Canada* [1896] A.C. 348.

To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s.91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces.³³

Therefore, the supposed far-reaching powers of the federal government under the trade and commerce clause and the residual clause were severely limited by the interpretation of the Judicial Committee.

While it is fair to credit early court decisions with the provision of a constitutional basis for some measure of decentralization of the Canadian economic union, they do not offer a full explanation for the current state of affairs.

As Cairns argues,

It is impossible to believe that a few elderly men in London deciding two or three constitutional cases a year precipitated, sustained, and caused the development of Canada in a federalist direction the country would otherwise not have taken.³⁴

Writing in 1963, Smith claims that the Supreme Court of Canada, which replaced the JCPC as the final court of appeal in 1949, began to change direction with respect to constitutional decisions. He contends that the Supreme Court did not feel bound by the position taken by its predecessor and showed itself to be more willing to examine

³³Decision of Lord Watson, as cited in Russell, 59.

³⁴Alan C. Cairns, "The Judicial Committee and Its Critics", Constitution, Government and Society in Canada: Selected Essays by Alan C. Cairns, Douglas E. Williams, ed. (Toronto: McClelland & Stewart Inc., 1988)

jurisdictional disputes in light of similar case law from other federal countries, such as the United States.³⁵

As a case in point he cites *The Farm Products Marketing Act Reference* [1957] which is discussed in more detail in Chapter Two. The Supreme Court was to determine whether this Ontario legislation was *ultra vires* the province's legislative authority. The Court ruling found the legislation valid, but went further by setting limits to provincial activity in commercial marketing and establishing federal paramountcy in certain aspects of produce trade, specifically interprovincial and international trade. According to Russell, the justices applied the "aspects" doctrine to the regulation of trade and identified its interprovincial and international aspects, as opposed to the more narrow view of the transaction as a contract and therefore within the jurisdiction of the provinces.³⁶

The Supreme Court also broadened the scope of the residual power in *Johannesson v. West St. Paul*.³⁷ In deciding jurisdiction in the field of aeronautics, the Supreme Court declared airports to be a "class of subject which has attained such dimension as to affect the body politic of the Dominion"³⁸, and could therefore fall under the federal government's residual power. This was an

³⁵Smith, 7.

³⁶Russell, 166-7.

³⁷[1952] 1 S.C.R. 292.

³⁸As cited in Martha Fletcher, "Judicial Review and the Division of Powers in Canada", Canadian Federalism: Myth or Reality, J. Peter Meekison, ed. 2nd ed. (Toronto: Methuen Publications, 1971) 177

important case because, as Russell notes, it was the first case which the Supreme Court heard after abolition of the JCPC as the final court of appeal in Canada and it indicated a more expansive reading of the federal government's residual power.³⁹ But it remained the domain of the government to assume its authority, which did not happen in Canada.

III. Province-building and the Extra-Constitutional Reality

Using the pendulum analogy of Canadian federalism, the post-war 1950's was a time when the federal government exercised more power and the shift was towards greater centralization as Canada laid the foundation for post-war economic growth. Scholars of federalism noted the tendency, not only in Canada but in other modern democratic states, towards a stronger central government. Wheare notes that a major factor in this trend was the predominance of the federal governments in the area of finance.⁴⁰ Provinces were limited in their powers of taxation and spending, and dependent upon the federal government for resources to fund initiatives in provincial areas of jurisdiction. The growth of the welfare state, a burgeoning public education system, and the advent of a modern economic order signalled an increasing role for the central government. Indeed, speculation at the time suggested that this trend would continue and economic imperatives would ensure that a

³⁹Russell, 158.

⁴⁰Wheare, 238.

federal structure would be replaced by a *de facto* unitary system, or at the least, a system firmly controlled by the central government.⁴¹

However, this did not occur in Canada. Rather, provincial governments during the 1960's and 70's grew in size and increased the scope of their activity including involvement in economic affairs. As noted before, state growth was a common feature of industrialized democracies. In Canada, however, it occurred at the provincial level as well. Provincial economic activity was not limited to its involvement in the growth of the welfare state, but extended into areas such as industrial policy formation and international trade.

The post-war years witnessed a national economic growth with a corresponding increase in the importance of policy areas under provincial control, such as health and post-secondary education. Given the limited capacity of the provinces to raise revenues, the federal government became fiscally involved in these areas through tax-sharing agreements and through shared-cost programs. Increasing economic activity at both levels of government resulted in greater interdependence and a need for intergovernmental cooperation. Shared-cost programs were the hallmark of the era of cooperative federalism as institutional arrangements facilitated the adjustments required by the rise of the

⁴¹Black and Cairns, 93.

welfare state.⁴² In the 1950's and 60's, shared cost programs included health care, welfare assistance, education and housing, to name but a few of the coordinated policy fields. In addition, the federal government attempted to deal with differences in regional growth through tax-rental and tax sharing agreements. While most of these arrangements allowed federal intervention into areas of exclusive provincial jurisdiction, the provinces acquired a great deal of power as they had the responsibility for administering these programs. As a result, both their administrative and financial capabilities grew.⁴³

In part, the increase in provincial government economic activity, and the subsequent intergovernmental conflict, was fuelled by linguistic and cultural divisions. The Quiet Revolution in Quebec marked the end of the province as an agrarian, parochial society dominated socially by the Catholic church and economically by Anglophone businesses. Instead, the Lesage government was dedicated to intervention in Quebec's political and economic affairs so that French-Canadians could become *maitres chez nous*. Intense economic planning was undertaken, including such measures as the nationalization of Hydro-Quebec and initiatives to enhance Quebec's secondary manufacturing sector. While provincial economic intervention was encouraged, the Quebec government

⁴²Kenneth Norrie, Richard Simeon and Mark Krasnick, Federalism and the Economic Union in Canada (Toronto: University of Toronto Press, 1986) 298-9.

⁴³Simeon and Robinson, 152.

became increasingly opposed to federal incursions into policy areas it felt were the domain of the province. For example, Quebec was vigorously opposed to the Canada Pension Plan, and eventually it was given the choice of opting-out and allowed to set up its own scheme.

Not only were cultural and linguistic divisions on the rise, but during the 1960's it was becoming apparent that despite overall growth in the 1950's, regional disparities were not abating. Uneven development was further exacerbated by varying provincial reliance on agriculture, natural resources and secondary manufacturing. Long-standing tensions arose between the resource-dependent provinces in Canada's periphery and the manufacturing provinces in central Canada. Provinces, frustrated by the federal government's inability to reduce regional disparities, followed the lead of Quebec and undertook industrial policy initiatives of their own. Provinces attempted to diversify their economies and protect their areas of natural strength. As Cairns suggests, "... province-building was predicated on a belief that citizens, through their governments, could alter economic circumstances."⁴⁴ As provincial governments became more competent at managing their affairs and their bureaucracies and budgets grew, their interests diverged with those of one another and the federal government. Cairns notes the development of intergovernmental conflict and likened it to

⁴⁴Ibid., 300.

"...a contest between big battalions with often opposed plans for the societies and economies for which they hope to play an enlarged steering role."⁴⁵

As the economic policies of the governments became more interwoven and interdependent, issues of jurisdiction arose. The management of intergovernmental conflict increasingly took place at the executive level, in the form of First Ministers meetings and federal-provincial conferences and committees, incorporating premiers, ministers and bureaucratic staff. Smiley referred to this as executive federalism which he defined as "...the relations between elected and appointed officials of the two orders of government in federal-provincial interactions...."⁴⁶ The multitude of fora in which to negotiate federal-provincial conflict has resulted in what was previously referred to as the 'extra-constitutional reality' whereby the political practice is negotiated without reference to the formal constitutional division of powers. Cairns argues that while constitutional flexibility is important, responses to conflict in Canada, outside the constitution, have diminished its validity and provoked increased competition and conflict between governments as they move to occupy more policy fields both within and outside of their

⁴⁵Alan C. Cairns, "The other crisis of Canadian federalism", Canadian Public Administration, Vol. 22(2) Summer 1979, 182.

⁴⁶Donald V. Smiley, Canada in Question: Federalism in the Eighties, 3rd ed. (Toronto: McGraw-Hill Ryerson, 1980) 91.

jurisdictional competence.⁴⁷ Neil Caplan concurs with this view. He suggests that

The expansion of the number and the scope of areas where governmental activity has been coordinated and conflicts resolved by means of the newer patterns of "cooperative federalism" may very well have reduced the *litigious* resolution of federal-provincial disputes. It has not, however, brought about any major changes in the basic competitive nature of federal-provincial relations.⁴⁸

The tendency for conflict is perhaps greater in First Ministers' Conferences which are played out in the public arena. As Dupre notes, the tendency is that "...first ministers have become prone to talk past each other from their respective capitals, rather than with each other on the basis of their policy interdependence."⁴⁹

Province-building has engendered interprovincial competition and conflict as well. Beggar-thy-neighbour policies are undertaken unilaterally by provincial governments inherently to protect local economic activities. The tendency for these policies to multiply across provinces occurs because "...each government views the conduct of the other governments as threatening to its own pursuits."⁵⁰ For example, Tupper notes that during the 1950's and 60's,

⁴⁷Ibid., 189.

⁴⁸Neil Caplan, "Some Factors Affecting the Resolution of a Federal-Provincial Conflict", Canadian Journal of Political Science, Vol. II, no. 2 (June 1969), 186.

⁴⁹J. Stefan Dupre, "Reflections on the Workability of Executive Federalism", Intergovernmental Relations, Richard Simeon, Research Coordinator (Toronto: University of Toronto Press, 1985. 15.

⁵⁰Cairns, 192.

four provinces abandoned the concept of least cost procurement in favour of promoting local, or at least Canadian, suppliers. Currently, however, all provinces aggressively utilize government procurement policies which favour local suppliers.⁵¹ It is notable that in 1989 the Western Premiers signed an agreement to reduce barriers in the form of government preferential purchasing practices. However, the agreement has no application to Crown Corporations, hospitals, school boards, and municipalities which form a significant component of government procurement. In addition, any government can make a claim for special circumstances, such as an economic recession, and be exempt from the agreement. This suggests that while provincial governments recognize the need for cooperative action, they still retain sufficient control to act in their own best interests.

Moreover, while there are economic costs associated with these actions, there are no political reasons to stop the behaviour. Provinces erecting barriers to trade can externalize the consequences of their actions so that it is other provinces who will feel the effects. There is no political accountability for the province which initiates the action. The province experiencing the negative effects of the policy may find electoral advantage in retaliating. As Flatters and Lipsey argue, what is at work is the 'prisoner's dilemma' which suggests that

⁵¹Tupper, 34.

... each of the two people makes independent decisions that take the other's possible decisions into account but both are led to an outcome that is inferior to the one they would reach if they co-operated to make a joint decision.⁵²

As the trade war cited in the Introduction between New Brunswick and Quebec illustrates, the prisoner's dilemma can be more compelling than cooperation.

IV. Conclusion

Clearly, conflict resolution between the two levels of government has moved beyond constitutional considerations, and cooperation and executive federalism have replaced the courts as the arbiters of jurisdictional boundary disputes. Stevenson argues that the result has been "...a *de facto* division of powers ... that singularly lacks the virtues of logic, precision and predictability."⁵³ In addition, there has been a persistent tendency towards the weakening of central government control over economic initiatives, which often generate conflict, and a balkanization of the Canadian common market.

In order to achieve economic and political ends, provinces employ a large number of regulatory means. Some of these include preferential procurement practices, labelling regulation and different product standards,

⁵²F.R. Flatters and R.G. Lipsey, Common Ground for the Canadian Common Market (Montreal: The Institute for Research on Public Policy, 1983) 47.

⁵³Garth Stevenson, "The Division of Powers", Division of Powers and Public Policy, Richard Simeon, Research Coordinator (Toronto: University of Toronto Press, 1985) 73.

agriculture marketing boards, liquor-buying practices, transportation regulation, regulation of securities, competition policy, professional certification, residence requirements for workers, education policies, and communications regulation.⁵⁴ Despite increased attention on internal barriers, they have not diminished.

Federalism in Canada has moved beyond the classical model of water-tight compartments and there are now many areas where jurisdiction overlaps, defying constitutional definition. While this is in part due to early judicial decisions, it is also a result of the diverse forces in Canada which existed at the time of Confederation, and the federal government's inability to contain the diversity. When this diversity is also manifested in economic objectives, other institutional arrangements become necessary to attempt to coordinate the competing interests.

The fact that our constitution has survived for 126 years has led many observers to remark upon its flexibility in defining the relations between the two levels of government. However, internal barriers to trade have also demonstrated a remarkable resiliency to the provisions of the Constitution Act, 1867. Notwithstanding the flexibility

⁵⁴This list is certainly not exhaustive. See Judith Maxwell and Caroline Pestieau, Economic Realities of Contemporary Confederation (Montreal: C.D. Howe Research Institute, 1980) 88-9. For a more comprehensive listing, see Michael J. Trebilock, et al, "Provincially induced barriers to trade in Canada", in Federalism and The Canadian Economic Union, Michael J. Trebilock, et al, eds. (Toronto: University of Toronto Press, 1983) 324-51.

of the Constitution Act, as Stevenson notes "Whatever the actual impact of such measures, their intent is incompatible with any notion of federalism as well as with the best interests of the consumer."⁵⁵

The following Chapters will examine two specific areas of interprovincial barriers to trade. The history of the regulation of agricultural marketing boards and motor carrier transportation will highlight the difficulties of divided jurisdiction. In addition, they provide a good example of the inability of the federal government to reconcile provincial interests with its own.

⁵⁵Garth Stevenson, Unfulfilled Union, Revised ed. (Toronto: Gage Publishing Company, 1982) 115.

CHAPTER TWO: AGRICULTURAL MARKETING BOARDS

The regulation of agricultural products through marketing boards provides a good case study in the discussion of interprovincial barriers to trade because of the importance of agricultural products in both domestic and international trade, and because of their high visibility. Over 50% of all farm produce in Canada is channelled through marketing boards. The proliferation of marketing boards since the 1950's and their closer association with provincial governments than with the federal government has led to their use as a tool of provincial economic policy-making and as an agent of discriminatory policy.

Agricultural marketing boards can be defined as, "A compulsory horizontal marketing organization for primary and processed natural products operating under government delegated authority."¹ They employ a wide range of measures to protect the local market from extra-provincial competition. These may include grading policies, variable standards and pricing policies, 'buy local' policies, entry restrictions and quota entitlement.

¹Nora Silzer and Mark Krasnick, "The Free Flow of Goods in the Canadian Economic Union", in Perspectives on the Canadian Economic Union, Mark Krasnick, ed. (Toronto: University of Toronto Press, 1986) 165. This is not Silzer and Krasnick's definition, but one they have synthesized.

Jurisdiction over agricultural marketing boards is currently shared by both the federal and provincial governments due to the fact that provinces have authority over intraprovincial aspects of agricultural products trade, while the federal government has control over the interprovincial and international trade of these products. It is difficult to establish where intraprovincial trade stops and interprovincial trade begins. Therefore, agricultural marketing boards epitomize the difficulty of blurred jurisdictional boundaries.

Currently, there are over 120 marketing boards which control the marketing of various products, such as honey, sugar, pork, poultry, eggs, fruits, vegetables, to name a few. In addition, there are four national agencies which coordinate the activities of provincial boards in the areas of chickens, eggs, milk, and turkeys. The scope of these boards varies, from promotion and development of the product, to price-setting and supply management, but in total these boards encompass all aspects of the production and marketing of agricultural products.

This chapter will outline the jurisdictional problems encountered in the establishment of marketing boards, including pertinent constitutional decisions and the ensuing political compromises. Examples of the use of marketing schemes to disrupt interprovincial trade flows will highlight the need for reform. It will be argued that the national presence established in 1972 only served to prevent

internal trade wars, but in so doing furthered the fragmentation of the agriculture market in Canada. As such, it was a second-best solution. In addition, the operation of supply management boards are currently under threat from outside pressures in the form of the Canada-United States Free Trade Agreement and the continuing Uruguay Round of the GATT. These external forces appear likely to precipitate the demise of supply managed systems both at the provincial and national levels. It will be argued that Canadian domestic agricultural production should not be the object of provincial protectionism, but that a regulatory system, such as supply management, is important to the industry and a national economic policy.

The primary focus of this chapter will be on supply management boards, specifically in the poultry and dairy sectors. These boards exhibit the most discriminatory behaviour and they are the main focus of trade disputes between Canada and its trading partners. The Canadian Wheat Board will not be discussed because this agency is a Crown Corporation and therefore is operated differently from other provincial and federal boards.

I. The Problem of Divided Jurisdiction

Agriculture is an industry which is subject to the vagaries of the market. Since Confederation, the fortunes of agricultural producers have risen and fallen in accordance with instability in supply and demand of their

products. The federal government, as early as the 1890's, became involved in the promotion of agricultural expansion through grants to encourage the production of more competitive farm manufacture, as well as through educational measures. The focus of these early policies was trade enhancement rather than the protection of producers.² Producers themselves began to experiment with voluntary cooperatives during the general recession of the 1870's as a means to alleviate price-cost inequalities and to give them greater control over the market. Their success in this regard was limited because the producers had little bargaining power on their own. Non-participants were able to exploit the benefits associated with the cooperatives which meant there was little incentive to join. As well, when the cooperatives decided to cut supply in order to increase prices, independent producers would sell their products, thereby thwarting the intentions of the producer organization. The weaknesses of voluntary organizations were glaringly apparent and they had little positive effect on product marketing.

British Columbia fruit growers in particular had experimented with cooperative organizations for some time and recognized the need for a compulsory marketing organization. The producers lobbied the provincial government, and the *Produce Marketing Act*, passed in 1927,

²W.M. Drummond, W.J. Anderson and T.C. Kerr, A Review of Agricultural Policy in Canada (Agriculture Economics Research Council of Canada, June 1966) 19.

was the result. British Columbia became the first province to establish a marketing scheme. A Committee of Direction was appointed with the power to regulate the marketing of agricultural produce, set prices, and provide an equalization fund for producers based upon a collected levy.³ In 1931 the Supreme Court declared the legislation *ultra vires* on the grounds that it affected interprovincial trade and furthermore, that the levy constituted an indirect tax which was outside the province's jurisdiction to impose.⁴ It appeared obvious that the enabling legislation for the creation of an agriculture marketing board was the purview of the federal government.

The Depression of the 1930's exacerbated the plight of farmers and in light of the *Produce Marketing Act* decision, producers pressured the federal government to enact the necessary legislation for producer boards. In 1934, as part of the Bennett government's 'New Deal' package, the *Natural Products Marketing Act* was passed. The Act created a Dominion Marketing Board authorized to control all aspects of marketing agricultural products, or should it wish, to delegate these powers to local boards. In 1935 the legislation was referred to the Supreme Court by the newly elected Liberal government of Mackenzie King. The Prime Minister was sensitive to provincial criticism that much of the 'New Deal' legislation, including the marketing

³Ibid., 35.

⁴*Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* [1931] S.C.R. 357.

legislation, encroached on provincial jurisdiction. As Simeon and Robinson argue, the federal government referred the legislation as it was committed to employing a strategy of "minimal federal activity" in order to preserve national unity.⁵ The legislation was struck down by the Supreme Court and their ruling was upheld in 1937 by the Privy Council which ruled that

Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing [both] ... to the same authority.⁶

The ability of the federal government to intervene in this area was restricted by these decisions.

In effect, the 1927 and 1937 decisions exhibited the limitations on both levels of government to establish a comprehensive marketing scheme for producers. As Peter Russell states:

[These] cases also pointed to a possible no man's land where neither the Dominion nor the provinces could find constitutional support for effective marketing legislation.⁷

Subsequent to the *Natural Products Marketing Reference* case, provincial marketing boards were established, but were

⁵Simeon and Robinson, 82.

⁶*Reference re The Natural Products Marketing Act* [1936] S.C.R. 398. Decision delivered by Duff C.J. as reproduced in Whyte and Lederman, 354.

⁷Peter H. Russell, ed., Leading Constitutional Decisions, 4th ed. (Ottawa: Carleton University Press, 1987) 119.

limited to regulating intraprovincial aspects of agricultural products marketing only.

It was the conclusion of the JCPC that the provinces and the federal government should combine their respective legislative authority in a cooperative effort to ensure that a totality of regulation in agricultural products was achieved.⁸ To this end in 1949 the federal government passed the *Agricultural Products Marketing Act* (APMA) which enabled both levels of government to delegate their powers over intraprovincial and interprovincial marketing to existing marketing boards as a third party. The delegation aspect of this legislation is notable. Early court decisions had established that neither level of government could delegate their jurisdictional authority directly to the other. What the APMA proposed was the delegation of legislative authority to a non-legislative body - marketing boards. The validity of this exercise was upheld in 1952 by the Supreme Court in *P.E.I. Potato Marketing Board v. Willis* which ruled that delegation of authority to a third body was consistent with the advice rendered by the JCPC in 1937 for cooperative legislation.⁹ While the APMA enabled both the federal and provincial governments to avoid the problem of split jurisdiction, it also served to convey a greater scope

⁸Ibid., 121. See also Grace Skogstad, The Politics of Agricultural Policy-making in Canada (Toronto: University of Toronto Press, 1987) 85.

⁹*P.E.I. Potato Marketing Board v. Willis* [1952 2 S.C.R. 392; [1952] 4 D.L.R. 146. See judgment of Rinfret, C.J., as reproduced in Whyte and Lederman, 258.

of activity to the provincial boards, which could now control all aspects of product trade, including interprovincial and foreign export.

There was, however, a continuing role for the federal government. In 1957, Ontario's *Farm Products Marketing Act* was referred to the Supreme Court by the federal government.¹⁰ The province had enlarged its legislation to invest greater control and power to the central selling boards. However, Ontario had neither requested nor received the delegation of authority as required under s. 2(1) of the APMA so that it could legally broaden its legislative authority. The Court was asked to rule on several aspects of the legislation, most notably it was to consider the validity of the Act on the assumption that its scope was intraprovincial trade only. On this basis, the legislation was ruled *intra vires*. However, the Supreme Court in its judgment set limits on the scope of provincial authority over trade and commerce. Specifically, they set out in their judgment "... the kind of activity which is inherently extra-provincial."¹¹ The Court found that given the interdependent nature of product marketing between its internal and external movements, neither level could act wholly on its own with respect to regulation. They added a federal dimension to the marketing of agricultural products

¹⁰Reference re *The Farm Products Marketing Act* [1957] S.C.R. 198.

¹¹Russell, 166.

which had been the *de facto* domain of the provinces since the 1937 judicial decision.

The federal government was reluctant to exercise its judicially specified authority and, the reason was political. In the 1957 federal general election the opposition Conservatives captured 39% of the vote in Ontario, previously a Liberal party stronghold, to win 61 of the 85 seats.¹² The result was a minority Conservative government for the first time since 1935 and the election was won in Ontario. Shortly after the 1957 reference, the federal government, through legislation, delegated to provincial boards the power to charge licencing fees. Previous court rulings had viewed these levies as an indirect tax, and solely the authority of the federal government. Now the provincial boards could assess fees and cover their administrative costs and the delegation of powers to provincial boards was complete.

The Supreme Court ruling had offered the federal government the opportunity to occupy the field of agriculture marketing with the provinces, and to take a lead role in the interprovincial marketing aspect. The political climate, however, militated against the federal government occupying its jurisdiction.

While the APMA did induce a cooperative atmosphere among provincial boards in the regulation of agricultural marketing, such cooperation was short lived. Marketing

¹²Simeon and Robinson, 136.

boards work in concert with provincial governments and the interests of the two groups are closely intertwined. Governments seek to achieve or retain economic advantage and producers wish to ensure themselves a good return. As the provinces became more interventionist in economic affairs, so too did they become more aggressive in the marketing of agricultural products. Drummond, Anderson and Kerr, writing in 1966, cautioned that coordination between provinces, and not isolation, would militate against "... the establishment of high cost agriculture in Canada based on regional self-sufficiency or other specious objectives."¹³ Yet by the early 1970's it appeared that this is precisely what happened.

The 'chicken and egg wars' of the early 1970's are a potent example of the balkanization of Canadian agriculture, and of the extent to which marketing boards can be used to erect interprovincial trade barriers. The situation in 1970 was a surplus of eggs and sagging prices. In response to this, the Quebec egg marketing board (FEDCO) set up a marketing scheme to protect its producers. While all eggs sold in Quebec were to be marketed through FEDCO at the higher price, Quebec retailers bought their supplies directly from outside producers who were not supply managed and able to undercut FEDCO's prices. A price war soon erupted among the provinces which had traditionally supplied Quebec markets, including Manitoba. Unable to settle the

¹³Drummond, et al, 66.

dispute through cooperative means, Manitoba implemented regulations similar to those of FEDCO and submitted its legislation to the Manitoba Court of Appeal as a reference case. The Court found the regulations to be *ultra vires* - a judgment that was later upheld by the Supreme Court in *Attorney General for Manitoba v. Manitoba Egg and Poultry Association*.¹⁴

In Ontario, a like situation arose with the marketing of broiler chickens. Production quotas had been set by the Ontario Broiler Chicken Producers Marketing Board to stabilize prices. However, Quebec, which was not regulated under a marketing scheme, exported its product to Ontario at a lower price than was set by the Ontario Board. Quebec broiler chickens became an attractive commodity in Ontario markets, effectively undermining the Ontario Board's objectives. A trade war erupted as Ontario attempted to regulate against 'imported' chickens, through the requirement of permits and stickers on imported birds. While the trade wars began in Quebec and Ontario, they soon moved to other provinces. As poultry and egg producers in other provinces were affected by the actions in Quebec and Ontario, they pressed their marketing boards to enact parallel regulations. For example, in both British Columbia and Newfoundland, egg boards attempted to limit the importation of eggs by requiring that all out of province eggs be labelled individually with their point of origin.

¹⁴[1971] S.C.R. 689; D.L.R. (3rd) 169.

These regulations were immediately struck down as infringing upon interprovincial trade.¹⁵ The APMA was clearly deficient in preventing provinces from acting to the detriment of other provinces.

II. Federal Involvement

The proliferation of restrictive regulation and the subsequent halting of the interprovincial movement of eggs and poultry prompted the involvement of the federal government. The government was acting in response to requests from the Canadian Federation of Agriculture and producers who were injured parties in the trade wars. In March 1970 the government introduced Bill C-197 "...to create national marketing agencies and ensure a prominent federal role and presence in agriculture."¹⁶ Due to opposition, especially from cattle and hog producers, the bill died on the order paper. When it was reintroduced in late 1970, the federal government undertook a country-wide tour to hear presentations from provincial governments and producers. In the course of these hearings, the federal government lost much of the larger role it originally envisaged and the subsequent legislation, the *Farm Products Marketing Agencies Act* (FPMA), represented a compromise of provincial and producer interests and those of the federal government. According to Skogstad, the provincial governments were adamant that provincial sharing and

¹⁵Haack, et al 30.

¹⁶Skogstad, 88.

agreement were essential to the establishment of federal marketing agencies, and the producers were on the side of the provinces.¹⁷ The new legislation, therefore, reflected the concerns of the provincial governments and the producers and left a relatively small role for the federal government.

Under the FPMA, national agencies can only be established at the request of a majority of producers and under an agreement with provincial governments. In addition, the majority of directors of the national agencies and the National Farm Products Marketing Council (NFPMC), which oversees the agencies, must be primary producers. Most importantly, the size of national quotas and the allocation of these quotas to provincial boards are determined, not by the federal government alone, but by provincial governments and producers as well. As Skogstad notes, "The very composition of the agency builds in interprovincial conflict, providing as it does an institutional basis for the articulation of provincial interests."¹⁸ The new legislation did succeed in preventing the trade wars of the magnitude described above, through regulations pertaining to anti-dumping, surplus removal and pricing, but it has also introduced a high degree of provincialism into the marketing of agricultural products. The result is that there is little movement of these supply managed products across provincial boundaries.

¹⁷Ibid., 90.

¹⁸Ibid., 97.

There are currently four national agencies: the Canadian Egg Marketing Agency (CEMA), the Canadian Turkey Marketing Agency (CTMA), the Canadian Chicken Marketing Agency (CCMA) and the Canadian Broiler Hatching Egg Marketing Agency (CBHEMA). Dairy products are currently regulated under the aegis of the Canadian Dairy Commission, a Crown corporation. The national agencies set production quotas for each province, and in turn, provincial boards allot these to their producers. The quotas are determined on both past and expected production.¹⁹ In addition, penalties are assessed to any province which overproduces its market share. The goal of quota allocation based upon comparative advantage has been written into the FPMA but has yet to be met.²⁰

The initial determination of global (national) quotas, based on past production, and the allocation of those shares back to the province suggest that each province will receive the market share it has always had. The basis for determining initial quotas was the reason why Alberta has not joined the CCMA. It was a net importer of chicken and had a limited production history. Joining the national agency would have interfered with its plans for expansion in the industry.²¹

¹⁹Past production is calculated on the basis of performance in the 5 years preceding the establishment of a national agency.

²⁰Skogstad, 93.

²¹Ibid., 95.

Once provincial quotas are set, they become very difficult to change should circumstances warrant. The criteria for reallocation of provincial quotas, a feature of all national agencies, indicate a greater promotion of the concept of provincial self-sufficiency. For example, Skogstad cites the example of two of the criteria under the CCMA. They are: total market requirement within each market area; and, proportion of market demand in the province.²² Inevitably, if one province's market share is increased, it is usually at the expense of another province. This is because national agencies are reluctant to increase the global share and risk over-supply of the market.²³ Due to these rigidities comparative advantage is difficult to attain.

Dissatisfaction with market shares has caused some provinces to withdraw from the national agencies, or to disregard the allocation from the national board. For example, after British Columbia received an increase in its market share of chicken to cover expected demand during Expo, it left the national agency.²⁴ In 1991, Manitoba was fined for overproducing its market share, and according to the General Manager of the Manitoba Chicken Producers Board,

²²Ibid., 94. Haack et al found the same favouring of provincial self-sufficiency held true in reallocation of market shares under CEMA. 22.

²³Interview with Kerry Dexter, General Manager, Manitoba Chicken Producers Board, August 3, 1993.

²⁴Interview with Kerry Dexter.

disregard of the national board's allocation by individual provinces is not uncommon.²⁵

In Ontario quota allocations have not kept pace with both consumer demand and an increase in population. As a consequence, there is a shortage of chicken in the province and retailers and restaurants have had to locate supplies in other provinces and in the U.S.. Despite this, it is unlikely that Ontario will see a corresponding increase in its market share quota as the CCMA "... can't tell one province that another is more deserving of its market share."²⁶ According to Skogstad, the problem is that the national agencies have not been able to reconcile the competing interests of provincial boards.²⁷ National agencies have not contained interprovincial competition, and in fact have served to maintain the barriers. Provincial agricultural barriers introduce costs into the country as a whole. Thirsk has calculated that the overall welfare costs associated with marketing boards are small. However, with the movement to provincial self-sufficiency, these costs are compounded and approach significant proportions.²⁸

²⁵Ibid.

²⁶"Ontario retailers cite system in shortage of chickens", Globe and Mail, Wednesday, March 21, 1989, B4.

²⁷Skogstad, 97.

²⁸Wayne R. Thirsk, "Interprovincial Trade and the Welfare Effects of Marketing Boards", in Perspectives on the Canadian Economic Union, Mark Krasnick, ed. (Toronto: University of Toronto Press, 1986) 26.

III. Threats From Without

While the negative side of marketing boards are the politically divisive rigidities and problems of supply, they have achieved significant goals. Supply management boards have been successful in ensuring market stability for producers and relative price stability for consumers. But the future of supply managed boards has been increasingly undermined on several fronts over the last five years.

The GATT panel ruling on ice cream and yoghurt of 1989 was the first assault. Under Article XI of the GATT, a country may impose import restrictions for agricultural and fisheries products where such restrictions are "... necessary to the enforcement of governmental measures which operate to restrict the quantities of like domestic product permitted to be marketed or produced...." Supply marketing boards are exempted from other GATT trade rules through this provision. In 1988, Canada added ice cream and yoghurt to the Import Control List as two products which are supply managed. Any itemized product under the List is protected from imports by the imposition of quotas reflective of their past import performance. The U.S. challenged the ruling on behalf of Pillsbury Co., arguing that the import quotas for ice cream and yoghurt could not be justified under Article XI:2, and recommended their elimination. The Canadian position was that these products qualified as "like products" to milk and therefore, were subject to supply management. The GATT panel ruled against Canada, stating

that these were not "like products" and the restriction of imports was not necessary for the enforcement of the supply management program for milk.²⁹

The ruling is important because import quotas are an integral component of the supply management system. Imports of products such as ice cream and yoghurt may mean a reduction in local production of the same products. For example, should domestic processors reduce their demand for milk, then the domestic market share quotas and prices will be affected. Furthermore, the ruling extends to other supply managed sectors, such as poultry, which will be unable to control the import of processed products.

Currently, the issue of import controls is at an impasse with the stalled GATT Uruguay Round negotiations. One of the major obstacles to agreement in this Round remains agricultural subsidies. The goal is to improve access to import markets and to reduce the distortions in global agricultural trade caused by both direct and indirect subsidies. Supply management boards, therefore, have been a major focus of the talks. Of primary concern to producers is the U.S. proposal to 'tariffy' all agricultural subsidies as set forth in the draft agreement of December 1991. Basically, tariffication involves transforming current non-tariff barriers, such as import quotas, into monetary tariffs. Import quotas, for example, would be eliminated

²⁹General Agreement on Tariffs and Trade, Canada - Import Restrictions on Ice Cream and Yoghurt. Report of The Panel (September 27, 1989) 30.

and an import tariff on items currently under import control would be implemented. Any volume of agriculture produce could be imported into Canada as long as foreign producers are willing to pay the tariff. Moreover, these tariffs will be reduced at least 36% by the year 1999.

The U.S. tariffication proposal is not only consistent with liberalized trade goals, but it is also beneficial to U.S. producers seeking access to Canadian markets. The National Farmers Union (NFU) reported that, calculating the proposed tariffs for fluid milk, a 4 litre container of U.S. milk would be less expensive than the same 4 litres of Canadian product.³⁰

Canada had previously tabled its own proposal which would have strengthened and clarified the wording of Article XI, specifically in determining "... the products eligible for import quota coverage in terms of those made, wholly or mainly, from the fresh product under domestic supply control."³¹ If this proposal were to be accepted, the GATT Panel ruling on ice cream and yoghurt would be nullified.

The Canadian proposal has found support from other GATT signatories including Japan, South Korea, Switzerland, Austria and Nordic countries. However, the Cairns group³²

³⁰"Newsletter", National Farmers Union, Vol. 22, No. 10 (December 24, 1991).

³¹"Canada Tables Proposal for Strengthening and Clarifying GATT Article XI in Support of Supply Management Programs" Government of Canada News Release, Ottawa, March 14, 1990.

³²Other Cairns members include Australia, New Zealand, Argentina and Brazil. Together, the Cairns group accounts for approximately 25% of world agricultural trade.

of nations, 14 agricultural exporting countries of which Canada is a member, do not support strengthening supply controls as contained in the Canadian proposal. The Cairns group was formed as a response to the clout of the EEC and the U.S. in the negotiations, and their aim is to fully liberalize all aspects of agriculture trade.³³ Accordingly, Canada's proposal for increased protection for supply management through Article XI is in contradiction to the stance of the Cairns group. Limited support for the Canadian position also came from the EEC.³⁴ It is expected that the Canadian demands will not be met as the Cairns Group, with the exception of Japan, has moved to the U.S. position.³⁵

While the Uruguay Round is currently at an impasse, there remains an additional threat to Canada's supply management boards. The Canada-U.S. FTA, while not explicitly concerned with marketing boards³⁶, has already had serious repercussions for those boards. Under the FTA Canada agreed to eliminate tariffs on the imports of processed foods. Mel Clark, former deputy chief negotiator

³³Goodloe, Carol A. "Government Intervention in Canadian Agriculture", Agriculture Canada, Agriculture and Trade Analysis Division, 1988. 4.

³⁴"GATT Background", a publication of the Canadian Broiler Hatching Egg Marketing Agency, the Canadian Chicken Marketing Agency, Canadian Egg Marketing Agency and the Canadian Turkey Marketing Agency, October 1991, 3.

³⁵Ibid., 3.

³⁶Under the Agreement, Canada agreed to a one-time increase in its import quotas for poultry, turkey and eggs to reflect the supplemental quotas which have been allocated over the last 5 years, in all likelihood due to the shortages of domestic supply.

for Canada at the GATT Tokyo Round, believes that under the FTA marketing boards will disappear. For example, he suggests that the ice cream/yoghurt dispute was precipitated by the FTA, as Canada, at the urging of the industry, placed these items under import control so they would not be subject to tariff reductions. According to Clark, the government did not represent the interests of supply managed sectors when it agreed to remove tariffs on processed foods, and that the government was probably aware that "... prospects were remote of persuading GATT that restrictions on imports of ice cream and yoghurt were legal."³⁷ In Clark's assessment the government has traded away supply management under the FTA and is attempting to hide this fact by blaming GATT.³⁸ To date, Clark's accusations have not been corroborated. However, there is evidence which suggests that the Canadian government would like to move agriculture, particularly supply managed produce, in a more market-oriented, deregulated direction, consistent with the industry in the U.S.

In 1989, then Agriculture Minister Don Mazankowski released a working paper entitled "Growing Together: A Vision for Canada's Agri-Food Policy". The paper included terms of reference, identifying problems in all facets of agriculture production including supply management, and

³⁷Mel Clark, Memorandum, "Marketing Boards, Ice Cream/Yoghurt, and the U.S. Waiver and the FTA and GATT", December 14, 1989, 4.

³⁸Ibid., 1

these were the bases for policy conferences held subsequently. The paper also outlined six principles for action: improved market responsiveness; more exposure to international markets; closer vertical coordination within the marketing system; more transparent decision-making; efficient and effective operation of national agencies; and more flexibility in federal-provincial agreements. The language of the policy has suggested to more than one reader that the government is contemplating deregulation of the agri-food industry, and that the aim is "... rationalization, privatization, and trade liberalization."³⁹

For example, more exposure to international markets, in the case of supply managed products, is consistent with the elimination of tariffs on processed foods. In addition, vertical coordination as mentioned in the third principle is primarily an American concept. In the U.S., vertical integration is defined as corporate ownership in all aspects of food production, including the live product, the killing plant and the retail outlet.⁴⁰ This corporate concentration reduces the cost and ensures the supply of the product. However, they are unregulated by marketing schemes and there is no incentive to cut back on production when prices are

³⁹See Proceedings. Supply Management. Growing Together: A National Agri-Food Policy Conference. Agriculture Canada, 1989. Presentation of Louis Balcaen, Dairy Farmers of Canada, 19-21. Also, National Farmers Union, "Submission to the Sub-Committee on Regulations and Competitiveness of the House of Commons Standing Committee on Finance", September 16, 1992, 2.

⁴⁰Bill Redekop, "Hog farmers fear corporate trend", Winnipeg Free Press, Monday, April 9, 1990, 24.

poor.⁴¹ In the U.S., corporate farms which are vertically integrated have replaced the family farm concept and the previous producer has become an employee of the corporation. Finally, there has been a charge from the U.S. that marketing boards lack transparent policy-making contrary to GATT provisions, a charge which the fourth principle seeks to address.⁴² It appears that the federal government vision for the agri-food industry is predicated not on strengthening the industry, but on achieving a level playing field with the U.S. industry. One observer believes that the federal government entered the FTA with the express purpose of dismantling agricultural marketing boards.

The whole purpose of the free trade agreement, in my view, was not to get free trade with the Americans - it was to accomplish something in reducing the structural rigidities in the Canadian economy that were started in the 1970's by the Liberal government. The Mulroney government couldn't accomplish this objective through domestic policies so it decided to force change from the outside...[and] free trade (was) one important step in that direction.⁴³

Moreover, since tariffs on processed foods are being phased out, food processors in Canada have begun to challenge supply management systems and blame them for the processors' lack of comparative advantage against U.S.

⁴¹It is interesting to note that in the U.S. experience, vertical integration has meant that corporate farms are less responsive to the general market since they control both supply and demand. See Redekop, 24.

⁴²Larry Kusch, "Grain trade not poised for change", Winnipeg Free Press, Monday, October 29, 1990, 21. The U.S. directed the complaint specifically towards the Canadian Wheat Board.

⁴³Remarks of Al Lyons, Professor of Agriculture Economics, as cited in, Larry Kusch, "Economist calls for end to supply management", Winnipeg Free Press, April 2, 1990, 24.

processors. The complaint is that producers are receiving too much money for their cost of production, and there is pressure to reduce the producers' farm gate prices to make it easier for processors to compete in a free trade environment.⁴⁴ Equally vocal, consumer groups place the blame for high retail prices on the producers and the supply management system which keeps prices artificially high.⁴⁵

There is evidence, however, which suggests that farm gate prices have actually been falling and that the real increase in product comes at the processing and retail end of production. Garth Coffin states that, since 1981, the price paid to producers for milk has fallen 15%, the price for eggs by 25%, and the figure is 10% for poultry.⁴⁶ Furthermore, he argues that processor gross margins are equally to blame for the wholesale price differences between Canada and the U.S., and that these differences existed before supply management. And while the retail price for poultry rose in 1988, producers were paid less than the cost of production.⁴⁷ It may be that supply management boards and the producers they protect have been unfairly used as scapegoats for problems in the agri-food industry.

⁴⁴Grace Skogstad, "Canada: Conflicting Domestic Interests in the MTN", *Agricultural Trade: Domestic Pressures and International Tensions*, 39-60. Grace Skogstad and Andrew Fenton Cooper, eds. (Halifax: The Institute for Research on Public Policy, 1990) 55.

⁴⁵Proceedings. Supply Management. Presentation of Michele M. Veeman, Department of Rural Economy, University of Alberta, 38-40.

⁴⁶*Ibid.*, Presentation of Garth Coffin, Macdonald College of McGill University, 8.

⁴⁷*Ibid.*, 9.

IV. Conclusion

Agricultural marketing boards were first introduced in response to economic pressures which highlighted the inequalities of the market for producers. Since that time, supply management boards have benefitted both agricultural producers and consumers. They have helped cushion producers from cyclical downturns, impeded over and under production to ensure a stable market, and they have kept produce prices relatively stable. In their 1982 study, however, Forbes, Hughes and Warley found that of all the criticisms directed at marketing boards,

...perhaps most damning of all, (is) that these boards negate the very essence of Canada as a common market by economic balkanization of the country into a set of provincial sub-markets.⁴⁸

The ideal of comparative advantage within Canada has been lost, and provincial self-sufficiency is ingrained in the system.

The involvement of the federal government in 1972 was a rather weak response to the problems of interprovincial barriers in supply management. As Skogstad explains, it was easy for the federal government to remove a larger role for itself, as supply management boards did not involve a large expenditure of funds and producers were satisfied with the arrangements.⁴⁹ It was due to these factors that government conflict over marketing boards takes the form of interprovincial disputes.

⁴⁸Forbes, et al, 113.

⁴⁹Skogstad, 91-2.

There is no doubt that the current GATT Round and the Free Trade Agreement will have significant impacts on the operations of supply managed boards. While the federal government has currently adopted a position of strengthening Canada's system of supply management at the GATT, it is in contradiction to the government's position of liberalized free trade for the grain and meat sectors. And in light of the paucity of support for the Canadian position at the GATT, supply management schemes face a real threat. As one presenter to the Agri-Food Conference stated:

Were we to abandon the system by neglect or default, ultimately we would all be losers, as we would become captive to a market system that ignores social responsibilities and is completely "bottom-line driven." This is not the Canadian way; it is not a desirable result.⁵⁰

This sentiment is strong in Canada where the ideal of the family farm holds special status among a majority of Canadians.⁵¹ While this ideal may be more symbolic than real, the Canadian way can be set against the movement in the U.S. toward corporate farms and vertical integration.

Agriculture marketing boards have achieved positive results and they can play an important role in a managed trade strategy. Were the federal government to assume more direct control, through the national agencies, and allocate global quotas on the basis of comparative advantage, the

⁵⁰Proceedings. Supply Management, Presentation of Jack Brock, Scott's Food Services, 30.

⁵¹Barry Wilson and Peter Finkle, "Is Agriculture Different? Another Round in the Battle Between Theory and Practice", Agriculture Trade: Domestic Pressures and International Tensions, 18.

more negative aspects of these boards would be nullified. When the cost effectiveness of supply management systems is considered, as opposed to direct government subsidies, there is much to recommend their continued use as an agricultural policy tool.

CHAPTER THREE: TRANSPORTATION REGULATORY POLICY

The regulation of the transportation industry, in particular the motor carrier sector¹, will be examined as the second case study of interprovincial barriers to trade. This industry shares some similarities with agricultural marketing boards in that the constitutional jurisdiction is shared by the federal and provincial levels. Like agricultural marketing boards, regulation of the motor carrier industry is used by the provinces to erect interprovincial barriers to trade. What separates the two case studies, however, is that the federal government has attempted to deal with the problems in the industry through deregulation.

There has always been some degree of confusion regarding jurisdiction over the motor carrier industry. This is due in part to the fact that a motor carrier industry was not envisioned at the time of Confederation, but a national rail transportation system was. The federal government had sole jurisdiction over the east-west railway system which was part of the national economic plan. With the appearance of the trucking industry in the 1930's,

¹The term motor carrier industry used herein will refer to the inter-city, for-hire, freight sector only. As such, this Chapter does not discuss either private carriers or passenger transportation.

questions of jurisdiction arose. At the time, the federal government believed that the industry's capacity for growth was limited and it would not be a significant player in a national transportation system and as a nation-building tool. A second, and related assumption was that trucking would not be a major competitor of the railways, especially for long-haul traffic. Therefore, it was believed to be a smaller, more localized industry, one which could be regulated by the provinces.

It will be argued in this chapter that initially, the federal government was reluctant to assume jurisdictional control over the motor carrier industry because of its involvement in and preoccupation with rail transportation. In addition, the federal government failed to address the question of jurisdictional authority over the industry. When the question of jurisdiction was settled by the courts, the federal government had neither the will nor the expertise to assume its authority over the trucking industry. The history of motor carrier transportation regulation, including constitutional cases, will be presented. By giving provinces regulatory control over the industry with the introduction of the Motor Vehicle Transport Act (MVTA) in 1954, the federal government allowed the provinces to erect regulatory barriers.

It will be further argued that the federal government failed to solve the problems of interprovincial barriers in the industry when it introduced deregulation of

extraprovincial transportation in 1987. For the industry, deregulation was not the solution to the problems it had long expressed. Rather, by examining the U.S. experience, and evidence in Canada to date, it will be shown that deregulation has only introduced new problems into the industry.

I. The Trucking Industry and Regulatory Control

There are many valid reasons to regulate the transportation industry. Of primary importance is its role as a public utility. As with marketing boards, transportation has played and continues to play a vital role in the economic growth of Canada, providing the necessary infrastructure for the development of other industrial sectors. Given the geographic isolation of the nation, the regulation of transportation

...can create a geographic distribution of opportunity for economic growth spread over a larger and more diverse group of participants, thereby enhancing pluralism.¹

Transportation policy in Canada has traditionally struck a balance between "...the dictates of public necessity and the requirements of commercial enterprise."² That is, a healthy transportation system in Canada has been fundamental to the nation-building experience but at the

¹Paul S. Dempsey, William E. Thoms and Sonja Clapp, "Canadian Transport Liberalization: Planes, Trains, Trucks and Buses Rolling Across the Great White North", in Transportation Law Journal, Vol 19, 1990, 82.

²Canada. Report of the Royal Commission on Transportation, Vol. II (Ottawa: Queen's Printer, 1961) 98.

same time, transportation must serve other commercial activities which operate in a competitive environment. Up until the late 1970's, the debate was not over whether or not to regulate the motor carrier industry, but which level of government should have the authority to do so.

The federal government had jurisdictional authority over the building of a transcontinental railway and therefore had the authority to regulate the railways. The provinces, with jurisdiction over highways and, under Section 92(10) of the constitution, over "local undertakings" believed that the regulation of the motor carrier industry fell under provincial jurisdiction. Pressure for the regulation of motor carriers in the 1920's and 30's came from the industry itself which sought stability from "chaotic and cutthroat competition"⁴, which characterized this sector during the Depression. Additionally, the railways, which were regulated, argued for control of the new competition primarily to protect their traffic share. In 1932, the Duff Royal Commission recommended that the trucking industry be regulated, although it was the opinion of the Commission that the provinces, not the federal government, had the authority to do so.⁵

⁴F.P. Nix and A.M. Clayton, Motor Carrier Regulation: Institutions and Practices, Working Paper No. E/I 1. (Ottawa: Economic Council of Canada, 1980) 12.

⁵Ibid., 13.

In 1937 the federal government responded to the lobbying from the railway industry and introduced legislation to establish a federal board of commissioners with the powers to oversee all transportation operations, including those of motor carriers. According to Schultz, provincial opposition combined with opposition from the industry led to the shelving of the legislation.⁶ The trucking industry was wary of the federal government's intentions and in the breach, provincial governments regulated the motor carrier industry.

Despite repeated attempts, such as a recommendation from the Rowell-Sirois Royal Commission, to involve the federal government in coordinating all areas of the transportation industry, it was not until a constitutional challenge in 1954 that the extent of its jurisdiction was established. At the heart of the jurisdictional uncertainty was whether or not provinces, with authority over highways, could also claim authority to regulate vehicles moving interprovincially over those highways.

It was a passenger bus line which provoked the constitutional challenge in *Winner v. S.M.T. (Eastern) Ltd. and A.G. of Canada*.⁷ Mr. Winner, an American citizen, operated a passenger bus service between Maine and Halifax, with a route through New Brunswick. The New Brunswick

⁶Richard J. Schultz, Federalism, Bureaucracy, and Public Policy: The Politics of Highway Transportation Regulation. (Montreal: The Institute of Public Administration in Canada, 1980) 14.

⁷[1951] S.C.R. 887.

government attempted to curtail Winner's commercial activity within the province under its *Motor Carrier Act*. Mr. Winner possessed a license to travel through the province, but he was not allowed to pick up and discharge passengers within New Brunswick. In 1951, the Supreme Court ruled that the New Brunswick legislation was *ultra vires*. The constitutional basis for the decision was s. 92(10) of the Constitution Act of 1867 which prohibits provincial control over "...undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province...."⁸ The decision had profound consequences for all the players, but none more so than the provinces which had been regulating trucking since the 1930's. Ontario, Alberta, Prince Edward Island and New Brunswick combined to appeal the decision to the JCPC because of the implications for provincial control over motor vehicle operations.⁹ The Judicial Committee not only upheld the decision of the Supreme Court but it further ruled that the federal government had sole jurisdiction over intraprovincial operations when a company was also engaged in interprovincial undertakings. As the Privy Council pronounced:

No doubt the taking up and setting down of passengers journeying wholly within the province could be severed from the rest of Mr. Winner's undertaking, but so to treat the questions is not to ask is there an undertaking and does it form a

⁸[[1951] S.C.R. 887, Whyte and Lederman, 478.

⁹Schultz, 15.

connexion [sic] with other countries or other provinces, but can you emasculate the actual undertaking and yet leave it the same undertaking or so divide it that part of it can be regarded as inter-provincial and the other part as provincial.¹⁰

The JCPC had clearly defined the federal government's jurisdiction in motor carrier transportation. However, neither the federal government nor the provincial governments were prepared for the Court's decision: the federal government because it had no regulatory system in place; and the provinces because their regulation of extraprovincial activity in motor vehicle transportation was declared invalid.

The federal government's response to the regulatory lacuna left by the court decision was to enact the Motor Vehicle Transport Act (MVTA) in 1954. The legislation delegated regulatory control for interprovincial traffic to provincial transport boards by allowing them to

...issue a licence to a person upon the like terms and conditions and in the like manner as if the extra-provincial undertaking operated in the province were a local undertaking.¹¹

This mirrors the situation which arose with respect to marketing boards and the delegation of federal powers over interprovincial trade under the APMA. The delegation of federal authority to provincial transport boards was upheld

¹⁰[1954] A.C. 541, Decision of Lord Porter, as reproduced in Whyte and Lederman, 490-1.

¹¹Section 3(2) of the MVTA, as cited in Silzer and Krasnick, 165.

as valid by the Supreme Court in *Coughlin*.¹² The Court ruled that, specifically, the power of the Ontario Highway Transport Board derived from Parliament and that the matter of such delegation had been previously settled in *Willis*.¹³

While the question over jurisdiction of motor vehicle transport had been decided in the judicial arena, it appeared that the responsibility was unwanted by the federal government. The justification for abrogating its responsibility was simply that the federal government did not have the expertise to regulate the motor vehicle industry, but the provinces did because they had been doing so for years.¹⁴ Unfortunately, the question of jurisdiction in the political arena was not settled with the passage of the MVTA.

The MVTA was a windfall for the provinces as they were handed an important regulatory tool, virtually free from federal interference. The motor carrier industry was experiencing substantial growth in the 1950's due to the completion of the TransCanada Highway and the rail strike of 1950 which "...opened the door for the expansion of long-haul trucking that might otherwise have taken years to accomplish."¹⁵ The provinces had jurisdictional competence

¹²*Coughlin v. Ontario Highway Transport Board* [1968] S.C.R. 569.

¹³Decision of Cartwright, C.J., as reproduced in Whyte and Lederman, 266.

¹⁴Schultz, 16.

¹⁵H.L. Purdy, Transport Competition and Public Policy in Canada (Vancouver: University of British Columbia Press, 1972) 31.

to regulate such matters as entry and licencing of intraprovincial carriers, rate setting, and vehicle weights and dimensions. To this they could now add determination of entry and issuance of operating authorities for interprovincial carriers - a control which could be used to protect locally-based trucking companies and to ensure that local routes were maintained. This control was significant as by 1957, trucking's share of the total freight tonnage carried in Canada had grown to 45.7%.¹⁶

In the same year that the MVTA was passed, provincial premiers convened a conference with the purpose of coordinating provincial regulations. The 1954 conference established the Canadian Conference of Motor Transport Administrators (CCMTA) which meets on a yearly basis. The mandate of the CCMTA at the time of its formation was to ensure uniformity and compatibility of regulations among all provinces and territories, with an ultimate goal of eliminating all barriers to interprovincial transport in Canada.¹⁷ Despite the formation of the CCMTA, there was little coordination of regulations among the provinces. The lack of uniformity of technical regulations including weights and dimensions and safety standards created problems for the industry. Variations existed among provinces and

¹⁶Schultz, 17.

¹⁷Interview with Doug Mitchell, Chairman of the Canadian Conference of Motor Transport Administrators, December 22, 1989.

this meant that interprovincial carriers were restricted by the lowest common denominator existing in one province.

Perhaps more onerous from the industry's point of view were the economic regulations concerning licencing and entry. In order to operate in a province, interprovincial motor carriers had to obtain an operating authority from that province. Truckers embarking on long haul operations

had to apply to each autonomous provincial motor transport board for a number of authorities or licences when he wished to move between provinces and ultimately the scope of his authority depended on the least authority that was given to him by an individual province.¹⁸

The combined result of variations in provincial regulations, both technical and economic, was to make motor carrier firms less efficient than they might otherwise have been.¹⁹

It is important to note that while all provinces have motor transport boards, there is a significant variety in the functions of these boards. Most of the regulatory controls overseen by the boards are concerned with the power to grant licences, the power to control operations, and the power to control rates.²⁰ Provincial boards, in close

¹⁸Alexander C. Phillips, "Air, Rail and Motor Transport Deregulation in Canada and its Implications for Regional Economic Development", July 1987, 4.

¹⁹F.E. Collins, et al., Review of Transborder Trucking Markets, Project Report prepared for The Minister of Transport's Task Force on Trucking Issues. Montreal: n.p., April 15, 1991. 42.

²⁰Nix and Clayton, 30. As the authors note, this is an oversimplification of the regulatory powers, since in practice an extensive variation of these powers is controlled by individual provinces.

association with provincial Ministries, wield substantial authority in determining both entry into the industry and the rates of return.

The MacPherson Royal Commission on Transportation (1961) highlighted the provincial bias which occurred as a result of delegating interprovincial control of highway transport to the provinces:

...the consequence has been that public assistance towards the expansion of the country's road system has traditionally been on a provincial rather than a national basis and, inevitably, has tended to reflect provincial rather than national interests. It has, therefore, been within an essentially provincial framework that the motor transport industry in Canada has had to develop.²¹

A key recommendation of the Commission was that the federal government take back its jurisdictional control and play a major role in the regulation of motor carrier transportation. The Commission's report was the major impetus for subsequent federal legislation.

In 1967, the federal government passed the *National Transportation Act* (NTA) which would effectively coordinate all transportation regulatory control under one body, the Canadian Transport Commission (CTC).²² All five modes of transportation would be governed by the new legislation, including the motor carrier industry. Under Part III of the NTA the highway transport industry would be included in a national transportation strategy. The MVTA would be

²¹Report. Royal Commission on Transport, Vol.II, 98.

²²*National Transportation Act*, Revised Statutes of Canada 1970, c.N-17.

rescinded and the federal government would assume its responsibility for extraprovincial motor carrier activity.

The NTA was passed in 1967, and Part III was proclaimed but never implemented. The federal government and the provinces entered into discussions, beginning in 1971, under the Federal-Provincial Advisory Council on Motor Carrier Regulation. The discussions were to secure provincial agreement for the transition of authority. Schultz, in a comprehensive study of the federal-provincial negotiations on Part III, asserts that the intergovernmental conflict which ensued was due to provincial perceptions of trucking regulation as an important policy tool for regional development.²³ It was the only mode of transportation controlled by the provinces and the negotiations foundered on the issues of provincial participation on the new federal board and the amount of authority over inter-provincial transport which would be transferred.

All provinces were opposed to Part III, but it was Quebec and Ontario which became the major opposition. Quebec's position was easily understood in the context of the time. The 1960's marked the beginning of the "Quiet Revolution" when the province was aggressively assuming control over its economic affairs. It was unlikely that the province would welcome a federal initiative to share, or perhaps remove, the province's jurisdiction in any sphere over which it had held sole authority for so long. At one

²³Schultz, 24.

point in the negotiations, Quebec threatened to impose regulatory barriers against federally licenced carriers if Part III were implemented against its objections.²⁴

As for the Ontario government, its position was that of a consummate province-builder. The importance of trucking as a tool of regional economic development was greater in Ontario given its central geographic position and its strong manufacturing base. If Part III were implemented, it was estimated that 75 to 90% of the industry in Ontario would be under federal control.²⁵ Moreover, significant numbers of interprovincial carriers derived their revenue from intraprovincial business. While the situation was more pronounced in Ontario with its larger share of the industry, all provinces were opposed to federal intrusion affecting intraprovincial commerce.²⁶

The trucking industry had been opposed to federal regulatory control in the 1930's primarily because of the federal government's involvement with the railways. They did, however, support the NTA and inclusion of Part III. The problem of gaining entry into individual provinces, as noted earlier, had convinced most carriers that provincial self-interest did not equate with the interests of the industry.

²⁴Ibid., 65.

²⁵Ibid., 23,

²⁶Canada. The Institutional Framework of the Canadian Trucking Industry, Volume I: The Public Sector. Transport Canada, May 1980., 3.

With the introduction of Part III, the trucking industry found itself in a curious position. For years it had fought against federal control. The Canadian Trucking Association (CTA), the organization which represents the motor carrier industry, was founded in 1937, coinciding with the first attempt by the federal government to regulate the industry.²⁷ However, when the new legislation was proposed, the industry saw an opportunity to solve the problems of interprovincial barriers, and at the same time lobby for inclusion of its concerns in Part III.

Due to its support of the federal proposal, the industry incurred the wrath of provincial transport boards. Attempts were made to simultaneously court the industry back to the side of the provinces, and to threaten CTA members with retaliation. Ontario, with the most to lose under Part III, used the latter method. As one industry observer noted,

We are regulated by O.H.T.B. (Ontario Highway Transport Board) and they are fundamentally against Part III and some of the boys thought they would be discriminated against by the Board. They can put quite a bite on you. There was fear of bucking the Ontario Highway Transport Board and that fear was quite important.²⁸

Thus the industry was "Caught in the Vice of Federalism"²⁹ as it sought to promote its interests between two competing levels of government. The experience with

²⁷Schultz, 149.

²⁸Ibid., 160.

²⁹Ibid., 147.

Part III was a major disappointment and the industry was left with no choice when the legislation was never implemented but to once more ally with the provincial governments.

Despite the fact that the federal government had the constitutional authority to implement Part III, it attempted to negotiate an agreement with the provinces before occupying the jurisdiction. Schultz concludes that it was internal conflict involving federal bureaucrats which led to the abandonment of Part III.³⁰ However, the intergovernmental conflict generated during the negotiations was also a factor. As Nix and Clayton note, the federal government need only exempt an interprovincial carrier from the MVTA and that carrier would automatically be regulated under Part III.³¹ The federal government appeared to have abandoned its goal of regulating extraprovincial trucking.

II. Regulatory Reform?

In the early 1980's several circumstances combined to bring the issue of motor carrier regulation to the forefront once more. As noted in Chapter Two, the Economic Council of Canada was undertaking a study into the issue of regulation in Canada, and this included transportation regulation. The Council concluded that some regulation of the industry was desirable to ensure stability, but that a unified policy

³⁰Ibid., 146.

³¹Nix and Clayton, 18.

approach would reduce inefficiencies for interprovincial carriers. Recommendations were made for the removal of provincial regulations in the areas of licencing and rate regulation, with a specific proposal to place licencing authority under the purview of the CCMTA.³² One impetus for the Council's recommendations was the deregulation of the U.S. transportation industry in 1980. While U.S. carriers were becoming more competitive, their Canadian counterparts were burdened by excessive regulations which varied among the provinces. The Manitoba Task Force Review of Motor Carrier Regulations of 1982 confirmed that its catalyst was events taking place in other jurisdictions, most notably the U.S., with which Manitoba carriers interact.³³

Furthermore in 1984 then Transport Minister Lloyd Axworthy was moving to deregulate the Canadian airline industry. Deregulation of both the railways and motor carriers would not be far behind. Canada was still in the recession which began in the late 1970's and it was the Minister's contention that "Transportation must play a major role in the rebuilding of the Canadian economy and it must be unfettered by cumbersome regulations."³⁴

It was in this atmosphere that some cooperation among provinces for uniformity was achieved. The CCMTA now

³²Reforming Regulation, 22-24.

³³Manitoba. Recommendations on Motor Carrier Regulations. The Task Force Review of Motor Carrier Regulations in Manitoba, September 6, 1984.

³⁴Cecil Foster, "Pressure for deregulation is growing", Winnipeg Free Press, June 25, 1984, B5.

included a federal representative, and in 1982 the Canadian Agreement on Vehicle Registration was signed. The Agreement permitted a single license plate for long-haul truckers. The plate would be issued by the province in which the most mileage was travelled.

In February 1985, the provinces and the federal government moved even closer to eliminating many of the internal barriers by signing a Memorandum of Understanding (MOU) which had as its primary focus the reform of entry regulation. The MOU was significant because all provincial and territorial governments had bargained with a degree of cooperation previously unknown in the transportation field. Some key points of the MOU were: reversing the burden of proof in granting an operating authority from the applicant to the objector; eliminating the requirement of provincial board approval for rates and rate changes; exemption of some commodities from economic regulation, and; a streamlined application process.³⁵ As such, the MOU represented a substantial step towards the elimination of interprovincial barriers in transportation.

In July 1985 the federal government released its White Paper on Regulatory Reform in Transportation, entitled "Freedom to Move", which proposed amending the MVTA to reflect the changes agreed to in the MOU. In addition, the government would exercise its authority over interprovincial

³⁵David Rampersand, "Interprovincial Trade Barriers", Current Issue Paper #99, Legislative Research Service, June 1990. 24.

traffic through a revised Part III, specifically the entry criterion would be changed from a test of "public convenience and necessity" to a requirement of "fit, willing and able".³⁶ This was a significant departure from the MOU and would remove a great deal of the discretionary power of provincial boards. In November 1985, the government introduced legislation to amend both the MVTA and the NTA.

The White Paper, however, was met with opposition from the industry and the same provinces which had been signatories to the MOU. The main objection of the provinces was that the proposal did not contain the recognition that "...transportation is a key to regional economic activity and development."³⁷ Moreover, several of the provinces expressed concern with the broad reliance on competition as a basis of the new policy and viewed this as a shift away from protecting user and developmental interests.³⁸ While the provinces have supported regulatory reform, they were cautious about the extent of reform contained in the White Paper.

Other industry observers were more forceful in their opposition, calling the White Paper a contradiction of the

³⁶Canada. Freedom to Move: a framework for transportation reform. Ottawa: Minister of Supply and Services, 1985. 42.

³⁷"Views Conflict on Federal Proposal", in Special Report of Transportation Business, October 1985. See the comments of Richard Hatfield, then Premier of New Brunswick, page 2. The same comments were also made by Hugh Planche, Alberta (despite the fact that Alberta agreed with the overall direction) Minister of Economic Development on page 12 of the issue, and John Plohman, Manitoba Minister of Highways and Transportation on page 12.

³⁸Ibid., remarks of John Plohman and Richard Hatfield.

MOU.³⁹ The White Paper and the subsequent legislation went much further in scope than the proposals contained in the MOU. The industry had backed the MOU, with the provinces, but deduced that the new legislation was deregulation under the guise of regulatory reform. A memo written by A.K. Maclaren, Executive Director of the CTA, to provincial member organizations sums up their feelings of betrayal by the federal government:

I guess the most frustrating aspect is that despite industry support in principle for fundamental regulatory reform, we have been manipulated into a situation where, due to legalistic subterfuge, we are surreptitiously deregulated.⁴⁰

After years of *de facto* provincial control over extraprovincial regulation, the federal government would now exercise its jurisdictional prerogative under Part III of the NTA. The reasons for this action appear to have little to do with industry concerns about interprovincial barriers. Furthermore the government's policy represented a departure from the view of transportation as a public utility to one of the sector as a derived demand, which can be utilized to increase the competitiveness of other sectors in the Canadian economy, specifically the shippers who rely on transportation. In the U.S., shippers, especially large

³⁹Remarks of Hugh Morris, Past President, Canadian Transport Lawyers Association, in above journal, page 10.

⁴⁰Internal memo from A.K. Maclaren to member organizations, dated July 22, 1986. This memo was obtained from the files of the Manitoba Trucking Association.

companies, have been the chief beneficiaries of deregulation.⁴¹

Moreover, the federal government was dedicated to developing closer trade ties with the U.S., Canada's largest trading partner. The U.S. deregulated in 1980, and it was believed that the federal government felt "... we have to play catch-up to U.S. deregulation."⁴² Transportation deregulation in Canada would benefit American motor carriers because of the concentration of industry in the southern portions of Ontario and Quebec. By simply moving their operations to several points just north of the border, "they effortlessly gain access to two-thirds of the Canadian market."⁴³

Despite industry opposition, the new MVTA was passed in 1986. Provincial governments continue to impose regulatory barriers in the areas of weights and dimensions, sales and fuel taxes, and labour codes. And progress on a uniform, national safety code has been slow. What has occurred is that some interprovincial barriers to trade continue to hamper the industry, and new problems have evolved. A consequence of eliminating barriers to entry in extraprovincial trucking has been a dramatic increase of trucks on the highways. This increase of carriers, combined with the elimination of rate filing, have pushed rates down,

⁴¹Dempsey, et al, 170.

⁴²Transportation Business, remarks of John F. Kennedy, President, The Kingsway Group of Companies, page 8.

⁴³Ibid., 8.

jeopardized safety standards and caused thousands of bankruptcies. This is what has occurred in the United States since deregulation.

There is evidence to suggest that the U.S. experience with deregulation has been negative for the industry and small outlying communities. In addition, accident rates in the U.S. have increased since deregulation. Several trends have been documented. A large number of new entrants into the market lowered prices to the extent that even efficient carriers were unable to stay in business. An additional cost of increasing competition has been that a few large shippers can now dictate the rates of transportation, or monopsony control of the trucking market. Small shippers, however, have found themselves paying more for transportation costs than prior to deregulation.⁴⁴ A further consequence of deregulation is that service to small and rural communities has declined, while the costs for those services has increased. Declining rates have made these routes even less profitable, and carriers are no longer able to cross-subsidize this service.⁴⁵

Highway safety has been another cost of deregulation. Again, declining prices for service result in poorly maintained vehicles as truckers attempt to cut their overhead costs. Lower wages in the industry have encouraged the entry of untrained drivers who work longer hours in an

⁴⁴Dempsey, et al, 170.

⁴⁵Collins, et al, 40.

attempt to make a profit. Unsafe vehicles and untrained, tired drivers make a deadly combination on the highway. Statistics culled in the United States show that accident rates for new drivers are 27% higher than for experienced drivers. In one year alone, fatigued drivers were responsible for 41% of all trucking accidents. And an increasing number of inspected vehicles are being deemed unsafe.⁴⁶

Some of the consequences noted in the U.S. experience have the potential to be even more dramatic in Canada. The motor carrier industry in Canada has had less time to adjust to a deregulated environment. There is now an open border in transportation between the two countries and American carriers are highly competitive, having been rendered "lean and mean" by deregulation.⁴⁷ Geographically, it is much easier for the American firms to penetrate the more concentrated Canadian market than vice versa, as the majority of large, urban centres in Canada are located within 100 kilometres of the U.S. border. This is especially true in Ontario, where an increased presence of U.S. carriers since 1987 has been documented.⁴⁸

Given the geographic reality, it is also difficult to perceive any benefits to small, rural communities. Extraprovincial carriers are now able to access the smaller markets in any province. The likely scenario will be that

⁴⁶Dempsey et al, 175.

⁴⁷Collins, et al, 48.

⁴⁸Ibid., 21.

larger carriers drive smaller, local carriers out of business.⁴⁹ These large carriers would then determine the quality and price of service to rural areas. As in the U.S. experience, a vast expanse of the Canadian countryside may not be served as efficiently or as inexpensively as it once was.

Finally, the issue of safety has yet to be addressed through the MVTA, pending consultation within the CCMTA on a common, national safety test. In a brief to the House of Commons Standing Committee on Transport, the CTA noted the current problems with assessing the safety fitness of new entrants. New entrants must pass a test which consists of filling out a questionnaire requiring 'yes' or 'no' responses. Gilles Belanger, President of the CTA stated:

Of the utmost seriousness is the fact that when a questionnaire is completed by the applicant, it is rarely, if ever, subject to verification by the provincial licensing authorities.⁵⁰

Despite these concerns, the National Transportation Act Review Commission found no evidence that highway accidents involving motor carriers have increased as a result of deregulation.⁵¹ However the Commission has recommended that

⁴⁹See comments of Al Harris, General Manager of the Manitoba Trucking Association in Mary Ann FitzGerald, "Deregulation gears grind", Winnipeg Free Press, Wednesday, April 17, 1991, 17.

⁵⁰Minutes of Proceedings and Evidence of the Standing Committee on Transport, House of Commons, Issue No. 44, Thursday, April 22, 1993. Presentation of Gilles J. Belanger, President, Canadian Trucking Association, 5.

⁵¹Canada, National Transportation Act Review Commission, Competition in Transportation: Policy and Legislation in

a uniform safety code be achieved by March 1994. The proper enforcement of safety standards will be of even more importance in a deregulated environment, In Saskatchewan, which has increased its monitoring of vehicles, 40% of vehicles checked had defects.⁵²

III. Conclusion

The transportation industry was regulated in the 1930's in recognition of its importance as a public utility and as a tool of economic growth. But the regulation itself became detrimental to the industry as provinces used regulation to erect barriers to the flow of traffic across Canada. Various federal initiatives to assume control of extraprovincial motor carrier regulation were unsuccessful until 1986. When the federal government undertook regulatory reform, key among its objectives was greater reliance on market forces and competition which would result in lower costs and a greater range of services to shippers and the public.⁵³ This would have been achieved with the implementation of the proposals under the MOU of 1985, as interprovincial barriers would have been eliminated.

However, the federal government went further by eliminating the test of 'public convenience'. The Macdonald

Review, Vol. I. Ottawa: Minister of Supply and Services, 1993. 47.

⁵²Ibid., 49.

⁵³Freedom to Move, 4.

Royal Commission in 1985 recommended increased competition for all modes of transportation, but specified that deregulation must be selective with a view to the Canadian market.⁵⁴ The new NTA, however, mirrors the legislation in the U.S. suggesting that its intent was to harmonize policies with those of the U.S. industry. The government has changed its focus on the transportation industry. The view is that transportation is less a public utility and more a commercial enterprise.

Interprovincial barriers continue to hurt the industry which must now face competition from U.S.. These barriers hamper the east-west flow of traffic in Canada, yet at the same time, policies such as deregulation and the F.T.A. will increase the north-south movement. Since deregulation in 1987, traffic patterns from east-west to north-south has increased by as much as 28%.⁵⁵

The regulation of transportation in Canada appears to have come full circle. Regulation of the industry was undertaken by governments in the Depression of the 1930's to stabilize the industry and correct the imperfections of the market. In the 1980's, the federal government's response to uncertain economic times was to deregulate. It is no wonder that the industry and its employees are concerned that the government has subjected them "...again to the days of "the

⁵⁴Report. Royal Commission on the Economic Union and Development Prospects for Canada. Volume Two. Ottawa: Minister of Supply and Services, 1985. 254.

⁵⁵Ibid., 7.

market knows best", with its likelihood of corporate abuse and private avarice."⁵⁶

⁵⁶Transportation Business. Special Report. Comments of J.D. Hunter, Canadian Brotherhood of Railway, Transport and General Workers, 6.

CHAPTER FOUR: CANADA AND GLOBAL CHALLENGES

The previous three chapters have looked at the province-building and nation-building imperatives from both an economic and political standpoint. But, as has been discussed in the cases of agricultural marketing boards and transportation policy, significant pressures on internal barriers to trade have come from outside the country. Indeed, these pressures have altered the economic framework within which Canada does business, both at home and abroad. Globalization is the new buzzword of the 1990's and its implications have the potential to be profound.

The term globalization encompasses the many economic and political changes which the world has undergone over the last several years, and the restructuring which continues at a rapid pace. Developments such as new technologies which facilitate the movement of capital, goods, and services across national borders, the formation of the European Economic Community (EEC) and the rise of the Pacific region as an economic power, and the break-up of the former Soviet Union and Eastern Europe, with their transition from communism to capitalist economies, have all served to shrink the global village and to force nation states into closer interdependence with one another.

Direct policy initiatives undertaken by the Canadian federal government, such as the Canada/U.S. Free Trade Agreement and the North American Free Trade Agreement, privatization, and deregulation have circumscribed the policy tools available to the government. To a lesser extent, further decision-making authority is curtailed by membership in multilateral forums such as the GATT.

While these global challenges are not unique to Canada and are, in fact, a reality for every nation in the world, some analysts suggest that Canada's internal domestic conflicts and the consequences of province-building impede our ability to respond to the exigencies of globalization. Hugh Thorburn suggests that the provinces have been involved in competition with one another in the area of economic initiatives and the result is that "... an effective Canadian concerted economic presence has so far failed to develop."¹

During the 1980's, attempts at constitutional reform such as the Meech Lake Accord and the recent Charlottetown Accord, indicate that Canadians may be too preoccupied with internal tensions to prepare to face the external pressures.

If Canada is to respond adequately to the economic and political challenges exerted by a modern global economy, then economic policy-making should be harmonized. Fragmented and parochial economic policies arising from the

¹H.G. Thorburn, Planning and the Economy (Toronto: James Lorimer & Co., 1984) 23.

provinces are a 'luxury' which Canada can no longer afford. It will be further argued that deregulation and a free trade, market-oriented strategy are not answers to the current problems. Rather, a managed trade strategy must be the focus of Canadian policy-making, with leadership provided by the federal government.

By examining the global pressures mounting against Canada, it will be argued that, within the confines of the federal system, solutions to national economic management are not only necessary but available. Indeed, Canada must turn its attention to implementing these solutions if it is to remain a viable nation-state.

I. New Economic Imperatives

Neo-conservative economic policies in the 1980's, epitomized by Prime Minister Margaret Thatcher of Great Britain and U.S. President Ronald Reagan, focussed on an agenda of liberalized free trade and a market-oriented approach in both domestic and international affairs. Large corporations capitalized on this new era and invested abroad. Newly industrialized countries in the Pacific region and the emergence of Japan as a world economic force have altered traditional trade patterns and contributed to the growing rivalry among multinational corporations. Barriers to trade and investment have fallen in countries around the world. In addition, new technologies have been developed (and are developing) which speed the movement of

capital, goods, and services. In effect, these developments have transformed multinational corporations into transnational, or supra-national entities.²

Ties to a particular nation become redundant as transnationals seek only to maximize the returns to shareholders. Transnational companies will locate in a country which offers the most conducive economic environment (ie. the lowest labour and overhead costs), and invest in the country where the most profits will be realized. Profitability, not patriotism, guides the new global corporation.³

The elimination of barriers to trade and investment and increasing global competition have also been the catalyst for the formation of large trade blocks, of which the EEC is a prime example. The integration of the European market has created a single market of 350 million people⁴, and the second largest economy in the world. The Pacific region, including Japan is another example. The sheer size of these blocks allows them to gain economic advantages abroad, while pursuing protectionist and managed trade policies at home.

²Thomas J. Courchene, "Canada in the 1990's: Coping with Internal and External Economic Change", in Canadian Federalism: Meeting Global Economic Challenges?, Douglas M. Brown and Murray G. Smith, eds. (Queen's University, Kingston: Institute of Intergovernmental Relations, 1991) 44.

³Robert Reich, The Work of Nations (New York: Vintage Books, 1992) 130.

⁴Murray G. Smith, "Muddling Through is Not Enough: A Survey of Global and Economic Challenges", in Canadian Federalism: Meeting Global Economic Challenges?, Douglas M. Brown and Murray G. Smith, eds. (Queen's University, Kingston: Institute of Intergovernmental Relations, 1991) 200.

Moreover, the break up of the former Soviet Union and Eastern European countries, as well as the reunification of Germany, will further complicate the international economic picture. Allan Gottlieb has speculated that the European Community could eventually encompass all of Europe and integrate former Soviet countries. The result is that the EC would become the largest political and economic block in the world.⁵

All of these developments have important implications for the Canadian economy. Canada has a small domestic market, so trade is crucial to our economic survival. Approximately 30% of Canada's national income is derived from trade.⁶ Our exports indicate a continuing reliance on the trade in unprocessed natural resources, and Canada's manufacturing sector is weak in comparison with other countries. In addition Canada is dominated by foreign-owned subsidiaries and has the highest foreign investment of any country in the world. The majority of this foreign ownership is U.S. based and, because it is our largest trading partner, the Canadian economy has become inextricably linked with the economy of the United States. As American economic hegemony has sharply declined in the face of large trading blocks, so too is Canada's status as a middle economic power threatened. Additionally, the concentration on trade

⁵Allan Gottlieb, "Canada in the Global Context", in Canadian Federalism: Meeting Global Economic Challenges?, 163.

⁶Canadian Federalism: Meeting Global Economic Challenges?, Douglas M. Brown and Murray G. Smith, eds., Introduction, 3.

relations with the U.S. has meant that Canada's trade links to countries in the European and East Asian blocks have been weak. At a time when it would be beneficial to expand and diversify our trade patterns, any protectionist policies undertaken in the European and Pacific Rim markets will effectively push Canada into closer integration with the United States.

This was the prescription offered by the Macdonald Royal Commission on Economic Union and Development Prospects in Canada, established in 1982.⁷ The Commission identified the growing degree of protectionism adopted by many industrialized nations, including the U.S. The Commissioners concluded that, in light of the instability and unpredictability of external forces, free trade with the U.S. was imperative to Canadian economic growth.⁸ The Commission also recommended retaining Canada's trade ties with other nations through membership in the GATT.

Rather than undertake trade diversification, the federal government adopted the report of the Royal Commission, through the signing of the Canada/U.S. Free Trade Agreement in 1988. The FTA was a marked departure in Canadian foreign economic policy, away from multilateralism and towards a comprehensive, bilateral agreement. The agreement was deemed a necessary and advantageous solution

⁷Canada. Report of the Royal Commission on Economic Union and Development Prospects in Canada, Vol. III (Ottawa: Minister of Supply and Services, 1985) 570 (Appendix A).

⁸Ibid., 417.

for several reasons. First, the recession of 1981-82 was considered to be the result of external forces which could be rectified by the FTA. Second, it was a response to growing American protectionism and an ever increasing number of trade disputes between the two countries. Finally, there was growing disenchantment with the ability of the GATT to resolve the issue of protectionism.⁹ In trade policy, Canada would be directing its effort towards its largest trade partner.

The implications of the deal for Canadian political and economic sovereignty are becoming evident despite the fact that negotiations are still being conducted on a number of unresolved issues such as definitions of rules of origin, agriculture trade, services, and subsidies.¹⁰ There are, however, examples illustrating that the FTA has limited the policy-making ability of both the federal and provincial governments

A case in point is Ontario. The Ontario NDP government of Premier Bob Rae was committed to establishing public automobile insurance, as currently exists in three other provinces. Under Sections 2010, 2011, and 1605 of the FTA, the Ontario government would have been required to

⁹Murray G. Smith and Frank Stone, eds. Assessing the Canada-U.S. Free Trade Agreement (Halifax: The Institute for Research on Public Policy, 1987) Introduction, 6.

¹⁰Douglas M. Brown, "The Evolving Role of the Provinces in Canada-U.S. Trade Relations", States and Provinces in the International Economy, Douglas M. Brown and Earl H. Fry, eds. (University of California, Berkeley: Institute of Governmental Studies Press, 1993) 126.

compensate private Canadian and American insurance companies up to \$2 billion for lost business, and the Americans were intent on pursuing compensation.¹¹ Subsequently, the Ontario government did not nationalize automobile insurance. Clearly, creating a new public enterprise may be politically desirable, but it is no longer economically feasible, especially in industries where American firms will claim substantial losses.

The Parliament of Canada recently passed the legislation necessary to enter into the North American Free Trade Agreement. There is some evidence that Canada had no choice but to join Mexico and the United States in negotiations, due to its prior commitment to the FTA. Despite the problems which a new round of negotiations could entail, such as putting contentious policy issues back on the table, "...Canada probably has very little choice but to negotiate ... to prevent a bilateral Mexican-American agreement that might be harmful to its position in the all-important U.S. market."¹²

¹¹Maude Barlow, "The Road Back", in Crossing The Line, Jim Sinclair, ed. (Vancouver: New Star Books, 1992) 181. It should be noted that the Ontario government has never publicly blamed the F.T.A. for its decision to back down on public auto insurance. However, in a statement following the decision, Premier Rae stated, "If there were litigation, and we would expect some, and there were other costs ... in terms of compensation to the industry, the costs would have been even higher...." Transcript of statement provided by VIVA VOCE VERBATIM, Toronto, Ontario.

¹²G. Bruce Doern and Brian W. Tomlin, Faith and Fear (Toronto: Stoddart Publishing Co., 1991) 303.

II. Provincial Involvement in Trade Policy

In the uncertainty of the new world economic order, there is no logical support for a further impediment to the federal government's ability to direct external and trade policy that comes from within. Since the 1970's, the provinces have been demanding a growing participation in international agreements. This coincides with the provinces' growing economic intervention and with the shift in the GATT's focus to the elimination of non-tariff barriers, many of which originate in the provinces. As the provinces' economic sphere grew and overlapped with that of the federal government, so too did the number of areas under provincial control which could be the subject of international negotiations and agreements.

The attack on agricultural subsidies in the Uruguay Round of the GATT, for example, will have a significant impact on agricultural marketing boards which are a provincial jurisdiction. And the negotiations in the areas of government procurement, services, and investments will not only involve federal policy, but provincial policy. Moreover, there are recent cases of international trade disputes over practices undertaken by provincial governments. One example is the countervail imposed by the U.S. government against Canadian softwood lumber, claiming the industry was unfairly subsidized by the provinces. Another example is the GATT dispute regarding the sale and

distribution of alcohol through provincial liquor boards.¹³ While these disputes have been settled, the potential for future trade conflicts involving the provinces is strong given the focus of these conflicts on non-tariff barriers. Ironically, external forces may remove interprovincial trade barriers, rather than internal mechanisms.

The provinces recognize their increasing interdependence with the global economy and have aggressively sought varying degrees of representation in Canadian foreign economic policy-making. In 1982, Alberta requested, but was refused, its own representation, apart from the Canadian delegation, at GATT meetings.¹⁴ In fact, most provinces routinely send representatives to GATT meetings, if not as active participants, at least as onlookers.

Today, "All levels of provincial governments engage in foreign relations."¹⁵ All provincial governments are active in the promotion of trade, commerce, and tourism, and lobby for protection of their economic interests in foreign countries. The extent of their activity ranges from ad hoc official missions to promote trade or to sign contracts, most notably in the area of sales of hydro-electricity, to the establishment of foreign offices. In the latter area, British Columbia, Alberta, Ontario and Quebec are the most

¹³Brown, 122.

¹⁴Elliot J. Feldman and Lily Gardner Feldman, "The Impact of Federalism on the Organization of Canadian Foreign Policy", in Perspectives on Canadian Federalism, R.D. Olling and M.W. Westmacott, eds. (Scarborough: Prentice-Hall Canada Inc., 1988) 261.

¹⁵Ibid., 267.

active provinces, with permanent delegations in a variety of countries around the world.¹⁶

Instead of one national trade policy, Canada appears to have ten distinct policies. As Michael Jenkin argues, "Indeed, we present a confused and incoherent picture to those outside Canada, and frequently to ourselves."¹⁷ While countries around us are becoming highly competitive with one another, Canada remains highly competitive internally. There is real danger that this internal fragmentation could be exploited by Canada's foreign competitors, and place the country at a comparative disadvantage.

III. A Case for Managed Trade

The quandary for Canada, therefore, is how to resolve the internal differences so that Canada can present a coordinated, united front in the face of external pressures. Furthermore, the pressures which act upon the country are not only economic, but political as well. The more the powers of the federal government are eroded, or decentralized to the provinces, the less relevance it has. Globalization has contributed to the decline of east-west economic linkages, and the political linkages are declining as well. Courchene predicts that the winners of globalization will be multinational corporations and the losers will be national governments as decision-making power

¹⁶Ibid., 261.

¹⁷Michael Jenkin, The Challenge of Diversity: Industrial Policy in the Canadian Federation (Ottawa: Minister of Supply and Services, 1983) 18.

is transferred from governments to the new transnationals.¹⁸ If Canada is to be more than "...an archipelago of economies ... held together by bribes"¹⁹ then immediate action is required.

Many scholars observing the increasing global challenges conclude that Canada must have a national industrial and trade policy if it is to survive.²⁰ Such a strategy must integrate domestic and external trade policy and include all facets of industrial activity from production to export. Identifying where Canada's strengths and weaknesses lie is a first priority. And this implies a strong leadership role for the federal government.

Economic policy-making has long been conducted on an *ad hoc* basis, with no attendant articulation of a long-term vision. For example, Simeon and Robinson contend that the focus of industrial policy in the Diefenbaker years was to reduce regional disparities rather than to initiate economic development based upon diversification or secondary manufacturing.²¹ Under successive Liberal governments of the 1960's and '70's, regional economic planning was continued and rationalized under the new Department of Regional Economic Expansion. However, none of the initiatives resulted in a coherent national plan. Even

¹⁸Courchene, "Canada in the 1990's: Coping with Internal and External Economic Change", 45.

¹⁹Murray G. Smith, 231.

²⁰For examples, see Doern and Tomlin, 300; Brown and Murray, 17; Safarian, 96; Lazar, xv; Atkinson and Coleman, 193; and Thorburn, 203; Leslie, 180-90.

²¹Simeon and Robinson, 169.

Trudeau's ambitious trade policy of the 1970's, the 'Third Option' which would have promoted trade links with the Asian-Pacific region, was a non-starter. Some of the problems identified with past attempts to establish a national strategy were a plethora of agencies, programs and departments which often worked at cross purposes with one another, and a lack of provincial input, which generated conflict and ensured that the process would not have political legitimacy.²² Previous industrial policies were reactive, inconsistent, and were undertaken without an attendant national objective.

The Macdonald Commission reported in 1985, and its broad mandate included both economic and political components. Economically, it was to assess Canada's long term economic potential and recommend national economic goals and policies to achieve those goals. As part of its political mandate, the Commission also examined and recommended changes to national institutions so that they could promote economic development. With respect to an industrial policy, the Commissioners argue that the circumscription of world free trade is the result of the managed trade policies of various countries. Specifically, the Commission concluded that:

...governments generally lack the capability to orchestrate, or even formulate, a comprehensive, detailed, industrial strategy of the kind advocated by the more ardent interventionists. Even if a detailed strategy were possible, it

²²Jenkin, 161; see also Simeon and Robinson, 230.

would not be desirable. The world is just too complex, and the need for flexibility and adaptability too great, to justify confining the private sector in such a strait-jacket.²³

Therefore, as the private sector is the one which can enhance competition and productivity, the Commission recommended an industrial policy for Canada which allows the private sector to operate with the most freedom, and which has as its central component an adjustment policy to assist displaced labour resources.²⁴

In a response to the Commission's Report, Breton challenged the assumption that free markets are inherently better placed than governments to increase the well-being of a country's citizens. He argues that, while markets which are "well-structured and competitive" can work in the longer term, governments can accomplish the same goals when they are "well-structured and competitive".²⁵ As a case in point, he argues that the practice of equalization payments allows provinces to compete with one another (have v. have-not provinces) and thereby to become more productive.²⁶

Leslie concurs with this view. He points out that where government intervention has been used to achieve market stability, economic productivity over the long term is enhanced. In the cases of natural resources, particularly, productivity is maintained even in periods of

²³Report. Vol. II, 138.

²⁴Ibid., 263.

²⁵Supplementary Statement of Albert Breton, Report of the Royal Commission, Vol. III, 522.

²⁶Ibid. 508.

economic downturns.²⁷ This is shown clearly in the case of agricultural marketing boards which have been spared the fluctuations in the market by government regulation. Finally, Manzer asserts that, in the Canadian situation, government regulation has provided for the failings of the market and, in fact, private markets have worked because of "...generous doses of public regulation."²⁸ It appears that, despite the Report of the Macdonald Commission, government intervention into the economy is still an area of significant controversy.

A managed domestic trade policy is not anathema in a world which appears to be opening up to market-place forces and the concept of free enterprise. Most of the world's most successful nations use interventionist and protectionist policies with the aim of increasing the competitiveness of domestic firms. The experiences of Japan, France and several of the newly industrialized Asian countries are instructive. They have used government intervention to effect structural changes which have made them highly competitive. Japan has been very effective at targetting growth industries, offering financial and technical assistance, and aggressively locating markets for their products.²⁹ And in both Japan and France, the

²⁷Leslie, 158

²⁸Ronald Manzer, Public Policies and Political Development in Canada. Toronto: University of Toronto Press, 1985.

²⁹Fred Lazar, The New Protectionism: Non-Tariff Barriers and Their Effects on Canada (Toronto: James Lorimer & Company, 1981), 20-1.

government has been successful in obtaining the involvement and cooperation of the private sector in planning their industrial policies. According to Atkinson and Coleman, the industrial policy options employed by Japan, France and some of the newly industrialized nations are predicated on the objective of managing change which external factors bring:

The premise of industrial policy is that such a process cannot be left to markets alone because capital, labour, and product markets are often defective.³⁰

IV. An Industrial Policy for Canada

A long-term industrial strategy in Canada would encompass the development of certain sectors, including government subsidies, promotion of research and development capabilities, and promotion of human resources, or a labour market strategy, including education and training. It should also ensure that the necessary infrastructure is in place to assist industrial development, such as communications and transportation. Finally, the federal government must take an active role in securing new markets for Canadian goods and services. This implies a proactive approach as opposed to the ad hoc policy responses of the past.

It is imperative that the provinces are able to participate in the new national strategy. Not only will this ensure regional sensitivity is incorporated and alleviate the generation of conflict, but the provinces have

³⁰Atkinson and Coleman, 24.

become spheres of unique and innovative economic strategies. Provincial governments have honed their expertise in the international trading system. British Columbia, for example, has surpassed federal government efforts in securing trade and investment links with Pacific rim countries.³¹ Furthermore, provincial participation would assist in achieving what Leslie refers to as "regional complementarity", wherein development of central Canada and peripheral regions would be mutually reinforcing.³² Arguably, it would be difficult in the Canadian circumstance to impose an industrial policy without substantial provincial participation.

There is no degree of consensus on how a national strategy should be implemented and a variety of policy means exists to further a managed trade policy. Some observers favour constitutional reform, specifically strengthening the federal government's power over trade and commerce and including a commitment to the economic union in the Constitution.³³ Recent events, however, would indicate that constitutional reform would be an impossible attainment.

The national debates over the Meech Lake Constitutional Accord and the recent Charlottetown Accord were extremely emotional and divisive. It is not likely that further

³¹Stuart Culbertson, "A British Columbia Perspective", in Canadian Federalism: Meeting Global Economic Challenges?, Douglas M. Brown and Murray G. Smith, eds. (Queen's University, Kingston: Institute of Intergovernmental Relations, 1991) 153-4.

³²Leslie, 20.

³³Safarian, 108.

attempts will be made to reopen talks on constitutional reform of that magnitude in the near future. The problem in Canada is that there is a "grab bag" approach to constitutional change. Once talks are opened, a variety of competing interests, including those of the provinces, emerge.³⁴ While there is general agreement that a new constitution contain support for the concept of a Canadian economic union³⁵, any perception that the federal government is attempting to strengthen its economic powers would most likely not get the support necessary for amendment.

A more logical option would be for the federal government to utilize the considerable powers it possesses to implement a managed trade policy. The federal level still wields a great deal of control over financial matters, such as control over taxation, responsibility for the money supply, and jurisdiction over interprovincial trade and commerce. The federal government has the ability to offer tax incentives, loans, or grants to encourage new industries or research and development initiatives. It can also play a significant role in ensuring that the infrastructure is in place to assist Canadian firms. One of the only impediments

³⁴Alan Cairns, "The Embedded State: State-Society Relations in Canada", State and Society: Canada in Comparative Perspective, Keith Banting, Research Coordinator (Toronto: University of Toronto Press, 1986) 67.

³⁵For example, the Dobbie-Beaudoin Constitutional Committee found considerable support during its hearings for the concept of a strengthened Sec. 121 and a statement on the goal of economic union. Canada. Report of the Special Joint Committee on a Renewed Canada. Hon. Gerald Beaudoin, Senator and Dorothy Dobbie, M.P., Joint Chairmen. February 28, 1992. 86-8.

to action may be the lack of political will. As Jenkin notes:

...the federal government's capability to implement industrial policy really depends on its ability both to spend or invest creatively to influence the private sector, and to utilize its existing jurisdiction imaginatively.... What is needed is a political commitment to a strong industrial leadership role, and some coherent priorities concerning the objectives and content of a federal industrial policy.³⁶

Furthermore, while some of the federal powers have been circumscribed by judicial interpretation, a number of recent court rulings indicate that the trend may now be toward a more generous interpretation of federal powers. Beginning with the 1983 *CN Transportation* decision the Supreme Court upheld federal legislation under the general trade and commerce power, s. 91(2) and signalled "...a cautious broadening of the scope of federal economic powers."³⁷ And in the 1989 *General Motors* case, the Supreme Court again ruled federal legislation valid under Sec. 91(2). The five *indicia* which the Court set out as a test of the valid use of the general power increased the scope for federal activity. According to one observer, the decisions signalled a recognition by the Supreme Court that the federal government "...must have the tools necessary to

³⁶Jenkin, 158.

³⁷*A.G. Canada v. Canadian National Transportation Ltd.* [1983] 2 S.C.R. 206. Robert Howse, Economic Union, Social Justice, and Constitutional Reform: Towards a High but Level Playing Field (North York: Centre for Public Law and Public Policy, 1992) 53.

manage the national economy."³⁸ Moreover, the criteria established could be used in future cases to decide whether matters solely within provincial jurisdiction could be upheld as "general trade affecting the whole Dominion."³⁹

These court decisions do not represent a major reversal of judicial review away from a federal balance and toward federal government authority. However, they do offer the necessary encouragement that economic management remains largely the domain of Parliament. Given this, there are some alternatives to provincial balkanization and the lack of concerted government action. Thorburn suggests that "... policy integration itself is clearly an idea looking for an effective institutional manifestation", and he recommends that the current Senate be replaced with a House of the Provinces to harmonize competing federal-provincial economic policies and undertake broad scale indicative planning.⁴⁰ Provincial governments would participate fully in the House and ensure regional sensitivity in policy outcomes. Guiding the work of this body would be an explicit set of national economic goals. Thorburn believes that the House of the Provinces, by articulating national goals and harmonization can remove "... the inherent bias of the status quo."⁴¹ The major weakness in Thorburn's model is that it is a concept

³⁸Robert G. Richards, "The Canadian Constitution and International Economic Relations", Canadian Federalism: Meeting Global Economic Challenges? 62.

³⁹Howse, 56.

⁴⁰Thorburn, 211.

⁴¹Ibid., 213.

which was discussed in constitutional negotiations in the late 1970's and dismissed.⁴² It is unlikely that constitutional change to abolish the Senate and create a new Upper Chamber will be forthcoming.

Jenkin suggests a similar model, but envisions a super-department or agency as opposed to a new constitutional body. He concurs with Thorburn that there is a need for an "... institutional mechanism which can combine a more regionally tailored set of industrial development programs with an integrated and coherent approach to national, industrial development."⁴³ The new agency would replace and/or combine existing departments and would be given a large mandate to devise new methods of implementing an industrial strategy, integrate regional perspectives, and act as a catalyst for new development opportunities. Above all, it would have to "...take a leadership role in framing and implementing industrial policy, both with industry and the provinces."⁴⁴ Jenkin recognizes that an inherent weakness in his model is that a reorganization of departments may provoke criticism that it is merely a wasteful reshuffling. He concedes that establishing a new mechanism in itself is not the solution, but that a major change in attitudes on the part of Canada's governments is

⁴²Leslie, 77.

⁴³Jenkin, 179.

⁴⁴Ibid., 180.

ultimately what will determine the success of any new endeavour.⁴⁵

There are several key features of the above models which would ensure the success of a Canadian industrial policy. The first element is the proposition of a coherently expressed, comprehensive national policy which addresses the benefits to be derived from harmonizing economic policies. National objectives have been missing from past initiatives, and fragmented, confused policy options contributed to provincial unilateral action. Attendant to this is the proposition that any new initiative must be regionally sensitive. As past experience has shown, regional alienation is a potent force and easily provoked. A final element is that a new strategy must be comprehensive. Not only must it accomplish the goals of assistance to selected industry and expansion of trade markets, but it should embrace the whole system of infrastructure in Canada, such as transportation and communications, education and labour market training, etc. Under a national strategy, the role of transportation as a public utility facilitating industrial development would be affirmed.

The benefit to agricultural marketing boards would be to define their role in national economic development. This would reduce the uncertainty of agricultural producers and allow for a coherent, united front in the international

⁴⁵Ibid., 179.

arena. It would certainly alleviate the current suspicions as to whether or not the federal government is representing provincial and producer interests at the GATT talks.

V. Conclusion

In the changing world political and economic order, the external forces which exert pressure on Canada have caused the country to redefine its priorities and follow a path of continentalism. The issue of government regulation into the economy to correct imperfections in the market has been decided, at least for the meantime. Writing in 1984, Thorburn noted the tendency in other nations to pursue internal managed trade strategies at the same time that Canada was considering withdrawal from regulatory intervention. He stated:

It is clear that this option of diminishing federal responsibility appears to be somewhat of a chimera. It is rendered unlikely because it is a step out of harmony with the movement of modern governments at the present time. It would constitute an act of self-mutilation by the Canadian nation.⁴⁶

Arguably, the choice of trade policy options which the government has chosen gives it little control over the internal policies it may wish to pursue. For example, the establishment of Crown corporations, considered a potent policy tool, may not be feasible under the F.T.A.

⁴⁶Thorburn, 209-10.

What Canada must do to strengthen its internal trade is undertake the removal of interprovincial barriers to trade. With the announcement by Industry Minister Jean Charest, this process has begun. What is unclear, however, is an assurance that the outcome will be harmonization of government regulations as opposed to deregulation. As the example of transportation policy illustrates, deregulation offers the government little room to manage internal trade.

There is perhaps reason to believe that a managed trade strategy is incompatible with the goals of free trade. As Leslie notes, in its strictest sense this may be true.⁴⁷ However, he argues as well that some degree of protection is desirable, for example, positive, adjustment-promoting policies for displaced workers and new industries.⁴⁸ In the coming years it will be of immeasurable importance for Canada to not only get its own house in order, but to present a united front in the formulation of its industrial objectives. Should the forces of free trade be impossible to turn back⁴⁹, at the very least, "Canada will need some form of enhanced industrial policy as a complement to free trade."⁵⁰

⁴⁷Leslie, 184.

⁴⁸Ibid., 184.

⁴⁹Of the three main federal political parties, the NDP has pledged to abrogate the F.T.A. and the Liberal party has stated that it will attempt to negotiate some revisions.

⁵⁰Doern and Tomlin, 300.

CONCLUSION

The constitutional division of powers is an enduring theme in discussions about Canadian federalism. During the evolution from a classical model of federalism, whereby jurisdictional authority is clearly defined, to the process of executive federalism, with its emphasis upon First Ministers Conferences, the focus has been on the structures of the federal system and how they have contributed to, or contained the competing images found in Canada. The economic and political diversity which originally existed in Canada has never been attenuated, and in fact have been heightened. Centrifugal forces have grown along with provincial governments which have intervened into many aspects of their economies regardless of the formal stipulations in the constitution.

With respect to interprovincial barriers to trade, the constitution is a less than adequate structure to curb their implementation and to safeguard the Canadian economic union. Section 121 prohibits the imposition of tariff barriers only. There is currently no guarantee for the free movement of goods, services, labour and capital.¹ The Courts, as institutions of federalism, have also been unable to adjudicate the role of each level of government in economic

¹While the Canadian Charter of Rights and Freedoms, under Section 6, guarantees mobility rights to all Canadians, it is subject to laws and practices in force in any province and has not reduced provincial barriers such as professional certification.

affairs. In fact, as early decisions of the JCPC illustrate, constitutional decisions served to muddy the waters. As a consequence, government incursions in a wide variety of policy fields occur outside the parameters of the constitutional division of powers. Finally, the process of intergovernmental relations, with its public emphasis on cooperation, have merely increased the number of issues around which conflict can be generated.

Many of the studies commissioned for the Macdonald Royal Commission of 1985 argue that the economic costs of interprovincial barriers to trade are not excessive and the problems associated with their use have been overstated. Simeon and Robinson argue that the focus on these barriers was a political ruse, employed by the Trudeau government in 1980 "... to re-establish the authority of the central government ... and reorient politics around national issues identified with the national government."² Clearly, the focus of the federal government in the early 1980's was to curtail the centrifugal forces and formulate a federal response to the economic recession. What is less clear is why the attempt to define national issues was viewed as an onerous policy direction. It is difficult to find any virtue in a process whereby provincial self-interest is followed without consideration for the national interest. Province-building works directly against the concept of

²Simeon and Robinson, 333.

national unity by highlighting the features which divide Canadians and eroding those which unite.

Interprovincial barriers to trade provide a cogent example of the failure of governmental institutions to contain the forces of province-building, but they do not offer a full explanation. As illustrated in the two case studies presented herein, provincial governments will implement their own regulatory initiative in the absence of a national regulatory program. In both these examples, the Courts established the role of the federal government in the extraprovincial trade aspect of agriculture and transportation, and in both cases the federal government declined to exercise its authority, opting instead to delegate its authority back to the provincial governments through regulatory agencies. The provinces had accumulated the experience and the expertise to operate the regulatory schemes, if not to articulate the national vision.

The actions of the federal government served to entrench the balkanization of the Canadian market with respect to supply managed products. In their role as referees over allocation of global market shares, national agencies encouraged provincial self-sufficiency and regional self-interest. Provincial producers composed the national agencies and were therefore in a position to further provincial goals. Agricultural marketing boards play an important role in protecting producers, and ultimately consumers, from the unpredictable forces of the market

place. Unfortunately, the goal of comparative advantage has been diminished by interprovincial conflict. It is unlikely that supply management boards will withstand either the effects of the free trade agreement or the pressures from the GATT. Should the Uruguay Round of talks continue, which speculation at the recent meeting of the G7 countries suggests it will, there is a very good chance that the U.S. proposal for tariffication will replace the current Article XI as Canada is losing its allies in support of supply managed schemes. Under tariffication, the power of boards to control imports will be curtailed. This is a significant erosion of their functions.

Transportation regulatory policy has suffered the same fate. Once regarded as a public utility with an important function in the economic growth of the nation, its importance has been disregarded as it progressed as an instrument of province-building. Regulation has always been regarded as instrumental to the stability of the industry, but it too was caught in the arena of federal-provincial conflict. This is well illustrated by the industry's shifting alliances between the federal and provincial governments, depending upon which level appeared prepared to address its concerns. Currently, the industry, through the CTA and its provincial counterparts, continues to lobby for the removal of interprovincial barriers, and most likely welcomes the federal government's recent initiative. Additionally, the CTA lobbies for increased implementation

and enforcement of regulations, most notably in the area of safety standards.

While little empirical evidence is available, rationalization of the industry under deregulation will likely mean greater concentration in the industry, further penetration of the Canadian market by American carriers, and high labour displacements.

If, as is believed, globalization presents a threat to the continued viability of national governments, then the Canadian government is currently placed poorly to defend itself against obsolescence. The only discernible national strategy is a business-led, free trade, free market economy, underpinned by the belief that less government is better government. Moreover, the Conservative government's direction in federal-provincial affairs is to decentralize more powers to the provincial governments, as illustrated in the proposals contained in the Meech Lake Accord and in the Charlottetown Accord. Federal trade policies such as the Canada-U.S. trade agreement and the proposed NAFTA will increasingly transfer decision-making power from the government to the private markets. As noted previously, both the GATT and the F.T.A. limit the ability of Canadian governments at all levels to intervene in the economy.

Canada's internal fragmentation and the conflicts which arise between the federal and provincial governments have led some to speculate on the demise of the country. An equal number, however believe that a federal system offers

the flexibility and adaptability to overcome what may appear to be insurmountable obstacles. Currently, these obstacles are a lack of internal cohesion, including a surge in Quebec nationalism, pressures from globalization and free trade, and a constitutional impasse. Equally numerous are the prognostications advanced to contain these divisive forces. It has been argued that increased decentralization of federal powers will reduce both internal and external tensions and logically, the provinces will never surrender the power or control which they have achieved. There is a sense that, as a country, we cannot move backwards.

... globalization, the Free Trade Agreement, the burden of the public debt and the underlying geoeconomics appear to be driving Canada towards greater decentralization in selected areas. Transferred to the political or constitutional domain, this suggests that it may make little sense to oppose a potential request from Quebec for a much more decentralized Canada if this is where these underlying forces are driving the country in any event.³

This view is rather short-sighted. A reduced federal role in the redistribution of national resources, the growing reliance on natural resources for economic growth, combined with the corresponding decline in the secondary manufacturing sector, and limits on the abilities of governments to intervene in the economy, will only exacerbate regional disparities and pit province against province. It is unlikely that the larger, resource wealthy

³Thomas J. Courchene and John N. McDougall, "The Context for Future Constitutional Options", in Options for a New Canada, Ronald L. Watts and Douglas M. Brown, eds. (Toronto: University of Toronto Press, 1991) 33.

provinces will be inclined to share with smaller, have-not provinces.⁴ A commitment to the national economic community will be undermined and it is difficult to imagine what economic or political rationale might remain to continue as a nation.

Currently in Canada the public's faith has waned as high unemployment, an economic recession, and protracted, divisive constitutional negotiations have occupied the political arena. High unemployment and a reduced standard of living have made Canadians more cynical about the extent to which politicians are dedicated to the public good as opposed to their own personal gain. The recently rescinded increase in Senators' living allowance sparked an angry response from the public and further entrenched the view that the only function of the Senate is to increase the financial well-being of its members. Not surprisingly, the debate on the existence of this body has been renewed with vigor. However, what this suggests is that there is a need for governments to stimulate economic renewal rather than focus on constitution reform.

The federal government has ample powers to secure the Canadian economic union, but what it requires is the political will.

⁴Robin Boadway, The Constitutional Division of Powers: an Economic Perspective (Ottawa: Minister of Supply and Services, 1992) 36.

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