

IMAGE VS. REALITY

Ontario as a Province-Builder

By: Leanne Matthes

A thesis
presented to the University of Manitoba
in fulfillment of the
thesis requirement for the degree of
Master of Arts
in
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ONTARIO AS A PROVINCE-BUILDER

BY

LEANNE MATTHES

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

MASTER OF ARTS

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ABSTRACT

This thesis examines Ontario as a province-builder. Far from being the self-proclaimed nation-builder, Ontario acts in a manner which is consistent with that of a province-builder. Additionally, given its wealth and electoral power, Ontario's self-interest is often protected to the detriment of other, less wealthy provinces. This has caused resentment and retaliatory actions within Canada, as other provinces attempt to gain for themselves the economic and political advantages Ontario already has.

In the late 1950s and the early 1960s, other provinces began to imitate Ontario's provincialist stance in attempts to even out some of the economic inequalities which existed between their economies and that of Ontario. Faced with this competition and the more balanced decisions emanating from the Supreme Court of Canada (as opposed to those from the Judicial Committee of the Privy Council), Ontario changed its strategy to one which included influencing the federal government.

In terms of province-building, Ontario is a province unlike the others. During the early years of Confederation, Ontario was an active province-builder which frequently challenged the federal government in the courtroom. However, in subsequent years, Ontario has been trying to avoid the label of province-builder. On the surface its claims appear to have some credence. However, when certain areas are examined it becomes clear that Ontario is still a province-builder; however now it has coopted the federal government into its province-building plans.

In other areas such as interprovincial Non-Tariff Barriers and provincial foreign policies, Ontario has shown itself to be prepared to defend its provincial interests, should it deem it necessary. Barriers to interprovincial trade are a tool which Ontario uses to the same extent as any other province; and in terms of foreign policy mechanisms, Ontario is second only to Quebec.

Ontario's provincial activities in the areas of judicial interpretation of the constitution, its relationship with the federal government, interprovincial trade barriers and foreign policy are examined. What is found is that Ontario is a chameleon which has the resources and capacity to continue to province-build either alone or with the help of the federal government. It is the only province to have this choice available to it.

Both history and a closer examination of these areas help to dispel the image Ontario has attempted to portray--that of a nation-builder as opposed to a province-builder. The reality is that Ontario has not yet given up its position as a leader in the province-building arena.

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CHAPTER 1: INTRODUCTION

Ontario as a province-builder is not a term which the province presently accepts as a label. Rather, Ontario prefers to be considered a nation-builder, a province which is willing to put aside its own interests in favour of the national interest. However, upon closer examination it becomes clear that Ontario has been a province-builder throughout its history, and remains one to this day. Ontario's nation-building strategy is merely a province-building strategy in disguise.

This paper will use the concept of province-building to help interpret Ontario's actions within the Canadian federation. The term "province-building" was first used by Edwin Black and Alan Cairns in their article "A Different Perspective on Canadian Federalism." In this article the authors loosely define province-building as "a more intense pattern of communications and associational activity within provincial boundaries than across them."¹ However, Garth Stevenson offers a different perspective, and defines province-building as "The development of strong, wilful provincial states bent on pursuing provincially defined economic strategies."² It is this definition which more aptly describes province-building as discussed here.

Recently, Young, Faucher and Blais have undertaken to refute the utility of this concept. They argue that the term is too general, and attempt to show that the growth and expenditures of provincial governments are not so great as to allow for aggressive province-building. Young, Faucher and Blais also state that since Ontario cooperates with the federal government, then province-building cannot include propositions that extreme demands will be made on the central government and that

all provincial jurisdictional encroachments will be resisted with vigour. Rather, they argue, the concept of province-building simply recognizes the some generalizations regarding changes in the structure and activities of the provinces.³

However, Garth Stevenson makes the counterpoint that the size and complexity of the federal government, as compared to the provincial governments, is not synonymous with effectiveness.⁴ Stevenson's point is valid--as will be shown, the provinces, Ontario in particular, have been extremely effective in extending its jurisdiction at the expense of the federal government. Conversely, this paper will argue that Ontario cooperates with the federal government only when it is in its interests. Additionally, Ontario has in the past, and still does, make demands upon the federal government. Further, Ontario has been the province most resistant to federal encroachments upon provincial jurisdiction. Province-building has become a generally accepted fact of Canadian life. Provinces, more often than not the relatively wealthy ones, have begun developing provincial economic strategies aimed at diversifying their economies. The effects of this trend are under debate. Some argue that the provinces must look after themselves in these tough economic times as the federal government cannot do this for them. Others argue that this is a dangerous trend--one which is costly to the nation. The problem lies not so much with the wish to diversify, but with the methods used to achieve diversification, methods which include the attempt to insulate a provincial economy against external influences, and the attempt by various provincial governments to put the economic good of their province over that of the rest.

Province-building provides the framework of provincial self-interest which is useful in examining Ontario's actions throughout history. In earlier years it was a provincial autonomist without equal; yet more recently, it has become an ally of the federal government. This is not merely a normal change in the structure and activity of a province; rather, it is a change that has been motivated by self-interest on the part of Ontario.

This paper will concentrate on the detrimental aspects of province-building with a focus on Ontario. It will be argued here that province-building is costly both economically and psychologically; the costs of province-building are high economically due to Non-Tariff Barriers which prevent the free flow of goods, labour and capital within Canada. They are costly psychologically in that many citizens of Canada have been led into thinking in provincial terms instead of national; thereby jeopardizing nationalist sentiment. It will be asserted that these actions are the creations of provincial governments, not necessarily the citizens.

While Ontario is not the only province to zealously protect and assert its own interests above those of the rest of the provinces, it is unique in its attempts to deny such actions. Rather, Ontario has vacillated from working against the federal government to creating an image of itself whereby it works in the national interest as opposed to its own. Recently, Ontario has come to favour the latter position, one in which it portrays itself as a selfless nation-builder. This image will be examined, and the reality will show Ontario to be involved in province-building to an extent as great or greater than other provinces. This is what makes Ontario such an interesting

study--it is a chameleon in that it will, at times, wear the cloak of provincial autonomy; however, more often it province-builds under the guise of nation-building.

Ontario's ability to use the federal government to its advantage makes it a formidable player in the province-building game. This ability stems from Ontario's sheer size, electoral strength and economic power. It will be shown, Ontario has fairly consistently benefited from federal government policies affecting the entire country. The fact that the federal government often does work in Ontario's interest allows Ontario to present itself as a non-insular province devoted to a common Canadian market--a position which will be shown to be an "Ontario First" policy.

As will be discussed, Ontario's wealth allows it to influence business investment decisions by offering tax incentives and subsidies which can carry a cost to the provincial treasury that few other provinces can afford. If the Ontario economy is stimulated, it has an effect upon a large segment of the Canadian population. In electoral terms, this can be very appealing to the federal government. It is these electoral and economic attributes which allow Ontario to, most effectively of all the provinces, influence both the federal government and private investors to its advantage.

Canada has a federal system of government, one in which "government powers and responsibilities are shared between a national government...and one or more sets of regional units."⁵ In Canada the regional units are the provinces; this means that provincial governments have certain powers reserved for them apart from the federal government's powers. Such powers as property and civil rights (s. 92(13)) and

Matters of a local and private nature (s. 92(16)) have allowed the provinces to expand their powers via judicial decisions. These powers, along with those regarding natural resources, have given the provinces some opportunities to expand their jurisdiction.

The problems arise when these powers are used by a province to increase its wealth and power without consideration for the other provinces or the federal government. As shall be shown, the most disturbing aspect of province-building is its effect upon the rest of the country. The situation that exists in Canada today as a result of this provincial impetus to expand is, in the words of Professor Alan Cairns:

Eleven governments pursuing visions instead of one, two hundred ministers building empires instead of twenty-five, several hundred distinct departmental hierarchies of civil servants seeking expansion of their activities instead of a tenth as many - all these provide an extensive supplementary impetus to the normal pressures for expansion of the public sector present in other polities.⁶

This situation has led to an increasingly competitive form of federalism within Canada. This theory "emphasizes federalism as a collection of 11 autonomous governments, each exercising power with respect to the same population, but each being separately responsible to its own electorate for the conduct of its affairs."⁷ The result of this has been provinces attempting to better the quality of life within their respective boundaries through the use of economic and political actions which may serve to enhance their own status within confederation, even if it is to the detriment of the other provinces.

There is an argument that the provincial governments exist to protect the interests of their electorates, and that provincial competition can actually be healthy.

Certainly, one of the duties of a provincial government is to protect the interests of its citizens, however, what often happens is that provincial governments attempt to protect the interests of the provincial state, not necessarily the citizens living within the state. Provincial governments can lead public sentiment by dictating the issues to the electorate and stressing a provincially-oriented stance. Provincial competition can be healthy, but only if provincial interests are examined in the context of the national interest--otherwise balkanization is the likely result of competition. There needs to be a forum where the interests of the provinces can be balanced against those of the nation. The logical arena for this would be the central government; however, at the national level there does not appear to be either the will or the concern necessary for reforms.

It is commonly thought that province-building really only began in the late 1950s through the 1960s. This is more likely the case for the Western provinces than it is for the two central Canadian provinces. It certainly is not the case for Ontario. As will be shown, Ontario has been province-building through the courts and the federal government at least since Confederation. It began in the courts and has continued with the aid of the federal government. However, there has been a more obvious trend towards province-building, on the part of all provinces, since the late 1950s.

For the peripheral provinces, the desire to further their own limited interests lies in the fact that within the larger whole of Canada there is an economic justification based upon comparative advantage⁸ of each province. Often this

comparative advantage lies in primary industry, an area which tends to be quite volatile in that the prices are not stable and the resources are generally non-renewable--this often leads to cyclical or "boom and bust" effects. Ontario, on the other hand, does have primary industry; however, it is also the manufacturing centre of Canada due to its ability to attract investment and to influence the federal government. This diversity stabilizes its economy to an extent not experienced by the other provinces. The other provinces have attempted to diversify their economies through province-building initiatives. In the past Ontario tended to defend its interests against the federal government; however, these initiatives from the other provinces have led it to seek the federal government as an ally against the economic threat from these upstart provinces.

The judicial element will be examined in chapter two which will discuss the judicial interpretation of the British North America (B.N.A.) Act and Ontario's influence on those decisions. This chapter will show Ontario to be one of the oldest province-builders and will show how its province-building extends into the judicial system. It will show how Ontario benefited from, and utilized to its advantage, the decisions of the Judicial Committee of the Privy Council--the highest court in the land until 1949. This was the time during which Ontario was the adversary of the federal government. This was also the time during which Ontario was able to make its largest gains in terms of provincial autonomy. Since the Supreme Court of Canada took over from the JCPC, its decisions have caused Ontario to turn to the federal government to achieve its provincial aims. Thus we see Ontario coopting the federal

government into its economic plans, as opposed to the confrontational litigation of past years.

The third chapter will focus on Non-Tariff Barriers (NTBs), which are barriers to the free movement of goods, persons, services and capital between provinces. As will be shown, Ontario is formally opposed to NTBs, and this may be seen as a component of its province-building strategy. Given that Ontario is the manufacturing centre of Canada, an open common market is to its advantage, as this would allow Ontario-based companies to sell their goods and services to all parts of the country without having to set up plants in each province in which they wish to sell their goods.

However, in the interim, given its wealth and subsequent ability to lure business and investment capital into its borders, Ontario can survive with NTBs, though it would have more to gain if the market were open and its goods could be freely marketed throughout Canada. Thus, it is Ontario which issues the strongest warnings of the dire consequences of a fragmented market. However, it will not be the first to lower its barriers to trade. Ontario has an arsenal as full as any province.

Chapter four discusses the provinces' roles in foreign relations. Ontario is not particularly outstanding in this area due, partly, to the fact that it is content to let the federal government conduct trade negotiations which tend to benefit the province. Yet, at the same time, Ontario is second only to Quebec in terms of the number of foreign offices it operates. It also will not hesitate to embark upon extensive trade

forays or ministerial visits. Again, we see Ontario as a province which will use whatever tools it has to further its own interests, and that these tools provide Ontario with the ability to further its interests at the expense of the smaller provinces which cannot afford to maintain extensive foreign relations arsenals.

The fifth chapter examines the ways in which the federal government works in Ontario's interest. Here it is shown that Ontario uses its electoral and economic power to coerce the federal government into supporting Ontario's positions on certain key issues such as energy and constitutional amendment. It is in this chapter that we will see Ontario claiming that it supports the national interest as represented by the federal government, while in fact what we are seeing is the federal government accommodating Ontario.

The sixth and final chapter examines Ontario's actions and finds them to be the precursor to province-building actions on behalf of the other provinces, even those which cannot really afford it. It concludes that Ontario, given the examples from the previous chapters, has been a province-builder throughout history, and that its motives have not changed recently, merely its method of achieving its objectives has.

Thus, this paper will show that Ontario, far from being the altruistic nation-builder it claims to be, is really a self-interested chameleon ready to change its colours at a moment's notice. However, the results of Ontario's actions are unfortunate, the smaller, "have-not" provinces are sacrificed for the benefit of one dominant provincial entity--Ontario.

ENDNOTES

1.E. Black and A. Cairns, "A Different Perspective on Canadian Federalism" in J.P. Meekison ed. Canadian Federalism: Myth or Reality (Toronto: Methuen Publications, 1977), 43.

2.G. Stevenson, Unfulfilled Union (Toronto: Gage Publishing Ltd., 1982), 22.

3. R.A. Young, P. Faucher and A. Blais, "The Concept of Province-Building: A Critique," in Perspectives on Canadian Federalism, eds. R.D. Olling and M.W. Westmacott (Scarborough: Prentice-Hall Canada Inc., 1988), 136-140.

4. G. Stevenson, Unfulfilled Union 3rd ed. (Toronto: Gage Publishing Ltd., 1989), 180-183.

5.K. Norrie et. al., Federalism and the Economic Union in Canada (Toronto: University of Toronto Press, 1985), 3.

6.A. Cairns, "The Other Crisis of Canadian Federalism" in Constitution, Government and Society in Canada (Toronto: McClelland and Stewart, 1988), 184.

7.Norrie, Federalism 129.

8.This is generally taken to mean that a province will be encouraged to produce what is found to be most cost-efficient.

CHAPTER 2: JUDICIAL INTERPRETATION

There can be little doubt that the courts have had a major influence upon the interpretation of the British North America Act, subsequently renamed the Constitution Act 1867 after the patriation of the Constitution in 1982. Due to the fact that the division of powers under sections 91 (federal powers) and 92 (provincial powers) is not always clear, there has been a good deal of litigation between the federal and provincial governments regarding the constitutionality of various pieces of legislation sponsored by each level of government.

The Fathers of Confederation, during the period between 1864 to 1867 when they were creating the Constitution, could not have foreseen the societal changes which would take place in years to come. Therefore, the division of powers as set out in the BNA Act is not always clearly applicable; leaving a good deal of interpretive room with the courts. The justices on the Judicial Committee of the Privy Council, which was the highest court of appeal until 1949, and the Supreme Court of Canada, which was awarded that honour in 1947 in the case of A.G. Ontario v. A.G. Canada Reference re: Privy Council Appeals, have had a significant influence upon the federal nature of Canada.

Although the courts were important actors in the definition of federalism, their role was passive/reactive. They could only adjudicate on the matters brought before them. One of the most prominent litigants was the province of Ontario. Ontario, as will be shown, was the province which was most willing, especially in its earlier years under Premier Oliver Mowat, to challenge the federal government in the courts.

However, once the trend of provincial assertiveness had been started, Ontario was quite content to sit back and let the other provinces fight the provincial autonomy battle for it; in other cases it served as an intervenor. Thus, while Ontario was not involved in all the major battles, its presence is still evident.

This chapter will attempt to determine the influence of Ontario on the constitutional, in terms of division of powers, trends apparent in the decisions of the Judicial Committee of the Privy Council (JCPC), and the Supreme Court of Canada (hereafter referred to simply as the Supreme Court) after 1949. It will be argued that the JCPC had a distinctly provincial bias. While the Supreme Court has been less consistent, it is still possible to argue that it has had a more centralizing effect.

Ontario's action will be shown to have had a major impact on the federal system as interpreted in the courts. However, more importantly, the benefits which accrued to Ontario as a result of its provincialist impetus will be examined. It will be shown how Ontario continued its province-building impetus into the judicial system--how it took certain cases to court in order to benefit itself. However, it must be noted that Ontario has been very careful about which cases it took to the highest courts--it participated in only those which it was very certain it could win. In order to fully understand Ontario's actions regarding the Constitution, the circumstances surrounding Confederation should first be examined. Put simply, Confederation stemmed from the threat of annexation by the United States (exemplified by the Fenian raids), political deadlock within the Upper and Lower Canadian political

union, and a cultural clash between the two members of the Union (Upper and Lower Canada). Both Quebec (Lower Canada) and Ontario (Upper Canada) supported Confederation based on the idea that it would allow each unit involved to, "maintain its sectional or regional interests under its own particular provincial government, while all would share in the general federal regime designed ultimately to reach from Atlantic to Pacific."¹ Provinces such as Quebec and Ontario saw Confederation as a device for the preservation and development of their member communities.²

Indeed, it was an Ontario premier who first articulated the Compact Theory of Confederation which argued that Confederation "was a compact between the British North American colonies and that the federal government was and is a creature of those colonies."³ Premier Howard Ferguson stated, at the Imperial Conference of 1929, that:

...the confederation of the provinces of Canada was brought about by the action of the provinces. Our Constitution really is the crystalization into law by an Imperial Statute of an agreement made by the provinces after full consultation and discussion.⁴

Under this compact theory constitutional interpretation involves more than matters of a local and private nature, thus making it imperative that the provinces give their approval to proposed changes. Ontario especially adhered to this theory as it saw itself as being of major significance within the Canadian union. Thus it was of the opinion that its wishes must be heard and acted upon.

I. The Influence of the Judicial Committee of the Privy Council

A) Interpretation of the British North America Act

It was under the influence of the Judicial Committee of the Privy Council, a committee of members of the Privy Council in Britain which served as the final court of appeal in Canada until 1947, that the provinces began to see their powers enhanced at the expense of the federal government. W.F. O'Connor, in his Report to the Senate of Canada, has argued that the JCPC has misinterpreted the wishes of the Fathers of Confederation:

I think that the failure of the Act fully to achieve the intent of those who framed it has not been owing to any defect in draftsmanship, but has been caused by demonstrable error in the interpretation of its terms. Many pronouncements of the Judicial Committee...are materially in conflict with the pre-confederation scheme of distribution of legislative powers and also (since that pre-confederation scheme and that of the Act agree) with the scheme of distribution provided by the Act. I have found most serious and persistent deviation on the part of the Judicial Committee from the actual text of the Act.⁵

O'Connor thinks that the JCPC misinterpreted the BNA Act, the remedy he sees lies in enforced observance of its terms, not constitutional amendment.⁶

The validity of the intentions of the Fathers of Confederation has many proponents, including F.R. Scott who argues that one cannot easily bypass the constitutional values of the Fathers. Obviously they valued provincial autonomy to some extent or else there would not have been a federal system. However, it is equally obvious, in Scott's opinion, that they leaned towards central strength or they would not have unified the court structure or given the federal government its

residual powers, as well as those of disallowance and the appointment of Lieutenant Governors.⁷

Similarly, Sir John A. Macdonald, one of the Fathers of Confederation, and the first Canadian Prime Minister, stated in the Confederation Debates that:

We have given the General Legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incidental to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the General Government and Legislature.--We have thus avoided that great source of weakness which has been the cause of the disruption of the United States.⁸

Obviously Sir John A. Macdonald was not the only Father of Confederation and his is not the only view; however, with the support of George-Etienne Cartier and George Brown, the BNA Act was enacted with a structure as mentioned above, one in which the federal government was to dominate.

The federalist interpretation of the Constitution Act 1867 given by the JCPC was anticipated by economic and social trends in Canada. Cheffins and Johnson, in their book The Revised Canadian Constitution, argue that the JCPC moved Canada from a quasi-federal nation to a truly federal state. It did this by putting the powers of the federal and provincial governments on a more equal basis "than might appear from a cursory reading of the Constitution Act 1867."⁹ In their opinion, the JCPC did not attempt to further the unrealistic view--unrealistic when taken in context of the immense cultural and geographic diversity of the country--of a highly centralized federation as put forth by John A. Macdonald.

It has been argued that it was the practice of the JCPC to interpret the BNA Act as it would any other statute. However, if this were so, then it would have been difficult for them to make a case for anything other than a strong central government. On the contrary, the JCPC's decisions had a distinctly provincial bias which would not have been apparent from a purely legalistic reading of the constitution. In other words, the JCPC had to have been influenced by environmental factors, factors which include the effect of the provincialist movement led by Ontario.

Many academics and lawyers maintain that the JCPC favoured the provinces in its decisions. In fact, it can be argued that the JCPC pursued a policy, one which was, in the words of Cheffins and Tucker "maximum protection of the provincial legislative position".¹⁰ F.R. Scott argues that the JCPC had consistently adopted the autonomist conception of federation--meaning a division of political authority which allowed the provinces to define their general policy in their own sphere of activity without being obligated to conform to any pattern set down by the central government.¹¹

Even a defender of the JCPC such as Alan Cairns has admitted that "It is evident that on occasion the provinces found an ally in the Privy Council, and that on balance they were aided in their struggles with the federal government."¹² However, Cairns goes on to say that to attribute any more than that to the JCPC would be to "strain credulity" as he finds it impossible to believe that such an institution could turn Canada in a direction which it would otherwise not have taken.

Rather, says Cairns, it was a tool of groups and individuals seeking objectives that could be furthered by judicial support.

Cairns does acknowledge at least some provincial bias as he argues that the JCPC's "covert pursuit of policy" (ie. protecting the provinces' interests) meant that their reasoning process in their decisions was often inadequate to sustain the decision reached.¹³ Cheffins and Tucker write along the same vein as Cairns, but they too concede that the JCPC "took a non-literal approach and replaced application of the actual words of the statute with a clear pursuit of a policy, namely, maximum protection of the provincial legislative position."¹⁴

We can see this trend in the decision handed down by Lord Watson in the Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick:

The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by section 92, are specially reserved for provincial legislatures, the legislature of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act.¹⁵

This indicates that the JCPC, or at least Lord Watson, saw the federal and provincial governments as being two equally sovereign legislatures. According to Vincent MacDonald the principle put forth by Lord Simon in the Liquidators case is not

expressed in the BNA Act and owes its origin to judicial sanction.¹⁶ This decision considerably strengthened the position of the provinces by prohibiting the federal government from using its general powers in areas covered by Section 92 of the B.N.A. Act.

Although the Liquidators case originally had little to do with the division of powers, federalism ended up being its focus. This case originated with Lenoir v. Ritchie and involved two acts of the Nova Scotia legislature regarding the ability of provincial Lieutenant-Governors to appoint Queen's Counsel and regulate precedence before the bar, both of which were representative of their prerogative power. The Supreme Court of Canada, in a close 3-2 decision, ruled that the acts were ultra vires the Nova Scotia legislature.¹⁷

This prompted the Lieutenant Governor of Ontario to write a letter to the Secretary of State for the provinces. In it he argued that the Lieutenant Governor has the jurisdiction to exercise all prerogatives incident to Executive authority in matters within provincial jurisdiction. He went on to question the knowledge of the three Supreme Court justices who formed the majority in the decision. He stated that they represented an interpretation of the BNA Act which goes against that of Ontario--the Supreme Court decision would "go far to deprive [the provinces] of the whole Executive authority which it was intended they should possess, and which they have hitherto exercised..."¹⁸

The Supreme Court decision was also a blow to such provincial rights activists as Ontario's Oliver Mowat and his successors, who then "engaged the courts for

nearly twenty years, until the Lenoir doctrine had been safely laid to rest."¹⁹ They were not to be disappointed, as in 1892 the subject of provincial prerogative came up in the Liquidators case. This time, however, the case made it to the JCPC which, not entirely surprisingly, overturned the Supreme Court's decision in the Lenoir case. In this case, persistence paid off.

One of the most notorious cases of province-building on the part of Ontario took place during Mowat's premiership. This case is known as the Boundary Dispute and involved a section of territory which both Ontario and the federal government (which acted on behalf of the province of Manitoba) claimed as theirs. The federal government had Manitoba claim the land as natural resources within Manitoba territory belonged to the Crown. This dispute was a prolonged one, stretching from the initial claim of Ontario in 1871 to a final JCPC decision in Ontario's favour in 1884 and the final Parliamentary legislation recognizing the JCPC decision in 1889.

The dispute took a long time to settle as many attempts at resolving it were made, but none were successful in pleasing both sides. In 1871 Ontario dispatched two boundary commissioners to negotiate with the federal government; however an agreement could not be reached and negotiations were suspended in 1872. In 1874, under the premiership of Oliver Mowat, the Ontario legislature passed a resolution calling for settlement by arbitration. The decision of the board was not reached until 1879 when it handed down a report which accepted almost all of Ontario's claims.²⁰ This arbitration board was set up during the Mowat term in Ontario and the Mackenzie term in Ottawa. Apparently Mackenzie was sympathetic to Ontario's

claim (both were Liberals), and Morris Zaslow, in his essay on the Dispute, suggests that this may explain the fact that the decision by the arbitration board was "unaccompanied by supporting reasoning or explanations."²¹

However, due to the delay in the board's decision, the Conservatives had returned to Ottawa by the time the report was completed. Sir John A. Macdonald, as Prime Minister, refused to ratify the award in Parliament. After much name-calling, in 1883 both Ontario and the federal government agreed to take the dispute to the JCPC. In 1884 the JCPC reiterated the arbiters' decision and gave the land to Ontario.

Zaslow argues that the "win" by Ontario was due largely to Ontario's preparedness as compared to that of the Dominion and Manitoba. This could be seen in Ontario's zealousness in terms of its skilled attorneys, especially Premier Mowat who was questioned closely before the JCPC for two days, as well as the years of preparation which had gone into the Ontario argument.²² In fact, according to C.R.W. Biggar, Mowat's biographer, the JCPC had mentioned that they were impressed with Mowat's argument.²³

Ontario wanted to win the Boundary Dispute for two main reasons. First, the area contained many natural resources, especially in terms of forest and mineral wealth--something which would be a valuable tool for economic diversification within the province as, at the time, Ontario was primarily agricultural in terms of natural resources.²⁴ The second reason is that Ontario was worried that it would have less area than Quebec or British Columbia.²⁵

Upon returning home from London, Ontario having won the appeal to the JCPC, Mowat was little less than a hero. Mowat was the man who, in the eyes of Ontarians, had won despite the combined resources of opposition of the Dominion and Manitoba. His speech upon arrival in Ontario reflects the prevalent feeling in Ontario at this time:

Now, why is it that we are so anxious that the limits of our province shall not be curtailed? First, and foremost, is because we love Ontario, we believe in Ontario, and we know from past experience that it is in the interest of the Dominion, as well as of the provinces composing the Dominion that the limits of Ontario should not be restricted. Ontario is, in fact, the "back-bone" of the Dominion; and we desire that that should continue to be the position of our province; that it should not be brought down to be one of the least of the great provinces; that there should be an extent of country ample enough to admit of its development, so that, as the other provinces develop, Ontario should develop also.²⁶

Mowat remained determined to secure control over all the resources of the province and manage them in such a way as to benefit of Ontario citizens. Ontario wished to be left alone to develop its resources without interference from anyone.²⁷

Mowat also challenged the federal government's power of disallowance in the Rivers and Streams Act. This legislation was passed by the Ontario Legislature in response to a dispute regarding the movement of logs down a waterway within the province. The Act said that anyone could drive logs on a waterway providing they pay a fee to persons responsible for improvements. Upon a complaint from an Ontario lumberman (who had made such improvements and wished to prevent the competition from using the river since he alone had financed the improvements) the federal government disallowed the legislation a total of three times on the grounds

that the Ontario legislation took "away the rights of one man and vest[ed] them in another..." and that this was "in flagrant violation of private rights and natural justice."²⁸ However, the JCPC ruled the legislation to be intra vires provincial jurisdiction in a private suit.

The federal power of disallowance was also successfully challenged by the Mowat government via a court case involving liquor licensing legislation. Such an area was quite lucrative in terms of licence fees and patronage--thus both Ottawa and Ontario wished to control the area. Once again the JCPC ruled in Mowat's favour. Mowat soon made it clear to Ottawa that it was ill-advised to use the power of disallowance against Ontario. In fact, under the premiership of Oliver Mowat there were a greater number of legal disputes with the Dominion than at any other time. And in most cases there was a vindication of his provincialist stance by the JCPC.²⁹

B) Trade and Commerce

In order to better understand the influence of Ontario in Canadian federalism, it is necessary to examine some prominent cases which affected the federal government's Trade and Commerce power. It is also interesting to note the actions of Ontario in these cases, and the benefits which accrued to Ontario as a result of such actions. It should be stated at the outset that Ontario was not necessarily involved in each and every case, however the Ontario government legacy as protector of provincial rights can be discerned in all. While it would be difficult, if not impossible, to argue that Ontario had such influence as to be the determining factor

in the JCPC's interpretation of the B.N.A. Act, it certainly was a prominent actor in many cases. The influence of the provincial rights movement, led early on by Ontario Premier Oliver Mowat, is reflected in many of the JCPC's decisions.

The diminution of the federal government's Trade and Commerce power was concurrent with the expansion of the provincial powers of Property and Civil Rights in the Province (Section 92(13)) and Matters of a merely local or private Nature in the Province (Section 92(16)). In fact, under the JCPC these provincial powers were interpreted broadly, so broadly that some argue that section 92(13) has become a residual clause more powerful than the P.O.G.G. clause. In general the JCPC tended to see the enumerated powers of Section 91 as having precedence over the residual clauses, rather than viewing them merely as examples of powers belonging to the federal government.

The restriction of the federal Trade and Commerce Power began with the Parsons case in 1881 which was concerned with the regulation of fire insurance in Ontario. This case dealt with an Ontario statute which required insurance companies to maintain uniform conditions for all fire insurance as prescribed. Parsons was denied compensation by his insurance company as it argued that he had not observed its special conditions. Parsons argued that he was not bound by the contracts as they were not in compliance with the Ontario statute. The companies argued that the Ontario statute was ultra vires provincial jurisdiction.³⁰ The JCPC upheld the Ontario Act relating to Property and Civil Rights, arguing that the federal government could not overextend its Trade and Commerce power. The ultimate

result of this case was that the JCPC restricted the federal power to three areas: 1) trade requiring the sanction of Parliament (international trade agreements); 2) the regulation of trade in matters of interprovincial concern; and 3) general regulation of trade affecting the whole Dominion. In other words, the trade and commerce power does not extend to intraprovincial trade--thereby excluding intraprovincial trade from federal jurisdiction.³¹ The BNA Act itself did not reserve for the provinces power over intraprovincial trade as was the case in the United States constitution. In Canada this power began with the Parsons case.³²

In the Insurance Reference case of 1916, Lord Haldane, speaking for the majority on the Council, restricted the "general regulation of trade affecting the whole Dominion" provision which was implied in the Parsons case. According to Haldane, Parliament could not establish a scheme for the regulation of a particular business (in this case, insurance) throughout the Dominion.³³ This case ended federal efforts to regulate provincially chartered insurance companies. The federal Insurance Act of 1917 said that failure to take out a federal licence was a criminal offence for Canadian or foreign-chartered companies (provincial concerns could receive them if they wished). This Act was founded upon federal control over "aliens" and "immigration". In 1924 the JCPC invalidated some of the provisions of the Act; and in 1926 the Ontario Court of Appeal found the key licensing provisions to be unconstitutional.³⁴

At the Inter-Provincial Conference of 1926 Ontario moved that the federal government recognize these decisions as binding and withdraw from the insurance

field. As a response to this, in 1927 the federal government drafted a new bill. The provinces still were not satisfied as they did not wish to lose licence fees. Ontario and Quebec agreed to license some twenty New England fire insurance mutuals who refused to put up federal deposits, promising them that the provinces would provide them with legal support if they were charged. The provinces (Ontario under Howard Ferguson) took the legislation to the JCPC who ruled that the federal government was "intermeddling" in the insurance field, and the key provisions of the 1927 Act were declared unconstitutional.³⁵

This was not to be the end of the issue. In 1932 the Bennett government added a ten per cent tax on premiums paid to foreign insurers lacking federal licences. In 1933 life insurance companies pressed for a revised federal Insurance Act. Due to the fact that constitutional experts were sceptical as to whether the federal government could win a challenge in the courts, new legislation was passed in 1934. This legislation allowed for effective regulation of the business of insurance for companies not chartered by Ottawa to rest with the provinces, although, if they wished, companies could go abroad with certificates of solvency issued by the Canadian government.³⁶

It is no surprise that Ontario played such a large role in this affair, as there were a disproportionate number of the insurance industry's head offices in Toronto. All of the provinces except for Ontario, Quebec and British Columbia wished for a continued federal role in the insurance licencing area.³⁷ However, this was not in Ontario's interests, so it took a leading role in challenging the legislation in the

courts. This forced the federal government into a legal corner and, regardless what a majority of the provinces wished, forced it to acquiesce to Ontario's demands.

C) Peace, Order and Good Government

The JCPC's interpretation of P.O.G.G. is probably the most controversial aspect of its decisions. There seemed to be hope that the JCPC would give a broad interpretation of P.O.G.G. in the case of Russell v. the Queen in 1882. In this case the JCPC ruled that the Dominion's temperance legislation was intra vires due to the concern for public order and safety throughout the Dominion (in that the problem of temperance was not confined to one province)--something which was held to be within the Dominion's scope of power.³⁸

As we shall see, this broad interpretation of P.O.G.G. was not to last. It was in the case of A.G. Canada v. A.G. Ontario, better known as the Local Prohibition Case (regarding the Canada Temperance Act) that the so-called "trenching doctrine", which did not allow the federal government to legislate on matters enumerated under section 92, was brought out by the JCPC. In this same case, the Supreme Court of Canada ruled that a province had no legislative jurisdiction to prohibit the manufacture or sale of intoxicating liquor within a province. The JCPC reversed this decision by stating that in the absence of conflicting legislation by the Parliament of Canada a province could prohibit the manufacture or sale of intoxicating liquor within a province.³⁹ However, Lord Watson further argued that the preservation of

provincial autonomy required that the P.O.G.G. power not have the same capability to override provincial legislation as do the federal enumerated powers:

...the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92.⁴⁰

This decision was a great victory for Ontario and its vision of provincial autonomy, as it set a precedent which substantially limited the federal government's use of the P.O.G.G. power. It was to become the basis for later decisions by the JCPC regarding P.O.G.G.

Beginning in 1921 with the Board of Commerce case, the JCPC began to build a doctrine of "emergency" around the exercise of P.O.G.G. The legislation contained both anti-combines provisions as well as those prohibiting the hoarding of the "necessities of life" (i.e. food, clothing and fuel), and required stocks of such necessities to be sold at fair prices.⁴¹ The JCPC found this to be an intrusion upon s. 92(13) (property and civil rights within a province). Haldane argued that the situation did not amount to a "highly exceptional circumstance" (more specifically war or famine) which could transform it into a matter of national concern, and thereby bring it under the P.O.G.G. power.⁴²

In the 1923 Fort Frances Pulp and Power Co. v. Manitoba Free Press case the federal government had enacted laws controlling the price and supply of newsprint. Normally this would fall under provincial jurisdiction, except that the federal

government argued that this fell under emergency wartime conditions. Haldane agreed, saying that in "a sufficiently great emergency such as that arising out of war" the P.O.G.G. power would allow the federal government to authorize laws in areas normally under provincial jurisdiction.⁴³

The "emergency" doctrine was solidified in the case of Toronto Electric Commissioners v. Snider (1925). The matter involved was a statute which established national conciliation services to avoid labour stoppages during work disputes in vital industries (mines, transportation and communication agencies, and public service utilities). Lord Haldane argued that the contents of this statute did not meet the emergency test. The result of this decision was to limit federal legislation regarding the settlement of labour disputes to such activities as are subject to federal jurisdiction (ie. interprovincial railways or federal Crown agencies).⁴⁴ Peter Hogg notes that no mention was made of the "national dimensions" test.⁴⁵

The stringent interpretation of the "emergency" doctrine was applied during the Depression when the Bennett government attempted to pass nationwide social legislation to help alleviate the effects of the economic slump. The legislation was composed of eight parts: 1) Weekly Rest in Industrial Undertakings Act; 2) Minimum Wages Act; 3) Limitation of Hours of Work Act; 4) Natural Products Marketing Act; 5) Employment and Social Insurance Act; 6) Farmers' Creditors Arrangement Act; 7) Dominion Trade and Industry Commission Act; and 8) Section 498A of the Criminal Code dealing with unfair trade practices. Five of the eight measures were invalidated by the JCPC. The only ones to survive were the Farmers'

Creditors Arrangement Act (upheld under the federal jurisdiction over bankruptcy), Section 498A of the Criminal Code (upheld under Trade and Commerce and Criminal Law), and legislation establishing a national trademark for products conforming to the requirements of government established "Canada Standards".⁴⁶

The first three Acts were created in compliance with the International Labour Organization convention, but were considered invalid under section 132 due to the fact that it was not a treaty between the British Empire and foreign countries, but was between Canada and foreign countries.⁴⁷ Nor were they considered valid under the residual clause, rather they were considered to fall under Property and Civil Rights of the Provinces (s. 92(13)).⁴⁸ The Natural Products Marketing Act was said not to fall under the federal government's Trade and Commerce power as it dealt partially with intraprovincial trade in natural products, thereby placing it under s.92(13) too.⁴⁹ The Employment and Social Insurance Act was not valid under either the residuary or taxing power--it fell under s.92(13) also.⁵⁰

With regard to the first three Acts, the JCPC said that "The Dominion cannot 'merely by making promises to foreign countries,' clothe itself with legislative authority which it did not possess originally and thus invade the provincial domain."⁵¹ Nor were the invalidated statutes covered by P.O.G.G. since such legislation was only justified in "some extraordinary peril to the national life of Canada," in some "abnormal circumstances", or "epidemic of pestilence".⁵² It appears that a nationwide depression did not constitute an emergency as outlined in previous decisions.

In A.G. Ontario v. Canada Temperance Federation (1946), the Ontario government challenged the validity of the 1927 Canada Temperance Act. The case was basically the same as that of Russell v. the Queen, however, as Peter Russell states, "the real object of this case was to challenge that decision and consolidate the much narrower construction of peace, order and good government clause which the Privy Council had been developing since 1882."⁵³ This time, Ontario won the case; however the grounds upon which the federal P.O.G.G. power was restricted were different.

In this case Viscount Simon argued that the validity of federal legislation depends, not upon the existence of an emergency, but upon the subject matter of the legislation.⁵⁴ Therefore, if the subject matter falls under s. 92, then the provincial will should prevail. This vein of constitutional interpretation was never solidified, as the courts reverted back to the emergency doctrine.

Although Ontario lost this next case, its involvement proves significant. The 1947 case was A.G. Ontario v. A.G. Canada re: Abolition of Privy Council Appeals. The federal government, with the support of the two other national political parties, wanted the JCPC to be abolished as the highest court of appeal in Canada. Peter Russell asserts that the growth of Canadian nationalism, the acquisition of Dominion autonomy and "the antagonism aroused amongst English Canada's political and legal elite by the Privy Council's interpretation of the B.N.A. Act, especially its decisions on the New Deal legislation, further fuelled the fires of judicial nationalism."⁵⁵

The technical question to be considered in this case was whether or not the federal government could also abolish appeals concerning provincial laws. However, it must be borne in mind that Ontario (along with Quebec, New Brunswick, and British Columbia) was willing to fight the federal government on any basis, as it and other provincial governments had benefited from the decisions of the JCPC, and were not enthusiastic about the possibility of the perceived centralist Supreme Court of Canada becoming the highest court in the land. The provinces realized that they had a vested interest in the continuance of appeals to the JCPC. It is interesting to note that two "have-not" provinces, Manitoba and Saskatchewan, supported the federal government. These provinces were (and still are) very reliant upon the federal government's spending power and its support for provincial programs. Thus, they could not allow the federal P.O.G.G. power to be interpreted too narrowly.

It appears that Ontario had been able to influence the decisions of the JCPC. This was due, in part, to the vigour of Ontario--the fact that it was extremely dedicated to its causes and was willing to fight to the end. Many argue that, since the JCPC was separated by thousands of miles from the affairs upon which they were expected to rule, they were susceptible to strong provincial arguments:

In general the counsel who appeared for the Provinces seem to have had more interest in their work and to have presented better cases than their opponents. Such people as Blake and Mowat, who were themselves staunch "Provincial Rightists" naturally had more interest in securing a favourable verdict than had counsel for the Dominion, who for the most part, lacked personal interest in the question of Dominion vs. Province. For example, Sir John Macdonald never once appeared before the Privy Council while Mowat argued several of his own cases himself.⁵⁶

The provinces had a great deal to gain from decisions which granted them increased powers, or those which diluted or limited the powers of the federal government. A premier of a province arguing his own case would probably be more emphatic than a lawyer commissioned by the federal government.

Whether or not one agrees with the validity of the decisions of the JCPC, it would be difficult to argue that there was no provincial bias in their decisions. The Trade and Commerce and Peace Order and Good Government powers, two of the most sweeping powers of the federal government, were severely restricted--to the benefit of the provinces. Though the JCPC was not bound by precedent, these decisions became the basis for subsequent judicial interpretation of the BNA Act; this can be substantiated by reading through various dictums of the JCPC and the Supreme Court. Ontario had managed to leave a lasting legacy through its influence upon the decisions of the JCPC.

II. The Supreme Court of Canada

A) Interpretation of the Constitution Acts 1867 and 1982

As a result of the Reference re: Privy Council Appeals in 1947, the Supreme Court of Canada became the final court of appeal in Canada in 1949. In several instances the JCPC had overturned the Supreme Court's decisions, Ontario certainly must have been apprehensive about whether the decisions of this court would be as favourable to its interests as was the JCPC.

It has been asserted that the JCPC had an obvious provincial bias in its decisions regarding the division of powers. Did anything change when the Supreme Court of Canada became the final court of appeal in Canada in 1949? It will be argued that, while there does not seem to be such an obvious trend as there was in the case of the JCPC, the Supreme Court does appear to have a slightly centralist bias compared to the JCPC. It was this bias which was the major impetus behind Ontario's switch from being the adversary of the federal government to joining forces with the federal government in order to protect its interests.

Most scholars agree that, in the beginning (approximately 1949-60) of its new role as final court of appeal, the Supreme Court tended to favour the federal government. This was especially apparent in the areas of labour law, the trade and commerce power, taxation, criminal law and economic planning. Generally speaking, the Supreme Court restricted provincial jurisdiction while, at the same time, they expanded federal jurisdiction where federal legislation touched upon matters within provincial jurisdiction.⁵⁷

A shift is noticeable between the years 1960-75 during which time a "bi-polar federalism" began to take shape constitutionally. During this time the Supreme Court, while still retaining a centralist element, began deciding more cases of importance in favour of the provinces (especially Quebec). More than half the Court's decisions were in favour of the federal government, but not all of them were of major significance. The cases decided in the provinces' favour were of greater importance.⁵⁸ This seems to have been a period during which the court attempted

to create some sort of equity between the federal and provincial governments. In the previous period the Court had decided more cases in favour of the federal government, but Dale Gibson makes the claim that in the 1960s, at least, there was a considerable expansion of provincial legislative jurisdiction. He also maintains that this did not occur at the expense of federal jurisdiction--rather it took the form of an increased willingness by the Supreme Court to permit the provinces to employ concurrent powers in areas where potential federal jurisdiction had not yet been exercised.⁵⁹

Guy Tremblay discerns three trends in Supreme Court decisions up to 1985. The first of these trends is that the Court has demonstrated continuity in the basic conception of the Canadian form of government. By this he means that the Supreme Court has continued to follow Judicial Committee principles of Canadian federalism. Examples of this are that the federal and provincial governments are sovereign in their respective domains (Lord Atkin's "watertight compartments"), and that the purpose of the BNA Act was not to meld the provinces together nor to subordinate them to the central government. In addition, the Supreme Court, like the JCPC has tried to control the application of the P.O.G.G. power as otherwise, if the application were broad, areas delegated to the provinces could be invaded at will.⁶⁰

The second trend noted by Tremblay is that the Supreme Court had maintained an equilibrium between federal and provincial powers. He notes that, since 1945, the Supreme Court

...has succeeded...in maintaining a balance of legislative powers comparable to that existing previous to that date. The balance is not

perfect equality. It is part of a system that contains a bias in favour of the federal authority but also includes compensating mechanisms to prevent irremediable centralization. In addition, the jurisprudence demonstrates a subtle conjecture of the dynamics of exclusiveness with the dynamics of overlapping powers, which leaves the Court free to see to the maintenance of a regime that is both federal and flexible, a regime capable of adapting to new contexts.⁶¹

Peter Hogg has also argued that the Supreme Court has kept with the doctrine of the JCPC with regard to the provinces. If the Court has departed from JCPC precedents it has chosen competing lines of reasoning which "have favoured the provincial interest at least as often as they have favoured the federal interest."⁶²

The third trend has been that the Supreme Court has tried to promote federal-provincial co-operation. An example of this trend would be the Willis case in which the Court allowed the federal government to delegate powers to a provincial potato marketing board. In addition, in 1978 there was a Reference re the Agricultural Products Marketing Act. In this case the Court unanimously upheld the implementation of a 1972 federal-provincial (including all provinces) agreement to set up a comprehensive program for the marketing of eggs. It seems to be the opinion of the Court that, in the sphere of marketing boards at least, joint federal-provincial action is most effective.⁶³ Professor Dale Gibson has asserted that this co-operative trend was quite apparent in the Court's decisions in the 1960s. He says that at this time there was considerable expansion of provincial jurisdiction. This expansion did not occur at the expense of federal jurisdiction but took the form of an increased willingness by the Court to permit the provinces to employ concurrent powers in areas where potential federal jurisdiction had not yet been exercised.⁶⁴

Concurrent jurisdiction allowed Ontario to use its provincial powers and to influence the federal government's share of the powers--thereby offering it the best of both worlds.

B) Trade and Commerce

In 1980 the Supreme Court rejected the Trade and Commerce power as a basis for federal consumer protection legislation in the case of Labatt v. Attorney General of Canada. In this case the Supreme Court declared ultra vires federal regulations which required brewers using the generic term "light beer" to meet certain alcohol content standards. They based their decision on the argument that the regulations did not apply to international and interprovincial trade, but rather to an industry which was primarily local in character.⁶⁵ However, it should be noted that the only reason that brewers fall under intraprovincial jurisdiction is due to Non-Tariff Barriers which require a brewer to produce in each province in which it wishes to sell its products.

Energy was the basis for the Canadian Industrial Gas and Oil Ltd. case. In this case there was a dispute between the Saskatchewan Government and C.I.G.O.L. regarding the price of natural gas and oil. The N.D.P. government in Saskatchewan wished to receive some of the windfall benefits from the jump in oil prices due to the OPEC crisis of 1973. The government placed a royalty surcharge on all Crown-owned land equal to the price jump caused by the OPEC crisis. The Court deemed this surcharge to be an indirect tax and an export tax (since much of the oil was

exported to the U.S.), areas which are not within provincial jurisdiction. Thus, the provincial legislation was found to be unconstitutional.⁶⁶

While the events surrounding the Potash case are more complex, the general thrust of the issue is that the Saskatchewan government attempted to regulate natural resource production (in this case the resource being potash) within the province. However, Central Canada Potash Co. Ltd. had contractual agreements in the U.S. which had to be met and the production level set by the Saskatchewan government would leave them unable to meet them. The federal government then joined Central Canada Potash in its litigation against the Saskatchewan government.⁶⁷

The Supreme Court decided against the Saskatchewan government, arguing that normally the provinces have the authority to control the production of natural resources, however, in this case the legislation also attempted to control interprovincial and international trade--areas not within provincial jurisdiction.⁶⁸ The Supreme Court has made a concerted effort to maintain federal jurisdiction in the interprovincial and international aspects of trade and commerce during this period of time.

Ontario was able to benefit indirectly from these cases in that the decisions meant that the energy and resource-rich provinces would not be able to control supply (and, as a consequence, drive up the price) of their resources. Given that Ontario was in need of energy resources, it was in its interests that the federal government be able to have a say in such matters.

As will be shown in Chapter 2 via the example of the National Energy Program, Ontario was favourable to federal regulation of inter-provincial and international trade. Given the concentration of manufacturing in Ontario, the provincial government supported the federal government in its quest to ensure that the supply of energy is not limited by a provincial government, and that the domestic price of energy is kept low.

C) Peace, Order and Good Government

The 1970s can be said to be the time during which the Supreme Court solidified the centralist direction of its decisions. The Anti-Inflation Act, implemented by then Prime Minister Pierre Trudeau and supported by the government of Ontario, authorized the federal government to control incomes, profits and prices in key segments of the private sector as well as all of the federal public sector and to public employees of provinces which agreed to the scheme. Under the Act, this authority could be exercised for up to three years and could be extended by Order-in-Council with approval of both Houses.⁶⁹

The Supreme Court upheld the Anti-Inflation Act which had been challenged by the Ontario Public Employees Union. This decision was one of major significance for the federal government in terms of revamping its P.O.G.G. power. Writing for the majority, Chief Justice Bora Laskin stated that the Anti-Inflation Act fell under the P.O.G.G. power, and did not infringe upon provincial jurisdiction.

The legislation was supported, not by the national dimensions test, as that was considered to be too broad; rather, the Court used the emergency doctrine to uphold the Act. However, the criteria which determine what constitutes an "emergency" were made less stringent than those used by the JCPC. In his decision, Laskin argued that all the Court needed to do was find that a rational basis exists for a finding of emergency:

"this Court would be unjustified in concluding,...that the Parliament of Canada did not have a rational basis for regarding the Anti-Inflation Act as a measure which, in its judgment, was temporarily necessarily to meet the situation of economic crisis imperilling the well-being of the people of Canada as a whole and requiring Parliament's stern intervention in the interest of the country as a whole."⁷⁰

He also stated that the onus was, not on the proponents to show a rational basis, but rather fell on the opponents of the legislation to establish the lack of a rational basis.⁷¹

Ontario may well have been so staunch in its support of the Anti-Inflation Act in that it would continue the dominance of the federal government in the area of macro-economic policy. It was (and is) important to Ontario that it be able to influence economic policy to its benefit; and given its influence with the federal government, this decision ensured that Ontario would, for a while at least, have its say. Additionally, Premier Davis of Ontario, wrote Prime Minister Trudeau requesting that the First Ministers' meetings on economic policy continue to be a part of the Canadian political process.⁷²

Other examples of the centralist interpretation of the federal government's powers are the Offshore Mineral Reference of 1967, the Canadian Industrial Gas &

Oil Limited case of 1977, and the Central Canada Potash decision of 1978. In the Offshore Mineral Reference the Court decided that, in British Columbia's case at least, the federal government had rights to offshore mineral revenues. The Court placed federal jurisdiction in this case under section 91(1) public debt and property as well as under the P.O.G.G. power. It was argued that offshore minerals are of concern to Canada as a whole and extend beyond local or provincial interests.⁷³

Another expansion of the federal P.O.G.G. power took place in 1988 in the Crown Zellerbach case. This case was important in that, for the first time, the Supreme Court used the "provincial inability" test to uphold federal legislation. This essence of this test is as follows:

In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.⁷⁴

The issue in this case was whether federal regulation of dumping in the sea could also apply to dumping in waters within provincial territory. The federal government argued that controlling marine pollution is indivisible, and therefore is a justifiable use of the P.O.G.G. power. Four out of seven judges agreed.⁷⁵

The implications of this decision are far-reaching and very threatening for the provinces. The fact that it rests upon provincial inability to deal in an effective and cooperative manner with a problem could be worrisome to the provinces which are caught up in province-building. The whole idea of province-building is to insulate a provincial economy from the effects of policies of others--this decision may make this

behaviour more difficult for the provinces. This puts the onus on the individual provinces to consider the extra-provincial effects of their policies.

III. Summary

The fact that recent Supreme Court decisions seem to have favoured the federal government explains to a great degree why the Ontario government has been more inclined to directly lobby the federal government, rather than take the more confrontational option of going directly to the courts. As shall be shown in later chapters, Ontario has, since the late 1970s, been more inclined to lobby the federal government, and then, once its interests have been taken into account in federal policy, put its support behind the federal government. When Ontario was the strongest province and one of the only ones to have a province-building strategy, it was in its interests to oppose the federal government. However, times have changed, and more provinces are implementing province-building strategies.

It appears that Ontario won a large majority of the cases which it appealed to the JCPC. The reason behind this is that Ontario was very careful about which cases it pressed that far. Nonetheless, the JCPC was quite responsive to the grievances of the provinces, more specifically Ontario as it was the most powerful province and the one most likely to take cases to the final court of appeal. In this way, Mowat used the JCPC as a province-building tool; he used the threat of court action (which was often successful in his favour) against the federal government in cases which Ontario had a large stake.

Ontario has laid the foundation for province-building in its use of the JCPC. However, with the turn of Supreme Court decisions to the federal government's benefit, Ontario does not presently put as much emphasis on the judicial interpretation of the division of powers as the majority of this was done during the Mowat era.

ENDNOTES

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CHAPTER 3: ONTARIO AND THE FEDERAL GOVERNMENT

A commonly held belief in both Western and Eastern Canada (Quebec included) is that the federal government too often works in the interest of Ontario. This may, in fact, be true. It is the purpose of this chapter to examine some of the areas in which this occurs, and to what extent this premise is accurate. The areas to be surveyed are those of equalization, trade, constitutional amendment, and energy. It will be shown that, in many cases, Ontario protects its interests under the auspices of "nation-building". Realistically, it must be admitted that this will not always be the case; therefore, periods and issues of conflict between Ontario and Ottawa will also be considered.

Without doubt Ontario's economy, population and subsequent electoral clout have a great deal of influence with federal politicians in Ottawa. Ontario contains more than one-quarter of Canada's population. It also has the largest number of Members of Parliament--as of 1987 Ontario held 99 out of 295 seats--and the largest contingent of cabinet ministers in the federal government (approximately 35 percent). In 1965, 48.3 percent of federal bureaucrats were from Ontario. As well, five Canadian Prime Ministers who held power (collectively) for 53 years were from Ontario (as of 1987 this number constituted 44 percent of the time since Confederation).¹ Ontario also has a great deal of economic influence on the Canadian union. In 1990, Ontario accounted for 41 per cent of Canada's total Gross Domestic Product--the next highest was Quebec with 23 per cent. Additionally,

Ontario accounts for 39% of Canadian employment.² Thus, the perpetuation of the prosperity of the Ontario economy is essential to the electoral fortunes of the government of the day in Ottawa.

It is not surprising, then, that Ottawa has a large political stake in the continuance of Ontario's economic dominance within the Canadian federation. It is also not a particularly startling revelation to say that it is quite likely that Ottawa will work on behalf of Ontario more vigorously than it might on behalf of other Canadian provinces. Professor Simeon concurs with this assertion:

...while conflict between Ottawa and Queen's Park has often been intense, it has usually taken place within a context of broad agreement on the fundamentals of economic policy, an agreement borne of the political strength of Ontario in the national government, and on the similarity of economic interests to which both governments have had to respond.³

Indeed, studies have shown that Ontario residents more often identify with the federal government as they see it as being an extension of Ontario itself, so well does it take Ontario's interests into consideration.

As previous chapters have shown, Ontario has not always been so concerned about national unity as opposed to provincialism. H.V. Nelles has argued that the province is a recent convert to centralization as its new outlook only began with the threat of Quebec separatism (as it would cause economic instability) and the rise of energy prices.⁴ However, at the same time he states that "In the federal arena successive Ontario premiers pursued Ontario's interests with ruthless efficiency all the while insisting that they were primarily concerned about Canada's well-being."⁵ Also, as has been shown, the decisions of the Supreme Court of Canada since 1949

have not always been favourable to the provinces--causing Ontario to gravitate toward the federal government in order to have its wishes taken into account.

I. Equalization

Equalization is one area in which conflict between the Ontario and federal governments is more apparent than close cooperation. Unfortunately, not all Canadian provinces have the same fiscal capacity. Due to this fact, the concept of equalization has become entrenched in the Canadian constitution. The basic idea of equalization is that the federal government gives grants to provinces whose tax yields are below the national average⁶. As stated in Section 36(2) of the Constitution Act 1982, the purpose of equalization is to "ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."⁷ To the poorer provinces, equalization is an absolute necessity if their residents are to maintain a comparable, or even acceptable, standard of living when compared with the rest of Canada.

However, equalization schemes have not always been readily accepted in Ontario (nor are they necessarily at present). Ontario's primary argument is that, though the monies for equalization technically come from the federal government, Ontario pays a great deal of money to the federal government in the form of taxes which are then given to other provinces in the form of equalization payments. Other provinces argue that they are entitled to equalization in order to provide their citizens

with access to programs and services of a similar standard to those provided to citizens of wealthier provinces.

Ontario's resistance to equalization is evident in successive statements by Premiers. When the Rowell-Sirois Commission first recommended a form of equalization payment, then-premier of Ontario Mitchell Hepburn called it a "raid on Ontario's treasury," further, said Hepburn, "equality between the provinces is impossible" and that if some provinces could not handle their constitutional responsibilities, then they should consider amalgamation.⁸ Premier Howard Ferguson declared that Ontario would not be the milch cow of Confederation. Former Premier John Robarts, in a similar statement argued that:

Ontario has for many years been the paymaster for much of these federal transfers to the poorer provinces. We accept this situation but would caution against carrying equalization so far that the growth and development of the wealthier provinces is retarded.⁹

Ontario also argues that the lower-income regions not only are eligible for equalization payments, but also receive a good deal of "implicit" equalization in the form of federal government aid. This "implicit" equalization takes many forms including hospital insurance and Unemployment Insurance. Robarts argued that the equalization formula does not take into consideration the interprovincial differences in costs, as the assistance is based on the national average. This causes some provinces whose costs are lower to be oversubsidized, while provinces with higher costs are undersubsidized.¹⁰

The federal government has, to a certain extent, been responsive to Ontario's demands. For example, the equalization formula does take into consideration

provincial resource revenues as well as the Atlantic Provinces Adjustment Grants.¹¹ As well, the current five province standard does not include Alberta, thus indirectly saving Ontario money. These provisions serve to broaden the base of the equalization formula and saves the federal government (and Ontario, indirectly) money in equalization payments. Additionally, in the 1952 equalization arrangements, Ontario was offered a given share of the tax yield generated from within Ontario.¹² If this were done to all provinces, the results would have been less than equalizing, especially for the smaller, "have-not" provinces as they have a smaller tax base. However, the federal government shortly thereafter introduced a formal equalization system.

Since approximately 1957, Ontario's indignant cries have been subdued, and a pro-equalization stance has become popular. This could be for two reasons, one being that Ontario wishes to increase its image of a province which is concerned about others within the federation. A second, perhaps more plausible, reason could be one related to the Keynesian argument that heightened activity in the poorer regions helps the Ontario economy and its industry as the poorer regions now have more money to spend on goods manufactured in Ontario.¹³ In fact, on January 30, 1992, Ottawa announced that it would increase equalization payments to the "poor" provinces (all but Ontario, Alberta and British Columbia) by \$600 million over the next two fiscal years. Ontario's response was positive as it supports stimuli to the national economy.¹⁴ However, as will be discussed further on, if the Free Trade Agreement increases north-south trade at the expense of east-west trade, Ontario

may well become an opponent of equalization. The general attitude of Ontario is that, while it is prepared to pay a price for Confederation, it would prefer to pay as little as possible, "in practical terms, this means minimizing federal equalization and other transfer payments to the 'have-not' provinces."¹⁵

II. Trade Policy

The National Policy, since its inception, has been criticized by the Western provinces who are not protected by the tariff wall--in fact it has been detrimental to them in many ways. Western farmers are heavily reliant upon international market prices for their agricultural products and are also adversely subject to the tariff when importing farm machinery. In addition, most everything they buy has a higher price due to the tariff on manufactured imports. Thus, there has been much resentment toward the perceived federal bias toward the welfare of Ontario as opposed to the rest of the country. The Free Trade Agreement would have put an end to this favouritism in some areas.

The interests of the federal government and Ontario have not meshed in the area of trade, more specifically, there has been friction between the two regarding the Free Trade Agreement (FTA) between Canada and the United States. The National Policy of 1879 was essentially a national industrial policy designed to protect Canadian business, which was, at the time heavily dominated by natural resource extraction, from American competition. This policy benefited Ontario and has, over time, proven itself adaptable enough to continue to protect industry, 50 percent of

which is located in Ontario, into the 1980s prior to the FTA. However, within the Free Trade Agreement a major concession was made to Ontario and British Columbia with regard to wines, the clause (FTA 804) allows for discrimination in the distribution of imported and domestic products on the premises of wineries and distilleries, and private wine store outlets in Ontario and B.C.¹⁶

When the opportunity to secure a free trade deal with the United States arose, the Western provinces were solidly behind both the idea and the subsequent agreement. However, Ontario was rather less enthusiastic--given the increased exposure to international competition and the fear that U.S. subsidiaries, which had moved into Canada to circumvent the tariff, would move their Canadian operations back to the U.S. and simply distribute their products from there. Even though private business in the province was behind the agreement, the government knew that there was the potential for thousands of jobs to be lost--an economic, and thereby electoral, chance which the Ontario government was reluctant to take. Additionally, small businesses (which were the most important source of job creation) were opposed to the deal as they were content to serve their local markets, and were not prepared to compete under Free Trade.¹⁷

Ontario had been in an economic boom from 1985-88 during which time the province was experiencing stability and prosperity while other provinces were not faring as well. While Ontario was concentrating on excellence in education and a world-class health and social system as policy priorities, the other provinces and Ottawa were concentrating on alleviating their economic woes as well as linguistic and

regional conflicts. Thus, from the point of view of Ontario, it was thought that the economic climate would be satisfactory without a free trade deal. Free trade could only stand to upset the present stability and create new policy problems--and of all the provinces Ontario faced perhaps the largest adjustment challenge and largest losses.¹⁸

However, due to the favourable reception from big business and other provinces (including the Canadian Manufacturer's Association), Ontario was rather reserved in its opposition to the agreement. In order to try to sway the opinions of the other provinces and Ottawa, Ontario asked "hard questions" about the impact of the FTA¹⁹, and relied heavily on legal and economic analyses so as not to appear to simply be acting in an "Ontario first" manner. Ontario argued at the 1987 First Minister's Conference that the free trade deal would "dramatically and systematically reduce the ability of all provincial governments to shape and implement social and economic policy."²⁰ Realizing he was fighting what appeared to be a losing battle, Premier David Peterson demanded federal consultation and meaningful provincial involvement in the negotiations. In addition Ontario requested a task force on the effects of the FTA and a commitment to reduce interprovincial barriers to trade.²¹ However, ultimately Ontario came to be seen as "protectionist, fearful of competition and unwilling to see other regions prosper."²² The fact that Ontario was the primary beneficiary of the tariff makes it appear as if it does not way to share the wealth which could go to other provinces under Free Trade.

III. Constitutional Amendment

One area in which the federal government cannot ignore Ontario is in the area of constitutional amendment. However, in this area Ontario grapples with two different interests. The first of these is the need to maintain the Canadian economic union, while the second is the necessity of giving Ontario a definite say in the country's direction due to its electoral and economic dominance. The difficulty lies in striking the proper balance between the two interests; the latter interest must not be so evident as to endanger the former.

During the Confederation Debates Ontario allied itself with a strong central government due to the mercantilist mindset of the time. Big business in Ontario saw a strong central government as a prerequisite for economic growth and western expansion.²³ Apparently it was assumed that Ontario would remain the dominant interest in Canada and that its interest and that of the federal government would remain similar.

However, as has been shown in previous chapters, this assumption did not always hold true; thus, Ontario has had to protect its own interests in the past. In the 1930s, due to a large degree to the Depression, many provinces called for constitutional amendment to allow the federal government broader powers to deal with the difficult economic times (mostly in the form of mass unemployment) being experienced. Ontario, could have raised sufficient revenues for its needs during this time, but it would have been electorally unpopular. The only other option was to give taxation room to Ottawa; Ontario preferred to suffer than to give away any

powers to the central government. This caused a fair bit of resentment from the nearly bankrupt prairies as the redistribution of Ontario's wealth would have benefited them.²⁴

At the time the BNA Act did not contain an amending formula, which would allow for the transfer of such powers, so the first step would be to find one which would be acceptable. Ontario was insistent upon a veto over any proposed amendments and would oppose all alterations until they received what they believed was rightly theirs. This attitude resulted in the failure of the constitutional talks.²⁵

In later years, the interests of Ontario (and Quebec) were readily apparent in the failed Victoria Formula in which the two central provinces each demanded a permanent veto. Although there was a provision which would have allowed other provinces to attain this special status at the time they acquired at least 25 percent of the national population, this proposal was seen as the entrenchment of central Canadian legal domination. In addition to this the formula did not require unanimity to change the constitution with respect to matters of fundamental importance to other provinces.²⁶

More recently Ontario was one of the federal government's staunchest supporters during Prime Minister Pierre Trudeau's attempt to patriate the constitution. One of the major reasons for this conciliator role for Ontario had to do with, as shall be shown shortly, the federal government's support of Ontario in the area of energy. The energy crisis left Premier Davis with a feeling for a "national" perspective which entailed the opposition to decentralization. In addition, the

mobility rights called for in the Charter of Rights would help Ontario's goods, people and capital move into other provinces. This would allow Ontario businesses to open "branch plants" in other provinces without encountering various non-tariff barriers such as licensing requirements. Thus, Section 121 of the Constitution Act 1982 regarding economic mobility is seen as reaffirming Ontario's economic dominance at the expense of the rest of Canada. The loss of Quebec and increased interprovincial non-tariff barriers could seriously jeopardize Ontario's position within the Canadian federation.

Further, Ontario could afford to support the federal government as French language education rights (as stated in the proposed amendments) were already established in Ontario, thereby leaving Ontario with little problem to "withstand pressure to become officially bilingual."²⁷ In fact, the federal government made an important concession to Ontario in that it made no reference to Ontario becoming a bilingual province, but provided the means for this to occur.²⁸ Thus, the benefits to be accrued to Ontario were substantial enough to warrant its support.

Despite the party differences, the Ontario Conservatives supported Trudeau's Liberals throughout the constitutional quagmire. David Milne, in his book Tug of War states that:

Most noteworthy is the strong and consistent support of the Ontario Conservative government; it joined forces with Ottawa in its plan to contain both Quebec separatism and western regionalism. Not surprisingly, many federal constitutional items and other policies appeared to reflect the status quo interests of Ontario at the expense of those forces seeking to reshape the country in their own interests.²⁹

Ontario is Quebec's largest trading partner, and vice-versa. At the same time, Ontario needs its markets in the West. By way of its constitutional proposals, the federal government, with its broad economic powers could aid Ontario in this area.

More recently, during the Meech Lake Accord constitutional amendment attempt, Ontario gave its unwavering support to the federal government's initiative. For one thing, the Accord would have effectively put an end to Senate reform, something Ontario feared given its dominance in the upper house.³⁰ Additionally, it would have helped to ensure that Ontario's largest trading partner, Quebec, would have remained in confederation. In the end, however, Ontario made a last-minute offer of Senate seats in order to try to ensure the passage of the Meech Lake Accord. Note that they did not offer to reform the Senate along with the offer of seats--as the Senate stood, it was not particularly effective--thus it was no real threat to Ontario's dominance in the House of Commons.

More importantly, faced with the prospect of Quebec separating from Canada, and thereby the potential dissolution of the Canadian union, Ontario decided that, even at the cost of devolution of federal powers to the provinces, it would aid Ottawa in the effort to bring Quebec back into the constitution. While Ontario would benefit from the devolution of powers to the provinces, that scenario would also jeopardize its economic preeminence within Canada.

In fact, while speaking at a conference regarding the future of Canada after Meech Lake, a prominent member of the former Ontario government stated that Ontario's interests clearly lie with Quebec and that if Quebec left confederation

Ontario might well follow.³¹ This is consistent with Ontario's province-building stance in that it may be willing to leave Canada if it found that the economic benefits of leaving confederation outweighed the benefits of remaining in confederation.

IV. Energy

Probably the area in which the interests of the federal government and Ontario are most similar is in the area of energy. Of course there have been periods of conflict, most notably in the 1890s regarding Nova Scotia coal. However, as a rule, Ontario supports a strong federal presence in the non-renewable resource arena--this then allows Ontario to have its say in federal policy regulating these resources. This helps ensure that Ontario will never be held hostage to provincial resource policies which could damage the Ontario economy.

The crux of the coal debate was whether or not there should be duty on U.S. coal imports in order to increase Canadian (mostly Ontario) consumption of Nova Scotia coal and thereby increase the east-west trade deemed necessary in the National Policy. Generally Ontario was quite content with its imports of cheaper U.S. coal, yet at the same time it wanted Nova Scotia's coal to remain available in order to keep Ontario from being too reliant upon the U.S. coal. However, Ontario would not buy Nova Scotia coal at any price, and in order to make the Nova Scotia coal competitive a \$1-2 per ton duty would have to be put on U.S. coal. Ontario did not embrace this nationalistic policy, saying that the duty would put an intolerable burden on Ontario manufacturers and homeowners. Finally, in 1919, during the U.S.

coal miner's strike, Ontario began to soften due to the unanticipated unreliability of supply.³² As this example illustrates, Ontario would not be such a vehement nation-builder if it were not in its interests. When the circumstances are not in its favour, suddenly nation-building is not so very important to Ontario. This is perhaps an all too typical example of the Ontario attitude against which other provinces have been forced to act--in this case Ontario accepted tariff protection for its manufactured goods, but would not allow the same for Nova Scotia coal.

Ontario's self-interest is also readily apparent when discussing hydro-electricity. Due to the high overhead and infrastructural costs, hydroelectricity generation was (and is) too expensive to be undertaken by private interests--given their financial resources, provincial governments have been the ones to enter this realm. Ontario Hydro was used to provide hydroelectric power at low rates to Ontario industry, thereby improving the competitive position of Ontario industry in relation to Quebec and the U.S. As noted before, Ontario, prior to this, had been reliant upon coal from Nova Scotia and the U.S. Thus, Ontario Hydro increased the self-reliance of Ontario and had the effect of reinforcing uneven development and the concentration of Canadian industry in one province.³³ If a province can offer low, subsidized prices, business will flock to it.

In fact, the firm control of hydro-electricity by a few more fortunate provinces such as Ontario rendered impossible John Diefenbaker's 1960 campaign effort to provide a national power grid which would have aided industrialization in Saskatchewan and the Maritimes.³⁴ The plan would have moved power from areas

of surplus to those in deficit as needed. However, there was opposition to this plan, and it was eventually dropped. However, the National Oil Policy was also included in the same plan. Alberta wished to service the Montreal area; however, the government deemed it more important that this area be supplied with cheaper Venezuelan oil.³⁵ This same scenario would not likely be repeated in the reverse order--the tariff has prevented the western provinces from benefiting from cheaper imports in this way.

So protective is Ontario of its natural water resources that Premier Drury once said that:

Any effort to take control of the waters and water power of this province further than is necessary for the purposes of navigation will be strongly resisted...and will be considered...to be an unwarranted invasion of the provincial domain by the federal authorities.³⁶

As we shall see, when it is Alberta's turn to argue the same with regard to energy resources, Ontario begins citing the national interest.

Energy has not always been such a problematic issue among the provinces. During the period between 1947 and 1973 there was little state intervention in the realm of energy. The National Oil Policy (NOP) of 1961, implemented by the Diefenbaker government, was typical of this attitude. This policy had Alberta oil supplied as far east as the Ottawa Valley, with any excess exported to the U.S. For the area east of the Ottawa Valley, relatively cheap Venezuelan oil was imported. This meant that Ontario had to pay a marginally higher price for oil, however the province was soon placated by the creation of a large petroleum refining industry in Ontario.³⁷

Problems began, however, when, in 1973, Alberta unilaterally announced that royalties would rise with oil price increases. This move was a consequence of Ottawa's growing intervention in the energy market, which entailed such measures as an oil price freeze and an oil export tax--the revenues from which were used to subsidize Eastern Canadians dependent upon oil imports which were growing more expensive.³⁸ It was in this same year that Trudeau abandoned the NOP's two-tiered system in favour of a single price for all of Canada. Additionally, much to Alberta's chagrin, in 1974 the potentially restrictive Petroleum Administration Act was implemented by the federal government.³⁹

During the years between 1973 and 1979 the federal government allowed Alberta's domestic price to rise to 80 percent of the world price, however, with the 1979 Iranian revolution and the subsequent oil price shock, the federal government refused to further link domestic and world prices.⁴⁰

In the 1979 federal election the Liberal party, led by Trudeau, was narrowly defeated by the Conservatives led by Albertan Joe Clark. Clark's view of Canada as a "community of communities" as well as his promise to privatize Petro-Canada appealed to the Western producing provinces who threw their support behind his party and policies.

In 1979 the Conservative government in Ottawa decided, with a push from Ontario⁴¹, that it would consider an Energy Bank and Stabilization Fund which would be used to recycle petro-dollars (from Ottawa's increased share of revenues) throughout the Canadian economy in an effort to offset the price impact. Ontario

could then take advantage of Alberta's economic prosperity, as money could then be put into Ontario's manufacturing sector to help offset increased energy prices. Alberta responded that if there was any recycling of its share of resource revenues, it would be the one to do it. The province then announced that it would lend \$2 billion to the Bank Fund at near-commercial rates.⁴²

However, even such attempts at placating Ontario were not enough to allow the Clark government to survive, as within a year of its first mandate the government was defeated over its budget, thereby allowing the Liberals, with the strong backing of Ontario, to come back to power with a majority government.⁴³ However, the Conservatives still retained strong support in the West⁴⁴, while the Liberals had the support of Ontario, Quebec and the Maritimes. Upon his return to power, Trudeau almost immediately implemented the National Energy Program (NEP), a policy designed to harness the rapid economic domination of the Western producing provinces and the oil companies. In 1979 Premier Davis of Ontario gave a speech denouncing the "community of communities" approach espoused by Clark, and argued that it was the duty of the Canadian government to remain the guardian of the interests of the whole country.⁴⁵ Additionally, a 1979 Ontario government policy paper counselled the federal government to "be prepared to use its declaratory power if necessary in order to fulfil its national responsibilities."⁴⁶ David Milne describes the correlation between the Liberal's return to power with the backing of Ontario voters and the introduction of the NEP as nothing short of "blatant" in that "...its political objective appeared to be aimed at undermining the economic foundations

of regionalism in both East and West, while shoring up the Liberal party and its political base in central Canada."⁴⁷

The official objectives of the NEP were threefold: to make Canada self-sufficient in oil by 1990; to achieve Canadianization of the petroleum industry; and to attain a better petroleum-pricing and revenue-sharing regime for the federal government.⁴⁸ In addition, the NEP called for 50 percent Canadian ownership in the petroleum industry by 1990, and allowed the federal government to increase its revenue share to 24 percent of all oil and gas revenues. The unofficial objectives of the program included the reduction of both provincial and corporate shares of price increases, while at the same time restraining price increases.⁴⁹ After the reinstatement of the Liberals in Ottawa, Ontario's strategy increasingly became one of identifying the interests of its economy with the national interest. Ontario's Premier Davis said that:

When massive and unprecedented interregional shifts of tax dollars threaten to distort the economy and enfeeble the capacity of our national economy to meet its national responsibilities, then provincial royalties are of legitimate national concern.⁵⁰

The federal government echoed Ontario's sentiments in its NEP rationale.⁵¹ They were afraid, along with Ontario, that greater wealth in the periphery would take the power from the centre, thus leading to the fragmentation of Canada. It is interesting that this fear was never raised when Ontario was holding the balance of power.

An angry Alberta Premier Peter Lougheed attacked Ontario, charging that:

...Ontario also argues that oil (and natural gas by implication) are somehow different in jurisdiction from other resources - so they want to change the rules of Confederation when circumstances suit them.

They try to argue that oil revenues do not belong to the owner of the resource - but this position doesn't apply to other resources - to Ontario Hydro or Quebec Hydro - but only Alberta's oil....⁵²

Alberta Energy Minister Merv Leitch argued that Ontario should not be complaining about paying the world price for oil when the rest of Canada has had to, since the National Policy was implemented, pay more than the world price for manufactured goods.⁵³ Saskatchewan Premier Alan Blakeney also made his province heard, "We in the West find it passing strange that the national interest emerges only when talking about Western resources or Eastern benefits. If oil, why not iron and steel products? If natural gas, why not copper?"⁵⁴ Clearly, it appeared to the western provinces that central Canadian natural resource wealth was never so aggressively taxed by Ottawa, and it also became apparent that excess wealth was allowed to accumulate only in provinces with substantial population share (i.e. Ontario and Quebec), not in the underpopulated peripheries.⁵⁵

In 1986 little appeared to have changed when oil prices began falling quickly. The producing provinces wanted price protection and intervention to keep the industry afloat, yet, at the same time, Ontario consumers wanted to reap the benefits of lower prices. Though it wished to maintain its support in the West, the Conservative government led by Brian Mulroney, had to take central Canadian interests into account, especially since the government was in the latter half of its mandate. Thus the introduction of the so-called "Ontario clause" in the Western Accord, which generally reduced or removed federal taxes on the oil and petroleum industry. The Ontario clause allowed Ottawa to intervene to prevent exports of

Canadian oil and gas in the event of shortages, and to limit the price of oil when it was deemed necessary.⁵⁶

V. Summary

Ontario is well aware of its political and economic strength, and does not hesitate to use it to gain provincial concessions. It also seems that Ontario is flexible enough, and concerned enough about its own welfare, to move quickly between a province-defending and a nation-defending stance:

The provincial government has been cross-pressured on many issues. It shares many interests with other provincial governments' resistance to federal intrusions; the desire for a greater share of resources to respond to the demands of provincial electorates; the pressure for expansion at the provincial level arising from the search for power and from the initiatives of a large, effective civil service, and so on. On the other hand, political and economic pressures lead to cooperation with Ottawa and deference to federal leadership.⁵⁷

On the surface, Ontario appears to be paradoxical in its actions. However, the effects of the two, for Ontario at different periods in its history, have been much the same in that both are geared to provide better terms for Ontario within Confederation.

Ontario's support for federal initiatives (and vice versa) have really only been evident since the 1970s during which time the threat of Western wealth and Quebec separatism have been at the fore of Canadian politics.⁵⁸ Similarly, H.V. Nelles asserts that:

We have recently become accustomed to thinking of Ontario as the most centralist of the provinces. That is in part because of the aberrant behaviour required by the energy crisis...and the threat of the

breakup of the country by Quebec separatism....And in the 1970s Ontario residents tended to identify themselves more strongly with the federal government than the province. This only confirmed eastern and western suspicions that deep down inside Ontario really thought of itself as Canada, suspicions often felt though rarely voiced. In such extremes Ontario's federalist interests were clear. But in more conventional circumstances Ontario is by nature decentralist.⁵⁹

Thus, it is possible to conclude that the federal government does, many times, and in many ways, work in Ontario's interest. However, Ontario also knows when to abandon its decentralist stance and support federal policies which it finds provincially advantageous. As this chapter has shown, while there have been conflicts between Ontario and the federal government, these conflicts are relatively minor--and often are resolved in Ontario's interest. It must be conceded, however, that Ontario's political and economic strength make it a difficult province to ignore. The fact that at least one-quarter of Canada's population resides in the province ensures that politicians will take Ontario's claims very seriously. Technically, as Dyck argues, a federal election could be won without Ontario; however, the odds of this actually happening, of the other regions' voters acting in a monolithic manner, are slim.

However, one myth which can safely be dispelled is that of Ontario as an objective "nation-builder". Certainly, Ontario does support nation-building, but only as long as this stance will provide it with the desired results. As Nelles has said, once the national interest is no longer consistent with Ontario's interest it will be abandoned in favour of a decentralist position.

ENDNOTES

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40. Ibid., 93.
41. Doern and Toner, 191 and 273.
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43. The Conservative government was defeated on its budget which called for an 18 cent increase in the price of oil. See R. Romanow, J. Whyte, and H. Leeson, Canada...Notwithstanding (Toronto: Carswell/Methuen, 1984), 56-57.
44. The Liberals had only two members (both from Manitoba) elected West of Ontario.
45. Doern and Toner, 277.
46. Ibid., 191.
47. Milne, 82.
48. Romanow, Whyte and Leeson, 14.
49. Dyck, "The Position of Ontario", 335.
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51. The federal government stated that, "The resulting inter-regional transfers of wealth are now so large, and growing so rapidly, that they have become a national issue." See Doern and Toner, 261.
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53. Ibid.
54. Ibid., 163.
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CHAPTER 4: BARRIERS TO TRADE

In an increasingly competitive world-trade environment dominated by large multi-national corporations, there is an incentive for product specialization on a nation-wide basis, one which becomes more important if the country is to fully benefit from economies of scale. A.E. Safarian warns of the impending danger of provincial barriers when he states:

The barriers to trade and investment in Canada are beginning to resemble those which exist on the international scene. Unable to utilize tariffs, quotas and certain kinds of indirect taxes for constitutional reasons, the provinces have developed partial substitutes by way of subsidies, regulation of industry, moral suasion, provincial private or public ownership, and other devices....But have we not travelled this road before? There are a substantial number of well-documented studies which clearly point to the unwelcome effects of prolonged protection of the Canadian market....Are we seriously proposing to travel that route in the smaller provincial markets?¹

This argument is all the more convincing when one considers the fact that when services are added to interprovincial trade it becomes slightly larger than international trade.² Therefore, from a national point of view one could argue that interprovincial trade distortions (or barriers) are potentially as significant as distortions of international trade.

This chapter will show that interprovincial non-tariff barriers are a detrimental aspect of province-building, and will consider Ontario as a specific example. Ontario is an unique example in this area as the province is generally committed to the

elimination of interprovincial non-tariff barriers. This policy is an example of province-building in itself in that, while Ontario can afford to survive within either a provincially protectionist or free market society, it would derive greater benefits from an open market within Canada. However, Ontario does not necessarily practise what it preaches regarding the elimination (or reduction) of barriers. Due to the fact that there appears to be no conclusive economic data regarding the economic losses of interprovincial trade barriers, this chapter will also take into account the more theoretical effects (ie. national unity) of these barriers.

The existence of interprovincial non-tariff barriers is a detrimental phenomenon as it makes the maximization of gross national product and specialization within the Canadian market much more problematic. The first section of the chapter will consist of an examination of barriers to goods, personal and labour mobility and capital (consisting of tax incentives and subsidies to firms by the provinces), as well as an examination of Ontario's industrial strategy. The second section discusses the more theoretical question of the overall desirability of these barriers.

I. Background

To begin, it is necessary to define exactly what a barrier constitutes. According to Courchene a barrier to trade is "a policy measure which leads to resources being misallocated either within or between provinces"³, for the purposes of this paper a barrier will be restricted to allocation between provinces. John

Whalley further defines "barrier" when he states that "a trade barrier impedes the free movement of goods and factors and results in smaller trade flows between provinces than would occur in its absence."⁴

Due to the allocation of powers in the Canadian Constitution Act 1867 (and 1982), the power to erect tariff barriers is given exclusively to the federal government. Conversely, the provinces are subject to Section 121 of the Constitution Act 1982 states: "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."⁵ However, as we shall see, the provinces have managed to effectively circumvent this section through the use of Non-Tariff Barriers (NTBs).

As we have seen in Chapter Two, the courts have restricted the federal government's Trade and Commerce power with the effect of making it difficult (if not impossible) for the federal government to eliminate these NTBs. An example of this is the Parsons case which set a restriction which forbids the federal government to regulate intraprovincial trade. The restrictions applied to this power can limit the federal power to reduce NTBs, as a barrier may only (and more often than not does) technically affect only intraprovincial trade.

It is difficult for the Courts to differentiate between policies aimed at regulation of intraprovincial and interprovincial trade. The answer to the question of when an intraprovincial regulation begins to infringe upon interprovincial trade is a difficult one to distinguish. This cloudy definitional area is exemplified by such phenomena as "spillovers", or the effects of one province's policies to enhance its

economy on the surrounding provinces. For example, if Ontario were to raise its minimum wage and jobs were lost as a result, job-seekers might flock to Alberta (or any other province) in search of employment, thereby putting a strain on the recipient province's social services. Thus, Ontario's policies, aimed only at the province of Ontario, have had an effect upon the economies of other provinces. Is the rise in the minimum wage, then, to be deemed strictly an intraprovincial policy?

The rise of province-building in the 1960s (led chiefly by Quebec and its Quiet Revolution) led to provincial determination to protect and promote their jurisdictions. The best way to protect a provincial economy was to insulate it from the actions of other provinces. The provinces do not possess the power to erect formal tariff barriers, which are one of the most effective economic insulators. The next most effective policy was to implement non-tariff barriers which would strengthen provincial industry while eliminating some other provincial competition within the province. Thus we see barriers to the movement of goods, persons and labour as well as capital. The Macdonald Commission warns of the dangers of this logic:

By preventing trade flows that would otherwise occur, internal barriers preclude gains from specialization and exchange. The region that imposes them will have to produce products or services itself, thereby using more resources than necessary because of its comparative disadvantage. The costs of the barrier...are equal to the difference between what could be produced or supplied if resources were allocated optimally and what actually is produced. This represents an economic loss in the sense that it involves real output foregone which can never be recouped. The greater volume of trade suppressed by these barriers, the more the potential benefits of an economic union will be dissipated.⁶

Various barriers to the movement of goods are perhaps the most obvious and harmful to the economic aspect of the Canadian union. The most often cited reason for this is that barriers tend to reduce the "surplus" generated by economic union. A surplus being "the amount by which the national income of Canada is larger than the total of the separate provincial incomes that would be achieved if the provinces functioned as independent national units."⁷ These surpluses can be generated in four ways: 1) gains from trade--this generally comes into play when a province has a cost or comparative advantage in a good or area; 2) the pooling of risk--this takes the form of support programs such as equalization payments; 3) the sharing of overheads--such things as infrastructure and collective assets; and 4) increased international bargaining power--individual provinces do not have as much international "clout" as the whole of Canada.⁸

Edwin Black and Allan Cairns argue that the impetus for the erection of trade barriers can be traced back to the fact that Confederation "was the accomplishment of a small group of elites who neither sought nor obtained popular support for the new undertaking...."⁹ More recently, this insular behaviour was reinforced in the post World War Two economic and social environment which allowed for regional disparities to be examined in a harsher light as concerns for equity between provinces and a more fair distribution of the economic benefits of confederation were demanded by the poorer provinces in particular.

Due to the existence of regional disparities (real and perceived) most provinces began to call into question the "national interest" represented by the federal

government in Ottawa. As will be shown, it appeared that Ontario benefited disproportionately from the policies which were deemed (by Ontario and the federal government) consistent with the national interest. Thus it seemed that the national policy itself had a regional bias in Ontario's favour. Other provinces felt compelled to counteract these measures with their own policies which sought to insulate their economies from perceived negative national developments¹⁰, while seeking to capture all the benefits of a particular economic opportunity. Although independent initiative would seem to appeal most to the poorer provinces, it was, ironically, the richer provinces who were more capable of affording a decentralized economic policy, and it is they who have since pursued this option most vigorously.

At present, Canadian provinces are doubtful of both the theory of surplus and the ability of the federal government to unilaterally alleviate regional disparities. There is a perception that the theory of equitable distribution of gains¹¹ among the partners of Confederation is not capable of being realized if left to the federal government. A popular notion is that if a province wishes to receive its "fair share" of wealth generated in Canada it must provide for itself.

It must be noted, however, that in the 1991 constitutional proposals there was a section dealing with the removal of barriers to trade among the provinces. The federal government proposed to give itself, with support of seven provinces with 50 per cent of the population (and an opting-out clause for dissenting provinces), powers to "exclusively make laws in relation to any matter that it declares to be for the efficient functioning of the economic union." The proposals also called for a

strengthening of section 121 of the Constitution Act 1982 by providing for a reduction of inter-provincial trade barriers. The proposals would ensure the enhanced mobility of persons, capital services and goods within Canada by prohibiting laws or practices of federal or provincial governments that would constitute barriers or restrictions to such mobility. This provision would allow for exceptions for the following reasons: national interest, legislation promoting regional development or equalization.¹²

The reaction to the broadened federal powers was negative, as the provision was seen as a "power grab" by the federal government.¹³ Similarly, the strengthening of section 121 met with a generally negative response. It appears that the less wealthy provinces are the ones making the most fuss given that they are the ones "where extra efforts must be made to produce jobs or bring in industry."¹⁴ The general consensus seems to be towards annual First Ministers' Conferences to deal with interprovincial trade barriers, as opposed to enshrining the concept in the constitution. Although there has been some talk of lowering interprovincial barriers to trade regionally, more specifically in the West and Atlantic regions, the only real barriers to come down to date are beer barriers within Canada.¹⁵ Ontario is the province which will have the most to gain by this policy change. Given the large Ontario market, it would make sense for brewers to serve several provincial markets out of Ontario.

Negotiations among the premiers regarding the removal of interprovincial barriers have been slow and they have given themselves three years to remove existing trade barriers. They have also committed themselves to including

"compliance mechanisms" in any deal.¹⁶ This is certainly a start; however, in the meantime there remain a whole host of barriers to trade within Canada.

II. Barriers to Goods

In the area of restrictions on the movement of goods, we see barriers which most commonly take the form of provincial government procurement policies, provincial regulation (for example, in the areas of transportation and marketing boards), natural resource policies and liquor policies. The Royal Commission on the Economic Union and Development Prospects for Canada, more commonly referred to as the Macdonald Commission, found that nearly two-thirds of all goods and services produced in a province were sold there. In addition, one-fifth of a province's total output moved across provincial boundaries within Canada, while 15% of output was marketed abroad.¹⁷ At first glance the significance of this breakdown does not seem so severe--interprovincial barriers to trade would only affect one-fifth of a province's production.

The amount may seem trivial, however, it must be taken into consideration that one percent of interprovincial movement of goods can be approximated to Newfoundland's Gross Provincial Product (GPP). If services were removed from this breakdown (justified by the fact that the large majority of services are consumed locally), it would be seen that only 44 percent of total provincial goods output is initially marketed within the province of origin (for a breakdown of each province's

destination of goods, see Appendix). More than one-quarter of the total amount of goods produced in Canada is shipped interprovincially.¹⁸

Provincial procurement policies are the first to be examined in the area of barriers to goods. Each province has some sort of restrictive governmental purchasing policy. Procurement policies are often difficult to identify as they tend to range from the subtle price premium to an outright limitation on bidding and or contract awards to local firms. This action is detrimental in that it discourages, and in some cases even prevents, companies located in other provinces from selling their goods and/or services to other provincial governments. This has the indirect effect of restricting labour mobility.

On the surface, Ontario has a procurement policy which is less stringent than many. In fact, Ontario has no explicit preference for local suppliers, a preference to Ontario firms comes into play only when their bids are competitive. However, this does not prevent Ontario from giving absolute preference to Ontario firms, such as in the case of a 1977 streetcar contract which was awarded to a Thunder Bay firm which submitted a higher bid than the Quebec firm of Bombardier. The reason given for the award was that Thunder Bay had a high level of unemployment at the time. At the same time, however, Ontario expressed its discontent with Quebec's protectionist policies.¹⁹ Most of the time, however, a ten percent preference is given to Canadian, not just Ontario, suppliers.²⁰ It must be borne in mind that it might be easier for Ontario to have a less explicit procurement policy due to the fact that most of Canadian firms and suppliers reside in Ontario.

Other procurement policies which can be, and are, used by provincial governments include: inadequate publicity or information on bidding, selective or single tender as opposed to public tender, short time limits for bid submissions, performance requirements tailored to what local business can provide, and residence requirements.²¹ Due to the fact that the larger provinces will necessarily have more (and most likely larger) projects upon which to bid, firms located within the boundaries of those provinces will find business to be much more lucrative than in the less wealthy provinces. In the case of most provincial public utility supply contracts, firms must usually set up a production facility in the province whose market they wish to have access to.²² This sort of action tends to harm economies of scale as firms which cater only to local provincial demand tend to find it too expensive to set up ten provincial factories when they could operate out of one in the area of their choice. In addition, forcing firms to meet smaller, local demand leaves them in no shape to compete on an international scale. This gives Ontario an advantage when attracting business, as it can offer them a larger provincial market than can a smaller, less populous province.

Regulation is another policy instrument which can be used as a barrier to goods. The first area to be examined under this heading is in the realm of transportation (primarily in the trucking industry). There are several areas in the transportation industry which can be regulated. One of these is economic regulation in which provinces apply different criteria to, or have different requirements for,

extraprovincial truckers than for intraprovincial truckers. There exist in Canada several sets of regulations for the trucking industry.

Examples of transportation regulation include such things as safety restrictions (the enforcement of which varies from province to province), and licencing. For example, in Ontario a household goods licence includes the transportation, within Ontario, of electronic components, but in Quebec, a household goods licence does not include the transportation of electrical components.²³ Policies such as these can be expensive, inconvenient and frustrating to truckers.

Another element of transportation regulation is weight and dimension restrictions. The prairie provinces, with their weaker road beds, have the lowest allowable weights; while the central provinces of Quebec and Ontario, with their more solid foundations, have the highest. In addition to weight, allowable dimensions (width and length) also vary from province to province; for example, the prairies allow longer vehicles than the central provinces.²⁴ These restrictions can cause countless problems for the trucking industry. Among them is the problem of going from provinces with higher allowable weights to those with lower. Oftentimes in order to be granted entry into the lower level province the truck must unload some of its cargo at the border and either go back for it or have another truck come and pick it up. This process can be costly and time consuming.

The final area of transportation regulation is that of fuel and sales taxes. For example, all provinces except Alberta tax diesel fuel. In addition, there is a variance in tax rates and the administration of the taxes--carriers must pay tax in each

province according to how much fuel was consumed within provincial borders. These forms can be quite detailed.²⁵

It can be determined that transportation regulation, of the trucking industry in particular, can be costly, time-consuming and inconvenient. Thus it can be said that transportation regulation is a definite barrier to the efficient flow of goods in Canada.

Once again Ontario maintains barriers to trade at the same time as it would prefer to lower these barriers.

Yet another element of interprovincial barriers to goods is that of provincial agricultural policy. One area within agricultural policy are the marketing boards. The purpose of a marketing board is to control the amount of production, the price and the factors governing the marketing of various products. Often a province will restrict sales and those who can sell certain products within a province.

In Ontario the milk marketing board regulates Ontario milk marketing. Under the regulations all producers must be inspected by provincial inspectors prior to selling milk in Ontario. However, the inspectors do not travel outside the province, thereby effectively ensuring that non-Ontario milk producers cannot sell milk in Ontario.²⁶ Thus, provincial marketing boards have the practical effect of restricting the free flow of agricultural goods across Canada. The fact that they are provincial in nature means that they will attempt to market the products which are produced by the province for whom they work. Here again, we see that Ontario, in protecting its agricultural producers, is behaving in a similar manner to other provinces.

Another example of an interprovincial marketing board dispute is the so-called "egg war", which took place in 1970, between Quebec and Manitoba. In this case the Quebec Federation of Producers of Consumer Eggs (FEDCO) employed a law to the effect that all eggs, wherever produced, had to be marketed by FEDCO if they were to be sold in Quebec. Manitoba responded by duplicating the Quebec regulations and submitted them as a reference case to the Supreme Court of Canada. The Court held that the regulations were ultra vires because in seeking "the best advantage for provincial producers" the regulations sought to limit interprovincial trade.²⁷ This only helps to secure Ontario's buy Canadian policy. The case, like others discussed in Chapter 2, helped to prevent the limitation of interprovincial trade.

In the product standards realm of agricultural policy there are also barriers. For example, Ontario has its own potato-grading system, as opposed to the Canadian grading system. The difference is that Ontario No. 1 potatoes are considerably smaller and less expensive than Canada No. 1 potatoes from other provinces. This gives an advantage to Ontario producers, as consumers often do not distinguish between the two No. 1s, and purchase the less expensive Ontario No. 1 potatoes.²⁸ Also with regard to product standards, there have been charges from other provinces (namely Quebec) that Ontario fruit and vegetable inspectors vary their behaviour depending on the supply situation in Ontario.²⁹

Agricultural support programs represent yet another facet of barriers erected via the agricultural policies of the provinces. Generally these programs have two elements; one being direct aid in the form of cash, crop insurance, loan guarantees

and capital grants. In addition to this there is also promotional support available, support which is provided primarily by way of advertising so as to differentiate between local products and out-of-province products.³⁰ It can be argued that these programs are merely economic supports, however, the fact that they too are provincially based makes them prone to provincial competition - whichever province has the most money wins.

Natural resources have always been a favoured and practical way for provinces to create and maintain development strategies in that they can be a substantial source of provincial revenue. The most common policies involve: taxes or royalties on resource income, an increased amount of processing of natural resources to be done within provinces, and terms and conditions in provincial government leases of natural resources which may restrict entry to local residents or impose obligations with regard to the processing of the resources.³¹ If properly exploited, resources can prove to be a significant non-tax revenue source for the provinces, "the ability of governments to tap this source frees other funds for the financing of otherwise inviable programs and allows governments greater freedom in tax policy and industrial incentives."³²

This was exemplified during the OPEC (Oil Producing and Exporting Countries) Crisis of the early 1970s. In this case rising oil prices were being passed on to eastern Canadians who received their oil from the west (Alberta and, to a lesser extent, Saskatchewan). At the same time, the United States was importing vast amounts of the relatively cheap Canadian oil. The Eastern provinces (especially Ontario due to its concentration of industry which relied heavily upon oil and gas)

complained about the high prices to the federal government. Ontario was the province which put forth a proposal to keep the domestic price low.

The national government reacted by creating a two-tiered price system; a lower, subsidized domestic price and a higher export price set at the world market price for oil. While the federal government claimed to be representing the national interest, Alberta and Saskatchewan were upset at having control of their resources taken away. However, the matter was temporarily resolved by allowing the oil producing provinces to: 1) take a larger share of total state revenues accrued from petroleum production; and 2) raise their oil rents.³³

In this case Ontario found that it was in its interests to lobby the federal government to act in the interests of Ontario consumers (many of them being in the industrial sector - a very important group in the eyes of both Ontario and the federal government). Ontario was not willing to allow the Western provinces to use their resources to benefit primarily their citizens at the expense of Central Canada. In this case it was (and still is) imperative to the Ontario government that energy resources flow freely.

Thus, natural resources can be seen as a major barrier and province-building tool in that a province can hold its resources "ransom" in order to influence policy to its favour. In addition, natural resource revenues can be rather lucrative and can be used for provincial development purposes.

Ironically, Ontario was the first province to use Section 109 (regarding provincial control over resources) of the Constitution Act to its fullest extent. It was

Ontario that originated the so-called "manufacturing condition" by ensuring that permits to cut wood on crown lands were only granted on the condition that the wood be sawed into lumber before being exported from the province.³⁴

Ontario is well known around the world for its creation of the provincially-owned hydroelectric company Ontario Hydro. Prior to this Ontario was highly reliant upon coal from Cape Breton, Nova Scotia and the United States. By exploiting its water resources in this manner, Ontario could ensure lower hydroelectricity rates to Ontario industry, thereby improving the competitive position of Ontario industry in relation to Quebec and the U.S. Ontario Hydro increased the self-reliance of Ontario and, "...also reinforced the uneven development and the concentration of Canadian industry in one province that had made it possible in the first place."³⁵ It appears that Ontario's demands for the free flow of natural resources depend upon their effect upon the Ontario economy.

Ontario and other provincially-owned hydroelectric companies are concerned about the Free Trade Agreement in that it contains a clause which prohibits governments charging more for energy in export markets than in domestic market. It is unclear whether this applies to Crown corporations.³⁶

Another example of interprovincial barriers to goods is liquor policy. All provinces have a monopoly on the sale of liquor. There are three ways in which provinces can and do discriminate against out-of-province producers. The first is the support of local products--examples of this include shelf positioning and price. The second is to impose a quota system on the sale of out-of province liquor, or the

levying of taxes on purchases. The third policy regards special packaging requirements which can make it too costly for other provinces to enter the provincial market.³⁷ Ontario and British Columbia (B.C.) provide good examples of these kinds of policies. Ontario has a policy which requires that all wines produced outside the province must list with the Liquor Control Board, whereas Ontario wines may also sell through their own retail outlets. Ontario wines can also be distributed in a wider range of sizes. In addition, the distribution of Ontario wines in high-volume provincial liquor stores is automatic, while it is up to the store manager to decide where out-of-province products will be carried. There has also been some speculation that Ontario wines may not be as rigorously tested as those from other provinces.³⁸

Similar policies can be found in B.C. For example, B.C. table wines are marked up by only 50 percent, while other provinces' wines are marked up by 110 percent. Also, non-B.C. wines must meet specific sales quotas or be delisted--such is not the case with B.C. wines. In addition, in B.C. liquor commissions, B.C. wines have access to approximately 25 percent of shelf space and are given preferential displays.³⁹ Policies such as these can be quite devastating to other liquor producers throughout the country. Provinces with large internal markets can afford to discriminate and be discriminated against with less financial impact than can provinces with relatively small internal markets. Ontario has a much larger internal market than does B.C., thus enabling it to call for the dismantling of trade barriers in areas including liquor.

As well, all provinces protect their domestic beer markets. If a company wishes to sell in a province, it must set up a production facility within the provincial boundaries. However, as noted above, this policy will fall on July 1, 1992.

With reference to the General Agreement on Tariffs and Trade (GATT), we see Ontario being the main province protesting the GATT ruling that states that Canadian wines are given unfair treatment. Here we see Ontario keeping out other provinces' wines as well as those from other countries.

III. Barriers to Mobility

The next barrier to be examined is that to personal and labour mobility between provinces. Technically, since the implementation of the Charter of Rights and Freedoms in the Constitution Act 1867, Section 6 of the Charter prohibits barriers to personal mobility within Canada. Writing in 1982, Emilio Binavince stated that, "mobility rights mean the liberty to acquire and use services and capital anywhere in Canada and to enjoy life anywhere in Canada."⁴⁰ In the same article he also states that for Section 6 to have any force existing provincial barriers must be challenged by the people and the courts must be willing to interpret the section in an "imaginative" manner (as opposed to a literal interpretation).⁴¹

In 1985, the Macdonald Commission wrote that not only is section 6 restricted by subsection 3,⁴² but often, "It is not always easy...to distinguish requirements which ensure competence from those which discriminate against non-residents seeking entry."⁴³ To prove its point the Commission cites a 1985 offshore resources

agreement between Canada and Newfoundland which calls for "first consideration" to be given to goods and services provided in Newfoundland where these are competitive in price, quality and delivery.

In addition, Newfoundland residents are to receive first consideration for training and employment opportunities "consistent with the Canadian Charter of Rights and Freedoms."⁴⁴ This is allowed by section 6 subsection 4 which allows provinces to pursue programs in the interest of ameliorating the conditions of socially and economically disadvantaged individuals when the provincial employment rate is below the national rate.⁴⁵

Other examples of limitations on personal and labour mobility include: preferential hiring practices, restrictive standards for entrance into occupations, and the licensing of trades. As noted above, preferential hiring practices are often associated with natural resource development (due to the fact that it is a provincial responsibility), and are often combined with provincial procurement policies. Alberta is a good example of this with its stipulation that for all projects requiring Industrial Development Permits, Forest Management Agreements, or Coal Development Permits, the applicant must agree to "the use wherever practicable of Alberta engineering and other professional services, as well as materials and supplies from Alberta."⁴⁶ In other projects the government of Alberta urges compliance with the above.

Yet another restriction to personal and labour mobility involves restrictive standards for entrance into occupations. The reason for this is a lack of uniform

standards from province to province, as well as a lack of reciprocity (for example, the recognition of out of province training or experience). In many provinces, occupations licences are issued. In Ontario alone there are 33 occupations which are subject to provincial licensing. This ensures that only Ontario residents with offices located in Ontario can work in the province.

In the professional realm there exist barriers in law, architecture, engineering and accounting to name a few. For example, in each province only persons enrolled in the law society and/or holding an annual certificate may practice there. British Columbia, Ontario, Alberta, Manitoba, Quebec, New Brunswick and Nova Scotia all require that lawyers have practised in their previous province of residence three out of the five years preceding the application, and they then must take an exam in provincial statutes in order to practise in any of those provinces. Otherwise the applicant must redo his or her articling and write the province's bar exam.⁴⁷

Skilled tradespeople are also subject to barriers as there is substantial variation among provinces with regard to the licensing requirements of occupations. Even unskilled workers can be affected by the provinces' barriers to labour mobility as was the case in 1977 when there was a dispute between Ontario and Quebec when Quebec, due to its residency requirements, would not allow Ontario construction workers to work on projects in Quebec.⁴⁸

Not only is labour mobility deterred by the variance in provincial policies, personal mobility, though to a lesser extent, is as well. Personal mobility is more likely to be affected by such factors as the portability of benefits (for example

Unemployment Insurance and private pension plans), language and culture and education--most notably in the post-secondary realm as out-of-province acceptance and financial procedures may be prohibitory. Additionally, Ontario's secondary school system is different from the rest of the country in that it still has a 13th year. As well, the Ontario Hospital Insurance Plan has a user fee depending upon the income of the user. As has been shown, Ontario has similar licencing requirements to those of other provinces.

IV. Barriers to Capital

The final set of barriers to be examined involve the free flow of capital. Unlike the other two barriers (goods and mobility) which attempt to keep out competition, capital barriers are not designed to keep capital out, rather the end is quite the opposite--barriers to capital generally take the form of incentives and subsidies whose purpose is to attract capital investment to the province in question.

Subsidies include financial assistance and industrial incentives such as grants, loans, loan guarantees, government provision of support services and infrastructure. Incentives are generally tax related and include extended tax "holidays" with no tax to be paid for a prescribed period of time, and tax deductions which are generally quite high. However, one should not make the mistake of believing that the end result is more positive than that of the other barriers.

The area of tax incentives and subsidies are a favourite tool of provincial governments due, in large part, to the federal government's perceived ineffectiveness

in alleviating regional disparities. Subsidies and incentives are offered by individual provinces in the hope of luring business away from other provinces, and thereby improving the standard of living and the level of employment in the province. Ontario, Quebec and Alberta all have separate corporate tax systems, leaving two-thirds of all corporate profits outside the agreement.⁴⁹ Each of these provinces is wealthy relative to the rest of Canada, thus, this wealth allows them the luxury of affording lower tax rates. In 1946 Ontario's Premier George Drew made a speech to the Dominion-Provincial Conference on Reconstruction in which he argued that Ontario must have its corporate and income tax fields back from the federal government (which took them over during WWII). These are good tools for attracting business. Business is attracted to provinces which can afford to keep their tax rates low, thereby allowing business to make a larger profit.

In 1975 Ontario temporarily suspended retail sales tax on motor vehicle sales (in order to boost production), but made it applicable only to cars assembled under the Canada-U.S. Auto Agreement of 1965. This initiative excluded the Swedish company of Volvo whose cars are assembled in Nova Scotia.⁵⁰ In this case, Ontario was using its wealth to look after its own interests (as most assembly plants covered by the 1965 agreement were located in Ontario) by attempting to ensure that sales did not drop and cause the auto companies to lay off workers or shut down assembly plants either temporarily or permanently. Unfortunately for it, the government of Nova Scotia would find such financial manoeuvres extremely difficult, if not impossible. Ontario has a greater tax base, yielding higher tax revenues,

thereby allowing it greater financial leeway than the significantly poorer province of Nova Scotia has.

In addition to tax incentives, there is a great deal of direct provincial financial support to industry. In 1979-80 the provinces spent approximately \$330 million on direct support, of which approximately one-quarter was taken up in direct cash transfers. As well, in 1977 provincial loans outstanding to business and industry amounted to \$779 million.⁵¹ This would be fine if the provinces were somehow coordinated in their spending efforts, but, in reality, what happens involves ten provincial governments competing for the attention of industry; true to form, business will then play off one jurisdiction against another in order to secure the best subsidy.

This sort of competition led the Nova Scotia government to enact restrictive labour legislation. This legislation was meant to prevent the organization of workers at specific factories; a weak labour force would help ensure sizable foreign investment.⁵² It appears that when it comes down to a financial battle to attract industry, those provinces which are underdeveloped and could use the boost from industrial location in the provinces are those who lose out, as they are also the ones who can least afford to subsidize industry.

Rather than sit back and be overlooked, provinces attempt to keep up with the other provinces in whatever way they can. This includes government departments and agencies whose objective it is to promote secondary manufacturing. In Ontario there are several. One example is the Ontario Development Corporation (ODC), whose is to provide financial assistance to manufacturers considering locating or

expanding in the province. Another example is the Ontario Ministry of Industry and Tourism (MIT) (established in 1972). This ministry's mandate includes: the creation of jobs, the sustenance of strong secondary industry, the assistance of small business and the development of export markets (this last point will be examined further in chapter four). While the ODC finances industry, MIT offers feasibility studies, technical data on plant location and the distribution of research on foreign trade and export possibilities.⁵³ The two departments complement each other in this way.

These departments in the Ontario government are part of the Ontario industrial strategy which came about as a result of rising energy prices and industrial decline experienced in the province in the early 1980s. The government of Ontario put together a five point strategy to protect its economy.

The first was to improve the business environment through taxation (incentives), deregulation and a reduction of government expenditures on non-economic development items. The second point was export promotion and import replacement - this would be done via trade missions abroad and a vigorous "buy Canadian" consumer awareness program. Thirdly, the province focused on North American industrial patterns, thus the creation of the Employment Development Fund (EDF) which was designed to offer industrial incentives. In 1979-80 the Fund had a \$200 million budget designed to "top up" existing provincial investment incentives. For example, the Ontario government gave Ford Motor Company a \$28 million grant to establish a plant in Windsor. In 1980 the EDF was replaced by the

Board of Industrial Leadership and Development (BILD) which had a 1980-81 budget of \$2 billion.

The fourth point in the plan consisted of a rationalization of Ontario's industrial strategy which included a concerted effort to reduce Ontario's dependence on imported oil and increased Research and Development and resource development programs. Fifthly, the government established private sector advisory committees on key industrial sectors. Ontario insists that it is a staunch defender of an open national economy, however, this is a fairly comprehensive industrial strategy for such a province as this is a strategy which is designed specifically to protect Ontario interests alone.

V. Barriers and Their Effects

The effects of the barrier-perpetuating actions of a large, wealthy province like Ontario are economically devastating to the smaller or less affluent provinces. Economic barriers require a full provincial treasury. Unfortunately, many of the smaller provinces have been driven to fight for their economic share within Canada at considerable expense (which they cannot afford). Although Ontario is seemingly a lesser offender when compared to other provinces, however it is still an accomplice to the perpetuation of the present economic barriers which exist among the provinces. It also has, and uses, the option of calling for an open interprovincial market. It is really the only province wealthy enough to have this luxury. While the provincial governments of Ontario have been preaching free trade within Canada on

the one hand, on the other they have been undercutting their neighbours to the best of their financial ability. Ontario feels that it must maintain its economic and political dominance within Canada, and is willing to do so even at the extra cost of implementing NTBs when it would be more economically viable for it to eliminate barriers. Economic and political clout go hand in hand, seldom is one possible without the other.

It is disturbing that the provinces insist upon perpetuating these barriers when the results vary from decreased international competitiveness (due, primarily, to diseconomies of scale), lower incomes and fewer employment opportunities for residents of all provinces. Add to this the fact that the tax burden for all taxpayers (both provincial and national) grows due to the higher cost of public procurement and lower tax yields⁵⁴, and one is left bewildered at the logic of the provinces. It appears that the long-term benefits of a barrier free Canada are being sacrificed for the short-term gains which satisfy the politicians.

One possible answer highlights the uncertainty and lack of cooperative measures among the provinces; it is a sort of deterrence theory--they perpetuate barriers due to the fact that they have no guarantee that other provinces will not put up barriers. In a scenario such as this, the province which did not implement barriers would be the big loser in the provincial game. In addition, provinces will implement barriers, fully aware of the negative consequences, provided the groups for which the legislation was created are net gainers.⁵⁵

Ontario has its fair share of barriers to goods, services, mobility and capital. However, at the same time, Ontario is the province most committed to securing interprovincial free trade. Ontario is the heartland of industrialization and manufacturing in Canada, and, therefore, wants to be able to sell its products within Canada and worldwide - barriers create diseconomies of scale thereby interfering with profit maximization. However, while Ontario sees the common market approach as helpful to its manufacturing-dominated economy, the other provinces see NTBs as the solution to a market-determined distribution of jobs, industry and wealth.⁵⁶

Because Toronto has become...the commercial and financial, as well as industrial, centre of Canada, it is the government of Ontario that is now most likely to find itself in conflict with other provincial governments over economic issues. Ontario imports energy and raw materials from other provinces and sells manufactured products to them, and both forms of interdependence create occasions for interprovincial disputes....Ontario and the economic interests which it represents are perhaps even more profoundly concerned by the tendency of other provinces to favour local manufacturers and establish barriers to the interprovincial movement of finished products, thereby fragmenting Ontario's markets. The fact that Ontario itself pioneered the practice of self-centred province-building does not make it any happier to see other provinces now following its example.⁵⁷

In terms of trade, Ontario has a deficit with the rest of the world, but has a surplus of trade with the rest of Canada. When services (internal) are added in, we find a large overall surplus (see Appendix).⁵⁸

While Ontario has publicly committed itself to the reduction of interprovincial barriers, it appears that the reality is that Ontario is not averse to using them in cases where they are the most effective tool to serve a purpose. A paradox appears

apparent, but one must bear in mind that both policies are province-building tools, though not necessarily in the traditional sense.

It is the unfortunate result of these zero-sum (meaning the benefit of one province to the detriment of another) provincial policies that they reduce both efficiency and surplus which should be generated by an economic union. In most cases the smaller, economically disadvantaged provinces lose out in such a competitive environment.

Policies which are intended to promote a province's interest through non-tariff barriers, often occur at the expense of other provinces. Due to the fact that the citizens of the affected provinces have no recourse in terms of voting, they often have an incentive to encourage their provincial leaders to retaliate in kind. If this sort of action continues the provinces run the risk of creating a vicious circle. Competition among them decreases the effectiveness of the economic union, forcing the provinces to develop stronger economic policies to fill the gap.⁵⁹ Professor Courchene has argued, "the nation is perched rather perilously at the precipice, where a further move in the direction of provincial protection might lead to a landslide of retaliatory measures."⁶⁰ However, it might be just as correct to say that Canada is presently in the midst of such a situation.

As we have seen, interprovincial barriers to trade are a fact of Canadian life. They constitute a key element in the broader picture of province-building, a phenomenon whereby each province asserts its autonomy as far as possible within its constitutional jurisdiction. One of the primary purposes of Confederation was to

create a collective economic surplus, yet it seems that with each new barrier between provinces a bit of national unity is being carelessly and thoughtlessly discarded.

Norrie, Simeon and Krasnick echo this sentiment:

...the freedom to move to any part of Canada, or to sell one's products anywhere in Canada without prejudice, is held to be an inalienable right of national citizenship. To compromise this is to compromise the nation.⁶¹

ENDNOTES

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45. Ibid., 299.
46. Trebilcock et. al., 272.
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59. Chandler and Chandler, 335.
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CHAPTER 5: PROVINCIAL FOREIGN POLICIES

As with many issues in Canadian politics, the federal and provincial governments view Canadian foreign policy in very different ways. While the federal government would like to be able to speak for the country as a whole, on many issues the provinces want to speak for themselves. The Canadian constitution, as will be shown, is not much help in determining the basis for either's claims.

This chapter will explore this particular Canadian quandary in international relations. More specifically, the chapter will examine the ways in which Ontario fits into the trend of provincial autonomy in foreign relations, and in what ways it is different from the other provinces in this realm. It will also be argued that there is an inherent danger in allowing Canada to have eleven different foreign presences. While the provinces should not be left out of the process (nor can they be due to legal considerations), their activity must be more effectively coordinated and the federal government.

Five sections will provide a complete picture of the existing situation. The first section examines the legal aspect; the second discusses federal and provincial arguments for jurisdiction; the third discusses provincial interest in foreign affairs; the fourth discusses the implications of provincial activity in this area; and the fifth examines the most common form of provincial foreign affairs activity, which is that of state-provincial relations between American states and Canadian provinces.

I. Constitutional and Legal Provisions

It is an unfortunate, but very real, circumstance of Canadian politics that the British North America Act says little or nothing about the jurisdictional claims of the federal and provincial governments in foreign policy. Section 132 of the BNA Act 1867 is the only reference made to treaty making powers; it reads:

The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.¹

However, this section is, for all intents and purposes, null and void due to the fact that Canada is no longer a colony of the British Empire. This fact only serves to complicate matters, as it leaves no explicit or express and effective constitutional reference point regarding foreign policy jurisdiction.

The jurisdictional question has now fallen to both the courts and federal-provincial compromise. In the re: Regulation and Control of Radio Communication in Canada case decided in 1932, the JCPC declared that federal legislation to implement a treaty fell under the Peace, Order and Good Government clause in Section 91.

However, the major case in this area is the A.G. Canada v. A.G. Ontario (Labour Conventions), or better known as the Labour Conventions case, of 1937. As was seen in Chapter 2, this case dealt with the "New Deal" legislation of the Bennett government; while the legislation was meant to be domestic, it had serious implications for Canadian foreign policy. Prime Minister Bennett based his legislation

on the convention adopted by the International Labour Organization (ILO), of which Canada is a member. The Ontario government felt that this constituted an unjustified intrusion into provincial jurisdiction, and the case eventually came to the JCPC.

In the time between the Radio and the Labour Conventions cases the JCPC's personnel had changed entirely. Ultimately, in the Labour Conventions Case the JCPC ruled in favour of the provinces. Lord Atkin, stated that:

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped.

But the legislative powers remain distributed and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by cooperation between the Dominion and the Provinces.²

The effect of this decision was to make treaties entirely subject to the division of powers under Sections 91 and 92.

While the judgement did not affect the federal government's right to make treaties, it did affect implementation--which was subsequently to rest entirely on the subject matter of the treaty.³ This meant that if the subject matter of a treaty fell under provincial jurisdiction (as set out in Section 92 of the BNA Act), it was then up to the provincial governments to implement the treaty's provisions in their provinces. The Court refused to consider the subject of treaty-making, they made it clear that in this case they would only consider the implementation of treaties.

The International Law Commission of the United Nations treads gingerly around the issue of federalism and foreign policy; Article 3(2) states that, "State members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits laid down."⁴ Thus, the Article simply hands the matter back to the countries in which the state activity originates.

II. Federal and provincial arguments for jurisdiction

One of the most common arguments put forth by the federal government is that, although section 132 is no longer applicable, the Royal Prerogative has fallen to the Governor-General as the Letters Patent was issued to the Governor General by the Crown in 1947. Also, in 1939 the British Parliament provided Canada with its own Great Seal. The federal government also goes back to the 1936 Supreme Court decision on the Labour Conventions case. The six man tribunal was split evenly in this case--three of the six justices, including Chief Justice Duff, argued that the authority to enter into international agreements rested with the federal government--even in matters within provincial jurisdiction.⁵

In addition, the federal government cites the international law of recognition which was given to Canada by Britain in 1926 at the Imperial Conference and by Washington in the form of the letters of credence accepted by the U.S. in 1926. Canada's independent declarations of war in 1939 and 1941 added to this recognition, as did the fact that Canada was accepted by the U.N. in 1946.⁶

One of the federal government's favoured arguments used to restrict provincial international activity is the international law of state responsibility. The consequence of this is that the central government is responsible if the component units default on international agreements or commit international torts. Also, the provinces have no means to back up their international actions as they cannot become parties to an action in the International Court of Justice, they have no recognized diplomatic corps or armed forces.⁷

The provinces, on the other hand, argue that matters which fall under their jurisdiction should be handled by them. They also argue that since they have the right to implement treaties in matters under their jurisdiction, it follows that they must also have the right to make treaties in the same areas.

III. Factors influencing provincial interest in foreign affairs

It is necessary to examine the impetus behind the provincial move into foreign affairs. One of the major reasons has already been discussed--the fact that the provinces wish to have supreme authority over matters within their constitutional jurisdiction. A second factor was the change of policy priorities during the 1960s, due mostly to "detente" (after the cold war). The significance of this lies in the fact that what was formerly considered "high" politics gave way to "low" politics.⁸ In other words, military-security problems gave way to economic and social concerns (both domestic and the development of the Third World).

The third reason is the expansion of what Munton and Levy call "political factors", namely the expansion of provincial responsibilities and spending power. Areas such as health and education became of major importance politically and economically, both internationally and domestically. This expansion of provincial powers came primarily in the 1960s with the new Quebec assertiveness (and the subsequent growth of provincial bureaucracies) as well as with the weakened position of the federal governments due to the prevalence of minority governments.⁹

Fourthly, a combination of the heightened importance of economic issues and existing regional disparities, brought on, in part, by a lack of effective provincial representation at the centre (ie. the Senate) led the provinces to look for ways to insulate and strengthen their individual economies. The differences in the structures of the regional economies and past federal actions left many provinces with the feeling that their interests would be sacrificed by the federal government in favour of representing Canada's overall commercial interests.¹⁰

Ontario, for example, looks abroad for both markets for its manufactured products as well as a source of investment dollars. Other provinces began looking to their natural resources as a way of increasing their fortunes. For example, the 1960s gave way to American affluence and a demand for Canadian raw materials. As well, with Japan's economic resurgence came a demand for Canadian lumber and fuel.¹¹ The resource rich provinces which had previously seen themselves as being exploited by the Central Canadian mercantilist system saw the demand for natural resources as a way of strengthening their economies. For provinces like Alberta,

whose fortunes it considered stifled by the federal government's policy of a low domestic price for gas and oil, the idea of expanding its economic opportunities abroad (in terms of foreign investment and export markets) was very tempting. Finally, the provinces argue that the Canadian (federal) embassies do not pass on adequate information quickly enough.¹²

IV. Implications of provincial foreign affairs activity

It is inevitable that provincial foreign activity has implications for domestic policy. Perhaps the most damaging implication of provincial foreign affairs activity is the potential for an internally competitive, contradictory and fragmented Canadian foreign policy. As seen in Chapter Three, the poorer provinces are always the losers when the provinces become competitive, as they lack the financial resources to strengthen their economies. Unfortunately, many of the wealthier provinces do not consider this to be a problem; an example of this attitude is the following statement by Quebec's International Relations Minister, "True there is competition among provinces....They take their share, we take our share. They win some, we win some. That's part of the game."¹³ A consequence of this sort of attitude is the fact that the poorer provinces (as well as the richer) begin seeking investment capital from external sources, and are not as concerned about its origin as its availability.

Due to their disadvantaged position within the Canadian union, the governments of the less affluent provinces, "sometimes attempt to secure from other countries the requisites of economic growth that they have hitherto been unable to

obtain through political action in the Canadian federal system."¹⁴ In order to attract this capital the provinces offer incentives to investors. However, the poorer provinces obviously cannot afford to bid in the same league as their richer counterparts; as a result, they often overextend themselves in a desperate attempt to secure investment.

Nova Scotia's Industrial Estates Limited (IEL), a development corporation operated by provincial businessmen, offers incentives in buildings, land, equipment and taxes in hopes of securing European and Japanese investment in the form of branch plants. They have had some luck in the form of Volvo (Sweden) and Michelin (France) plants. However, as mentioned in Chapter Three, one only has to look back to Ontario's policy in 1975, in which it temporarily suspended retail sales tax on motor vehicle sales applicable only to cars assembled under the Canada-U.S. Auto Agreement of 1965, to see the detrimental effects of provincial competition.

In areas other than foreign investment the provinces interests are still divergent. For example, Ontario and Quebec favour protectionist measures, while the West favours the General Agreement on Tariffs and Trade (GATT) policies. GATT would eventually lower tariffs--which would then bring Central Canada into line with the non-tariff protected western provinces. At present the tariff wall protects manufacturing located in Central Canada, but hurts farmers whose produce is not protected by the tariff, but rather is subject to world price. In Ontario's case GATT members France and Italy are upset with Ontario's promotion of its own wines in its liquor stores.¹⁵

Ontario was also one of the most vehement opponents of the Free Trade Agreement between Canada and the U.S. This opposition was based upon the fact that Ontario faced perhaps the largest adjustment challenge and the largest losses with free trade. The Ontario economic climate was quite good without a free trade deal, the province was experiencing a period of stability and prosperity while other provinces were not faring as well. In fact, free trade, it was argued, could upset the present stability and create new policy problems.¹⁶ There was the potential for jobs to be lost--Ontario was particularly worried about the U.S.-Canada Autopact--and with the lost jobs, political repercussions. Additionally, the province knew small business (which is generally the area of growth and corresponding growth in employment) opposed the deal.¹⁷ There was also, as stated in Chapter 4, some concern regarding the status of Crown-owned hydroelectric facilities. The province was unsure whether they would fall under the area which prevents governments from charging more for energy in export markets than in domestic markets.

An equally valid assessment of Ontario's opposition to the deal lies in the fact that Ontario stands to lose in any deal increasing north-south trade. At present, Ontario buys raw materials from other provinces, refines and manufactures it, and sells the finished product back to the same provinces at a higher price. Thus, Ontario benefits from the payments to the less wealthy provinces, as the money gives them more purchasing power which tends to benefit Ontario manufacturers. Increased north-south trade could significantly interfere with this profitable element of the status quo. With north-south trade, many goods will likely be purchased from United

States manufacturers at a lower cost than could be offered by Ontario. A result of this may well be increased opposition by Ontario to equalization.¹⁸

It is provincial attitudes such as Ontario's that cripple such collaborative mechanisms as the 1985 First Ministers' Conference agreement of "full provincial participation" in the Free Trade Agreement negotiations.¹⁹ Gordon Robertson asserts that we can see from the Free Trade negotiations the extent to which the provinces can limit the federal government's capacity to act effectively in foreign affairs.²⁰ In general, it can be argued that provinces are sometimes both unable and unwilling to take into consideration long-range and wholesale policies; instead they try to impose their own short-range and limited interests. It was seen in Chapter Three that this is indeed true, and one would have to be very optimistic to believe that this trend would be reversed in the realm of foreign affairs.

The greatest concern of the Canadian government when it comes to provincial involvement in the foreign affairs arena is that of a fragmented foreign policy. Justifiably, the federal government wants to avoid giving other countries,

an image of confusion and the impression that there are conflicts between different levels of government; because that could have implications in many other areas, like investments, for example. We must make sure that the constitutional conflicts which we understand, are not sometimes misunderstood outside the country and do not create an unfavourable impression as to the future of our country.²¹

Essentially, the federal government wishes to prevent potentially embarrassing situations.²² Who will speak for Canada if the provinces insist upon speaking for themselves?

While the provinces maintain that they prefer to work through Ottawa, they will only do so as long as it is effective in terms of cost and results. However, if Ottawa fails to deliver results for a province it will fill the gap itself, "a pragmatic province will not hesitate to employ other means, including ones that could create confusion abroad, reduce Canada's clout, and erode its sovereignty"²³.

While the federal government recognizes that it most likely cannot alter the chosen path of the provinces' international interests, it does attempt to forge greater cooperation and cooptation with them. Actually, External Affairs first approves the establishment of provincial offices abroad, and could make it difficult, if not impossible, for a province to operate outside Canada. However, "Commonsense suggests that a refusal would lead to a major federal-provincial dispute and would only serve to force a province to try alternatives, such as meetings in hotel rooms."²⁴

It is this de facto, if not de jure, power of the provinces which led the federal government, over the years, to acknowledge certain powers for the provinces in the area of foreign affairs. They are as follows:

- 1) the provinces have no treaty-making powers, but do have the right to enter into private commercial contracts with foreign governments and to make bureaucratic agreements of a non-binding nature with foreign governments.
- 2) they may open offices in foreign countries, as long as the office engages only in arrangements of a non-binding nature.
- 3) they have the right to be involved in the formulation stages of treaty making activities when the subject matter falls within provincial jurisdiction.
- 4) the provinces may be included in Canadian delegations attending international gatherings, and may play a role in formulating and enunciating the Canadian

position when the subject matter falls within provincial legislative competence.²⁵

The federal government seems to have realized that "the failure to anticipate regional interests in the formulation of objectives can increase unpredictability by encouraging regions to intervene during policy implementation stages."²⁶ This statement is clearly an attempt to reduce the unpredictability in the foreign policy-making environment.

While the recommendations set out by the federal government are a start, they do not really streamline or clarify the process. For one, the formula obliges Canadian diplomats to conduct two sets of negotiations simultaneously at international meetings (one with other national delegations, and one with the provinces). Secondly, the Canadian position on issues is not always as clear as it would be if the government were to speak for the entire country on all matters.²⁷

Some argue that Canada does have a federal structure and that the provinces should be able to represent their own jurisdictions in whatever way they see fit. Others argue that the federal government should be supreme in the area of foreign policy. Unfortunately, however, few foreign policy issues have implications for only one level of government; therefore, some sort of compromise is required. J.P. Schlegel states that legally and practically Canada should act as a single unit in its foreign dealings. Further, there should be no independent international acts undertaken by the provinces--even in areas under provincial jurisdiction; instead, the federal government should consult with the provinces in areas of their jurisdiction.²⁸

Similarly, Ronald Atkey argues that while the provinces may be allowed to participate in international conferences they should fully brief the federal government in advance (with the possibility of federal officials attached to the provincial delegation as independent participants). As well, the federal government should retain the right of invoking the overriding national interest clause. In terms of International Organizations, the provinces could possibly participate in an organization such as the Great Lakes Area Council (in which Ontario is presently involved), but they would not be able to participate in something such as the United Nations.²⁹

Schlegel's idea is a good one, however he neglects to mention the manner in which this consultation would take place. Atkey's, while interesting, is unlikely to gain provincial support with the provision of the federal overriding national interest clause. One solution would be that on a foreign policy issue which fell within provincial jurisdiction, the provinces would meet among themselves to negotiate a mutually satisfactory compromise. Then, representatives (perhaps two or three) elected by the group would take the compromise to the federal government and the negotiation process would be repeated. In the end, the actual international negotiations would take place through the federal government. This process should be made public, thereby making it difficult for either party to derogate from an agreement. Also, instead of having individual provincial missions abroad, they would work from within the Canadian embassy, positions which might be filled by federal officials.

V. Provincial activity in foreign affairs

Now that the legal and theoretical implications and complications have been set out, it is necessary to examine the provincial (Ontario in particular) activities abroad. Provincial activity in foreign affairs is not limited to one or two provinces, rather, all provinces have forayed into the area at one time or another. Quebec has led the way in pushing for provincial involvement in foreign affairs, and remains one of the most adamant proponents of this activity. Ottawa is especially wary of Quebec, as its motives are both cultural and economic. In the past, as well as the present, Quebec has, with the aid of France, attempted to establish an independent international presence--especially with reference to meetings of "la francophonie". The federal government is not an advocate of this, as it feels that it should represent all of Canada at international conferences, and that there is a fine line which separates business from politics. On several occasions there has been friction between Ottawa and Quebec in foreign affairs.

One of the first was the "Gabon affair" of 1968 in which Quebec, but not Ottawa, was invited to a Conference of Education Ministers. Quebec went even though it knew Ottawa did not wish it to attend, and Ottawa decided to break diplomatic relations with Gabon due to the perceived slight.³⁰ A similar incident several years later raised the ire of the federal government once again. On this occasion, in 1986, Prime Minister Brian Mulroney invited Quebec Premier Robert Bourassa to attend the first meeting of "la francophonie" (an organization of French speaking nations). The only condition was that Bourassa not speak unless he had

first consulted Mulroney. However, at the meeting Bourassa proposed a plan to distribute food to the Third World--a plan about which he had said nothing to the Prime Minister.³¹

While Quebec is not the only province to concern itself with cultural matters, the international interests of most other provinces, Ontario in particular, are primarily economic. While it has been noted that Ontario (and Alberta to a certain degree) has begun to take an interest in cultural matters in London, Brussels and Paris, its motives are, for the large part, economic elsewhere. Some of Ontario's non-economic/cultural activities include: the sending of aid to disaster victims (Italian earthquake) and giving educational grants for Canadian studies in the United Kingdom. However, it is interesting to note that the province, after having closed its Paris office due, partly, to financial constraints and partly to diminish the appearance of federal-provincial competitiveness, reopened it at Ottawa's request in order to offset Quebec's presence there.³² This action on Ontario's part may be interpreted as Ontario returning a favour to the federal government for its continued promotion of Ontario's interests in both the national and international arenas. As has been noted, Ontario is not a province which will do something for nothing--it would not open an office there unless it either had a lot to gain (which it apparently did not prior to Ottawa's request) or felt it was in a position where it must heed Ottawa's request. Alberta, while being predominantly concerned with industrial development and investment as well as energy, has started to show an interest in cultural, scientific, educational and technological exchanges.³³

However, the other provinces have not been shy about entering the foreign affairs arena, and today many have foreign affairs mechanisms which some claim will soon rival that of the federal government,

Given the range of joint understandings, agreements, activities, and even direct treaty involvement, it is difficult to discern the precise differences between the type of international activity pursued by the provinces and the type pursued by the federal government.³⁴

Most provincial governments have some bureaucratic mechanism relating to foreign affairs; however, the size of the department and its budget varies with the size and wealth of the province. Some provinces such as Quebec, Ontario and Alberta have large departments with relatively large budgets. Quebec has a separate Ministry of International Affairs with an annual budget of \$93.2 million, and keeps 26 provincial offices abroad with 326 employees.³⁵

Ontario has an Office of Intergovernmental Affairs which is divided into two branches--a Federal-Provincial and Interprovincial Secretariat, and an External Relations Secretariat. The 1980-81 budget of the Office of Intergovernmental Affairs was \$1 million, and five people were assigned to External Relations, and ten to the others.³⁶ In addition, Ontario keeps 16³⁷ offices abroad with 137 employees at a cost of over \$16.8 million.³⁸

However, it is interesting to note that even such an openly aggressive province such as Alberta has a foreign affairs mechanism which is smaller than that of Ontario. The Department of Federal and Intergovernmental Affairs has an International Affairs division which accounted for 40 per cent of the 1980-81 departmental budget, a total of \$1.2 million, and had five of the department's 30 staff.³⁹ Not surprisingly,

the departments and staff of other provinces' departments are significantly smaller, as in the case of Nova Scotia, a province which keeps an office in London, a small office in Boston, a "Permanent Representative" in Paris, and runs through a public relations firm in New York.⁴⁰ Additionally, there are token presences by Manitoba, New Brunswick and Saskatchewan, while Newfoundland and Prince Edward Island have no international presences at all.⁴¹ This comparison reflects the positive correlation between the wealth of a province and its ability to conduct foreign affairs; a province with slender financial resources such as Nova Scotia can hardly be expected to compete with Ontario, Quebec and Alberta.

It must be kept in mind that Ontario is very careful to avoid being seen as a province which challenges federal sovereignty in international relations. This delicate balancing act is exemplified in the quasi-paradoxical statement of an Ontario official in his attempt to explain the foreign affairs activities of his province:

An attempt is made...to explain to the host country that Ontario is a separate and an important unit of a much larger country and that it has certain responsibilities and powers and a very wide range of activities, which it can carry out on its own but in cooperation with and in support of Canadian missions.⁴²

One of the most noticeable symbols of provincial activity in international relations is the office of the agent-general. Most of the provinces have provincial "Houses" abroad, the objectives of which are primarily economic.⁴³ One of the primary roles of the agents-general is that of keeping their province in the minds of influential people in the country in which they are stationed. While Ontario Agent-General in Paris, Adrienne Clarkson managed to get the GEAC Computer

Corporation of Markham Ontario a joint venture with a French conglomerate to computerize the card catalogues of the French National Library. Since then GEAC has won other contracts in Europe. Clarkson also used her contacts to help Carlos Ott, a Toronto architect, win the competition to design the new Paris Opera.⁴⁴

Similarly, the Ontario Agent-General in London helped an Ontario computer firm land a \$14 million deal to sell microcomputers through a British firm. Ontario House provided people and support in an attempt to give "the company stature, the look of a seasoned, international firm which it most certainly was not."⁴⁵ Ontario's representative in Frankfurt contacts all German firms producing commodities for which Canada's imports exceed \$50 million per year, and invites them to set up business in Ontario.⁴⁶ There are many provincial emissaries such as Ontario House around the world. Surprisingly, New Brunswick was the first to station a representative in London in 1868. However, that same year Ontario, too, established an office in London. Quebec installed an Agent-General in London in 1874, Paris in 1882 and Belgium in 1911.⁴⁷ As of 1989, there were approximately 65 provincial offices abroad, from 31 in 1971.⁴⁸ For example, Ontario has six offices in the United States, one in Paris, London, Hong Kong, Frankfurt, Seoul, Singapore, Tokyo, Nanjing, Stuttgart and New Delhi.⁴⁹ Other active provinces include Quebec with 29 offices, Alberta with six, British Columbia with ten, Saskatchewan with four and Nova Scotia with three.⁵⁰

Other trade promotion mechanisms include trade forays and international actions by the premiers and ministers of a province. It is not at all uncommon for

either the premier of a province or his senior ministers to travel abroad in search of economic opportunities. From 1981-83 Ontario's Premier Bill Davis and/or his ministers visited the U.S., Australia, New Zealand and Western Europe. As well, in 1983 alone, Ontario hosted senior government officials from Asia, the Middle East, Eastern and Western Europe and Africa.⁵¹

Ontario Liberal Premier David Peterson made a three country (Switzerland, Britain and West Germany) European tour in February of 1988. The trips were made in an attempt to increase trade between Ontario and the European Community (Ontario's exports to the EC in 1986 were only slightly over \$2.3 billion, while its exports to the U.S. in the same year totalled \$56.2 billion), and to attract investment.⁵²

Provincial premiers are often treated in a similar manner to heads of state. For example, Peterson held private meetings with both British Prime Minister Margaret Thatcher and West German Chancellor Helmut Kohl. As well Peterson addressed the World Economic Forum in Davos, Switzerland. In his speech he extolled Ontario's virtues as an obvious North American base for investors due to its location, strong growth rate, growing high-tech manufacturing sector and deregulated financial services industry. Interestingly, at this Forum the federal delegation was smaller than that of Ontario.⁵³ This behaviour is often considered an affront to the federal government. The implications of provincial premiers being received in a similar fashion to heads of state are serious. This is an admission on the part of the

host country that they consider the provincial premiers to have economic power on par with the national government.

Again in 1989, Peterson made a four day visit to Paris, but this time a delegation of 40 high-level business executives accompanied him. The purpose of the visit was to forge links between Ontario and French firms in anticipation of the EC, and to lessen Ontario's reliance on the U.S. Ironically, although he opposed the Free Trade Agreement, Peterson told potential investors that it would give them access to the entire North American market.⁵⁴ Ontario, it seems, is willing to argue whatever case is necessary to further its economic interests.

A good example of provincial activity in foreign affairs is that of British Columbia and the Columbia River Treaty of 1960. BC's desire to have American assistance with the development of the Columbia River led to Premier W.A.C. Bennett making several trips to the U.S. during the Treaty negotiations.⁵⁵ BC has also had some success with its international endeavors, as it managed to secure the northeast coal megaproject, which contracts for the mining and shipment of coal to Japan, representing a total investment of \$3 billion.⁵⁶

Quebec provides a similar example regarding international diplomacy at the provincial level. After the Parti Quebecois 1976 electoral victory in Quebec, leader Rene Levesque addressed the Economic Club in the U.S. in an attempt to assure them that Quebec's separation from Canada would affect neither its economic feasibility nor the stability of the financial climate within the province. Prime Minister Trudeau was then forced to address the U.S. Congress assuring them of the

pre-eminence of Ottawa and the cohesiveness of the Canadian federation. Then, in an unprecedented event, Rene Levesque addressed the French National Assembly in 1977,⁵⁷ a privilege normally reserved for heads of state. In addition, Levesque managed to secure a commitment from the French government's aluminum company to build a \$1.5 billion smelter on the St. Lawrence.⁵⁸

Even the smaller provinces' premiers have entered the fray, as in the example of Nova Scotia's Premier Regan. In 1970 he travelled to Los Angeles to assure businesspeople and financiers that their capital was welcome (in the form of either branch plants or bonds). In 1971 he travelled to both Chicago and Europe in an attempt to secure "industrial development capital".⁵⁹

Alberta is definitely devoted to protecting its interests. In April of 1989 Minister of External Affairs, Joe Clark, expressed concern that Alberta had been attending meetings of the Oil Producing and Exporting Countries (OPEC) and the independent oil-producing nations. Clark preferred that Canada associate with the International Energy Agency as opposed to a cartel such as OPEC. Clark then asked Alberta not to attend these meetings. In response, Alberta Energy Minister, Rick Orman, argued that these meetings are critical to Alberta as they offer information and insight, and further, that Alberta has the right to take part at "the highest levels"; said Orman, "We have jurisdictional responsibility here,...We think it's important that we stand our ground."⁶⁰ While the other provinces are more aggressive--Quebec for cultural reasons, Alberta and B.C. for economic reasons, Ontario has no cultural interests, and, for the most part, its interests abroad are represented by the federal

government. However, when something is clearly in its interest, Ontario will step in. On occasion it will even be the initiator.

VI. State-Provincial Relations

By far, most of the provincial transnational agreements take place with the individual states of the United States. This is not really surprising, due to the geographical proximity of Canada and the United States. The prevalence of state-provincial relations reflects this, especially when one considers that many states and provinces have common boundaries. In fact, many provinces argue that Canada's east-west trading system is an artificial one. Both Alberta and the Atlantic provinces come immediately to mind, but other provinces share this view, and this is reflected in the abundance of state-provincial arrangements which presently exist. A 1976 study by Swanson found that there were 766 state-provincial arrangements⁶¹, a high number by any standards. While all Canadian provinces and all 50 U.S. states were involved, not surprisingly, 62 per cent of the U.S. action was taken by the 14 border states. Of those 14 states, Maine, Michigan, New York and Minnesota together comprised 33 per cent of the activity. On the Canadian side, Ontario, Quebec and British Columbia accounted for 61 per cent of interactions.⁶²

There are eleven functional categories; however, the bulk of provincial-state arrangements encompass the categories of transportation, natural resources, commerce and industry, human services and environmental protection.⁶³ While no single province was involved in all 11 functional categories, however, Ontario, BC

and Quebec are involved in 10. Ontario is involved in all but agriculture, with an emphasis on natural resources (the province has taken legal proceedings against foreign corporations polluting the Great Lakes), transportation, environmental protection, and commerce and industry. BC is involved in all except unclassified, with emphasis on transportation, human services, and commerce and industry. Finally, Quebec involves itself in all but agriculture, with emphasis on education and cultural, transportation, and commerce and industry.⁶⁴ In that most matters dealt with between provinces and states consist of simple, uncomplicated matters, it seems to suggest that most province-state interactions are of a rather pragmatic nature.

It is necessary to bear in mind that all state-provincial arrangements are not made via the same mechanism--in fact, there are three levels of interactions: 1) arrangements (informal); 2) understandings; and 3) agreements (the most formal). A full 70 per cent of the interactions are considered "arrangements", which include any form of written or verbal communications not expressed by the following two mechanisms. "Understandings", which include correspondence, resolutions, memoranda, etc. not jointly signed, but set forth regularized procedures between state and provincial officials, comprise 24 per cent, and "agreements", encompassing the remaining 6 per cent, are jointly signed documents which set forth regularized procedures.⁶⁵

In addition to telephone conversations and correspondence, most state-provincial dealings take place by way of bureaucratic ad hoc meetings, direct representation in the provinces and states via offices or public relations firms (mostly

for trade, tourism and economic development), "summit diplomacy" or meetings of governors and premiers, legislative exchanges, and the establishment of state/provincial joint organizations.⁶⁶ A good example of "summit diplomacy" is that of the annual meetings of the New England Governors/Eastern Canadian Premiers Conference. At the 1980 Conference a resolution (8-2) was adopted which would allow refined Canadian petroleum products to pass through to New England markets unimpeded.⁶⁷

Joint organizations include B.C.'s participation in the Memorandum of Agreement between BC and Washington State for joint efforts to handle oil pollution problems in adjoining waters. The local governments initiated a written agreement, thereby representing a claim to treaty initiation--an area normally reserved for international persons.⁶⁸ In 1950, the Ontario Hydro-Electric Power Commission and the New York Power Authority implemented a Canada-U.S. treaty regarding the diversion of the Niagara River via a memorandum of understanding.⁶⁹ Also, Ontario has signed protocols with Michigan and Ohio, and sells hydro-electric power on the basis of contracts to both New York and New Jersey, and has, with the federal government's blessing, lobbied Washington D.C. regarding acid rain.⁷⁰ Additionally, Ontario is involved in a joint U.S.-Canadian Great Lakes Commission. This makes Ontario is a member of a formal, international body.

It seems that neither of the federal governments is very concerned with these subnational agreements. In the U.S., although, as we have seen, the federal government has the treaty power, Congress has argued that the terms "compact" and

"agreement" do not apply to every compact or agreement.⁷¹ Basically, as long as the states do not try to increase their powers or encroach upon or interfere with federal supremacy, nothing is said.

Similarly, says T.A. Levy, "Canadian legal opinion is virtually unanimous in regarding these [arrangements and understandings] as something other than treaties."⁷² In general, Ottawa is willing to allow the provinces to pursue strictly economic objectives internationally, but not cultural or political. For example, at one time or another, for different reasons, Ontario, Alberta and Manitoba have requested permission from the federal government to set up offices in Washington; the answer they received was an unequivocal "no", as Ottawa feels that representation in Washington is more political than economic.⁷³

VII. Summary

The area of Canadian foreign policy is complicated to a great degree by federalism. The initial stumbling block being the unique Canadian problem with regard to jurisdiction of foreign policy at the federal and provincial levels. This lack of constitutional clarity has created many difficulties for both levels of government.

Valid are the more common complaints of problems regarding consultation with the provinces and the difficulties in reaching a compromise among all eleven actors. An example of this was seen in the provincial competition in the area of international relations. Although all provinces are attempting to enhance their trade options, the richer provinces can afford to have more trade offices and

ministerial trade forays abroad. Competitive bidding among the provinces exists in the form of attempts to lure foreign investment into a province as well as in the drive to secure export markets for goods.

As has been shown, all provinces are involved in the area of international relations in one way or another--this includes Ontario. In many areas of trade, Ontario sees the economic fortunes of both itself and Canada as being synonymous, thus it does not generally attempt to pursue non-economic objectives as does Quebec. Rather, Ontario's interests are economic, and the province has equipped itself with a large arsenal of foreign relations weapons, one which is second only to that of Quebec in terms of money spent and the number of trade missions abroad. Ontario is careful about stepping on federal toes in the foreign relations area, as it does not wish to jeopardize its close relationship with the federal government in this area. However, as exemplified by the number of trade forays embarked upon by various provincial premiers, if Ontario does not feel that its province is being well represented, it will not hesitate to forage on its own.

ENDNOTES

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2. Gordon Robertson, "Federalism, the provinces and foreign policy," International Perspectives, Sept.-Oct. 1987:3.
3. H.A. Leeson and W. Vanderelst, External Affairs and Canadian Federalism (Toronto: Holt, Rinehart & Winston of Canada, Ltd., 1973), 623. also see G.S. Mahler, New Dimensions of Canadian Federalism (Mississauga: Associated University Presses, 1987), 112. as well, for legal evaluations of the case see Hogg, op. cit. and Bora Laskin, "The Provinces and International Agreements," in Contemporary Issues in Canadian Politics, eds. F. Vaughan et. al. (Scarborough: Prentice-Hall of Canada, Ltd.), 125.
4. R.J. Jackson and D. Jackson, Politics In Canada 2nd ed. (Scarborough: Prentice-Hall Canada Inc., 1990), 633.
5. R.G. Atkey, "Provincial Transnational Activity: Approach to a Current Issue" in Background Papers and Reports, Vol. I, ed. Ontario Advisory Commission on Confederation (Queen's Printer of Ontario, 1967), 166.
6. Ibid.
7. Ibid., 167.
8. T. Levy and D. Munton, "Federal-provincial dimensions of state-provincial relations," International Perspectives, March/April 1976:24. also see T. Levy, "The International Economic Interests and Activities of the Atlantic Provinces," International Perspectives, March/April 1976:98.
9. Levy and Munton, 23-24.
10. H.J. Michelmann, "Federalism and international relations in Canada and the Federal Republic of Germany," International Journal, 41 (Summer 1986):548.
11. Levy and Munton, 24. also Michelmann, 560-61, and B. Hocking, "Regional Governments and international affairs: foreign policy problem or deviant behaviour?," International Journal, 41 (Summer 1986): 488.
12. Hocking, 488.
13. A. Cohen, "Too Many Cooks?," Saturday Night, 104 (September 1989): 22.

14. Levy, "Atlantic", 100.
15. W. Schabas, "Foreign Currency," Saturday Night, 99 (July 1984): 8.
16. S.M. Dunn, "The Free Trade Initiative and Regional Strategies," in Canada: The State of the Federation 1987-88, eds. P.M. Leslie and R.L. Watts (Queen's University: Institute of Intergovernmental Relations), 1988.
17. R. Simeon, "Federalism and Free Trade," in M.D. Henderson (ed.) The Future on the Table: Canada and the Free Trade Issue (North York: Masterpress, 1987), 86.
18. T.J. Courchene, "Forever Amber," in After Meech Lake, eds. D.E. Smith et. al. (Saskatoon: Fifth House Publishers, 1991), 43.
19. This agreement was made in Halifax at the 1985 First Ministers' Conference, and agrees on the principle of, "full provincial participation in the forthcoming trade negotiations between Canada and the United States and in the GATT...[and that the] preparatory work should include the determination of how best to give effect to the principle of full provincial participation in subsequent phases of the negotiations." See M.G. Smith, "Closing a Trade Deal: the Provinces' Role," Commentary C.D. Howe Institute no. 11 August 1986. and Robertson, 4.
20. Robertson, 3. In his explanation he refers to the fact that many of the areas which the negotiations concern are within provincial jurisdiction, thus leaving the federal government with little recourse but to negotiate with the provinces.
21. Department of Intergovernmental Relations, "Roles of the Ontario External Affairs Office," Foreign Affairs 23 January 1975: 4:12.
22. Such as that in 1947 at which time Canada was requested to vote in favour of a UN resolution calling for member countries to have the UN Charter and other important aspects of the organization taught to their children. Canada was unable to do this, as education is a provincial responsibility, and the federal government would not have been able to pass the legislation to implement the treaty in Canada. See Leeson, 513.

Another potential situation would be a scenario in which a province made an international agreement without reference to the federal government and another country violates that treaty. The other country could prepare a defence which declares that the agreement is ultra vires the province, thereby subjecting the Constitution Act to outside judgement (possibly at the International Court of Justice). See R.H. Leach, R.B. Riley, and T.A. Levy, "State-

Province Relations Across the Canadian Border," State Government Summer 1975: 154.

23. T. Keating and D. Munton eds., The Provinces and Canadian Foreign Policy (Toronto: Canadian Institute of International Affairs, 1986), 26.

24. Ibid., 47.

25. Jackson and Jackson, 634.

26. Hocking, 493.

27. D.C. Thomson and R.F. Swanson, Canadian foreign policy: options & perspectives (Toronto: McGraw-Hill Ryerson Ltd., 1971), 16.

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29. Atkey, 170.

30. H.A. Leeson, "Foreign Relations and Quebec," in Canadian Federalism: Myth or Reality, 3rd ed., ed. J.P. Meekison (Toronto: Methuen Publications, 1977), 514.

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

33. Ibid., 266.

34. Ibid., 267.

35. Cohen, "Cooks", 21.

36. T. Woolstencroft, Organizing Intergovernmental Relations (Kingston: Institute of Intergovernmental Relations, 1982), 125.

37. A.M. Jacomy-Millette, F. Coulombe and J. Lee, Canadian Provinces and Foreign Relations (Ottawa: Library of Parliament, 1990), Appendix.

38. Cohen, "Cooks", 21.

39. Woolstencroft, 125.

40. T.A. Levy, "Provincial International Status Revisited," Dalhousie Law Journal, 3, 1 May 1976: 106.

41. Cohen, "Cooks", 19.
42. Keating and Munton, 8.
43. The exception to this is Quebec, the government of which tends to pursue cultural, as well as economic, objectives.
44. A. Cohen, "Down But Not Out In London and Paris," Financial Post, 79, 21 December 1985: 17.
45. Ibid.
46. Michelmann, 561.
47. Leeson, 520.
48. A. Cohen, "Provinces are encroaching more on federal territory" Financial Post 83 no. 26, 3 July 1989: 13.
49. Jacomy-Millette et. al., Appendix.
50. Ibid.
51. Feldman and Feldman, 265.
52. Matthew Horsman, "Peterson makes European trade foray," Financial Post, 82 no. 3, 1 February 1988: 13.
53. Ibid.
54. John Daley, "Champagne diplomacy," Maclean's, 17 April 1989: 39-42.
55. P.R. Johannson, "Provincial international activities," International Journal, 33, Spring 1978: 360-68.
56. Feldman and Feldman, 264.
57. D.B. Dewitt and J.J. Kirkton, Canada as a Principal Power (Toronto: John Wiley & Sons Canada Ltd., 1983), 190.
58. Schabas, 7.
59. Levy, 103.
60. Cohen, "Provinces encroaching", 13.
61. Information for this section came primarily from R.F. Swanson, "The range of direct relations between states and provinces," International Perspectives, March/April 1976: 18., and R.F. Swanson, The U.S.-Canada Relationship at the State/Provincial

Level: A U.S. Perspective (Winnipeg: The Natural Resource Institute, 1976), and Levy and Munton, 23-7.

62. Ontario led with 29%, followed by Quebec with 19% and BC with 13%. Other provincial action includes New Brunswick with 11.5%, Manitoba with 9.5%, Saskatchewan with 6.6%, Alberta with 5.5%, Nova Scotia with 3.6%, Prince Edward Island with 1.2%, and Newfoundland with 0.58%. See Swanson, "U.S.-Canada", 34.

63. Transportation accounted for 28 per cent of the arrangements; natural resources for 20 per cent; commerce and industry for 10 per cent; human services with 10 per cent; environmental protection with 9 percent; education and cultural affairs with 6 per cent; energy with 5 per cent; public safety for 5 per cent; agriculture for 4 per cent; military and civil defence with 2 per cent; and unclassified with 3 per cent. See Swanson, "direct relations", 18.

64. Swanson, "U.S.-Canada", 35.

65. Swanson, "direct relations", 19.

66. Ibid.

67. Leach, Riley and Levy, 151.

68. P.R. Johannson, "British Columbia's relations with the United States" Canadian Public Administration

69. Levy and Munton, 23.

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71. Swanson, "U.S.-Canada", 3.

72. Levy, 98.

73. Schabas, 8.

CHAPTER 6: CONCLUSION

Aside from the proven negative economic (and in some cases, political) effects, province-building has prevailed as the most common provincial "equalization formula" in Canada. It is the one way in which the provinces can attempt to insulate their economies from the rest of the country in their attempts to improve the quality of life for their citizens. This behaviour can be partially attributed to the fact that the prevalent theory of regional comparative advantage has not effectively obtained economic security for all regions of the country. Thus, the provinces have turned to the option of trying to provide for themselves what the Canadian economic union has failed to provide for them.

There is no doubt that the dominance of Ontario in Canadian political and economic life has been a precursor of province-building in general. This was exemplified in the introduction of the National Policy. In reality the only province this policy benefited was Ontario, and to a lesser extent, Quebec. The peripheral provinces were the ones who paid the economic and political price of Ontario's success and continued dominance of Canada. The National Policy allowed Ontario manufacturer's to remain competitive within Canada as a tariff on imported goods was implemented. It was the consuming provinces who felt the negative effects in the form of higher prices for goods.

The other provinces see themselves as being too dependent upon natural resource exploitation and primary industry in general, while Ontario has received both most of the secondary manufacturing and service sector industry, and protection of the same. This leaves the other provinces victim to the cyclical nature of their unprotected industries. They are also caught in the mercantilist trap which was a result of the National Policy, a policy devised by Ontario and the federal government--Ontario purchases raw materials from the less fortunate provinces, processes them and sells them back to the same provinces at a higher price.

The discontented provinces then begin to insulate their economies from negative economic effects. As has been shown, provincial efforts extend from economic barriers to foreign policy initiatives. Unfortunately, these barriers do more harm than good as they destroy the benefits which can be enjoyed by regional specialization. As well, they are costly; thereby ensuring that those provinces which have greater financial resources in the first instance can better insulate their economies with less of an economic effect. These are the provinces who tend to opt-out of national programs, feeling they can offer their residents better service themselves as they can top-up federal compensation packages with their own money--thereby leaving legacies of differentiated services throughout Canada.

Contrary to popular belief, however, it is not only the less fortunate provinces which espouse the concept. Alberta, British Columbia and Ontario, the most affluent provinces in the country, have been perhaps the most effective province-builders of all.

Most provinces are relatively blatant about their objectives in this area; Ontario, however, has moved from a confrontational stance toward the federal government to a different sort of province-building, one which is a little more surreptitious--Ontario has, of late, chosen to province build under the guise of nation-building. Ontario has fairly consistently maintained a policy which is essentially of a province-building nature.

In the early years of Confederation Ontario was known as the protector of provincial interests. The province (especially under Premier Oliver Mowat) would not hesitate to take legal action against the federal government in order to achieve its own, some might say self-serving, goals. With the help of the Judicial Committee of the Privy Council, which was extremely responsive to Ontario's appeals, Ontario has had a large hand in ensuring that the federal government's residual powers were severely limited. This was especially true in during Mowat's reign in Ontario. During this time the province appealed many cases to the JCPC, however it only appealed those which it was almost completely certain it would win. Ontario quickly became the provincial-rights voice in Canada. If any province was willing to take on the federal government it was Ontario.

Ontario's initiative in these legal matters led to the significant limitation of the federal government's expansive and residual powers. The Trade and Commerce Power has been curtailed through Ontario's involvement in such cases as Parsons and the Insurance Reference cases in the early years of Confederation.

Similarly, the Peace, Order and Good Government clause has been diluted to the point that it has become little more than an "emergency" power. This trend began with the 1921 Board of Commerce case it was here that the emergency doctrine was built into the p.o.g.g. power. The federal government has never managed to recover this power, even when the Supreme Court became the final court of appeal. Thus, the legacy of the JCPC, and Ontario's influence upon it, has left a distinctively provincialist mark on the interpretation of, and subsequent exercise of, the federal government's powers regarding the BNA Act.

Ontario, during the reign of the JCPC, relied very heavily upon judicial interpretation in order to achieve its province-building initiatives. However, with the ascent of the Supreme Court of Canada to the status of the final court of appeal in Canada, Ontario has not fared as well. The Supreme Court appears to be attempting to balance its decisions between the federal and provincial governments more carefully than did the JCPC. This has taken away a province-building tool from Ontario; the result has been that Ontario has compensated by attaching its interests to those of the federal government.

At this Ontario has been very successful. This success is due, in large part, to Ontario's electoral and economic strength within the Canadian federation. Given that Ontario has over 25 percent of the population of Canada, and contributes over 40 percent to our Gross Domestic Product, Ontario is a rather formidable player in the Canadian political arena. While it is possible for a Canadian federal election to be decided against Ontario's wishes, it is an unlikely scenario.

An example of Ontario's influence on the federal government is the National Energy Policy (NEP). Former Prime Minister Joe Clark lost the 1980 election, due, in large part, to Ontario's opposition to his energy stance. Pierre Trudeau won that election, and soon after implemented the NEP which, among other things, controlled the domestic price of oil and gas. This was an initiative demanded by Ontario.

This is not to say that the interests of Ontario and the federal government are monolithic, for they are not. Ontario's opposition to the free trade agreement is indicative of this. As is its position on equalization. Although here the federal government has gone to great lengths to appease Ontario by doing such things as broadening the base of the formula to include natural resources. This has served to decrease the amount of money spent on equalization payments. Ontario's grudging acceptance is based primarily upon the positive second-round spending effects on the Ontario economy. However, increased north-south trade, at the expense of east-west trade, under the Free Trade Agreement may reinforce Ontario's resistance towards equalization.

The use of non-tariff barriers to insulate provincial economies are a major factor in any provincial industrial strategy. To be fair, it must be stated that all provinces have implemented such barriers. Despite the fact that analysis has shown that the effects of these barriers is detrimental to all concerned, they remain intact. Non-tariff barriers have been shown to, in most cases, drastically reduce economic efficiency by forcing businesses and governments to cater to a significantly smaller

market. As well, these barriers limit the movement of people, goods and capital, something which is not desirable in an economic union.

It is ironic that, in many cases, these barriers tend to perpetuate the very inequalities which they are attempting to counter. As with many areas of Canadian politics, it is the wealthy provinces which are the ones who implement the most elaborate provincial industrial strategies. However, barriers remain in existence due primarily to the provinces' wariness of each other's motives. No one will be the first to eliminate, or even reduce, its barriers as it would be the one which would suffer the most dire economic consequences if the other provinces were not to follow in suit. This applies to Ontario as well. Ontario is the province which stands to benefit the most from the lowering of NTBs; however, Ontario, given its economic strength, can afford to prosper with or without NTBs.

Ontario provides as many examples of inter-provincial barriers as any other province. Ontario has, for example, taken a very insular approach in its liquor and agricultural marketing board policies. At the same time as it is calling for economic openness, Ontario is busy using such barrier-perpetuating economic tools as tax incentives and subsidies to lure business into its provincial sphere.

This denial of any provincial self-interest, not accidentally, has tended to aid Ontario in its quest to increase its exports to the rest of the country. It is much easier for Ontario to declare that it will not favour its province in its procurement policies, and instead offer a 10 percent preference to Canadian suppliers, when most Canadian industry is located in that province. Due to this concentration of industry

in Ontario, other provinces have become wary of the Ontario-supported "buy Canadian" policy of the federal government.

Due to the lack of clarity in the Canadian Constitution, province-building has extended into the realm of foreign affairs. Even Ontario does not leave its foreign policy objectives completely in the hands of the federal government, arguing that often important information regarding provincial interests is not sufficiently adequate, nor is it passed on to the provinces quickly enough.

However, unlike provinces such as Quebec, Alberta and British Columbia, Ontario is more likely to allow the federal government speak on its behalf. As with Non-Tariff Barriers, this is not for lack of a provincial foreign policy mechanism (as in the case of Newfoundland and Prince Edward Island), rather, it is due to the fact that the international aims of Ontario and the federal government are often similar. Ontario's foreign policy objectives are primarily economic in nature, and given that Ontario is the established industrial heartland of Canada, the federal government is often in the position of luring business to that province.

Ontario does maintain a substantial foreign policy presence, and if, the province does not consider its interests well-represented by the federal government, it will use its own resources. The desire for as much economic prosperity as possible motivates the governments of Ontario as much as any other provincial governments.

At present it appears that the federal government cannot remove the provinces from the foreign policy realm, especially in areas falling under provincial jurisdiction. However, jurisdictional questions aside, it is necessary for the federal

government to be the sole voice in Canadian foreign policy. That is not to say that the provinces should not have any input, however, their input must be made, and taken into account by the federal government, prior to any international meetings.

Ontario claims to be a nation-builder as opposed to a province-builder. In some instances this certainly is true. However, when one examines the province's motives, they are confronted with the discovery that this nation-building stance is often little more than a well-disguised province-building policy. It has been shown that Ontario is by nature provincially oriented, but that it will use the federal government whenever possible, and will altruistically deny any provincial motivation.

The losers in this situation are the provinces with smaller fiscal capacities. They cannot afford to compete with their richer provincial counterparts in such matters as using financial incentives to lure business into their province. The real losers in all of this are the Canadian people--they are the ones whose goods cannot necessarily be distributed throughout the country, the ones who, may not be able to move from province to province in search of work due to, for example, hiring restrictions or educational inequalities.

Various Ontario premiers have used everything from mild coercion to threats of political, legal and/or economic action. Ontario has always been the dominant economic and political force in Canada, and it does not intend to give up that privilege easily. Thus, far it has been very effective in achieving its goal.

Aside from what the province would have Canadians believe, the only real difference between the province-building actions of Ontario and those of, for

example, Alberta, is that Ontario is the only province which has managed to equate its own interest with that of the country as a whole. The province has, at times, cleverly disguised its own provincial ambitions as being the national interest. The image of Ontario as a nation-builder is quickly being eroded as it pursues this image only at such times as it finds it beneficial to its own political and economic structure.

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APPENDIX I

Destination of Goods by Province 1979

	('000 \$ and per cent)			
	Total	Within Province	Rest of Canada	Exports
	Per Cent	Per Cent	Per Cent	Per Cent
Newfoundland	100	28	21	51
P.E.I.	100	40	39	21
Nova Scotia	100	40	34	26
New Brunswick	100	29	29	42
Quebec	100	48	28	24
Ontario	100	47	25	28
Manitoba	100	35	41	24
Saskatchewan	100	25	29	46
Alberta	100	39	34	27
British Columbia	100	45	15	40
Yukon & N.W.T.	100	31	8	61
Canada	100	44	27	29

Source: Statistics Canada, Input-Output Division, Interprovincial Trade Flow Data, 1979.

Note: Totals may not add to a hundred because of rounding.