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**CAN FEDERAL STATES SURVIVE THE TWIN TENSIONS OF
REGIONALISM AND GLOBALIZATION?**

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Given the difficulty of governing a diverse federal state like Canada, is it possible for the nation state to survive the twin tensions of regionalism and globalization, or is it true that, as the relevant spheres of human activity become both larger and smaller than the nation state, the very concept of the nation state will be relegated to history? At first blush, the challenges of building, in a federal state, an economic union that is strong enough to protect the interests of its citizens within an increasingly global web of trade liberalization agreements may seem overwhelming. However, I would suggest that the very existence of an economic union in Canada that has functioned for 133 years argues that it is possible for the nation state to manage these tensions in a way that will ensure its survival, as long as it has the political will to do so.

Should one wish to create a situation fraught with dynamic tensions, one likely could do no better than the Fathers of Confederation did in 1867, at least as their words have been interpreted by judges over the subsequent decades. The Fathers of Confederation knew that, to survive as a sovereign state, the then colonies of Great Britain had to provide the new central government with enough economic clout that it could act as a sovereign power on the North American continent, rather than as an economic or political colony of the United States. Therefore, they provided the federal government with what they expected would be sweeping powers over the economy of the new federation, for example by giving it jurisdiction over trade and commerce.

At the same time, though, the Fathers of Confederation needed to provide the provinces with the power to protect their local distinctiveness and local ways of life. The colonies that originally formed Canada had their own long histories, unique economic circumstances, and distinctive regulatory regimes to respond to these local economic conditions. To preserve the distinctiveness that is, after all, the reason for creating a federation rather than a unitary state, the provinces were assigned jurisdiction over “Property and Civil Rights in the Provinces” in section 92 (13).

Because of the imprecise nature of the words used to describe the federal and provincial jurisdictions, interpreting the limits of each government’s jurisdictions is more art than algebra. When assertions of jurisdiction come into conflict, each jurisdiction is interpreted (and has been many times re-interpreted) in light of the opposing power, often on the basis of the judges’ understanding of what is good for the federation in the circumstances. As well, governments have avoided the full implications of judicial decisions on these powers by negotiating intergovernmental arrangements to better balance the need for a sufficiently

integrated national economy and distinctive local economies.

Federal and provincial efforts to regulate the exploitation of natural resources in the 1970s and 1980s provide an excellent case study of both the importance of balancing national and regional interests in a federal state and the role of the courts and intergovernmental negotiations in achieving this balance. In the 1970s, the federal government undertook two very significant regulatory interventions in the oil industry, initially to encourage the development of domestic oil reserves by preventing the sale of imported oil west of the Ottawa River and, later, to limit oil price increases for Canadian consumers and take any windfall profits for the federal treasury. The first initiative was the subject of litigation in the case of *Caloil Inc. v. Attorney-General for Canada*. In deciding this case, the Supreme Court of Canada found that the federal requirement that licences to import gasoline include the condition that no imported gasoline could be transported west of the Ottawa Valley line were within the federal government's authority. Their rationale was that these licensing requirements were incidental to the effective control of international trade in gasoline so as to foster the development and utilization of domestic oil. The second initiative, called the National Energy Program, was also within the federal government's constitutional jurisdiction but continues to be a touchstone for western Canadian anger over federal intervention to regulate Western Canadian resources for the benefit of Central Canada.

As government regulation of the economy became more extensive in the post-World War II era, provinces, too, began to assert their authority to regulate their economies for the advantage of either provincial economic growth or provincial government revenues. These efforts focussed on the regulation of the provinces' natural resources, first in Western Canada and later, as off-shore oil and gas reserves were found, in Atlantic Canada. This created a situation in which the courts were asked to resolve the tension between the provinces' assertion of their right to regulate the conditions under which their resources can be exploited – claimed by the provinces to be a clear exercise of their authority over property and civil rights, as well as their authority to levy direct taxes – and the federal assertion that, as these were directly aimed at affecting the terms of interprovincial and international trade in these resources, the provinces were attempting to act in an area of federal jurisdiction. Two Saskatchewan cases, *Canadian Industrial Gas and Oil v. Government of Saskatchewan* and *Central Canada Potash Company Ltd. and Attorney-General of Canada v. Government of Saskatchewan*, played a prominent part in this debate. In both of these cases, the Supreme Court of Canada declared Saskatchewan's actions to be unconstitutional. These decisions, when combined with the *Caloil* decision, were perceived by the Western provinces to seriously unbalance the relative scope of federal and provincial regulatory authority over the economy.

The Supreme Court's treatment of the provinces' attempts to manage their resources led to a strong push by the western provinces, during the constitutional debates of the 1979 to 1981 period, to include a constitutional amendment that reversed the Supreme Court decisions. These negotiations were largely successful for the provinces and led to s. 92A of the Constitution, which somewhat expands the provinces' authority to regulate their natural resources beyond what the Supreme Court of Canada had previously decided was

constitutionally possible. Section 92A is a prime example of an intergovernmental agreement being used to rebalance the division of powers between the federal and provincial governments when court decisions had put the powers out of balance.

A similar story occurred later in Atlantic Canada, over offshore oil and gas rights, after major oil and gas discoveries were made off Newfoundland and Nova Scotia. In 1984, the Supreme Court of Canada decided, in *Re. Newfoundland Continental Shelf* that resources beneath the territorial waters off Newfoundland belonged to the Government of Canada. As Atlantic Canada is a less-developed region of the country, however, and as Atlantic Canadian governments were, for the most part, of the same political affiliation as the federal government of the time, the federal government negotiated an intergovernmental agreement, the Atlantic Accord, with the provinces of Newfoundland and Nova Scotia. This provided those provinces with some regulatory authority over and, more importantly, some of the royalties from offshore oil and gas development. As with section 92A, governments used the mechanism of an intergovernmental agreement to rebalance the division of powers when a court decision had put the powers out of balance.

In contrast to these examples of the successful conclusion of intergovernmental agreements to retain a balance between federal and provincial powers, the federal government has also twice sought to reduce the scope of provincial powers over the economy through constitutional amendment. In each case, the federal government has failed because of strong provincial appeals to the importance to the federal principle of keeping competing federal and provincial objectives in balance. The first of these attempts came during the constitutional negotiations of 1979 to 1981, when the federal government sought an explicit constitutional amendment granting them power to regulate the national economy.

By 1992, when the federal government again wished to alter the balance of authority to regulate the economy within the federation as part of a proposed constitutional amendment package, its tactics were more subtle. Instead of directly seeking federal powers over the economy, the federal government proposed to amend section 121 to prevent all forms of interprovincial barriers to trade. The problem, as we know from debates over international trade agreements, is that one government's barrier to trade is another government's legitimate regulation. Thus, the effort to amend section 121 became bogged down in an endless debate over what did and did not constitute legitimate regulation.

As the draft legal text of the new section 121 became ever longer and more complex and as it came to be seen as protecting more practices than it eliminated, the federal government abandoned the whole idea of constitutionally preventing interprovincial trade barriers. Instead, governments negotiated an Agreement on Internal Trade in 1994. This does much of what the federal government had hoped the section 121 amendments would do, but is an intergovernmental agreement, rather than a constitutional provision, and it focuses on "soft" enforcement through intergovernmental processes and arbitration, rather than judicial enforcement. This agreement addresses the legitimate need of the federation to strengthen the economic union but does so in a way that respects the federal principle and the process of intergovernmental decision-making.

The 1980s and 1990s were also the era in which international trade and investment agreements began to take on a prominent role in international politics. In Canada, the federal government negotiates such agreements but the agreements have increasingly affected matters that constitutionally are within the jurisdiction of the provinces. According to the 1937 Labour Conventions case, the federal government cannot gain jurisdiction over a matter that is otherwise within provincial jurisdiction by turning the matter into a treaty obligation. Rather, the jurisdiction, and the right to decide whether to implement the international obligation, remains with the provinces. However, in the Canada-U.S. Free Trade Agreement and the North American Free Trade Agreement, the federal government undertook commitments to “ensure that all necessary measures are taken in order to give effect to the provisions” of these agreements. While this clause cannot alter the constitutional division of powers, a trading partner could point to this clause to justify retaliating against the country for a provincial policy that, while constitutional, does not comply with the provisions of an agreement. Effectively, then, these international agreements could allow the federal government or, more questionable still, a foreign government or private corporation to reduce the ability of the provinces to regulate their economies. Needless to say, such a commitment has been highly controversial in intergovernmental circles.

In the 1997 case of *R. v. Hydro-Quebec*, Mr. Justice La Forest of the Supreme Court of Canada, for the majority, expressed caution about expanding the scope of federal jurisdiction by broadly interpreting federal powers. Referring to an earlier Supreme Court of Canada case, *R. v. Crown Zellerbach*, he stated that, while the constitutional necessity of characterizing certain activities as beyond the scope of provincial legislation and falling within the national domain was accepted by all members of the Court [in *Crown Zellerbach*], the danger of too readily adopting this course was not lost on the minority. Determining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism.

Given this note of caution from the Supreme Court, the possibility certainly exists that, if pushed by an excessive intrusion of a trade agreement’s rules, negotiated as they are by the federal government, into an area of provincial jurisdiction, a province may well launch a constitutional challenge against any federal attempts to take “all necessary measures... to give effect to the provisions” of the agreement. The precedents herein cited from the post-war era would suggest that the federal government would be well advised to avoid creating the possibility of constitutional litigation and instead negotiate an intergovernmental agreement committing to an internal process for negotiating and implementing international trade agreements, as has been advocated by Premiers for quite a number of years.

So, what can we learn from these examples of federal-provincial interactions in Canada that is generally applicable to federal states trying to balance the stresses of regional and transnational pressures in a way that allows them to retain national sovereignty? I believe there are three important lessons:

The first lesson arises from Canada's tradition of effective intergovernmental negotiation and accommodation. National governments need to use the intergovernmental processes available to them to manage regional tensions and define a broadly acceptable national interest to put forth in international negotiations if they are to be credible actors on the world stage. After all, it will not serve the cause of national sovereignty if a national government is unable to implement the commitments it makes because of divided constitutional authority and the unwillingness of a significant number of sub-national units, or of sub-national units of significant influence, to fulfil the obligations of international agreements.

The second lesson is that national governments must concern themselves with, and define, what their national interests are, distinct from both regional interests within the nation and transnational interests beyond the nation. While globalization undoubtedly brings economic benefits to nations, it also has costs, both economic and, more importantly, democratic. The only reason for the existence of a national government is that it represents distinct national interests that distinguish one state from the others in the international community and from the regions within the state. If governments are not prepared to articulate and protect their national interests, even at the expense of sacrificing their ability to accomplish some of their transnational interests, either the sense of community that defines the country will fade until the twin forces of regionalism and globalization overwhelm it, or the electorate will challenge the legitimacy of not only the national government but of the global economic system of which the national government is seen to be too much an advocate. I would suggest that the protests and disruptions of the Seattle WTO Ministerial Meeting last December were examples of the latter phenomenon in action.

The third lesson from Canadian federalism is that, unless your nation is a super-power, it should demonstrate a preference for multilateral fora in which it can cultivate allies. The federal government, as the government of all Canadians, is a very powerful force with a significant ability to have its views prevail in the case of conflicts with provinces. Historically, though, provinces have been better able to counter-act the weight of federal authority and make room for provincial perspectives to be considered in national debates when they have acted in blocs. Similarly, when countries find themselves in a conflict with a much more powerful country over the terms of international trade or economic regulation, they are much more likely to have these terms reflect their fundamental interests when they are debated in multilateral fora.

Canada will continue to struggle to create a functioning and distinctive economic union that is capable of managing the twin tensions of regionalism and globalization to the overall benefit of the federation, just as it has done for the last 133 years. Whether, and for how long, we will succeed is unknowable, but the fact that we retain the political will to continue the effort makes Canada an example of a successful federation.

* Senior Policy Advisor, Cabinet Planning Unit, Executive Council, Government of Saskatchewan. The opinions expressed herein are my personal opinions and do not necessarily reflect the policies of the Government of Saskatchewan. This is a shortened

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