Appendix

ACCESS: *A C*onvention on the *C*anadian *E*conomic and *S*ocial

to the rest of Canada (Courchene, 1996, Table 1). One obvious challenge arising from this is that our east-west transfer system must now be superimposed over an increasingly north-south trading system. Another is the resulting pressures for greater decentralization (and presumably enhanced asymmetry) that are mounting in the face of this shift from domestic to international markets. Finally, but hardly exhaustively, Canada's fiscal (debt/deficit) overhang is leading to a significant downsizing and decentralization of Ottawa's powers, especially in the social policy arena.

The consequence of all of this is that Canadians have never been so concerned about the future of their east-west social policy network. Phrases like "the end of Medicare" and a "race to the bottom" have become commonplace in spite of the fact that during the recent free-trade debate and election our social envelope was heralded as the cornerstone of much of our identity in the upper half of North America.

This is the backdrop to the ensuing analysis, which focusses on preserving and promoting the Canadian economic and social union. More explicitly, the paper proceeds from an assumption and a question, both drawn from the above scenario. The assumption is that social policy is undergoing substantial, indeed unprecedented, decentralization and the question is: how, in light of this decentralization, do we Canadians reconstitute our internal common markets in the socio-economic arenas? The concise and inescapable answer is that the provinces have to be brought more fully and more formally into the key societal goal of preserving and promoting social Canada.

At the more detailed level, and as the (admittedly forced) title suggests, the proposed answer is ACCESS — *a c*onvention on the *C*anadian *e*conomic and *s*ocial *s*ystems. What distinguishes ACCESS is that it is a federal-provincial and, in places, an interprovincial approach to securing the socio-economic union. This represents a sharp break from our post-war tradition where Ottawa was both the standard-setter and enforcer of the internal common market. But in light of the set of forces detailed above, we really have no choice but to forge a federal-provincial partnership and in some cases an interprovincial accord in order to deliver an effective internal union. In terms of coverage, however, the components of ACCESS

power. On the taxation front, for example, the tax collection agreements for the personal income tax have become a model for federal nations — decentralized yet substantially harmonized. Ottawa stands ready to collect provincial taxes, largely free of charge, as long as the provinces adhere to a set of non-discriminatory provisions. (Admittedly, this statement excludes Quebec which has its own personal income tax, but this province has signed on to other tax harmonization measures.) On the social policy front, the use of shared-cost programs and other initiatives have allowed Canada to convert the various provincial programs into "national" ones by guaranteeing principles such as portability for health care and, for welfare, the absence of residency requirements. In the language of the Charlottetown Accord, this is "negative integration", namely a series of top-down "thou shalt nots" — thou shalt not extra bill, thou shalt not impose residency requirements, etc. While this is important and remains important, it is no longer sufficient. What is increasingly required is "positive integration" — a pro-active meshing of provincial systems (skills transferability) and federal-provincial systems (consumption tax harmonization). This cannot be done without the full participation of the provinces. Hence, delivering a full-blown socio-economic union requires both top-down (vertical) and bottom-up (horizontal) integration.

That this is the case is becoming progressively more evident. As more powers are passed down (back?) to the provinces, as indicated in the Speech from the Throne, provincial involvement becomes ever-more essential. Moreover, as Ottawa pares cash transfers to the provinces under the CHST, from roughly $18 billion this year to the announced floor of $11 billion at the turn of the century, it is losing both its moral authority and its financial capability for enforcing unilateral top-down standards. In terms of the latter (financial enforcement), it is interesting to note that a provincial sales tax at roughly half the average provincial rate would give Alberta more money than it will get in federal transfers at the turn of the century. Indeed, Alberta's current budget surplus exceeds the amount of federal transfers to the province. This highlights the federal dilemma and explains in part why the 1995 federal budget called for the development of a set of "mutual consent" principles to underpin the CHST. Beyond these financial considerations, the increasing north-south nature of the Canadian economy in tandem with the quite distinct provincial economies will imply different approaches on the part of the various provinces in terms of designing and delivering their respective social envelopes. In turn this means that any notion of identical standards across all provinces is a non-starter — much of the negotiation will have to be in terms of principles and "equivalencies". Finally, the need for involving the provinces was explicitly recognized by Ottawa in its last two budgets as well as in the Throne Speech. Basically, this amounts to a federal recognition that the existing principles (e.g., the five Canada Health Act principles and the prohibition of residency

requirements for welfare) can no longer deliver the needed degree of integration in terms of the internal socio-economic union. In large measure, the march of globalization and the knowledge/information revolution require new approaches

objectives: if the objective is distributional, then it should be delivered via a distributional instrument (e.g., the tax-transfer system), not via an allocative instrument. Another is that where intergovernmental transfers are involved, the incentives should not be such as to encourage what elsewhere (Courchene, 1994) I have labelled "intergovernmental gaming" (for example, the incentives under existing legislation for provincial governments to create make-work projects to transfer citizens from provincial welfare to federal UI). Finally, the elimination of duplication and overlap has an obvious efficiency component and in the process it probably also contributes to enhanced transparency and accountability.

- **FA#4: Equity**

In the context of reconstituting the social and economic union there are at least two types of equity issues that must be addressed. The first is that we must respect the *equalization principle* — all provinces must have ACCESS to revenues sufficient to ensure that they can provide reasonably comparable public services at reasonably comparable tax rates (s.36(2) of the *Constitution Act, 1982).* The second is *fiscal neutrality.* This is the proposition that, apart from equalization, federal programs should treat similarly situated individuals equally, regardless of place of residence. The existing UI provisions fall way short of this mark: an unemployed individual in New Brunswick is more than twice as likely to be in receipt of UI benefits as a similarly situated Ontarian (Courchene, 1994 and Sargent, 1995). In many cases, federal transfers other than those for equalization ought to treat provinces equally on a per capita basis. These two equity principles are related in the sense that if equal-per-capita transfers for the CHST, for example, serve to undermine the equalization principle, then the latter should be adjusted appropriately. Violation of either of these principles will severely undermine the likelihood of achieving a thorough convention on the socio-economic union. More ominously, the federal proclivity for introducing an equalization element in every federal program will almost certainly serve to undermine support for the formal equalization program. This would spell the end of social Canada!

- **FA#5: Citizen Rights**

While the Convention will be an intergovernmental agreement, the underlying rationale is to provide basic rights and privileges for all Canadians. Hence, the presumption associated with the specific details of any provisions of an internal socio-economic union should always be on the side of citizens. In other words, the burden of proof in terms of defending any derogations from the Convention

must reside with governments, not with citizens. The specific ways in which this principle can become operational will be dealt with in the appropriate later context.

While ACCESS is a goal in its own right, it is also the case that it is a key ingredient in the larger on-going context of proposals to revitalize and rebalance the federation, e.g., the report of the Group of 22 (1996). Hence, as a bridge between the above framework axioms and the later common-market principles, there are several rebalancing and revitalization precepts that merit highlight.

• FA#6: The Principle of Subsidiarity

The principle of subsidiarity states that government should be as close as possible to citizens: powers or competences should be delegated to the lowest level of government where they can be effectively exercised. This implies a bias toward decentralization. However, if the nature of the service or the activity means that it cannot be carried out efficiently at the local level, then a higher level of government should assume responsibility. The presence of cross-provincial policy spillovers, for example, would imply the need for an upward shift of the policy area. But upward need not mean central: it could also mean interprovincial or federal-provincial.

• FA#7: The Federal Principle

Subject to adhering to the provisions of the Convention, the provinces must have the flexibility to design and deliver their own vision and version of the socio-economic envelope. Economists typically refer to this as competitive federalism. The most cited exemplar here is the experimentation in Saskatchewan which led to Medicare. Recently, this province has substituted free drugs to the elderly with a system based on ability to pay. Other provinces are following suit. The more general point is that the on-going blossoming of provincial experimentation across a range of fronts is absolutely critical to recreating an efficient and viable social Canada. The policy challenge here is to ensure that this experimentation takes place within a framework of “national” (federal, federal-provincial or interprovincial) norms or principles.

• FA#8: The Spending Power Provision (Federal Flexibility)

Corresponding to this provincial flexibility, there is a need to retain federal flexibility as well. Specifically, the federal government should be able to exercise its spending power in areas of provincial jurisdiction provided that the provinces can

opt out with compensation. Whether this opting out must relate to the establishment of an equivalent program (as in the Throne Speech) or whether opting out should be unconditional (as in the report of the Group of 22) is obviously an issue of some contention, but some version of the spending power provision is important to ensure federal flexibility.

upward. For example, if not all provinces are in favour of transferring responsibility for securities regulation to the federal government, this should not stand in the way of those that wish to do so. Our federation is already highly asymmetrical. Contrary to much received opinion, these asymmetries are best viewed as solutions rather than problems. For example, the fact that Quebec has its own personal income tax (an asymmetrical feature) means that the rest of the provinces can achieve a much higher degree of harmonization than otherwise would be the case in terms of the joint federal-provincial, personal-income-tax arrangements. Finally, it is important to recognise that the asymmetries that may arise in the Convention are *de facto* asymmetries, not *de jure* asymmetries.

- **FA#11: Provincial Treatment**

The principle of "provincial treatment" must be the core operating principle in any Convention on the socio-economic union. This is the internal union counterpart of "national treatment" under the FTA. In terms of the latter, Canada has considerable freedom to design its own policies, provided only that they do not discriminate between Canadians and Americans. Transferred to the Convention, provincial treatment means that New Brunswick, for example, can design its internal policies as it wishes, provided a) that in their implementation New Brunswick does not discriminate in favour of its own residents and b) that they abide by

TABLE 1: A Prototype of the Interim ACCESS Model

Social Union

- Essentially the status quo prevails;
- The five *Canada Health Act* principles would remain, as would the prohibition of

be implementable immediately. To be sure, others may have structured the accord somewhat differently, but this is inevitable in this sort of exercise.

Among the several potential problems with this type (and likely any type) of interim accord, two in particular merit highlight since they lead directly to the

probably needs is a pan-Canadian *Well-Being Act* replete with its own set of principles relating to portability, public administration, comprehensiveness, ACCESS and universality. It is likely that under this system coverage will be enhanced (i.e., become more comprehensive), portability and universality will be guaranteed,

TABLE 3: Principles to Guide Social Policy Reform and Renewal

Social Programs Must Be Accessible and Serve the Basic Needs of All Canadians

1. Social policy must assure reasonable access to health, education and training, income support and social services that meet Canadians' basic needs.
2. Social policy must support and protect Canadians most in need.
3. Social policy must promote social and economic conditions which enhance self-sufficiency and well-being, to assist all Canadians to actively participate in economic and social life.
4. Social policy must promote active development of an individuals' skills and capabilities as the foundation for social and economic development.
5. Social policy must promote the well-being of children and families, as children are our future. It must ensure the protection and development of children and youth in a health, safe and nurturing environment.

Social Programs Must Reflect Our Individual and Collective Responsibility

6. Social policy must reflect our individual and collective responsibility for health, education and social security, and reinforce the commitment of Canadians to the dignity and independence of the individual.

freeing up the flow of goods, services, capital and labour within Canada. As already noted, all governments initialled the AIT in 1994. However, as detailed in the excellent C.D. Howe volume on the AIT (*Getting There...*,1995), too many of the key provisions are in the nature of best-efforts intentions to removing existing barriers. Thus, the firm commitment to remove all existing barriers with a reasonable time frame, as proposed in Table 2, would be most appropriate and most welcome.

With these measures in place and agreed to, it becomes rather natural to include in ACCESS an enlarged s.121 of the Constitution. Section 121 currently reads as follows:

> 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.

While it is likely that, in light of the FTA and NAFTA, the courts will begin to interpret s.121 more expansively, the fact of the matter is that, as written, this provision does not refer to labour, services or capital. It must. A stronger commitment to provisions guaranteeing the economic union is a *sine qua non* for enn,ttd f-TD yrw

In a recent article, Richard Zuker (1995) focusses on this very issue. He argues that because of the demise of the federal spending power and because of the ongoing decentralization, new arrangements are required to minimize the potential negative spillovers arising from vertical policy interdependencies. Zuker refers to these potential arrangements as "reciprocal federalism". The name is particularly apt since the concept recognizes, at base, that the provinces need Ottawa to act in certain ways in order that *provincial* policies become more effective. Similarly, Ottawa needs some help from the provinces in order that *federal* policies be more effective. No matter what label one places on such arrangements, it is obvious that there exist plenty of opportunities for mutual gain arising from enhanced coordination, harmonization or even just from greater information sharing.

The challenge is probably most acute in the macroeconomic area. Debt and deficits, for example, are a national concern not just a federal concern. And appropriate stabilization policy cannot ignore the fact the provinces (with the municipalities) now spend more than Ottawa does. For example, Ontario's policy in the late 1980s was way offside with overall macro policy and particularly monetary policy. By revving up expenditures to the mid-teens in the context of an already overheated provincial economy, Ontario's actions forced the Bank of Canada, in its pursuit of price stability, to raise interest rates (and, hence, the value of the dollar) to levels that would not otherwise have been called for. In the event, Ontario paid dearly for this, since the combination of high interest and exchange rates exacted an enormous economic toll on Ontario in the early-1990s recession. The point here is not to attempt to assign blame. Rather, it is to make the important observation that incompatible policies can exact high penalties on everybody. Hence, mechanisms that allow for information-sharing at a minimum and perhaps some formal coordination are warranted.

Toward this end, ACCESS should provide a framework for this to occur. One approach is to follow the Australian example, where there is a pre-budget-cycle First Ministers' Conference which makes public the projected expenditures, revenues and deficits of all governments on a consistent accounting basis. These forecasts assume no change in any fiscal parameters and they present the data for two income-growth scenarios. It is surprising that there is no counterpart to this in Canada. Because the business cycles across the provinces and regions do not move in synch, it is not obvious that any formal attempt at full harmonization of macro policy is appropriate, but what surely is appropriate as a first step is the greater information-sharing and transparency that would follow from adopting the Australian approach. This is an area where "learning by doing" is probably the appropriate strategy.

Another example of potential policy coordination relates to the challenge arising from federal government participation in international treaties that touch upon

areas of exclusive provincial jurisdiction. Again Australia provides a useful comparison with their recent proposal for a "Treaties Council" as part of their equivalent of our First Ministers' Conference. The German federation has taken this

decision in the Canada Assistance Plan case. Since the issue at stake is steeped in

> legislation was silent on the question of the Parliament's power to enact new laws, that power was unimpaired, and could be used to alter the federal government's obligations under the agreements. The Court said that it would require a very clear indication in a statute, especially a non-constitutional statute, before the court would find an "intention of the legislative body to bind itself in the future." (*Ibid*, 313)

But even following the procedure in the last sentence of the quote may not do the trick, because it might run afoul of the rule that Parliament may not delegate its legislative powers to the provinces (Hogg, 1992,313, note 55).

This creates real problems with the interim model outlined above and in particular with the notion that the announced $11 billion federal cash floor could ever be binding. In effect, the status quo would prevail: nothing now prevents the next budget, let alone the next Parliament, from reneging on this proposed floor. And unless the federal government were to embed this floor in manner and form legislation, it would likewise not be binding under the provisions of the interim model. And perhaps not even then.

Not surprisingly, therefore, the provinces (or at least some provinces) are pressing for a conversion of these cash transfers into tax-point transfers as the only sure way out of this dilemma. In this key area, these provinces would obviously prefer the full-blown ACCESS model to any version of an interim model. But this begs the further question: can interprovincial agreements be binding on the provinces?

2: Can Interprovincial Agreements Be Binding On the Provinces?

Not surprisingly, perhaps, the above concerns also arise in respect of intergovernmental agreements. In reference to the *Agreement On Internal Trade*, Katherine Swinton (1995, 199) offers the following observations:

> An agreement implemented through legislation that purports to impose binding obligations on the legislature remains, in a certain sense, unenforceable, because the doctrine of parliamentary sovereignty prevents a legislature from binding its successors, or even itself in the future, except through a formal constitutional amendment. Political accountability of the legislature to the current electorate takes precedence over ongoing adherence to past commitments or policy decisions. As a result, a legislature may unilaterally cancel its adherence to an intergovernmental agreement or legislate in defiance of its obligations in an implied repeal of its earlier adherence.

By way of an example, Swinton adds:

> [an] option for a government would be to pass legislation expressing a commitment to be bound by the recommendations of a dispute resolution panel.... But even if a

> further legislation in the same area, nor can it establish a bureaucracy through which to regulate the States. In that sense, there is no reference to *powers* at all.
>
> In effect, the States are using the Commonwealth to jointly make an amendment to each of their constitutions at the one time. In practice, what the States are doing is ceding sovereignty to each other [and not to the Commonwealth — TJC].

This option is not available in Canada, clearly a shortcoming of our Constitution. For example, the Ontario desire to transfer securities regulation upward could easily be accommodated by such a route — Ottawa would pass legislation (perhaps drafted by the province(s)) and those provinces who then passed parallel legislation would be bound by it. Because this is not possible, Canada has to resort to other options.

4: Creative Approaches to Ensuring Compliance

With this as backdrop, one can now contemplate approaches that should go a long way to ensure that agreements, whether interprovincial or federal-provincial, can become effectively binding, albeit not constitutionalized.

The first approach draws from both the Australian experience as well as the concept of "manner and form" legislation. The process would work as follows. The governments would design an accord or convention that they would then initial. Template legislation would then be drafted and passed in the legislatures of all signing parties. Embedded in this legislation would be manner and form requirements for amendment procedures relating both to the legislation itself and any future amendments. This may not be constitutionally binding, but derogations from it would become very difficult, particularly if the convention itself emdodied citizen rights.

This leads to the second and related approach. In order to become effectively binding, a convention need not have constitutional backing if it has substantial political backing. Swinton (1995, 209) makes this very point in connection with the AIT:

> ...the absence of coercion is not fatal to an agreement if it gains the necessary legitimacy among political actors and citizens. One way to make the agreement more effective without changing the overall structure dramatically is to try to improve the effectiveness of the political process by emphasizing openness and accountability.

While not in any way tending to downplay the importance of the AIT, the fact of the matter is that the citizen appeal with respect to the economic union is likely to be minimal compared to the appeal that a convention on the social union or a convention guaranteeing free flow of occupational training across provinces. In

interprovincial agreements that would have to go through the open processes of ratification by the respective legislatures that would not be very appealing to Canadians.

> political forces that pose a continuing challenge to Canadian unity. The agreement reflects a belief, however tentative, in the primacy of Canadian citizenship and identity over local attachments. Because the obligations set out in the agreement are reciprocal and are to be enforced though a process that is transparent and fair, it represents one of the few politically acceptable avenues by which Canadian attachments can be permitted to prevail over local or provincial ones. In a country as fractious as Canada, that is no small achievement.

With this perspective, namely that the glass is half full rather than half empty, the further challenge is to design an approach to monitoring and dispute resolution that serves to fill the glass, as it were, and to convert the Convention into an integral substantive and symbolic institution of Canadian nationhood and identity. Without becoming overly involved in the institutional structure of the Convention, the following aspects would appear to have considerable merit:

- As already exists under the AIT, the extended Convention (AIT plus the social union and mutual recognition), will involve ad hoc working groups from the parties whose responsibility, among others, will be to design a set of operational guidelines based on the principles in the Convention. By their very nature, these guidelines will be subject to further refinement and elaboration as the Convention is implemented and wrestles with the complexities that will follow the implementation. Whether or not "stakeholders" are part of this initial process is not as important as making these guidelines public and allowing open processes for their evolution.
- As part of the Convention, there will have to be public administration with an appeal process. For purposes of expositional convenience, I shall associate this with the existence of an ombudsperson in each province (and one for the federal governement, where relevant). This becomes important since it is part of the institutional design whereby citizens can ACCESS the dispute resolution process directly. This would be an improvement over the AIT, where citizens who wish to launch a complaint must first attempt to persuade a government to bring the complaint on their behalf. Although the signatories to the Convention are governments, the Convention is really all about citizen rights in the socio-economic arena so that they must have independent and direct ACCESS.
- The complaint/appeal process might work as follows. Claims brought forward by a government or a citizen or a corporation would go through an initial screening group, which could be the group of ombudspersons or a separate screening panel as part of the Convention secretariat (which is called for under the AIT in any event). The role of the screening panel will be to

themselves to the system. The only way to not rescind the offending legislative provision is, in effect, to pull out of the Convention. The second, and related, reason follows on from the first. Withdrawal implies that a province's citizens no longer have the socio-economic rights under the Convention. Nor does its business sector have the Convention's protection in terms of ACCESSing the internal market. Thus, refusing to abide by the panel's recommendation would involve an

the process will develop a dynamic that will virtually ensure that all other provinces will come on board: their citizens will settle for nothing less. This process may not generate the "Charter" fever of the early 1980s, but it may come close. Thus Ottawa will have to come on board as well.

In terms of the process dimension of the full-blown ACCESS model, the initial

warranted. With respect, however, this is coming at the underlying issue from precisely the wrong direction. The reality is that Canada is undergoing unprecedented decentralization — some of it driven by global forces and some of it policy- and fiscal-driven. From this perspective, ACCESS acquires a quite different rationale, namely, how in the face of this decentralization do we maintain the integrity of our social and economic union? ACCESS may not be the answer, but Canadians must surely devise some reasonable facsimile that challenges the provinces to shoulder enhanced "pan-Canadian" responsibilities commensurate with their increased powers.

NOTES

I wish to thank Richard Simeon, Katherine Swinton and analysts from the Ontario Ministry of Intergovernmental Affairs for valuable comments on an earlier draft. However, responsibility for the ideas expressed in the paper rest entirely with the author.

1. Note that I am using "standstill" in its trade-agreement context, i.e., no deregotations from the existing degree of interprovincial mobility or from existing principles. The standstill provision is not about provincial evolution of various policy areas. Indeed, under the former CAP provisions, there was no requirement that a province even have a welfare program, so that it is not appropriate to view standstill as relating to the status quo of any individual program.
2. This is not quite correct. There will still be a very important federal presence in most of these areas where truly national issues are at stake. Consider health, for example; Ottawa would continue to control/monitor key areas such as drug accreditation, national blood monitoring systems, etc., as well as the interaction between health and immigration. What the statement in the text is meant to imply is that, in the day-to-day relationship between individuals and the health care system, the provinces will be paramount.
3. This concern that creative arrangements be put in place to ensure that Canada can speak with one voice with respect to international treaties in areas of exclusive provincial jurisdiction is also addressed in Burelle (1995).

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