

APPENDIX

ACCESS: A Convention on the Canadian *Economic and Social Systems*

Thomas J. Courchene

I: INTRODUCTION

The last decade has wrought dramatic changes upon the Canadian and global economies alike. While the forces ushering in these changes have in general been beyond the control of any one country, their impacts have been most pronounced in terms of “domestic” policy arenas and nowhere more so than in the area of the welfare state. For example, globalization has internationalized production with obvious implications for the conception and role of the traditional welfare state. Typically, welfare states have been geared to their “national production machines:” when production becomes international, the structure and incentives of welfare states need to be rethought. Likewise, the advent of the information revolution and the emergence of knowledge as a key component in international competitiveness are serving to alter the social structure of developed nations. Market incomes are polarizing and non-standard jobs are proliferating, again with serious problems for old-style welfare states. Indeed, key aspects of societal structure are also undergoing substantial change: domestic unions are proving no match for international capital and production.

Within this context, which applies to all developed countries, Canada has some special challenges. With the increasing shift toward north-south, rather than east-west, trade all provinces except PEI now export more to the rest of the world than

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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 convention on the Canadian economic and social systems. 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 are rather straightforward — the economic union, the social union, labour market integration, reworking fiscal federalism and approaches relating to accommodating the increasing policy interdependencies between the two levels of government. Some of these areas and proposals are lifted directly from the recent *Report to Premiers* by the Ministerial Council On Social Policy Reform and Renewal (1995). Others are adapted from my previous work (Courchene, 1994) and the writings of other policy analysts (e.g., Burelle, 1995, 1996). While detail will be provided later, this brief overview of the range of issues subsumed under ACCESS is probably adequate for introductory purposes.

In more detail, the analysis proceeds as follows. Part II focusses on a set of framework axioms or precepts that ought to subtend any federal-provincial agreement on the socio-economic union. While many of these are rather uncontroversial (e.g., transparency), some do touch upon substantive issues (e.g., the principle of subsidiarity).

Part III then addresses the substantive elements of a Canadian Convention on the socio-economic union. The analysis develops two models. The first of these is referred to as an “interim” model — it maintains many of the features of the status quo, it is federal-provincial in nature and it is broadly consistent with recent pronouncements of both levels of government. The second or “steady-state” model is more consistent with the scenario outlined in the introduction to this paper — it involves substantial alteration of the status quo, it is more interprovincial in nature and it embodies considerable disentanglement and decentralization. While, as noted, the latter is more consistent with the foregoing analysis, it may well be that the interim model is a necessary half-way house on the road to the more thoroughgoing approach to a reworked socio-economic union. For both of these variants, the analysis will attempt to grapple with the design of acceptable common-market principles. However, these principles will lack full detail because they will inevitably be derived from intense federal-provincial or interprovincial negotiation.

In Part IV, the analysis turns to the issues of enforcement and remedies. Are there ways to make ACCESS binding on all governments and, if so, how? Not surprisingly, this will be a more difficult issue for the steady-state or full-blown version of ACCESS. Part V then addresses some process issues, followed by a brief concluding section.

There is one other aspect of ACCESS that merits highlight in this introduction. Running throughout the analysis will be the recognition that a Convention on the socio-economic union, while of necessity an agreement among governments, is first and foremost about the rights and privileges of citizens, consumers, labour and enterprise on the socio-economic front. This is the rationale for the acronym ACCESS.

Prior to directing attention to these three core areas — framework axioms, pan-Canadian common-market principles and enforcement/remedies issues — it is instructive to address a key operating assumption of ACCESS, namely that an effective internal socio-economic union must require the combined efforts of all levels of government.

The Provincial Imperative

Securing the socio-economic union in post-war Canada was essentially left to Ottawa. And Ottawa rose to the challenge, largely by creative use of the spending

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 to preserving and promoting the Canadian common market. And key to any and all of these new approaches is a partnership among the various orders of government in Canada.

There is another perspective that can be brought to bear on all of this. In order to create and integrate our “national” social policy network in the 50s and 60s, Ottawa needed to play an overarching role. And central to this role were the development of the various shared-cost programs and the evolution of our comprehensive equalization program. As these social programs matured and became “established”, it was only natural to shift funding from a conditional (shared-cost) basis to unconditional grants. Now that social Canada is in need of restructuring in the face of a variety of forces (economic, fiscal, demographic, etc.), the roles of the two orders of government in this renewed process are now radically altered. Specifically, apart from providing certain social services to First Nations, Ottawa is not really a player in the social policy design and delivery game. It has no option except to leave this to the provinces. Thus, while transfers, subsidies, principles, fines and the like were appropriate in terms of initially creating our social network, these instruments are ill-suited in terms of forging the needed national or interprovincial integration of this “second-round” of social program design. This would be true even if there were no cuts and caps and freezes to federal-provincial transfers. The provinces must rise to the citizen and societal challenge by accepting a larger responsibility for preserving and promoting social Canada.

Thus, bringing in the provinces should not be construed as in any way a watering down of the internal socio-economic union. Quite the opposite. Indeed, part of the reason why the German and Swiss and Australian federations have more thoroughgoing integration in terms of transferability of skills, for example, is that Canada has never attempted to bring the provinces meaningfully into the operational workings of our internal union. Canadians deserve better and this can only come from a partnership approach to our east-west internal union.

This being said, however, there are differing degrees of provincial (and federal) involvement. The “interim” model of the Convention calls for federal-provincial cooperation and co-determination in terms of securing the economic union, whereas the steady-state or full ACCESS model assumes a greater role for interprovincial management of the internal union, in line with existing constitutional responsibilities especially in the social policy areas.

II: FRAMEWORK AXIOMS

In designing a convention on the socio-economic union there are certain underlying axioms or principles that should apply irrespective of the content of any such convention. Indeed, most of the following axioms ought to apply to any policy area. Among these general framework axioms are the following:

- **FA#1: Accountability**

Governments must be accountable to citizens for the prudent use of public monies and the programs that incorporate these funds. In the current Canadian context, enhanced accountability means a clarifying of the roles of the two levels of government in the social sphere. A useful companion to accountability is the *principle of fiscal coincidence*: the jurisdiction responsible for spending funds should in general be the one responsible for raising them in the first place. The existence of intergovernmental transfers is an obvious exception to this principle, an exception that can be rationalized in a variety of ways (e.g., economies of scale in raising taxes). However, in these circumstances, the design of the transfer system should be as consistent as possible in terms of isolating the locus of responsibility and, therefore, accountability.

- **FA#2: Transparency**

This principle is closely related to accountability. If programs are not transparent, accountability will become blurred. The existing CHST transfer system, with its combination of cash transfers and tax point transfers, is hopelessly complex and, therefore, at cross purposes with any transparency principle. In the recent past, Ottawa has been able to claim that transfers (cash plus tax points) to the provinces have increased while the provinces have argued that federal transfers (cash transfers, since this is all that is really transferred) have fallen. And both parties can substantiate their claims. As a result, citizens become confused and accountability becomes diffused. In any new convention, the provisions must be transparent so that all parties (including citizens) recognize where accountability resides.

- **FA#3: Efficiency**

Given the fiscal burden at all levels of government, efficiency becomes a virtue. Beyond the obvious, namely ensuring that no more than the essential amounts of funds are expended in terms of achieving a particular policy goal, there are other facets to efficiency. One is the appropriate matching of policy instruments to policy

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.

- **FA#9: Uniform Application (Equal Partners)**

Newfoundland, as part of the *Constitution Act, 1982*, has the right to discriminate in hiring in favour of its residents. Likewise, the federal government, under s.36(1) of the Constitution, has the responsibility for “promoting equal opportunities for the well-being of Canadians” and for “furthering economic development to reduce disparity in opportunities”. However, ACCESS should have uniform applicability on all signatories. There should be no derogations from citizens rights to the social and economic union. There are several reasons for this. First, the Convention will be a symbol of who and what we are as a federation. Accordingly, this should be a statement of uniform rights for citizens across the country. Second, the Convention will be an intergovernmental agreement, not part of the Constitution. Hence, the Constitution will trump the Convention. This being the case, there is no need for derogations in the Convention. Third, the existence of derogations will likely torpedo the Convention. The notion that Ottawa could, as part of the Convention, discriminate against Ontario on regional equity grounds while Ontario could not, again as part of the Convention, react to this discrimination will surely mean that the Convention will never see the light of day. In practical terms, what this means is that the onus is on Ottawa to be willing to enter the Convention on equal terms with the provinces and on the provinces to ensure that they are also equally and severally bound.

- **FA#10: Duality and Asymmetry**

While uniform application, as in the previous framework axiom, is imperative, this need not mean that the end result will be symmetrical for all provinces. For example, some provinces may wish to impose standards higher than those embodied in the Convention. As long as these are non-discriminatory in nature, this should be encouraged even if the result will be asymmetrical. Similarly, to the extent that Quebec may be more likely than other provinces to draw down all powers offered, this, too, should pose no problem. Phrased differently, the design of the Convention should respect the *duality* aspect of our federation (i.e., two languages of convergence). Asymmetries can also arise from transfers of powers

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 other provisions of the Convention. Others may wish to refer to this as the “principle of non-discrimination”.

- **FA#12: Standstill Provisions**

The Convention will not likely deliver an unimpeded internal socio-economic union. Certainly, the status quo falls way short of the mark here. Hence, the goal should be to improve on the status quo — to aim to free up the socio-economic union in selected areas and to prevent “slippage” in all other areas. This is the concept of *standstill*, namely to ensure that there is no backtracking in terms of existing common-market achievements. Adherence to this principle will guarantee that the Convention will be an improvement on the interprovincial or pan-Canadian aspects of the status quo.¹

With no claim to being exhaustive, these framework principles provide a launchpad for designing a new Convention on the Canadian social and economic union. We now turn to an analysis of the substance and principles that this Convention might contain.

III: ACCESS: PAN-CANADIAN PRINCIPLES FOR THE SOCIO-ECONOMIC UNION

The above framework principles are consistent with a variety of approaches to a Canadian Convention on the internal union. Our principal interest in this section is elaborating upon the full-blown model that takes the framework principles to their logical and Constitutional limit. Not surprisingly, this will be referred to as the “full” ACCESS model. However, the model cannot be implemented tomorrow since, as will become apparent, the variant proposed below calls for interprovincial accords with respect to labour market and social union issues, the conversion of cash transfers into tax-point transfers, a series of federal-provincial administrative amendments and a set of dispute-resolutions procedures and enforcement mechanisms for securing the internal union. Hence, the negotiation process will involve healthy doses of both time and goodwill.

This being the case, the stage is set for the implementation of what will be referred to as the “interim” ACCESS model, which *can* be implemented tomorrow. The basic feature of this interim model is that it is broadly consistent with the series of recent “official” pronouncements by both levels of government on the evolution of the social union, e.g., the last two federal budgets and the Speech from the Throne on Ottawa’s part and the *Report to Premiers* (1995) on the provinces’ part. These two models are consistent with each other in the sense that the interim model is probably an essential stepping stone and building block toward the full ACCESS model.

In order to breathe some reality into this discussion, Table 1 represents a workable prototype of an interim model while Table 2 is my own proposal for what a full-blown ACCESS model might look like. While the lines of demarcation between these two approaches are no doubt blurred in places, the following key differences are evident:

- The interim model is more federal and federal-provincial in nature whereas the full ACCESS model is more federal-provincial and interprovincial. In other words, the full ACCESS model is more consistent with the provisions of the Constitution in vesting responsibility for areas like social policy and labour-market training with the provinces.
- The federal-provincial financial interface differs significantly between the two models. The interim model contemplates the continuation of federal cash transfers with the important proviso that they will be monitored by a federal-provincial mechanism rather than by the current federal enforcement. On the other hand, the full ACCESS model requires the conversion of the cash transfers into equalized tax-point transfers, along the lines of the fiscal coincidence provision under FA#1 above.

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 residency requirements for welfare;
- The \$11 billion cash transfer floor (as per the 1996 federal budget) would obtain;
- Financial penalties (reductions in cash transfers) would continue for violation of social union principles. However, the monitoring of these penalties would fall to a federal-provincial oversight agency rather than the current federal oversight.

Division of Powers

- Training would be devolved to the provinces;
- So would tourism, mining, recreation, etc., as indicated in the Throne Speech;
- The federal spending power would be circumscribed, again as outlined in the Throne Speech;
- Ottawa would accommodate an upward transfer of powers (e.g., securities regulation) for those provinces willing to do so;
- The end result may well involve asymmetry.

Economic Union

- Commitment to both orders of government to fully implement the *Agreement on Internal Trade*.

Coordination

- The powers of the Secretariat (as required under the AIT) would expand to monitor these arrangements;
- There would need to be an appeal process and a dispute-resolution mechanism, replete with decision rules for the parties.

Prospect

- While this is a modest alteration of the evolving status quo, it might develop into an European-style co-determination model with respect to a broad range of economic, social and policy interdependency issues.
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TABLE 2: A Prototype of the Full ACCESS Model

Social Union

- Full provincial responsibility for design and delivery of health, social services and education in line with the principles in the *Report to Premiers*.
- Enforceable interprovincial accord whereby the provinces jointly implement and maintain a framework of principles and standards/equivalencies that will guarantee across Canada rights such as mobility and portability.

Fiscal Relations

- An effective equalization program guaranteeing all provinces the ability to provide reasonably comparable public services at reasonably comparable tax rates.
- Beyond equalization, fiscal neutrality would obtain (FA#4).
- Conversion of existing federal cash transfers into equalized tax-point transfers.
- Allow provinces to levy a “tax on base” (as an alternative to the current “tax on tax”) under the shared personal-income-tax system.

Labour Markets

- Full provincial responsibility for all labour market development measures.
- Federal-provincial co-management of UI (along with greater accountability to employers and employees who now fully finance the system) so it can be integrated into provincial designs for overall human capital policy. As an alternative, one could provincialize UI (via equalization of UI premium income).
- Interprovincial agreement on mutual recognition of training and qualifications across provinces.

Economic Union

- Incorporate an expanded s.121 (into ACCESS) to include labour, capital and services. Consider enshrining this in the Constitution, at some future date.
- A commitment by all parties to remove all internal barriers to trade with a specified time period (i.e., to implement fully the provisions of the 1994 Agreement on Internal Trade).

Coordination & Flexibility

- Embrace subsidiarity, allowing powers to be transferred down (e.g., forestry, mining, recreation, etc. as in the Throne Speech) and upward or horizontally (e.g., national securities commission, national tax agency etc.).
 - Ensure policy flexibility by accepting FA#7 and FA#8 above;
 - Incorporate initiatives designed to manage policy interdependencies among governments, e.g., “reciprocal federalism” as elaborated in the text.
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- The enforcement/remedies also differ dramatically. The interim model is a variant of the status quo, with the above-noted difference that the financial transfers will now be overseen by a federal-provincial body. Since there are no cash transfers (except for equalization) under full model, this places a premium on designing mechanisms to ensure that the Convention is binding on the parties.

In terms of proceeding, it is convenient initially to devote brief attention to spelling out how the interim model might work. This will facilitate the more in-depth analysis of the full-blown ACCESS model.

A: A Workable Interim Model

At one level, implementing an interim model of the type reflected in Table 1 is rather straightforward:

- On the social side, the five CHA principles would be maintained, as would the prohibition of residency requirements for welfare.
- On the labour market side, Ottawa would follow through with its Throne Speech commitments to devolve labour-market training to the provinces and to circumscribe the exercise of the federal spending power (along the lines of FA#8 above).
- The interim accord could involve processes to manage the policy interdependencies between the two levels of government (but this would probably best be left for the full model). However, it should involve commitments to reinforce the economic union, probably via best efforts measures to deliver on various provisions of the *Agreement On Internal Trade (1994)*.
- Monitoring would be done by a federal-provincial agency (or group of ministers) that would report to the First Ministers.
- Citizen or government challenges to this accord would first go to a panel of experts for adjudication. If sustained, the remedies could vary, but would include the withholding of cash transfers by the federal-provincial monitoring body.
- The accord would be signed for successive five-year periods.

These provisions track fairly closely the provisions contained in Table 1. More importantly, they resonate well with existing proposals from both levels of government. This is by design since one of the criteria of this interim accord is that it

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 sorts of provisions embodied in the later full-blown ACCESS model. The first is that this sort of accord is not likely to bind the federal government. It is true that the existing federal unilateralism in assessing whether a province is in violation of the common-market principles would be replaced, under the interim model, by federal-provincial monitoring and oversight. While the voting mechanism was not spelled out, one could imagine, for example, that if either the provinces (at least 7 provinces with 50% of the population) or Ottawa supports the decision of the expert panel, then the panel's decision will hold. However, the real issue arises with the level of cash transfers. Given the Supreme Court decision on the Canada Assistance Plan challenge (to be detailed later), it is not at all obvious that this sort of interim accord could guarantee the \$11 billion CHST cash transfer floor after the turn of the century (as outlined in the 1996 federal budget). In other words, the federal government would still be free, constitutionally, to repeat the series of unilateral series of cuts, freezes and caps to cash transfers that occurred over the last decade and that are still in progress. The full ACCESS model attempts to address this issue by means that include, among other approaches, parallel legislation passed by all governments. To be sure, these approaches could be incorporated into an interim accord, but since the negotiations pursuant to this would likely be intense, not to mention time-consuming, much of the value of an interim (i.e., immediate) model would fall by the wayside. Why not go directly to the full-blown ACCESS variant?

The second area is equally problematic: the social policy area is in full evolution, so much so that relying on the five CHA principles is likely to do more harm than good. The *Report to Premiers* expressed the issue rather well:

Premiers have indicated their unanimous support for a publicly funded health system and are committed to the *Canada Health Act* as one dimension of the system. However, the Canadian health system has evolved beyond physician and hospital care, and includes a wide range of preventative, promotive, supportive and rehabilitative services. As well, it has become widely recognized that a whole range of factors outside the health system are important determinants of health. The *Canada Health Act* narrowly focusses on insured physician and hospital services, and does not recognize the extent to which the health system has evolved. (1995, p. 11)

But even this is too narrow a vision of health. Progressively, the system is evolving toward a conception of *well-being*, not just old-style health care. What Canada

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, but ACCESS will become subject to ability-to-pay user fees, most likely delayed and reconciled through the personal tax system. In other words the system will become more European in nature — extended coverage but with some role for ability-to-pay private financing throughout the system.

The essential point here is not to attempt to guesstimate the likely evolution of the health or well-being sector, but rather to emphasize that the driving factors underpinning this evolution are the efficiency, equity and fiscal concerns triggered in part by the massive cuts to cash transfers under the CHST, which are only now beginning to bite. In effect the CHST is in the process of transforming the design and delivery of both health and welfare. In a real sense, there is no status quo in these areas. The longer term solution probably requires a combination of a) an explicit recognition on the part of Ottawa that its actions are generating a new era in terms of health and welfare, b) an assurance from the provinces that they will not back off their impressive set of social policy principles incorporated in the *Report to Premiers* (and reproduced as Table 3), and c) a negotiation of a new social contract among the provinces, Ottawa and selected stakeholders. But, this, too, is really much more in line with the full ACCESS model than with the interim variant.

Despite these potential problems, the concept of an interim model has much to recommend it, since there is a need to establish a new, temporary, status quo while negotiations with respect to the full ACCESS model are on-going. Most of the pieces for this interim model are either already in place or can be with the stroke of a pen. Thus, there is no reason why it could not be fully operative by year's end. If this does not come to pass, the recent conflicts with Alberta over health and with British Columbia over welfare will begin to multiply, and not only in the "have" provinces.

But this is diverting attention away from the core thrust of the paper — to outline a Canadian Convention on the socio-economic union consistent with the emerging globalization and knowledge/information paradigms, with the framework axioms of section II and with the letter and spirit of the Constitution. To this I now turn.

B: The Full ACCESS Model

Most of the key elements in a full-blown version of ACCESS appear in Table 2. Even a cursory glance at these provisions indicate that this is a highly decentralized

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.
7. Partnerships among governments, communities, social organizations, business, labour, families and individuals are essential to the continued strength of our social system.
8. There is a continuing and important role, to be defined, for both orders of government in the establishment, maintenance and interpretation of national principles for social programs.

Social Programs Must be Affordable, Effective and Accountable

9. The ability to fund social programs must be protected. Social programs must be affordable, sustainable, and designed to achieve intended and measurable results.
 10. The long-term benefits of prevention and early intervention must be reflected in the design of social programs.
 11. Federal constitutional, fiduciary, treaty and other historic responsibilities for assurance of Aboriginal health, income support, social services, housing, training and educational opportunities must be fulfilled. The federal government must recognize its financial responsibilities for Aboriginal Canadians, both on and off reserve.
 12. Governments must coordinate and integrate social programming and funding in order to ensure efficient and effective program delivery, and to reduce waste and duplication.
-

... continued

TABLE 3 (cont'd.)

Social Programs Must be Flexible, Responsive and Reasonably Comparable Across Canada

13. Social policy must be flexible and responsive to changing social and economic conditions, regional/local priorities and individual circumstances.
 14. Governments must ensure that all Canadians have access to reasonably comparable basic social programming throughout Canada, and ensure that Canadians are treated with fairness and equity.
 15. Social policy must recognize and take into account the differential impact social programming can have on men and women.
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Source: *Report to Premiers (op. cit.)*.

approach to securing the internal common market, with any attendant externalities/spillovers to be sorted out largely via interprovincial accords rather than federal intervention. However, it is also evident that the only way in which Ottawa could possibly consent to several of these provisions is if the interprovincial mechanisms for securing the internal union are binding on all parties and in particular on the provinces. As already noted, this puts a premium on issues relating to compliance, enforcement and remedies. These critical issues are the subject of part IV. The role of the present section is to elaborate on the substance of a full-blown ACCESS, drawing heavily from Table 2. In so doing, I shall deal with the social and fiscal categories together since they are closely related. Then, in turn, attention will be directed to the labour market, to the economic union and, finally, to the coordination of the policy interdependencies between the two levels of government.

1: Promoting and Financing the Social Union

As Table 2 indicates, full responsibility for the design and delivery of health, welfare and education would devolve to the provinces.² This is the “closer to the people” component of subsidiarity (FA#6). The externalities or pan-Canadian components of subsidiarity would be addressed via an interprovincial accord which would embody principles and standards as well as measures to guarantee mobility and portability. On the fiscal side, the proposal incorporates both the equalization and the fiscal neutrality principles (FA#4). More significantly, the

interprovincial accord presumes a complete federal withdrawal from the area since cash transfers would be transferred into additional equalized tax-point transfers.

By way of elaboration of the last element (additional tax-point transfers), this would certainly remove the concern of the interim model where the federal government might continue with the on-going process of reducing cash transfers: these would now be provincial revenues. It is also worth noting that transferring additional tax points to the provinces would serve to bring the rest of the provinces in rough alignment with the existing treatment of Quebec, which is currently in receipt of an additional 16.5 personal income tax (PIT) points. Finally, with the enhanced decentralization in the social policy area (as well as the labour market area), greater provincial participation in the income tax system makes eminent sense since this will increasingly be the vehicle of choice in terms of delivering and integrating much of the social envelope and probably the labour-market envelope as well. In order to facilitate this flexibility, Table 2 recommends that provinces be able to levy their portion of the shared personal-income-tax system on the federally determined base for taxable income, rather than the current system which limits the provinces to taxing federal tax payable. In the jargon of the tax-collection arrangements, this proposal is usually referred to as a "tax on base". (For more details, see Ontario Economic Council, 1983 and Courchene, 1994).

Given that the federal government is on record as being against further PIT tax-point transfers, the only possible way that this can become a reality in ACCESS is for the provinces to demonstrate to themselves, to the federal government and, most of all, to Canadians that they indeed have the will and the ability to design and deliver an effective internal social union Convention. The key building blocks required for this exercise are fairly obvious. For example, the Table 2 commitment to guarantees with respect to portability and mobility are clearly essential. And the Table 3 social policy principles would be shared by the vast majority of Canadians. The challenge then becomes one of integrating these guarantees and principles in a manner that generates a set of operational pan-Canadian norms or standards or equivalencies. Perhaps these could be accompanied by a set of minimum standards for specific areas. (As an aside, it is interesting to note that there never have been minimum standards for welfare benefits under CAP, for example). This exercise will hardly be easy, particularly since both health and welfare policy areas are in full evolutionary flight, but the goal is achievable. Indeed, it must be achievable since a pan-Canadian social safety is a core Canadian value. And, increasingly, it is only with support of the provinces that Canada can fully deliver on this goal. That this basic message has not been filtered down to citizens constitutes a major stumbling block. With its call for mutual-consent principles in the 1995 budget (and reiterated in the 1996 budget and the Throne Speech), Ottawa

has reconciled itself to this reality. It now needs to communicate this to Canadians.

2: *UI/Labour Markets*

With the advent of the CHST, the Throne Speech commitment to transfer labour-market training to the provinces, and the more recent promise to devolve the “developmental” aspects of UI (now EI) to the provinces, the obvious and logical next step is to ensure that UI itself is more integrated into the provincial (or regional) social policy systems. What is essential is that the constellation of programs coming within the UI/training/education/welfare subsystem be forged into an integrated whole. This is the human-capital imperative, expressed so forcefully by Lester Thurow (1993): “If capital is borrowable, raw materials are buyable and technology is copyable, what are you left with if you want to run a high-wage economy? Only skills, there isn’t anything else”. Since the federal government, with the CHST and the devolution of training, has apparently abandoned any attempt or desire to forge this integration, it has to fall to the provinces. This is even more evident with the recent announcement by Human Resources Minister Doug Young that for those interested in job creation, “knock on the door of your provincial legislature” (Greenspon, 1996). Table 2 speaks in terms of co-determination of UI among the provinces, Ottawa, labour and management. It also specifies an obvious and more disentangled alternative, which would be to “provincialize” UI, with the proviso that the UI premium income be equalized to ensure that all provinces have at least the five-province average of premium income per capita. (Courchene, 1994, 283).

With either the provincialized version of UI or the federal-provincial version in place, the *quid quo pro* on the provincial front would have to be an interprovincial mutual recognition of skills accreditation and certification so that training becomes fully mobile across provincial boundaries. An important step in this direction is the mutual recognition provisions (chapter 7) of the *Agreement on Internal Trade* (AIT), with even more recent support for mutual recognition of training embodied on the *Report To Premiers* (1995,16). While this commitment to mutual recognition could be subsumed in the economic union section of Table 2, it is important for substantive as well as symbolic reasons that it become part and parcel of the UI/labour market provisions of ACCESS.

3: *The Economic Union*

The economic union provisions of Table 2 represent, as they must in any full-blown ACCESS model, a significant improvement on the status quo in terms of

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 enhanced decentralization and is an essential ingredient of the full ACCESS model. In accordance with FA#9 (uniform application), this should be a straightforward provision equally applicable to all governments (i.e., no derogations written into the provision). While Table 2 runs in terms of incorporating an expanded version of s.121 as part of the Convention, the ideal solution would be to enshrine this in the Constitution.

4: Coordination and Flexibility

The final panel of Table 2 focusses on issues relating to coordination and flexibility. The first two entries attempt to ensure that the Convention is consistent with the rebalancing and revitalization of the federation. Hence the emphasis on the principle of subsidiarity, as well as the acceptance of competitive federalism and the role of the federal spending power. It may well be that the result of these measures will imply greater asymmetry across provinces. For example, some provinces may not want to take up the Throne Speech offer to devolve forestry, mining, recreation, etc. And not all provinces might be willing to follow Ontario's 1996 budget proposal to transfer securities regulation upwards.

The remainder of this panel addresses, in skeletal form, the challenge of increasing policy interdependencies among governments. Admittedly, one of the roles of the social/labour-market accords is to accommodate and internalize horizontal (cross-provincial) policy spillovers. However, the issue addressed here relates more to vertical or federal-provincial harmonization.

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 even further. In the context of the European Union, if an issue is up for discussion that falls under the constitutional responsibility of the lander (i.e., provinces), then lander representatives (i.e., the upper chamber or Bundesrat, since it is what Canadians might call a “House of the Provinces”) will take the lead in negotiations (Courchene 1996a). The point here is not to argue for “importing” institutional procedures from other federations. Rather, it is to suggest a full-blown ACCESS model has the potential for evolving into a co-determination model in the treaties area, so that Canada can speak with one voice, as it were, in international agreements that involve provincial constitutional competences. This, too, would fall under the umbrella of reciprocal federalism.³

5: Summary

This full-blown version of ACCESS represents a thorough rethinking and reworking of the federal-provincial relationship within the federation. It is, however, the logical extension of the forces of globalization on the one hand and the recent federal initiatives on the social-policy/labour-market fronts on the other. And it resonates well with the written constitutional word. But the potential Achilles heel of the full-blown version of ACCESS is that the several embedded agreements or accords, whether interprovincial or federal-provincial, may not be binding on the parties. To this I now turn.

IV: COMPLIANCE, ENFORCEMENT AND REMEDIES

Designing an internal-union Convention that resonates well with governments and citizens will be difficult enough in its own right. Equally challenging will be to design processes of enforcement and dispute resolution that will likewise be deemed to be fair and acceptable. What follows are some tentative analyses relating to, first, ensuring compliance and enforcement and, second, providing fair and transparent dispute resolution and remedies.

A: Compliance and Enforcement

1: Can Ottawa Be Bound?

The appropriate starting point for the analysis of whether and how intergovernmental agreements can be made binding upon governments is the Supreme Court

decision in the Canada Assistance Plan case. Since the issue at stake is steeped in Constitutional law, I shall defer to expert opinion here, namely Osgoode Hall Law School Professor Peter W. Hogg who also served as one of counsel to the Attorney General of Canada on this case. Hogg (1992, 307-8) summarizes the case as follows:

In *Re Canada Assistance Plan* (1991), a constitutional challenge was made to a federal bill to implement a federal budget proposal that would place a five per cent annual cap on the growth of Canada Assistance Plan transfer payments from the federal government to the three provinces of Alberta, British Columbia and Ontario. (These three provinces were singled out because they were the three wealthiest provinces, as measured by their failure to qualify for equalization payments.) The Canada Assistance Plan (CAP) was a federal statute that authorized cost-sharing agreements be entered into by the federal government with the provinces, under which the federal government would undertake to pay 50 per cent of the costs incurred by the provinces in the provision of certain stipulated social assistance and welfare programmes. Under this authority, the federal government entered into CAP agreements with all ten provinces. By the terms of both the CAP legislation and each agreement, each agreement could be amended only with the consent of both the federal government and the province. It was argued that the budget proposal, by restricting the federal contributions to less than the agreed-upon 50 per cent share, was in effect a unilateral amendment of the three agreements which had not been made with the consent of the three affected provinces.

While there was no doubt that the federal government was obliged to fulfil its side of the CAP arrangements so long as the CAP legislation remained unchanged, the effect of the proposed bill, once it was enacted, would be to amend the CAP legislation and thereby place a statutory limit on the federal government's CAP payments. Following the orthodox theory of parliamentary sovereignty, the Supreme Court of Canada held that Parliament remained free to amend the CAP legislation in this way (or in any other way) notwithstanding the cost-sharing agreements with the provinces.

However, all may not be lost since “while a legislative body is not bound by self-imposed restraints as to the *content, substance or policy* of its enactments, it is reasonably clear that a legislative body may be bound by *self-imposed procedural (or manner and form) restraints* on its enactments” (*Ibid*, 309, emphasis added). But this “manner and form restraint” did not apply in the Canada Assistance Plan case:

The Court held that the consent [of the provinces] requirement was not a manner and form requirement for the simple reason that it expressly applied to the amendments to the agreements, not to the amendments of the legislation. Since the

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 renegeing 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

jurisdiction committed itself to be bound, this would be technically ineffective if the panel's decision required legislative action, such as the repeal or amendment of a standard or regulation, that a legislature were unwilling to undertake. Again, the principle of parliamentary supremacy ensures that the ultimate decision about whether to take legislative action remains with the legislature, not with the panel (Swinton, *op cit.*, 207).

There may, however, be creative ways around this problem. Some rest with the way in which the legislation is framed and executed. Others relate to the fact that these agreements are also political documents involving rights of citizens which in turn can make these documents binding politically, if not constitutionally. In pursuing these approaches, it is instructive to begin with the way in which the Australians have been able to make their intergovernmental agreements binding.

3: The Australian Model

Australia does not face the same problems as Canada in terms of making inter-state (interprovincial, in our terms) agreements binding. This is because their Constitution contains a provision for delegating powers upward. Specifically, s. 51(xxxvii) of the Australian Constitution reads:

51. The Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to

...

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

The best example of this relates to the recent Mutual Recognition Agreement among the states pertaining to regulations and standards relating to the sale of goods and the registration of occupations. (Note that the latter is an integral component of the proposed "full" ACCESS model.) The states designed the appropriate legislation, but then realized that this might not be binding on the various states. The solution became obvious: ask the Commonwealth to pass the identical legislation, after which the states would follow suit. Because of federal paramountcy in the Australian Constitution, the provision became binding — in effect constitutionalized.

Sturgess (1993, 10) elaborates on this process as follows:

...the Commonwealth is obtaining no power from the States under this very limited reference, other than to pass a single Act of Parliament once-for-all. It cannot pass

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 embodied 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

other words, the pressures on all governments to abide by the provisions of conventions in these areas will be intense, if not overwhelming. And as Swinton has pointed out, if the processes are open and accountable then compliance is further guaranteed.

The third element of securing compliance is that the process will be aided by precedence and even the Constitution. Again, Swinton's comments are appropriate (and again she is referring to the AIT):

Even without those mechanisms [constitutionalization — TJC], however, the Agreement on Internal Trade is likely to have an impact on Canadian law and government policy. Most of its effects will come because governments feel an obligation to comply, whether or not they have a legal ability to do otherwise. Over time, as well, the agreement may also filter into Canadian constitutional law, as courts use the principles to develop jurisprudence under the guarantee of labour mobility in section 6 of the Charter. (1995, 209)

In terms of the social union and the free flow of occupational standards this observation may be particularly telling.

Fourth, if the proposals for a full-blown ACCESS model come to fruition, this could include an enhanced s.121 of the Constitution which, in turn, will reinforce the observations in the previous point. One can surmise that many of the internal union provisions embodied in the various accords would eventually acquire constitutional status via this route. But even if the enhanced s.121 is not enshrined, the fact that it is included in the Convention (and, therefore, legislated by all parties) will influence the interpretation of the existing s.121.

Fifth, and finally, the degree of compliance on the part of governments will depend on the remedies associated with any derogations. As the recent Alberta health controversy has shown, citizens of the province do not want their governments to be offside with the provisions of the Canada Health Act. The issue is not one of dollars, but rather one of having the system declare that their government is pursuing policies that run counter to the national norms. Under the conventions contemplated in the full-blown ACCESS model, the remedies could go much further than a public announcement that government x or y is running afoul of nationally agreed-upon norms. It could involve expulsion from the internal union so that the mobility provisions no longer apply to the residents of the province. If this were part of the convention, then compliance would be virtually assured.

In summary, while interprovincial or federal-provincial conventions may not be legally or constitutionally binding, it nonetheless seems apparent that they can be given standing that makes derogations from the convention extremely difficult and, indeed, unlikely. To be sure, this depends in part on the specific guarantees embodied in the convention. But it is hard to conceive of federal-provincial and

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.

B: Monitoring and Dispute Resolution

A key component in any federal-provincial or interprovincial agreement involves the on-going monitoring of the agreement and, when disputes arise as they obviously will, ACCESS to a transparent and fair dispute-resolution mechanism. These are not unfamiliar to Canadians and their governments: they exist under GATT and now the WTO; they exist under the FTA and NAFTA and they also are an integral part of the *Agreement on Internal Trade*. In terms of the AIT, which is essentially a convention in the way that I am using the term in this paper (although the Convention would also incorporate the social union and mutual recognition of skills accreditation), several analysts have focussed on the various ways in which the monitoring and dispute resolution mechanisms fall short of the ideal (e.g., Howse, 1995). And in an important sense this is certainly true, as will be elaborated later. However, as an entree to this section of the paper, I much prefer the more optimistic assessment and perspective of the AIT provided by Patrick Monahan (1995, 217). (In reading this quote, readers may wish to associate the references to the AIT with the social union and mutual recognition):

Despite some not trivial shortcomings — both in the institutional provisions and elsewhere — the Agreement on Internal Trade nevertheless holds the potential to significantly reduce existing barriers to internal free trade in Canada. This potential lies not so much in any particular provision of the agreement, but in the recognition that internal trade in Canada ought to be subject to a set of binding norms. For the first time, governments in Canada have committed themselves to resolving trade disputes through a set of generally acceptable and enforceable rules. International experience with the General Agreement on Tariffs and Trade has shown that this commitment to a rules-based regime represents the fundamental breakthrough in promoting freer trade. Once a rules-based regime has been established — even if the substantive requirements of the rules are initially quite modest — a foundation has been laid for future construction.

This is the promise and the potential of the Agreement on Internal Trade. Shot through with exceptions, caveats and reservations, it nevertheless commits governments to a set of norms for resolving trade disputes. It establishes a new set of political understandings about the extent to which governments should be allowed to discriminate against other Canadians in order to favour local or regional interests. In this relatively modest way, the agreement has the potential to counteract centrifugal

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 through 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 government, 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

either reject these appeals (e.g., because they are frivolous or because there is no obvious violation of the operational guidelines) or pass them onwards to the Conference secretariat. Initially, there may well be a flood of appeals, but as the operational guidelines become established and understood and as the rulings of the dispute-resolution committee interpret these guidelines, the screening exercise will become rather straightforward, if not easy.

- Complaints passed upwards by the screening panel, whether emanating from governments or citizens, will then end up in the first of two potential dispute resolution mechanisms, namely the political mechanism. At this political level, governments would be encouraged to explore compromise solutions or alternatives in response to the complaint. One would expect that most complaints would be resolved at this level, especially after the rulings of the formal dispute resolution mechanism become rather predictable.
- If the political mechanism cannot sort out the impasse, then the complaint would go the “administrative law” route to the dispute-resolution panel. Under the AIT provisions, a panel of 5 would be struck from the permanent roster of 65 experts to be maintained by the parties. One could imagine one panellist being selected by the challenger, one by the challenged government and three by the Convention secretariat. The panel’s decision would become binding on the Convention.
- There would need to be some time frame within which the dispute must be resolved. One alternative here is to presume, for complaints that have gone beyond the screening process, that the claims or appeals will be accepted unless the process renders a negative decision within a specified timetable. In normal circumstances, this would mean placing the burden of proof on the government or governments to defend their barriers or impediments to the internal common market. This resonates well with the ACCESS acronym.

These are hardly firm proposals but are rather in the nature of a set of appropriate incentives to be embedded within the monitoring and dispute resolution aspects of the Convention.

At this point, it is useful to bring the earlier enforcement analysis into the picture. Suppose that the expert dispute-resolution panel recommends that province X rescind some particular legislative provision? Can the offending province (or Ottawa) refuse to go along with the recommendation? Constitutionally, the answer may well be yes, as suggested in the previous section. In practice, however, this will be an implausible, if not impossible, result. There are several reasons for this. The first is that all parties would have passed the template legislation creating the legislation in the first place. Hence they have voluntarily committed

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 enormous political and economic cost. Third, the Convention is likely to become very popular and the recommendations of the dispute-resolution panel will likely also receive strong popular support especially if the process is "transparent and fair", to use Monahan's words. In other words, while ACCESS may be difficult to bring to fruition, it will be much more difficult to unwind, once in place.

By way of a final comment on the design of the convention for a full-blown ACCESS model, it is clear that this institution will constrain Parliamentary flexibility, even sovereignty. Indeed, this is the *raison d'être* of such a Convention — in effect it is a set of social and economic rights of citizens and private-sector agents generally. As a result, aspects of sovereignty will become shared among the provinces and Ottawa or, if one prefers, transferred to the new institutional Convention. Perhaps an even better way to express the result is that sovereignty will be transferred to individual Canadians. In any event, there is no free lunch for governments here. But this is increasingly what globalization is all about — a mushrooming array of international and domestic "contracts" among governments and between governments and private sector agents in the trade, military, environmental, economic, etc., areas. As globalization proceeds, sovereignty inevitably becomes more diffused and dispersed. Indeed, with or without the Convention, citizens/corporations will gain guaranteed ACCESS to the internal union, so that the real issue becomes one of whether ACCESS is preferable to the range of other options for securing the internal market.

V: PROCESS

As the final substantive section of this paper, it is appropriate to devote some attention to process or, more specifically, to focus on how ACCESS might come to fruition.

The answer in terms of the interim model seems perfectly clear. Essentially, all it would take would be some initial moves by Ottawa and in particular a federal commitment to place the oversight and policing role of the CHST cash transfers at the service of a federal-provincial monitoring and enforcement agency. The rest of the interim model would then quickly fall into place. This relates to the earlier claim that the interim model is capable of immediate implementation.

Triggering the full-blown ACCESS model is a more difficult process challenge. However, it seems clear that the provinces would have to take the lead role. Specifically, one way would be to convert the principles in their *Report to Premiers* into a workable interprovincial accord on the social union. They will also have to design a mutual-recognition accord for skills transferability and they will probably have to undertake something more than a best-efforts approach to implementing the provisions of the AIT. Beyond all of this, they will probably have to commit themselves to a Convention embodying all of this as well as an appropriate enforcement and dispute-resolution mechanism. But if they can accomplish this, then the pressure for compliance falls on Ottawa. If the internal socio-economic union is secured, there is no longer any rationale for federal cash transfers to the provinces as an enforcing mechanism. Hence, this current rationale is no longer a stumbling block in terms of converting cash transfers to tax-point transfers. And the dynamics underlying the CHST and the transfer of training to the provinces means that the logical and consistent next step is for Ottawa to allow UI to be more accommodative of provincial policies to forge an integration of the entire labour-market/education/welfare subsystem. Given that the status quo is hardly a fall back position, Ottawa will have difficulty holding out, particularly if citizens embrace the “national” initiatives of the provinces. Indeed, if the process gets rolling, Ottawa will likely come in at an early stage to press its own interests.

The previous sentence is more revealing than it might at first appear. Essentially, the view of the federal government and, I suspect, the view of Canadians generally, is that the provinces will never get their act together, i.e., they will never subject their “provincial “ interests to the national interest and, therefore, the attempt at creating a workable Convention will come to naught. As long as this perception prevails, the federal government presumes that it can count on citizen support for a strong central role, even a unilateral central role, in monitoring and policing the internal socio-economic union. This is a very questionable presumption on Ottawa’s part, since the vacuum left by the disappearing status quo is quickly and surprisingly coming to be filled by creative provincial initiatives.

This leads to my final observation on process. What the Australian experience with mutual recognition has revealed is that the exercise quickly becomes dynamically attractive. Essentially, the provisions for mutual recognition were developed by three of the six Australian states. Once the process became well launched, however, citizens of other states effectively demanded that their own states also sign on. Carried over to the Canadian scene, the real challenge becomes one of finding four or five provinces to begin the process of developing principles and legislation for securing the socio-economic union. At this point,

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 challenge is not to approach the exercise by insisting on bringing all ten provinces on board all at once. Rather, the key may well be for four or five like-minded provinces to begin the process of design and implementation of the socio-economic Convention and then let “contagion” do the rest.

VI: CONCLUSION

Decentralization is a reality. Powers are in the process of being devolved. More ominously, financial responsibility, especially in the social policy arena, is also being devolved to the provinces. As a result, the federal-provincial economic and financial interface is in full evolutionary flight — there is no status quo.

This is an unacceptable situation for a country which has long taken pride in its comprehensive east-west social contract. Canada and Canadians need to reconstitute and revitalize our socio-economic union. The role of this paper is to serve as a catalyst in this process. The analysis focussed on two alternative (although presumably time-consistent) approaches to a socio-economic Convention. One (the interim ACCESS model) is more federal-provincial in nature whereas the full-blown ACCESS model is more interprovincial and, I think, more in line both with the letter of the Constitution and with the manner in which the federal-provincial interface is evolving. And between these two versions is no doubt a continuum of alternative models.

One of the contributions of the above analysis is that the full ACCESS model represents a real, live option. While not constitutionally “air-tight” (nor is the interim model for that matter) the full-blown ACCESS Convention is eminently achievable and the dispute-resolution systems are likely to be workable and enforceable on the parties. As a result, there is in effect a rich menu of alternative approaches to reconstituting our social-economic union and plenty of room for strategic bargaining and negotiation on the part of both orders of government.

This, then, leads to the *raison d’être* of the paper — to challenge all governments to move quickly in this area of preserving and promoting Canada’s internal socio-economic union, keeping in mind that the name of the game, above all else, is to endow Canadians with a guaranteed set of rights and privileges on the socio-economic front. No doubt many readers will view the full ACCESS model as embodying a degree of decentralization that they are not comfortable with. If the comparison is traditional post-war status quo, then their concerns are probably

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

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1. Note that I am using “standstill” in its trade-agreement context, i.e., no deregulations 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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