CANADIAN CONSTITUTIONALISM AND SOVEREIGNTY AFTER NAFTA

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Just as national political authority has been contested by the power of transnational capital, so has the notion of sovereignty been embattled. By sovereignty, I mean the idea that political communities are self-determining in regard to those fundamental subjects around which their legal and political communities are organized: that "political authority within a community has the undisputed right to determine the framework of rules, regulations and policies within a given territory and to govern accordingly."[1] The power of transnational capital together with international trade agreements are seen as having undermined the relevance of sovereignty and also domestic constitutional arrangements, as a manifestation of sovereignty. In a recent series of articles, for example, Stephen Clarkson has argued that the recently enacted free trade agreements can be likened to a "new economic constitution."[2] For Clarkson, they should be "more properly understood as constitutional documents as important for the future of the northern dominion's political system as the Constitution Act of 1982."[3] According to former Attorney-General of Ontario, Ian Scott, "whether or not the [U.S.-Canada free trade] agreement amounts to a constitutional amendment in any formal sense, it represents *de facto* constitutional change — and a constitutional change of very significant magnitude."[4] Similarly, Bruce Doern and Brian Tomlin have written that "FTA is now one of Canada's *de facto* constitutional pillars, lodged in the political pantheon alongside federalism, Parliamentary government and the Charter of Rights and Freedoms."[5]

If the North American Free Trade Agreement (NAFTA) can be likened to a new economic constitution, NAFTA poses a serious challenge to sovereignty and domestic constitutionalism. While Canadian sovereignty always has been qualified by the economic power of its major trading partners, NAFTA consolidates and makes material the power of transnational capital by legalizing free trade in a charter of economic conduct. NAFTA may have the effect, then, as have constitutions, of disabling governments from acting in a wide variety of legislative domains. This is a direction contrary to Canadian constitutional thinking prior to 1982. Strongly influenced by the British Parliamentary tradition,[6] Canadian state power was potentially limitless — jurisdictions were divided between two levels of government which, between them, shared complete authority. In the traditional view of Canadian federalism, "there is *no* sphere of human life that is immune from ... intervention"[7] by the state. The entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982 substantially changed the character of Canadian constitutional design from one of general unboundedness to one of constitutional limits. Similarly, NAFTA, and the U.S.-Canada Free Trade Agreement (FTA) which preceded it, continue to transform the character of Canadian constitutionalism into one primarily concerned with limits on legislative power. In the first part of this essay, I will inquire into how NAFTA may be analogous to domestic constitutional law and why it may be useful to think of it in those terms.

A second interesting parallel between FTA, NAFTA and the *Charter* is that the free trade agreements have been justified and defended by resorting to 'rights' discourse, namely, the idea of equality. The "principle" around which both FTA and NAFTA have been organized is that of "national

treatment." This principle requires that each party to the agreement treat the nationals of the other member states no less favourably than its own nationals — being largely a formal statement of the idea of equality. State practices are measured against the standard that the nationals of all party states are to be treated equally, but no particular standard is mandated. This principle of equality, argues Richard Lipsey in regard to FTA, provides much continued room for legislative manoeuvre. In the second part of this essay, I will inquire briefly into this argument to suggest, on the contrary, the national treatment principle in NAFTA impinges significantly on the ability of governments in Canada to regulate their local and national economies. This is achieved not only by the ostensibly neutral principle of "national treatment" but also by NAFTA provisions which disable legislative initiatives more directly.

NAFTA AND CONSTITUTIONALISM

NAFTA is an international treaty concerning trade, entered into by the Government of Canada, and is rescindable with six months notice. It would seem curious, then, to characterize NAFTA as constitutional in nature or effect. Important parallels, however, can be drawn between some characteristics of NAFTA and those of domestic constitutions as they are ordinarily understood.[8] A few of those parallels below are set out below.

(a) NAFTA, like most domestic constitutions, commits the federal government (and the provinces, although they are not signatories), to a model of legislative behaviour in which the Canadian state (meaning both the federal and provincial governments) is disabled from pursuing certain legislative initiatives. This is what Stephen Holmes usefully characterizes a "precommitment strategy," whereby one generation disables itself and future generations from acting contrary to goals articulated by constitution framers.[9] Thus, as a strategy of precommitment, constitutionalism disables by denying present and future legislative majorities the choice of pursuing certain of their chosen objectives. NAFTA, in a similar way, commits the Canadian state to not discriminate legislatively against the nationals of other member states when it comes to matters concerning economic resources.

Holmes argues that precommitment strategies not only disable (the traditional view), but also enable democratic decision making. They enhance democratic power by checking abuses of legislative and executive power and by facilitating democratic discussion at the point at which the checking function is exercised.[10] Some would argue that NAFTA serves an enabling function as well: as Richard Posner has argued in regard to the U.S. Constitution, prohibiting rent-seeking and other forms of discriminatory commercial practices, makes government more efficient and democratic politics more stable and predictable.[11] Posner's appeal to democratic politics is commendable but problematic in this instance.[12] Democratic politics would seem to require the opportunity to deliberate upon those very matters which Posner would prefer to have removed from public discussion — matters which are legitimately contestable within a democratic polity.

(b) Is the Canadian state disabled under NAFTA as it is under the Canadian constitution? There is no comparable provision in NAFTA to section 52 of the *Constitution Act, 1982*, which declares that laws inconsistent with the constitution are "of no force and effect." Rather, NAFTA commits the parties to respect the obligations encompassed in the agreement: the parties are required to complete the "necessary legal procedures" in order to honour the agreement (Art. 2203),[13] further, the parties must "ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance...by state and provincial governments" (Art. 105). No permanent mechanism of governance is established, but a free trade commission is established to supervise implementation and to resolve disputes arising out of the agreement (Art. 2001) as well as a secretariat to assist the Commission and "otherwise facilitate the operation" of the agreement (Art. 2002). As well, a number of committees and working groups are established to assess the operation of the agreement in a number of specific sectors.[14] Dispute settlement mechanisms are a mix of consultation and arbitration.[15] The agreement throughout declares that dispute mechanisms are "binding" on the parties. In the case of a trade dispute, parties can seek resolution from an arbitration tribunal, who can make recommendations to resolve disputes. If the party whose measure has been found to contravene NAFTA fails to comply with the arbitration board's findings and recommendations, the complaining party is empowered to take retaliatory measures of "equivalent effect" (Art. 2019). Economic coercion, bolstered by juristic fiat, are generally the means of enforcement. In this way, national sovereignty is impaired by a mix of both functional and formal mechanisms.[16]

This is clearly the case in disputes involving private investors. Should a measure breach NAFTA's investment rules (Chapter 11), an investor from one of the member states (rather than simply the member state) can seek to enforce NAFTA obligations before an arbitration tribunal (in accordance with rules established by the World Bank's International Center for the Settlement of Investment Disputes [ICSID], the ICSID's Additional Facility, or the U.N. Commission on International Trade Law [UNCITRAL]).[17] Decisions of the tribunal are "binding" (Art. 1136.1) and the parties are obliged to ensure that these awards are enforceable within their territories (Art. 1136.4). Federal and provincial laws presently provide for the enforcement of such international arbitration awards before domestic courts.[18] NAFTA provisions which protect the rights of investors, ultimately, are enforceable within domestic courts of law and are constraining in the same way as are other self-binding commitments. And, unlike most domestic statute law, the NAFTA provisions concerning investment are designed not to facilitate government activity but to suspend it altogether.

(c) As they are mechanisms which bind present and future generations, constitutions should be less amenable to change than ordinary legislation. According to the *Constitution Act, 1982*, a high degree of consensus is needed amongst provinces and the federal government to amend most provisions of the constitution, and an extraordinary degree of consensus (namely, unanimity) is required for a few provisions. Significantly, most *Charter* rights and freedoms can be overridden by ordinary legislative enactment for renewable five year periods.

NAFTA, of course, is not as difficult to change as is most of the Canadian constitution. While a high degree of consensus likely is required (unanimity) to modify the terms of the agreement (Arts. 2202), a less onerous process is established to have other countries accede to the agreement (although consent of a member state is required for a new Party to enforce NAFTA's terms against that state: Art. 2205), and, as mentioned, any one party can unilaterally withdraw upon six months notice (Art. 2205). Nonetheless, as the Charter experience has shown, commitments which are capable of circumvention may still be sufficiently authoritative to be binding functionally. Moreover, NAFTA's effects may be difficult to undo — NAFTA, like constitutions, may "set in motion irreversible processes which, in turn, necessarily box in future generations."[19]

As Ian Robinson argues, some of the gains which the Mulroney government sought to achieve within Canada via the process of constitutional reform — such as the guarantee of the free movement of goods, persons, services, and capital across provincial boundaries — will have been realized through FTA and NAFTA: "These gains have been entrenched in the quasi-constitutional form of an international agreement that will be difficult if not impossible for subsequent national governments to amend in these areas, and more costly to abrogate with each passing year."[20] As capital increasingly becomes mobile, and as economies of scale necessitate that firms invest in production facilities outside of Canada, irreversible losses to the Canadian economy likely will result, at least in the short to medium term.[21] In this light, NAFTA's six month notice period for withdrawal looks more like a binding mechanism than a convenient escape clause. The period of withdrawal would be too short a time within which to make adjustments and, hence, would be too disruptive for the Canadian economy.

To sum up, I have attempted to demonstrate that NAFTA exhibits characteristics typical of constitutions: (a) it is a type of precommitment strategy; (b) it is binding politically and, in some circumstances, also legally; (c) it is not easily amended because its effects are not easily reversed. In these ways, NAFTA can be understood as a constitutional document of a sort and its implications discussed in terms similar to those which constitutions are understood.

NAFTA, EQUALITY, AND CANADIAN SOVEREIGNTY

If it is correct to argue that trade agreements, like constitutions, disable domestic legislative initiatives, to what extent does NAFTA impair the ability of the Canadian state to regulate economic and social life? Usually this question is asked: to what extent is Canada's *sovereignty* impaired by continental trade agreements? Critics reply that sovereignty is impaired significantly. As federal and provincial governments lose their capacity to regulate economic and social welfare, Canadians will have more reason to turn to Washington, rather than to Ottawa, as the *situs* of political struggle. Even worse, sovereignty could shift entirely out of the domain of political authorities to a

"small coterie of financial and industrial giants."[22] Robert Reich, in *The Work of Nations*, argues that the transnational corporation is no longer the citizen of a host country but, rather, a global citizen whose output is the combined product of value added from anywhere, at any time.[23] Hence, nation states are less capable now, than ever, of influencing the social welfare function of capital. Supporters of the continental agreements agree that sovereignty may be impaired to some degree — all such agreements have this effect — but they do not agree that Canadian sovereignty is impaired in the manner and to the extent of which critics have argued.

Richard Lipsey, writing about FTA, argues that Canada's sovereignty, in its ability to both *regulate* a wide variety of economic interests and to *retain* a national system of social policy, is not impaired.[24] Canada's sovereignty remains intact, Lipsey writes, due to the use of the principle of "national treatment." This principle, found in both FTA and NAFTA, requires not that Canada refrain from legislating in the areas covered by the agreement, but that Canada refrain from using legislative power to discriminate against nationals of the other parties, either in intention or in effect. According to Lipsey, this means "that Canada is free to follow policies that are completely different from those followed by the United States on any matter whatsoever as long as it applies these policies equally to Canadian and U.S. [and now Mexican] firms operating in Canada."[25]

As mentioned, the principle of national treatment requires that "goods, services, or investors of one party to the agreement are to be given treatment no less favourable within the territory of another party than the treatment which the party accords to its own goods, services, or investors."[26] Nationals of the member states to the agreement are required to be treated equally and without discrimination. Using this form of 'rights' discourse, Ronald Wonnacott argues that:[27]

> If Canada ratifies the NAFTA, trade liberalization would be on track in the creation of a hemisphere *free of discrimination*, one in which all countries would have free and *equal access* to the markets of all others. Canada and any other participant could hope to look out someday over an *equal opportunity* hemisphere.

This discourse of equality and freedom from discrimination may be more than coincidental. As the recent rounds of Canadian constitutional reform suggest, the language of equality is a powerful rhetorical instrument with which to advance one's claims. But, a very formal notion of equality — equality or similarity in treatment — is being offered. It is one familiar to readers of Adam Smith: "To hurt in any degree the interest of any order of citizens, for no other purpose but to promote that of some other, is evidently contrary to that justice and equality of treatment which the sovereign owed to all the different orders of his subjects."[28]

Even accepting that equality rights discourse is fitting in these circumstances, a more sophisticated equality argument can be advanced in contrast to the formal notion of equality currently employed by free trade proponents. A more complex version of equality, where equality can mean not only equality in treatment, but also differing treatment, has been articulated by equality rights theorists.[29] It has also been invoked by others, such as the Government of Canada during the Charlottetown Accord referendum, as it sought theoretical justification for granting distinct or differing status to the province of Quebec.[30] This contextual approach to equality requires that, in some circumstances, equality mean not sameness, but difference.[31]

This fuller notion of equality can apply in the context of international trade. While formal equality in treatment (sameness) may be called for in some circumstances, in other situations a contextual approach to equality, mandating differential rather than similar treatment, is appropriate. For economically depressed regions of a country, a policy other than formal equality may be justifiable, shielding certain industries or economies from the pressures of economic restructuring — pressures which result from the lower wage and less-taxed jurisdictions to the south. Government procurement practices, which prefer local goods, services and industries for example, are not entirely dysfunctional; they act as a form of regional development, however economically inefficient such practices may otherwise be. Government expenditures within regional economies can help to promote the welfare of those most proximate to voters, those within local communities of concern.[32] There also are good socio-cultural reasons for preferring local services, as in the areas of public school examinations[33] or in the provision of publicly funded child-care services.

Performance requirements dictate that there be local content, domestic purchasing or technology

transfer to the host country (Art. 1006). NAFTA's investment chapter prohibits the use of performance requirements in relation to investments which nationals of a Party (and even a non-Party) have an interest. As Jim Stanford explains, these kinds of requirements have been an effective tool of industrial policy in both Mexico and Canada.[34] Barred from relying on these strategies, NAFTA will make it more difficult "to influence the nature of investment and thus promote long-run industrial and regional development goals."[35] While some provincial policies which do not conform to the investment chapter will be protected if included in a list of non-conforming measures (Art. 1108), the formal equality of national treatment generally fails, as an "operating principle," to be sensitive to these concerns.[36]

The analogy to formal equality, reflected in the principle of national treatment, does not capture the scope nor magnitude of NAFTA's reach into Canadian sovereignty. Lipsey, Schwanen, and Wonnacott, writing about the ostensible neutrality of NAFTA in relation to sovereignty, argue that:[37]

> Among other misconceptions about the NAFTA's supposed encroachment on Canada's ability to pursue independent policies, it is worth noting that the NAFTA does not prevent Canadian government from adopting any fiscal or monetary policy they wish — to subsidize firms (for example, in return for specific investment or research commitments), to extend research and development contracts to anyone they choose, to nationalize industries or set up public monopolies in any sector or to set any standard they wish (for example toward sustainable development objectives).

If the authors mean to say that NAFTA does not prohibit these activities unconditionally, they are correct. To the extent that the agreement prohibits most of these activities expressly and sanctions the use of economic coercion should Canada pursue offending policy objectives — either through the threat of trade retaliation or by the payment of damages to injured investors — the authors are not being faithful to the text. Consider, for example, how NAFTA's limits on (a) the nationalization of industries, and (b) the setting of technical standards, move beyond the requirements of formal equality. In both these areas something more than respect for the national treatment principle is required of the parties. In this way, the agreement provides for more substantive, rather than merely procedural, criteria with which to scrutinize legislative conduct. I will discuss briefly each of these areas.

(a) As regards the nationalization of industry, NAFTA's investment chapter forbids the Parties from "directly or indirectly" nationalizing or expropriating an investment of an investor of another Party or from taking measures "tantamount to" nationalization or expropriation. Such actions are permitted if they are done (a) "for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with the due process of law and Article 1105 (1); and (d) on payment of compensation ..." (Art. 1110.1). Article 1105.1 requires that each Party accord to investments and investors of another Party "treatment in accordance with international law, including fair and equitable treatment and full protection and security." The NAFTA expropriation section builds on similar provisions found in FTA (Art. 1607) by enabling investors to sue member states for alleged takings. There may be little objection to the principle that the state pay fair market value for property which it seizes outright, but the prohibition is wide enough to catch a variety of reasonable social policy mechanisms.

Recently, for example, the American tobacco company Phillip Morris threatened a claim for compensation "for hundreds of millions of dollars" under NAFTA's investment chapter should the Government of Canada legislate the plain packaging of cigarettes.[38] According to the legal opinion obtained by Phillip Morris and R.J. Reynolds from Carla A. Hills, who acted as U.S. Trade Representative for NAFTA, the imposition of plain packaging "would amount to expropriation of a lawfully registered trademark in violation of Article 1110(1), giving rise to massive compensation claims."[39] Jean-Gabriel Castel has disputed Hill's opinion, arguing that a general health exception applies to such intellectual property (Art. 2101), as does the more specific exception relating to performance requirements found in the investment chapter (Art. 1106.2).[40] Assuming these are investments under Chapter 11, the challenge facing supporters of plain packaging is that no specific health exception is mentioned in the expropriation section. Assistance may be found, however, in the more general requirement that takings be for a "public purpose." Whichever interpretation is most correct, the investment chapter prohibitions on nationalization and expropriation may inhibit severely the attainment of Canadian state objectives, like the plain packaging initiative.

(b) In addition, NAFTA prohibits the use of technical standards as barriers to trade, except when they are measures related to safety, the protection of human, animal or plant life or health, the environment or consumers (Art. 904). The use of technical standards as "unnecessary obstacles" to trade are forbidden. Standards are deemed to be "unnecessary" where "the demonstrable purpose of the measure is to achieve a legitimate objective" and the standard does not also operate to exclude the goods of another Party (the "national treatment" principle) (Art. 904.4). Not only does the "legitimate objective" test open up to substantive scrutiny most technical standards, but, according to one commentator supportive of NAFTA, the legislating Party will also have to show that the standard was the "least restrictive" trade measure available to achieve the desired objective.[41] As the Canadian experience under the *Charter* suggests, less restrictive means can almost always be devised.[42] The branch of the *Oakes* test (which assists in determining whether limits on Charter rights are reasonable)[43] concerned with least restrictive means has been the most often invoked in striking down legislation.[44] It is also because of the onerous standard set by the least restrictive means test that the Supreme Court of Canada has moved to relax this part of the *Oakes* test.[45] The prospect that there will be review of the substantive policy objectives of national and sub-national units is high, while the test for justification, at least with respect to technical standards, may be difficult to satisfy.

CONCLUSION

As Doern and Tomlin note, viewed broadly as an economic constitution for North America, "free trade leaves Canada forever changed."[46] The principle of national treatment, as a statement of formal equality, potentially disables member states from pursuing desirable social policy objectives. Furthermore, NAFTA also disables party states from pursuing policy objectives which offend the operation of a free trade zone and not simply the principle of 'equal opportunity.'

NAFTA's effects, then, on the democratic idea of representation are profound, the implications of which I will only allude to, given this short space. Suffice it to say that what the trade agreement takes away from local governments, at both the national and sub-national level, it does not give to a supra-national institution. Although the NAFTA sets up an apparatus of some eighteen standing committees, as well as *ad hoc* committees, panels and tribunals, it does not provide for representation at the continental level in any meaningful way. If, as Reg Whitaker has argued, Canadian federalism is agnostic about community,[47] NAFTA is, in many ways, antagonistic to community. Although some are hopeful that continental free trade will cultivate political allegiances which transcend national boundaries, fostering new alliances and coalitions, these political forces will have no where to turn to give effect to their political agendas. As Piven and Cloward have demonstrated, historically, social change has been achieved by social confrontation[48] — who are social movements to confront in the new transcontinental arena? While a variety of differing, and contradictory, allegiances may be fostered, including a sense of belonging to a North American community, this new plurality of actors will have, in the words of Donald Smiley, fewer forums with which to engage in the "ongoing process of democratic debate, persuasion and pressure."[49]❑

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Endnotes

1. David Held, "Democracy, the Nation-State and the Global System" (1991) 20 Economy and Society 138 at 150. On the disutility of the concept of sovereignty see Jacques Maritain, "The Concept of Sovereignty" in W.J. Stankiewicz, ed., *In Defense of Sovereignty* (New York: Oxford University Press, 1969) 41 and Harold J. Laski, *Studies in the Problem of Sovereignty* (New York: Howard Fertig, 1968).

2. "Disjunctions: Free Trade and the Paradox of Canadian Development" in Daniel Drache and Meric S. Gertler, eds., *The New Era of Global Competition: State Policy and Market Power* (Montreal & Kingston: McGill-Queen's University Press, 1991) at 116.

3. "Constitutionalizing the Canadian-American Relationship" in Duncan Cameron & Mel Watkins, eds., *Canada Under Free Trade* (Toronto: James Lorimer, 1993) at 12.

4. Ian Scott, "A Constitutional Challenge" (1988) 10:2 *The Facts* (Canadian Union of Public Employees) 25 at 26.

5. G. Bruce Doern & Brian W. Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddart, 1991).

6. Exemplified by William Blackstone and A.V. Dicey.

7. Patrick Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 U.T.L.J. 47 at 84.

8. Trade agreements generally may be seen to exhibit some of these same characteristics. NAFTA, however, goes much further in limiting state action than do most trade agreements. As Mel Clark argues in regard to FTA: "It is evident that while vital national powers are protected under GATT, the same can not be said of FTA." See Clark, "Canadian State Powers: Comparing FTA and GATT" in Cameron and Watkins, eds., *supra* note 3, 41 at 43. .

9. Stephen Holmes, "Precommitment and the Paradox of Democracy" in Jon Elster & Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 195.

10. See Holmes, *ibid.* at 225*ff.* and Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993).

11. "The Constitution as Economic Document" (1987) 56 Geo. Wash. Law Rev. 4.

12. See discussion in Cass R. Sunstein, "Constitutions and Democracies: An Epilogue" in Elster & Slagstad, eds., *supra* note 9 at 341.

13. See Stephen A. Scott, "NAFTA, the Canadian Constitution, and the Implementation of International Trade Agreements" in A.R. Riggs & T. Velk, eds., *Beyond NAFTA: An Economic, Political and Sociological Perspective* (Vancouver: The Fraser Institute, 1993) 238.

14. See Isaac Cohen, "Beyond NAFTA: The Institutional Dimension" in Rod Dobell & Michael Neufeld, eds., *Beyond NAFTA: The Western Hemisphere Interface* (Lantzville: Oolichan Books, 1993) 86 at 98-100.

15. On the dispute settlement mechanisms in NAFTA, see Armand de Mestral, "NAFTA Dispute Settlement Panels: Theory and Practice" in Riggs & Velk, eds., *supra* note 12 260. On the experience under FTA see Donald McRae, "International Dispute Settlement Under the Canada-United States Free Trade Agreement" in William Kaplan & Donald McRae, *Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen* (Montreal & Kingston: McGill-Queen's University Press, 1993) 186.

16. See John D. Whyte, "The Impact of Internationalization on the Constitutional Setting" in Institute of Public Administration of Canada, *Think Globally, Proceedings of the 42nd Annual Conference* (Toronto: Institute of Public Administration of Canada, 1991) at 470, and Joseph A. Camilleri, "Rethinking Sovereignty in a Shrinking, Fragmented World" in R.B.J. Walker & Saul H. Mendlowitz, eds., *Contending Sovereignties: Redefining Political Community* (Boulder and London: Lynne Rienner, 1990) at 24.

17. See Gary Clyde Hufbauer & Jeffrey J. Schott, *NAFTA: An Assessment* (Washington: Institute for International Economics, 1993) at 81.

18. See, for example, *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, R.S.C. 1985 and the discussion in Errol P. Mendes, "Assessing the Ultimate Question About International Commercial Arbitration: The Enforcement of Foreign Arbitral Awards" (1993) 5 C.U.B.L.R. 233 at 240-41.

19. Holmes, *supra* note 9 at 223.

20. Ian Robinson, "Neo-Conservative Trade Policy and Canadian Federalism: Constitutional Reform By Other Means" in D.M. Brown, ed., *Canada: The State of the Federation 1993* (Kingston: Institute for Intergovernmental Relations, 1993) at 217.

21. Although Duncan Cameron argues that, given the already unfavourable impact of free trade upon Canada: "any costs accrued from termination would not be very onerous. The prospect of regaining powers ceded by the FTA far outweigh the costs of termination." See Cameron "Renegotiation and Termination" in Cameron & Watkins, eds., *supra* note 3, 277 at 282.

22. Robert Chodos, Rae Murphy & Eric Hamovitch, *Canada and the Global Economy* (Toronto: James Lorimer, 1993) at 46.

23. (New York: Alfred A. Knopf, 1991) at 12.

24. Richard G. Lipsey, "The Free Trade Deal and Canada's Sovereignty: Are the Fears Justified? " *C.D. Howe Institute Trade Monitor* (November 1988) No.8 at 2.

25. Lipsey, *ibid.* at 2. Also see Richard G. Lipsey, "The Free Trade Agreement in Context" in Marc Gold & Douglas Leyton-Brown, eds., *Trade-Offs On Free Trade* (Toronto: Carswell, 1988) 67.

26. Richard G. Lipsey, Daniel Schwanen, & Ronald J. Wonnacott, "Inside or Outside the NAFTA? The Consequences of Canada's Choice" *C.D. Howe Institute Trade Monitor* (June 1993) No.48 at 16.

27. Ronald J. Wonnacott, "Hemispheric Trade Liberalization: Is NAFTA on the Right Track?" *C.D. Howe Institute Commentary* (June 1993) at 17 [emphasis added].

28. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Vol. 2 (Indianapolis: Liberty Classics reprint of Oxford University Press, 1976) at 654.

29. See, for example, Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990).

30. This argument can be found in the Government of Canada pamphlet on the Charlottetown Accord delivered to every Canadian household in October 1991: "We want a country in which everyone is equal. But no one wants a country in which everyone is the same." See, in addition, Judy Rebick, "The Charlottetown Accord: A Faulty Framework and a

Wrong-Headed Compromise" in Kenneth McRoberts & Patrick Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: McGill-Queen's University Press, 1993) at 102-04, and Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal & Kingston: McGill-Queen's University Press, 1994) at 233-34.

31. Take for example the case of a woman seeking pregnancy leave. Equality as sameness would require that no special benefits be available for pregnant women — she could qualify for regular "disability" benefits as would other disabled employees. Equality as difference would require that the differences between pregnancy and sick leave be recognized and accommodated to suit the needs of the pregnant employee (requiring different amounts of leave, spousal leave, etc.). See discussion by Dickson C.J. in *Brooks* v. *Canada Safeway*, [1989] 1 S.C.R. 1219 and Sheilah L. Martin, "Persisting Equality Implications of the 'Bliss' Case" in Sheilah L. Martin & Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 195.

32. See Arne Johan Vetlesen, "Why Does Proximity Make a Moral Difference?" (1993) 12 Praxis International 371.

33. The case of B.C. contracting for the delivery of grade twelve examinations to a firm outside of the country is discussed in Matthew Sanger, "Public Services" in Cameron & Watkins, eds., *supra* note 3 at 190.

34. Stanford, "Investment" in Cameron & Watkins, *ibid.* at 166.

35. *Ibid.*

36. A more attentive balancing of the public interest is offered in Robert Howse, *Economic Union, Social Justice, and Constitutional Reform: Towards a High But Level Playing Field* (North York: York University Centre for Public Law and Public Policy, 1992).

37. Lipsey *et al.*, *supra* note 26 at 17-18.

38. Letter dated May 5, 1994 from William H. Webb, President and Chief Executive Officer, Philip Morris International Inc., to the House of Commons Standing Committee on Health.

39. Legal opinion dated May 3, 1994 from Carla A. Hills to R.J. Reynolds Tobacco Company and Philip Morris International Inc. filed with House of Commons Standing Committee on Health at 18.

40. Legal opinion dated May 11, 1994 from J.-G. Castel to Fasken Campbell Godfrey filed with the House of Commons Standing Committee on Health. Also see Castel, Letter to the Editor, *Globe and Mail* (30 May 1994) A18.

41. Bradley J. Condon, "Constitutional Law, Trade Policy, and the Environment: Implications for North American Environmental Policy Implementation in the 1990s" in Riggs & Velk, eds., *supra* note 13 at 224.

42. See Joel Bakan, " Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall L.J. 123 at 165-66 and Peter Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 878-882.

43. *R. v. Oakes*, [1986] 1 S.C.R. 103.

44. See David Beatty, "The End of Law: At least as We Have Known It" in Richard Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond-Montgomery, 1991) at 395.

45. Andreé Lajoie & Henry Quillinan, "Emerging Constitutional Norms: Continuous Judicial Amendment of the Constitution — The Proportionality Test as Moving Target" (1992) 55 Law and Contemporary Problems 285.

46. Doern & Tomlin, *supra* note 5 at 305.

47. Reg Whitaker, "Federalism and Democratic Theory" in Whitaker, *A Sovereign Idea* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 198.

48. See Frances Fox Piven & Richard Cloward, *Poor People's Movements: Why They Succeed and How They Fail* (New York: Vintage, 1977), Frances Fox Piven & Richard Cloward, *Regulating the Poor: The Functions of Public Welfare* 2nd ed. (New York: Vintage, 1993) and Bryan Turner, "Outline of a Theory of Citizenship" in Chantal Mouffe, ed., *Dimensions of Radical Democracy* (London: Verso, 1992) 33 at 38.

49. Donald Smiley, "A Note on Canadian-American Free Trade and Canadian Policy Autonomy" in Gold & Leyton-Brown, eds., *supra* note 25, 442 at 443.