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Political and Economic Integration: The European Experience and Lessons for Canada

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POLITICAL AND ECONOMIC INTEGRATION: THE EUROPEAN EXPERIENCE AND LESSONS FOR CANADA

Patrick Monahan

BACKGROUND STUDIES

OF THE YORK UNIVERSITY CONSTITUTIONAL REFORM PROJECT

STUDY NO. 10

CENTRE FOR PUBLIC LAW AND PUBLIC POLICY

In this study, Professor Monahan examines the broader dimensions of current efforts at integration of the European Community. He shows the importance of properly understanding what the recent European experience entails. Monahan first provides a background sketch of the laws and institutions of the European Community and an overview of the important changes brought about by the *Single European Act* of 1987. He next details how the European Community's agenda has broadened in recent years to encompass non-economic and non-trade-related matters. Monahan then identifies the lessons for Canada, arguing that the real lessons arising from the European experience are quite different from those often suggested. He concludes with an assessment of the 1991 of the federal proposals for strengthening the economic union.

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THE YORK UNIVERSITY
CONSTITUTIONAL REFORM PROJECT

This publication is part of the Centre's latest project, the York University Constitutional Reform Project. The Project studied the legal issues surrounding Québec sovereignty, Ontario's interests in the current constitutional discussions, and the federal proposals released in September of 1991. A comprehensive eight-month study by researchers at the Centre, meetings and conferences with eighteen distinguished academics from York University and the University of Toronto, and individual studies by distinguished academics and professionals throughout Canada culminated in the publication of eleven Background Studies and a Final Report. The Final Report, *An Agenda For Constitutional Reform*, is written by Patrick Monahan, Director of the Centre, and Lynda Covello, Coordinator and Director of Research for the Project. The Report puts forward and discusses forty-eight recommendations on constitutional reform. The publications are listed on the inside of the back cover.

POLITICAL AND ECONOMIC INTEGRATION: THE EUROPEAN EXPERIENCE AND LESSONS FOR CANADA

Patrick Monahan

BACKGROUND STUDIES
OF THE YORK UNIVERSITY CONSTITUTIONAL REFORM PROJECT

STUDY NO. 10

York University Centre for Public Law and Public Policy
North York, Ontario
1992

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Political and Economic Integration:
The European Experience and Lessons for Canada
Patrick J. Monahan

Study No. 10
Background Studies of the York University Constitutional Reform Project

This Background Study was published simultaneously with the Final Report and the ten other Background Studies of the Project. The inside of the back cover lists the publications, and explains how to order them.

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PART I: INTRODUCTION*

As Canada approaches its constitutional "high noon" — a sovereignty referendum in Québec by October of 1992[1] — the purported parallels between events in Canada and those unfolding elsewhere around the globe have begun to multiply. Canada's survival has come into question precisely at a time when many other linguistically-divided States are undergoing dramatic transformations, most in the direction of greater decentralization, some even involving fracture and disintegration. With these nations experiencing what amounts to constitutional earthquakes, Canadian commentators claim to have discovered important lessons for our own domestic constitutional squabbles. Of course, the more that Canadian leaders and pundits proclaim parallels between events here and those taking place elsewhere, the more vigorous are the denials of the validity of the comparisons. While Parti Québecois leader Jacques Parizeau professes to find analogies between Québec's claim to independence and the new-found sovereignty of the Baltics, Prime Minister Mulroney denies any such comparisons can be made.[2] The disintegration of the Yugoslav federation is thought by some to demonstrate the impossibility of maintaining political unity in a multi-ethnic State. Others see the

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* This paper was completed in November of 1991.

[1] Bill 150, *An Act Respecting the Process for Determining the Political and Constitutional Future of Québec*, 1st Sess., 34th Leg. Que., 1991, adopted on 20 June 1991, requires the holding of a referendum on sovereignty by 26 October 1992. The requirement is mandatory; there is no discretion vested in the government to postpone or cancel the referendum. Moreover, the wording of the question is limited by the fact that an affirmative outcome in the referendum will "constitute a proposal that Québec acquire the status of a sovereign State one year to the day from the holding of the referendum" (section 1). The only way to avoid the holding of a referendum on whether Québec should acquire the status of a sovereign State is for the Québec National Assembly to amend or repeal the terms of Bill 150.

[2] See E. Stewart, "Québec Eyes Baltic's Independence" *The Toronto Star* (28 August 1991) A19.

outbreak of civil war as an illustration of the difficulty facing anyone seeking to peacefully transform a single federal State into a number of different ethnic entities.[3]

Of all the international comparisons, however, the most frequently-cited has been the alleged parallel between developments in Canada and those in the European Economic Community. As with other international comparisons, there is little consensus as to the appropriate lessons Canada can draw from the European model. In part, the contested nature of the comparisons between Europe and Canada is due to the speed with which events are unfolding in Europe. Since the mid-1980s, Europe has been evolving towards ever-greater political and economic integration at what amounts to breakneck speed. The creation of a single European market on 31 December 1992 is now less than a year away; in December of 1990, two intergovernmental conferences were convened to study monetary and political union. There is the prospect that by the late 1990s, Europe will have achieved monetary union and moved to some form of quasi-federal structure. Such a possibility would have been unheard of even a few years ago.

For some, the European example provides strong ammunition for maintaining a united Canada. The Prime Minister, for example, has often referred to the European experience as illustrating both the benefits and the inevitability of close political and economic ties in developed western States.[4] Mulroney argues that while the Europeans are moving towards greater integration, Québec nationalists would take Canada in precisely the opposite direction. He says developments in Europe demonstrate that those who would break apart the Canadian nation-State are moving against the tide of history.

Others claim to decipher a different message from the tea leaves of the European example. In this view, what the European case illustrates is the fact that economic union is possible within a decentralized political structure. Québec Premier Robert Bourassa has talked vaguely for some time of a possible political superstructure linking Québec and Canada, modelled on the European experience.[5]

[3] See J. Simpson, "If Canada followed the Communists, things might not stop at Québec" *The Globe and Mail* (10 September 1991) A16.

[4] See, *e.g.*, Stewart, *supra*, note 2.

[5] See, *e.g.*, R. Sequin, "Bourassa raises spectre of new federalism" *Globe and Mail* (9 Feb. 1990) A11.

At its meeting in the summer of 1990, the Youth Wing of the Québe Liberal Party called for the adoption of European political institution in Canada.

Most significantly, the report of the Allaire Committee in Januar 1991,[6] with its proposal for "political autonomy" for Québec couple with a strengthened Canadian economic union, is clearly inspired b the European experience. The Allaire Committee's proposals ar premised on the idea that it is possible to have economic union withou comprehensive political union. Thus, the Allaire Committee i prepared to cede to the Canadian government exclusive jurisdiction i relation to the "Canadian economic space," including control over th currency, customs, and tariffs, management of the common debt, an equalization. But Allaire would grant Québec exclusive or share jurisdiction in virtually all other areas in order to protect the politic autonomy of Québec. In these areas of exclusive provinci jurisdiction, Allaire contemplates mechanisms for "joint action with th corresponding bodies in the rest of Canada;" this joint action takin the form of reciprocal agreements designed to coordinate governmen action or to harmonize standards and regulations.[7]

Reference to the European experience as a political model fo Canada has not been limited to Québec alone. Certain political leader and commentators in English Canada have argued that the recen European experience with a social charter — the *Community Charte of the Fundamental Rights of Workers*[8] — provides a model whic

[6] See *Constitutional Proposals of the Québec Liberal Party: A Québec Free to Choo* (Montreal: Québec Liberal Party, 29 January 1991) [hereinafter *Allaire Report*].

[7] *Ibid.* at 38.

[8] COM (89) 248 final (30 May 1989) [hereinafter European *Social Charter*]; and se *Commission of the European Communities* (Luxembourg: Office of Official Publication of the European Communities, 1990). This document should not be confused with th Council of Europe's Social Charter, a convention adopted by the twenty-one membe Council in 1961 [hereinafter Council's *Social Charter*]. The Council's *Social Charter* h been ratified by nine of the twelve Member States of the European Economi Community. However, the Council's *Social Charter* contains no provision for leg enforcement through the courts. The system of supervision is based on national report from the parties. This weak form of enforcement has meant that the Council's *Soci Charter* has had relatively limited impact on harmonizing and integrating social polic in Europe. See D. Harris, "The System of Supervision of the European Social Charte

Canada might adopt.[9] They have further suggested that Canada ought to write its own social charter into the constitution. While the exact details of what such a charter would entail are notoriously vague and general,[10] it would seem to involve some form of constitutional entrenchment of economic and social rights. The inclusion of these rights is justified on the basis that social policy is a central aspect of Canadians' self-image as a "kinder, gentler" society within North America. The social charter idea has also been linked to the decentralization of legislative powers to the provinces. Because the social charter would apply across the country, it would represent a set of national standards guaranteeing all Canadians their entitlement to a basic level of social and economic welfare. These guarantees are said to make possible the granting of additional constitutional jurisdiction to the provinces in the social-policy field. The theory is that granting greater provincial control over social policy would not result in the balkanization of government efforts in this field if it were accompanied by a social charter.[11]

— Problems and Options for the Future" in L. Betten, ed., *The Future of European Social Policy* (The Netherlands: Kluwer Law and Taxation Publishers, 1989) at 11.

[9] See L. Osberg, "Rights and Responsibilities: Canadian Federalism for the Future" (Halifax, Dalhousie University, 1991) [unpublished]. See also, S. Delacourt, "Ottawa to float concept of constitutional 'social charter:' National-unity package could include plan to entrench rights to shelter, decent living standard" *The Globe and Mail* (10 September 1991) A1.

[10] See, *e.g.*, Osberg, *ibid.*, who calls for "a more explicit statement of the social and economic rights of Canadians, along the lines of the U.N. Universal Declaration of Human Rights." It is not clear, however, whether such a statement would be legally enforceable or whether it would simply operate at the level of general principle.

[11] The idea of a social charter raises a host of important questions, none of which has been adequately addressed or analyzed in the current Canadian debate. The first issue is whether the social charter would be legally enforceable or whether it would merely represent some form of political commitment along the lines of section 36(1) of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11. If the social charter is to be legally enforced, the next issue is the method of enforcement. Should the social charter be enforced directly by the courts, similar to the existing *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [hereinafter *Canadian Charter of Rights*]? Alternatively, should some other agency or institution be vested with the authority to ensure that the social and economic rights set out in the social charter are legally binding? These issues will all be discussed below at 32ff.

The interest in the European experience as a possible model fo Canada has yielded an impressive crop of academic commentary on th subject.[12] Most commentators have accepted the premise tha concerns about the economic union can be separated from other aspect of legislative jurisdiction. For these commentators, the key questio centres on how much an economic union and a common currenc would restrict political autonomy.[13] The European experience is the invoked to demonstrate that the Europeans have accepted very broa constraints on political autonomy in the interests of creating th European economic space.[14] As Tom Courchene has recently argue these constraints are significant enough to make a mockery of claim to sovereignty: any additional powers granted to provinces wi inevitably be Pyrrhic in the sense that the exercise of these powers wil be closely monitored and regulated.[15]

These observations do not seem to have blunted the appetite fo additional political powers in the province of Québec. Indeed, th *Allaire Report* apparently accepts the proposition that maintenance c the economic union inevitably implies significant constraints o political autonomy. The *Allaire Report* is fully prepared to grant th Government of Canada exclusive jurisdiction over monetary policy, a well as certain other important powers essential to the maintenance c the economic union. The Report appears to recognize the significan limitations which this would impose on Québec's political autonomy The *Allaire Report* proposes to willingly submit the province to thes constraints in the interest of preserving the "Canadian economi

[12] See, *e.g.*, D. Soberman, "European Integration: Are There Lessons for Canada? in R. Watts & D. Brown, eds, *Options for a New Canada* (Toronto: University c Toronto Press, 1991) 191; P. Leslie, *The European Community: A Political Model f Canada?* (Ottawa: Minister of Supply and Services Canada, 1991); and T. Courchene, *I Praise of Renewed Federalism* (Toronto: C.D. Howe Institute, 1991). The commo message of this literature is that economic integration implies political integration.

[13] See, *e.g.*, Courchene, *ibid.* at 15, who formulates the question in this way: "[w]h is the nature of the minimum political, institutional, and economic superstructure — tha is, the minimum political and economic integration — consistent with the maintenanc on a sustainable basis of a common currency and an economic union in the upper ha of North America?"

[14] See, *e.g.*, Courchene, *ibid.*, and Leslie, *supra*, note 12.

[15] See Courchene, *ibid.* at 34-40.

space." At the same time, however, the Report attempts to distinguish between concerns about the economic union and all other aspects of legislative jurisdiction, including social and cultural policy, environmental policy, regional development policy, and manpower training. The approach of the *Allaire Report* is to devolve control over these other matters to the Québec government as the province moves "resolutely towards political autonomy."[16]

While the Canadian literature on the European Community is growing rapidly, little attention has thus far been paid to the social and political dimensions of recent developments in Europe. The commentary on the European experience has focused primarily on the economic and trade dimensions, and the implications of closer economic ties for political organization.[17] Non-economic, non-trade-related aspects of European developments have received scant attention.[18] For example, there has been little serious academic analysis of the European *Social Charter*, despite the prominence of the social charter idea in current Canadian political debates.[19] In down-playing the social and political dimensions of European integration, commentators have implicitly accepted the assumption that the economic realm can be considered apart from the broader social and political realm. This is precisely the assumption underlying the *Allaire Report's* insistence that a common political structure be limited to dealing with issues about economic union, with the provinces being left to regulate social, cultural, and environmental policy.

This limited focus on the economic and monetary aspects of European integration is seriously incomplete and misleading. The terms of the emerging European debate, while once limited to issues

[16] See *supra*, note 6 at 37.

[17] It should be noted that the idea of a social charter has played a part in the broader political debate over the future of Canada. However, as I will suggest below at 17ff, this political debate seems to have proceeded without any real understanding of the nature of the social charter movement in Europe.

[18] For an exception to this generalization, see R. Howse, *Economic Union, Social Justice, and Constitutional Reform: A High But Level Playing Field* (North York: Centre for Public Law and Public Policy, 1992).

[19] For instance, Peter Leslie, *supra*, note 12, in an otherwise admirable and comprehensive discussion of the recent European experience, makes no mention whatever of the European *Social Charter*.

about economic union, have broadened quite dramatically in the pa few years. Social and political issues, only indirectly connected wit the creation of a single market, are now occupying a central place i current attempts to achieve greater integration. The European *Soci Charter* is one illustration of this social and political dimension t recent European experience. Other examples of the same phenomeno — ranging from environmental policy, foreign policy, and politic reform of European Community institutions — are becomin increasingly important. These developments arose out of, but no transcend, concerns over the economic union. Thus, to continue t talk of the European Community model in exclusively economic an trade terms[20] is to ignore the broader dimensions of current efforts a integration. Any account of the emerging European experience mus explain how and why these non-economic factors have come to featur so prominently in the debate.

This paper is an attempt to provide such an explanation. I wil focus on the emergence of the European *Social Charter*. The Charte is a prime illustration of the European Community's growin involvement in matters not strictly related to the economic union. Th European *Social Charter* is important, therefore, because it challenge what has been until now a common assumption of many Canadia commentators. This assumption, shared by the *Allaire Report* as wel as by its critics, is that it is possible to make a distinction betwee concerns about the economic union and non-economic, political, o social matters. The experiment with the European *Social Charter*, wit its blending of the economic and social agendas, calls into direc question the validity of this assumption.

The second reason for examining the social and politica dimensions of the European experience relates specifically to th emerging interest in a social charter in the Canadian context. Th definition and boundaries of a Canadian social charter have bee exceedingly vague. It is unclear how this proposed charter would b developed and whether or how it would be legally enforceable. Bu proponents of the social charter insist they are merely seeking t

[20] Courchene, for example, *supra*, note 12 at 10, argues that "it should be remembered that the EC is first and foremost an economic union."

import to Canada a concept that has been tested successfully elsewhere, primarily in Europe. It is critically important, therefore, that Canadians have a detailed understanding of precisely what the recent European experience entails. I will suggest that much of the current Canadian discussion surrounding a social charter has been based on a profound misreading of the European Community's experience. The real lessons arising from the European *Social Charter* are quite different than those suggested in much of the current Canadian debate.

The first section of the paper provides a background sketch of European Community laws and institutions. This section also provides an overview of the important changes put into place by the *Single European Act* of 1987.[21] It explains how the 1992 programme is designed to create a single European market.

The next section of the paper details how the European Community's agenda has broadened in recent years to encompass non-economic and non-trade-related matters. The section outlines the emergence of the movement to establish a Community charter of fundamental social rights. The analysis also highlights the difficulties encountered in implementing the European *Social Charter* following its signing in 1989. These difficulties have fuelled efforts to achieve a more broad-based form of political union in the context of the Intergovernmental Conference on Political Union.[22]

The final section of the paper seeks to identify the lessons of the European experience for Canada. I argue that the key message for Canadians from the European experience is the need to maintain a meaningful federal role in the social-policy field. The federal role cannot be limited to maintaining the economic union since, as I suggest, concerns about the economic union are inextricably linked with social policy. Moreover, the federal responsibility in the social-policy field cannot be shunted off onto the shoulders of judges. Judges lack the capacity to undertake this responsibility and, in any event, entitlements to social and economic goods should not be frozen in the constitution. Finally, the implications of these findings for the redesign of national institutions or for the creation of new national institutions

[21] (1987) 29 O.J. Eur. Comm. (No. L169), effective 1 July 1987.

[22] See the discussion, *infra*, notes 90-95 and accompanying text.

are identified and explored. The paper concludes with an assessment of the federal proposals for strengthening the economic union which were released in September of 1991.

PART II: BACKGROUND — LAWS AND INSTITUTIONS IN THE EUROPEAN COMMUNITY

The origins of the European Community can be traced to April of 1951 when Belgium, France, Holland, Italy, Luxembourg, the Netherlands, and West Germany signed the *Treaty Establishing the European Coal and Steel Community.*[23] Six years later, these countries ratified the *Treaty Establishing the European Economic Community.*[24] This latter Treaty, as amended, is the operative constitutional law of the European community. The Treaty defines the decision-making processes and powers of European institutions and regulates the relationship between community law and the laws of the respective Member States. The *EEC Treaty* sets out the framework for the free circulation of goods, persons, services and capital.[25] It forbids discriminatory practices and unfair competition and provides the legal machinery for Member States to adopt common policies.[26]

The *EEC Treaty* has a constitutional character due to the supremacy and direct applicability of Community law in relation to the laws of Member States.[27] The Court of Justice of the European Community has held that Community law takes primacy over national law within its field of applicability. Member States are obliged to implement the Community's authoritative legislation, either directly or by secondary legislation.[28] The Court has also held that Community

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[23] 18 April 1951, 261 U.N.T.S. 140.

[24] 25 March 1957, 298 U.N.T.S. 11 [hereinafter *EEC Treaty*]. These countries also ratified the *Treaty Establishing the European Atomic Energy Community*, 25 March 1957, 298 U.N.T.S. 3.

[25] *Ibid.*, art. 3.

[26] *Ibid.*, arts 7-8.

[27] See J. Thieffry, P. Van Doorn & S. Lowe, "The Single European Market: A Practitioner's Guide to 1992" (1989) 12 B.C. Int'l & Comp. L. Rev. 357 at 358-59.

[28] See D. Kennedy & L. Specht, "Austrian Membership in the European

law can be invoked directly by individuals in their own national courts.[29] Other Member States and the institutions of the Community may also legally compel Member States to fulfil their obligations under the Treaty. These obligations are enforced by the European Court of Justice which has exclusive power to "ensure that in the interpretation and application of the law ... [the European Community Treaties are] observed."[30] A decision of the European Court is not subject to appeal.

A. *Institutions and Their Role in Decision Making*

The Council of Ministers: The Council of Ministers of the European Community is the most important decision-making body. The Council consists of ministers designated by each of the twelve Member States according to the subject matter on the agenda. The Council is vested with formal law-making authority, with the ability to enact a variety of legal "instruments."[31] In most instances, the Council may only act on the basis of a proposal from the "Commission." In addition, these proposals may be commented upon and sometimes approved by the European Parliament. Council decisions are often taken *in camera*, making it difficult for national parliaments to hold individual governments accountable.[32]

The Commission: The Commission is responsible for initiating Community policy, for formulating proposals for decision by the Council, and for enforcing Community law. The seventeen members of the Commission are appointed by the Member States for fixed terms of four years. The Commissioners are to be "completely independent in the performance of their duties;" they are the custodians of the European interest rather than the particular interest of individual Member States. The policy initiatives of the Commission involve an

Communities" (1990) 31 Harv. Int'l L.J. 407 at 437-38.

[29] See *Amministrazione delle Finanze dello Stato* v. *Simmenthal Spa*, [1978] Eur. Comm. Ct J. Rep. 629.

[30] *EEC Treaty*, *supra*, note 24, art. 164.

[31] See *infra*, notes 39-43 and accompanying text, for discussion of the various instruments.

[32] See *supra*, note 28 at 442.

elaborate process of consultation with national governments, advisory bodies, and interest groups.[33]

The European Parliament: The 518-member European Parliament, directly elected since 1979, lacks any meaningful legislative capacity. The Parliament must be consulted by the Council and the Commission in the legislative process and, in certain circumstances, it can reject or amend Council decisions. Even when the Parliament rejects a proposal, however, the Council may still enact the rejected measure by a unanimous vote.

The European Court of Justice: The Court of Justice of the European Community[34] is vested with authority to enforce the obligations created by the Treaty. It consists of thirteen judges appointed by the Member States for terms of six years. The Court has been an important factor in promoting European integration, supporting the substantive extension of Community law, and aggressively enforcing Community laws and treaty obligations.[35]

The Law-making Powers: The steps in the law-making process begin with the submission of a proposal to the Council of Ministers by the Commission. While the Council is considering the proposal, the European Parliament also comments on it, providing its opinion within three to six months. The Commission may amend its proposals in light of the Parliament's opinion before the matter is formally considered by the Council, although the Commission is under no obligation to do so. Next, the Council decides the matter either by a simple majority, a qualified majority or a unanimous vote. Increasingly, decisions in the Council are taken by qualified majority vote, which requires the support of between seven and ten of the Member States.[36] In such cases, the Council adopts what is termed a

[33] See *EEC Treaty*, *supra*, note 24, arts 155-63, which delineate the powers of the Commission.

[34] Hereinafter *European Court of Justice*.

[35] See Kennedy & Specht, *supra*, note 28 at 443; Thieffry *et al.*, *supra*, note 27 at 361.

[36] The *Single European Act*, *supra*, note 21, replaced the former requirement of unanimity with a requirement of qualified majority in a number of important areas, including the following: measures for the approximation of laws in Member States designed to establish the internal market (article 100a); measures to determine that provisions in force in a Member State must be recognized as being equivalent to those applied by another Member State (article 100b); measures designed to protect worker

"common position" which is then transmitted to the European Parliament for a "second reading."[37] If the common position is approved by the Parliament or is not acted upon within three months, it is automatically adopted by the Council. If the Parliament rejects the common position, then the proposal goes back to the Council, which can adopt it only through a unanimous vote. Finally, if the Parliament proposes amendments to the common position, the Commission must re-examine the proposal and submit a new proposal to the Council. The Council may then adopt the amended proposal by a qualified-majority vote. However, if the Council wishes to incorporate amendments proposed by the Parliament but not taken up by the Commission, or to introduce amendments of its own, it may do so only by unanimous vote.[38]

An EC law may take a variety of forms. A "directive" requires each Member State to integrate a point of EC policy into its national law. While the transposition of Community directives into internal national law is mandatory, the exact form of the national legislation is left to the discretion of the individual Member State.[39] The European Court has declared that Member States are obliged to adopt all dispositions contained in a directive in their entirety.[40] A "regulation" binds Member States directly, even without Member State legislation.[41] Regulations are usually employed to implement common policy, such as in the fields of agriculture, transport, and competition

health and safety (article 118a); and measures designed to prevent discrimination on grounds of nationality (article 7).

[37] The procedure described above applies in cases where the Council decision is to be taken by qualified majority. In cases where unanimous consent is required, the Council does not arrive at a "common position" but simply determines whether there is unanimous support for a particular Commission proposal.

[38] See *EEC Treaty*, *supra*, note 24, arts 137-98.

[39] "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods": see *ibid.*, art. 189.

[40] Moreover, the Court has held that in cases of bad implementation or non-implementation of a directive by a Member State, it is possible for a citizen to rely upon the terms of the directive itself if the directive is "unconditional and sufficiently precise": see *Becker* v. *Finanzamt Munster-Innenstadt*, [1982] Eur. Comm. Ct J. Rep. 53.

[41] "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States": *EEC Treaty*, *supra*, note 24, art. 189.

policy. A "decision" addresses fact-specific situations, in which a community stipulation binds a Member State or a private individual.[42] Decisions are used particularly in competition policy and in the control of State subsidies. Finally, a "recommendation" states a point of EC policy but is not binding on the Member States.[43]

Certain features of the Community law-making process bear emphasis. Most importantly, it is almost entirely an executive-driven process. The most significant actors — the Council of Ministers and the Commission — are not directly accountable to any electorate. The Council of Ministers provides for government interaction between Member States. However, these decisions are not subject to ratification by the home parliaments of the Member States and the Council deliberations are often taken behind closed doors. As for the Commission, it is an appointed body expressly designed to be free of the influence of governments or home legislatures. The only elected Community institution is the Parliament, but its role is largely advisory and it lacks the scope of initiative associated with a domestic Parliament. As Peter Leslie has noted, a Canadian analogy to the European Council of Ministers would be a meeting of provincial premiers (or their designates) vested with power to enact binding laws.[44] In some cases, the laws voted on by the premiers would be binding on Canadians directly; in other cases, the provincial legislatures would be obliged to enact the implementing legislation. Pursuing the analogy, Leslie notes that, if European institutions were replicated in Canada, the Parliament of Canada would be unable to pass any legislation. Its role would be limited to providing non-binding advice to the provincial premiers or requiring the premiers to make decisions by unanimous vote rather than through a qualified majority. Furthermore, an independent secretariat named by the premiers would have exclusive control over the initiation of the legislative process. Leslie's suggested analogy to the Canadian situation helps to bring home the un-democratic, executive-driven character of European

[42] "A decision shall be binding in its entirety upon those to whom it is addressed": *ibid.*, art. 189.

[43] "Recommendations and opinions shall have no binding force": *EEC Treaty*, *ibid.* art. 189.

[44] See Leslie, *supra*, note 12 at 5-6.

Community institutions. The European law-making process suffers from what has been described as a "democratic deficit," spurring repeated calls for reforms in the direction of greater democratic control and accountability.[45]

A second important general observation about Community institutions is the critical role played by decision-making rules, particularly evidenced by the recent shift to qualified majority voting in the Council of Ministers. Students of organizational behaviour have long noted that a requirement for unanimous consent is inefficient and likely to produce stalemate and deadlock. The European Community provides a practical illustration of the validity of this observation. By the early 1980s, the European Community found that further integration was largely impossible under the then-prevailing rule of unanimity for most important matters. The search for consensus produced incredible delay and deadlock within the Council of Ministers. For example, proposals from the Commission on standards or technical regulations required an average of 2.5 to 7 years to be disposed of by the Council of Ministers.[46] It was widely recognized that if further integration efforts were to succeed, the Council would have to abandon unanimity in favour of decision by qualified majority. Under the *Single European Act*, measures designed to complete the legislative framework for the single market require only a qualified majority. The change has reduced delay and provided for more effective decision-making.[47]

[45] A conference of EC Parliaments, held in Rome in November of 1990, overwhelmingly called for the European Parliament to be given an equal role with the Council of Ministers in the legislative process. See "Conference of the European Community Parliaments: Final Declaration," *Agence Europe*, No. 1668, 8 December 1990.

[46] See J. Pinder, "The European Community, the Rule of Law and Representative Government: The Significance of the Intergovernmental Conferences" (1991) 26 Gov't and Opposition 199 at 208.

[47] The time taken by Council to act on a proposal from the Commission under the *Single European Act*, *supra*, note 21, now averages between eleven and twenty-two months. While this is a considerable improvement over the previous performance, it illustrates the fact that community legislative machinery continues to operate in a cumbersome fashion, as compared to domestic legislative processes. See Pinder, *ibid.* at 208.

This unhappy experience with unanimity as a decision-making rule should be nothing new to Canadians. Federal-provincial relations in this country have often been frustrated by a strait-jacket of unanimity, as evidenced most recently in the failed efforts to secure the ratification of the Meech Lake Accord. What the European experience confirms is that any move to expand requirements of unanimous consent should be viewed with considerable caution, either in the constitutional amendment context or in the ordinary conduct of federal-provincial relations. The contractual model of integration is premised on the idea that each constituent party is entitled to a veto over common decisions. It is a recipe for frustration, failure, and paralysis. Any programme which depends for its success on securing the unanimous consent of all those affected by it is almost certainly doomed to failure.

B. *The White Paper and the Single European Act*

By the early 1980s, the process of integration, originally contemplated under the 1957 *EEC Treaty*, threatened to grind to a halt. It was widely recognized that to achieve the original concept of a united European market with a single identity, a dramatic new breakthrough would be required.

The European Commission's White Paper of 14 June 1985 provided the needed breakthrough. It set forth a concrete agenda for the EC's single market.[48] The White Paper established the date of 31 December 1992 for the achievement of a single integrated market and identified nearly three hundred barriers which would have to be eliminated to meet this timetable. The barriers were classified as falling into one of three categories: "physical barriers," such as border controls and controls over the movement of weapons,[49] "technical barriers," such as divergent safety standards or discriminatory government procurement policies,[50] and "fiscal barriers," such as

[48] "Completing the Internal Market: White Paper from the Commission to the European Council," COM (85) 310 final [hereinafter White Paper].

[49] *Ibid.*, "Annex," Part A.

[50] *Ibid.*, Part B.

differential levels of cigarette taxes or value-added taxes.[51] The Commission set out a timetable under which measures in these three categories would be harmonized, either through EC-level legislation or through recognizing the equivalence of existing standards in Member States.

The *Single European Act*, ratified by the Member States in 1986, provided the legal and institutional framework necessary to achieve the integrated market by the end of 1992. The *Single European Act* provided that the Community was to adopt measures with the aim of "progressively establishing the internal market over the period expiring on 31 December 1992."[52] To realize this goal, the *Act* provided that measures which have "as their object the establishing and functioning of the internal market" could be adopted by a qualified majority of the Council of Ministers.[53] It should be noted, however, that the requirement of unanimous consent within the Council was not abolished altogether. In certain specific areas, including labour and social policy, the operative decision-making rule continued to be unanimity.[54] The White Paper and the *Single European Act* thus made a clear distinction between trade matters associated with the 1992 programme and the fields of social and labour policy. This emphasis on the trade aspects of the 1992 programme was designed to gain the support of former British Prime Minister Margaret Thatcher, as well as of the European business community. Both Thatcher and the European business community were wary of movements to promote a "social Europe," suspecting that such efforts would involve greater government regulation and increased operating costs for business.[55]

[51] *Ibid.*, Part C.

[52] *Supra*, note 21, art. 13, adding art. 8a of the *EEC Treaty*, *supra*, note 24.

[53] See *ibid.*, arts 14,16 & 18, amending the *EEC Treaty*, *ibid.*, arts 8(b), 28, 57(2), 59, 70(1), 84(2) & 100(a).

[54] See the *EEC Treaty*, *ibid.*, art. 100(a), para. 2, which provides that the qualified majority voting rules shall not apply to "fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons." Note, however, that a significant new power was added permitting the Council to set down "minimum requirements" in the field of the "working environment" and occupational health and safety; this power has subsequently proven to be of considerable importance. See the *EEC Treaty*, art. 118(a).

[55] See D.C. Dowling, Jr., "Worker Rights in the Post-1992 European Communities: What 'Social Europe' Means to United-States-Based Multinational Employers" (1991) 11 Nw. J. Int'l L. & Bus. 564 at 580-83.

By highlighting the expected gains in terms of economic efficiency, economies of scale, and increased trade, proponents of the 1992 programme succeeded in garnering broad-based political support for their proposals.

The programme to achieve a single, integrated market by 31 December 1992 remains the official policy of the community, although some doubts have been expressed about the ability to meet the deadline. Recent reports indicate that the Council of Ministers has adopted only about 200 of the 279 measures required for the creation of the single market.[56] Even assuming these outstanding matters can be resolved by the Council of Ministers, there remains the problem of securing implementing legislation by the Member States. It remains to be seen whether all the necessary pieces of the puzzle will be in place by the end of 1992.

C. *The Emergence of a European Social Agenda: The Social Charter Movement*

While both the White Paper and the *Single European Act* had given primacy to the trade-related aspects of the 1992 programme, there had also been suggestions there was a social dimension to the programme. The White Paper acknowledged that enhancing opportunities for trade would not necessarily produce a fair sharing of the fruits of that trade. Indeed, the White Paper noted that eliminating trade barriers could have the opposite result — producing greater regional inequality and greater disparity between rich and poor.[57] The Commission observed that if this occurred, it would represent a threat to efforts at greater political integration. Thus the White Paper suggested that the completion of the Internal Market would have to be accompanied by "appropriate measures aimed at fulfilling the

[56] See "Europeans try to beat free market deadline" *Toronto Star* (16 September 1991) C2. The article reported that sixty-nine measures were still to be adopted by the Council of Ministers and that only seventeen of these had a reasonable prospect of being adopted this year.

[57] *Supra*, note 48, paras 20-21.

Community's employment and social security objectives."[58] Precisely what these "appropriate measures" might entail was not spelled out in the White Paper. The Commission indicated that these issues would not be covered in detail in the White Paper since "they represent considerable areas of study in their own right and merit separate and fuller consideration elsewhere."[59]

The *Single European Act* made passing reference to these concerns about equity, committing Member States to the goal of "reducing disparities between the various regions and the backwardness of the least-favoured regions."[60] The *Single European Act* also stated that the implementation of the single European market shall "take into account the objectives of [reducing disparities] and shall contribute to their achievement."[61] The *Single European Act* proposed to deal, at least in part, with the "equity" issue through the European Regional Development Fund and the European Social Fund which would redress regional imbalances and promote structural adjustment.[62] The Commission was to submit a comprehensive proposal to the Council of Ministers regarding the use of these funds and the Council was to act on the proposal within a year of the coming into force of the *Single European Act*.

Immediately following the adoption of the *Single European Act* in 1987, the social and equitable aspects of the single market programme began to gain increasing prominence. In essence, the argument was that considerations of equity had to be treated on the same footing as the goal of economic efficiency. The effort to create a single European market had to be accompanied by measures to ensure an appropriate distribution of the gains from trade. In September 1987, the EC's Section for Social, Family, Educational and Cultural Affairs published a report entitled "Social Aspects of the Internal Market."[63] The

[58] *Ibid.*, para. 20.

[59] *Ibid.*, para. 22.

[60] See art. 23, *supra*, note 21, adding art. 130(a) to the *EEC Treaty*, *supra*, note 24.

[61] See art. 23, *ibid.*, adding art. 130(b) to the *EEC Treaty*, *ibid.*

[62] See art. 23, *ibid.*, adding arts 130(c) & 130(d) to the *EEC Treaty*, *ibid.*

[63] See "Information Report of the Section for Social, Family, Educational and Cultural Affairs on the Social Aspects of the Internal Market," CES (87) 225 (17 September 1987).

Report argued that there was an important social dimension to the single market programme, the objective being to redress existing inequalities between individuals, groups, and regions and to prevent new equalities from arising. The Report further argued that fundamental social rights would have to be protected in the Community through such measures as a single EC social security system, the harmonization of working conditions in the various regions of the community, and a comprehensive system of worker participation in business enterprises.[64] The Report also raised the fear that the completion of the internal market would lead to "social dumping" — the movement of industry away from higher-wage northern Europe and the subsequent exploitation of Mediterranean workers by denying them needed protection in the workplace and needed benefits. Community-wide minimum standards protecting the social rights of workers were seen as an effective way of preventing such social dumping from arising.

In late 1987 and early 1988, the EC's Economic and Social Committee[65] provided two separate Opinions to the same effect.[66] The Committee called for guarantees of basic "social rights" which would redress the "growing inequalities in economic, civil, social and cultural conditions and opportunities."[67] In September 1988, the European Commission also threw its support behind the idea of protecting social rights with the publication of a working paper on the "Social Dimension of the Internal Market." The main thesis of the working paper was that the achievement of economic integration would be "pointless" if it was not also accompanied by a "fair shareout of the advantages deriving from the Single Market."[68] To achieve this fair

[64] *Ibid.*, para. 5.2.4.

[65] This is a body provided for under the *EEC Treaty*, *supra*, note 24. Its members are appointed by the Council of Ministers from nominees submitted by the Member States for terms of four years. The mandate of the Committee is to provide advice to the Council of Ministers on economic and social issues. See the *EEC Treaty*, arts 193-198, for role of Committee.

[66] See "Opinion on the Social Aspects of the Internal Market" (European Social Area) 87/C 356/08 (19 November 1987); and "Opinion on Social Developments in the Community in 1987" 88/C 208/12 (2 June 1988).

[67] See "Opinion on Social Developments in the Community in 1987," *ibid.*, para. 1.10.

[68] See "Foreward" in Social Dimension of the International Market, Commission

shareout, the Commission proposed a variety of concrete measures which together constituted a comprehensive social agenda for the Community.[69]

With this increasing attention being paid to the equitable and distributional aspects of the 1992 programme, the Council of Ministers asked the Commission to prepare a statement of principles for its consideration. The result was a draft entitled "Community Charter of Fundamental Social Rights" (European *Social Charter*) which the Commission published in May 1989.[70] The European *Social Charter* set out twelve categories of social rights which it proposed to guarantee to all workers; these rights included the right to "fair pay," improved working conditions, an "adequate level of social security," and collective bargaining. The European *Social Charter* was said to represent a statement of Community policy not legally binding on the Member States.[71] But when the European Council considered the proposed European *Social Charter* at its May 1989 meeting in Brussels, British Prime Minister Margaret Thatcher refused to accept it. The European *Social Charter* was sent back to the Commission to be re-drafted.

Over the following months, the Commission re-drafted the European *Social Charter* with a view to securing Thatcher's support. A revised draft issued in October 1989, and the final draft dated 29 November 1989, attempted to limit the open-ended language of the initial proposal.[72] The final version of the European *Social Charter* was labelled a "Solemn Declaration" to emphasize the non-binding, political character of the Charter. Although Thatcher remained adamant in her opposition, the European *Social Charter* was adopted

Working Paper, SEC (88) 1148 final (14 September 1988) at i.

[69] The European Parliament added its voice to those calling for protection for "fundamental social rights." See "Resolution on the Social Dimension of the Internal Market," Doc. A2-399/88.

[70] *Supra*, note 8.

[71] The *EEC Treaty*, *supra*, note 24, makes no provision for enactment of a charter. It was thought that the document would be a political declaration with no legal impact on the Member States.

[72] For a discussion of the progressive "watering down" of the European *Social Charter* through its successive drafts, see B. Bercusson, "The European Community's Charter of Fundamental Social Rights of Workers" (1990) 53 Mod. L. Rev. 624.

over her objection at the 8-9 December 1989 meeting of the European Council at Strasbourg by a vote of eleven to one.

The preamble to the European *Social Charter* noted that the same importance had to be attached to the social aspects as to the economic aspects of the establishment of a single European market. The European *Social Charter* then set out twelve categories of "Fundamental Social Rights of Workers" framed in extremely broad and open-ended terms. It is replete with references to "equitable treatment," "fair wages," a "decent standard of living," and "adequate levels of social security." Furthermore, the various rights in the European *Social Charter* are not framed in absolute terms. Instead, there is continued emphasis placed on the concept of "reasonableness" and on the notion that such rights must be implemented in a gradual and continuing fashion rather than on a once-and-for-all basis. As such, the European *Social Charter* is quite a different type of document from the *Canadian Charter of Rights* or the American *Bill of Rights*.[73] It reads much more like a legislative programme than a declaration of inalienable rights. There is no precise Canadian equivalent to such a document; the closest Canadian comparisons might be to the Speech from the Throne opening a session of Parliament or to a communique issued by a federal-provincial conference of First Ministers. Even these parallels, however, are somewhat misleading, as the following summary of the rights guaranteed by the European *Social Charter* makes plain:

- *the right to freedom of movement*: each worker is said to enjoy the right of free emigration among all EC Member States, including the right to "equal treatment as regards access to employment, working conditions, and social protection in the host country;"
- *employment and remuneration*: workers are entitled to an "equitable wage ... sufficient to enable them to have a decent standard of living;"
- *right to improved working conditions*: the development of the European labour market must be accompanied by an

[73] U.S. Const. amends I-X.

"improvement in the living and working conditions of workers," including a right to a weekly rest period, to annual paid leave, and to provisions establishing a maximum working time;

- *right to social protection*: the Charter guarantees a right to social protection which it defines as an "adequate level of social security," including a minimum income and appropriate social assistance for the unemployed;
- *right to freedom of association and collective bargaining*: the Charter guarantees to every worker the right to join a union or to renounce membership in a union; it also specifies that this guarantee entails a right to negotiate and conclude collective agreements as well as the right to strike;
- *right to vocational training*: public authorities, enterprises or the two sides of industry are to establish "continuing and permanent training systems" enabling every citizen to undergo retraining and to obtain leave for training purposes;
- *right of men and women to equal treatment*: the Charter forbids sex discrimination in employment; it also guarantees the "principle of equality" in matters of "remuneration, access to employment, social protection, education, and vocational training and career development;"
- *right of workers to consultation and participation in management*: workers are to be informed and have a right to participate in management decisions affecting them "along appropriate lines and in such a way as to take account of the laws, collective agreements, and practices in force in the Member States;" the right to participate is to apply particularly in companies operating in several Member States of the Community;
- *right to health and safety protection in the workplace*: every worker must enjoy "satisfactory health and safety conditions;" "appropriate measures" must be taken with a view to achieving further harmonization of conditions across the Community;

- *protection of children and adolescents*: the minimum employment age is to be fixed at age fifteen; youth under age eighteen shall work no more than forty hours per week and shall not perform night work except "where permitted by legal provisions or the provisions of collective agreements;"
- *protection of the elderly*: every retired person shall have sufficient resources to enjoy a "decent standard of living;" those not eligible for a pension shall be entitled to a minimum income and to social and medical assistance specifically suited to their needs; and
- *protection of the disabled*: all disabled persons are entitled to "additional concrete measures aiming at improving their social and professional integration," including vocational training, ergonomics, accessibility, mobility, means of transport, and housing.

In effect, the European *Social Charter* laid out a proposed legislative programme for the European Community in the social and labour fields. The legislative character of the Charter was confirmed by the provisions dealing with its implementation and enforcement. Article 27 of the European *Social Charter* indicates that its guarantees were to be implemented through Article 27: "legislative measures or collective agreements." It also invited the European Commission to submit to the Council of Ministers an "Action Programme" for implementation of the Charter. This programme would set out the various legal instruments which might be adopted by the Council to effectively implement the rights set out in the Charter. The Action Programme was to be governed by the principle of "subsidiarity," which suggests powers should reside at the Member State level to the greatest extent possible.[74] The principle of subsidiarity is reflected throughout the European *Social Charter*; it makes clear that the establishment of Community-wide standards should be flexible enough

[74] On the principle of subsidiarity, see B. Hepple, "The Implementation of the Community Charter of Fundamental Social Rights" (1990) 53 Mod. L. Rev. 643 at 646-47.

to take account of the diversity of national practices while achieving equivalent outcomes.[75]

The Commission brought forward its Action Programme for implementation of the European *Social Charter* on 29 November 1989, even before formal adoption of the *Social Charter* by the European Council.[76] The Action Programme set out forty-seven specific proposals, including eighteen proposed directives, four other unspecified "instruments," and a variety of recommendations, decisions, and opinions. These proposals were to be put forward in work programmes from 1990 to 1992 for consideration by the Council of Ministers and the European Parliament. The Commission indicated that the Action Programme had been prepared in accordance with the principle of subsidiarity and the body had "limited its proposals for directives or regulations to those areas where Community legislation seems necessary to achieve the social dimension of the internal market."[77] Despite this proviso, what is striking about the Action Programme, at least to Canadian eyes, is the extent to which it proposes to centralize control over employment standards and labour regulations. The Programme defines an ambitious legislative agenda which would see the European Community defining a set of minimum standards in the employment field directly binding on the Member States. These standards, if successfully implemented, would bite into the sovereignty of the European Member States in ways that would be unheard of in the Canadian context.[78]

[75] See, *e.g.*, *supra*, note 8, art. 5 (fair wages are to be determined "in accordance with arrangements applying in each country"); art. 8 (the right to weekly rest and annual paid leave must be progressively harmonized "in accordance with national practices"); and art. 9 (the right to negotiate and conclude collective agreements must be under "the conditions laid down in national legislation and practice").

[76] See Communication from the Commission concerning its Action Programme relating to the Implementation of the Community Charter of Basic Social Rights for Workers, COM (89) 568 final; Commission of the European Communities, Brussels, 29 November 1989 [hereinafter Action Programme].

[77] *Ibid.*, para. 5.

[78] In Canada, federal power to set employment standards is limited to undertakings or activities directly under federal jurisdiction, such as banks, airlines, and railway workers. See P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 462-63.

This can be illustrated by considering some of the proposed directives published by the Commission in 1990 in accordance with the Action Programme. The directives included the following:[79]

- a proposal on working hours which would entitle each worker to at least eleven hours of rest in twenty-four hours and an average of one rest day a week; the work-week would be limited to forty-eight hours and night work would be limited to eight hours a day. These rules would not apply if seasonal or unusual work is involved or if a collective agreement regulates hours of work;
- a proposed directive guaranteeing pregnant women fourteen weeks of paid leave (up to a fixed ceiling) as long as they had held their jobs for six months before becoming pregnant;
- a proposed directive on part-time and temporary workers which would give these workers the same rights with respect to training and holidays as full-time staff; and
- a proposed directive on worker participation which would require any company employing more than one thousand persons, with at least one hundred employees in each of two Community countries, to establish a "European works council;" the works council would have to meet at least once a year and management would have to report on any important strategic decisions that it plans.

Under the *EEC Treaty*, directives are said to be binding only "as to the result to be achieved," leaving to the discretion of the Member States the precise form which its implementing legislation should take.[80] But given the extremely specific character of the proposed directives under the Commission's Action Programme, there seems little room for discretion at the national level. If adopted by the Council of Ministers, these directives would constitute a set of

[79] See "Social Charter: State of Play" (1991) 11 Eur. Indus. Rel. Rev. 22-25 for summaries of these various measures and the progress made on their implementation.

[80] *EEC Treaty*, *supra*, note 24, art. 189.

Community-wide minimum standards. Member States could enact legislation exceeding these minimum guarantees, but any legislation could not be allowed to fall below them.

The impact of these directives would be greatest on the United Kingdom, which has the weakest set of employment standards in the European Community.[81] Under Prime Minister Margaret Thatcher, the British were openly hostile to the proposals advanced by the Commission under the Social Action programme. Thatcher's successor, John Major, has continued with efforts to block and delay the adoption of the proposed directives by the Council.[82] The U.K. has maintained that the proposed directives require unanimous consent in order to be enacted by the Council, and can therefore be vetoed by a single dissenter. However, whether unanimity is required under the *EEC Treaty* for these directives is far from clear.

The *Single European Act* had specified that measures aimed at the establishment and functioning of the internal market could be adopted by qualified majority; no individual State could exercise a veto. It had created, however, an exception to this rule; measures relating to the free movement of persons or to the rights and interests of employed persons were to remain subject to a requirement of unanimous consent.[83] The issue was further complicated by a separate provision which states that measures relating to worker health and safety can be adopted by a qualified majority only.[84]

The British argue that, since the directives proposed under the Action Programme directly relate to free movement and to employment rights, they fall within the exception in article 100(a)(2) and require unanimous consent. The Commission has countered this, however, by arguing for an expansive reading of the power to pass measures regarding worker health and safety. The Commission insists that this power covers any proposal designed to enhance the working environment in a way that affects the health of the workforce.[85] The

[81] See "More rights for the workers" *The Economist* (28 July 1990) 60.

[82] See "Up the Workers: The Social Dimension of Europe's Single Market" *The Economist* (29 June 1991) 64.

[83] *EEC Treaty*, *supra*, note 24, art. 100a(2).

[84] *Ibid.*, art. 118a.

[85] See Action Programme, *supra*, note 76, Part II, c. 3.

Commission has sought to justify a wide variety of measures, including proposals on working hours, pregnancy leave, and restrictions on employment of young persons as health and safety measures. By classifying them in this way, the Commission is suggesting they can be adopted by a qualified majority vote only.

The legal basis of the proposed measures remains in doubt.[86] The *European Court of Justice* will have the final word on the meaning and application of the *EEC Treaty* provisions. However, no one has wanted to obtain a definitive legal ruling on the extent to which unanimity is required for any of these proposed measures. In the meantime, the British have succeeded in delaying the consideration of the measures. At a meeting of Social Affairs Ministers in Luxembourg in June 1991, the British blocked agreement on directives on working hours and on the protection of pregnant women.[87] The Commission's ambitious social programme remains bogged down in the cumbersome and circuitous institutional machinery of the Community.[88]

D. *The Move to Broader Political Union: Expanding the Social Policy Role of the Community*

The legal ambiguity surrounding the Community's role in the social-policy field has created broad support for amendments to the *EEC Treaty* to remove any doubts on the issue. Only a "constitutional amendment" providing for greater use of qualified majority voting in the social-policy field is seen as a remedy to the difficulties encountered in the implementation of the Social Action programme.

The desire to broaden the Community's competence in relation to social policy has been one of the factors driving the effort to strengthen the Community's central political institutions.[89] In

[86] See Hepple, *supra*, note 74, for an extended discussion of the legal debate over applying the Treaty to the Action Programme.

[87] See *supra*, note 82.

[88] For a summary of the limited progress achieved in implementing the Social Action programme by the summer of 1991, see *supra*, note 79.

[89] Another major concern relates to the executive-driven character of the central institutions — the "democratic deficit." See *supra*, text accompanying note 44.

October 1990, the twelve European heads of State decided to convene two intergovernmental conferences, one on monetary union, the other on political union. The Conference on Political Union was given a mandate to reform the political institutions of the Community in two ways: first, it was to strengthen the role of the Community relative to that of the Member States; and secondly, it was to increase the effectiveness and democratic legitimacy of Community institutions.

The conference on Political Union was convened in Rome on 15 December 1990. On 12 April 1991, the presidency of the Conference issued a "no-author" or "non-paper" text designed to help identify emerging areas of consensus.[90] The non-paper text is said to reflect the "prevailing drift to emerge during the first reading of the contributions from Member States and the Commission and does not aim to reflect individual Member State's positions."[91] The proposed revisions to the *EEC Treaty* set out in the non-paper demonstrate an emerging consensus in favour of broadening the policy spheres of the Community quite dramatically. In fact, the non-paper proposals reflect an approach which would move away from the notion that the Community was limited to legislating within defined spheres or "competencies."[92] The proposed Treaty articles would effectively endow the Community with the capacity to pursue a general legislative programme across the full range of policy fields.

The shift in approach is indicated by the proposed change in the name of the Community itself; the "European Economic Community" would be renamed the "European Community." The new name would reflect the fact that the role and purpose of the Community extends beyond the economic sphere.[93] The draft proposals identify a variety of new purposes which will guide the future activities of the Community, including the following:

- a social policy comprising a European Social Fund;

[90] See "Draft Treaty Articles With a View to Achieving Political Union" (Non-Paper) *Agence Europe*, no. 1709/1710, 3 May 1991.

[91] *Ibid.* at 1.

[92] The underlying theory of the role of the Community has been that it has competence in limited and defined spheres. For a discussion, see *supra*, note 28 at 444-45.

[93] See *supra*, note 90 at 3, proposed amendment to Article 1 of the Treaty.

- strengthening of [the Community's] economic *and social* cohesion;
- an environmental policy;
- a technological research and development policy;
- contribution to the attainment of a high level of health protection;
- contribution to high quality education and training and to the flowering of European culture in all its forms; and
- the strengthening of consumer protection.[94]

Given the all-encompassing reach of these various categories, the question which arises is whether there are to be any meaningful limits on the policy competence of the Community. Extending the competence of the Community in the manner envisaged by the non-paper would create significant inroads on the sovereignty of the Member States.[95] Some check is needed on the potential centralizing tendencies of the Treaty. This check is apparently to be supplied by explicit recognition of the principle of subsidiarity within the main body of the Treaty. A proposed new article is to be inserted stating that the action of the Community shall be governed by the principle of subsidiarity, which permits Community action only "if and in so far as those objectives can be better achieved by the Community than by the Member States acting separately because of the scale or effects of the proposed action."[96] It is apparent, however, that the principle of subsidiarity, at least as defined by the proposed Treaty, may not operate as a meaningful check on the centralization of authority in Brussels. The proposed text states the principle in functional and apparently open-ended terms; if the action can be better achieved by the Community, then it is free to intervene. There is no requirement

[94] See, *ibid.* at 3-4, regarding the proposed amendments to art. 3 (emphasis added).

[95] This is precisely the reason Great Britain has objected vehemently to the proposed Treaty articles. See "She Makes Her Stand" *The Economist* (29 June 1991) 49. The article recounts a speech by former Prime Minister Margaret Thatcher denouncing the proposed articles on political union.

[96] See *supra*, note 90 at 4, proposed art. 3b.

that Community intervention be necessary, as proposed by some earlier definitions of the principle of subsidiarity.[97] The idea of "effectiveness," as opposed to that of "necessity," appears a largely illusory limitation on the growth of centralized power. In virtually any case in which the Community would seek to intervene, it will be plausible to argue that centralized decision-making will be more "effective" than uncoordinated activity at the Member State level.

The main body of the Treaty provides the institutional teeth that will give effect to the very broad purposes which are to guide Community action. A new section is to be added to the Treaty under the heading "Union Citizenship." The section will provide that every citizen of a Member State is also a citizen of the Union, with the right to "move and reside freely within the territory of the Member States of the Union, without limit as to duration."[98] This right of mobility is said to be subject to conditions ensuring "fair distribution of the resulting burden on Member States, particularly in the area of social protection." The drafters intend to provide some form of limitation on individual mobility rights, similar to those in the *Canadian Charter of Rights*.[99] But the European approach permits the limitations on mobility to be determined by political authorities rather than the courts. The draft Treaty provides that the Council of Ministers shall "adopt measures ... to give effect to [mobility] rights," including the definition of the limitations on those rights.[100] Only after political authorities have given shape and definition to mobility rights will they become directly enforceable in Court proceedings.[101]

The remainder of the Treaty follows the same approach, enhancing the scope for the political institutions of the Community to regulate a wide variety of policy areas. One of the most significant innovations is the extension of the system of qualified majority voting outside the economic sphere. The proposed Treaty contemplates qualified majority voting covering environmental policy, foreign affairs,

[97] See discussion of the principle of subsidiarity, *supra*, note 74 at 646-47.

[98] See *supra*, note 90, Part 2, art. B.1.

[99] See *supra*, note 11 at ss 1 & 6.

[100] See *supra*, note 90, Part 2, art. F.

[101] The current proposals would require the Council to act unanimously and to enact the necessary legal instruments by 31 December 1993.

public health, education, culture and heritage conservation, consumer protection and energy policy. The extension of qualified majority voting to these areas is a decisive shift of political authority from the national level to the Community level. Former Prime Minister Margaret Thatcher hammered home this point in a speech to the British House of Commons this past June, just before the meeting of the European Council to consider the proposed Treaty articles. Calling the proposals "the greatest abdication of national and parliamentary sovereignty in our history," Thatcher noted that the extension of the principle of majority voting "means that we give the Community the right to impose on the British people laws this House might fundamentally disagree with."[102] Thatcher argued that the effect of these proposals was to create a "federal Europe," a concept which she rejected. "Otherwise," she asked pointedly, "what is the point of standing as candidates in the next general election?"

The proposals to increase the use of qualified majority voting were accompanied by changes designed to strengthen the role of the European Parliament in the policy process. The non-paper proposed to grant the Parliament a right of "co-decision" in certain defined areas. Under the co-decision model, the Parliament would have the ability to block proposals which might otherwise be approved by the Council. Parliament's right to block a proposal could only be invoked following a lengthy process designed to produce a compromise proposal acceptable to both the Council and the Parliament.[103] Under the proposals set out in the non-paper, Parliament's right of co-decision

[102] See *supra*, note 95.

[103] The procedure set out in the non-paper was extremely complicated, but can be summarized as follows. In the event of a deadlock between the Council and the European Parliament, a "conciliation committee" would be convened. It would be made up of the members of the Council and an equal number of members of the Parliament. The conciliation committee would be assigned the task of reaching agreement on a joint text, by a qualified majority of the members of the Council and by a majority of the representatives of the Parliament. If the conciliation committee agrees on a text within six weeks, the text can be adopted as law if it achieves a qualified majority in Council and a majority in the Parliament as a whole. Otherwise, the Council can revert to the text it had adopted prior to the conciliation committee, and the Parliament has a period of six weeks in which to veto the Council's proposal.

would be limited to specific policy areas; these areas were not spelled out, but were to be the subject of further negotiations.

When the twelve-member Council of Europe met in June 1991 to consider these proposals, along with draft Treaty articles relating to monetary union, little progress was made. The British, in particular, objected to the proposals to increase the use of majority voting in the Council and the power of co-decision for the European Parliament.[104] The Commission was assigned the task of producing a revised draft which could form the basis of an agreement at the December summit in Maastricht.

Whether the December meeting will be able to achieve agreement is unclear. At the same time, the Intergovernmental Conference presidency's non-paper presented to the June summit indicates that there is now very broad consensus in favour of broadening the role of the Community in the non-economic sphere. There is now general recognition that a once single-pronged economic agenda focusing on trade matters has assumed a different character. In simple terms, concerns about equity have come to rival those about efficiency and barriers to trade. As Europe has moved towards greater economic integration, the question of how to appropriately distribute the gains and the losses from trade has become unavoidable. The only way to respond effectively to the distributional issue is to enhance the policy capacity of the Community in the social-policy field. It would appear that acceptance of an effective Community competence over social policy has now become inextricably bound up with the project of achieving greater economic integration.

[104] For an account of the meeting, see "A busy five minutes" *The Economist* (6 July 1991) 49-50.

PART III: LESSONS FOR CANADA

There are a variety of important lessons for Canada from the recent European efforts to achieve greater political and economic integration. These lessons can be summarized in the following terms.

A. *Lesson One: Economic Policy and Social Policy are Inextricably Linked*

Both the *Allaire Report* and its critics have shared an assumption about the separation between economic and social policy. According to this assumption, it is possible to pursue an agenda which focuses exclusively on concerns about economic union. A debate framed in these terms boils down to the extent to which an economic union necessarily entails a political union. The *Allaire Report* argues that an economic union is consistent with relatively weak and decentralized political ties. The Report's critics maintain that an economic union necessitates a wide range of constraints on political autonomy.

This is really a false debate. There is no doubt that it is *theoretically* possible to pursue an agenda limited to concerns about economic union. The question is whether such an agenda is possible as a practical political matter. The European experience indicates that for all practical purposes economic and non-economic concerns cannot be separated in any meaningful sense. Once you commit yourself to the achievement of an economic union, you inevitably raise the question of who will reap the benefits and assume the burdens of the economic union. In this sense, the agenda governing economic union inevitably gives rise to broader political concerns about equity and distribution. Thus, in the European case, an agenda which began with the elimination of trade barriers and the creation of a single market has now evolved to include full-blown political union at the Community level.

This result should not be surprising. The European experience of the past few years is merely an illustration of a dynamic that is commonplace in political debates over markets and economic efficiency. Even those who advocate the pursuit of economic efficiency recognize that one must address the separate issue of who benefits from any increases in allocative efficiency.[105] The efficiency norm tells us nothing about the appropriate distribution of wealth in society. These concerns simply cannot be avoided.

B. *Lesson Two: The Effectiveness of Political Institutions Depends Upon Their Decision-making Rules*

Having recognized the need to deal with the social or equitable dimension of the creation of an internal market, the Europeans have responded by expanding the legislative capacity of Community institutions. This has been accomplished by moving from a requirement of unanimity to one of qualified majority in the Council of Ministers.

The European experience demonstrates that the effectiveness of political institutions depends directly upon the decision-making rules under which they are required to operate. Of critical importance is the extent to which the institutions must make decisions based on unanimous consent. The European experience shows that any political organization which can only proceed on the basis of unanimity is likely to be wholly ineffective. Time and again, the unanimity requirement turns out to be a political strait-jacket and a recipe for deadlock and paralysis. This reality became crystal clear in the context of efforts to achieve greater economic integration beginning in the late 1950s. For years, the Community sought to achieve closer economic ties by relying on a contractual model of decision-making. Under the contractual model, it was hoped that common standards and integrated markets would be created through unanimous agreement of the Member States. By the mid-1980s, the Community's goal of achieving

[105] See, *e.g.*, G. Calabresi, *The Costs of Accidents* (New Haven: Yale University Press, 1970); R. Dworkin, "Is Wealth a Value?" (1980) J. Legal Stud. 191; and G. Calabresi, "About Law and Economics: A Letter to Ronald Dworkin" (1980) Hofstra L. Rev. 553.

greater economic integration using the contractual approach was going no-where. It was apparent that only a qualified majority voting rule would permit the programme of further economic integration to move forward. Thus the *Single European Act* substituted a qualified majority voting rule for the previous requirement of unanimous consent, at least for purposes of the 1992 single-market programme. This new voting procedure has permitted a great leap forward in efforts at achieving a single European market.

In the years following the enactment of the *Single European Act*, the same process has been unfolding in the social-policy field. The *Single European Act* appeared to leave the social-policy field subject to a requirement of unanimous consent. Once again, this unanimity requirement has stymied efforts to achieve agreement on implementing the Charter of Social Rights. It has now become clear that further progress in the social-policy field will necessitate relaxation of the requirement of unanimous voting within the Council of Ministers. Some have argued that existing provisions in the *EEC Treaty* already permit majority voting on certain social policy issues. Others have argued that the issue of majority voting in the social-policy field must be resolved through comprehensive revisions to the *EEC Treaty* itself.

The implications of this experience for the Canadian situation are particularly significant. Federal-provincial relations in Canada have tended to operate on the basis of an informal rule requiring unanimous provincial consent. Matters falling within the jurisdiction of the provinces tend to be dealt with on the basis that no province can be compelled to act against its wishes. This is why the exercise of the federal "spending power" has been so crucial to the achievement of integration in the social-policy field. The federal government has been able to "purchase" the consent of the provinces using federal tax dollars. This has permitted the achievement of national programmes in education, medicare, and social welfare. In the absence of the coercive role played by the federal government, it is doubtful whether such national programmes would ever have been achieved; a purely contractual approach to integration would likely have proven no more successful in Canada than it has in Europe.

This analysis must be kept firmly in mind in assessing proposals for freeing the provinces from the constraints of the federal spending power. Both the *Allaire Report* and the "Group of 22" have suggested

that the federal spending power should be eliminated.[106] Both sets of proposals appear to contemplate that mechanisms of joint action, such as reciprocal agreements or mutual recognition of standards, be relied upon to achieve co-ordination of provincial policies. The reliance on mechanisms of joint action is a classic illustration of the contractual approach to achieving economic or political integration. It proposes to define common standards or to achieve enforceable agreements through negotiations aimed at securing unanimous consent. The European experience has demonstrated the inadequacy of this approach and the need for a recognizable national authority with the capacity to force compromises. In Canada, the federal spending power has traditionally been the coercive force in the social-policy field. If that power is to be restricted or eliminated, then some other mechanism to *force* compromise (as opposed for waiting for compromise to arise spontaneously) must be created.

One possibility is to create a federal-provincial council, bringing together representatives of the federal and provincial governments.[107] But if this council is to be effective, the same considerations outlined above must be kept firmly in mind. In particular, if this council proceeds on a contractual model, requiring unanimous consent before proceeding, then it is unlikely to achieve concrete results. Only if the council is provided with some form of *coercive power* — the ability to *force compromises* on unwilling or hold-out parties — can it hope to be an effective instrument for establishing common standards. Yet to permit the council to impose a consensual view will no doubt prove very difficult in the Canadian context, with our tradition of decentralized decision-making. There can be no doubt that the provinces, accustomed to jealously guarding their own autonomy while seeking a greater say in areas of federal jurisdiction, would resist the creation of a new federal-provincial body with meaningful powers. Of course this political reality must be taken into account in the design of any new institutions, such as a federal-provincial council. It may be that provincial concerns may be accommodated without sacrificing the

[106] See, *supra*, note 6 at 62; and see *Some Practical Suggestions for Canada: Report of the Group of 22* (Montreal, June 1991) 15 [hereinafter *Group of 22 Report*].

[107] See *Shaping our Future Together: Proposals* (Ottawa: Minister of Supply and Services, 1991) at 47, proposal no. 28 [hereinafter *Federal Proposals*].

effectiveness of any new institutions. But to create a new federal-provincial body operating on the basis of unanimity is to prevent that body from playing any effective or meaningful role.

C. *Lesson Three: National Legislative and Political Institutions Must Play a Key Role in the Field of Social Policy*

There has been considerable discussion lately in Canada about entrenching social and economic rights in the constitution.[108] While the precise details of such proposals have tended to be vague and indeterminate, the implication is that the judiciary would play a key role in defining and enforcing national standards in the social-policy field.

The European experience demonstrates that this approach is unworkable. The Europeans have relied on political and legislative institutions to define individual entitlements in the social-policy field. The role of the judiciary has been limited to enforcing the particular standards or rules set down by the political authorities. For example, the political institutions of the Community have sought to promote a safe working environment by setting down precise standards to govern such matters as maximum hours of work or maternity leave. Current proposals would see women granted fourteen weeks of paid maternity leave, while limiting the regular work week for all workers to forty-eight hours.[109] The establishment of these Community standards is a quintessentially legislative act. The idea that the judiciary would be given the task of defining the length of maternity leave or the maximum work week for the European Community is simply unknown. The judiciary's role is limited to the enforcement of particular standards after they have been defined by the appropriate political authorities.

It has been suggested that a judicially-enforceable social charter would not involve a radical redefinition of the role of the courts in Canada.[110] The argument is that the Canadian courts already exercise

[108] See Ontario, Ministry of Intergovernmental Affairs, *A Canadian Social Charter: Making Our Shared Values Stronger*, Discussion Paper (Toronto: Queen's Printer, 1991).

[109] See text accompanying note 79.

[110] See L. Osberg & S. Phipps, *A Social Charter for Canada* (Toronto: C.D.Howe

a broad policy-setting role under the *Canadian Charter of Rights.* Nor is the existing judicial role limited to the definition of what are termed negative rights — *freedom from* government regulation. The *Canadian Charter of Rights* already contains a number of clauses which impose positive obligations on government.[111] Thus, it is argued that the entrenchment of social and economic rights in the constitution might extend the reach of judicial review, but it would not alter its essential role and function.

It is certainly true that the judiciary exercises a broad policy-setting role under the existing terms of the *Canadian Charter of Rights.* Moreover, this role includes both negative and positive rights — *rights to* as well as *from* government. But the problem with a judicially enforceable social charter is that it would vastly expand the range and number of political issues determined by the courts. More significantly, the issues would be devoid of any standards or criteria which can be applied by judges.

A concrete example will illustrate the problem. Under the *Canadian Charter of Rights* as currently applied, there are limits to the ability of courts to review the constitutional validity of social programmes. The judiciary will typically inquire into whether the social programme meets standards of procedural fairness, or whether the programme relies upon criteria or categories which represent a form of discrimination. It is true that the courts have interpreted their mandate under the *Canadian Charter of Rights* in liberal terms. A good example of this expansive judicial approach is the Federal Court of Appeal's judgment in *Schachter* v *The Queen.*[112] In *Schachter*, certain provisions in the *Unemployment Insurance Act* providing child care benefits for adoptive parents, but not natural parents, were attacked as violating equality rights. The Federal Court of Appeal amended the legislation rather than simply declare it invalid. Accordingly, the Court

Institute, 1991).

[111] See, *e.g.*, *supra*, note 11, ss 16-23.

[112] (1990), 66 D.L.R. (4th) 635, leave to appeal to S.C.C. granted [hereinafter *Schachter*]. The case held that section 32 of the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1, was inconsistent with section 15 of the *Canadian Charter of Rights*, *supra*, note 11, because it did not accord natural parents the same child care benefits as adoptive parents.

extended the child care benefits to include natural parents as well as adoptive parents.

Despite the breadth of this remedial power, the court's field of inquiry under the *Canadian Charter of Rights*, as it stands, is contained within certain broad boundaries. Even in a case such as *Schachter*, the court is interested in whether the use of a particular distinction — adoptive versus natural parents — can be justified according to the purposes of the statute. But if judicially-enforceable social and economic rights were entrenched in the constitution, there would be no such boundaries around the judicial function. With an entrenched social charter, the courts would not simply inquire into the appropriateness of certain distinctions or categories as they appeared in the legislation. Instead, the judiciary would have to determine the overall fairness of the legislation. In the unemployment insurance context, for example, the courts would have to determine whether the benefits provided by the *Act* were too low, or whether the number of qualifying weeks for benefit eligibility ought to be altered in some way. In fact, the court inquiry would not be limited to reviewing the provisions of the particular legislation that had been challenged. The courts would be driven to make some assessment of the overall spending priorities of the government, and whether the amounts that were being spent on social programmes were adequate or reasonable.

The judiciary simply has no capacity to deal with broad, open-ended legislative issues of this type. To entrench judicially-enforceable social and economic rights in the constitution is to hand over to non-elected judges the business of government. More importantly, it "constitutionalizes" or freezes in place matters which are properly the subject of continuous political debate and argument. Once courts define a constitutional standard, it can only be changed through a constitutional amendment or, in certain cases, through use of the notwithstanding clause. Thus, once the courts take over the business of defining the reach of social and economic entitlements, these entitlements are removed, to a significant extent, from the ordinary cut and thrust of political debate. The democratic arm of government is denied the opportunity to gradually improve and extend the range of social programmes available to Canadians.

Traditionally, both Canadians and Europeans have looked to political and legislative institutions, rather than the judiciary, to define

and expand social policy entitlements at the national level. The difficulty in the current Canadian context is that the traditional instrument for defining these national principles — the federal spending power — appears to be on its last legs. Provincial governments have complained for years about the spending power, asserting that it encroaches on provincial jurisdictional turf. More recently, the federal government has unilaterally backed away from its existing commitments under shared-cost programmes because of its desperate fiscal position.[113] This has fuelled provincial demands for complete devolution of all social policy jurisdiction to the provinces.

The message of the European experience in this regard is twofold. First, there is a continuing need for a national or community-wide role in the social-policy field. This national role is not necessarily inconsistent with a recognition of the primary responsibility of provincial or local authorities in social-policy matters. The second message is that this national role in social policy must be exercised by national *legislative* institutions rather than by the judiciary. The European experience with implementing its social charter demonstrates the folly of handing over the national role in social policy to the judiciary. The courts are simply incapable of designing complicated and costly national programmes in the social-policy field. The task of programme design, particularly in the social-policy field, must be performed by the legislative arm of government.

There is a growing sense in the Canadian context that the federal spending power can no longer ensure a national presence in the social-policy field. This has led to a search for an alternative instrument or institution which might guarantee Canadians a minimum set of entitlements. But the fact that the federal spending power is threatened should not confuse Canadians into abdicating political responsibility in favour of the judiciary. The federal spending power is not a precondition to national involvement in social policy. It is noteworthy that in Europe, the Community's expenditure in the social-policy field is negligible. The European Community defines general principles

[113] See *Reference Re Canada Assistance Plan Act* (1991), 83 D.L.R. (4th) 297 (S.C.C.). This case held that the federal government had the right to unilaterally alter a federal-provincial agreement on the Canada Assistance Plan.

without relying on the expenditure of tax dollars. There is no reason in principle why Canadians could not design some legislative mechanism which might perform a similar role.

D. *Lesson Four: A National Role in Social Policy Must Be Balanced with a Concern for Local Autonomy*

The Europeans have sought to expand the competence of the Community in social policy while preserving national or local autonomy. This concern for local autonomy has been expressed in a variety of forms. First, most of the Community institutions are controlled, directly or indirectly, by the governments of the Member States. The Council of Ministers, the most powerful institution in the legislative process, is made up of ministers of the national governments. The Commission, which has the key power of initiative in the law-making process, consists of appointees of the Member States. Furthermore, the role of the Community, particularly in the social-policy field, is generally limited to defining general objectives or principles. This is reflected in the terms of the *EEC Treaty* itself, under which a community directive is binding "as to the result to be achieved ... but shall leave to the national authorities the choice of form and methods." The concern for local autonomy is also reflected in the principle of subsidiarity which proposes that primary jurisdiction is vested in the Member States. The community exercises its jurisdiction only in cases where such jurisdiction is seen as being more effective.

There are a number of ways to apply these ideas in Canada. First, it is noteworthy that there are no national law-making institutions directly or indirectly controlled by provincial governments. This is a complaint that has been voiced long and loud by the provinces. The desire to achieve better regional and provincial representation in the organs of the central government has fuelled a growing interest in Senate reform. But Senate reform proposals have been advanced primarily as a means of restricting or limiting the freedom of action of the federal government. There has been little provincial interest in creating a reformed Senate with authority over areas traditionally controlled by the provinces.

The European experience suggests quite a different possible role for a national institution representing provincial interests. The

European approach has been to create Community institutions which are intended to harmonize the activities of the Member States themselves. In the Canadian context, this implies one or more national institutions, subject to the control of the provincial governments, with authority over areas of provincial jurisdiction.

The European experience illustrates the undoubted benefits flowing from national institutions designed along these lines. The European Community has had notable success in breaking down trade barriers, as well as promoting economic and political integration on a Community-wide basis. There is every reason to expect similar results would be forthcoming from national institutions with a mandate to promote integration in matters that are of common interest to the provinces. At the same time, the role and powers of these institutions would have to be carefully framed and monitored so as to respect provincial autonomy. The European concept of defining general purposes at the Community level, while leaving the precise implementation of those purposes to the Member States, seems particularly significant. In fact, the European approach is not far off the formula agreed to in the Meech Lake Accord with respect to shared-cost programmes. Under Meech Lake, the federal government was to define the objectives of a shared-cost programme, while the provinces would design and implement a programme compatible with the national objectives. This formula, much criticized throughout the Meech Lake debate, appears to have worked rather well in the European context. The advantage to the approach is its attempt to mesh federal and provincial roles in a policy field. The European experience suggests that this formula may well be worth a second look in any effort to achieve greater integration, not only in terms of social policy, but across a range of policy fields.

The European experience also indicates the importance of creating a *set* of institutions to facilitate integration rather than relying on a single body or institution. The European Member States have demonstrated a clear preference for vesting jurisdiction in Community institutions subject to Member-State control. But the undemocratic, executive-driven character of these institutions has spurred calls for enhancing the role of the European Parliament. What the European experience suggests, then, is the need for a *number* of different institutions giving effect to different political imperatives. Clearly,

these institutions will have to include a democratically-accountable Parliament at the centre of the law-making process. But there should be room in the equation for a variety of different institutions, giving effect to a number of different purposes. Only in this way can one hope to reconcile all the conflicting interests and agendas which must be taken into account in the complex effort to balance unity with diversity.

PART IV: CONCLUSION — THE FEDERAL PROPOSALS ON THE ECONOMIC UNION

Comparative political analysis must always be approached with restraint and caution. The danger is that one will fall victim to false analogies or misleading comparisons. Yet, even with this cautionary observation kept firmly in mind, there do appear to be a series of important, albeit limited, lessons for Canada from the recent European experience. Of particular significance is the broadening of the European agenda from its previous focus on economic integration alone to include efforts at harmonization in the social-policy field. For Canada, what this suggests is that any attempt to limit the role of the national government to one of economic coordination, without any social policy component, is unlikely to succeed. This conclusion would appear to apply not only in the context of negotiations over a re-balanced federalism, but also in discussions over some form of sovereignty-association between Québec and the rest of Canada. In *either* instance, any attempt to restrict the agenda to economic or trade-related concerns will be met by the demand to deal with the equitable or distributional aspects of these issues. At that moment, the debate is no longer simply about increasing gains from trade; it is also about who will benefit or share in those gains.

The European experience, as well, also has a good deal to tell us about the nature of the national role in the social-policy field most likely to lead to positive results. In particular, the Europeans have relied upon increasing the legislative jurisdiction of the political institutions of the Community; there has been no attempt to shift responsibility for developing a coherent set of social policy norms onto the shoulders of the judiciary. The lesson for Canada from this experience is relatively straightforward. We are going to have to rely on politicians and legislative mechanisms to define national norms in

social policy, not on judges and courts. This will prove particularly challenging in Canada, given the unfavourable prognosis for the federal spending power. The spending power has been the key political instrument forcing national compromises. It has also led to the emergence of genuine national programmes in the social-policy field. If it disappears, new mechanisms and institutions will have to be created to perform this role.

On 24 September 1991, the Government of Canada published a comprehensive set of proposals for amending the Constitution of Canada.[114] A central objective is to strengthen the Canadian economic union. The federal government proposes to significantly broaden section 121 of the *Constitution Act, 1867* to protect the free movement of persons, goods, services, and capital.[115] The federal government also proposes to entrench in the constitution a new power to manage the economic union.[116] This power would be vested in the Parliament of Canada. Any law enacted under the new section 91A, however, would require the approval of the governments of at least two-thirds of the provinces, representing at least fifty per cent of the population.[117] The proposals further provide for a Council of the Federation, comprised of representatives of federal, provincial, and territorial governments. The Council would approve federal laws to enhance the functioning of the economic union.[118]

[114] See *Federal Proposals*, *supra*, note 107.

[115] See proposal no. 14, *ibid.*, which provides for the free movement of persons, goods, services, and capital "without barriers or restrictions based on provincial or territorial boundaries." The proposal also states that this principle binds both Canada and the provinces. There are a series of exemptions, including a power to override any court decision striking down a barrier. This exemption is only effective if it is approved by the Parliament of Canada and the governments of two-thirds of the provinces representing fifty per cent of the population.

[116] See the "Power to Manage the Economic Union," *ibid.*, proposal no. 15.

[117] In addition, up to three provinces could "opt out" of any federal law enacted under section 91A by passing a resolution of dissent supported by sixty per cent of the members of the province's Legislative Assembly. The opt-out would apply for a period of three years, after which time all provinces would be bound by the terms of the federal law.

[118] See *supra*, note 107 at 47, proposal no. 28. The Council would also vote on the establishment of guidelines for fiscal harmonization and make decisions on the use of the federal spending power in areas of exclusive provincial jurisdiction. All decisions would require the approval of the federal government and of at least seven provinces representing fifty per cent of the population.

It is evident that the federal proposals seek to incorporate into Canadian law some of the important institutional elements of the European experience. In particular, the proposal to create a Council of the Federation appears to be modelled to some extent on the Council of Ministers in the European Community.

There are a variety of positive elements to these proposals. First and foremost, the proposed Council of the Federation would proceed on the basis of weighted-majority voting, rather than unanimity. As was noted earlier, a requirement of unanimous consent is almost certain to produce deadlock and paralysis in any political institution. The proposed voting rule for the Council of the Federation — seven provinces representing fifty per cent of the population — would allow the Council to strengthen the economic union.

A second positive element is the recognition that responsibility for regulating the economic union must be divided between the judiciary and political institutions. The judiciary is charged with primary responsibility for enforcing the terms of section 121 of the *Constitution Act, 1867*, designed to eliminate barriers to interprovincial mobility. Section 121 deals with what has been termed "negative integration" — limitations on the ability of governments and legislatures to discriminate against each other. But the *Federal Proposals* also make provision for "positive integration" — the coordination of policies among different governments and legislatures. This positive integration is to be achieved through the proposed section 91A and the new Council of the Federation, a political as opposed to a judicial body. The European experience has demonstrated the necessity of providing for both positive and negative integration in an economic union; Europe has also indicated that political institutions, not judicial ones, must play the leading role in achieving this positive integration. The federal government proposals are a clear attempt to build upon the European experience in designing new institutions for the Canadian federation.

A third positive element of these proposals is that they make provision for national standards in the social-policy field. The

proposed power to manage the economic union is expressed in extremely broad and open-ended terms: under section 91A, the Parliament of Canada is to be granted the power to make laws "in relation to any matter that it declares to be for the efficient functioning of the economic union." This power would clearly encompass the ability to set national standards in such areas as environmental protection, education, and social programmes. As the European experience with the social charter has demonstrated, these matters are directly related to the free flow of people, goods, and investments across the country. Differing standards for health care, social assistance, or protection of the environment all act as potential barriers to interprovincial mobility.

Given the fact that the proposed section 91A could be used to achieve this type of national harmonization in social policy, the federal proposal seems entirely consistent with the Ontario government's recent discussion paper on a social charter.[119] The Ontario paper proposes the constitutional entrenchment of a "statement of the values and principles which Canadians wish to affirm and which should guide governments in the realm of social policy."[120] However, the discussion paper also notes that these general principles should not transfer the obligation to develop and implement social policy from governments to the courts.[121] The paper suggests a variety of mechanisms to enforce the social charter, including a reformed Senate or some kind of federal-provincial institution.

The federal government's proposed Council of the Federation is simply a particular institutional expression of the very ideas defended in the Ontario discussion paper. The Council would possess the mandate to articulate and to enforce a social charter precisely along the lines contemplated by the Ontario government. The only difference between the two approaches is that the federal proposal does not contain any reference to an explicit statement of social values to be entrenched in the constitution. But there is certainly nothing in the proposals which would preclude the inclusion of such a statement of

[119] See *supra*, note 108.
[120] *Ibid.* at 14.
[121] *Ibid.* at 16.

general principles. Indeed, the federal government has suggested the inclusion of a "Canada Clause" in the constitution, making reference to such matters as the "importance of tolerance for individuals groups and communities" and the "commitment to the objective of sustainable development." It would certainly be consistent if a statement of principles, along the lines suggested by the Ontario government, was included in the Canada Clause. Alternatively, the statement of principles comprising the social charter might be set out separately, in order to signify the particular importance attached to these values in the Canadian federation.

In this sense, the federal government proposals make it possible to take into account one of the central elements of the European experience — the necessary interconnection between economic and social policy. The Council of the Federation would have a mandate to harmonize laws and set national standards across a broad range of policy fields. The creation of the Council would provide a forum for addressing the Ontario government's concern about the need for national standards and values in the social-policy field.

The *Federal Proposals* on the economic union are a positive step forward, but they are not entirely without difficulty. The major problem is the extent to which the proposals rely upon institutions of executive federalism to enhance the economic union. The Council of the Federation is composed entirely of government representatives. There is very little role for provincial legislatures to approve laws designed to strengthen the economic union.[122] This reliance on agreements between governments (as opposed to legislatures) has already attracted considerable criticism.[123] The objection is that the federal proposals suffer from the same "democratic deficit" associated with the institutions of the European Community. Commentators have suggested that the functions of the Council of the Federation should more properly be exercised by an institution that is directly accountable to the people, such as a reformed Senate.

[122] If a province wishes to opt out of a federal law enacted under section 91A, a resolution must be passed by the provincial legislature. In contrast, approval for a federal law under this section requires the approval of the government alone, without the necessity of seeking legislative approval. Compare sections 91A(2) and (3).
[123] See Howse, *supra*, note 18.

There is considerable force in these objections. The demand for greater accountability in our political institutions is becoming much more pervasive in contemporary Canadian political debate. Yet the criticisms directed at the *Federal Proposals* must be balanced against a number of other considerations. First, any laws designed to enhance the functioning of the economic union must receive the approval of the Parliament of Canada — an institution elected by the people of Canada. Thus, the federal government's proposals ensure that a democratically-accountable institution remains at the centre of the law-making process. In this sense, these proposals do not suffer from the same kind of "democratic deficit" that has been associated with the European Community. Under that system the European Parliament has a largely advisory role in the legislative process.

The more difficult question is whether laws enacted by Parliament — a democratically accountable institution — should be subject to a veto by provincial governments. Some would think that where Parliament has spoken, its will should not be subject to that of the provinces. On balance, however, I believe that a strong case can be made for the direct involvement of provincial governments. The power to manage the economic union would necessarily involve many areas now under provincial jurisdiction, including subsidies to local industry, training, and protection of the environment. It is difficult to envisage how wide-ranging policies could be harmonized without the direct involvement of provincial governments.[124]

A final objection to the *Federal Proposals* lies with section 91A. Some commentators have argued that the proposed power to manage the economic union is simply unnecessary. On this view, recent judicial interpretations have broadened the existing powers of the federal Parliament so as to make any such new power superfluous.[125]

[124] An alternative to the federal proposal would be to require provincial legislatures to approve any proposed federal law. But this type of requirement would essentially involve the same process as is currently followed for constitutional amendments. In this sense, it would add nothing to the current amending formula and would not seem to be worth the trouble of entrenchment in the constitution.

[125] For example, Howse, *supra*, note 18, argues that recent expansive interpretations to the federal trade-and-commerce power, as well as the federal residual power, have significantly expanded the scope of federal authority. In his view, those judicial extensions of federal authority have been so significant as to make the new section 91A redundant.

My own view is that this objection is not entirely persuasive. While it is certainly true that recent judicial pronouncements have expanded federal authority in certain limited areas, it is difficult to see how these incremental adjustments could substitute for a broad power to manage the economic union and harmonize federal-provincial policy. There is mounting evidence that some mechanism is needed to provide for greater co-ordination and harmonization of federal and provincial activity. The Economic Council of Canada's recent annual review, for example, singles out this problem for particular attention.[126] The Economic Council's research confirms that the lack of such integration between governments is of far greater significance than the cost of interprovincial trade barriers. Only a federal-provincial body such as a Council of the Federation could achieve the kind of co-ordination that is required.

There are numerous other difficulties with the *Federal Proposals* on the economic union. It is beyond the scope of this paper to detail or analyze them.[127] Overall, I conclude that these proposals represent a positive set of reforms which would enhance the economic union. This assessment relates to the substance of the proposals and their likely impact, if entrenched in the constitution.

Whether these proposals turn out to be politically acceptable is quite another matter. The main difficulty is that the proposals envisage a significant limitation on the powers of provincial legislatures and governments. The limitation arises from the fact that the Council of the Federation can approve laws with the approval of only seven

[126] See Economic Council of Canada, *A Joint Venture: The Economics of Constitutional Options* (28th Annual Review, 1991).

[127] Such a detailed analysis can be found in Howse, *supra*, note 18. It might be noted that the proposed section 91A has been criticized on the basis that it supposedly confers an "exclusive power" on the federal Parliament to manage the economic union. In fact, however, no laws can be passed pursuant to this power without the consent of the provinces. In substance, therefore, there is no increase in the powers of Ottawa; what section 91A does is to constitutionalize a role for *both* levels of government in the management of the economic union. This matter can be resolved by redrafting section 91A so as to remove any reference to an "exclusive" federal power in relation to the economic union. The revised section would simply provide that Parliament may enact laws for the management of the economic union with the consent of the provinces.

provinces; after three years, any dissentient province is bound by the measure. The amending formula in Part V of the *Constitution Act, 1982* provides that no province can have its powers reduced without its consent. This effectively means that the proposals on the economic union will have to secure unanimous provincial consent if they are to be enacted.[128] Given the history of constitutional reform in this country, it is difficult to see how these proposals could form the basis of a consensus among provincial governments. It is much more likely that the proposals on an economic union will be so watered down as to be rendered virtually meaningless, or else dropped entirely from the package. Either result would be unfortunate, because this stripped — down package would then take on a decidedly-decentralist thrust. Whether such a decentralizing set of proposals will be acceptable to Canadians outside of the province of Québec is problematic at best.

[128] This is because the opt-out power in section 38(3) of the *Constitution Act, 1982* would apply to the enactments of section 91A. Any province which does not consent to an amendment diminishing its powers may opt out. Thus, even though the proposals on the economic union may only require the consent of seven provinces (a matter of some controversy itself), the remaining provinces can simply opt out of them. The exercise of this opting out power would undermine the whole point of the proposals — to establish a common set of legally binding rules applying to the entire economic union. In a practical sense, therefore, the consent of all provinces will be required if the economic union proposals are to become a reality.

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