The Consumer Perspective of Trade & Commerce Powers

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EXECUTIVE SUMMARY

Interprovincial trade barriers are often cited by the government and economists as a costly part of doing business in Canada and a disincentive for provincial businesses to expand and participate in the full Canadian economy. These barriers allegedly increase inefficiencies in the market and adversely affect the ability of Canadian firms to compete on international markets. Removing interprovincial trade barriers could result in benefits for consumers, such as lower prices and increased choices flowing from increased efficiencies and competition in the market.

The Canadian Constitution states the principle of removing interprovincial trade barriers and maintaining a common national market in s. 121 and entrusts Parliament with exclusive jurisdiction over the regulation of trade and commerce in Canada in s. 91(2). The federal "trade and commerce" power is the source for the federal government to regulate interprovincial trade in Canada and has been the topic of several constitutional cases. Since *Canada v. Parsons*, it has been accepted that intraprovincial trade and commerce is a matter within provincial jurisdiction under s. 92(13) of the Constitution. The Supreme Court of Canada has characterized Parliament's authority to regulate interprovincial trade narrowly, limiting Parliament's ability to regulate local trade where the regulation is necessarily incidental to the effective regulation of international or interprovincial trade. In more recent cases such as *Morguard Investments Ltd. v. De Savoye* and *Hunt v. T&N plc*, the Supreme Court of Canada qualified provincial jurisdiction to legislate on matters that may have an effect on other provinces by requiring provinces to respect minimum standards of order and fairness. Legal scholars have suggested that this qualification suggests that Parliament can legislate to maintain and enhance the proper functioning of the Canadian economic union, and that where there is valid and overlapping legislation on the same matter by Parliament and a provincial legislature, the provincial law is subject to overriding by the paramount powers of Parliament.

While the definition of interprovincial trade barriers can be agreed upon by most economists and scholars, the question of what constitutes an unacceptable interprovincial trade barrier that requires reconciliation through government action has been the subject of much debate. As well, scholars and economists have put forward conflicting accounts of the true cost of interprovincial barriers on the Canadian economy or the potential gains that could flow from eliminating interprovincial barriers to trade.

There have been several efforts to eliminate interprovincial trade barriers in Canada, starting with the 1985 Royal Commission on the Economic Union and Development Prospects for Canada. As well, Canada has been working to establish internal trade agreements in order to comply with its commitments to international free trade treaties. As well, a series of interprovincial trade agreements have been signed, starting with the Agreement on Internal Trade (AIT) in 1994. The Trade, Investment and Labour Mobility Agreement (TILMA)

between Alberta and British Columbia in 2006 attempts to remove barriers to trade, investment and labour mobility between the two provinces. The federal government continues to renew its promise to eliminate interprovincial trade barriers. As well, Ontario and Quebec recently signed an Agreement on Enhancing the Ontario-Quebec Economic Region and Nova Scotia and New Brunswick signed a Partnership Agreement on Regulation and the Economy (PARE).

These interprovincial trade agreements have been criticized for ineffective dispute resolution processes and minimal changes in federal and provincial laws and regulations. Most critically, the federal and provincial governments are criticized for negotiating these agreements without consultation with the public or special interest stakeholder groups, as the agreements are often not announced until after they have been signed.

Canada's federal and provincial governments have the obligation to regulate the economy in a manner that protects the public interest and consumers. There is no doubt that the creation of a more competitive economy could be achieved by eliminating certain interprovincial trade barriers and a more competitive economy would benefit Canadian consumers. Consumers have fundamental rights such as the right to be informed, the right to choice, the right to participate in marketplace decision making and the right to redress. Striving for a more competitive economy is in line with these fundamental consumer rights and governments must live up to their responsibility of maximizing social welfare and protecting consumers in the process of removing interprovincial trade barriers. Canadian interprovincial trade agreements should be framed in the interests of Canadian consumers by balancing these agreements towards information and cooperation to achieve a competitive Canadian marketplace rather than market access or the convergence of national policies.

Three potential solutions using the federal trade and commerce power to strengthen the Canadian economic union are discussed. First, shifting to judicial oversight over s. 91(2) of the Constitution would empower courts to determine the magnitude of unacceptable burdens on commerce weighed against a wide array of policy justifications advanced by provincial governments. This approach implies that provincial laws should be struck down if they impose an undue burden on commercial activity because of differing standards and regulations in a number of provinces. However, courts might not be the most suitable or accessible venue for resolving disputes involving interprovincial barriers to trade.

A second possible solution is increased Parliamentary leadership to enhance the Canadian economic union. Parliament could enact legislation to promote the economic union by giving effect to a non-discrimination principle, prevent or eliminate obstacles to internal trade and provide a common set of rules for mutual recognition of provincial standards and regulations. Such an approach would not bar provinces from enacting legislation on the same matters. Provinces could

also voluntarily take on harmonization measures on matters affecting interprovincial trade. Any legislation or harmonization measures coming from federal and provincial governments must focus on increasing competition in the Canadian market instead of focusing on specific competitors within the market, as increased competition should be seen to directly benefit consumers and the public interest. As well, any legislative action and future interprovincial trade agreements must involve its citizens and expand consultation with stakeholders beyond industry and business firms. Consultation with consumer groups and the public are important to promote political accountability. The federal government is well placed to develop guidelines for provincial government consultation with their respective populations.

A third possible solution is the oversight of barriers to interprovincial trade by an expert agency or tribunal. The agency or tribunal should be required to provide consumers and consumer organizations with avenues to participate in their proceedings and also ensure that obstacles to effective participation are removed. Consumer groups and the public should be able to access market information that would help inform their participation.

In conclusion, as interprovincial trade agreements are struck and more efforts to remove interprovincial trade barriers to stimulate the Canadian economic union are pursued, it is imperative that governments do not fail in their responsibility to protect the public interest and strive to protect consumer interests. Increased transparency and consultation with the public and special interest stakeholder groups are crucial in interprovincial trade discussions. As well, interprovincial trade agreements should set into place conditions for a competitive environment so that firms are compelled to produce desirable goods and services in the most efficient manner but also to distribute them at the right quality and price if they are to survive. In this way, seeking solid competition policy and focusing on a properly operating competitive environment rather than specific competitors within the Canadian market will best serve consumers.

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INTRODUCTION

Interprovincial trade barriers are often cited by the government and economists as a costly part of doing business in Canada and a disincentive for provincial businesses to expand and participate in the full Canadian economy. These barriers allegedly increase inefficiencies in the market and adversely affect the ability of Canadian firms to compete on international markets. Removing interprovincial trade barriers could result in benefits for consumers, such as lower prices and increased choices flowing from increased efficiencies and competition in the market.

This paper examines various issues in the debate over interprovincial trade barriers in Canada, in particular, the issues associated with the application of the "trade and commerce" powers set out in section 91(2) of the *Constitution Act, 1867* to accomplish nationwide goals to enhance competitive markets.

This paper begins by explaining the history of "trade and commerce" powers in Canada and their use to determine the constitutionality of legislative provisions. As well, the paper discusses the challenges of defining "barriers to interprovincial trade" and reviews various efforts to eliminate interprovincial trade barriers in Canada. The paper also examines the consumer interest in interprovincial trade in Canada and explains the difficulty of clearly identifying the consumer interest in interprovincial trade. We then take a brief look at the various interprovincial trade agreements that have been signed in attempt to remove interprovincial trade barriers and promote a more integrated regional economy and note the criticisms of these agreements and their impact on Canadian consumers. Finally, potential solutions to the Canadian economic union using the federal trade and commerce power are discussed and recommendations are put forward to ensure that interprovincial trade agreements properly consider consumer interests.

TRADE & COMMERCE POWERS IN CANADA

Trade and commerce in the Canadian Constitution

Section 121 of the Constitution is often referred to as the "common market clause" and is the principle of removing interprovincial trade barriers in Canada. This clause prohibits explicit interprovincial trade barriers, or tariffs.

> **Canadian Manufacturers, etc.**
> 121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Parliament has exclusive jurisdiction to regulate trade and commerce in Canada, pursuant to section 91(2) of the *Constitution Act, 1867*.

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> ...
>
> 2. The Regulation of Trade and Commerce.[1]

Thus, provincial legislatures cannot pass laws that prohibit or limit extra-provincial trade. However, provinces have the jurisdiction to regulate local or intraprovincial trade, pursuant to sections 92(13) and (16) of the *Constitution Act, 1867*, which allow them to regulate property and civil rights in the province and "generally all matters of a merely local or private nature in the province" respectively.

As well, section 6 of the *Canadian Charter of Rights and Freedoms* guarantees every citizen and permanent resident the right to move to any province in Canada and pursue an economic livelihood, though this may be subject to provincial limits.

This section will discuss each of these constitutional powers and rights in greater detail.

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[1] Canada, *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).

The constitutional definition of the federal "trade and commerce" power

The starting point for the analysis of the federal trade and commerce power is the judgment of the Judicial Committee of the Privy Council in *Citizens Insurance Co. of Canada v. Parsons* (*Parsons*).[2] In this case, the appellant insurance company challenged the constitutionality of an Ontario statute that prescribed terms for fire insurance policies on the basis that only the federal Parliament could regulate "trade and commerce." The Privy Council contemplated the scope of the federal "trade and commerce" powers, ultimately finding that the Ontario statute was valid in relation to property and civil rights in the province. The "regulation of trade and commerce" did not include the power to regulate the contracts of a particular trade or business within a province, such as fire insurance contracts in Ontario.[3]

Sir Montague Smith interpreted "regulation of trade and commerce" to "include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and general regulation of trade affecting the whole dominion."[4]

Since *Parsons*, it has been accepted that intraprovincial trade and commerce is a matter within provincial power under "property and civil rights." The federal trade and commerce power is limited to two branches: (1) interprovincial and international trade and commerce; and (2) trade and commerce affecting Canada as a whole, or "general" trade and commerce.

The first branch: interprovincial and international trade

The Judicial Committee of the Privy Council largely ignored the second branch of federal trade and commerce, focusing on the first branch exclusively. Under the first branch, a distinction is drawn between interprovincial and intraprovincial trade. The regulation of interprovincial and international trade is the regulation of goods, persons, capital or services crossing provincial or Canadian borders for a commercial purpose. Intraprovincial trade does not include the power to regulate transactions, activities, or persons entering and leaving the province.[5] The local nature of this trade is supervised by provincial authority over "property and civil rights" and "matters of a local or private nature in the province" (ss. 92(13) and 92(16) of the *Constitution Act, 1982*, respectively). The case law is clear that provinces may not pass laws prohibiting extraprovincial transactions. Thus, provincial marketing schemes that prevent provincial residents from purchasing goods from suppliers outside the province have been struck down.[6]

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[2] (1881), 7 App. Cas. 96 [*Parsons*].
[3] *Ibid.* at para. 25.
[4] *Ibid.*
[5] See Patrick Monahan, *Constitutional Law*, 2nd ed. (2002, Toronto: Irwin Law) at Chapter 9.B. "International and Interprovincial Trade" in which he cites *Ontario A.G. v. Canada A.G.*, [1896] A.C. 348 (P.C.).
[6] *Manitoba (A.G.) v. Manitoba Egg and Poultry Ass'n*, [1971] S.C.R. 689. See also *Burns Food Ltd. V. Manitoba (A.G.)*, [1975] 52 Can. Bar Rev. 597.

Provinces have the authority to regulate transactions that take place wholly within the province, as demonstrated in *Home Oil Distributors Ltd. v. Attorney General of British Columbia*.[7] The case discussed the regulation of gasoline and fuel sold in the province. The Supreme Court determined that where the pith and substance of the legislation is to regulate businesses entirely within the province, its extra-provincial market impact does not change the pith and substance and regulation is properly within the scope of the province.

In a more recent case, the Supreme Court determined that certain activities of federally regulated entities can be regulated by provinces. In *Canadian Western Bank v. Alberta*,[8] federally regulated banks promoting insurance were found to be participating in the business of insurance, which was a provincially regulated subject matter. Thus, the provincial *Insurance Act* applied to the banks' insurance promotion.

Several cases have affirmed Parliament's exclusive authority for international and interprovincial trade.[9] What is less clear is Parliament's ability to regulate local trade. In particular, the jurisprudence considers the extent to which Parliament can regulate local transactions or activities where the regulation is necessarily incidental to the effective regulation of international or interprovincial trade. The Privy Council determined the validity of a federal trade statute by examining whether it applied directly to transactions, persons, or activities that were located within a single province. If this inquiry was answered in the affirmative, the federal statute was found to be invalid no matter how close the connection between the regulation of the transaction, person or activity and interprovincial or international trade and commerce.[10]

Professor Monahan posits that this restricted approach significantly limits the extent to which Parliament can effectively regulate international and interprovincial trade, since effective regulation often requires control over the entire production and marketing of a product. Monahan suggests that one way Parliament has dealt with this limitation on its trade power has been to apply mandatory restrictions on interprovincial or international trade and voluntary restrictions on intraprovincial trade in the product.[11]

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[7] [1940] S.C.R. 444 [*Home Oil Distributors*].

[8] [2007] S.C.J. 22.

[9] *Reference Re: Validity of s. 5(a) of Dairy Industry Act (Can.)*, [1949] S.C.R. 1. See also *Labatt Breweries of Canada Ltd. v. Canada (A.G.)*, [1980] 1 S.C.R. 914.

[10] Monahan, *supra* note 5 at Chapter 7.D. "The JCPC and Trade and Commerce". In *British Columbia (A.G.) v. Canada (A.G.)*, [1937] A.C. 377, the Privy Council held that a federal statute regulating trade in natural products was invalid, even though the products in question were almost exclusively exported because the legislation directly regulated certain transactions that could be completed within a single province.

[11] Monahan, *supra* note 5 at Chapter 9.B. "International and Interprovincial Trade". Monahan uses the *Motor Vehicles Safety Act*, S.C. 1993, c. 16 as an example of Parliament creating a national safety mark that prescribes standards to meet before the mark can be affixed to a motor vehicle. Vehicles that move across provincial borders must bear the mark and thus must meet

In *Reference Re Agricultural Products Marketing Act (Canada)*,[12] the Supreme Court upheld a complex scheme of federal and provincial legislation that established a national egg marketing agency with power to set production and marketing quotas and to impose levies on producers. The scheme was designed to share the interprovincial and export market for eggs by allocating quotas to each province and to each egg producer. While the federal legislation was mainly concerned with interprovincial and international trade in eggs, it imposed certain obligations on producers of eggs whose product was traded locally. The court upheld the scheme, noting that this scheme was a cooperative effort between all governments and remarking that it would be "really unfortunate" if the scheme was declared invalid.[13]

In *Caloil Inc. v. Attorney General of Canada* (*Caloil*),[14] the Supreme Court contemplated the validity of federal regulation concerning extra-provincial trade and commerce that had an incidental effect on intraprovincial trade and commerce. Monahan suggests that the case is sometimes regarded as an indication of "greater willingness on the part of the Supreme Court to allow Parliament to regulate local transactions where such regulation is necessary to the effective functioning of a regulatory scheme directed at international or interprovincial trade."[15] In this case, the federal government prohibited the transport and sale of imported oil west of Ottawa with the purpose of protecting the west's domestic industry from cheaper imported products. The federal legislation was found to be valid, as it was a necessary part of a scheme to regulate interprovincial and export trade: "a purpose that is clearly outside provincial jurisdiction and within the exclusive federal field of action."[16]

However, Monahan notes the difficulty of interpreting *Caloil* as broadening federal authority over local trade:

> In short, all that the *Caloil* case establishes is that Parliament may impose controls on the manner in which imported goods are to be used once they have entered the country. But it could also be interpreted as indirectly confirming the fact that Parliament cannot purport to extend controls to domestically produced goods, even where such controls are necessarily incidental to the effective application of interprovincial or international trade.[17]

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product standards. For vehicles that are traded within the province of production, the manufacturer has the option to affix the safety mark, but where they choose to affix the mark, the vehicle must comply with product standards.

[12] [1978] 2 S.C.R. 1198.

[13] *Ibid.* at 1296.

[14] [1971] S.C.R. 543 [*Caloil*].

[15] Monahan, *supra* note 5 at Chapter 9.B.

[16] *Caloil*, *supra* note 14 at 550.

[17] Monahan, *supra* note 5 at Chapter 9.B.

The second branch: general trade and commerce

As previously stated, the Privy Council largely ignored the second branch of *Parsons*, finding that the federal trade and commerce power was limited to the regulation of goods, persons or activities crossing provincial borders. The Supreme Court has since departed from the Privy Council's approach, broadening the ambit of the general trade and commerce power.

Monahan suggests that the phrase "general regulation of trade affecting the whole dominion" invites some assessment of the relative importance of an economic activity to the national economy, as well as whether such activity should be regulated by Parliament as opposed to the provinces.[18]

The Supreme Court first addressed the second branch of *Parsons* in 1976 in *Re Anti-Inflation Act*.[19] No arguments regarding trade and commerce were proposed to the court, but Laskin C.J. suggested that anti-inflation legislation might be supported by the general federal trade and commerce power in obiter. In support of this, Laskin noted that the anti-inflation legislation was not directed to a particular trade, but "[was] directed to suppliers of commodities and services in general and to the public services of governments, and to the relationship of those suppliers and of the public services to those employed by and in them, and to their overall relationship to the public."[20]

In *MacDonald v. Vapor Canada Ltd.* (*Vapor Canada*), Laskin elaborated on the second branch of *Parsons*, suggesting that the existence of a federal regulatory scheme or the presence of a federal regulatory agency would be central to determining the validity of federal legislation under the trade and commerce power.[21] In *General Motors Canada v. City National Leasing* (*City National Leasing*), Dickson C.J. expanded on Laskin's theory by enumerating a test to assess whether federal legislation can be supported on the basis of Parliament's authority over the general regulation of trade.[22]

The five hallmarks of valid legislation under the general trade and commerce power are as follows:

1. the impugned legislation must be part of a general regulatory scheme;
2. the scheme must be monitored by the continuing oversight of the regulatory agency;
3. the legislation must be concerned with trade as a whole rather than with a particular industry;

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[18] *Ibid.* at Chapter 7.D. See also *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] S.C.J. 66 at para. 16 [*Kirkbi*].
[19] [1976] 2 S.C.R. 373.
[20] *Ibid.* at 426.
[21] [1977] 2 S.C.R. 134 at 165 [*Vapor Canada*].
[22] [1989] 1 S.C.R. 641 [*City National Leasing*].

4. the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
5. the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

These requirements ensure that federal legislation does not upset the balance of power between federal and provincial governments.[23] In addition, the court cautioned that these indicia are not an exhaustive list of traits that characterize general trade and commerce legislation, and the presence or absence of one of them is not necessarily determinative. Where the general trade and commerce power is advanced as a ground for constitutional validity, a case-by-case analysis is appropriate.[24]

The Supreme Court applied this test to the *Combines Investigation Act* in *City National Leasing*. Satisfying the first two indicia, the Act embodied a "complex scheme of economic regulation" as it comprised three elements: identification of prohibited conduct, the creation of an investigatory mechanism, and the establishment of a remedial mechanism.[25] As such, the Act was concerned with trade in general, not just the regulation of a particular industry or commodity and was thus valid legislation under the federal trade and commerce power. In applying the final two indicia, the court focused on the need to ensure that Parliament could respond effectively to national economic problems.[26]

Framework to determine the constitutionality of legislative provisions under the federal trade and commerce power

In *City National Leasing*, the Supreme Court of Canada set out a framework for determining the constitutionality of provisions under the trade and commerce power.[27] The Court qualified this framework by stating that in certain cases, some steps can be dispensed with if a clear answer to one of them resolves the issue. Below is a summary of the test and demonstration of its application in two cases: *City National Leasing* and *Kirkbi AG v. Ritvik Holdings Ltd* (*Kirbi*).

Step 1: Intrusion and extent of intrusion on a provincial power

First, the court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so, to what extent they intrude. In order to make this determination, the court should examine the impugned provision's purpose and effect.

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[23] *Ibid.* at para. 34.
[24] *Ibid.*
[25] *Ibid.* at para. 55.
[26] *Ibid.* at para. 59-60.
[27] *Ibid.* at para. 47.

Application of Step 1 in *City National Leasing* and *Kirkbi*

In *City National Leasing*, the court examined s. 31.1 of the *Combines Investigation Act*, which created a civil cause of action for certain infractions of the Act, notwithstanding the fact that the creation of civil causes of action lies within the domain of the provinces. In *Kirkbi*, the court examined s. 7(b) of the *Trade-marks Act*, which created a civil cause of action codifying the common law tort of passing off. In both cases, the court highlighted three factors in its finding that the intrusion of the impugned provision into provincial legislation was minimal. First, the impugned provision was remedial and was not a substantial part of the legislative scheme. As well, the impugned provision did not create a general cause of action. Second, the application of the impugned provision was limited by the provisions of the legislation. Finally, Parliament was not constitutionally precluded from creating rights of civil action where the measures are shown to be warranted. In *Kirkbi*, the impugned provision did not expand federal jurisdiction in relation to trade-marks but merely rounded out an otherwise incomplete trade-mark scheme.

Step 2: Validity of the federal legislative or regulatory scheme

In the second stage of analysis, the court must determine whether the Act, or a severable part of it, in which the impugned provision is found is valid.

In cases involving the second branch of general trade and commerce, this will normally involve finding the presence of a regulatory scheme and ascertaining whether the scheme is valid. In *City National Leasing*, the court listed five hallmarks of validity for legislation under general trade and commerce, which were adopted and extended from three indicia set out in *Vapor Canada*. The five hallmarks are as follows:

1. the impugned legislation must be part of a general regulatory scheme;
2. the scheme must be monitored by the continuing oversight of the regulatory agency;
3. the legislation must be concerned with trade as a whole rather than with a particular industry;
4. the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
5. the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

The court cautions that these indicia are not an exhaustive list of traits that characterize general trade and commerce legislation, and the presence or absence of one of them is not necessarily determinative. Where the general trade and commerce power is advanced as a ground for constitutional validity, a case-by-case analysis is appropriate.

If the scheme is determined to be invalid, this is the end of the inquiry.

Application of Step 2 in *City National Leasing* and *Kirkbi*

In *City National Leasing*, the Supreme Court found that the *Combines Investigation Act* was valid federal legislation under the general trade and commerce power, meeting the hallmarks for validity. The Act is a complex, well-integrated scheme of economic regulation to eliminate activities that reduce competition in the marketplace. It identifies and defines anti-competitive conduct, establishes an investigatory mechanism for revealing prohibited activities, and provides a range of remedies. As well, provinces are constitutionally incapable of enacting the nature of this legislation, and the failure to include one or more provinces would jeopardize successful operation of the legislation in other parts of the country.[28]

In *Kirkbi*, the court held that the *Trade-marks Act* establishes a regulatory scheme for both registered and unregistered trade-marks and is concerned with trade-marks as a whole, across and between industries in different provinces. Divided provincial and federal jurisdiction could lead to uneven protection.[29]

Step 3: Integration of provision in legislative or regulatory scheme

If the legislative or regulatory scheme is found to be valid, the court must then determine whether the impugned provision is sufficiently integrated with the scheme such that it can be upheld by virtue of that relationship. This is a two part inquiry clarified by LeBel J. in *Kirkbi*.[30] First, the court must determine the appropriate test of "fit" – "how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation."[31]

Second, the court must determine the degree of integration required by considering the extent to which the provision encroaches on provincial powers, or "the degree of relationship that is required is a function of the extent of the provision's intrusion into provincial powers."[32] This is further explained by LeBel J. in *Kirkbi*:

> If the encroachment is minimal, then a "functional relationship" is sufficient to sustain the constitutionality of the provision. If a provision is highly intrusion, a stricter test is applied: the provision must be "truly necessary" or "integral" to the federal scheme. Consideration of the seriousness of the encroachment of provincial powers and of the proper standard for the relationship between a legislative provision and a valid federal scheme ensures that the balance of constitutional powers is maintained and

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[28] *Vapor Canada*, *supra* note 21 at para. 60.
[29] *Kirkbi*, *supra* note 18 at para. 29.
[30] *Ibid.* at para. 32.
[31] *Vapor Canada*, *supra* note 21 at para. 44.
[32] *Ibid.* at para. 67.

> focuses the analysis on the "pith and substance" of the provision.[33]

If the provision passes the integration test, then the provision is *intra vires* Parliament as an exercise of the general trade and commerce power. If the provision is not sufficiently integrated into the scheme of regulation, then it cannot be sustained under the second branch of s. 91(2).

Application of Step 3 in *Kirkbi*

The court in *City National Leasing* did not apply this step. In *Kirkbi*, minimal encroachment was found, requiring a "functional relationship" between the provision and provincial powers. The pith and substance of s. 7(b) of the *Trade-marks Act* was found to be directly connected to the enforcement of trade-marks in Canada by avoiding confusion through the use of trade-marks. Without this provision, there would be a gap in the legislative protection of trade-marks, creating inconsistencies and uncertainties in trade-mark protection.[34] Thus, s. 7(b) was found to be sufficiently integrated into the federal scheme and within Parliament's legislative competence.

Overriding principles for provincial legislation concerning trade and commerce: Morguard and Hunt

In *Morguard Investments Ltd. v. De Savoye* (*Morguard*),[35] the Supreme Court found that mutual recognition of judgments across the country was inherent in a federation and part of the integrating character of Canada's constitutional arrangements. In arriving at its decision, the court discussed elements pointing to the creation of a single country, such as steps taken to foster economic integration: the creation of a common market, the removal of barriers to interprovincial trade.[36] The Supreme Court stated that "[g]enerally trade and commerce between the provinces was seen to be a matter of concern to the country as a whole."[37]

The Supreme Court expanded on *Morguard* by stating that respect for diversity must be tempered by the need to coordinate with diversity in *Hunt v. T&N plc* (*Hunt*).[38] The Court suggested that old common law rules rooted in the concepts of sovereignty and independence came at the cost of unfairness and thus must be reformed.[39] In particular, the Supreme Court qualified provincial jurisdiction to legislate on matters that may have effect in other provinces: provinces must respect minimum standards of order and fairness.[40]

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[33] *Kirkbi, supra* note 18 at para. 32.
[34] *Ibid.* at para. 36.
[35] [1990] 3 S.C.R. 1077 [*Morguard*].
[36] *Ibid.* at para. 36.
[37] *Ibid.*
[38] [1993] S.C.J. No. 125 at para. 1 [*Hunt*].
[39] *Ibid.* at para. 53.
[40] *Ibid.* at para. 56.

Monahan suggests that *Morguard* and *Hunt* support the proposition that "Parliament can legislate so as to maintain and enhance the proper functioning of the Canadian economic union."[41] Thus, there may be valid and overlapping legislation on the same matter enacted by Parliament and a provincial legislature. This does not mean that the provincial law is unconstitutional, merely that it is subject to overriding by the paramount powers of Parliament.

Mobility rights in the Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* (the "Charter") has further augmented the constitutional provisions for the free flow of goods within Canada, particularly with respect to labour mobility under section 6.[42] The Supreme Court of Canada has recognized that section 6 was included in the Charter in order to guarantee adherence to the principles of an economic union to create a national economy and the removal of interprovincial tariffs and internal barriers to mobility intended by the drafters of the *Constitution Act of 1867*.[43]

Section 6 of the Charter reads as follows:

> **6.** (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
> (a) to move to and take up residence in any province; and
> (b) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
> (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
> (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
>
> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who were socially or economically disadvantaged if the rate of

[41] Monahan, *supra* note 5 at Ch. 9.E. "The Canadian Economic Union and the Constitution".
[42] *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11.
[43] *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591.

> employment in that province is below the rate of employment in Canada.

Section 6 has been used to challenge regulations that limit mobility rights, particularly regulations that address professions. As well, section 6 has been used to dispute the constitutionality of certain regulations on interprovincial trade, such as the use of quotas.

Although mobility rights are guaranteed by section 6, these rights can be limited by section 1 of the Charter. Section 1 states that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[44] Thus, even though the government may be found to be in violation of section 6 of the Charter, this violation could be justified under section 1 after applying the test set out in *Oakes*.[45] As well, section 6(3) has imposed additional limits through case law. Certain laws are exempted from the mobility rights guaranteed in section 6, such as provincial laws that require a reasonable period of residence in order to qualify for social service programs, laws that do not discriminate on the basis of one's province of previous residence or present residence, and laws designed to improve conditions in areas of Canada with lower than average employment rates.[46]

Section 6 cases involving the mobility of professions

As a general rule, section 6 protects interprovincial mobility rights, but it cannot be invoked in a manner such that it protects intraprovincial mobility rights.[47]

Section 6 has often been used to challenge provincial statutes that regulate the mobility of certain professions. For example, in *Black v. Law Society of Alberta*, the Supreme Court of Canada struck down two rules passed by the Law Society of Alberta for violating section 6 of the Charter. These rules stipulated that Alberta residents were prohibited from entering into an arrangement to practice law with non-residents of Alberta and no member of the Law Society could be associated with more than one firm. However, it has been established that provinces are allowed to regulate professions. An example of an allowable regulation is a reasonable legislative restriction enacted to ensure that certain professions are practiced only by those who meet minimum standards of education or proficiency.[48] Regulations must be drafted in a manner that does not discriminate based on one's province of previous or current residence.[49]

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[44] *Charter of Rights and Freedoms*, *supra* note 42 at s. 1.
[45] *R. v. Oakes*, [1986] 1 S.C.R. 103.
[46] Mollie Dunsmuir & Kristen Douglas, *Mobility Rights and the Charter of Rights and Freedoms* (Ottawa: Public Works and Government Services Canada, 1998).
[47] *McDermott v. Nackawic,* [1988] N.B.J. No. 713.
[48] *O'Neill v. Law Society of New Brunswick,* [1993] N.B.J. No. 449.
[49] See *O'Neill*, *ibid.* See also *Law Society of Upper Canada v. Skapinker,* [1984] 1 S.C.R. 357. See also *Taylor v. Institute of Chartered Accountants of Saskatchewan,* [1988] S.J. No. 501. See also *Walker v. Prince Edward Island*, [1995] S.C.J. No. 45.

Section 6 cases on mobility restrictions in interprovincial trade

Section 6 of the Charter has also been used to challenge restrictions on mobility within the commercial realm. In *Canadian Egg Marketing Agency v. Richardson*, section 6 of the Charter was used to prevent the Canadian Egg Marketing Agency (CEMA) from obtaining an injunction that would prevent two territorial egg producers from partaking in interprovincial or export trade. CEMA sought this injunction on the basis that the regulatory scheme in place did not impose a quota on the eggs produced in the Northwest Territories. The Northwest Territories Court of Appeal decided that the marketing scheme violated section 6 of the Charter due to the abrogation of the producers' right to sell within interprovincial markets. The court held that while the government had a right to regulate the field, what ensued in this case was effectively a prohibition since the egg producers of the Northwest Territories would never be subject to a quota, without which they are unable to sell their eggs.[50]

It should be noted that quotas themselves are in accordance with section 6 of the Charter. Many Canadian cases have affirmed that regulations that institute the imposition of quotas through marketing boards dealing with interprovincial and export trade are regulations of general application that do not discriminate against individuals based on their provinces of current or previous residence.[51]

[50] Dunsmuir & Douglas, s*upra* note 46.

[51] See for example *Le Groupe des Eleveurs de Volailles et al. v. Canadian Chicken Marketing Agency*, [1984] A.C.F. no 251; *Archibald v. Canada*, [1997] F.C.J. No. 394; *Milk Board v. Clearview Dairy Farm Inc.*, [1985] B.C.J. No. 2396.

BARRIERS TO INTERPROVINCIAL TRADE

Defining "barriers to interprovincial trade"

Several commentators have attempted to define what constitutes a barrier to interprovincial trade. For example, George Vegh argues that "interprovincial trade barriers should be characterized in terms of the disproportionate impact that provincial measures have on the flow of trade between the provinces."[52] A disproportionate impact measures impediments to the flow of trade that are not necessary to implement the objectives of provincial legislation.

There are two types of interprovincial trade barriers: explicit barriers also known as tariffs, and indirect barriers such as different rules and regulations between provinces and regional programs that distort the market.[53] An example of an interprovincial trade barrier is provincial legislation that has the effect of removing out-of-province competition to protect local interests. As well, the large compliance costs associated with the bureaucratic web of federal and provincial regulations can impose a major cost of doing business on companies that want to do interprovincial business.

A study by the Canadian Chamber of Commerce in 2004 surveyed several companies regarding their experience with interprovincial trade barriers. The study stated that 42% of respondents that operate in more than one province encountered some form of barrier, with "most common barriers [including compliance] with multiple sets of regulations, different licensing requirements, labour mobility barriers, local preferences for procurement and local presence requirements."[54]

However, as K. Swinton points out, there is a significant degree of confusion regarding what constitutes an unacceptable interprovincial trade barrier.[55] Some commentators argue that government procurement practices that favour local suppliers and producers over their out-of-province counterparts is an example of a trade barrier that is in the form of direct discrimination on the basis of residency. Elimination of this type of barrier is often described as "negative integration" – an end to arbitrary and purposeful discrimination.[56] A more ambitious definition of trade barrier would encompass indirect discrimination, such as provinces refusing to recognize occupational qualifications in another province or different product, consumer protection or environmental standards of other provinces. By

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[52] George Vegh, "The Characterization of Barriers to Interprovincial Trade Under the Canadian Constitution" (1996) 34 Osgoode Hall L.J. 355-410.
[53] Eugene Beaulieu, Jim Gaisford & Jim Higginson, *Interprovincial Trade Barriers in Canada: How Far Have We Come? Where Should We Go?* (2003: Van Horne Institute for International Transportation and Regulatory Affairs), at p. 5 [Van Horne Institute].
[54] The Canadian Chamber of Commerce, "Obstacles to Free Trade in Canada: A Study on Internal Trade Barriers" (November 2004), at p. 3 [Canadian Chamber of Commerce].
[55] K. Swinton, "Courting Our Way to Economic Integration: Judicial Review and the Economic Union" (1995) 25 Cdn. Bus. L.J. 280 [Swinton].
[56] *Ibid.*

eliminating this barrier, provinces can achieve "positive integration" – harmonization of policies across jurisdictions. Canadian law has often recognized the principle that identical treatment for everyone is not a primary value, as we "accept differential treatment of groups where such treatment is justifiable to achieve some further principle of justice."[57]

It is difficult to reach a consensus on which limitations are reasonable and which are arbitrary. If "barriers" are defined to include both direct and indirect burdens on the mobility of goods, capital, labour and services, then a large number of provincial practices may become suspect.

The costs of interprovincial trade barriers and the benefits of removing them

In the early 1980s, Canada became concerned over the potential costs of regulation. This issue was addressed by the Economic Council of Canada as part of a study of government regulation.[58] The Council categorized the costs of regulation as directive administrative costs, compliance costs, political activity costs, induced costs, and costs that might arise from changes in industry structure. For example, compliance costs are the costs incurred by industry in complying with government regulation. To the extent that these costs cause an increase in the operating costs of a company, they are usually reflected by increased consumer prices. Compliance costs are an interprovincial trade barrier for several firms, especially those who wish to expand their dealings beyond provincial borders and must comply with the regulations of each province and the federal government.

According to the Canadian Chamber of Commerce, interprovincial barriers to trade "add the cost of conducting business and discourage some businesses, especially small and medium sized businesses, from doing business in more than one jurisdiction."[59] In turn, this negatively impacts the competitiveness of Canadian business and the economy and limits the standard of living of Canadians.

Canadian firms also suffer because they operate on a less efficient scale, as interprovincial trade barriers prevent them from consolidating and taking advantage of economies of scale.[60] These inefficiency costs are passed on to consumers.

Where provinces adopt measures to protect suppliers within a certain region, these suppliers may benefit from higher prices and additional revenues, but

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[57] *Ibid.*
[58] Economic Council of Canada, *Responsible Regulation: An Interim Report* (Ottawa: Canadian Government Publishing Centre, 1979) and *Reforming Regulation, 1981* (Ottawa: Canadian Government Publishing Centre, 1981).
[59] Canadian Chamber of Commerce, *supra* note 54 at p. 3.
[60] Van Horne Institute, *supra* note 53 at p. 11.

MacMillan and Grady argue that there will be a net efficiency loss arising from the distortions to production and consumption.[61] They argue that these distortions will result in higher taxes, inferior government services and increased government debt. These distortions will reduce overall competitiveness with the effect of lower productivity, raised input costs to businesses, shielding local firms from outside competition and restricting the suppliers' access to market opportunities in other provinces and territories.

As well, additional costs faced by Canadian firms can potentially adversely affect their ability to compete on international markets. Foreign firms may choose not to pursue the Canadian market since the costs of entry resulting from interprovincial trade barriers may be too high.[62] International studies suggesting that Canada's interprovincial trade barriers contribute to its poor productivity affect the perceptions of international investors.[63]

The potential effects of lowering interprovincial barriers are lower costs and equipping firms to better compete in domestic and international markets. According to the Van Horne Institute, this can lead to lower prices thereby increasing consumer purchasing power and strengthening and unifying the economy overall. A stronger and larger economy means increased tax revenues for the government, job creation and improved performance in international markets.[64] The flow of benefits from reducing internal trade barriers are summarized in the diagram below, from Graham Parsons.[65]

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[61] Kathleen E. MacMillan & Patrick Grady, "A New Prescription: Can the BC-Alberta TILMA Resuscitate Internal Trade in Canada?" C.D. Howe Institute (October 2007).
[62] Van Horne Institute, *supra* note 53 at p. 11.
[63] See the Organisation of Economic Co-operation and Development (OECD) and International Monetary Fund (IMF) reports referenced in footnotes 80 and 81 below.
[64] Van Horne Institute, *supra* note 53 at p. 12.
[65] Graham Parsons, *Internal Trade and Economic Cooperation: Down the Wire on an Internal Trade Agreement*, Canada West Foundation (1994).

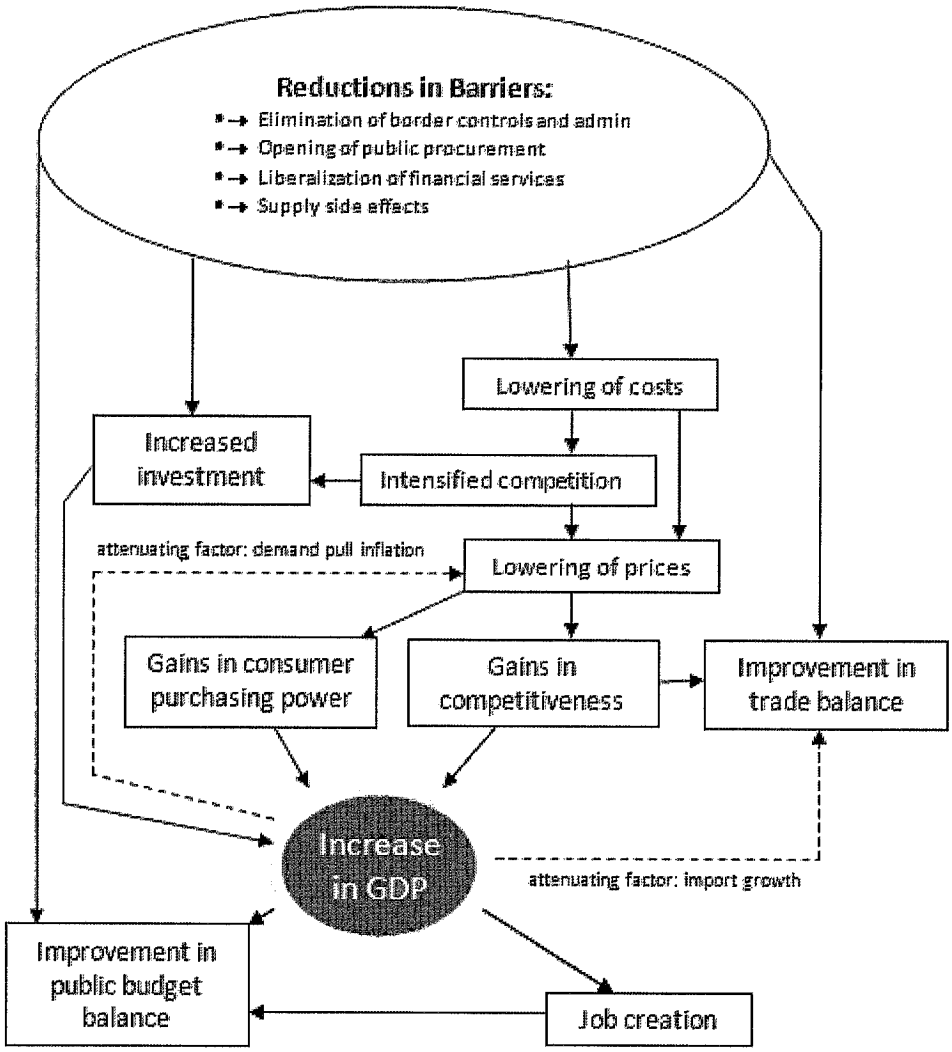

Figure 1: The Flow of Benefits from Reducing Internal Trade Barriers[66]

Exaggerated trade barriers?

Some critics question the true extent of interprovincial trade barriers in Canada. Research for the 1985 Macdonald Commission suggested that interprovincial trade barriers cost Canada no more than 0.05% of the GDP.[67] One of the most outspoken organizations is the Canadian Centre for Policy Alternatives (CCPA), with commentary from policy researchers Marc Lee and Scott Sinclair. Lee argues that the presence of interprovincial trade barriers is "miniscule at most" and "to the extent they existed in the past… they have already been resolved."[68]

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[66] Cited from Van Horne Institute, *supra* note 53 at p. 12, originally cited from Graham Parsons, *Internal Trade and Economic Cooperation: Down to the Wire on an Internal Trade Agreement*, Canada West Foundation (1994) at p. 4.

[67] Canada, Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald Commission), *Report* (Ottawa: Minister of Supply and Services, 1985).

[68] Marc Lee, "In Search of a Problem: The Future of the Agreement on Internal Trade and Canadian Federalism" (2002) 2 Asper Rev. of Intl'l Bus. And Trade Law 225 at para. 3.

Sinclair agrees, finding no credible evidence of a crisis in Canadian internal trade relations, stating that trade barriers within Canada are relatively small.[69] Lee claims that most serious studies conclude that there are few significant obstacles to trade and investment in Canada, as Canadian provinces are more likely to trade with other provinces than with the United States by a large margin.[70] In fact, since 2000, interprovincial trade has been growing much faster than Canada's international trade.[71]

There have been a few attempts to estimate a dollar cost of interprovincial trade barriers. However, the estimates vary depending on the methodology and the time period used. The Fraser Institute sums up three of the most commonly cited studies in the literature for interprovincial trade barriers.[72]

One of the first estimates of the costs of interprovincial trade barriers was provided by John Whalley in 1983.[73] Whalley reviewed interprovincial distortions or barriers imposed by both provincial and federal governments and the volume of interprovincial trade. He estimated the annual costs of interprovincial barriers to trade in goods to be from 0.11% to 1.54% of the GDP in 1974. He also estimated the costs of barriers to labour mobility to be 0.04% of the GDP, bringing the total cost of interprovincial barriers to be approximately 0.15% to 1.58% of the GDP.

One of the most cited studies on interprovincial trade barriers is the one published by the Canadian Manufacturers' Association (CMA, now the Alliance of Manufacturers and Exporters of Canada) in 1991.[74] The study estimates the cost of interprovincial trade barriers to be $6.5 billion per year, or about 1.0% of the GDP in 1990. The study also estimated that of the $6.5 billion, approximately $500 million came from barriers on beer and wine and $1 billion from agricultural subsidies.

Marc Lee of the CCPA has questioned the CMA study, pointing out flaws in the numbers, as the CMA focused on the costs of existing policies but ignored the benefits of regulations and standards for legitimate public policy objectives.[75] When these numbers are corrected, Lee suggests that the new resulting gain by

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[69] Scott Sinclair, "Canada's Internal Market – A Report Card" (2002) 2 Asper Rev. of Int'l Bus. And Trade Law 201 at para. 3.
[70] Lee, *supra* note 68 at paras. 6 and 8.
[71] Marc Lee & Erin Weir, "The Myth of Interprovincial Trade Barriers and TILMA's Alleged Economic Benefits" (Canadian Centre for Policy Alternatives: February 2007) at p. 1.
[72] Robert Knox & Amela Karabegovic, "Myths and Realities of TILMA" (Fraser Institute, February 2009).
[73] John Whalley, "Induced distortions of interprovincial activity: an overview of issues" printed in Michael J. Trebilcock et al. (eds.), *Federalism and the Canadian Economic Union* (University of Toronto Press for Ontario Economic Council) (1983) at pp. 161-200.
[74] Todd Rutley, "Canada 1993: A Plan for the Creation of a Single Economic Market" (Canadian Manufacturers' Association, 1991).
[75] *Ibid.*

eliminating internal trade barriers is 0.05% of the GDP.[76] Brian Copeland has also criticized the CMA's methodology.[77] Copeland argued that the study confused some international trade barriers with interprovincial trade barriers. As well, the barriers for the alcoholic beverage industry have decreased since the study was published and accounted for one of the most costly barriers cited by the study. Copeland suggested that a more precise estimate of interprovincial trade barriers is from 0.05% to 0.1% of the GDP. The Fraser Institute calculates that using the lowest estimate, 0.05% of the GDP per year, the cost of trade barriers is about $766 million in 2007 or around $23 per Canadian in 2007.[78]

In a more recent study called *Death by a Thousand Paper Cuts*, the Conference Board of Canada concedes that there is little evidence of interprovincial trade barriers, yet claims that these trade barriers are too numerous to measure:

> There has been little research to date on the many interprovincial barriers to competition in Canada. These barriers are found in all sectors of the economy and affect trade in both goods and services. No comprehensive listing of these barriers seems to exist – indeed, their sheer numbers present a daunting obstacle to any attempt to compile a full list or estimate the cost of each barrier to the Canadian consumer.[79]

The Conference Board study suggests that interprovincial barriers are reducing Canadian productivity. Another study by the Organisation for Economic Co-operation and Development (OECD) argues that Canada must "dismantle the remaining obstacles to interprovincial trade and reduce the number of 'regulated occupations' to increase its level of productivity."[80] The conclusion that interprovincial trade barriers was a major factor explaining Canada's relatively poor productivity performance was echoed in a 2007 study by the International Monetary Fund.[81]

Steven Shrybman published a paper in March 2009 examining Canada's internal free trade agenda. Shrybman argued that there are few real impediments to internal trade based on the fact that on average, three disputes are filed each year under the Agreement on Internal Trade (AIT) and only a handful have proceeded

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[76] Lee, *supra* note 68 at para. 10. This was confirmed by research conducted for the 1985 Royal Commission on the Economic Union and Development Prospects for Canada, *supra* note 67. The research is also referenced in Lee & Weir, *supra* note 71.

[77] Brian Copeland, *Interprovincial Barriers to Trade: An Updated Review of the Evidence*, British Columbia Ministry of Employment and Investment (1998).

[78] Knox & Karabegovic, *supra* note 72 at p.1.

[79] Paul Darby et al. *Death by a Thousand paper Cuts: The Effect of Barriers to Competition on Canadian Productivity.* (Ottawa: Conference Board of Canada, 2006) at p. 17.

[80] Organisation for Economic Co-operation and Development, *Economic Policy Reforms: Going for Growth* (2007).

[81] International Monetary Fund, *Canada: Article IV Consultation.* Staff Report 07/51 (February 2007), online: http://www.imf.org/external/pubs/ft/scr/2007/cr0751.pdf.

to dispute resolution. Shrybman goes on to state that "[s]everal disputes have been dismissed during the screening process as having no merit, but most are resolved by consultation or are abandoned."[82]

> Of the fifteen disputes that actually concerned interprovincial trade (averaging one a year), *all* concerned agricultural goods. One third, or five of these cases concerned access to snow crabs harvested off the east coast, two involved Quebec's colouring requirements for margarine, and three others concerned wine and beer marketing. Most of the non-trade cases involved issues of labour mobility – for hair stylists, hunting guides, accountants and a handful of other workers. Most were resolved through consultation. ... While the handful of unresolved AIT cases are not trivial, they clearly do not support the need for dramatically expanding the existing and largely consensual regime that has successfully resolved most interprovincial 'trade' irritants. Furthermore, even if the domestic trade law regime is expanded, governments are likely to simply exempt measures they are willing to abandon.[83]

Given that the Canadian Marketing Association study in 1991 on internal trade barriers propelled Canada's Agreement to Internal Trade in 1995, one might expect that the AIT would have played a large role in resolving internal trade disputes. But the fact that AIT has not resolved many internal trade disputes and that the reality of impediments to internal trade in Canada continues to be questioned by economists and scholars suggests that there might be a broader agenda at play. According to Marc Lee:

> Focusing the discussion on 'trade barriers' diverts attention from the real issue: the presence of laws, regulations and policies at the provincial level that exist to promote economic development; protect consumers, workers and the environment; and to set minimum standards that businesses must abide by. While there may be an additional cost to doing business as a result, these policies exist for a reason. Because provinces have different regional circumstances, economic and social conditions and resource endowments, diverse policy reasons must be accommodated. In areas of provincial jurisdiction, provincial governments will make differing policy choices about how best to regulate to achieve important policy goals. This diversity is a legitimate feature of Canadian federalism and democracy.[84]

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[82] Steven Shrybman, "State of Play: Canada's Internal Free Trade Agenda" (Sack Goldblatt Mitchell LLP, March 2009), online: http://cupe.ca/updir/State-of-Play-TILMA-internal-trade.pdf.
[83] *Ibid.* at pp. 5-6.
[84] Lee, *supra* note 68 at para. 14

History of efforts to eliminate interprovincial trade barriers in Canada

Royal Commission on the Economic Union and Development Prospects for Canada

Also known as the MacDonald Commission, the Royal Commission on the Economic Union and Development Prospects for Canada was appointed in 1982 and presented its findings and recommendations in 1985. The MacDonald Commission cited problem areas and interprovincial trade barriers and called for a remedy of a "Code of Economic Conduct" developed and adopted by coordinated provincial governments. The MacDonald Commission illustrated a broader view of freer internal trade in Canada:

> I take section 121 [of the Constitution], apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist.[85]

This statement suggests a broad interpretation of the Constitution, the *Canadian Charter of Rights and Freedoms* and interpretations by the Supreme Court of Canada.

Canada's international free trade agenda

Since signing on to the North American Free Trade Agreement (NAFTA) in 1994 and the World Trade Organization (WTO) in 1995, the federal government has been working to establish internal trade agreements in order to implement commitments made under these treaties. The domestic trade agenda embodied by the Agreement to Internal Trade in1995, namely, the concept that Canada is obliged to ensure that provincial governments comply with international free trade rules, is mandated by the federal government's commitments under NAFTA and the WTO.[86] But as Shrybman points out, the problem is that while Canada is liable under international law when provincial measures violate trade rules, our constitution does not require provinces to comply with international commitments: "[i]n signing onto NAFTA and the WTO, the federal government's reach exceeded its constitutional grasp."[87]

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[85] MacDonald Commission Report, *supra* note 67 at p. 115.
[86] Shrybman, *supra* note 82 at p. 4.
[87] *Ibid.* Shrybman refers to the Labour Conventions Case (*Canada (A-G) v. Ontario (A-G)*, [1937] A.C. 326 at 347 (P.C.), wherein the Judicial Committee of the Privy Council held that while the federal government retains the power to make treaties, the power to implement treaties splits according to the division of powers between the national and regional authorities, such that treaties that fall within a provincial area of responsibility must be implemented by the enactment of provincial legislation.

Constitutional amendments

In the fall of 1991, the Canadian government released a set of proposals for constitutional reform to broaden section 121 of the Constitution to provide for the free movement of persons, goods, services and capital and have the effect of nullifying any provincial or territorial laws or regulations that impeded the Canadian common market. Exceptions would be allowed for reasons of national interest, for regional development and for any federal legislation enacted to further the principle of equalization.[88]

It was also proposed that the federal government be given a specific mandate to manage the Canadian economic union by extending section 91 of the Constitution. This would result in positive integration and the active pursuit of federal policies to enhance the efficient operation of the economic union.

However, constitutional reform proved too difficult with the failure of the referendum on the Charlottetown Accord and political will to move on these constitutional amendments waned.

Internal trade agreements

Trade agreements are government-to-government arrangements that address trade restrictions and impediments that are created by governments. International trade agreements focus on tariffs and subsidies, whereas domestic trade arrangements address non-tariff barriers and similar impediments to trade.[89]

According to the Certified General Accountants Association of Canada (CGA), domestic trade arrangements are based on two accepted principles:

- Canadians should be able to work and do business in Canada without restrictions and impediments; and
- an open, efficient, predictable and productive domestic market is important to the economic well-being of Canada and its provinces and territories.[90]

The Agreement on Internal Trade (AIT) was signed by the Prime Minister and the first ministers of all provinces and territories in July 1994. The British Columbia-Alberta Trade, Investment and Labour Mobility Agreement (TILMA) was signed on April 28, 2006. AIT and TILMA are based on the stated need to reduce barriers to the mobility of labour, goods, capital and services within Canada. These trade agreements, as well as new trade commitments among other provinces such as Quebec-Ontario and New Brunswick-Nova Scotia will be discussed in further detail later in this report.

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[88] *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services, 1991).
[89] Certified General Accountants Association of Canada, "Establishing an Open Domestic Market for Canada" (May 2007) at p.7.
[90] *Ibid.*

The Competition Policy Review Panel

The June 2008 Competition Policy Review Panel report found that "a proliferation of internal barriers to the free movement of goods, services and people" result in the misalignment of revenue sources with program responsibilities and market fragmentation, driving up costs and weakening Canada's competitiveness.[91] The report is about one proposition: "raising Canada's overall economic performance through greater competition will provide Canadians with a higher standard of living."[92]

The Competition Policy Review Panel identified Canada's jurisdictional fragmentation and regulatory burden as factors that weaken competition.[93] The report cites a study by SECOR International (now Stantec): "[c]ountry fragmentation makes a small economy smaller, and translates into a loss of business opportunities and additional costs for domestic players."[94] The lack of effective mechanisms to address federal-provincial differences leads to market fragmentation and Canadian firms tend to remain small in our decentralized federation.

Canada's regulatory approach creates a "tyranny of small differences" and puts Canada at a disadvantage with its international trading partners. Unnecessary regulations and procedures "slow down innovation, frustrate new product launches, operate to protect domestic producers from foreign competitors, and create a drag on competitiveness, productivity, investment and growth."[95]

As a precursor to international trade success, Canada must ensure that its domestic markets are healthy and that unnecessary barriers to entry are reduced or eliminated. Greater domestic competitive intensity will translate into more success in world markets.[96]

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[91] Competition Policy Review Panel, "Compete to Win" (Industry Canada: June 2008), Final Report Executive Summary at p. 8.
[92] *Ibid.* in Full Report at p. 1.
[93] *Ibid.* in Full Report at p. 24.
[94] *Ibid.* in Full Report at p. 79.
[95] *Ibid.* in Full Report at p. 25.
[96] *Ibid.* in Full Report at p. 27.

THE "CONSUMER INTEREST" IN INTERPROVINCIAL TRADE IN CANADA

Government regulation of the economy for the public interest

There are a variety of reasons for government regulation in the economy, starting with the general obligation of government to regulate economic activity in the public interest. However, John S. Strick warns that "[b]enefits of regulation to society in general or to individual groups or members are, however, difficult to quantify even though they may be readily recognizable."[97] Benefits are difficult to quantify because they often take the form of costs avoided. Government regulation is based on the assumption that the government seeks to maximize social welfare.

According to Strick:

> Modern-day market economies fail to meet ... conditions for an efficient allocation of resources and welfare maximization. Imperfections of varying degrees exist in the market, including monopoly elements, lack of complete knowledge on the part of consumers and producers, and factor immobility. ... Government, therefore, is required to interfere in economic activity and correct market imperfections, regulate monopoly, reduce external costs, and provide for public services which the market does not provide. The objective of government intervention is the public interest.[98]

Government regulation is meant to place its emphasis on the protection of the individual consumer and the public interest of society as a whole. The purpose of regulation is to provide goods and services to the public as economically and efficiently as possible, with the assurance that the public is not misled or harmed in the consumption and production process.

Interprovincial trade barriers and Canadian consumers

As mentioned earlier, when Canadian firms operate inefficiently, costs arising from these inefficiencies are passed on to their consumers, meaning higher prices and fewer choices in the market. The resulting increase in prices will reduce consumers' real income, that is, the amount of goods a consumer can purchase with a fixed level of income. Thus, the removal of interprovincial trade barriers could result in increased efficiency leading to lower prices and increasing consumers' purchasing power.

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[97] John S. Strick, *The Economics of Government Regulation: Theory and Canadian Practice* (1994: Thompson Educational Publishing Inc., Toronto) at p. 109.
[98] *Ibid.* at p. 22.

The removal of interprovincial trade barriers provides businesses with the incentive to expand their activities beyond provincial borders, thereby increasing competition and the business' economic performance. Strong economic performance translates into more jobs, which results in consumer benefits such as better products, lower prices, more choices and better services.[99] As well, strong economic performance translates into better jobs with higher earnings, meaning a rise in the average level of income, giving consumers more disposable income to spend on goods and services in the economy. As well, economists suggest that where there is more competition in the economy, the most competitive firms will survive and pass on the benefits of competition to their consumers.[100]

According to Consumers International, the global voice for consumers, consumer policy "promotes the establishment of legislation, institutions and information that improve quality of life and empower people to make changes in their own lives." Fundamental consumer rights include:

- the right to satisfaction of basic needs;
- the right to have access to basic services;
- the right to safety;
- the right to be informed;
- the right to choice;
- the right to participate in marketplace decision making;
- the right to be heard;
- the right to redress;
- the right to consumer education; and
- the right to a healthy and sustainable environment.[101]

Thus, the goals of removing interprovincial trade barriers and striving for a more efficient economy are in line with fundamental consumer rights as described by Consumers International. However, governments have an important balancing role in the removal of interprovincial trade barriers in Canada. Governments must be careful to maintain relevant laws and regulations that maximize social welfare and protect consumers.

Consumers International has published several discussion papers on consumer policy and multilateral trade agreements.[102] Consumers International recognizes that competition policy is inherently biased to benefit consumers by promoting competitive or "fair" markets and serves to balance the dominance of producer

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[99] Competition Policy Review Panel, *supra* note 91 in Full Report at pp. 1 and 3.
[100] *Ibid.* in Full Report at p. 4.
[101] Adopted from Consumer International and Consumers' Association of Canada, online at: http://www.consumer.ca/1625.
[102] For all of Consumers International publications on consumers and trade, see online; http://www.consumersinternational.org/Templates/Publications.asp?NodeID=89700.

interests represented in policy-making processes.[103] In their papers, Consumers International advocates for the creation of a multilateral competition agreement in the WTO framed in the interests of consumers. While Consumers International's recommendations focus on consumer interests in international trade agreements, their recommendations can be extended to Canadian consumer interests in interprovincial trade agreements.

For example, Consumers International suggests than any multilateral agreement should focus on the competitive process rather than on competitors themselves. Producer interests are heavily represented in policy-making processes, thus competition policy is inherently biased to consumer interests by promoting the competitive process rather than competitors.[104] Just as Consumers International suggests for multilateral agreements, Canadian interprovincial trade agreements should be framed in the interests of Canadian consumers by balancing these agreements towards information and cooperation rather than market access or the convergence of national policies.

The challenge of defining the consumer interest in interprovincial trade

The consumer interest is not always consistent with the parameters of interprovincial trade. It is difficult to define a clear statement of the consumer interest in interprovincial trade, as the consumer interest does not always lie in the lowest price, for example. The costs and benefits of trade cannot be quantified through a simplified calculation to allocate costs. Consumers have a legitimate interest in preserving consumer protection regulations and standards.

When approaching a trade issue, it is important to carefully parse out the consumer interest and to recognize the multifaceted interests of consumers. One cannot always suggest a unilateral consumer interest. Instead, we suggest that when approaching interprovincial trade issues, the government has usually focused on increasing trade and avoiding trade disputes, effectively letting consumer protection standards and regulations slide. While interprovincial trade may eventually benefit consumers through the trickle-down effects of lower prices and increased choices, this may come at the cost of diluted consumer protection standards. Thus, it is not so simple to clearly define the consumer interest in the removal of interprovincial trade barriers.

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[103] Consumers International, "Consumer Policy and Multilateral Competition Frameworks: A Consumers International Discussion Paper" (March 2003), online: http://www.wto.org/english/tratop_e/dda_e/symp03_ci_disc_paper.pdf.
[104] *Ibid.* at p. 22.

INTERPROVINCIAL TRADE AGREEMENTS IN CANADA

The Agreement to Internal Trade (AIT)

The AIT was signed by Canadian First Ministers in July 1994. Its purpose is "to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investment within Canada and to establish an open, efficient, and stable domestic market."[105] The AIT exists to remove existing interprovincial trade barriers, prevent the establishment of new barriers and harmonize interprovincial standards. According to the AIT, these actions reduce extra costs to Canadian businesses by "making internal trade more efficient, increasing market access for Canadian companies and facilitating work mobility for trades people and professionals."[106]

The AIT is administered by the Internal Trade Secretariat with the supreme body of the Ministerial-level Committee on Internal Trade, which is co-chaired by the federal Minister of Industry and a rotating provincial co-chair.

Principles of the AIT

There are six general rules to prevent governments from establishing new trade barriers and to reduce existing barriers:

- **Non-discrimination:** equal treatment for all Canadian persons, goods, services and investments
- **Right of entry and exit:** prohibiting measures that restrict the movement of persons, goods, services or investments across provincial boundaries
- **No obstacles:** ensure provincial government measures do not create obstacles to trade – "measures" is defined broadly to include any direct or indirect government policy or action
- **Legitimate objectives:** ensuring provincial non-trade objectives that may deviate from the above guidelines have a minimal adverse impact on interprovincial trade
- **Reconciliation:** basis for eliminating trade barriers caused by differences in standards and regulations across Canada
- **Transparency:** ensure information is accessible to interested businesses, individuals, and government

Affected economic sectors

AIT focuses on reducing trade barriers in eleven sectors:

- **Procurement:** eliminates local price preferences, biased technical specifications, unfair registration requirements and other discriminatory practices for non-resident suppliers in order to ensure equal access to procurement for all interested Canadian suppliers

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[105] *Agreement on Internal Trade*, online: http://www.ait-aci.ca/index_en.htm. Nunavut is not a signatory to the AIT but has observer status.
[106] *Ibid.*

- **Investment:** ensures Canadian businesses can make investment decisions based on market conditions by eliminating barriers to investment based on head-office location, prohibiting local content and purchasing conditions, reducing local residency requirements, and standardizing corporate registration requirements
- **Labour mobility:** enables qualified workers to practice their occupation anywhere in Canada by eliminating residency requirements; requires licensing, certification and registration to be based primarily on competence; commits to recognizing worker's occupational qualifications and reconciling differences in occupational standards
- **Consumer-related measures and standards:** reconciles consumer protection requirements of different provinces which act as non-tariff barriers in order to allow Canadian firms to capitalize on economies of scale by servicing larger markets with same products
- **Agricultural and food products:** examines supply management systems for dairy, poultry and eggs; removes technical barriers between provinces such as differing product and grade standards and plant and animal health regulations
- **Alcoholic beverages:** prohibits discriminatory practices in areas such as product listing, pricing, distribution and merchandising between liquor control boards and retail outlets of provinces
- **Natural resources processing:** prohibits introduction of new barriers to processing of forestry, fisheries, mineral resource products
- **Energy:** harmonizes treatment of energy goods and energy services (negotiations still underway)
- **Communications:** ensures equal access to public telecommunication networks and use of public telecommunications services
- **Transportation:** harmonizes regulations applicable to commercial vehicles such as safety standards and weight/dimension rules
- **Environmental protection:** ensures that federal or provincial protection measures do not become non-tariff trade barrier

In January 2009, the federal government and all provinces and territories agreed on new labour mobility regulations, to become effective on April 1, 2009. The new regulations would allow most trade workers and professionals to operate in different jurisdictions across the country without re-certification to meet varying local standards.[107] There were also talks considering the addition of a chapter on energy to improve the flow of energy between jurisdictions, including energy production, development and processing but no agreement was reached. It was agreed that the wording of a new energy chapter would be reviewed at the June

[107] "Premiers, PM reach labour mobility deal" *CBC News* (16 Janaury 2009), online: http://www.cbc.ca/canada/story/2009/01/16/ministers-economy.html?ref=rss.

2009 meeting, though Newfoundland and Nova Scotia indicated that they would not adopt an energy deal.[108]

Dispute resolution mechanism

It is important to note that the agreement is not a legal agreement but a political one. The agreement is not subject to judicial oversight, but utilizes a formal dispute resolution mechanism. There are two components: a state-to-state process and an investor-to-state process. Businesses can challenge government policy measures, which tends to increase the number and expense of disputes. As well, individual workers and consumers can challenge government policy measures.

There are mechanisms for monitoring and reporting that may ultimately lead to a process of mediation and non-binding arbitration. Sanctions may be imposed against a non-compliant actor. Dispute panel decisions are not binding.

At the December 2008 meeting, the federal, provincial and territorial trade ministers, with the exception of Ontario, approved a draft of proposed amendments to the AIT dispute resolution chapter. These amendments would "significantly strengthen the enforcement mechanisms, including through a more effective compliance process, provision of an appeals process as well as imposition of monetary penalties and suspension of dispute resolution privileges."[109]

The Council of the Federation

In 2003, Canada's premiers created the Council of the Federation, an institution for "collaborative intergovernmental relations."[110] The Council works to provide leadership in revitalizing the Canadian federation and building a more constructive and cooperative federal system. Its objectives are to promote interprovincial cooperation and closer ties between members of the Council to ultimately strengthen Canada and to foster meaningful relations between governments based on respect for the Constitution and recognition of the diversity within the federation.

Naturally, the Council of the Federation renewed attention on internal trade, striving for a stronger and more effective AIT.[111] A number of issues remained unresolved in the AIT. In 2007, the Council endorsed a five point plan dealing

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[108] Brett Bundale, "Agreement Ministers to sit down and perfect internal trade in Canada, policy advisor says" *Telegraph Journal* (5 December 2008). See also Brett Bundale, "New labour mobility regulations agreed upon" *Telegraph Journal* (6 December 2008).
[109] Committee on Internal Trade: *Progress on Labour Mobility and Dispute Resolution Enforcement*, 5 December 2008.
[110] Council of the Federation, "About the Council", online: http://www.councilofthefederation.ca/aboutcouncil/aboutcouncil.html.
[111] Council of the Federation, "Internal Trade", online: http://www.councilofthefederation.ca/Internaltrade/internaltrade.html.

with Labour Mobility, Dispute Resolution, Energy, Agriculture and Reconciliation of Regulations.

The Trade, Investment and Labour Mobility Agreement (TILMA)

Both Alberta and British Columbia agreed that there were significant gaps in AIT's coverage, such as the failure to address energy. As well, the dispute resolution mechanism was seen to be unenforceable.[112] On April 28, 2006, Alberta and British Columbia signed TILMA, an agreement to remove barriers to trade, investment and labour mobility between the two provinces. TILMA came into force on April 1, 2007 for provincial governments, with a two year transitional period for municipalities, academic institutions, health authorities, school boards and crown corporations.

Principles of the TILMA

TILMA focuses on two key goals:

- **No obstacles:** government measures will not restrict or impair trade, investment or labour mobility between the two provinces
- **Non-discrimination:** there will be no preferential treatment of a province's people, investments and goods, except for justified actual cost-of-service differences

The governments propose that Alberta and British Columbia will enjoy several benefits, such as:[113]

- Less costly flow of goods and services between the provinces by reconciling regulations, thereby leading to less duplication and lower costs
- Seamless access to opportunities in either provinces for both businesses and workers through recognition of business registration and worker certification
- Best value for public spending through open procurement policies, thereby creating more opportunities for businesses, particularly small- and medium-sized businesses
- Non-discriminatory access to energy goods and services (which have not been negotiated by the AIT yet)

Affected economic sectors

TILMA applies to all sectors of the economy, with comprehensive application to all government "measures," which include legislation, regulations, standards, policies, procedures and guidelines.[114]

The governments established Special Provisions for certain economic sectors:

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[112] The British Columbia – Alberta Trade, Investment, Labour Mobility Agreement, "FAQs", online: http://www.tilma.ca/about/faqs.asp#one.

[113] The British Columbia – Alberta Trade, Investment, Labour Mobility Agreement, "Opportunities and Benefits", online: http://www.tilma.ca/about/opportunities_benefits.asp.

[114] The British Columbia – Alberta Trade, Investment, Labour Mobility Agreement, "About TILMA – What's Covered", online: http://www.tilma.ca/agreement/whats_covered.asp.

- **Labour mobility:** eliminate discrimination in government employment based on residency; recognition of worker certification; reconciliation of licensing requirements; government collaboration to enhance health, safety and labour standards
- **Government procurement:** requires non-discrimination in the purchase of goods, services and construction exceeding stipulated thresholds that are lower than AIT thresholds; with some exceptions to procurement
- **Standards and regulations:** mutual recognition and reconciliation of existing standards and regulations that restrict or impair trade, investment or labour mobility; reduce differences in standards or regulations that achieve legitimate objectives; government cooperation to enhance sustainable development, consumer protection, environmental protection, health and safety standards and labour standards
- **Business subsidies:** prohibits governments from providing business subsidies that offer a competitive advantage, induce relocation or distort investment decisions; allows subsidies that offset subsidies offered by other governments to prevent businesses in BC-Alberta from being at a disadvantage
- **Transportation:** recognizes vehicle licenses for temporary vehicle operations – up to 90 days a year
- **Investment:** reconcile business registration and reporting requirements

TILMA does not cover provincial laws, regulations and standards that do not meet TILMA requirements when they meet legitimate objectives in key public policy areas. These key areas include:

- Public security and safety
- Protection of human, animal or plant life or health
- Environmental protection, including the conservation and prevention of waste of non-renewable and exhaustible resources
- Consumer protection
- Protection of the health, safety and well-being of workers
- Provision of social and health services within a province
- Affirmative action programs for disadvantaged groups
- Prevention or relief of critical shortages of goods essential to a province

For these areas, the only requirement is that government laws, regulations and standards are as non-restrictive on trade, investment and labour mobility as possible, requiring governments to "consider the impact on trade, investment and labour mobility when developing policies, and to ensure that any negative impacts are justified and necessary."[115]

[115] The British Columbia – Alberta Trade, Investment, Labour Mobility Agreement, "TILMA Agreement – What's Not Covered", online: http://www.tilma.ca/agreement/whats_not_covered.asp.

In addition, certain government measures are excluded from TILMA. Notable exceptions include measures relating to regulated rates established for the public good or public interest and social policy.

In March 2009, the British Columbia and Alberta Cabinet Ministers for trade met in Victoria, as TILMA was poised to take full effect on April 1, 2009. The Ministers agreed upon a labour mobility deal.[116]

The federal government's commitment to eliminating interprovincial trade barriers

The Harper government has emphasized its desire to strengthen the Canadian economic union by eliminating interprovincial trade barriers in two of the government's Speeches from the Throne. In the second session of the 39th Parliament, the government stated that:

> Our government will also pursue the federal government's rightful leadership in strengthening Canada's economic union. Despite the globalization of markets, Canada still has a long way to go to establish free trade among our provinces. It is often harder to move goods and services across provincial boundaries than across our international borders. This hurts our competitive position but, more importantly, it is just not the way a country should work. Our government will consider how to use the federal trade and commerce power to make our economic union work better for Canadians.[117]

In the first session of the 40th Parliament, the government reiterated its commitment:

> Better positioning Canada to compete for investment and market opportunities will require action at home. A fragmented regulatory environment for internal trade and commerce has for too long restricted the flow of labour and investment across the country. Our Government will work with the provinces to remove barriers to internal trade, investment and labour mobility by 2010.[118]

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[116] "BC-Alberta trade deal nearly complete" *Surrey Leader*, (2 March 2009), online: http://www.bclocalnews.com/surrey_area/surreyleader/business/40554863.html.

[117] Privy Council Office, "Speech from the Throne to Open the Second Session of the 39th Parliament of Canada" (16 October 2007), online: http://www.pco.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=sft-ddt/2007-eng.htm.

[118] Privy Council Office, "Speech from the Throne to Open the First Session of the 40th Parliament of Canada" (19 November 2008), online: http://www.pco.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=sft-ddt/2008-eng.htm.

In January 2009, Alberta Premier Ed Stelmach suggested that Alberta would initiate a constitutional amendment to remove interprovincial trade barriers if TILMA was not extended to Canada within a year.[119]

Securities regulation in Canada

Each province and territory has a securities commission or equivalent authority that regulates securities through its established laws. The largest provincial regulator is the Ontario Securities Commission. The Canadian Securities Administrators (CSA) is a voluntary umbrella organization of provincial and territorial securities regulators to coordinate and harmonize securities regulations in Canada. The CSA aims to achieve consensus on policy decisions, develop uniform rules and guidelines for market participants and coordinate initiatives of the regulators. The CSA has developed a national electronic system through which regulatory filings can be made and processed in all jurisdictions. Provincial and territorial regulators handle all complaints regarding securities violations and enforcement of securities regulations for their respective jurisdictions.

Canada does not have a federal securities regulator and this has been a subject for extensive debate, as many industry groups and academics argue that the current structure results in operational inefficiencies and decreased confidence in the Canadian market. Because of the fragmented system, Canada is less competitive on the global market and Canadian firms are negatively impacted as they incur unnecessary costs in their attempts to raise capital. According to the Canadian Bankers Association, this disproportionately affects small- and medium-sized enterprises since there are clear economies of scale in developing and filing securities offerings.[120]

The federal government agrees with this view. Provinces and territories established securities regulators under their constitutional authority over property and civil rights in each province. Commentators have speculated that the federal government likely has parallel constitutional authority under its power over trade and commerce, but the federal government has yet to enact securities legislation because of provincial opposition. Over the past 15 years, the federal government's efforts to consolidate the provincial securities regulators into a single regulator have failed. The only province that supported the creation of a single national securities regulator was Ontario.

Most recently, the Expert Panel on Securities Regulation released its final report in January 2009. The report included a draft *Securities Act* and advocated for a principles-based approach to securities regulation in Canada. Its central recommendation was to establish a single securities regulator to administer a

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[119] "A TILMA for all provinces" *The Globe & Mail* (15 January 2009), online: http://www.theglobeandmail.com/sevlet/story/RTGAM.20090114.weStelmach15/BNStory/politics/home.

[120] "CBA strongly supports recommendations from expert panel on securities regulation: single securities regulator needed now" *Marketwire* (12 January 2009).

single securities act for Canada, which would result in clearer national accountability, reduce overlap and duplication, strengthen enforcement and better serve the needs of investors while maintaining the high level of local service currently being provided and meeting the distinct need of regional markets.[121] Finance Minister Jim Flaherty stated that he would push ahead with the creation of a national securities regulator.[122] The report was endorsed by the Canadian Bankers Association, the Canadian Council of Chief Executives representing the heads of the country's largest companies, and the Investment Industry Association of Canada.

However, some provinces were not as enthusiastic. Quebec re-affirmed their intention to appeal the proposal to the Supreme Court and suggested that Alberta would do the same. Manitoba was also opposed to the proposal for a national securities regulator, while British Columbia stated that further negotiation would be needed. Alberta, Manitoba and Quebec support a "passport system" that would maintain the provincial and territorial commissions but reduce the paperwork required of firms across jurisdictions.

At the time of this report's writing, no federal legislation had been proposed for a national securities regulator. However, this example demonstrates the political challenge of utilizing the federal trade and commerce powers to enact a solution to a fragmented and inefficient provincial and territorial regulated area.

Continued talks for new interprovincial trade initiatives

Agreement on Enhancing the Ontario-Quebec Economic Region

Talks between Ontario and Quebec were brought on by the impetus of stiffer competition for Canadian manufacturing companies as a consequence of a stronger Canadian dollar and how these exports might be affected by a slowdown of the American economy. On November 26, 2007, Ontario Premier Dalton McGuinty and Quebec Premier Jean Charest signed a *Joint Statement: Agreement on Enhancing the Ontario-Quebec Economic Region*. The joint statement set out a framework for negotiations towards the goals of eliminating trade barriers and improving labour mobility between the two provinces. As well, the framework would include a "binding and effective dispute resolution mechanism for specific commitments and rules under the Agreement."[123]

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[121] Expert Panel on Securities Regulation, *Final Report: Creating an Advantage in Global Capital Markets* (12 January 2009), online: http://www.expertpanel.ca/eng/reports/index.html.

[122] Kevin Carmichael et al., "Battle erupts over securities watchdog: Alberta, Quebec threaten Supreme Court challenge after expert panel proposes central regulation to stave off economic collapse" *The Globe & Mail* (13 January 2009), online: http://www.theglobeandmail.com/servlet/story/LAC.20090113.RREGULATOR13/TPStory/?query=battle+erupts.

[123] Shrybman, *supra* note 82 at p. 14.

The provinces have yet to conclude their negotiations, but have indicated that the agreement may be released in the spring of 2009. Quebec has committed to holding public consultations on a draft agreement when it is made public.

Nova Scotia and New Brunswick PARE

On February 24, 2009, New Brunswick Premier Rodney MacDonald and Nova Scotia Premier Shawn Graham announced that they were entering into a *Partnership Agreement on Regulation and the Economy* (PARE). The agreement would eliminate business, trade and labour irritants, agreeing to:

> ... enhance competitiveness, improve productivity, contribute to workforce development and availability and positively influence issues of mutual interest by streamlining practices, removing duplication, and harmonizing regulations and practices between the Parties.[124]

Western Canadian 'economic partnership'

In March 2009, Saskatchewan, Alberta and British Columbia announced plans to work on a new Western Canadian "economic partnership".[125] The Saskatchewan government joined BC and Alberta in a series of joint cabinet meetings, but Saskatchewan Premier Brad Wall declined to sign onto TIILMA. BC Premier Gordon Campbell suggested that the partnership agreement would involve the three provinces working together in promoting the sale of natural resources and other exports in the Asia Pacific area and the possibility of joint business registration within the partnership. As well, the three provinces could pursue joint action in dealing with gang-related criminal activity and addressing concerns about various bail conditions and sentencing procedures.

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[124] Shrybman, *supra* note 82 at p. 15.

[125] Neil Scott, "Plans for a new 'economic partnership' announced" Leader-Post (13 March 2009), online: http://www.leaderpost.com/news/Plans+economic+partnership+announced/1387730/story.html.

CRITICISMS OF INTERPROVINCIAL TRADE AGREEMENTS AND THEIR IMPACT ON CONSUMERS

Criticism of the AIT

The impetus for the AIT came in the late 1980s and 1990s in light of international trade agreements signed by Canada. The Canada-US Free Trade Agreement came into effect in 1989 and NAFTA was born in 1994. The General Agreement on Tariffs and Trade was transformed into the World Trade Organization in 1995, and the AIT came into force on July 1, 1995. Marc Lee argues that the AIT served "a very practical purpose to facilitate the implementation of Canada's international trade commitments... [which] was much more important than stated needs to 'strengthen the Canadian union.'"[126] Trade policy specialist Scott Sinclair echoes this, stating that the intention of the AIT was "to clear obstacles to NAFTA implementation and, specifically ease the federal government's task of implementing NAFTA in areas of provincial jurisdiction."[127]

It is generally accepted that the AIT has not been a great success. Critics point to the fact that the agreement is limited to specified sectors, complex, inaccessible and legally unenforceable. In addition, the dispute settlement mechanism is slow and unresponsive to the private sector.[128] The AIT has only led to minimal changes in federal and provincial laws and regulations and has not improved the predictability, the efficiency of the Canadian market.[129]

Lee suggests that the provisions enabling provinces to pursue "legitimate objectives" imposes a difficult four-part test. Provinces bear the burden of proof and panelists have the discretion to strike down a measure.[130] As well, mutual recognition standards and harmonization create a "framework biased toward the downward movement of standards relating to the environment, consumer protection and labour, and impair the ability of provinces to set higher standards in the future."[131]

A strong Canadian union requires intergovernmental processes that are open and accountable. Critics argue that the AIT negotiating process works in the opposite direction with secrecy surrounding negotiating texts.[132] The danger in closed negotiations is that legitimate standards in the public interest will be undermined by challenges from corporations or other governments with lower standards.[133]

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[126] Lee, s*upra* note 68 at para. 18.
[127] Scott Sinclair, "Shifting Powers, Depressing Standards: An Analysis of the Internal Trade Agreement" (Canadian Centre for Policy Alternatives, 1994).
[128] Competition Policy Review Panel, *supra* note 91 in Full Report at p. 80.
[129] Certified General Accountants Association of Canada, *supra* note 89 at p. 3.
[130] Lee, s*upra* note 68 at para. 30.
[131] *Ibid.* at para. 31.
[132] *Ibid.* at para. 53.
[133] *Ibid.* at para. 56.

Criticism of the TILMA

The CGA believes that TILMA is a better alternative to the AIT for several reasons:

- TILMA is comprehensive and applies to all measures that relate to trade, investment and labour mobility
- TILMA applies not only to measures that restrict trade but also to those that affect the efficiency of the marketplace by impairing trade, investment and labour mobility
- TILMA's architecture is more simple and transparent
- TILMA boasts a simplified dispute resolution process that includes consequences for governments who fail to implement panel findings (whether this is an adequate incentive for governments to respect trade obligations is a different question)[134]

However, in a CCPA paper, Marc Lee and Erin Weir articulate the same concerns with the AIT, arguing that the true purpose of TILMA is not to facilitate interprovincial trade but to reduce different provincial regulations to the lowest common denominator.[135] They cite UBC economist Brian Copeland:

> Because trade barriers between the provinces are low, efforts to liberalize those barriers that do not exist are likely to have only a small effect on trade flows. Much of the debate is not really about interprovincial trade, but rather about how decentralized the policy regime should be in Canada and how much flexibility governments should have to intervene in markets.[136]

By giving investors wide latitude to sue provincial governments over differences in public-interest regulation, TILMA will place downward pressure on provincial standards.

The Conference Board studied the impact of TILMA in 2005.[137] The report did not estimate the magnitude or cost of trade barriers between Alberta and BC, but projected that TILMA would add $4.8 billion or 78,000 jobs to BC's economy. The CCPA questioned the validity of these numbers, suggesting that the Impact Assessment was based on a draft text of TILMA and projected gains in sectors that were exempt from the final agreement. Re-calculating the study's methodology with these adjustments, the CCPA projected TILMA's benefits as less than $1 billion, or significantly below 1% of provincial GDP.[138]

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[134] Certified General Accountants Association of Canada, *supra* note 89 at p. 6.
[135] Lee & Weir, *supra* note 71 at p. 4.
[136] *Ibid.* at p. 5.
[137] Conference Board of Canada, "An Impact Assessment of the BC/Alberta Trade, Investment and Labour Mobility Agreement" (2005) http://www.gov.bc.ca/ecdev/down/conf_board_impact_assessment_2005.pdf.
[138] Lee & Weir, *supra* note 71 at p. 7.

Further to that, the Conference Board surveyed key TILMA stakeholders with the following interesting responses:

> The responses from the private sector were very positive, while the government responses varied. The reasons given for the negative responses by some government respondents were: there are legitimate reasons for different standards and regulations, stakeholders will object to the agreement, local businesses along the border may suffer losses to Alberta firms, the specific regional and sector benefits may not outweigh the costs, the agreement does not recognize that the growth or management of the provincial economy is a legitimate objective and that the lack of local office residency requirements will make it difficult and/or costly to initiate court actions.[139]

The Impact of the AIT and TILMA on Consumers

Chapter 8 of the AIT specifically addresses consumer protection, establishing measures in this area as "barriers" because they increase the cost of doing business and inhibit companies from taking advantage of economies of scale. Article 807 requires provinces to reconcile, "to the greatest extent possible" their respective consumer-related measures and standards "to a high and effective level of consumer protection."[140] Dispute resolution panels balance the legitimate reasons of provincial governments to enact consumer protection standards with the objective of trade efficiency. Though Article 807 states that no province is required to lower consumer protection standards it maintains for the purpose of reconciliation, Lee warns that the panels tend to view cases with a narrow trade-enhancing lens and determine whether public interest standards are "barriers."

The British Columbia and Alberta provincial governments state that TILMA will reduce the costs of goods and services imported from or traveling through the other province. It does this by:

- Eliminating unnecessary duplication of fees
- Reducing costs associated with business registration requirements
- Reducing shipping costs by recognizing vehicle license registration in the other province
- Preventing provinces from protecting locally produced goods and services, thereby preserving market competition

Consumers should experience reductions in the costs of goods and services. As well, businesses will have the ability to expand into the other province, providing consumers more choice for a variety of goods and services. Expansion of businesses promotes further competition among businesses in each province,

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[139] Conference Board of Canada, *supra* note 137.
[140] *Agreement on Internal Trade*, *supra* note 105 at Article 807.

which is likely to result in a reduction of the cost of certain goods and services for consumers.[141]

In terms of the public and consumer interest, TILMA is often recognized as a step up from the AIT. TILMA better recognizes that governments have legitimate objectives other than promoting freer trade, investment and labour mobility. These legitimate objectives include consumer protection, public security and safety, health protection and environmental protection. Thus, TILMA specifically exempts measures relating to social policy.[142]

Concerns with new trade initiatives

Federal and provincial governments are often criticized for the manner in which interprovincial trade initiatives are negotiated. In what he describes as a "determined lack of transparency," Shrybman suggests that trade officials often misrepresent the purpose and effects of their trade agenda because they know that the agreements would not stand up to public scrutiny. As a result, interprovincial trade agreements are made public only after they are signed. According to Shrybman, sometimes agreements are not even made public after they are signed. He refers to an example in December 2008 where FTP trade ministers signed an amending agreement to the AIT empowering AIT tribunals to award monetary damages where a province fails to expunge a policy, law, regulation or program that is found to offend the AIT. This agreement has yet to be made public.[143]

Adding to the lack of transparency, politicians and trade officials neglect to hold public consultations or even private consultations with special interest groups on the topic of internal trade agreements at any point in the process. Thus, there has been a complete lack of political accountability for the negotiation and implementation of interprovincial trade agreements in Canada.

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[141] The British Columbia – Alberta Trade, Investment, Labour Mobility Agreement, "What We Are Doing" and "Consumers Results," online: http://www.tilma.ca/tilma_and_you/consumersWhatWeAreDoing.asp and http://www.tilma.ca/tilma_and_you/consumersResults.asp.

[142] The British Columbia – Alberta Trade, Investment, Labour Mobility Agreement, "Consumer FAQs", online: http://www.tilma.ca/tilma_and_you/consumersFaqs.asp.

[143] Shrybman, *supra* note 82 at p. 6.

POTENTIAL SOLUTIONS TO THE CANADIAN ECONOMIC UNION USING THE FEDERAL TRADE & COMMERCE POWER

Judicial oversight of s. 91(2)

The existing jurisprudence defines the federal "trade and commerce" power narrowly. Provinces have the wide scope to regulate "property and civil rights" which covers most areas of labour, education, health care, consumer protection, licensing and investment. Swinton notes that the doctrines developed under the federal trade and commerce power and the provincial power over property and civil rights have been criticized for the:

> ...conceptual focus on whether the subject of regulation is in the interprovincial or international flow of commerce or intraprovincial in situs. ... But this approach ignores the burdens that can be imposed on the national economy from diversity in provincial regulations of business activity. Thus, critics of the status quo call for greater sensitivity to the spillover effects of provincial jurisdiction on those in other jurisdictions and to their overall impact on the national economy.[144]

Swinton suggests that one approach to these concerns would be a shift of judicial oversight over positive integration to a "burdens on commerce" approach to provincial jurisdiction. Courts would determine the magnitude of unacceptable burdens on commerce weighed against a wide array of policy justifications advanced by provincial governments. This approach implies that provincial laws should be struck down if they impose an undue burden on commercial activity because of differing standards and regulations in a number of provinces. The solution to this regulatory inconsistency would be to allow the federal government to address the problem – a solution that has been recognized by the Supreme Court in *Morguard* and *Hunt*. Positive integration would seek harmonization by reducing burdens on commerce, thereby significantly expanding the federal trade and commerce power and constraining provincial jurisdiction.[145]

However, many have argued that courts are unsuited to making complicated assessments of identifying laws and regulations that constitute barriers to interprovincial trade. They suggest that the responsibility of determining measures that amount to barriers of internal trade should be reserved for an expert tribunal or agency.[146]

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[144] *Home Oil Distributors*, *supra* note 7.
[145] *Ibid.*
[146] Monahan, *supra* note 5 at Chapter 9.E. "The Canadian Economic Union and the Constitution."

Increased Parliamentary leadership to enhance the Canadian economic union

Federal legislation regarding the economic union

Two key Supreme Court cases have now recognized that maintaining and strengthening the Canadian economic union is a key principle underlying the Canadian constitutional framework.[147] Professor Patrick Monahan suggests that these cases stand for the proposition that Parliament has the legislative authority to enact legislation designed to enhance the functioning of the economic union.[148]

Monahan argues that the key to defining Parliament's role flows from the distinction between negative integration and positive integration. Monahan advances several areas for Parliament to legislate negative integration to promote the economic union, such as:

- Legislate to give effect to a non-discrimination principle
- Legislate to prevent the establishment or maintenance of restrictions on the free movement of persons, goods, services, or investments across provincial borders, as well as the free movement of factors of production
- Legislate to prevent or eliminate obstacles to internal trade, focusing on measures that are more trade restrictive than necessary and are disguised restrictions on trade
- Legislate to provide a common set of rules for mutual recognition of provincial standards and regulations
- Enforcement of these requirements by private individuals and persons through a specialized tribunal or ordinary courts

This negative integration approach does not necessarily bar provinces from enacting legislation on the same matters. Under the "double aspect" doctrine, overlapping federal and provincial legislation can be valid. However, where there is a conflict between the laws, the provincial law would be suspended to the extent of the inconsistency as per paramountcy.

Harmonize provincial measures by provincial cooperation

For positive integration or to harmonize provincial measures affecting interprovincial trade, legislative or regulatory action would have to be voluntary for provinces.

In line with this, the 2008 Competition Policy Review Panel recommended that the federal government provide leadership in the elimination of all internal barriers between provinces and territories that inhibit the free flow of goods, services and people by June 2011.[149] As well, the panel recommended that the federal

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[147] See *Morguard*, *supra* note 35 and *Hunt*, *supra* note 36.
[148] Monahan, *supra* note 5.
[149] Competition Policy Review Panel, *supra* note 91 in Full Report, Recommendation 42 at p. 21.

government lead on national securities regulation and fully harmonize federal environmental assessment procedures with provincial processes.[150]

Invoke standards in the public interest to protect Canadian consumers

Standards must be put in place to encourage the development of a properly operating market environment in which the consumer interest is protected. Currently, the consumer interest is not a main focus of the agreements structured to remove interprovincial trade barriers. Instead, agreements and standards are set with the objective of increasing trade or avoiding trade disputes, with proponents of these agreements suggesting that consumers may receive benefits that flow from these agreements. The consumer interest and the public interest are not a primary focus of these agreements and their interests are not built into the framework and decision making processes of interprovincial trade agreements.

Focus on preserving competition, not simply removing interprovincial trade barriers

Legislation concerning interprovincial trade and interprovincial trade agreements must focus on increasing competition in the Canadian market instead of focusing on specific competitors within the market, as increased competition should be seen to directly benefit consumers and the public interest.[151] Interprovincial trade agreements focus primarily on increasing trade and the avoidance of trade disputes while suggesting that successful achievement of these goals will produce run-off benefits for consumers, such as lower prices or increased choice in the market. However, the creation of mutual recognition standards and a harmonization framework might dilute consumer protection standards and impair the ability of provinces to set higher standards in the future.

Where competition is the focus, emphasis is placed on the creation of a level playing field for businesses that benefits both producers and consumers. Competition to attract consumers can create the same goals that the reduction of interprovincial trade barriers sets out to achieve: economic efficiency, innovation and better quality products at lower prices. Where competition is the focus, consumers and the economy win.

Increased democratic approach to trade barriers

In order to gain public support and confidence, any legislative action and future interprovincial trade agreements must involve its citizens and expand consultation with stakeholders beyond industry and business firms.

The CCPA advocates for increased citizen participation in determining which interprovincial trade barriers are legitimate. To begin, business organizations would compile publicly-available lists of interprovincial barriers and citizens could respond, assessing the social, economic and environmental purposes of the

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[150] *Ibid.* in Full Report, Recommendations 44 and 45 at p. 21.
[151] Consumers International, *supra* note 103.

alleged barriers. Provincial governments could remove barriers that entail economic costs but do not serve important policy objectives.[152] By implementing a transparent, democratic and incremental approach, Canadian citizens would be well-served and would not be at the mercy of an independent tribunal.

Similarly, the CGA in conjunction with the KTA Centre for Collaborative Government suggest that where the public interest arises in interprovincial trade issues, stakeholder consultation should support self-regulation. Public consultation should involve a wide enough cross-section of stakeholders to make the process legitimate.[153] This approach shifts the responsibility for reducing interprovincial trade barriers from the government to stakeholders. Further to this, the CGA and KTA advocate for changes in the dispute resolution process, increasing flexibility and openness to allow private companies, NGOs and individual citizens to raise grievances against each other. As an added incentive to negotiate their differences, the failure to consult would expose them to the risk of the tribunal imposing a decision.[154]

Where interprovincial trade agreements are pursued in the future, increased transparency must be introduced into the negotiation process. The lack of consumer representation and consultation with the Canadian public on the issue of interprovincial trade is a major obstacle to the perceived legitimacy of these trade agreements. As well, the failure of the federal and provincial governments to consult with their citizens on this important issue only serves to perpetuate the democratic deficit within Canada and may involve trade-offs that would be politically unacceptable within a particular region in Canada. Without improved accountability, public concern about interprovincial trade agreements will grow. This democratic deficit is detrimental to stakeholders and Canadian consumers whose daily lives are affected by the decision making of these trade officials.

Canadian trade officials must foster participation of certain groups of stakeholders in civil society. Consumers must be able to participate in trade negotiations. To make their participation meaningful, consumers should be able to access publicly available draft trade standards so that they can submit their input. As well, consumer groups should be formally recognized as legitimate stakeholders in competition authority procedures.

The federal government should develop guidelines for provincial government consultation with their civil society. Ensuring greater provincial consultation would help ensure that negotiators take into account a broader set of issues than securing market access for firms. As well, legislative scrutiny of interprovincial trade agreements should be encouraged at the federal Parliament and at provincial legislatures. Consultation with the public and special interest

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[152] Lee, *supra* note 68 at p. 8.
[153] Donald G. Lenihan and David Hume, "Governance in the Agreement on Internal Trade" (2004: Certified General Accountants and KTA Centre for Collaborative Government) at pp. 10 and 15.
[154] *Ibid.* at p. 15.

stakeholder groups such as consumer groups should not be limited to the trade agreements, but also extend to provincial harmonization measures.

Expert agency or tribunal overseeing barriers to interprovincial trade

If Parliament enacts federal legislation designed to enhance the economic union, then an enforcement mechanism is a policy choice left to Parliament rather than a constitutional requirement. An alternative to recourse in ordinary courts is through an expert agency or tribunal. Monahan suggests that a new body could be created with the exclusive mandate of enforcing federal laws respecting internal trade. Alternatively, this responsibility could be added to the mandate of an existing agency, such as the Competition Tribunal.[155]

The CGA suggests that the federal government develop and establish a Canada Open Market Tribunal to enforce what they call the "Open Market Standard" – that any government measure that restricts or impairs trade, investment and labour mobility is unacceptable.[156] They propose TILMA as a model for the development of an "Open Market Standard," as it is comprehensive and applies to all measures, includes an effective "legitimate objective" standard, and it provides for exceptions. The Canada Open Market Tribunal would be a cooperative endeavour among governments, adjudicating federal, provincial and territorial measures against the "Open Market Standard." The Tribunal would provide an easily accessible independent mechanism to ensure that the trade restrictions submitted to it are resolved.[157]

The agency or tribunal that is charged with overseeing interprovincial barriers to trade should be required to provide consumers and consumer organizations with avenues to participate in their proceedings. This would mean that representative consumer organizations be formally recognized as legitimate stakeholders, or parties with a "legitimate interest" in competition authority procedures and in the judicial system. Beyond simply allowing consumer organizations to participate, the agency or tribunal should remove obstacles to effective participation by providing consumer organizations with sufficient time and funding for their involvement in various proceedings and consultations. As well, consumer groups should be given access to market information. As well, the agency and tribunal should work with the consumer organizations to establish joint consumer education and awareness projects on various interprovincial trade issues.

The 2008 report of the Competition Policy Review Panel also suggests the creation of a Canadian Competitiveness Council that is independent of government but with a reporting relationship to Parliament. The Council would not be a tribunal, but would be Canada's primary advocate for competition, taking a global perspective of competition issues in the public and private sectors. Its

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[155] Monahan, *supra* note 5.
[156] Certified General Accountants Association of Canada, *supra* note 89 at p. 8.
[157] *Ibid.* at p. 9.

mandate would be broad and include the review of progress toward the elimination of internal barriers to the free flow of goods, services, people and capital.[158]

[158] Competition Policy Review Panel, s*upra* note 91 in Full Report at pp. 98-101.

CONCLUSION

Parliament has the exclusive jurisdiction to regulate trade and commerce in Canada and the Canadian Constitution recognizes the principle of removing interprovincial trade barriers to foster a common market in Canada. Though the degree to which interprovincial trade barriers exist and negatively affect the Canadian economy is a matter of dispute amongst economists and scholars, there is broad consensus that interprovincial trade barriers are generally inconsistent with the goal of promoting a Canadian economic union and that increased competition in the Canadian economy will benefit Canadian consumers.

There is some difficulty in defining a clear consumer interest in interprovincial trade, as consumers have an interest in lower prices and increased choices but also in maintaining consumer protection standards and regulations. When approaching interprovincial trade, great care must be taken to parse out the consumer interest and one cannot always suggest that there is a unilateral consumer interest.

However, interprovincial trade agreements should not merely focus on increased trade and trade dispute resolution at the expense of the consumer interest. Striving for market efficiency in Canada should result in benefits that flow directly back to Canadian consumers and the federal and provincial governments are entrusted with the responsibility to protect the public interest.

In structuring a properly operating market, standards must be put in place to ensure a trade environment that protects the public interest and Canadian consumers. Given that trade agreements are negotiated by politicians who are often lobbied by industry, the consumer interest must be built into the framework of interprovincial trade agreements. By ensuring that the main goal is a competitive market with the foundation of solid competition policy and not simply the removal of trade barriers or increasing trade in Canada, consumers will benefit.

As well, the process of trade negotiations should be transparent and involve wide consultation with civil society and stakeholder groups, including consumer organizations. Federal and provincial legislative bodies must be proactive in consulting with Canadian consumers on any federal and provincial legislation concerning interprovincial trade. So far, the federal and provincial governments have failed to consult with the Canadian public on the Agreement to Internal Trade and the other regional interprovincial trade agreements that have since been signed. Consultations should also involve stakeholder organizations with special interests, such as consumer group and the federal government should take the lead in setting out guidelines for provincial government consultations with the province's populations.

If an expert agency or tribunal is charged with the responsibility of overseeing interprovincial trade in Canada, the process must include consumers and consumer organizations by allowing them to meaningfully participate in trade proceedings.

In conclusion, as interprovincial trade agreements are struck and more efforts to remove interprovincial trade barriers to stimulate the Canadian economic union are pursued, it is imperative that governments do not fail in their responsibility to protect the public interest and strive to protect consumer interests. Increased transparency and consultation with the public and special interest stakeholder groups are crucial in interprovincial trade discussions. As well, interprovincial trade agreements should set into place conditions for a competitive environment so that firms are compelled to produce desirable goods and services in the most efficient manner but also to distribute them at the right quality and price if they are to survive. In this way, seeking solid competition policy, and focusing on a properly operating competitive environment rather than assisting specific competitors within the Canadian market, will best serve consumers.