

THE SUPREME COURT AND STRENGTHENING THE CONDITIONS FOR EFFECTIVE COMPETITION IN THE CANADIAN ECONOMY

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This paper evaluates the contributions of the Supreme Court of Canada to strengthening the conditions for effective competition in the Canadian economy. It proceeds by first examining the evolving position of the Supreme Court with respect to the federal government's external treaty making powers, specifically trade liberalization treaties, and notes indications that the Court is prepared to reconsider the scope of the Labour Conventions doctrine which precludes the federal government from implementing external treaties that encroach upon provincial jurisdiction. The paper then describes and evaluates the contributions of the Supreme Court to strengthening the Canadian economic union by constraining internal trade barriers. Again, the paper notes significant evolution in the Supreme Court's thinking on both negative integration i.e. constraining the ability of the provinces to adopt policies that create inter-provincial barriers to trade, and positive integration i.e. the ability of the federal government to adopt legislative or regulatory policies designed to promote the fuller integration of the Canadian economy. The paper then contrasts the approach of the Agreement on Internal Trade entered into between the provinces and the federal government in 1995 to promote the fuller integration of the Canadian economy through both negative and positive integration commitments and through adoption of a non-judicial form of dispute resolution. Finally the paper examines the contributions of the Supreme Court to the development of Canadian Competition Policy, concluding that in general the pre-Charter Court's jurisprudence on mergers, monopolies, and conspiracies weakened Canadian Competition Law in undesirable ways, while post-Charter decisions of the Court have generally shown much more economic sophistication in the interpretation of Canadian Competition Law. In all of the areas reviewed the paper concludes that major institutional substitutes for the courts have emerged over time, thus underscoring the existence of actual or potential institutional competition and the importance of avoiding judicial complacency in the discharge of the Court's functions with respect to the Canadian economy.

Cet article évalue les contributions faites par le Cour suprême du Canada au renforcement des conditions d'une concurrence effective dans l'économie canadienne. Il commence par examiner la position changeante de la Cour suprême en ce qui concerne les pouvoirs du gouvernement fédéral de faire des traités avec

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d'autres pays, en particulier des traités de libéralisation des échanges; il relève des indications que la Cour est disposée à reconsidérer la portée de la doctrine des Conventions sur le travail, laquelle empêche le gouvernement fédéral de mettre en œuvre des traités qui empiètent sur le pouvoir législatif provincial. Ensuite l'article décrit et évalue les contributions de la Cour au renforcement de l'union économique canadienne en restreignant les barrières au commerce à l'intérieur du pays. De nouveau, il relève une évolution significative de la pensée de la Cour à la fois sur l'intégration négative, i.e. restreindre la capacité des provinces d'adopter des politiques créant des barrières inter-provinciales au commerce, et l'intégration positive, i.e. la capacité du gouvernement fédéral d'adopter des politiques législatives ou réglementaires visant à favoriser une intégration plus complète de l'économie canadienne. Ensuite l'article fait le contraste avec l'Accord sur le commerce intérieur, conclu en 1995 entre les provinces et le gouvernement fédéral, pour favoriser une plus grande intégration de l'économie canadienne au moyen d'engagements en faveur d'une intégration positive et négative et par l'adoption d'une forme non judiciaire de résolution des conflits. Finalement l'article examine les contributions de la Cour suprême au développement de la politique canadienne en matière de concurrence. Il en arrive à la conclusion qu'en général la jurisprudence d'avant la Charte, sur les fusions, les monopoles et les complots, a affaibli la politique canadienne en matière de concurrence d'une manière indésirable, alors que les décisions d'après la Charte ont généralement démontré un beaucoup plus grand degré de sophistication économique dans l'interprétation du droit canadien de la concurrence. L'article conclut que, dans tous les domaines considérés ici, d'importants substituts des tribunaux ont émergé avec le temps, mettant en évidence une concurrence réelle ou potentielle au niveau des institutions ainsi que l'importance d'éviter la suffisance judiciaire dans l'exécution des fonctions de la Cour en matière d'économie canadienne.

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I. Introduction

Many factors determine the competitiveness of a domestic economy, including natural endowments, density of markets, public and private investments in infrastructure, education, training, research and development; and framework laws such as international trade treaties, constitutional and other constraints on internal barriers to trade, intellectual property laws, tax policy, and domestic competition policy. In many of these policy domains, the courts play a marginal role. However, with respect to the framework laws relating to external and internal trade and domestic competition policy, they do or can potentially play a much more significant role.

This paper evaluates the contributions of the Supreme Court of Canada in both the pre-*Charter* and post-*Charter* eras to the strengthening of conditions for effective competition in the Canadian economy through these framework laws. My perspective is that of a law and economics scholar who specializes in international trade law and competition policy, not constitutional law per se; thus my perspective is to an important extent an external one. In Part II of the paper, I examine the role of the Court in strengthening the ability of the Canadian government to enter into external trade liberalizing treaties with our trading partners. In Part III of the paper, I examine the contributions of the court to constraining internal barriers to trade and strengthening the Canadian Economic Union. In Part IV of the paper I examine whether the Agreement on Internal Trade (AIT), concluded among the Federal and Provincial governments in 1995, has significantly improved on the Court's contributions to strengthening the Canadian Economic Union. In Part V of the paper, I evaluate the contributions of the Court to strengthening Canadian competition policy. Parts II, III and IV largely concern attempts to constrain policies that discriminate between "insiders" and "outsiders" in international and internal trade and can be thought of as economic counterparts to "equality" rights. Part V of the paper is concerned with attempts to ensure equality of economic choice and opportunity, at least to the extent that this is constrained by anti-competitive practices of others. Equality rights should not be conceived of parochially, either in terms of geography or in terms of artificial distinctions between political and economic rights for each tends to complement and reinforce the other. Lack of economic resources often deprives individuals of the capacity to ensure their political rights. It is not a coincidence that most of the rich countries in the world are democracies and most of the poorest countries are not. Equality rights should not be viewed as stopping short of "strangers at our gates," whether they be traders, investors, or would-be immigrants.

II. External Trading Relationships

In a small economy like Canada's, with a relatively small population dispersed over a large geographic area, which often results in many "thin" domestic markets and high levels of domestic concentration necessary for the realization of minimum efficient scale and scope economies, foreign competition, principally through trade, but also to an important extent through foreign investment, is a major source – often the major source – of competitive discipline on domestic suppliers. While for almost a hundred years, Canada pursued highly protectionist trade policies originating with Sir John A. Macdonald's National Policy, premised essentially on an infant industry promotion rationale, creating coincidentally a severe and dysfunctional tension between Canada's international trade policy and its domestic competition policy, a century is long enough for most infants to grow up. Since the genesis of the GATT in 1947 these trade barriers have been progressively dismantled, and Canada must now engage the challenge of competing effectively in a global economy. The largest economic boom and lowest employment rate in twenty years along with similar booms in our two NAFTA partners, the U.S. and Mexico, which is now the envy of most of the developing world suggests that we are up to the challenge, and that trade liberalization is a positive sum game for all of us.

Foreign trade, and increasingly foreign investment, are regulated under international treaties with our major trading partners – in Canada's case, the GATT/WTO and NAFTA. Trade liberalizing trends over the post-war period have reduced tariffs from an average of forty per cent worldwide on non-agricultural products in 1947 to about three per cent today. Other border measures, such as quotas, have also been substantially reduced. Current and future trade liberalization efforts are increasingly focused on "within the border" measures, especially the plethora of industry, trade, or profession-specific forms of regulation that differentially impact domestic and foreign providers of the goods or services in question. In a federal system, such as Canada's, many of these regulatory regimes fall wholly or partly within provincial jurisdiction, rendering international negotiations involving the federal government and our major trading partners much more problematic than in the past, when negotiations focussed principally on border measures, such as tariffs and quotas. This problem is compounded by the Privy Council's decision in the *Labour Conventions*¹ case, holding that the Federal Government's treaty making power does not authorize it to encroach upon areas of provincial jurisdiction. This means that, relative to unitary states or federal states like the US and Australia where the federal government's treaty making powers have been interpreted more expansively, Canada has faced an asymmetry problem in international negotiations, in that the commitments that it is able to make may be much more constrained than those that many of our trading partners are able to make, and hence, given the central role played by notions of reciprocity in international economic relations, may have

¹ *A-G Canada v. A-G Ontario (Labour Conventions)*, [1937] A.C. 326 [hereinafter *Labour Conventions*].

constrained Canada's ability to obtain desirable commitments from our trading partners in terms of securing greater access to their markets. However, recent decisions of the Supreme Court of Canada appear to have opened the door to a narrowing of the scope of the *Labour Conventions* doctrine.

A treaty is an agreement entered into between states which is binding in international law.² Because a treaty is an agreement which is binding in international law, a treaty can only be made by an entity having international legal personality. The *British North America Act* of 1867 did not grant treaty making power to either level of government. Rather, this power remained with the Imperial Crown in London, which had the authority to enter into treaties binding on all members of the British Empire. The Balfour Declaration, made at the 1926 imperial conference, recognized that Great Britain and its dominions were "autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or foreign affairs,"³ and in 1947 the Crown delegated to the Governor General "all powers and authorities lawfully belonging to [the King] in respect of Canada,"⁴ which has the effect of delegating to the federal government the power to enter into treaties binding Canada.

The framers of *The British North America Act*, though not contemplating Canada's evolution into a completely independent country, did grant the federal government the power to implement treaties entered into on behalf of Canada by the Imperial Crown in Great Britain. Section 132 of *The Act* states:

The Parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

In 1935, the federal government ratified three labour conventions enacted by the International Labour Organization in 1919, 1921, and 1928, making them legally binding on Canada in international law. The government then enacted the necessary legislation to bring Canadian laws into accord with these treaty obligations. The Privy Council, however, in the *Labour Conventions* case,⁵ held that section 132 did not authorize the implementation of treaty obligations by the federal government arising from treaties entered into by Canada in accordance with its expanded authority.⁶ Lord Atkin held that,

there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.⁷

² P.W. Hogg, *Constitutional Law of Canada*, 4th ed., (Toronto: Carswell, 1997) at 11-1.

³ M. Ollivier, *Colonial and Imperial Conferences*, vol. 3 (Ottawa: Queen's Printer, 1954) at 146.

⁴ R.S.C. 1985, App. II, No. 31, cl. 2.

⁵ *Supra* note 1.

⁶ *Ibid.* at 349.

⁷ *Ibid.* at 351.

Thus, if the subject matter of a treaty (or portion thereof) fell under one of the heads of power in section 91, the federal government had authority to implement necessary changes to *federal* law, but the federal government did not have the constitutional authority to enact legislation aimed at a class of subjects falling under one of the provincial heads of power under section 92, and only the provinces had the authority to make the necessary changes. It is irrelevant to the evaluation of a statute that its purpose is the implementation of an international treaty. In *Labour Conventions*, the impugned federal statutes were related to conditions of employment, a matter falling under provincial authority under section 92(13). As a result, the federal government did not have the authority to implement such legislation and the labour conventions were struck down.

As noted by Professor Hogg, the *Labour Conventions* ruling "produces the highly inconvenient result that the Government of Canada, which creates treaty obligations, is powerless to ensure the performance of many of those obligations."⁸ The *Labour Conventions* decision has impaired Canada's capacity to play a full role in international affairs, and Canada has been unable to meet treaty obligations on labour, education, the status of refugees, women's rights, and human rights generally.⁹

It may be, however, in the light of more recent Supreme Court decisions, that some of the sting of *Labour Conventions* may have been drawn. It is now at least conceivable that the federal government has some authority, either under the second branch of the Trade and Commerce power,¹⁰ or under the national concern branch of the Peace, Order, and Good Government power, to implement certain treaty obligations which impinge on provincial jurisdiction. The existence and nature of a treaty has been found relevant to the characterization of implementation legislation. Where the form and nature of an extant treaty indicates that its subject matter is viewed by signatories as unified and indivisible, such a treaty may be used to support Parliament's power to enact enabling legislation. In *R. v. Crown Zellerbach*,¹¹ the Supreme Court upheld federal legislation regulating marine pollution in both intra- and extra-provincial waters. The Court, in elaborating the national concern branch of P.O.G.G., held that for a matter to qualify as a national concern,

it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the constitution.¹²

⁸ Hogg, *supra* note 2 at 11-13.

⁹ I. Bernier, *International Legal Aspects of Federalism* (Hamden, Conn.: Archon Books, 1973) at 152-58.

¹⁰ As per *Citizen's Insurance Co. v. Parsons* (1881), 7 A.C. 96 at 113, the second branch of the Trade and Commerce power allows for the general regulation of trade affecting the whole dominion.

¹¹ [1988] 1 S.C.R. 401.

¹² *Ibid.* at 432.

LeDain J., at least in part, based his conclusion that marine pollution is a single, distinct subject matter on the evidence of the single and distinct international regime.

Further, in explaining his conception of singleness, distinctiveness and indivisibility, he emphasized that:

In determining whether the matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.¹³

It is noteworthy that the focus of LeDain's J.'s comments is on whether a province can deal *effectively* with the issue of concern, not whether it is constitutionally capable of dealing with the issue. Further reinforcing this position, LeDain J. suggested that actual failure to co-operate was equivalent to provincial incapacity.¹⁴ Monahan notes that this 'provincial inability test' "actually focuses on the effects in other provinces of a *failure* by one province (as opposed to the *inability* of that province) to deal effectively with the control or regulation of a matter."¹⁵

In *General Motors of Canada v. City National Leasing*,¹⁶ the court revived the second branch of the general trade and commerce power as enunciated in *Citizen's Insurance Co. of Canada v. Parsons*,¹⁷ allowing for federal legislation on the "general regulation of trade affecting the whole dominion."¹⁸ The first branch grants the federal government legislative authority over interprovincial and international trade. In doing so, it laid down five indicia of validity for legislation under the second branch of section 91(2):

- the legislation must be part of a general regulatory scheme;
- the scheme must be monitored by a regulatory agency;
- the scheme must not constitute the regulation of a single industry or trade;
- the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting;
- 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

This test, as well as the test espoused in *Crown Zellerbach*, suggests significant federal government scope to implement international treaties notwithstanding that their subject matter would fall under a provincial head of power if the legislation were strictly evaluated in the manner espoused in *Labour Conventions*. Furthermore, this scope can conceivably be increased. This could arise, on the one hand, by regarding "constitutional incapacity" on the part of the provinces

¹³ *Ibid.*

¹⁴ *Ibid.* at 432-3.

¹⁵ P. Monahan, *Constitutional Law* (Concord, Ont.: Irwin Law, 1997) at 240.

¹⁶ [1989] 1 S.C.R. 641.

¹⁷ *Supra* note 10.

¹⁸ *Ibid.* at 113.

to regulate under the general regulation of trade test in a similar manner as LeDain J. did in considering the nature of provincial inability under the national concern doctrine in *Crown Zellerbach*. On the other hand, the scope of the general regulation of trade power could provide a basis for an expansive use of the necessarily incidental doctrine.¹⁹ Professor Howse, in several papers, has argued that the United Nations Convention on Contracts for the International Sale of Goods, the Canada- United States Free Trade Agreement, and the North American Free Trade Agreement could all be implemented by federal legislation pursuant to the Supreme Court's decisions in *Crown Zellerbach* and *General Motors* using some of these devices.²⁰ Professor Fairly, commenting on the Canada - United States FTA, has argued that implementation legislation for international trade agreements meets the five-part test established by Dickson C.J.C. in *General Motors*.²¹ While Lord Atkin's judgment in *Labour Conventions* has not by any means been overruled, the groundwork now exists for a finding that the federal government does have the authority to implement certain international treaties that impinge, to some degree, on provincial jurisdiction, although uncertainties remain where a single industry or trade is involved.

Apart from these judicial developments, Article XXIV (12) of the GATT (the so-called federal state clause) provides: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of the Agreement by the regional and local governments and authorities within its territories." While sub-national levels of government are not parties to international trade treaties and are not directly bound by obligations therein, the federal government risks international trade sanctions if it is unable to demonstrate that it has made reasonable efforts to induce sub-national levels of government to conform to these commitments. Exactly what constitutes reasonable efforts in this respect is not entirely clear, but in recent GATT/WTO panel decisions (the most important of which involve the so-called Canada-US beer wars), provincial regulatory restrictions on foreign trade were held to violate various provisions of the GATT and to expose the federal government to sanctions under Article XXIV (12), on the grounds that it had failed to make "serious, persistent and convincing" efforts to induce provincial compliance. In the *Beer* case, the GATT Panel held that it was inconsistent of the federal

¹⁹ Note that Howse's analysis of this is flawed, as he regards the necessarily incidental test as a test of political necessity, i.e., given that an agreement must be constitutionally permissible, it ought to be allocated to the federal government's jurisdiction. In fact, the necessarily incidental test requires a valid federal regulatory purpose which nonetheless will involve some degree of intrusion into matters which, but for their necessary implication by the valid federal purpose, would be under the provinces' jurisdiction. See R. Howse, "The Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations" (1990) 16 Can. Bus. L.J. 160.

²⁰ Howse, *ibid.*, and "NAFTA and the Constitution: Does *Labour Conventions* Really Matter Any More?" (1994) 5 Constitutional Forum 54.

²¹ H.S. Fairly, "Implementing the Canada-United States Free Trade Agreement" in D.M. McRae & D.P. Steger eds., *Understanding the Free Trade Agreement* (Halifax: Institute for Research on Public Policy, 1988).

government to argue that various liquor distribution restrictions in Ontario and other provinces were not a violation of various provisions of the GATT, and at the same time to argue that it had made "serious, persistent and convincing" efforts to induce provincial compliance with these obligations.²² This "Catch-22" argument will often expose the federal government to a serious risk of adverse determinations by supra-national panels on account of non-compliant provincial policies, leading (as in the *Beer* case) to retaliatory sanctions by our trading partners, which are likely to be strategically targeted on exports principally from non-compliant provinces. In short, decisions by the Dispute Settlement Body under the GATT/WTO have reinforced domestic judicial developments in more narrowly confining the scope of the *Labour Conventions* doctrine and strengthening the ability of the Canadian government to undertake reciprocal trade (and related) commitments with our major trading partners.²³

The Supreme Court will almost certainly be confronted in the foreseeable future with the challenge of re-evaluating explicitly the scope of the *Labour Conventions* doctrine, as the focus of international trade liberalization efforts shifts to within the border measures such as regulation of services that have largely fallen within provincial jurisdiction. The federal government would render this challenge more tractable if it develops an institutionalized process for consulting with the provinces (perhaps through the AIT) on its negotiating position on trade issues that implicate both levels of government.

III. *The Supreme Court and The Canadian Economic Union*

a) *The Welfare and Efficiency Costs of Internal Trade Barriers*

A key issue in the debate about the importance of interprovincial trade surrounds the economic costs of internal trade barriers in Canada in the four fundamental economic classes of inputs and outputs—labour, capital, goods and services. No consensus method exists for estimating these costs and in fact the estimates vary. However, one aspect of the issue is clear—the Canadian economy is already well integrated. Canadians share a common currency, a closely harmonized tax system, a developed rail and highway transportation infrastructure, and all provincial governments are constrained by section 121 of the *Constitution Act*, which guarantees that all goods must be permitted to move within Canada without being made subject to provincial tariffs. Since the addition of the *Charter* to the *Constitution* in 1982, Canadians have also benefited from section 6, which guarantees personal mobility rights and the

²² See S. Kierstead, "An International Bind: Article XXIV (12) of GATT and Canada" (1993) 25 Ott. L. Rev. 315

²³ It is not yet clear how the decisions of these dispute settlement bodies will be related to the jurisprudence of the Supreme Court. But see Hon. G.V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Canadian Yearbook of International Law 89.

right to pursue a livelihood in any province of Canada. Furthermore (with some minor exceptions, such as restrictive land ownership rules in Prince Edward Island), Canadians have also benefited from relatively unhindered capital flows and freedom of investment within Canada.

The relative magnitude of government constraints on fundamental economic freedoms is extremely important to devising an accurate estimate of how costly in terms of efficiency losses the remaining internal barriers to trade have been and are likely to be for Canadians. The key to understanding how such an estimate can be made is the theory of comparative advantage, which explains how gains from trade develop and why allowing the free movement of factor inputs (labour and capital) and final products (goods and services) is key to generating gains from trade. If interprovincial barriers to trade were complete – that is, with no factor input or product mobility – then the residents of each province would consume exactly what they produce. Prices for commodities and services would vary from province to province under such a scenario. For example, consider how two provinces – British Columbia and Saskatchewan – would fare under complete economic immobility, with no goods, services, labour or capital crossing their provincial borders.²⁴ In British Columbia, the price of salmon and lumber would be (relatively) low, while the price of wheat would be (relatively) high. This outcome would necessarily result because British Columbia has high natural resource endowments in salmon and lumber whereas the costs associated with growing wheat would be high.²⁵ In Saskatchewan on the other hand, the relative costs would be reversed. It would be quite expensive for Saskatchewan residents to acquire salmon or lumber (which are extremely scarce, if extant, resources in the province), while it would be inexpensive to farm wheat. With complete economic immobility, British Columbia would be forced into farming the small amount of wheat that residents would demand at the inevitably high cost of doing so, and Saskatchewan would have to provide internally all of the salmon and lumber that residents demanded at a price reflective of the necessarily high cost of doing so.

Clearly, the residents of each province would be better off if British Columbia could trade some salmon and lumber to Saskatchewan for some wheat. If trading were allowed, British Columbia would concentrate more resources on the production of salmon and lumber than wheat, whereas Saskatchewan would concentrate its resources on wheat farming. In the parlance of trade theory, wheat farming is an area of economic activity in which Saskatchewan enjoys a comparative advantage, and forestry and salmon fishing represent areas of comparative advantage for British Columbia. The gains from trade in this example would be given by the sum of the increases in the

²⁴ The usual assumption is that within each province there is unencumbered mobility of goods and services. However, the results still hold if there is relatively free economic mobility.

²⁵ This would be the case because much of the relatively small amount of arable land in British Columbia is located in the Okanagan Valley, where it can be used more intensively and valuably to grow fruit.

production of salmon, lumber, and wheat between a state of complete economic immobility and a scenario in which free trade is allowed. These two states of the world represent two ends of a continuum. The greater the barriers to trade, the more one approaches complete economic immobility. Conversely, the lower the barriers to trade, the more one approaches free trade.

In actual fact, economic mobility in Canada is and has been far closer to the free trade ideal than to complete economic immobility. The idea of comparative advantage and gains from trade can be (at least conceptually) easily extended to all Canadian provinces. The actual welfare gains that Canadians would realize from interprovincial free trade are equal to the difference between the sum of the GDP that the provinces and territories currently generate with the existing barriers to trade (i.e. the existing level of economic immobility between areas), and the GDP that Canada as a cohesive economic union – that is, absent all barriers to trade and with full legislative and standards harmonization – would generate.

An empirical study conducted by John McCallum using data from 1988-1990 shows that interprovincial merchandise trade is much more dense, *ceteris paribus*, than merchandise trade between Canadian provinces and American states (province-state trade). Using data from 1988-1990, McCallum has shown that interprovincial trade was 20.1 times more dense than data on provincial-state trade flows would have predicted using a “gravity model” that takes into account both GDP and trading distances.²⁶ More recent empirical work using a similar “gravity model” by John F. Helliwell expands upon and confirms McCallum’s results for a longer time period. Helliwell uses a combination of the same and more recent data running from 1988 to 1996 and re-estimates the relationship. The results showed that although the border effect is no longer on the order of 20 times as great (because of decreasing tariffs under NAFTA), the border effect factor remained as high as 11.9 for 1996.²⁷ For interprovincial trade in services, Helliwell’s results show that the border effect is much stronger than it is for merchandise goods – interprovincial trade in services is 32.1 times as dense as that of province-state trade in services after taking both distance and GDP into account.²⁸ These findings demonstrate that the Canadian Economic Union is very well integrated, and therefore that the welfare costs of imperfect economic mobility may not be considerable.

A much cited 1991 study published by the Canadian Manufacturers’ Association identified approximately 500 internal trade barriers in Canada and estimated their annual welfare costs to Canadians at approximately 6.5 billion dollars – approximately one percent of annual GDP.²⁹ This estimate reflects approximate welfare costs of 5 billion dollars due to preferential government

²⁶ See J. McCallum, “National Borders Matter: Canada-U.S. Regional Trade Patterns” (1995) 85 *American Economic Review* 615.

²⁷ J.F. Helliwell, *How Much Do National Borders Matter?* (Washington, D.C.: Brookings Institution Press, 1998) at 22.

²⁸ *Ibid.* at 38.

²⁹ T. Rutley, *Canada 1993: A Plan for the Creation of a Single Economic Market in Canada* (Toronto: Canadian Manufacturers’ Association, 1991).

procurement policies, 1 billion dollars from agricultural trade barriers and 500 million dollars from trade barriers pertaining to alcoholic beverages. This study has attracted much criticism, largely because of the *ad hoc* nature of the estimate regarding the welfare costs of preferential government procurement. The CMA study based the 5 billion dollar welfare cost of preferential procurement practices on an estimated 5 percent "local premium" on the annual 100 billion dollars of Canadian procurement expenditures. The primary weakness of this reasoning is that not all of this estimated increased government expenditure would represent deadweight losses that would serve to decrease overall welfare or compromise efficiency.³⁰ Notwithstanding this criticism, however, Daniel Schwanen has argued that "there is nothing implausible about the often-cited figure of 1 percent of GDP."³¹ Further strength is added to the rough legitimacy of the 1 percent estimate by the fact that other studies,³² including one favourably cited by the MacDonald Commission,³³ estimate the welfare costs of internal trade barriers as being between 1 and 1.5 percent of GDP. Although a welfare cost of one percent of GDP may not seem extraordinary, it is significant. For an average Canadian family of four, this represents a foregone benefit of approximately \$1000 annually.³⁴

b) *Negative and Positive Economic Integration*

Under a "negative integration" approach, the emphasis is placed on prohibiting or constraining measures adopted by one party that discriminate against another party, requiring that such measures be modified or withdrawn. That is to say, a negative integration approach tells parties *what they may not do* and has been the traditional focus of most international trade treaties. A

³⁰ Some of these increased expenditures, of course, would represent welfare losses. The extent to which this premium is a welfare loss or not depends on the relative efficiency of production between local and non-local firms. If local suppliers are as productively efficient as extra-provincial suppliers but simply capture this local-preference premium as an economic rent, then the alleged welfare loss is illusory. On the other hand, if local suppliers are five percent less productively efficient than other suppliers, then the welfare losses are real.

³¹ D. Schwanen, "One Market, Many Opportunities: The Last Stage in Removing Obstacles to Interprovincial Trade" (Toronto: C.D. Howe Institute, 1994) at 6.

³² See, e.g., T.J. Courchene, *Economic Management and the Division of Powers* (Toronto: University of Toronto Press, 1986) at 216; T.J. Courchene, "Analytical Perspectives on the Canadian Economic Union" in M. Trebilcock et al. eds., *Federalism and the Canadian Economic Union* (Toronto: University of Toronto Press, 1983) 51; J. Whalley, "Induced Distortions of Interprovincial Activity: An Overview of Issues" in Trebilcock et al., eds., *Federalism and the Canadian Economic Union* (Toronto: University of Toronto Press, 1983) 161; and Schwanen, *ibid.*

³³ Quoted in F. Palda, *Provincial Trade Wars: Why the Blockade Must End* (Vancouver, Fraser Institute, 1994) at xvi.

³⁴ M.J. Trebilcock & R. Behboodi, "The Canadian Agreement on Internal Trade: Retrospect and Prospects" in M.J. Trebilcock & D. Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade* (Toronto: C.D. Howe Institute, 1995) at 22.

prominent example of this approach is the National Treatment obligation in the GATT (Article III), which prohibits member states from adopting internal laws or measures that treat foreign producers less favourably than domestic producers of like products. In contrast, a more ambitious approach to economic integration would emphasize, in addition to negative integration, "positive integration", where parties agree on a series of positive steps that they commit themselves to taking to reduce or remove impediments to the free movement of goods, services, persons, and capital. Typically, a "positive integration" approach focuses on removing or reducing regulatory divergences that create multiple compliance or transaction costs, impeding parties from one jurisdiction from operating effectively in another. The most prominent example of a strategy of positive integration is the European Union. Following the removal of border measures, such as tariffs, quantitative restrictions, and measures equivalent to tariffs or quantitative restrictions pursuant to the Treaty of Rome of 1957, the *Single European Act*, 1986 and a series of directives and regulations committed member states to mutual recognition or harmonization of a vast range of domestic regulatory measures pertaining to goods, services, persons, and capital with a view to creating a single European market by 1992. The strategy rested on the existence of strong pan-European central institutions, in particular the EU Commission and the Council of Ministers of the European Community. These European institutions are empowered to enact regulations, directives and decisions that are legally binding on member states. EU legislation may require the adoption of minimum standards, mutual recognition, or harmonization of laws in many areas. Noncompliance with these measures can be challenged in domestic courts and in the European Court of Justice, both by governments and by private parties. Substantial progress toward the goal of a single European market is widely attributed to these special institutional arrangements, to the adoption of more relaxed majority voting rules in the Council of Ministers, which has reduced holdout problems, and to the adoption of a default principle of mutual recognition in the absence of agreement on minimum or harmonized standards. The Court of Justice has been one of the most important forces in the development of the single market in Europe. It has extended the reach and enhanced the power of EU institutions and laws and championed the single market even when the institutions and the membership of the EU have seemed unwilling or unprepared to carry through with the process of integration.

Historically, with respect to the Canadian Economic Union, the Privy Council, and later the Supreme Court, took a restrictive view of the federal government's power to regulate for the furtherance of the economic union, while correlatively allowing provincial governments broad powers to regulate the economic marketplace. While much of the case-law manifests equivocalities and inconsistencies, recent trends tend to reflect an increasing sophistication on the part of the Court in promoting internal economic integration. By tracing the evolution of the trade and commerce power under section 91(2) and the correlative provincial power over property and civil rights under 92(13), the Court's role in furthering the economic union can be evaluated. Of relevance is the degree to which the federal government has been granted authority under the *Constitution* by the courts to pursue positive economic integration through the national regulation of markets and standards,

and its ability to impinge on provincial jurisdiction over intraprovincial trade in order to further the cause of interprovincial or international trade, on the one hand, and the ability of provincial governments to pursue policies inconsistent with negative economic integration, through discriminatory laws, regulations and practices, on the other. It is noteworthy that a majority of cases which affect the federal government's ability to promote positive economic integration arose through federal government action designed, through the imposition of marketing schemes and quotas, to limit the free movement of goods across jurisdictional boundaries. Thus, the fact that the federal government has the constitutional authority to promote positive economic integration does not mean that the goals of the Canadian economic union will, in fact, be furthered.

1) *Negative Economic Integration*

i. *Provincial Interference with Interprovincial Trade and Commerce*

With respect to the degree to which provincial regulation can incidentally affect interprovincial transactions, the Supreme Court in the past employed used two different, and indeed somewhat contradictory approaches to determining the validity of provincial legislation which affects interprovincial trade flows. At times, the Court has restricted provincial jurisdiction to transactions which are entirely completed within the province so as to prevent interference with interprovincial trade, while at other times the Court has held the interprovincial effects of provincial legislation to be irrelevant in the classification of provincial legislation as *intra* or *ultra vires*. Thus, while it can be concluded that the Court achieved some limited degree of negative economic integration, several of its rulings significantly impeded the goals of the Canadian economic union.

An example of the first approach in preventing provincial legislation from impacting on interprovincial transactions is found in *Prince Edward Island Potato Marketing Board v. H.B. Willis Incorporated*.³⁵ In that case the Supreme Court unanimously held that provincial legislation which authorized a potato marketing board to collect levies from potato producers was unconstitutional insofar as the levies applied to potatoes with extraprovincial destinations. The majority held that the fee could not be levied on these potatoes as such levies would interfere with Parliament's jurisdiction over interprovincial trade. Kerwin J. (Fauteux J. concurring) held that the application of such a levy was "clearly referable to export trade and cannot be supported,"³⁶ while Rand J. stated that

"the scheme ... is primarily one of trade regulation ... so far as it extends to external trade it is invalid,"³⁷ and Kellock J. (Locke J. concurring) held that The powers so given go beyond the mere regulation of the potato trade within the province or carriage thereof from one provincial point to another, and encroach upon the sphere of the regulation of interprovincial and export trade. There is no attempt to confine the scheme or the orders under it to local as distinguished from export trade, and it is to be remembered ... *that the business of marketing potatoes in the province is preponderantly an export business*.³⁸

³⁵ [1952] 2 S.C.R. 392. ^a

³⁶ *Ibid.* at 409.

³⁷ *Ibid.* at 416.

³⁸ *Ibid.* at 423 [emphasis added].

Similarly, in *Re Ontario Farm Products Marketing Act*³⁹ the terms of reference directed the Court to assume that legislation applied only to interprovincial transactions. In determining the meaning of this direction, a majority of the court held that intraprovincial transactions only involve products to be produced and consumed in the province. Kerwin C.J.C. stated that “[o]nce an article enters into the flow of interprovincial or external trade, the subject-matter and all its attendant circumstances cease to be a matter of local concern”,⁴⁰ while Locke J. (Nolan J. concurring) held that intraprovincial trade consists of:

[P]urchases and sales of the controlled product ... for consumption in the Province, and sales to processors, manufacturers or dealers proposing to sell such products, either in their natural form or after they have been processed ... for consumption within the province.⁴¹

However, in *Shannon v. Lower Mainland Dairy Products Board*,⁴² and in *Home Oil Distributors v. A.-G. (B.C.)*,⁴³ the Privy Council and the Supreme Court were not concerned with the incidental effects of provincial legislation on interprovincial trade. In *Shannon*, the Privy Council upheld a provincial marketing scheme for milk, including its application to milk produced extraprovincially, while in *Home Oil*, the Supreme Court held that provincial price regulation of gasoline and fuel oil could validly be applied to products produced outside of the province.

In *Carnation Co. v. Québec Agricultural Marketing Board*,⁴⁴ the Québec milk marketing board set the price at which milk producers could sell their product to Carnation above the price of milk on the open market available to other producers. The evidence showed that prices paid by Carnation were about 10 to 25 cents per hundred pounds higher than those paid by other purchasers of raw milk in the same area. Further, Carnation sold most of its processed milk interprovincially, and was a federally incorporated company with its head offices in Toronto. Notwithstanding this, the Supreme Court, in upholding the scheme, found that any interprovincial effects were irrelevant in assessing the validity of the regulatory structure. Martland J., for a unanimous court, held that:

[i]t is not the possibility that these orders might “affect” the appellant’s interprovincial trade which should determine their validity, but, rather, whether they were made “in relation to” the regulation of trade and commerce.⁴⁵

In *Re Agricultural Products Marketing Act*⁴⁶ Pigeon J., speaking for the majority, held that the judgment in *Carnation* stood for the proposition that the regulation of production “is *prima facie* a local matter, a matter of provincial

³⁹ [1957] S.C.R. 198.

⁴⁰ *Ibid.* at 205.

⁴¹ *Ibid.* at 231 and see Rand J.’s statement to the same effect at 210.

⁴² [1938] A.C. 708.

⁴³ [1940] S.C.R. 444.

⁴⁴ [1968] S.C.R. 238.

⁴⁵ *Ibid.* at 252.

⁴⁶ [1978] 2 S.C.R. 1198.

jurisdiction.”⁴⁷ So long as the regulation was aimed at production, the ultimate destination of the regulated goods was held to be irrelevant:

[i]n view of the reasons given, the conclusion could not be different even if the whole production had been going into extraprovincial trade.⁴⁸

Thus, in these cases, the Court’s approach in its decisions has been to treat the goods’ eventual destination as irrelevant. Rather, the Court adopted an artificial distinction between production and marketing to function as a proxy for intra- and inter-provincial trade. It was held *intra vires* for provincial governments to regulate the production of goods and services, although regulation with respect to marketing such goods was held to encroach on federal jurisdiction.

In *A.-G. Manitoba v. Manitoba Egg & Poultry Association (Manitoba Egg)*,⁴⁹ a provincial marketing scheme that applied to all eggs sold within the province, including those produced extraprovincially, was struck down as being beyond the purview of provincial legislative authority. Martland J., for the majority of the Court, held that the purpose of the scheme was, in fact, to, “restrict or limit the free flow of trade between provinces as such.”⁵⁰ Thus, the Court concluded that the marketing scheme was, in pith and substance, related to the regulation of interprovincial trade flows.

In *Central Canada Potash Co. v. Saskatchewan*,⁵¹ the Supreme Court struck down a provincial prorationing scheme fixing the price and restricting the production of potash. Laskin C.J.C., for a unanimous court, emphasized that “[t]he only market for which the schemes had any significance was the export market,”⁵² thus ignoring the distinction between production and marketing illustrated in *Carnation* and espoused seven months prior to the *Canada Potash* decision in *Re Agricultural Products Marketing Act*.

Similarly, in *Canadian Industrial Gas and Oil v. Government of Saskatchewan*⁵³ the Court struck down provincial legislation imposing a surcharge on oil produced in the province. The surcharge was to equal the difference between the price received for the oil and the world market price prior to its escalation due to the oil price shock of 1973. The legislation also allowed the provincial government to fix the price of oil where it determined that it was being underpriced. Martland J., writing for a majority, emphasized in declaring the statute *ultra vires* that the oil “has almost no local market.”⁵⁴

⁴⁷ *Ibid.* at 1293.

⁴⁸ *Ibid.* at 1294.

⁴⁹ [1971] S.C.R. 689; 19 D.L.R. (3d) 169 [hereinafter cited to D.L.R.].

⁵⁰ *Ibid.* at 179.

⁵¹ [1979] 1 S.C.R. 42; (1978) 88 D.L.R. (3d) 609 [hereinafter cited to D.L.R.].

⁵² *Ibid.* at 610.

⁵³ [1978] 2 S.C.R. 545.

⁵⁴ *Ibid.* at 568.

ii. Section 121

Section 121 of the *Constitution Act* provides as follows:

All Articles of 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.

The first attempt to challenge legislation under section 121 arose in *Gold Seal Limited v. Dominion Express Company*,⁵⁵ where a liquor importer challenged the validity of the *Canada Temperance Act*⁵⁶ which prohibited the importation of liquor into provinces where its sale was prohibited by provincial statute. The Court, in upholding the federal legislation, held that section 121 only prohibited the imposition of customs duties on interprovincial trade, and did not prevent the federal government from restricting the interprovincial flow of goods. "Free," in the context of section 121, was interpreted to mean, "without any tax or duty imposed as a condition of ... admission".⁵⁷ This statement was adopted in *Atlantic Smoke Shops Limited v. Canlon*⁵⁸ and by the majority in *Murphy v. Canadian Pacific Railway Company*.⁵⁹ Other interpretations of the scope of section 121 have been adopted. In *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*,⁶⁰ Cannon J. held section 121 to proscribe, "any hindrance ... by legislation of the untrammelled commerce between the provinces in all 'articles of the growth, produce or manufacture' of any one of them."⁶¹ This interpretation was not followed in subsequent cases, and the restrictive interpretation of section 121 in *Gold Seal* continued to be adopted. In *Murphy*, however, Rand J., in a separate concurring opinion, held the word 'free' in section 121, "means without impediment related to the traversing of a provincial boundary."⁶² While this opinion was not adopted by the majority of the court, it was repeated by a unanimous Supreme Court in *Black v. Law Society Alberta*,⁶³ more than 30 years later.

By contrast, the United States Supreme Court has been far more aggressive in interpreting and applying the U.S. Constitution to impediments to interstate trade. The U.S. Court has developed a body of jurisprudence surrounding the so-called dormant Commerce Clause under Article 1, section 8 of the US Constitution, which grants to Congress the power "to regulate commerce with foreign nations, and among the several states...". According to a review of this jurisprudence by Sunstein,⁶⁴ the US Supreme Court has come to understand the

⁵⁵ (1921), 62 S.C.R. 424.

⁵⁶ R.S.C. 1906, c. 152.

⁵⁷ *Supra* note 55 at 470.

⁵⁸ [1943] A.C. 550 at 569.

⁵⁹ [1958] S.C.R. 626 at 634 (per Locke J.).

⁶⁰ [1931] S.C.R. 357.

⁶¹ *Ibid.* at 372-3.

⁶² *Supra* note 59 at 638.

⁶³ [1989] 1 S.C.R. 591.

⁶⁴ C. Sunstein, "Protectionism, the American Supreme Court, and Integrated Markets" in R. Bieber et al., eds., *One European Market? A Critical Analysis of the Commission's Internal Market Strategy* (Baden-Baden: Nomos Verlagsgesellschaft, 1992).

Commerce clause as having a "dormant" dimension that operates as a prohibition on interferences with commerce by the states. Sunstein identifies two principal purposes of the clause: the first is to control what might be called naked protectionism that promotes the interests of "insiders" at the expense of "outsiders" due to their lack of effective political voice in the jurisdiction in question; the second is to ensure that there will be a national market requiring that state action be proscribed even if regulations derive from something other than protectionism. According to Sunstein, the US jurisprudence is largely, although qualifiedly, premised on the first and narrower purpose. He notes that: (1) Regulation that discriminates on its face against out-of-staters encounters a strong presumption of *per se* invalidity. (2) Regulation that has discriminatory effects must be powerfully justified. (3) Non-discriminatory regulation is invalidated only if the non-protectionist benefits are illusory or trivial in comparison with the burden of the trade. In the case of facially discriminatory regulation, the presumption of invalidity can be overcome, if at all, only by showing, first, an extremely close connection between the asserted non-protectionist value and the statutory enactment and, second, that less restrictive alternatives are unavailable. With respect to regulations that have discriminatory effects but are facially non-discriminatory, the US Supreme Court has usually required a close connection between legitimate ends and statutory or regulatory means and looked to the existence of less restrictive alternatives. With respect to non-discriminatory regulation that nevertheless has an effect on interstate trade, for example, by introducing inconsistent or divergent regulatory requirements from one state to another, judicial scrutiny of such legislation or regulation tends to be highly deferential and it is usually sufficient to show that there is a rational basis for the asserted benefits of the legislation or regulation and that the burden on interstate commerce is not grossly excessive in relation to those benefits.

According to Sykes,⁶⁵ most of the criticisms of the dormant Commerce Clause jurisprudence focus on the *ad hoc* and subjective nature of the balancing exercise entailed in Category 3 and to a lesser extent Category 2 cases, and argues persuasively against adoption of such a balancing exercise in international trade disputes involving claims of regulatory protectionism, provided the measure in question has some genuine non-protectionist justification, principally because such a balancing exercise is likely to overextend the WTO Dispute Settlement Body's technical and political credibility. This contrasts with the domestic U.S. context, where Congress (the national political assembly representing "insiders" and "outsiders"), pursuant to its active trade and commerce power, can if it chooses either reinstate restrictions found by the courts to violate the dormant Commerce Clause or alternatively adopt some national scheme of regulation. Sykes also notes that while the European Court

⁶⁵ A. Sykes, "Regulatory Protectionism and the Law of International Trade," (1999) 66 Chicago L.R. 1.

of Justice has historically been more inclined to engage in a balancing exercise in reviewing domestic regulations under the Treaty of Rome, the more recent tendency has been to avoid such an exercise.

iii. Section 6 of the Charter

The Supreme Court's first opportunity to address the possible existence of economic rights in section 6(2)(b) of the *Charter* arose with its ruling in *Law Society of Upper Canada v. Skapinker*⁶⁶ (hereinafter *Skapinker*). In *Skapinker*, a non-citizen permanent resident challenged the Law Society of Upper Canada's requirement for admission to the bar that new members be "Canadian citizens or other British subjects"⁶⁷. Of relevance to the Canadian economic union, the court ruled that section 6(2)(b), which states that:

6(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right ...

(b) to pursue the gaining of a livelihood in any province⁶⁸

"does not establish a separate and distinct right to work divorced from the mobility provisions in which it is found."⁶⁹ The court ruled that the mobility guarantee does, however, "[accord] the transprovincial commuter ... the right to work under [6(2)](b) without the need of establishing residence in the province of employment in exercise of the right under para. (a)."⁷⁰

The Supreme Court had another opportunity to consider the section 6 mobility guarantees in constraining provincially imposed labour mobility barriers in *Black v. Law Society Alberta*⁷¹ (hereinafter *Black*). In *Black*, the Law Society of Alberta, in an attempt to prevent incursion into the province of the Ontario law firm McCarthy & McCarthy through the creation of a provincial affiliate staffed entirely by partners and associates qualified to practice law in Alberta, passed rule 154, prohibiting members of the Law Society who ordinarily reside and practice in Alberta from entering into partnerships with non-residents, and rule 75B, prohibiting members of the Law Society from being members of more than one law firm.⁷² La Forest J., speaking for a majority of the court, stated that, "Rule 154 makes it, for practical purposes, impossible for any person to practice law effectively in Alberta without taking

⁶⁶ [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161, [hereinafter cited to D.L.R.].

⁶⁷ R.S.O. 1980, c.233, s. 28(c).

⁶⁸ *Canadian Charter of Rights and Freedoms*, Part V of the *Constitution Act 1982*, being Schedule "B" to the *Canada Act 1982* (U.K.) (1982), c.11 (the "Charter"), s. 6(2).

⁶⁹ *Supra* note 65 at 181.

⁷⁰ *Ibid.* at 179.

⁷¹ *Supra* note 63.

⁷² The Rules of the Law Society of Alberta enacted under the Legal Profession Act, R.S.A. 1980, c L-9.

⁷³ *Supra* note 63 at 619.

up residence there,”⁷³ and thus violates section 6(2) of the *Charter*. He further held that rule 75B violated section 6, as “the two rules working in concert render interprovincial law firms unfeasible, and it is obvious from the facts that this is what they were designed to do.”⁷⁴ Thus, the restrictions imposed by the Law Society on the ability of non-residents to pursue the gaining of a livelihood through the sale of legal services were found unconstitutional. Additionally, La Forest J. noted that:

[Section 6(2)(b)] accords the citizen the right ‘to pursue the gaining of a livelihood in any province’ ... [which] does not connote the physical movement of the individual to the province. The expression ‘to work in the province’, which is used in some of the cases, might more easily be open to that interpretation. But these are not the words used in the *Charter*. There is, however, no doubt that a person can pursue a living in a province without being there personally.⁷⁵

It should be noted that the pursuit of a livelihood must necessarily entail either the sale of goods or services, or the use of capital. Thus, according to the interpretation endorsed by the court, section 6 mobility rights are concerned not only with personal mobility, but also with other forms of economic mobility which do not directly involve the mobility of labour.

In *Black*, La Forest J., discussed at some length the relationship between sections 6 and 121 of the Constitution, and the Canadian Economic Union. Writing for a majority of the Court, La Forest J. endorsed the broad characterization of section 121 expressed by Rand J. in *Murphy v. Canadian Pacific Railway Co.*⁷⁶ As noted above, Rand J. held that the word ‘free’ in section 121, “means without impediment related to the traversing of a provincial boundary.”⁷⁷ The majority in *Murphy* had characterized section 121 as having as its aim the prohibition of customs duties on interprovincial trade, following the Supreme Court’s decision in *Gold Seal Ltd. v. A.G. Alberta*.⁷⁸ Given the fact that the Court neither discussed nor sought to rely on section 121 in *Canadian Egg*,⁷⁹ it is probably an exaggeration to say that Rand J.’s view has been definitively adopted. Nonetheless, in *Black* the majority of the Court endorsed a much broader interpretation of section 121 than the court had followed for 68 years.

The Supreme Court in *Black*, in an attempt to characterize section 6 mobility rights, ultimately adopted the position that these rights were essentially related to citizenship. “What section 6(2) was intended to do was to protect the right of a citizen (and by extension a permanent resident) to move about the country, to reside where he or she wishes and to pursue his or her livelihood without regard to provincial boundaries.”⁸⁰ But in his endorsement of mobility rights as those rights which are inherent in citizenship, La Forest J. recognized that,

⁷⁴ *Ibid.* at 623.

⁷⁵ *Ibid.* at 621.

⁷⁶ [1958] S.C.R. 626, 15 D.L.R. (2d) 145 [hereinafter cited to D.L.R.].

⁷⁷ *Ibid.* at 150.

⁷⁸ [1921] 62 S.C.R. 424 at 470.

⁷⁹ *Canadian Egg Marketing Association v. Richardson*, [1998] 3 S.C.R. 157.

⁸⁰ *Supra* note 63 at 620.

... economic concerns undoubtedly played a part in the constitutional entrenchment of interprovincial mobility rights, ... But citizenship, and the rights and duties that inhere in it are relevant *not only to state concerns for the proper structuring of the economy*. It defines the relationship of citizens to their country and the rights that accrue to the citizen...⁸¹

By stating that citizenship concerns are informed *not only* by economic considerations, the majority of the court implicitly recognized that state economic concerns in promoting the economic union are one of the inherent aspects of citizenship, and thus section 6, insofar as it is related to citizenship rights, is also concerned with the promotion of the Canadian economic union.

However, the Supreme Court's decision in *Canadian Egg Marketing Agency v. Richardson*⁸² in 1998 goes quite far in undermining the scope of *Skapinker* and *Black*, and demonstrates the limits to the benefits that flow from the economic union when the federal government is vested with the authority to regulate for the benefit of the union under P.O.G.G. and section 91(2). In *Canadian Egg*, producers of eggs in the Northwest Territories challenged the federal export quotas set up under the Canadian Egg Marketing Association. Acting in cooperation with the provinces, the federal government allocated quotas in 1972 to provincial egg producers based on historical production levels. Producers in the territories did not receive any quota, as at the time there were no producers of eggs within their borders. Producers alleged that the quota scheme which excluded territorial producers, violated section 2(d) freedom of association guarantees and section 6 mobility rights.

The court of first instance held that such a scheme, which had the effect of preventing anyone in the Northwest Territories from obtaining a quota for export, violated sections 2 and 6 of the Constitution. De Weerd J. of the Northwest Territories Supreme Court observed that no one who moved to the Northwest Territories could pursue a livelihood through the production and export of eggs. Hunt J.A., for the Court of Appeal, found territorial egg producers to be disadvantaged in pursuing their livelihood because, unlike egg producers in other provinces, they could never obtain quotas. Because the legislation had entirely different effects on territorial and provincial residents, it had the effect of discriminating on the basis of residence and was not saved by section 6(3). Howse, writing in 1996 after the ruling of the territorial Court of Appeal, spoke of the appeal court judgment as, "show(ing) the promise of section 6 in helping to secure the Canadian economic union."⁸³

The Supreme Court, however, in a 7-2 judgment, reversed the findings of the lower courts and held that there was no violation of sections 2 and 6. Not only did the majority find that the scheme did not violate mobility rights as characterized in *Skapinker* and *Black*, but they recharacterized the mobility

⁸¹ *Ibid.* at 612 [emphasis added].

⁸² [1998] 3 S.C.R. 157, 166 D.L.R. (4th) 1 [hereinafter cited to D.L.R.].

⁸³ R. Howse, "Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government," (Toronto: C.D. Howe Institute, 1996) at 8.

rights guarantee in a way that would appear to reject any role that it could have in furthering the economic union. According to the majority, "Section 6 is rooted in a concern with human rights, not the conditions or operation of the federal structure of Canada."⁸⁴ This is inconsistent with the interpretation of section 6 in *Black* by La Forest J. where state concerns with the proper functioning of the economy are included in the section 6 mobility guarantee.⁸⁵ Iacobucci and Bastarache JJ., writing for the majority, further stated:

It guarantees the mobility of persons, not as a feature of the economic unity of the country, but in order to further a human rights purpose. It is centred on the individual. Section 6 neither categorically guarantees nor excludes the right of an individual to move goods, services, or capital into a province without regulation operating to interfere with that movement.⁸⁶

By contrast, McLachlin J. (as she then was), in dissent, held that section 6:

has two purposes, one collective, one individual: (1) to promote the economic union among the provinces; and (2) to ensure to all Canadians one of the fundamental incidents of citizenship: the right to travel throughout the country, to choose a place of residence anywhere within its borders, and to pursue a livelihood, all without regard to provincial boundaries. These purposes are related. The individual right of citizens and permanent residents of Canada to reside and pursue the gaining of a living in any province is the private correlative of the collective interest in a unified country.⁸⁷

The majority, in attempting to discern the effects of the federal quotas on territorial inhabitants, found it best to compare their lot with provincial inhabitants who also did not possess a quota. The Court found that these two groups were essentially in the same situation, apparently ignoring the fact that provincial inhabitants wishing to begin production and export had the opportunity to purchase provincial quotas from other egg producers, while it was impossible for territorial producers ever to acquire such quotas.

This ruling has significant implications for the mobility of goods, labour and capital within the Canadian economic union. These are exemplified by the status of the two respondents, Richardson and Pineview Poultry, in *Canadian Egg*. Richardson had previously produced eggs for export in Alberta, where he continued to reside throughout the time his firm produced eggs in the Northwest Territories. However, upon locating operations in the territories, Richardson found himself unable to market his eggs interprovincially or internationally. Clearly then, this ruling interfered significantly with both capital and labour mobility. The movement of productive capital from one jurisdiction to another,

⁸⁴ *Supra* note 82 at 30. Note also that the majority placed weight on the fact that the scheme had not been enacted for a colourable or discriminatory purpose. The dissent, however, challenged this view, particularly in light of the fact that to continue the quota scheme was in the interest of the provincial producers and exporters who controlled the scheme not to allow new competitors.

⁸⁵ See *supra* note 81.

⁸⁶ *Ibid.* at 34-5.

⁸⁷ *Ibid.* at 62.

while likely resulting in increases in efficiency and a more integrated economy, is functionally forbidden by the court's endorsement of the marketing plan, while those who work in the production of eggs cannot pursue their livelihood in the Northwest Territories. Pineview Poultry Ltd., the other respondent, is wholly owned by the aboriginal people of the Dene nation. These individuals are effectively forbidden by the regulatory scheme from ever making a livelihood in the production of eggs, unless they choose to move from their ancestral home to a province where they can acquire a quota. This scheme makes it impossible, under any circumstances, for eggs produced in the Northwest Territories to cross provincial boundaries for sale in other provincial jurisdictions.

It needs to be acknowledged that the legislation in question was federal (not provincial) legislation, and by way of analogy with U.S. dormant Commerce Clause jurisprudence, one might argue that the federal government should be free to adopt or sanctify restrictions on interprovincial trade, on the grounds that it is politically accountable to both "insiders" and "outsiders". However, section 6 contains no special dispensations for federal as opposed to provincial measures constraining personal mobility, so that it is not clear that the analogy is apposite.

2) *Positive Economic Integration*

The relevant question for this analysis of the economic union is to what extent the federal government has authority to pursue positive economic integration through the legislation and regulation of uniform standards and national markets, principally pursuant to the two branches of the trade and commerce power under section 91(2) of the Constitution (the regulation of international and interprovincial trade, and the general regulation of trade affecting the whole dominion). Most of the early Supreme Court cases focussed on the first branch of the trade and commerce power. The critical question in this context is that, given that the federal government has exclusive jurisdiction over international and interprovincial trade and the provinces lack that jurisdiction, but that provinces have exclusive jurisdiction to regulate trade within a province, to what extent can the federal government regulate intraprovincial transactions as part of its efforts to regulate international or interprovincial trade without intruding upon provincial jurisdiction over transactions within a province?

The leading early cases addressing federal legislation under the regulation of interprovincial and international trade branch of the trade and commerce power are *The King v. Eastern Terminal Elevator Co.*⁸⁸ and *Attorney-General for British Columbia v. Attorney-General for Canada* ("*Natural Products Marketing*")⁸⁹ In *Eastern Terminal*, a majority of the Supreme Court struck down federal

⁸⁸ [1925] S.C.R. 434.

⁸⁹ [1936] S.C.R. 398, aff'd [1937] A.C. 377.

legislation regulating the grain trade. At issue was a provision, added in 1919, stating that surpluses in grain elevators were to go to the Wheat Board to pay for its costs, rather than accruing to the elevators. This provision was struck down notwithstanding that most of the grain was to be exported from the province. In addressing the "lurking fallacy" in the argument proposed by the federal government that the regulation of interprovincial trade may carry with it a need to regulate local forms of trade, Duff J., for the court, stated:

Obviously that is not a principle the application of which can be ruled by percentages. If it is operative when the export trade is seventy percent of the whole, it must be equally operative when that percentage is only thirty; and such a principle in truth must postulate authority in the Dominion to assume the regulation of almost any trade in the country, provided it does so by setting up a scheme embracing the local, as well as the external and interprovincial trade; and regulation of trade, according to the conception of it which governs this legislation, includes the regulation in the provinces of the occupations of those engaged in the trade, and the local establishments in which it is carried on.⁹⁰

In *Natural Products Marketing*, the Privy Council struck down federal regulations establishing a national marketing board with the power to oversee the distribution, production, grading and classification of natural products which were shown to have their principal market outside the province or that some part of the production process occurred extraprovincially. Lord Atkin held that the entire statute was invalid as it contained within its purview some transactions which were completed entirely intraprovincially. These two cases made clear that the federal government did not have the constitutional authority under section 91(2) to regulate intraprovincial transactions notwithstanding the fact that such regulations may be necessarily incidental to the furtherance of interprovincial or international trade. The degree to which the product regulated was ultimately consumed in extraprovincial markets was held to be irrelevant.

In several cases the Supreme Court has indicated a willingness to reconsider the extent to which federal legislation may impinge on provincial jurisdiction over property and civil rights. In *Re Ontario Farm Products Marketing Act*,⁹¹ four of the eight presiding judges indicated by implication that federal power would extend to some transactions which were completed within a province.⁹² In *Murphy v. C.P.R.*,⁹³ the Supreme Court upheld the validity of the federal *Canadian Wheat Board Act*. Although in that case at issue was an interprovincial transaction, in *R. v. Klassen*⁹⁴ the Manitoba Court of Appeal upheld the validity of the scheme with respect to purely local, intraprovincial works, and leave to appeal was refused by the Supreme Court.

⁹⁰ *Supra* note 88 at 447-8.

⁹¹ [1957] S.C.R. 198.

⁹² *Ibid.* at 204, 209, 231.

⁹³ [1958] S.C.R. 626.

⁹⁴ (1959), 20 D.L.R. (2d) 406 (Man. C.A.).

In *Re Agricultural Products Marketing Act*,⁹⁵ the federal marketing legislation constituting an interlocking federal-provincial egg marketing scheme was upheld. The scheme, *inter alia*, authorized the federal marketing agency to allocate federal quotas on the basis of prior production, rather than prior trade flows, to purchase and dispose of both interprovincial and intraprovincial surplus product, and to impose levies on all producers, regardless of whether their products were extraprovincially destined. The federal legislation was upheld, notwithstanding the fact that 90 per cent of all eggs produced in Canada were consumed within their province of production. The Court gave considerable weight to the fact that the scheme was agreed to by both the federal and all the provincial governments, and, as Pigeon J. held for the majority, the Act was part of "a sincere cooperative effort," and "it would really be unfortunate if this was all brought to nought."⁹⁶

However, two cases which arose prior to the incorporation of the *Charter of Rights and Freedoms* into the Canadian Constitution reinforced the position that the federal government was incapable of regulating specific trades and intraprovincial transactions for the purpose of strengthening the economic union. In *Dominion Stores v. The Queen*⁹⁷ the Supreme Court struck down Part I of federal legislation which provided for the establishment of grades and grade names for agricultural products. Part II of the act made it compulsory for goods moving in interprovincial or international trade to use the federally regulated grade names, while Part I of the act provided that if the federal grade names were used in intraprovincial trade, then the products would have to comply with the standards specified in the Act. The Court held that Part I of the Act was an unconstitutional attempt to regulate local trade, though it is clear that federal grade names could not serve their purpose of informing consumers as to the quality of the graded products if intraprovincially traded goods could use the grade names without adhering to the federal standards.

In *Labatt Breweries v. A.-G. Canada*⁹⁸ the Supreme Court held federal national product standards to be unconstitutional. At issue were the labelling requirements in the federal *Food and Drug Act* for light beer. The Act itself specified production and content requirements for dozens of food and beverage products. Laskin C.J.C., in dissent, stated that under the general regulation of trade branch of section 91(2), Parliament, "should be able to fix standards that are common to all manufacturers of foods, including beer, drugs, cosmetics, and therapeutic devices, at least to equalize competitive advantages in the carrying on of businesses concerned with such products."⁹⁹ However, the majority of the Court held that the legislation, rather than being concerned with the general regulation of trade, was merely composed of many sections aimed at the regulation of particular trades, which is *ultra vires* federal legislative authority.

⁹⁵ *Supra* note 46.

⁹⁶ *Ibid.* at 1296.

⁹⁷ [1980] 1 S.C.R. 844.

⁹⁸ [1980] 1 S.C.R. 914.

⁹⁹ *Ibid.* at 921.

Thus, on the whole, Privy Council and Supreme Court of Canada decisions prior to the introduction of the *Charter* were not conducive to the ability of the federal government to pursue positive economic integration through the creation of uniform national standards. The Supreme Court's ruling in *Eastern Terminal* strictly limited the scope of the federal trade and commerce power by denying federal legislation the ability to impinge, in a necessarily incidental manner, on provincial jurisdiction over property and civil rights. While the court had shown some inclination towards softening its original position, its rulings in *Dominion Stores* and *Labatt* showed a continued reluctance to allow the federal government to pursue positive integration of the Canadian Economic Union through nationally legislated standards, including "voluntary" standards perceived by the Court as subterfuge intended to evade the strictures of section 91(2).

However, two cases dealt with by the Court in the early 1990s, *Morguard Investments Ltd. v. De Savoye*¹⁰⁰ and *Hunt v. T&N PLC*,¹⁰¹ significantly expanded the scope of federal legislative jurisdiction to address matters which affect the economic union and promote positive integration. In *Morguard*, at issue was the recognition given by provincial courts to judgments issued by the courts of other provinces. Traditionally, the judgments of courts in other provinces on private law matters have been treated as foreign judgments. La Forest J., for a unanimous court, held that the intent of the Constitution to create a single country, and by extension an economic union, implies that the courts of one province must recognize the judgments of the courts of other provinces, so long as the latter courts had not assumed jurisdiction arbitrarily or unreasonably. According to La Forest J., a regime of mutual recognition of judgments is "inherent in a federation."¹⁰²

Additional *obiter* comments imply that the federal government may, under the Peace, Order, and Good Government provision of section 91 of the Constitution, have jurisdiction to legislate on provincial recognition of extraprovincial judgments:

The integrating character of our constitutional arrangements as they apply to interprovincial mobility is such that some writers have suggested that a "full faith and credit" clause must be read into the Constitution and that the federal Parliament is, under the "Peace, Order and Good Government" clause, empowered to legislate respecting the recognition and enforcement of judgments throughout Canada...The present case was not, however, argued on that basis, and I need not go that far.¹⁰³

While private law has historically fallen within exclusive provincial jurisdiction pursuant to section 92(13) of the Constitution, La Forest J. strongly hinted that the federal government may be able to use its residual power to constrain provincial autonomy in an effort to ensure the mutual recognition of judgments, as they are 'inherent in a federation.' This suggestion is affirmed by La Forest J. in *Hunt*,

¹⁰⁰ [1990] 3 S.C.R. 1077; 76 D.L.R. (4th) 256 [hereinafter *Morguard* cited to D.L.R.].

¹⁰¹ [1993] 4 S.C.R. 289; 109 D.L.R. (4th) 16 [hereinafter *Hunt* cited to D.L.R.].

¹⁰² *Supra* note 100 at 272.

¹⁰³ *Ibid.*

where, again writing for a unanimous court, he had the opportunity to expand on his ruling in *Morguard*. At issue in *Hunt* was a Québec statute¹⁰⁴ which prohibited "... the removal from the province of documents of business concerns in Québec that are required pursuant to judicial processes outside the province."¹⁰⁵

In relating *Morguard* to the issue of the Canadian economic union, La Forest J. stated that

It is inconceivable that in devising a scheme of union comprising a common market stretching from sea to sea, the Fathers of Confederation would have contemplated a situation where citizens would be effectively deprived of access to the ordinary courts in their jurisdiction in respect of transactions flowing from the existence of that common market. *The resultant higher transactional costs for interprovincial transactions constitute an infringement on the unity and efficiency of the Canadian market-place*, as well as unfairness to the citizen.¹⁰⁶

La Forest J. found the constitutional considerations in *Morguard* to be constitutional imperatives, and as such binding on legislatures as well as on courts.¹⁰⁷ In discussing his ruling in *Morguard*, La Forest J. stated:

I noted in *Morguard* that a number of commentators had suggested that the federal Parliament had power to legislate respecting the recognition and enforcement of judgments, and in my view that suggestion is well founded. This issue is ultimately related to the rights of the citizen, trade and commerce and other federal legislative powers, including that encompassed in the peace, order and good government clause.¹⁰⁸

Of this statement, Robert Howse¹⁰⁹ comments:

I do not think one could ever expect a clearer statement by the Court on the link between the expanded scope of the federal government's general powers and the need for harmonization of provincial laws to secure the Canadian economic union.¹¹⁰

The Court's ruling may, in the long run, have the potential to facilitate positive economic integration within the Canadian Economic Union. In the European Union, beginning with the *Cassis de Dijon* case,¹¹¹ issues similar to those raised in *Morguard* and *Hunt* ultimately led to positive integration in Europe through mutual recognition arrangements combined with regulatory criteria as a basis for recognition.¹¹² One commentator has even gone so far as to claim that,

... *Morguard* and *Hunt* ought to be relied upon in support of a general constitutional doctrine that a province is required to recognize other provincial standards unless it can demonstrate good grounds not to do so. Absent such grounds, a failure to

¹⁰⁴ The Québec Business Concerns Records Act, R.S.Q., c. D-12.

¹⁰⁵ *Supra* note 101 at 26.

¹⁰⁶ *Ibid.* at 45.

¹⁰⁷ *Ibid.* at 40.

¹⁰⁸ *Ibid.* at 42.

¹⁰⁹ *Supra* note 83.

¹¹⁰ *Ibid.* at 12.

¹¹¹ *REWE-Zentral AG v. Bundesmonopolverwaltung für Branntwein* ('*Cassis de Dijon*'), C120/78, [1979] E.C.R. 649.

¹¹² See discussion *supra* and see, e.g., D. Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, Mass.: Harvard University Press, 1995) at ch. 2.

recognize extraprovincial standards should be considered an unconstitutional barrier to interprovincial trade.¹¹³

While this interpretation appears consistent with the constitutional imperatives identified in *Morguard* and *Hunt*, it is not yet clear whether the court will adopt such a view and extend these imperatives to the positive integration of regulatory standards. Patrick Monahan,¹¹⁴ however, comments that, "in *Hunt*, Mr. Justice La Forest effectively recognizes that Parliament may, pursuant to the POGG power, enact legislation providing for the free movement of persons or for the enhancement of the economic union."¹¹⁵

As discussed above, both *Crown Zellerbach*¹¹⁶ and *General Motors*¹¹⁷ have also significantly expanded the legislative authority of the federal government to address issues of national concern, including promoting a more integrated economic union by means of the national concern branch of P.O.&G.G. and the trade and commerce power, respectively. The Supreme Court, in *Crown Zellerbach*, found in a 4-3 decision that federal legislation¹¹⁸ which regulated the dumping of substances in marine waters, including intraprovincial marine waters, was *intra vires* Parliament's legislative jurisdiction as a single matter of national concern, pursuant to the national concern branch of the federal P.O.&G.G. power. While matters directly related to the economic union were not directly addressed in *Crown Zellerbach*, the court's interpretation of the national concern doctrine has significant potential to expand the scope of federal legislative authority to deal with matters affecting the economic union. LeDain J., for the majority, commented that:

[for] a matter to qualify as a matter of national concern ... it must have a singleness, distinctiveness, and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.¹¹⁹

In addition, as discussed above, LeDain J.'s emphasis on viewing provincial inability as *effective* inability rather than constitutional incapacity, going so far as to regard provincial failure to co-operate as provincial inability, may significantly expand the national concern doctrine insofar as it affects the economic union.

In *General Motors*, the Court recharacterized federal competition policy as a matter falling under the general trade and commerce branch of section 91(2).

¹¹³ G. Vegh, "The Characterization of Barriers to Interprovincial Trade Under the Canadian Constitution" (1996), 34 Osg. Hall L. J. 355 at 399.

¹¹⁴ *Supra* note 15.

¹¹⁵ *Ibid.* at 245.

¹¹⁶ *Supra* note 11.

¹¹⁷ *Supra* note 16.

¹¹⁸ Ocean Control Dumping Act, S.C. 1974-75-76, c. 55.

¹¹⁹ *Supra* note 11 at 432.

At issue in the case was section 31.1 of the *Combines Investigations Act*¹²⁰ (now section 36 of the *Competition Act 1986*), which created a civil cause of action for certain infractions of the Act. As noted above, Dickson C.J.C., writing for a unanimous court, elaborated five indicia to be used in determining whether a federal regulatory scheme is valid as a general regulation of trade affecting the whole dominion.¹²¹

The fourth and fifth criteria (provincial incapacity and the effects on other provinces of one province's failure to cooperate, respectively) appear closely analogous to the provincial inability test outlined in *Crown Zellerbach*. Dickson C.J.C. commented that "competition cannot be *effectively* regulated unless it is regulated nationally."¹²² Monahan has noted that Dickson C.J.C., in applying the final two indicia, focussed on the need to ensure that the federal law was effective, rather than focussing on whether a particular matter could be regulated piecemeal by the provinces.¹²³ This appears to have significant implications for economic union issues, as determining whether federal regulation falls within section 91(2) requires the court to determine whether the purpose of the federal legislation can be achieved in the absence of provincial co-operation, rather than whether the provinces are constitutionally capable of enacting necessary aspects of the regulations.

What, then, are the implications of *Crown Zellerbach* and *General Motors* for the Canadian economic union? Howse comments that:

[b]oth *Crown Zellerbach* and *General Motors* clearly afford the federal government some scope to sustain constitutionally harmonizing regulation that impinges on areas of provincial jurisdiction, whether in *consumer protection*, environment, or *financial services*.¹²⁴

According to Monahan, the *General Motors* test, "would appear to establish a strong constitutional basis for the establishment of a national securities commission."¹²⁵ He notes that federal securities regulation would clearly pass the first two criteria established in *General Motors*, and that securities regulation is concerned with the capital raising function of the securities market in general rather than any particular trade (although it would, admittedly, involve regulation of securities firms). It has often been argued that a uniform national securities regime is desirable in an increasingly international market for securities, and that federal regulation would be ineffective if restricted to interprovincial and international securities transactions.

¹²⁰ R.S.C. 1970, c. C-23.

¹²¹ *Supra* note 16 at 661-2.

¹²² *Ibid.* at 680.

¹²³ *Supra* note 15 at 263.

¹²⁴ *Supra* note 83 at 12 [emphasis added].

¹²⁵ *Supra* note 15 at 263-4.

Conclusion

David Beatty¹²⁶ argues persuasively that the Supreme Court has shown increasing sophistication and adeptness in division of power cases in balancing the co-equal political autonomy of national and provincial levels of governments necessarily implicit in a federal system. According to Beatty, the Court has done this by implicitly drawing on notions of proportionality in evaluating policy objectives of challenged legislation or regulatory action in terms of respecting the political autonomy of both levels of government in areas of overlapping jurisdictions, while applying notions of rationality (least drastic means or minimal impairment) to choices of policy instruments to vindicate legitimate policy objectives that incidentally entail incursions into the constitutional jurisdiction of other levels of government. This is perhaps most evident in the recent positive integration case law relating to permissible spheres of federal government action. Perhaps surprisingly, it is less evident in the negative integration case law (as exemplified by the recent decision of the Supreme Court in *Canadian Egg*), given that negative integration is conventionally regarded as the more modest and more readily realized form of economic integration than positive integration. The Court's negative integration case-law seems much more equivocal, contradictory, and less well-developed than the counter-part body of U.S. Supreme Court Dormant Commerce Clause jurisprudence (recognizing that the latter presents some of its own set of inconsistencies) or for that matter with the National Treatment jurisprudence developed under the GATT/WTO. Even the recent positive integration case-law, including the scope of the federal government's external treaty-making powers, while signalling a willingness on the part of the Court to re-evaluate the legitimate scope of federal initiatives of this kind, leaves open many unresolved uncertainties to the permissible scope of federal action and is again much less well-developed than U.S. positive trade and commerce power jurisprudence. However, recognizing the delicate balance that must be maintained between federal and provincial political autonomy in the Canadian federal system (more delicate in important respects than in the U.S. federal system), one can recognize virtues in judicial incrementalism, or as Cass Sunstein has recently put it "one case at a time"¹²⁷, or as Charles Lindblom puts it, "the Science of Muddling Through."¹²⁸

IV. The Agreement on Internal Trade

The Agreement on Internal Trade (AIT) was signed by all ten provinces, the federal government and the two territories of Canada on July 18, 1994, and officially took effect almost one year later on July 1, 1995. The principal goal

¹²⁶ D. Beatty, *Constitutional Law in Theory and Practice*, chap. 2 (Division of Powers), (University of Toronto Press, 1995).

¹²⁷ C. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, (Harv. University Press, 1999).

¹²⁸ C. Lindblom, "The Science of Muddling Through," (1959) 19 Pub. Admin. Rev. 79.

of the AIT is articulated in Article 100 of the agreement: "It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market." The objective of the AIT is an important one in light of the significant (albeit not overwhelming) estimated welfare costs of interprovincial barriers to trade. In effect, the AIT represented an institutional by-passing of the existing constitutional and judicial framework for protecting the Canadian Economic Union. Although the AIT has not *de jure* displaced the courts in matters concerning the economic union, its aspiration is to provide a more accessible and effective forum in which interprovincial trade disputes – especially those that have heretofore been deemed to fall outside constitutional constraints – can be resolved. Five years from the implementation of the AIT, two basic and related questions have arisen regarding the Agreement and the Canadian Economic Union. To what extent has the AIT met its objective of reducing interprovincial barriers to trade, thereby creating a more open, efficient and stable domestic market; and, how well can we expect it to do in the future?

The discussion is organized in five parts. First, it briefly reviews the attempts to constitutionally entrench the free mobility of goods, services, labour and capital that led to the genesis of the AIT. Second, it provides a brief overview of the content of the Agreement in terms of negative and positive integration. Third, it provides a description of the institutional framework of the AIT including a brief description of the main features of the dispute resolution process. Fourth, it discusses the record of the AIT in resolving actual trade disputes over its first five years. Finally and most importantly, it evaluates how well the AIT has performed its stated objective of reducing barriers to internal trade and how effective we can expect the Agreement to be in the future.

a) *The Genesis of the AIT through Constitutional Initiatives*

As noted above, section 121 of the *Constitution Act*¹²⁹ states that: "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." Section 121 has been understood by the Supreme Court of Canada¹³⁰ to have constitutionally entrenched the free mobility of goods within the country without hindrance from tariffs or similar explicit protectionist measures. Although the freedom of goods from tariffs is indubitably a *necessary* element of a strong economic union, the *Constitution Act* leaves much to be desired because the guarantee of the free mobility of goods is not a *sufficient* condition for a strong economic union. A cohesive, seamless and efficient economic union requires the unambiguous establishment of four fundamental economic freedoms – the free mobility of goods, services, labour and capital.

¹²⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter, *Constitution Act*].

¹³⁰ See, for example, *Gold Seal*, *supra* note 55 and *Murphy*, *supra* note 59.

The ontological rationale of the Canadian AIT is interesting from a comparative law perspective. To observers from other federal countries including the United States, Australia and Germany, the AIT must *prima facie* appear to be an example of superfluous politicking or simply an overly rigorous mechanism for developing an economic union. The guarantee of economic union in the United States, Australia and virtually every other federation has been explicitly recognized in the constitution or has been *de facto* accomplished through the constitutional division of powers. For example, an agreement similar to the AIT is patently unnecessary in the United States because of the existence and operation of the dormant Commerce Clause, and the expansive view taken by the courts of the affirmative scope of the federal government's trade and commerce power. Under the dormant Commerce Clause, any State legislation or regulation that has the effect of unduly interfering with interstate trade is unconstitutional. Similarly, Australia has no need for an internal trade agreement, largely because all of the functions of the AIT are implicit in the division of powers between the Australian provinces and the Australian federal government. According to William Rich, "In the context of limiting state economic regulation the Supreme Court holds to its position that the [United States] Constitution implies a prohibition against protectionist discrimination. Australia uses the same test, the High Court noting that even laws with general application may be ruled unconstitutional if they have a protectionist character."¹³¹ The constitutional arrangements initially adopted by Canada (as interpreted by the Judicial Committee of the Privy Council and the Supreme Court) did not facilitate the full attainment of true economic union. Because of this failure, several attempts have been made to strengthen the constitutional foundations of Canada's economic union. Although none of these initiatives eventually proved to be successful, they did ultimately lead to the negotiation and adoption of the AIT.

The first attempt to secure constitutionally the guarantee of a full economic union occurred during the reform deliberations prior to the patriation of the Constitution by the *Constitution Act* in 1982. At this point, there was already an awareness among policy makers that economic mobility within Canada was incomplete and was imposing significant welfare costs on many of the nation's businesses and residents.¹³² During these discussions an alternative, strengthened reformulation of section 121 was proposed by the federal government. The proposed reformulation of section 121 would have extended the reach of section 121 to the full mobility of goods, services, labour and capital from the guarantee of the free movement of goods without hindrance from tariffs or like restrictions.

¹³¹ W. Rich, "Constitutional Law in the United States and Australia: Finding Common Ground" (1995) 35 Wash. L.J. 1 at 9.

¹³² This awareness was largely the result of several important studies that indicated the extent that barriers to internal trade were compromising the Canadian economic union. See, for example, J. Chrétien, *Securing the Canadian Economic Union in the Constitution* (Ottawa: Supply and Services Canada, 1980); A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa: Privy Council Office, 1974) and A.E. Safarian, *Ten Markets or One? Regional Barriers to Economic Activity in Canada* (Toronto: Ontario Economic Council, 1980).

However, the proposed amendment to section 121 was soundly rejected with nine of the ten provinces refusing to endorse the reformulated section 121 on the grounds that it added considerably to the powers of the federal government while commensurably eroding the constitutional powers of the provinces.¹³³ One aspect of further economic freedom did make its way into the patriation and amendment process of 1982. A guarantee of personal mobility and the right to gain a livelihood anywhere in Canada was added to the *Constitution Act* by virtue of section 6 of the *Charter of Rights and Freedoms*. Thus, in 1982, the economic mobility of labour was added to the partial constitutional guarantee of the free mobility of goods within Canada.

The Charlottetown Accord of 1992 gave Canadians another opportunity to guarantee constitutionally the full economic freedom of goods, services, labour and capital within Canada. In a study paper entitled *Shaping Canada's Future Together*,¹³⁴ the federal government again proposed an amended section 121, quite similar to the one that was proposed (and subsequently abandoned) at the Constitutional Conference of 1980. The newly proposed section 121 guaranteed the negative economic integration of Canadian markets by making any artificial economic barriers to goods, services, labour and capital unconstitutional. However, the proposed section 121 did not contain any assurance of "positive integration" – that is, the proactive harmonization of provincial policies and standards in the pursuit of reduced interprovincial frictions in the flow of economic factors of production and final goods and services. The federal government recommended it be accountable for initiatives related to positive integration. Consequently, the federal government proposed another amendment to the *Constitution Act* – known as section 91A – that would have given the federal government the power to legislate the harmonization of standards or take any other legislative measure designed to increase the efficiency of the operation of the economic union. A proviso was attached to this proposal that the federal government could only implement legislation under the proposed section 91A with the support of at least seven provinces that represented at least 50 percent of the population (the seven-and-fifty rule).

The federal proposals with regard to the economic union, among others, were considered by the Dobbie-Beaudoin Committee (a joint, all-party committee of the House of Commons and the Senate) during public hearings across the country that were designed to gauge public opinion and allow input from citizens on the constitutional amendment process. In its subsequent report, the Dobbie-Beaudoin Committee recommended that a weakened

¹³³ For the text of the federally proposed reformulation of section 121 and an account of its rejection, see R. Howse, *Economic Union, Social Justice and Constitutional Reform: Towards a High but Level Playing Field* (North York, Ontario: York University Centre for Public Law and Public Policy, 1992) at 61-72.

¹³⁴ Canada, Privy Council, *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services Canada, 1991).

version¹³⁵ of the proposed section 121 be included, but that no section 91A be incorporated into the amendments proposed in the Charlottetown Accord. The impact of this recommendation was that negative integration initiative was encouraged, but that the initiative to positively integrate the economic union was not. Ultimately, the Charlottetown Accord did not include either a weakened section 121 or the proposed section 91A, largely as a result of criticisms that a weak constitutional entrenchment would be more damaging to the economic union than no amendment at all.

Although the Charlottetown Accord was soundly defeated by referendum on October 26, 1992, it did propose a "political accord" that informally survived the referendum rejection and set much of the groundwork for the subsequent AIT negotiations. The discussions that grew out of this political accord were begun in earnest in March 1993 by the then Minister of International Trade, Michael Wilson, with the goal of negotiating a non-constitutional agreement regarding the increased facilitation of internal trade. At that time, a deadline of June 30, 1994 was set for the successful completion of deliberations. Out of these negotiations, the AIT was concluded.

b) *The Content and Integrative Potential of the AIT*

The AIT is a very complex agreement because it balances the interests of thirteen separate governments and is the product of separately negotiated chapters on a broad range of trade areas. As evidence of this complexity the most recent consolidation of the Agreement prepared by the Internal Trade Secretariat is 252 pages long.¹³⁶ The Agreement's specific provisions cover procurement practices, investment, labour mobility, consumer-related measures and standards, agricultural and food goods, alcoholic beverages, natural resources processing, energy (not yet incorporated), communications, transportation, and environmental protection. The provisions of each of these chapters to the Agreement can be conceived of as being on a continuum between requiring partial negative integration (i.e. the reduction in explicit barriers to trade) and requiring proactive positive integration (i.e. the harmonization of regulatory standards).

The Agreement's procurement practices provisions emphasize negative integration through Article 504 by prohibiting various procurement practices that explicitly or implicitly discriminate between suppliers in different parts of

¹³⁵ This weakened version of section 121 would have retained many permissible areas in which trade barriers could escape scrutiny. For instance, legislation regarding, *inter alia*, regional development, public security, safety or health, consumer protection, the protection of the environment, and strangely, the establishment and maintenance of monopolies all would have been exempt. For the text of this weakened version of section 121 proposed by the Dobbie-Beaudoin Committee, see Trebilcock & Behboodi, "The Canadian Agreement on Internal Trade: Retrospect and Prospects", *supra* note 34 at 29-30.

¹³⁶ See Internal Trade Secretariat, *A Consolidation of the Agreement on Internal Trade* (July 1999), online: <http://www.intrasec.mb.ca/pdf/consol_e1.pdf>.

the country. Because of the discrete, contractual nature of procurement and the wide array of public bodies covered by the Agreement, there would likely be little or no value associated with reconciling the procurement practices of the provinces and the federal government. It is no surprise, then, that the Agreement does not demand positive integration in procurement practices. The investment chapter also emphasizes negative integration, but in addition prescribes positive integration through the harmonization of corporate registration and reporting requirements under Article 606 and Annex 606. The labour mobility chapter also incorporates both negative and positive integration initiatives. Negative integration with regard to labour mobility is encouraged by the proscription of residency requirements by Article 706 for employment, licensing, certification or eligibility for occupational status. Positive integration in labour mobility is incorporated into the Agreement under Articles 707 and 708, which calls for the mutual recognition of occupational standards of other jurisdictions and the reconciliation of differences in standards. The Agreement's treatment of consumer-related measures and standards contains both negative and positive integration aspects. Negative integration is encouraged by Articles 805 and 806, which mandate that all license, registration and certification fees be equalized between all applicants (although fees may differ if they are based on underlying cost differences), and that residency cannot be made a condition for licensing, registering or certification. Article 807 entails positive integration in that it requires the harmonization and reconciliation of consumer-related measures and standards to "a high and effective level of consumer protection." Agricultural and food goods are subject only to negative integration provisions. Articles 904 and 905 call for the reduction of current barriers and a prohibition on the erection of explicit or implicit trade barriers. The alcoholic beverages chapter contains measures related to both positive and negative integration. Articles 1004 and 1005 call for non-differential treatment of alcoholic beverages from all areas of the country. Article 1007 promotes positive integration through the reconciliation and harmonization of labelling and packaging regulations. The provisions covering natural resources processing are intended to promote both negative and positive integration. Article 1103 allows any party to the Agreement to initiate consultations with any other party to discuss any barrier to the trade in natural resources processing and negotiate for the removal of such barriers. Article 1105 explicitly demands the reconciliation of measures that have an impact on the interprovincial trade in natural resources processing. The energy chapter was left blank in the original Agreement and has not yet completed. According to Daniel Schwanen, the chapter "has apparently been drafted, but disagreement over allowing exceptions to the non-discrimination rule for the purpose of regional development is holding up its adoption."¹³⁷ The provisions of the communications chapter primarily entail negative integration. Under Article 1302 no province is allowed to discriminate in allowing parties to access and use public telecommunications networks. Article 1304 requires that all monopolies supported or maintained by any party to the Agreement not

¹³⁷ D. Schwanen, "Happy Birthday, AIT!" (July 2000) Policy Options 51 at 52.

engage in conduct that is anti-competitive in a way that affects detrimentally another party. The transportation chapter is the one in which the greatest degree of positive integration is required of the parties to the Agreement. Articles 1402, 1406, 1407 and 1408 make clear that the objective in the transportation sector is full harmonization and the reconciliation of all regional differences in policies, standards and regulations and the elimination of all explicit barriers to interprovincial transportation. The final sector specific chapter deals with environmental protection. The environmental protection provisions have aspects of both negative and positive integration. For instance, negative integration is furthered by Article 1505(7), which states clearly that any environmentally motivated regulation must not be more trade restrictive than is necessary to meet the environmental objective. Positive integration is supported by Article 1508, which demands the harmonization of any environmental measures that may directly affect interprovincial mobility and trade.

Some of the chapters, such as those on procurement practices and agricultural and food goods, concentrate on negative integration. Other chapters, such as those on transportation and consumer protection, call for a high degree of standardization and positive integration of policies and standards nationwide. All else the same, it has been and will be much easier for negative integration to occur than positive integration. Negative integration requires the independent dismantling of trade barriers by each party to the Agreement, whereas positive integration will require proactive and constructive commitments. There are two ways in which positive integration can occur. First, the provinces can reach unanimous agreement in each of the areas in which positive integration is prescribed and proceed based on the consensus reached. Second, the federal government, perhaps under the authority of the trade and commerce power, section 91(2), could ask for submissions from each of the provincial governments and unilaterally legislate the harmonization of standards. Unfortunately, positive integration has thus far proven to be a slow moving process. Given the difficulty of achieving agreement among ten provinces, the more effective route for achieving harmonization may be through federal leadership and unifying federal legislation (assuming it has constitutional jurisdiction, as discussed in Part III of this paper). A credible threat of unilateral federal action may have been part of the initial impetus for the negotiation of the AIT and it may yet prove a spur to ongoing cooperation among the provinces under the AIT.

c) *The Institutional Features of the AIT*

The AIT negotiations resembled those leading up to the GATT/WTO and NAFTA in two primary ways. First, the negotiations were highly complex, involved many different policy areas, and tradeoffs between governments often occurred across several policy areas. Second, the negotiating governments tended to act as completely sovereign parties even though all of the governments are part of Canada. Advocates of wide provincial jurisdiction and autonomy

applauded this aspect of the negotiations. For instance, the Québec premier at the time, Pierre-Marc Johnson, remarked that the negotiation of the AIT was a "perfect illustration of how federalism should work."¹³⁸ Not surprisingly given these two features of the negotiations, the institutional structure and dispute resolution mechanism that resulted from the AIT negotiations are remarkably similar to those of the WTO and NAFTA Agreements.¹³⁹

The AIT makes provision for three institutional bodies. The first and most important of these is the Committee on Internal Trade (CIT), established by Article 1600 of the Agreement. The CIT is composed of cabinet level representatives from each of the federal, provincial, and territorial signatory¹⁴⁰ governments. Its functions include facilitating the implementation of the AIT, reaching full consensus on decisions and recommendations with respect to the ongoing operation of the AIT and determining the practices and procedures by which the Committee itself will operate. The CIT is also responsible for preparing an annual report on the operation and functionality of the AIT. The CIT makes decisions on a unanimity basis. The second of the institutional bodies, constituted by Article 1602 of the AIT, is known as the Working Group on Adjustment (WGA). The WGA has responsibility for reporting on the effects of the AIT on each province each fiscal year and makes recommendations to the CIT regarding ways in which parties can further adjust policies and procedures to better accommodate the effects of the AIT. It is envisioned that the WGA will not be needed beyond April, 2006, at which point it will be disbanded. The last of the institutional bodies established by the AIT in Article 1603 is the Internal Trade Secretariat (ITS). The Secretariat is centred in Winnipeg and was established to provide administrative and operational support to the ongoing functions of the CIT.

More important than the specific institutional arrangements that support the Agreement is the dispute resolution mechanism that the AIT incorporates. The dispute resolution scheme of the AIT has six stages. The first stage of any potential trade dispute must include an attempt to settle the complaint through an informal dispute resolution and avoidance procedure. The precise nature of this first stage is in part dependent upon the particular chapter of the AIT under which the dispute has arisen. The second stage of the dispute resolution process involves consultations. This is the first general dispute resolution stage. The parties may request either direct consultations between themselves or trigger more formal dispute resolution procedures. The third stage invokes the first

¹³⁸ Quoted in G.B. Doern and M. MacDonald, *Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade* (Toronto: University of Toronto Press, 1999) at 26.

¹³⁹ For a comparison of the AIT with the NAFTA and WTO agreements, see E.W. Clendenning & R.J. Clendenning, "A Comparative Study of the Structure, General Rules, Dispute Settlement Mechanisms and Sectoral Provisions of the Agreement on Internal Trade (AIT) with those of the NAFTA and WTO Agreements" (March 1999) Industry Canada, online: <<http://strategis.ic.gc.ca/SSG/SSG/il00038e.html>>.

¹⁴⁰ Note that as of July 2000, Nunavut has not yet become a signatory to the AIT.

direct involvement by the CIT in the dispute. At this point the CIT "must convene to assist the Parties, through seeking technical advice, establishing working groups, facilitating the use of conciliation, mediation and other dispute resolution mechanisms, and making recommendations."¹⁴¹ If this third stage is unsuccessful in yielding a resolution to the dispute, a request for a panel can be made by either party. An AIT panel is composed of five members, two of whom are appointed from the roster of panelists by each party (with the stipulation that the two members of the roster appointed by each party to the dispute at hand were not named initially to the roster by the naming party). Within ten days of their appointment, the four panelists select a fifth member from the roster to serve as the panel chairperson. At the fifth stage hearings are conducted by the panel, and within 45 days from the conclusion of the hearings the panel must present their findings to the CIT as to whether or not the impugned policy or conduct is inconsistent with the AIT, and if necessary, the measures recommended to bring the party's conduct into conformance with the AIT. The sixth stage involves the implementation of the panel's decision. Within 60 days of the panel's report, the parties must arrive at a mutually agreeable resolution to the dispute. If this does not occur, then the Secretariat will make the panel report public and will add the dispute to the agenda of the next meeting of the CIT. If after one year the panel's decision has still not been implemented, then the deprivation of benefits or retaliatory measures (only as approved by the CIT) of equal consequence may be taken by the non-offending party against the offending party until the dispute has been resolved.

This dispute resolution mechanism is peculiar in at least one respect from an international perspective – that is, as compared to the those of GATT/WTO and NAFTA – in that an individual person or business may, under certain circumstances, proceed as complainant against a government that is party to the agreement without the explicit support of any of the governmental parties to the agreement. A person or business must first petition a government with which they have a "substantial and direct connection" to initiate proceedings on their behalf. Within 30 days the government must decide whether or not it will actually initiate proceedings on behalf of the petitioner. If the government decides not to proceed with a complaint on behalf of the petitioner, the petitioner may make a further appeal for the consideration of the complaint by an independent third-party screener previously appointed by the petitioned government. If the independent screener decides that the complaint is not frivolous, then the person or business may themselves commence proceedings against the allegedly offending party. At this point, the remaining stages of the dispute resolution process are the same as they would be if the complainant was a government. The two main remaining differences are that an individual person or business cannot take retaliatory action against a government and that a panel may award a successful individual person or business the costs of engaging in the proceedings (within prescribed limits).

¹⁴¹ Clendenning & Clendenning, *supra* note 139 at 4.

d) *The Current Record of the AIT*

In the five years since the AIT first came into effect, the dispute settlement mechanism has been initiated 84 times – with a relatively constant complaint load per year.¹⁴² Thus far, 78 of these disputes have been resolved. The vast majority (62) of these complaints have involved procurement – 57 were complaints related to provincial and 5 to federal government procurement practices. The remaining complaints consisted of 14 in regard to labour mobility, four regarding agricultural issues, one with respect to investment, one with regard to environmental protection, and two with respect to alcoholic beverages. According to the Internal Trade Secretariat, the average time from the initiation of the dispute resolution procedure to disposition for these 84 complaints has been 4.7 months. The trend in the time to disposition has been decreasing steadily since the implementation of the AIT. In the first year of the AIT, the average time to disposition of the 16 disputes initiated was 6.1 months. In the most recent 1999/2000 year, the time to disposition was nearly halved to a relatively expeditious 3.6 months.¹⁴³

Notably, only two of the 78 disputes that have been settled so far have been resolved by panel decisions. The other 76 were settled at an earlier stage of the dispute settlement mechanism. This is a promising result for two main reasons. First, negotiated settlements are usually superior for both the complainant and the defendant because they can arrive at a tailor-made remedy that may suit each of their needs better than even the most well-informed panel decision could hope to do. In addition, it indicates that the AIT dispute resolution process is considered to be fair, legitimate and conclusive by the participants. If it were otherwise, parties would simply engage in whatever type of protectionist behaviour they wanted and disregard the dispute settlement process. That parties are not inclined to simply ignore the AIT dispute settlement process is encouraging.¹⁴⁴

¹⁴² The 1996-97 year witnessed the lowest number of initiated disputes with only 12. The most active year thus far has been the 1998-99 year, when the dispute settlement mechanism was initiated a total of 22 times. For a summary of the AIT dispute settlement mechanism statistics, see Internal Trade Secretariat, "Number and Status of Complaints Since Coming-Into-Force" (April 6, 2000), online: at <<http://www.intrasec.mb.ca/eng/tablesum.htm>>.

¹⁴³ Note that the decrease in the average time to disposition is biased downward for the last three years, so that the actual drop in time to disposition has been overstated. The root of this bias is that there are still six disputes outstanding that are still "on the clock" that will increase the averages for the last three years when they are resolved. There is one outstanding dispute from 1997-98, two from 1998-99 and three outstanding disputes from the 1999-2000 year.

¹⁴⁴ For early discussions regarding potential concerns about the fact that panel decisions are not enforceable in court because of the political nature of the AIT, see R. Howse, *Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government* (Toronto: C.D. Howe Institute, 1996) & K. Swinton, "Law, Politics, and the Enforcement of the Agreement on Internal Trade" in *Getting There: An Assessment of the Agreement on Internal Trade*, Trebilcock and Schwanen, eds., (Toronto: C.D. Howe Institute, 1995) 196.

Of the two panel decisions so far concluded, the most recent panel report, released on January 18, 2000, held that Prince Edward Island could not attach a restrictive provision to a license for the distribution of milk products to the effect that the licensee could not import milk products from Nova Scotia to Prince Edward Island.¹⁴⁵ This case was a relatively straightforward one doctrinally, since the Prince Edward Island government did not make any claim that the dairy products imported from Nova Scotia posed any health, safety or consumer protection concerns, admitted that the regulation had a protectionist character, and did not allege that the impugned regulation was made in the pursuit of any of the legitimate objectives identified by the AIT.

The dispute adjudicated by the first panel, on the other hand, raised more complex issues. The panel's report, released on June 12, 1998, held that the federal government could not prohibit the interprovincial trade in the fuel additive MMT based on health, environmental and consumer protection concerns, largely because, in the opinion of the panel, means of achieving the same objective were available that did not impact as adversely on trade as the means selected by the federal government. The impugned Act in the dispute prohibited the importation or interprovincial trade of MMT, allegedly on the basis that MMT had the potential to interfere with the operation of on-board diagnostic equipment in automobiles (the consumer protection aspect) and increase smog in urban areas (the health and environmental protection aspects). The panel concluded that establishing tradeable permits for MMT, introducing higher taxes on MMT, or directly regulating MMT under section 46 of the *Canadian Environmental Protection Act* would have been as effective as the initiative taken, were reasonably available and would not have had such deleterious effects on trade as the implemented Act. The panel articulated its views on the role of the AIT in the dispute as follows: "Not all measures that eliminate MMT are equally trade restrictive. The intention of the [AIT] is to limit the use of trade restrictions to achieve other objectives, rather than [limit the pursuit of] the objectives themselves."¹⁴⁶ In the US, in the context of the dormant Commerce Clause and especially in international dispute settlement by the GATT/WTO, concerns have arisen regarding the legitimacy of this kind of oversight exercised by quasi-judicial bodies.

In a recent paper, Trebilcock and Soloway argue that the WTO Dispute Settlement Body should assume a deferential stance toward professed legitimate consumer, health and environmental protection measures adopted by member countries even where these measures have an adverse impact on trade.¹⁴⁷ In essence, they argue that

¹⁴⁵ Report of the Article 1704 Panel Concerning a Dispute between Nova Scotia and Prince Edward Island Regarding Amendments to *The Dairy Industry Act Regulations*, Internal Trade Secretariat, File No. 98/99-9-FCD-PEI-P031.

¹⁴⁶ Report of the Article 1704 Panel Concerning a Dispute Between Alberta and Canada Regarding the *Manganese-Based Fuel Additives Act*, Internal Trade Secretariat, File No. 97/98-15-MMT-P058 at 10.

¹⁴⁷ M.J. Trebilcock & J. Soloway, "International Trade Policy and Domestic Food Safety Regulation: The Case for Substantial Deference by the WTO Dispute Settlement Body Under the SPS Agreement" (Working Paper, University of Toronto, Faculty of Law, September 2000).

the WTO oversteps the bounds of its technical and political legitimacy when it makes decisions regarding the proper scope of legislation that is enacted in reaction to a perceived threat to the health of its citizens, the environment or consumer protection, but has an adverse impact on trade. Only when there is a legislative alternative that is less trade restrictive and is at least as effective as the impugned legislation in meeting the environmental, health or consumer protection objective, should the WTO find that the measures taken are in violation of the WTO agreement.

A strict reading of the AIT reveals that by virtue of Article 404, the Agreement explicitly adopts almost precisely this stance with regard to the pursuit of legitimate health, environmental or consumer protection objectives. According to Article 404, an otherwise invalid measure may be acceptable, so long as it meets four criteria. Specifically, for an otherwise invalid measure to be substantiated under Article 404:

- the purpose of the measure is to achieve a legitimate objective;
- the measure does not operate to impair unduly, the access of persons, goods, services or investments of a Party that meet the legitimate objective;
- the measure is not more trade restrictive than necessary to meet the objective; and
- the measure does not create a disguised restriction on trade.

Under Article 200, “legitimate objective” is defined as follows:

- (a) public security and safety;
- (b) public order;
- (c) protection of human, animal or plant life or health;
- (d) protection of the environment;
- (e) consumer protection;
- (f) protection of the health, safety and well-being of workers; or
- (g) affirmative action programs for disadvantaged groups;

considering, among other things and where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification. Except as otherwise provided, “legitimate objective” does not include protection of the production of a Party or, in the case of the Federal Government, favouring the production of a Province. If these four criteria are met, then measures taken are allowable notwithstanding the fact that they may otherwise have been invalid because of their impairment of economic mobility. There is no explicit mention of any tradeoff analysis being undertaken under Article 404. By a strict reading of the text of the provision, it appears that if highly trade restrictive measures are necessary to meet a legitimate objective then such necessary measures may be taken. The difficulty with this strict understanding of Article 404 is, of course, in the subtleties underlying the determination of what a legitimate objective is, and the indeterminacy associated with deciding what is truly necessary to meet an acceptable legitimate objective. The balancing and tradeoffs that occur in this determination in the context of the AIT are not altogether different from the balancing that occurs in the context of, for example, section 1 of the *Charter*. The AIT explicitly recognizes that the removal of trade barriers is not the only relevant consideration to determining

the legitimacy of legislation. With regard to this tradeoff analysis, Daniel Schwanen has said:

I believe that this allowance in the AIT for very explicit and transparent tradeoffs between, on the one hand, the benefits stemming from the removal of unnecessary trade barriers and non-discriminatory treatment in the marketplace and, on the other hand, the legitimate objectives of all governments, is one of the agreement's most important features, and that its application deserves to be closely monitored. Over the next few years, it may well be perceived as a substantial and original Canadian contribution to the increasingly pressing problem of finding the proper balance between well-established trade agreements and other policies of national and international importance.¹⁴⁸

e) *The Long-term Potential for the AIT*

The AIT represented a significant step forward in federalism and the Canadian Economic Union by demonstrating the existence of a common commitment amongst all Canadian governments to removing trade barriers, making procurement practices more transparent and competitive, and to creating a more integrated, efficient Canadian market. Despite this positive symbolism, however, it is important to remain cognizant of the fact that, unlike the failed attempts to entrench economic freedoms in the Constitution, even though the AIT is a multiparty agreement with a clear dispute resolution mechanism and was the product of joint decision making, the Agreement is not enforceable by the courts, and a party can only engage in trade retaliation when more than a year has lapsed since a panel decision in the party's favour and they have the unanimous support of the CIT (including the non-compliant government) – a rule that the WTO has now abandoned in its dispute settlement process, where only a consensus of members favouring rejection of a panel's findings (including the winning party) will lead to the non-adoption of panel or Appellate Body decisions.

From its inception, the AIT has faced criticism from business persons and academics alike that the eventual importance and reach of the AIT in the Canadian Economic Union may turn out to be rather insignificant. Many of these concerns surround the extensive list of matters that were and are exempt from the agreement. Article 404, for example, makes provision for the pursuit of "legitimate objectives" that can excuse a province or the federal government from the valuable trade facilitating provisions of the Agreement. As a further example, Article 1801 allows trade discriminatory "regional development" initiatives, provided that they are reported to all of the parties. Armand de Mestral argues that "throughout the text [of the AIT], the obligations, with the two exceptions of procurement and some of the articles on investment, are meaningless and involve no serious commitment whatsoever by the parties." Thus, of the 84 complaints registered so far, 62 (nearly three quarters) have involved allegedly infringing procurement practices. However, some of the early criticisms regarding the wide range of exceptions to the AIT have been mitigated. For example, the exemption of the MASH (municipalities,

¹⁴⁸ Schwanen, *supra* note 132 at 54.

academic institutions, school boards and health and social service entities) sector from the procurement practices chapter, which was an early source of criticism, has come to an end. With the third protocol of amendment that came into force on April 17, 1999, the MASH sector has been incorporated into the agreement on procurement practices and must now abide by the same rules as governments do directly.¹⁴⁹

Another set of concerns surrounds the fact that many Canadians are not aware of the existence of the agreement.¹⁵⁰ It surely has vastly lower name recognition among Canadians than the FTA, NAFTA, the WTO and the EU. This ignorance is problematic for several reasons, but it is probably most problematic in the repercussions it has for the scope of use of the AIT by private persons and businesses (or their government on their behalf). Although the AIT makes provision for individuals to challenge policies of parties to the agreement that they consider to be in violation of the AIT, it is unlikely that much use will be made of this provision unless the AIT is given much greater public prominence. First of all, in order even to make a complaint an individual must be aware of the AIT and her ability to trigger the dispute resolution process. Second, fully disputing a complaint under the AIT dispute resolution process has the potential to be a drawn out and expensive procedure¹⁵¹ – in some cases perhaps out of reach of all but very large corporations. This combined with the fact that a private party is never guaranteed of winning a dispute or guaranteed to receive a costs award from the panel means that a person would have to have a very high stake in the actions of a party to the agreement to undertake the onerous task of seeing through a dispute on their own. That is, there may be both risk aversion and collective action disincentives to the commencement of a dispute by potential private party complainants. Third, since private parties may not engage in any retaliatory protectionism, there is no way for the individual to compel the offending party to comply with the panel's decision. Moreover, a costs award, if made, is not enforceable in court by a victorious private complainant.¹⁵²

There are other aspects of the AIT that are perhaps only of minor importance in themselves but may be symptomatic of greater difficulties. These include the fact that many of the deadlines associated with reporting requirements have been missed – even, distressingly, by the Committee on Internal Trade and the

¹⁴⁹ However, both British Columbia and the Yukon have refused to implement the changes contained in the third protocol of amendment, ostensibly because of fears of increasing “the administrative burden on local administrations.” See Schwanen, *ibid.* at 52.

¹⁵⁰ Certified General Accountants' Association of Canada, *Roundtable on the Agreement on Internal Trade: Proceedings and Recommendations* (Ottawa: CGA Canada, 1996) at 2.

¹⁵¹ For instance, one complaint [97-98 9-UNILEV] initiated in October 1997 is still active – nearly three years after the initial triggering of the dispute resolution mechanism.

¹⁵² However, some governments, such as Nova Scotia and Alberta have passed legislation that makes costs awards to successful private complainants enforceable in court. See Robert Howse, “Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government”, *supra* note 139 at 5.

Internal Trade Secretariat themselves.¹⁵³ Additionally, individuals and businesses have not yet brought forward complaints in the dispute resolution system to the panel stage, which suggests that, despite the ability to bring action, it is an unattractive option.¹⁵⁴ One other aspect of the AIT that is troubling is that any changes in the way that the CIT operates must be subject to unanimous agreement. This seems likely to impede significant progress on many important issues in the coming years, especially issues related to positive economic integration. An idea that has been suggested elsewhere (and as reflected in the adoption of super-majority voting rules in the EU) that would ameliorate this potential difficulty, but would be politically very contentious, would be the adoption of a seven-and-fifty rule or some other sub-unanimity threshold for legitimate decision making.¹⁵⁵

However, there is some empirical evidence that the AIT has already had a desirable impact on interprovincial trade. A 1998 study by Patrick Grady and Kathleen Macmillan investigated the strong growth in international trade flows as a proportion of GDP and the relative decline of interprovincial trade flows as a proportion of GDP that has occurred since the early 1980s – most abruptly since the late 1980s.¹⁵⁶ One of their control variables was a dummy representing the implementation of the AIT. They found that the AIT accounted for increased interprovincial trade flows of between 4.9 and 7.4 percent (depending on the particular specification of the econometric relationship they estimated) from its inception in July 1995 to the end of 1997. Since that time, it is likely that the importance of the AIT in increasing interprovincial trade flows has increased with the continued reduction in trade barriers, and especially because of the inclusion of the MASH sector in the procurement practices section of the AIT via the third protocol of amendment.

¹⁵³ For detailed account of the progress that has been made on implementing the AIT so far, see Internal Trade Secretariat, "Progress to Date" (August 2000). Digital Document available online at <http://www.intrasec.mb.ca/eng/progress.htm>. For a critical view of the operation of the dispute settlement process, see Robert Knox, "The Unpleasant Reality of Interprovincial Trade Disputes", Fraser Institute, Fraser Forum, October, 2000.

¹⁵⁴ A competing explanation may be that individual persons or businesses have not had to pursue complaints on their own because governments have been committed to helping resident persons and businesses to exercise their entitlements under the agreement.

¹⁵⁵ Of course, the implementation of such a rule would require unanimous agreement – a catch-22. For a discussion surrounding the proposal to move to a majority from a consensus driven decision making structure, see D. Schwanen, "Drawing on Our Inner Strength: Canada's Economic Citizenship in an Era of Evolving Federalism" (Toronto: C.D. Howe Institute, 1996).

¹⁵⁶ See P. Grady & K. Macmillan, "Why is Interprovincial Trade Down and International Trade Up?" *Canadian Business Economics* (November 1998) 26.

f) *Conclusion*

Although the AIT is a political agreement in the sense that its provisions cannot be enforced through the courts, and although it addresses an issue that is of significant but not of overwhelming economic proportions, it can be regarded as being an important albeit qualified success for the economic interests of Canadians. There is progress to be made on several fronts in strengthening the Agreement, including ensuring that the parties to the agreement maintain fidelity to it by producing reports in a timely manner, by holding further negotiations on schedule, by resolving differences in areas that still have not achieved consensus (such as the energy chapter), and by ensuring that new provincial and federal legislation is consistent with the Agreement. Successes have come in the form of an increased awareness of the possible adverse effects of regulation and legislation on internal trade, the inception of a forum in which to air concerns about policies adverse to the national interest and an effective way to resolve them, and evidence of the AIT's role in increasing interprovincial trade flows. One further development (whose effect may be contentious) is the explicit consideration of difficult tradeoffs that AIT panels have shown that they are willing to make.

V. *Domestic Competition Policy*

a) *Escaping the Criminal Law Strait-Jacket*

Federal competition law in Canada has a long history, dating back to the first *Anti-Combines Act* in 1889 – arguably the first antitrust law to be enacted by any country in the world in the post-industrial revolution era. Controversy surrounds the motivations for the enactment of this initial statute. Skeptics view it as a cynical effort by the MacDonald government to deflect attention from the competition-reducing effects of the National Policy adopted a decade earlier (highlighting the close connection between international trade policy and domestic competition policy as determinants of the conditions of the domestic competition), and view the initial statute as mostly “smoke and mirrors”. Whether this cynicism is entirely warranted or not, the fact of the matter is that the criminal law nature of the prohibitions of conspiracies and a little later monopolies and mergers, and the associated burden of proof on the Crown, along with the highly nebulous nature of the prohibitions in the case of mergers and monopolies, where the Crown was required to prove that they were operating or were likely to operate to public detriment, meant that over the early years of the legislation, enforcement efforts were sporadic at best.¹⁵⁷

¹⁵⁷ See M. Trebilcock, R. Winter, P. Collins & E. Iacobucci, *The Law and Economics of Canadian Competition Policy*, (Toronto: University of Toronto Press) [forthcoming] c. 1.

Recognizing the limitations of a criminal law approach to potentially anti-competitive practices, the federal government in 1919 introduced a regulatory/administrative law regime to deal with most anti-competitive practices, but the constitutional validity of this approach was challenged and the six judges who sat on the case in the Supreme Court of Canada were equally divided.¹⁵⁸ On appeal to the Privy Council the laws were declared invalid as encroaching upon the property and civil rights jurisdiction of the provinces.¹⁵⁹ The implications widely drawn from this decision was that the constitutional validity of federal competition law would henceforth have to rest solely on the federal government's criminal law powers, and that civil and administrative law approaches to the regulation of anti-competitive practices were constitutionally unsustainable. Reinforcement for this view was provided by the decision of the Supreme Court of Canada in 1935 striking down the *Dominion Trade and Industry Commission Act* of 1935 which established a commission to administer the *Combines Investigation Act*. Following the Privy Council's earlier decision, the Supreme Court held that this legislation exceeded the legislative authority of Parliament.¹⁶⁰

The implications of these constitutional holdings for the evolution of Canadian competition policy were little short of disastrous. While a steady trickle of price fixing conspiracies were successfully prosecuted under the criminal conspiracy provisions of the Act, only a tiny handful of prosecutions were brought over the intervening years with respect to mergers and monopolization and almost all failed.

The final straw for Canadian merger and monopolization law was arguably the Supreme Court of Canada's decision in *K.C. Irving Limited*¹⁶¹ in 1976 where the Supreme Court of Canada, in a unanimous judgment delivered by Chief Justice Laskin, rejected charges that the respondents were parties to the formation and operation of a combine by reason of the acquisition by K.C., Irving Limited and its subsidiaries of all five English language daily newspapers in the province of New Brunswick. Under the wording of the merger and monopoly provisions in the *Combines Investigation Act*, the Crown was required to prove that by virtue of the acquisition and control of an industry through merger or monopolization, competition was or was likely to be lessened to the detriment or against the interest of the public or that the person or persons having such control had operated or were likely to operate the combine to the detriment or against the interest of the public.

The Court held that it cannot be concluded that acquisition of entire control over business in a market must mean not only that competition was or was likely to be lessened, but that such lessening or likely lessening was to the detriment

¹⁵⁸ *Re Board of Commerce Act and Combines and Fair Prices Act of 1919* (1920), 60 S.C.R. 456.

¹⁵⁹ [1922] A.C. 191.

¹⁶⁰ *Reference re Dominion Trade and Industry Commission Act, 1935*, [1936] S.C.R. 379.

¹⁶¹ *R. v. K.C. Irving Ltd.*, [1978] 1. S.C.R. 408.

or against the interest of the public. The court held that the trial judge erred in the holding that once a complete monopoly had been established, detriment in law resulted. Instead, it was for the Crown to adduce proof of actual detriment or that the public interest had been adversely affected. According to the Court, the only evidence adduced was theoretical, from witnesses who spoke of the threat to newspaper independence and likely resulting public detriment, without having made any study of the actual situation or addressing themselves to the facts of the operation of the newspapers involved. The Court noted evidence at trial that there had been an increase in circulation of all five daily English language newspapers since their acquisition by K.C. Irving, despite the fact that several were in a loss position; there had been a substantial improvement in the facilities of the publishing companies; the provincial economy had benefited since all profits were re-invested in New Brunswick enterprises; there was no evidence that K.C. Irving interests did in fact attempt to influence the respective publishers and editors in the gathering or publication of news or in editorial direction; nor was there any evidence that there was any actual detriment to the public in respect of circulation rates, advertising content and rates, and quality and quantity of news. Somewhat mysteriously, according to the Court, "the pre-existing competition, where it existed, remained and was to some degree intensified by the take-over of the newspapers."

The implications of such an open-ended and unstructured inquiry – a polycentric inquiry, in Lon Fuller's terms¹⁶² – into the public interest ramifications of a merger or a monopoly were such that the Crown, bearing the criminal law burden of proof in adversarial proceedings in all-purpose courts, would rarely be able to discharge this burden.

In the meantime, the federal government had asked the Economic Council of Canada to undertake a fundamental reevaluation of Canadian competition law and policy, and in its Interim Report on Competition Policy in 1969,¹⁶³ recommended *inter alia* that mergers and monopolies should become matters for review by a civil tribunal, against a substantial lessening of competition standard, as should various other business practices, such as refusals to deal, exclusive dealing, tying arrangements, and other vertical distribution practices. In the case of mergers, the tribunal would have power to permit, forbid, or modify proposed transactions, and in the cases of other business practices prohibit them in certain circumstances. The Economic Council's report precipitated almost two decades of intense political debates over the reform of Canadian competition law and policy, resulting in a first series of amendments in 1976 and culminating in a second series of amendments with the enactment of the *Competition Act* in 1986.¹⁶⁴ The most important outcome of this reform process was that review of mergers and monopolies (now called abuse of

¹⁶² L. Fuller, "The Forms and Limits of Adjudication," (1978) 92 Harv. L.Rev. 353.

¹⁶³ Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969).

¹⁶⁴ Trebilcock *et al.*, *supra* note 152 at c. 1.

dominance), along with a variety of reviewable practices (mostly vertical distribution practices) were remitted to the newly constituted Competition Tribunal for adjudication in a civil review process, with the principal remedy being cease and desist orders or in limiting cases structural remedies. In addition, in 1976 a civil right of action for actual damages for violations of the criminal law provisions of the *Act* (principally conspiracies, bid rigging, predatory pricing, price discrimination, resale price maintenance, and misleading advertising) was adopted.

These amendments boldly challenged the historical and paralyzing constraints of the criminal law and all-purpose courts as an appropriate legal and institutional framework for evaluating and adjudicating often complex business practices and transactions. Not surprisingly, given the earlier history of Canadian competition law, these non-criminal law dimensions of the new *Competition Act* almost immediately attracted constitutional challenges. As discussed earlier in this paper, the Supreme Court's landmark decision in *General Motors*,¹⁶⁵ upheld the validity of the civil damage provision with respect to violations of the criminal prohibitions in the statute under the second branch of the federal trade and commerce power under section 91(2) of the *Constitution Act 1867*. While Section 31.1 (now Section 36) can be viewed as intruding on provincial powers over property and civil rights, the Court held that it was part of a more general and valid regulatory scheme for regulating the national economy and was closely integrated with this scheme by defining the scope of the civil right of action in terms of violations of criminal prohibitions in the *Act* and hence complementing these provisions in enhancing effective enforcement of the *Act*. Citing with approval scholarly writing in law and in economics by Professors Hogg and Grover,¹⁶⁶ and Professor Safarian,¹⁶⁷ Chief Justice Dickson noted that in many respects Canada is one large marketplace and that markets in particular goods or services are not coincident with provincial borders, thus making it infeasible or undesirable for any single province or subset of provinces to attempt to regulate competitive conditions in these markets.

This decision finally liberated Canadian competition law from the strait-jacket of the criminal law, and also opened up possibilities for assigning a role to specialized administrative agencies (like the Competition Tribunal) rather than all-purpose courts in evaluating and adjudicating allegedly anti-competitive but often complex business practices. Not surprisingly again, the central role assigned to the Competition Tribunal under the new *Competition Act* with respect to mergers, abuse of dominance, and other reviewable practices was also quickly challenged. However, a constitutional challenge to the independence of the Tribunal was rejected by the Québec Court of Appeal in *Alex Couture Inc.*

¹⁶⁵ *Supra* note 16.

¹⁶⁶ P.W. Hogg & W. Grover, "The Constitutionality of the Competition Bill" (1976), 1 Can. Bus. L.J. 197.

¹⁶⁷ A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa: Supply & Services, 1974).

*v. Canada (Attorney General)*¹⁶⁸ and leave to appeal to the Supreme Court denied, and the Tribunal's contempt powers for violation of its orders were upheld by a majority of the Supreme Court in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*.¹⁶⁹

However, while any doubts about the constitutional validity of the Competition Tribunal were now put to rest, under Section 13 of the *Competition Tribunal Act*, an appeal lies to the Federal Court of Appeal from any decision of the Tribunal as if it were a judgment of the Federal Court – Trial Division (although appeals on questions of fact lie only with leave of the Federal Court of Appeal), thus raising the prospect or spectre of the Competition Tribunal ultimately proving to be a relatively subordinate player to the courts in interpreting and applying the provisions of the *Act* within its mandate. Compounding these concerns was a classically Canadian compromise struck at the time that Competition Tribunal was created whereby its membership comprises up to four members of the Federal Court-Trial Division and up to eight non-judicial members, who sit in panels of three chaired by a judicial member. Under Section 13 of the *Competition Tribunal Act*, questions of law must be determined only by judicial members of the Tribunal. In the early years of the Tribunal, judicial appointees were simply Federal Court – Trial Division judges, who spent most of their time adjudicating other matters in the Federal Court and had no specialized prior background in competition matters (a shortcoming that has been substantially mitigated in more recent judicial appointments to the Tribunal).

Concerns over the degree of autonomy that would be extended to the Competition Tribunal seemed to be realized by the Federal Court of Appeal's decision in *Southam* where it held that no greater deference was required by the court to Tribunal decisions than any Federal Court – Trial Division decision, on questions of law, *i.e.*, that a standard of "correctness" applied, leading the Federal Court of Appeal to overturn key determinations of the Tribunal on the definition of the relevant market in a merger between the two daily newspapers in British Columbia owned by Southam and a number of small community newspapers with respect to the market for retail print advertising. According to the Court, the Tribunal had ignored relevant evidence, and this was a question of law. However, on further appeal to the Supreme Court of Canada,¹⁷⁰ Mr. Justice Iacobucci, writing for a unanimous court, held that the determination of the relevant market was an issue of mixed law and fact and therefore fell within the mandate of both judicial and non-judicial members of the Tribunal. The Court noted that the Tribunal's expertise lies in economics and commerce, and that these are matters concerning which members of the Tribunal are likely to

¹⁶⁸ *Alex Couture Inc. v. Canada (Attorney General)* (1991), 38 C.P.R. (3d) 293.

¹⁶⁹ *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1992), 42 C.P.R. (3d) 353.

¹⁷⁰ *Canada (Direction of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

be far more knowledgeable than the typical judge. While noting legitimate misgivings about some aspects of the Tribunal's rather rambling and unstructured decision (especially rejection by the Tribunal of evidence that Southam's own expert consultant regarded community newspapers as the principal threat to retail advertising revenue from Southam's two dailies), Mr. Justice Iacobucci, displaying admirable self-restraint, held that a standard more deferential by appellate courts than "correctness" but less deferential than "not patently unreasonable" is required, in effect a standard of "reasonableness", or a "not clearly wrong" standard, is appropriate. Applying this test, Mr. Justice Iacobucci held that the Tribunal's decision was not unreasonable or clearly wrong.

Because Mr. Justice Iacobucci was able to find that the determination of the relevant market was an issue of mixed law and fact and hence implicated the expert non-judicial members of the Tribunal, his argument from expertise has some cogency. However, if the issue under appeal had been a purely legal issue and hence within the sole prerogative of judicial members of the Tribunal (*e.g.*, the determination of relevant and irrelevant criteria for defining the relevant market), his argument for judicial deference would, by implication, have been inapplicable. This points not so much to a deficiency in his judgment as a deficiency in the provisions constituting the Competition Tribunal, in particular the provision that assigns questions of law for determination solely by judicial members of the Tribunal. There is no justification for treating judicial and non-judicial members differently in this respect. Determinations of questions of law in a competition law context are essentially determinations of important aspects of economic policy and can be appropriately informed by relevant expertise, a point that is central to the Supreme Court's decision in *Pezim*.¹⁷¹

This issue may arise in the Competition Bureau's appeal from the decision of the Competition Tribunal in the recent Propane merger, where the Tribunal held that the merger was likely to result in a substantial lessening of competition, but a majority (one judicial member and one non-judicial member) held that it was saved by the efficiencies defence in section 96 of the *Competition Act*. The dissenting non-judicial member took a more restrictive view of the scope of the defence. The interpretation of the meaning of section 96 is arguably a question of law to be determined by judicial members alone, and warranting less deference than questions of fact or mixed law and fact.

These constitutional law and administrative law developments with respect to Canadian competition law all represent promising new beginnings, and the modern Supreme Court is to be complimented in helping set Canadian competition policy off in new and more constructive directions. Having said this, policy judgments about the efficacy of the Competition Tribunal are still premature. Contested proceedings before the Tribunal have turned into enormously protracted adversarial proceedings, as a result of which most contentious business practices or transactions are resolved in the office of the Commissioner

¹⁷¹ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

of Competition in the Competition Bureau, despite the attempt to bifurcate investigative and enforcement functions vested in the Bureau, on the one hand, and adjudicative functions vested in the Tribunal, on the other.¹⁷² Moreover, several of the Tribunal's enormously lengthy judgments have seemed preoccupied with factual minutiae and have not paid nearly as much attention to developing well-articulated analytical or conceptual frameworks within which to evaluate the evidence. However, these may be growing pains and the Supreme Court's decision in *Southam* gives the Tribunal substantial latitude, both substantively and procedurally, to adapt itself to the legitimate expectations that it must meet if it is to avoid a policy judgment in the future that it has proven a noble but failed experiment. In the event that that this judgment were reached, it seems unlikely that Canadian competition law would revert to assigning a central role to the courts with respect to mergers, abuse of dominance, and reviewable practices. Rather, a more likely scenario would be the reconstitution of the Competition Bureau as a single, integrated Competition Agency, probably headed by a multi-member commission, perhaps along the lines of the US Federal Trade Commission, subject to limited rights of judicial appeal or review.

b) *The Criminal Prohibition Against Conspiracies*

Despite these changes, substantive and institutional, with respect to mergers, abuse of dominance, and reviewable practices, a largely unchanging constant in the Canadian competition law firmament has been the place of criminal law prohibitions in the Act, principally the conspiracy provisions now found in Section 45 of the Act. The conspiracy prohibitions found in most countries' antitrust laws are often regarded as the heart of antitrust law and are generally supported both by economic interventionists and non-interventionists alike as promoting consumer welfare, whatever their disagreements about the policy wisdom of other competition or antitrust doctrines. In comparing the contributions of the pre-*Charter* and post-*Charter* Supreme Court to the evolution of Canadian competition law on horizontal agreements among competitors, a roughly parallel pattern emerges to that described above with respect to the evolution of non-conspiracy aspects of the law. That is to say, with some exceptions, earlier Supreme Court case-law generally weakened the conspiracy provisions in Canadian competition law, while more recent Supreme Court decisions show a more sophisticated economic understanding of the role and scope of these provisions.

One seed of difficulty in the Supreme Court case law in this context was sown in its decision in *R. v. Howard Smith Paper Mills Limited* (the *Fine Papers*

¹⁷² See N. Campbell, H. Janisch & M. Trebilcock, "Rethinking the Role of the Competition Tribunal" (1997) 76 Can. Bar Rev. 297; M. Sanderson & M. Trebilcock, "Process and Politics in Canadian Merger Review", Competition Policy Roundtable, University of Toronto, Faculty of Law (16 June, 2000).

case),¹⁷³ which involved a conspiracy among mill operators and wholesale merchants in the fine papers market. In three separate judgments, the Supreme Court upheld the convictions of the accused conspirators. One aspect of the decision strengthened the conspiracy provisions by holding that once it was proved that competition had been unduly lessened, it was not necessary for the Crown to prove any detriment to the public from the agreement, nor was it a defence that the agreement resulted in public benefit, through reasonable prices and profits or through stabilization of production and employment in the industry (unlike the public detriment test then explicitly incorporated in the law with respect to mergers and monopolization). However, Cartwright J. stated that had the matter been *res integra*, he would have viewed these considerations as relevant to the test of undue ness, but accepted that this view was precluded by prior authority. Nevertheless, he went on to adopt a test of undue ness that largely equates it with monopoly, by requiring the virtual elimination or prevention of all competition, or a lessening of competition to the point where the participants in an agreement become free to carry on their activities virtually unaffected by the influence of competition. In modern terms, this implies that a price fixing conspiracy could not be said to have unduly lessened competition unless the parties to the conspiracy accounted for almost 100 per cent of output in the relevant product and geographic markets. Most modern economic understandings of market power would accept that market power can be effectively exercised by either a single firm or a group of competitors acting collusively with a market share of substantially less than 100 per cent.

While Cartwright J's views were not endorsed explicitly by other members of the Court other than Locke J. who joined him in the opinion, in *R. v. Aetna Insurance Co.* in 1978,¹⁷⁴ the majority of the Supreme Court, in a 5-3 decision written by Ritchie J., appeared to adopt something very close to this test in endorsing the views of the trial judge that an agreement violates the conspiracy provisions if it has the effect of virtually relieving the conspirators of free competition, although apparently there is no requirement for the Crown to prove the existence of a monopoly (although this seems largely a distinction without a difference). Moreover, in acquitting the accused conspirators, the majority held that the trial judge had properly admitted evidence that the agreement among 73 insurance companies in the province of Nova Scotia, all members of the Nova Scotia Board of Underwriters, to set their fire insurance rates in accordance with the rates set by the Board, had various public benefits. Among these benefits were that (1) the agreement secured the solvency of member companies; (2) through such operations costs were minimized; (3) the Board's operations involved useful assistance to fire departments in Nova Scotia on fire prevention; (4) the Board provided technical assistance in connection with assessment of risk; and (5) the Board was of assistance to municipalities in the province in fire prevention efforts. It is not clear that an agreement to fix prices was necessary for

¹⁷³ *R. v. Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403.

¹⁷⁴ *R. v. Aetna Insurance Co.*, [1978] 1 S.C.R. 731.

any of these functions of the Board, except perhaps the first. However, it bears recalling that the Supreme Court in the *Fine Papers* case had explicitly and vigorously excluded as irrelevant precisely such considerations as stabilization of prices, profits, and production in an industry. In addition, the majority's decision in *Aetna Insurance* introduced a further ambiguity into the conspiracy provisions in the *Competition Act* by arguably endorsing a requirement that the Crown must prove that the accused intended to lessen competition unduly, as well as proving intent to enter into an agreement the likely effect of which was the undue lessening of competition (an issue for the courts as a matter of law and factual determination, rather than the subjective intention of the accuseds).

In a vigorous dissent, Chief Justice Laskin, writing on behalf of himself and Judson and Spence JJ., held that "unduly" simply requires proof of the inordinate lessening of competition, and any off-setting public benefits associated with this are irrelevant. The minority also held the *mens rea* of the offense was the intention of the accuseds to enter into the agreement, and it was irrelevant whether they intended the agreement to lessen competition unduly. Finally, the minority held that the Crown did not bear the onus of establishing a monopoly or a virtual monopoly on the part of the co-conspirators. However, the incongruity between Chief Justice Laskin's opinions in *Aetna* and in *K.C. Irving* in the very same year in vigorously rejecting the relevance of any public benefit considerations in a conspiracy context while being open to a highly expansive canvassing of such benefits in a merger and monopoly context, arguably reflecting differences in wording of the two provisions at the time, raises important policy issues as to why the basic analytical framework for evaluating the competitive implications of conspiracies, mergers, or monopolies should differ in any important respect.

Several of these seeds of doubt were perpetuated in the majority decision of the Supreme Court in *Atlantic Sugar Refineries Company v. Canada (Attorney General)*.¹⁷⁵ The accused were the three major sugar refineries in eastern Canada. They were alleged to have tacitly colluded in maintaining uniform price lists, changes to which were publicly posted in advance and thus made accessible to competitors. They were also alleged to have tacitly conspired to maintain market shares in closely constant proportions with little interruption over a period of 25 years. In acquitting the accused conspirators, Pigeon J., writing for the majority, upheld the finding of the trial judge with respect to identical price lists that there was no evidence of communication between the accuseds on the subject of price. With respect to the maintenance of market shares, the trial judge found on the evidence that this was the result of a tacit agreement between the accuseds, but that it had not been shown that the agreement was arrived at with the intention of unduly preventing or lessening competition. The majority seemed to disagree on both issues (although Pigeon J.'s judgment is less than a model of clarity). "Did the 'tacit agreement' resulting

¹⁷⁵ *Atlantic Sugar Refineries Co. v. Canada (Attorney General)*, [1980] 2 S.C.R. 644.

from the expected adoption of a similar policy by the competitors amount to a conspiracy? I have great difficulty in agreeing that it did because the author of Redpath's marketing policy was conscious that its competitor would inevitably after some time become aware of it in a general way and also expected them to adopt a similar policy which would also become apparent." On the issue of intent, the majority held that assuming that the tacit agreement was illegal, the accused need not be conscious of its legality. "It is for the court to decide on the facts whether an agreement to lessen competition means that competition is to be lessened unduly and the views of the accused on this issue are irrelevant." However, the majority supported the finding of the trial judge that the Crown had not proven an undue lessening of competition. The Court relied on evidence that each of the refiners granted discounts off their price list to major customers; there was some evidence of modest new entry; and the Court held each refiner was under no obligation to compete more vigorously than it felt desirable in its own interests. The majority endorsed the test of "unduly" adopted by Ritchie J. in *Aetna Insurance*, which in turn traces back to the decision of Cartwright J. in the *Fine Papers* case, i.e., that an agreement must have the effect of virtually relieving the conspirators from the influence of free competition, although there is no requirement for the Crown to prove the existence of a monopoly. According to Wong and McFetridge, the combined effect of the Supreme Court's decisions in *Aetna* and *Atlantic Sugar* is that a market share of at least 80 per cent on the part of the conspirators was required.¹⁷⁶

In a strong dissent, Estey J. held that the trial judge's findings supported an inference of a tacit agreement to maintain market shares and that a tacit agreement is sufficient to fall within the conspiracy provisions of the Competition Act; that the agreement did lessen competition; that the constraints on competition imposed by this tacit agreement were undue; and that even if they were imposed for good motives, such as avoiding a price war or destructive competition, this was irrelevant (following *Fine Papers*).

Atlantic Sugar raises some important broader issues. One is that it may be very difficult for competition law to do much about interdependent behaviour by oligopolists if an oligopolistic market structure must be taken as a given. That is to say, mutual recognition of reactions of rivals to one's own pricing and output decisions may be inevitable or unavoidable in such a market structure. Second, however, oligopolistic market structures should not always be taken as a given. For example, in *Atlantic Sugar* (and one might readily surmise from the records in other earlier leading Canadian competition law cases like *Fine Papers*¹⁷⁷ and *Eddy Match*),¹⁷⁸ the domestic industry was heavily protected through tariffs and quotas. The simplest and most effective pro-competition solution to competitive shortcomings in these markets was simply to remove the

¹⁷⁶ D. McFetridge & S. Wong, "Agreements to Lessen Competition After *Atlantic Sugar*" (1981) 5 Can. Bus. L.J. 329 at 333.

¹⁷⁷ *Supra* note 173.

¹⁷⁸ *Eddy Match Co. Ltd. v. The Queen* (1953), 20 C.P.R. 107.

external trade barriers. To require domestic competition law to address competitive shortcomings in a heavily protected domestic market is to remit it to a world of deep second best. Cases such as *Atlantic Sugar* illustrate the close interrelationship between trade policy and competition policy in securing the conditions for effective competition in the Canadian economy.

The Supreme Court's decisions in both *Aetna Insurance* and *Atlantic Sugar* substantially weakened the conspiracy provisions in Canadian competition law. Subsequently, Parliament saw fit to intervene by enacting the following amendments to Section 45, which are directly responsive to deficiencies in these decisions:

(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

(2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

(2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1) it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

Unfortunately, more judicial damage was forthcoming, before the tide began to turn, in an unanimous decision of the Supreme Court of Canada in 1982 in the *Jabour Case*.¹⁷⁹ In this case, the Benchers of the Law Society of British Columbia initiated steps to discipline Jabour, a member who advertised his legal practice and fees for certain common services, for "conduct unbecoming" a member of the Law Society of British Columbia. The Director of the Competition Bureau initiated an investigation under the *Combines Investigation Act* on the grounds that the actions of the Benchers might constitute an agreement or arrangement to substantially lessen competition in the provision of legal services. Estey J. for the Supreme Court held that Section 32 (now Section 45) of the *Act* did not apply to the Law Society in these circumstances. The Benchers' actions were authorized by the *Legal Professions Act* which provided for disciplinary action for "conduct unbecoming" a member of the Society and broadly defined that conduct to include, "any matter, conduct or thing...deemed in the judgment of the Benchers to be contrary to the best interests of the public or of the legal profession." According to the Supreme Court, these provisions engaged the so-called "regulated industries" defence in that action taken

¹⁷⁹ *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307.

pursuant to a validly enacted provincial regulatory scheme could not be deemed to constitute an undue lessening of competition.

This decision provides a broad licence to self-regulatory bodies acting under delegated legislation in any business, trade or profession to adopt anti-competitive regulations or policies. This stands in sharp contrast to the state action doctrine in US antitrust law, where in order for an action to qualify for the state action exemption, the challenged activity must be authorized by a state and clearly articulated in laws or regulations. In addition, the authorized conduct must be actively supervised by the state. There is merit to similarly limiting the scope of the Canadian regulated industries defense to cases where the allegedly anti-competitive conduct or activities have been specifically directed or authorized by statute or are inherent in the regulatory scheme itself (e.g., production quotas under agricultural marketing board schemes), and in cases where regulatory bodies are vested with broad discretion there should be a strong legal presumption that this discretion should not be exercised so as to direct or authorize conduct that would otherwise violate the *Competition Act*. Conduct of self-regulatory bodies as opposed to independent regulatory agencies should attract especially close scrutiny in this respect, because of obvious protectionist incentives inherent in many schemes of self-regulation.

Some of the damage done by the Court's decision in *Jabour* has been undone by the Supreme Court's subsequent decision in *Royal College of Dental Surgeons of Ontario v. Rocket*¹⁸⁰ in holding that extensive restrictions on advertising prerogatives by dentists violated the freedom of expression guarantee in Section 2(b) of the *Charter* and were too broad to be justified under Section 1 (an argument not available at the time of the decision in *Jabour*). However, for conduct or activities that fall outside the realm of expression, *Jabour* presumably still holds. For example, would a self-regulating profession which maintained a minimum fee schedule and sought to discipline members who deviated from it on the grounds that price competition is "conduct unbecoming" of a member of the profession in question attract immunity from scrutiny under the *Competition Act*? Lower courts are currently badly divided on the scope of the "regulated industries" defence.¹⁸¹

In general, then, the pre-*Charter* Supreme Court's contributions to the evolution of Canadian competition law on anti-competitive forms of collusion amongst competitors were mostly negative. However, some of that damage has been undone by the unanimous decision of the Supreme Court in *R. v. Nova Scotia Pharmaceutical Society* (commonly referred to as the *PANS* decision) in

¹⁸⁰ *Royal College of Dental Surgeons of Ontario v. Rocket* (1990), 71 D.L.R. (4th) 68.

¹⁸¹ See *Re Law Society of Upper Canada and Attorney General of Canada* (1996), 134 D.L.R. (4th) 300 for an expansive view of the scope of the defence; see *R. v. Independent Order of Foresters* (1989), 26 C.P.R. (3d) 229 for a more restrictive view; more generally, see Trebilcock, *et al.*, *supra* note 157 at c. 11 (Competition Policy and Regulated Industries).

1992.¹⁸² In a judgment written by Gonthier J., constitutional challenges under Sections 7, 11(a) and 11(d) of the *Charter* to Section 32 (1)(c) – now Section 45 (1)(c) – of the *Act* on grounds of vagueness and lack of an adequate *mens rea* requirement were rejected. With respect to the *mens rea* requirement, Gonthier J. held that Section 45 (1)(c) requires the proof of two fault elements, one subjective, the other objective. To satisfy the subjective element of the offense, the Crown must prove that the accused had the intention to enter into the agreement and had knowledge of its terms. To satisfy the objective element, the Crown must prove that on an objective review of the evidence adduced the accused intended to lessen competition unduly, *i.e.*, that the evidence, viewed by a reasonable business person, establishes that an accused was aware or ought to have been aware that the effect of the agreement entered into would be to prevent or lessen competition unduly. So interpreted, section 45 (1)(c) does not violate the *Charter*. Thus, according to Gonthier J., having proved that an agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or should have known that this was the likely effect of the agreement.

With respect to the vagueness objection (upon which most of the judgment focussed), Gonthier J. held that a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate – that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. Laws are sufficiently certain if they limit enforcement discretion by introducing boundaries and sufficiently delineate an area of risk to allow for substantive notice to citizens. In upholding the validity of Section 45 (1)(c) against the charge of vagueness, he noted that the *Act* is central to Canadian public policy in the economic sector and that section 45 itself is one of the pillars of the *Act*. “The prohibition of conspiracies in restraint of trade is the epitome of competition law, finding its place in every competition law. Considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie outside of the inquiry under section 45 (1)(c). Competition is presumed by the *Act* to be in the public benefit.” Gonthier J. then went on to compare section 45 (1)(c) with the U.S. *Sherman Act* and jurisprudence thereunder which has developed two paradigms of adjudication known as the *per se* rule and the rule of reason.

“Section 45 (1)(c) of the *Act* lies somewhere on the continuum between a *per se* rule and a rule of reason. It does allow for discussion of the anti-competitive effects of the agreement, unlike a *per se* rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a full blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason would. Since “unduly” in Section 45 (1)(c) leads to a discussion of the seriousness of the competitive

¹⁸² *R v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

effects but not of all relevant economic matters, one may say that the Section creates a partial rule of reason."

Gonthier J. suggested that there are two major elements to the inquiry under section 45 (1)(c) that reduce any vagueness to an acceptable range: (1) the structure of the market, and (2) the behaviour of the parties to the agreement. He stated that a definition of the relevant market is required as a preliminary step with respect to market structure, and that the aim of the market structure inquiry is to ascertain the degree of market power of the parties to the agreement. However, in this respect many factors other than market share are relevant including: (1) the number of competitors and the concentration of competition; (2) barriers to entry; (3) geographical distribution of buyers and sellers; (4) differences in the degree of integration among competitors; (5) product differentiation; (6) countervailing power; and (7) cross-elasticity of demand. He also noted that under the US 1984 Merger Guidelines the ability to raise prices on a given product by five per cent over a year without losses is the yardstick for market power and that this approach may or may not be appropriate in the context of section 45 (1)(c).

Most antitrust scholars and specialists would find Gonthier J.'s observations to this point unexceptional. However, some of his ensuing observations are somewhat more opaque. He defines market power as the ability to behave "relatively independently of the market." If what he means by this is "relatively unconstrained by the competitive discipline of the market", this is probably innocuous but not especially helpful. The critical question is when are the conditions present which enable the effective exercise of market power, and when do we know whether it is being exercised? For antitrust specialists, very much following the spirit of the US Merger Guidelines and now the Canadian Merger Enforcement Guidelines, market power is essentially the ability profitably to sustain prices significantly above cost (with which fully competitive prices are presumed to equate) for a non-transitory period of time. Under the US and Canadian Merger Guidelines, the ability to sustain prices profitably over cost (or competitive levels), by at least five per cent for at least two years without attracting entry, is a widely agreed measure of market power. More technically, applying the Lerner Index, market power measures the percentage by which price exceeds marginal cost, which is equal to the inverse of the demand elasticity facing a firm. The extent to which the inverse exceeds zero, i.e., the extent to which price exceeds marginal cost, is the Lerner measure of market power.¹⁸³ In fact, in most conspiracy cases and most merger, abuse of dominance and reviewable practice cases, it is difficult and uncommon to estimate the Lerner Index directly, but on the assumption that firms will maximize profits within the constraints that they face, if the conditions under which firms may be said to possess market power are present, the prediction follows that they will be likely to exercise it. As to whether a given firm possesses market power, cross-elasticities of demand and supply at the firm

¹⁸³ See Trebilcock *et al.*, *supra* note 157 at c. 2.

level within the relevant product and geographic markets, and barriers to new entry (including foreign entry) are likely to be critical factors.¹⁸⁴

Gonthier J. goes on to say that the level of market power necessary to trigger the application of section 45 (1)(c) is not necessarily the same as for other sections of the *Act*. For example, section 79 of the *Act*, prohibiting abuses of dominant position, contemplates that the holders of a dominant position “substantially or completely control throughout Canada or any area thereof a class or species of business.” “The required degree of market power under Section 79 comprises ‘control’, not simply the ability to behave independently of the market. The application of Section 45 (1)(c) of the *Act* does not presuppose such a degree of market power. Parties to the agreement need not have the capacity to influence the market. What is more relevant is the capacity to behave independently of the market in a passive way. A moderate amount of market power is required to achieve this.”

These observations are confusing. While the observations are helpful in refuting observations in earlier cases that the virtual elimination of competition was required in order for an agreement to violate section 45, it is far from clear that market power means different things in sections 79 and 45(1)(c). The Competition Tribunal has appropriately equated “control” in section 79 with possession of market power, and “class or species of business” with relevant product and geographic markets.¹⁸⁵ While degrees of market power can obviously vary, in the absence of any market power in cases of single firm dominance or multi-firm collusion, anti-competitive consequences are unlikely to attend the parties’ actions. Thus, section 79 simply deals with single firm market power and Section 45 with multi-firm market power exercised collusively, but in both cases the underlying economic concerns are the same. One might, of course, take the view that most conspiracies have few redeeming social virtues (unlike concentrated single firm dominance), and that a lesser degree of market power should expose them to scrutiny, but this is the rationale for the U.S. *per se* rule, which Gonthier J. explicitly rejected in interpreting section 45.

Compounding this confusion is Gonthier J.’s statement that parties to an agreement under section 45 (1)(c) need not have the capacity to influence the market but must have the capacity to behave independently of the market in a passive way. The meaning of this statement is quite obscure. Parties to a collusive agreement substitute the collusive price for the market price and in effect displace the market price to this extent. Here, clearly they must have the capacity to influence the market price. If they account for so small a fraction of the market and thus possess no market power, colluding over price will indeed have no impact on the market price. That is because the parties have no market power. The statement that what is more relevant is the capacity to behave independently of the market “in

¹⁸⁴ *Ibid.* at c. 2.

¹⁸⁵ See *Canada (Director of Investigation and Research, Competition Act) v. Nutrasweet Co.* (1990), 32 C.P.R. (3d) 1; *Canada (Director of Investigation and Research, Competition Act) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289

a passive way" is equally obscure. For example, if three firms in an industry comprising one hundred firms and accounting for three per cent of the market collude over price they will be driven from the market by lower priced competitors. Thus, a strategy of colluding over price in the absence of market power is a recipe for economic oblivion. Parties with market power who collude over price are in effect displacing the previously prevailing competitive market price and not in a passive way. The agreement is an active strategy for exercising market power through coordinated pricing or output decisions and displacing or superseding the competitively determined market price.

Gonthier J. goes on to suggest that following an analysis of market structure, the second part of the framework of analysis found in the case law on section 45 and its predecessors involves an examination of the behaviour of firms. He states that section 45 (1)(c) requires, in addition to some market power, some behaviour likely to injure competition. It is the combination of the two that makes a lessening of competition "undue". "Many combinations are possible. For one, market power may come from the agreement. The agreement could either have an "internal" effect, in consolidating the market power of the parties (as is the case with price fixing) or have an "external" effect, in weakening competition and thus increasing the market power of the parties (as is the case with market sharing). Market power may also exist independently of the agreement, in which case any anti-competitive effect of agreement will be suspicious. Particularly injurious behaviour may also trigger liability even if market power is not so considerable."

These comments are again confusing. The essence of the objection to horizontal agreements among competitors is that the agreement to coordinate pricing or output decisions itself creates the market power. The distinction between internal and external effects is also difficult to follow. Price fixing agreements have external effects on consumers of outputs of the members of the conspiracy. It is possible that a horizontal agreement could have adverse effects on other competitors, not through market sharing (as Gonthier J., suggests), but perhaps through collective boycotts by, *e.g.*, retailers of a manufacturer who supplies goods to a price cutting retail competitor. However, in all cases the adverse effects that competition law focuses on are reductions in consumer welfare. This is the touchstone that should motivate all competition/antitrust law analysis, whatever the particular transaction or practice under scrutiny. While it may be true that market power may also exist independently of an agreement amongst competitors (for example, in a duopolistic industry), an actual agreement between duopolists to coordinate pricing and output decisions is likely to enhance this market power, in effect by aligning them more closely with a monopoly. But again, it is the *enhanced* ability to exercise market power as a result of the agreement that section 45(1)(c) focuses on, and not market power that exists independently of the agreement. While it may be the case that a particularly injurious behaviour should trigger liability even if market power is not so considerable, the less market power that parties to an agreement possess under section 45(1)(c), the less plausible it becomes to imagine more rather than less injurious behaviour.

In short, while Gonthier J.'s decision upholding the constitutional validity of section 45(1)(c) against charges of vagueness and lack of an appropriate *mens rea* is welcome salvation for the core of Canada's *Competition Act*, his attempts to elucidate the scope of the section and to demonstrate that it is not unacceptably vague are not entirely convincing. His decision on the *mens rea* element is much more straightforward and convincing. Failure to anchor the policy or normative foundations of section 45(1)(c) (as with all the other core provisions in the *Competition Act*) explicitly in a consumer welfare framework tends to cloud the central issues. In every case, the critical question is whether the agreement, merger, practice, etc., in question does, or is likely to, enhance or reduce consumer welfare. If parties lack market power, then no anti-competitive practice in which they engage (outside of fraud or misleading advertising) is likely to impact consumer welfare. Where they do possess market power, then applying the usual profit maximizing assumptions to private economic agents' motivations, they should generally be presumed to be likely to exercise it.

One factor which does distinguish sections 45(1)(c) and 79 is that under section 79 (like section 2 of the *Sherman Act*), merely raising prices to supra-competitive levels by a dominant firm with market power is not regarded as an abuse of dominant position, unlike the abuse of dominance provisions in the Treaty of Rome, and some additional injury to competition is required in the form of some act or practice that has an exclusionary, disciplinary, or predatory purpose or effect. In this context, distinguishing market structure, or as I would prefer to put it, the existence of market power and behaviour, makes some sense. Indeed, given the requirement under section 79 of some additional act injurious to competition (beyond simply charging supra-competitive prices), one could argue that a lesser degree of market power than that required under section 45 is appropriate in order to deter attempts at monopolization (e.g., through predation) by dominant firms currently with lesser degrees of market power. However, in the context of section 45(1)(c), it is far from clear that there is any utility to the distinction between market structure and behaviour. If parties to an agreement to fix prices, reduce output, or allocate market share possess market power, they should be presumed in most cases to be likely to raise prices to supra-competitive levels and thus to reduce consumer welfare.

Having noted these reservations about Gonthier J.'s judgment in *PANS*, it must be acknowledged that jurisdictions around the world have had great difficulty framing prohibitions against anti-competitive horizontal arrangements among competitors that are not either over- or under-inclusive or both.¹⁸⁶ Horizontal arrangements among actual or potential competitors come in a myriad of forms, some of which are pernicious, some of which are innocuous, and some of which are pro-competitive or efficiency enhancing. Simple

¹⁸⁶ See P. Warner & M. Trebilcock, "Rethinking Price-Fixing Law" (1993) 38 McGill L.J. 672.

categoric prohibitions of the kind found in section 45 (or in section 1 of the *Sherman Act*), particularly in a criminal law context, will always engender difficulties in grappling with any degree of precision or predictability with this myriad of circumstances. Over recent years, proposals have been advanced for attempting to narrow the scope of the criminal prohibition against horizontal collusive arrangements to a hard core of *per se* arrangements, and remitting other horizontal arrangements for rule-of-reason review by the Competition Tribunal on much the same basis that mergers, abuse of dominance, and reviewable practices are now treated.¹⁸⁷ The Federal Government currently has under consideration proposals to this effect in forthcoming amendments to the *Competition Act*. Thus, while Gonthier J. may not have been especially successful in clarifying the content and scope of section 45(1)(c), he is not alone in his failure to achieve a high level of precision in ascribing content to the provision. Thus, resolving doubts about the appropriate scope of a prohibition on horizontal agreements or arrangements amongst competitors that I have sketched above constitutes important "unfinished business" on the competition law reform agenda. Whether this business will be finished by the courts or by the legislative process remains an open question.

VI. Conclusions

The principal theme that emerges from this paper is that in those areas canvassed, the modern (post-*Charter*) Supreme Court of Canada has displayed a good deal more economic sophistication than the older (pre-*Charter*) Supreme Court in strengthening the conditions for effective competition in Canada. This is evident in recent decisions that appear to expand the ability of the Federal Government to enter into external trade liberalizing treaties that bind provinces in some respects in matters that would otherwise fall within exclusive provincial jurisdiction. This is also exemplified in recent case law that appears to take a more expansive view of the federal government's ability to take proactive initiatives to promote integrated national markets (positive economic integration) and that constrains the provinces (but apparently not the federal government as evident from *Canadian Egg*) from adopting discriminatory policies that impede interprovincial movement of goods, services, labour, and capital (negative economic integration). With respect to domestic competition policy, the modern Supreme Court had accorded substantial deference to the specialized Competition Tribunal with respect to reviewable practices, and with respect to criminal violations of the Competition Act has adopted a generally more sophisticated economic understanding and less restrictive interpretation of the conspiracy provisions than reflected in earlier Supreme Court decisions.

¹⁸⁷ See M. Trebilcock & P. Warner, "Fixing Price Fixing Laws" (1996) 17 Canadian Competition Record 48; T. Kennish & T. Ross, "Toward a New Canadian Approach to Agreements Between Competitors" (1997) 28 Can. Bus. L.J. 22.

A striking feature of developments in a number of these fields is the emergence of parallel institutional arrangements to the courts for strengthening the conditions for effective competition in Canada. With respect to external trade commitments that may impinge on provincial jurisdiction, the federal-state clause contained in Article XXIV (12) of the GATT enables foreign sanctions to be targeted on non-compliant provinces in many contexts, following adverse WTO Dispute Settlement Body rulings, even though provinces are not directly parties to, or bound by, external trade treaties. With respect to the strengthening of the Canadian Economic Union, the evolution of the Agreement on Internal Trade provides a vastly more fully elaborated set of commitments on the part of the federal and provincial governments with respect to internal trade in goods, services, labour, and capital than that embodied in the Canadian Constitution or in case law that has developed thereunder, as well as creating a non-judicial form of dispute resolution as an alternative to, but not displacement of, the courts. With respect to domestic competition policy, the creation of the Competition Tribunal in 1986 has largely displaced the courts from any significant substantive role in the interpretation and application of the reviewable practice provisions of the Competition Act. With respect to both of these latter developments it is premature to form a firm judgment as to whether they will prove substantially more effective than the courts in strengthening the conditions for effective competition in Canada, but at least in the contexts with which this paper has been concerned they emphasize the importance of not becoming too court-centric in evaluating the efficacy of existing institutional arrangements in promoting the policy objective which has been the focus of this paper.

Moreover, from a political economy perspective, these alternative arrangements emphasize that even courts, like most other public institutions, face actual or potential institutional competition in the functions that they perform¹⁸⁸, and deficiencies in their performance are likely to lead, over time, to the emergence of institutional substitutes, hence cautioning against excessive judicial complacency. While it is often claimed that one of the characteristics of monopoly is a quiet life, fortunately very few institutions in our country truly possess uncontestable monopoly power.

¹⁸⁸ See A. Breton, *Competitive Governments* (New York: Cambridge University Press, 1996).