

Macdonald-Laurier Institute

True North

In Canadian Public Policy

February 2017

One nation or
13 cliques?

Only Ottawa can
make us citizens
not strangers

Eliminate
provincial trade
barriers with
a Charter of
Economic Rights

Liberté économique
pour les Canadiens

**Citizen of One,
Citizen of the Whole**

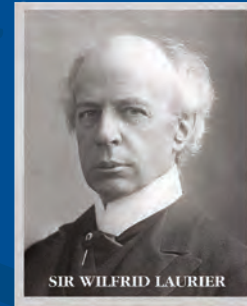
Hon. George Brown



True North in
Canadian public policy



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RE-ISSUED FOR CANADA 150

If a Canadian goes now to Nova Scotia or New Brunswick, or if a citizen of these provinces comes here, it is like going to a foreign country. The customs officer meets you at the frontier, arrests your progress, and levies his imposts on your effects. But the proposal now before us is to throw down all barriers between the provinces — to make a citizen of one, citizen of the whole; the proposal is that our farmers, and manufacturers and mechanics, shall carry their wares unquestioned into every village of the Maritime Provinces, and that they shall with equal freedom bring their fish, and their coal, and their West India produce to our three millions of inhabitants. The proposal is, that the law courts, and the schools, and the professional and industrial walks of life, throughout all the provinces, shall be thrown equally open to us all.

— George Brown, 1865

I don't even like to contemplate what the famously irascible George Brown would say if he were to travel 150 years into the future from the date of Confederation to the Canada of 2017.

This is a man who celebrated Confederation as a project to tear down the barriers that separated the colonies of British North America, who thought he and the other founders were forging a new united nation, and making the citizens of each separate colony into members of a greater whole.

And yet here we are 150 years later having failed signally to realise Brown's vision. He would look for the powerful federal government he and his colleagues intentionally created to resist the siren song of protectionism and parochialism, a federal government that would encompass English and French, Maritimer and Upper Canadian, Catholic and Protestant, and out of that diversity fashion a new nation enjoying a single national market and economy while protecting local identities.

Instead what he would see today is a timorous Ottawa that for decades has placated the provinces by refusing to use its legitimate power under the Constitution to create a barrier-free internal market. In its place he would behold a Rube Goldberg construction of an Agreement on Internal Trade cobbled together by the provinces as a face-saving measure but which has consistently failed to deliver the goods.

He would surely ask why we would have expected things to

be any different. No other federation in the world allows the constituent units to decide if they will volunteer to give up the barriers that prevent the creation of a unified national economic space. And he would doubtless point out that there is a good reason why we do not expect provinces or states in federations to fix this problem: they are the ones who created the barriers in the first place, and who reap political benefits from doing so. He would remind us that it was the precursors of the modern provinces, the United Province of Canada, Nova Scotia and New Brunswick, that wanted to secure markets and internal free trade, and imagined a tide of commerce out of the North West, down the St Lawrence to the sea, all predicated on the creation of a federal government that could make it happen.

Today's situation would all seem so familiar to him. In the middle of the 19th century governments derived most of their revenue from duties and tariffs, and the customs house was a familiar sight on the borders between the colonies. Canada having lost, over the preceding decades, privileged access to both the US and the Imperial market, the desperate colonies were driven to see that at the very least they could ensure that the local domestic market would be open to people in every part of Canada. Confederation was held out, not least by Brown himself, as the solution to this problem, not the shabby enabler of its perpetuation.

In this classic MLI paper, one of the first ever published by the Institute after it opened its doors in 2010, we proudly pick up George Brown's mantle and make the case, not just economically, but politically and morally, why Ottawa should make good on the founders' vision, including through a Charter of Economic Rights. The provinces have proven incapable of solving the problem and I expect very little other than more cant and prevarication from the promised new Agreement the premiers are to announce in the coming weeks.

Fortunately the courts are now being given a chance to weigh in and may be beginning a process of resuscitating Section 121 of the British North America Act (Constitution Act, 1867) that should have ensured a barrier-free economy from the start. But we should not leave this issue to the tender mercies of fickle courts. We, on George Brown's behalf, reissue this paper in the year of Canada's 150 birthday to remind our national politicians, yet again, that they are failing the founders and failing Canada and failing Canadians when they choose the quiet life in federal-provincial relations instead of using the legitimate and powerful tools they were granted in 1867 to fix this problem. We will keep reminding them until they get the job done.

— Brian Lee Crowley, Managing Director,
Macdonald-Laurier Institute

CITIZEN OF ONE, CITIZEN OF THE WHOLE

HOW OTTAWA CAN STRENGTHEN OUR NATION BY ELIMINATING
PROVINCIAL TRADE BARRIERS WITH A CHARTER OF ECONOMIC RIGHTS

By Brian Lee Crowley, Robert Knox and John Robson

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“The proposal
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~ GEORGE BROWN, 1865

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ECONOMIC FREEDOM FOR CANADIANS

If Canada is our common home, why are so many doors locked inside it? The federal government has the legal power and moral duty to ensure that there are no restrictions and impediments to the free movement of people, goods, services and investment in Canada. Not only are these barriers costly impediments to the efficiency of the Canadian marketplace, but they interfere with and erode the basic rights of Canadians. Establishing that Canadians have a right to move, work and do business anywhere in Canada would be the much-delayed fulfilment of our Founders' dream of a great nation, and of the deal they struck in 1867.

The national duty

Provincial and federal measures and policies that impede and restrict trade do considerable economic harm. But they do something far worse. They make us less of a nation. Our national anthem celebrates “the true North, strong and free” and our first French-speaking prime minister, the Liberal Sir Wilfrid Laurier, boasted that “Canada is free, and freedom is its nationality.” When governments trample on our right to move about, make a living, and use our talents as we think fit anywhere in our national home, they don't just make us poorer or less free, they turn us from fellows into foes and from citizens into strangers.

The economic responsibility

The economic case for national action is also compelling. It makes no sense to have impediments to trade and economic activity between provinces simply because there are no national rules to stop them. If barriers are intended to make one province or territory richer by making others poorer they usually fail and we all suffer, but anyone who fails to play the protectionist game is a chump. Only the national government can ensure that Canada has an open, efficient, predictable and stable domestic market where all Canadians are treated fairly and equally.

The legal power

As in every well-designed federation, Canada's Constitution firmly and distinctly assigns power over internal trade to the central government. The Fathers of Confederation clearly

wanted to make Canada one economic space, to prevent a harmful protectionist “beggar-thy-neighbour” free-for-all. And the courts have generally upheld this vision. Only a failure of federal nerve has prevented the forceful exercise of this clear power. It is high time for the federal government to introduce a sweeping statute to ensure that no government rules or policies unnecessarily restrict the free movement of goods, services, labour and capital, and give individual citizens clear legal remedies against such restrictions.

Our recommendations

We recommend that, since the federal government already has the power to get rid of most of the barriers to free trade and mobility within Canada, an Act of Parliament should create The Economic Charter of Rights for Canadians that would be faithful to the vision of our Founding Fathers while respecting the constitutional division of powers and responsibilities between the provinces and Ottawa.

We further recommend the creation of an Economic Freedom Commission with the power to investigate breaches of the Economic Charter of Rights on its own initiative as well as in response to complaints. Giving this body power to bring its own legal actions would dramatically benefit individuals and small businesses that cannot afford to launch costly litigation against provincial authorities.

Time to act

If Canada is our common home, we should not be shut out of many rooms or forced to empty our pockets before entering them. The federal government has the duty and the power to undo this harm.

In the 2007 Throne Speech the federal government promised to “consider how to use the federal trade and commerce power to make our economic union work better for Canadians” and in its 2008 election platform the Conservative Party declared itself “prepared to intervene by exercising federal authority if barriers to trade, investment and mobility remain by 2010.”

The federal power exists. The domestic barriers continue. The historical vision and the present moral duty are clear. Why are Canadians still waiting to have their freedoms vindicated in this vital field? What is the government waiting for? •

LIBERTÉ ÉCONOMIQUE POUR LES CANADIENS

Si le Canada est notre domicile commun, pourquoi contient-il autant de portes fermées? Le gouvernement fédéral a le pouvoir moral et légal de faire en sorte qu'il n'y ait aucune restriction ou obstacle au libre mouvement des personnes, produits, services et investissements au Canada. Ces barrières et restrictions sont coûteuses, elles rendent les marchés canadiens moins efficaces, en plus d'éroder les droits fondamentaux des Canadiens. Établir le droit des Canadiens de se mouvoir, de travailler et de faire affaire n'importe où au Canada serait l'aboutissement longtemps attendu du pacte de nos Pères Fondateurs, qui, en 1867, entendaient fonder une grande nation commune pour tous les Canadiens.

Le devoir national

Les mesures et politiques provinciales et fédérales qui entravent le commerce sont extrêmement coûteuses sur le plan économique. Mais il y a bien pire. Ces mesures et politiques affaiblissent la nation canadienne. Wilfrid Laurier a dit : « Le Canada est libre, et la liberté est sa nationalité. » Quand les gouvernements empiètent sur notre droit à la mobilité, sur notre droit de gagner notre vie et d'utiliser nos talents comme bon nous semble n'importe où au pays, ils ne font pas que nous appauvrir et nous rendre moins libres. Ils font de nous des adversaires et non des alliés, des étrangers et non des concitoyens.

La responsabilité économique

Les raisons économiques d'agir sont également importantes et nombreuses. Il n'y a aucune raison d'avoir des obstacles au commerce et à l'activité économique entre les provinces simplement parce que les règles nationales les interdisant n'ont jamais été adoptées. Si ces barrières sont érigées avec pour intention de rendre une province ou territoire plus riche en appauvrissant les autres, elles faillent généralement et nous en souffrons tous. Seulement, dans un tel contexte, la province ou territoire qui refuse d'ériger de telles barrières est plus perdante que les autres. Seul le gouvernement fédéral est en mesure de s'assurer que le Canada ait

un marché domestique ouvert, efficace, prévisible et stable où tous les Canadiens sont traités de façon juste et équitable.

Le pouvoir légal

Comme dans toute fédération bien pensée, la Constitution canadienne donne au gouvernement fédéral le pouvoir de réglementer les échanges et le commerce et ce, de façon claire et ferme. Les Pères de la Confédération ont clairement voulu faire du Canada un espace économique unique afin d'éviter un enchevêtrement nuisible de mesures protectionnistes. Et le système judiciaire a généralement soutenu cette vision. Seul un manque de volonté de la part du gouvernement fédéral empêche l'exercice vigoureux de cette prérogative fédérale claire. Il est plus que temps pour le gouvernement fédéral d'introduire une loi cadre pour s'assurer qu'aucun gouvernement provincial ou territorial n'impose des règles ou politiques qui limitent indûment le libre mouvement des biens, services et capitaux, et qui donnerait aux individus des remèdes clairs et efficaces contre de telles limites.

Le temps d'agir

Si le Canada est notre domicile commun, aucune pièce ne devrait nous y être interdite. Le gouvernement fédéral a le pouvoir et le devoir de nous protéger contre de telles mesures.

Dans le discours du Trône de 2007, le gouvernement conservateur a promis d'envisager « des moyens d'utiliser le pouvoir fédéral de réglementation des échanges et du commerce pour assurer un meilleur fonctionnement de notre union économique, au profit de l'ensemble des Canadiennes et des Canadiens » et en 2008, la plateforme électorale du Parti conservateur promettait d'utiliser l'autorité du gouvernement fédéral si les obstacles au commerce, à l'investissement et à la mobilité existaient encore en 2010. Ces barrières sont toujours en place aujourd'hui.

Ce pouvoir fédéral existe. Les barrières au commerce domestique continuent d'exister. La vision historique ainsi que la responsabilité présente sont claires. Pourquoi les Canadiens doivent-ils encore attendre pour faire valoir leurs libertés dans ce domaine crucial? Qu'attend le gouvernement pour agir? •

PART I: THE MORAL DUTY

Canada's federal government has a clear moral duty to strike down the maze of government obstacles to economic freedom and genuine national citizenship. As George Brown said in his magnificent pro-Confederation speech on Feb. 8, 1865, complaining about the swarm of customs officers harassing people at every provincial border, the idea behind Confederation was to "throw down all barriers between the provinces — to make a citizen of one, citizen of the whole."¹ There lies the crucial consideration.

Our Founders did not expect to build a sense of nationhood on gaudy rhetoric. They knew true patriot love arises when citizens feel membership in a political community as a privilege and a responsibility, as Wilfrid Laurier did when he boasted "Canada is free, and freedom is its nationality." That is why small-minded measures that chip away at that freedom, and in doing so turn us from proud citizens into parochial adversaries, ought to be regarded with scepticism and disbelief.

The men who made Confederation expected people to grow to love Canada because it would give them room to be themselves and make them free to pursue their destiny without artificial obstacles to their talent. It was not only a worthy vision from the point of view of human fulfilment, it is dangerous to ignore from the point of view of national cohesion.

Our common citizenship is dangerously incomplete so long as artificial obstacles to the exercise of that citizenship remain. A profusion of rules that put us at odds when we go to work or to shop is neither fair, nor sensible, nor true to the vision of our Founders. And it is no way to run a serious country.

NO WAY TO RUN A COUNTRY

To speak of the Founders' vision risks running up immediately against a peculiar myth that national pride and principled patriotism are somehow unCanadian. As B.C.'s long-time senior constitutional public servant Mel Smith put it, "Robert Stanfield, often described as the best prime minister Canada never had, once said that Canada will continue to exist as long as we don't stop to define what keeps it together."² But the men who made and shaped it held no such shabby opinion of what they had created.

Sir John A. Macdonald, on Feb. 6, 1865, challenged his legislative colleagues to embrace "the great country which British North America is certain to be" and assured them that within mere decades "our alliance will be worthy of being sought by the great nations of the earth,"³ which it certainly was in two world wars. And a Newfoundland legislator vainly argued in 1869 that if his province joined Confederation, "Our liberties would, in fact, be vastly extended, and we should move in a grander, wider, and nobler sphere."⁴

"The gentlemen who formed the conference at Quebec did not enter upon their work with the miserable idea of getting the advantage of each other..."

1 Janet Ajzenstat, Paul Romney, Ian Gentles, and William D. Gairdner, eds., *Canada's Founding Debates* (Toronto: Stoddard, 1999), 135.

2 In *British Columbia Report*, 13 June 1994, 9.

3 John A. Macdonald in the Legislative Assembly of Canada, 6 February 1865, quoted in Ajzenstat et al., eds., *Canada's Founding Debates*, 204-5.

4 Robert Pinsent in the Newfoundland House of Assembly, 11 February 1869, quoted in Ajzenstat et al.,

Yes, “liberties.” Popular and even scholarly accounts of Confederation too often depict our Founders not only as uneducated horse-traders but also as unreflective defenders of the privileges of the rich and well-connected. But Janet Ajzenstat, who has done as much as anyone to combat this pernicious myth, insists that the men who drafted, debated and ratified Confederation referred copiously to political philosophers from John Locke to William Blackstone, John Stuart Mill and the now sadly forgotten Jean Louis de Lolme, as well as to history and current events.⁵ Theirs was an articulate philosophical project to create a nation loved by its inhabitants because it protected minority rights and safeguarded personal freedom.

Not mere things

The key to our Founders’ thought about the economic freedom that all Canadians should share was this belief:

it is a serious affront to human dignity to deny a person the right to pursue their calling, and it is therefore statesmanship of the highest order to create a nation where it will not be allowed to happen. That is why men like Brown and Macdonald opposed interprovincial trade restrictions, and why Laurier, years later, praised “freedom, freedom in every sense of the term, freedom of speech, freedom of action, freedom in religious and civil life, and last but not least, freedom in commercial life.”⁶ There is no use excluding commercial freedom from the list of vital human freedoms. The work we do is one of the most important manifestations of who we are and what we wish to become. That is why cooperating economically binds citizens together in fellowship that transcends materialism. And a great society removes barriers to the full exercise of our individual powers not merely because it makes us more efficient, but because it makes us more able to be everything that we may wish to be.

Of course this freedom to buy and sell, to carry on a profession or calling, in every part of the country, is also good for prosperity. Our Founders believed that a man doing what he was meant to do, exerting his talents in the way best

suited to his personality, was probably going to be a man who prospered. Peter Mitchell warned the Legislative Council of New Brunswick in 1866 that “Isolation [is] dangerous to our liberty and destructive to our progress.”⁷ And later Laurier, boasting that the 20th century would belong to Canada, predicted that “For the next 75 years, nay for the next 100 years, Canada shall be the star towards which all men who love progress and freedom shall come.”⁸ But to them it was a happy coincidence that protecting individualism and defending the rights of personality was also the best way to create wealth.

Our Founders did not think there was a trade-off between prosperity and the higher, more spiritual things. Nor do most Canadians today. If a government policy could be found that increased wealth at the expense of human dignity we would surely reject it. We would not seek to improve GDP by, say, tolerating bigotry or sexism in the workplace even if we thought it would work, which we don’t. To us, as to the Founders, liberty and prosperity are linked, but freedom rather than material progress is the main point.

Our Founders were wise enough to base our constitutional order on the resulting insight that we would love a national home that told us to be Canadian and follow our dreams, wherever they might lead. And it is surely significant that a 2009 Pew Charitable Trusts survey found that 72 percent of Canadians said “being free to accomplish anything with hard work” is essential to the “Canadian Dream,” while 73 percent included freedom “to say or do what you want.” The corresponding U.S. figures were 74 and 68 percent.⁹

Canadian and American values overlap dramatically in this respect. But more than 200 years ago, Americans gave firm effect to their dream by forbidding the states to erect barriers to the freedom of Americans to give full play to their talents and abilities in every part of their country. In our failure to honour our Founders’ vision of a nation free of barriers to the economic and entrepreneurial energy and enthusiasm of Canadians, we have not merely lessened our prosperity. We have made our nationhood more fragile by elevating parochialism and protectionism over our common citizenship and freedom.

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eds., *Canada’s Founding Debates*, 58-9.

5 Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal & Kingston: McGill-Queen’s University Press, 2007), 7, 139. See also her forthcoming paper for the Macdonald-Laurier Institute.

6 Sir Wilfrid Laurier “some 80 years” ago, quoted by George Koch and John Weissenberger, *National Post*, 23 February 2004, A13.

7 Peter Mitchell in the Legislative Council of New Brunswick, 16 April 1866, quoted in Ajzenstat et al., eds., *Canada’s Founding Debates*, 132.

8 Wilfrid Laurier in Toronto, 14 October 1904, in Dennis Gruending, ed., *Great Canadian Speeches* (Markham: Fitzhenry & Whiteside, 2004), 86.

9 See Miles Corak, *Chasing the Same Dream, Climbing Different Ladders* (Economic Mobility Project, 2010, available at www.pewtrusts.org), 12.

One nation or thirteen cliques?

We must not delude ourselves. Canada has had several near-death experiences in recent decades precisely because, when confronted with a party that said Canada didn't make sense, too many important people had no intelligible reply, let alone one that Macdonald, Brown or Laurier would have endorsed. The last Quebec referendum in 1995 came within 1.16 percent of possibly breaking up Canada. If 27,145 people had voted the other way we might well no longer be a nation. Back in 1980 the "No" side won by 9.12 percent and 702,140 votes. In the intervening 15 years it gained only 174,657 votes, the "yes" side 822,509. Another 15 years later, complacency would be foolishness.

Powerful currents of regional alienation also flow through the West, the Atlantic provinces and even the North. And while it is comforting to regard the dramatic rise of the Reform Party in the 1980s as the expression of resurgent conservatism, it was initially a reflection of smouldering Western alienation, fanned into flames by the National Energy Program and propelled across the firebreak of the "national" Progressive Conservative party by a superficially trivial decision to move a CF-18 maintenance contract from Winnipeg to Montreal. It is inconceivable that such a thing could bring a new political party to Official Opposition status in 10 years in any other industrial democracy. And it is a dangerous measure of how little sense people have in various parts of Canada that they live in a truly national home.

Every rule that makes it harder to move to, or sell to, another province drives home that our "fellow" Canadians regard us as foreigners, people from elsewhere who represent a threat to their livelihood, rather than fellow citizens with whom they are engaged in the great enterprise of nation-building, sharing economic and commercial space just as we share geographic, legal and ecological space. As George Brown said in his great speech of Feb. 8, 1865, "The gentlemen who formed the conference at Quebec did not enter upon their work with the miserable idea of getting the advantage of each other..."¹⁰ and it is not an improvement that today's provincial governments so often engage in conduct that, whatever its motive, has precisely that effect in practice.

Removing interprovincial trade barriers will not solve

¹⁰ George Brown in the Legislative Assembly of Canada, 8 February 1865, quoted in Ajzenstat et al., eds., *Canada's Founding Debates*, 136.

all our regional woes. But since these barriers damage Canada and Canadians, and do not bring the economic benefits their defenders claim, it is foolish and short-sighted to tolerate the ongoing harm they do. As William Dymond and Monique Moreau of the Centre for Trade Policy and Law began a paper on Canada's Internal Market Barriers this past January, "One of the curiosities about Canada in the second decade of the twenty-first century is the stubborn resilience of internal market barriers."¹¹ It is not just bad policy, it is bizarre bad policy.

Silly and serious

The barriers in question are in many cases quite evidently foolish. Consider that different provinces mandate different sizes for those little containers of milk or cream for coffee that you find on restaurant tables.¹² Does anyone need protection against the hazard of imbibing a few extra millilitres of dairy product in their java? Indeed, does anyone suppose that inhabitants of, say, Manitoba habitually add a tiny bit more or less cream to their morning brew? Has anyone ever said, "Whoa, that's a Quebec dose you just put in"? No. It has only the purpose of favouring local producers at the expense of dairy farmers and processors elsewhere, and the effect of raising the cost by reducing the available choice to consumers.

By the same token, restrictions on the ability of accountants to "follow their clients" into Ontario¹³ are clearly not motivated by concerns about accounting standards in other provinces. An even odder restriction is that you can neither order wine directly from another province nor, indeed, buy a single bottle and legally carry it back with you,¹⁴ given that most provinces and territories from Newfoundland to the Yukon neither have

Every rule that makes it harder to move to, or sell to, another province drives home that our "fellow" Canadians regard us as foreigners.

¹¹ William Dymond and Monique Moreau, *Canada's Internal Market Barriers and Integration*, 1.

¹² We are indebted to Don Jarvis of the Dairy Producers' Association of Canada for this example.

¹³ Technically, Ontario prohibits Certified General Accountants from offering opinions on the validity of financial statements as they may elsewhere, so, for instance, an Alberta bus tour company wishing to add stops in Ontario cannot use financial statements produced by its Alberta CGA in the permit approval process (this example comes courtesy of Carole Pressault, Vice-president, government and regulatory affairs, CGA-Canada).

¹⁴ See wine critic Beppi Carosol's column "Let my vino go!," *The Globe and Mail*, 6 May 2009; in fact, the controlling legal authority in this case is a federal statute enacted at the request of the provinces that is probably nevertheless unconstitutional (see below).

nor are likely to develop a wine industry.

Meanwhile, Ontario and B.C. have different standards for bus brakes that affect both passenger and freight vehicles.¹⁵ Can anyone suggest that buses in one or the other of these provinces do not stop when the brake pedal is depressed? Then why can't the two provinces, while maintaining their own standards if they must, also declare that any bus-braking system acceptable in the other may be used in their own? In fact, B.C. specified that if Greyhound wanted approval for a bus trailer brake system already approved in Alberta, Ontario and other provinces, it would have to cause a bus to flip over with a trailer attached to it, an absurdly expensive requirement.

Quebec's infamous ban on pale yellow margarine has actually now been removed. But it certainly illustrated the deceptive nature of these barriers, since consumers hardly needed to be protected by the colour of the product inside from mistaking something with "margarine" on the label for butter. It was to impose extra cost on non-Quebec margarine makers, to the benefit of Quebec dairy producers, but at the expense of Quebec margarine buyers. So is the rule, still in place, that butter sold in Quebec must be wrapped in foil; what harm comes to Canadians elsewhere from the use of alternative packaging materials has never been explained. As is the rule in place as recently as 2007 that hay from Alberta cannot be trucked to B.C. unless it is unloaded and repacked to B.C. shipping standards.¹⁶ And a horde of equally petty and preposterous rules so immense that no one has ever come close to cataloguing them all. But in writing this paper, our experience, which any interested reader can easily duplicate, is that anyone familiar with any particular industry can readily furnish examples of vexing barriers in that industry.

OTHER BENEFITS

In addition to helping restore Canadians' faith in their nation and one another, bold, sensible, successful reform in this area would provide a badly needed boost to our rickety federal system in which everything seems to be upside down.

The federal government meddles in urban transit while inviting the provinces to trade talks with the European Union, prompting a senior international trade lawyer to

15 Cited in Eugene Beaulieu, Jim Gaisford and Jim Higginson, *Interprovincial Trade Barriers in Canada: How Far Have We Come? Where Should We Go?* (Calgary: The Van Horne Institute for International Transportation and International Affairs, 2003), 40.

16 See David Andolfatto, "Interprovincial Trade Barriers and the TILMA," 16 October 2007, at www.sfu.ca/~dandolfa/tilma.pdf.

say, "No country could seriously engage with a Canadian team of such makeup and divergent viewpoints."¹⁷ For the

federal government to relieve the provinces of the considerable burden of debating specific barriers to internal trade would be a service in itself. But it would also contribute to the strengthening of accountability more generally, by helping to disentangle federal and provincial responsibilities. Citizens are far better served when most policies and programs are designed, administered and funded by one clearly identified level of government.

Bold federal action to remove the ugly mass of internal trade barriers would not only be a triumph for federalism in the short run but a victory for better policy at every level in the long run. These are important

secondary considerations. But we should not focus unduly on governments.

MAKE US CITIZENS, NOT STRANGERS

It is in our daily lives that we will or will not feel ourselves to be one people. We only vote occasionally but we work together — or at cross-purposes — every day. And the Canadian federation should not put us at cross-purposes.

Throwing down the barriers George Brown despised would bring material benefits discussed in the next section. But the key point is that it would "make a citizen of one, citizen of the whole." To the Fathers of Confederation, patriotism was not some narrow creed or perfunctory obligation. It was the justified pride people would feel in belonging to a political community that gave them room to be what they were meant to be, to develop their talents and use their energies as they saw fit. It still is.

17 Lawrence Herman, "international trade counsel at Cassels Brock & Blackwell LLP in Toronto" in *The Globe and Mail*, 9 February 2010, A25; he also noted that the recent deal on the notorious "Buy American" provisions of the U.S. stimulus bill was only necessary because Ottawa protected the provinces' own preferential procurement rules in the WTO and NAFTA a decade and a half earlier. Among its other noxious features, protectionism tends to beget more protectionism. The willingness of the provinces to attend international talks also testifies to their uneasy awareness of the problems of trade barriers within Canada, including their ramifications for international treaties and the inadequacy of the current approach in dealing with them.

PART II: THE ECONOMIC RESPONSIBILITY

Over and above its moral responsibility to remove these obstacles to Canadians' freedoms, the federal government also has a clear economic responsibility to remove these harmful internal trade barriers in two distinct ways. First, narrowly, the responsibility exists because the barriers carry a high material cost. Second, in the broad sense that used to be called political economy, the responsibility falls to the federal government because only it is in a position to remove them effectively, inexpensively and with a reasonable degree of permanence.

THE THREE PROBLEMS OF ECONOMETRICS

When we say interprovincial trade barriers (IPTBs) have a high material cost, we do not claim that we, or anyone else, can calculate the cost exactly. All attempts to do so are unsatisfactory for three unavoidable reasons. First, IPTBs are so numerous and varied that no one has managed even to list them all. Second, they have such complicated effects that it is impossible to measure even their short-run costs with any certainty. Third, the harm they do accumulates dramatically over time in ways that are even harder to measure, especially their depressing impact on people's enthusiasm for trying new things, which, after all, is the elusive "innovation" that is the Holy Grail of so much government economic policy.

The listing problem

Numerous individuals and organizations have made attempts to estimate the cost of IPTBs.¹⁸ But none have tried to list them exhaustively; at best they try to designate the broad conceptual categories into which the whole bewildering variety of specific measures could in principle be placed. Thus a 2007 study for Industry Canada by Kathleen Macmillan and Patrick Grady listed the most serious areas as "government procurement practices; barriers to trade in agricultural and food products; technical standards and regulation; securities regulation; and barriers to investment," plus labour mobility, which the authors dealt with in a separate study.¹⁹

The harm that interprovincial trade barriers do accumulates dramatically over time in ways even harder to measure, especially their depressing impact on people's enthusiasm for trying new things.

¹⁸ The various attempts people have made to give a precise figure underline its impossibility. John Whalley of the University of Western Ontario did two studies, in 1983 and 1995, suggesting it was comparatively small, between one-tenth and one-fifth of a percentage point of GDP. In 1984 the famous "Macdonald Commission" suggested a much higher number, around 1.5 percent of GDP. A 1991 study for the Canadian Manufacturers' Association also found large costs but has been criticized for over-counting. Patrick Grady and Kathleen Macmillan, and the IMF, have weighed in using indirect methods that give a lower figure than the Macdonald Commission.

¹⁹ mpr.ub.uni-muenchen.de/8709/1/MPRA_paper_8709.pdf

The counting problem

If you cannot hope to list all the barriers, you certainly cannot place a dollar figure beside each and, by adding them up, get the total cost. But even if you could, the result would be highly unsatisfactory.

Suppose it was possible to list every provincial rule that raised the price of everything from a bottle of beer to a lawyer to a haircut,²⁰ figure out how much every rule raised the price of each, then multiply the relevant dollar figure by the number of beers consumed, lawyers' hours billed or haircuts in that province in a year, and add it all together. To call that result the "total cost" would still undercount badly, even if you got every part of the exercise right.

For one thing, it would leave out the time and effort brewers, lawyers and stylists waste filling out unnecessary forms full of baffling fine print. For another, it would omit the things people don't buy because they cost too much and the things entrepreneurs never even create because investors' or their potential customers' pockets are too empty. And it certainly fails to capture the long-term harm: how can anyone claim to measure the cumulative impact of stopping a decade's worth of innovations and improvements before the first one can take place?²¹

The depressing problem

The final and most serious flaw in any such tally of barriers and their costs is highlighted by a famous passage from John Maynard Keynes, no rabid advocate of laissez-faire economics. In his extremely influential interventionist manifesto *The General Theory of Employment Interest and Money*, Keynes wrote:

Enterprise only pretends to itself to be mainly actuated by the statements in its own prospectus, however candid and sincere. Only a little more than an expedition to the South Pole, is it based on

20 This is a real example; different provinces maintain different standards for barbers, although the Service Canada website (www.jobfutures.ca/noc/6271p2.shtml) notes that "Barbers can also obtain interprovincial trade certification (Red Seal) as qualified hairstylists."

21 In economic language, the problem is that you can only measure static costs, not dynamic ones, and any attempt to generate computer models of dynamic costs are far more impressive for their creativity orchutzpah than their reliability.

an exact calculation of benefits to come. Thus, if the animal spirits are dimmed and the spontaneous optimism falters, leaving us to depend on nothing but a mathematical expectation, enterprise will fade and die...²²

IPTBs tell entrepreneurs that if they find a new way to offer goods and services, upsetting today's cosy arrangements, a horde of bureaucrats will swarm around them trying to make it stop.

IPTBs tend to have exactly that effect, telling entrepreneurs that if they find some new way to offer goods and services, upsetting today's cosy arrangements, a horde of special interests, bureaucrats and officeholders will swarm around trying to make it stop.

For all these reasons, we cannot stuff a vast comprehensive matrix of IPTBs and their exact costs into a big computer and get a precise figure out. But this inability is not a serious impediment to our understanding. As Einstein said, echoing Aristotle, "Everything should be made as simple as possible, but not more so."²³ We

can state with certainty that IPTBs leave us all far worse off materially than anyone can calculate with precision, and the harm grows over time.

Measuring the unmeasurable

Researchers have nevertheless made various attempts to estimate the total cost of IPTBs, although as Grady and Macmillan note with considerable understatement, "There is no single overriding research methodology that is most appealing." Unable to make a precise count, they are generally compelled to make highly sweeping assumptions. For instance, one widely cited estimate starts by assuming that 17.5 percent of internal trade is affected by barriers with an average cost of 10 percent and one percent "interprovincial trade elasticity."²⁴ It is very difficult to see how one might attempt to test the empirical validity of these assumptions singly or in combination.

It is also not encouraging that the results of such indirect methods of approaching the problem vary widely, from around 0.2 percent of GDP to as much as 1.5 percent. But

22 John Maynard Keynes, *The General Theory of Employment Interest and Money* (New York: Harcourt Brace and World, 1964), 161-2.

23 Cited by Burton Malkiel, *A Random Walk Down Wall Street*, fourth edition (New York: W.W. Norton & Co., 1985), 210.

24 This is what economist John Whalley did in a widely cited 1983 paper. In 2004 the Canadian Chamber of Commerce surveyed its members and summarized the replies of the 37 companies that responded.

suppose the direct short-run cost of the various IPTBs is toward the low end of this range, around half a percent of GDP. That still means we are squandering more than a day's work by every employed Canadian every year for no good reason. Would a person earning \$50,000 a year scorn to pick up \$250 lying on the sidewalk?

With today's \$1.6-trillion economy, half a percent of GDP is \$8 billion a year, not chump change even to governments. In these hard economic times, if governments knew any other way of raising annual growth from, say, 1.5 percent to 2 percent, they would certainly do it, especially given chronic laments about slow productivity growth,²⁵ high unemployment and persistent, worryingly large government deficits.

So would citizens. That \$8 billion would mean an extra \$242 per Canadian, or more than \$950 for a family of four. And more. Make the economy \$8 billion bigger this year and, by the magic of compound interest, even sluggish annual growth of, say, 2 percent per year for a decade would turn that \$8 billion into \$9.56 billion in year 10, or \$1,211 for our typical family, and \$10,600 over the entire decade (their share of a total cumulative gain to the economy of \$87.6 billion).

Small is huge

Because of the dynamic effects of greater economic freedom, this estimate is certainly too low. And if a removal of barriers produced not a one-off benefit but a permanent increase in the rate of growth from, say, 2 percent to 2.5 percent a year, our typical family would be gaining something like \$1,460 a year within a decade. Nobody, from parents saving for their kids' education to those contemplating retirement to governments desperate for tax revenue, could possibly think this a small matter. And even that leaves out the impact of annoying rules on people's creative energy.

The best sum we can do

The limits of "econometric" efforts to reduce everything in life to computable equations need not cause us to despair of understanding the matter clearly. If the country is plagued by so many counterproductive regulations that no one can count them all, and every one of them imposes losses and discourages enterprise, and the possibility of new ones creates uncertainty that dampens innovation and discourages

25 See, for instance, the strongly worded speech by Bank of Canada governor Mark Carney on this topic on 4 February 2010.

investment, it takes no wit to recognize that their cumulative impact is both negative and large.

SOLVING IT SENSIBLY

If IPTBs are dangerous to our national unity, restrictive of our freedoms and harmful to our welfare, then the only remaining problem is how best to get rid of them. Persons of goodwill might consider it less risky or confrontational and more "Canadian" to seek a solution in federal-provincial cooperation or the goodwill and intelligence of the provinces. But while the suggestion is generous, there are two key reasons why it does not and cannot work, and why the federal government must take bold and decisive action.

Two things

The first thing we know when it comes to artificial barriers to the free movement of goods, services, workers and investment is that all "protectionism" is counterproductive. Behind the elaborate details, every governmental attempt to increase wealth by restraining trade amounts to trying to make citizens richer by making them poorer.

If, for instance, a government favours local dairy farmers by allowing only those with government-assigned quotas to sell milk and cheese within a province, it does no favours to those farmers who were already offering a good deal to stores and shoppers. By reducing the total amount for sale, or excluding lower-priced milk from other provinces, it certainly makes the favoured farmers richer. But every extra dollar they gain as producers is an extra dollar someone else in the province just paid as a consumer, so the community can't be better off overall.

If things like dairy quotas only moved money from the pockets of consumers to those of producers, there would still be room to question their fairness. Making it more expensive for poor people to give their growing children milk is not self-evidently a contribution to social justice. But there's another problem.

Because the cheese that people in the province are eating now costs more to make, but isn't any better to eat, the province as a whole is necessarily worse off, because it now receives less value for the same income overall. That's why, from the point of view of a society, every protectionist measure is quite exploded by the old

The country is plagued by so many counterproductive regulations that no one can count them all.

huckster's joke about losing money on every sale but making it up in volume.²⁶

Unfortunately the second thing is that, unless binding rules stop them, governments will indulge in protectionist conduct because of an unhappy meeting of honest error with dishonest self-interest. As a result, it is highly unlikely that provincial policies to limit the free movement of goods, services, labour and capital within Canada can be removed by the same provincial level of government that created them. And it is even less likely that provincial governments, even if they do summon the strength to clear away many of these barriers in one massive effort, will be able to maintain their resolve and avoid adding a host of new ones over time. The uncertainty created by the possibility of unpredictable new barriers in the future is every bit as economically debilitating as the barriers that exist today.

Honest error

Protectionism could not flourish if citizens and politicians were not prone to honest error, especially the familiar and widespread mistake of thinking that economics and economic policy is about producers. "Jobs, jobs, jobs" says the populist politician, and "strategic industry" says his wonky colleague, but the purpose of economic activity is not to expend effort, it is to get the goods and services we need and want. Moreover, all *consumers* have the same interest, in better products at a lower price, and it is both possible and desirable for governments to further that common interest of all citizens through judicious policy. But *producers* are competing with one another, so governments cannot further *all* their interests collectively, and to further those of some firms at the expense of others is favouritism, both inefficient and unfair.

Here, as is so often the case, the last word is the first, from Adam Smith: "Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it is necessary for promoting that of the consumer."²⁷ Unfortunately politicians and analysts all too often make a second honest error. They know, rightly, that

²⁶ It is curious that the benefits of trade are as well established as anything in the social sciences, from David Ricardo's 1817 theoretical demonstration to countless detailed studies to world history from Hong Kong to Argentina. Yet every generation has to rediscover them.

²⁷ Quoted by Lionel Robbins, *The Theory of Economic Policy in English Classical Political Economy* (London: Macmillan & Co. Ltd, 1952), 7. From *The Wealth Of Nations*, Book IV Chapter VIII, v. ii, p. 660, para. 49, according to www.adamsmith.org.

in business as in life, we are often wise to sacrifice today for a better tomorrow. Just as individuals exercise instead of eating, or cut out restaurant meals to pay down the mortgage, so businesses limit dividends to buy new machine tools. Where policymakers go wrong is in thinking that they know better than the shopping public what short-term sacrifices of consumers' interests will bring prosperity in the long run, bringing on blunders from PetroCanada to the Bricklin sportscar to state-sponsored composting. In fact, what is good for the economy is the success of the firm that does a better job of making customers happy, and only customers know which firm that is.

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The other kind

How much harm these two mistaken ideas could do in a vacuum we will never know, because unfortunately there are many people whose support for protectionism arises from something far darker than honest error. Virtually any protectionist measure that imposes small costs on very large numbers of consumers brings large benefits to a small number of producers, who are very definitely aware of the benefits they gain from that same protectionism.

As Adam Smith tartly observed, the people who made the protectionist argument "were by no means such fools as they who believed it."²⁸

The resulting political calculus favours protectionism even though the economic calculus does not. Interprovincial trade barriers are devices whereby a small number of producers seek to enrich themselves at the expense of a large number of consumers. And while the result is bad for the economic health of the community, those who benefit are highly motivated to mobilize politically to obtain such ill-gotten gains because, to each of them, the amount in question is large. And once they have got these legislated benefits, they are even more highly motivated to protect them through political action.

Accountants, for instance, will donate time and money to the campaigns of politicians who defend local standards that exclude competitors in other provinces. They will speak, write and distribute propaganda on behalf of rigorous local standards in accounting, and may even vote primarily on a candidate's stand on this issue. After all, they stand to lose

²⁸ Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Chapter III, Part II (Project Gutenberg online edition). It may just be coincidence, but those who impose such barriers are careful not to inflict them on opinion leaders like journalists or academics.

thousands of dollars a year if the law changes.²⁹

The populace at large, by contrast, has very little reason to mobilize politically to encourage opening up the spreadsheets because they're each paying only a few dollars more to get their taxes done or, indirectly, because local companies face slightly higher accounting costs. Even citizens who are politically engaged will normally speak, donate and vote primarily on other, broader issues.

Thus protectionist measures that do economic harm to most of the populace, and to the community as a whole, are a perennial political menace very hard to prevent or remove at the level that naturally gives rise to them.

THE SOLUTION

Foreign trade

This problem is extremely hard to solve when it comes to international trade. Even national governments convinced of the general blessings of free trade find it hard to resist implementing specific protectionist measures in wild profusion. And if they do somehow bind themselves through international treaties, they have considerable difficulty living up to their obligations. Despite the broad consensus that the Canada-U.S. Free Trade Agreement (FTA) and the North American Free Trade Agreement (NAFTA) have been hugely beneficial to Canada, governments of every partisan stripe still respond to nearly every FTA or NAFTA dispute as though trade were a brawl in which victory means our stuff beating their stuff, and attractively priced foreign cars, cheese or lumber pose a major threat to our prosperity.³⁰

Internal trade

Fortunately internal trade presents far fewer difficulties in a well-designed federation (and virtually none in a unitary state like Britain or France). Whatever crisis or accumulation

of pressures impels separate states or provinces to unite, if statesmen seize the moment to give the central government power to stop them waging economic war against one another, and the central government then uses that power intelligently, no one is sorry afterwards.³¹

Making such a decision — giving the centre binding authority over the states or provinces in matters of internal trade — bypasses the “incentive trap” described above at one fell swoop as far as internal barriers are concerned. The federal government may well find it hard to resist the protectionist temptation when it comes to international trade. But it is happy to restrain protectionist acts by the provinces or states within the federation, because pressure groups that may delude a provincial government into attempting to benefit its own residents at the expense of citizens elsewhere in the nation cannot possibly appeal to the national government with that argument.

It is not physically or theoretically impossible for provinces, states or territories within a federation to cooperate to reduce internal trade barriers. But it requires

constant strenuous efforts against their apparent best interest, a foolish and risky waste of the time, effort, brainpower and virtue of provincial politicians whose agenda is already crowded with things they should and can do.

Thus the federal government has decided to go ahead and create a national securities regulator, which virtually everyone agrees we ought to have and that virtually every other country does have³² but that the provinces were unable to create on their own. Unfortunately the proposed Canadian Securities Act would not compel but merely invite provinces to join the new unified regulatory regime,³³ an unduly cautious step in our view, especially

as Ottawa's decision to refer the draft bill to the Supreme Court and ask “Is the annexed Proposed Canadian Securities Act within the legislative authority of the Parliament of Canada?” will almost certainly elicit a ringing affirmation of

It is highly desirable to treat power over internal commerce as a crucial national function like defence or money.

29 See for instance the Certified General Accountants' 20 May 2009 “Update” on precisely such lobbying efforts by a rival organization, at www.cga-manitoba.org/cga/page_details.aspx?mpID=240&tID=800&pID=1002.

30 To be sure, governments can have legitimate complaints about dispute settlement processes in specific instances including in FTA and NAFTA. But it is remarkable how often their complaint is that they cannot prevent foreigners from selling citizens good things at attractive prices.

31 Not even Quebec sovereigntists, whose arguments for leaving Canada do not seem to include opting out of North American, or even pan-Canadian, free trade. *Au contraire*, the whole concept of “sovereignty-association” is that sovereignty will be achieved while leaving intact the economic union, and the sovereignty movement was generally favourable to free trade with the U.S. as a useful counterweight to economic interdependence with the rest of Canada.

32 Among the 109 current member nations of IOSCO, the International Organization of Securities Commissions, Canada alone lacks a national securities regulator.

33 The draft Act is available at www.fin.gc.ca/drleg-apl/csa-lvm-eng.htm.

the federal government's Constitutional authority over trade and commerce. As it should.

Ironically, the only real obstacle we can see to the affirmation of the federal government's authority arising from this reference case is the fact that the federal government's timorousness in making the national securities regulator optional rather than mandatory for all provinces weakens the case for the necessity and constitutional legitimacy of federal action.³⁴

Given the invidious nature of protectionism in a democratic system, it is highly desirable to treat power over internal commerce as a crucial national function like defence, money, or weights and measures. And that is what our founders believed they were doing in 1867.

Existing mechanisms and their inadequacy

So says theory. And practice; Canada has taken the alternative route for well over a decade, with extremely disappointing results.

The AIT

Canada's governments have been engaged in a protracted effort to reduce internal economic barriers since 1994, when they signed the Agreement on Internal Trade (AIT), which took effect on Canada Day, 1995. In the wake of the referendum defeat of the Charlottetown Accord in 1992, our federal and provincial governments were concerned to create a process that did not require constitutional changes, relied on cooperation and proved the federation could work.

The results of the process they created were disappointing in predictable ways. The AIT covers some barriers but not others. It is complex, difficult to access and to understand, but the main problem is that, for all practical purposes, compliance is voluntary. There are dispute resolution procedures but they are complicated and arduous, expensive and time-consuming to use and apply, and ultimately unenforceable.

No undertaking to establish an open domestic market is serious without being comprehensive and clear, and without absolute certainty that governments will respect and apply their undertakings and that there is a means of ensuring that they do.

One of this paper's authors, Robert Knox, was executive director of the Internal Trade secretariat when the AIT was

³⁴ For the full argument, see the article by Professor Jeffrey MacIntosh, *Financial Post*, 1 June 2010, FP11.

negotiated in 1993-94. As he wrote a decade ago, the AIT dispute resolution mechanism "is byzantine, expensive, time-consuming and, ultimately, pointless. Governments are free to flaunt it with no penalty. The only enforcement mechanism in the Agreement is itself perverse. A provincial government may retaliate against another provincial government that has failed to implement an Agreement-based finding. The result: more, rather than fewer trade barriers, and maybe an internal trade war."³⁵

Recently governments have tried to make the AIT's dispute-resolution procedures more effective and enforceable. Unfortunately, although their effort was well intended, processes remain fundamentally the same. They have added the possibility of financial penalties for non-compliance, but these penalties are sufficiently small that provincial governments can readily ignore them.³⁶ If provinces were willing to tie their own hands in these matters, they would already have done so; since they are not, the various specific flaws in the AIT are all just reflections of this unwillingness.

The fact is there will be no open domestic market in Canada without simple trade rules that apply to all economic activities in Canada enforced by impartial courts or trade tribunals. The AIT model is fundamentally flawed and cannot be made to work even with goodwill.

We have the AIT not because it is the best agreement but, having tried and failed to negotiate changes to the Constitution, Canadian governments thought it was the best they could do. The irony is that there is no

need for constitutional change or the AIT. Canada's Founders gave the federal government both the responsibility and the power to ensure an open domestic market in Canada.

The clients' view

The experts may assure us that progress is being made to eliminate barriers to internal trade using the Agreement on Internal Trade and other domestic trade agreements. Within limits it probably is. But when people whose livelihood depends on the existence of an institution praise it, outsiders are entitled to scepticism. Especially when the

³⁵ Robert H. Knox, "The Unpleasant Reality of Interprovincial Trade Disputes," *Fraser Forum*, October 2000, 27.

³⁶ The new provision for penalties (see the text on the Internal Trade Secretariat web site, at www.ait-aci.ca/index_en/ait.htm) is in Article 1707.1 but they are capped by Annex 1707.1(2) at \$5 million for the largest provinces and just \$250,000 for the three Territories and P.E.I.

*The Agreement
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intended beneficiaries are vocally unhappy.

The Certified General Accountants' Association of Canada, for instance, issued a paper in May 2007 called "It's Time to Move on from the Agreement on Internal Trade!" in which they said they had supported the goals of, and process leading to, the AIT and at first "believed it to be a good start." Unfortunately, they said "It is generally accepted that the AIT has not been a great success. It is limited, complex, inaccessible and unenforceable...."³⁷ And in February 2008, a major business coalition declared that "the AIT has not worked as intended. It is limited, complex and unenforceable. It is opaque and inaccessible to those outside of government, and operated by an intergovernmental structure incomprehensible to outsiders."³⁸ And it is.

The AIT is a backward process: its specific defects — from liberalizing only things specifically included, a patchwork of exclusions in different sectors, a cumbersome dispute resolution process, and a glacial negotiating pace — all reflect a presumption against internal free trade that is chronic at the provincial level. The solution is a federal action with a presumption in favour of liberalization that only permits exceptions where provinces pursue legitimate provincial goals using properly crafted laws and regulations.

Fifteen years since it was signed, the AIT lumbers awkwardly on. If it really worked it would have achieved most of its goals by now. Instead, consider that its Energy Chapter was, as of this writing, just as blank as when the AIT was first signed. In a dynamic and changing world, this snail's pace is not adequate and a serious nation would not think it was.

TILMA

It is not merely companies that are unhappy. So are the provincial governments most committed to liberating internal trade. That is why Alberta and B.C. created the Trade,

Investment and Labour Mobility Agreement or TILMA in April 2006.³⁹

On the surface TILMA is a major improvement on AIT. It's much shorter (just 33 pages) and it's much shorter because it's much freer. Where the AIT excludes from its liberalizing measures all goods and services not specifically covered within its pages, TILMA puts everything on the table that is not expressly removed. TILMA also has a better dispute resolution process. It can still be ignored, but at a cost. But its very strengths accentuate its weaknesses as a solution to our national problem.

Where AIT allows the most uncooperative provinces to obstruct progress, TILMA leaves them out, and therefore does nothing about the barriers they erect. TILMA includes only the particular provincial regimes most committed to liberalizing internal trade, and one adverse election could destroy it (members may withdraw with one year's notice). Because it only includes some provinces, TILMA also risks

further distortion of internal trade. Removing barriers among a few provinces could make it cheaper for individuals and firms to buy goods and services within the regional grouping that, without barriers in other parts of the country, would actually make more sense to buy elsewhere in Canada. The signing in September 2009 of the Trade and Cooperation Agreement Between Quebec and Ontario, which has almost all the weaknesses of the AIT and to the extent that it is effective will further regionalize the Canadian economy, is

not encouraging in this respect.

On Sept. 11, 2009, the government of Saskatchewan signed the Western Economic Partnership (WEP) with B.C. and Alberta; its internal trade section pledged that:

Building on the agreement already in place between British Columbia and Alberta, the Western Economic Partnership will include a comprehensive western interprovincial trade agreement (Agreement) to remove barriers to trade, investment and labour mobility between the three western provinces. The Agreement will cover all public sector entities and will encompass all economic sectors.

It remains to be seen whether binding action will be taken here (another trilateral meeting is being arranged at the time of writing), but even if it is, the WEP risks further hardening

The AIT "is opaque and inaccessible to those outside of government and is operated by an intergovernmental structure that is incomprehensible to outsiders."

³⁷ See www.cga-canada.org/en-ca/ResearchReports/ca_rep_2007-05_AIT.pdf.

³⁸ See www.cga-canada.org/en-CA/DiscussionPapers/ca_rep_internal_trade_position-paper2008.pdf; the coalition included the Canadian Chamber of Commerce, Canadian Bankers Association, Canadian Council of Chief Executives, Canadian Federation of Independent Business, Canadian Petroleum Products Institute, Canadian Restaurant and Foodservices Association, Certified General Accountants' Association of Canada, Dairy Processors' Association of Canada and Vegetable Oil Industry of Canada.

³⁹ See www.tilma.ca.

of regional trading blocs at the expense of our common internal market and without any guarantee of permanence.

Council of the Federation

Another attempt to solve the problem has been the creation of yet another high-profile, politicized interprovincial grouping, the “Council of the Federation,” consisting of the provincial and territorial premiers. The main interest of the COF lies in increasing federal transfers to the provinces rather than freeing internal trade. But to the extent that it turns its attention to the latter, it is a classic case of trying to solve the fox-guarding-the-henhouse problem by building a better fox. The COF does list “Internal Trade” as one of its four key initiatives⁴⁰ but, under that heading, merely harkens back to the AIT. The COF has made some improvements to the AIT, especially the Labour Mobility Chapter and the enforcement mechanisms. But they are not committed to a sweeping liberalization of Canada’s domestic market, only to the piecemeal AIT approach that is the core of the problem, not a solution to it.

Canadians have been debating the need for free trade within their own country for too many generations. In the new, information-driven global economy that respects few national boundaries, the time for action is long overdue.

How others have done it

Before we turn to the subject of the federal authority to remove barriers to internal trade without infringing on provincial authority (including authority over property and civil rights), it is worth noting a few examples of how other federal nations have approached the problems and opportunities of securing internal trade.

There are dozens of federations in the world but most of them differ so widely in their history, institutions, political culture and economic circumstances as to furnish few useful lessons. The two main exceptions are the two other continental federations derived from the unitary British model; that is, Australia and the U.S.

The U.S.

The single most important case study is the United States.

⁴⁰ www.councilofthefederation.ca/keyinitiatives/keyinitiatives.html

Not because it is our largest trading partner or because its cultural and intellectual influence is the stuff of Canadian nationalist nightmares. Rather, the U.S. is very much like Canada in being a nation on a continental scale, with largely British constitutional roots that flowered in federal rather than unitary form. And very much unlike Canada, it went through an initial stage of constitutional evolution that badly botched the issue of trade among the states, an experience from which the Fathers of our Confederation drew good lessons.

The Articles of Confederation

The immediate result of the Revolution and War of Independence was not the Constitution America has today, but the Articles of Confederation that created a loose federation of sovereign states rather than a national government. And the foundational crisis of American federalism lies in this period, from 1781 to 1789.

The short-lived Confederacy exhibited all the flaws that “theory” now tells us to expect when a central government lacks the power to do those things only it can do, from defence to trade policy. The result was, among other things, bitter protectionist battles among its 13 member states. And when its many failings provoked a crisis, America’s

Founding Fathers wrote a Constitution that, while still quite decentralized, gave the new federal government key powers including the ability to strike down restrictions on interstate trade.

The United States of Commerce

After 1789, the U.S. had few problems with restrictions on internal trade. The Constitution pretty much ruled out direct barriers in Article I, Section 10, which says “No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.” And for many years state governments were neither big enough nor ambitious enough to create many indirect barriers like subsidies or preferential procurement policies.⁴¹

In the latter part of the 19th century, economic and

⁴¹ In 1824 in *Ogden v. Gibbons* the Supreme Court was asked to rule whether “commerce” should be broadly defined (to include licensing steamboats) and whether the federal government had to share the commerce power with the states; it said “yes” to the first question and “no” to the second.

population growth led to a more active state agenda. But when state regulation became an impediment to internal commerce, beginning with railroad regulation, the federal government tended to step in, for instance by creating the Interstate Commerce Commission in 1887. And if such acts were challenged judicially, the Supreme Court favoured a broad reading of Article I, Section 8 of the U.S. Constitution (which not only gives Congress power to “regulate commerce with foreign nations, and among the several states” but also “To make all laws which shall be necessary and proper for carrying into execution the foregoing powers”).

Through the 19th century the Supreme Court limited that power to some extent by insisting that manufacturing was not commerce and was subject to state rather than federal authority. But in 1937, in *Jones & Laughlin*, the Supreme Court upheld the comprehensive pro-union “Wagner Act” (formally the National Labor Relations Act) on the novel ground that anything with a “close and substantial relation” to commerce was federal under Article I, Section 8.⁴²

American courts have also generally shared the federal government’s generous view of Article VI of the Constitution, which declares “This Constitution, and the laws of the United States which shall be made in pursuance thereof” to be “the supreme law of the land.” Washington has generally been able to pre-empt state action in areas connected with interstate commerce.

Even where the federal government has not acted, the courts have interpreted Article I, Section 10 as a “Dormant Commerce Clause” under which the power to regulate trade is given to the federal government and, if not exercised by Washington, must lie dormant rather than being exercised by states or municipalities. Thus the U.S. Supreme Court declared bluntly in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), that laws motivated by “simple economic protectionism” encounter a “virtually per se rule of invalidity.” In a typical example dating

back half a century, *Dean Milk Co. v. City of Madison, Wisconsin*, 340 U.S. 349 (1951), the court struck down a Madison, Wisc., ordinance requiring that all milk sold in that city be pasteurized at a local plant. And more recently, in dramatic contrast to the Canadian situation, the U.S. Supreme Court in *Granholm v. Heald*, 544 U.S. 460 (2005), struck down New York and Michigan rules against direct purchases from out-of-state wineries.

Proponents of cooperation may well note that the various states have achieved some impressive agreements, including a Uniform Commercial Code adopted by all 50 states, and 25 others adopted by at least 45 states, including the Interstate Driver’s License Compact and the Multistate Tax Commission. But it must never be forgotten that the tendency

of the states to play nice in this area is strongly influenced by the capacity, and willingness, of the federal government to take action when the localities do not, something Ottawa has so far been generally unwilling to do.

There continue to be problems and complaints, including foreign countries objecting to the extremely decentralized and not always harmonious way Americans set technical specifications. But the U.S. has dealt with the matter of internal trade barriers fairly effectively.⁴³

What lessons exist for Canada? Certainly the Fathers of Confederation noted that even a system far too decentralized for their taste assigned

power over internal trade and commerce to the national government in Washington, and profited greatly from it. They gave this power to our national government too (see Part III of this paper, page 21).

Moreover, even in a Constitution that gives all residual power to the states rather than the central government, American courts have generally upheld federal exercise of the trade and commerce power to remove internal barriers to the free movement of goods, services, labour and capital.

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⁴² In an eccentric subsequent decision, *Wickard v. Filburn* (1942), the court, in upholding the Agricultural Adjustment Act of 1938, ruled that this included wheat a man grew for his own personal consumption, an alarmingly open-ended doctrine that threatened to eliminate any sphere of state autonomy; in 1995, in *United States v. Lopez*, the court took a baby step backward, rejecting federal government claims that guns in schools affected interstate commerce by contributing to crime and thus raising insurance costs and making people less willing to travel to unsafe areas.

⁴³ There are some problems in the U.S., of course, most notably local procurement and a bewildering variety of local standards in all manner of areas. But as noted, the Supreme Court takes a very dim view of things whose purpose is clearly protectionist.

Australia

That observation brings us naturally to Australia, another continent-wide federation spun off from Britain's unitary system. Australia's Constitution, like the American, gives the states all powers not expressly assigned to the central or "Commonwealth" government (see Sections 51, 52 and 107). But those powers given to the centre definitely included internal trade and commerce. And as in the United States, Australian courts have usually sided with the federal authorities.⁴⁴ Australia's central government also has more power than the Constitution might suggest because it raises a much larger share of total tax revenue than Ottawa or Washington, which it has frequently used to gain leverage over the states on a wide range of issues.

One curious feature of Australia's Constitution when it comes to internal commerce is the declaration in Section 92 that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."⁴⁵ Regrettably this clause contains no enforcement mechanism, unlike the Dormant Commerce Clause requirement in the U.S. of affirmative Congressional action, and the Australian Parliament has never attempted to create one.

One reason for this inaction is that, for reasons of political culture rather than formal institutions, Australia's economy was for many years far less free than our own. A broad consensus on Fabian-style British socialism meant economic liberty was long considered far more unAustralian than (at least until recently) unCanadian. However, from the mid-1980s on, a consensus developed that Australia was in a steep economic decline — from 1950 to the mid-1980s, it fell from 5th to 16th in per capita income among OECD countries — that could only be reversed by rethinking old pieties.

First, external tariffs were slashed and have stayed down. Then with an invigorating foreign breeze blowing through

44 Thomas Jefferson, who hated the judicial branch, predicted such a development in his *Autobiography*, asking "how can we expect impartial decision between the General government, of which they are themselves so eminent a part, and an individual State, from which they have nothing to hope or fear?"

45 Technically it said they would be absolutely free once the federal government established uniform customs duties, as Section 88 obliged it to do within two years and as it did.

the economy, the federal government undertook a sweeping review of its own anticompetitive policies with a new and, for Australia, startling presumption in favour of competition.⁴⁶ What they call Government Business Enterprises or GBEs (roughly, our Crown corporations) were comprehensively reformed, and state cooperation was purchased by reforming the very lopsided structure of Australian fiscal federalism. A jewel in this reform crown was the Mutual Recognition (Commonwealth) Act of 1992,⁴⁷ which covers labour as well as goods and whose default presumption in favour of mutual recognition of professional standards was adopted in the latest revision to Chapter 7 on Labour Mobility in our own AIT (though, as always and regrettably, without the legal force of the Australian statute).

Just as the federal wave of market reform was ebbing, Australia's states launched a second wave of reform. Dragging along a now-reluctant central government, they undertook sweeping regulatory reform with the goal of creating a "seamless national economy," a broad and admirable phrase. What is especially noteworthy here is that, in recognizing that the national interest was not served by local protectionism, Australia's premiers also recognized that it was very hard to combat at the local level. Thus they intentionally engaged the federal government and got it to use its legislative power to bind them

to commitments they might very well have had trouble sticking to otherwise. Canadians might also usefully note that, as a result of all these reforms, Australia was back to 8th in per capita income in the OECD by the middle of the last decade.

Clearly Australian achievements in this area deserve commendation. Two factors limit their usefulness as a model, though. One is that although generally more over-regulated, their economy had fewer internal obstacles than ours.⁴⁸ Another is that Australia has no Quebec, no politically distinct region so dramatically out of step with most other

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46 A bracing reminder of the extraordinary complexity of modern government, and the bewilderingly vast task of piecemeal reform of anything from the U.S. federal budget to Canadian provincial protectionism, is that this sweeping Australian review involved some 1,500 different Acts. How could there be so many? And who could examine them all?

47 www3.austlii.edu.au/au/legis/cth/consol_act/mra1992221/

48 Its social programs were fully portable, and it has long had national corporate and securities regulation, and very few local content requirements or discrimination based on residency.

provinces on economic theory and in political culture that cooperation on national goals is electorally dangerous for its politicians.

Those qualifications noted, it remains well worth noting that Australia's founders, like Canada's, believed that in any sensible federation the central government should have power to strike down internal trade barriers. It is also noteworthy that when its state premiers want to get rid of such barriers, they tend to agree with their founders' vision and ask Canberra to get involved. A final point Ottawa should note is that as in the United States, when the Australian central government has taken action in this area, the courts have generally sustained it.⁴⁹

Elsewhere

Other foreign examples are less useful to us. Britain, for instance, is a unitary state; Switzerland has amended its constitution 140 times since 1848 and completely replaced it twice; the institutional arrangements of the European Union differ drastically from our federal government in ways we could not imitate even if we wanted to.

What can be said is that when people form genuine federations, they do it for fairly simple and consistent reasons, to combine the advantages of a unitary government in matters like defence and free internal trade with the advantages of continued local independence in matters like education and culture. And it is clear that Canada is one of the places where this federal concept was initially implemented sensibly.

In some ways Canada's Constitution may have been too centralized, in original intent and subsequent practice. But the Founders were absolutely right in 1867 to give Ottawa sweeping central power over trade and commerce. What remains in 2010 is to make full, frank, bold use of it.

Interesting if true

Or does it? The reader has yet to be shown that Canada's federal government really has the power we claim it does in the written text of the Constitution, in the minds of its founders and in the opinion of the courts. To that question we now turn.

⁴⁹ See, for instance, the Work Choices case (2006).

PART III: THE LEGAL POWER

CONSTITUTIONAL RULES

Feds rule

S. 91 of Canada's constitution unambiguously and decisively gives the federal government control over internal as well as international trade, including the power to strike down measures that deliberately, or accidentally, impose significant barriers to internal trade.

That is not to say that it has untrammelled authority in any area that involves commerce, of course. It is a fundamental legal maxim that you cannot do indirectly what you cannot do directly, and as the federal government may not invade provincial jurisdiction directly it cannot do it through the commerce power either. But by the same token, the provinces are not constitutionally permitted to create barriers to the free movement of goods, services, labour and capital directly, so they cannot do it indirectly.

With care

What is needed is a carefully drafted federal statute laying out an Economic Charter of Rights for Canadians enumerating, in broad terms, citizens' rights to free trade and mobility within Canada and giving aggrieved citizens and businesses resort to the courts if other dispute resolution mechanisms, from informal discussion to arbitration, fail. Essentially Canadians would be guaranteed the right to buy from or sell to another province or territory, and to work in and invest in it, as if they lived there, subject only to restrictions that can be demonstrated to be rationally related to a constitutionally valid provincial objective and to impair economic freedom as little as possible.

The statute in question would entrench a domestic version of the "national treatment" provision⁵⁰ of international treaties like NAFTA, striking down provincial measures including preferential government procurement⁵¹ that undermine our common internal market and create the paradox that it is sometimes easier for Americans to sell to Canadians than it is for their fellow Canadians to do so. For instance, NAFTA forbids restrictions on investment requiring local content and local processing rules; the AIT, by contrast, contains no such prohibition.⁵²

Canada's constitution gives the federal government the power to strike down measures that deliberately, or accidentally, impose significant barriers to internal trade.

⁵⁰ That is, it would be legally obligatory to treat goods and services produced in other provinces as though they had been produced locally.

⁵¹ The legislation should probably exempt government contracts below a certain size in order to avoid adding huge local administrative costs for little national gain.

⁵² Kathleen Macmillan and Patrick Grady, *Inter-Provincial Barriers to Internal Trade in Goods, Services and Flows of Capital: Policy, Knowledge Gaps and Research Issues*, Industry Canada, Working

The statute would not use the federal trade and commerce power to regulate the private sector, but rather would empower private individuals and private firms to enforce their rights.

The right of resort to normal legal processes is crucial here. How the statute upholds economic freedom is as important as what it aims to do. That is why we recommend the creation of an Economic Freedom Commission (EFC) with the power to investigate breaches of the Act on its own initiative as well as in response to complaints, to recommend arbitration and if need be to initiate legal action, but not to the exclusion of private parties' own independent right to do so.

Allowing citizens recourse to the courts is essential for two reasons. First, it is the only avenue to impartial dispute resolution; the legal maxim that no one shall be judge in his own case must be observed in the name of fairness. It is also crucial to decentralizing the process of unravelling the nightmarish complexity of IPTBs in the name of efficiency.

A government body charged with challenging such barriers is also essential, though, because the cost and complexity of litigation discourages individuals and small businesses from going to court against provincial governments and their all but unlimited resources. And large firms tend to work around barriers and do business where profits are to be had instead of spending shareholders' money on public policy litigation. We would also add that the EFC ought to employ precisely the sort of lawyers Sir John A. Macdonald did not want on the royal commission into the Pacific railway scandal, whom he pithily called "young disembowelling counsel."⁵³

These barriers exist in such astounding and often petty profusion that no centralized remedy can possibly work. That warning applies not only to attempts to identify and remove IPTBs piecemeal. It also applies to any attempt to centralize dispute resolution. It is no coincidence that Canada's governments, when they created the AIT, not only funnelled all disputes through a centralized process, they used a funnel sufficiently narrow to reduce progress to a trickle. Putting these disputes before Canada's elaborate court system, where precedent is generally observed, would radically enhance both the fairness and rapidity of the process.

A carefully drafted statute would avoid encroaching

on legitimate provincial jurisdictions (and therefore avoid judicial annulment). For instance, it would not attempt harmonization of standards. Nor would it challenge provincial subsidies. Constitutionally speaking these seem to lie well within provincial tax and spending power. And in any case they are far less insidious than most types of protectionism because they plainly require a provincial government to take from the majority to give to a favoured minority. And one additional virtue of placing enforcement in the hands of the courts rather than some federal tribunal is that it offers an additional safeguard against any tendency to encroach on provincial rights.

Structured in this way and in this spirit, an Economic Charter of Rights for Canadians with robust enforcement provisions would be in keeping with the text of the Constitution, the vision of Canada's Founders and more than a century of clear jurisprudence.

Section 91 is the key

Let us examine first the text of the Constitution. The core of the federal power to keep internal commerce free is not the oft-cited S. 91(2), saying "The Regulation of Trade and Commerce" is under "the exclusive Legislative Authority of the Parliament of Canada." Rather, the key to S. 91 is its broad grant of federal

authority to make any and all laws for the "Peace, Order and good Government of Canada," followed by the sweeping declaration that the central government has exclusive authority over "all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Enumeration is a frill

The list of enumerated federal powers in S. 91, including "Trade and Commerce," as that Section explicitly states, is only "for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section." If S. 91(2) had been left out of the Constitution entirely, or were removed from it, the federal government would still have exclusive jurisdiction over trade and commerce unless it were possible to point to some explicit grant of such powers to the provinces. With a few very specific and limited exceptions, it is not.

There is therefore neither reason to worry nor room to quibble that the mid-Victorian language of S. 91(2), or the

*We recommend
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Economic Freedom
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power to investigate
breaches of the Act on
its own initiative.*

Paper Series, 31 March 2007, 12. Online at mpira.ub.uni-muenchen.de/8709/.

53 We are indebted to Ian Blue for drawing this phrase to our attention.

mental habits of our Founders, might have failed to anticipate 21st century economic developments to the detriment of federal authority over, say, services or Internet commerce. It doesn't matter if most commerce could go in a mule cart in 1867. Everything not explicitly provincial in our Constitution is federal, and ambiguity deliberately favours federal power. Whether or not one would choose such an arrangement if starting from scratch, it is certainly a sensible way to handle internal trade barriers and it is without question, doubt or wiggle room the legal framework for legislation in Canada.

The American example

The Fathers of Confederation famously and deliberately wrote our Constitution that way for two main reasons. First, as proud inheritors of the system of British liberty, they drew much of their constitutional inspiration from the unitary, non-federal system in the United Kingdom. Sir John A. Macdonald is even on record that "I have again and again stated in the house, that, if practicable, I thought a legislative union would be preferable."⁵⁴ Legislative union along British lines was not possible but the Fathers preserved as many of its features as possible. And the second reason they did so was that they believed the disastrous and just-concluded American Civil War resulted from excessive decentralization in the United States Constitution. Whatever one thinks of this reasoning, the resulting legal draftsmanship was precise.

The American Constitution reserves to the states and the people all powers not expressly granted to the federal authorities, a point confirmed rather than established by the 9th and 10th Amendments in their Bill of Rights. The British North America Act of 1867, since renamed the Constitution Act, 1867, does the opposite, clearly and deliberately.

Section 91 rules

For this reason the superficial similarity between S. 91 of our Constitution and Section 8 of the American Constitution, both listing federal powers, must not be misunderstood. Theirs is exhaustive, ours merely illustrative. Any power not explicitly assigned to the American federal government by Section 8 does not, in fact, belong to it. But any power not explicitly assigned to the Canadian federal government

⁵⁴ Sir John A. Macdonald in the Legislative Assembly of the United Province of Canada, 6 February 1865, quoted in Janet Ajzenstat et al., eds., *Canada's Founding Debates*, 279.

by S. 91 belongs to it anyway unless expressly assigned to the provinces.

Provincial powers

The main section of our Constitution allocating powers to the provinces, S. 92, is the one that must be read restrictively if Victorian language does not entirely capture 21st century realities. And the drafters made sure no one could read any similarity to the American and Australian system of reserving non-enumerated powers to the localities into our Constitution. S. 92(16) of our Constitution Act gives the provinces "Generally all Matters of a merely local or private Nature in the Province." But S. 91 already ended by declaring firmly that "any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." That includes Trade and Commerce, read broadly.

Section 92, eh?

It is true that a newer section of the Constitution, S. 92A, added in 1982, extends provincial authority to include fairly wide powers over natural resources and electricity including, in subsection (2), "the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy." But it immediately adds that "such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada," so this power cannot be used to fragment or obstruct interprovincial trade. And then in subsection (3), S. 92A takes back what it just said by stipulating that "Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict." In short, S. 92A gives provinces permission to regulate the export of natural resources and electricity only in the absence of federal action, and even then denies them any capacity to create obstacles to free trade between the provinces.

The Fathers of Confederation believed the disastrous and just-concluded American Civil War resulted from excessive decentralization in the U.S. Constitution.

Section 121

That Canada's Founders gave power over internal trade and commerce to the federal government so it would get rid of such barriers, not replace provincial obstacles with federal ones, is driven home by S. 121, which 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." There is simply no room for doubt that those who created Canada wanted the federal government to have, and use, complete authority to rid Canadians of barriers to the free movement of goods, services, labour and capital within their national home. And read in conjunction with S. 91, the language of S. 121 places a very heavy burden of proof on the provinces when they act to obstruct interprovincial trade.

Ian Blue, a partner with Cassels Brock in Toronto and an experienced litigator on commercial and constitutional matters, has argued that even the federal ban on interprovincial liquor sales (the Importation of Intoxicating Liquors Act, or IILA, enacted at the provinces' urging) is probably unconstitutional because of S. 121.⁵⁵ Provincial barriers are far more vulnerable to legal challenge than the IILA, especially in response to suitable federal legislation. For one thing, in asking Ottawa to create this statute back in 1928, the provinces implicitly admitted that commerce is an area of federal rather than provincial jurisdiction.

Trade and commerce

The courts have repeatedly declared that the "trade and commerce" power comprises two heads, one being power over international and interprovincial trade, and the other a "general" heading that confers at least some authority to create national regulatory schemes covering even trade that occurs only within one province. This latter power, though extensive, is not absolute; the courts have consistently ruled since the *Parsons* case in 1881 (see below) that the Constitutional grant of power over property and civil rights to the provinces does limit it. But because of the main language of S. 91, it is Canada's provinces, not its federal government,

that need special permission to act in the area of trade and commerce, and while the federal authority to regulate commerce encounters some limits, the provincial authority to impede interprovincial trade simply does not exist and S. 121 clearly gives Ottawa broad power to deregulate in this area. Therefore federal authority over interprovincial trade, and commerce generally, may not give it unlimited power to impose rules but it certainly gives it the power to override improper provincial ones.

The Charter

No Canadian constitutional story can end in 1867, of course. In 1982 we not only "patriated" our Constitution but added the Canadian Charter of Rights and Freedoms, which had an enormous impact on law and jurisprudence in a wide range of areas. So even though the authors of the Charter were not primarily concerned with "economic"

rights narrowly defined, it is still important to see if their work had major implications for IPTBs.

The Charter certainly contains one clause of great importance for the concept of Canada as our common home. S. 6(2) declares that "Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province; and (b) to pursue the gaining

of a livelihood in any province." S. 6(3) adds a qualification of great importance, but one that conforms to and illuminates the scope of the 1867 trade and commerce power. It says, "The rights specified in subsection (2) are subject to (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services." These exceptions, like S. 91 and the Constitution generally, ensure that S. 6 does not annihilate or diminish legitimate provincial powers.

Three other Charter Sections have tangential relevance. It is possible that the equality rights in S. 15(1) of the Charter could be invoked to combat certain kinds of provincial protectionism and rather more remotely possible that subsection 36(1)(a) of the Equalization provisions, committing the federal government to "promoting equal opportunities for the well-being of Canadians" could be used. And the Canadian Constitution Foundation has suggested

"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."

⁵⁵ See Ian Blue, "On The Rocks? Section 121 of The Constitution Act, 1867, And The Constitutionality of The Importation Of Intoxicating Liquors Act," *The Advocates Quarterly*, 2009, 35, 306-33.

that the right to earn a living, and to own and enjoy property” is protected by “the Charter section 7 right to ‘life, liberty and security of the person.’”⁵⁶ But these provisions are hardly necessary to devising an unanswerable case for federal power to strike down IPTBs; it existed before 1982 and the Charter did not weaken it.

Proportionate impact

This power must be exercised carefully with respect both to intentions and means, avoiding both direct invasion of provincial jurisdiction and disproportionate impact on it. Indeed, it is important to stress that the specific statute and Economic Charter of Rights we recommend would not encourage, and S. 91 would not permit, the federal government to strike down any provincial law or regulation that happens to create impediments to interprovincial trade. To do so would annihilate the federal structure, which is neither legally possible nor desirable in policy terms.

The Constitution assigns important areas of responsibility to the provinces, from municipal affairs (S. 92(8)) to education (S. 93) to “Hospitals, Asylums, Charities, and Eleemosynary Institutions”⁵⁷ (S. 92(7)). And in the legitimate exercise of these powers the provinces cannot possibly avoid passing legislation and imposing regulations that create obstacles to the free movement of goods, services, labour and capital within Canada. In doubtful cases courts will have to make complicated judgments about whether and where particular laws and regulations cross the boundary into improper action or disproportionate impact but, just as the existence of twilight does not invalidate the concepts of night and day, the possibility of complicated disputes over specific facts does not invalidate the notion of acting on broad principle.

We do not want the federal power over trade and commerce to be used as a cover or a lever for intruding on areas of provincial jurisdiction. But we insist that areas of provincial jurisdiction not be used as a cover or a lever for meddling with the freedom of Canadians to buy, sell, work and invest anywhere they want in their common national home. That is sound economics and it is true to the vision

⁵⁶ See Karen Selick, “The Right that Dares not Speak its Name,” January 2010, 3. Paper submitted by the Canadian Constitution Foundation to the Content Advisory Committee of the Canadian Museum for Human Rights.

⁵⁷ Eleemosynary is a fine old word meaning “charitable.”

of our Founders, to which we now turn.

ORIGINAL INTENT

If we had nothing to go by except the actual language of the Constitution, we could not doubt that Ottawa has complete power to regulate trade and commerce in order to eliminate internal barriers to economic freedom. But we have two other important sources of information: the debates of Canada’s Founders and the rulings of its courts.

Throw down the barriers

Consider first the explicit statements of the people who negotiated and legislated Confederation, starting with the impassioned speech in favour of Confederation in the Legislative Assembly of the United Province of Canada on Feb. 8, 1865, by George Brown, pioneering journalist, abolitionist and long-time political foe of Sir John A. Macdonald, but an invaluable partner in Confederation: “I go heartily for the union, because it will throw down the barriers of trade and give us control of a market of four millions of people.”⁵⁸

As the words “throw down the barriers” make plain, his vision was as clear as it was comprehensive. “If a Canadian goes now to Nova Scotia or New Brunswick,” he complained in that same speech, “or if a citizen of these provinces comes here, it is like going to a foreign country. The customs officer meets you at the frontier, arrests your progress, and levies his imposts on your effects. But the proposal now before us is to throw down all barriers between the provinces — to make a citizen of one, citizen of the whole; the proposal is that our farmers and manufacturers and mechanics shall carry their wares unquestioned into every village of the Maritime provinces; and that they shall with equal freedom bring their fish, and their coals, and their West India produce to our three million of inhabitants. The proposal is that the law courts, and the schools, and the professional and industrial walks of life, throughout all the provinces, shall be thrown equally open to us all.”⁵⁹

Brown thus spells out the importance of freedom for people as well as goods. Services and professions as well as goods should be Canadian, not parochial. As should Canadians.

⁵⁸ Janet Ajzenstat et al., eds., *Canada’s Founding Debates*, 134.

⁵⁹ Janet Ajzenstat et al., eds., *Canada’s Founding Debates*, 135.

Throw down the wall

We noted at the outset the importance of George Brown's reference to making "a citizen of one, citizen of the whole" and how broadly that vision was shared in 1867. So was his emphasis on throwing down, rather than merely nudging or glaring at, the barriers to free interprovincial trade. It was received wisdom in London as well as here.

In February 1867, at second reading of the British North America Act in the House of Lords in London, the Secretary of State for the colonies, Lord Carnarvon, noted with dismay that "At present there is but a scanty interchange of the manufacturing, mining, and agricultural resources of these several Provinces. They stand to each other almost in the relation of foreign States. Hostile Custom Houses guard the frontiers, and adverse tariffs choke up the channels of intercolonial trade. There is no uniformity of banking, no common system of weights and measures, no identity of postal arrangements. The very currencies differ." After detailing the ludicrous profusion of monetary arrangements, he said, "I can hardly understand that any one should seriously dispute the advantage of consolidating these different resources, and interests, and incidents of government under one common and manageable system."⁶⁰

In fact, the creation of a large common market was very much on the minds of the Fathers of Confederation because access to both the American and British markets was uncertain. The United States eventually withdrew from the reciprocity (i.e., free trade) treaty signed in 1854, Britain's commitment to free trade was uncertain and its prior policy of including Canada in privileged access to protected markets had vanished with the repeal of the Corn Laws in 1846. In this unsettled circumstance, statesmen in the United Province of Canada, and in the Maritimes, realized they had a highly attractive third option, an internal common market, and they seized the opportunity.⁶¹

⁶⁰ hansard.millbanksystems.com/lords/1867/feb/19/second-reading

⁶¹ For more on this point see especially Brian Lee Crowley, Jason Clemens and Niels Veldhuis, *The Canadian Century* (Toronto: Key Porter, 2010), 38.

Everybody knows

In his award-winning biography *John A.: The Man Who Made Us*,⁶² Richard Gwyn expresses irritated surprise that at the Quebec City conference, "Issues that have dominated Canadian politics ever since, such as the division of powers between the two levels of government, were barely discussed at all; Macdonald suggested a list of federal powers, and

Oliver Mowat a list of provincial ones, and both were passed quickly with little argument or debate."⁶³ But one may reply with justice that in their minds there was little to discuss, especially with respect to the federal power over trade and commerce. Every argument and example argued for it, even the experience of the United States, too decentralized in the minds of many of Canada's Founders, but certainly flourishing due to the removal of internal barriers.

Thus New Brunswick's Amos Botsford invited his Legislative Council colleagues to read the history of the United States "and mark the progress she has made since the Declaration of Independence; as contrasted with the time previous thereto when the country was divided into minor petty provinces, each having a distinctive tariff, and without a central governing power. Union became strength there, and today, as the result of the confederate principle, the United States stands a prodigy — a wonder among the nations."⁶⁴

When George Brown spoke of gaining "all the advantages of a large and profitable commerce," he said nothing controversial to his audience. When he asked his adversaries "What one thing has contributed so much to the wondrous material progress of the United States as the free passage of their products from one state to another?" no one had a convincing reply and everyone knew it. And when he said the purpose of Confederation was to unite "for purposes of commerce, for the defence of our common country, and to develop the vast natural resources of our united domains,"⁶⁵

⁶² Recipient of the 2008 Charles Taylor Prize for Literary Non-Fiction.

⁶³ Richard Gwyn, *John A.: The Man Who Made Us: The Life and Times of John A. Macdonald, Volume One: 1815-1867* (Random House Canada, 2007), 316.

⁶⁴ Amos Botsford in the Legislative Council of New Brunswick, 4 April 1866, quoted in Ajzenstat et al., eds., *Canada's Founding Debates*, 202-3.

⁶⁵ George Brown in the Legislative Assembly of the United Province

no one objected to his placing commerce and defence in parallel, even though they all knew national defence must be a core function of the central government in any federation, especially given the dreadful American experience under the Articles of Confederation.

What more need be said?

Confederation was widely debated, not only at the Quebec and Charlottetown conferences but in the legislatures of every province. Many points were raised in its favour and many in opposition. But the debate shows no one opposing (or supporting) the union because it would *deny* the federal government power to create a seamless internal market. For better or worse the federal government would have uncontested power to make Canada one common economic home. And that is what happened. As Stéphane Dion noted in a November 1996 speech as Minister of Intergovernmental Affairs, “The trade barriers that still exist among the provinces are undermining one of the original objectives of our federation, which is to ensure the free movement of goods, services, labour and capital throughout Canada.”⁶⁶

JURISPRUDENCE

If we had only the Constitution and surrounding debates we could have no reasonable doubt on this point. But we have something far more important, in both intellectual and practical terms. The judicial branch in Canada has been presented with this question on a number of occasions and its rulings are as clear as legal reasoning can ever be when general rules collide with the complexity of human conduct.

Parsons

The first major case concerning the “Trade and Commerce” power arose soon after Confederation, in *Citizen’s Insurance Company of Canada v. Parsons* (1880) 4 Can. S.C.R. 215. In *Parsons*, a hardware store owner sued his insurance company after a fire, claiming an exemption clause

of Canada, 8 February 1865, quoted in Janet Ajzenstat et al., eds., *Canada’s Founding Debates*, 134-5.

⁶⁶ See www.pco-bcp.gc.ca/aia/index.asp?lang=eng&Page=archive&Sub=speeches-discours&Doc=19961120-eng.htm. In that speech, Mr. Dion went on to cite a Canadian Chamber of Commerce estimate that IPTBs cost “1% of GDP a year, or close to \$7 billion.”

in the contract didn’t conform to the Ontario Fire Insurance Policy Act. The Citizen’s Insurance Company, as respondent, argued that the Ontario act was “ultra vires,” that is, outside the

authority of the province of Ontario, because it trespassed on the federal power to regulate trade and commerce. The Supreme Court disagreed. As Chief Justice Ritchie wrote in his decision respecting the scope of the trade and commerce power, “while the legislative rights of the local legislatures are in this sense subordinate to the right of the Dominion parliament...the Dominion parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the parliament of Canada.” And as Justice Fournier added in a concurring judgment, “commerce in its most comprehensive meaning extends to

everything.... It is evident that this word cannot have in our Constitutional Act such an extensive meaning.”

The case was heard on appeal in 1881 by the Judicial Committee of the British Privy Council, then Canada’s highest court. In this, the first Canadian constitutional case to reach it, the Judicial Committee upheld the Supreme Court’s decision, saying the regulation of insurance contracts in Ontario was assigned to that province by S. 92(11), (13) and (16), covering “The Incorporation of Companies with Provincial Objects,” “Property and Civil Rights in the Province” and “Generally all Matters of a merely local or private Nature in the Province.”

Clarification, not limitation

This case is sometimes described as limiting the federal power. It did nothing of the sort. It simply underlined that federal paramountcy in trade and commerce did not annihilate the federal structure of our constitution by trumping any provincial act involving anything that is, or might be, sold between provinces or sold in such a way as indirectly to influence interprovincial commerce. On the whole, consistently with the *Parsons* precedent, courts have read the federal power broadly, just not so broadly as to function as a kind of constitutional *aqua regis*, a universal solvent that dissolves legitimate provincial powers.

In a forthcoming paper,⁶⁷ Ian Blue notes that in its judgment on appeal in *Parsons*, “the Judicial Committee

⁶⁷ Ian Blue, “Off the Grid: Federal Jurisdiction and the Canadian Electricity Sector,” to appear in Vol. 32 No. 2 of the *Dalhousie Law Journal*, 339-66.

of the Privy Council said that the words ‘The Regulation of Trade and Commerce’ in S. 91(2) included ‘regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion,’ but not so as to ‘comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province....’”

The restrictions thus created certainly have not significantly reduced the scope of the trade and commerce power. As Blue goes on to note:

In *Lawson*, Duff J. in the Supreme Court of Canada said about S. 91(2): “.... there is no lack of authority for the proposition that regulations governing external trade... as well as regulations in matters affected with an inter-provincial interest... are within the purview of that head.”

In *Natural Products Marketing Act*, Duff, now the Chief Justice of Canada, said: “the Regulation of Trade and Commerce does not comprise, in the sense in which it is used in S. 91, the regulation of particular trades or occupations or a particular kind of business...or the regulation of trade in particular commodities or classes of commodities insofar as it is local in the provincial sense; while, on the other hand, it *does embrace* the regulation of external trade and the regulation of interprovincial trade... [emphasis added].”

Blue adds that the subject has come up repeatedly and the courts, including the Privy Council, have been consistent. The provinces have jurisdiction over “trade which is entirely local and of purely local concern” (Chief Justice Duff again). But in *Willis*, Chief Justice Rinfret in the Supreme Court of Canada stated that the marketing of agricultural products outside the province in interprovincial and export trade were “two subject matters which are undoubtedly within [federal] constitutional authority.” In *Re: Farm Products Marketing Act*, Chief Justice Kerwin in the Supreme Court of Canada said: “Once an article enters into the flow of interprovincial or external trade, the subject-matter *and all its attendant circumstances* cease to be a mere matter of local concern.” (Emphasis added.)

As Blue sums up the jurisprudence, “From the above decisions, it can be easily seen that IPTBs would also fall under federal jurisdiction under section 91(2) on the grounds

that they would be matters of interprovincial and international trade and commerce.”

CIGOL v. Saskatchewan

Various other cases have touched on the scope of the federal trade and commerce power, including the rather complicated case of *CIGOL v. Saskatchewan* in 1978 in which the Supreme Court struck down a regime of taxes and royalties on resources designed to influence international

trade prices. This ruling seemed to trench so deeply into provincial powers that it prompted inclusion of S. 92A in the Constitution Act, 1982. But as noted above, that section first sharply restricts provinces’ uses of this power to meddle in trade and commerce and then gives the federal government power to pre-empt this provincial authority anyway.

Ontario Hydro v. Ontario (1993)

Another case often cited in this connection is *Ontario Hydro v. Ontario (Labour Relations Board)* in 1993. This case was primarily about the

exception in S. 92(10)(c) to the assignment of “Local Works and Undertakings” to the provinces if those Works “although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.” The Supreme Court ruled that in fact this Section allowed the federal government to intervene in relations between the Ontario government and employees of the provincial public power company at a nuclear plant, making the potentially very open-ended additional observation that federal authority in this area was strengthened by the general S. 91 power “to make Laws for the Peace, Order, and good Government of Canada.” But this decision is not central, partly because its main focus was the details of S. 92 rather than S. 91, and because it was a narrow 4-3 split decision with two rather different majority opinions.

The Big Three

The proper place to look for definitive clarity is a trio of cases, *Canadian National Transportation* in 1983, *City National Leasing* in 1989, and *Kirkbi* in 2005, in which the Supreme Court laid down and then reiterated

The courts, including the Privy Council, have been consistent. The provinces have jurisdiction over “trade which is entirely local and of purely local concern.”

the key tests of the “general” branch of the federal trade and commerce power.

In *A.G. (Can.) v. Can. Nat. Transportation, Ltd.*, [1983] 2 S.C.R. 206, the Court undertook a review of S. 91(2) jurisprudence going back to *Parsons*, which it extensively and approvingly cited as saying federal measures are valid if they are primarily intended to regulate trade and commerce generally and achieve this end with reasonable precision.⁶⁸

The Court returned to this subject in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, in which it laid out five key principles for determining whether federal legislation was valid under the “general” head of S. 91(2). Sixteen years later it repeated those hallmarks verbatim in *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302, 2005 SCC 65 (which also quoted *Canadian National Transportation* favourably). The *Kirkbi* judgment said:

The jurisprudence of our Court now recognizes that the following factors are hallmarks of a valid exercise of Parliament’s general trade and commerce power: (i) the impugned legislation must be part of a regulatory scheme; (ii) the scheme must be monitored by the continuing oversight of a regulatory agency; (iii) the legislation must be concerned with trade as a whole rather than with a particular industry; (iv) the legislation should be of a nature that provinces jointly or severally would be constitutionally incapable of enacting; and (v) 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 (*City National Leasing*, at pp. 662-63).

It then quoted *City National Leasing* that these are “a preliminary check-list” and that “The proper approach... is still the one suggested in *Parsons*, a careful case by case assessment” to see whether an intent to regulate trade and commerce is what both *City National Leasing* and *Kirkbi* call the “pith and substance” of a given legislative act.

In short, there oughta be a law

We certainly cannot predict, let alone dictate, what courts will do in the future. But this is one area where the Supreme Court itself seems to regard the jurisprudence as both settled and clear and it strongly favours federal power of precisely the sort we are arguing for. Since it has developed in the absence of any really decisive federal attempt to vindicate Canadians’ economic liberty against provincial restrictions, we have every confidence that such a statute, clearly and boldly drafted, would be upheld judicially at almost every turn. It might be added that if no such statute is passed, the federal government cannot possibly accomplish the goals we have in mind.

Some readers of an earlier draft of this paper have suggested that creating an Economic Charter of Rights could actually complicate litigation, by requiring courts to examine whether a given law or regulation contravened that Act as well as S. 91, 92 and 121. Our view is that given the lack of momentum to this point, legislated or litigated, a decisive federal Act is clearly called for.

If the federal government is convinced of the multiple blessings of what the Australians call a “seamless internal market,” it has nothing to lose by passing one and much to gain. As do we all.

The Supreme Court seems to regard the jurisprudence as both settled and clear and it strongly favours federal power of precisely the sort we are arguing for.

⁶⁸ The case also involved a complex dispute over authority to initiate criminal prosecutions, also resolved in favour of the feds, so the discussion of 91(2) does not begin until more than halfway through the judgment.

CONCLUSION

The profusion of internal trade barriers within Canada is harmful in every conceivable way. It is bad for our prosperity, it frustrates citizens' dreams and it undermines our sense of common citizenship. And the federal government has the power to get rid of most of them with a simple, vigorous legislated Economic Charter of Rights for Canadians setting out our right to free trade and mobility within our common national home, and giving us legal remedies against provincial measures that deprive us of our freedoms.

Such an Act would make us richer. It would be faithful to the vision of our Founders. And it would clearly respect the Constitutional division of powers and responsibilities between the provinces and the federal government as laid out in the Constitution Act of 1867 and upheld by the courts ever since.

We further recommend the creation of an Economic Freedom Commission (EFC) with the power to investigate breaches of the Economic Charter of Rights on its own initiative as well as in response to complaints, recommend arbitration and, if need be, initiate legal action, but not to the exclusion of private parties' own independent right to do so.

A government body charged with challenging such IPTBs, in addition to free access to the courts for private parties whose interests have been harmed, is also essential because the cost and complexity of litigation discourages individuals and small businesses from going to court against provincial governments and their all but unlimited resources. And large firms tend to work around barriers and do business where profits are to be had instead of spending shareholders' money on public policy litigation.

The federal government has repeatedly stated its intention to remove these barriers, so it clearly believes it has the authority to act in this area and the responsibility. All it needs is to find the courage. It was present in 1867 and we believe it can as easily be present today.

ABOUT THE AUTHORS



John Robson is the new Managing Editor of the Macdonald-Laurier Institute. John is also an Invited Professor of History at the University

of Ottawa, a columnist with the *Ottawa Citizen* and a commentator-at-large with News Talk Radio 580 CFRA in Ottawa. He holds a Ph.D. in American history from the University of Texas at Austin.



Robert Knox was the senior federal public servant responsible for the internal trade file starting in 1986 and

the Executive Director of the Internal Trade Secretariat during the negotiation of the Agreement on Internal Trade. Since retiring in 1996, he has been an active commentator on domestic trade issues and has provided advice on the application of the AIT.



Brian Lee Crowley is Managing Director of the Macdonald-Laurier Institute. He is the founder of the

Atlantic Institute for Market Studies (AIMS) in Halifax, a leading regional think tank. Brian is a two-time winner of the Sir Antony Fisher Prize for excellence in think tank publications and holds a Ph.D. from the London School of Economics.

STATEMENT OF SUPPORT

re: “Citizen of One, Citizen of the Whole”

Whereas barriers to the free movement of goods, services, labour and capital within Canada are economically harmful;

Whereas measures that divide Canadians by region and put us at odds with one another needlessly are harmful to our sense of common citizenship;

Whereas the federal government has the clear constitutional authority to remove barriers to free internal trade;

Whereas the founders of our Confederation clearly intended the federal government to create a seamless internal market for the economic, social and national benefit of Canadians;

Whereas the current government has committed itself to acting to remove such barriers;

And whereas the provinces cannot reasonably be expected to do so without decisive federal action;

We, the co-signatories of this statement, urge the federal government to pass legislation guided by the following principles and goals:

- Canadians should be free to pursue a livelihood anywhere in our national home;
- This right should be legally protected;
- The federal government should take positive, decisive

action to provide that legal protection;

- The federal government should establish an agency with the authority to investigate and, where appropriate, litigate against improper barriers to free trade, labour mobility and investment within Canada;
- In taking such action the federal government should respect the legitimate, constitutionally mandated rights and jurisdiction of the provinces and territories;
- In taking such action the federal government should complement, not infringe upon or supplant, citizens’ ability to enforce their rights to earn a livelihood anywhere in Canada through free access to impartial courts.

The proposal for a federally legislated Economic Charter of Rights and appropriate enforcement mechanisms put forward by Brian Lee Crowley, Robert Knox and John Robson, in their paper “Citizen of the Whole” for the Macdonald-Laurier Institute for Public Policy, meets all these criteria. We support the authors’ proposal that the federal government enact such a Charter, establish an Economic Freedom Commission and fulfill the dream of the Fathers of Confederation that in Canada a citizen of any province or territory would be a citizen of the entire nation.

SIGNATORIES

Tom Akworthy
Jan Blue

John Carpay
Purdy Crawford

Thomas d’Aquino
Jerry Grafstein

Stanley Hartt
Harry Swain

SIGNATORIES

re: "Citizen of one, citizen of the whole"



Tom Axworthy, a political strategist, writer and educator, is the new president and CEO of the Walter and Duncan Gordon Foundation in Toronto. He is the former chair of the advisory council for the Centre for the Study of Democracy, in the School of Policy Studies at Queen's University. He was senior policy advisor and principal secretary to Prime Minister Pierre Trudeau.



Thomas d'Aquino is senior counsel at Gowlings and serves as chair of the company's business strategy and public policy group. He chairs the Advisory Council for the Lawrence National Centre for Policy and Management at University of Western Ontario and is the former president and chief executive of the Canadian Council of Chief Executives. Tom served as a special assistant to the Prime Minister.



Ian Blue is a commercial litigator in energy-related, administrative law and constitutional law issues. He has appeared before all levels of government in Ontario, Alberta, Nova Scotia, New Brunswick and the Yukon. Ian has also appeared before the National Energy Board, the Ontario Energy Boards and other provincial energy and utility boards.



Hon. Jerry Grafstein is counsel at Minden Gross, practising in communication, broadcasting and entertainment, corporate and finance, international finance, and e-commerce. A long-time member of the Senate, Jerry chaired the Senate Standing Committee on Banking, Trade and Commerce, and co-chaired the Canada-US Interparliamentary Group.



John Carpay is executive director of the Canadian Constitution Foundation. He has served as special assistant to a federal cabinet minister and as an executive assistant to a Member of Parliament. He was Alberta director for the Canadian Taxpayers Federation.



Stanley Hartt, a labour lawyer, is chair of Macquarie Capital Markets Canada. He was chair of Citigroup Global Markets Canada Inc. and was the federal deputy minister of finance and Chief of Staff to Prime Minister Brian Mulroney. Stanley is a former partner at Stikeman Elliott.



Purdy Crawford practises corporate and commercial law at Osler, Hoskin & Harcourt. He was chief operating officer, chief executive officer, and executive and non-executive chairman at Imasco Ltd. He chaired the committee appointed to review securities legislation in Ontario and the Securities Industry Committee on Analysts Standards.



Harry Swain is senior advisor at the Canadian Institute for Climate Studies and a research associate at the University of Victoria's Centre for Global Studies. Expert in public environmental policy, Harry has chaired the research advisory panel of the Walkerton Inquiry, and an expert panel on a water and wastewater strategy for Ontario. He is a former deputy minister at Industry Canada.

RELEVANT SECTIONS OF THE CONSTITUTION ACT, 1867

VI. DISTRIBUTION OF LEGISLATIVE POWERS

Powers of the Parliament

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

1. Repealed.
- 1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,--

1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:--

(a) Lines of Steam or other Ships, Railways, Canals, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

(b) Lines of Steam Ships between the Province and any British or Foreign Country;

(c) Such Works as, although wholly situate within the Province, are before or after the Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage

of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

*Non-Renewable Natural Resources, Forestry
Resources and Electrical Energy.*

92A. (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable resources natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) The expression “primary production” has the meaning assigned by the Sixth Schedule.

(6) Nothing in subsections (1) to (5) derogates from any power or rights that a legislature or government of a province had immediately before the coming into force of this section.

VIII. REVENUES; DEBTS; ASSETS; TAXATION

....

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

RELEVANT SECTIONS OF THE CONSTITUTION ACT, 1982

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in, and leave Canada.

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

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Equality Rights

15. (1) Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

EQUALIZATION AND REGIONAL DISPARITIES

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians; •



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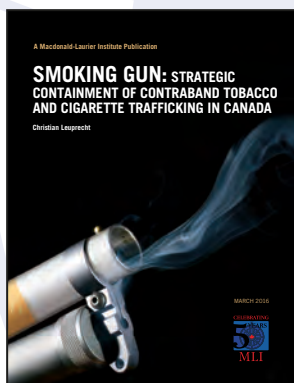
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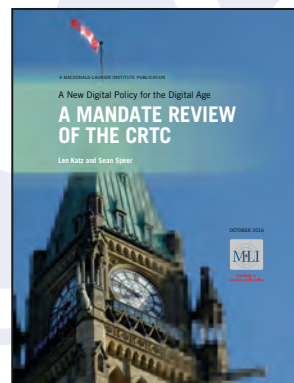
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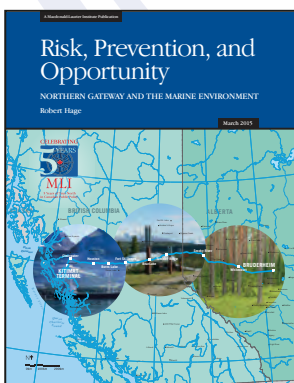
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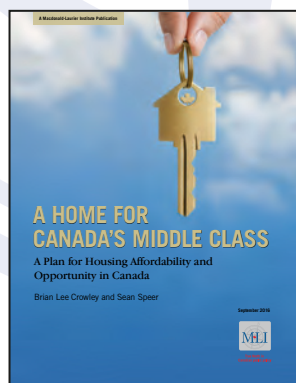
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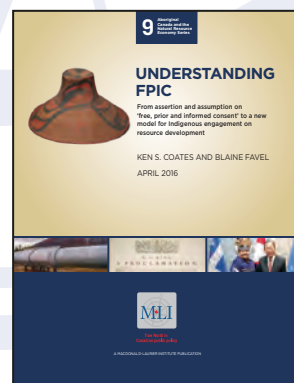
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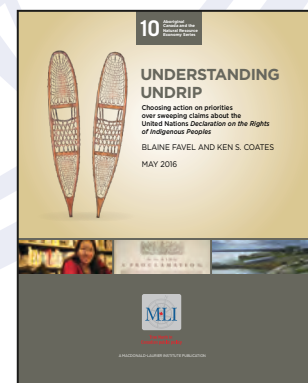
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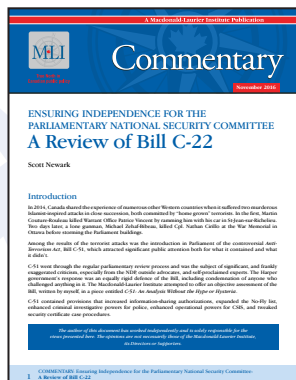
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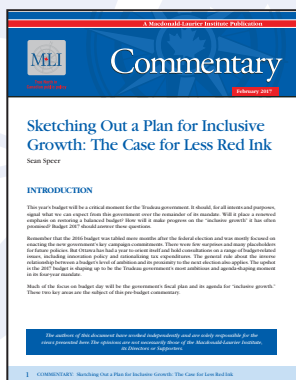
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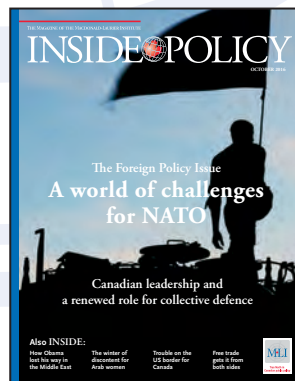
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THE RIGHT HONOURABLE STEPHEN HARPER

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