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UNLOCKING CANADA'S ECONOMY

Why mutual recognition is the key to supercharging internal trade

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Executive summary | *sommaire*

US President Donald Trump's tariff threats seem to have reminded Canadians that we don't even trade well with each other. We self-sabotage through domestic trade obstacles that hinder economic growth and security.

Right now, Canada's interprovincial trade barriers are a patchwork of conflicting laws and regulations that impose undue restraint on goods, services, and labour seeking to cross an internal frontier. It impacts everything from high-visibility safety apparel to electrical codes to health care professionals. These barriers harm Canadian growth and prosperity: by one estimate they add between 7.8 and 14.5 per cent to the price of goods and services.

Over the past thirty years, the federal and provincial governments have tried to tackle this issue via domestic trade agreements. These include the pan-national *Canadian Free Trade Agreement* (CFTA) and Western Canada's *New West Partnership Trade Agreement* (NWPTA) among several others. These agreements offer various tools to reduce trade barriers but among the most important is "mutual recognition."

Mutual recognition (MR) is an arrangement where two or more governments agree to accept each other's standards, regulations or laws in respect of goods, labour, and services without the need for additional testing or compliance checks. This approach stands in contrast to that of harmonization, which requires uniform rules. Governments find MR more attractive than harmonization because they can preserve their own standards and then choose to recognize those of others, thereby retaining greater local autonomy and policy flexibility.

Enshrining broad-based mutual recognition via provincial and territorial legislation would massively advance freer internal trade, unlocking Canada's full economic potential. To achieve this, the author recommends the following:

- A single legislative instrument for mutual recognition of goods, jobs, and services, with adjustments for their unique needs.
- For jobs, adopt a system similar to Australia's that accepts qualifications from other provinces and territories by default, with 30 days for regulators to reject.

- Ensure clear and transparent rules to operationalize mutual recognition, e.g. imposing response time limits and laying out the precise procedure to deny mutual recognition.
- Include inter-regulator trust-building mechanisms such as verification procedures, notification protocols, and reason-giving obligations when denying mutual recognition.
- Allow for appeals of mutual recognition decisions, with rules in place to ensure fairness.
- Incorporate a process for governments to escalate discrepancies for common standards.
- Permit exceptions and exemptions but in a way that furthers overall trade liberalization.
- Require regular reporting to ensure the proper functioning of the mutual recognition arrangement.

The evidence clearly shows that provinces and territories would benefit even if they adopted unilateral mutual recognition. Canada can also learn from the experiences of Australia and the European Union, which both adopted forms of mutual recognition. These lessons should be applied to the foundation established by Nova Scotia's precedent-setting legislation, the *Free Trade and Mobility within Canada Act*.

As other countries – particularly the United States – embrace economic isolationism, the need for Canada to break down its domestic trade barriers has never been more urgent. Now is the time for bold reforms that will remove these obstacles and drive prosperity for all Canadians. **MLI**

Les menaces à l'égard des tarifs par le président des États-Unis Donald Trump semblent avoir rappelé à la population du Canada que le commerce à l'intérieur de ses propres frontières ne fonctionne pas très bien. Nous échouons par notre propre faute, car cela nuit à notre croissance économique et à notre sécurité.

Les barrières commerciales entre provinces et territoires résultent d'un enchevêtrement de lois et de réglementations discordantes qui limitent indûment la circulation des produits, des services et de la main-d'œuvre d'une frontière intérieure à l'autre. Elles impactent tout, des vêtements de protection à haute visibilité jusqu'aux codes électriques, en passant par les travailleurs de la santé. Ces barrières freinent le développement et l'essor économique du Canada : on estime qu'elles font grimper les prix des produits et des services de 7,8 à 14,5 %.

*Pendant trente ans, les gouvernements aux paliers fédéral et provincial ont tenté de régler cette question avec des accords commerciaux nationaux : notamment l'*Accord de libre-échange canadien *à l'échelle nationale et l'*Accord commercial du nouveau partenariat de l'Ouest*. Ces accords offrent des mécanismes pour supprimer les barrières commerciales, mais la « reconnaissance mutuelle » figure parmi les plus bénéfiques.*

La reconnaissance mutuelle (RM) est une entente entre gouvernements pour reconnaître les normes, réglementations ou législations de l'autre partie en matière de produits, de main-d'œuvre et de services, sans nécessité de tests complémentaires ou de contrôles de conformité. Cette approche diffère de l'harmonisation, qui requiert des règles uniformes. Les gouvernements privilégient souvent la RM pour pouvoir conserver leurs normes tout en choisissant de reconnaître ultérieurement celles des autres, gagnant ainsi en autonomie locale et en souplesse politique.

La mise en place d'un régime général de reconnaissance mutuelle par le biais des lois provinciales et territoriales pourrait engendrer une poussée massive du commerce intérieur et débloquer le plein potentiel économique du Canada. Pour y parvenir, l'auteur recommande les actions suivantes :

- *Élaborer une législation unique et distincte pour la reconnaissance mutuelle des produits, des emplois et des services, avec des ajustements adaptés.*
- *Adopter un système comparable à celui de l'Australie pour la reconnaissance automatique des certificats de compétence délivrés par chaque province et territoire (en prévoyant un délai de 30 jours pour le retrait des régulateurs).*
- *Formuler des règles claires et transparentes pour la reconnaissance mutuelle, par exemple en imposant des délais de réponse obligatoire et une procédure précise en cas de refus.*
- *Intégrer des mécanismes pour renforcer la confiance entre les régulateurs : contrôles, notifications et obligations d'explication en cas de refus.*
- *Mettre en place un système d'appel, en établissant des règles pour assurer l'équité.*
- *Prévoir pour les gouvernements un processus de résolution des différends à l'échelon supérieur en vue de fixer des normes communes.*
- *Permettre les exceptions et les dérogations, mais de manière à favoriser la libéralisation globale du commerce.*
- *Exiger des comptes rendus périodiques pour assurer le bon fonctionnement des ententes.*

Les faits montrent que les provinces et les territoires bénéficieraient même de l'adoption d'une reconnaissance mutuelle unilatérale. Le Canada pourrait également s'inspirer de l'Australie et de l'Union européenne en matière de RM. Ces leçons devraient être mises à profit dans le cadre du Free Trade and Mobility within Canada Act*, projet de loi proposé par la Nouvelle-Écosse – une première en son genre.*

Alors que certains pays comme les États-Unis optent pour l'isolationnisme économique, il est plus crucial que jamais pour le Canada de supprimer ses barrières commerciales internes. Le moment est venu d'entreprendre des réformes énergiques pour lever ces freins et favoriser la prospérité universellement. **MLI**

Introduction

While negotiating in draughty halls in Charlottetown and Quebec City, Canada's Fathers of Confederation watched the US Civil War as a cautionary tale. They took lessons from this conflagration that pitted neighbours against one another, as well as independence movements across the globe from the French Revolution onwards, and incorporated them into the *Constitution Act, 1867*. Thanks in part to teachings accrued from the trial and error of others, Canada has one of the most durable, vibrant, and longest-living democracies in the world.

Canada is once again well positioned to reap insights from abroad to strengthen its economic union. With the backdrop of ascendant isolationism south of the border and across the Western world, provincial and territorial laws enshrining mutual recognition would represent a massive leap forward for Canadian prosperity. Short of Confederation itself, there are few policy approaches that could be more effective at liberalizing trade amongst the provinces and territories. With a combined seven decades of experience between Australia and the European Union to draw from, Canada can learn from two instances of implementing mutual recognition via legislation and/or regulation. Importantly, by studying two different experiences, it is possible to extrapolate system-level insights to inform a wholly Canadian approach to mutual recognition legislation.

The timeliness of Canadian reform efforts

Canada's interprovincial trade barriers stem from conflicting laws and regulations that make it hard for goods, services, and labour to cross a domestic border, affecting everything from high-visibility safety apparel to electrical codes to health care professionals. These barriers harm Canadian growth and prosperity: by one estimate they add between 7.8 and 14.5 per cent to the price of goods and services (Alvarez et al. 2019). They contribute to the housing and health care crises plaguing the country, hinder individual freedom of movement, dampen competitive intensity, and make it that much harder for small businesses to flourish. Internal trade reform typically comes during critical windows of opportunity. Australia and the European Union seized upon these crucial moments successfully in the past. Past reforms in Canada also show this pattern. A number of factors would suggest that now is another promising chance for reform.

In Australia, the uptake of mutual recognition legislation in 1992 came during a period of increasing globalization that strained Australia's economy (Brown 2023, 40). In the late 1980s and early 1990s, state policy leaders across the country shared economic competitiveness as a top priority (Brown 2023, 196). Subnational governments aligned on the need for internal market reform, and generally appreciated federal leadership.

"Internal trade reform typically comes during critical windows of opportunity.

In the EU, a lack of progress on internal market harmonization inspired the European Commission to pivot to a new strategy in the mid-1980s based on mutual recognition (Janssens 2013, 57). Business group interest, pan-European pressure for greater liberalization, and ambitious political leadership during the period played significant roles (Moravcsik 1991).

In Canada, several concurrent factors inspired reform by way of the CFTA's predecessor, the 1995 *Agreement on Internal Trade*. Failed

attempts at constitutional amendment, high awareness of the utility of free trade agreements, and a looming Quebec secession referendum collectively propelled a pan-Canadian intergovernmental trade agreement (Manucha 2022).

Another rare window for reform has opened because of post-pandemic shocks to the economy and supply chains, affordability challenges across the country, lackluster growth, growing global economic instability, the ascendancy of isolationism amongst global trading powers, and a protectionist Trump administration in the US. Together these factors make internal trade reform efforts exceptionally opportune.

A case study in internal trade barriers: Interprovincial trucking

Varying trucking regulations across provinces add 8.3 per cent to freight rates, causing $500 million in direct economic losses. Full barrier removal could increase Canada's real GDP by over $1.6 billion.

Examples of trade barriers:

- Differing driver qualifications for long combination vehicles.
- Variation in trailer registration validity periods.
- Varying caps on the maximum sizes of tow trucks.
- Non-unified oversize/overweight permitting processes.
- Differing weight allowances for self-steer quad semi-trailers depending on tire size.

Source: Manucha and Tombe 2024.

Impetus for a legislative approach to mutual recognition

Canada has nearly thirty years of experience with a pan-Canadian domestic trade agreement, and nearly eight with the Regulatory Reconciliation and Cooperation Table (RCT). When the CFTA replaced its predecessor (the AIT) in 2017 it included the RCT. The RCT serves as a vital forum for Canada's governments to resolve the multitude of regulatory divergences that are the root cause of most trade barriers in contemporary Canada, and can be credited for some wins such as the 2019 reconciliation of construction codes, which is set to produce annual savings of $1 billion per year starting in 2028. However, actors and observers alike yearned for greater progress, paving the way for the addition of the infamous Item 30[1] to the RCT's work plan in 2021–22. Item 30 is a bold attempt to move the needle by prioritizing mutual recognition. When

initially added, Item 30 explicitly targeted a December 31, 2024, deadline for an agreement on widespread mutual recognition for goods and services.[2] (That date has since been amended to December 31, 2025, which is still a remote possibility). Despite its lofty ambition, Item 30's addition loudly signalled a shift towards mutual recognition as the key means of reducing trade barriers. Unsurprisingly to many, progress on implementing Item 30 under the CFTA has largely stalled. Advancing broad-based mutual recognition now appears to depend on a coalition of willing first ministers, aided by the Committee on Internal Trade (a body of Cabinet-level appointees).

How did Item 30 stall? Thanks to the constraints of institutional setup. As a voluntary intergovernmental political agreement, the CFTA's mandate to drive synchronized regulatory reform across as many as 14 governments on any particular issue encounters strong headwinds. Moreover, its capabilities as a consensus-based institution largely dependent on political direction must not be overestimated. CFTA/RCT reform efforts are also easily mired in other obstacles: regulatory inertia and turf protection, ever-present dependency on political intervention to overcome conflicting stakeholder interests, and limited goodwill amongst provincial governments. However, resistance to change may be grounded in legitimate objections. For instance: it is a fact that heavy trucks impact highways differently during springtime thaw depending on a province's local soil conditions. In such cases, robust inter-regulator dialogue ensures that well-founded concerns are addressed and safeguarded, while exposing illegitimate or unsubstantiated claims.

But structure is not the only hindrance to mutual recognition's widespread rollout under the CFTA. It is now increasingly the case that officials of junior rank occupy (in title or in practice) the role of RCT Representative ("RCT Rep"). It was originally envisioned that RCT Reps would be at a Deputy Minister or Director level, as such individuals would not only have significant negotiation and project management experience, but also have the requisite professional/social linkages within their home governments to undertake whole-of-government reform exercises. For something as far reaching as Item 30, the problem of junior government officials occupying RCT Rep seats is magnified. Without the authority or connections to achieve progress on politically sensitive regulatory matters, the hope for mutual recognition on a broad scale is diminished. Certainly, the CFTA and RCT are important institutions and should remain a component

of the nation's approach to internal trade liberalization, including through harmonization and regulatory co-operation. But its voluntary, non-binding nature and other structural limitations must be understood, and alternatives (like legislation) at least considered.

On the bright side, the addition of Item 30 (mutual recognition) to the RCT's work plan suggests Canada has awakened to the same realization that Europe came to in the late 1970s, and that Australia came to in the mid-1980s: harmonization of regulations and standards is exceptionally challenging whereas mutual recognition offers a much more promising path towards successful outcomes. Mutual recognition offers an attractive middle ground between strict territorialism and universalist harmonization (Berman 2007). Driving licences offer an elegant illustration of mutual recognition's advantages. A duly licenced Quebec soccer dad can shuttle his kid to a tournament in Ontario in his sedan all without him needing to take a driver's test upon crossing the border, or Ontario forcing Quebec to match its credentialing system. However, the challenge of rolling out MR on a large scale remains.

Origins and legal bases for mutual recognition in Europe and Australia

EU politicians increasingly looked to MR during a period when the EU was struggling to achieve unanimity in rules and regulations (Janssens 2013, 36). By the 1980s, the EU launched a new legislative strategy that combined MR with minimum harmonization. The principle of MR had emerged as a cornerstone of Europe's internal market a few years earlier, ever since the European Court of Justice (ECJ) *Cassis de Dijon* ruling in 1979 (Janssens 2013, 79). ECJ case law provides that MR's legal basis is grounded in one of the EU's foundational instruments: the Treaty on the Functioning of the European Union (TFEU). Specifically, the TFEU's free movement provisions validate and justify MR legislation (Janssens 2013, 36–40). Over time, the EU has introduced specific legislation ("directives") as well as regulations to operationalize MR effort.[3]

A review of the empirical economic literature reveals that MRAs yield material benefits: they increase the value of exports by between 15 per cent to 40 per cent and increase the probability that a firm exports new products to new markets by up to 50 per cent.[4] A 2019 research study found significant positive impacts stemming from the EU's single market. The authors estimated

annual real income benefits of approximately 987 billion euros for 2017 alone. And without a single market, income per capital would decline 6.43 per cent.[5] Though the 2019 study did not isolate the impact of mutual recognition instruments on their own, these laws and regulations serve as fundamental underpinnings to the single market arrangement.

One criticism of mutual recognition that has surfaced in the EU – and which is relevant to Canada – is that it undermines local autonomy, as a government's monopoly on power is to some degree weakened if it is required to recognize the laws/regulations of another. However, as was seen in the European experience, well-designed mutual recognition schemes allow room for exemptions on grounds with legitimate justification, which lessens this concern.

> *EU politicians increasingly looked to mutual recognition during a period when the EU was struggling to achieve unanimity in rules and regulations.*

Australia directly borrowed the idea of MR from Europe (Painter 1996, 112). The larger states, particularly New South Wales, successfully argued that issue-by-issue regulatory standardization (which Australia's federal government had initially preferred) would prove less successful as turf wars would play out during negotiations of every regulatory domain (Brown 2003, 212). Following broad consensus to shift gears away from harmonization and in favour of MR, Australia's federal government (the "Commonwealth") demonstrated a preference to leave it to the states to reach an acceptable MR scheme on their own (Painter 1996, 112). As a result, the states – particularly New South Wales – drove the legislative MR approach. (In the Canadian context, this would be like Ontario driving mutual recognition). Australia eventually settled on legislating mutual recognition by way of a 1992 intergovernmental agreement[6] coupled with enacting the federal *Australian Mutual Recognition Act* (and corresponding state legislation for those states

that chose not to refer requisite authority to the Commonwealth under paragraph xxxvii of the Australian constitution). The procedural history of Australia's mutual recognition framework offers valuable insights for Canadian readers. Initially, Australia's governments had settled on an interstate mutual recognition agreement under which states referred requisite powers to the Commonwealth, thereby enabling the Commonwealth to enact federal legislation giving effect to MR. New South Wales and Queensland referred these powers, allowing the Commonwealth to pass the *Mutual Recognition Act* 1992. However, near the finish line, Victoria, South Australia, and Western Australia chose not to refer their requisite powers to the federal government. These other states and territories simply adopted the legislation passed by the Commonwealth (French 2003).

A number of gains can be attributed to Australia's mutual recognition arrangement. Within the first two years, over 15,000 Australians had used the scheme to move to another state with their labour qualifications. And within the first five years, the scheme had contributed to the development of national competency standards for over 20 occupations, further easing frictions of the internal labour market (Industry Commission Office 1997).

Claims of economic actors engaging in regulatory arbitrage in Australia highlight another potential critique of mutual recognition that could also apply to Canada. For example, the government of New South Wales (NSW) raised concerns that those incapable of satisfying competency standards for security personnel under the NSW criteria were first obtaining their credentials in Queensland (where the standards were allegedly less stringent) and subsequently registering in NSW pursuant to the mutual recognition scheme (Productivity Commission 2015). Such a situation is unsurprising, but underscores the need for sustained trust amongst conformity assessment bodies and their regulators.

Canada currently implements mutual recognition not through legislation, but rather via the CFTA. The agreement's predecessor, the AIT, laid the groundwork for resolving trade barriers through mutual recognition as early as 1995. To date, no RCT Work Plan Item has been resolved via mutual recognition. Some have suggested that the 2018 reconciliation agreement for pressure equipment is a mutual recognition agreement. However, looking to the text of that agreement, participating provinces and territories actually achieved reconciliation via harmonization (Canadian governments opting into

a federal standard). Still the CFTA with its proviso for MR has nonetheless spawned MR efforts. For instance, in 2001, Canada's provincial and territorial regulatory bodies for professional psychologists struck a Mutual Recognition Agreement (which could have gone farther in automaticity and exhaustively setting out the procedures for granting registration to applicant professionals licensed in another province/territory) (Psych 2021). Like Australia, Canada drew inspiration from European reform initiatives, as evidenced in a 1991 set of proposals for reform in the lead-up to the Charlottetown Accord. The document, *Shaping Canada's Future Together: Proposals*, discussed then-recent reforms in Europe that were facilitating the free movement of goods, persons, services and capital (even borrowing EU terminology, the "four freedoms") (Government of Canada 1991). The federal government went on to propose revising the Constitution's section 121 common market clause in order to curb restrictions to the four freedoms. When the Charlottetown Accord failed, this document served as a crucial basis for the *Agreement on Internal Trade* (Brown 2003, 140–41).

Mutual recognition law is consistent with Canadian federalism and respects subnational differences

Mutual recognition is a compromise between two extremes. At one end of the spectrum is strict territorialism, and at the other is universalist harmonization (Berman 2007, 1195). MR offers a middle ground, wherein provinces and territories preserve their own standards while recognizing those of others. It threads the needle of (i) respect for provincial autonomy and public policy differences, and (ii) the "inculcat[ion] of tolerance, dialogue and mutual accommodation" amongst Canada's governments (Berman 2007, 1236). This is owing to the very essence of MR, and procedural MR in particular: governments are not asked to adopt the standards or certifications of another jurisdiction, they are merely asked to accept those of other jurisdictions. In a likeness to the *Constitution Act, 1867* with its division of powers at sections 91 and 92, mutual recognition does not demand a "hierarchy of substantive norms" (Berman 2007, 1166) but rather, offers a means to manage the multiplicity of overlapping legal systems.

Nine essential components of Canadian mutual recognition legislation

Drawing from the legislative approaches to mutual recognition in the EU and Australia, the following key elements and obligations should be incorporated into Canadian MR legislation.

The law should do the following:

1. Handle separately (i) goods, (ii) occupations, and (iii) services.

Both Australia and the EU handle MR for goods, occupations, and services separately. There are unique considerations for each of these three domains that merit different handling. Australia's MR law and intergovernmental agreement tackle both goods and occupations within the same instrument, though in different sections. The EU has brought into force separate instruments to manage MR for goods, services, and occupations. It is possible to use the same literal instrument, as in the case of Australia, but the provincial/territorial law must account for the fact that these items of commerce each have fundamentally different characteristics.

Recommendation 1a:
A single legislative instrument enshrining the mutual recognition of goods, occupations, and services, but which accounts for and manages the unique characteristics and considerations of these three items of commerce.

With respect to goods, the EU's tool of self-drafted Mutual Recognition Devices (MRDs) is a creative and compelling solution for Canada if governments cannot agree to automatic mutual recognition for particular goods. MRDs are drafted by producers and set out that the goods comply with the rules of another EU country, where they are already being sold. Regulators are still always permitted to assess goods coming from another jurisdiction notwithstanding the MRD's existence. However, the MRD establishes a presumption of compliance and an easy means of validating compliance claims. The concept of the MRD is an attractive means to implement MR for goods, as it creates a standard operating procedure, and enshrines a presumption that certificates and tests of another jurisdiction are acceptable.

Recommendation 1b:

Canadian MR legislation could adopt the device of the MRD to operationalize MR for goods. Such a tool would still leave space for regulatory assessments and offer an easy means for validating compliance claims, but also foster a tradition that certifications and tests of another jurisdiction are to be accepted.

With respect to occupations, the Australian scheme of deemed registration following notification to local registration authorities is a compelling model for Canada. It places the burden on local regulators to establish that an individual cannot carry out an occupation, rather than the other way around. In essence, it imposes a 30-day limit for a regulator to object to a worker's carrying out an occupation, thereby providing timeliness in decision-making and general certainty to both workers and firms. Moreover, the scheme requires a regulator to articulate reasons for rejection, and supply notice of its decision to counterpart regulators across the country, thereby ensuring transparency and raising the likelihood that rejections are based on reasonable grounds.

Recommendation 1c:

Canadian MR legislation should adopt Australia's scheme of deemed registration to implement MR for occupations.

With respect to services, the EU model of requiring regulators to accept the documentation of another member state as proving a requirement satisfied is a compelling model for Canada. It creates the presumption that the certification and testing of another regulator is sufficient.

Recommendation 1d:

Canadian MR legislation should adopt the EU's model of requiring acceptance of documentation (and hence, the certification and testing) of another government's regulator.

2. Rely more heavily on procedural, as opposed to substantive, mutual recognition

MR legislation can use one or both of substantive and procedural mutual recognition to unlock economic integration and facilitate trade. **Substantive MR** entails recognizing the equivalency of standards or regulations (for example, Province A recognizing the safety standards for electrical appliances of Province B as equivalent to its own, and vice versa). There is a greater focus on the intrinsic/substantive content of the good, service, or credential. Substantive

mutual recognition generally leads to deeper economic integration owing to the primacy placed on equivalency, but is harder to achieve, and is more feasible where a degree of regulatory alignment and trust already exists. **Procedural MR** entails accepting the controlling and testing procedures of another jurisdiction (for example, driving licences, or licences to practice medicine; the focus is not on establishing Province B credentials as equivalent, but rather, whether holders have undergone the licencing procedure of Province B). Procedural MR is less about establishing equivalency, and more about simply accepting the processes or procedures of another jurisdiction.

MR legislation should lean more heavily on procedural MR in the likeness of the EU instruments. Substantive MR requires sufficient inter-regulator trust and regulatory alignment, which is less likely to exist immediately following the implementation of domestic mutual recognition legislation. Regulators will need time to become more familiar with mutual recognition as well as the regulations of counterpart regulators.

A concrete, illustrative example of EU procedural MR: EU mutual recognition law for trade in services requires as default that regulators give effect to those documents of another member state that prove a requirement as satisfied.[7] The Australian model chiefly relies on substantive mutual recognition, but this was made possible because all Australian governments recognized the need for, and willingly adopted, MR legislation.

Recommendation 2:

Canadian MR legislation should make greater use of procedural (as opposed to substantive) MR, focusing less on establishing equivalency between standards and regulations, and focusing more on accepting controlling or testing procedures of another jurisdiction.

3. Constrain the ability for government agents to flout the intention of the law by exhaustively prescribing procedure and protocol

Properly drafted MR legislation will prevent a government's officials from skirting the purpose of the law. It will also be sufficiently prescriptive to ensure that economic actors can easily benefit from the law's intended purpose. For example, the EU's directive on MR of services requires that member states provide single points of contact for foreign service providers to liaise with, thereby streamlining communications. And procedures and formalities for

a foreign company to begin supplying services must be simple and easily completed online. Similarly, the EU's regulation on MR for goods requires member states to establish Product Contact Points who supply information and facilitate knowledge-sharing to economic operators. Australia's MR law is equally comprehensive, ensuring that in-person attendance cannot be required for recognizing testing procedures from another state. In the absence of such provisions, a member state could devise an administrative scheme that flouts the effective functioning of MR. Australia's comprehensiveness extends to giving guidance in more complex and murky situations. For example, it details how to manage occupational mutual recognition where the same job in two states has different responsibilities. The Australian model thus provides one answer on how to handle inconsistent gasfitter licencing programs across Canada.

Recommendation 3:

Canadian MR legislation should set out detailed, streamlined procedures (as just a few examples: time limits to respond to inquiries, prohibitions on the requirement of in-person attendance, enumerated grounds to reject MR, procedures when refusing to provide MR) to ensure transparency, adherence to the law's purpose, and that intended benefits flow from its operation.

4. Incorporate trust building mechanisms

A policy of mutual recognition fosters inter-regulator trust-building, which will yield future payoffs. If one jurisdiction is to accept the technical regulations, testing procedures and/or the decisions of testing bodies of another, it must have faith in both the standards themselves as well as the application of the standards. This faith may take time to develop following the start of mutual recognition policy. New Brunswick regulators may take time to gain comfort that Manitoban long-combination vehicle truck drivers do not impose undue risk while driving in the province. Once that trust is clinched, however, it pays dividends. Trust-building only comes from the repeated interaction of regulatory authorities, and is best fostered with explicit mechanisms in mutual recognition legislation itself.

There are three important types of trust-building mechanisms that Canadian MR law should include. The first is a defined process (that includes time caps for responses) for regulators to engage with one another to verify

compliance. The second is inter-regulator notification, especially where a regulator rejects or attaches supplementary conditions to the operation of MR. The third is obligation to provide reasons for rejecting or limiting MR.

Mechanisms that build trust amongst regulators are found in both EU and Australian MR laws. The EU's directive on the recognition of professional qualifications, for example, establishes a mechanism for regulators to exchange information about individuals seeking to work in another member state. As another example, member states must notify other member states as well as the Commission if they are attaching conditions to the entry of a professional. As yet another example, the EU regulation for MR of goods establishes a process whereby regulators are able to contact counterpart regulators in other member states to verify facts. That same regulation also sets out what the decision of a local regulator must contain in order to support the rejection or limitation of MR. Similarly in Australian MR law, when a tribunal upholds the finding of a local regulatory authority that two occupations are not equivalent, that local regulatory authority must then notify its counterparts in other Australian states. Specific mechanisms mandating engagement amongst regulatory bodies facilitate the trust-creation process. Trust in and understanding of foreign regulatory schemes does not happen overnight, and gradually builds over time.

Recommendation 4:

Canadian MR law should include trust-building mechanisms, and three in particular. The first is a defined process for regulators to engage with one another to undertake confirmatory due diligence. The second is inter-regulator notification, particularly where a regulator rejects or attaches supplementary conditions to the operation of MR. The third is an obligation to supply reasons where MR is rejected or limited by a regulator.

5. Incorporate an appellate review mechanism, penalties, and political override

In the likeness of the Australian legislative approach, Canada's MR legislation should place appellate review responsibilities with the CFTA dispute-resolution mechanism. The reasons for doing so are several. First, the panelist appointment process dispels the perception that the federal government could pose an overbearing role in dispute outcomes. In CFTA disputes, the claimant and defence each appoint their own panelist, and then those two appointees

together select a third. Second, to date thirteen internal trade disputes have yielded a panel decision, and this emergent body of case law has propelled the mechanism's credibility and capacity.[8] Third, the relative trade law expertise of CFTA panelists (as is called for under the CFTA) may be more efficacious for the overall system. Finally, fourth, and perhaps most importantly, given heightened political sensitivities regarding MR application, this could better allow for a release valve in the form of veto power over dispute panel decisions by intergovernmental assemblies of relevant ministers, as is provided for in Australia's MR scheme.

The federal government's toolbox to enforce compliance is wide ranging from public disclosure ("naming and shaming") on one end to uncapped and judicially enforceable financial penalties on the other. A penalty scheme that is consistent with (if not identical to) the one provided for under the CFTA, namely, capped financial penalties for continued breach of MR obligations, is workable.

Recommendation 5:
Canadian MR law should provide for an appellate mechanism to review the MR decisions of regulators, with the possibility of override by political bodies. Compliance should be enforced in a manner consistent with, if not identical to, the CFTA: capped financial penalties for continued breach of MR obligations.

6. Provide a mechanism whereby governments can refer matters for harmonization/common standards.

Market integration cannot be left to mutual recognition alone. Harmonization remains a useful tool to achieve trade liberalization, and a mechanism to escalate matters for standardization should be integrated into MR legislation. Importantly, even minimal harmonization increases levels of trust amongst regulators. In Europe, for example, harmonization has been integral to the success of MR for driving licences (Janssens 2013, 62). In particular, standardization on the definition of a secure document and a common period of validity were crucial (Renew Europe 2003). As another example, the EU's directive on services includes a mechanism to advance specific, narrowed matters for standardization. In Australia, the legislative MR approach incorporates a mechanism that can escalate certain goods standards for national standardization. (One example: all laws/economic goods that parties place on the temporary exemption list are

subject to national standardization review). This threat of harmonization is a useful tool to help break deadlock and propel freer internal trade. Canada's law could take the Australian approach, whereby a vote of two-thirds of provinces and territories is used to decide on the uptake of the standard. Incorporating a population requirement as part of the two-third threshold would deviate not only from trade agreement norms, but also from an underlying principle of the CFTA, which places governments on equal footing.

Recommendation 6:

Canadian MR law to include a mechanism whereby governments can refer matters for harmonization/common standards. Moreover, any measures that parties place on a temporary exemption list should be assessed for standardization. A vote of two-thirds majority of provinces and territories to decide on the uptake of the standard.

7. Provide surgically crafted off-ramps from automatic mutual recognition

MR instruments can provide for varying degrees of automatic recognition. Canadian MR law should be highly automatic for MR in goods, and slightly less automatic for occupations and services.

Generally, Australian MR instruments reveal greater automatic mutual recognition than do those of the EU. However, both exhibit far greater automaticity for goods than for occupations and services. In Australia, MR for goods is highly automatic; there are almost no additional requirements in order to sell goods into another Australian state. Similarly, in the EU, there is a presumption that economic operators can supply goods lawfully marketed in another EU state ("Mutual Recognition Declarations" are held on file by economic operators, and competent authorities may select to run an economic operator's goods through an assessment). Canada should adopt a highly automatic device for goods MR.

Australian and EU instruments both exhibit slightly reduced levels of automatic recognition for occupations and services. In order to carry on an occupation in a new state/territory, Australian governments require workers to supply notice to local registration authorities, which then have a 30-day window to review the individual. Similarly, the EU directive on professional qualifications permits member states to require notice in advance of a worker carrying on their profession; member states then have a time-limited window

to conduct a review of the individual. Similarly, in the EU directive on MR for services, EU member states are permitted an opportunity to determine if service providers have satisfied national requirements. EU instruments are less automatic than Australia's because they allow member states more opportunities to inspect and verify documents before granting mutual recognition. EU legislators would appear to have a greater fear of pure automaticity than do Australian legislators. One reason, arguably, is the greater diversity of EU member states as compared to Australian subnational governments.

Recommendation 7:
Canadian MR law should have high levels of automatic recognition for goods, and slightly less automatic recognition for occupations and services.

8. Permit safe harbours from MR and use them as "carrots"

MR legislation can provide for many types of exceptions or exemptions (of greater or lesser strength) that limit mutual recognition requirements. An exception is a situation that doesn't follow a rule, while an exemption is permission to not follow a rule. These two devices can be helpful to get all parties to the table from the outset. They also engender consistency between a Canadian MR law and Canadian federalism's permissiveness for decentralized rule-making in light of local concerns.

The strongest type of safe harbour from MR is a total exception, seen in both the EU and Australia. An exception explicitly marks areas where the legislation absolutely does not apply. For instance, labour law and cultural laws are wholly excluded from the EU MR directive on services. As another example, laws regulating the manner of the sale of goods are removed from the scope of Australia's MR law.

A reduced safe harbour exhibited in MR instruments are exemptions on justifiable grounds. MR legislation in the EU and Australia allow for exemptions from mutual recognition where the laws are in pursuit of a legitimate objective (with the EU test going farther in requiring the limitations also be proportionate). Such laws are typically in respect of health, safety, or the environment.

The MR instruments studied exhibit other creative approaches to exceptions/exemptions that balance economic liberalization with caution, enabling member governments to get behind MR schemes. For example,

Australia's MR law permits permanent exemptions, but requires full consensus of all member governments for matters to be added to the list. Examples of this class include fireworks, firearms, gaming machines, and pornographic materials. A similar unanimity requirement for Canada would be consistent with the consensus-based underpinnings of the CFTA. As another example of an interest-balancing device, in the EU's MR legislation on services, an exhaustive list of services (including transport, financial, private security) is excepted from the directive, but the legislation requires the periodic review of these matters excepted from the directive's scope every three years. Yet another example is how Australia's MR law handles temporary exemptions from MR for particular goods: temporary exemptions are capped at 12 months, and must be on grounds of health, safety, or the environment.

Recommendation 8:

Canadian MR law should contain exception and exemption provisions, and reserve their availability to Canadian governments that participate in the MR scheme. Permanent exemptions should require unanimity, and temporary exceptions should be subject to review and must be on clearly articulated and justifiable grounds.

9. Require recurring (i.e. every two or three years) reporting to sustain momentum, transparency, trust-building, alignment, and solution innovation.

Trust is essential to the success of mutual recognition. Regular reports help establish and build trust amongst regulators. As an example, the EU directive on professional qualifications requires that member states submit a report every two years regarding decisions on the equivalency of professional qualifications. And every five years, the commission is to report on the implementation of the directive. The reporting requirement in the Australian MR intergovernmental agreement is not as prescriptive, but does allow governments to ask ministerial councils for updates on progress and implementation for certain goods or jobs.

Recommendation 9:

Canadian MR law should require each Canadian government to designate a body with the responsibility of reporting on the functioning of the MR scheme.

Trade-offs and limitations

We previously identified loss of local autonomy and the taking advantage of differences in rules between jurisdictions as potential drawbacks to mutual recognition legislation. On the former, a government's exclusive control over legislative and regulatory power is weakened when a government is required to recognize laws and regulations of another government. However, not only is this less of a concern for subnational jurisdictions within a federal state, but mutual recognition frameworks typically include safety valves in the form of exemptions where there are legitimate and justifiable grounds. As for exploiting differences in regulation that could trigger a "race to the bottom" across a host of regulatory domains (e.g. environment or labour), this risk is also mitigated by a well-drafted mutual recognition law. Such a law can include off-ramps, allowing home regulators to restrict mutual recognition for valid reasons.

> *Mutual recognition is a compelling approach as it offers a balance between local control and national economic growth.*

Setting aside the tension between the economic union and provincial autonomy, the broader question is whether free internal trade is even desirable. This question is often raised when discussing global trade. The gains from freer trade may not be enjoyed broadly within Canada. However, Canada doesn't face a binary choice between economic fragmentation and uniform regulation. Canada would certainly crumble with 13 autarkies, just as it would if rigid uniform rules were required from coast to coast. Mutual recognition is a compelling approach as it offers a balance between local control and national economic growth.

It should also be noted that mutual recognition is not a cure-all for every regulatory inconsistency giving rise to an internal trade barrier. For example,

truck carriers struggle to transport oversized loads partly due to the absence of common bridge height standards. Mutually recognizing larger truck sizes does not magically raise bridge heights. In such situations, true harmonization (such as on standardized infrastructure specifications) would be necessary.

Conclusion

Careful examination of the legislative approaches to mutual recognition in the EU and Australia offers insights for Canadian MR law. The Australian model with its greater emphasis on substantive mutual recognition would offer greater economic integration. However, strategic use of procedural MR (in the likeness of the EU directives) where there is inadequate trust or regulatory alignment can offer additional means to reach consensus. Other tactical devices that should be included in MR legislation include a diverse set of exemption measures, (limited) allowances for non-automatic mutual recognition, and escalation mechanisms to pursue harmonization. Finally, MR legislation should be understood with the medium-term in mind. The building of trust and understanding not only with the principles and mechanics of MR, but also the substance and procedure of regulatory systems in other provinces and territories is paramount for sustainable success and internal trade reform. MLI

About the author

Ryan Manucha, a leading expert on interprovincial trade in Canada, is frequently called upon to advise governments and agencies, and his work has appeared in prominent Canadian peer-reviewed legal journals and national newspapers. He is a regular media commentator, with appearances on CBC News, BNN Bloomberg, CBC Radio, and TVO's *The Agenda with Steve Paikin*. His book *Booze, Cigarettes and Constitutional Dust-Ups: Canada's Quest for Interprovincial Free Trade* won the Donner Prize for best in Canadian public policy writing and was a finalist for the Balsillie Prize for Public Policy. MLI

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Endnotes

1 Item 30 as articulated on the RCT work plan calls for "the identification and mutual recognition of regulatory measures, such that any good or service that may legally be sold or provided in the jurisdiction of one Party may legally be sold or provided in the jurisdiction of all other Parties, without further material requirements, unless specifically listed as an exclusion."

2 Specifically, the goal under the 2021–22 RCT Work Plan was a full reconciliation agreement on goods and services that utilized mutual recognition.

3 Three important examples guiding this paper's insights: (i) Directive 2005/36/EC on the recognition of professional qualifications, (ii) Directive 2006/123/EC on services in the internal market, and (iii) Regulation 2019/151 on the Recognition of Goods Lawfully Marketed in Another EU Country.

4 See Cernat 2022; Baller 2007; Prayer 2021.

5 See European Parliament 2019.

6 Agreement between the Commonwealth of Australia, the state of New South Wales, the state of Victoria, the state of Queensland, the state of Western Australia, the state of South Australia, the state of Tasmania, the Australian Capital Territory, and the Northern Territory of Australia, relating to mutual recognition, dated May 11, 1992.

7 See: Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L 376/36.

8 These thirteen cases were brought under the CFTA's predecessor, the 1995 Agreement on Internal Trade (AIT). No case has yet advanced to the release of a CFTA panel report.

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