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THE SINGLE MARKET MYTH

How Ottawa and the provinces can finally dismantle Canada's costly internal trade barriers

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MLI
TRUE NORTH
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We Canadians like to think that we live in a single national market – we don't. Our country's greatest untapped trade opportunity is not abroad. It is at home.

It is often easier to sell goods, provide services, or move professional credentials across national borders in the European Union than across provincial borders in Canada.

This is not merely embarrassing. It is economically dangerous.

Canada is now confronting serious external trade uncertainty. If Canada is serious about resilience, productivity, and growth, it must finally confront a long-ignored problem: the self-inflicted wound caused by our internal trade barriers.

The common response is to say, "Ottawa should fix it." Constitutionally, that instinct is wrong.

That is because Canada's constitutional structure makes unilateral federal action largely impossible. Parliament's "trade and commerce" power is not a general licence to impose a national economic code country-wide. The day-to-day regulation of goods, services, labour, and professions lies primarily with the provinces. Nor does the Charter rescue us. Courts have consistently refused to treat the Constitution's mobility or liberty rights as also protecting economic freedom. On the contrary: provincial regulation is constitutionally permissible and, indeed, expected in many areas of economic activity, even when it fragments the national market.

This means that obvious, intuitive solutions – federal legislation or constitutional litigation – cannot deliver true economic integration.

But that does not mean nothing can be done.

Canada already possesses a powerful, underused constitutional tool: co-operative federalism through inter-delegation. Parliament and the provinces cannot trade legislative powers. But they can jointly empower administrative institutions. They can create shared bodies, give them real authority, and require governments to participate in coordinated regulatory schemes. This is not theory. It is how Canada built its national agricultural marketing systems. And it is how we could finally dismantle internal trade barriers.

What would this look like?

We propose the creation of a joint federal-provincial economic integration agency, mandated by matching legislation across participating jurisdictions. This body would not replace governments; it would coordinate them. It would be empowered to do three things:

- First, it would mandate mutual recognition. If a good, service, or professional qualification is lawful in one province, it should presumptively be lawful in all.
- Second, where mutual recognition is insufficient, it would develop harmonized national standards. Provinces would remain free to regulate. But in defined areas they would commit to building common frameworks instead of 10 different ones.
- Third, it would systematically identify and remove unnecessary regulatory barriers. This may require carefully circumscribed executive powers to repeal or modify outdated restrictions, subject to legislative supervision and judicial review.

Canada already gestures in this direction. The Canada Free Trade Agreement proclaims lofty goals, though in fact it must rely on voluntary reconciliation, sprawling exceptions, and weak enforcement. The result has been incrementalism, not integration. Real economic union cannot be built on polite requests and explanatory memos. It requires binding coordination.

Some will object that this proposal threatens provincial autonomy. In fact, the opposite is true.

The greatest threat to autonomy is not coordination, but fragmentation. When each province regulates in isolation, its choices inevitably burden the citizens and businesses of other provinces. A national coordinating body will not erase provincial power; what it will do is manage the collisions between provincial regimes. It will ensure that autonomy exercised in one jurisdiction will not disable autonomy elsewhere.

Others will worry about technocracy. But we should be honest: Canada already lives under dense and multi-layered regulation. The status quo is not laissez-faire. It is 10 overlapping regulatory states that unintentionally block one another. The question is not whether government will structure the economy. It is whether it will do so incoherently or intelligently.

The drafters of our Constitution envisioned an economic union. They constitutionally guaranteed free trade in goods between provinces. But courts have since drained that promise of force. We cannot litigate our way back to it. But we can legislate our way forward – together – with a joint federal-provincial economic integration agency. **MLI**

Au Canada, nous pensons souvent à tort *que notre marché national est isolé – c'est faux. Les possibilités commerciales inexploitées les plus intéressantes sont chez nous, pas à l'étranger.*

Or, il est généralement plus aisé de commercialiser des produits, offrir des services ou faire valoir des compétences au sein de l'Union européenne qu'à travers nos frontières provinciales : une source de malaise et une menace économique.

L'avenir de notre commerce international est empreint d'incertitudes. Si le Canada tient vraiment à renforcer sa résilience, sa productivité et sa croissance, il doit enfin s'attaquer à un enjeu trop longtemps négligé : les obstacles intérieurs auto-infligés.

La réponse habituelle est de supposer que : « C'est à Ottawa de résoudre le problème ». D'un point de vue constitutionnel, cette réaction est inappropriée.

Effectivement, notre Constitution rend presque impossible toute initiative fédérale unilatérale. L'autorité du Parlement en matière de «commerce et d'échange» ne lui permet pas d'imposer un même code économique à travers le pays. Les provinces contrôlent quotidiennement les produits, services, mains-d'œuvre et compétences. Et la Charte n'apporte point de salut. Les tribunaux n'ont jamais voulu confirmer que le droit à la liberté et la mobilité garantissait également la liberté économique. À l'opposé, la réglementation provinciale est constitutionnellement admissible et, d'ailleurs, anticipée dans bon nombre de secteurs, même si elle divise le marché national.

En clair, les solutions automatiques – législation fédérale ou contentieux constitutionnel – ne sauraient produire une véritable intégration économique.

Cela ne signifie nullement qu'on ne peut rien faire.

Le Canada possède déjà un outil constitutionnel puissant et peu utilisé : le fédéralisme coopératif par délégation réciproque. Le Parlement et les provinces ne peuvent échanger leurs pouvoirs législatifs. Cependant, ils peuvent conjointement habiliter des institutions administratives, créer des entités communes disposant d'une véritable autorité et encourager les gouvernements à participer à des mécanismes de régulation coordonnés. Et pas qu'en théorie. Voilà comment le Canada a mis en place ses systèmes nationaux de commercialisation des produits agricoles. Et voici comment nous pourrions finalement abolir les barrières intérieures au commerce.

Où cela nous mènerait-il ?

Nous proposons la création d'une agence fédérale-provinciale dédiée à l'intégration économique, encadrée par une loi type que chaque région partenaire s'engagerait à transposer. Au lieu de remplacer les gouvernements, cette entité devrait les coordonner. Elle aurait trois rôles :

- *Elle jetterait d'abord les bases d'une reconnaissance mutuelle. Si une compétence professionnelle, un service ou un produit est légal dans une province, il doit présumément l'être partout.*
- *Puis, lorsque la reconnaissance mutuelle fait défaut, elle instaurerait des normes nationales harmonisées. Les provinces conserveraient leur liberté de*

réglementer, mais elles s'engageraient, dans certains secteurs précis, à mettre sur pied des structures communes au lieu de dix distinctes.

- *Cette entité chercherait enfin à identifier et à supprimer systématiquement les contraintes réglementaires inutiles, en définissant les pouvoirs exécutifs nécessaires pour abroger ou modifier les restrictions obsolètes, sous un contrôle législatif et judiciaire.*

Le Canada est déjà engagé dans cette voie. L'Accord de libre-échange canadien, malgré ses objectifs ambitieux, repose en réalité sur le principe du volontariat, des exceptions étendues et une application peu rigoureuse, s'approchant davantage d'un « gradualisme » que d'une intégration. Or, il est impossible de construire une union économique efficace avec des sollicitations courtoises et des notes explicatives. Une union efficace exige une coordination stricte.

De l'avis de certains, notre proposition menace l'indépendance des provinces. En fait, c'est tout le contraire.

Contrairement à la fragmentation, la coordination n'est pas le principal risque pour l'autonomie. Quand chaque province réglemente seule, ses décisions pèsent inévitablement sur les citoyens et les entreprises hors province. Un organisme national de coordination ne saurait abroger l'autorité provinciale, mais réduirait les risques de chevauchements. Il veillerait à ce que l'indépendance observée dans un domaine précis ne compromette pas l'autonomie de la majorité.

D'autres encore s'inquiètent de la technocratie. Soyons francs : le Canada fait face à un régime réglementaire complexe et stratifié. Le statu quo n'est pas synonyme de laissez-faire, considérant qu'actuellement, dix autorités se superposent et, non intentionnellement, se nuisent mutuellement. La problématique ne tient pas à la structure de l'économie, mais plutôt à la capacité du gouvernement à agir avec cohérence et discernement.

Les créateurs de notre Constitution ont assuré la libre circulation des biens entre les provinces pour promouvoir l'union économique. Cependant, les tribunaux ont depuis vidé cette promesse de sens. Il nous est impossible de faire marche arrière par la voie judiciaire. Cependant, il est possible de progresser – par le biais de démarches législatives concertées – en s'appuyant sur une agence d'intégration économique fédérale-provinciale. **MLI**

Introduction

In the European Union, a Polish truck driver, steering a vehicle made in Sweden but owned by an Italian trucking company, can collect a load of pharmaceuticals produced by a German company at a factory in Spain built by Irish workers and staffed by Estonians, then drive onto a Belgian ferry piloted by Greek workers and upon arrival in France continue across the continent all the way to Finland – all without ever passing through a checkpoint or showing a passport.

Decades of economic integration have made frictionless trade a reality. Under European Union law, with its commitment to the "four freedoms," goods, services, people, and capital can move effortlessly across national borders.

Canada presents a striking contrast. Our provincial boundaries are much less porous than the national borders on the other side of the Atlantic. Cross-border trade in goods is often restricted – just try buying a bottle of wine from British Columbia in a store in Ontario. Services do not move freely – a licence to sell in one province will often not allow you to engage in precisely the same transaction in another province. People face hurdles to interprovincial mobility – a nurse in Saskatchewan cannot simply cross the border and start working in Manitoba or Alberta. And capital in regulated sectors is sometimes tied down in one province by regulatory restrictions.

Canada can do better. Certainly, the Fathers of Confederation envisaged an economic union more like the contemporary European Union than contemporary Canada. Their vision has, so far, not borne fruit. Yet with the nation locked in a potentially existential trade war with our southern neighbour, there is a growing consensus that for the True North to be economically strong,

it must also be economically free. Existing measures, such as the Canada Free Trade Agreement, have fallen well short of what is now widely believed to be necessary.

This paper maps out a legal path forward for Canadian economic integration. Much of it will describe the various obstacles on the path. Given Canada's federal structure, there is no simple legislative means of ensuring greater integration, and any regulatory measure to facilitate integration must ultimately respect federal structure. We begin by describing the limited scope of Parliament's ability to make laws related to trade and commerce. Any federal legislation must be carefully calibrated to respect provincial autonomy – so much so, we conclude, that Parliament cannot simply legislate economic union into existence; any attempt to do so would likely be struck down by the courts. In a nutshell, federal unilateralism is simply not an available option.

> *For the True North*
> *to be economically strong,*
> *it must also be economically free.*

Next, we explain that the *Charter of Rights and Freedoms*, despite its nominal commitment to interprovincial mobility (section 6) and liberty (section 7), has not been interpreted in a manner that would further economic integration. Courts – the Court of Justice of the European Union being the most obvious example – can advance economic integration projects, but this has not been the case in Canada. Overall, the message is that the federalism and rights provisions of the Constitution of Canada, as interpreted by the courts, hinder economic integration much more than they help.

All is not lost, however. As this paper will show, the concept of inter-delegation (the process by which one level of government attempts to hand over its lawmaking authority to the other) opens an avenue of exploration. In principle, if *both* Parliament and the provincial legislative assemblies *together* passed laws, they could mandate and empower a joint federal-provincial administrative agency to achieve economic integration. Such interlocking

federal and provincial schemes are common in, for example, agriculture where the supply management system is underpinned by laws made by Parliament within its spheres of competence and the legislative assemblies within theirs. Of course, the success of any inter-delegation scheme will depend on the political will of provinces and the federal government, a topic we address below.

We will also address recent efforts at economic integration with a view to identifying the topics that an inter-delegation scheme could address as well as the legislative techniques that it might use. We discuss the Canada Free Trade Agreement in some detail, mostly to identify the areas that a joint federal-provincial administrative agency could be authorized to address and also to note some of the reasons why the Agreement has not been the driver of economic integration that policy-makers and scholars hoped it would be. The CFTA illustrates, in particular, the limits of consensual efforts to dismantle trade barriers. We also describe recent federal and provincial legislative efforts in the area of economic integration. Here, so-called "Henry VIII powers" have loomed large. These powers permit the executive to amend primary law, arrogating to itself a legislative function.

Finally, we map out two basic approaches to economic integration. One focuses on positive integration. This could involve creating a mutual recognition system, where compliance with a federally or provincially set standard entitles firms to trade freely across the country, or pursuing regulatory harmonization through a single Canada-wide compliance standard. The other focuses on identifying barriers to free trade and simply eliminating them: here, Henry VIII powers could be particularly useful in pruning back regulatory restrictions that inhibit growth. Both approaches could be provided for in the federal-provincial scheme we envisage: the administrative agency jointly empowered by Parliament and the provincial legislative assemblies that could be authorized to (i) require mutual recognition and (ii) develop harmonized standards. Meanwhile, (iii) provincial and territorial ministers could remove barriers. Naturally, such significant powers would have to be strictly circumscribed and subject to appropriate oversight.

What we propose is as radical a vision of economic integration in Canada as the current constitutional framework permits. No doubt the Fathers of Confederation would look askance at such a powerful administrative agency. Some contemporary readers might too. Indeed, as self-confessed skeptics of wide-ranging government power ourselves – no fans of Henry VIII clauses in

particular – we thought long and hard about what to put forward. That said, trade barriers within Canada endure because there already exists expansive governmental restriction of the freedom to trade goods, offer services, move capital, and travel across provincial borders. Dismantling these legislative and regulatory barriers – and letting freedom flourish as the original constitutional design envisaged – will require further regulatory and legislative intervention to correct. Those regulatory and legislative interventions must respect the constitutional design. Ultimately, our view is that Canadians face a decisive moment, that it is vital to capitalize on a significant opportunity to advance the cause of internal free trade, and that a joint federal-provincial initiative will provide the most effective and enduring legal framework with which to do so.

Our brief is legal, not political: on the assumption that economic integration is politically desirable, we map out how it can be done legally. But we are not blind to practical realities. Accordingly, we offer two comments about the politics of economic integration.

The first is that barriers to trade are almost inevitable when legislative authority is decentralized. With multiple provincial and territorial legislative assemblies as well as Parliament exercising authority in their respective spheres, it is entirely unsurprising that friction emerges. Whenever there is legislation about, say, product safety, it naturally produces a barrier to trade. This is to say nothing of the history of more protectionist provincial efforts to control trade (as the "chicken and egg war" of the 1970s demonstrates). Short of such efforts, even benign legislation motivated by legitimate public policy concerns will create trade frictions. This is a fact of federal life.

This is particularly so in a federal system where powers are divided in the way they are in the *Constitution Act, 1867*. Provincial governments are granted wide powers over "property and civil rights" in their provinces (s.92(13)), and "all Matters of a merely local or private Nature in the Province" (s.92(16)). Alongside other provincial heads of power – the areas of jurisdiction granted to the provinces under the Constitution – these provisions provide ample constitutional space for the provinces to enact various types of economic regulation, even if those regulations have an incidental effect on the flow of interprovincial trade (*Carnation Company Limited v. Quebec Agricultural Marketing Board et al.*, [1968] 2 S.C.R. 238 (S.C.C. 1968)).

Our view is that a national coordinating body, and only a national coordinating body, can address the inevitable trade barriers that arise by virtue

of life in a federation. The case for a national coordinating administrative agency does not rest on any assumption of provincial protectionism; rather, the very structure of decentralized regulation ensures the proliferation of non-tariff barriers, and only a national body with the authority to mandate mutual recognition and harmonization can overcome these initially benign, but cumulatively disabling, obstacles to an integrated national market. This is not blind faith on our part in technocracy or the ability of technocrats to find elegant solutions to political problems. Rather, as we discuss, it is the only conceivable way of using collective action to surmount the hurdles to frictionless trade that are baked into Canada's constitutional order. There are inevitable costs to technocracy that we outline. But these costs, in this particular case, are justified.

The second point is that a national coordinating body can get started without buy-in from all the provinces and territories. Indeed, we expect that some will see our proposal as encroaching on their autonomy, to the point that they would be unwilling to sign up. In our view, provincial or territorial reticence would not be fatal. In fact, the Supreme Court of Canada has recently confirmed that practical compulsion to buy into a joint federal-provincial scheme is constitutionally permissible. As long as, in theory, the provinces and territories remain free to exercise their legislative authority to disengage from a cooperative endeavour, there can be no constitutional objection. Ultimately, we expect that if a joint federal-provincial scheme is put in place and contributes to enhanced interprovincial trade, the recalcitrant and reluctant will, in the end, join in, grudgingly or not, and all Canadians will be the better for it. Crucially, the goal here is not to override provincial autonomy, but rather to recognize that it is necessary to coordinate the unavoidable interactions of multiple autonomous regimes to ensure that autonomy exercised by one province does not impair the autonomy of another province's residents, businesses, or workers.

Legislative power over trade and commerce

Legislative authority over trade and commerce in Canada is highly decentralized, posing significant challenges for regulatory – or deregulatory – legislation that is national in character. This section explains why that is the case, setting up the later discussion of interprovincial free trade and the measures governments take to facilitate it. It begins with an overview of legislative power over trade, focusing on the relevant provisions of the *Constitution Act, 1867,* and on Parliament's power to make laws in relation to two key components of trade and commerce: interprovincial trade and general Canada-wide trade. The courts have found that neither of these aspects can serve as the basis for the development of national regulatory or deregulatory standards in legislation that applies everywhere in Canada. The section also explains how and why significant non-tariff barriers to trade persist between provinces, despite the commitment of the drafters of the *Constitution Act, 1867* to free trade. These barriers make frictionless trade a significant public policy challenge in the federation.

Interpreting the *Constitution Act, 1867*

In Canada, legislative authority is divided between Parliament and the provincial legislative assemblies. The division is set out in ss. 91 and 92 of the *Constitution Act, 1867*, which create various "heads" of legislative power.

At first glance, these provisions might appear to give Parliament broad powers to regulate the national economy. Most importantly, s. 91(2) refers to "The Regulation of Trade and Commerce." On its face, this head of power is extremely broad:

> The words "regulation of trade and commerce," in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of Parliament, down to minute rules for regulating particular trades (*Citizens' Insurance Company of Canada v. Parsons* (1881), 4 S.C.R. 215 at 112 (SCC 1881); (McDonald 1969, 189))

However, the individual heads of power in ss. 91 and 92 cannot be read in isolation. They must be read as forming part of a cohesive scheme. For the trade and commerce power, this has two implications.

First, it is circumscribed by the other heads of power contained in s. 91:

> If the words [trade and commerce] had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency. (*Citizens' Insurance Company of Canada v. Parsons* (1881), 4 S.C.R. 215 at 112 (S.C.C. 1881))

The point here is that if "trade and commerce" were read literally, it would already include matters such as legislation in relation to banking and rates of interest. The fact that the drafters of the *Constitution Act* included specific provisions about banking, rates of interest, and so on is, therefore, an indication that they intended "trade and commerce" to be read more narrowly than its literal meaning suggests.

Second, the trade and commerce power has to be read cohesively with the heads of provincial power set out in s. 92. Most importantly, s. 92(13) empowers provincial legislative assemblies to make laws about "Property and Civil Rights in the Province." Too broad a reading of "trade and commerce" would end up "substantially impairing the autonomy of the provinces in respect of matters of purely provincial concern" (Reference re Alberta Statutes, [1938] S.C.R. 100 at 121 (S.C.C. 1938); *Lawson v. Interior Tree Fruit and Vegetable Committee*, [1931] S.C.R. 357 at 366 (S.C.C. 1931)). Put another way, s. 92(13) requires a "subtraction" from the trade and commerce power (*Reference re Farm Products Marketing Act*, [1957] S.C.R. 198 at 202 (S.C.C. 1957)), not because the *Constitution Act, 1867* expressly requires it, but by necessary implication (*Reference re Farm Products Marketing Act*, [1957] S.C.R. 198 at 212 (S.C.C. 1957)).

As Malcolm Lavoie has argued, and as we suggest below, this allocation of power contemplated by s. 91(2) makes economic sense (Lavoie 2023). In other words, the text of the Constitution reflects underlying principles of political economy: national economic power was designed to overcome

coordination and holdout problems among the provinces (Lavoie 2023). These problems could stymie the potential for one national economy. As we shall see, our proposal will ultimately build on this insight, with the federal Parliament creating a coordinating mechanism to harmonize and eliminate regulatory barriers.

Now, the precise scope of s. 92(13) can be debated. In an early case, the Privy Council concluded that it must include at least the authority to regulate "the contracts of a particular business or trade" (*Citizens' Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96 at 112 (S.C.C. 1881)). Professor Lavoie has suggested that it extends to the regulation of matters of private law, such as contracts, torts, property, and relations between persons (Lavoie 2023). Perhaps the proper scope of "property and civil rights" is somewhere in between these two poles. Regardless, the point is that the heads of power in ss. 91 and 92 must be read as a cohesive scheme and this requires a "balance" to be struck, especially in interpreting Parliament's authority over trade and commerce (Reference re Securities Act, [2011] 3 S.C.R. 837 at 68–85 (S.C.C. 2011)).

There are two aspects to the trade and commerce power: the regulation of interprovincial and international trade, and a so-called "general" power:

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. (*Citizens' Insurance Company of Canada v. Parsons* (1881), 4 S.C.R. 215 at 113 (S.C.C. 1881); *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 (S.C.C. 1989))

We will deal with each of these in turn.

Interprovincial trade

In terms of regulation of interprovincial trade, it is helpful to start with *Canada (Attorney-General) v. Alberta (Attorney-General)* ([1916] 26 D.L.R. 288 (U.K.J.C.P.C. 1916)). Here, the Privy Council concluded that a federal *Insurance Act*, which purported to require companies selling insurance to be licensed by the federal government, was unconstitutional:

> the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces. (*Canada (Attorney-General) v. Alberta (Attorney-General),* [1916] 26 D.L.R. 288 at 292 (U.K.J.C.P.C. 1916))

The problem here, in the Privy Council's view, was that the federal legislation would preclude a provincially incorporated company from selling insurance in that province.

In subsequent decisions, schemes for the regulation of grain elevators and products produced for export from the province were also invalidated on similar grounds (*The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434 (S.C.C. 1925); *British Columbia (Attorney General) v. Canada (Attorney General),* [1937] 1 D.L.R. 691 (U.K.J.C.P.C. 1937)). In that era, the Privy Council even articulated the "ancillary theory" of the trade and commerce power, which would have narrowed this head of power to a vanishing point (Hogg 2020).

After the abolition of appeals to the Privy Council, the Supreme Court of Canada expanded the scope of the power to regulate interprovincial trade somewhat, upholding in *Caloil Inc. v. Attorney General of Canada* a scheme prohibiting the sale of imported oil west of Ottawa even though it applied to intraprovincial transactions:

> the policy intended to be implemented by the impugned enactment is a control of the imports of a given commodity to foster the development and utilization of Canadian oil resources. The restriction on the distribution of the imported product to a defined area is intended to reserve the market in other areas for the benefit of products from other provinces of

> Canada. Therefore, the true character of the enactment appears to be an incident in the administration of an extraprovincial marketing scheme ... Under the circumstances, the interference with local trade restricted as it is to an imported commodity, is an integral part of the control of imports in the furtherance of an extraprovincial trade policy and cannot be termed "an unwarranted invasion of provincial jurisdiction." (*Caloil Inc. v. Attorney General of Canada*, [1971] S.C.R. 543 at 551 (S.C.C. 1971); *Murphy v. C.P.R.*, [1958] S.C.R. 626 (S.C.C. 1958); *R. v. Klassen* (1959), 20 D.L.R. (2d) 406 (M.B.C.A. 1959))

But it must be noted that intraprovincial transactions could only be regulated by federal legislation where this was necessarily incidental – an "integral part" – to the regulation of interprovincial or international trade. Otherwise, "the Parliament of Canada may not, in the guise of regulating trade and commerce, reach into the fields allocated to the provinces by s. 92(13) and (16) and regulate trading transactions occurring entirely within the provinces" (*Dominion Stores Ltd. v. R.,* [1980] 1 S.C.R. 844 at 855 (S.C.C. 1980)).

The fate of federal legislation establishing product standards is instructive. In *Dominion Stores Ltd. v. R.* ([1980] 1 S.C.R. 844 (S.C.C. 1980)), the Supreme Court invalidated the *Canada Agricultural Standards Act*. This legislation sought to establish uniform national standards for agricultural products. To take apples as an example, the idea was that a "Canada Extra Fancy" apple would be such throughout the country. It was an offence to use the federally established standard without complying with the standard. This scheme was layered on top of provincial regulation, which used similar standards. By a 5–4 majority, the Supreme Court held that the statute was not authorized under Parliament's power to regulate interprovincial trade as "the thrust of the federal statute is the regulation of local as well as interprovincial and international marketing, as for example, by the detailed regulation of packaging" (*Dominion Stores Ltd. v. R.,* [1980] 1 S.C.R. 844 at 861 (S.C.C. 1980)):

> Stripping off the complexities of the constitutional argument and reducing the transaction to its real proportions, the appellant here offered apples for sale pursuant to an admittedly valid provincial statute. The dealer did not select and adopt a grade name prescribed by a federal statute, but rather complied

> with applicable, valid provincial legislation. The precise issue facing the Court in this proceeding is whether or not, in these circumstances, a charge may be laid under the federal statute. It may be, of course, that the provincial inspectors took a different view of the apples in question than did the federal inspectors, which may explain why no action was taken under the provincial statute. However, the offence, if any, must, in my view, be against the provincial legislation and not the artificially extended federal statute. Here the sequence of passage of marketing schemes was first the provincial statute, followed by a like federal statute purporting to reach down to intraprovincial trade. If, however, the Attorney General for Canada be correct, the latter is valid and the offence allegedly committed by the appellant is against the federal statute and not the provincial statute without which the federal statute would have no legal application as regards local trade. The parasite and not the host thereby becomes the bigger and more important animal. (*Dominion Stores Ltd. v. R.*, [1980] 1 S.C.R. 844 at 859 (S.C.C. 1980*); Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914 (S.C.C. 1980))

This is an especially notable decision as uniform standards are one of the most powerful resources available in a federation to ensure seamless trade across borders. The European Union boasts more than 3,600 such standards across an extraordinary range of product categories, facilitating frictionless exchange from one end of the Union to the other (*Public Resource Org Inc. v. Right to Know CLG* [2024] C.J.E.U. C-588/21 P at para 71 (C.J.E.U. 2024)). Parliament, however, has no comparable authority, and this clearly affects the potential for frictionless exchange in Canada.

General regulation of Canada-wide trade

In terms of the general power to regulate trade and commerce, the leading case remains *General Motors of Canada Ltd. v. City National Leasing* ([1989] 1 S.C.R. 641 (S.C.C. 1989)). Noting that a "careful case by case analysis" is required in all cases where this power is invoked, Judge Dickson set out a list of five non-exhaustive indicia of validity for a federal statute seeking to effectuate general regulation of trade affecting the whole country:

> First, the impugned legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry … [Fourth] the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting… [Fifth] 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. (*General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 at 661–662 (S.C.C. 1989))

This sufficed, in the *General Motors* case, to uphold competition legislation.

But when the federal government proposed comprehensive legislation to regulate the securities industry, the Supreme Court held that the general power to regulate trade could only be exercised where there is a "constitutional gap" (Reference re Securities Act, [2011] 3 S.C.R. 837 at 83 (S.C.C. 2011)). The Supreme Court accepted that regulating trade in securities "might well relate to trade as a whole" but cautioned that "the proposed Act reaches beyond such matters and descends into the detailed regulation of *all* aspects of trading in securities, a matter that has long been viewed as provincial" (Reference re Securities Act, [2011] 3 S.C.R. 837 at 114 (S.C.C. 2011)). Fundamentally, Parliament sought to "regulate *all* aspects of contracts for securities within the provinces, including *all* aspects of public protection and professional competence within the provinces" (Reference re Securities Act, [2011] 3 S.C.R. 837 at 122 (S.C.C. 2011)). This was a bridge too far:

> The provisions of the proposed Act, viewed as a whole, compel a negative response. The Act chiefly regulates contracts and property matters within each of the provinces and territories, overlain by some measures directed at the control of the Canadian securities market as a whole that may transcend intraprovincial regulation of property and civil rights. A federal scheme adopted from the latter, distinctly federal, perspective would fall within the circumscribed scope of the general trade and commerce power. But the provisions of the Act that relate

> to these concerns, although perhaps valid on their own, cannot lend constitutional validity to the full extent of the proposed Act. Based on the record before us, the day-to-day regulation of all aspects of trading in securities and the conduct of those engaged in this field of activity that the Act would sweep into the federal sphere simply cannot be described as a matter that is truly national in importance and scope, making it qualitatively different from provincial concerns. (*Reference re Securities Act*, [2011] 3 S.C.R. 837 at 125 (S.C.C. 2011))

In the absence of some sort of "constitutional gap" – a term left undefined – there is no role for national regulation even of an industry that is Canada-wide in scope and has significant interprovincial aspects (*McLean v. British Columbia* (Securities Commission), [2013] 3 S.C.R. 895 (S.C.C. 2013); *Sharp v. Autorité des marchés financiers*, [2023] 487 D.L.R. (4th) 467 (S.C.C. 2023)).

Finally, consider the Supreme Court's decision in *R. v. Comeau* ([2018] 1 S.C.R. 342 (S.C.C. 2018)). In our view it highlights the general approach of the Canadian courts to matters of interprovincial trade. Put bluntly, provincial regulation has been allowed to stymie interprovincial trade, and the judicial approach has been quite permissive, even in the face of constitutional provisions that seem to demand muscular judicial protection of free trade.

At issue in *Comeau* was a provision of New Brunswick law forbidding people to "have or keep liquor not purchased" from the province's liquor monopoly, the New Brunswick Liquor Corporation (*Liquor Control Act*, R.S.N.B. 1973, c. L-10 at s. 134(b)). Comeau had contravened the prohibition by travelling to the neighbouring province of Quebec, filling his car with cheap(er) liquor, and returning home. He was caught by vigilant police officers who were monitoring liquor purchases in border areas.

At trial, he successfully convinced the judge that the prohibition was unconstitutional, because it was inconsistent with s. 121 of the *Constitution Act, 1867*: "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."

Alas for Comeau, the Supreme Court took a different view, holding that the constitutional provision only covers laws affecting "interprovincial

movement of goods," which act "like a tariff" where "restriction of cross-border trade" is "the primary purpose of the law...", an interpretation that excludes "laws enacted for other purposes, such as laws that form rational parts of broader legislative schemes with purposes unrelated to impeding interprovincial trade" (*R. v. Comeau*, [2018] 1 S.C.R. 342 at 114 (S.C.C. 2018)). To be sure, there are constitutional limits on the ability of the provinces to enact intraprovincial trade barriers that could be argued attack the "flow" of interprovincial trade (*Attorney-General for Manitoba v. Manitoba Egg and Poultry Association et al.*, [1971] S.C.R. 689 at 703 (S.C.C. 1971)), but under the *Comeau* decision most bona fide legislative initiatives will be constitutionally valid even if they inhibit trade. The *Comeau* litigation throws into sharp relief the importance in contemporary liberal democracies of so-called "non-tariff" barriers to trade. These are barriers that have the effect of inhibiting trade, but whose purpose is (usually) to give effect to public policy. As the Supreme Court put it in *Comeau*, "provinces within a federal state should be allowed leeway to manage the passage of goods while legislating to address particular conditions and priorities within their borders" (*R. v. Comeau*, [2018] 1 S.C.R. 342 at 86 (S.C.C. 2018)).

> *Put bluntly, provincial regulation has been allowed to stymie interprovincial trade.*

States the world over do precisely this, for instance, as New Brunswick did, acting to establish a liquor monopoly that (depending on one's level of cynicism) can be designed to reduce alcohol consumption or maximize tax revenues. Indeed, non-tariff barriers are, on the whole, much more prevalent and effective in the modern world than tariff barriers. Tariffs have progressively been reduced over recent decades, to a point where they make up a small part of the price of traded goods, small enough that tariffs will often be less of a concern to exporters and importers than fluctuations in currency exchange rates. While this may be changing because of the United States' efforts at re-balancing its own tariff rates for imported products, the overall picture remains stable, especially as it pertains to Canada.

Non-tariff barriers are a different matter: exporters must dance to the tune of the importing jurisdiction. For instance, given the statutory prohibition upheld by the Supreme Court, a company wanting to market liquor in New Brunswick must strike an agreement with the monopolist, the New Brunswick Liquor Corporation — otherwise, their product will be shut out of that market entirely. Put another way, getting over a tariff barrier is a question of reaching into your wallet; getting over a non-tariff barrier can require a complete overhaul of your production process, or might simply be impossible.

Many non-tariff barriers are designed to inhibit imports. A great deal of international arbitration addresses allegations that non-tariff barriers have been erected in order to discriminate against foreign enterprises, and much of the body of European Union law is concerned with such matters. Even those barriers that are not discriminatory in their design are not always based on laudable motives. Although the Supreme Court in *Comeau* saw provincial liquor monopolies as promoting "public health" (*R. v. Comeau*, [2018] 1 S.C.R. 342 at 86 (S.C.C. 2018)) or "public supervision of alcohol" (*R. v. Comeau*, [2018] 1 S.C.R. 342 at 124 (S.C.C. 2018)), most Canadians understand that the primary purpose of these laws is to maximize provincial governments' revenues.

But even if one paints provincial legislative interventions in their most positive light and treats them as genuine efforts to respond to pressing public policy concerns within their jurisdiction, those interventions will still hamper interprovincial trade. Benign regulatory interventions in the provinces will, inevitably, create friction by erecting barriers to trade. This is the offshoot of provincial autonomy in a federation: a bona fide restriction on goods, services, labour mobility, or capital will simply hamper interprovincial trade and is the price of a federal structure in which the provinces and territories have control over property and civil rights. At its base, the problem is not protectionism or rent seeking (even though this undoubtedly occurs) but the mere coexistence of multiple regulatory authorities that are each able to enact different standards:

- Standards differ because risk tolerances differ.
- Inspection and conformity procedures differ because administrative capacity differs.
- Licensing frameworks differ because professions evolved differently across regions.
- Consumer protection rules differ because markets differ.

- Environmental and labour standards differ because political economies differ.

None of this is necessarily malicious, but the effects are substantial: a benign certification rule in a province becomes a de facto barrier to out-of-province service providers; an inspection protocol that seems reasonable on the surface becomes a hidden restriction on goods; a well-intentioned residency requirement limits labour mobility; and sensible provincial precautionary standards block interprovincial competition and capital flows.

Canada's Constitution permits this and thus embeds trade friction in the constitutional order.

The *Charter of Rights and Freedoms*

The discussion of *Comeau* leads naturally into a discussion of the interpretation of the *Canadian Charter of Rights and Freedoms*. Here, too, the judicial approach has been to eschew any economic rights, thereby defanging the *Charter* as a potential weapon against over-intrusive regulation. In this section, we explain how the provisions of the *Canadian Charter of Rights and Freedoms* have been interpreted as not including economic freedoms. Overall, the Supreme Court of Canada (and, until appeals were abolished in 1949, the Privy Council) has not functioned as a "driver" of economic integration and trade in the same way as, say, the United States Supreme Court or the Court of Justice of the European Union.

Section 6

The most obvious economic liberty provision in the *Charter* is s. 6(2)(b), which gives every citizen and permanent resident the right "to pursue the gaining of a livelihood in any province." The Supreme Court circumscribed this provision in *Law Society of Upper Canada v. Skapinker* ([1984] 1 S.C.R. 357 (S.C.C. 1984)). Justice Estey explained that s. 6(2)(b) "was not intended to establish a free-standing right to work": rather, the right is to "earn a living in any province subject to the laws and practices of 'general application' in that province which do

not discriminate primarily on the basis of provincial residency" (*Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at 28 (S.C.C. 1984)). It is no more than a right "to work without establishing residence" (*Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at 33 (S.C.C. 1984)); the worker may work in another province but in order to do so must satisfy the statutory and regulatory requirements for working there.

It is only where these requirements are discriminatory in their effect that s. 6(2)(b) will be breached (*Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 (S.C.C. 1998)). So in *Black v. Law Society of Alberta* ([1989] 1 S.C.R. 591 (S.C.C. 1989)), a provincial law preventing non-resident lawyers from entering a partnership with an Alberta lawyer had the effect of rendering the practice of law virtually impossible for outsiders and s. 6(2)(b) was breached.

But in *Canadian Egg Marketing Agency v. Richardson* ([1998] 3 S.C.R. 157 (S.C.C. 1998)), the federal-provincial supply management regime for eggs did not breach s. 6(2)(b) because any discrimination against provincial producers was not the primary purpose of the regime: for a breach of s. 6(2)(b) to be made out, the discriminatory effects of a regime would have to displace the valid legislative purposes (*Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at 102 (S.C.C. 1998)). To date, there is little support in the case law for "a reading of section 6 that recognizes its place in promoting economic union" (Lavoie 2023 at 187) – it is certainly possible that a "renewed understanding" (Lavoie 2023 at 189) will emerge in the future, but for now the prospects of that are slim.

Section 7

Section 7 states that: "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." But "liberty" does not mean economic liberty.

Relatively early in the *Charter's* existence, Canadian courts had to grapple with the proposition that regulatory offences might interfere with the liberty and security of the person. In *Re B.C. Motor Vehicle Act* ([1985] 2 S.C.R. 486 (S.C.C. 1985)), the Supreme Court had to consider a statute that would make it a criminal offence to drive a motor vehicle whilst one's licence was suspended. The judges unanimously agreed that the statute was unconstitutional, but only because the law provided for a term of imprisonment as a sanction for driving

with a suspended licence. But it was imprisonment that triggered s. 7 because it would deprive a guilty party of their liberty. This would not be true, Justice Wilson explained, of regulatory offences generally:

> It is true that the section prevents citizens from driving their vehicles when their licences are suspended. Citizens are also prevented from driving on the wrong side of the road. Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the *Charter* to sweep all those offences into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1. (*Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 at 106 (S.C.C. 1985))

Rather, to use the words of the Ontario Court of Appeal in *R. v. Videoflicks Ltd*: "The concept of life, liberty and security of the person would appear to relate to one's physical or mental integrity and one's control over these, rather than some right to work whenever one wishes" (*R. v. Videoflicks Ltd*., (1984), 48 O.R. (2d) 395 at 433 (O.N.C.A. 1984)).

The high but short-lived watermark of deregulatory use of s. 7 was the decision of the British Columbia Court of Appeal in *Wilson v. British Columbia (Medical Services Commission)* ((1988), 53 D.L.R. (4th) 171 (B.C.C.A. 1988)). Provincial legislation required doctors to apply for practitioner numbers, which could be refused or granted subject to geographical restrictions. The Court of Appeal took a broad view of the scope of "liberty" in s. 7, seeing it as including "individual freedom of movement, including the right to choose one's occupation and where to pursue it, subject to the right of the state to impose, in accordance with the principles of fundamental justice, legitimate and reasonable restrictions on the activities of individuals" (*Wilson v. British Columbia (Medical Services Commission)* (1988), 53 D.L.R. (4th) 171 at 46 (B.C.C.A. 1988)). Even there, though, the Court of Appeal was careful to emphasize the human dignity aspect of the ability to work, rather than the doctors' raw economic interests in being able to receive payment for their services; in the Court of Appeal's view the case was about "personal rights affecting the freedom and quality of life of individual doctors" (*Wilson v. British Columbia (Medical Services Commission)* (1988), 53 D.L.R. (4th) 171 at 51 (B.C.C.A. 1988)).

Subsequently, the courts have pulled back from this high watermark. The decision in *Wilson* has been said to have been "implicitly overruled" by the Supreme Court of Canada in a case involving the regulation of accountants (*Johnson v. British Columbia (Securities Commission)* (1999), 67 B.C.L.R. (3d) 145 (S.C.) at 61 (B.C.S.C. 1999)): some areas of accountancy practice were reserved by provincial legislation to chartered accountants, much to the chagrin of the certified accountants who were the protagonists in the litigation. In *Walker v. Prince Edward Island* ([1995] 2 S.C.R. 407 (S.C.C. 1995)), the Supreme Court dismissed an appeal from the bench, giving brief oral reasons: "In light of our previous decisions as regards ss. 2(*b*), 6 and 7 of the *Canadian Charter of Rights and Freedoms*, we are all of the view that there has been no restriction to those rights in this case" (*Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407 at 409 (S.C.C. 1995)). If this is so, then *Wilson* "must now be considered wrongly decided" (Stewart 2019, 108; Casey 1994).

Little serious argument can be advanced that the *Charter* is of much use in pursuing a project of economic integration (*Drover v. Canada (Attorney General),* 117 O.R. (3d) 561 (O.N.C.A. 2025)).

Inter-delegation

We are left with the concept of "inter-delegation," which permits Parliament and the provincial legislatures to delegate *administrative* authority to the other level of government.

This section will explore the merits of inter-delegation, which has emerged as an alternative to federal legislation as a way of achieving national economic objectives. In principle, as long as Parliament and the provincial legislative assemblies work together, significant regulatory and deregulatory measures are entirely possible. We suggest that it would be more fruitful to explore this avenue given the barriers to using federal legislation to further economic integration. It is here that Canada has pursued economic integration with some ferocity, albeit mostly in the area of agricultural products marketing, not in order to deregulate but to protect farmers from the vagaries of competitive markets.

In Canada, "co-operative federalism" has been treated as a "guiding principle of our constitutional order," which requires that "the main constitutional doctrines [of federalism] and the interplay between them should be construed so as to facilitate the achievement of the objectives of Canada's federal structure" (*Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at 24 (S.C.C. 2007)). As with other constitutional principles, however, co-operative federalism cannot be used to invalidate statutes or impose positive obligations (*Toronto (City) v. Ontario (Attorney General)*, [2021] 2 S.C.R. 845 at 55-60 (S.C.C. 2021); *Quebec (Attorney General) v. Canada (Attorney General),* [2015] 1 S.C.R. 693 at 20 (S.C.C. 2015); Daly 2014) and the fundamental orderings of the federation – the division of exclusive powers – remains central (*Opsis Airport Services Inc. v. Quebec (Attorney General),* [2025] S.C.J. No. 17 (Q.L.) at 32 (S.C.C. 2025)). Here, as elsewhere, parliamentary sovereignty is the fundamental principle. Nonetheless, the principle of co-operative federalism plays an interpretive role, helping to ensure that federal-provincial efforts to co-operate to achieve common goals are not easily defeated. The operative doctrine is that of inter-delegation and it imposes only very modest limits on combined federal-provincial initiatives. Moreover, the doctrine empowers the provinces and the federal Parliament to accomplish its shared goals through political compromise and cooperation.

How far can such co-operative endeavours go? So long as there is no transfer of *legislative* power that would upset the exclusive distribution of law-making authority in ss. 91 and 92 of the *Constitution Act, 1867*, there is no inter-delegation objection.

Consider *Attorney General of Nova Scotia v. Attorney General of Canada* ([1951] S.C.R. 31 (S.C.C. 1951)). The legislation here permitted the Nova Scotia Cabinet to delegate to Parliament the authority to legislate employment in the province *and* allowed Nova Scotia to apply provincial employment legislation to areas of federal competence. The legislation also provided that Parliament could authorize the Nova Scotia Cabinet to impose a sales tax up to 3 per cent. The Supreme Court unanimously held that the scheme was unconstitutional. By handing federal legislative authority to a province and provincial legislative authority to Canada, the scheme upset the division of powers in ss. 91 and 92. As Justice Kerwin put it, "[t]he *British North America Act* divides legislative jurisdiction between the Parliament of Canada and the Legislatures of the Provinces and there is no way in which

these bodies may agree to a different division" (*Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31 at 38 (S.C.C. 1951)); the scheme was thus, for Justice Fauteux (as he then was), "incompatible with the normal operation" of the Constitution (*Attorney General of Nova Scotia v. Attorney General of Canada,* [1951] S.C.R. 31 at 55 (S.C.C. 1951)). To hold otherwise, Justice Rand noted, would be to permit the "substance of transfer to take place" from one level of government to another (*Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31 at 48 (S.C.C. 1951)). The limited scope of this decision should be immediately obvious: the difficulty from a constitutional perspective lay in creating a new law-making authority altogether.

By contrast, where a federal-provincial scheme involves the sharing of *administrative* authority (i.e., a province empowering a federal agency to enforce its laws, or conversely Parliament giving a provincial agency enforcement authority) there is no constitutional objection. As long as the legislation is "carefully framed" to ensure the enacting body does not step outside its sphere of competence (*British Columbia (Attorney General) v. Canada (Attorney General),* [1937] 1 D.L.R. 691 at 695 (U.K.J.C.P.C. 1937)), a legislature may "employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority" (*Proprietary Articles Trade Association et al. v. A.G. for Canada et al.,* [1931] 2 D.L.R. 1 at 12 (U.K.J.C.P.C. 1931)). This being so, there is nothing unconstitutional about employing to that end executive officers who also happen to work for someone else.

A representative provision is s. 22(3) of the *Farm Products Agencies Act*:

> An agency may, with the approval of the Governor in Council, grant authority to any body, authorized under the law of a province to exercise powers of regulation in relation to the marketing locally within the province of any regulated product in relation to which the agency may exercise its powers, to perform on behalf of the agency any function relating to interprovincial or export trade in the regulated product that the agency is authorized to perform. (*Farm Products Agencies Act*, R.S.C. 1985, c. F-4)

The leading case on the constitutionality of provisions such as these is *P.E.I. Potato Marketing Board v. Willis* ([1952] 2 S.C.R. 392 (S.C.C. 1952)).

Here, the legislature of Prince Edward Island had given the provincial Cabinet the authority to create entities for marketing agricultural products in the province (*Agricultural Products Marketing (Prince Edward Island) Act*, (S. of P.E.I., 1940, c. 40)). The provincial Cabinet duly created the PEI Potato Marketing Board as the body responsible for tubers. Meanwhile, a federal statute permitted the federal cabinet to empower provincial marketing boards to exercise powers within federal jurisdiction, i.e., issues relating to interprovincial trade in agricultural products (Agricultura*l Products Marketing Act (Can.)* 1949, 1st Sess., c. 16). These federally granted powers were similar in character to the provincially granted powers and extended to the making of regulations. Applying the *Nova Scotia Labour Relations* case, the PEI Court of Appeal concluded that the scheme was unconstitutional. The Supreme Court of Canada reversed that decision. Given that both statutes were within jurisdiction – Parliament's authority over interprovincial trade and the province's over intraprovincial commerce – the use of provincial officials as the administrative instrumentality of Parliament was permissible:

> What the law in this case has done has been to give legal significance called incidents to certain group actions of five men. That to the same men, acting in the same formality, another co-ordinate jurisdiction in a federal constitution cannot give other legal incidents to other joint actions is negated by the admission that the Dominion by appropriate words could create a similar board, composed of the same persons, bearing the same name, and with a similar formal organization, to execute the same Dominion functions. Twin phantoms of this nature must, for practical purposes, give way to realistic necessities. (*P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392 at 402, 414-415 (S.C.C. 1952))

As the delegation at issue here was administrative rather than legislative, the situation was "entirely different" from the *Nova Scotia Labour Relations* case (*P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392 at 410 (S.C.C. 1952)). Regulations are not primary legislation and, therefore, the delegation of a regulation-making power is not constitutionally impermissible.

This was, Chief Justice Laskin later commented, a "constitutional method of escape" from the logic employed to invalidate legislative inter-delegation

(*Reference re Agricultural Products Marketing,* [1978] 2 S.C.R. 1198 at 1223 (S.C.C. 1978)). Accordingly, in *Reference re Agricultural Products Marketing*, where the scheme hatched by Parliament and the provincial legislatures involved an "umbrella" federal agency and provincial regulations could be adopted federally, there was no constitutional objection either:

> It should be plain, in the light of the delegation cases which have followed after the *Nova Scotia inter-delegation* case, that its basis is that the mutually exclusive legislative authority of Parliament and Provincial Legislatures cannot as such be exchanged between them but it does not preclude borrowing or adopting for valid federal purposes prescriptions which a Provincial Legislature may have validly enacted within its own areas of competence and, again, it does not preclude delegation of administrative authority to a provincial board which may be permitted by federal order to support that authority by being empowered to make implementing regulations. (*Reference re Agricultural Products Marketing,* [1978] 2 S.C.R. 1198 at 1223-1224 (S.C.C. 1978))

Notice that the creation of a federal umbrella agency is simply a more efficient way of achieving Parliament's goals. There is no doubt that Parliament could create a Federal Marketing Board (Ontario), Federal Marketing Board (Manitoba), and so on. But instead, Parliament relied on provincial boards that were already empowered to take the sorts of action that Parliament considered necessary to achieve its ends: *Willis* makes clear that such a delegation is appropriate, even if it includes the power to make regulations. Why, then, should Parliament not be able to create one single umbrella board when it could create multiple individual boards? The Supreme Court of Canada could not see a good reason to make such an arrangement constitutionally impermissible.

The most recent inter-delegation case concerned a proposal to create a national scheme of regulation for systemic risk in the securities market. As this proposal was upheld by the Supreme Court of Canada, and it provides a model for the inter-delegation scheme we propose, we will now consider it in greater detail.

Regulatory harmonization: Recent efforts in constitutional perspective

Thus far, we have explained the constitutional backdrop to the issue of interprovincial free trade in Canada. There are significant legal and political hurdles to frictionless trade in Canada, and few clear legal mechanisms to clear away the hurdles: significant provincial powers over property and civil rights support powers to enact non-tariff barriers; and the Charter does not contain a standalone right to economic freedom or free trade.

With the constitutional backdrop in mind, we now turn to recent history and the efforts of provinces and territories and the federal Parliament to harmonize economic regulation. As we shall see, these efforts have – at least until recently – largely been haphazard and incomplete. Additionally, the recent efforts have been characterized by liberal use of Henry VIII clauses, which empower the executive to amend primary statutory law. The constitutional and political issues with this legislative device are well-documented. But as we shall see, used restrictively and appropriately, these clauses can bolster the inter-delegation scheme we contemplate.

The Canada Free Trade Agreement

Capturing the late 20th century zeitgeist, Canada's First Ministers signed the Agreement on Internal Trade (AIT) that came into force in 1995. In 2017, the AIT was replaced by the Canada Free Trade Agreement (CFTA). All the provinces and territories, as well as the federal government, are signatories to the CFTA. More recently, with limited fanfare, the same parties announced the Canadian Mutual Recognition Agreement on the Sale of Goods (CMRA), an agreement designed to plug into the CFTA and, therefore, subject to the same limitations.

At the outset, Article 100 of the CFTA states a lofty goal:

> The Parties' objective is to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investments within Canada and to establish an open, efficient, and stable domestic market. The Parties recognize

> and agree that enhancing trade, investment, and labour mobility within Canada would contribute to the attainment of this goal.

The CFTA makes general provision for non-discrimination (Article 201), free movement of goods (Chapter 3, Part A), services (Chapter 3, Part B), capital (Chapter 3, Part C), and people (Chapter 7). The burden is on the party claiming any exemption created by the CFTA to assert it (Article 1207(7)).

That said, the opening provisions also announce, somewhat portentously, that "the right to regulate is a basic and fundamental attribute of government" and insist on "the need to preserve flexibility in order to achieve public policy objectives" (Canada Free Trade Agreement, Article 102(1)).

A partial commitment to free trade

Chapter 3, Part A, on goods, highlights the internal tension revealed by the opening provisions. On the one hand, Article 301(2) and (3) purport to limit trade barriers:

> 2. A Province shall not adopt or maintain any measure that restricts or prevents the movement of goods across provincial or territorial boundaries.
> 3. The Government of Canada shall not adopt or maintain any measure that unduly restricts or prevents the movement of goods across provincial or territorial boundaries.

But Article 301(1) contains a significant carve-out by creating an exception for "any technical regulation, conformity assessment procedure, standard, or sanitary or phytosanitary measure." Then, according to Article 302(8), it becomes clear that this exception is guarded by each party to the CFTA operating within its own sphere of authority:

> On request, each Party shall accept the results of another Party's conformity assessment procedures, even if those procedures differ from its own, provided it is satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to its own procedures. If a Party does not accept the results of a conformity assessment procedure conducted in the territory of the other Party, it shall, on request of the other Party, explain the reasons for its decision.

In other words, it is for each government (federal, provincial, or territorial) to set standards in its area of competence: it *ought* to accept the conformity assessment procedures of another government, but if it does not, its only obligation is to "explain the reasons" why not.

The CMRA represents, at best, a modest improvement. Paragraph 1 of Part E announces an impressive principle:

> Each Party shall ensure that a good that may be lawfully sold in the territory of another Party, in compliance with the requirements contained in regulatory measures applicable in that other Party, may be sold in its territory without having to meet an applicable requirement.

But this is quickly qualified by paragraph 2 (a Party may apply "a requirement on the sale of a good produced in its territory or imported from a non-Party into it") and paragraph 3, which legitimates any "requirement to obtain or maintain a licence, registration, or other authorization to sell a good" (clause (c)), and any regulation on "the circumstances in which a good may or may not be sold" (clause (e)), as long as the measure is not discriminatory. This still leaves considerable scope for provinces and territories to impose non-tariff barriers on goods crossing provincial borders.

> *There are significant legal and political hurdles to frictionless trade in Canada, and few clear legal mechanisms to clear them away.*

The commitment to free trade in services and capital is also somewhat limited. In both instances, for example, there is an express provision permitting governments to require "a person to be a resident of, or have a commercial presence" in a province or territory in order to conduct business (Canada Free Trade Agreement, Articles 307(2), 312(2)(g)). In the digital age, this is a significant restriction on freedom to trade. Furthermore, the exclusive means of enforcing those provisions of the CFTA that would further economic integration is the CFTA dispute resolution process.

As to labour mobility, although the goal is "to eliminate or reduce measures adopted or maintained by the Parties that restrict or impair labour mobility" (Article 700), especially in relation to residency and certification requirements, the CFTA does not apply to "social policy measures including labour standards and codes, minimum wages, employment insurance qualification periods, and social assistance" (Article 701(2)(a)). Even the commitments to removing residency requirements and ensuring mutual recognition of certification are shot through with exceptions. Article 705(3)(f), for example, qualifies any right to be certified automatically in another province or territory by permitting a party to require the worker to "demonstrate knowledge of the measures maintained by that Party applicable to the practice of the occupation in its territory" (see also Article 705(4)(d)). More generally, Article 706 allows the parties to the CFTA to "adopt or maintain any occupational standard, and in doing so ... establish the level of protection that it considers to be appropriate in the circumstances." As with the provisions relating to goods discussed above, the federal, provincial, and territorial governments ultimately have the power to determine which standards apply in their jurisdiction and how compliance is to be assessed (Article 706(2)–(5)). Article 707 provides for a further set of exceptions to the general prohibition on residency requirements.

Moreover, there are approximately 50 pages of exceptions set out in Part VII, Annex II: neither Canada nor Ontario has any exceptions but each other party has identified multiple areas of economic activity to which various provisions of the CFTA do not apply. Annex II represents the same exercise, but for measures to be taken in the future – once more, the exceptions occupy around 50 pages of text. CMRA is similar: the text of 7 pages is dwarfed by the 38 pages of exceptions that follow (again, with Canada and Ontario notably leaving their annexes blank).

Chapter 10 provides for dispute resolution mechanisms, both between governments (Part A) and between individuals and governments (Part B). However, although a panel can make determinations about whether a measure is inconsistent with the CFTA, its remedies are recommendations only (Article 1008(3)(d), 1025(3)(d)), although there is an additional enforcement process that can conceivably result in the application of a monetary penalty (Article 1010(11)(d), 1027(11)(b)). To date, there has only been a handful of adjudications under the dispute resolution mechanisms.

Non-binding harmonization mechanisms

The CFTA provides only for non-binding mechanisms to achieve further integration. Continuing the theme of labour mobility, Article 707(3) establishes a Forum of Labour Market Ministers that shall, amongst other things, "promote the implementation of and ongoing adherence to this Chapter, and develop a work plan or plans related to the objectives of this Chapter" (Article 708(1)(a)).

The provision for regulatory reconciliation set out in Article 403 is more elaborate:

1. Parties shall enter into negotiations to reconcile regulatory measures, identified by a Party, that act as a barrier to trade, investment, or labour mobility within Canada. Reconciled measures are to be identified under reconciliation agreements as provided for in Annex 404.
2. Subject to Article 405 and Article 406.1, Parties shall achieve reconciliation in accordance with each reconciliation agreement.
3. If a Party has reconciled a regulatory measure pursuant to a reconciliation agreement, that Party shall not amend that regulatory measure in a manner that circumvents the reconciliation agreement.
4. Reconciliation agreements and associated exceptions shall be published on this Agreement's website.

Currently, there are 12 reconciliation agreements made pursuant to this provision.

That said, in respect of future regulatory measures, Article 408(2) makes clear that cooperation is not mandatory: "A Party is not required to participate in the development of the future regulatory measure or adopt the future regulatory measure at the end of a joint development process."

Nowhere in the CFTA is there a full-throated commitment to regulatory harmonization: just as the commitment to free trade is partial, the harmonization mechanisms are non-binding. We can salute the progress made, and the compromises embedded in the CFTA, whilst also insisting that more really should be done especially in terms of providing for binding obligations that prevent Canada's governments and legislatures from wriggling out of their commitment to internal free trade.

Overall, nonetheless, the structure of the CFTA could well form the basis for a federal-provincial scheme of inter-delegation, with stronger commitments to free trade and binding harmonization or mutual recognition mechanisms. The basic idea is sound: there needs to be an agreement that an official body should be in place to facilitate free trade within Canada by providing for mutual recognition and/or harmonization of regulatory standards, backed up by a dispute resolution process allowing potential beneficiaries of freer trade to enforce the standards against recalcitrant governments.

One thing lacking from the CFTA is any power to simply eliminate burdens on free Canada-wide trade. We turn next to the legislative means that could be used to this end.

Henry VIII and the constitutional framework

In this section, we analyze one of the common legislative tools the federal government and the provinces have used in recent years to reduce regulatory barriers: so-called Henry VIII clauses. Henry VIII clauses delegate power to the executive (sometimes Cabinet collectively, sometimes Ministers of the Crown individually) to modify the provisions of a primary law. They are a means of legislating by executive fiat – an approach favoured by Henry VIII, who is purported to have legislated via proclamations without parliamentary approval. The basic idea in the present context would be to empower ministers to identify and eliminate regulatory restrictions on trade via such clauses, but under the watchful eye of the courts and restrained by appropriate legislative drafting.

No such clause has ever been invalidated in Canada on constitutional grounds, but they have been criticized for inhibiting democratic accountability and sidelining legislatures. As such, their use should be carefully constrained. We suggest that Henry VIII clauses may have a role to play as part of a detailed statutory scheme of deregulation, subject to rigorous safeguards being put in place to ensure that the executive is properly accountable and that elected representatives play an active role.

We begin by explaining the constitutional framework governing Henry VIII clauses. We then explain how they have been deployed in recent legislative attempts to remove regulatory barriers, both at the provincial and federal levels. Understanding the constitutional framework and the objectionable

aspects of recent resorts to Henry VIII clauses will allow us to map out a way forward to further economic integration across the country.

Henry VIII clauses are deployed throughout the Westminster legal ecosystem and in this sense they are not particularly uncommon (Daly 2017). Indeed, in an increasingly complex and fast-moving world, where legislatures cannot conceivably set out the minute details of regulation, Henry VIII clauses become attractive. This explains why, in Canada, they are largely a post-Confederation invention (Armstrong 2022, 4). However, they are legally extraordinary because they effect a transfer of law-making power – a power of amendment – to the executive. In some jurisdictions, such as Ireland, Henry VIII clauses are simply unconstitutional because permitting ministers to legislate violates the separation of powers. Even where a Henry VIII clause may lawfully be adopted, observers worry about the lack of accountability over the executive's law-making function.

Let us first address the constitutional argument around their use. Subject to an important caveat to which we will turn below, the weight of legal authority in Canada holds that Canadian legislatures – provincial and federal – can delegate plenary powers. This line of authority is unbroken, ranging from the Judicial Committee of the Privy Council's landmark decision in *Hodge v. The Queen* ((1883), 9 App. Cas. 117 (J.C.P.C. 1883)), to a majority of the Supreme Court in the recent *Greenhouse Gas Reference* (*References re Greenhouse Gas Pollution Pricing Act*, [2021] 1 S.C.R. 175 (S.C.C. 2021)). Put differently, there are few judicially enforceable limits on delegation of powers. As *Hodge* maintains, delegations are "matters for each Legislature, and not for courts of law, to decide" (*Hodge v. The Queen* (1883), 9 App. Cas. 117 (J.C.P.C. 1883)).

Canadian courts have largely upheld the use of Henry VIII clauses that are properly authorized by enabling legislation. During the First World War, Parliament legislated a Henry VIII clause under drastic terms. Under the *War Measures Act*, Parliament delegated extensive power to the Governor-in-Council: "[t]he Governor-in-council shall have power ... to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada." The *War Measures Act* also set out classes of individuals who would be exempt from mandatory

service. Under the power of the Henry VIII clause, the federal government cancelled exemptions from service set out in the *War Measures Act*. By majority, the Supreme Court concluded that this amendment of a primary statute was authorized by the enabling statute (*Re George Edwin Gray*, 57 S.C.R. 150 (1918) at 177 (S.C.C. 1918)).

However, the Supreme Court's reasoning requires – and rewards – careful reading. For *Gray* contained within it the seeds of a limit on the power of the legislatures to delegate. In holding that the order-in-council in *Gray* was valid, the Court was assured that Parliament had not terminated "its perfect control over the Governor," a reference to "the political reality that the Governor General's ministers remained responsible to the House of Commons for their tenure in office" (Armstrong 2022, 7). Different members of the Court majority referred to a potential limit on delegation: so long as Parliament did not *abdicate* or abandon its powers, any delegation of power would pass constitutional muster (*Re George Edwin Gray*, 57 S.C.R. 150 (1918) at 171 (S.C.C. 1918)). This is the caveat referred to earlier. The non-abdication limit continues to animate debate and discussion about delegation and Henry VIII clauses in Canada.

> *Henry VIII clauses are deployed throughout the Westminster legal ecosystem and in this sense they are not particularly uncommon.*

The meaning of "abdication" is unclear. The Supreme Court has referred to several situations that might constitute abdication: for example, a provincial legislature cannot "create and endow with its own capacity a new legislative power not created by the Act to which it owes its existence" (*Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31 at 44 (S.C.C. 1951)); nor can it "abandon control" over any subordinate (*Reference as to the Validity of Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto,* [1943] S.C.R. 1 at 18 (S.C.C. 1943)).

The non-abdication doctrine carries uncertain consequences for the constitutional validity of delegation. Some might say that the non-abdication limit is "at most something to talk about," (Laskin 1943, 144), given that Parliament can never – without totally effacing itself and the convention of responsible government – "abandon control" over the executive. As such, it will be difficult to establish that any delegation of law-making power to the executive would be unlawful.

However, the non-abdication limit has been restated as often as the principle that Canadian legislatures may delegate plenary powers, and its vitality is not in question. Accordingly, it has been argued that the non-abdication limit is most usefully applied in cases where there is a tenuous connection between a body creating regulations and a politically responsible actor (Mancini 2020). And in some scenarios, a Henry VIII clause might be so sweeping in scope as to amount to an abdication of legislative authority, the elected representatives abandoning the keys to the statute book by handing them over to ministers.

So far, Canadian courts have not identified an abdication of legislative power, typically because resort to Henry VIII clauses has tended to be confined to honing the finer details of complex regulatory schemes.

The *Greenhouse Gas Reference* is a good example. Generally speaking, the *Greenhouse Gas Pollution Pricing Act* provided for a national scheme of carbon pricing, manifesting as a fuel levy and a pricing mechanism for industrial emitters (*Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s.186). The scheme vested various significant regulation-making powers in the Governor-in-Council. Consider, for example, section 168(4) of the statute. It states:

> If a regulation made under this Part in respect of the fuel charge system states that it applies despite any provision of this Part, in the event of a conflict between the regulation and this Part, the regulation prevails to the extent of the conflict.

In a nutshell, this is a Henry VIII clause that permits the Governor-in-Council to apply the fuel charge even given contrary indications in the statute.

While the case was mostly decided on division-of-powers grounds, Chief Justice Wagner (for a majority) and Justice Côté (in dissent) vividly outlined the constitutional controversy over Henry VIII clauses. For Chief Justice Wagner, *Gray* was authority for the constitutional validity of Henry

VIII clauses (*Greenhouse Gas Pollution Pricing Act,* S.C. 2018, c. 12, s.186 at 88). However, Wagner also explicitly rejected the proposition that this Henry VIII power amounted to abdication of legislative authority (*Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s.186 at 88). Since "the general rules of administrative law" continue to apply to the Governor-in-Council, and because the power at issue is simply a power to "implement" the enabling statute, no constitutional problem arose, in his view (*Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s.186). To borrow language used by the Irish Supreme Court, the principles and policies Parliament sought to achieve were set out in the statute – a national minimum price in order to create an incentive for the reduction of greenhouse gas emissions – and the Henry VIII clause was merely a vehicle to ensure those principles and policies could be achieved (*McGowan & ors v. Labour Court Ireland & anor*, [2013] I.E.S.C. 21 at 21-31 (I.E.S.C. 2013); *Naisiunta Leictreacht (NECI) v. Labour Court & ors* (Approved), [2021] I.E.S.C. 36 at 53-61 (I.E.S.C. 2021)). Moreover, under Canada's current administrative law framework, courts could deploy a "robust" reasonableness review to ensure that regulation-makers remain within even broad delegations of authority (*Auer v. Auer*, [2024] S.C.J. No. 36 (Q.L.) at 26 (S.C.C. 2024)) – there is, indeed, ample scholarly (Mullan 1999, 377–378) and judicial support for the proposition that courts should look very closely at the use of Henry VIII clauses (R (*Public Law Project) v. Lord Chancellor*, [2016] U.K.S.C. 39 at 25 (U.K.S.C. 2016); *Orange Personal Communications Ltd*., [2001] Eu L.R. 165 at 177 (E.U.L.R. 2001)).

As one of us wrote after the *GHG Reference*, however, "the powerful partial dissent of Côté J indicates that the debate about the limits of delegation in Canada is far from over and, indeed, is likely to inspire litigation testing the existing limits and proposing new ones" (Daly 2021). For Justice Côté, the leading authority permitting these clauses (*Gray)* was suspect because it was "... not in accord with our contemporary understandings of core constitutional principles" (*Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s.186 at 258). She was careful to distinguish *Gray* by noting that the justices in that case "were clearly moved by the great emergency of war" (*Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s.186). More fundamentally, she argued that Henry VIII clauses upset basic constitutional principles. Relying on s.17 of the *Constitution Act, 1867*, which declares that there shall be one Parliament, and ss. 91 and 92 of the *Constitution Act, 1867*, she concluded that the transfer

of law-making power as contemplated in the statute in effect displaced the Parliament (*Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s.186 at 271). As Stephen Armstrong has observed, it is arguable that Henry VIII clauses violate the division of powers, which contemplates an exclusive and exhaustive division of powers, with all law-making powers held by the Parliament and the provincial legislatures (Armstrong 2022, 11–13).

The *GHG Reference* demonstrates that the constitutional debate about Henry VIII clauses is not fully settled. In particular, the potential for a sweeping Henry VIII clause to represent an abdication of the legislative role very much remains. In our view, recent provincial legislative interventions have pushed the boundaries of constitutional acceptability.

In the face of economic challenges and a political case for greater economic integration, provincial legislatures and the federal Parliament have enacted Henry VIII clauses in recent legislative efforts. These efforts help to illustrate why Henry VIII clauses might present political or democratic costs and even run up against the limits of constitutionality.

To explore this point, we outline three instances of recent legislation incorporating Henry VIII clauses.

Federal Legislation: The *One Canadian Economy Act*

Bill C-5 is the federal government's landmark legislation, given Royal Assent as the *One Canadian Economy Act*. Part 1 of the statute enacts the *Free Trade and Labour Mobility in Canada Act*. The centrepiece of this Part is the establishment of reciprocal recognition of provincial and federal regulatory requirements. In some situations, federal and provincial regulatory requirements are similar, and could be duplicative. Part 1 of the statute provides a regime for reducing the burden of this duplication, in roughly comparable goods and services.

Under s.8(1) of the statute, "a good produced, used or distributed in accordance with a provincial or territorial requirement is considered to meet any comparable federal requirement" (*Free Trade and Labour Mobility in Canada Act*, S.C. 2025, c. 2, s. 2 at s. 8(2)). Section 9(1) provides for the same equivalency on "a service provided in accordance with a provincial or territorial requirement…." A regulatory requirement might be a design standard that regulates how a good must look or be created, broadly speaking (size, weight, production, packaging, etc.), or a standard that regulates how a service must be performed.

The Act further specifies that a provincial or territorial requirement will only be comparable to a federal requirement where the requirements are in respect of the "same aspect or element" of the good or service (*Free Trade and Labour Mobility in Canada Act*, S.C. 2025, c. 2, s. 2 at s. 8(2)(a), s. 9(2)(a)), and "the requirements are intended to achieve a similar objective" (*Free Trade and Labour Mobility in Canada Act*, S.C. 2025, c. 2, s. 2 at s.8(2)(b), s.(9)(a)(b)). The federal government's regulatory backgrounder describes an example:

> For example, under the Act, an appliance manufacturer that meets provincial requirements for energy efficiency would have that certification recognized by Natural Resources Canada as meeting the comparable federal requirement. (Canada 2025)

This regulatory equivalency is backed by extensive powers held by the Governor-in-Council, on the recommendation of a responsible minister, to create exceptions to various provisions of the statute and to otherwise create regulations "respecting anything that by this Act is to be provided for by the regulations" (*Free Trade and Labour Mobility in Canada Act*, S.C. 2025, c. 2, s. 2 at s.11(1)(f)).

> *"In the face of economic challenges and a political case for greater economic integration, provincial legislatures and the federal Parliament have recently enacted Henry VIII clauses.*

The Henry VIII clause is found in Part 2 of the statute, the *Building Canada Act.* The centrepiece of this Part is the power, granted to the Governor-in-Council, to declare certain projects as ones "in the national interest" (*Building Canada Act*, S.C. 2025, c. 2, s. 4 at s. 5(1)). Where the Governor-in-Council declares a project in the national interest, the law deems any finding or determination required to authorize the project to be made, "in favour of permitting the project to be carried out in whole or in part" (*Building Canada Act*, S.C. 2025, c. 2, s. 4 at s. 6(1)).

In service of regulatory efficiency, the Governor-in-Council under the *Building Canada Act* is also vested with extraordinary powers. Section 22(1) of the *Building Canada Act* delegates to the Governor-in-Council, on the recommendation of a responsible minister, Henry VIII powers. The Governor-in-Council may make regulations "exempting one or more national interest projects from the application of any provision of that enactment or any provision of regulations made under that enactment" (*Building Canada Act*, S.C. 2025, c. 2, s. 4 at s. 22(1)). The statute defines an "enactment" as the listed statutes in the schedule to the *Building Canada Act*, but the list is extensive – the entire suite of federal environmental laws – and the power to amend this extensive list of primary statutes is broad. This power is only somewhat limited by the internal context of the statute: for example, it enacts a variety of consultation requirements, including with Indigenous peoples and other provincial stakeholders (*Building Canada Act*, S.C. 2025, c. 2, s. 4 at s. 5(7)). However, the power is constrained in two important ways. First, s. 4 of the Act contains a purpose clause:

> The purpose of this Act is to enhance Canada's prosperity, national security, economic security, national defence and national autonomy by ensuring that projects that are in the national interest are advanced through an accelerated process that enhances regulatory certainty and investor confidence, while protecting the environment and respecting the rights of Indigenous peoples.

Second, s. 5(6) sets out non-exhaustive – but very much illustrative – criteria to be taken into account in designating projects as being in the national interest. Cabinet must consider whether designation will:

> (a) strengthen Canada's autonomy, resilience and security;
> (b) provide economic or other benefits to Canada;
> (c) have a high likelihood of successful execution;
> (d) advance the interests of Indigenous peoples; and
> (e) contribute to clean growth and to meeting Canada's objectives with respect to climate change.

Cabinet's power is, therefore, not at large. Rather, it can only be used to further the objective in s. 4 and by reference to the criteria set out in s. 5(6). If any designation or use of the Henry VIII powers were challenged,

the government of Canada would have to demonstrate that it had exercised its statutory authority in conformity with ss. 4 and 5.

Under the *Free Trade and Labour Mobility in Canada Act,* the federal government has recently announced regulations clarifying the application of the Act (*Free Trade and Labour Mobility in Canada Regulations*: SOR/2025-225). The regulations pursue several objectives. First, they clarify language in the Act. For equivalence to exist on a good, a provincial or territorial requirement must respect: (i) the same regulated person or entity or the same stage of the life cycle of the good; and (ii) the same feature, characteristics or functions of a good, or the same activity or process that pertains to the good (*Free Trade and Labour Mobility in Canada Regulations*: SOR/2025-225 at s. 2(1)(a)). In the case of a service, there is equivalence in requirements if they respect the same service provider and the same feature, characteristic or function of the service or the same activity or process that pertains to the service (*Free Trade and Labour Mobility in Canada Regulations*: SOR/2025-225 at s. 2(1)(b)(i)(ii)). Moreover, the regulations clarify that there is equivalence between a provincial or territorial and federal requirement where the provincial requirement seeks to advance "the same public interest as the federal requirement," which includes the health, safety or security of Canadians; environment or consumer protection; or economic efficiency or market fairness (*Free Trade and Labour Mobility in Canada Regulations*: SOR/2025-225 at s. 2(4)(a)(b)(c)). In short, the regulations specify when a provincial requirement will be equivalent to a federal requirement.

Second, the regulations draw out exceptions from the application of the Act and regulations. First, the regulatory regime is restricted to goods other than those that are governed by rules that regulate the flow of hazardous waste *(Free Trade and Labour Mobility in Canada Regulations*: SOR/2025-225 at s. 4). Second, the regime excludes goods that are subject to supply management, such as dairy products, and other food products governed by the *Safe Food for Canadians Act* and other associated statutes and regulations (*Free Trade and Labour Mobility in Canada Regulations*: SOR/2025-225 at s. 3).

Finally, the regulations clarify a particular concept in the Act: authorization. Authorization refers to any requirement to practice a particular occupation. The Act purports to establish equivalency on provincial and federal authorizations (*Free Trade and Labour Mobility in Canada Regulations*: SOR/2025-225 at s. 10(a), (b)). The regulations specify this equivalency,

listing situations in which a federal regulatory body "must not recognize or issue an authorization" (*Free Trade and Labour Mobility in Canada Regulations*: SOR/2025-225 at s.6(a)(b)).

Ontario: *Special Economic Zones Act*

The extensive powers enabling the federal Cabinet under the *One Canadian Economy Act* are mirrored and further extended in Ontario's *Protect Ontario by Unleashing our Economy Act.* Alongside significant amendments to other provincial statutes, this statute in its Schedule 9 enacts the *Special Economic Zones Act.* This law enables the Lieutenant Governor-in-Council to, via regulation, "designate an area of the Province as a special economic zone if the prescribed criteria are met" (*Special Economic Zones Act*, 2025, S.O. 2025, c. 4, Sch. 9 at s. 2(1)). Once the Lieutenant Governor-in-Council has designated an area as a special economic zone, those proponents designated as a "trusted proponent" completing a "designated project" inside the zone will benefit from streamlined permit and approval processes, among other things (*Special Economic Zones Act*, 2025, S.O. 2025, c. 4, Sch. 9 at s. 3(1), s. 4(1)). The definition of "special economic zone" is broad: on its face, it grants Cabinet the power to declare any area of any size a "special economic zone."

Most notably, the *Special Economic Zones Act* creates an expansive Henry VIII power that extends further than the federal power. The power reads as follows:

> **5** (1) The Lieutenant Governor in Council may, by regulation, exempt a trusted proponent or a designated project from requirements under provisions of an Act or of a regulation or other instrument under an Act, subject to conditions specified in the regulation, as those requirements would apply in a special economic zone.

Unlike the federal law, Ontario's statute is not limited to certain enactments listed in a schedule. Rather, it applies to the whole of Ontario's statute book. There is also no statement of purpose: the Act is devoid of any principle or policy. Coupled with the broad special economic zone designation power, the Henry VIII power is vast. The combined force of these provisions vests significant power in the Cabinet to control, potentially throughout the entire province, the force of any primary statute.

British Columbia: *Economic Stabilization (Tariff Response) Act*

British Columbia was the first province to propose a Henry VIII power in recent economic legislation. When it was first tabled in the British Columbia Legislature for First Reading, the *Economic Stabilization (Tariff Response) Act* resembled Ontario's *Special Economic Zones Act* in the breadth of its Henry VIII power. It provided:

> **20** (1) Subject to subsection (2), the Lieutenant Governor in Council may, by regulation, do one or more of the following:
>
> (a) make an exemption from one or more requirements under an enactment;
>
> (b) modify a requirement set under an enactment;
>
> (c) establish limits on the application of an enactment;
>
> (d) establish powers or duties that apply in place of or in addition to an enactment;

British Columbia's proposed legislation was similar in breadth to Ontario's. While the term "enactment" was not defined in the proposed legislation, it is defined in the British Columbia *Interpretation Act* as "an Act or regulation or portion of an act or regulation" (*Interpretation Act*, R.S.B.C. 1996, c. 238 at s. 1). Put this way, the scope of the proposed legislation applied to the entirety of the British Columbia statute book, permitting the Cabinet to "modify" requirements that exist under extant law. This power did not require review or approval by the Legislature prior to its exercise.

After public outcry about the scope of the power (Sirota and Mancini 2025), the premier of British Columbia announced that the government would revise its tariff-response bill by removing the entirety of Part 4. The version of the Bill that was passed by the Legislature and given Royal Assent did not include the Henry VIII power.

Analysis of regulatory techniques: The use of Henry VIII clauses

To ensure that Henry VIII clauses are used in a way that is consistent with Canada's constitutional architecture, it is helpful to consider fundamental principles, such as the rule of law, parliamentary sovereignty, and the separation of powers. In this context, these principles require not only limits on the use of Henry VIII clauses that could be policed by the courts, but oversight mechanisms to ensure robust parliamentary accountability.

Let us begin with the rule of law. The rule of law is an "essentially contested" term (Waldron 2021), but at its centre is the idea that the state must find authorization for its action in a legal source (*Roncarelli v. Duplessis,* [1959] S.C.R. 121 (S.C.C. 1959)). Indeed, Canada's superior courts have a "core" power of judicial review of administrative action that cannot be affected by legislative power (*Reference re Code of Civil Procedure (Que.)*, art. 35, [2021] 2 S.C.R. 291 at 51 (S.C.C. 2021)). This includes ensuring that administrative actions have a legal basis. The exercise of delegated powers, such as the power to make regulations, is the "lifeblood of the administrative state" (*Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at 40 (S.C.C. 2009)) but policing these powers is within the realm of the judicial system.

Henry VIII clauses are sometimes defended on the basis that the courts can exercise their core function of reviewing the exercise of such powers to ensure that legal limits are respected (*Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 at 87). However, where Henry VIII powers are drawn in broad terms, the practical ability of courts to police the boundaries is reduced. Consider the scope and breadth of Ontario's *Special Economic Zones Act*. This statute lacks any real enforceable procedural or substantive constraints that courts can enforce. The Henry VIII power, unlike the power in the federal law, contains no consultation provisions or other substantive provisions for the courts to enforce. This drastically limits the practical utility of judicial review and undermines the rule of law. Accordingly, any Henry VIII power should be carefully calibrated and should target restrictions that have a demonstrable impact on trade, with that demonstration coming through a reasoned report by the joint federal-provincial administrative agency.

Parliamentary sovereignty provides, in its orthodox form, that Parliament may make or unmake any law (Dicey 1889, 38). This traditional conception of British parliamentary sovereignty is attenuated in Canada, first by the *Constitution Act, 1867,* and later by the *Charter of Rights and Freedoms*. But even so, "parliamentary sovereignty remains foundational to the structure of the Canadian state" and "the legislative branch of government remains supreme over both the judiciary and the executive" (*Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189 at 58 (S.C.C. 2018)). Parliamentary sovereignty is a legal principle, but as the Supreme Court articulated in the *Quebec Secession Reference,* the principle of parliamentary sovereignty is related to an underlying structural norm of democracy

(*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 61, 63 (S.C.C. 1998)). Building on this observation, James (Alyn) Johnson argues that "discussion and deliberation are indeed crucial ingredients of political legitimacy" within legislative institutions (Johnson 2019, 845). This means that the legislature must be the site where substantive political debate occurs.

As a result, Johnson articulates a test that focuses attention on the degree to which legislatures, through their own procedures, resolve policy conflicts (Johnson 2019, 888). He argues that courts should determine "whether an underlying policy conflict has been meaningfully resolved such that a citizen, affected or coerced by an executive measure, can be said to recognize and understand the measure and thereby take responsibility as its implied author" (Johnson 2019, 888).

Whether or not one accepts Johnson's judicial test, his concerns centre on the important role of legislatures in our system of government and are grounded in the separation of powers. When legislatures create Henry VIII clauses, they shift the centre of gravity away from themselves to the executive. Robust accountability mechanisms are, at a minimum, required. The use of Henry VIII clauses permit a piecemeal approach in which a statutory body relieves certain entities and projects from the burden of regulatory law. The prospect of a virtually unbounded executive discretion to pick and choose projects of national importance risks depriving the public of an important opportunity to scrutinize the government's conduct. Accordingly, it is necessary to provide for appropriate procedural safeguards whenever Henry VIII clauses are used. Here, one possibility would be to provide legislatures with a "veto" power through a negative resolution process, whereby any proposed elimination of a regulatory restriction is tabled for debate and can be voted down by a parliamentary majority.

In short, we see potential for Henry VIII clauses to be used as deregulatory mechanisms, as long as (1) there are substantive limits on their use that can be policed by the courts; and (2) there are robust oversight mechanisms that parliamentarians can use. In this way, courts and legislatures can check executive and administrative power to ensure that it is not being misused.

Two approaches to economic integration

Let us draw together what we have learned up to this point.

Beginning with legal structure, what we envision is a scheme of federal-provincial inter-delegation, with both Parliament and the provincial and territorial legislative assemblies acting within their spheres of competence to enact statutes that empower and mandate further economic integration.

We see these powers as having two aspects: the power to engage in positive integration by providing for mutual recognition and regulatory harmonization of standards; and the power to remove barriers. We will address these two aspects separately, but before doing so, we explain why a coordinating agency is necessary in the first place.

Justifying a coordinating agency

In an era when many citizens mistrust public officials, we understand the reticence to empower an administrative agency to increase regulatory harmonization and reduce barriers to trade. It might appear counterintuitive: how can government barriers be removed by another government agency?

The administrative agency we envision is structured as a particular response to a particular problem: a lack of coordination – and lack of incentive to coordinate – regulatory law in each of the provinces. As we note above, there are understandable reasons for different provinces to adopt different regulatory strategies, given their own economic circumstances. These strategies might be enacted for entirely benign reasons. Nevertheless, they contribute to the erection of disjointed barriers that impede the free flow of people, goods, and services across provincial boundaries. The agency we envision will be empowered to enact revised harmonized regulations. But because the provinces and territories will also have deregulatory authority on the recommendation of the agency, the agency will play a key role in identifying and removing barriers that provinces might otherwise not have the incentive to remove.

This coordinating function of the trade and commerce power, originally granted to the federal Parliament, suggests that the federal Parliament, along with the provinces and territories, could create a national board governing interprovincial trade barriers, justifying an administrative structure that creates

one federal board for Ontario, one federal board for New Brunswick, and so on. However, an inter-delegation scheme achieves the same coordinating function while maintaining the legislative sovereignty of each of the participating jurisdictions. In this sense, the proposal is a mix of practical economic wisdom and constitutional propriety. It is a narrow regulatory intervention, one that is consistent with the division of powers.

That said, considering a new coordinating agency raises legitimate worries that deserve attention. A new bureaucracy could be costly. It could lead to an expansion of regulatory power. And if it relies on Henry VIII powers, it might lead to an accountability problem.

We view bureaucracy as a "necessary evil" in the 21st century – not to be outlawed, but to be channeled, controlled, and subject to robust political and legal constraints. This is particularly so in this case, where the coordinating agency serves a specific function – to overcome the inevitable barriers that arise in a decentralized federation. We take that view to its logical conclusion by proposing an agency that is tailored in several respects:

- The agency is designed to coordinate the potentially duplicative and unproductive regulatory actions of the provinces. It is the only legal mechanism that can do so, consistent with the constitutional arrangements of a decentralized federation. This narrow function and purpose will structure the exercise of powers of the agency (*Halifax (Regional Municipality) v. Canada (Public Works and Government Services*, [2012] 2 S.C.R. 108 at 55 (S.C.C. 2012)).
- The elimination of trade barriers in specific provinces, on the recommendation of the coordinating agency, might also encourage or necessitate provinces to remove duplicative enforcement mechanisms or other existing provincial bureaucracies.
- The use of Henry VIII powers would be limited in this regime. Positive integration does not require recourse to Henry VIII powers (and some may view it as less constitutionally objectionable for that reason). Rather, a joint federal-provincial administrative agency would have the authority to require mutual recognition of standards and/or to force regulatory harmonization by adopting Canada-wide standards. Indeed, although Henry VIII clauses could have a place in the joint federal-provincial scheme, we do not believe that the power to amend

provincial or territorial legislation could (or should) be exercised by a joint federal-provincial administrative agency. These powers would be created and exercised only at the federal, provincial, or territorial level to permit the elimination of trade barriers at the same level.

The choice to empower a coordinating agency is not something we recommend for the sake of creating a new agency. Instead, it is a particular tool to accomplish a specific goal: the removal of interprovincial trade barriers.

> *"We view bureaucracy as a "necessary evil" in the 21st century – not to be outlawed, but to be channeled, controlled, and subject to robust political and legal constraints.*

Positive ntegration: Regulatory harmonization and mutual recognition

Administrative agencies are "governments in miniature" (Liston 2021). They can make rules and regulations prescribing standards of conduct, they can investigate compliance with those rules and regulations, and they can make binding determinations about rights and obligations. If the administrative agency is set up to achieve public policy objectives related to a federal or provincial head of legislative power, there is nothing constitutionally objectionable about the delegation of power to such an agency (*Labour Relations Board of Saskatchewan v. John East Iron Works Limited,* [1948] 4 D.L.R. 673 (U.K.J.C.P.C. 1948)). Any questions about whether the agency has respected the limits on its authority and acted fairly and reasonably can be adjudicated before the superior courts (*Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220 (S.C.C. 1981)).

In our context, an administrative agency empowered under a joint federal-provincial legislative scheme could make rules and regulations harmonizing standards Canada-wide or requiring mutual recognition. It could investigate, on its own motion or on application by individuals or companies, whether harmonization and/or mutual recognition is required in a particular sector, and whether governments are properly complying with the rules and

regulations established by the agency. And it could also adjudicate on disputes about compliance with the rules and regulations. Such an agency could be a powerful tool for economic integration.

To be sure, the federal government's legislation to harmonize regulatory requirements is a step in the right direction. But it is only a step. The scheme of inter-delegation we envision is stronger than the government's current efforts because it would also provide a constitutionally compliant mechanism of involvement for the provinces and territories in a comprehensive, binding scheme.

To return to the CFTA to flesh this out further, consider again Article 308(2) on mutual recognition:

> On request, each Party shall accept the results of another Party's conformity assessment procedures, even if those procedures differ from its own, provided it is satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to its own procedures.

The question of "satisfaction" would no longer be for the Party to address (with all of the potential for lobbying and self-interest that this brings) but, rather, for the administrative agency to determine. There would be presumptive mutual recognition, with any failure to comply subject to binding sanctions imposed by the agency, with the agency's determinations immediately enforceable. If the agency requires mutual recognition, then that would permit an individual or company in another province to benefit from the ruling with immediate effect.

Any administrative agency is a creature of the statute that brings it into being. Its functions and powers are set out in legislation and demarcate the scope of its authority. We envisage legislation that would describe the economic integration objectives the administrative agency is designed to achieve and specify triggers for the exercise of its powers. For example, the statute could provide that rules and regulations could be made about regulatory harmonization or mutual recognition where the agency has reasonable grounds to believe that there are barriers to the free movement of goods, services, capital, or workers. Once the agency has made an evidence-based determination about the existence of barriers, it could make its own harmonized standard or insist on mutual recognition of a provincial standard.

In our view, an appropriate model for a joint federal-provincial scheme is the recent proposal for a national regulator for systemic risk in the securities sector. The Supreme Court of Canada confirmed the constitutionality of such a scheme in *Reference re PanCanadian Securities Regulation* ([2018] 3 S.C.R. 189 (S.C.C. 2018)).

On appeal from a reference to the Quebec Court of Appeal by the provincial government (*Renvoi relative à la réglementation pancanadienne des valeurs mobilières*, [2017] Q.J. 5583 (Q.C.C.A. 2017)), the Court advised that the legislative and regulatory system envisaged by the Cooperative Capital Markets Regulatory System would be lawful.

There were four strands to the system considered *(Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189 at 21 (S.C.C. 2018)):

- uniform provincial and territorial legislation (in the form of a Capital Markets Act to be adopted by all participating provinces and territories) (*Capital Markets Act*: A Revised Consultation Draft 2015);
- federal legislation focusing on systemic risk (a matter falling within federal jurisdiction) ("*Capital Markets Stability Act* – Draft for Consultation," Finance Canada 2016);
- a national regulator (to which powers would be delegated under the provincial and territorial and federal legislation) (the Capital Markets Regulatory Authority. See *e.g.* CISION 2016);
- and a council of ministers made up of the federal Minister for Finance and the minister's provincial counterparts (whose powers and responsibilities are set out in a Memorandum of Agreement) ("Memorandum of Agreement Regarding the Cooperative Capital Markets System," Federal and Provincial Governments 2016).

As one would expect, the provincial and territorial legislation would relate to matters within provincial jurisdiction (such as the registration of financial services operators) and the federal legislation to federal matters (such as criminal sanctions).

Given that the centrepiece of the inter-delegation scheme we are proposing is a joint federal-provincial administrative agency, it is worth quoting the Supreme Court's description of the administrative agency it considered:

> The Memorandum contemplates a delegation by the federal government (pursuant to s. 73 of the *Draft Federal Act*) and the participating provinces (pursuant to s. 202 of the *Model Provincial Act*) of certain regulatory powers to a single operationally independent capital markets regulatory authority (the Authority). The intention is that the Authority will become the sole entity responsible for administering both the federal and provincial cooperative system legislation, and will fulfill all relevant regulatory, enforcement and adjudicative functions relating to the trade in securities under these statutes as enacted (Memorandum, s. 3(a)(iii)). As of now, a draft of the Authority's enabling legislation has not yet been published.

It is also important to highlight that in the *Pan-Canadian Securities Reference*, any regulations proposed by the administrative agency had to be approved by a majority of the Council of Ministers before taking effect (*Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189 at 27 (S.C.C. 2018)).

> *A joint federal-provincial scheme of legislation designed to promote economic integration under the watchful eye of an administrative agency would be constitutionally permissible.*

Four further aspects of the system are worth noting. First, participation is voluntary. Second, amendments are only to be made to the *Model Provincial Act* if supported by 50 per cent of all the council of ministers and the ministers of the major provinces. Third, any participating province can withdraw with six months' notice. Fourth, regulations proposed by the regulator must be approved by the council of ministers.

Quebec complained about the potentially coercive nature of the system, essentially saying that once the system was up and running, Quebec would be compelled to participate as a practical matter and, over time, would be

compelled to go along with the views of a majority of the provinces rather than exercising its legislative powers itself. The Quebec Court of Appeal found that the system was unconstitutional for this reason. But the Supreme Court disagreed, finding that Quebec's argument was based on the "flawed premise" that the council of ministers would be capable of fettering the sovereignty of provincial legislatures over matters within their jurisdiction (*Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189 at 61 (S.C.C. 2018)). While the commitments entered into were "likely to weigh heavily in the exercise of each jurisdiction's sovereign will" (*Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189 at 71 (S.C.C. 2018)), the doctrine of parliamentary sovereignty "preserves the provincial legislatures' right to enact, amend and repeal their securities legislation *independently*" of the council of ministers (*Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189 at 67 (S.C.C. 2018)):

> When an action of the executive branch appears to clash with the legislature's law-making powers, parliamentary sovereignty can be invoked for the purpose of determining the legal *effect* of the impugned executive action, but not its underlying *validity*. For example, the executive of one province may act within the confines of its constitutional authority when entering into an intergovernmental agreement with that of another province. If a term in such an agreement purports to bind the province's legislature, the result is not that the agreement itself is constitutionally invalid; the principle of parliamentary sovereignty simply means that the legislature's hands cannot be tied, and therefore that the impugned term is ineffective. In other words, because the legislature's law-making powers are supreme over the executive, the latter cannot bind the former. The result is that any executive agreement that purports to fetter the legislature is not inherently unconstitutional but will quite simply not have the desired effect. (*Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189 at 62 (S.C.C. 2018))

In principle, therefore, a joint federal-provincial scheme of legislation designed to promote economic integration under the watchful eye of an administrative agency would be constitutionally permissible.

We would add that provisions relating to appointment could be added in order to make the agency more politically palatable. Those at the head of the agency could be appointed with provincial input, or perhaps the provinces could be provided with a veto. Moreover, as is the case with the CRTC, the agency could have multiple commissioners drawn from different regions of the country, ensuring broad representation and, hopefully, buy-in (*Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22 at ss. 10(1.1), 10.1).

Naturally, the respective federal and provincial or territorial statutes would have to be drafted to come within the relevant heads of power. In particular, a federal statute would only be able to speak to objectives within Parliament's competence in relation to trade and commerce. In the *Pan-Canadian Securities Reference*, the Supreme Court explained that a narrowly tailored federal statute is constitutionally permissible, on condition that the federal legislation has a complementary character rather than a character designed to displace provincial and territorial legislation (*Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189 at 95-96 (S.C.C. 2018)). Furthermore, even if a group of provinces could block proposed regulations, "since the delegated authority can always be revoked by the sovereign legislature and its scope remains limited by and subject to the terms of the governing statute," there is no breach of parliamentary sovereignty (*Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189 at 123 (S.C.C. 2018)):

> In exercising its sovereign legislative powers, Parliament has the authority to confer on a statutory body — in this case, the Council of Ministers — the power to approve or reject proposed subordinate regulations, even if some members of that body are representatives of certain provinces. The delegation of administrative powers in a manner solicitous of (or even dependent upon) provincial input is in no way incompatible with the principle of federalism, provided that the delegating legislature has the constitutional authority to legislate in respect of the applicable subject matter. (*Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189 at 126 (S.C.C. 2018))

Our goal, ultimately, is to leverage the constitutional space created by the inter-delegation doctrine and fill it with joint federal-provincial legislation empowering an administrative agency to achieve regulatory

harmonization and/or require mutual recognition, backed up (as is often the case with administrative agencies) by investigative powers and binding dispute resolution mechanisms.

This would be an appropriate matter for federal legislation (*Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s.186 at 141). As benign regulation across multiple federal, provincial, and territorial regimes systematically produces obstacles to interprovincial trade, the only institution capable of counteracting these inevitable structural effects is a national administrative agency empowered to:

- Evaluate equivalence;
- Impose mutual recognition;
- Harmonize standards where necessary; and
- Resolve disputes with binding effect.

No province can credibly certify equivalence in a way acceptable to other provinces. Nor can the provinces be expected to voluntarily converge on harmonized standards, because that would require a massive coordination effort and impose asymmetric costs. The slow progress of the voluntary reconciliation process under CFTA is demonstrative of this fact.

Negative integration: Removing trade barriers

As noted above, we envision the use of targeted and ultimately limited Henry VIII clauses for deregulatory purposes. But there is an important limitation on the use of Henry VIII powers in the context of a joint federal-provincial scheme. As the Supreme Court explained in the *Pan-Canadian Securities Reference*,

> while Parliament or a provincial legislature may delegate the regulatory authority to make *subordinate* laws (like binding rules and regulations) in respect of matters over which it has jurisdiction to another person or body, it is nevertheless barred from transferring its *primary* legislative authority — that is, its authority to enact, amend and repeal statutes — with respect to a particular matter over which it has exclusive constitutional jurisdiction to a legislature of the other level of government. (*Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189 at 76 (S.C.C. 2018))

Given that the effect of a Henry VIII clause is to "amend [or] repeal statutes," we consider that empowering a joint federal-provincial administrative agency to modify primary legislation would engage legitimate worries about the consistency of the clause. Accordingly, we do not make this recommendation.

Rather, we envisage that under the joint federal-provincial scheme, individual provinces and territories would create – in the model economic integration legislation – the power to remove trade barriers where there are reasonable grounds to believe that they inhibit the free movement of goods, services, capital, and labour. These powers would be triggered based on recommendations from the national administrative agency but legally exercisable only by ministers in the provinces and territories. In addition, we envisage that such powers would be subject to parliamentary oversight via a negative resolution procedure, in order to respond to concerns about the need to promote accountability for the use of legislative powers.

In summary, then, we envisage a national administrative agency to promote positive economic integration, assisted by the provincial power to remove trade barriers, through a co-operative federalism process in which the national body would work closely with the provinces to identify trade barriers that should be removed with a view to furthering the national project of economic integration.

Conclusion

Canada's increasingly fragmented economic union is not the product of provincial malice, protectionism, or parochialism. It is the inevitable outcome of a federal structure in which multiple autonomous legislatures – each pursuing legitimate regulatory goals in good faith – generate overlapping, divergent, and sometimes incompatible rules. Even benign provincial regulation, properly tailored to local conditions, produces non-tariff barriers that cumulatively impede the movement of goods, services, workers, and capital. The Constitution, as interpreted by the Supreme Court of Canada, both permits and perpetuates this dynamic. Parliament cannot legislate uniform national

standards. The Charter provides no robust economic rights. And the courts – most strikingly in *Comeau* – have repeatedly signalled a willingness to tolerate trade-inhibiting provincial rules so long as they arise within each province's sphere of competence.

If Canada is to achieve the degree of economic integration envisioned by the Fathers of Confederation and demanded by contemporary economic realities, reform must occur not through federal unilateralism, judicial innovation, or voluntary intergovernmental cooperation, but through the only remaining constitutional pathway: a carefully crafted scheme of federal-provincial inter-delegation. The doctrine governing inter-delegation permits Parliament and the provincial legislative assemblies to empower a joint administrative agency to harmonize standards, require mutual recognition, and adjudicate disputes arising from internal trade barriers. As the *Pan-Canadian Securities Reference* confirms, such a cooperative regime is fully compatible with both parliamentary sovereignty and the distribution of legislative powers, provided that withdrawal remains legally possible and legislative supremacy is preserved.

A national coordinating body of this kind is not a centralizing intrusion upon provincial autonomy. It is the institutional mechanism required to ensure that the autonomous exercise of regulatory power in one province does not unduly impair the autonomy of citizens, workers, and businesses in another. Far from diminishing the role of the provinces, a joint agency provides the structure necessary for their regulatory choices to coexist within a shared economic space. In this sense, coordinated administration is the precondition – not the antithesis – of meaningful federalism.

The removal of barriers will require both positive and negative integration. Positive integration is achieved through mutual recognition and regulatory harmonization, mandated and enforced by a joint agency with investigative powers and binding dispute-resolution authority. Negative integration may, in limited circumstances, require that provincial ministers use Henry VIII clauses to eliminate specific statutory restrictions that cannot be reconciled through harmonization alone. But these powers must be tightly limited, subject to strict statutory criteria, judicial review, and parliamentary oversight through mechanisms such as negative resolution. Used in this manner, Henry VIII clauses can serve as constitutionally legitimate tools of deregulation rather than engines of executive overreach.

Ultimately, economic integration within Canada is legally feasible only through the cooperative exercise of federal and provincial authority. A joint federal-provincial administrative agency, empowered to mandate mutual recognition, harmonize standards, and remove barriers, represents the most ambitious vision of integration consistent with Canada's constitutional order. It reflects both the structural realities of Canadian federalism and the economic imperatives of the 21st century. If Canada is to move from a patchwork of regulatory enclaves to a genuinely integrated national market, the legal architecture proposed here is not merely *one* option – it is the *only* option that the Constitution permits. MLI

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