

THE AGREEMENT ON INTERNAL TRADE: AN INSTITUTIONAL RESPONSE TO CHANGING CONCEPTIONS, ROLES AND FUNCTIONS IN CANADIAN FEDERALISM

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INTRODUCTION

After decades of relative stability, the Canadian State has undergone substantial restructuring during the past 15 years. Sweeping changes resulted from the patriation of the Canadian constitution in 1982, with the adoption of the Charter of Rights and a new amending formula. International trade treaties like the Free Trade Agreement, NAFTA, and the agreements associated with the new World Trade Organization have also forced governments to review the way they "do business." Other events in the 1990s like an economic downturn of major proportions, a referendum in Quebec and what was considered by many at the time to be a serious fiscal crisis have also re-ordered the state. All of these have worked to change the face of Canada in important ways.

Amongst the less publicized institutional changes in the last decade was the creation of the Agreement on Internal Trade (AIT) signed in 1994. Negotiated and implemented largely without the knowledge or input of the general public, the AIT has established a set of new institutional arrangements in Canada. At first glance this new institution would seem to have the potential to reshape key relationships amongst individuals, corporations, and governments in the country. However, observers and academics do not agree on the importance or durability of the AIT. Some believe that it has great potential to change the way we do business in Canada. Others believe that unless it is strengthened immediately it will fall into the dustbin of institutional history.

One purpose of this paper is to examine these arguments and come to some conclusion about whether or not the AIT is significant, and if so, where it will fit in the panoply of existing institutions. Another purpose of this paper, however, is to examine the agreement from the perspective of its ideological roots, to answer the question: in whose interest was this new institution created? Supporters of the AIT argue that it will function in the interest of all Canadians. They accept the assumption that the AIT will help "grow the economic pie," and therefore contribute to the welfare of all. Others add that as well as growing the economic pie the AIT is in the general interest of all Canadians, in that it extends and deepens what it means to be a Canadian citizen. Thus, Canadians will benefit both materially and as citizens from the adoption of the AIT. But some do not agree with this assessment. They argue that the AIT is chiefly designed to benefit one group, the larger business community, and that its real impact will be to further entrench an already strong and growing ideological consensus about restricting the role of democratically elected governments in their ability to intervene in the market place. The truth, as we will see, is probably somewhere between these assessments.

This paper will come to three conclusions. First, it will agree with those who argue that institutions matter, and by implication, that the AIT is potentially significant. Second, it will disagree with those who argue that a stronger and deeper AIT is needed in order to ensure that the economic union is preserved. Finally, it will argue that the AIT, as it has been negotiated and implemented, not only "perfects" trade arrangements between and amongst provinces, but also ensures that a particular ideological view of Canadian society is even more deeply entrenched.

AN ANALYTICAL FRAMEWORK

In 1980 Donald Smiley published the third in his series of books on Canadian federalism. In it he explicitly outlined his conception of the interrelationship between society and political structures:

Canada is a federal society with a federal system of government. But what shapes it? Does Society decisively determine Government-or is it the other way round? In a formal sense, is Society the independent variable, and Government the dependent variable?¹

His conclusion was that institutions matter. As he said, "... once established, they themselves come to shape and influence the environment."² Our job, he concluded, was to explain why things are as they are and why change of whatever kind is occurring. To accomplish this task we must not only understand what has been, but why and how it might change. In short, if we are to predict the future we must understand the forces that have shaped the past.

Thus, whatever your view of the causal arrow, it is true that we must take account of institutions, either because they reflect changes in the social environment, or because they themselves are changing society. This is particularly true in federal states like Canada, where the conduct of politics seems always to be affected by the inter-relationship of federal and provincial governments.

Although many of the institutions and the social cleavages that support them remain familiar and important, some things have changed so profoundly that the old way of "doing business" may be gone forever. As Simeon and Swinton said:

We are rethinking concepts like sovereignty, autonomy, and independence, for economic and social flux has produced institutional change

and an enormous need for new institutional designs.³

As a result we need to revisit our basic conceptions of federalism if we are to understand how and why institutional change is proceeding. Some of these conceptions have a long and honourable history, serving us well in past analysis. But are they relevant now? How important is it to examine Canadian federalism within a paradigm that postulates that governments are driven by the competitive need to maximize their position in relation to all other governments? Are analyses about the relative centralization or decentralization of the federation important now? Just how important are matters like globalization, or the fiscal crisis of the past decade, and where do we integrate the profound ideological changes of the past fifteen years into our review? How we conceive of the whole federal system will drive much of any analysis, and conclusions about its worth or place in Canada.

It should not surprise us therefore, to learn that the AIT, and conclusions about its role in our society, are historically rooted in basic ideological conceptions about how Canada should be organized politically and economically. The AIT is a new institution with a very old pedigree.

THE INTERNAL TRADE AGREEMENT- IDEOLOGICAL ORIGINS

The ideological origins of the Internal Trade Agreement are familiar to most students of Canadian history. They emerge from the great debates about the role of government and the state that dominated eighteenth and nineteenth century discourse on liberalism. Liberals in Europe enthusiastically embraced conceptions of society

¹ Donald Smiley, *Canada In Question: Federalism in the Eighties*, 3rd ed. (Toronto: McGraw-Hill Ryerson, 1980) p.3.

² *Ibid.*, p.6

³ Richard Simeon and Katherine Swinton, "Rethinking Federalism in a Changing World" in eds. Karen Knop, *et al*, *Rethinking Federalism*, (Vancouver: UBC Press, 1995) p.3.

that freed the individual and restricted the role of government, especially in the economic sphere. This view owed much to men like David Hume and Adam Smith.

What emerges, then, from the thought of the Scottish thinkers, in particular that of Hume and Smith, is the view of the state as important, not so much as a means of political participation and fulfillment of political personality, but as a means of economic development. . . . The state therefore had to provide the framework of justice in which self-seeking individuals with their property and specialization were protected by law and authority. The purpose of government, after all, said Smith was 'to secure wealth and defend the rich from the poor.'⁴

Confederation in Canada was a compromise between the older toryism and the new liberalism, a finesse of economic and political needs that sought to accommodate several conceptions of the role of the state. What was clear, however, was the belief that larger markets and increased free trade inside Canada were essential to the future of the fledgling state.

These concerns are also reflected in Alexander Galt's speech during the Confederation Debates. Union, he said, would mean that the tariffs that had impeded the free flow of goods between provinces would be removed, thereby, 'opening up' . . . the markets of the provinces to the different industries of each"⁵

The insertion of Section 121 in the British North America Act was the tangible outcome of this belief.

The Great Depression of the Thirties brought with it a new awareness of the fragility of the economic order and of the inadequacies of existing social mechanisms for coping with economic catastrophes of this nature. In retrospect, governments adopted two contradictory responses to the Depression after WWII. The first was the adoption of various policies that sought both to moderate the business cycle of the nation and to provide a social safety net for those in distress as a result of the failure of the market. This meant a much greater role for governments in the social and economic order, sometimes referred to as activist government or the mixed economy. The second was to set in place international trade agreements to ensure that the protectionist policies of the pre-WWII era did not recur. These "free trade" measures grew in importance and variety, culminating in the regional and worldwide frameworks in existence today.

The contradictory assumptions that underpinned these two approaches to the market place — free market capitalism internationally and regulated capitalism nationally — have remained largely unexamined. There was little impetus for such an examination so long as national economies remained relatively unimpeded and unencumbered by international trade requirements. However, it should have been apparent that as trade grew proportionately in the economic life of the developed world this contradiction would one day generate ideological confrontation, the resolution of which could only be decided in favour of the unfettered free market. Ideologically then, the AIT has a spotless pedigree, one which is consistent with good liberal thought, and also with the ideological direction of western liberal democracies in the past twenty years.

RECENT ORIGINS OF THE AIT

The more immediate causes of the present internal trade arrangements can be traced in large part to the constitutional discussions of 1978-

⁴ Peter J. Smith, "Ideological Origins of Canadian Confederation," *Canadian Journal of Political Science*, March, 1987, XX:I, p.8

⁵ *Ibid.* p. 28

1981, which culminated in the patriation of the Canadian constitution in 1982. From 1960 to 1976, as a result of the Quiet Revolution, constitutional negotiations primarily engaged the role of Quebec in Canada. The election of the Parti Quebecois to government in 1976 opened a second important phase in this area. However, as a result of the oil-pricing crisis caused by OPEC in the period after 1973, other matters such as the revenue from natural resources also became important. The combination of separatism in Quebec and regionalism in Western Canada proved to be potent indeed.

These forces, of a regional/economic and regional/ethnic character, were of sufficient strength to compel the view that constitutional reform was indispensable to Canada's survival. . . . Equally important, however, was the fundamental conflict between the regionalist vision of Canada and the notion of Canada as a single community with one dominant political focus.⁶

The Trudeau government sought to deal with these forces together, with emphasis on the PQ threat in Quebec. However, the political weakness of the federal government in 1978, nearing the end of its third term after eleven years in office, proved insurmountable. Negotiations on all fronts proved fruitless, and the Liberals relinquished power to the Clark Conservatives in the spring of 1979.

The issue of internal trade barriers was not prominent during these negotiations. Indeed, the emphasis was clearly on devolution of powers, especially in the area of natural resources, and not on curtailing the economic powers of provinces. For obvious political reasons no one in the federal government felt compelled to "push the issue" at the time.

⁶ Roy Romanow, John Whyte, Howard Leeson, *Canada...Notwithstanding* (Toronto, Methuen, 1984), p.p. xix, xx.

Such was not the case after the Trudeau Liberals returned to power early in 1980. Armed with a fresh mandate and a majority government, they were determined to put an end to the threat from "enemies within." Their strategy was straightforward, to defeat the PQ in the referendum in Quebec, and to reestablish the strength of the federal government in Canada.⁷

Much has been written on the "intentions" of Trudeau and his last government. Many are critical of him for being at best deliberately ambiguous, and at worst unprincipled and duplicitous in his role in the Quebec referendum and the subsequent patriation of the constitution.⁸ Whatever the truth, it was crystal clear from his actions immediately after the referendum that he intended to reassert what he perceived to be the necessary role of the federal government in Canada. Gone was the willingness to consider provincial requests for transfer of certain powers without some *quid pro quo*.

Significantly, Ottawa requested that two new matters, a constitutional preamble and a commitment to the maintenance of the economic union, be placed on the constitutional agenda.

It was an attempt to create a national view of the country. As to the economic union, the Pepin-Robarts report had recommended that the Constitution contain a provision that would maintain and enhance the economic union in Canada, but there had been no discussion of the issue during the previous round of negotiations.⁹

The Pepin-Robarts Committee had indeed recommended a new constitutional provision to "perfect" the economic union. In particular, Recommendations 20-23 inclusive were directed

⁷ Ibid. pp. 62-67.

⁸ See Guy LaForest, *Trudeau and the End of a Canadian Dream* (Montreal: McGill-Queen's University Press, 1995).

⁹ Romanow *et al.*, p.64.

at removing inter-provincial trade barriers. They stressed the need for a revised Section 121 to more effectively guarantee free trade between the provinces, and recommended that it be extended to include services, labour and capital, as well as a clarification of government purchasing policies to ensure that market costs and not political goals would be the prime consideration.

The Pepin-Robarts recommendations gave no clue as to the intellectual antecedents for its approach.¹⁰ However, a careful comparison of the discussion in the Report and that in an earlier document entitled *Canadian Federalism and Economic Integration* by A.E. Safarian, prepared for the Privy Council in 1974, reveals that most of the Report's discussion, and its conclusions, were probably taken from the Safarian study.¹¹

The Safarian work is a well-written and lengthy evaluation of the then current state of the Canadian economic union. The opening chapter lays out the following critical assumptions:

1. Economic integration in the form of specialization and the division of labour is critical to economic growth.
2. The corollary to increased specialization is exchange. That is, if specialization of labour is to work, it implies that there must be the possibility to exchange goods or services.
3. The size of the market matters. That is, the smaller the market the less the efficiency gain from specialization.
4. Governments, for other than economic reasons, which may be legitimate, should not interfere with the efficiency of this process by restricting the actions of the

market through the use their legislative and fiscal powers.¹²

Therefore, all interventions by governments in federal states should at least to be examined for interference with the "natural" economic flow, or, assumed to be suspect unless proven otherwise. (Safarian himself adopted the former view, but as we will see, the latter view is most prevalent amongst those advocating more stringent measures on internal trade barriers.) In order to ensure that such scrutiny takes place, and that remedial action can be implemented, Safarian opted for constitutional change.

The main conclusion of this paper is that constitutional revision is necessary to guarantee more fully the common market and economic union basis of the federal state. This basis is susceptible to considerable erosion and is incapable of adequate realization in the absence of a strengthened guarantee. The ultimate result is a loss to all Canadians.¹³

It is Safarian's work that formed the intellectual basis of the Trudeau demand for more "powers over the economy" in the discussions of 1980/81. But the federal motivation was more complex than this. By this time the Liberals had become convinced that there was no reasonable way to deal with provincial demands for more power. Put another way, they believed that to grant more power to provincial governments in negotiations would only lead to a desire for more power, a slippery slope and *de facto* if not *de jure* separatism and disunity. Hence, they were only prepared to negotiate on provincial priorities in the area of natural resources if there was a *quid pro quo* on the regulation of national and international economic matters. In their view only a strong national government together with strong national institutions could ensure that the "enemy within" was not successful. This conjunction of

¹⁰ The discussion, on pages 65-77, while interesting, is largely devoid of empirical substance. That is, it does not provide data to substantiate its conclusions.

¹¹ A. E. Safarian, *Canadian Federalism and Economic Integration*, (Ottawa: Queens Printer, 1974)

¹² *Ibid.* pp. 3-5.

¹³ *Ibid.* p. 96.

intellectual and tactical goals formed the basis of their approach.

However strong the federal view on the matter, they seemed ill prepared for the actual negotiations on substance. It was not until mid-July that they tabled some hastily improvised proposals.¹⁴ In, *A Framework For Discussion*, Ottawa identified five areas of economic management:

- Maintenance of an Economic Union in Canada;
- Redistribution of incomes among persons and regions;
- Promotion and influencing economic development;
- Stabilization of the economy as a whole;
- Conduct of International Economic Relations.

A second document, *Securing the Canadian Economic Union in the Constitution*, dealt more specifically with questions of internal trade. In it the federal government proposed constitutional changes along the line of those envisaged by Safarian. In mid-July of 1980 they submitted three specific constitutional changes, entrenching mobility rights in the Charter, revising Section 121 to strengthen its ambit with regard to "impediments" to trade, and broadening the power of the federal government under the trade and commerce section of Section 91. It was further proposed that all of these new sections would become justiciable, that is, enforceable by the courts.

Most provinces reacted angrily to these proposals, not because they objected in principle to strengthening the economic union, but because of the linkage of these matters to natural resources

and to the insertion of the courts as "the umpire" these matters.

Furthermore, even if Ottawa had correctly assessed the state of the economic union, the proposed constitutional remedies were far worse than the disease.... Not only would the federal proposals augment Parliament's role in a major way; they would expand the role of the courts.¹⁵

The government of Saskatchewan proposed a compromise that would entrench a constitutional commitment to the general principles of the economic union, similar to the equalization section, leaving enforcement to governments and parliaments instead of the courts.¹⁶ Ottawa rejected this proposal, although it eventually considered a variation of it in September before the First Ministers Conference. Only the proposals on mobility rights eventually found their way into the agreement of November 1981, and subsequent patriation of the constitution in April of 1982.

Several things should be noted about these negotiations. First, these proposals formed the basis for all subsequent negotiations on internal trade barriers. The two basic approaches, a constitutionally enforceable provision versus a voluntary agreement between governments, have dominated discussions since then. Second, empirical evidence for constitutional change, that is, evidence to support the claim that there were substantial economic gains to be realized from "perfecting the economic union," was very weak. This made support for the proposals seem largely ideological, since it came primarily from those on the ideological right.

INTERNAL TRADE AND THE CHARLOTTETOWN ACCORD

Discussions on internal trade began again in 1987, and found their way into negotiations on the Charlottetown Accord. As with many "good

¹⁴ For a discussion of this see Raymond Hudon, "Quebec, the Economy and the Constitution," in eds. Keith Banting and Richard Simeon, *And No One Cheered* (Toronto: Methuen, 1983) p.138

¹⁵ Romanow, *et al*; p. 71.

¹⁶ *Ibid.*, pp. 72& 73.

ideas," the notion of free trade inside Canada had not died: it had simply remained dormant. Interestingly, of the two basic options put forward in 1980, constitutionalized change or intergovernmental agreement, the Macdonald Royal Commission opted for the latter.

Within an economic union, harmonization of policies across jurisdictions is vital.... What are the lessons of [the] record of interprovincial harmonization? The evident lack of drive behind these efforts could have several meanings. Perhaps there is already a significant degree of harmonization; perhaps existing gaps in harmonization pose relatively few costs; perhaps there is a great unfulfilled need for new institutions. Commissioners incline to the first two explanations.¹⁷

The report went on to opt for a Council of Ministers to monitor internal trade.

Not surprisingly, given the adoption of the FTA and the importance of the marketplace for the Mulroney government, the matter of internal trade arrangements resurfaced during the negotiations leading up to the Charlottetown Accord. Proposals for a new constitutional provision were put forward in the federal discussion paper in the Fall of 1991, and were discussed in detail at the Renewal of Canada Conference held in Montreal, January 17 to 19, 1992. They were broad in scope, including a power to legislate on any matter for the "efficient functioning of the economic union." These proposals found their way into the government discussions later in the year, where they were not uniformly applauded by provincial governments.¹⁸

Most criticism surrounded the involvement of the courts as a final umpire in economic matters.

The government of Saskatchewan was most vocal in opposition to making these provisions justiciable. Newly elected Premier Romanow wondered "is this to be a sledgehammer to crack a peanut?"¹⁹ He proposed again, as he did in 1980 that First Ministers agree on a compromise that would leave the courts out. Eventually this view was adopted.²⁰

With the demise of the Charlottetown Accord the country seemed to have exhausted its ability to consider constitutional matters. Indeed, the Liberals were elected in the following year, at least in part, on their promise not to talk about the issue. Such was not the case with the issue of internal trade arrangements however. It was shortly to be revived.

NEGOTIATIONS ON INTERNAL TRADE

The reason for the persistence of discussions about internal trade matters after the fall of 1992 can be traced to political forces other than those surrounding constitutional changes. As mentioned above, for the business community such discussions were a natural next step in the process of securing freer trade worldwide. It seemed to them indefensible that there seemed to be more barriers to trade within Canada than between Canada and the United States. As well, ideologically the world had moved to the right on many issues, but most specifically on matters of the market and trade. Ideas that were important in 1974 and 1980 for reasons of national unity were now doubly important in the new globalizing world. The contradictions between "free trade" internationally and "managed trade" domestically had become apparent.

¹⁷ *Royal Commission on the Economic Union and Development Prospects for Canada*, Vol. III, pp. 270, 271.

¹⁸ There are several good discussions of this. One is found in the book *Getting There*, see note 41.

¹⁹ *Briefing Document*, Government of Saskatchewan, 1992.

²⁰ *The Charlottetown Agreement: A Saskatchewan Perspective* (Constitutional Unit: Saskatchewan Justice, 1992) p.16.

The most successful lobby groups in this area were the Canadian Manufacturers' Association and the Business Council on National Issues. In 1991 the former released a paper in which it calculated that there were over 500 internal barriers to trade, costing the economy \$6.5 billion in lost efficiency. This was the first time that anyone had supplied empirical data to justify enhancing federal power under Section 121 of the constitution. The Mulroney government, having been successful on the international trade front in 1988, was determined in 1989 to do something about what they perceived to be a major problem.

Thus, parallel with the constitutional discussions in 1992, the federal government got broad agreement in March of 1992 at a First Ministers Conference on the Economy to a set of principles and a timetable for negotiating arrangements and agreements to remove supposed barriers.²¹ Broadly stated, the First Ministers agreed to construct an agreement and a mechanism for enforcement of new rules by June of 1994. A committee of ministers was to conduct the actual negotiations. This committee, the Committee of Ministers on Internal Trade (CMIT), met in December of 1992 and March of 1993 reaffirming its intention to proceed quickly on a comprehensive agreement despite the failure of the Charlottetown Accord.

The election of 1993 resulted in the complete rejection of the Conservative government and the installation of the Liberals headed by Jean Chrétien. Much has been written on the extent to which the Liberals have simply adopted the priorities of the previous government, most of it uncomplimentary. In the case of internal trade negotiations the Liberals pursued them with renewed vigour, having included them in their Red Book proposals. There was, as one provincial

negotiator described it, virtually a "seamless web"²² between the two governments.

In early 1994 the Chrétien government moved swiftly to re-establish internal trade arrangements as a priority. Speaking in the House on January 21, 1994 the new Minister of Industry, John Manley, indicated quite forcefully that he would give this matter a high priority. He was especially adamant about delay by the provinces:

What makes it so hard to break down the barriers of trade among our Canadian provinces?... We [seem] like 10 little markets....

We now have a fixed schedule. I am hopeful that this process towards progress on this file will continue very rapidly.²³

The new government's energy on this issue surprised most provinces. Why were the Liberals so zealous in their approach? In Parliament Manley had the following to say:

It can create jobs, not just because of the encouragement of trade in Canada, but the fact that we have these internal barriers is a deterrent to foreign investment.²⁴

Later, in February, speaking on the Budget he said:

The elimination of trade barriers within Canada could generate as much as 1-percent increase in our GDP, a product of \$6 billion to \$7 billion a year.²⁵

The public relations link, then, was to jobs, a prominent part of the Liberal campaign. The real reasons seem to have been more ideological. The new Prime Minister had zealously pursued this

²¹ See Appendix A for this agreement.

²² George Peacock, a constitutional lawyer, was the chief negotiator for the government of Saskatchewan
²³ House of Commons, *Debates*; January 21, 1994. P162.

²⁴ *Ibid.*

²⁵ *Ibid.*, 4 February, 1994, p. 1780

objective as Minister of Constitutional Affairs in 1980, and remained completely convinced as to the need for an agreement. The new government was also trying to firmly establish its links to the business community in order to occupy completely the "middle" of the political spectrum. Finally, as the Minister said in Parliament, the government had quickly become convinced that trade, both external and internal, was the key to economic recovery. These negotiations were only one part of a larger plan designed to reduce trade barriers, reduce the deficit, and reduce government.

RATIONALES FOR THE AGREEMENT

While the negotiations on the agreement seemed to have a feeling of *déjà vu* about them for many of the participants, such was not the case for the arguments that drove the process. The primary arguments remained the same: that there was much to be gained economically from the removal of barriers, and that this would ultimately benefit all Canadians. Daniel Schwanen outlined these succinctly in an article for the C.D. Howe Institute in 1994.

As Canada's economy evolved, many observers noticed with increasing alarm that interprovincial flows of growing importance to the economy- such as those related to services, labour movement, or government purchases- were not, or were imperfectly, protected by existing arrangements. Given the growing influence of provincial governments this left the door open to potentially damaging impediments to trade within the federation.²⁶

However, these traditional arguments were supplemented by an arsenal of new ones. Some of these, such as the deficit, the need to take account of global trade, and the inadequacy of existing government programs, have already been discussed. Added to these, however, were more sophisticated arguments about the rights of economic citizenship. Daniel Schwanen cogently argued this conception in a later piece done for the C.D. Howe Institute.

All Canadians possess rights of citizenship which, by definition, they can only exercise in Canada....

One dimension of these rights is economic, so that we can speak of all Canadians holding common economic citizenship....

The benefits of Canadian economic citizenship flow from the ability of individuals and businesses to interact across the country in a relatively unhindered fashion, rather than being forced to confine their horizons to any particular region or more uncertain external markets for growth.²⁷

As one can see, this conception involves not only the right of the individual or business to move his or her labour freely about the state, but also the right to move ones capital freely as well. "Doing business" anywhere in Canada meant being free of residence requirements or intervention by governments that sought to restrict "doing business" to those within its own jurisdiction. The analogy is to rights under the Charter, which guarantee certain activities free of government intervention everywhere in Canada. The right to do business thus becomes a right of citizenship. This "right" flows from a particular

²⁶ Daniel Schwanen, *One Market, Many Opportunities: The Last Stage In Removing Obstacles To Interprovincial Trade*, (Commentary: C.D. Howe Institute, NO. 60, March, 1994) p.4.

²⁷ Daniel Schwanen *Drawing On Our inner Strength: Canada's Economic Citizenship in an Era of Evolving Federalism* (Commentary: C.D. Howe Institute, no. 82, June, 1996) pp.3&4.

conception of property and property rights that are inherent in some views of liberal democracy.

The desirability of adopting this view of citizenship is buttressed by some when they argue that such a right will enhance our sense of identity in Canada.

It is quite remarkable to what extent the original and evolving architecture of the Canadian constitution can be understood as a framework for a community of association, where living together is based on shared values, common goals, and thickening or evolving economic and social intercourse between citizens.... More recently, LaForest J., in the cases of *Morguard* and *Hunt* has articulated the relationship between economic union and the idea of Canadian citizenship.²⁸

The author laments the fact that this conception of the economic citizen and enhancing our sense of community has not been allowed to flourish.

In policy and constitutional debates over the last decade or so, the connection between the economic union and the idea of Canada as a community has nevertheless frequently been obscured. In various ways the economic union "agenda" has become identified with a laissez-faire outlook, or a conservative economic platform more generally.... Thus, what might have been an opportunity for broadening the concept of economic union into a fuller notion of the requirements of a community of association was largely lost.²⁹

Such arguments have a powerful attraction in the post-Charter era, especially for those who lament the lack of social and economic bonds to keep Canada intact. It elevates the need for action from that of simple economic gain, which may have to compete with other social and economic priorities, to the level of national necessity. More will be said about this later.

Few if any challenged the various rationales for some kind of agreement. Most governments supported the effort in principle, if not in all of its manifestations. In particular several provincial governments sought to ensure some degree of economic freedom, especially those that did not believe that regional interests were always served by the free functioning of the market or the federal government and the courts. As to other social groups or the general public, they were simply not included in the process.

FINAL NEGOTIATIONS

The last six months of negotiations were complex, exhausting, and tough. Although the federal government had abandoned its goal of constitutional agreement, it was determined to make any intergovernmental agreement as binding as possible. The model proposed was drawn from both existing institutions like the EU, and from FTA and NAFTA. Several components of the agreement were critical for the federal government.

- All governments must agree;
- The agreement must be comprehensive;
- There must be a binding dispute settlement mechanism.

The principles that guided the negotiations had been approved by the First Ministers the previous year. They were:

- A. Governments treat people, goods, services, and capital equally, irrespective of where they originate in Canada.

²⁸ Robert Howse, "Searching For Plan A" in *Canada: The State of the Federation 1997 Non-Constitutional Renewal*, ed. Harvey Lazar (Kingston: Institute of Intergovernmental Relations, 1998) p.317

²⁹ *Ibid.*, P.318.

- B. Governments reconcile standards and regulations to provide for the free movement of people, goods, services and capita within Canada.
- C. Governments ensure that their administrative policies operate to provide for the free movement people, goods, service, and capital within Canada.

Most governments agreed with the general principles involved, but understood that these principles were only part of a larger economic equation which involved size, area, state of development, industrial and capital base, etc. In other words, while one could be in favour of free trade in principle, its application to the real world would never meet the ideal.

As noted above, perfection may be impossible, and not even desirable, in this sort of area in Canada. The "magic of the market" will seldom help regions or provinces such as Saskatchewan that need sufficient ability to help regional economies develop and flourish—we already have to contend with natural forces, the FTA, and now the NAFTA; essentially, a perfect economic union will lead to more and more for Toronto, Montreal and Vancouver.³⁰

Thus, one might have expected that the "hinterland provinces" might align themselves against these proposals. Such was not the case, primarily for ideological reasons. New Brunswick, Manitoba and Alberta were the strongest supporters of the federal government. Quebec, Ontario, Saskatchewan, and British Columbia were described as "cautious." In the case of Quebec the Liberal government was unwilling to agree to something that could be described by the PQ as having given power to the federal government. The NDP governments in Ontario,

Saskatchewan and BC were less enthusiastic about totally free markets than some other jurisdictions. Cleavages surfaced along these and other dimensions, making the negotiations even more difficult.

The task was compounded by the fact that the empirical case for the agreement was suspect in the minds of several governments.

The Canadian Manufacturers Association has said that there are over 500 barriers, the costs of which are \$6.5 billion, but there are no detailed inventories of internal impediments to trade nor are there any proper breakdowns and specific costs provided when these assertions are made. . . . a paper prepared in March 1993 for the British Columbia government by Professor Copeland of UBC challenges the CMA's assertions on the basis that proper economic analysis reveals only quite small efficiency costs of interprovincial trade barriers.³¹

Thus the negotiations surrounding the ambit of the agreement involved two distinctly different views of the world. The federal government and its provincial allies wanted a comprehensive agreement involving a large number of areas, while some of the provincial governments remained unconvinced of the need for such a "sledgehammer."

Much of this area is dominated by "irritants" that are more symbolic than actually harmful to the Canadian economy or the economic union. . . . These have assumed an importance vastly out of proportion to their real costs to the economy or the economic union. Elimination of these highly visible and publicized barriers is being used as the justification and cloak for a much larger agenda³²

³⁰ Briefing Document, Government of Saskatchewan, 1992.

³¹ Ibid.

³² Ibid.

In Saskatchewan, as an example, the list of potential "targets" was quite long.

- government, Crown corporation, municipal, hospital, schools and university procurement preferences for both goods and services;
- provincial monopolies: liquor, telephone, electrical and natural gas utilities, basic auto insurance;
- restrictions on extra provincial acquisition of government bonds (e.g. savings bonds), privatized crown corporation shares, etc.;
- head office restrictions re privatized crowns;
- interprovincial professional and trades licensing and practice;
- liquor board listings;
- natural products marketing schemes through marketing boards;
- contractual/proprietary requirements or incentives to process or upgrade raw materials in the province and other restrictions on export from the province;
- preference re disposal of government assets;
- employment preferences;
- social services residence qualification;
- pension plans and interprovincial portability;
- intraprovincial regional development;
- product standards;
- transport regulation, particularly trucking;
- rules and policies re provincial investment of pension or other funds;
- non-resident land ownership restrictions;
- company law requirements residence of directors, etc.³³

Thus, the negotiations degenerated into a discussion about lists of exceptions and the legitimacy of the general assumptions involved.

Finally, in June of 1994, after eighteen months of negotiations the Ministers were able to report agreement. The text of the new accord went to the First Ministers in July of 1994, where it was approved.

THE AGREEMENT ON INTERNAL TRADE

The text of the AIT, together with excellent commentary, are available in several good articles or on the web.³⁴ It would be useful, however, to review here the most important provisions of the agreement. In general, the Agreement met the principles and objectives outlined above. That is, all governments signed the agreement, it is comprehensive, and it has a dispute settling mechanism. As well, the agreement sets out to treat people, goods, services and capital equally, irrespective of where they originate in Canada, begins the process of reconciling standards and regulations with regard to goods, etc., and agrees to a process for streamlining administrative practices. These principles are recognized in Chapter One of the Agreement. A fourth principle is also included, that is, parties agree not to establish new barriers to internal trade.³⁵ However, the governments also set out some other principles of application. Key to these are, the need for exceptions, transition periods, the legitimacy of regional development objectives, and the importance of environmental objectives, consumer protection, and labour standards. Thus, while there are general principles, there are exceptions to them. This is true also of the extent of obligations. Part Two of the agreement specifically reaffirms the constitutional powers of

³³ Ibid.

³⁴ See <http://www.intrasec.mb.ca/>

³⁵ All comments in this section are taken from the text of the AIT itself. These principles can be found on pp.2-4.

each government, thus emphasizing that it is an intergovernmental agreement and non-justiciable.

Part Four outlines the general and specific rules. In relation to the latter these include the following.

- Procurement
- Investment
- Labour Mobility
- Consumer Matters
- Agriculture and Food Goods
- Alcoholic Beverages
- Natural Resources Processing
- Energy
- Communications
- Transportation
- Environment

Part Five sets out the bureaucratic structures associated with the agreement, including the dispute settling procedures. It sets up a Trade Secretariat, a Ministerial Committee (Committee on Internal Trade), and provides for funding. Most importantly, it sets out the procedures by which disputes will be settled, including government to government disputes and person to government disputes. Remedies include consultations, panels, and if necessary, where a government fails to comply, retaliation. The procedures appear to be complex, cumbersome, and time consuming.

The need for a binding settlement mechanism was key for those who had hoped for constitutional provisions. For the most part they were disappointed.

Resolving disputes and enforcing commitments is an issue in all trade agreements. . . . Although Canadian governments can apply the normal trade policy model to dispute resolution, they need to find creative ways to make it work effectively in a domestic context.

The private sector, which was pressing for an agreement on internal trade, wants an accessible, transparent, inexpensive, non-adversarial process that is enforceable Most provincial governments want a system that is inexpensive and allows them some control over the issues to be considered and that does not allow third parties, namely the courts, to define policy. . . . Unfortunately, . . . it is not clear that the process[in the AIT] even serves the interests of governments.³⁶

Later judgments on this section were more favourable as we will see below.

Part Six contains some important final provisions. Amongst these are provisions for:

- *Regional-economic development* - allowing for measures that encourage long term job creation and reduce economic disparities.
- *Aboriginal peoples* - exempting treaty rights.
- *National security* - safeguarding information and the right to action if necessary.
- *Relationship to international agreements* - ensuring that the AIT does not import obligations from international agreements.
- *Future negotiations* - sets out the general agreement to negotiate specific sectors in the future.
- *Accession and withdrawal* - provides for a 12 month notice of withdrawal.

Finally, there are several provisions that set out exceptions to the agreement, including exemptions for each province. These range from none in Alberta, to longer lists in other provinces.

The AIT is a lengthy, complex and detailed document. It is, as noted above, modeled on international agreements. Many criticized it for

³⁶ Robert H. Knox, "Economic Integration in Canada," in Lazar, pp. 161,162.

For the first time publicly one of the governments expressed ideological objections to this provision. BC minister Noel Schacter warned that the provision could undermine Canada's publicly funded health and social services system. He also insisted that without exemption for these sectors they would become increasingly commercialized.⁴⁶ Just as importantly he was supported by municipal and university sector officials who said that they "wanted nothing to do with the deal" which they perceived would tie their hands and make their lives more bureaucratic and less flexible.⁴⁷ Interestingly they used the practices and arrangements of the private sector to justify their position.

Ron MacDonald said public institutions are trying to reduce their number of suppliers and negotiate partnership deals, rather than simply rely on an administratively burdensome competitive bidding process- as are corporations in the private sector. He said cash strapped institutions can't afford to play favourites with local suppliers.⁴⁸

Negotiations remained stalled, while some federal ministers warned that the federal government might try to act unilaterally and impose an agreement by testing federal powers in this area in court.

[Trade Minister Sergio] Marchi is advocating a tough approach to the provinces, suggesting the possibility yesterday of using federal constitutional powers to impose an agreement on the provinces. . . . "I would certainly urge our officials to consider that as a possible future settlement."⁴⁹

Interestingly, the lead minister in this area, John Manley, did not agree with him, although

this may have simply been a tactic on the part of the two ministers.

Such an action did not occur however, as governments agreed to a revised MASH proposal at their meeting on February 20, 1998. Two governments, British Columbia and Yukon, did not sign the agreement. In deciding to go forward without them the other participants broke with precedent. In previous negotiations governments were reluctant to proceed without unanimous consent. To do so would weaken the agreement and eventually create a patchwork of application. In this instance, however, they hoped that BC and the Yukon could be persuaded to agree at a later time.⁵⁰

The MASH agreement was comprehensive and binding. It covered procurement in municipalities, municipal organizations, school boards, and publicly funded academic, health and social service entities. The implementing agreement, called the Third Protocol, was signed on April 17, 1999, and became effective on July 1, 1999.⁵¹ By contrast, negotiations on the energy section, also mandated by the Premiers in 1998, have not been completed. It is clear that the energy negotiations are more complex and important to the provinces than some other sections that remain unimplemented.

The Internal Trade Secretariat is now fully functional and "open for business." In particular the dispute settlement procedures have been used several times. The most important decision came in June of 1998 when a panel reported on a dispute under Section 1704 regarding the Manganese Based Fuel Additives Act. This act, passed by the parliament of Canada, used parliament's power over international and inter-

⁴⁶ Ibid., p.B.6.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid., 18 February 1998, p. B4.

⁵⁰ 20 February 1999, cited in

<http://www.intrasec.mb.ca/eng/library.htm#IN THE NEWS>, 12 October 1999.

⁵¹ For details see *Third Protocol Of Amendment*, <http://www.intrasec.mb.ca/eng/3protoco.htm>.

provincial trade to eliminate the use of methylcyclopentadienyl manganese tricarbonyl (MMT) in gasoline by prohibiting trade in the product. It did not attempt to regulate or eliminate MMT that was manufactured and used intra-provincially, since this was considered to be beyond the power of parliament. In short, the federal government wanted to eliminate the use of MMT, but because of a split constitutional jurisdiction in the area of the environment it was unable to do so directly. The fuel industry challenged the Act on the basis of Sections 402, 403, and 404 of the AIT. The government of Alberta initiated the complaint under Chapter 15 on behalf of a group of refiners in that province. The governments of Saskatchewan and Quebec were also a party to the complaint.

After considering the arguments the AIT Panel rendered a split decision, which runs 34 pages. The majority found that the federal legislation did infringe on Sections 402 and 403 of the AIT, and that this infringement was not saved by clause 404 which allows for infringement if it meets a legitimate objectives test. One member of the Panel came to the opposite conclusion.⁵² With this decision, the AIT, in a sense, came into its own. It proved that the agreement was not just a statement of good intentions. The fact that the first important decision of the AIT involved the lowering of environmental standards in Canada did nothing to reassure some that it was really about building a better Canada.

Four years after the signing of the AIT it is obvious that the maturing of this institution has only begun. Many of the sections of the agreement remain to be negotiated, and two governments remain outside the ambit of the MASH section. While there is no evidence to suggest that governments will abandon the AIT in the

immediate future, there is also little evidence to indicate how negotiations on some sections will proceed. As with the international counterparts of the AIT there will undoubtedly be some surprises in how the agreement matures and is interpreted.

CONCLUSION

This paper set out to examine the Agreement on Internal Trade from the perspective of how Canadians connect with each other, how they relate to their institutions and how new institutions might affect those relationships. In particular we wanted to examine the AIT from three vantage points: do political institutions remain significant to Canadians as we approach the new millennium and if so, is the AIT likely to be significant for ordinary Canadians? Is the present version of the AIT flawed and in need of strengthening? Finally, does the AIT contribute to the enhancement of Canadian citizenship, to a strengthening of our identity and our rights as Canadians, or is it about benefiting some at a cost to others?

In my opinion, the answer to first question is yes. Despite the general weakening of the role of government and other institutions in Canadian society there is little to challenge the general assumption of Smiley and others that institutions serve as both dependent and independent variables in our political life. Therefore, an institutional arrangement like the AIT has the potential to become important – to shape the way that we “do the public business.”

As to the second part of this question: is the AIT likely to become important to our lives? I believe that the answer is also yes. In my opinion, it has already begun to shape relationships between government and businesses in Canada. We ought to ignore those in the academic and business community who lament the weakness and durability of this arrangement as the lamentations of those who seek ideological perfection not pragmatic compromise. The AIT is an entirely new way of approaching the role of

⁵² Report of the Article 1704 Panel Concerning a Dispute Between Alberta and Canada Regarding the Manganese Based Fuel Additives Act, June 12, 1998, p. 11.

in 1980. It involves the assumption that the more we do things nationally the stronger the Canadian identity will become. It assumes that regionalism is destructive to this identity, that it is the "enemy within" as Trudeau said. In this zero sum nation, the growth of one can only come at the expense of the other. Again, it is difficult to disprove this argument. Common sense tells us that we must have some symbols and activities that enhance our common sense of a society. The interplay of this with regional identities is difficult to ascertain. Whatever the truth of this view, the AIT seems to me not to be a strong institutional response to this need. In simple terms, it does not involve most Canadians. Most Canadians do not bid on projects in other provinces, most Canadians do not travel far for their employment in life, and in most cases if they were required to do so the restrictions which might affect them are minimal. Therefore, only one class of people will benefit substantially from this activity, the larger business class.

Ironically many of the authors who have written on the subject of the AIT believe that a much stronger agreement would have emerged if the process had been more transparent and involved the public to a greater extent. I think that this analysis is dead wrong. In my view, the involvement of the general public would have brought the reaction that we saw from the local governments and educational agencies in BC and elsewhere when they became aware of the proposed scope of the AIT. Indeed, I would go so far as to say that the AIT as it is would not have survived a more public process.

We are left therefore with one question: does it matter that there is an institution called the AIT? I am inclined to agree with Katherine Swinton on this:

... the agreement on internal trade is likely to have an important impact on Canadian law and government policy. Most of its effects will come because governments feel an obligation to comply, whether or not they have the legal ability

to do otherwise. Over time, as well, the agreement may also filter into Canadian constitutional law, as courts use the principles to develop jurisprudence... The process will take time, but at least it has been set in motion by this important addition to Canada's intergovernmental machinery.⁵⁶

Smiley's causal arrow is in flight. Only the distance that it will fly is in doubt.

⁵⁶ Swinton, pp. 209, 210.