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True North Strong & (Trade Barrier) Free:
Reasons and recommendations to eliminate non-tariff barriers to internal trade within Canada

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For my wife;
for without your love and support,
none of this would have been possible.

And to my peers and professors;
thank you for inspiring my newfound
appreciation for sound public policy.

The proposal now before us is to throw down all barriers between the provinces—to make a citizen of one, citizen of the whole; the proposal is, that our farmers and manufacturers and mechanics shall carry their wares unquestioned into every village… that the law courts, and the schools, and the professional and industrial walks of life, throughout all the provinces, shall be thrown equally open to us all.[†]

THE HON. GEORGE BROWN
Father of Confederation
8 February 1865
Québec City

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[1†] Confederation Debates. 2019. “Legislative Assembly. Wednesday, February 8, 1865.” https://hcmc.uvic.ca/confederation/en/lgPCLA_1865-02-08.html.

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LIST OF ABBREVIATIONS

AIT	Agreement on Internal Trade
BDC	Business Development Bank of Canada
CCDA	Canadian Council of Directors of Apprenticeship
CCMRS	Cooperative Capital Markets Regulatory System
CETA	Comprehensive Economic and Trade Agreement
CFTA	Canadian Free Trade Agreement
CIT	Committee on Internal Trade
E.U.	European Union
GDP	gross domestic product
ITS	Internal Trade Secretariat
JCPC	Judicial Committee of the Privy Council
NAFTA	North American Free Trade Agreement
NWPTA	New West Partnership Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PARE	Partnership Agreement on Regulation and the Economy
RCT	Regulatory Reconciliation and Cooperation Table
SCC	Supreme Court of Canada
SEC	Securities and Exchange Commission
SMEs	Small and/or medium-sized enterprises
TCA	Trade and Cooperation Agreement
TILMA	Trade, Investment and Labour Mobility Agreement
TTMRA	*Trans-Tasman Mutual Recognition Act 1997*
U.S.	United States of America
WTO	World Trade Organization

1. EXECUTIVE SUMMARY

The Constitution of Canada delegates decision-making authority over all matters of international and interprovincial trade and commerce to the federal government. Yet interprovincial trade impediments abound, as a result of provincial authority that expressly allows for the regulation of all matters related to property and civil rights. In a federation of equal, self-governing provinces and territories, it is inevitable that discrepancies between regulations will arise out of such independent decision-making. In Canada, wherever regulatory misalignment adversely affects interprovincial trade in goods and services—which is responsible for about one-fifth of Canada's annual gross domestic product—an internal barrier to trade is said to exist. From the perspective of Canadian firms, internal barriers to trade create duplication and variation in processes and procedures, deter foreign direct and private sector investments in uncompetitive jurisdictions, and fragment the domestic market, which all serve to discourage competition and innovation. From the perspective of Canadian consumers, this duplication, deterrence, and fragmentation increases the price of preferred goods and services, while simultaneously limiting their very availability. Internal barriers to trade impact productivity and business formation, the ease of doing business, and the success of small and medium-sized enterprises, as well as aggregate welfare, labour mobility, and Canada's ability to realize its future economic growth potential.

Historical attempts at dismantling internal barriers to trade have resulted in a patchwork of solutions across the country; certain efforts have fallen short, certain efforts have made real progress, but none have resulted in a truly single market for Canadian goods, services, capital, and labour. The agriculture and mining, finance, food and textiles, and wholesale and retail sectors of the Canadian economy are some of the most interconnected and are ripe for liberalization. Policy solutions to this seemingly intractable issue do exist, having been adopted by federations around the world that have been faced with similar internal trade hang-ups. Mutual recognition agreements, regulatory harmonization initiatives, the greater empowerment of existing regulatory authorities and internal trading arrangements, and the modernization of key domestic public institutions would all help Canada to achieve the economic

union that was first envisioned by the Fathers of Confederation. As with any direct interference in the free market, any government support that is directed to facilitate enhanced interprovincial trade would inevitably come with unintended consequences. However, the long-run socio-economic benefits to Canadians from all walks of life and Canada as a whole would outweigh any near-term economic disruptions. In the wake of the current COVID-19 pandemic, Canada will need to use every policy tool in its arsenal to service its massive levels of debt, support its aging population, and preserve its way of life for future generations.

2. LIST OF POLICY RECOMMENDATIONS

No. 1. Labour Mobility

The Red Seal Secretariat should prioritize resources to identify non-Red Seal skilled trades for inclusion within the Red Seal Program, and it should task the provincial and territorial members of the Canadian Council of Directors of Apprenticeship with mutually recognizing each of the skilled trades that are already recognized by Employment and Social Development Canada according to the Ellis Chart.

No. 2. Ease of Doing Business

The Canadian Council of Insurance Regulators should call on its members to recognize the captive insurance market in all Canadian jurisdictions outside of British Columbia. Furthermore, it should forbid any Canadian insurer from considering legitimate historical gaps in insurance coverage in the determination of insurance premiums in all Canadian jurisdictions outside of Ontario.

No. 3. Post-Pandemic Economic Recovery

To ensure the success of Canadian businesses post-COVID-19, all levels of government should prioritize initiatives that boost economic efficiency. For example, the Canada Infrastructure Bank should partner with the private sector to upgrade Canada's digital infrastructure in less profitable domestic markets, as universal internet connectivity will be required to drive the next generation of Canadian manufacturing. Rural and remote communities, remote workers, and high technology-dependent businesses all stand to gain from next-generation digital infrastructure.

No. 4. Agriculture & Agri-food

The Minister of Agriculture and Agri-food should amend the *Canadian Dairy Commission Act's* Dairy Products Marketing Regulations, as well as the relevant regulations pursuant to the *Agricultural Products Marketing Act*, so as to return authority over the export trade in dairy products to the federal government and to enable increased domestic dairy production solely for export purposes. This would

spur innovation and productivity in Canada's agricultural sector, which is highly interconnected on a domestic basis, and result in amplified benefits for Canadian consumers and producers alike.

No. 5. Internal Trade Barriers Index

The Regulatory Reconciliation and Cooperation Table should publish a list of known regulations that affect internal trade within Canada prior to their identification in its annual workplans. This includes the originating entity of each non-tariff trade barrier—whether this is a submission by a governmental department or organization, or Industry Canada's Internal Trade Barriers Index. This would allow Canadian businesses, policymakers, researchers, and trade negotiators the opportunity to independently assess these trade barriers, prioritize their advocacy and work efforts accordingly, and plan future commercial operations around upcoming efforts to liberalize internal trade.

No. 6. Regulatory Harmonization

The provincial trade blocs of Western Canada and the provinces of Ontario and Québec should adopt Atlantic Canada's *Charter of Governing Principles for Regulation* within their respective internal trade agreements. By obligating provincial legislatures to consider the regulatory burden of new legislation, the committees tasked with regulatory harmonization would not continuously be forced to play catch-up to newly enacted policies and regulations. A Protocol of Amendment to institute a similar principle in the Canadian Free Trade Agreement would bind all levels of government in Canada to this approach.

No. 7. Empowering Existing Regulatory Authorities & Trading Arrangements

Canada's provinces and territories should follow the lead of Alberta and Manitoba and immediately review their sectoral exceptions that were negotiated under the Canadian Free Trade Agreement. Whether undertaken in unison, or merely done unilaterally, the removal of internal trade exceptions will encourage individuals and firms that reside and operate elsewhere in Canada to pursue employment and business opportunities within these newly liberalized jurisdictions and economic sectors.

No. 8. Strengthening Canada's Internal Trade Secretariat

The Alberta Export Expansion Program should be broadened to include domestic trade promotion activities. Currently, only international business development activities qualify for this program. An expanded mandate would help Alberta-based businesses to expand their trade relationships across the country. When Canadian businesses look to increase their exports of goods and services, domestic opportunities should not be viewed any differently than international opportunities, as increased economic activity is a direct result of both avenues of export growth.

No. 9. Financial Securities Regulation

The President of Treasury Board and Minister of Finance of the Government of Alberta should initiate the Province of Alberta's participation in the Cooperative Capital Markets Regulatory System. This pan-Canadian framework for financial securities regulation was crafted to respect constitutionally-guaranteed jurisdictional authority and to create a more competitive financial system for participating jurisdictions. Alberta's existing industry expertise would be preserved, and no-strings-attached federal adjustment assistance would offset any revenue volatility associated with Alberta's entry into the CCMRS.

No. 10. Canadian Productivity Commission

The Government of Canada should create an institution comparable to the Australian Productivity Commission. While the External Advisory Committee on Regulatory Competitiveness is a promising semblance of such an institution, its indeterminate lifespan will handicap its long-term success. This committee should be made a permanent fixture of the federal public service and its responsibilities should be assigned to an agency with the independent authority to consult, review, and report on the economic implications of anti-competitive and discriminatory internal trade barriers, such as Canada's Competition Bureau or the Canadian Free Trade Agreement's Committee on Internal Trade.

3. AN INTRODUCTION TO INTERNAL TRADE WITHIN CANADA

The Constitution of Canada delegates decision-making authority over all matters of international and interprovincial trade and commerce to the federal government, thereby denying provincial and territorial legislatures the power to enact tariffs on the import and export of goods and services. The constitution states that "all articles of the growth, produce, or manufacture of any one of the Provinces shall…be admitted free into each of the other Provinces." (*Constitution Act* 1867) In 1865, Sir John A. Macdonald proclaimed that "unrestricted free trade, between [the] people of the…provinces" was, in fact, a primary purpose of Confederation. (Blue 2010, 173) Although it is clear that the provinces and territories may not establish direct impediments to interprovincial trade and commerce within Canada, indirect interprovincial trade impediments abound and sorely restrict the creation of a truly single Canadian market.

Nothing exemplifies this uniquely absurdist Canadian reality better than a 2018 Supreme Court of Canada (SCC) ruling on the interprovincial transportation of alcohol for personal end-use. In *R. v. Comeau*, the SCC ruled that—despite functioning "like a tariff" and impeding "liquor purchases originating anywhere other than the New Brunswick Liquor Corporation"—the primary purpose of New Brunswick's *Liquor Control Act* "is not to restrict trade across a provincial boundary, but to…control the supply and use of liquor within the province." (*R. v. Comeau* 2018, §112) In other words, any hindrance to interprovincial trade is merely an incidental consequence of provincial authority that expressly allows for the regulation of alcohol production, distribution, and consumption. Historically, the SCC tends to favour such narrow rulings in internal trade cases, lest it inadvertently and unnecessarily interfere in areas of provincial and territorial jurisdiction. (Economist 2016) Speaking at the F.R. Scott Lecture at McGill University, retired SCC Justice, the Honourable Morris Jacob Fish (2011, 192), stated that:

> Liquor has exerted a staggering influence on Canada's constitution. More staggering, in fact, than the influence it exerted on the constitution of Canada's first prime minister. Yet…few seem to have noticed that alcohol has played so important a role in our national legal development…[and] that 30 of the first 125 cases addressing the division of powers between the federal and provincial governments involved liquor disputes.

While Gerard Comeau ultimately lost his 'free-the-beer' case, the media frenzy that surrounded this ruling by Canada's top court prompted a widespread discussion in the public sphere over the advantages of the free market versus the right to regulate by Crown monopolies, as well as the merits of provincial and territorial regulatory schemes that indirectly affect interprovincial trade. (MacKinnon 2018; Corcoran 2018)

Given the inability of the provinces and territories to directly legislate on matters of interprovincial trade and commerce, Canadians are left to find other ways to revive the notion of the economic union that was first envisioned by the Fathers of Confederation. Intergovernmental cooperation has produced various trade agreements aimed at dismantling Canada's internal barriers to trade, but most of these have fallen short of their intended goals. Over the years, the federal, provincial, and territorial governments have enacted the pan-Canadian Agreement on Internal Trade; Alberta and British Columbia's Trade, Investment and Labour Mobility Agreement; Western Canada's New West Partnership Trade Agreement; the Maritime's Partnership Agreement on Regulation and the Economy; Eastern Canada's Trade and Cooperation Agreement; and, most recently, the much-hailed Canadian Free Trade Agreement. While each of these internal trade agreements was meant to streamline trade in goods and services, capital investment, or labour mobility between the provinces and territories, negotiated exceptions and protectionist instincts both continue to foster a proliferation of differences in standards and regulations across the country.

The intent of this paper is to describe the Canadian experience with respect to a seemingly unending barrage of internal barriers to trade—both the legal history of this predicament and its current status—as well as to illustrate a few of the existing regulatory schemes that indirectly affect internal trade relationships within Canada. This paper will start with a brief primer on both trade barriers and Canada's constitutional division of powers, before discussing the ways in which the welfare of Canadians, as well as Canada as a whole, is affected by restrained internal trade. The internal trade experiences of a handful of foreign federations will also be explored, in the hopes that solutions to this seemingly intractable

problem can be borrowed and applied here at home. Along the way, policy recommendations that stem from logical conclusions of the discussion of various internal trade topics will be put forth. These recommendations will be specific, straightforward, and near-term opportunities for political action and reform of Canada's internal trade policy approach by all levels of government. These recommendations will also aim to be practical. They will be offered with the full knowledge that political capital is generally spent on policies targeted towards special interests, and that the outcome of intergovernmental cooperation is often at the whim of the governments in power at the time of negotiations. This paper contains existing knowledge and new perspectives on the topic of internal trade within Canada, and it will hopefully serve as a guide to both junior and senior policymakers and public office holders who possess a professional interest in internal trade policy. This may include, but is not limited to, the businesses, think tanks, and governmental and non-governmental organizations that produced the published literature upon which this paper relies. With any luck, members of the federal, provincial, or territorial public service sectors who possess decision-making authority, such as Canada's Internal Trade Representatives, will one day take note of the policy recommendations humbly put forth herein, and subsequently be inspired to advocate for changes to Canada's internal trade regime that needlessly weighs down our collective economic well-being, standard of living, and ability to compete and innovate on the world stage.

4. NON-TARIFF MEASURES AND INTERNAL TRADE BARRIERS EXPLAINED

The average Canadian might wonder why a focus of their attention should be the policies and regulations enacted by the public sector. At first glance, such subject matter might appear overly bureaucratic and trivial, especially when much of the conversation that emanates from Canadian politicians is instead infused with dog whistles and shallow rhetoric. But public policy should not be confused with politics. The former is what provides the framework for the fabric of Canadian society, while the latter can be distilled into a multiplayer game of collective choice. The Atlantic Provinces Economic Council (Chaundy 2016, 1) explains the civic importance behind everyday policies and regulations very simply:

> Regulation is a pervasive feature of everyday life. We wake up in the morning to the sound of our clock radio, which is manufactured according to product regulations, and with the radio station regulated by the Canadian Radio-television and Telecommunications Commission (CRTC). When we shower, turn on the taps and flush the toilet, our water and wastewater are subject to environmental standards. When we drop off our kids at daycare or school, there are standards that regulate the facilities and education they receive. When we drive to work, the construction of the roads we drive on, the manufacture of the vehicles we drive and the rules of the road are all regulated. The commuter ferry we board is subject to safety regulations…as is the construction of the building we work in. Our employers are bound by labour standards governing our work. The food service establishment we eat at during lunch is subject to…regulations governing food safety. There are by-laws pertaining to off-leash areas where we take our dog for a walk. And when we go to the mall after supper, there are regulations regarding advertising, electronics recycling and product returns. From morning to night, we live in a society that is governed by regulations.

Such regulations are created, amended, and superseded every day in federal, provincial and territorial legislatures across Canada, and their sole purpose is to be "an instrument for mandating or enabling particular behaviours or outcomes in order to achieve public policy objectives." (Canada TSB Secretariat 2018) In 2015, the Government of Canada reported that there were over 130,000 regulations in existence at the federal level alone. (Greer 2018, 1) At the provincial level, similar reporting is scant; however, as of 2016, Ontario had a tally of over 380,000 regulations. (Cross 2016) This litany of regulations and the resulting complexities and intricacies of their respective frameworks can be difficult to fathom.

While policies and regulations are normally devised to ensure minimum performance standards in areas such as health, safety, security, and the environment, they are rarely perfect in their design and

implementation, and they often come with societal trade-offs and unintended consequences. In a Canadian context, regulatory frameworks ensure the safety and well-being of the general public, they preserve Canadian culture in a world that is subject to the forces of globalization, and they prevent anti-competitive behaviour in the free market. However, they may also inadvertently create impediments to interprovincial trade and commerce as a result of decisions made concerning intra-provincial matters. In a federation of equal, self-governing provinces and territories, it is inevitable that discrepancies between various policies and regulations will arise out of such independent decision-making. Each province and territory possesses its own unique set of cultural and socio-economic circumstances and will, therefore, tailor its policy and regulatory responses accordingly. Reconciling this quirky facet of Canadian federalism requires constant attention. (Brodie 2019, 7) From the perspective of Canadian producers of goods and services, any policies and regulations that differ between jurisdictions create duplication and variation in processes and procedures, deter foreign direct and private sector investments in uncompetitive jurisdictions, and fragment the domestic marketplace, which all serve to discourage competition and innovation. From the perspective of Canadian consumers, this duplication, deterrence, and fragmentation may inadvertently increase the price of preferred goods and services, while simultaneously limiting their very availability—unintended consequences that are often unbeknownst to consumers themselves. (Chaundy 2016, 1)

Aside from customs duties that are levied at the borders between countries, any policy or regulation that directly or indirectly affects international trade in goods and services, by influencing either the quantity traded or the price of the traded product, is either known as a non-tariff measure or a non-tariff barrier to trade. The Organisation for Economic Co-operation and Development (OECD) describes the macroeconomic market distortions that result from non-tariff barriers to trade as follows:

> These [non-tariff] measures are generally imposed to address market failures, such as information asymmetries or negative externalities. They can provide a signal of quality, strengthening consumer confidence that foreign products abide by domestic regulations. But while countries may share the same objectives, they often apply different standards or methods to ensure compliance with regulatory measures. These differences can raise costs for businesses seeking to access more than one market. As a consequence,

> economies may forego opportunities to participate in global trade if traders decide that the costs to meet additional market requirements are too high. (OECD n.d.)

The United Nations Conference on Trade and Development maintains two primary classifications of such non-tariff barriers to trade: technical measures and non-technical measures. Technical measures include regulations and standards, such as sanitary and phytosanitary measures, and technical barriers to trade. Sanitary and phytosanitary measures relate to human, animal, and plant health, including food safety standards and measures designed to prevent the spread of diseases and pests. Technical barriers to trade relate to mandated product characteristics, such as labelling and packaging rules, minimum quality requirements, and dimensional or weight restrictions placed upon intermodal methods of transportation. Non-technical measures include most other trade-limiting policies and regulations, such as anti-dumping and countervailing duties, quotas and price-control mechanisms, local content requirements and rules of origin, and government subsidies. (UNCTAD 2019, vii-ix)

When policies and regulations adversely affect trade in goods and services inside of a jurisdiction, the result is an internal barrier to trade; in the Canadian context, these internal barriers to trade are known as interprovincial trade barriers and are similar in nature to the non-tariff barriers to trade that exist in international markets. Such internal barriers to trade within Canada result from our unique physical geography, including the long distances that exist between major metropolitan areas, and the infrastructure and time that is required to both navigate and traverse these distances, as well as public sector resourcing and procurement rules that favour local content, local prices, and local suppliers, and which are widespread within government-mandated regional economic development initiatives. Last, but not least, the jurisdictional differences in technical measures, such as regulatory regimes and labour standards, which exist between all levels of government, as a result of Canada's constitutional distribution of legislative powers, have an economic impact on everything from capital allocation to labour mobility. (Chaundy 2016, 18-20) It is important to note that Canada's geography has been estimated to account for roughly half of all of the internal barriers to trade that exist in this country. (Alvarez, Krznar & Tombe 2019, 10) However, given that geographical characteristics are mostly immutable, this paper will

henceforth only discuss the non-geographic interprovincial trade barriers that can be influenced by government policy.

5. *THE CONSTITUTION ACT, 1867* AND CANADA'S DIVISION OF POWERS

The constitution of a country is the supreme law of the land, and can be composed of any amalgamation of legal principles and legislation that provides the framework for society. Canada is a federated state, consisting of ten provinces, three territories, and a national government, where ruling authority is shared between federal, provincial, and territorial jurisdictions. Section 91 of the *Constitution Act, 1867*—originally enacted as the *British North America Act, 1867*—outlines the areas of exclusive legislative authority conferred upon the Parliament of Canada for the purpose of peace, order, and good government. In addition to the matters listed therein, this section also provides Parliament with jurisdiction over all residual matters that are not explicitly assigned to the provincial legislatures under section 92.

The Government of Canada maintains complete control over, *inter alia*, unemployment insurance; postal services; the national census and statistics; national defence; navigation and shipping; coastal and inland fisheries; banking, currency, and coinage; patents and copyrights; criminal law; First Nations reserves; interprovincial shipping, railways, and telecommunications; and any "works and undertakings" that cross provincial borders. Provincial jurisdiction is exclusive to areas including, but not limited to, intra-provincial taxation; shops, restaurants, and public houses; hospitals and health care; municipalities; the incorporation of businesses; non-renewable natural resources and forestry resources; electricity generation; property and civil rights; and any matters that are of a local or private nature. (*Constitution Act* 1867) It is worthwhile to note that not all authorities were explicitly listed within the constitution, such as jurisdiction over the environment or the regulation of dangerous goods. Jurisprudence over these legal domains has evolved over the last 153 years, and it continues to do so even today, which is one reason that carbon taxes—and the federal sales tax before it—are being challenged by certain provinces all the way to the SCC. While Parliament can claim paramountcy in the name of peace, order, and good government, jurisdiction over property and civil rights is equally as powerful before the courts, which we will see below.

One of the two constitutional clauses that affects internal barriers to trade is section 91(2), which simply states the following: the regulation of trade and commerce. The second constitutional clause that is often discussed alongside matters of interprovincial trade is section 121, which outlines the basis for trade within Canada. This clause states that "all articles of the growth, produce, or manufacture of any one of the provinces shall…be admitted free into each of the other provinces." (*Constitution Act* 1867) Whether or not this clause also applies to interprovincial trade in services in today's knowledge economy is a question that is still up for debate. (Tkachuk & Day 2016, 39) In 1865, Sir John A. Macdonald proclaimed that "unrestricted free trade, between [the] people of the…provinces" was, in fact, a primary purpose of confederation. (Blue 2010, 173) Sir Alexander Tilloch Galt, another Father of Confederation, also claimed that the sole purpose of the Dominion of Canada was to enable "free trade among ourselves." (Blue 2010, 171) The Fathers of Confederation were known for their rousing speeches in support of this particular facet of confederation.[2,3] However, little could they have known how convoluted the interpretation of these constitutional clauses would become by the generations that followed in their footsteps.

Unlike the Constitution of the United States of America (U.S.), under which Article 1 has given rise to the 'dormant commerce clause' legal doctrine, which widely prohibits state-level discrimination against interstate or international commerce, federal authority over trade and commerce in Canada, as per the *Constitution Act, 1867*, has consistently been interpreted by Canadian courts through a much narrower lens. (Canada Senate 2016b) In 1881, the United Kingdom's Judicial Committee of the Privy Council (JCPC), on appeal from the SCC, ruled that the federal trade and commerce clause and the provincial

[2] Sir Alexander Tilloch Galt once proclaimed that: "The regulation of duties of customs on imports and exports might perhaps be considered so intimately connected with the subject of trade and commerce as to require no separate mention…[nevertheless, it is] most important to see that no local legislature should by its separate action be able to put any such restriction on the free interchange of commodities as to prevent the manufactures of the rest from finding a market in any one province, and thus from sharing in the advantages of the extended Union." (Blue 2010, 172-173)

[3] The Honourable George Brown was recorded as saying: "I go heartily for the union, because it will throw down the barriers of trade and give us control of a market of four millions of people. What one thing has contributed so much to the wondrous material progress of the United States as the free passage of their products from one state to another? What has tended so much to the rapid advance of all branches of their industry as the vast extent of their home market, creating an unlimited demand for all the commodities of daily use and stimulating the energy and ingenuity of producers? Sir, I confess to you that in my mind this one view of the union—the addition of nearly a million of people to our home consumers—sweeps aside all the petty objections that are averred against the scheme." (Honickman 2016)

property and civil rights clause were intended to be "read together, and that of one interpreted, and, where necessary, modified, by that of the other," lest federal authority unnecessarily impinge upon that of the provinces and vice-versa. (*Citizens and Queen Insurance Cos. v. Parsons* 1881, 7) This ruling has effectively limited federal jurisdiction over trade and commerce to matters of international and interprovincial trade—in other words, matters that affect Canada as a whole. (Tennant 2014) It precludes Parliament from enacting legislation related to the general regulation of trade and industry within provinces and continues to affect jurisprudence to this day. (*Ward v. Canada (Attorney General)* 2002, §42) The SCC continues to be characterized by its penchant for avoiding judicial fiat in areas of provincial responsibility, instead choosing to rely on the legislative branch of provincial governments to address matters of a local nature and to willingly engage in intergovernmental cooperation. (Hinarejos 2012, 538)

Furthermore, in 1921, the SCC ruled that section 121 was only intended "to prohibit the establishment of customs duties" that could affect trade between provinces. (*Gold Seal Ltd. v. Alberta (Attorney-General)* 1921, 456) Writing in support of the majority, Supreme Court Justice Mignault found that the "essential word here is 'free' and what is prohibited is the levying of custom duties or other charges of a like nature in matters of interprovincial trade." (*Gold Seal Ltd. v. Alberta (Attorney-General)* 1921, 470) As a result of this nearly 100-year-old plain text interpretation—not to mention the alleged political interference that inspired it—non-tariff barriers continue to impede interprovincial trade and the efficiency of the free market. (Blue 2011, 18-19) As previously mentioned, in *R v. Comeau*, the SCC relied on the doctrine of *stare decisis* to deliver a contemporary example of how incidental internal barriers to trade are still legally permissible. (*R. v. Comeau* 2018, §26) However, a purposive interpretation of section 121—in other words, consideration for the historical purpose and legislative context of this clause—which is exemplified by the documented proclamations of the Fathers of Confederation in support of eradicating intercolonial trade barriers, leads to a different logical outcome. (Blue 2011, 5) In 1958, Supreme Court Justice Rand wrote that section 121 was actually "aimed against

trade regulation which is designed to…restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist." (*Murphy v. C.P.R.* 1958, 642) Such an interpretation equally respects provincial jurisdiction over property and civil rights and federal jurisdiction over trade and commerce. Had the Canadian Constitution's living tree doctrine—first introduced by the JCPC in the 'Persons Case'—existed at the time of *Gold Seal Ltd. v. Alberta (Attorney-General)*, then a purposive interpretation of section 121 might have instead set the judicial precedent. (*Henrietta Muir Edwards v. Canada* 1929, 9) As Canada grew, and as federal, provincial, and territorial regulatory schemes multiplied, section 121 may have been permitted to evolve in parallel and the safeguarding of interprovincial free trade may have been treated as sacrosanct.

Nowadays, in order to expressly clarify the legislative intent of section 121, significant amendments to the Constitution of Canada would be required. The Meech Lake and Charlottetown Accords are the most recent examples of efforts to substantially amend the constitution. (Dunsmuir 1995, 9 & 25) Notably, the Charlottetown Accord included measures to strengthen section 121, granting the federal government with powers "to strike down barriers to the interprovincial flow of commodities, capital, and people." (Johnston 1993, 44) In the years since the failure of these two accords to gain acceptance, there have been no subsequent efforts to amend the constitution in this manner and it is unlikely that there currently exists the political will to do so. Given the most recent SCC ruling on section 121 of the constitution, future legal or political challenges to internal barriers to trade within Canada will likely take a different approach. Instead, the federal, provincial, and territorial governments will have to cooperate to a degree likely not imagined necessary by the Fathers of Confederation. For better or for worse, the future of interprovincial trade now depends on it.

6. HOW INTERNAL TRADE BARRIERS AFFECT CANADIAN CONSUMERS

6.1 Theory of Consumer Choice

The theory of consumer choice describes how consumers in a market economy will allocate their fixed levels of income amongst the various goods and services that are available for consumption according to personal preferences. Self-interested consumers are said to make rational choices that maximize their personal well-being in the face of cost-benefit decisions that possess economic trade-offs. For example, the opportunity cost of a particular good or service is an alternative choice that is foregone by purchasing such a good or service. So, given a budget constraint, a consumer may only be able to afford the most entry-level product or the most basic level of service, but not both—the opportunity cost of one is the renunciation of the other. The corollary of this theory is that consumers are able to afford more goods and services when their levels of income increase, or market prices decrease, or some combination of both. There are numerous causes behind the fluctuations in levels of income and market prices in an economy, and any individual consumer possesses limited power over these two elements. On the other hand, governments possess much more power in this regard and they often rely on public policy to influence market forces in order to achieve a desired economic, political, or social outcome—such as the reallocation of resources to foster either economic efficiency or economic equality. Most public policies, in one form or another, will directly or indirectly force a change to levels of income or market prices. (McKenzie 2018) The majority of Canadians can relate to these effects by considering the economic burden that is imposed by income tax and sales tax.

Internal barriers to trade create economic inefficiencies that create an economic burden for Canadian consumers and taxpayers, as well as impede the sustained social and political cohesion of the country. (Pittman, Dade & Findlay 2019, 2) Internal barriers to trade invariably result in an excessive administrative burden, a redundant bureaucracy, and exceedingly long wait times for regulatory interfaces at the federal, provincial, territorial, and municipal levels. Each of these inefficiencies is paired with its own opportunity cost, as a result of the additional labour or capital that is required to navigate or

overcome these barriers. This cost becomes an added expense that hinders and distorts the manufacture, sale, transportation, and delivery of goods and services between provinces and territories. In 2017, Statistics Canada estimated that additional input costs associated with interprovincial barriers to trade increase the price of Canadian goods by an average of 6.9 percent. (Bemrose, Brown & Tweedle 2017, 5) This price increase is akin to a tariff on interprovincial trade—something that Canadians wholeheartedly oppose at the international level, but seem to take no notice of at the domestic level, perhaps because the economic effects are not as highly salient. The Atlantic Provinces Economic Council has also suggested that internal barriers to trade inflate the financial burden on Canadian taxpayers, in that governments would be able to reduce their annual expenditures "by eliminating unnecessary regulation; harmonizing standards; [adopting] mutual recognition of licenses issued by other provinces; issuing regional permits; [pursuing] joint procurement; and even creating regional rather than duplicate provincial regulatory organizations." (Chaundy 2016, 22) Some of these opportunities for regulatory reconciliation will be explored in later sections of this paper; here we take a look at the impacts of internal barriers to trade on Canadian consumers.

6.2 Aggregate Welfare

The market distortions created by internal barriers to trade within Canada ripple through the economy in subtle ways and will often produce unexpected outcomes. However, the economic effects of these market distortions can be quantified using macroeconomic analysis, specifically input-output analysis, which relies on known sectoral interdependencies to estimate the size of these economic reverberations. Using data from Statistics Canada, Albrecht and Tombe (2016, 237) completed an input-output analysis to estimate the impact of internal barriers to trade on aggregate welfare, at the national level and per province and industry. Hypothetically, if the economic cost to Canadian consumers from internal barriers to trade were arbitrarily reduced by 10 percent nationwide, then real gross domestic product (GDP) would increase by $17 billion. Knowing this correlation, Albrecht and Tombe go one step further. By calculating that asymmetrical internal barriers to trade—in other words, the barriers that exist

when trade only flows in one geographical direction—cost the equivalent of 3.3 percent of real GDP, and non-geographic internal barriers to trade cost the equivalent of 6.8 percent of real GDP, then the removal of these internal barriers to trade "could add $50-$130 billion to Canada's overall GDP" every year. (Albrecht & Tombe 2016, 261) Thus, each and every Canadian household would save the equivalent of between $5,700 and $7,500 per year. (Tombe 2019a; Tombe 2016) This is money that Canadians have worked hard to earn, and would be made better off by keeping in their pockets.

The theory of comparative advantage states that all trading partners stand to benefit when each partner in a trading relationship invests its resources in producing the goods or services that incur the lowest relative opportunity cost. (WTO 2011, 13) The agriculture and mining, finance, food and textiles, and wholesale and retail sectors of the Canadian economy are some of the most interconnected (*i.e.*, they have an input-output multiplier $\gtrsim 0.1$), they are some of the most highly traded (*i.e.*, their share of internal trade is $\gtrsim 0.1$ percent), and they stand to gain more than any others from sector-specific reductions in internal barriers to trade. The provinces that possess revealed comparative advantages in these sectors are, respectively: Alberta, Manitoba, Newfoundland and Labrador, and Saskatchewan; Ontario; Manitoba, Nova Scotia, Prince Edward Island, Québec, and Saskatchewan; and British Columbia and Ontario. (Albrecht & Tombe 2016, 243-248) Therefore, nine out of ten Canadian provinces—the exception being New Brunswick—would realize amplified gains in their levels of aggregate welfare from sector-specific reductions in internal barriers to trade within the aforementioned sectors of the economy. Indeed, Albrecht and Tombe (2016, 259-260) come to this same conclusion, and they recommend that if given the opportunity to negotiate a "piecemeal approach to [internal trade] liberalization, [then these] highly interconnected sectors are where to start." Even New Brunswick would ultimately stand to gain from any such sector-specific reductions. Interprovincial trade would grow as a share of overall GDP, and Canadians would gradually migrate towards regions of the country that see the largest relative economic gains—in other words, Atlantic Canada, where employment levels could increase by up to 6 percent. (IMF 2019, 27)

6.3 Labour Mobility

Internal barriers to trade within Canada apply to more than manufactured goods—they also apply to the movements of an entire labour force. A high level of labour mobility provides the average Canadian worker with an equal opportunity to find meaningful employment in other regions of the country. When demand for labour is relatively higher in one area of the country than another, workers will gravitate towards available employment opportunities. This lowers the average cost of labour and reduces overall levels of unemployment, ultimately saving both businesses and governments from unnecessary spending on wages and welfare, respectively, which results in economic efficiencies, such as cost savings that can be reinvested elsewhere in the economy. (Blackwell 2013) Improved labour mobility is also a relatively fast-acting policy tool to backfill labour and skill shortages, when compared to longer term policies like investing in higher education or promoting skilled worker immigration programs. (Gomez & Gunderson 2017, 1) The importance of labour mobility is exemplified by the likelihood of out-of-work Canadians seeking gainful and stable employment opportunities as part of any economic recovery that follows the current COVID-19 pandemic. (C.D. Howe Institute 2020b, 5) Yet internal barriers to trade stifle the wholly unrestricted movement of labour between provinces and territories—often in subtle, yet significant ways. Examples of the occupations that are affected by such barriers are the skilled trades and regulated professionals.

Each province and territory in Canada is responsible for its own apprenticeship training programs and the accreditation of skilled trades. Over 60 years ago, a mutual recognition framework was established between the federal, provincial, and territorial governments to allow for the universal recognition of tradespeople across Canada. Training programs revolve around national standards and accreditation stems from the successful completion of a common examination. Today, this Red Seal Program is overseen by the Canadian Council of Directors of Apprenticeship (CCDA) and continues to develop in consultation with experienced members of each respective trade. (CCDA 2018) The Red Seal Secretariat, which is housed within Employment and Social Development Canada, also exists to provide

administrative support to the program, and it works with the CCDA to maintain a comprehensive index of information on skilled trades in Canada. This index is known as the Ellis Chart and it contains annually updated, publicly-available information on roughly 400 skilled trades in Canada, including an overview of the apprenticeship training programs and accreditation processes that are required for each. (Canada ESDC 2014)

While the number of designated skilled trades under the Red Seal Program continues to grow, as of 2015, only about 80 percent of all registered apprentices in Canada were governed by this mutual recognition framework. (OECD 2017, 191) When roughly one-fifth of registered apprentices cannot achieve pan-Canadian recognition for their skilled labour, it is clear that there is still work needed to be done to ensure wholly unrestricted labour mobility in Canada. As a result of the 2015 *Provincial-Territorial Apprentice Mobility Agreement*, apprenticeship training experience that is gained in one province or territory is now fully transferrable to another, but only as long as the latter jurisdiction recognizes the skilled trade in question. (Alberta Advanced Education 2020) In order to maximize the value of this agreement and encourage interprovincial mobility of registered apprentices, as well as to acknowledge the capabilities of fully accredited tradespeople anywhere in Canada, the Red Seal Secretariat needs to support the mutual recognition of all remaining provincial and territorial apprenticeship training programs that are not currently recognized under the Red Seal Program. For example, while aircraft maintenance engineers, locksmiths, small engine and equipment mechanics, and water well drillers are all recognized by a minimum of five Canadian jurisdictions, as per the Red Seal Program's own designation criteria, no pan-Canadian mutual recognition of these trades exists and there has been no obvious attempt to develop harmonized Red Seal Occupational Standards for these skilled trades. (CCDA 2017) Only when every skilled trade in Canada is recognized across Canada, will labour mobility amongst skilled tradespeople be truly unrestricted.

Lastly, while the Canadian Charter of Rights and Freedoms guarantees the right of all Canadians to "take up residence in any province" or territory and to "pursue the gaining of a livelihood" according to

one's professional skillset, the mobility rights of regulated professionals also continue to be hampered by internal barriers to trade. (Macmillan & Grady 2007b, 9) Dental hygienists who were trained outside of Alberta or Saskatchewan, but who choose to reside and practice in these provinces, are restricted from administering local anaesthesia unless they undergo academic upgrading to meet the additional qualification requirements of these provinces. And nurse practitioners and registered practical nurses who originate from Québec are not automatically permitted to diagnose chronic illnesses in Alberta or work in pediatrics and obstetrics elsewhere in Canada, respectively, without supplementary education or a prior learning assessment. (Forum of Labour Market Ministers n.d.) Meanwhile, the Paramedic Association of Canada regulates the national occupational standards for paramedicine across Canada, but each of the provinces and territories simultaneously recognizes its own levels of practice. For example, British Columbia and Saskatchewan distinguish between four distinct practice levels: Emergency Medical Responders and Primary, Advanced, and Critical Care Paramedics. (APBC n.d.; SCOP n.d.) Alberta only recognizes the first three; Ontario the latter three. (ACP 2017; Ontario MOHLTC 2020) And Manitoba, Prince Edward Island, and Québec only train Primary and Advanced Care Paramedics (PAM n.d.; PAPEI 2018; Olson 2018) As for Canadian lawyers, those who are called to the bar outside of Québec cannot practice civil law without attending a French civil law school; the same goes for lawyers from Québec, who are restricted from practicing English common law. (Durocher 2016, 2) It goes without saying that the provinces and territories should regulate their respective labour markets according to local needs, but there is no reason for this to preclude wholly unhindered labour mobility. The provinces and territories are often slow to comprehend this reality, and even slower to admit it. (Campbell & Kingston 2014, 30)

POLICY RECOMMENDATION NO. 1

The Red Seal Secretariat should prioritize resources to identify non-Red Seal skilled trades for inclusion within the Red Seal Program, and it should task the provincial and territorial members of the Canadian

Council of Directors of Apprenticeship with mutually recognizing each of the skilled trades that are already recognized by Employment and Social Development Canada according to the Ellis Chart.

7. HOW INTERNAL TRADE BARRIERS BURDEN CANADIAN PRODUCERS

7.1 Theory of Firm Behaviour

The theory of firm behaviour is analogous to the consumptive behaviour of self-interested consumers in a market economy, but it instead describes the opposing side of the economic model of supply-and-demand, in order to resolve how various goods and services are made available to society. Firms will seek to maximize profit in any given market environment by producing a given quantity of goods and services at minimum cost. The competitive nature of market economies means that firms will seek specialized production processes as a means of achieving the economies of scale that are required to minimize their production costs. All else being equal, firms achieve this by orchestrating a delicate balance between their respective factors of production. Such factors constitute the core components of the production process and consist of numerous forms and quantities of labour and capital. Labour may take the form of skilled workers, semi-skilled workers, or unskilled workers and generally constitutes an input cost that is required on a recurring basis. Capital may take the form of land, buildings, hardware, or software and generally constitutes an enduring asset that is only repurchased on a periodic basis. The optimal industrial organization of a firm results from profit-maximizing production processes that are not set in stone, but rather ebb and flow as both input costs change and the resulting quantity of goods and services change in response to changing market conditions. (Mankiw, Kneebone & McKenzie 2017, 257) Governmental policies and regulations inevitably influence market conditions, as firms respond to, as well as anticipate future changes to, the legal frameworks within which they must conduct their business.

In Canada, the integrated nature of domestic supply chains means that internal barriers to trade have a compounding effect on the raw material, manufacturing, and service sectors of the economy. Canadian firms have developed complex value chains that supply domestic and international markets with all kinds of goods and services. If the production processes that are used by a firm to turn one particular unit of input into one resulting unit of output are adversely affected, then firm-level productivity falters and total producer surplus will suffer. The free flow of capital—both physical and financial—is,

therefore, highly sensitive to internal barriers to trade. For example, the onset of the current COVID-19 pandemic exposed this sensitivity in the freight industry. Canadian carriers faced a shortage of shipping containers as different provinces mandated differing lists of essential services and suspended the delivery of all non-essential freight. This stranded goods that were deemed essential by some provinces within the provinces that had deemed the same goods as non-essential, preventing shipping containers from entering back into circulation. (Powell 2020) A minute discrepancy in provincial attitudes towards the prioritization of economic activities during an unprecedented public health emergency resulted in largely unforeseeable knock-on effects to the upstream and downstream market activities of interdependent firms and their respective production processes. Thus, it is understandable how that the firms and sectors that are more integrated with one another will suffer from internal barriers to trade to a greater extent than those firms and sectors that are less integrated with one another.

7.2 Productivity & Business Formation

According to The Conference Board of Canada, the level of productivity within an economy can be understood as an aggregation of the "thousands of decisions made by individual firms, including the type and amount of physical capital and human resources in the production process and the rate of adoption of technological change." (Darby et al. 2006, 2) A country's level of productivity is a primary economic indicator of its economic prospects and its standard of living. However, when compared against our nearest and dearest international trading partner, Canada's level of labour productivity across the entire economy relative to the U.S., as measured in GDP per worker, has been steadily declining since the late 1970s. In 2019, Canada's GDP per worker was 76 percent of that of the U.S. (Centre for the Study of Living Standards 2020) GDP per worker is a more effective measure of labour productivity than GDP per capita, because it accounts for the differences in labour force participation rates that exist between countries. The OECD has previously stated that "stronger competitive forces" in the U.S. are a primary contributor to the discrepancy in the levels of productivity that exists between our two countries. (Darby et al. 2006, 1-2) So what would it take to enable stronger competition with respect to interprovincial

trade? Canada should work to boost labour productivity by encouraging domestic businesses to achieve atypical economies of scale within a whole-of-Canada market, and by eliminating internal barriers to trade within the sectors of the Canadian economy that possess comparative advantages, in order to facilitate an increase in demand for Canadian goods and services both at home and abroad. (Léonard 2014, 5-6)

From 2001 to 2013, only Alberta, Ontario, and British Columbia exceeded the Canadian average in terms of the number of businesses that were incorporated: 41.6 percent, 29.7 percent, and 23.6 percent, respectively, compared with the Canadian average of 20.4 percent over this twelve-year period. At the other end of the 'incorporation spectrum' were the Maritime provinces. From 2001 to 2013, Nova Scotia, New Brunswick, and Prince Edward Island all experienced negative growth in the number of businesses that were incorporated in each province: -7.2 percent, -7.3 percent, and -9.6 percent, respectively. (Ratté 2016, 4) (For the purpose of providing context for a later discussion on internal trade agreements, specifically with respect to the 2009 Trade and Cooperation Agreement, Québec secured fourth last place on this list, eking into positive growth territory with a 3.1 percent increase in the number of businesses created over this twelve-year period.) The Business Development Bank of Canada (BDC) has previously observed that an increase or decrease in the number of businesses in a particular province "is directly proportional to movements related to economic activity and population." (Ratté 2016, 4) However, according to the Government of Newfoundland and Labrador (2019), each one of these aforementioned provinces—both the top three performers and the bottom three performers—experienced population growth over this twelve-year period. Between 2001 and 2013, Alberta had an increase of 922,903 people (+30.2 percent); Ontario had an increase of 1,613,247 people (+13.6 percent); British Columbia had an increase of 553,127 people (+13.6 percent); Nova Scotia had an increase of 7,940 people (+0.851 percent); New Brunswick had an increase of 8,724 people (+1.16 percent); and, Prince Edward Island had an increase of 7,429 people (+5.44 percent). (Québec had an increase of 714,424 people, which is equal to 9.66 percent of its 2001 population.)

While the Maritimes did not have the same double-digit levels of population growth as the top three business-creating provinces, they experienced population growth nonetheless. According to the BDC's theory, this leads to the notion that if changes related to population growth are not solely the result of the Maritime provinces' decrease in new businesses between 2001 and 2013, then movements related to economic activity must be. So what happened within this twelve-year period to cause a decline in economic activity in the Maritimes? And do interprovincial trade barriers play any part in this decline? While a comprehensive study of the twelve-year economic output across these three Canadian provinces falls outside of the scope of this paper, there is evidence to suggest that interprovincial trade barriers were accumulating in various sectors of the economies of Nova Scotia and New Brunswick during this time. (Beaulieu & Zaman 2019, 11) The 2009 Partnership Agreement on Regulation and the Economy (PARE) between New Brunswick and Nova Scotia left much to be desired in the way of internal trade liberalization. This narrowly focused trade agreement is hypothesized to have inadvertently deterred trade between these two provinces, as will be discussed in greater detail in a later section. On the other hand, the 2007 Trade, Investment and Labour Mobility Agreement (TILMA) between Alberta and British Columbia was much more comprehensive and was shown to have promoted positive trade flows between these two provinces. (Beaulieu & Zaman 2019, 12) While correlation does not imply causation, the relationship between interprovincial trade flows and economic activity—or lack thereof—that is laid bare by PARE and TILMA is a compelling one nonetheless.

7.3 Ease of Doing Business

Corporate registration is another facet of provincial responsibility that contributes to the problem of internal barriers to trade within Canada. According to section 92(11) of the *Constitution Act, 1867*, private, publicly-listed, and not-for-profit corporations are generally creatures of the provinces. Business registration must occur for companies to access basic legal and financial services, to pay income tax and to benefit from government programs and services, and to participate as producers of goods and services within the formal economy. Given the integral nature of corporate registration to the very existence of

businesses within an economy, it should not come as a surprise that this aspect of the business process has been identified as a bellwether of employment and productivity levels. (Doing Business Project 2014, 47) However, corporations that conduct business in more than one Canadian jurisdiction are required to register with each province or territory in which they operate. While such a requirement sounds reasonable, most provinces and territories require different information as part of the registration processes and they normally require that a physical representative of the corporation be situated within their jurisdiction. (Schwanen 2013, 3) With Canada's thirteen provinces and territories, this could mean establishing a physical presence in thirteen separate locales. As a result, Canadian corporations that operate in more than one province or territory are estimated to be cumulatively liable for upwards of $20 million per year in duplicate first-time registration costs, as well as another $20 million in duplicate annual fees. (Schwanen 2013, 7)

While the Agreement on Internal Trade (AIT)—Canada's first internal trade agreement—promised to align corporate registration and reporting via a Canada-wide system named Registrex, interprovincial cooperation stalled and this tool never materialized. (Dawson 2015, 7) Various other ad-hoc efforts have been made to align the multitude of existing corporate registration systems, such as New Brunswick and Nova Scotia's mutual recognition of each other's corporations and the federal government's Joint Online Registration System, but these initiatives have all fallen short of achieving pan-Canadian acceptance. (Schwanen & Chatur 2014, 4) Western Canada's New West Partnership Trade Agreement (NWPTA) is a multilateral extension of a bilateral accord that first existed between Alberta and British Columbia. To date, this agreement has provided the most comprehensive solution to the issue of Canada's fragmented provincial and territorial corporation registration and reporting system. While the trade principle underlying this agreement is the same as that agreed to by New Brunswick and Nova Scotia, the NWPTA goes one step further. When private, publicly-listed, or not-for-profit corporations register in Alberta, British Columbia, Manitoba, or Saskatchewan, they have the option to simultaneously register with each of these other provinces. Furthermore, a business that incorporates in one of these four

provinces is only required to file one annual report with its home jurisdiction. (NWPTA Secretariat 2016a) As a result, this system has reduced the administrative cost of running a business in Western Canada. While there is reason to believe that this system will be expanded to include the remaining provinces and territories, the ongoing absence of a pan-Canadian corporate registry continues to confer a disadvantage upon corporations operating outside of Western Canada. (Council of the Federation 2019)

Internal barriers to trade not only affect the corporate registration and reporting process, they also affect overall economic efficiency by limiting optimal resource allocation between neighbouring provinces and territories. Canadian producers are no strangers to being inhibited from achieving an optimal allocation of their goods and services over the normal course of business. One particular aspect of day-to-day business that is inhibited by internal barriers to trade is the portability of commercial insurance coverage between provinces and territories. In Canada, commercial insurance policies are widely available through both mutual insurance companies (*i.e.*, companies that are owned by policyholders) and proprietary insurance companies (*i.e.*, companies that are owned by shareholders). However, British Columbia is the only jurisdiction in Canada that also allows and recognizes captive insurers. Most simply, captive insurance allows a corporation, or group of franchisees or industry peers, to establish an insurance subsidiary, which is then retained to insure the specific business-related risks faced by the parent organization, either for tax purposes or because traditional commercial insurance policies might not be suitable for the scope and scale of the business risks in question. Captive insurers are funded by their parent organization and may subsequently choose to transfer excess business risk to a commercial reinsurer. (Marsh LLC 2020)

In 2016, the Senate Standing Committee on Banking, Trade and Commerce heard oral testimony from Colin Hansen, a former Minister of Finance and Deputy Premier for British Columbia. This committee was studying the issues pertaining to internal barriers to trade in Canada, a study which initially began in June 2006 (Order of Reference 2006-05-02) and culminated in a final report, entitled *Tear Down These Walls: Dismantling Canada's Internal Trade Barriers*, ten years later (Order of

Reference 2016-02-16). Mr. Hansen stated that if a Canadian company is not incorporated in British Columbia, then it is forced to register a captive insurer outside of Canada, "because of the inability of the British Columbia captive insurance system to be recognized by other provinces [and territories] in Canada." (Canada Senate 2016a) Canadian multinationals will often register their foreign captive insurers in Barbados or Bermuda, both of which possess competitive regulatory environments that recognize captive insurers, which ultimately serves to stymy the growth of this component of the financial services sector of the Canadian economy. (Marsh LLC 2020) As an aside, vehicle insurance is also subjected to similar inconsistencies. Insurance companies based in Ontario and New Brunswick are prohibited from competing with Crown corporations in British Columbia, Saskatchewan, Manitoba, and Québec. (Milke & St. Onge 2019, 14) Ontario is also the only province that prohibits insurance companies from engaging in discriminatory price-setting based on historical gaps in coverage. (FSCO 1997) In all other provinces and territories, an individual with a legitimate historical lapse in vehicle insurance—as a result of, say, being unable to afford a vehicle or pursuing higher education outside of their home province—can be charged a higher rate for future coverage, as such a gap in continuous coverage is translated into a higher insurance risk rating. This practice is discriminatory and, as seen in the example above, likely serves to punish low-income and young Canadians.

POLICY RECOMMENDATION NO. 2

The Canadian Council of Insurance Regulators should call on its members to recognize the captive insurance market in all Canadian jurisdictions outside of British Columbia. Furthermore, it should forbid any Canadian insurer from considering legitimate historical gaps in insurance coverage in the determination of insurance premiums in all Canadian jurisdictions outside of Ontario.

7.4 Small & Medium-sized Enterprises

In Canada, 99.8 percent of all private companies are either small or medium-sized enterprises (SMEs). (Canada ISED Small Business Branch 2019) Only one-tenth of one percent of small businesses —in other words, those that employ upwards of 99 people—will become mid-sized businesses, and out of all the mid-sized businesses in Canada, only 1.8 percent will cross the critical 500-employee threshold into the world of big business and increased competition. (Ratté 2016, 8 & 11) Therefore, in order to champion home-grown businesses, it is imperative to limit the number of obstacles that could prevent Canada's SMEs from scaling up their operations and driving a larger share of economic growth. Internal barriers to trade consistently stand in the way of Canadian SMEs from achieving their full potential. The BDC has become an authority on the obstacles that affect mid-sized Canadian businesses, which have experienced a surprising decline in their numbers over the first decade of the 21st century, as well as the common attributes of those mid-sized businesses that prove to be successful enough to join the world of big business.

According to the BDC, one attribute of mid-sized businesses that contribute to their successful growth is their domestic market presence beyond their province of origin. Sylvie Ratté (2016, 14) found that half of all mid-sized businesses with operations in at least three provinces or territories will ultimately achieve big-business status, whereas less than one-third of mid-sized businesses with operations in only a single province or territory will ultimately do so. Yet a minority of mid-sized businesses actually have a corporate presence in at least three provinces (22 percent); the majority remain in their province of origin (62 percent). Furthermore, businesses that successfully expand into new Canadian markets "tend to employ more workers, are more innovative and are more likely to export" their goods and services than those that, for one reason or another, choose not to expand into new Canadian markets—or find themselves unable to do so. (Canada Senate 2016a) Roughly 41 percent of Canadian SMEs that engage in interprovincial trade also export their goods and services abroad, whereas only 3.5 percent of SMEs that do not participate in interprovincial trade will export abroad. (Pierce 2013, 4) This

stark reality contradicts research completed by the BDC in 2016, which determined that mid-sized businesses are largely growth-oriented. The same research revealed that the single largest obstacle to business growth was not one of sector-specific economic prospects, it was one of human resources: the many challenges associated with hiring skilled labour. (Ratté 2016, 18) Even semi-skilled and unskilled labour is hard to find in Canada. (McGrath-Gaudet & Moreau 2015, 7) This human element is directly affected by the issue of labour mobility, which was previously discussed with respect to skilled trades and regulated professionals. Any improvement in the odds of locating, attracting, and retaining skilled, semi-skilled, and unskilled labour would count as a benefit for the mid-sized businesses that are looking to expand their footprints beyond their current bases of operation.

Furthermore, for the SMEs that are purely looking to engage in interprovincial trade of goods and services outside of their home jurisdictions—rather than those looking to establish a physical presence—the largest obstacles standing in the way of them doing so also come, not surprisingly, in the form of internal barriers to trade. According to the Canadian Federation of Independent Business, the differences in licensing requirements, labour legislation, and workers' compensation within Canada are "the most cited [internal trade] barriers for those [businesses] who are not currently trading with other [provincial or territorial] jurisdictions." (McGrath-Gaudet & Moreau 2015, 5) Even after SMEs overcome these initial regulatory hurdles, additional internal barriers to trade stand in the way of maintaining trading relationships with other Canadian jurisdictions. As has been previously mentioned, corporations outside of Western Canada have to contend with multiple corporate registration and reporting systems, which inevitably results in an increase in overhead and compliance costs. For many SMEs, this additional administrative burden is a very genuine obstacle that stands in the way of corporate growth. At a macroeconomic level, there is also an economic cost to the Canadian economy as a whole—the 'deadweight loss'—that results from an accumulation of businesses failing to create value and forever missing out on potential opportunities to generate economic growth.

8. HOW INTERNAL TRADE BARRIERS IMPACT CANADA'S INTERESTS

8.1 Global Competitiveness

Within the last few years, a flurry of multilateral free trade agreements has reduced, renegotiated, or altogether eliminated tariffs and non-tariff barriers between Canada and foreign countries all around the world. Solely as a result of the Comprehensive Economic and Trade Agreement (CETA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and the Canada-U.S.-Mexico Agreement, Canada possesses newly liberalized trading arrangements with an additional 39 nations around the world. (Canada Global Affairs 2020c) It is now arguably easier for the provinces and territories to trade with foreign countries than with their fellow Canadian jurisdictions. Internal barriers to trade are preventing Canadian businesses from accessing new domestic markets, from expanding beyond their current borders, and from gaining the economies of scale that are required to compete within the global marketplace. Canadian businesses are, in short, missing out on a whole-of-Canada market. (Findlay 2019) Without such opportunities for growth, the export of Canadian goods and services—both interprovincially and internationally—inevitably suffers. This stifles the number of domestic investment opportunities that exist and makes Canada an overall less attractive destination for foreign direct investment. The Canadian Chamber of Commerce consistently ranks internal barriers to trade as one of Canada's top ten barriers to global competitiveness. (Canadian Chamber of Commerce 2013; 2014; 2015; 2016) Furthermore, in the absence of global economies-of-scale, and thanks to Canada's newly liberalized international trading arrangements, Canadian businesses are at risk of operating at a disadvantage on home soil relative to the foreign multinationals that choose to setup shop within Canada. (Pittman, Dade & Findlay 2019, 2 & 19)

In today's globally interconnected markets, the supply chains that belong to multinational firms can be distributed around the world. Such global production means that certain goods will "flow across provincial and international borders as inputs and intermediate products before reaching the final consumer." (Chaundy 2016, 8) These businesses have streamlined each step in their international value

chains to deliver maximum utility to the final consumers of their products. As a result, relative to jurisdictions outside of Canada, any manner of trade impediment that increases the cost, or limits the availability, of components in the production process of goods that are destined for export will also decrease the competitiveness of Canadian businesses. Such uncompetitive performance will manifest as either a more expensive product or a smaller profit margin. (Chaundy 2016, 7-8) Whether or not Canadians see themselves as tied to the fortunes of their American brethren and sistren, the world's largest economy will never cease to be the main draw for Canada's own export-dependent economy. (Bercuson 2020, 11) Canada has no choice but to account for how the U.S. manoeuvres its cultural and economic might. The Canadian Chamber of Commerce has highlighted that the cost of doing business in Canada, compared to the U.S., is a main determinant of the competitiveness of Canadian businesses. (Greer 2018, 8) The cost of doing business is, in turn, influenced by the regulatory burden with which Canadian firms must operate. (Business Council of Canada 2019, 6) The global economy has never been more competitive and multinational firms far too often possess the ability to fly a 'flag of convenience' when deciding upon the most profitable jurisdictions for future corporate expansion. Canada will be left out of such decision-making processes if internal barriers to trade continue to unduly obstruct interconnected global markets.

8.2 Domestic Security

In the event of future armed conflict, natural disasters, or outbreaks of disease, such as with the current COVID-19 pandemic, the presence of internal barriers to trade could exacerbate the breakdown of domestic supply chains. Canada's shortage of shipping containers is only one example of how a breakdown in just-in-time supply chains might manifest. In order to insure against such perilous economic dysfunction, internal barriers to trade should be scrutinized within the key industrial sectors that protect Canada's domestic security interests. These are the areas of the economy that are essential for ensuring the security of Canadians and the proper functioning of Canadian society. These strategic areas include, but are not limited to, agriculture and agri-food, consumer staples, defence manufacturing,

including aerospace and marine procurement, telecommunications equipment, information technology systems, and the production of medical equipment and vital pharmaceuticals, such as medical ventilators and vaccines. (Brewster 2020)

Most of Canada's domestic manufacturers currently only produce individual components of the respective end products of these strategic goods and services. Other countries hold the balance of control over these supply chains, such as China and India, who are estimated to control a combined 80 percent of all active pharmaceutical ingredients worldwide. (Kolga, Shahrooz & Majumdar 2020) In this case, the federal government should repatriate or 'onshore' such critical manufacturing expertise. This is likely feasible through some blend of economic subsidies and protectionism, including long-term take-or-pay purchase agreements and targeted tariffs on comparable foreign goods and services. (Coyne 2020) The C.D. Howe Institute has also recommended that remaining gaps in the availability of critical goods need to be identified and dealt with, such as with Canada's ongoing efforts to bolster our National Emergency Strategic Stockpile of personal protective equipment and medical ventilators. (C.D. Howe Institute 2020a, 2; Tumilty 2020) Lastly, if the federal government were ever to invoke the *Emergencies Act*, in order to marshal domestic supply chains to deliver critical goods and services, such activity should be made exempt from the administrative and regulatory obstacles that stem from discrepancies between the policies and regulations of the federal, provincial, and territorial governments.

8.3 Post-Pandemic Economic Recovery

The advent of COVID-19 has made it abundantly clear that massive economic inequality continues to persist in society—whether at home in Canada or elsewhere around the world. The current pandemic has disproportionately affected the most marginalized citizens in society and it has exacerbated the socio-economic obstacles that these groups have long struggled to tolerate and overcome. Any plans for Canada's post-pandemic economy will need to ensure that future economic gains are distributed more equitably and without discrimination. (Black & Viel 2020) With that in mind, the Bank of Canada is already considering novel monetary policy measures that will actively encourage the equitable

distribution of economic gains that flow from post-pandemic economic growth. (Press 2020) The reason that future economic growth prospects are being considered in a discussion of internal barriers to trade is because the post-pandemic economy will need to be free of any hindrances that stymie economic efficiency and economic equality. Internal barriers to trade constitute such a hindrance for Canadian consumers and producers from all walks of life. Their existence deters SMEs from expanding beyond local and regional markets, and their non-salient nature deters consumers from making rational choices that maximize their personal well-being.

Furthermore, Canada's aging population and second-rate level of productivity are set to slow the rate of economic growth in Canada over the long-term. (Business Council of Canada 2019, 4) Canadian manufacturers will need to embrace widespread technological automation to overcome labour force limitations created by recurring waves of infection and the need to respect public health guidelines, such as social distancing. (Mintz 2020) As labour and capital requirements decouple from one another, governments in advanced industrialized economies may have to grapple with permanent levels of residual unemployment. (CPAC 2020) Current financial support for Canadian workers affected by COVID-19, namely the Canada Emergency Response Benefit, will likely result in a permanent expansion of employment insurance benefits for contract and part-time workers in the gig economy. (Clark 2020) Discussions around a universal basic income have also picked up steam around the world. (Cox 2020) And child-care benefits may become a widespread policy instrument to ensure that working age parents are able to maintain uninterrupted, gainful employment. (French 2020) Lastly, the federal government will need to continue to provide targeted financial support to Canadian businesses. The Canada Emergency Business Account has helped to avoid mass bankruptcies amongst Canadian SMEs, but more support will be required to give Canadian businesses the boost in confidence that is required to scale-up their operations and capture a whole-of-Canada market.

The combined economic effects of federal expenditures on the reinforcement of Canada's social safety net, as well as Canada's concurrent economic contraction, are forecasted to result in a $343 billion

deficit for the current fiscal year. This will grow the federal debt-to-GDP ratio by 18 percentage points to 49 percent. (Zimonjic 2020) Yet this debt burden is not unprecedented in Canadian history. Another four years of equivalent government deficits would increase the federal debt burden to its historical record high. (Brethour 2020) By the end of the Second World War, the Government of Canada had amassed enormous levels of debt, which were incurred to finance six long years of overseas military operations. Federal debt peaked in 1946 at 109 percent of annual GDP. (By way of comparison, the federal debt-to-GDP ratio in the years immediately following the First World War peaked at a 'modest' 55 percent.) (Di Matteo 2017, 37) The level of spending that was undertaken by the Government of Canada was unheard of at the time, but wholly necessary to fund the Allied war effort. The same is true today, in order to ensure the Canadian economy survives the COVID-19-induced economic lockdown. However, in the decades that followed WWII, Canada's enormous levels of debt shrank in comparison to the size of the economy. A multiplicity of factors was responsible for taming this debt load, including fiscal discipline and a substantial post-war economic expansion, the latter of which was fueled by serendipitous economic circumstances, such as the start of the baby boom and the establishment of a liberalized global economic order. (Brethour 2020)

To manage the level of government spending that is necessary to bridge the pre- and post-pandemic economies, Canada will have to rely on a similar strategy of fiscal discipline and economic expansion. Recent discourse amongst central banks around annual inflation targets seems to imply that controlled, inflationary expansion of nominal GDP might become another tool to pay down Canada's debt, but for now it is too early to tell. (Yakabuski 2020) While many of the aforementioned economic circumstances that existed during the mid-20th century do not exist within today's economy, the federal, provincial, and territorial governments do possess policy instruments that can be leveraged to help the economy expand. One area of focus should be internal trade within Canada. As previously discussed, Canada should work to boost labour productivity, which will facilitate an increase in demand for Canadian goods and services both at home and abroad. According to the Business Council of British

Columbia, governments of all levels can assist in the pursuit of this goal by "streamlining outdated and needlessly burdensome regulations…and scaling more Canadian-based companies." (Williams & Finlayson 2020) The Canada Infrastructure Bank should also prioritize the next generation of digital infrastructure, including universal high-speed internet access, in order to facilitate remote work and close the connectivity gap that affects rural and remote communities. While the federal government has a connectivity strategy in place to achieve such access for all Canadians by 2030, it is at risk of being beaten to the punch by the private sector within the next year. (Canada ISED 2019; SpaceX 2020) Enhanced digital infrastructure will also be important to offset losses in economic efficiency that Canada will incur as it onshores strategic manufacturing capacities in the post-pandemic world. (Black & Viel 2020; McCarten 2020) As a result of globalization, the manufacturing capacities of most advanced industrialized nations were permanently lost when they were offshored to developing countries, where labour was a significantly less expensive input in the production process.

POLICY RECOMMENDATION NO. 3

To ensure the success of Canadian businesses post-COVID-19, all levels of government should prioritize initiatives that boost economic efficiency. For example, the Canada Infrastructure Bank should partner with the private sector to upgrade Canada's digital infrastructure in less profitable domestic markets, as universal internet connectivity will be required to drive the next generation of Canadian manufacturing. Rural and remote communities, remote workers, and high technology-dependent businesses all stand to gain from next-generation digital infrastructure.

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9. A DIGEST OF INTERNAL TRADE WITHIN CANADA

9.1 Current State of Trade

Canada is a trading nation and the provinces and territories have long relied on each other to simultaneously source the goods and services that Canadians require to maintain a high standard of living and to sell the goods and services that are required to drive the growth of the economy across the country. In 1986, interprovincial trade totalled $112 billion; thirty years later, the value of internal trade within Canada had more than tripled to $366 billion. (Canada StatsCan 1998, 21; Canada StatsCan 2020) Roughly $1 billion worth of goods and services move between the provinces and territories every day, and interprovincial trade is responsible for about one-fifth of Canada's annual GDP and continues to grow at an average rate of 4.2 percent per year. (Tombe 2017; Canada ITS n.d.-a; Canada StatsCan 2016, 2) It should not come as a surprise that a majority of the provinces and territories actually source more goods and services from elsewhere within Canada than they do internationally.

In 2015, the majority of interprovincial trade—58 percent or $213 billion—took place solely within the service sector of the Canadian economy. These services included accommodation and food services, arts and entertainment, education, finance and insurance, health and social assistance, information and professional services, real estate, research and development, and transportation, amongst others. And, on average, provinces and territories sourced roughly one-sixth of their services from elsewhere within Canada. This fraction jumped to nearly one-quarter of all the services supplied in the territories. (Canada StatsCan 2018) Raw materials and manufactured products accounted for the remaining $154 billion in interprovincial trade. These goods included agricultural and forestry products, animals and fish, computers and electronics, food and beverages—both alcoholic and non-alcoholic—furniture, industrial machinery, metal ores and minerals, petroleum products and fuels, plastics and petrochemicals, textiles and clothing, and transportation equipment and motor vehicle parts, amongst others. Once again, on average, provinces and territories sourced roughly one-sixth of their goods from

elsewhere within Canada. This number climbed as high as 30 percent of all the goods consumed in Prince Edward Island. (Canada StatsCan 2018)

These statistics speak to the importance of internal trade within Canada. However, over the last thirty-odd years, interprovincial trade as a share of annual GDP has stagnated in relation to the growth of international trade, which is arguably a result of non-tariff barriers that have prevented equivalent levels of growth in interprovincial trade. (Beaulieu & Zaman 2019, 3) David Chaundy (2016, 55-76) with the Atlantic Provinces Economic Council has compiled an extensive list of specific areas of regulatory reform that would facilitate greater interprovincial trade, including policy initiatives that would ease the regulatory burden on multi-jurisdiction firms, promote increased labour mobility, and reform public sector resourcing and procurement. Additional comprehensive, full-length publications on the subject of internal barriers to trade within Canada include those authored by Beaulieu, Gaisford, and Higginson (2003) and edited by Palda (1994). A few more relevant and recent examples of internal barriers to trade will now be discussed.

9.2 Agriculture & Agri-food

Agricultural and agri-food products are another area of overlapping jurisdiction between the federal, provincial, and territorial governments. For example, meat products that are destined for interprovincial or international export must adhere to federal meat inspection regulations and must be processed in a facility that is registered with the Canadian Food Inspection Agency. If any proportion of these meat products are destined for intra-provincial markets, then their production must also adhere to the regulations of their province or territory of origin. Again, while such a regulatory requirement sounds reasonable, the devil is in the details. If a provincially-certified food manufacturer uses meat products that originate from a federally-certified abattoir, then the food manufacturer must also adhere to federal meat inspection regulations if it wishes to subsequently sell its products in a neighbouring province or territory. (Beaulieu, Gaisford & Higginson 2003, 52) Similar restrictions apply to the interprovincial sale of fresh and processed fruits and vegetables, which are subject to federal labelling and packaging standards under

the *Canadian Agricultural Products Act*. (Griffin & Plett 2019, 69) As of 2016, there were approximately 511 "federal standards of composition or identity" within Canada's agriculture and agri-food sector covering 27 different products—products that may be simultaneously regulated by the provinces and territories in ways that might differ from the federal standards. Such is the case with the grading of maple syrup and the production of yogurt in Québec, which has chosen to implement a classification system and compositional standards for these two products that are wholly unique to this jurisdiction. (Canada Senate 2016b) A more concerted effort between the federal, provincial, and territorial governments to align food safety regulations, as well as to recognize each other's regulations, would eliminate many internal barriers to trade and simplify interprovincial trade in agricultural and agri-food products.

However, the real elephant in the room is Canada's set of supply management regimes for dairy, eggs, and poultry products. Dairy products constitute the largest of these three subsectors of the agri-food industry and, so, will be used as an example to discuss the distortionary economic effects, as well as the resulting internal barriers to trade, of Canada's supply management systems. Together with the Canadian Dairy Commission, the provincial milk marketing boards set the price for dairy products across Canada based on the price of production; the Canadian Milk Supply Management Committee predetermines the level of domestic consumption and, by extension, an annual production allotment for each province and its dairy producers; and Global Affairs Canada maintains tariffs to prevent international dairy products from reaching the domestic market. (Findlay 2012, 4-5) These 'three pillars' of the dairy supply management system constitute—what is, by definition—a cartel. Price-fixing and anti-competitive behaviour elsewhere within the economy are routinely investigated and punished by Canada's Competition Bureau. The most recent high-profile example of this in the agri-food industry was the discovery of anti-competitive behaviour and price-fixing over bread. Yet dairy producers are immune to make use of such practices. While overpriced bread is thought to have cost Canadians an average of $25 per year, overpriced dairy products are estimated to cost consumers roughly twenty times this amount, or

a cumulative $2.6 billion per year, and ultimately function the same as a non-salient and regressive *ad valorem* tax. (McKenna 2017)

Aside from blatant market interventionism, internal barriers to trade exist as a result of the federal *Agricultural Products Marketing Act*, which empowers provincial marketing boards to regulate interprovincial and export trade in a slew of agricultural products, such as dairy, eggs, and poultry. (Coulibaly 2010, 2) As a result, supply management systems also affect Canadian producers. Between 2000 and 2014, emerging markets in Asia fueled a surge in global demand for dairy products and are predicted to continuing doing so well into the future. Global demand for milk increased by 30 percent over this period and global demand for butter increased by over 60 percent. While dairy exports from the U.S. increased roughly six-fold to satiate this growing level of demand, domestic dairy production within Canada has so far failed to capitalize on this opportunity. (Maguire 2014) Ironically, the same powers that enable provincial milk marketing boards to regulate pricing and trade also restrict domestic manufacturers from increasing their levels of supply for export purposes. Canada's largest dairy processor, Saputo, has had to acquire foreign manufacturing capacity as a means to participate in the growing international dairy market. (AGCanada 2015) By relaxing existing regulations concerning the export trade in dairy products, the federal government can champion Canadian dairy manufacturers and side-step political repercussions associated with dismantling the existing dairy supply management system. After all, dairy products that are destined for international markets would not skew domestic consumption forecasts or affect domestic price-fixing. (Dawson 2015, 12) This approach will also benefit Canada's agri-food sector as a whole; increasing the volume of high-value agricultural exports will increase sectoral innovation and productivity. (Black & Griffin 2020) Moreover, in light of Australia's experience with deregulation, a full dismantling of Canada's supply management regimes is technically achievable, if it weren't so politically unpalatable. Simply put, over a period of eight years, adjustment assistance was paid to Australian dairy producers to offset financial losses associated with a transition away from supply management. This

assistance was funded by an ingenious levy on consumption, which avoided the need to bailout the dairy industry. (Findlay 2012, 17)

POLICY RECOMMENDATION NO. 4

The Minister of Agriculture and Agri-food should amend the *Canadian Dairy Commission Act's* Dairy Products Marketing Regulations, as well as the relevant regulations pursuant to the *Agricultural Products Marketing Act*, so as to return authority over the export trade in dairy products to the federal government and to enable increased domestic dairy production solely for export purposes. This would spur innovation and productivity in Canada's agricultural sector, which is highly interconnected on a domestic basis, and result in amplified benefits for Canadian consumers and producers alike.

9.3 Alcoholic Beverages

In 2016, Frédéric Seppey, Chief Agriculture Negotiator for Agriculture and Agri-Food Canada, testified before the Senate of Canada's Standing Committee on Banking, Trade and Commerce. Mr. Seppey noted that "most of the levers to further liberalize and facilitate internal trade belong to [the] provinces and territories. In addition, the federal government does not maintain as many regulatory measures that could affect internal trade as [do] the provinces and territories." (Canada Senate 2016b) An example that was provided to the committee involved the federal *Importation of Intoxicating Liquors Act*. Following a sustained grassroots campaign—aptly named 'Free My Grapes'—organized by the non-profit Alliance of Canadian Wine Consumers, Private Member's Bill C-311 was introduced into the House of Commons in October 2011, and received royal assent in June 2012, in order to amend the prohibition-era *Importation of Intoxicating Liquors Act* by allowing interprovincial trade in wine for personal consumption. (Tchernina 2012) The *Importation of Intoxicating Liquors Act* was further amended in 2014 to include beer and spirits, and again in 2019 to remove a requirement that direct-to-consumer imports be consigned through provincial liquor boards. (Morden 2018; Canadian Press 2019) To understand the added cost to Canadian consumers of purchasing alcoholic beverages through provincial liquor boards,

consider that the Liquor Control Board of Ontario imposes mark-ups of up to 66 percent on wholesale liquor pricing. (Tkachuk & Day 2016, 32)

Yet only British Columbia, Manitoba, and Nova Scotia have begun to pass legislation to align provincial regulations governing interprovincial trade in alcohol with federal law, albeit only by allowing direct-to-consumer shipments of wine, but not of beer, cider, or spirits; Saskatchewan allows direct-to-consumer shipments of wine and spirits, but only of those that are produced in British Columbia. (Waters 2020; Beer Canada 2015, 8) Similar consignment requirements for direct-to-consumer alcohol sales in Ontario were set to expire on January 1, 2020, but have recently been extended until Canada Day 2021. (Ontario 2019; 2020) The majority of provinces still rely on provisions within the *Importation of Intoxicating Liquors Act* to shield their breweries, distilleries, and wineries from interprovincial competition. (Brodie 2019, 6) Unfortunately, such a parochial policy stance has had the unintended consequence of driving capital investment into the U.S. instead of into neighbouring provincial jurisdictions. (Tkachuk & Day 2016, 32) Mr. Seppey conceded that alcohol is "a very significant source of revenue" and that "to make progress [on the elimination of internal barriers to trade,] you need to get… each government around the same table to create the dynamics to encourage change." (Canada Senate 2016b) Any concerns regarding foregone revenue would likely require discussions with the federal government around so-called adjustment assistance—payments routinely made to special interest groups that are adversely affected by trade liberalization—whereby regulatory reconciliation that is undertaken in the name of greater national unity would be underwritten with federal funds. (Pittman, Dade & Findlay 2019, 14-15) Alternatively, the federal government could withhold conditional transfers from provinces that refuse to recognize federal actions undertaken in support of internal trade liberalization. (Tkachuk & Day 2016, 42)

9.4 Internal Trade Barriers Index

Seeing as internal barriers to trade generally arise as a result of regulatory discrepancies between federal, provincial, and territorial jurisdictions, their existence is widespread, yet it is also obscure. These

regulatory discrepancies remain hidden from public view until someone goes looking for them or encounters them, and they are constantly being created and rescinded. The last comprehensive study of the number of internal barriers to trade that exist in Canada was completed almost thirty years ago. In 1992, Smith Gunther Associates Ltd. compiled a report for Industry, Science and Technology Canada that consisted of "thousands of pages cataloguing [these] barriers and describing their effects" on interprovincial trade. (Palda 1994, xii) Prior to this was another study completed in 1983 by Trebilcock, Whalley, Rogerson, and Ness, who produced an inventory of internal barriers to trade that focused on provincial policies in the years preceding free trade negotiations between Canada and the U.S. (Whalley 2007, 1) There is no evidence to suggest that either of these two reports were kept as living documents, so it is likely that they are both wildly out of date.

Thus, in December 2014, the federal government formally announced that Industry Canada had awarded a $1 million contract to Ernst & Young LLP to fund the development of a comprehensive catalogue of internal barriers to trade within Canada. (Canada PSPC 2014b) This special project was known as the Internal Trade Barriers Index and it would "provide a clear understanding of areas where governments, business and organizations should focus reforms and policy efforts to make it easier for goods to flow across Canada." (Canada IC 2014c) According to the Terms of Reference within the original Request for Proposal, the Internal Trade Barriers Index was to be modelled on the OECD's Services Trade Restrictiveness Index, which was launched in 2014 to provide publicly available information on the regulations that affect trade across 22 service sectors in 46 countries around the world. (Canada PSPC 2014a; OECD 2020) This Services Trade Restrictiveness Index is an unprecedented trove of information that is updated annually for the benefit of businesses, policymakers, researchers, and trade negotiators around the world. The Government of Canada intended to mimic the OECD's success and implement a similar tracking tool at the federal, provincial, and territorial levels, which in theory could also be used to gauge the success of regulatory reconciliation initiatives within Canada over time.

Despite the completion of this special project by the end of 2016, the Internal Trade Barriers Index, and its associated final report entitled *The State of Internal Trade Barriers in Canada*, were never publicly released by the federal government. (Canada PSPC 2014a) Instead of becoming an unprecedented trove of information on internal barriers to trade within Canada, Ernst & Young's deliverables seem to be sitting on a shelf in Ottawa. By August 2018, the perceived loss of value resulting from this inaction was so great that Alain Rayes, then Shadow Minister for Intergovernmental Affairs, Cathy McLeod, then Shadow Minister for Indigenous and Northern Affairs, and John Nater, then Shadow Secretary for Interprovincial Trade and the Sharing Economy, collectively wrote to the Honourable Dominic Leblanc, then Minister of Intergovernmental Affairs and Northern Affairs and Internal Trade. These three shadow cabinet members implored Mr. Leblanc to "bring more transparency to this file" by reversing the federal government's prior refusal to freely share this information with all Canadians. (Rayes, McLeod & Nater 2018) A coalition of Canada's eight largest Chambers of Commerce also subsequently called on the federal government to raise the public profile of regulations that affect interprovincial trade. (Canadian Global Cities Council 2019, 6)

While the former Shadow Secretary for Interprovincial Trade and the Sharing Economy was able to discover that the data collected by Ernst & Young's Internal Trade Barriers Index is being used to inform the annual workplans of the pan-Canadian Regulatory Reconciliation and Cooperation Table (RCT), there has never been an official government announcement regarding the existence of such a data-sharing agreement. (Nater 2018) If this end use is accurate, it is being shrouded in secrecy and hidden from public scrutiny, much like the progress of the RCT's technical working groups themselves. (Rayes, McLeod & Nater 2018) In order for Canadian businesses, policymakers, researchers, and trade negotiators to effectively tackle interprovincial trade barriers, the RCT should be fully transparent about the methods that it is using to identify and quantify internal barriers to trade—including data sources such as Ernst & Young's Internal Trade Barriers Index and the governmental originators of the barriers that are being submitted to the RCT for reconciliation—and it should make this information publicly available.

(The RCT's reconciliation process and annual workplans will be discussed in more detail in subsequent sections.)

POLICY RECOMMENDATION NO. 5

The Regulatory Reconciliation and Cooperation Table should publish a list of known regulations that affect internal trade within Canada prior to their identification in its annual workplans. This includes the originating entity of each non-tariff trade barrier—whether this is a submission by a governmental department or organization, or Industry Canada's Internal Trade Barriers Index. This would allow Canadian businesses, policymakers, researchers, and trade negotiators the opportunity to independently assess these trade barriers, prioritize their advocacy and work efforts accordingly, and plan future commercial operations around upcoming efforts to liberalize internal trade.

10. INTERNAL TRADE AGREEMENTS WITHIN CANADA

10.1 Trade Agreements 101

A trade agreement is a mutually agreeable economic treaty that allows governments to formally establish trade relationships with unrelated governmental or organizational entities. These agreements may take the form of, amongst others, foreign investment promotion and protection agreements, international free trade agreements, or mutual recognition agreements, and they may be bilateral, plurilateral, or multilateral in scope. The explicit purpose of international free trade agreements are to eliminate tariffs and non-tariff measures between countries, in order to facilitate the enhanced efficiency of trade in goods and services. By their very nature, international free trade agreements expand the size of market economies and promote competition on a global scale. (BDC n.d.) Trade negotiations often involve two-level game theory, whereby trade negotiators must reconcile domestic politics and the coalitions that represent special interest groups with the positions of governmental or organizational entities sitting on the opposing side of the bargaining table. Trade negotiations tend to succeed whenever there is an overlap of benefits that is deemed to be acceptable by each party involved in the negotiations. (Rioux 2019) The premise that parties enter into a negotiation in good faith, despite their competing economic priorities and sensitivities, is fundamental to understanding the outcome of trade agreements. Thus, successful negotiations may also create intrinsic value above and beyond any identifiable increases in trade and investment, including by setting the stage for future rounds of trade negotiations. (Alberta International and Intergovernmental Relations 2014, 17)

Similar to the role that free trade agreements play between nations at the international level, internal trade agreements are proven to reduce the prevalence of internal barriers to trade at the subnational level. Alvarez, Krznar, and Tombe (2019, 15-16) have shown that the growth in levels of interprovincial trade following the implementation of internal trade agreements is a function of the corresponding reduction in internal barriers to trade, rather than extraneous pockets of economic growth or greater consumer demand concentrated within jurisdictions that are external to the trade agreement in

question. A primary driver of this internal trade growth is the realignment of domestic trade flows towards paths of lesser trade resistance. Beaulieu and Zaman (2019, 9) have shown that this realignment is a result of what are known as 'lagged' and 'anticipatory' trade effects, whereby internal barriers to trade slowly fall over time and businesses are able to anticipate policy and regulatory changes and readjust their commercial operations accordingly. Lagged effects can sometimes persist for decades. On average, regional trade agreements will result in maximum positive trade affects roughly 18 years after entering into force. (Beaulieu & Zaman 2019, 11) A number of past and present examples of internal trade agreements within Canada will now be explored.

10.2 Agreement on Internal Trade

On July 1, 1995, a year-and-a-half after the North American Free Trade Agreement (NAFTA) entered into force, the federal, provincial, and territorial governments—save for Nunavut, which only ever maintained observer status—joined together to enact the pan-Canadian AIT. The AIT was the first ever wholehearted political attempt at eliminating non-tariff "barriers to trade, investment and mobility within Canada." (Canada IC 2011) However, this sudden revolution in Canada's approach to internal free trade was in many ways a direct result of NAFTA, as the prospect of foreign competitors from the U.S. and Mexico being given a home market advantage over domestic businesses was a highly sensitive issue at the time. (Dawson 2015, 2) The 1985 Royal Commission on the Economic Union and Development Prospects for Canada, colloquially known as the Macdonald Commission, had actually recommended internal trade liberalization, but this recommendation was largely forgotten as a greater importance was placed on the further alignment of the Canadian economy with that of the U.S. through free trade. (Kukucha 2015, 198) This theme of internal trade liberalization taking place on the back of international trade liberalization is one that we will find repeats itself in Canadian history.

The AIT originally covered ten sectors of the Canadian economy—procurement, investment, labour mobility, consumer-related measures and standards, agricultural and food goods, alcoholic beverages, natural resources processing, communications, transportation, and environmental protection—

and accompanied the establishment of an Internal Trade Secretariat (ITS) that would support the implementation and operation of the AIT under the direction of the Committee on Internal Trade (CIT). (Canada IC 2011) At the time, the addition of agricultural and food goods to the scope of this internal trade agreement was considered remarkable. These products are derived from an area of shared jurisdiction between the federal, provincial, and territorial governments, but their production and trade are highly coveted and often heavily protected during trade negotiations. This was evident by the agreed upon right of all levels of government to preserve and protect their supply management systems and agricultural marketing boards. (Kukucha 2015, 212) As signatories to the AIT, the federal, provincial, and territorial governments all introduced legislation in accordance with the agreement to ensure that existing statutes would not constitute internal barriers to trade. For example, in Alberta, this legislation took the form of the *Agreement on Internal Trade Statutes Amendment Act, 1995*. (Alberta 1995)

However, the AIT did not result in material improvements to the status quo. While it did achieve success in a few areas, such as improved labour mobility for certain regulated professionals and enhanced transparency in government procurement—the latter of which was mainly accomplished by forbidding local bias—it also suffered from an extremely limited economic scope, as a result of its so-called 'bottom-up' or 'positive list' approach, as well as inadequate dispute resolution mechanisms. (Canada IC 2014b, 1; Alvarez, Krznar & Tombe 2019, 5) The AIT was also not judicially unenforceable; instead, it was framed as a "general set of principles…to encourage compliance and foster collegiality [between the provinces and territories] while avoiding recourse to the courts." (Hinarejos 2012, 550; Macmillan 2013, 14) Additionally, the AIT included no institutional mechanism for enabling regular internal trade policy reviews, which left Canadians in the dark on whether or not the provinces and territories were maintaining overall compliance with the agreement. (Whalley 2009, 320) It was only in 2009 that the Tenth Protocol of Amendment introduced monetary penalties into the dispute resolution process for the first time, specifically in instances of government-to-government disputes. Monetary penalties for disputes between governments and private individuals, including businesses and trade unions, were only

included in the Fourteenth Protocol of Amendment, which entered into force in 2015—a staggering twenty years after the AIT was first created. (Canada Senate 2012) Until this time, non-compliance went unpunished and largely relied on public pressure to induce non-conforming jurisdictions into compliance. (Whalley 2009, 320)

10.3 The Western Blocs: TILMA & NWPTA

By the mid-2000s it was becoming apparent that the AIT was not producing results as intended. A continuing proliferation of differences in standards and regulations across the country were hampering its effectiveness. Examples of this ranged from the packaging requirements for butter to the transportation regulations for hay bales. (Crowley, Knox & Robson 2010, 9) In 2007, liberal-minded premiers in Alberta and British Columbia agreed to reconcile their differences through an all-encompassing trade agreement known as TILMA. (TILMA Secretariat 2020) TILMA was built on top of a number of bilateral memoranda of understanding that already existed between these two provinces, but which did not yet reside under a common free trade framework. (Whalley 2009, 321) This trade agreement made use of both mutual recognition and regulatory harmonization to address outstanding discrepancies and misalignment in policies and regulations related to internal trade, capital investment, and bilateral labour mobility. TILMA also included monetary penalties for non-compliance with the dispute resolution process, which ironically served as inspiration for the AIT's Tenth Protocol of Amendment. (Knox & Karabegović 2009a, 20; 2009b, 21) As TILMA was being finalized, a study of its economic potential for British Columbia indicated that it could create upwards of 78,000 jobs and add $4.8 billion to annual GDP. (Macmillan & Grady 2007a, 15)

By 2010, having seen the realized benefits this trade agreement, Saskatchewan decided that it no longer wanted to sit on the sidelines. Separate economic analysis had indicated that Saskatchewan stood to gain about 4,400 jobs and $291 million in annual GDP if it chose to participate in TILMA. (Darby 2006, 44) Thus, the Government of Saskatchewan entered into agreement with Alberta and British Columbia to formally cooperate on internal trade, and the NWPTA was born. (NWPTA Secretariat

2016b) The NWPTA was billed as a "coalition of the willing" and was intended to further accelerate regional trade liberalization "through measures that could not be agreed upon in the larger, national internal trade debates." (Pittman, Dade & Findlay 2019, 26) For instance, any and all procurement that was to be undertaken by Crown corporations would be subject to the rules of this new trade agreement, whereas this stipulation did not previously apply under the AIT. (Alberta International and Intergovernmental Relations 2014, 11) With respect to labour mobility and capital investment, the number of regulated professionals covered by this multilateral trade agreement far exceeded those covered under the AIT and any corporate subsidies that served to adversely affect third-parties, or materially distort capital investment decisions, were expressly prohibited. (Kukucha 2015, 204 & 209) The success of such regional efforts to liberalize internal trade has been attributed to the Goldilocks Principle—in other words, regions are not too big and they are not too small, they are just the right size to get along. (Roach 2009, 11)

Seven years later, Manitoba decided that, it too, no longer wanted to be left out of this Western Canadian free trade zone. Manitoba's subsequent entry into the NWPTA cemented the largest internal trade bloc in Canada—one with a combined annual GDP of roughly $720 billion and a population approaching 12 million people—and provided the entire country with a step toward the ultimate goal of a single market. (Alberta 2020) In fact, between 1982 and 2017, increasing levels of internal trade within Canada have primarily been a result of the interprovincial trade flows between the four provinces that now constitute this Western Canadian free trade zone; the NWPTA is sure to accelerate this historical trend. (Alvarez, Krznar & Tombe 2019, 6). The success of the NWPTA has even been noticed by other Canadian provinces, as there has been chatter that elements of the Progressive Conservative Party of Ontario have supported Ontario's entry into the NWPTA, given its promise of boosting Ontario's annual GDP by approximately $1 billion per year. (Coyne 2014; Tombe 2019b) While a further expansion of this trade agreement would arguably necessitate a new acronym, its newfound economic might would be absolutely undeniable: a combined annual GDP well over $1.5 trillion—equivalent to roughly 70 percent

of Canada's annual GDP—representing roughly 70 percent of Canada's total population. (Ontario Ministry of Finance 2020)

10.4 The Eastern Blocs: PARE & TCA

Despite the success of certain internal trade agreements, certain other internal trade agreements have actually been found to deter trade growth. This phenomenon can occur when political pressures originating from special interest groups that are adversely affected by trade liberalization coerce federal, provincial, and territorial governments into administering countervailing adjustment assistance. (Beaulieu & Zaman 2019, 11) However, such counteracting effects are generally less permanent than the trade-reducing effects that stem from structural limitations inherent within the architecture of a trade agreement itself. Both the 2009 PARE and the 2009 Trade and Cooperation Agreement (TCA) were primarily positive-list, sector-specific trade agreements that did not extend to all of the goods and services produced and consumed in New Brunswick and Nova Scotia or Ontario and Québec, respectively. (McLean 2013, 24-25) Instead, PARE ended up harmonizing policies and regulations primarily within the fishing industry and facilitating labour mobility for only three skilled and semi-skilled professions; and TCA promised, amongst other things, to facilitate joint economic cooperation over transportation infrastructure initiatives in the Ontario-Québec region and to harmonize sanitary and phytosanitary measures in areas related to food safety. (Beaulieu & Zaman 2019, 5 & 11; Kukucha 2015, 202 & 213)

The failure of these two trade agreements to encompass a majority of the economic activity within their respective jurisdictions contributed to their lacklustre performance. Not only did these two trade agreements fall short of their full potential, they both had a significant negative impact on interprovincial trade flows between their respective provinces. By 2012, three years after these two trade agreements entered into force, PARE was responsible for a 41 percent reduction in trade flows between New Brunswick and Nova Scotia, whereas TCA was responsible for a 45 percent reduction in trade flows between Ontario and Québec. (Beaulieu & Zaman 2019, 10) By relying on data from the BDC that describes the number of businesses that were incorporated between 2001 and 2013, a relationship

between interprovincial trade flows and economic activity within New Brunswick and Nova Scotia was previously ascertained. This can easily be extended to include Québec, given the poor performance of TCA and this province's weak levels of business creation over this same twelve-year period. Again, this relationship is admittedly speculative, yet compelling. Ontario was also a party to TCA and lost roughly 300,000 manufacturing jobs over the ten-year-period ending in 2013, but still exceeded the Canadian average in terms of the number of businesses that were incorporated between 2001 and 2013. (Ferguson 2013) Further research beyond the scope of this paper would be required to determine if this statistical relationship is indeed causal.

10.5 Canadian Free Trade Agreement

By the summer of 2014, aware of the continuing encumbrances that internal barriers to trade were creating for Canadian consumers and producers, the federal government set out to establish a framework for renegotiating Canada's internal free trade agreement. At the time the AIT took effect, Canada possessed free trade agreements with only two countries—the U.S. and Mexico via through NAFTA. Various foreign investment promotion and protection agreements also existed with Argentina, Hungary, Poland, and Russia, but Canada was a relative newcomer to the world of bilateral and plurilateral free trade agreements. (Canada Global Affairs 2020c) Twenty years later, much had changed. Since the early 1990s, international trade liberalization and increased foreign demand for Canadian goods had created new avenues of growth for Canadian businesses, and international exports became a major driver of economic growth. (Canada StatsCan 2000, 11) Industry Canada was acutely aware of the shortcomings and faltering efficiency of the AIT, including how this outdated internal trade agreement could potentially hinder Canadian businesses when faced with ever greater international competition, given that Canada has trade agreements either in place or nearing completion with 43 countries around the world. (Canada IC 2014a)

In *One Canada, One National Economy: Modernizing Internal Trade in Canada*, Industry Canada proposed two methods for renegotiating the AIT. One approach proposed a complete redesign of

the agreement based on a modern international free trade framework, while the other approach proposed targeted reforms of only "key elements" of the agreement. (Canada IC 2014b, 13) Both methods were designed to bring Canada's internal free trade agreement in line with its international trade obligations. The most stringent set of international trade obligations at the time of this renegotiation stemmed from the recently completed CETA negotiations, which were to provide the European Union (E.U.) with sub-federal market access to each of the provinces and territories. (Canada IC 2014b, 8) Without decisive action by the provincial, territorial, or federal governments, CETA would have given "European firms… more freedom to compete for provincial contracts than Canadian ones." (Economist 2017) The treacherous prospect of foreign competitors being given a market advantage over domestic businesses had once again nearly come to pass. So, given Industry Canada's proposal, it would be up to the CIT to decide which approach to pursue. Whichever method would be chosen, federal funds had been allocated for the creation of an Internal Trade Promotion Office that would support the renegotiation efforts. (Canada 2015)

Ultimately, the AIT underwent a complete redesign and, in April 2017, a new internal free trade agreement emerged: the Canadian Free Trade Agreement (CFTA). This pan-Canadian accord was entered into by all ten provinces, all three territories, and the Government of Canada, with a stated intent:

> …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. (Canada ITS 2020, 2)

Mindful of the rather limited reach of the AIT, the negotiators of the CFTA included some important concepts and provisions that rewrote Canada's internal trade framework. These approaches were not new innovations in the world of trade policy, but were important steps to take by governments that claimed to be committed to the 'twin principles' of non-discrimination and reciprocity, and they have fundamentally restructured the way in which both public and private actors in Canada can engage in interprovincial trade and commerce. At the time of the agreement's unveiling, government officials estimated that the CFTA would contribute approximately $25 billion per year to the Canadian economy. (Jones 2017)

Unlike the AIT, the CFTA made use of a 'top-down' or 'negative list' approach to determine the scope and scale of economic activities that would be subjected to the provisions within this accord. This means that free trade rules automatically apply unless a particular good or service is explicitly listed as being exempt—in other words, their explicit listing negates such goods and services from inclusion in the accord. The negative list approach also means that future goods and services created from technological advancement and innovation within Canadian society will automatically be liberalized. (Dawson 2015, 3) Internal trade within Canada will incrementally 'ratchet-up' as products and services are invented or redirected in new and innovative ways. As previously mentioned, this approach is not ground-breaking. The negative list approach underpins the most-favoured-nation principle of non-discrimination included within Article 1 of the General Agreement on Tariffs and Trade, predecessor to—and basis for—the World Trade Organization (WTO), the original iteration of which provisionally entered into force on January 1, 1948. (WTO n.d.) But while this approach may seem wide-ranging, protectionist instincts at all levels of government still led to 125 pages of specific, negotiated exceptions. These range from residency requirements for the "taking of bullfrogs" to a minimum "Ontario grape content" in blended wines, to the federal, provincial, and territorial governments all reserving "the right to adopt or maintain any measure limiting market access" within their spheres of influence. (Canada ITS 2020, 205-209 & 277)

The CFTA also created mechanisms to reconcile pre-existing regulatory differences between jurisdictions and to level stiffer penalties against jurisdictions that violate its principles—two approaches that are, again, not overly pioneering, but which were sorely needed to modernize Canada's internal trade framework. With respect to the resolution of pre-existing differences, it is the responsibility of the RCT to find ways to dismantle pre-existing internal barriers to trade. Membership in the RCT is composed of trade representatives from each level of government and the committee as a whole is headed by a Chair and Vice-Chair—positions which rotate annually, much like the CIT, which is chaired by the federal government or one of the provinces and territories, but no longer done so by both; a weakness of the current CIT, which has created discontinuity in this committee's level of progress. (Canada ITS n.d.-d;

Magnifico 2014, 22) With respect to administrative penalties, Chapter 10 of the CFTA allows for a Compliance Panel of the ITS to issue monetary penalties against any government that enacts regulations which are found to frustrate the intent and purpose of the free trade rules contained within this accord. (Canada ITS n.d.-b) Unlike the AIT, monetary penalties for non-compliance also became judicially enforceable, which brought the CFTA's dispute mechanism in line with international norms. (Schwanen 2017)

11. OPPORTUNITIES FOR GREATER REGULATORY RECONCILIATION

11.1 Mutual Recognition

Despite the fanfare surrounding the CFTA, internal barriers to trade within Canada continue to prosper. To make any lasting progress on this issue, Canada's internal trade policies will require continuous improvement. In a federation like Canada, which possesses a constitutional distribution of legislative powers, improvements upon the status quo must be implemented in accordance with the principle of cooperative federalism. This principle has been actively prescribed by Canada's top court, most notably in 2011, when the SCC ruled in response to a reference question posed by the Government of Canada on the constitutionality of a federally-instituted national securities regulator. The SCC endorsed a "view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation." (*Reference re Securities Act* 2011, §57) Yet cooperative federalism is time-consuming and does not guarantee that all of the provinces and territories will reach a consensus; it should underpin the methodological framework for reaching agreements, but not displace specific trade strategies. Canadians should take a lesson from one of the most successful single markets in history. Mutual recognition would permit each province and territory to automatically recognize the regulatory requirements of all others, in lieu of the recertification of goods and services by each jurisdiction.

The principle of mutual recognition was first enshrined in the Treaty of Rome, and then the ensuing Maastricht Treaty that established the E.U., and it has since been adopted by the Australians—within their own country, as well as with New Zealand—and provided the basis for TILMA, the NWPTA, and CETA between Canada and the E.U. Mutual recognition is founded upon reciprocal non-discrimination and it obliges participating jurisdictions to automatically recognize each other's goods, services, capital, and labour, despite any technical specifications or quality differences that may exist. (Macmillan 2013, 5) By its very nature, mutual recognition removes the need to harmonize regulations between participating jurisdictions. (McCormack 2016, 2) Mutual recognition is also an effective tool for dismantling internal barriers to trade where multiple jurisdictions share the same policy objectives, as

well as a desire to align economic interests, but where independent legislative authority has resulted in a plethora of duplicative standards. And mutual recognition allows for the continuous evolution of regulatory regimes without resulting in a 'race to the bottom' between provinces and territories that may be competing for the same pools of capital or labour. (Canada Senate 2016b)

According to cooperative federalism, each of the provinces and territories is responsible for fostering an ecosystem of cooperation to both defend local interests and ensure the prosperity of all Canadians. While Article 5 of the NWPTA stipulates that all of the parties to this agreement must adhere to the principle of mutual recognition regarding "trade, investment or labour mobility," the CFTA only suggests that this principle be considered as a means to reconcile internal barriers to trade during the formal dispute resolution process. (NWPTA Secretariat 2019, 3; Canada ITS n.d.-c) Thus, the provinces and territories should make use of their involvement with the CIT to advocate for greater inclusion of mutual recognition within the CFTA, in order to incorporate this principle in all matters of internal trade —not just dispute resolution. The CFTA has ushered Canada to the threshold of the economic union first proposed by the Fathers of Confederation. Certain provinces in Western Canada are tantalizingly close to recognizing a true single market for their goods, services, capital, and labour. The remaining provinces should muster the political willpower and join this cause. Canadians should never forget that the division of powers that extends from the Constitution of Canada was never intended to create internal frontiers. Mutual recognition is one trade strategy that can be used to remind Canadians of this.

11.2 Regulatory Harmonization

Regulatory harmonization initiatives would involve a plurality of provinces and territories agreeing to a common set of standards amongst themselves, but it would also allow provinces and territories to retain regulatory authority over their own jurisdictions. Provinces and territories could choose to either adopt a standard that already exists amongst themselves, or negotiate a new shared standard that would require adoption by each jurisdiction. Furthermore, harmonization could also extend beyond regulatory standards to cover regional commonalities, such as tourism marketing, domestic and

international trade missions, post-secondary school application processes and summer student programs, provincial payroll rebates, and pension plan investments. (Chaundy 2016, 40) For example, the Common Ground Alliances of British Columbia, Alberta, Saskatchewan, and Manitoba have negotiated such a new shared standard in the area of One-Call services. In 2016, these partners established a Business Rule Alignment Group that worked to align provincial best practices from each of these four jurisdictions, so that one common call centre and online ticketing system could be employed for locating buried utility lines across Western Canada. This regulatory harmonization initiative allows for the sharing of advertising and operational costs, and has resulted in a general increase in the accuracy of all utility locates. (Before You Dig Partners 2019)

Similarly, in 2015, the Maritime provinces established a joint Office of Regulatory Affairs and Service Effectiveness, in order to navigate the harmonization of provincial regulations; Newfoundland and Labrador joined this effort the following year. The mandate of this joint office is to increase regional economic competitiveness through the reduction of the regulatory burden that is "created by unnecessary regulatory differences between the [Atlantic] provinces and by eliminating barriers to the free flow of goods and services between them." (Government of Nova Scotia 2015) While this particular mandate is not atypical when it comes to regulatory harmonization initiatives—and already underpins the work of the NWPTA's Ministerial Committee, the CFTA's RCT, and the TCA's Joint Committee on Regulatory Cooperation—this joint office goes one step further. In addition to finding opportunities for regulatory harmonization and reform, each Atlantic province that participates in the Office of Regulatory Affairs and Service Effectiveness is required to abide by a *Charter of Governing Principles for Regulation*. This charter ensures that the implementation of new policies and regulations, and the harmonization of existing policy and regulations, impose the smallest possible regulatory burden upon Atlantic Canada, and it requires annual reporting on any progress made towards meeting the mandate of this regulatory harmonization initiative. (Government of Nova Scotia 2015) Atlantic Canada must have taken a lesson

from Australia in this regard, as the purpose of this charter is similar in nature to the Australian Productivity Commission.

Meanwhile, the RCT was established under the CFTA to encourage the mutual recognition or regulatory harmonization of conflicting regulations. While the RCT makes honest attempts at proactively dismantling non-tariff trade barriers, its process is cumbersome and it possesses a number of limitations that prevent the effective and widespread reconciliation of conflicting regulations. (Canada ITS n.d.-c) Firstly, only a government entity (federal, provincial, or territorial) may submit a non-tariff trade barrier to the RCT for consideration. Private actors, be they citizens or corporations, are excluded from reporting internal barriers to trade to the RCT. Secondly, not every signatory to the CFTA needs to participate in the reconciliation process. If a particular province or territory determines that it is within their best interest to forego mutual recognition or the regulatory harmonization of a particular internal barrier to trade, then they are free to opt out of the reconciliation process, including from any regulatory commitments contained within the final reconciliation agreement. Finally, the reconciliation process is steered by technical working groups composed of public sector experts that possess the relevant experience necessary to understand and resolve the internal barrier to trade in question. While effective in theory, public sector resourcing limitations—such as those occurring as a result of the current COVID-19 pandemic—restrict the number of internal barriers to trade that can be reconciled at any given time. Lastly, for a reconciliation agreement to be legally binding upon the participating provinces and territories, it needs to not only be endorsed by each jurisdiction, but to also be ratified by each level of government. This leaves reconciliation agreements open to political interference, depending on the whims of the government in power.

In practice, the combination of these limitations restricts progress on mutual recognition or regulatory harmonization to a snail's pace. According to the RCT's 2019-2020 Workplan, of the 23 regulatory measures that were submitted for consideration in the first full year of operation, only five reconciliation agreements, covering eight regulatory measures, were completed and endorsed; only four

of these reconciliation agreements have been ratified. This resulted in 16 regulatory measures being rolled into the following year's workplan. (Only half of the *First Aid Kits & Workplace First Aid Training* measure was dealt with in 2018-2019; workplace training was rolled into the following year.) This is in addition to five new regulatory measures that were submitted for consideration in 2019-2020, which leaves a total of 29 regulatory measures currently before the RCT. (Canada ITS RCT 2019, 1) The number of regulatory measures will likely continue to increase each year, and addressing internal barriers to trade one at a time is, so far, not an efficient means of resolving interprovincial trade barriers. Either a different approach is required, or additional government resources need to be committed to the RCT, in order for this initiative to meaningfully and successfully meet its stated mandate of reducing non-tariff "barriers to trade, investment, and labour mobility within Canada." (Canada ITS RCT 2020, 3)

While outside of the scope of this paper, it is worthwhile to mention that similar regulatory harmonization initiatives also exist at the international level. For example, the Canada-U.S. Regulatory Cooperation Council was launched in February 2011 by the governments of Prime Minister Stephen Harper and President Barack Obama. In this case, regulatory harmonization is being pursued in the areas of healthcare products, consumer and food safety, and environmental protection. (U.S. Government Department of Commerce n.d.) This regulatory cooperation initiative is not only being undertaken on a go-forward basis, but also includes an agreement to undertake a "look-back" at the policies and regulations that are already in place at the federal level of these two countries, in order to discard obsolete regulations that are inadvertently increasing the cost of trade between Canada and the U.S. (Robertson 2013, 40) The Regulatory Cooperation Council has, so far, made progress on the harmonization of transportation of dangerous goods regulations—a 'look-back' achievement—as well as on cross-border air emission standards for next-generation locomotives—a 'go-forward' achievement. (Canada TSB Secretariat 2019b) Similarly, the Canada-E.U. Regulatory Cooperation Forum was created to "enhance the efficacy of regulations by seeking to reduce duplication and misalignment" between these newly

minted free trade partners; this agreement on regulatory cooperation is further enshrined in Chapter 21 of CETA, which provisionally entered into force in September 2017. (Canada TSB Secretariat 2020)

POLICY RECOMMENDATION NO. 6

The provincial trade blocs of Western Canada and the provinces of Ontario and Québec should adopt Atlantic Canada's *Charter of Governing Principles for Regulation* within their respective internal trade agreements. By obligating provincial legislatures to consider the regulatory burden of new legislation, the committees tasked with regulatory harmonization would not continuously be forced to play catch-up to newly enacted policies and regulations. A Protocol of Amendment to institute a similar principle in the Canadian Free Trade Agreement would bind all levels of government in Canada to this approach.

11.3 Empowering Existing Regulatory Authorities & Trading Arrangements

Thus far, discussion around regulatory reconciliation has only focused on reciprocal recognition or the statutory alignment of pre-existing regulations between different provinces and territories. However, by thinking bigger, one might consider that existing provincial and territorial regulatory authorities could also be empowered to apply a shared mandate across entire regions. In effect, comparable regulatory authorities could assist in the administration of a common regulatory framework between multiple jurisdictions. The act of obtaining an approval, certification, or permit from one's home regulatory body would simultaneously grant a blanket approval, certification, or permit for an entire region, such as Atlantic Canada or Western Canada. The most liberal scenario might even see supranational regulatory cooperation, such as that of the Pacific NorthWest Economic Region. (PNWER n.d.) This would negate the need for consumers and producers to obtain separate approvals, certifications, or permits from each of the other jurisdictions that have adopted a common regulatory framework. This approach blends the principles of mutual recognition and regulatory harmonization. Taken a step further, comparable regulatory authorities within a particular region could also be amalgamated. Provinces and territories could either adopt an existing authority, and elevate its mandate to apply across the region, or

negotiate a new joint authority that would require the collective support—financial, informational, logistical, and otherwise—of each participating jurisdiction. For example, the Atlantic Provinces Economic Council has proposed the establishment of a liquor board for all of Atlantic Canada, similar in scope to the Atlantic Lottery Corporation, which would enable administrative efficiencies through a scale of economy that would be impossible to achieve at the provincial level. (Chaundy 2016, 38) Such regional collaboration would cement regulatory reconciliation efforts and set the stage for future internal trade agreements. (Kukucha 2015, 216)

There is also no reason why regulatory reconciliation must be purely reciprocal. Over the course of 2019, Alberta unilaterally removed 22 of the 28 sectoral exceptions to internal free trade that it had previously negotiated under the CFTA, as well as initiated a governmental review of those exceptions that remained. (Jeffrey 2019; Kenney 2019) This was on top of an announcement at the most recent summertime meeting of Canada's premiers that Alberta will move to mutually recognize the professional and trade credentials of every other province and territory; an initiative that was further highlighted within Budget 2020, but which is sure to be set back by the current COVID-19 pandemic. (Doherty 2019; Alberta Treasury Board 2020, 11) In October 2019, Manitoba announced that it, too, would unilaterally renounce its trade exceptions related to procurement, and review any and all exceptions that remained. (Mills & Cheung 2020) These actions serve to encourage the economic participation of Canadian individuals and firms residing and operating outside of Alberta and Manitoba in these newly liberalized sectors. Such unilateral approaches to trade liberalization can, therefore, benefit provincial and territorial jurisdictions even in the absence of reciprocal recognition. (IMF 2019, 26) In acknowledgement of the public backlash that stemmed from *R. v. Comeau*, Canada's premiers have also committed to the unconditional elimination of personal exemption limits on the transportation of alcohol across provincial and territorial borders. (Council of the Federation 2019) Such a move to liberalize internal trade is consistent with the founding priorities of the Council of the Federation. (Canadian Intergovernmental Conference Secretariat 2003) Yet such piecemeal approaches—however principled—are inefficient over

the long-term, and regulatory reconciliation must become a *modus operandi* for the provinces and territories that wish to eliminate non-tariff barriers to trade.

Professor Emeritus John Whalley, a Fellow of the Royal Society of Canada and a Distinguished Fellow at the Centre for International Governance Innovation in Waterloo, Ontario, has previously written about yet another regulatory reconciliation concept known as the subnational WTO approach. This approach is predicated on the idea that the existing international agreements and protocols that underpin the regulatory framework upon which the WTO operates could theoretically be extended to subnational jurisdictions of any member federation, such as each of Canada's provinces and territories. (Whalley 2009, 316) With the stroke of a pen, the most-favoured-nation principle of non-discrimination incorporated within the General Agreement on Tariffs and Trade, as well as the WTO's dispute settlement mechanisms and various other internationally negotiated agreements, would apply to the entirety of internal trade within Canada. This arrangement would require the approval of each provincial and territorial legislature, as well as the other members of the WTO, but it would instantaneously harmonize interprovincial trade rules with Canada's international trade obligations. By streamlining interprovincial and international trade principles, Canadian producers would only be subjected to one set of standards in order to export their goods and services anywhere in Canada or anywhere in the world. (Whalley 2009, 316)

However, any economic freedoms derived from the accession of Canada's provinces and territories into the WTO would, of course, come with a price. The provinces and territories would lose a certain measure of legal protection currently afforded by the federal government, not to mention a significant loss of jurisdictional authority over the design and implementation of domestic trade agreements. While the provinces and territories would gain the right to initiate trade disputes with other member nations of the WTO—potentially allowing British Columbia to initiate a trade dispute with the U.S. over softwood lumber, for example—other member nations would be provided with the same right to launch disputes with each of the provinces and territories. (Whalley 2009, 318) This trade-off almost

certainly ensures that no province or territory would seriously entertain this approach to internal trade within Canada. A variant of this approach is the option of pseudo-accession into the WTO, which would mitigate this legal and jurisdictional risk. By cherry-picking various WTO agreements and protocols, without formally joining the WTO itself, the provinces and territories could have the best of both worlds: streamlined trade principles and retained jurisdictional authority. (Whalley 2009, 319) While this sounds like an administrative nightmare, this process could be accomplished with relative ease through incorporation by reference. Such incorporation could either be ambulatory or static; the former would ensure that any amendments to WTO agreements and protocols are automatically carried over to the associated agreements at the provincial and territorial level, while the latter would require intentional legislative action to adopt such amendments. While certainly an innovative and intriguing concept, the subnational WTO approach has ostensibly failed to gain traction within the national discourse and will likely remain a purely theoretical exercise.

POLICY RECOMMENDATION NO. 7

Canada's provinces and territories should follow the lead of Alberta and Manitoba and immediately review their sectoral exceptions that were negotiated under the Canadian Free Trade Agreement. Whether undertaken in unison, or merely done unilaterally, the removal of internal trade exceptions will encourage individuals and firms that reside and operate elsewhere in Canada to pursue employment and business opportunities within these newly liberalized jurisdictions and economic sectors.

11.4 Strengthening Canada's Internal Trade Secretariat

The ITS is a grossly underutilized institutional mechanism for promoting internal trade within Canada. Greater federal support for this organization would allow the ITS to function in a higher calibre capacity, similar to that of the WTO Secretariat. (Findlay & Pittman 2019) One of the competencies that

the ITS needs to gain for it to realize its full potential includes the "research capacity that would allow [Canada] to keep…an inventory of what remains to be done with respect to addressing barriers" to internal trade. (Canada Senate 2016b) Currently, there is not enough publicly available data to consistently and routinely calculate the amount of lost economic output of each of the provinces and territories, and regular internal trade policy reviews are completely absent. (Pittman, Dade & Findlay 2019, 3 & 15) In the healthcare industry, the Canadian Institute for Health Information continuously tracks and publicly reports pan-Canadian health data, and is a homegrown example of an organization that could serve as a model for a strengthened ITS. (Asselin & Speer 2019, 39) And while the ITS was created with the intent to provide support to the provinces and territories through the CIT, in 2015, the federal government assigned responsibility for internal trade matters to the now-defunct Internal Trade Promotion Office, in order to assist with the CFTA negotiations. So instead of providing resources to the very secretariat that was created to promote internal trade, Industry Canada turned the Internal Trade Promotion Office into "the central hub for internal trade analysis and coordination…with [the] provinces and territories, businesses, workers, consumers and academia to explore opportunities to address internal trade barriers." (Canada IC 2015)

In addition to a reanimated and expanded research, analysis, and advocacy capacity, the ITS should be permitted to work alongside the provinces and territories to facilitate domestic trade missions and tradeshows, similar to the Economic Development Tours that are organized by the Manitoba Chambers of Commerce. These tours facilitate travel to northern Manitoba, so that businesses from all over Canada can discover the local economic development opportunities that exist in this region. They also serve to encourage a 'Buy Canada' attitude. (Pittman, Dade & Findlay 2019, 19-20) Alberta's Ministry of Economic Development, Trade and Tourism operates the Alberta Export Expansion Program, which offsets expenses incurred by SMEs as a result of business travel related to export promotion activities, yet only international business development opportunities qualify. (Alberta Economic Development 2020) This program should be expanded to cover domestic trade promotion activities as

well. The Government of Canada maintains a similar program, named CanExport, through the federal Trade Commissioner Service. (Canada Global Affairs 2020a) Since 2016, CanExport has provided assistance to roughly 1,000 Canadian companies, the end result of which has been $375 million in new business in over 90 countries around the world. (WD 2019, 23) While this federal initiative is strictly focused on the growth of international trade, the level of trade expertise that exists within this 125-year-old organization should be leveraged by the ITS, as its works to build its own internal capabilities and professional networks in the areas of domestic market intelligence and domestic business development opportunities for Canadian businesses. (Canada Global Affairs 2020b)

Finally, the current $600,000 annual operating budget of the ITS is simply not enough to support the depth of expertise required for this institution to effectively discharge its duties to uphold and enforce internal free trade. What's more, smaller provinces and territories in Canada do not possess much capacity for dealing with internal barriers to trade. Several provinces and territories "have only two or three people" working on internal trade matters, which restricts these jurisdictions from meaningfully contributing to the work of the ITS. (Pittman, Dade & Findlay 2019, 17-18) In these instances, a strengthened ITS could lend its expertise to the provinces and territories that do not possess the wherewithal to grow their own bureaucracies. (Dawson 2015, 4) Under-resourcing also severely hampers the ability to effectively arbitrate interprovincial trade disputes. A more robust dispute settlement mechanism is necessary to resolve ongoing and future disputes promptly and transparently. Even Industry Canada (2014, 16) acknowledged that dispute settlement is most effective "when businesses know how to access the process, when workers' complaints are resolved quickly and when consumers [subsequently] see improvements made to policies and programs." In the absence of a robust dispute settlement mechanism, two alternatives include the establishment of an independent Interprovincial Trade Commissioner or a quasi-judicial Canada Free Trade Tribunal, both of which would investigate and arbitrate on matters related to internal trade, as well as require substantial levels of government funding. (Cordy & Bellemare 2019; Liberal Party of Canada 2019)

POLICY RECOMMENDATION NO. 8

The Alberta Export Expansion Program should be broadened to include domestic trade promotion activities. Currently, only international business development activities qualify for this program. An expanded mandate would help Alberta-based businesses to expand their trade relationships across the country. When Canadian businesses look to increase their exports of goods and services, domestic opportunities should not be viewed any differently than international opportunities, as increased economic activity is a direct result of both avenues of export growth.

11.5 Unintended Consequences of Regulatory Reconciliation

Government intervention in society via the implementation of public policy will always alter the incentive structures of the free market and force a change in consumer and producer behaviours. Market intervention creates economic distortions and information bottlenecks, which result in market inefficiencies. Government intervention is not, in and of itself, always detrimental, as governments should be responsible for implementing policies to cope with inevitable market failures. However, the more that government regulations approach direct commands, the greater the resulting consequences of this market interference will be. Therefore, modern politics and society are inherently a result of conflict, cooperation, the interdependencies of decision-making, and the outcomes of such decisions. Governments are faced with the complex task of deciding how to expend resources, while simultaneously considering the unintended consequences of doing so, and the limitations placed on them by the political landscape, social norms, and cultural values. Decisions are not discrete in nature—purely black or white—but continuous in nature; they require the use of decision-making models that are intended to determine the point at which, amongst an infinite set of possible choices, the net benefits of any particular policy are maximized. (Fellows 2019)

Given that objective decisions made by subjective individuals are inherently fallible, it should not come as a surprise that regulatory reconciliation initiatives will inevitably possess unintended consequences for society. Governments may lose valuable revenue streams if they cannot maintain their position as middle-men in the market. Provincial liquor boards are one excellent example of such lucrative monopolies. Since politics revolves around the election cycle, governments often prioritize near-term considerations. If the long-term fiscal benefits of deregulation can be accurately quantified up-front, deregulation can be easier to accept. Generally, intergovernmental cooperation also does not happen easily. Take provincial and territorial labour standards. While workers that routinely cross provincial and territorial borders as part of their day-to-day responsibilities, such as long haul truckers, are compensated according to the highest minimum hourly wage among the jurisdictions in which they are employed, other peculiarities related to regulatory reconciliation certainly exist. (Tkachuk & Day 2016, 33) Where overtime, vacation, and severance pay differ between jurisdictions, fiscal gaps would emerge. (Chaundy 2016, 38) Provinces and territories may struggle to agree on the harmonization of workers' compensation, especially for temporary workers, lest they burden SMEs with the administrative and financial responsibilities of topping-up workers' compensation. The process of deregulation will also create market winners and market losers. Some businesses will lack the necessary economies of scale to compete in an increasingly competitive environment. This will result in consolidation in some areas and bankruptcies in others. Therefore, the importance of adjustment assistance, revenue neutrality, and revenue-sharing cannot be understated from the dual vantage points of economic equality and political palatability. (Chaundy 2016, 36-37)

Lastly, mutual recognition accords also need to be carefully crafted, in order to ensure that they meet their intended goals. Sectors that place high importance on consumer safety and environmental protection must be insulated from jurisdictions that are less concerned with the safety and well-being of the general populace. However, this is more of an issue at the international level and is less concerning within Canada, where high consumer safety and environmental protection standards already exist. Mutual

recognition can also drive uncertainty in the free market, where companies may feel the need to stay vigilant about legislative developments in neighbouring jurisdictions. But there are ways to navigate these difficulties. Mutual recognition agreements should not be 'living documents' and any subsequent efforts to reconcile regulations should instead occur through harmonization. This insures that goods and services are not inadvertently certified or regulated due to statutory changes in a neighbouring jurisdiction. (Macmillan 2013, 15) All said and done, mutual recognition and regulatory harmonization are still highly effective methods for dismantling internal barriers to trade. Other countries around the world have managed to implement public policy designed around these principles without creating permanent encumbrances. In the E.U., Australia, and Switzerland—three countries that we will examine in further detail in the next section—the liberalization of internal trade has not only created more successful domestic economies, it has also entrenched a cooperative mindset within the participatory member states, territories, and cantons. As governments become accustomed to economic integration, ongoing regulatory harmonization and reconciliation becomes self-reinforcing and an accepted component of governing.

12. A COMPARATIVE LOOK AT INTERNAL TRADE IN FOREIGN JURISDICTIONS

12.1 United States of America

In addition to the dormant commerce clause legal doctrine that was highlighted earlier in this paper, the federal government in the U.S. has taken additional steps to foster internal market integration. One of the most applicable examples for the Canadian context are the actions that were undertaken by the U.S. Congress to establish a national securities regulator. (Macmillan 2013, 2) In 1934, the U.S. Congress passed legislation that created the Securities and Exchange Commission (SEC), which possesses the legal authority to regulate U.S. financial markets nation-wide. The *Securities Exchange Act* provided the SEC with the authority to "oversee brokerage firms, transfer agents, and clearing agencies" across the country and to prohibit all "types of conduct in the markets" that are deemed to be fraudulent, such as insider trading. (U.S. Government SEC 2013) Faced with such illegal behaviour, the SEC provides information to the necessary law enforcement agencies that can then charge both individuals and corporations with financial crimes.

Meanwhile, Canada is the only member of the OECD that does not possess a national financial securities regulator. (Canada Competition Policy Review Panel 2008, 81) Despite the fact that the idea for a single regulator at the federal level has been around since the 1960s, every province and territory independently operates its own regulator, each of which is limited in its oversight and enforcement capabilities to its home province or territory. (Tkachuk & Day 2016, 12) While these 13 independent securities regulators are all members of the Canadian Securities Administrators umbrella group, such a patchwork of authority often permits fraudulent capital market activities to go unnoticed and unpunished. In December 2017, *The Globe and Mail* published the results of a year-long investigation into white collar crime in Canada. The investigation, aptly named Easy Money, uncovered numerous instances of illegal behaviour going back as far as 30 years. This behaviour included everything from securities fraud to identity fraud, as well as rampant recidivism and the wilful evasion of securities fines. (Robertson and Cardoso 2017a; 2017b; 2017c) To make matters worse, the SCC has set forth that the "focus of regulatory

law is on the protection of societal interests, not [the] punishment of an individual's moral faults," which serves to preclude provincial and territorial securities regulators from sharing evidence of financial crime with Canadian law enforcement agencies for the sole purpose of securing convictions. (*CETAMS v. OSC* 2001, §42) A unified securities regulator would end the inefficiencies and redundancies that exist under the current system of haphazard capital markets regulation, as well as allow for the pooling of resources in the common pursuit of exposing fraudulent capital market activities.

In *Reference re Securities Act* (2011, §132), the SCC prescribed the principle of collaborative federalism as a means to ensure that the federal, provincial, and territorial governments all adequately discharge their respective legislative duties in the name of greater national unity:

> It is not for the Court to suggest to the governments of Canada and the provinces the way forward by, in effect, conferring in advance an opinion on the constitutionality on this or that alternative scheme. Yet we may appropriately note the growing practice of resolving the complex governance problems that arise in federations…[is] by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts.

Despite this rejection of the federal government's preferred approach to unify provincial and territorial securities regulators, Canada's top court did admit that the oversight of "systemic [financial] risk may trigger the need for a national regulator…under which provincial governments can work to ensure that their markets will not transmit any disturbance across Canada or elsewhere." (*Reference re Securities Act* 2011, §104) Such an arrangement would be constitutional vis-à-vis federal jurisdiction over interprovincial and international trade and commerce. So, in 2013, the federal government agreed with British Columbia and Ontario to create the Cooperative Capital Markets Regulatory System (CCMRS), where provincial and territorial oversight of capital markets would be nestled under federal oversight of systemic risk and the investigation of criminal financial conduct. (CCMRS 2013) While the Maritimes, Saskatchewan, and the Yukon have all since joined the CCMRS, Alberta and Québec are the two main holdouts to this cooperative system. (Spiro 2018) Provincial concerns regarding the potential loss of capital availability and the dilution of industry expertise—particularly with respect to oil and gas in Alberta and high technology in Québec—associated with moving away from the current 'passport

system' are valid, but are wholly mitigated by the cooperative system. (Marotte 2010; Palmieri 2019) Since industry investors are often located across the country and around the world, the headquarter location of a securities regulator has no direct bearing on financial market location. (Puri 2012, 192) Furthermore, the promise of a regional office in every province, staffed with experts possessing local knowledge of provincially-important industries, should alleviate any concerns that industry expertise would be lost; thus, Alberta would maintain a regulatory office in Calgary, which is a well-known precondition of its participation in this cooperative system. (CCMRS 2013; Wood 2014) Lastly, federal adjustment assistance has been promised to offset any provincial revenue volatility associated with the transition to a cooperative system. (Fekete 2013)

POLICY RECOMMENDATION NO. 9

The President of Treasury Board and Minister of Finance of the Government of Alberta should initiate the Province of Alberta's participation in the Cooperative Capital Markets Regulatory System. This pan-Canadian framework for financial securities regulation was crafted to respect constitutionally-guaranteed jurisdictional authority and to create a more competitive financial system for participating jurisdictions. Alberta's existing industry expertise would be preserved, and no-strings-attached federal adjustment assistance would offset any revenue volatility associated with Alberta's entry into the CCMRS.

12.2 European Union

As previously discussed, Canadians can learn from the European Single Market. The Treaty of Rome enshrined principles of mutual recognition in the constitutional basis of the E.U. and, today, *Regulation (EU) 2019/515* ensures the free movement of goods—one of the 'four freedoms' of the European Single Market—throughout the E.U. (European Commission 2016) Since reciprocal non-discrimination is vital to the success of this single market, the enforcement of this principle is paramount

in situations where jurisdictions inadvertently run afoul of mutual recognition agreements. As a result, the European Commission, which is the executive branch of the E.U., maintains complete jurisdictional authority over the implementation and enforcement provisions that underpin mutual recognition amongst the E.U.'s 27 member states, and it reports annually on the extent of barriers to trade within the European Single Market. (Macmillan 2013, 5) It is also important to note that the European Court of Justice has approached judicial review very differently from the SCC. The former has become the arbiter of mutual recognition in the E.U., while we have seen that the latter does not shy away from reminding governments in Canada about the constitutional division of powers in this country, and by extension their duty to cooperate, and to not rely on the judiciary to solve complex legislative challenges. (Hinarejos 2012, 542)

The E.U.'s acceptance of mutual recognition also extends to labour mobility and the ease of doing business. Certain regulated professionals are allowed to perform work across state lines without the need to undergo professional recertification and all workers are free to move about within the European Single Market—together, these are another one of the 'four freedoms' of the single market. However, labour mobility is still hampered by cultural differences, language barriers, and gaps in the minimum wage between member states. (Macmillan 2013, 6) This reality goes to show how even the most well-designed policy can still possess unintended consequences; in this case, a result of the entrenched differences that exist between cultural groups and the resulting social hierarchies between the various countries that comprise the E.U. Any reconciliation of Canadian labour regulation, such as disparities in the minimum hourly wage that were previously mentioned, would likely face similar cultural differences between the anglophone and francophone regions of Canada, or even socio-economic differences between the 'have' and 'have not' provinces and territories, albeit to a lesser extent than that which persists across the E.U. (Gomez & Gunderson 2007, 17) Lastly, in 2017, the E.U. completed a five-year-long initiative to connect the business registration systems of its member states. The Business Registers Interconnection System provides a one-window approach for private and public entities to access company information

from across the E.U. This harmonization initiative was spurred by a shared desire to enhance the ease of doing business with multinational European firms, which would ultimately boost their competitiveness in the global marketplace. (European Commission 2019)

12.3 Australia

As a result of our shared historical and political identities, Australia is described as the most comparable foreign country to Canada out of all of the members of the OECD. (Schwanen 2013, 22) However, Australia has chosen to fully embrace the principle of mutual recognition, by undertaking domestic market reforms in the early 1990s that reduced burdensome regulations, improved its levels of productivity, and enhanced its overall competitiveness. To illustrate how successful Australia's experiment with deregulation has been, consider that the 1992 *Mutual Recognition Act*, which was specifically designed to allow for the free flow of both goods and chartered professionals between the Australian states and territories, was responsible for a five to seven percent increase in interstate trade between 2001 and 2005 alone, and has set permanently the stage for ongoing regulatory harmonization initiatives. (Ivison 2014) Australia's ongoing harmonization efforts take shape according to the Council of Australian Governments, of which each state and territory has a seat, and which operates via a permanent secretariat in the Office of the Prime Minister. Unlike the technical working groups that operate under the pan-Canadian RCT, decisions that are made by the Ministerial Councils within the Council of Australian Governments are legally binding on state and territorial governments. (Macmillan 2013, 8) And instead of allowing governments the option to opt out of the harmonization process, the state and territorial governments are all mandated to reach a consensus, which ensures that there is no patchwork of mutual recognition agreements or regulatory harmonization initiatives spread across Australia.

In 2016, the Senate Standing Committee on Banking, Trade and Commerce—in the midst of its study on the issues pertaining to internal barriers to trade within Canada—heard from international trade policy expert Kathleen Macmillan. Ms. Macmillan specifically highlighted the mutual recognition regime

that exists between Australia and New Zealand as a relevant example for Canadian consideration. The *Trans-Tasman Mutual Recognition Act 1997* (TTMRA) is predicated on "a high degree of intergovernmental cooperation. It is also refreshingly pragmatic…[insofar that] they decided to adopt or recognize [Canadian] driver's licences…as a way of contributing to the mobility of professionals between our two countries and [fostering] commercial links." (Canada Senate 2016b) Further to Australia's mutual recognition accords is the existence of the aforementioned Australian Productivity Commission. This Crown commission monitors the performance of federal, state, and territorial governments in accordance with the *Mutual Recognition Act* and the TTMRA. The Productivity Commission also "consults widely with regulators, other governments, the business community and the general public" as a means of proactively identifying pre-existing and emerging internal barriers to trade. (Macmillan 2013, 8) And it looks beyond its own borders, by scrutinizing international free trade agreements for legal clauses and trade mechanisms that are best-in-class and that should be incorporated into future protocols of amendment of the *Mutual Recognition Act* and the TTMRA. The most similar Canadian institution to the Australian Productivity Commission is the External Advisory Committee on Regulatory Competitiveness, which was established in 2019 at the recommendation of the Advisory Council on Economic Growth. (Canada TSB Secretariat 2019a) Unfortunately, this advisory committee appears to be a temporary invention of the federal government, with no apparent plans to fund this council beyond the next election cycle.

POLICY RECOMMENDATION NO. 10

The Government of Canada should create an institution comparable to the Australian Productivity Commission. While the External Advisory Committee on Regulatory Competitiveness is a promising semblance of such an institution, its indeterminate lifespan will handicap its long-term success. This committee should be made a permanent fixture of the federal public service and its responsibilities should be assigned to an agency with the independent authority to consult, review, and report on the economic

implications of anti-competitive and discriminatory internal trade barriers, such as Canada's Competition Bureau or the Canadian Free Trade Agreement's Committee on Internal Trade.

12.4 Switzerland

Switzerland is another well-established federation that possesses similarities to Canada. Physically surrounded on all sides by the E.U.—an economic powerhouse situated on its doorstep, in much the same way that Canada sits adjacent to the U.S.—Switzerland was forced to reconcile its internal barriers to trade when it chose to forego membership in the E.U. Historically, Switzerland's 26 cantons enjoyed considerable autonomy, going so far as to each impose "separate production standards for the construction and admission of automobiles into their jurisdiction." (Macmillan 2013, 11) Possessing such high economic barriers to entry, and facing competition from a far more efficient single market in the same geographical neighbourhood, Switzerland overcame its competitive disadvantages by choosing to unilaterally adopt the technical standards of the E.U. These technical standards were subsequently adopted by each Swiss canton, simultaneously serving to dismantle the inter-cantonal trade barriers that had previously existed.

Another notable aspect of the Swiss experience relates to its federal Competition Commission, which is similar in nature to Canada's Competition Bureau. While exact roles and responsibilities differ, the Swiss Competition Commission has been granted the power to intervene in legal proceedings that relate to matters of internal trade, as well as to take on the role of public prosecutor wherever the principal of reciprocal non-discrimination is not being followed by cantons or companies, and where no other public or private party has yet launched legal action. (Macmillan 2013, 13) In Canada, the Competition Bureau is limited to intervening before federal and provincial tribunals, and it must refer evidence of wrongdoing to the quasi-judicial Competition Tribunal for adjudication. (Canada ISED Competition Bureau 2019) The Swiss approach to the enforcement of internal free trade would be a novel exercise for

the Competition Bureau, which is normally limited to dealing with anti-competitive behaviour, such as bread price fixing.

12.5 Final Lessons for Canada

Within each of the foreign federations described above, the private sphere has always had access to the commissions that have been tasked with reviewing and reporting on internal barriers to trade. All levels of government in Canada must accept that intergovernmental cooperation will inevitably include consultation with private actors, as well as the stakeholder groups who represent such actors and their interests. The External Advisory Committee on Regulatory Competitiveness is a good starting point in this regard. Regulatory reconciliation agreements are also only successful when parties enter into negotiations in good faith. Before concrete actions can be taken, the federal, provincial, and territorial governments must alter their mindsets and focus on the long-term economic benefits to Canadians of efforts to liberalize internal trade. Alberta and Manitoba have taken positive first steps in this direction. Mutual recognition is also not particularly new to governments in Canada. The NWPTA has already made extensive use of this free trade principle. And for cost-conscious provincial and territorial governments struggling to balance their budgets post-COVID-19, mutual recognition is a low-cost method for dismantling internal trade barriers without the need for extensive rounds of negotiation or the requirement that public resources be marshalled together to guarantee widespread acceptance and implementation. (Macmillan 2013, 15)

13. CONCLUSION

Canada is a wholly unique country, with a wholly unique culture, people, economy, society, and internal divisions in the area of domestic trade. Federations around the world have encountered similar internal frontiers, to one extent or another, well before Canada gave much thought to the need for regulatory reconciliation between the federal, provincial, and territorial governments. The economic realities inherent within newly liberalized international free trade regimes has often been the main catalyst for all levels of government to advance the domestic trade agenda—albeit with many negotiated sectoral exceptions. However, this patchwork of mutual recognition and harmonization initiatives has left Canadians—consumers, producers, and the nation as a whole—with false hopes of a single economic union. The Fathers of Confederation advocated for a Canadian Single Market, so that the citizens of this country could benefit from the market influence that we possess as a collective. If the federal, provincial, and territorial governments put partisan politics and short-termism aside and actually moved in unison, Canadian firms could achieve economies of scale that might rival global conglomerates; Canadians of all walks of life would see better standards of living for their children and grandchildren; and, Canada would be a more attractive destination and influential player on the world stage. This idealistic vision for Canada's next 153 years is achievable, and it is all the more important to strive for given the widespread withdrawal of support for a rules-based international order from historically reliable trading partners. As a trade-dependent, middle power nation, the liberal international order has benefitted Canada tremendously. In the wake of the current COVID-19 pandemic, Canada will need to use every policy tool in its arsenal to service its massive levels of debt, support its aging population, and preserve its way of life for future generations.

This paper has endeavoured to describe the legal underpinnings and current state of affairs regarding Canada's incessant inability to overcome the internal barriers to trade that linger as a result of Canada's constitutional division of powers, as well as to illustrate a few of the existing regulatory schemes that indirectly affect internal trade relationships within Canada. Specific examples of obstacles

that impede domestic trade in goods and services have been described from the point-of-view of the Canadian consumer, the Canadian producer, and the country at large. Past and present attempts at dealing with these obstacles, both in a regional and a pan-Canadian context, have been presented, along with discussions about their positive and negative, intended and unintended, and short-term and long-term effects on domestic levels of trade. The internal trade experiences of a handful of foreign federations were explored, in an attempt to shed light on possible policies that the federal, provincial, and territorial governments could adopt as a means to further dismantle internal barriers to trade, as well as to provide evidence that tried-and-true approaches to common problems are not as scary of a political prospect as they may seem at first glance. Where appropriate, policy recommendations that naturally flow from new perspectives on the existing pool of knowledge regarding internal barriers to trade have been put forth. These recommendations vary widely in their subject matter, but they present practical and promising near-term opportunities for political action and reform of Canada's internal trade policy approach by all levels of government. Given that modern politics and society are inherently a result of conflict, cooperation, the interdependencies of decision-making, and the outcomes of such decisions, this platter of policy proposals will be limited in its uptake by the availability of political capital and the political appetite for intergovernmental cooperation. If any single one policy recommendation presented herein has any influence on any domestic trade policy at any time in the future, then this academic undertaking will have been a success. Otherwise, there now exists one more well-informed member of the citizenry with an appreciation for the effects of Canada's internal trade regime on our collective economic well-being, standard of living, and Canadians' ability to compete and innovate in a world of nearly 8 billion people.

The liberalization of international trade has occurred gradually over time, with nations advocating for a rules-based approach that was combined with the formation of global institutions that encouraged participating nations to abide by the rules. It did not happen as a result of the instantaneous, unilateral dismantling of trade barriers, nor the heavy-handed imposition of top-down directives to engage in freer trade. (Brodie 2019, 12) The liberalization of domestic trade in Canada will be very much the same;

occurring gradually over time, according to ever-more expansive internal trade agreements—likely built on the back of new and improved international free trade regimes—and a newfound Canadian appreciation for cooperative federalism. To insure long-term success, modern institutions will need to be created and tasked with upholding and enforcing the principles of internal free trade. Other federal states around the world have encountered internal trade hang-ups similar to those experienced by Canada, and the federal, provincial, and territorial governments should all take comfort in knowing that the path set out in front of us has been well-travelled by those who have come before us. Policy solutions for these obstacles already exist, including those that have been outlined in this paper, and Canada should not hesitate to improve upon the status quo by experimenting with a few of these domestic trade strategies. Vested interests and a lack of concerted effort prevent us from achieving a Canadian Single Market, but "nothing in this world is worth having or worth doing unless it means effort, pain, difficulty." (Roosevelt 1910) Let the time be now that we throw down all remaining internal barriers to trade and make a citizen of one, citizen of the whole.

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