

THE CHARACTERIZATION OF BARRIERS TO INTERPROVINCIAL TRADE UNDER THE CANADIAN CONSTITUTION[©]

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This article identifies barriers to interprovincial trade as a legislative subject matter under the constitutional division of powers. It argues that interprovincial trade barriers should be characterized in terms of the disproportionate impact that provincial measures have on the flow of trade between the provinces. The term “disproportionate impact” means the measures’ impediments to the flow of trade which are not necessary to implement the objectives of provincial legislation.

This method of identifying trade barriers has been used to address trade barriers and other arrangements, such as the General Agreement on Tariffs and Trade, the Canada-United States Free Trade Agreement, the North American Free Trade Agreement, the Treaty of Rome, the United States Constitution, and the federal-provincial agreement on internal trade. It is also consistent with the ancillary doctrine under the Canadian Constitution. Under this doctrine, laws aimed primarily at a matter within a legislature’s or Parliament’s jurisdiction may validly contain provisions intruding into a competing area of legislative jurisdiction. Justification of such laws will depend upon the seriousness of the intrusion into competing areas of jurisdiction.

Cet article affirme que les barrières à l’échange interprovincial proviennent du domaine législatif en raison de la division constitutionnelle des pouvoirs. Il soutient que les barrières à l’échange interprovincial doivent être caractérisées en prenant en considération l’impact disproportionné des mesures provinciales sur les flux d’échanges entre les provinces. Le terme, “impact disproportionné”, signifie des obstacles aux flux d’échanges qui ne sont pas nécessaires à la réalisation des objectifs de la législation provinciale.

Cette méthode d’identifier les barrières à l’échange a été appliquée aux barrières à l’échange et à d’autres arrangements, comme l’Accord général sur les tarifs douaniers et le commerce, l’Accord du libre-échange Canada-Etats-Unis, l’Accord du libre-échange nord-américain, le Traité de Rome, la Constitution américaine et l’accord fédéral-provincial sur l’échange interne. Elle est aussi compatible avec la doctrine auxiliaire sous la Constitution canadienne. Selon cette doctrine, des lois qui s’adressent principalement à un domaine appartenant à la juridiction d’une Législature ou du Parlement peuvent comprendre des dispositions qui touchent à d’autres domaines de juridiction législative. La défense de ce type de loi dépendra de l’importance des effets sur d’autres domaines de juridiction.

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I. INTRODUCTION

The flow of interprovincial trade, as a legislative subject matter, is within Parliament's jurisdiction over the regulation of trade and commerce pursuant to section 91(2) of the *Constitution Act, 1867*.¹ As a result, provincial legislatures cannot pass laws prohibiting extra-provincial transactions. However, pursuant to sections 92(13) and 92(16) of the *Constitution Act, 1867* provincial legislatures may pass laws respecting local trade.² The problem arises when these two competing

¹ (U.K.), 30 & 31 Vict., c. 3.

² The precise basis for provincial authority over local trade may vary by reference to the legislation at issue. In this article, I shall, for the sake of convenience, refer to s. 92(13)—property and civil rights—as the primary provincial jurisdictional basis. Having said this, it is not clear that all of provincial trade regulation may be reduced to the regulation of property rights and civil rights. Jurisdiction may also be found in provincial authority over local works and undertakings (s. 92(10)) and local and private matters (s. 92(16)). I believe that the better way of understanding provincial jurisdiction in this area is by reference to provincial jurisdiction over local trade as a subtraction from Parliament's jurisdiction over interprovincial and international trade. In *Reference Re Farm Products Marketing Act* [1957] S.C.R. 198 at 211-12 [hereinafter *Farm Products Marketing*], Rand J. articulated this more general concept of local trade as falling within a provincial residual power:

Local trade has in some cases been classed as a matter of property and civil rights and related to head 13 of s. 92, and the propriety of that allocation was questioned. The production and exchange of goods as an economic activity does not take place by virtue of positive law or civil right; it is assumed as part of the residual free activity of men upon or around which law is imposed. It has an identity of its own recognized by head 2 of s. 92. I cannot agree that its regulation under that head was intended as a species of matter under head 13 from which by the language of s. 91 it has been withdrawn. It happened that in *The Citizens Insurance Company of Canada v. Parsons; The Queen Insurance Company v. Parsons*, assuming insurance to be a trade, the commodity being dealt in was the making of contracts, and their relation to head 13 seemed obvious. But the true conception of trade (in contradistinction to the static nature of rights, civil or property) is that of a dynamic, the creation and flow of goods from production to consumption or utilization, as an individualized activity.

bases of jurisdiction collide: what happens when provincial legislation in relation to a local trade matter has the result of impeding or effectively preventing the interprovincial flow of trade? Such a scenario requires a more subtle analysis of the way in which constitutional trade jurisdiction should be divided. The need for subtlety arises because the flow of trade, by its nature, is dynamic; it is about the way in which people, goods, services, and capital move across the country. It is therefore difficult to fit the elements which go into regulating this flow into categorical constitutional distinctions.

On the whole, the Supreme Court of Canada has sought to avoid the need for a more subtle analysis of this issue. Rather, it has sought to classify legislation as being *either* in relation to a local matter *or* an interprovincial matter. The result of this approach has been a number of inconsistent decisions which, I shall argue, do not correspond to the underlying purposes which the division of powers over trade should serve.

My thesis is that interprovincial trade barriers should be characterized by reference to the disproportionate impact which provincial measures have on the flow of trade between the provinces. By disproportionate impact, I mean the measures' impediments to the flow of trade which are not necessary to implement the objective of otherwise valid legislation. The method by which disproportionate impacts are identified should be by way of the ancillary doctrine, also called the necessarily incidental doctrine.

According to that doctrine, laws which are primarily aimed at a matter within a legislature's (or Parliament's) jurisdiction may validly contain provisions intruding into a competing area of legislative jurisdiction *provided* that such an intrusion is justifiable. This justification requirement varies by reference to the seriousness of the intrusion; where the intrusion is marginal, it may be justified by showing that the impugned provision is a rational and functional part of an otherwise valid scheme; where the intrusion is more serious, the provision must be justified as necessary to implement the scheme. The

Head 16 contains what may be called the residuary power of the Province: *Attorney-General for Ontario v. Attorney General for the Dominion et al* and it is within that residue that the autonomy of the Province in local matters, so far as it might be affected by trade regulation, is to be preserved. As was recognized in the *Parsons* case, *supra*, this points up the underlying division of the matters of legislation into those which are primarily of national and those of local import.

See also, to the same effect, Laskin C.J.'s concurring decision in *Manitoba (A.G.) v. Manitoba Egg and Poultry Ass'n* [1971] S.C.R. 689 at 706-07 [hereinafter *Manitoba Egg*].

applicability of the ancillary doctrine to interprovincial trade would parallel the way in which trade barriers are addressed in other contexts.

Most importantly, from the Canadian perspective, on 18 July 1994, the federal, provincial, and territorial governments concluded the Agreement on Internal Trade.³ The Agreement, which took effect in July 1995, states that its purpose is to “reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investments within Canada and to establish an open, efficient, and stable domestic market.” The conceptual centrepiece of the Agreement is the identification of trade barriers as obstacles to internal trade which cannot be justified by reference to legitimate objectives. The operative justificatory principle is proportionality. A trade barrier will be justified under the Agreement where it is aimed at a legitimate objective and does not result in a disproportionate impact on the movement of trade in light of that objective.

Proportionality is also a central element in addressing trade barriers in other arrangements. It is used in identifying barriers under the General Agreement on Tariffs and Trade,⁴ the Canada-United States Free Trade Agreement,⁵ the North American Free Trade Agreement,⁶ the Treaty of Rome,⁷ and the United States Constitution. In these arrangements, the concern has been similar to that in the Canadian trade context: how to reconcile legitimate exercises of local authority with the movement of trade through and among these jurisdictions. The proportionality principle as adopted in the Agreement and as applied in international, European, and American trade law is thus similar to the ancillary doctrine. In both cases, they function to determine the validity of local trade regulations which impact on extra-local matters by reference to the reasonable necessity of the means taken to implement local objectives.

³ (Ottawa: Government of Canada, 1994) [hereinafter Agreement].

⁴ *General Agreement on Tariffs and Trade* 30 October 1947, Can. T.S. 1947 No. 27 [hereinafter GATT]. A comprehensive new set of agreements was reached in 1994 that established a World Trade Organization, while encompassing the GATT. See *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Text* (Geneva: GATT Secretariat, 1994).

⁵ *Free Trade Agreement between The Government of Canada and the Government of the United States of America* 22 December 1987, Can. T.S. 1989 No. 3 [hereinafter FTA].

⁶ *North American Free Trade Agreement: between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America* 17 December 1992, Can. T.S. 1994 No. 2 [hereinafter NAFTA].

⁷ *Treaty Establishing the European Economic Community* 25 March 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

This article is organized as follows. First, I shall outline the Canadian interprovincial trade jurisprudence. My emphasis will be on those cases where the Supreme Court of Canada has addressed the constitutionality of provincial regulation of goods destined for export from the province. I shall argue that what is lacking in these cases is a sensitivity to the underlying constitutional values at stake in the division of powers over interprovincial trade. My thesis is that these values would be better served by the application of the ancillary doctrine than by the various approaches which the Court has taken to the issue.

Second, I shall provide a summary of the proportionality principle as adopted in the Agreement and as applied in international, European, and American law. I shall also discuss the remedial provisions of the Agreement insofar as they touch upon constitutional issues.

The final part of this article shall address the conceptual and functional compatibility of my thesis with other constitutional principles. As to conceptual compatibility, I shall consider criticisms of the ancillary doctrine as I propose it should be applied. I will also consider concerns with respect to the emphasis that my argument puts on the effects or impact of legislation for the purposes of constitutional characterization. What drives both of these concerns is an underlying position in favour of judicial restraint in federalism cases. I shall argue that the legitimacy of judicial review in the interprovincial trade context is more sustainable than in other areas because of the impact that trade barriers have on persons outside the province.

As to functional compatibility, I shall argue that treating provinces as analogous to the independent states which are parties to international agreements is historically supportable. In this regard, I shall also argue that the remedies provided by the Agreement raise constitutional concerns which may undermine its effectiveness and which indicate the need to integrate it with the division of powers under the *Constitution*

II. TRADE AND COMMERCE UNDER THE CANADIAN CONSTITUTION

Interprovincial trade is one element of Parliament's jurisdiction under section 91(2) of the *Constitution Act, 1867* to pass laws in relation to the regulation of trade and commerce. The concept of interprovincial trade as a legislative subject matter has its genesis in the Privy Council's decision in *Citizens Insurance Company of Canada v. Parsons*.

The words "regulation of trade and commerce" in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shews that the words were not used in this unlimited sense.

Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulating trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole dominion.⁸

This quotation from *Parsons* has occupied much of the jurisprudence and scholarship in the constitutional trade area. Most of the recent deliberations have focused on the meaning of the so-called second branch of *Parsons*, the "general regulation of trade affecting the whole dominion." This article focuses on the first branch, the regulation of trade in matters of interprovincial concern. In particular, I shall address the way in which the first branch of *Parsons* constrains provincial legislatures. I shall pay less attention to the jurisprudence respecting

⁸ (1881-82), 7 App. Cas. 96 at 112-13 (P.C.) [hereinafter *Parsons*].

federal legislation in this area,⁹ although the two issues are obviously related.¹⁰

This branch of *Parsons* has been generally accepted to mean that Parliament has jurisdiction over the flow of interprovincial trade, while the provincial legislatures have jurisdiction over intraprovincial trade. The issue for the courts has been to identify the outer boundaries, or

⁹ The leading cases addressing federal legislation in this area are: *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434 [hereinafter *Eastern Terminal*], and *British Columbia (A.G.) v. Canada (A.G.)*, [1936] S.C.R. 398 [hereinafter *Natural Products Marketing*], aff'd [1937] A.C. 377 (P.C.). In *Eastern Terminal* a majority of the Court struck down federal regulation of grain terminals even though most of the grain was to be exported from the province. Duff C.J., whose decision has become the *locus classicus* in the interprovincial trade area, identified what he described, at 447-48, as the "lurking fallacy" in the argument that the regulation of interprovincial trade may carry with it a need to regulate individual forms of trade:

Obviously that is not a principle the application of which can be ruled by percentages. If it is operative when the export trade is seventy per cent of the whole, it must be equally operative when the percentage is only thirty; and such a principle in truth must postulate authority in the Dominion to assume the regulation of almost any trade in the country, provided it does so by setting up a scheme embracing the local, as well as the external and interprovincial trade; and regulation of trade, according to the conception of it which governs this legislation, includes the regulation in the provinces of the occupations of those engaged in the trade, and of the local establishments in which it is carried on.

Similarly, in *Natural Products Marketing* the Court struck down federal regulation respecting the marketing of natural products. In order for the products to be brought into the marketing scheme, it had to be shown that either the principal market for the natural product is outside the province of production or that some part of the product produced was outside the province: see the Privy Council's discussion of the scheme, at 386. Duff C.J., at 414, stated the following for the unanimous Court:

Legislation necessarily incidental to the exercise of the undoubted powers of the Dominion in respect of the regulations of trade and commerce is competent although such legislation may trench upon subjects reserved to the provinces by section 92, but it cannot, we think, be seriously contended that sweeping regulation in respect of local trade, such as we find in this enactment is, in the proper sense, necessarily incidental to the regulation of external trade or interprovincial trade or both combined.

For a discussion of these decisions and the lack of a role for the ancillary doctrine in support of the exercise of federal jurisdiction in this area see: G. Le Dain, "Sir Lyman Duff and the Constitution" (1974) 12 *Osgoode Hall L.J.* 261 at 298-301; and H.S. Fairley, "Jurisdiction over International Trade in Canada: The Constitutional Framework" in M. Irish & E.F. Carasco, eds., *The Legal Framework for Canada-United States Trade* (Toronto: Carswell, 1987) 131 at 148-49.

¹⁰ Although there is a relation between the outer boundaries of federal and provincial jurisdiction under the *Constitution Act, 1867* generally, and interprovincial trade in particular, it does not always follow that finding an absence of provincial jurisdiction to enact a scheme results automatically in a finding that Parliament does have jurisdiction to enact an identical scheme. As Laskin C.J. stated for the unanimous Supreme Court of Canada in *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42 at 75 [hereinafter *Central Canada Potash*]:

It is true ... that (with some exceptions, not relevant here) the *British North America Act, 1867* distributes all legislative power either to Parliament or to the provincial Legislatures, but it does not follow that legislation of a Province held to be invalid may *ipso facto* be validly enacted by Parliament in its very terms.

what William Lederman called “equilibrium points,”¹¹ between these two general bases of legislative authority.

The one area where the case law is clear is that provinces may not pass laws prohibiting extraprovincial transactions. Thus, provincial marketing schemes that prevent provincial residents from purchasing goods from suppliers outside the province have been struck down.¹² Similarly, provincial legislation prohibiting liquor transactions has been held to be constitutional provided that it does not prohibit transactions between provincial residents and persons outside the province.¹³ In the latter context, the Privy Council noted that even where the scope of the provincial legislation is restricted to the activities of persons within the province, inevitably, “it must interfere ... indirectly at least with business operations beyond the limits of the province.”¹⁴

The extent of that permitted interference has occupied much of the Supreme Court of Canada’s treatment of constitutional jurisdiction over interprovincial trade. The question is the extent to which local trade regulation may interfere with the movement of interprovincial trade. The Court has taken two contradictory approaches to this issue. The first has been to restrict provincial jurisdiction to transactions which are entirely completed within the province so as to prevent any interference with interprovincial trade. The second has been to hold that the effects of provincial regulation on interprovincial trade is constitutionally irrelevant.

An example of the first approach is found in *Prince Edward Island (Potato Marketing Board) v. H.B. Willis Inc!*¹⁵ In that case, the Supreme Court of Canada considered the constitutionality of provincial legislation which authorized a potato marketing board to require dealers engaged in marketing potatoes to collect as agent for the board a levy from potato producers. The Court unanimously held that the levies were unconstitutional to the extent that they applied to potatoes with an extraprovincial destination. *Taschereau, Estey, and Cartwright JJ.* held that the levy was an indirect tax and thus inconsistent with the restriction that legislatures may only pass direct taxes pursuant to section 92(2) of

¹¹ W.R. Lederman, “Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation” (1975) 52 Can. Bar Rev. 597 at 604.

¹² *Manitoba Egg, supra* note 2 at 703; and *Burns Foods Ltd. v. Manitoba (A.G.)*, [1975] 1 S.C.R. 494 at 502.

¹³ *Manitoba (A.G.) v. Manitoba License Holders’ Ass’n* [1902] A.C. 73 at 80 [hereinafter *Manitoba License Holder*]; and *Gold Seal Ltd. v. Dominion Express Co.*, [1921] S.C.R. 424 at 446.

¹⁴ *Manitoba License Holders* *ibid.* at 80.

¹⁵ [1952] 2 S.C.R. 392.

the *Constitution Act, 1867* The remaining six members of the Court held that the fee could not be levied with respect to potatoes leaving the province because such an application would interfere with Parliament's jurisdiction over interprovincial trade. Kerwin J. (Fateaux J. concurring) held that such an application of the levy was "clearly referable to export trade and cannot be supported."¹⁶ Rand J. stated that "[t]he scheme before us is primarily one of trade regulation. Apart from taxation, so far as it extends to external trade it is invalid."¹⁷ Kellock J. (Locke J. concurring) approached the problem as follows:

In my view, the powers so given go beyond the mere regulation of the potato trade within the province or carriage thereof from one provincial point to another, and encroach upon the sphere of the regulation of interprovincial and export trade. There is no attempt to confine the scheme or the orders under it to local as distinguished from export trade, and it is to be remembered, as was admitted at the bar, that the business of marketing potatoes in the province is preponderantly an export business.¹⁸

The remaining judge, Rinfret C.J. upheld the levy insofar as it "can be limited in its operation to affect only transactions intended to be wholly and ultimately carried out within the Province."¹⁹ The result was that the application of the levy to goods with an extraprovincial destination went beyond provincial jurisdiction over local trade.

A similar approach was adopted by a majority of the Supreme Court in *Farm Products Marketing*²⁰ In that case, the Court was required, by the terms of the reference, to consider the validity of provincial legislation establishing a marketing scheme in which a marketing board purchased and sold farm products and distributed the sales proceeds among the producers. The terms of reference directed the Court to assume that the legislation "applies only in the case of intraprovincial transactions."²¹ The meaning of this assumption occupied most of the Court's reasoning. Four of the seven judges who addressed this issue held that an intraprovincial transaction only involves products to be consumed in the province. Kerwin C.J. stated: "Once an article enters into the flow of interprovincial or external trade, the subject matter and all its attendant circumstances cease to be a mere

¹⁶ *Ibid.* at 409.

¹⁷ *Ibid.* at 416.

¹⁸ *Ibid.* at 423.

¹⁹ *Ibid.* at 400.

²⁰ *Supra* note 2.

²¹ *Ibid.* at 203.

matter of local concern.”²² Locke J. (Nolan J. concurring) held that intraprovincial transactions consisted of:

purchases and sales of the controlled product, whether hogs, fruit or vegetables in their natural form, for consumption in the Province, and sales to processors, manufacturers or dealers proposing to sell such products, either in their natural form or after they have been processed by canning, preserving or otherwise treating them, for consumption within the Province.²³

The Court’s approach in these two cases thus severely restricts provincial regulation over goods which will enter into the flow of interprovincial trade. Under this approach, goods which are intended to move through the province are effectively immune from provincial regulation respecting their production, sale, or processing.

The Supreme Court has rendered a number of decisions that are inconsistent with this line of reasoning, but has not expressly retracted from this position.

In *Carnation Co. v. Quebec (Agricultural Marketing Board)* the Supreme Court upheld the constitutionality of a plan approved by a provincial marketing board which set the price at which a milk processor was required to purchase raw milk from producers despite the fact that most of the processed milk was destined for an extraprovincial market. Martland J. addressed the argument that the destination of the milk should be relevant for constitutional purposes:

That the price determined by the orders have a bearing upon the appellant’s export trade is unquestionable. It affects the costs of doing business. But so, also, do labour costs affect the cost of doing business of any company which may be engaged in export trade and yet there would seem to be little doubt as to the power of a province to regulate wage rates payable within a province, save as to an undertaking falling within the exceptions listed in s. 92(10) of the *British North America Act*. It is not the possibility that these orders might “affect” the appellant’s interprovincial trade which should determine their validity, but, rather, whether they were made “in relation to” the regulation of trade and commerce.²⁵

²² *Ibid.* at 205. See also, at 210, Rand J.’s statement to the same effect. Rand J. repeated this view extrajudicially, stating that “to declare that the transactions with which a statute deals are those within the province can be effective only where a producer confines his sales to consumers within the province”: see I.C. Rand, “Foreword” in A. Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963) at xi.

²³ *Farm Products Marketing* *supra* note 2 at 231.

²⁴ [1968] S.C.R. 238 [hereinafter *Carnation*].

²⁵ *Ibid.* at 252.

In *Re Agricultural Products Marketing Act* Pigeon J., for the majority, held that *Carnation* stood for the proposition that the regulation of production “whether agricultural or industrial, is *prima facie* a local matter, a matter of provincial jurisdiction.”²⁷ Provided that the provincial legislation was aimed at production, it did not matter where the goods were destined: “In view of the reasons given, the conclusion could not be different even if the whole production has been going into extraprovincial trade.”²⁸

The Court’s approach in the two foregoing decisions is thus to treat the goods’ movement in interprovincial trade as irrelevant for constitutional purposes. Seen this way, a province’s jurisdiction is not restricted in any measure by reference to whether goods move through the province. Instead, the Court effectively adopted a distinction between production and marketing as a proxy for intraprovincial and extraprovincial trade. This distinction has not been consistently applied.

In *Central Canada Potash*²⁹ the Court struck down a provincial prorationing scheme restricting the production and setting the sale price of potash. In so doing, Laskin C.J. emphasized that “[t]he only market for which the schemes had any significance was the export market.”³⁰ Furthermore, the Chief Justice was not prepared to save the legislation by applying the distinction between production and marketing which Pigeon J. emphasized only seven months earlier in *Agricultural Products Marketing*. The following remarkable passage illustrates how the concepts of production and marketing may be collapsed for constitutional purposes:

It is, of course, true, that production controls and conservation measures with respect to natural resources in a Province are, ordinarily, matters within provincial legislative authority. This Court’s reasons in its recent judgment in ... [*Re Agricultural Products Marketing Act*] supports that view. The situation may be different, however, where a Province establishes a marketing scheme with price fixing as its central feature.³¹

One more example should suffice. In *Canadian Industrial Gas and Oil v. Government of Saskatchewan*³² the Court struck down

²⁶ [1978] 2 S.C.R. 1198 [hereinafter *Agricultural Products Marketing*].

²⁷ *Ibid.* at 1293.

²⁸ *Ibid.* at 1294.

²⁹ *Supra* note 10.

³⁰ *Ibid.* at 72.

³¹ *Ibid.* at 74.

³² [1978] 2 S.C.R. 545 [hereinafter *CIGOL*].

provincial legislation that imposed a surcharge on oil produced in the province. The surcharge equalled the difference between the price received for the oil and the world market price for oil prior to its rapid escalation. The legislation also permitted the government to set the price of oil where it determined that it was being undersold. Martland J., writing for the majority, emphasized the fact that the oil “has almost no local market”:

This is not a case similar to *Carnation Co. Ltd. v. Québec Agricultural Marketing Board* where the effect of the Regulations was to increase the cost of milk purchased by Carnation in Quebec and processed there, mostly for sale outside Quebec. The legislation there indirectly affected Carnation's export trade in the sense that its costs of production were increased, but was designed to establish a method for determining the price of milk sold by Quebec milk producers, to a purchaser in Quebec, who processed it there. Here the legislation is directly aimed at the production of oil destined for export and has the effect of regulating the export price, since the producer is effectively compelled to obtain that price on the sale of his product.³³

The Court's treatment of the relevance of the movement of goods for the purposes of determining the scope of provincial regulation with respect thereto has thus veered from an intense focus on the movement of goods, e.g., *Willis, Ontario Farm Products CIGOL*, and *Central Canada Potash*, to categorical statements that this is irrelevant for constitutional purposes, e.g., *Carnation* and *Agricultural Products Marketing Reference*. Furthermore, the Court has not provided any rationale for determining when, and more importantly, the extent to which the movement of goods should be taken into account. Rather than identifying the way in which provincial legislation affects the movement of goods, and considering whether that effect can be justified in any given case by reference to the object of the provincial legislation, the Court treats the fact of the goods' movement as a fact to be considered in some cases and ignored in others.

In my submission, this area of jurisprudence is in need of reconsideration. As will be discussed immediately below, the problem with this first branch of *Parsons* is similar to that which plagued the second branch of *Parsons* until the Supreme Court reconsidered that area of law in *General Motors of Canada Ltd. v. City National Leasing*³⁴

The second branch of *Parsons*, it will be recalled, consists of the “general regulation of trade and commerce.” The various judicial approaches to the issue have been well documented and I do not propose to canvass them here. For present purposes, it suffices to say

³³ *Ibid.* at 568-69.

³⁴ [1989] 1 S.C.R. 641 [hereinafter *General Motor*].

that the problem with which the courts have wrestled has been to arrive at a method of reconciling the federal interest in national trade regulation with the provincial interest in regulating local trade. As the above quotation from *Parsons* indicates, this balancing of interests is what informed the interpretation of the term “trade and commerce” in the first place.

The problem over the years has been that the courts have avoided expressly acknowledging that they were balancing federal concerns against provincial ones. Rather, they have taken a categorical approach, holding that legislation is *either* in relation to local trade, and thus within provincial jurisdiction, *or* that it regulates trade on a general and national level, and is thus within federal jurisdiction. Of course, this categorical distinction is unworkable: all general and national trade regulation must also take place at the local level. The result was that this second branch of *Parsons* had fallen into almost complete disuse. Writing in 1981, James MacPherson stated that it “may well be extinct.”³⁵ This branch was finally resuscitated when the Supreme Court gave it a role to play by reference to measuring the respective federal and provincial authority in *General Motors*³⁶ In that case, the Court held that the federal *Competition Act*³⁷ was supportable under the general trade and commerce power and, in particular, that its provision permitting enforcement by a private right of action was valid. Chief Justice Dickson, writing for the Court, quoted approvingly from academic writing which stated that the jurisprudence on the issue was “abstractly legal, divorced from commercial context.”³⁸ Dickson C.J. criticized the previous case law for not “correctly assess[ing] the balance to be struck between s. 91(2) and s. 92(13).”³⁹ The test which Dickson C.J. proposed to incorporate this balance included a specific requirement to consider the interaction of federal and provincial interests by reference to their respective ability to legislatively address the subject matter at issue. A valid exercise of Parliament’s general trade and commerce power, in addition to containing general regulatory control over trade, is marked by the following criteria:

³⁵ J.C. MacPherson, “Developments in Constitutional Law: the 1979-80 Term” (1981) 2 Supreme Court L.R. 49 at 71.

³⁶ *Supra* note 34.

³⁷ R.S.C. 1985, c. C-34.

³⁸ *Supra* note 34 at 658, quoting from B.C. McDonald, “Constitutional Aspects of Canadian Anti-Combines Law Enforcement” (1969) 47 Can. Bar Rev. 161 at 189.

³⁹ *General Motors supra* note 34 at 660.

(i) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (ii) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.⁴⁰

Of equal importance, the Chief Justice discussed the way in which the constitutionality of the impugned provision, *i.e.*, the creation of the civil right of action, should be addressed. A civil right of action is, of course, a paradigmatic example of property and civil rights. Therefore, standing on its own, it would be within exclusive provincial jurisdiction. In this case, however, it did not stand on its own; it was used as a means to enforce federal legislation. The Court, therefore, had to address the relevance of Parliament's adoption of this apparently provincial remedial provision.

This type of problem goes to the root of constitutional jurisprudence in that it is aimed at identifying the outer boundaries of legislative jurisdiction. Particular legislative provisions, divorced of their statutory context, are almost always capable of being characterized as unconstitutional. In other words, constitutional litigation rarely involves the question of whether an entire statute is unconstitutional. The more standard approach is to concede that, as a general matter, the legislature has authority to regulate a certain subject matter, but that in the particular case, the specific means chosen go too far. The question for the courts is how to situate the provision in its proper context so that this claim can be evaluated: how far is too far? This involves looking both at how far the provision strays from the remainder of the statute and, more pointedly, how far it strays from the basis of legislative jurisdiction pursuant to which the statute was enacted. The second element of this question, *i.e.*, the relation between the provision and the statute's underlying jurisdictional authority, necessarily involves the question of how close the provision comes to threatening the competing legislative jurisdiction of the other level of government. Again, in *General Motors* Dickson C.J. set aside rigid legal categories as a basis for making this determination and approached the issue as one of balancing between federal and provincial jurisdiction. He acknowledged that the provision at issue "does appear ... to encroach on provincial power to some extent" and attempted to find a way to structure the permissible level of encroachment. His conclusion was that a provision which encroaches upon the constitutional jurisdiction of the other level of government will only be constitutionally permissible where there is an appropriate "fit"

⁴⁰ *Ibid.* at 662.

between the provision and the underlying scheme. As Dickson C.J. stated for the unanimous court:

By “fit” I refer to how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation. The same test will not be appropriate in all circumstances. In arriving at the correct standard the court must consider the degree to which the provision intrudes on provincial powers. The case-law, to which I turn below, shows that in certain circumstances a stricter requirement is in order, while in others, a looser test is acceptable. For example, if the impugned provision only encroaches marginally on provincial powers, then a “functional” relationship may be sufficient to justify the provision. Alternatively, if the impugned provision is highly intrusive vis-à-vis provincial powers then a stricter test is appropriate.

As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained.⁴¹

The test in *General Motors* is thus a form of the proportionality test under which the courts will strike down legislative provisions that *prima facie* extend beyond the legislature’s constitutional authority where the provision is insufficiently integrated with legislation supported under a constitutionally permissible legislative objective. In other words, where a constitutional challenge is aimed at a specific legislative provision, as opposed to the entire statute, the government must justify the provision by reference to its integration with the statutory scheme. Only if this can be shown will the provision be upheld as “necessarily incidental” to a valid exercise of authority. If the encroachment goes beyond being necessarily incidental, *i.e.*, if it is disproportionate, it will be struck down. In such a case, only the disproportionate part of the scheme is unconstitutional; the remainder is left to stand. The necessarily incidental doctrine as propounded by the Court in *General Motors* thus sets out the outer boundaries of legislative jurisdiction by reference to proportionality.⁴²

⁴¹ *Ibid.* at 668.

⁴² Throughout this article I shall use the term “proportionality test” to include what is sometimes called the “least restrictive means test.” The concept of proportionality goes to whether the impact of a government measure on a protected matter—in this case, interprovincial trade—can be justified by reference to the object of the measure. The least restrictive means test refers to the question of whether a government could have implemented its legislative objective by means which are less intrusive on a protected matter than the means which the government did adopt. The answer to this question is obviously relevant in determining proportionality: if the object of the measure could be attained by less restrictive means, then the impugned measure may be disproportionate.

It is true that the Supreme Court stated that the questions of proportionality and least restrictive means are separate and distinct for the purposes of determining whether a measure which restricts a *Charter* right is reasonable and justified under s. 1 of the *Charter*. See *Canadian Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. However, in practice, there is little to separate

In my view, the Court's treatment of the second branch of *Parsons* in the *General Motors* decision should also be applied to the first branch, under which Parliament has jurisdiction in relation to interprovincial trade. The general trade and commerce doctrine was saved from incoherence by the Court's willingness in *General Motors* to openly acknowledge that a categorical approach to the issue was inadequate: that the doctrine required a fundamental rethinking to take account of, and expressly incorporate the fundamental constitutional values that require balancing.

The problem with the first branch of *Parsons* is similar to that which plagued the second branch of *Parsons* prior to the *General Motors* case. The difficulty with categorizing legislation as being in relation to intraprovincial or extraprovincial trade is that the movement of trade defies these categories. Just as all legislation which may be conceptually categorized as being a "general" regulation of trade must operate at a level of specificity, all legislation which may be conceptually categorized as being in relation to interprovincial trade also has an intraprovincial operation. The solution set out in *General Motors* is to avoid the need for drawing hard and fast distinctions by creating a flexible measure of the operation of legislation in any given case. This measurement is

the two. Hogg has argued that asking both questions is redundant: "If the objective is sufficiently important, and the objective is pursued by the least drastic means, then it must follow that the effects of the law are an acceptable price to pay for the benefit of the law." See P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 883.

One possible distinction is that the least restrictive means test is a more stringent test, or at least a more stringent application of the proportionality test. For example, in the international trade context, some argue that the proportionality test provides "a looser or more flexible balancing" than the least restrictive means test: see M.J. Trebilcock & R. Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 338. However, even here, the distinction is more theoretical than practical. The least restrictive means analysis may be either stringent or flexible depending on how it is applied. This is also illustrated by the s. 1 analysis under the *Charter*. One way the Supreme Court has loosened the requirements of the least drastic means test is to speak of a requirement that the legislature only infringe rights "as little as *reasonably possible*": see *United States v. Cotroni*, [1989] 1 S.C.R. 1469 at 1490 [emphasis added]; and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 795. By introducing the concept of reasonableness, the Court has applied the least drastic means test in a way which gives greater scope to the legislature than would appear from the strict wording of the term.

The second way in which the Supreme Court has lessened the stringency of least drastic means language is to say that it is not enough to show that the government could have obtained an equally effective end using other means. A *Charter* claimant must show that the government could have obtained the same ends *as effectively* using other means: see *R. v. Chaulk*, [1990] 3 S.C.R. 1303. This is an extremely difficult test and would exclude only the most redundant of legislative provisions.

The Supreme Court has thus been able to import looser and more flexible standards in the least drastic means test. It is therefore not clear that it is a more stringent test than proportionality. Furthermore, even Trebilcock & Howse, at 339, appear to recognize the flexibility of the proportionality test by arguing that deference for governmental policy choices may be found in "the *application* of the least-restrictive means test."

carried out both in the general definition of the trade and commerce power, with its reference to whether the legislation is aimed at an area of provincial inability, and in the development of the ancillary doctrine which looks to the degree to which legislation intrudes into a competing head of power.

In the interprovincial trade context, my argument is that provincial jurisdiction should also be determined by reference to the impact that provincial legislation has on interprovincial trade. Accepting that some impact will necessarily result from virtually all provincial regulation, the courts should identify the constitutional implications of that impact. The courts should do this by use of the ancillary doctrine as developed in *General Motors* which measures the degree of permitted jurisdictional intrusion by reference to the necessity of the intrusion for the effective exercise of valid legislation. In the interprovincial trade context, this means that provincial legislation which is otherwise validly aimed at a matter within provincial jurisdiction should be reviewed to determine the extent to which it intrudes on federal jurisdiction over the flow of trade. Where a province cannot justify a trade impediment as necessary to implement a valid provincial objective, the trade impediment—the disproportionate part—should be constitutionally characterized as being in relation to extraprovincial trade. In other words, once it is determined that the disproportionate element is not required for intraprovincial purposes, it is difficult to continue to characterize it as in relation to intraprovincial trade. Rather, the primary purpose and effect of the disproportionate element would appear to be the prevention of the flow of interprovincial trade. Once identified as such, there is no apparent constitutional rationale for treating it as within provincial jurisdiction.

Further, the application of the ancillary doctrine in the interprovincial trade area is more aligned with the general approach the Court has taken to the problem of limiting the scope of legislative jurisdiction. In this case, the jurisdictional constraint under consideration is provincial authority over property and civil rights in the province in particular, and local trade in general. Characterizing the outer limit of this jurisdiction by reference to its disproportionate impact on the flow of interprovincial trade is consistent with the analysis by which constitutional characterization has been carried out to give scope to the national concern branch of Parliament's peace, order, and good government (POGG) power and the general branch of trade and commerce.

In both of these areas, the concern for the courts has been to rein in the potentially unlimited scope of these jurisdictional powers by

reference to the need to preserve provincial jurisdiction. In other words, the courts have looked to a test which incorporates and balances competing federal and provincial interests. The essential elements of this test have been set out in the POGG power context as follows in *R. v. Crown Zellerbach Canada Ltd*

For a matter to qualify as a matter of national concern ... it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.⁴³

The application of the proportionality principle in the interprovincial trade context satisfies these requirements in that it identifies interprovincial trade barriers—the element of provincial regulation which contains a disproportionate barrier to trade—as a self-contained subject matter. That element thus has, to use the language from *Crown Zellerbach*, “a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.” Furthermore, with respect, disproportionality is a better method of identifying this distinctiveness in the interprovincial trade context than the various tests adopted by the Court. The cases which have held provincial regulation to be inapplicable to goods exported from the province are not reconcilable with the division of powers in that they provide no scope for provincial regulation over the production, processing, and marketing of these goods. On the other hand, the cases which disregard the movement of goods and focus instead on whether the regulation is in respect to either production or marketing, fail both to (i) contain a standard of distinctiveness and indivisibility; and (ii) justify this standard by reference to its reconciliation with divided jurisdiction over trade.⁴⁴

⁴³ [1988] 1 S.C.R. 401 at 432 [hereinafter *Crown Zellerbach*].

⁴⁴ Katherine Swinton has defended the attempt to draw categorical distinctions in the trade and commerce area—what she calls the “conceptual approach”—on the grounds that there is an indeterminacy of results in any balancing test: see *The Supreme Court and Canadian Federalism* (Toronto: Carswell, 1990), c. 5. As my preceding discussion of the case law indicates, I do not agree that the “conceptual approach” has led to a predictable or sound jurisprudence.

As to the first requirement, marketing and production are not each single, distinctive, or indivisible concepts in the interprovincial trade context. Production and marketing are not easily separated. As will be seen in greater detail in my discussion of the European case law in Part III, below, marketing restrictions cannot be separated from production restrictions. A restriction on production may function as a restriction on marketing because, in order to be sold in the relevant market, the goods must be produced in a marketable form. It is therefore difficult to agree with Pigeon J.'s categorical statement in *Agricultural Products Marketing* that "[m]arketing' does not include production."⁴⁵ The lack of distinctiveness in these concepts is also demonstrated in the ease with which the Court collapsed them in subsequent cases, where it struck down provincial production controls, ostensibly on the basis that they were really aimed at marketing.

As to the second requirement of *Crown Zellerbach*, even if it could be argued that production and marketing each do represent discrete subject matters, it is not clear how a distinction drawn along these lines serves to reconcile the division of powers over interprovincial trade. It is accepted that, at least to the extent that it can be identified, the flow of interprovincial trade is within federal jurisdiction. As a result, a dividing line between federal and provincial jurisdiction should seek to reflect this by reference to the movement of trade. The distinction between production and marketing fails in this regard because rules respecting production standards have at least an equal potential to prevent interprovincial trade as do rules on marketing. Indeed, the refusal of provinces to recognize extraprovincial production standards do result in significant trade barriers. A survey of interprovincial trade barriers conducted by the Conference Board of Canada concluded that "the most frequently mentioned impact of barriers was the adoption of inefficient production processes designed to overcome the barrier."⁴⁶

The Court's failure to appreciate the way in which production controls impact on the movement of trade is illustrated in its decision in *Labatt Brewing Co. v. Canada (A.G.)*.⁴⁷ In that case, the Court held that federal production standards for the contents of "Light Beer" were an unconstitutional intrusion into provincial regulation over production of

⁴⁵ *Agricultural Products Marketing* supra note 26 at 1296.

⁴⁶ S. Loizides & M. Grant, *Barriers to Interprovincial Trade: Implications for Business* (Ottawa: Conference Board of Canada, 1992) at 3.

⁴⁷ [1980] 1 S.C.R. 914.

goods. With respect to the interprovincial trade issue, Estey J. stated the following for the Court:

The impugned regulations in and under the *Food and Drugs Act* are not concerned with the control and guidance of the flow of articles of commerce through the distribution channels, but rather with the production and local sale of the specified products of the brewing industry. There is no demonstration by the proponent of these isolated provisions in the *Food and Drugs Act* and its regulations of any interprovincial aspect of this industry. The labels in the record reveal that the appellant produces these beverages in all provinces but Québec and Prince Edward Island. From the nature of the beverage, it is apparent, without demonstration, that transportation to distant markets would be expensive, and hence the local nature of the production operation.⁴⁸

The Court thus asserted, “without demonstration,” in its words, that beer production is inherently local because of the nature of beer. It did not consider how provincial jurisdiction over beer production influenced the lack of interprovincial movement in beer. As Ian Irvine and William Sims demonstrate, local production rules were introduced for the very purpose of ensuring that beer marketed in the province is also produced there:

[I]t was not until recent decades that such production stipulations were necessary in order to maintain local production. Before the advent of preservatives, and before the arrival of the technology which brought scale economies with it, brewing was a relatively localized industry which had to sell its product within a short time. It was only when the economies of large scale brewing became evident that firms saw an economic advantage to centralizing production and that the provincial governments began to pressure the big brewers to produce in the province of sale.⁴⁹

The Court’s approach to constitutional characterization in the interprovincial trade context is thus open to question by reference to the general purposes which are served by the characterization of legislative subject matters under the *Constitution*. My argument is that the identification of disproportionate impact on interprovincial trade as a constitutional subject matter is more aligned with these purposes.

In making the determination of proportionality, the courts should consider the way in which impermissible barriers to interprovincial trade are identified in the federal-provincial Agreement on Internal Trade. The Agreement, in turn, draws upon the approach taken by international trade dispute panels under the GATT, the FTA, and NAFTA, the jurisprudence of the European Court of Justice respecting permissible trade impediments under the Treaty of Rome, as well as that

⁴⁸ *Ibid.* at 939.

⁴⁹ I.J. Irvine & W.J. Sims, “Interprovincial Barriers in the Beer Trade” in K.F. Palda, ed., *Provincial Trade Wars: Why the Blockade Must End* (Vancouver: The Fraser Institute, 1994) 1 at 5.

of the American courts in interpreting the commerce clause of the United States Constitution. These institutions have been attempting to address the type of issue that should be addressed under the interprovincial trade doctrine; that is, how to distinguish local trade regulation from disproportionate or undue burdens on trade.

III. PROPORTIONALITY AND THE AGREEMENT ON INTERPROVINCIAL TRADE

On 18 July 1994, the federal, provincial, and territorial governments entered into the Agreement on Internal Trade. The negotiations leading to the Agreement commenced in March 1993. The primary impetus for these negotiations was the defeat in a national referendum of the proposed constitutional amendments in the *Charlottetown Accord*.⁵⁰ The *Charlottetown Accord* contained a number of political accords respecting Canadian economic union in general and interprovincial trade barriers in particular. The failure of the *Charlottetown Accord* was preceded by earlier attempts at constitutional reform in the interprovincial trade area. The constitutional negotiations eventually leading to the patriation of the *Constitution Act, 1982*⁵¹ also addressed trade barriers. In the end, a lack of consensus on the terms of proposed amendments, as well as an extremely broad range of other constitutional issues addressed in these negotiations, resulted in these proposals falling off the table.⁵²

The Agreement thus illustrates an attempt to address interprovincial trade barriers without the need for constitutional amendment. Indeed, the Agreement goes outside of the constitutional arena by establishing institutions and incentives for the negotiated reduction of trade barriers. Most commentators have agreed that this approach is preferable in that the many complex issues involved in the interprovincial trade area are better suited to intergovernmental

⁵⁰ *Consensus Report on the Constitution: Charlottetown, 28 August 1992, Final Text* (Ottawa: Supply and Services Canada, 1992) [hereinafter *Charlottetown Accord*].

⁵¹ Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁵² For a discussion of the attempts at constitutional reform in this area, see M.J. Trebilcock & R. Behboodi, "The Canadian Agreement on Internal Trade" in M.J. Trebilcock & D. Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade* (Toronto: C.D. Howe Institute, 1995) 20 at 24-33; R. Howse, *Economic Union, Social Justice and Constitutional Reform: Towards a High but Level Playing Field* (North York, Ont.: York University Centre for Public Law and Public Policy, 1992) at 59-74; and T.J. Courchene, *Economic Management and the Division of Powers* (Toronto: University of Toronto Press, 1986) at 215-20.

negotiations than to constitutional litigation. Without questioning this general proposition, I shall argue in this part that there are advantages to a consistency of approaches in the negotiation and constitutional treatment of trade barriers. Before entering into this discussion, it is helpful to set out the general way in which trade barriers are identified in the Agreement.

Chapter Four of the Agreement sets out the general rules which are to be applied, with some qualifications and exceptions, to trade barriers in the different sectors covered by the Agreement. Article 401, entitled “Reciprocal Non-Discrimination,” requires the parties to treat the goods from any other party no less favourably than the best treatment it accords to its own or any other person’s “like, directly competitive, or substituted goods.” Under Article 401(2), each party must accord to persons, services, and investments of other parties treatment no less favourable than the treatment it accords to its own or others persons, services, and investments. Article 402 provides that the parties shall not adopt or maintain “any measure that restricts or prevents the movement of persons, goods, services or investments across provincial boundaries.” Under Article 403, “each party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.”

All of the above provisions are subject to being overridden by provincial measures which are aimed at a legitimate objective and which do not disproportionately impede trade. According to Article 404, where it has been established that a measure is inconsistent with Articles 401, 402, or 403, the measure may be saved where it is demonstrated that:

- (a) the purpose of the measure is to achieve a legitimate objective;
- (b) the measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meets the legitimate objective;
- (c) the measure is not more trade restrictive than necessary to achieve that legitimate objective; and
- (d) the measure does not create a disguised restriction on trade.

A legitimate objective is defined in Chapter Two of the Agreement as meaning public security and safety; public order; protection of human, animal or plant life, or health; protection of the environment; consumer protection; protection of the health, safety, and well-being of workers; and affirmative action programmes for disadvantaged groups.

Thus, Chapter Four of the Agreement proscribes the maintenance or imposition of barriers to interprovincial trade which cannot be justified as the least restrictive means by which to carry out legitimate objectives. Where a panel established under the Agreement finds that a party has established an unjustified trade barrier, and the party does not voluntarily remedy it, the party challenging the barrier may suspend benefits having an equivalent effect or impose equivalent retaliatory measures (Art. 1710).

The Agreement also contains a number of provisions aimed at specific types of trade barriers resulting from: disharmony in standards and regulatory measures (Art. 405); discriminatory procurement policies (Ch. Five); investment policies (Ch. Six); the regulation of labour and professionals (Ch. Seven); consumer-related measures (Ch. Eight); agricultural and food products (Ch. Nine); alcohol (Ch. Ten); natural resources processing (Ch. Eleven); energy (Ch. Twelve); communications (Ch. Thirteen); transportation (Ch. Fourteen); and environmental protection (Ch. Fifteen). These provisions set out detailed requirements aimed at the identification and negotiated removal of trade barriers. Although they differ in detail, these provisions adopt, either explicitly or in different terms, the same type of proportionality requirement set out in Article 404.

The proportionality requirement in Chapter Four of the Agreement is similar to the practice adopted in interpreting international trade agreements to which Canada is a party. For example, Article 401 of the Agreement adopts the national treatment and most-favoured nation treatment principles set out in the GATT, the FTA, and NAFTA. Ian Robinson has addressed the operation of the proportionality requirements in these agreements as follows:

Like the Tokyo GATT and the FTA, the NAFTA recognizes a special class of "legitimate" regulatory objectives—the "safety or the protection of human, animal or plant life or health, the environment, or consumers"—which may be valid even if they restrict trade. If a measure is found to be trade restrictive, a government seeking to defend it must first demonstrate that the intent of the measure was to realize one of these "legitimate objectives." In the FTA and the Tokyo GATT, if a trade-restrictive measure passed this first hurdle, the government had to show that this measure was also "necessary" to achieve that legitimate objective. If this second test was also met, then the measure survives the challenge. The NAFTA increases the difficulty of meeting this second test by requiring that governments prove that the measure chosen was the "least trade restrictive necessary" to achieve a legitimate objective.⁵³

⁵³ I. Robinson, "The NAFTA, the Side-Deals, and Canadian Federalism: Constitutional Reform by Other Means?" in R.L. Watts & D.M. Brown, *Options for a New Canada* (Toronto: University of Toronto Press, 1991) 193 at 197.

The operation of the proportionality principle is illustrated in two related applications of Article XX of the GATT to challenges to Canadian herring and salmon processing requirements. GATT Articles XX(b) and (g), respectively, exempt trade impeding measures which are “necessary to protect human, animal or plant life or health” and “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” The first challenge was to the requirement that Canadian salmon and herring be processed in Canada before export. Canada argued that the processing requirement was primarily aimed at conservation because of the need for accurate reporting requirements. The GATT panel rejected this argument in the following terms⁵⁴:

To qualify under Article XX(g) exceptions for measures “relating to” conservation, a measure must be primarily aimed at conservation.

Canadian export restrictions could not be considered to be primarily aimed at conservation, because (a) statistical data for conservation purposes was collected on other species without export restriction and (b) a limitation on consumption could not be effective if only exports of unprocessed fish were restricted.⁵⁵

Subsequent to the GATT panel’s report, but prior to Canada’s approval of same, Canada adopted a new requirement that all salmon and herring be landed in Canada for inspection prior to export. Again, the United States challenged the requirement, this time before a FTA panel. Michael Trebilcock and Robert Howse provide the following account of these proceedings:

Unlike the measure impugned in the earlier case, the landing requirement did not explicitly prohibit or restrict exports of the unprocessed fish. Nevertheless, its *effect* was to disadvantage American processors, because in the case of fish destined to U.S. processing plants, they would have to be both landed and unloaded in Canada (because of the law) and then repacked and unloaded again in the United States before processing. The United States claimed that the measure was, in effect, a restriction on “exportation or sale for export” (i.e. of unprocessed Canadian fish to the United States) and therefore in violation of Article XI of the GATT. Canada argued that even if the landing requirements were in violation of Article XI, the Article XX(g) exception applied, because landing of the fish was necessary for accurate monitoring of the catch pursuant to Canadian conservation programmes. The Panel found that other means less restrictive of trade existed to achieve Canada’s objectives of monitoring and compliance with its conservation schemes, including co-operation with U.S. authorities and on-board

⁵⁴ See *United States v. Canada: Restrictions on Export of Unprocessed Salmon and Herring Complaint*: 20 February 1987 (L/6132), reprinted in R.E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Toronto: Butterworths, 1993) App./Pt. I at 542.

⁵⁵ *Ibid.* at 543.

inspection of catches and cargo, and that (at least implicitly) Canada had adopted more restrictive means necessary for protectionist reasons.⁵⁶

The approach of the GATT and FTA panels to a claimed justification of a trade barrier by reference to a legitimate objective is thus to consider the availability of alternative means to carry out the same objective. As Trebilcock and Howse state, “instead of examining the legislative history of the measure to determine whether its primary aim was protection of the domestic Canadian processing industry, it considered whether other means less restrictive of trade could equally serve the stated conservation purpose.”⁵⁷

This objective proportionality test is also used by the Court of Justice of the European Communities (the “European Court of Justice”) to consider justifications of trade impeding measures under the Treaty of Rome. Articles 30 and 34 of the Treaty of Rome prohibit, subject to certain exceptions, quantitative restrictions on imports and exports “and all measures having equivalent effect.” There are two major qualifications to this proscription. The first is set out in Article 36, which permits the same type of legitimate objectives as those discussed above in the context of the Agreement, the GATT, the FTA, and NAFTA:

The provisions of Arts. 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The European Court of Justice has interpreted Article 36 to permit restrictions which are supportable on the enumerated public policy grounds provided that they use the least restrictive means to accomplish those goals. The Court put it as follows in *Campus Oil Ltd. v. Minister for Industry and Energy*

As the Court has previously stated (see judgments of *Eggers*, Case 13/78 (12 October 1978), and of *E.C. Commission v. France*, Case 42/82 (22 March 1983), Article 36, as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure and the measures taken pursuant to that Article must not create obstacles to imports which are disproportionate to those objectives. Measures adopted on the basis of Article 36 can therefore be justified only if they are such as to

⁵⁶ Trebilcock & Howse, *supra* note 42 at 337 [emphasis in original].

⁵⁷ *Ibid.* at 336.

serve the interest which that Article protects and if they do not restrict intra-Community trade more than is absolutely necessary.⁵⁸

The European Court of Justice has also used the proportionality principle to consider the validity of other governmental measures which, although they fall outside of Article 36, serve valid policy objectives. It has done this by applying a “rule of reason” to the interpretation of the term “measures having an equivalent effect” to quantitative restrictions on imports in Article 30. This method of interpretation permits disparities between the regulations of member states resulting in trade barriers provided that they satisfy “mandatory requirements”⁵⁹ which do not have a disproportionate impact on trade. The Court stated the rule as follows in *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein*

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.⁶⁰

Alan Dashwood has provided the following analysis of the relationship between the rule of reason in *Cassis de Dijon* and other areas of European Community law, especially Article 36:

The legal basis of justification through the satisfaction of mandatory requirements could not be Article 36, since the Court does not have power to add to the exceptions in that Article. And, indeed, Article 36 is not mentioned in the judgment. What the Court has done is to interpret Article 30 in such a way as to exclude non-discriminatory provisions necessary to satisfy mandatory requirement[s]. ...

⁵⁸ (No. 72/83), [1984] 3 C.M.L.R. 544 at 570-71, citing [1979] 1 C.M.L.R. 562 and [1984] 1 C.M.L.R. 160.

⁵⁹ The term “mandatory requirements” is meant to include only legislated requirements, as opposed to “the mere exercise of executive or administrative discretion”: see Trebilcock & Howse, *supra* note 42 at 436, note 21.

⁶⁰ (No. 120/78), [1979] E.C.R. 649 at 662 [hereinafter *Cassis de Dijons*]. The European Court of Justice has apparently retracted somewhat from its original statement of the scope of prohibited national marketing laws. In *Re Keck & Anor* (No. 267-68/91), [1995] 1 C.E.C. 306 at 307, the Court upheld French legislation prohibiting the selling of goods at a loss “provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other member states.” The Court stated, at 307, that this restriction of the type of marketing regulations which are prohibited under Article 30 was made necessary “[i]n view of the increasing tendency of traders to invoke art. 30 of the treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other member states” In any event, although the Court has restricted the scope of the rule, it did not indicate that the basic method of the proportionality analysis was open to question.

The solution adopted in *Cassis de Dijon* was foreshadowed by the principle in Article 3 of the Commission's Directive 70/50 that non-discriminatory marketing rules constitute measures having an effect equivalent to quantitative restrictions "where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules."⁶¹

Similarly, according to Gormley:

The rule of reason is not an application of the public policy provision in the first sentence of Article 36 EEC nor is it simply an expansion of the heads of the first sentence of Article 36. The interests or values covered by the rule of reason do not constitute a closed class but the case-law has given a clear indication of the sort of non-discriminatory national provisions which it will accept, provided that the conditions for acceptance are fulfilled ... So far the Court has indicated that national measures justified in the interests of consumer protection; the prevention of unfair commercial practices (sometimes expressed as the promotion of fair trading or the prevention of unfair competition); the effectiveness of fiscal supervision; environmental protection; improvement of working conditions; the protection of public health or the promotion of culture in general may be accepted, even though they are capable of affecting trade between Member States.

As has been indicated, measures justifiable under the rule of reason must be reasonable and are subject to the proportionality test; that is they must not restrict trade between Member States any more than is absolutely necessary for the attainment of the legitimate purpose and if there are other ways, less restrictive of trade between Member States of attaining that purpose then the measures will not be accepted. Additionally, the measures concerned must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.⁶²

The Court's interpretation of the basic trade law principles under the Treaty is thus to focus on two types of prohibited regulations: those which are discriminatory, and those which are disproportionate. Discriminatory provisions are aimed at preventing trade among Member States. An example of a discriminatory measure arose in *Schutzerband gegen Unwesen in der Wirtschaft. Weinvertriebs GmbH*⁶³ where the European Court of Justice held that a German law setting minimum alcohol content for imported vermouth violated Article 36. Because the legislation in that case was aimed exclusively at imported products, it was held to be a discriminatory trade barrier:

⁶¹ A. Dashwood, "The *Cassis de Dijon* Line of Authority" in Bates *et al.*, *In Memoriam J.B.D. Mitchell* (London: Sweet & Maxwell, 1983) 145 at 149, citing O.J. 1970, L.13/29; and *GB-Inno-BM v. Vereniging Van De Kleinhandelaars In Tebd* (No. 13/77), [1977] 1 C.M.L.R. 283.

⁶² L.W. Gormley, ed., *Introduction to the Law of the European Communities After the Coming into force of the Single European Act* (Deventer, The Netherlands: Kluwer, 1989) at 389-90 [footnotes omitted].

⁶³ (No. 59/82), [1984] 1 C.M.L.R. 319 [hereinafter *Schutzerband*]; see also *Factortame v. Secretary of State for Transport* [1991] 1 All E.R. 70 (H.L.), where an injunction was granted to prevent the U.K. Parliament from enacting regulations that prohibited foreign ownership of fishing vessels.

It is apparent from the argument before the Court, which has not been challenged in that respect by the plaintiff in the main action, that a provision of the importing member-State fixing a minimum degree of alcohol only for imported vermouth prevents the marketing of a product lawfully made in the exporting member-State, whereas it imposes no condition in relation to the minimum content of alcohol for the marketing of similar domestic products. ... Since such a provision affects only imported products, it is of a discriminatory nature.⁶⁴

Disproportionate measures are those which, although not facially discriminatory, have the effect of impeding trade to an extent which is not justifiable by reference to the listed grounds in Article 36 or the public policy grounds considered in the rule of reason. An example of a disproportionate measure arose in *Walter Rau Lebensmittelwerke, De Smedt Pvb*⁶⁵ where the Court considered a Belgian decree prohibiting the retail sale of margarine in cuboid packs. Because the prohibition applied to imported and domestic margarine alike, it was not a facially discriminatory measure. Nonetheless, the Court held that it was a barrier to trade because:

[I]t is of such a nature as to render the marketing of those products more difficult or more expensive either by barring them from certain channels of distribution or owing to the additional costs brought about by the necessity to package the products in question in special packs which comply with the requirements in force on the market of their destination.⁶⁶

The Belgian government sought to defend the requirement on the grounds that it was justifiable in order to protect consumers by preventing confusion between butter and margarine. The Court, applying the principle that “[i]f a member-State has a choice between various measures to attain the same objective it should choose the means which least restricts the free movement of goods,”⁶⁷ rejected this argument:

It cannot be reasonably denied that in principle legislation designed to prevent butter and margarine from being confused in the mind of the consumer is justified. However, the application by one member-State to margarine lawfully manufactured and marketed in another member-State of legislation which prescribes for that product a specific kind of packaging such as the cubic form to exclusion of any other form of packaging considerably exceeds the requirements of the object in view. Consumers may in fact be protected just as effectively by other measures, for example by rules on labeling, which hinder the free movement of goods less.⁶⁸

⁶⁴ *Schutzerband*, *supra* note 63 at 329.

⁶⁵ (No. 261/81), [1983] 2 C.M.L.R. 496 [hereinafter *Walter Rau*].

⁶⁶ *Ibid.* at 508-09.

⁶⁷ *Ibid.* at 508.

⁶⁸ *Ibid.* at 509.

The distinction between discriminatory and disproportionate measures is especially relevant to the Canadian interprovincial trade context. That distinction requires a two-step analysis. The first step is to consider whether the local regulation is discriminatory in the sense that it is aimed at interfering with trade among member-states. If the regulation is discriminatory, it is inconsistent with Article 30 or 34 of the Treaty of Rome. If the regulation is not discriminatory, its validity is determined by reference to the justifications permitted in Article 36 (if it is purportedly justified by reference to one of the enumerated grounds in that Article) or the rule of reason (if it is purportedly justified by reference to a mandatory requirement which is not included in the enumerated grounds in Article 36). In either case, in order to justify the regulation's impact on the movement of trade, the enacting state must show that this impact is necessary to carry out the objective of the regulation. These categories of cases thus resemble the type of issues at play in the Canadian interprovincial trade context.

What the European Court of Justice treats as discriminatory measures are similar to those provincial statutes that prohibit transactions with persons outside the province. In both the Canadian and European context, these measures are prohibited because they are aimed at preventing trade among persons in the different jurisdictions. The European Court of Justice's determination of disproportionate measures may also be compared to those cases where the Supreme Court of Canada has considered the application of provincial legislation to goods with an extraprovincial destination. The approach taken by the European Court of Justice is to evaluate the validity of local regulation by reference to the regulation's impact on the movement of goods and whether that impact is necessary in light of the purpose of the regulation. The rationale for this approach is to preserve local autonomy to the extent objectively necessary to implement valid local objectives. In the Canadian constitutional context, the Supreme Court of Canada has not taken these factors into account. Rather, the Court has attempted to treat these cases as falling within the starker category of whether the regulation is aimed at preventing the extraprovincial flow of trade. As the above discussion of the Supreme Court of Canada case law in this area demonstrates, the result has been a series of irreconcilable decisions, which do not appear to be supportable by any coherent principle.

The concept of proportionality is also found in American constitutional law, where the courts have applied it to interpret Articles VIII and IV(2) of the United States Constitution. Article VIII provides that "Congress shall have power ... to regulate commerce with foreign

Nations, and among the several States;" Article IV(2), the so-called "privileges and immunities clause" states "[t]he Citizens of each State shall be entitled to all Privileges and immunities of Citizens in the several States."

The American courts have interpreted Congress's power to regulate interstate commerce as prohibiting state legislation that "unduly" impedes interstate trade in light of the legislative objective. As Hogg has noted with respect to the American law, "[t]he language of 'burdens' on interstate commerce is conventional in the United States, where the essential problem is exactly the same, but is confronted more openly by the courts than in Canada."⁶⁹ More openly, and, I would argue, more coherently.

Stone J. described the interpretation of state legislation's compliance with the commerce power as follows for the United States Supreme Court in *South Carolina State Highway Department v. Barnwell*:⁷⁰ "the inquiry [is] whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."

In making this determination, the Court balances the means chosen to implement a legitimate legislative objective against its effects on interstate trade. Thus, in *Raymond Motor Transport Incv. Rice*,⁷¹ the Supreme Court struck down a Wisconsin regulation that prohibited the operation of vehicles over fifty-five feet long on highways within the state. The effect of this restriction was that the parties challenging the legislation, who used the industry standard sixty-five foot vehicles in surrounding states, either had to change their routes, bypassing Wisconsin, or detach their trailers prior to entering the state. These parties led evidence to show that there were no safety reasons which favoured the fifty-five foot restriction. The state argued that the purpose of the restriction was to promote highway safety, but did not offer any evidence respecting comparative safety. Powell J. discussed the Court's approach to the issue as follows:

In this process of "delicate adjustment," the Court has employed various tests to express the distinction between permissible and impermissible impact upon interstate commerce, but experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case. Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state

⁶⁹ See Hogg, *supra* note 42 at 553.

⁷⁰ 303 U.S. 177 (1938).

⁷¹ 434 U.S. 429 (1977).

regulatory concern in light of the extent of the burden imposed on the course of interstate commerce. As the Court stated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed.2d 174 (1970):

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit* 362 U.S. 440, 443, 80 S. Ct. 313, 4 L.Ed.2d 852. *If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.*⁷²

Similarly, in *Toomer v. Witsell*⁷³ a South Carolina statute requiring all owners of shrimp boats to unload their catch in that state prior to transporting the shrimp to another state was held to create an undue burden on interstate commerce because its effect was to interfere with the economical means of exporting directly, without unloading “the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry.”⁷⁴ The Court held that the state’s justification that the loading requirement assisted tax enforcement was insufficient because burdens on interstate commerce “should not be approved simply because they facilitate in some measure enforcement of a valid tax.”⁷⁵

A proportionality test is also used in the interpretation of the privileges and immunities clause. One of the provisions considered in *Toomer* was the imposition of a higher tax on out-of-state commercial shrimp fishers than on fishers resident within the state. The state sought to justify the higher tax on the grounds that its purpose was to conserve the shrimp supply and asserted that the fishing methods and boat sizes of out-of-state fishers, and the greater cost of enforcing the laws against them required the higher tax. The Court approached the issue as follows:

But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion. The State is not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely

⁷² *Ibid.* at 441-42 [emphasis added; footnotes omitted].

⁷³ 334 U.S. 385 (1947) [hereinafter *Toomer*].

⁷⁴ *Ibid.* at 403-04.

⁷⁵ *Ibid.* at 406.

compensate the State for any added enforcement burden they may impose or any conservation expenditures from taxes which only residents pay. We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens as a class, and the severe discrimination practiced upon them.⁷⁶

The American constitutional jurisprudence is thus aligned with the international trade law jurisprudence in that both look to the effect that a domestic measure has on the flow of trade and whether that effect is disproportionate.⁷⁷

Using the concept of disproportionality as the way to distinguish valid local trade regulation from unjustifiable interference with trade has thus gained wide international acceptance. The Agreement's adoption of this principle indicates that governments in Canada recognize the workability of that principle. Furthermore, its effective application in Canada could have significant consequences. The examples of the application of the proportionality principle discussed above are not just of academic interest. Each of the trade barriers identified in those examples has a parallel in Canada. Thus, the requirement of processing fish products prior to export, which was found to be in violation of the GATT and the United States Constitution, is comparable to Quebec regulations prohibiting fish and crab caught there from being processed in another province.⁷⁸ Similarly, the Belgian prohibition on the sale of margarine in cube form is akin to the requirement in Ontario and Quebec that margarine must be manufactured in a different colour than butter.⁷⁹ As well, the way in which Wisconsin's restriction on the length of vehicles operating on its highways prevented effective commercial through traffic is similar to the effect of Ontario's vehicle length restriction on trade with the United States and western provinces. As Norman Bonsor explains:

In all the Western provinces and all but 4 U.S. states (Alaska, Connecticut, Hawaii and Rhode Island), maximum vehicle length has been set at 25 metres and maximum trailer length at 53 feet. In Ontario, the maximum vehicle length is 23 metres and maximum

⁷⁶ *Ibid.* at 398-99 [footnotes omitted]. For a discussion of the relationship between the proportionality tests used to interpret the commerce clause, and the privileges and immunities clause, see L. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation, 1978) at 335 and 408-12.

⁷⁷ For a discussion on the impact of American commerce power case law on the jurisprudence of the European Court of Justice, see Gormley, *supra* note 62 at 357 and 381.

⁷⁸ K.F. Palda, "Why Canada Must Rid Itself of Interprovincial Trade Barriers" in Palda, ed., *supra* note 49, xi at xiii.

⁷⁹ B. Prentice, "Interprovincial Barriers to Agriculture Trade," in Palda, ed., *supra* note 49, 83 at 88.

trailer length is 48 feet. Québec allows 51 foot trailers and the other eastern provinces have the same standard as Ontario.

Carriers supplying services between Ontario and the west (and Ontario and the U.S.) are thus faced with either switching equipment at the Ontario-Manitoba border or sizing the equipment for the lowest common standard.⁸⁰

The presence of the Agreement illustrates a consensus in Canada that barriers to trade in Canada should be identified in the same way that barriers to trade are identified by the international community: by reference to their disproportionate impact. My argument is that this concept of barriers should be integrated into the Constitution to identify the outer scope of provincial jurisdiction over intraprovincial trade. Once it is determined that provincial legislation primarily aimed at intraprovincial trade impedes trade to a greater extent than is necessary to carry out the goals of the scheme, then, to that extent, the disproportionate element is beyond provincial jurisdiction. My argument is that disproportionate impact is consistent with the overriding constitutional goal of protecting a proper sphere for provincial jurisdiction in a way which is superior to the other approaches which the Supreme Court of Canada has taken to this issue.

Having said this, it is anticipated that there could be concerns with applying proportionality as the operative rule for the constitutional characterization of interprovincial trade.

IV. ADDITIONAL CONCERNS

A. *Criticisms of the Ancillary Doctrine*

The first major conceptual concern is not directly with applying foreign legal notions, but in defending the central role that I have proposed for the ancillary doctrine as applied in *General Motors*⁸¹ Hogg argues that the approach taken in this decision “is not satisfactory”:

If a provision is a rational, functional part of a federal legislative scheme, why should it be regarded as “encroaching” or “intruding” on provincial powers? Indeed, it may be doubted whether the provincial Legislatures would have been competent to enact the civil remedy provision that was under attack, since its purpose was to improve the enforcement of a federal law. The idea of encroachment or intrusion, however appealing in common sense, does not stand up to analysis. If I am wrong on this, there still remain

⁸⁰ N. Bonsor, “Big Wheels Stalling: How Bad are Barriers to Transportation Between the Provinces?” in Palda, ed., *supra* note 49, 155 at 165.

⁸¹ *Supra* note 34.

serious difficulties. How is the encroachment or intrusion, once found, to be measured? And, once measured, how is the unique test for validity to be formulated for that particular encroachment or intrusion? In my view, the *General Motors* approach makes the answer to a simple question too complicated, too discretionary, and therefore too unpredictable.

The proper course for the Court is to return to the true path marked out by *Nykorak*, *Papp*, *Zelensky* and *Multiple Access*. Each head of legislative power, whether federal or provincial, authorizes all provisions that have a rational connection to the exercise of that head of power. There is no theoretical or practical need for a separate ancillary power. The rational connection test is to be preferred to stricter alternatives, such as the “truly necessary” or “essential” tests, simply because it is less strict. The more liberal test respects the limits imposed by the Constitution’s distribution of powers by requiring a rational connection, but it still allows considerable leeway to the legislative judgment of both the federal Parliament and the provincial Legislatures. It thus accords with the refrain of this text in favour of judicial restraint.⁸²

Hogg’s criticism is a powerful one. Because I rely quite heavily on the Court’s decision in *General Motors* for my argument in this article, I shall respond to this criticism in detail.

First, Hogg argues that it is not proper to speak of a rational and functional part of a legislative scheme encroaching or intruding on the jurisdiction of the other level of government. But this is question-begging. Rationality and functionality cannot be viewed in the abstract for constitutional purposes. These concepts can only be understood by reference to the need to confine the authority of legislatures to their constitutional jurisdiction. For example, if a province sought to keep the streets free of prostitution, a rational and functional way for it to do so would be to make prostitution a criminal offence. That the provinces cannot do this is because criminal law is within federal jurisdiction. In other words, the requirement that an impugned provision be rationally and functionally related to a valid scheme is not driven by the need for legislation to contain only rational and functional provisions for their own sake, but to ensure that the entire legislative scheme, including the impugned provision, does not go beyond the jurisdiction of the legislature. As a result, the focus of the inquiry is the outer boundary of legislative jurisdiction. This necessarily involves consideration of the competing legislative jurisdiction of the other level of government. Therefore, if the concern of the courts is to ensure that an otherwise valid statute does not contain provisions that unjustifiably exceed the legislative jurisdiction under which the statute was enacted, I would argue that it is better for the courts to face this issue directly by acknowledging that the impugned provision does

⁸² Hogg, *supra* note 42 at 409; see also N. Finkelstein, “Case Comment” (1989) 68 Can. Bar Rev. 802 at 817.

intrude into the other government's jurisdiction and require the enacting government to justify the need to do so. Professor Le Dain, as he then was, has argued that the ancillary doctrine "permits the setting of reasonable limits to the scope of exclusive federal jurisdiction because of its preclusive effect, while at the same time permitting the *extension* of federal jurisdiction to what is reasonably necessary by actual legislative initiative."⁸³

Second, Hogg argues that the proportionality test is an overly complicated answer to a simple question and thus too unpredictable and discretionary. It is overly complicated, according to Hogg, because it requires the court to treat different types of intrusions differently by reference to the degree of intrusion. Hogg would therefore replace this with a single test of rationality and functionality. But again, it is necessary to consider why any justification of rationality and functionality is required. The need for justification only arises if the impugned provision contains a threat of extending legislative jurisdiction. Absent this threat, there is no need to justify the degree to which specific provisions are integrated with a statute. Thus, if the overriding concern is to protect the integrity of competing legislative jurisdiction, then it makes sense to consider the degree to which that jurisdiction is threatened and adjust the level of scrutiny accordingly. Where that threat is non-existent, no level of justification is required; where it is marginal, a looser justification is required; where it is significant, a higher standard must be met.

I concede that the test does not produce predictable results, but this is because the issues which it attempts to address are complex. The role of this test is to incorporate those issues and explicitly balance them against each other. The result of this process of balancing cannot be easily predicted, but that is certainly not unique to this area of constitutional law. In this regard, it is worth comparing this balancing to the similar balancing which is carried out under section 1 of the *Charter*.⁸⁴ Under section 1, the courts are required to balance infringements of constitutionally protected rights against the government's interest in pursuing legislative objectives. The result of that balance is not always predictable, but that is because the competing interests are not open to any obvious resolution. All that can be asked for in such a balancing exercise is that the courts include the relevant factors in the measurement of the balance. To be fair, Hogg criticizes

⁸³ *Supra* note 9 at 274 [emphasis added].

⁸⁴ *Supra* note 43.

the discretionary element of the section 1 balance, but he also acknowledges that “there is merit in the frank avowal that the guaranteed rights are not absolutes.”⁸⁵ I would argue that the ancillary doctrine as expounded by the Court in *General Motors* contains the same type of frank avowal that not all threatened extensions of legislative jurisdiction are equal.

Hogg’s third criticism of Dickson C.J.’s approach in *General Motors* is that it is too strict. Requiring the government to justify a legislative provision by a standard beyond the provision’s rational and functional relationship with the remainder of the statute restricts the legislatures’ freedom and is thus inconsistent with Hogg’s advocacy of judicial restraint. This criticism strongly informs the indeterminacy criticism discussed above. The indeterminacy argument could be met by a requirement that all legislative provisions can only be sustained where they are truly necessary to a valid legislative scheme. Hogg’s preference for the rational and functional relationship standard is that it involves less searching judicial review of legislation. This position on judicial restraint pervades Hogg’s treatise. Hogg argues for judicial restraint in federalism decisions because of the indeterminate issues presented in division of powers cases. These issues inevitably involve the exercise of political judgment, drawing upon contested values from history, political science, economics, and sociology. Because judges are not in as good a position as democratically elected legislatures to incorporate these values, the courts should generally defer to legislative choices:

One cannot say that a judge is wrong to take account of these kinds of considerations. How else is the judge to reach a decision as to the appropriate characterization of a statute, where conventional legal sources fail to supply the answer? But, in assessing these kinds of criteria, the judge has little to provide guidance and may tend to assume that his or her personal preferences are widely shared if not impliedly embodied in the Constitution. In that sense, judicial review can never be wholly neutral, wholly divorced from the predilections of the judges. This is one reason why in federalism cases judicial restraint should be a governing precept. In other words, where the choice between competing characterizations is not clear, the choice which will support the legislation is normally to be preferred.⁸⁶

Other scholars have noted the political dimensions of federalism decisions and have also tended to argue in favour of judicial restraint. Patrick Monahan and Paul Weiler have argued that, because of the political nature of these decisions, the courts lack the legitimacy to make them. According to Monahan, “federalism disputes, as to both federal

⁸⁵ Hogg, *supra* note 42 at 853.

⁸⁶ *Ibid.* at 390.

and provincial legislation, should be resolved through political processes. The claim is simply that federalism issues are inescapably political and there is no plausible reason for removing them from the political arena.”⁸⁷

Similarly, Weiler argues that the courts do not have a legitimate role in judicial review on federalism grounds and advocates the development of doctrine which would reduce, if not eliminate the role of the courts:

We must allow the representative governments to decide not only whether affirmative legislative action is desirable for a social problem but also whether it is the appropriate body to enact such legislation. The court should not have the job of making the latter, equally political, decision. ...

In my view, abolition of judicial review is the ideal, but I am more concerned with immediate practical steps towards minimizing either the incidence or the harm from review. Instead of trying to alter the Supreme Court in ways designed to make it a constitutional umpire, let us try to reduce as much as possible the significance of this function in its work.⁸⁸

There is obvious merit to the argument that, on the whole, the judiciary is less well placed than the legislatures to carry out the balancing required in political decisions and I do not propose to argue against these scholars on this general point. However, it is important to recognize that there are different types of federalism issues which come before the courts and that the relative legitimacy of the courts and the legislatures is not the same in each case. The concern in this article is interprovincial trade barriers and the role of disproportionality in provincial measures which impede trade.

One of the issues which interprovincial trade barriers raises is the legitimacy of provincial measures that impede the trade of persons *outside* their jurisdiction. The fact that provincial legislatures are democratically accountable to their provincial constituents does not militate in favour of judicial restraint where the issue is whether provincial measures implement policies at the expense of persons outside their jurisdiction. The problem of local legislatures implementing policies at the expense of persons outside their jurisdiction is the central point of John Hart Ely’s theory of judicial

⁸⁷ P.J. Monahan, “At Doctrine’s Twilight: The Structure of Canadian Federalism” (1984) 34 U.T.L.J. 47 at 96.

⁸⁸ P.C. Weiler, “The Supreme Court of Canada and Canadian Federalism” (1973) 11 Osgoode Hall L.J. 225 at 244 and 246 [hereinafter “Canadian Federalism”]; see also P.C. Weiler, *In the Last Resort* (Toronto: Methuen, 1974).

review in *Democracy and Distrust*⁸⁹ His object is to find a democratic justification for judicial review under the United States Constitution. Ely views the problem of legitimacy in the same way as the Canadian scholars: “a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like.”⁹⁰

Ely argues that this problem may be mitigated by restricting judicial review to ensuring that the process of legislative decisionmaking properly takes account of the persons subject to it. Importantly, Ely grounds his argument in a number of United States Supreme Court decisions interpreting the interstate commerce and privileges, and the immunity clauses discussed in Part III, above. Ely relies upon these decisions because they address the states’ authority to pass measures restricting the rights of out-of-state persons; Ely’s interpretation of these cases is that they “involve the protection of geographical outsiders, the literally voteless.”⁹¹ He extends the principle of these decisions to argue that the judiciary may legitimately overturn the decisions of democratically elected governments when governments have not complied with their “duty of representation.”⁹² Judges enforce this duty, not by questioning the substantive political choices made by the legislature, but by ensuring “that the political process—which is where such values *are* properly identified, weighed, and accommodated—was open to those of all viewpoints on something approaching an equal basis.”⁹³

On the whole, Canadian writers have not considered Ely’s approach to this issue, at least not for federalism issues.⁹⁴ One exception is Weiler, who, it will be recalled, proposes that constitutional doctrine should be aimed at reducing, if not eliminating the role of judicial review. One of these proposals is that the courts should adopt a

⁸⁹ J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

⁹⁰ *Ibid.* at 4-5.

⁹¹ *Ibid.* at 84.

⁹² *Ibid.* at 87.

⁹³ *Ibid.* at 74 [emphasis in original].

⁹⁴ Some have, however, considered Ely’s argument in the *Charter* context: see, for example, P.W. Hogg, “The Charter of Rights and American Theories of Interpretation” (1987) 25 *Osgoode Hall L.J.* 87 at 102-08; and P.J. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 86-87 and 127-31. Monahan has specifically argued, *supra* note 87 at 94-95, that a rights-based political and legal theory, including that put forward by Ely, has no analogy to federalism.

doctrine of concurrent operation of statutes which permits combined federal and provincial legislation on a subject matter, provided that they do not contain “inescapable contradiction of legal directives,” in which case, the provincial legislation should be inoperative: “[t]he only possible exception to this logic might be the case of provincial laws burdening interprovincial trade, and thus harming the economic interests of the citizens in other provinces to whom the legislating province is not electorally responsible.”⁹⁵

Thus, in the context of interprovincial trade barriers, there are strong arguments against a general policy of judicial restraint on democratic grounds. As a result, Hogg’s criticism of the approach in *General Motors* is not as compelling in this area.

B. *The Role of Effects in Constitutional Characterization*

Another conceptual problem in applying international, European, and American trade law in the Canadian constitutional context is that these foreign jurisdictions are primarily concerned with the effects of local legislation on the movement of trade. Thus, the international trade and European approach is to look to whether the local legislation has a “disproportionate impact” on international trade. Similarly, the American courts speak in terms of “undue burdens” on trade. In these doctrines, the focus is on effects, while the traditional Canadian approach has been said to be concerned with the purpose of legislation. According to this approach, the effects of legislation are not constitutionally relevant. As will be seen, however, the matter is not as simple as this. Despite scholarly and judicial attempts to provide categorical statements on the relevance of effects for constitutional characterization, the relevance of effects is more elusive than this. The important point is to distinguish between those effects that matter and those that do not. Like the ancillary doctrine, what drives this distinction is concern about the legitimacy of judicial review on federalism grounds.

⁹⁵ See “Canadian Federalism,” *supra* note 88 at 245. It should be noted that Weiler’s argument respecting standing does not coincide with this position. He argues, at 247, that private persons should not have standing to challenge legislation on constitutional grounds except “when there are two contradictory statutes from contending jurisdictions and he is asking for the minimal judicial decision about paramountcy.” Strictly applied, this approach would deny private persons the right to challenge provincial legislation on the grounds that it burdens interprovincial trade, yet, according to Weiler, these are the only grounds upon which laws should be struck down: see *supra* note 88 and accompanying text.

In addressing the relevance of effects for the purpose of constitutional characterization, the central problem results from the doctrinal lexicon which uses similar phrases to describe two distinct concepts: (i) the relevance of legislation's "effects" for the purpose of determining its pith and substance; and (ii) the "incidental effects" of legislation on matters outside of the legislature's authority.

In determining whether legislation is in relation to a federal or provincial head of power, the courts must determine the subject matter of the legislation. Hogg has recited the various articulations of this process as follows:

Laskin says it is a "distillation of the constitutional value represented by the challenged legislation"; Abel says it is "an abstract of the statute's content"; Lederman says it is "the true meaning of the challenged law"; Mundell says it is the answer to the question, "what in fact does the law do, and why?"; Beetz J. says it is "a name" for "the content or subject matter" of the law; other judges have sometimes said that it is the "leading feature" or "true nature and character" of the law, but usually they have described it as "the pith and substance" of the law. The general idea of these and similar formulations is that it is necessary to identify the dominant or most important characteristic of the challenged law.⁹⁶

As can be seen from the above list, some descriptions of this determination include a consideration of the effects of legislation, and some do not. Thus, Mundell's question of what the law "does" requires an investigation of how the law will actually work, while Abel's reference to an abstract of the statute's content will not require this. Professor Le Dain, as he then was, put the argument against the relevance of effects for the purposes of determining pith and substance as follows:

It may be argued that legislative purpose or object should be of little consequence, that it is effects that matter, and that the constitution should be regarded as permitting certain results to be achieved by provincial legislation and certain results by federal legislation. But the constitution is not really concerned with specific legislative results except insofar as they reflect general legislative concerns or purposes. It is concerned with the distribution of jurisdiction to pursue a variety of legislative purposes in broad areas of constitutional responsibility. Except insofar as effect may throw light on the area of legislative concern that is truly in contemplation it only becomes material in the case of operational conflict with valid federal legislation. No matter how great the effect, if it be incidental or consequential, it cannot give the legislation its character for purposes of jurisdiction. If it be the immediate, direct and intended effect of the legislation, then it is certainly an important, and often the most important, factor in determining that character.⁹⁷

Le Dain's discussion is revealing in that he starts with the premise that effects are not relevant; he then qualifies that position by

⁹⁶ Hogg, *supra* note 42 at 377 [footnotes omitted].

⁹⁷ See Le Dain, *supra* note 9 at 303-04.

stating that “incidental or consequential” effects cannot give legislation its purpose; and finally concludes by saying that the “immediate, direct and intended” effects of legislation may be determinative of constitutionality. It is revealing because, although he argues that effects are irrelevant, Le Dain effectively concedes that effects must be considered by the courts. Otherwise, there is no way of determining whether these effects are incidental or consequential, on the one hand, or immediate, direct, and intended on the other.

Hogg addresses the relevance of the actual effects of a statute in the context of colourability:

In characterizing a statute—identifying its “matter” or “pith and substance”—a court will always consider the effect of the statute, in the sense that the court will consider how the statute changes the rights and liabilities of those who are subject to it. This simply involves understanding the terms of the statute, and that can be accomplished without going beyond the four corners of the statute.⁹⁸

Like Le Dain, Hogg thus questions the importance of effects in a way that leaves open more questions than it answers. Hogg defines effects as being how the statute changes rights and liabilities. In one sense, this definition could encompass a very wide inquiry of what persons would be permitted or required to do were the statute not enacted. But Hogg also implies a much narrower meaning of the inquiry into effects, one that includes only an interpretation of the legislation, without reference to anything beyond its four corners. This limited sense of the relevance of effects is repeated in Hogg’s discussion of pith and substance where he treats effects as being irrelevant:

It is important to recognize that this “pith and substance” doctrine enables one level of government to enact laws with substantial impact on matters outside its jurisdiction. The levy of the tax in *Bank of Toronto v. Lambe* was, after all, a significant exercise of legislative power over the banks; but because the law was characterized as “in relation to” taxation (its pith and substance or matter), it could validly “affect” banking. There are many examples of laws which have been upheld despite their “incidental” impact on matters outside the enacting body’s jurisdiction.⁹⁹

Like Le Dain’s analysis, Hogg’s discussion of “effects” (or, in the latter passage, “impact”) permits an extremely wide role for consideration of effects but then cuts that role down by using the term “effect” (or “impact”) to include only incidental effects. The confusion arises because these writers use the terms “effects” and “incidental effects” interchangeably. However, there is a fundamental distinction

⁹⁸ Hogg, *supra* note 42 at 385.

⁹⁹ *Ibid.* at 378-79.

between the two. The effect of the law has to be taken into account to determine its pith and substance, or dominant characteristic. Thus, both Hogg and Le Dain explicitly acknowledge that it is relevant. In this sense, I do not think that the above quotations are inconsistent with Lederman's argument that consideration of effects is inseparable from the consideration of purposes to determine pith and substance:

In addition to speaking of the object or purpose of a rule, we may also speak of its intention and of its effects or consequences. But all these words lead us back to the one primary problem, the full or total meaning of the rule. There is an essential unity here that defies these grammatical attempts at separation. A rule of law expresses what should be human action or conduct in a given factual situation. We assume enforcement and observance of the rule and hence judge its meaning in terms of the consequences of the action called for. It is the effects of observance of the rule that constitute in part its intent, object, or purpose. Certainly the total meaning of the rule cannot be assessed apart from these effects.¹⁰⁰

In the same vein, Dickson C.J., in *R. v. Big M Drug Mart* a *Charter* decision in which he addressed the need for consistent characterization of legislation for division of powers and *Charter* purposes, said that purpose and effects are inseparable concepts:

All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.¹⁰¹

Assessing effects is thus a necessary element of constitutional characterization. At the same time, legislation cannot be struck down simply because it affects matters which are beyond the legislature's jurisdiction. This is because the effects of legislation are not self-contained: there may be a wide range of effects resulting from legislation, some unintended, and some only remotely attributable to the statute. It is not possible to pass legislation which will only have effects in the enacting legislature's area of jurisdiction. A simpler lexicon would be to distinguish between relevant effects and irrelevant effects. Instead, the latter have been classified as incidental effects. Whatever the name given to these irrelevant effects, the function served by the concept of incidental effects is to permit the court to cut off the inquiry into the effects of legislation in a way that is constitutionally manageable.

¹⁰⁰ "Classification of Laws and the British North America Act" in W.R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClelland & Stewart, 1964) 177 at 187.

¹⁰¹ [1985] 1 S.C.R. 295 at 313 [hereinafter *Big M Drug Mart*].

Seen this way, the concept of incidental effects in constitutional law performs the same function as the concept of remoteness in contracts and foreseeability in torts. It is employed as a means of limiting the judicial inquiry into the chain of causation caused by the enactment of legislation. In other words, in characterizing a law for constitutional purposes, courts will consider the types of effects which the legislature did foresee, or should have foreseen, when passing a law. The court will hold the legislature responsible for those effects. The legislature will not have to justify all the other effects that the law can or may cause. These other effects will be considered incidental to the principal effects of legislation and the courts will not inquire into them. In other words, incidental effects are those effects which the courts will not consider in determining the constitutionality of legislation.

The important point here is that the function of the incidental effects doctrine is to provide a check on the range of the judicial inquiry. The larger the category of effects which are characterized as incidental (or irrelevant), the greater the scope given to the legislature. In considering the relative importance of considering effects, one is therefore driven to a consideration of the relative legitimacy of judicial review on federalism grounds. Where, like Hogg, one takes the position that judicial restraint should be the operative posture, one would be more inclined to argue that the range of effects that the court should take into account should be restricted; put another way, there is a greater tendency to label effects as incidental effects, *i.e.*, those effects which the court should not take into account when reviewing legislation.¹⁰²

On the other hand, where one is less concerned with the legitimacy of judicial review, one would be more prepared to expand the scope of effects that the courts should take into account in determining the constitutionality of legislation. Thus, for example, Lederman, who admits to a larger role given to the relevance of effects, is less concerned about limiting the role of the judiciary in federalism cases:

Of course the value assumptions of the judges will enter into their decisions. We would complain if this were not so. They must weigh such matters as the relative values of nation-wide uniformity *versus* regional diversity, the relative merit of local *versus* central administration, and the justice of minority claims, when provincial or federal statutes are challenged for validity under the established division of powers. Inevitably, widely prevailing beliefs in the country about these issues will be influential and presumably the

¹⁰² For a discussion of the way in which the Australian courts have exercised judicial deference to legislative choices in the federalism context by not enquiring into the effects of legislation to determine constitutional jurisdiction, see: C.D. Gilbert, *Australian and Canadian Federalism, 1867-1984* (Melbourne: Melbourne University Press, 1986) at 7-27.

judges should strive to implement such beliefs. Inevitably there will be some tendency for them to identify their own convictions as those which generally prevail or which at least are the right ones. On some matters there will not be an ascertainable general belief anyway. In the making of these very difficult decisions of relative values, policy decisions if one prefers that word, all that can rightly be demanded of judges is straight thinking, industry, good faith, and a capacity to discount their own prejudices with due humility.¹⁰³

It is also worth pointing out that the importance that these effects have played in two recent cases respecting the constitutional duty on provinces to recognize each other's judicial processes: *Morguard Investments Ltd. v. De Savoye*¹⁰⁴ and *Hunt v. T&N PLC*.¹⁰⁵ In *Morguard* the Court held that, as a general rule, judgments of one province are enforceable in other provinces. In *Hunt*, the Court held that provincial legislation cannot prohibit the removal from the province of business documents that are required pursuant to judicial processes outside the province. Although in *Morguard* the Court expressly refrained from stating that mutual recognition was a binding constitutional principle, in *Hunt*, La Forest J. stated that the *Morguard* principle is a constitutional one

and, as such, is beyond the power of provincial legislatures to override. This does not mean, however, that a province is debarred from enacting any legislation that may have some effect on litigation in other provinces or indeed from enacting legislation respecting modalities for recognition of judgments of other provinces. But it does mean that it must respect the minimum standards of order and fairness addressed in *Morguard*.¹⁰⁶

Thus, in *Morguard* and *Hunt*, the Court took an approach to constitutional jurisdiction that requires consideration of rules of order and fairness. The principles of order and fairness cannot be adequately considered if the effects of legislation could not be taken into account. Indeed, there are significant parallels between the requirements of order and fairness in *Morguard* and *Hunt* and the role of proportionality advanced in this paper.

As mentioned in Part III, above,¹⁰⁷ the European Court of Justice has adopted the rule that, absent a demonstrable justification, goods lawfully produced and marketed in a member-state may be lawfully marketed in another member-state. *Morguard* and *Hunt* may be

¹⁰³ *Supra* note 11 at 619-20.

¹⁰⁴ [1990] 3 S.C.R. 1077 [hereinafter *Morguard*].

¹⁰⁵ [1993] 4 S.C.R. 289 [hereinafter *Hunt*].

¹⁰⁶ *Ibid.* at 324. La Forest J. stated in *Morguard*, *supra* note 104 at 1100-01, that some writers have suggested that mutual recognition was within Parliament's jurisdiction under POGG, but stated that "[t]he present case was not, however, argued on that basis, and I need not go that far."

¹⁰⁷ See *supra* note 60 and accompanying text.

used in support of the adoption of a similar position in Canada. Thus, in *Hunt*, La Forest J. made the following observation respecting the transaction costs of provincial legislation which does not recognize the judicial processes of other provinces:

When one considers that Ontario and Québec are the headquarters for many of the largest corporations in this country, many of which will properly be subject to tort and other actions in other provinces, the impact would be serious. The essential effect then, and indeed the barely shielded intent, is to impede the substantive rights of litigants elsewhere. It would force parties to conduct litigation in multiple fora and compel more plaintiffs to choose to litigate in the courts of Ontario and Québec. Other provinces could, of course, follow suit. It is inconceivable that in devising a scheme of union comprising a common market stretching from sea to sea, the Fathers of Confederation would have contemplated a situation where citizens would be effectively deprived of access to the ordinary courts in their jurisdiction in respect of transactions flowing from the existence of that common market. The resultant higher transactional costs for interprovincial transactions constitute an infringement on the unity and efficiency of the Canadian marketplace, as well as unfairness to the citizen.¹⁰⁸

Many of the statements made in the above passage are analogous to the reasons in support of mutual provincial recognition of production and marketing standards. Thus, for example, La Forest J. refers to the likely effect of laws prohibiting mutual recognition of judicial processes as leading to the commencement of duplicative and inefficient litigation in many provinces. Similarly, local production and packaging requirements have the effect, as the United States Supreme Court noted in *Toomer*, of imposing “an artificial rigidity on the economic pattern of the industry.”¹⁰⁹ Further, the Supreme Court of Canada’s analysis goes beyond providing analogical reasons for its application in the interprovincial trade context; it is premised upon a notion of interprovincial trade, going so far as to describe the legislation as “an infringement of the unity and efficiency of the Canadian marketplace.” In my submission, *Morguard* and *Hunt* ought to be relied upon in support of a general constitutional doctrine that a province is required to recognize other provincial standards unless it can demonstrate good grounds not to do so. Absent such grounds, a failure to recognize extraprovincial standards should be considered an unconstitutional barrier to interprovincial trade.

Accordingly, it is incorrect to say that, in all cases, effects should either be ignored or be the centrepiece of constitutional characterization. The question is what effects should be taken into account and why? As I have argued above in the context of the ancillary

¹⁰⁸ *Supra* note 105 at 330.

¹⁰⁹ *Supra* note 73 at 403.

doctrine, there are strong reasons why courts should not defer to the legislature when deciding the issue of whether the legislature has imposed a trade barrier against persons outside the court's jurisdiction. As the decisions in *Morguard* and *Hunt* illustrate, effects must be taken into account where the issue is whether the provincial legislature has met the requisite standards of order and fairness in its relations with other provinces.

The pith and substance doctrine thus does not pose insurmountable conceptual problems in applying international, European, and American trade law concepts to Canadian constitutional trade jurisprudence because these foreign sources are more effects-based than purpose-based. Although it is fair to say that, as a matter of practice, Canadian courts have focused on purpose more than effect, they have not always done so. Further, the extent to which effects should be considered is very much a function of the strength of the argument in favour of judicial review. Where, as in the context of interprovincial trade barriers, there is a stronger justification for judicial review on federalism grounds than in other areas, judicial scrutiny of effects is less problematic. Again, not all effects can be taken into account; some will be incidental (or irrelevant). But the courts should not be reluctant to focus their inquiry on the effects of legislation on interprovincial trade by falling into the trap of labelling all effects as incidental. The courts should articulate a standard, such as remoteness or some other notion, in order to provide direction as to what type of effects should be considered and what type should not.

C. The Analogy of Provinces to Independent States

When discussing the functional compatibility of these different areas to the division of powers over trade, the focus moves from the conceptual issue of whether the ideas used in these other forums can be logically integrated into Canadian jurisprudence to the question of whether they should be. This introduces the larger question of the relative values at stake in furthering the Canadian economic union. That question has been extensively canvassed in the literature and I will not attempt to summarize it here. Most of that literature was prepared in the context of proposed constitutional amendments respecting

interprovincial trade.¹¹⁰ As this article addresses interprovincial trade under the existing *Constitution*, I propose to look at a more focused point, and that is whether using trade law doctrine is consistent with other constitutional values.

The use of international trade law as a paradigm for interprovincial trade has been criticized by some commentators of the Agreement on Interprovincial Trade. The argument has been made that provinces should not be analogized with independent states. According to Armand de Mestral:

The underlying assumption appears to be that the provinces are totally independent sovereign actors and that it is appropriate for them to make mutual concessions on interprovincial trade barriers comparable to concessions made by governments in the GATT or the NAFTA. I find this truly extraordinary, and it is all the more extraordinary that the federal government should be aiding and abetting the process. This, in my view, can only legitimate the view of the federal government's role that is widely held in nationalist circles in Québec. It is a view that I consider to be in the broad sense unconstitutional.¹¹¹

Similarly, David Cohen argues that the Agreement adopts the following “provincialist” view with which he disagrees:

In the end, the provincialist argues that the citizens of provinces deserve at least the same degree of respect within interprovincial trade agreements as do citizens of states in international trade agreements. ...

Most remarkable and disconcerting of all is that the Canadian Internal Trade Agreement, an intra-national agreement supposedly representing the collective interests of all Canadians, should look so much like, but which perhaps accomplishes so much less than, the North American Free Trade Agreement—an international agreement between three sovereign nations motivated only by national self-interest.¹¹²

Both of these writers thus question the premise that provinces should be the principal actors involved in the identification and negotiation of interprovincial trade barriers. Rather, this matter should be left to Parliament which, presumably, should legislatively eradicate these barriers. The difficulty with this argument is two-fold.

¹¹⁰ For a cross-section of literature addressing proposed constitutional change in this area, see I. Bernier *et al.*, “The Concept of Economic Union in International and Constitutional Law,” in M. Krasnick, ed., *Perspectives on the Canadian Economic Union* (Toronto: University of Toronto Press, 1986) 35; N. Silzer & M. Krasnick, “The Free Flow of Goods in the Canadian Economic Union,” in Krasnick, ed., 155; Courchene, *supra* note 52; M.J. Trebilcock *et al.*, eds., *Federalism and the Canadian Economic Union* (Toronto: University of Toronto Press, 1983); and Howse, *supra* note 52.

¹¹¹ “A Comment” in Trebilcock & Schwanen, eds., *supra* note 52, 95.

¹¹² “The Internal Trade Agreement: Furthering the Canadian Economic Disunion?” (1995) 25 *Can. Bus. L.J.* 257 at 271 and 279.

First, the goal of the Agreement is not to restrict provincial sovereignty over matters within the provinces' jurisdiction. This would involve an increase in Parliament's authority and thus require constitutional amendment, which appears to be the ultimate goal of these authors. Thus, for example, Cohen argues: "Put most bluntly, too many provincialists believe, either as politicians, producers or consumers (but, in my view, mostly as provincial politicians) that they will be better off if they can exercise power at the provincial, regional or even local level."¹¹³

The argument that power should not be exercised at the local level is simply not realistic. Constitutional amendment has been attempted without success in this area. To reject efforts to address the interprovincial trade issues by non-constitutional means is effectively to accept that nothing will be done. Further, it is worth pointing out that studies of interprovincial trade barriers have indicated that Parliament has been at least as willing as provincial legislatures to impose trade barriers to interprovincial trade. According to Trebilcock and Behboodi:

Moreover, Canadian estimates previously undertaken of reductions in national income from internal barriers to trade found that federal policies (not provincial policies)—such as the National Energy Policy (NEP) and the national tariff, federal agricultural marketing board schemes, and regionally differentiated unemployment insurance entitlements—accounted for a large proportion of the losses.¹¹⁴

In this regard, it should also be pointed out that the adoption of proportionality as the operative principle by which to measure interprovincial trade barriers does not involve a transfer of jurisdiction between Parliament and the provincial legislatures. As has been seen, although the case law is clear that provinces do not have constitutional jurisdiction to enact trade barriers—these barriers would be in relation to interprovincial trade and commerce—the problem has been in characterizing trade barriers for constitutional purposes. In making that characterization, the courts have been clear that provincial regulation over local trade is constitutionally permissible and that such regulation will necessarily have an effect on interprovincial trade. The Agreement presents the opportunity to use proportionality as a conceptual tool to

¹¹³ *Ibid.* at 279.

¹¹⁴ *Supra* note 52 at 23; see also J. Whalley, "Induced Distortions of Interprovincial Activity: An Overview of Issues;" and J.R.S. Prichard & J. Benedickson, "Securing the Canadian Economic Union: Federalism and Internal Barriers to Trade" in Trebilcock *et al.*, eds., *supra* note 110, 1; Silzer & Krasnick, *supra* note 110 at 158; and C. Green, "Agricultural Marketing Boards in Canada: An Economic and Legal Analysis" (1983) 33 U.T.L.J. 407 at 423, note 21.

isolate disproportionate trade barriers as a discrete constitutional subject matter in a way which permits provincial regulatory authority to the extent necessary to carry out provincial ends. The value of the Agreement is thus that it assists in the identification of trade barriers by reference to the proportionality principle.

Second, the analogy between provinces and independent states with respect to the reduction of trade barriers is historically supportable. The issue of trade among and between the provinces is older than Confederation. Indeed, structuring an arrangement through which interprovincial trade could be developed and maintained between the provinces was one of the main reasons why Nova Scotia and New Brunswick entered into discussions with Upper and Lower Canada to form a political association. W.A. Mackintosh has summarized the economic context and motivations of the colonial provinces in the 1860s as follows:

At the outset the Dominion, though united politically, was economically made up of two groups of provinces, isolated from each other and lacking common economic life though sharing some common economic problems. Cast adrift twenty years earlier by the adoption of free trade in Great Britain, they had been rescued for the time being by rising prices, a high rate of investment, and by the United States market available to them through the Reciprocity Treaty. Now, without the benefit of that Treaty, they were fearful of the results of the loss of the United States market.

From the point of view of economic development much was hoped from Confederation. It was expected that the whole, economically and politically, would be found to be greater than the sum of its parts. A larger unit of government promised broader financial resources and the greater borrowing power necessary to carry out still more ambitious railway policies. It was hoped that the new Dominion would in some measure find within itself a circulation of trade which might compensate for the loss of free access to the United States market. This hoped-for integration within a national economy—a strengthening of internal trade to replace weakened external trade found expression in the repeated references to interprovincial trade.¹¹⁵

Similarly, Trebilcock and Behboodi observe:

The original Confederation compact, even if partly motivated by considerations of political and cultural autonomy and national security, also recognised as essential for the realisation of these goals the development of a viable integrated economy on an east-west axis north of the forty-ninth parallel.¹¹⁶

Much of the Confederation negotiations focused on the extent to which an economic association among the provinces required political

¹¹⁵ *The Economic Background of Dominion-Provincial Relations*, reprinted in J.H. Dales, ed., *Report of the Royal Commission on Dominion-Provincial Relations* (Toronto: McClelland & Stewart, 1964) App. III at 19-20 [hereinafter Rowell-Sirois Report].

¹¹⁶ *Supra* note 52 at 20.

integration. The two Maritime provinces, reluctant to lose their political independence by joining with the Canadian provinces, advocated a *Zollverein*, or customs union, which would be less politically integrated than the proposed confederation. On each occasion this position was advanced, John A. Macdonald rejected it on behalf of his Upper Canadian delegation. At the 1864 Quebec Conference, Macdonald argued that “[i]t was impossible to have a *Zollverein*. We must continue to have hostile tariffs unless we have a political union.”¹¹⁷ Macdonald’s reference to a *Zollverein* is instructive in that it situates Confederation in the context of the international trade relations and institutions of its era.

Trebilcock and Howse provide the following account of “the hey-day of free trade” which peaked in the period 1850 to 1885:

[B]y the mid-nineteenth century only national frontiers remained as effective barriers to trade ... Nation-building itself was in part an effort to ensure free trade where such had never existed before: the dismantling of internal tolls and levies was an essential precondition to industrial development in the European economies.

By the mid-nineteenth century, then, most of the advanced European countries had established free trade within their borders. But many nations continued to practice internationally what they had eschewed internally—protection (trade barriers) continued between nations as they vied for wealth and power in international relations. The first major break with these mercantilist-protectionist policies of the past came in Britain with the repeal of the Corn Laws in 1846, spearheaded by Prime Minister Sir Robert Peel, a late convert to the cause of trade liberalisation, and Lord Cobden The repeal of the Corn Laws was quickly followed by the unilateral removal or reduction of hundreds of tariffs on most imported goods, ushering in, in Britain, a period of resolute commitment to the principle of free trade that extended into the early years of this century.

Britain also, over the course of the century, negotiated a number of free trade treaties with other countries, beginning with the Cobden-Chevalier Treaty of 1860 with France. France in turn, in 1862, negotiated a comprehensive trade treaty with the *Zollverein*, the German Customs Union, as well as with a host of other European nations in the following decade. These treaties were notable for their espousal of the Most Favoured Nation (MFN) principle, which later became the cornerstone of the GATT. Under this principle, countries negotiating trade concessions with one another agreed that they would extend to each other any more favourable concessions that each might subsequently negotiate with third countries. The MFN principle encouraged multilateralism while discouraging trade discrimination, and because of its presence in most French treaties, free trade swept Europe during the 1860s.¹¹⁸

Thus, to a large extent, Canadian federalism was attributable to the desire of the provinces to have an institution through which the provinces could establish freer trade amongst themselves. Furthermore,

¹¹⁷ G.P. Browne, *Documents on the Confederation of British North America* (Toronto: McClelland & Stewart, 1969) Doc. No. 32, Notes of the Québec Conference (11 October 1864) at 96; discussion of the Maritime position is found at xx-xxi.

¹¹⁸ *Supra* note 42 at 18.

the modalities through which this freer trade would be implemented has always been strongly influenced by the modalities adopted internationally. It is therefore appropriate that issues respecting interprovincial trade should continue to be influenced by international trade models.

D. Remedies Under the Agreement

It may also be argued that the Agreement should be the only means by which trade barriers are addressed in Canada, that is, that the Courts should leave this matter to the experts and political institutions operating under the Agreement.¹¹⁹ This argument both overestimates the effectiveness of the Agreement and underestimates the role of constitutional adjudication in this area.

The Agreement has been recognized as an important first step towards addressing systematically interprovincial trade barriers. It has, however, also been subject to extensive criticism among commentators who question its effectiveness by reference to the many areas of trade exempted from the Agreement, such as agricultural quotas, energy and financial services,¹²⁰ the lack of binding enforcement powers,¹²¹ and the absence of procedures for the harmonization of provincial measures which fail to facilitate the movement of trade.¹²² These limitations have been discussed elsewhere and I will not address them here. The one issue I will address goes to the Agreement's remedies for non-compliance.

The remedial procedures in the international arrangements discussed above provide a range of alternatives. These options range from that set out in the GATT system, which only permits States to complain about non-compliance and relies principally upon moral

¹¹⁹ See Swinton, *supra* note 44 at 155-68; and K. Swinton, "Courting Our Way To Economic Integration: Judicial Review and the Canadian Economic Union" (1995) 25 Can. Bus. L.J. 280 at 298-302. Although Swinton does not make this specific argument, she has been generally critical of arguments that the Supreme Court of Canada should provide a more functional approach to the issue of constitutional jurisdiction over trade.

¹²⁰ See Trebilcock & Behboodi, *supra* note 52 at 85.

¹²¹ R. Howse, "Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade" in Trebilcock & Schwanen, eds., *supra* note 52, 170.

¹²² A. Easson, "Harmonization of Legislation: Some Comparisons between the Agreement on Internal Trade and the EEC Treaty" in Trebilcock & Schwanen, eds., *supra* note 52, 119.

suasion for its enforcement;¹²³ to NAFTA, which permits some private parties to enforce some of its provisions and obtain damages for non-compliance;¹²⁴ to the Treaty of Rome, which permits directly affected private persons to challenge and have rendered inoperative

¹²³ The following discussions respecting the enforcement of the GATT in this note, and respecting the FTA, *supra* note 5 and NAFTA, *supra* note 6, are taken principally from Trebilcock & Howse, *supra* note 42, c. 15; see also, in this regard, Hudec, *supra* note 54.

The GATT contains a large number of dispute resolution procedures, usually involving different avenues through which contracting parties may informally settle disputes using the GATT as a forum, not adjudicator. Only when this process has not led to a resolution may a contracting party—non-parties do not have standing to raise complaints—request conciliation. Where consultation and conciliation fail, a contracting party may bring the matter before the GATT Council of Representatives (Council) and request that a panel investigate the dispute. The Chair of the panel submits its report to the Council. The Council may then either adopt or block the report. Prior to the Uruguay Round Understanding of 19 December 1993, a consensus which included the party against whom the complaint was made had to approve the report for its adoption. The rule is now that a consensus is required to block approval of the report. The effect of adopting a report is described by Trebilcock & Howse at 393-94, as follows:

Because a report is adopted does not mean that its recommendations and rulings are automatically followed. Article XXIII:2 provides for the authorization of the suspension of concessions by one Party if another has nullified or impaired benefits accruing to the former under the Agreement Typically, implementation relies on the moral suasion of a recommendation by the Council (pursuant to a report), which can direct a Contracting Party to withdraw or modify a measure (if the measure was found GATT-“illegal”), or to take some other action to restore the balance of concessions (if a measure was found to be GATT-“legal” but to have nullified benefits reasonably expected under the Agreement). The Council can also seek to ensure compliance by regulatory monitoring whether or not a country has complied.

¹²⁴ The GATT dispute resolution mechanism of consultation, negotiation, and panels is also used in the FTA and NAFTA. The general dispute resolution procedure of the FTA, Chapter 18, which is adopted with some modifications in NAFTA, establishes the Canada-United States Trade Commission (Commission) which meets at the request of either of the parties where they have been unable to resolve a dispute. The parties may request the establishment of a panel, whose Chair is chosen by the Commission, to investigate the complaint and prepare a report. According to Trebilcock & Howse, *supra* note 42 at 401 [footnotes omitted]:

Once the Commission has received the final report, it is to agree on a resolution of the dispute in question “normally” in conformity with the recommendations of the panel. “Whenever possible”, this resolution is to be the non-implementation or withdrawal of measures not conforming with or causing nullification or impairment of benefits accruing under the FTA. If the Commission cannot reach agreement within 30 days of the receipt of the final report, or if a Party refuses to comply with the findings of a panel under the binding arbitration provisions of Art. 1806, then the other Party may suspend the application of equivalent benefits to that Party.

One significant development in NAFTA is that a NAFTA investor who alleges that a host government has violated an obligation of the investment provisions (Chapter 11), including the principles of national treatment and most favoured nation treatment, may seek arbitration, including a claim for damages, an award of which is enforceable in domestic courts.

national laws which are inconsistent with the Treaty;¹²⁵ to the United States Constitution, which is enforced by private persons and with which all laws in that country must comply.

The Agreement goes further than the GATT and NAFTA in permitting private persons to initiate challenges to measures which are inconsistent with it, albeit subject to meeting procedural and standing requirements. However, unlike the Treaty of Rome and the United States Constitution, the remedy for non-compliance is not to strike down inconsistent measures. Rather, it adopts the more restricted and state-centred remedy of permitting an aggrieved jurisdiction to impose retaliatory measures against a non-complying party.

The fact that the Agreement does not purport to override governmental measures which are inconsistent with it is not surprising. Governments, who are the parties to the Agreement, do not have legal authority to bind legislatures. Accordingly, they cannot make legislation

¹²⁵ European Community law is interpreted by the European Court of Justice which, pursuant to Article 177 of the Treaty of Rome, *supra* note 7, has jurisdiction to give preliminary rulings concerning the interpretation of the Treaty, the validity and interpretation of acts of Community institutions, and the interpretation of statutes of bodies established by the Council of Ministers. National courts are to determine whether national laws are in compliance with Community law, as interpreted by the European Court of Justice. In practice, this formal division of authority is not so neatly separated. As Gormley points out *supra* note 62 at 316:

It has to be said, though, that whilst the Court in an Article 177 ruling will not declare a national law or act incompatible with Community law but leaves this to the national court concerned the Court of Justice's rulings are frequently couched in such terms that the conclusion that the national law cannot be upheld is glaringly obvious. If a Member State does not then take steps to change its national law or practices, the Commission may well bring infringement proceedings under Article 169 EEC. It should be noted that it is not enough that the national law becomes effectively unenforceable; there is a clear duty to repeal or amend the offending provisions in the interests of transparency and legal certainty.

The European Court of Justice has interpreted European law to provide, under certain circumstances, enforceable rights of persons to challenge the compliance of national laws with Community laws. The Court put it as follows in *Van Gend en Loosv. Nederlandse Administratie der Belastingen* (No. 26/62), [1963] E.C.R. 1 at 12:

[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit in limited fields ... Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

The right to enforce treaty provisions which are incompatible with domestic law arises when the rights set out therein are found to have "direct effect," *i.e.*, according to Gormley at 334:

if the obligation imposed on Member States is (A) clear and precise and (B) unconditional and, if implementing measures are provided for, (C) the Community Institutions or the Member States are not allowed any margin of discretion.

See also Gormley at 334-38.

subordinate to the Agreement. This could only be effectively carried out through constitutional amendment.¹²⁶ As a result, the only way in which interprovincial trade barriers may be struck down is if they were found to be unconstitutional.

Having said this, the adoption of retaliation as a remedy for a breach of the Agreement is somewhat unusual in light of the constitutional restrictions on provincial legislatures. As de Mestral points out, the exercise of this remedy would probably be unconstitutional.¹²⁷ This is because provincial legislatures are not constitutionally entitled to pass laws that are in relation to either interprovincial trade or extraprovincial rights.

This leads to a more fundamental constitutional issue: is the law at which the retaliation is aimed also unconstitutional?¹²⁸ Consider the scenario where a panel established under the Agreement concludes that a provincial measure cannot be saved under Article 404(d) of the Agreement because it “create[s] a disguised restriction on trade.” Provinces do not, of course, have constitutional jurisdiction to impose disguised trade barriers. Thus, when provincial legislation may be characterized as being aimed at interprovincial transactions, the result is that the law is unconstitutional. A problem may also arise if a provincial measure is found not to be in compliance with the proportionality requirement in Article 404. The result in that case is that the measure impedes trade more than is necessary to implement a legitimate

¹²⁶ For a discussion, see K. Swinton, “Law, Politics, and the Enforcement of the Agreement on Internal Trade” in Trebilcock & Schwanen, eds., *supra* note 52, 196.

¹²⁷ *Supra* note 111 at 95; see also Cohen, *supra* note 112.

¹²⁸ The Agreement contains a number of other notions which are anomalous from a constitutional perspective. For example, the list of legitimate objectives in Chapter Two includes a number of matters which are, in whole, or in part, outside of Parliament’s jurisdiction, such as consumer protection. The result is that the federal government could not constitutionally rely upon this legitimate objective in defending an argument that one of its measures contains a trade barrier. Almost all of the other legitimate objectives in Chapter Two are areas in which both levels of government have some constitutional jurisdiction. For example, the legitimate objectives of the protection of the health, safety, and well-being of workers, and affirmative action are only in federal jurisdiction to the extent that they are a part of management of federal undertakings. The legitimate objective of protecting the environment is in federal jurisdiction to the extent that, in any given case, the measure adopted to protect the environment involves matters which have attained a “national dimension.” The remaining legitimate objectives, *i.e.*, public security and safety, public order, and the protection of human, animal or plant life, or health, could fall within either federal or provincial jurisdiction, depending mainly upon whether the measure adopting them could be classified as in relation to criminal law, and thus within federal jurisdiction, or property and civil rights, and thus within provincial jurisdiction. The point is that not all of the matters which are listed as legitimate objectives can be relied upon by governments to justify their measures under the Agreement.

objective. It therefore contains an element—the disproportionate part—which goes beyond what is required to carry out that objective. How should that element be considered for constitutional purposes? What then happens if the provinces negotiate a settlement to remedy this barrier and implement the result of that settlement by legislation? Is this settlement legislation outside of provincial jurisdiction because it is in relation to interprovincial trade?

As stated, one type of response to these questions is to ignore the constitutional issues and advocate an approach to interprovincial trade barriers which is entirely outside of the Constitution. The problem with this approach is that litigants may not cooperate. It is not difficult to envision a scenario where an aggrieved party seeks to challenge a provincial measure as being both inconsistent with the Agreement and unconstitutional. The incentive for taking the latter approach is that a private party may not be satisfied with the remedies available under the Agreement. Again, it is possible to treat these two types of challenges as entirely unrelated: impediments to the movement of interprovincial trade should be treated one way for the purposes of the Agreement and another way for the purposes of the Constitution. However, such an approach would lead to a serious misalignment in the institutional treatment of trade barriers in Canada. Governments could be instructed to approach trade barriers in different, perhaps contradictory, ways for constitutional purposes and for the purposes of the Agreement. This would not be a problem if the existing constitutional approach to interprovincial trade was superior to the approach adopted in the Agreement. If this were the case, then the Agreement, which is subordinate to the Constitution, could be ignored to the extent that it permitted unconstitutional actions. However, as I have sought to demonstrate, the existing constitutional trade law jurisprudence is not superior to the way in which the Agreement identifies trade barriers. Even if the Agreement did not exist, there are good reasons for rethinking the doctrine in this area. The Agreement thus provides an impetus towards this reform.

Finally, it is worth noting in this regard that the European Court of Justice has interpreted the Treaty of Rome as conferring upon persons “rights which become part of their legal heritage.”¹²⁹ As a result, that Court has held that the Treaty can be used to require states to repeal any legislation inconsistent with those rights. Similarly, in interpreting the commerce clause of the United States Constitution, the United States Supreme Court has integrated that provision with the

¹²⁹ See the discussion *supra* note 125.

privileges and immunities clause, the purpose of which, according to the Court in *Toomer*,

was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.¹³⁰

The Agreement on Internal Trade adopts many of the concepts employed in the above arrangements, but the parties to it are not in a legal position to provide the type of enforceable right to challenge the legality of trade barriers as is found in other documents. The result is that Canadians seeking to challenge these barriers may have to rely upon the remedies available to their governments under the Agreement. In the words of the United States Supreme Court, they are left with “the uncertain remedies afforded by diplomatic processes and official retaliation.” It is my submission that a remedy may also be found in the Constitution.

¹³⁰ *Supra* note 73 at 395.