

Provincial Leadership and Intergovernmental Collaboration in the Canadian Federation

by

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Bachelor of Arts, University of Lethbridge, 2009

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Supervisory Committee

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Abstract

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Traditional understanding of the Canadian federation includes a belief that leadership from the federal government is necessary for effective intergovernmental relations and collective policy. The ability of the federal government to set a national vision has waned in the years since the constitutional negotiations. In its place has been a rise in interprovincial collaboration and leadership. A 30 year review of policy regarding the economic union and internal trade reveals that provincial asymmetry and incremental bilateral or regional action has shown an ability to contribute to a renewed pan-Canadian consensus. From this we can see how the system of interprovincial relations that has developed can serve to advance innovative policy and critical intergovernmental collaboration needed in the Canadian federation.

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Introduction

One of the newest additions to the landscape of intergovernmental forums is the New West Partnership (NWP). Announced on April 30, 2010, the NWP joins the Council of the Federation (a Council consisting of all premiers), the Western Premiers' Conference (the four western most provinces and the three territories), the Council of Atlantic Premiers, and routine bilateral cabinet meetings held between Ontario and Quebec. The addition of the New West Partnership stands in contrast to the decline of the traditional meetings of the prime minister and all premiers at First Ministers' Meetings. Prime Minister Harper hosted just two meetings, back-to-back meetings in November 2008 and January 2009 to discuss the state of the Canadian economy.

The dichotomy between the rise in interprovincial collaboration and the decline of engagement by the federal government with the provinces reflects broader shifts in the federation. Canadian federalism has undergone a transition since the defeat of the Charlottetown Accord referendum in October 1992. The constitutional negotiations in the 1980s and early 1990s aimed to define a collective interpretation of the federation while respecting the unique identities Canadians hold. The failure to advance a successful package of constitutional reforms spurred governments to re-evaluate the ways in which they engage with each other.

Federalism rests on the assumption that the constituent units share a common future. There is an assumption that a common identity can be forged. The veracity of this assumption and the health of the Canadian federation has been a recent focus of debate in political science literature. The inability of the constitutional negotiations to advance a consensus on a broad conception of the federation resulted in a shift in focus to policy

specific visions and issues in the early 1990s. Many of these policies fell within primarily areas of provincial jurisdiction, or had strong implications for provincial governments. As a result, the 2000s saw the tenor and shape of intergovernmental relations and intergovernmental policy options change again. The NWP and the accompanying New West Partnership Trade Agreement (NWPTA) represent a new shape to intergovernmental relations.

The NWP was established by an umbrella agreement between British Columbia, Alberta and Saskatchewan. The umbrella agreement covered four intergovernmental agreements on trade, international cooperation, innovation, and procurement, and a cooperation memorandum of understanding on energy regulation and development. The wide-ranging nature of these agreements defined a broad partnership. The agreements were not, in and of themselves, significant – Alberta alone enters into several hundred agreements with other governments each year.¹ The trade agreement, however, was different. The NWPTA included legally binding provisions accepted by the three governments. The three founding premiers – Gordon Campbell, Ed Stelmach, and Brad Wall – hailed the agreement as the creation of “Canada’s largest interprovincial barrier-free trade and investment market” and an “historic step forward for western provinces, as they work together to provide economic leadership.”²

The NWPTA is rooted in earlier collaboration between Alberta and British Columbia. On April 28, 2006, those two governments announced the Alberta-British Columbia Trade, Investment, and Labour Mobility Agreement (TILMA). Saskatchewan

¹ A list of intergovernmental agreements signed by Alberta is included in the annual report of Alberta International and Intergovernmental Relations department available at: <http://international.alberta.ca/651.cfm>.

² “Saskatchewan, Alberta and BC launch New West Partnership”, Canada’s New West Partnership, accessed December 29, 2014, <http://www.newwestpartnership.ca/NR-043010>.

was at that time governed by New Democrats under Premier Lorne Calvert and declined to sign on to TILMA. In 2010, discussions between the three western most provinces clarified for newly elected Premier Brad Wall the impact the agreement had on municipalities and crown corporations. The political alliance was expanded to include Saskatchewan, it was formalized as the NWP, and TILMA was renamed the NWPTA.

The literature around the NWPTA and TILMA highlights two contributing forces: neo-liberalism and federalism. For some, the two agreements epitomize the ongoing subjugation of government actions to market actors. The agreements are examples of business dictating policy to political leaders. They minimize the ability of the democratic process to set standards and protect citizens from harmful products and practices.³ For others, the agreements are an example of a functioning laboratory of federalism. The provinces are putting forward innovative agreements that other jurisdictions can adopt if the agreements are deemed successful. The two agreements built upon the consensus established in the AIT and marked a path forward for additional action on internal trade.⁴

³ Marc Lee, "Investor Rights and Canadian Federalism: The Case of TILMA," *Studies in Political Economy* 82 (2008); Erin Weir and Marc Lee, "The Myth of Interprovincial Trade Barriers and TILMA's Alleged Economic Benefits," *Canadian Labour Congress*, February 2007; Ellen Gould, "Inter-Provincial Trade Deal Worse than NAFTA," *Canadian Centre for Policy Alternatives*, February 2007: <http://www.policyalternatives.ca/publications/monitor/march-2008-dark-side-tilma>; Ellen Gould, "Asking for Trouble: The Trade, Investment and Labour Mobility Agreement," *Canadian Centre for Policy Alternatives*, February 2007: http://www.policyalternatives.ca/sites/default/files/uploads/publications/BC_Office_Pubs/bc_2007/bc_ab_tilma_asking_trouble.pdf; Murray Dobbin, "In Defence of Red Tape," *Canadian Centre for Policy Alternatives*, May 2007: <http://www.policyalternatives.ca/publications/monitor/may-2007-defence-red-tape>; and Murray Dobbin, "The Dark Side of TILMA," *Canadian Centre for Policy Alternatives*, March 2008: <http://www.policyalternatives.ca/publications/monitor/march-2008-dark-side-tilma>.

⁴ Kathleen E. Macmillan and Patrick Grady, "A New Prescription: Can the BC-Alberta TILMA Resuscitate Internal Trade in Canada?" *C.D. Howe Institute*, November 2007: <http://www.cdhowe.org/a-new-prescription-can-the-bc-alberta-tilma-resuscitate-internal-trade-in-canada/4777>; Robert Knox and Amela Karabegovic, "Myths and Realities of TILMA," *Frasier Institute*, February 2009: <http://www.frasierinstitute.org/research-news/display.aspx?id=13234>; and Lorleen Berdahl, "(Sub)national Economic Union: Institutions, Ideas, and Internal Trade Policy in Canada," in *Publius* (2012).

This thesis will explore policy development in Canada in the current state of intergovernmental relations, focusing on the potential for, and shape of, provincial leadership. It will do so through the lens of the economic union and internal trade policy. We will see that while the economic union is an area of concurrent jurisdiction, federal leadership has diminished and provincial leadership has grown. Starting in the late 1970s, the two orders of government have engaged repeatedly on the Canadian economic union and how best to divide powers. The first chapter explores how Canadian governments interact with one another. The second chapter will explore these dynamics during constitutional negotiations over the economic union. We will see how federal leadership between 1980 and 1995 ran up against provincial autonomy and a growing provincial capacity. Once the Charlottetown Accord failed to gain approval from Canadians, governments concluded the Agreement on Internal Trade (AIT). The AIT was a less than satisfying compromise and it is clear that the dynamics of federalism at the time created serious challenges in achieving a more meaningful policy outcome.

In the third chapter, we will turn to provincial actions on internal trade since 1995. Dissatisfied with the outcome of the AIT, provinces continued to work together on internal trade. Leadership by British Columbia and Alberta drove a new agenda that evolved into a project for all provinces and territories and ultimately led to changes to the agreement with the federal government. That chapter demonstrates the shape of effective provincial leadership through incrementalism and asymmetry. It demonstrates how provinces are creating and advancing pan-Canadian policies in the modern intergovernmental landscape. The final chapter explores some of the lessons from the internal trade developments for application in other policy fields. Using internal trade as a

case study, it will explore the limits and possibilities of the current state of intergovernmental relations. Exploring the full picture of the policy proposals in this area will provide a better understanding of the dynamics and contours of Canadian federalism.⁵

This chapter provides an academic foundation in the current understanding of federalism, intergovernmental relations and interprovincial relations. It explores the dynamic between these three concepts and how we understand these terms today. We discuss the era of collaborative federalism and what that means for both our understanding of federalism and how it shapes the interactions of Canadian governments. Finally, we introduce the concepts of asymmetry and incrementalism and discuss the importance of these two concepts in the current debate on the federation and intergovernmental relations.

Federalism, Intergovernmental Relations, and Interprovincial Relations

Federalism is a belief system. It is a framework of responsibility for policy and it outlines how citizens under its rule are governed.⁶ The theoretical framework of Canadian federalism first codified in 1867 reflected the realities of that time and the priorities of the orchestrators. 150 years later, modern Canada has overflowed the neat containers of watertight policy and plumbed the reaches of the document governing the legal jurisdiction of Canadian governments. The federalism of today is very different from the federalism of yesterday. As is the case with most belief systems, experience, history and culture are forces that inform an understanding of the rules of federalism.

⁵ Gregory J. Inwood, *Continentalizing Canada: the Politics and Legacy of the Macdonald Royal Commission* (Toronto: University of Toronto Press, 2005), 5.

⁶ Herman Bakvis, Gerald Baier and Douglas Brown, *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* (Toronto: Oxford University Press, 2009) 1.

Many factors impact the practice of federalism – the Quebec experience with Canadian federalism is easily contrasted with that of Ontario or British Columbia. Each unique experience shapes a unique response to the practice of federalism. The federation does not automatically imbue Canadian governments with the value of collaboration.

“Canadian federalism is ambivalent in both its goals and its character, and its foundational premises remain contested, primarily because the federal components of the society and political culture are often at odds with the existing institution and their operating norms.”⁷ Engaging other governments through intergovernmental relations or intergovernmental policy brings unique understandings of federalism to the fore.

Intergovernmental relations is the intersection of autonomous governments with interdependent mandates to construct policy and deliver programs.⁸ Richard Simeon pioneered this perspective on Canadian federalism in 1972. Simeon shaped a better understanding the practice of Canadian federalism by incorporating and applying elements of international relations theory. Canadian governments all have jurisdiction over a set of responsibilities. They are independently responsible for meeting a set of their constituents needs. Those needs are, however, increasingly complex. As the needs become more complex, action increasingly requires the engagement of other governments to create solutions.

Canadian political science literature has traditionally understood federalism through a lens that privileges leadership by the federal government. Studies of federalism often assume that the role of the federal government is critical for collaboration and

⁷ Bakvis, Baier and Brown, *Contested Federalism*, 246-247

⁸ Richard Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada*, 2nd ed. (Toronto: University of Toronto Press, 2006).

coordination within the Canadian federation. This is logical. A meaningful role for the central government is foundational to a federal state.⁹ When studying intergovernmental relations, the focus remains on the state of relations between the federal government and the provincial governments – individually or collectively. This too is logical. How the federal government engages with the constituent members of the federation speaks to the health and status of the federation. As Canada is one of the most decentralized federations in the world, the relationship of individual provinces to the federal government is a key factor to consider. Much of the 20th century focussed on clarifying the division of responsibilities between the local provincial governments and the central federal government. The constitutional court cases and the protracted constitutional negotiations of the 1980s struggled with an appropriate understanding of which order of government was responsible for what aspects of policy. Governments worked to articulate a vision of the country with a strong role for both the federal government and provincial governments.

In a decentralized country like Canada, however, understanding the role of provincial governments in setting policy and leading national trends is critical to understanding the federation.¹⁰ Policy under the jurisdiction of the provinces – economic regulation and social services such as health care, among others – is growing in prominence and expense. Previously the junior members of the federation, provinces are growing in policy capacity and stature, both within Canada and internationally. Provinces

⁹ Herman Bakvis and Grace Skogstad, *Canadian Federalism: Performance, Effectiveness and Legitimacy* (3rd ed., Toronto: Oxford University Press, 2012), 4

¹⁰ Michael M. Atkinson et al., *Governance and Public Policy in Canada: A View from the Provinces* (Toronto: University of Toronto Press, 2013), 2.

are at the forefront of setting new policy and interprovincial collaboration is a growing feature on the intergovernmental landscape.

A Brief History of Canadian Federalism and Intergovernmental Relations

Over its 150-year history, Canadian federalism has traversed a spectrum from independent governments to joint decision-making, benchmarked along the way by consultation, co-ordination and collaboration.¹¹ At Confederation, Canadian governments maintained a classical federation. Watertight compartments kept responsibilities at arms' length from one another, negating the need for joint policy development. The expanding role of governments began in the 1930s, leading to more interaction between the two orders of government. Consultation and coordination gave way to collaborative federalism in the post-war period, as Canadian governments worked together to establish the social welfare state. Cooperative federalism enacted new social programs. At the same time a rise province building began to expand and create a power dynamic between governments. Power struggles between the two orders of government led to an era of competitive federalism, starting in the early 1970s. The two orders of government pushed to articulate greater power bases and defined the country that best reflected their ambitions.

The constitutional conversations of 1970s and 1980s epitomized competitive federalism. The era was a result of policy overlap between two orders of government with powerful executives. Growing provincial governments had gained in size relative to the federal government and the election of Prime Minister Pierre Trudeau exacerbated

¹¹ Bakvis and Skogstad, *Canadian Federalism*, 5.

ideological conflict with the federal government.¹² As time passed, the dearth of effective provincial representation within the federal government facilitated strong provincial leaders with a voice in national governance and a mandate to negotiate on behalf of their populations. A competitive dynamic between governments supplanted the collaborative relationships between ministers and senior officials. Unique visions of Canada as Ottawa-centered, province-centered or Quebec-centered drew the executives into protracted negotiations on the future of the country. The failure of the Charlottetown Accord signalled that broad-based constitutional reform was likely unachievable. It also sent the message that Canadians were no longer satisfied with white men in suits negotiating their future behind closed doors.¹³

The events of the 1980s and early 1990s damaged the authority of all political leaders to articulate the constitutional direction of the federation. The constitutional negotiations sought to define the federation as a collective of the unique identities. Failure to achieve that definition shifted the conversation from exploring diversity to questioning the foundation of the country. The conversations in the post constitutional era were about defining an associative community.¹⁴ The process of coming together during the constitutional negotiations became about staying together in the 90s. The traditional understanding of the federation defined the provinces as seeking to justify their existence by promoting their diversity.¹⁵ This concept was turned on its head following the

¹² David Cameron and Richard Simeon, "Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism," *Publius*, 32 (2002): 50.

¹³ *Ibid.*, 52.

¹⁴ Robert Howse, "Searching for Plan A: National Unity and the Chretien Government's New Federalism" in *Non-Constitutional Renewal*, ed. Harvey Lazar (Toronto: Queen's University Press, 1998).

¹⁵ Alan Cairns, "The Governments and Societies of Canadian Federalism," *Canadian Journal of Political Science* 10 (1977): 695-725.

constitutional negotiations; the issue became the federal government working to justify its existence.

The new form of intergovernmental relations advanced by Prime Minister Jean Chrétien exemplified the shift in the federation. Chrétien spent the first few years of his tenure as prime minister claiming to focus on running a good government rather than continuing the constitutional politics. With the important exception of the Parti Québécois, there was no appetite across the country to discuss the federation or the constitution.¹⁶ Western Canada was demanding more decentralization from the federal government, but at minimum was satisfied with a respect for the existing division of powers.¹⁷ Chrétien's government dismissed the rise of separatism in Quebec and operated on the assumption that running a good government would defuse the tense state of the federation. Even as Quebec headed towards the 1995 referendum, Chrétien refused to discuss the issue.¹⁸

Following the defeat of the referendum, Chrétien moved to a "renewal of the federation." The renewal centered not on the constitutional questions of the previous decade, but on better defining the roles of each order of government. The pragmatic approach to the federation continued, but also began to include a willingness to engage other governments in a conversation on the division of powers. The conversation had shifted focus from the grand concepts of rebuilding the federation in the 1980s to a dialogue on appropriate uses of the powers afforded each government under the

¹⁶ Peter Russell, "The End of Mega Constitutional Politics in Canada?" in *The Charlottetown Accord, the Referendum, and the Future of Canada*, eds. Kenneth McRoberts and Patrick J. Monahan (Toronto: University of Toronto Press, 1993), 219.

¹⁷ Harvey Lazar, "Non-Constitutional Renewal: Toward a new Equilibrium in the Federation," in *Non-Constitutional Renewal*, ed. Harvey Lazar (Toronto: Queen's University Press, 1998), 8.

¹⁸ *Ibid.*, 5.

constitution. Chrétien's definition of renewal did not include an intention to change the division of powers in any way; for Chrétien, the renewal was geared towards finding more productive and efficient ways to manage the federation.¹⁹ Chrétien steered the national conversation away from a discussion based on the federation to a discussion on intergovernmental relations. This shift ushered in the era defined as Collaborative Federalism.

Collaborative Federalism and Intergovernmental Relations: Chrétien

Cameron and Simeon's 2002 article theorized a structure of intergovernmental relations in the post-constitutional negotiation era.²⁰ They defined the new reality as 'collaborative federalism.' Collaborative federalism is "characterized more by the principle of co- determination of broad national policies than by either the Ottawa-led cooperative federalism of the post-World War II period or the more competitive federalism of later periods."²¹ Cameron and Simeon argue that a collaborative approach to defining intergovernmental policies and outcomes characterized intergovernmental relations in this era. The federal government emphasized a less hierarchical approach to relations with the provinces, treating them as equal orders of government rather than subordinate governments.²² Basing the relationship upon respect for the equal status of the orders of government contrasted with the post-war period in which the federal government advanced national standards for provinces to achieve, and the constitutional negotiation period in which the orders of government competed against each other for

¹⁹ Ibid, 7.

²⁰ Cameron and Simeon, "Intergovernmental Relations in Canada."

²¹ Ibid, 49.

²² Bakvis and Skogstad, *Canadian Federalism*, 8

jurisdiction. They argue that the new era of relations evidences a respect for the independence and interdependence of governments within the federation, even if the federal government failed to attribute its actions to this respect. Cameron and Simeon argue that the economic decline of the 1990s underpinned this era. The economic decline saw both governments enact cuts, and in particular, the federal government cut transfers to the provinces. The federal government's legitimacy in shaping policy declined as it withdrew funding from the provinces. The federal government's ability to fund compliance facilitated its role in setting national standards. Once the funding disappeared, the incentive for the provinces to take direction from the federal government also declined.²³

When Cameron and Simeon look at the intergovernmental tools used in the collaborative era, they are less confident that a break had occurred with the era of constitutional negotiations. Governments were no longer striving for firm constitutional arrangements, but rather seeking accords, frameworks, and declarations on policy through intergovernmental agreements.²⁴ The collaborative efforts initially focussed on the troubled relationships identified by the constitutional negotiations: the economic and social union.²⁵ The negotiations on the Agreement on Internal Trade and the Social Union Framework quickly broadened to define an appropriate role for each order of government in a broad variety of policy fields –healthcare and labour mobility, among others. The federal government was accepting more limits on its use of the spending power, but it

²³ Cameron and Simeon, "Intergovernmental Relations in Canada," 54

²⁴ *Ibid.*, 55.

²⁵ Bakvis and Skogstad, *Canadian Federalism*, 8

retained its freedom to intervene.²⁶ The focus was not on supporting and facilitating more effective policies, but rather on fencing the boundaries of jurisdiction. In this regard, Cameron, Simeon and others define the agreements as collaborative in appearance, but also as a substantive reversion to the competitive federalism seen in the constitutional negotiation era.²⁷

Governments' failure to reach meaningful agreements in some areas, such as healthcare, further challenged the emergence of a clear definition of a new era of collaborative federalism.²⁸ Lazar illustrates how the federal government applied on a case-by-case basis its new approach to collaborative management and flexibility.²⁹ In some policies, the federal government engaged seriously with the provinces and find consensus on solutions. In other areas, it moved forward unilaterally or bilaterally with individual provinces. The mixed approach made it difficult for provinces to predict how the federal government would respond to various policy proposals.³⁰ This approach to management of the federation led Bakvis to coin the term checkerboard federalism for the asymmetry it fostered.³¹ This predilection towards bilateral negotiations and unilateral action defined Prime Minister Paul Martin's approach to federalism during his tenure.³²

²⁶ Simeon, *Federal-Provincial Diplomacy*, 324

²⁷ Cameron and Simeon, "Intergovernmental Relations in Canada," 58

²⁸ Bakvis, Baier and Brown, *Contested Federalism*, 34.

²⁹ Lazar, "Non-Constitutional Renewal," 10.

³⁰ James Bickerton, "Deconstructing New Federalism," *Canadian Political Science Review* 4 (2010): 61.

³¹ Herman Bakvis, "Checkerboard federalism? Labour Market Development Policy in Canada," in *Canadian Federalism: Performance, Effectiveness, Legitimacy*, eds. Herman Bakvis and Grace Skogstad (3rd ed., Toronto: Oxford University Press, 2002).

³² James Bickerton, "Equalization, Regional Development, and Political Trust: The Section 36/Atlantic Accords Controversy," *Constitutional Forum* 17 (2008).

Collaborative Federalism and Intergovernmental Relations: Harper

There is a distinction to be drawn between Prime Ministers Chrétien and Harper. Chrétien was unsympathetic to Quebec nationalism or provincial concerns. He moved to reassert federal dominance, but did so in a manner that respected the political triggers of his time: Quebec sovereignty, provincial resistance, and the recent constitutional failures.³³ The federal government was accepting more limits on its use of the spending power, but it retained its freedom to intervene.³⁴ Where Chrétien explored the boundaries of federal and provincial jurisdiction, Harper's federalism limited the role of the federal government to managing its jurisdiction as a watertight compartment, to some extent disregarding the implications of federal decisions on provincial jurisdiction.³⁵

Harper outlined his concept of federalism, defined as 'Open Federalism', in a series of campaign proposals and speeches in the Conservative Party's first few years in office.³⁶ There he articulated a vision of federalism in which the federal government enacted policies within its area of jurisdiction in ways that respected the autonomy and constitutional independence of the provinces. The vision recognized the expertise of provinces in their areas of jurisdiction. Harper's understanding of federalism denied or sought to minimize the interdependency of policy in Canada, reducing the need for routine intergovernmental engagement. In his early days as prime minister, Harper eschewed the paternalistic nature of intergovernmental relations led by the federal

³³ Simeon, *Federal-Provincial Diplomacy*, 318

³⁴ Simeon, *Federal-Provincial Diplomacy*, 324

³⁵ Michael Behiels and Robert Talbot, "Stephen Harper and Canadian Federalism: Theory and Practice, 1987-2011," in *The State in Transition: Challenges for Canadian Federalism*, eds. Michael Behiels and François Rocher (Ottawa: Invenire Books, 2011), 20.

³⁶ See for example: <http://www.pm.gc.ca/eng/news/2006/04/20/prime-minister-harper-outlines-his-governments-priorities-and-open-federalism-0>.

government. Instead, he emphasized the importance of respectful relations between the federal and provincial governments. Combining respect for provincial jurisdiction with Harper's preference for small government served to enact the respectful co-management of policies espoused by Chrétien in the mid-90s.³⁷ A departure may exist between the beginning of Harper's tenure as Prime Minister, which emphasized peace with provincial governments, and later years, where federal policy increasingly received polarized responses from provincial governments. Criminal policy in particular has caused significant statements of concern from provincial governments tasked with enforcing federal policy. Federal dictation of economic policy to the provinces in areas such as securities and labour policy suggests Harper's distance from the provinces may be limited to social policy.

There is some debate in the literature as to whether or not Harper's Open Federalism was a departure from the collaborative federalism era of Chrétien. James Bickerton divides the literature on Harper's approach to federalism into five classifications.³⁸ The five are status quo skeptics, Quebec autonomists, progressive pan-Canadians, collaborative disentanglers, and network globalists. Status quo skeptics are reluctant to support the claim that Canada has entered a new era of federalism under Harper. These academics largely categorize Harper's statements on federalism and actions as prime minister as consistent with the general evolution of federalism that had begun under Chrétien. Status quo skeptics do not see any break from the previous era of collaborative federalism. Quebec autonomists see Harper's approach to federalism as broadly consistent with that of Chrétien, but note the relationship with Quebec as a major

³⁷ Bakvis and Skogstad, *Canadian Federalism*, 10

³⁸ Bickerton, "Deconstructing New Federalism."

exception. These academics argue that the federal government has begun to create a space for Quebec's unique needs and culture within policy advancements. Sensitivity towards Quebec's status occurs both within a pan-Canadian approach, and in policies advanced through a series of intergovernmental agreements that allowed for unique arrangements for Quebec. Quebec autonomists argue that this approach will facilitate asymmetrical federalism to build Quebec's satisfaction with the federation.

The other three classifications see external forces shaping federalism and intergovernmental relations. Progressive pan-Canadians are concerned about the impact of neo-liberalism on the state of the federation. They view Harper's policies as extensions of neo-liberalism that will fragment the country and limit the ability of the Canadian population to act together to reach its full potential. Neo-liberalism prioritizes the power of the market in policy making as a more legitimate force than governments. We will discuss later the concept of neo-liberalism as central to the discussion of the economic union. As a force, neo-liberalism "emphasizes the markets and actions by individuals rather than collective approaches to solving or handling economic and social problems."³⁹ The implication of neo-liberalism for Canada is a diminished role for the federal government in providing social supports to Canadians.⁴⁰ Given the general jurisdiction of provinces over the delivery of social services, neo-liberalism further discredits intervention by the federal government to provide funding, set national standards, or create additional supports for Canadians. The federal government will allow for

³⁹ Stephen McBride, *Paradigm Shift: Globalization and the Canadian State*, (Halifax: Fernwood, 2001), 14.

⁴⁰ Ibid, 147.

diversified delivery of social services by provincial governments and this will have damaging effects on the social safety net.⁴¹

Collaborative disentanglers believe that Canadian federalism is beginning to reflect a new reality of multi-level governance. Multi-level governance involves delegating authority and decision making from constitutional authorities upwards to the global community and downwards to the local community.⁴² The way Canadian governments engage with each other will evolve to fit this new reality. To achieve balance in this new order, the mechanisms of intergovernmental collaboration will need to be renewed and enhanced. Some academics believe that this type of federalism will require equal treatment of each province by the federal government, essentially suggesting that asymmetrical federalism will no longer be acceptable. Others feel that there will be diversity in the way governments engage with each other and that governments have come to understand that this is a necessary reality.⁴³

Network globalists connect the changes in federalism with the realities of globalization. For them, policy issues will increasingly overlap multiple jurisdictions and require responses from multiple jurisdictions for success. Thomas Courchene expands on this point by identifying that the overlap will increasingly be federal engagement in areas of provincial jurisdiction.⁴⁴ The national interest in the capacity of the population and economy to be competitive with the global economy will lead the federal government to enact policies in areas of provincial jurisdiction.

⁴¹ Adam Harmes, "The Political Economy of Open Federalism," *Canadian Journal of Political Science* 40 (2007): 434.

⁴² Bakvis, Baier and Brown, *Contested Federalism*, 20.

⁴³ Bickerton, "Deconstructing New Federalism," 65.

⁴⁴ Thomas Courchene, "Reflections on the Federal Spending Power: Practices, Principles, Perspectives," *Queen's Law Journal* 34 (2008).

Bickerton's classifications define the federation in terms of the powers that are shaping it. Missing from the classifications is provincial power and agency. All five categories frame their understanding of the current state of federalism as a reflection of actions by the federal government or of external forces such as neo-liberalism, multi-level governance, and globalization. The implications of these forces on intergovernmental relations are again primarily focussed on the role and viability of the federal government. Focussing on intergovernmental relations does bring provinces more directly into the equation. There are places where the literature references the potential for provincial leadership to drive collaboration. It ranges, however, from a sense that provincial leadership is a positive force on the federation to a concern that provincial leadership is detrimental to the federation. Collaborative disentanglers, much like Chrétien, emphasize the importance of the division of powers. There is recognition that provinces have a key role to play in setting policy in their areas of jurisdiction.⁴⁵ These theorists, however, ascribe responsibility for collaboration back to the federal government. Provinces leading collaboration on national policy is not a part of the dialogue. In particular, the progressive pan-Canadians discount provincial governments as legitimate actors within the federation.⁴⁶ This understanding of federalism leaves little room for leadership or agency on the part of provincial governments. While there is a debate over the collaborative relations between the federal and provincial governments in the Harper era, Bakvis and Skogstad illustrate how, under Harper, there has been a definite rise in interprovincial engagement using the collaborative model.⁴⁷

⁴⁵ Bakvis, Baier and Brown, *Contested Federalism*, 20.

⁴⁶ Bickerton, "Deconstructing New Federalism," 64.

⁴⁷ Bakvis and Skogstad, *Canadian Federalism*, 341

This thesis contends that provincial leadership is a critical aspect of intergovernmental relations and decision-making within the Canadian federation.

Exploring the broader literature on collaborative or open federalism with an eye to better facilitating this crucial force, highlights two themes: incrementalism and asymmetry.

Collaborative Federalism and Interprovincial Relations

Underlying much of the literature on collaborative or open federalism is a sense that the role of provinces in the federation is shifting. Often, the focus is on shifts in how provinces engage with the federal government, but there are also allusions to how provinces must now engage with one another. Simeon and Cameron argue that, most often, the new collaborative relations are between the federal government and the provinces, but they acknowledge that collaborative relations can also occur amongst the provinces and territories.

The federal government has traditionally been responsible for setting national direction on policies and overseeing intergovernmental work. In the era of cooperative federalism, the federal government led intergovernmental work on health care and pensions, as two examples, by defining national standards and encouraging provinces to meet them. In the constitutional negotiation era, the federal government defined key issues and preferred outcomes as the starting point of negotiations. In the new era of collaboration, the interdependence of Canadian governments was emphasized and the work took on a non-hierarchical approach. Provinces undertook leadership roles in shaping national policy, which included a role for the federal government.⁴⁸ In the new reality interprovincial processes contribute to national policy directions – directions that

⁴⁸ Lazar, “Non-Constitutional Renewal,” 21-23.

include the federal government, but also directions that may not incorporate a role for the federal government.

Interprovincial collaboration is first noted as a driving force in the conclusion of the Social Union Framework Agreement (SUFA). Collaboration between provincial and territorial social policy ministers was a key process that shaped and defined the national social union policy.⁴⁹ SUFA is held up as a positive example of provincial leadership in the new collaborative federalism. The provinces (except Quebec) came to an agreement, and the federal government came on board to complete the deal. What happens if no deal is reached? It appears that the literature discounts efforts with no marquee outcome as failing the test of collaborative federalism. Recognition of the new era of collaborative federalism was limited by the failure of governments to reach meaningful agreements in some areas, such as healthcare.⁵⁰ A similar response is elicited when the provinces and territories fail to reach agreement in a working group on financial arrangements.⁵¹ Failure to achieve a firm agreement are identified as limitations of the era of cooperation; this perspective preferences outputs over process as a defining feature of collaborative federalism.

The literature identifies consensus decision making – gaining agreement from all governments – as the downfall of collaboration.⁵² When the federal government is unable to reach agreements with the provinces and territories, it reverts to bilateral or unilateral

⁴⁹ Simeon, *Federal-Provincial Diplomacy*, 324; Bakvis, Baier and Brown, *Contested Federalism*, 110-111; and Cameron and Simeon, “Intergovernmental Relations in Canada,” 62.

⁵⁰ Bakvis, Baier and Brown, *Contested Federalism*, 34

⁵¹ *Ibid.*, 110-111

⁵² *Ibid.*; Malcolm M. Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: The University of Michigan Press, 2008).

action, challenging the fundamental principles of collaboration.⁵³ Some theorists propose that the federal government avoid the challenge of consensus by working around the divergent provinces and dealing directly with citizens.⁵⁴ The concept of collaborative federalism as a legitimate approach to Canadian federalism is abandoned in the face of the need for consensus.

Other theorists identify collaborative federalism as a positive opportunity to disentangle joint decision-making traps and incrementally build agreements that are more effective.⁵⁵ Collaboration in its initial stages had the federal government pushing through the best chance of agreement between all Canadian governments. The short-term gain from the minimalist agreement would ultimately undermine long-term stability. Effective collaboration requires the federal government to “stay at the table with the provinces” working incrementally towards an effective resolution; moreover, it will require “provincial support and at times their leadership” to advance negotiations and move effective collaboration forward.⁵⁶ Essentially, intergovernmental processes need the federal government to take a step back from its traditional role of arbiter between divergent provinces, pushing forward the bottom line.⁵⁷ In the space created, provinces can better shape the debate. That debate may not move at the pace originally envisioned by the federal government, or provinces pushing for change, but an incremental approach may lead to more lasting solutions.

⁵³ Bickerton, “Deconstructing New Federalism,” 61.

⁵⁴ Tom Kent, “The Federal Spending Power Is Now Chiefly for People, not Provinces,” *Queen’s Law Journal* 34 (2008): 421.

⁵⁵ Robert Young, “Open Federalism and Canadian Municipalities,” in *Open Federalism: Interpretations, Significance* (Toronto: Queen’s University Press, 2006).

⁵⁶ Lazar, “Non-Constitutional Renewal,” 33

⁵⁷ Peter Leslie, “The Two Faces of Open Federalism,” in *Open Federalism: Interpretations, Significance* (Toronto: Queen’s University Press, 2006), 65.

The concern within the literature associated with this approach is that removing federal oversight will lead to asymmetry and decentralization. Asymmetry is the process by which provinces take on different roles and relationships in areas of concurrent jurisdiction. The federal government has long afforded asymmetry to Quebec, in accordance with a *de facto* distinct status within the federation.⁵⁸ In the era of collaborative federalism, asymmetry has applied more broadly. The 2004 Health Accords codified an option for all provinces, not just Quebec, to opt out of the general terms of the agreement and pursue their own arrangement with the federal government.⁵⁹ The federal government enhances the process of decentralization when it withdraws from a leadership role within the federation. Canada has become one of the most decentralized federations in the world. Provinces maintain independent jurisdiction and policy autonomy over a broad set of policies. They are free to set policy as they wish in many areas, most notably in social policy. When Harper outlined his perspective of open federalism, there was an expectation that this would lead to greater decentralization.⁶⁰

The expectation among many academics is that asymmetry and decentralization lead to policy diversity that will undermine the notion of Canada as a country, and the protections provided to citizens. Fragmentation of policy approaches will fragment the country and prevent “Canada’s diverse communities from working towards a coherent and capable nation.”⁶¹ In particular, Harper’s implementation of open federalism is described as “avoid[ing] meaningful national standards in provincial and undefined areas

⁵⁸ Bakvis, Baier and Brown, *Contested Federalism*, 24

⁵⁹ *Ibid.*, 17

⁶⁰ Roger Gibbins, “Open Federalism: Thoughts from Alberta,” in *Open Federalism: Interpretations, Significance* (Toronto: Queen’s University Press, 2006), 73.

⁶¹ Whyte, John D. 2008. “Federalism Dreams” *Queen’s Law Journal* 34 (1): 1.

of jurisdiction.”⁶² Ultimately, it is feared that asymmetry and decentralization lead to “discrepancies in the quality of service Canadian’s receive” and challenge the development of new social programs, ultimately denying Canadians “one of the most important elements of a shared concept of citizenship.”⁶³ There is a sense that provinces shed regulations and limit oversight of business in order to improve their competitive positions relative to other jurisdictions.⁶⁴ Some academics are more positive about asymmetry, but primarily as a means to better incorporating Quebec into the federation.⁶⁵ Some academics assess broad asymmetry and find that it has been positive in some cases, but negative in others, presenting a mixed view.⁶⁶

This thesis contends that, like incrementalism, asymmetry and decentralization could be positive forces in Canadian federalism. The thesis argues that perhaps asymmetry and decentralization driving policy innovation is a positive development within the federation. Policies given space to “evolve as by-products of trial and error, adaptation and selective imitation” could serve citizens well in the best sense of the laboratory of federalism; while lacking the grand unified theory favoured by theorists, this approach could serve to build consensus around best approaches.⁶⁷ Growth in diversity among the regions of the country could create further challenges for the federal

⁶² Behiels and Talbot, “Stephen Harper and Canadian Federalism,” 74.

⁶³ Ibid.

⁶⁴ Kathryn Harrison, *Racing to the Bottom? Provincial Interdependence in the Canadian Federation* (Vancouver: UBC Press, 2006).

⁶⁵ Eric Montpetit, “Easing Dissatisfaction with Canadian Federalism? The Promise of Disjointed Incrementalism,” *Canadian Political Science Review* 2 (2008).

⁶⁶ Keith Banting “Remaking Immigration,” in *Canadian Federalism: Performance, Effectiveness, Legitimacy*, eds. Herman Bakvis and Grace Skogstad (3rd ed., Toronto: Oxford University Press, 2012), 278; and Bakvis and Skogstad, *Canadian Federalism*, 351.

⁶⁷ Geoffrey Hale, “Canadian Federalism and North American Integration,” in *The State in Transition: Challenges for Canadian Federalism*, eds. Michael Behiels and François Rocher (Ottawa: Invenire Books, 2011), 260.

government in managing relations.⁶⁸ Some may yet “[yearn] for a federal leader who will reject the ‘head waiter to the provinces’ mind-set and reassert federal authority.”⁶⁹ In the absence of the federal government asserting national aspirations, there is still leadership within the federation; that leadership is simply taking a form not traditionally recognized: that of provincial leaders.

Collaborative Federalism and Provincial Leadership

The academics assessing the state of the federation in the past two decades have struggled to classify outcomes and come to sanguine assessments when it comes to the effectiveness of the Canadian federation. They witness a decline in collective action by all Canadian governments, which lead to questions about whether or not the federation has moved beyond the dynamics of competitive federalism.⁷⁰ This thesis contends that the themes of incrementalism and asymmetry are not necessarily harbingers of the end of the federation, but rather positive features of interprovincial relations and provincial leadership. Where intergovernmental negotiations break down due to a lack of consensus, bilateral or multilateral efforts keep the policy discussion occurring. This may lead to asymmetry, but it could also lead to innovation and to progress on a national consensus.⁷¹ Canadian governments have long balanced their autonomy with a willingness to engage

⁶⁸ Brooke Jeffrey, “Challenges for Canadian Federalism,” in *The State in Transition: Challenges for Canadian Federalism*, eds. Michael Behiels and François Rocher (Ottawa: Invenire Books, 2011), 317.

⁶⁹ *Ibid.*, 330.

⁷⁰ Julie M. Simmons and Peter Graefe, “Assessing the Collaboration That Was ‘Collaborative Federalism’: 1996-2006,” *Canadian Political Science Review* 7 (2013), 26.

⁷¹ Bakvis and Skogstad, *Canadian Federalism*, 341

and compromise.⁷² Agreement to move forward is achieved when failure to make progress will have negative implications for the responsible governments.⁷³

This thesis will explore policy development in Canada in the current state of intergovernmental relations, focusing on the potential for provincial leadership. It will do so through the lens of the economic union and internal trade policy. It will trace the past 30 years of internal trade policy to assess the evolution of agenda setting and policy leadership. We will see that the first 15 years reflect federal leadership in policy; the second 15 years introduce a new dynamic of intergovernmental relations in which interprovincial action is leading policy development. Using internal trade as a case study, it will explore the limits and possibilities of the current state of intergovernmental relations. Finally, it will identify tools for building consensus decisions among Canadian governments and access points for advancing policy solutions.

The economic union is an interesting vantage point from which to study provincial leadership for two reasons. It is easy to compare the unique approach of the federal government's leadership on the issue during the constitutional negotiations with provincial leadership following the AIT. It also demonstrates how provincial initiatives gain traction as pan-Canadian standards.

Admittedly, internal trade as a case study of intergovernmental policy has its complications. Primarily, it is difficult to distinguish between action resulting from provincial leadership and action resulting from neo-liberal forces. As we saw above, some view Harper's open federalism as particularly supportive of the spread of neo-

⁷² Bakvis, Baier and Brown, *Contested Federalism*, 248-251

⁷³ Bakvis and Skogstad, *Canadian Federalism*, 351

liberalism within Canada.⁷⁴ There is some debate as to the extent to which globalization has affected an already highly decentralized federation like Canada.⁷⁵ There is evidence that questions the perception that Canadian federalism leads to unique policy outcomes relative to comparable non-federal countries. Are Canadian provinces advancing neo-liberalism or is neo-liberalism advancing as a common policy approach?⁷⁶

Regardless (and at a minimum), Canadians' concerns over the impact of globalization and neo-liberalism on how they are governed shape the choices governments make in advancing policy. Citizens concerns with the advancement of neo-liberalism led to broad debate on both the North American Free Trade Agreement and the accession of Saskatchewan to TILMA. Ideological alignment over neo-liberalism could foster greater regional alliances between governments or create divisive approaches to policy. As in the debates over free trade in the 1980s, provincial governments that fundamentally disagree with the economic approach of the federal government will struggle to find common accord in any number of policy fields.⁷⁷ Governments that find ideological alignment could find it easier to advance intergovernmental collaboration.⁷⁸

⁷⁴ Harmes, Adam, "The Political Economy of Open Federalism."

⁷⁵ See: Richard Simeon, "North American Integration and Canadian Federalism," in *The Impact of Global and Regional Integration on Federal Systems: A Comparative Analysis*, eds. Harvey Lazar, Ronald Lampman Watts, and Hamish Telford (Montreal: McGill-Queen's University Press, 2003); and Ian Robinson, "Neo-Liberal Trade Policy and Canadian Federalism Revisited," in *New Trends in Canadian Federalism*, eds. François Rocher and Miriam Smith (2nd ed., Peterborough: Broadview Press, 2003).

⁷⁶ Herman Bakvis and Douglas Brown, "Policy Coordination in Federal Systems: Comparing Intergovernmental

Processes and Outcomes in Canada and the United States," *Publius* 40 (2010).

⁷⁷ See for example: <http://www.cbc.ca/news/politics/kathleen-wynne-makes-full-court-press-for-meeting-with-pm-1.2869822>.

⁷⁸ Annie Lennox Esselment, "A Little Help from My Friends: The Partisan Factor and Intergovernmental Negotiations in Canada," *Publius* 43 (2013): 701-727.

The impact of more or less support for the principles of neo-liberalism could shape modern coalitions and willingness to collaborate in Canadian federalism.

For the purposes of this thesis, the focus will be on how governments view and advance collaboration within the federation. On any given issue, a coalition of support will be critical to build, and any number of factors could shape that coalition. The role of neo-liberalism in shaping policy outcomes is something to be conscious of as we go through the developments in this policy field. However, the ability to achieve support from 13 governments across the country for an issue is a monumental success, and remains worth exploring. The divisive constitutional negotiations of the 1980s, where this case study begins, illustrates the importance of collaboration most poignantly.

Chapter 2 – Federal Action on Internal Trade

How Canadian governments understand the federation shapes the relations that they undertake with one another. The constitutional debates of the 1980s and early 1990s saw government leaders from across the country work to define a new consensus on the foundations of the Canadian federation. Canadian governments shared their visions of the federation and their perspective on the changes needed to build a stronger union. These negotiations centered on a common conception of the federation, while the outcomes reflected a substantial shift in intergovernmental relations.

Governments in the postwar period had worked cooperatively to shape the welfare state. The dynamic centred on officials working together to shape social policies. The work was primarily in provincial areas of jurisdiction; the federal government's research and funding capacity were key sources of support as provinces evolved the social state. Two factors ended this era of collaboration. Provincial bureaucracies and related capacity for innovation began to rival that of the federal government. Provincial bureaucrats had worked alongside federal bureaucrats to define policy issues and shape solutions. They were becoming less likely to take direction from the federal bureaucrats.⁷⁹

The other factor that intervened in the era of cooperation was a shifting understanding of the federation and the balance between the orders of government. The Quiet Revolution in Quebec introduced a nationalist sentiment within the provincial order, challenging the basis of how Canadians understood the constitution. The rise of

⁷⁹ Inwood, Gregory J., Carolyn Johns, and Patricia O'Reilly. *Intergovernmental Policy Capacity in Canada: Inside the Worlds of Finance, Environment, Trade, and Health*. Montreal: McGill-Queen's University Press, 2011. 41.

Prime Minister Pierre Trudeau created an ideological conflict between the federal government and governments in Quebec and the west.⁸⁰ Provincial governments were less inclined to work with the federal government to shape the national interest. A dynamic of competition began to shape interactions between governments.

The federal government's claim to speak for all Canadians was facing serious challenges. The negotiations over the constitution began in this climate. As we will see, the negotiations were consistent with the dynamics of competitive federalism that was prevalent at that time. Governments were presenting competing visions of the federation and seeking to build alignment in their understandings of the future of the federation. While much of the focus was on building a federation that reflected the unique identity of Quebec, governments also struggled to maintain the autonomy of each order of government. This was particularly true in the case of the economic union. We will see that the federal government unilaterally advanced a proposal to redefine the economic powers attributed to it in the constitution under section 121, affording it broad power over the economy. The provinces rejected this proposal, fearing the implications for future policy decisions; the impact of the proposal was not clear. The provinces rejected a proposal to permit unilateral federal economic authority under section 121 again in the Charlottetown Accord negotiations.⁸¹ The federal government's attempt to address a pillar of the Canadian federation was too abstract for provinces to support.

The negotiations between the two governments centred on a broad conception of the economic union and the future of Canada. Governments agreed that economic development powers had caused some competitive and divergent economic policy in the

⁸⁰ Cameron and Simeon, "Intergovernmental Relations in Canada," 50.

⁸¹ Russell, *Constitutional Odyssey*. 173.

decades preceding. The federal government in particular was concerned about policy asymmetry amongst provinces. Provincial governments were reluctant, however, to cede a broad power to the federal government without fully understanding the implications for everyday policy. Provinces agreed that the federal government could play a role in maintaining the economic union, but were not willing to allow the federal government to be unilaterally responsible for determining the direction of the economic union. The proposal by the federal government to expand its powers under section 121 of the constitution would grant it broad power over the economy was untenable for provinces. Provinces made this clear early on in the constitutional process. Rather than presenting a more nuanced position, the federal government came back with variations of the same proposal: unilateral power for the federal government. The competitive dynamic between the governments over power and the mandate to define the future of the federation stifled meaningful negotiation and progress. Ultimately, the compromise reached in the Charlottetown Accord was a minimal commitment to collaboration.

We will see, however, that in the protracted negotiations on the foundation of the economic union, Canadian governments had begun to build a consensus that would support further action. The various rounds of negotiation had forged consensus around the concept of an economic code of conduct. Rather than allowing the federal government to shape unilaterally the economic union, a framework for intergovernmental relations around the economic union was emerging in the form of a domestic trade agreement. Federal efforts to define the state of the federation in the Macdonald Commission further outlined how this concept would work. At the same time, provincial governments had begun to be integrated into the international trade policy landscape.

These developments combined to spur action on internal trade following the collapse of the constitutional negotiations. The conversation shifted from entrenching constitutional federal oversight over the economy to a structure of intergovernmental relations defined in the Agreement on Internal Trade (AIT).

Canadian governments went on to negotiate and conclude the AIT. The signing of the AIT in 1994 was both monumental and lackluster. It was monumental because it succeeded in reaching an outcome in an era of constitutional reform where few other proposals had. It was lackluster in comparison to the grand ideas and lofty policy proposals for reforming the economic union advanced by the federal government in the decade preceding. The AIT as concluded was neither a bold statement on the economic union, nor was it a particularly effective compromise, but it was a new consensus for Canadian governments. The AIT blended two visions of the economic union into an agreement with which few governments were satisfied. Some governments wanted the AIT to be a binding agreement on trade consistent with international norms. Other governments wanted a non-binding statement on economic collaboration. Concluded in 1994, the AIT was the end of substantial pan-Canadian engagement on the issue until 15 years later.

This chapter provides a picture of the competitive dynamics of federalism and intergovernmental relations that defined the discussion on the economic union and internal trade in the 1980s and 1990s. It will show how the federal government's drive to define unilaterally a national consensus on the economy failed to incorporate adequately the needs of provincial governments. It will demonstrate how rising capacity within provincial governments shaped a new form of intergovernmental relations. In the new

reality of intergovernmental relations, the federal government set the agenda as lead policy-makers, but the provinces were no longer willing to be policy-takers. This dynamic culminated in negotiations on the AIT. The divisive outcome of the AIT supports the argument that collaboration through intergovernmental relations has evolved – an argument that we will explore in the next chapter.

The scope of the conversation on the economic union included the movement of goods, services, people and money across the country. It included actions by all Canadian governments to enhance the economy within their purview through economic development funding, or transfer of wealth between regions. The policy fields raised include regulatory regimes, labour market development and maintenance, procurement, tax regimes and transfers, securities, budget development, transfer payments, jurisdiction over natural resources, and intergovernmental agreements involving the use of the federal spending power in areas of provincial jurisdiction. At its most indirect, proposals included federal institutional reform or reform of the mechanisms of intergovernmental engagement to rectify perceived deficits in collaboration. In short, when governments discussed the economic union they were referring to a broad set of concerns and reviewing an even broader set of solutions. For the purposes of this analysis, all issues put forward and referred to as the economic union will be covered. The aim, however, is to track the evolution of the final outcome in the AIT, and the emphasis will be placed on how proposals directly related to the AIT progress. We will begin by reviewing the rules of the economic union as defined within the Constitution to better understand the proposals related to the movement of goods, people and economic activity across the country, and out of the country.

The Economic Union and the Division of Powers

Two sections in the Constitution govern the movement of economic activity across Canada. Section 121 states that “all Articles of the Growth, Produce and Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.” Judicial interpretation of this clause has limited its interpretation to tariff barriers on goods, but as we will see, most barriers to the movement of goods come through regulations. The more powerful clause of the Constitution in regards to interprovincial trade and the economic union is Section 92(13), which grants provincial jurisdiction over ‘Property and Civil Rights in the Province.’

The constitutional evolution of the economic union in Canada can be traced to the early history of the federation. In the 1881 *Citizens Insurance Co. v. Parsons* case, the Judicial Committee of the Privy Council (JCPC) ruled that Section 92 (13), Property and Civil Rights limit Section 91(2), which grants the federal government exclusive jurisdiction over ‘the regulation of Trade and Commerce’. The JCPC expressed concern that the two broad powers stood in contradiction to each other. It ruled that ‘Trade and Commerce’ applied to international commerce as well as trade ‘affecting the whole dominion,’ but did not refer to the regulation of an industry operating within provincial boundaries.⁸² The courts granted provinces the power to freely create regulatory regimes over economic activity within the boundaries of the province, which, over time, affected the flow of business between provinces.

The power ascribed to the provinces was further entrenched in the 1930s. In 1935, the federal government ratified three conventions from the International Labour

⁸² Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (3rd ed., Toronto: University of Toronto Press, 2004), 41.

Organization and Parliament proceeded to pass legislation that would put the conventions into effect. The federal legislation replaced provincial law enacted under Property and Civil Rights powers. Ontario challenged the constitutionality of the federal government using the Treaty powers to limit jurisdiction over Property and Civil Rights powers. In the 1937 case, *Attorney General for Canada v. Attorney General for Ontario* (commonly called the *Labour Conventions* decisions), the JCPC ruled that the federal government had the authority to negotiate and ratify treaties, but could not enforce compliance in areas of provincial jurisdiction. The Committee's ruling made it clear that the federal government could not override provincial regulations through international agreements.⁸³

This unique problem of treaty making in federal states is addressed in international law. The 1969 Vienna Convention on the Law of Treaties specifies in Article 27 that those states that have ratified cannot use limitations in domestic law to contravene a treaty. The General Agreement on Trade and Tariffs (GATT) and the successor World Trade Organization (WTO) include a 'federal state clause' that says: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory."⁸⁴ While Canada – along with other federal states – questions the definition of 'reasonable measures', most major international trade agreements now include clauses to address sub-federal states.⁸⁵

The sum of these rulings and conventions is a series of ten regulatory business regimes within Canada. While there is great diversity of opinion on how distinct these

⁸³ Kukucha, Christopher. *The Provinces and Canadian Foreign Trade Policy*. Vancouver, B.C.: UBC Press, 2008. 45.

⁸⁴ *General Agreement on Tariffs and Trade*. Vol. XXIV. Geneva, Sz.: WTO, 1999: 12.

⁸⁵ Kukucha, *The Provinces and Canadian Foreign Trade Policy*, 44.

regimes are, and how much the economy is impacted, it is clear that cooperation is required to address the movement of goods, labour and investment across provincial boundaries. The prominence of this area of federalism has waxed and waned over time, but perhaps reached its peak in the 1980s and 1990s. There are two factors that served to highlight the economic union at that time: developments in international trade and in constitutional negotiations. The international negotiations brought the issue to the fore.

Developments in International Trade Policy

Throughout the second half of the twentieth century, Canada was heavily involved in international trade policy. The initial period of mass international trade agreements revolved around tariffs levied on goods at borders. The GATT brought states together to lower tariffs. Tariffs are an entirely federal area of jurisdiction; negotiations at that time were a strictly federal exercise. By the 1970s and 1980s, tariffs were reduced to a level that left little to negotiate, and agreements shifted to reducing and removing non-tariff barriers (NTBs) to trade.⁸⁶ Non-tariff barriers are measures taken by a government that make domestic goods more competitive without directly raising the cost of foreign goods. These are more difficult to remove than tariffs because they are harder to identify. They come in many forms: subsidies, marketing boards, regulatory standards, and labour codes are a few of the more common NTBs encountered within Canada.

Canada's participation in international trade maintained a traditional focus, but involved new players. The Free Trade Agreement (FTA), and the subsequent North American Free Trade Agreement (NAFTA), centered on Canada's relationship with the United States. The focus on the United States was a continuation of the long-standing

⁸⁶ Ibid, 47.

cornerstone of Canadian trade policy. At the same time, however, negotiations in this agreement and at the WTO were encroaching on provincial areas of responsibility. With the move to inclusion of regulation in trade, the federal government was negotiating commitments under the WTO in areas of provincial jurisdiction, necessitating greater coordination and dialogue on the status of provincial regulatory regimes and new requirements of external trade partners.

Provinces and territories were first involved in federal formulation of international trade policy in the Tokyo GATT round (1973-1979).⁸⁷ Negotiations hinged on a number of provincial areas of jurisdiction or expertise: agricultural subsidies, liquor board purchasing, and procurement. Provincial deputy ministers were involved in establishing Canada's position through ad hoc meetings and irregular engagement. The federal government ratified the results of the negotiations, but lacked the authority and incentive to implement many of the provisions in areas of provincial jurisdiction. In 1985, the European Community challenged provincial inaction, particularly on the part of Ontario, at the GATT. The GATT rejected the argument that the Canadian Constitution limited and bound the federal government and federal negotiators went back to the provinces to negotiate cooperation from a majority.⁸⁸ It was clear that the new era of international trade required a more coordinated approach from Canada, a lesson not lost in the FTA negotiations.

The federal government established formal consultations with provinces and territories on international trade for the first time during the FTA negotiations (1986-88).

⁸⁷ Grace Skogstad, "International Trade Policy and Canadian Federalism: A Constructive Tension?" In *Canadian Federalism: Performance, Effectiveness, Legitimacy*, eds. Herman Bakvis and Grace Skogstad (3rd ed., Toronto: Oxford University Press, 2012).

⁸⁸ *Ibid.*

In preparing for negotiations, the federal government created an International Trade Advisory Committee with 40 experts and 15 Sectoral Advisory Groups on International Trade (SAGITs). It also created the Continuing Committee for Trade Negotiations (CCTN). The federal government chaired the CCTN, which consisted of senior officials from all provincial and territorial governments. Lead negotiator Simon Riesman briefed and received input from the committee monthly.⁸⁹ In addition, the prime minister agreed to meet with premiers regularly during negotiations. The prime minister kept that commitment, meeting with premiers twelve times over two years.⁹⁰

During these consultations, Alberta and Ontario began the call for a more formal decision-making role for provinces in all international trade negotiations and for ministerial oversight of the negotiations. The federal government rejected a decision-making role for provinces, and resisted all requests for more extensive involvement of provincial governments. Crucially, Prime Minister Mulroney never requested approval over the outcomes of the negotiations. Provincial governments had been consulted on the way forward and were expected to abide by the outcomes.⁹¹ This type of process repeated in the negotiation of NAFTA, the Uruguay Round of the GATT, the OECD Multilateral Agreement on Investment, the Millennium Round of the WTO, and the Comprehensive Economic Trade Agreement.⁹² The standard of provincial involvement in international trade was established: provincial governments were to be included on an ad hoc basis and

⁸⁹ Michael Hart, *A Trading Nation: Canadian Trade Policy from Colonialism to Globalization* (Vancouver: UBC Press, 2002), 376.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² G. Bruce Doern and Brian W. Tomlin. *Faith & Fear: The Free Trade Story* (Toronto: Stoddart, 1991); and Skogstad, "International Trade Policy," 2002.

were to view the federal government's consultation as due diligence in meeting international sub-national agreement requirements.

The dynamics between the federal and provincial governments at this time reflected the era of competitive federalism. As international trade negotiations moved into areas of provincial jurisdiction, the federal government engaged provinces in developing the positions advanced internationally. The initial cooperation eventually evolved into a more competitive relationship, however, as provinces pushed to better see their perspectives reflected in the positions of the federal government. The conversations were elevated from the officials' level to the political level, mirroring the executive nature of federalism of the 1970s and 1980s.

Federal-provincial relations in this area of policy led to two important developments. The first was the rise in prominence of the economic union. The number First Ministers Meetings around the FTA negotiations raised the public profile of the divided jurisdiction over international trade, and engaged the media in a protracted discussion of the federal division of powers.⁹³ The second development was the build-up of capacity provinces undertook to engage in international trade negotiations. Provinces joined the federal government in negotiations, and participate in a meaningful way. This required provinces to focus resources and talent on trade agreements.⁹⁴ Provinces worked to develop an understanding of the international trade system, and the interaction between provincial decisions and international outcomes. The small groups of officials appointed

⁹³ Hart, *A Trading Nation*, 376.

⁹⁴ Inwood et al, *Intergovernmental Policy Capacity in Canada*, 218.

to this area tended to stay on for long periods, building expertise and developing a strong interprovincial network.⁹⁵

While there are important differences between international trade policy and internal trade policy, the framework for internal trade negotiations draws heavily on the culture, rules and norms of international trade. It was the engagement of provinces in international trade negotiations that set the stage for developments on the internal trade file.

Reviewing the Economic Union: Defining the Concerns

The creation of an economic union was at the heart of Confederation. Throughout the early 1800s, Britain dismantled the system of preferential trade with colonies. At the same time, the American government was focusing inwards, enacting protectionist policies that prevented the flow of goods into that market. The abandonment of support for the Canadian colonies by their two biggest allies spurred action by the colonies to replace the economic activity traditionally achieved through the British and the Americans. Britain found the efforts by individual colonies to set tariffs and make economic development decisions to be at cross-purposes. Therefore, talks began in earnest on a deepening of the union. Confederation was thus less a move for independence, than it was an attempt to forge a deeper domestic economic interdependence.⁹⁶

A century later, the conversation on economic union began again. The build up of the welfare state between 1945 and 1975 saw governments across Canada employing a variety of economic development strategies. Provinces and municipalities used various

⁹⁵ Kukucha, *The Provinces and Canadian Foreign Trade Policy*, 91.

⁹⁶ Hart, *A Trading Nation*.

incentives to attract businesses, while federal regional development agencies were proliferating.⁹⁷ By the end of the 1970s, “the business community, economists, and other observers were expressing concern that, as a result of all these interventions, the economic union was becoming too fragmented, and that its benefits could be lost, at a considerable cost to overall economic welfare.”⁹⁸ This concern set the stage for making the state of the economic union a key part of constitutional negotiations.

In 1980, the federal government presented provinces with *Securing the Economic Union in the Constitution*, a federal position paper that made the case for including improvements to the economic union in the Constitution. The paper detailed civil society reports that outlined barriers within the economic union, but appealed to the provinces on the basis of international trade agreements. The GATT and the Treaty of Rome (which created the European Economic Community, the precursor to the European Union), it said, imposed more conditions on sovereign states than the Canadian constitution did on Canadian governments.⁹⁹ The paper argued that “given the prevailing trends in the world economy” – of liberalization of market access, and the creation of new free trade areas – “there [was] some urgency in safeguarding and strengthening our economic union.”¹⁰⁰ In the paper, the federal government defined both its perception of the key problems with the state of the economic union and its proposed solutions.

Securing defined four aspects of the economic union: a customs union administered by the federal government; a common market fractured by provincial

⁹⁷ Kukucha, *The Provinces and Canadian Foreign Trade Policy*, 39.

⁹⁸ Bakvis, Brown, and Baier, *Contested Federalism*, 189.

⁹⁹ Canada. Justice Canada. *Securing the Canadian Economic Union in the Constitution*. [Ottawa], 1980. vi.

¹⁰⁰ *Ibid.* 4.

regulatory regimes; a financial market somewhat impacted by provincial actions; and distinct provincial labour markets. The document largely bemoaned the power granted the provinces over property and civil rights in Section 92 (13), and the limited affect of Section 121. The paper identified four key concerns:

- Costs to business due to a failure to maximize economies of scale;
- Barriers making trade with international markets easier than with other provinces;
- Fewer employment opportunities, and resultant lower incomes, for residents of all provinces; and
- Higher public procurement costs.¹⁰¹

The federal government appealed to nationalism and referenced economic theory and developments in international law – international trade agreements – as rationales for moving forward to address the above-noted issues.¹⁰² It recommended three constitutional amendments to entrench mobility rights, limit government interference in the market by expanding Section 121, and broaden federal powers to “encompass all matters that are necessary for economic integration, thus ensuring that the relevant laws and regulations will apply uniformly throughout Canada.”¹⁰³ The document recognized that some provincial variation in market development might be necessary, but focussed ultimately on the need for expanded federal powers.

The proposals contained in *Securing the Economic Union* ultimately served to alienate provinces from the conversation on this area of constitutional reform. The federal government took the traditional approach of promoting national leadership over provincial policies, but the provincial governments had moved beyond that understanding

¹⁰¹ Ibid.

¹⁰² Ibid. 5.

¹⁰³ Ibid. 29.

of federalism. They took offense to the suggestion that the national interest could only be achieved through federal action and were suspicious that these proposals were an attempt to trump provincial economic power, especially in the area of natural resources.¹⁰⁴

Governments were entering a period of competitive federalism that focussed on how power is distributed between the two orders of government. The federal government's proposal did not include an assessment of how expanded federal powers would affect existing policies. It also did not provide sufficient detail on how the change could affect future provincial activities. Framing the proposals in this way ensured that this area of constitutional reform would not go forward in the patriation efforts.

The accord reached in the Government Conference Centre kitchen on the night of November 4, 1981 reflected just two issues related to the economic union: mobility rights were entrenched in the Charter of Rights and Freedom, and a federal commitment to equalization payments was included in Section 36. There was nothing on Section 121 or on moving goods, services and capital across the country. The provincial governments that drafted the accord ignored federal priorities outlined in *Securing the Economic Union*.

Defining the Options: The Macdonald Commission

Shortly after patriation, Michael Kirby, then federal Deputy Clerk of the Privy Council, asked Donald S. Macdonald to chair a commission to address the unfinished subject of the economic union. While governments had achieved patriation, the federal government remained concerned that Canada lacked a united economic foundation.

Again, the federal government took steps to address the state of the economic union.

¹⁰⁴ Douglas M. Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-making in Australia and Canada*, (Montreal: McGill-Queen's University Press, 2002).

Macdonald recalls that the impetus identified to him by Michael Kirby, Deputy Clerk of the federal Privy Council, in 1982 was the sense that patriation had left the state of the economic union unfinished.¹⁰⁵ The federal government's development of the Commission's terms of reference broadly expanded the scope of the inquiry.¹⁰⁶ The government saw this as an opportunity to address a number of additional issues in addition to the economic union, and so, the focus on that issue slipped.

One year after the conference that led to patriation, Prime Minister Trudeau announced the establishment of a Royal Commission on the Economic Union and Development Prospects for Canada. The Commission set out to "inquire into and report upon the long-term economic potential, prospects and challenges facing the Canadian federation and its respective regions, as well as the implications that such prospects and challenges have for Canada's economic and governmental institutions and for the management of Canada's economic affairs."¹⁰⁷ In announcing the Commission, the federal government highlighted four requirements:

- assess Canada's economic potential over the longer-term;
- recommend national economic goals, and national policies for the attainment of these goals;
- recommend ways in which the institutions of the national government – particularly those institutions which are vital to economic development – can better reflect the views of all Canadians and regions; and

¹⁰⁵ Donald S. Macdonald, "The Commission's Work and Report: A Personal Perspective," in *Prospects for Canada: Progress and Challenges 20 Years after the Macdonald Commission*, eds. David E.W. Laidler and William B.P. Robson (C.D. Howe Institute: Renouf Publishing Company Limited, 2005); and Inwood, *Continentalizing Canada*, 54.

¹⁰⁶ Macdonald, "The Commission's Work and Report." 5-6.

¹⁰⁷ Canada. *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*. Vol. 1. Ottawa: Minister of Supply and Services, 1985. xvii. <http://epe.lac-bac.gc.ca/100/200/301/pcobcp/commissions-ef/mcdonald1985-eng/mcdonald1985-eng.htm>.

- recommend institutional arrangements to handle more effectively relations between government, business and labour, and the fiscal and economic aspects of federal-provincial relations.¹⁰⁸

Further, in his statement, the prime minister indicated, “if we are to prosper, we must find ways to lessen the clamour of federal-provincial argument, and to reach consensus with far less pain. But if this is to be achieved, we must ensure that national policies are designed so that all parts of Canada can benefit from them, and that national institutions are truly reflective of regional needs.”¹⁰⁹ The prime minister characterized the Commission as an exploration of federalism and the economic union. He did so again when announcing the Commission in the House of Commons and at an early 1983 dinner with the members of the Commission.¹¹⁰ Three years and \$20 million later, the Commission delivered a three-volume report to the government, supported by 72 volumes of research.

The Commission Report advocated “for Canada a full involvement in the broader world.”¹¹¹ Indeed, the most notable legacy of the Commission was the recommendation to enter into free trade negotiations with the United States. In the time it took to prepare the report, the Liberals left office and the Conservatives led by Prime Minister Brian Mulroney formed government. The Commission provided the new prime minister with an update on its work, including an early indication that an international trade agreement with the United States would be among its recommendations. The prime minister and

¹⁰⁸ Ibid. Appendix A. 569-570.

¹⁰⁹ Ibid.

¹¹⁰ Inwood, *Continentalizing Canada*. 57, 65.

¹¹¹ Canada. *Report of the Royal Commission*. xii.

cabinet were ready to act upon that recommendation almost immediately after the report came out.¹¹²

In keeping with the trends in international trade, the Commission recommended an agreement that addressed both tariffs and non-tariff barriers, and indicated that a successful agreement would include a mechanism for input by sub-national bodies. There was an expectation that a North American trade union would necessitate greater intergovernmental collaboration within Canada. Building the Canada-U.S. framework would require Canadian governments to identify, mitigate and reduce barriers within the internal economy.¹¹³

Over and above the North American integration approach, the Commission also recommended a series of initiatives to strengthen regional representation within the executive, the Senate, and the electoral basis of the federal government. It recommended creating permanent Ministerial councils on finance, economic development and social policy. These proposals reflected the decade in which they were delivered. There was a sense that the federation had been destabilized and the legitimacy of the federal government was under scrutiny. The proposals made by the Commission were a reflection of that mentality.¹¹⁴ The proposals were largely focussed on action by the

¹¹² Doern and Tomlin, *Faith & Fear*.

¹¹³ Geoffrey Hale, "Federalism and Canada's Economic Union: The Past 20 Years," in *Prospects for Canada: Progress and Challenges 20 Years after the Macdonald Commission*, eds. David E.W. Laidler and William B.P. Robson (C.D. Howe Institute: Renouf Publishing Company Limited, 2005), 149.

¹¹⁴ Alan Cairns, "Federalism and Canada's Economic Union: What the Report Said," in *Prospects for Canada: Progress and Challenges 20 Years after the Macdonald Commission*, eds. David E.W. Laidler and William B.P. Robson (C.D. Howe Institute: Renouf Publishing Company Limited, 2005).

federal government; provinces, and province building, were a part of the problem that a stronger federal government could address.¹¹⁵

The Commission reflected the international trade environment and shaped the action taken on the economic union a decade later in the Agreement on Internal Trade. The Commission found that “a commitment to a strengthened economic union is a vital element of a healthy Canadian economy.” As such, “barriers to the free flow of labour, capital goods and services should be minimized, and integration of policies should be harmonized.”¹¹⁶ Practically, the Commission recommended a constitutional amendment to Section 121 to include services and non-tariff barriers as areas of exclusive federal jurisdiction.

The Commission further recommended that, in the interim before a constitutional amendment could be achieved, the federal government “should develop a Code of Economic Conduct to spell out acceptable practices, set out the principles of the economic union, and provide for enforcement.”¹¹⁷ The Commission identified aspects that should be included in the Code, including free movement of goods and people, justification of new policies that would create barriers, and identification of areas in which to reduce barriers. A key piece of the recommendation was that enforcement would be done through “public and governmental pressure” and progress would be made through intergovernmental engagement. The Code would not be enforceable, but rather

¹¹⁵ Ken Norrie, “Federalism and Canada’s Economic Union: Lessons for the Future,” in *Prospects for Canada: Progress and Challenges 20 Years after the Macdonald Commission*, eds. David E.W. Laidler and William B.P. Robson (C.D. Howe Institute: Renouf Publishing Company Limited, 2005).

¹¹⁶ Canada. *Report of the Royal Commission*. 432.

¹¹⁷ *Ibid.* 466.

spur a process of dialogue and negotiation between governments.¹¹⁸ Reflecting the concerns about province building, the federal government would establish the Code, though in reality implementation needed extensive provincial engagement. All of these principles would appear in the future structure of the AIT, and the unenforceable nature of the rules became a major point of contention.

It is worth noting two findings of the Commission in regards to the extent that barriers between provinces affect the economy. First and foremost, the Commission identified actions by the federal government as a source of “substantial distortions” in the market.¹¹⁹ The Commission challenged the perspective that barriers to trade in Canada were primarily caused by provincial governments. The Commission also found that “lost economic output from impediments to free movement and distortions of the common market appears small.” In spite of this finding, even at the report’s time of writing, “private economic actors... indicated that the policies in question create considerable difficulties for them.”¹²⁰ Despite the appearance of minimal impact, the Commission felt that continued global integration could exacerbate these problems, and recommended that they be addressed for simple reasons of national unity.

Doug Brown makes an interesting argument that the Macdonald Commission framed the economic union in terms of international trade, a language that governments understood and agreed upon.¹²¹ The focus of the commission was the challenge of federalism and the economic union; the solution proposed was from the realm of

¹¹⁸ Ibid.

¹¹⁹ Ibid, 116.

¹²⁰ Ibid, 465.

¹²¹ Brown. *Market Rules*. 121.

international relations. The report took the economic union out of the controversial language of the balance of power, and framed the issue instead in the language of international trade agreements (federalism being more complicated than the left-right economic policy divide of Canadian governments).

The recommendations and economic orientation of the Macdonald Commission were immediately criticized. The scope and mandate of the Commission essentially asked it to define new economic policy for Canada. The Commission explored not just the mechanisms by which Canada could better enact a coherent economic policy, but also what those policies should be. The inherently political nature of that activity was questionable for a royal commission.¹²² Further, the policies recommended favoured the emerging neo-liberal economic ideology through market-based options to enhance Canada's competitiveness. Critics argued that the final report ignored the input of those Canadians who had recommended "an economic order in which democratic control of the economy and the state is strengthened by creating new forms of participation."¹²³ The Commission was seen not as proposing solutions to the rise of powerful provincial governments, but rather promoting the rise of the market over the state and its constituents. These critiques became a central point of contention in the debates over free trade with the United States.

Domestically, the recommendations of the federally initiated Macdonald Commission shaped what would become the final outcome of federal-provincial engagement on internal trade: a code of economic policies amongst all governments. Like

¹²² Daniel Drache and Duncan Cameron. *The Other Macdonald Report: The Consensus on Canada's Future that the Macdonald Commission Left Out* (Toronto: J, Lorimer, 1985), ix.

¹²³ *Ibid*, x.

the federal government, the Commission too favoured a constitutional amendment that would empower the federal government to oversee provincial actions, but it recognized that, in a new era of provincial power and independence, that outcome would be difficult to achieve. As an interim measure, the Commission proposed a collaborative compromise.

From the Macdonald Commission to the Charlottetown Accord

While the focus of follow up on the Macdonald Commission was the newly elected Mulroney government's push for free trade with the United States, there was some consideration of the Economic Code proposal. The 1986 Annual Premiers' Conference issued a press release on the proposal, committing to review the proposals and advance collaborative work on the economic union. A proposal from the newly elected federalist government in Quebec, however, had engaged that same conference.

In March 1985, the Quebec Liberal government had announced five conditions needed for support of the *Constitution Act, 1982*, which had been constitutionally entrenched without the consent and over the protests of the government of Quebec. These conditions were:

- explicit recognition of Quebec as a distinct society;
- guarantee of increased powers in matters of immigration;
- limitation of the federal spending power;
- recognition of a right of veto; and
- Quebec's participation in appointing judges to the Supreme Court of Canada.

Quebec then began working with officials across the country to advance the proposals.¹²⁴ The provinces formally responded at the 1986 Annual Premiers' Conference, announcing an intention to engage on the constitution once again, using Quebec's five proposals as a basis for discussions. Officials began meeting to outline a new proposal, and reached the Meech Lake Accord at a meeting of first ministers on April 30, 1987. The Accord was refined and a final version, the 1987 Constitutional Accord, was approved by all first ministers and tabled in the House of Commons on June 3, 1987. The Accord passed Parliament and the Quebec National Assembly adopted it in a resolution on June 23, 1987, setting a three-year ratification deadline for all provinces.

Meech Lake was 'the Quebec Round,' an effort to complete the work started in the patriation agreement. As such, the proposals centered on Quebec and the agenda set by that province to address the events of patriation. Meech did include a list of issues to be addressed once Meech was passed. Among these was a commitment to entrench an Annual First Ministers' Meeting on the Economy.¹²⁵

Time ran out on Meech Lake in June 1990. The narrow scope of Meech's appeal to Quebecers – and reasonable accommodation by all Canadian governments – was set aside for a much broader scope of issues in the Charlottetown negotiations. The Quebec government established two committees (Allaire and Bélanger-Campeau) to review the place of Quebec in Canada. The Quebec government led by Premier Robert Bourassa passed a law requiring a sovereignty referendum if a new constitutional package was not received by the federal government by October 1992. The federal government, still

¹²⁴ Patrick J. Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991), 289-290.

¹²⁵ Canada. *Meech Lake Constitutional Accord, 1987*. Ottawa: Privy Council Office, 1987.
<https://primarydocuments.ca/api/pdf/1stMinsConstMeechFr1987Jun3.pdf>

weighing the impact of the failure of the Meech Lake Accord and sitting at just 14 percent in the polls, set up its own committees (Beaudoin-Edwards and the Spicer commission).¹²⁶ In 1991, the federal government delivered a new set of proposals in *Shaping Canada's Future Together*.¹²⁷

Shaping Canada's Future Together contained three proposals for the economic union. The federal government again proposed an expanded Section 121 to cover the free movement of persons, goods, services, and capital. The federal government would have the power to exempt federal or provincial legislation from the impact of the proposed provisions with the agreement of seven provinces with 50 percent of the population. In addition, the federal government proposed a new power under Section 91A to provide the federal government with jurisdiction over any matter declared, "to be for the efficient functioning of Canada." This power would also be governed by the 7/50 rule, and a dissenting province could opt out for three years. Finally, the federal government proposed the establishment of the Council of the Federation. The Council would "have the power to harmonize provincial budgetary policy with federal fiscal and monetary policy," if it had the support of the federal government in doing so along with seven provinces representing 50 percent of the population.¹²⁸

Consistent with previous proposals, *Shaping Canada's Future* proposed to give broad powers of oversight to the federal government. This time, however, the federal government proposed a compromise. In return for a role for the federal government in overseeing the economy, provinces would receive a commitment that the federal would

¹²⁶ Russell, *Constitutional Odyssey*. 162-171.

¹²⁷ Canada, *Shaping Canada's Future Together: Highlights*, Ottawa: Privy Council Office, 1991. <http://www.ifes.org/~media/Files/Publications/VRC/Civic%20Education/1991/CE00403/CE00403.pdf>

¹²⁸ Russell, *Constitutional Odyssey*, 173.

curtail the spending power in a series of related policy areas. Thus, the federal proposal would see the federal government playing an oversight role in the national economy while respecting the autonomy of provinces in setting policy within their jurisdiction. Arguably, the federal commitment to stop using the spending power as a policy tool seems minimal compared to requiring the provinces to cede such a broad swath of policy autonomy to the federal government. Indeed, provinces in the negotiations on the Charlottetown Accord once again rebuffed the constitutional amendment proposal.

The federal government began to engage provinces and territories on the proposals as the basis for a new constitutional deal in 1992. A series of meetings between officials and First Ministers led to a political agreement on August 28, 1992. The political agreement contained two clauses of direct importance to the economic union: a commitment to the maintenance of the economic union, and a provision on labour mobility. Charlottetown would have added a provision to the Constitution committing governments “to the principle of the preservation and development of Canada’s social and economic union.” At minimum, five policy objectives would govern the renewed economic union:

- working together to strengthen the Canadian economic union;
- the free movement of persons, goods, services and capital;
- the goal of full employment;
- ensuring that all Canadians have a reasonable standard of living; and
- ensuring sustainable and equitable development.

The provision would not be ‘justiciable’ – legally binding or enforceable – but was rather to be monitored through a process determined by first ministers. The Accord was explicit that “Section 121... would remain unchanged.” Related commitments were

included on equalization, fair distribution of national infrastructure projects, and exercising economic development in a manner that would reduce economic disparity.¹²⁹ The final legal draft pertaining to this principle essentially mirrored the original text.¹³⁰

This proposal tied the economic union to the social union and this too reflects the dynamics of federalism at that time. They tempered the language away from competition over jurisdiction found in the federal proposals. They also drew upon dialogue already underway within provincial jurisdiction. Ontario's newly elected New Democrat government was working on a charter of social rights in that province. Supported by New Democrat governments in British Columbia and Saskatchewan, negotiations included measures to support Canada's social union in the final proposal.

The social union was proposed as a solution to two concerns. First, the left saw the proposed expansion of federal powers in Section 121, not as an entrenchment of federal power over the national economy, but as a way to buoy the market over all Canadian governments.¹³¹ The proposal, as interpreted by Mulroney's conservatives, would prioritize free movement across a common market, not greater democratic control over the market. Second, the left was concerned with the role of Quebec within the proposals. Quebec's push for a limit to the federal spending power ran contrary to the federal-provincial relationship that had built the social welfare state. Redefining the importance of the provinces, and specifically Quebec, within the constitution ran in

¹²⁹ Canada. *Consensus Report on the Constitution*. Charlottetown: 1992. 2-3, <https://primarydocuments.ca/api/pdf/ConsensusReportOnTheConst1992Aug28.pdf>

¹³⁰ Kenneth McRoberts and Patrick Monahan, *The Charlottetown Accord, the Referendum, and the Future of Canada*. (Toronto: University of Toronto Press, 1993), Appendix 2, Draft Legal Text.

¹³¹ Harry Glasbeek, "The Social Charter: Poor Politics for the Poor," in *Social Justice and the Constitution: Perspectives on a Social Union for Canada*, eds. Joel Bakan and David Schneiderman (Don Mills: Carleton University Press Inc., 1992), 118.

contradiction to the concept of a constitution centered on the needs of Canadians.¹³² The spirit of the social union proposal would move past the failed constitutional negotiations and ultimately be advanced as the Social Union Framework Agreement.

Charlottetown also included provisions on labour that rebalanced powers for the federal government and the provinces. The federal government would stop directing provincial labour policy through the spending power. In return the federal government would receive additional powers to set national labour market policy, and all governments would work together to set common occupational standards. Labour mobility agreements supporting the recognition of credentials across jurisdictions would achieve this collaboration (for nurses, teachers and apprentices, as examples).¹³³

On October 28, 1992, 54.3 percent of Canadians voting in the referendum rejected the Charlottetown Accord, ending the era of big constitutional negotiations. The constitutional battles left few illusions as to the possibility of effective constitutional change. Prime Minister Mulroney resigned eight months after the referendum's defeat, and on November 3, 1993, the federal Progressive Conservatives suffered a devastating electoral loss from which they would never recover. Peter Russell observed shortly after the referendum that the only political party with any appetite to run on a constitutional platform was the Parti Québécois, and its platform would not be to repair the Constitution, but to end it.¹³⁴

In the Charlottetown negotiations, we can see the evolving relationship among governments in Canada. While the federal government began by advancing a unilaterally

¹³² Joel Bakan and David Schneiderman. *Social Justice and the Constitution: Perspectives on a Social Union for Canada*, (Don Mills: Carleton University Press Inc., 1992), 6.

¹³³ Ibid. 10-11.

¹³⁴ Russell, "The End of Mega Constitutional Politics in Canada?" 219.

drafted and in some ways one-sided document, the subsequent negotiations with the provinces yielded a very different text. The text moved from a constitutional amendment granting the federal government more power and ended with a commitment for all governments to work together to define the economic and social union. The inclusion of the social union highlighted the left-right division in negotiations. The negotiations also included an enhanced role for the electorate. Federalism was moving out of the era of executive only negotiations and responding to the need for more transparency and inclusivity. The more collaborative approach to federalism negotiated under the Charlottetown Accord would survive into the 1990s.

The era of constitutional negotiations also had an impact on the policy options available to proponents of the economic union. The conversation and negotiations among governments had shaped a path forward. The scope of the conversation ranged from a constitutional amendment to section 121 to a collaborative intergovernmental agreement. The proposal to reform the constitution to give the federal government more power in exchange for a variety of provincial powers had failed four times. The newly minted Prime Minister Jean Chrétien was very familiar with this failure, having served as Justice Minister under Trudeau. He had overseen the drafting of *Securing the Canadian Economic Union in the Constitution* and was intimately familiar with the conversations that had shaped the Macdonald Commission. It was under his leadership that the federal government would come to pursue and support a pan-Canadian agreement on internal trade.

The Agreement on Internal Trade

The work on the economic union continued despite the collapse of Charlottetown. The massive consultations undertaken in the previous decade had raised the profile of perceived barriers between doing business between provinces. Business groups had been well educated in the language of trade agreements and non-tariff barriers. Business groups were vocal supporters of including economic union reform in 1980's constitutional reform and the Charlottetown Accord negotiations, and kept the issue on the agenda in the years after leading to AIT.¹³⁵ In addition, provincial trade offices had been set up to address both new engagement on international trade agreements and the various constitutional proposals that had come forward. In March 1992, first ministers tasked officials to review and address internal barriers to trade by March 31, 1995.¹³⁶ First ministers struck a committee of ministers, and by 1993, eleven sectors were targeted for inclusion in the agreement. Ministers reached an agreement in principle in 1994. First ministers approved the agreement in principle on July 18, 1994 and the Agreement on Internal Trade came into effect on July 1, 1995.

On paper, AIT looks like an international trade agreement. The agreement uses the international trade language: “national treatment, non-discrimination and, to a lesser extent, mutual recognition.”¹³⁷ The following six general rules from the Agreement are intended to prevent new barriers:

- “non-discrimination: establishing equal treatment for all Canadian persons, goods, services and investments.

¹³⁵ Brown, *Market Rules*.

¹³⁶ *Ibid*, 147.

¹³⁷ Hale, “Federalism and Canada’s Economic Union,” 149.

- right of entry and exit: prohibiting measures that restrict the movement of persons, goods, services or investments across provincial or territorial boundaries
- no obstacles: ensuring provincial/territorial government policies and practices do not create obstacles to trade
- legitimate objectives: ensuring provincial/territorial non-trade objectives which may cause some deviation from the above guidelines have a minimal adverse impact on interprovincial trade
- reconciliation: providing the basis for eliminating trade barriers caused by differences in standards and regulations across Canada
- transparency: ensuring information is accessible to interested businesses, individuals and governments¹³⁸

These six rules apply to eleven designated sectors: procurement, investment, labour mobility, consumer-related measures and standards, agriculture and food products, alcoholic beverages, natural resources processing, energy, communications, transportation, and environmental protection. The agreement requires the creation of work plans for areas in which to reduce barriers. The agreement seeks to affect the legislative choices that provinces can pursue. The federal government had requested power to limit provincial legislative choices through Section 121 of the constitution; the AIT intended to achieve the same outcome through a structure that gave no one government power over the others. The literature reviewing the agreement centres the debate on the ability of AIT to effectively perform this role. For some, the lack of a dispute resolution mechanism with a judicial outcome leaves the agreement in intergovernmental limbo. Essentially, the debate centres on the perception that AIT “is

¹³⁸ Internal Trade Secretariat. “Overview of the Agreement on Internal Trade.” <http://www.ait-aci.ca/en/ait/overview.htm>

written in legal language but is not designed to be litigated.”¹³⁹ It contained legal clauses and commitments, but did not include any mechanism through which to enforce the legality of the agreement.

The agreement reflected the new era of federalism. All governments were equal partners in the agreement. The agreement reflected the limitations of collaboration, however, as the politics of negotiating with ten provinces and the complexity of the federal system limited the outcome. Two competing negotiating positions divided the negotiating governments. The federal government, Alberta, Manitoba, and to some extent Quebec viewed the negotiations through the lens of traditional trade talks as were done internationally. They approached the AIT negotiations as comparable to international negotiations; they envisioned an agreement structure that covered all forms of economic activity and expected that the agreement could include just a limited number of exclusions. Ontario, BC, and Saskatchewan (all New Democrat governments at the time) were fighting to retain legislative autonomy in key areas such as labour and the environment.¹⁴⁰ These parties engaged in a national debate on governance that limited the scope of policy that the agreement would cover. The finalized agreement was a blend of these two visions.

Doern and MacDonald discuss how the duelling visions encapsulated in the agreement also affected the enforceability of the agreement. The agreement was the result of competing visions on the policy needed to manage the economic union. The federal government, Alberta, Manitoba and to some extent Quebec were negotiating for a

¹³⁹ Brown, *Market Rules*, 163.

¹⁴⁰ G. Bruce Doern and Mark MacDonald. *Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade* (Toronto: University of Toronto Press, 1997), 62-69.

traditional trade agreement. The other governments were seeking something more consistent with the Economic Code of Conduct proposed in the Macdonald Commission. Doern and MacDonald identify that this conflict in vision led to the inclusion of a vague dispute resolution process. While the agreement had a dispute resolution clause, the implementation of any findings of a dispute resolution process was voluntary. A process that began as negotiations to permanently amend the constitution to enhance the economic union resulted in a non-binding commitment. The courts enforce the constitution and create binding decisions on government action. The AIT dispute resolution measures required a government to bring forward a complaint regarding a rule from another party. If the panel found against that party, there was no recourse to ensure the rule was changed. Doern and MacDonald identified political decisions to act and voluntary compliance as factors that would be critical to the success of the agreement in promoting the economic union.¹⁴¹ Academic assessment of the AIT in the years after it was established identified a political unwillingness to enforce and abide by the AIT as factors that limited the Agreement's effectiveness.

Assessing the Agreement on Internal Trade

From the perspective of trade negotiators, the agreement was incomplete. When viewed in light of the constitutional negotiation failures of the previous decades academics were optimistic about the outcome. The AIT was seen as a flexible outcome that allowed governments to work together on a national agenda without forfeiting policy options.¹⁴² While the agreement was critiqued as simultaneously complex and vague, the

¹⁴¹ Ibid. 162.

¹⁴² Robert H. Knox, "Economic Integration in Canada through the Agreement on Internal Trade," in *Non-Constitutional Renewal*, ed. Harvey Lazar (Toronto: Queen's University Press, 1998).

benefit of achieving an established intergovernmental process at that time was seen as a breakthrough. The agreement was seen as a flexible compromise that reflected political interests and would advance integration at a responsible rate.¹⁴³ The potential of the agreement was reliant on provinces applying the provisions found within it. The integration envisioned in the agreement would only advance if governments submitted themselves to the process they had designed. The Committee on Internal Trade, a secretariat established to facilitate government participation in the agreement, needed to be seen as a legitimate forum for advancing economic integration. In short, success for the AIT required the provinces to see beyond the tradition of unanimity and submit to the process outlined in the agreement.¹⁴⁴ If judged on the measures of international trade, the success of the agreement would have been defined by its ability to remove barriers to the movement of goods, capital and labour across the country. This is of particular interest because the agreement required “positive integration,” collaborative work to remove barriers, rather than simply refraining from further discriminatory legislation.¹⁴⁵

It quickly became clear that the results of the agreement were “timid implementation and lack of reporting and dissemination of information concerning the steps taken by governments or private parties in order to ensure its implementation.”¹⁴⁶ Lack of communication was indicative of an unwillingness to work together to achieve meaningful change in conjunction with other actors.¹⁴⁷ Early reviews pinpointed a

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Daniel Schwanen, “Canadian Regardless of Origin: ‘Negative Integration’ and the Agreement on Internal Trade,” in *Non-Constitutional Renewal*, ed. Harvey Lazar (Toronto: Queen’s University Press, 1998), 169.

¹⁴⁶ Ibid. 199.

¹⁴⁷ Ibid.

political unwillingness to develop work plans and make new commitments to achieve outcomes. The solution proffered was meaningful action through a rise in the public profile of the Committee on Internal Trade. Some academics did not see potential for meaningful reform. Mark MacDonald assesses the agreement from a view of the dichotomy between the economic union and federalism. How do governments promote economic growth through liberalization while protecting their ability to ensure diversity?¹⁴⁸ MacDonald found that the implementation of the agreement saw two types of action: competition and co-operation. The competitive behaviour that had characterized the federation in the 1980s and early 1990s had continued in spite of the agreement. He argued that the agreement could work. If the provinces followed the processes outlined in the agreement, it could lead to a balance between competitive federalism and co-operative trade negotiations.¹⁴⁹

The fact that the agreement did not bind the constitutional jurisdiction of the parties compounded the issue of a limited dispute resolution process. The agreement states that nothing in it detracts from the legislative authority of the parties. Further, the legality of the agreements negotiated in the era of cooperative federalism has faced court challenges that have implications for the enforceability of AIT. *Reference Re: Canada Assistance Plan* established a precedent of the Supreme Court refusing to litigate details of federal-provincial policy agreements. The Supreme Court rejected the principle of

¹⁴⁸ Mark MacDonald, "The Agreement on Internal Trade: Trade-Offs for Economic Union and Federalism," in *Canadian Federalism: Performance, Effectiveness, Legitimacy*, eds. Herman Bakvis and Grace Skogstad (1st ed., Toronto: Oxford University Press, 2002), 139.

¹⁴⁹ *Ibid.* 149.

‘external enforceability.’¹⁵⁰ External enforceability meant that the Supreme Court would not negotiate disputes over extra-constitutional agreements established by the federal and provincial governments, like the AIT. For example, the provinces sought to challenge unilateral changes made by the federal government to funding structures in the Canadian Assistance Plan (CAP), an intergovernmental agreement. The Supreme Court declined to hear the case.

Gerald Baier’s 2007 piece “The Courts, the Division of Powers, and Dispute Resolution” assessed the functionality of the AIT’s dispute resolution mechanism. He undertakes an interesting case study of an Ontario-based company, Unilever. Unilever attempted to challenge the Quebec ban on yellow margarine through AIT. The government of Quebec refused to engage the AIT process and Unilever took them to court. Ultimately, the Supreme Court upheld Quebec’s legislation as valid and argued that AIT had no bearing on this.¹⁵¹

Conclusions

The literature emphasizes two aspects of AIT that led governments’ dissatisfaction with the agreement. The first was the two competing visions of the agreement. Half of the governments were negotiating for a broad trade agreement in the style of an enforceable international agreement. The other half was negotiating a framework for intergovernmental engagement on policy issues that affect intergovernmental relations. The competing visions led to varying depths of commitment

¹⁵⁰ Katherine E. Swinton, “Law, Politics, and the Enforceability of the Agreement on Internal Trade,” in *Getting There: An Assessment of the Agreement on Internal Trade*, eds. Michael J. Trebilcock and Daniel Schwanen (Toronto: C.D. Howe Institute, 1995), 302.

¹⁵¹ Gerald Baier, “The Courts, the Division of Powers and Dispute Resolution,” in *Canadian Federalism: Performance, Effectiveness, Legitimacy*, eds. Herman Bakvis and Grace Skogstad (2nd ed., Toronto: Oxford University Press, 2008), 33.

in moving the agreement forward. The compromise resulted in an agreement with a limited scope of coverage, and a vague and unenforceable dispute resolution process. The agreement was written as a legal document. However, the literature illustrates a lack of willingness among governments to move the agreement forward, and an inability on the part of the courts to adjudicate these matters.

A third aspect debated is the role that public opinion could have played in the success of the agreement. Knox offers that the political/governance nature of the agreement could have been beneficial with adequate public support for the agreement.¹⁵² If those who would use the agreement were educated as to the purpose and scope of the agreement there would be less room for manipulation or neglect of the agreement by political actors. A strong central body, or secretariat, charged with facilitating further conversations, could have driven this. This concern is echoed by Schwanen's charge that the lack of communication between provinces and general lack of knowledge by the public allows governments to avoid the work of barrier removal.¹⁵³ This concern is not really taken up by governments in the reform efforts that follow. It is the limited scope of the agreement and the lack of an effective dispute resolution process that are pointed to as critical weaknesses of AIT; these are precisely the areas that would become subsequent targets for reform.

The AIT stood in contrast to the proposals to amend the constitution that preceded it. The AIT was decisively not a constitutional amendment. The federal government did not achieve its long sought after reforms of Section 121. The era of constitutional negotiations had ended without addressing the questions regarding the foundation of the

¹⁵² Knox, "Economic Integration in Canada."

¹⁵³ Schwanen, "Canadian Regardless of Origin," 169.

federation. However, the AIT achieved what was perhaps a more realistic policy avenue to address the concerns enunciated by the federal government. Any of the proposals outlined in the constitutional negotiations would have required substantial judicial interpretation putting governments in a very uncertain position.¹⁵⁴ The provinces, buoyed by a growing capacity and independence, were not willing to cede their autonomy in exchange for a very uncertain policy environment.

The AIT did not amend the fundamental relationship between Canadian governments, but created a companion manual on the relationship going forward. In agreeing to the AIT, Canadian governments committed to adopting international trade norms as a path forward in the evolving economic union. The AIT “establishes a new set of political understandings about the extent to which governments should be allowed to discriminate against other Canadians in order to favour local or regional interests.”¹⁵⁵ As one observer put it, the agreement perhaps outlined “the best relationship that an independent Quebec can realistically aspire to with the rest of Canada.”¹⁵⁶ That theory was not put to test as the 1995 Quebec referendum did not pass.

The achievement of the AIT was a step forward from the constitutional negotiations, but it was seen as more of a compromise than an effective collaboration. Both the federal government and a number of provinces deemed the AIT insufficient. In the next chapter, we will see how the provinces moved forward to address their concerns

¹⁵⁴ Russell. *Constitutional Odyssey*. 174.

¹⁵⁵ Patrick J. Monahan, “To the Extent Possible: A Comment on Dispute Settlement in the Agreement on Internal Trade,” in *Getting There: An Assessment of the Agreement on Internal Trade*, eds. Michael J. Trebilcock and Daniel Schwanen (Toronto: C.D. Howe Institute, 1995), 217.

¹⁵⁶ Michael J. Trebilcock and Rambod Behboodi, “The Canadian Agreement on Internal Trade,” in *Getting There: An Assessment of the Agreement on Internal Trade*, eds. Michael J. Trebilcock and Daniel Schwanen (Toronto: C.D. Howe Institute, 1995), 87.

with the AIT. We will see that while they begin by building upon the AIT consensus, they achieve real reform when they demonstrate policy innovation through bilateral agreements. We will ultimately see how the shift away from the competitiveness of the era of constitutional negotiations creates a space for provinces to lead new policy development and create a new pan-Canadian consensus.

Chapter 3 – Provincial Action on Internal Trade

Consensus and compromise are the foundations of federations. Building consensus requires a government to articulate its vision of a policy approach and negotiate that vision with its counterpart governments. Negotiations will end in one of two ways: a compromise is reached or parties go away with no resolution. For some, either outcome demonstrates the tragedy of federalism. In the case of a compromise, the will of the people is watered down to the lowest common denominator reached by negotiating governments.¹⁵⁷ In the case of negotiations ending with no resolution, federalism is blamed for an inability to advance a shared future for Canadians. This was the sense within academia following the end of Canada's rounds of constitutional negotiations.¹⁵⁸

The future of the economic union had been one of the key issues under negotiation. Those negotiations were consistent with the dynamics of competitive federalism that was prevalent at that time. Governments were presenting competing visions of the federation and seeking to build alignment in their understandings of the future of the federation. While much of the focus was on building a federation that reflected the unique identity of Quebec, governments also struggled to find the balance between the orders of government. The federal government unilaterally advanced a proposal to redefine Section 121 of the constitution, giving it unilateral power over the economy. The provinces rejected this proposal twice – at the end of the 1970s and again in the Charlottetown negotiations. The two orders of government fundamentally

¹⁵⁷ Malcolm M. Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: The University of Michigan Press, 2008).

¹⁵⁸ Russell, *Constitutional Odyssey*, 332.

disagreed on a vision of how to manage the Canadian economic union. The federal government wanted unilateral control over the national economy; provinces were reluctant to give the federal government unchecked power.

Negotiations between the two orders of governments centred on a broad conception of the economic union and the future of Canada. Governments agreed that divergent use of economic development powers had caused some concerns in the decades preceding. Provincial governments were reluctant, however, to cede a broad power to the federal government without fully understanding the implications for everyday policy. Provinces agreed that the federal government could play a role in maintaining the economic union, but were not willing to allow the federal government to be unilaterally responsible for determining the direction of the economic union. The federal intent to modify Section 121 was untenable for provinces. Provinces made this clear early on in the constitutional process. Rather than presenting a more nuanced position, the federal government came back with variations of the same proposal: unilateral power over the economy for the federal government. The competitive dynamic between the governments stifled negotiation and progress. Ultimately, the compromise on the economic union reached in the Charlottetown Accord was a minimal commitment to collaboration.

In the more tempered era of federalism following the rejection of Charlottetown, Canadian governments went on to negotiate and conclude the Agreement on Internal Trade (AIT). The AIT as concluded was neither a bold statement on the economic union, nor was it a particularly effective compromise. As we saw in the previous chapter, the AIT blended two visions of the economic union into an agreement with which few governments were satisfied. Concluded in 1994, that agreement was the end of

substantial engagement between the federal government and the provinces on this issue until 15 years later.

Despite over a decade of negotiations, Canadian governments were unable to reach a common vision for the economic union that addressed their respective concerns. This thesis highlights that the constitutional negotiations laid the groundwork for progress which was advanced by provinces in the years that followed. It points to two key factors that advanced negotiations: incrementalism and asymmetry. Even though governments were unable to agree on a permanent change to the division of powers for the economic union, there was value in the constitutional negotiations. Governments worked together for over a decade to define the issue and explore solutions. They explored a number of options for policies that would support the outcome of greater economic union. Through continual dialogue, they thoroughly understood the other governments' positions and opportunities for collaboration. Governments built the knowledge and expertise and were well prepared to move the issue forward in the decade that followed. This chapter contends that shifts in intergovernmental relations ultimately led to progress on the issue.

In the years that followed the AIT, provincial leadership, incrementalism and asymmetry allowed Canadian governments to accomplish meaningful reform to the national internal trade agreement. This success runs counter to traditional understandings of Canadian federalism. The expectation among many academics is that asymmetry and decentralization lead to policy diversity, which will in turn undermine both the notion of Canada as a country and the protections it provides to citizens. Fragmentation of policy approaches will fragment the country and prevent "Canada's diverse communities from

working towards a coherent and capable nation.”¹⁵⁹ This chapter will explore the contours of interprovincial relations in the post AIT period, highlighting the importance of asymmetry to action. It demonstrates how collaboration among the provinces led to incremental action on a national agreement. This collaboration is contrasted with the impatient and unilateral actions of the federal government in the period of constitutional negotiations, which challenged the emergence of collaborative federalism more broadly.¹⁶⁰ Provinces were effective in exploring the compromise reached in the AIT and building a new consensus. This was not accomplished quickly. It was done over 15 years in dozens of incremental intergovernmental agreements and meetings.

We will see that in the years following the conclusion of the AIT, provinces began to work bilaterally or regionally on the issues covered by the agreement. They took incremental steps to make the various pieces of the AIT more effective. They did not depart from the consensus established in the AIT, but rather used smaller intergovernmental agreements to take the work further. In the early 2000’s there was an interesting shift in the shape of the agreements. Provinces concluded a series of agreements in which they stated their vision of the economic union. This represented a new level of ownership over the issue and willingness to set an intergovernmental agenda in the area of the economic union. During the constitutional negotiations, the provinces were taking policy direction from the federal government. Now we see them make the shift from policy takers to policy makers. There are two agreements in particular that are significant: the founding agreement of the Council of the Federation and a bilateral

¹⁵⁹ John D. Whyte, “Federalism Dreams,” *Queen’s Law Journal* 34 (2008): 1.

¹⁶⁰ Harvey Lazar, “Non-Constitutional Renewal: Toward a new Equilibrium in the Federation,” in *Non-Constitutional Renewal*, ed. Harvey Lazar (Kingston: Queen’s University Press, 1998), 10.

agreement between the governments of British Columbia and Alberta. We will see how the newly formed Council of the Federation deepened interprovincial relations and fostered provincial leadership. We will also see how British Columbia and Alberta began to put action on internal trade back on the national agenda.

The Council of the Federation identified new goals for action on internal trade. We will see that, in spite of their efforts, provinces are unable to build a new collective consensus but that does not end the work. Rather, provinces take the lessons they learned through the Council of the Federation process and began to implement them bilaterally. Through bilateral policy innovation, provinces are able to return to the collective process with evidence and experience, and ultimately forge a new consensus. This thesis will track the evolution of policy and the construction of a new consensus on both labour mobility and dispute resolution. Interviews of policy makers conducted by Lorleen Berdahl confirm that asymmetry and incrementalism were crucial in building the new consensus on internal trade.¹⁶¹ This narrative begins with provincial action following the conclusion of the AIT.

Building on the AIT

As explained in the previous chapter, the AIT largely requires that governments across Canada not discriminate against companies or individuals based upon their residency. The agreement also includes a number of aspirational clauses which request that parties work together to align regulatory approaches. For example, on labour mobility, the agreement indicates that governments should seek to mutually recognize education standards set by other governments. This approach is the core of the AIT. The

¹⁶¹ Berdahl, “(Sub)national Economic Union.”

AIT covers sections of the economy, but requires a substantial amount of work in addition to the agreement to align regulatory approaches between governments. In the years that followed the completion of the AIT, provinces began to align their regulatory regimes and enhance parts of the agreement, most notably in procurement, labour mobility and transportation.

Table 1: Issue Specific Agreements

Agreement Focus	Parties	Year (Renewals)
Procurement	British Columbia, Alberta, Saskatchewan, Manitoba	1989
Procurement	Quebec, New Brunswick	1993 (2008)
Procurement & Labour Mobility (Construction)	Ontario, Quebec	1994
<i>Agreement on Internal Trade Approved by First Ministers – July 18, 1994</i>		
Procurement	Ontario, Quebec	1994 (1997)
Procurement	New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador	1996 (2005, 2008)
Labour Mobility (Construction)	Ontario, Quebec	1996 (2006)
Labour Mobility (Construction)	Quebec, Newfoundland and Labrador	1998
Transportation	New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador	2001
Labour Mobility	Quebec, New Brunswick	2009

Provinces had been working on procurement since 1989, when the four western most provinces signed an agreement to collaborate on procurement. The agreement was a

simple statement that the four provinces would end preferences for local suppliers, whether through selection or discounts. In 1994, Quebec and Ontario agreed to collaborate on improving labour mobility and procurement opportunities related to the construction industry within both provinces. Once the AIT was signed, the two provinces quickly moved to expand procurement opportunities across all sectors. In 1996, the two provinces signed a labour mobility agreement that mutually recognized the qualifications of trades people. Two years later Quebec signed a similar agreement with Newfoundland and Labrador in April 1998.¹⁶²

The four Atlantic provinces were also working together on the issues under the AIT, signing two agreements that deepened their commitments. In 1996, the four provinces committed to collaborate on procurement by lowering the threshold for spending on services that would trigger a need to tender beyond provincial boundaries. They also developed a common platform to advertise procurement contracts issued by the individual governments. The common platform serves to support companies outside of the respective provinces competing for government contracts. In 2009, Quebec signed a similar agreement with New Brunswick. In 2001, the four Atlantic provinces collaborated once again on a transportation agreement that established common standards for motor vehicle weights and dimensions. Similar to procurement, the AIT also covers transportation. The Transportation chapter of the AIT identifies weights and dimensions as an area for provinces to work together on. The Atlantic provinces were advancing the direct work of the AIT by working together on these issues.

¹⁶² For a link to these agreements, see the list of Trade Enhancement Arrangements available through the Agreement on Internal Trade Secretariat website: http://www.ait-aci.ca/index_en/progress.htm.

From this brief account, we can see that the consensus reached in the AIT became a platform for further action. Following the signing of the AIT, provinces worked collaboratively to advance the various components of the AIT for the first few years. They did so bilaterally or regionally, creating a diversity of approaches across the country. In the early 2000s, a new type of collaboration between provinces rose. It was still related to the economic union, but provinces began to reshape the consensus, rather than building on the consensus reached in the AIT.

Owning the Agenda

In the first few years after the AIT was concluded, provinces worked together to build upon the consensus reached in the AIT. At the outset of the 2000s, a new set of agreements began to shape further collaboration on the economic union. This collaboration came in the form of a series of good neighbour agreements signed between various governments. These agreements loosely committed them to policy collaboration on a variety of fronts, including economic development. These agreements included statements of common interests and value statements on the shared priorities of the signatory governments. While the matters were often similar – economic development, transportation corridors, and seamless provision of services for citizens moving between the two provinces – the agreements are records of the political commonalities between the governments.

In 2000, Manitoba signed an agreement with the newly formed territory of Nunavut. The agreement encourages a general intergovernmental partnership with a focus on trade and economic cooperation.¹⁶³ In 2003, the two governments signed a

¹⁶³ Manitoba-Nunavut Memorandum of Understanding for Cooperation and Development, available at: <http://digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=18752&md=1>

subsequent agreement focussing on building the tourism industry, sharing market data and marketing opportunities.¹⁶⁴ Similar agreements were signed by the Northwest Territories and the Yukon in 2003, British Columbia and Alberta in 2003, and British Columbia and the Yukon in 2004. The British Columbia-Yukon agreement, like the agreement between Manitoba and Nunavut, included a sub agreement on promoting economic development around forestry.¹⁶⁵ These agreements had no structure included in the terms of the agreements. The agreements encouraged collaboration, but on no specific timeline or policy. The agreements did, however, share the sentiment that collaboration on economic development and marketing were important.

On September 3, 2003, the three territories signed the Northern Cooperation Accord. As was the case in previous relevant agreements, the Accord stated shared priorities and a commitment to economic cooperation, but this agreement included a commitment to hold a meeting between the three territorial leaders each year. The three territories have met almost every year since that time to discuss a range of issues, often centered on economic priorities like infrastructure and energy development, and pressing social issues, like mental health.¹⁶⁶

Quebec and New Brunswick signed a less institutionalized agreement in 2006, but it was more substantive than the other agreements. The two governments signed an umbrella agreement to foster cultural, social, and economic exchanges. The agreement encompassed previous agreements on education, the fisheries and culture, and the two

¹⁶⁴ Manitoba-Nunavut Memorandum of Intent on Tourism Development, available at: http://www.gov.mb.ca/asset_library/en/documents/fedprovrelations/provincialagreement/moi_nunavut_mb_to_tourism_23july2003.pdf

¹⁶⁵ For a link to these agreements, see the list of Trade Enhancement Arrangements available through the Agreement on Internal Trade Secretariat website: http://www.ait-aci.ca/index_en/progress.htm.

¹⁶⁶ Information on the forum available at: <http://www.anorthernvision.ca/northernpremiersforum.html>

provinces committed to facilitate labour mobility between them fully. This agreement shaped a shared economic identity between the two provinces that included a strong French component. They agreed to work together on international initiatives related to the Francophonie and foster the unique francophone contributions to their respective economies. Each government agreed to have officials appointed to review collaboration annually and discuss new avenues of collaboration.¹⁶⁷

These agreements were not terribly significant in substantive terms. They were broad, language in many cases is vague, and typically there was little mandate for follow up within them. The agreements, however, did represent a shift in provincial attitude. Provinces were taking steps to set mutual agendas and collaborate on policy. There have long been ministerial forums that discuss specific sectors of policies amongst federal, provincial and territorial ministers. Premiers led these forums and included some measure of institutionalization by mandating officials to carry on discussions or, in some cases, directing ministers to make progress on specific issues. Where the issue specific agreements moved one shared policy priority forward, these agreements raised the importance of broader intergovernmental collaboration. Provinces were taking steps to lead the policy debate and set common policy agendas.

Table 2: Collaboration Agreements

Agreement Focus	Parties	Year
Policy Collaboration	Manitoba, Nunavut	2000
Tourism	Manitoba, Nunavut	2003

¹⁶⁷ For a link to this agreements, see the list of Trade Enhancement Arrangements available through the Agreement on Internal Trade Secretariat website: http://www.ait-aci.ca/index_en/progress.htm.

Policy Collaboration	Yukon, Northwest Territories	2003
Policy Collaboration	Yukon, Northwest Territories, Nunavut	2003
Policy Collaboration	British Columbia, Alberta	2003
<i>Council of the Federation Founding Agreement Advanced and Signed</i>		
Policy Collaboration	British Columbia, Yukon	2004
Forestry	British Columbia, Yukon	2004
Policy Collaboration	Quebec, New Brunswick	2006

In 2003, Quebec led the push to transform the former Annual Premiers' Conference into the new Council of the Federation. Premiers had been meeting together annually since 1960 through the venue of the Annual Premiers' Conference. In May 2003, Quebec Premier Jean Charest proposed the creation of a new body, the Council of the Federation. The Council would assess issues collaboratively, highlighting unique provincial perspectives and working towards common positions. Quebec cited a decline in federal-provincial relations and the problem of the fiscal imbalance as rationales for improving the coordination and cohesion between provinces.¹⁶⁸ Quebec envisioned an organization where provinces would “progressively develop their own vision of what Canada should become, and firmly consolidate their rightful place within our country.”¹⁶⁹

At first blush, the creation of the Council of the Federation appears to be nothing more than a “light institutionalization of the Annual Premiers' Conference.”¹⁷⁰ While

¹⁶⁸ Government of Quebec, *The Council of the Confederation: A First Step Towards a New Era in Intergovernmental Relations in Canada* (2nd ed., Québec City: Government of Quebec, 2004), available at: https://www.saic.gouv.qc.ca/publications/conseil_federation_en.pdf

¹⁶⁹ Ibid, 7.

¹⁷⁰ Jean Leclair, “Jane Austin and the Council of the Federation,” *Constitutional Forum* 15 (2006): 54.

Premiers would now meet twice a year, the only new addition to the meetings was a small secretariat – currently four people – headquartered in Ottawa. The founding agreement established decision making by consensus that required the support of all governments, and there was no method of enforcement or dispute resolution. As was the case with the agreement to establish the northern forum or the bilateral agreements on policy, the founding document itself contained little to enforce decisions or carry issues forward. Indeed, the Council encountered some initial failures that seemed to indicate it was a flawed institution.¹⁷¹

By formalizing a mandate and shared vision of provincial leadership, Quebec defined a renewed relationship of collaboration between provincial and territorial governments. The founding agreement stated four objectives:

1. Strengthening interprovincial-territorial cooperation, forging closer ties between the members and contributing to the evolution of the Canadian federation;
2. Exercising leadership on national issues of importance to provinces and territories and in improving federal-provincial-territorial relations;
3. Promoting relations between governments which are based on respect for the constitution and recognition of the diversity within the federation;
4. Working with the greatest respect for transparency and better communication with Canadians.¹⁷²

The objectives reflected a sense among provincial leaders that the federation had shifted. The objectives prioritized a need for, and belief in, the importance of provincial leadership. The Council did not change the nature of the federation; the divisive debates over the future and direction of the country remained. The founding agreement

¹⁷¹ Bakvis, Baier and Brown, *Contested Federalism*, [Sites, conferences chapter].

¹⁷² Council of the Federation Founding Agreement, 2003, available at: <http://www.canadaspremiers.ca/en/publications?q=en/publications&page=3>.

committed provincial leaders to a renewed focus on leadership by provinces in the direction of the country.

One of the first priorities for the Council was internal trade. Federal-provincial-territorial ministers responsible for trade had continued to work on the efficacy of the AIT. Between 1995 and 2003, the AIT was amended seven times.¹⁷³ Many of the amendments tinkered with the original language to make the agreement more functional, but there were a few substantial accomplishments. The agreement was extended to cover the MASH sectors (municipalities and academic, social and health organizations). The parties developed a common website on corporate registries and a portal for all procurement. They also fleshed out the rules for dispute resolution panels.

At the first meeting of the Council of the Federation, premiers set “strengthening the economic union, including enhancing internal trade” as a priority for action.¹⁷⁴ Premiers’ tasked the ministers responsible for economic issues to undertake a series of actions on internal trade. Two months after the initial meeting, premiers ordered their ministers to immediately bring their provinces into full compliance with the agreement, to expand the agreement to cover crown corporations, and to begin work on nine long-term objectives. The nine long-term objectives included: completing negotiations on the energy and agriculture chapters; improving the dispute resolution and labour mobility chapters; improving the code of conduct for investment incentives; reviewing the scope of the agreement; and accelerating the harmonization of regulations and standards.¹⁷⁵

¹⁷³ List of amendments available at: http://www.ait-aci.ca/index_en/ait.htm.

¹⁷⁴ Council of the Federation Internal Trade Workplan, 2004, available at: <http://www.canadaspremiers.ca/en/publications?q=en/publications&page=3>.

¹⁷⁵ Council of the Federation, Internal Trade Workplan: Progress Report, 2006, available at: <http://www.canadaspremiers.ca/en/publications?q=en/publications&page=2>.

Provincial ministers included their federal counterpart on this work plan and the ministerial council made quick gains on crown corporations and broad compliance.¹⁷⁶ In the next five years, the AIT was amended five times. Key amendments, however, were not achieved through negotiation, but through asymmetrical action by individual provinces. While the process was initiated through the Council of the Federation, subsequent progress was achieved when provinces partnered collaboratively outside of the Council and AIT process.

Asymmetrical Action by Provinces

Individual provinces advanced issues not addressed through the work of the Council of the Federation bilaterally or regionally. A number of provinces broke off into smaller pacts to experiment with solutions outside of the AIT. There were five key issues: agriculture, scope, regulatory harmonization, labour mobility, and dispute resolution.

Table 3: Asymmetrical Internal Trade Agreements

Agreement Focus	Parties	Year (Renewals)
<i>2003 - Council of the Federation Founded</i>		
Comprehensive Trade	British Columbia, Alberta	2006
Agriculture	British Columbia, Alberta, Saskatchewan, Manitoba, Prince Edward Island, Yukon	2006
Regulatory Alignment	New Brunswick, Nova Scotia	2009
Comprehensive Trade	Ontario, Quebec	2009 (2014)
Comprehensive Trade	British Columbia, Alberta, Saskatchewan	2010

¹⁷⁶ Agreement on Internal Trade, Sixth Protocol of Amendment, available at: http://www.ait-aci.ca/index_en/ait.htm.

The work directed by premiers on agriculture quickly stalled. When it was clear that the negotiations would not advance very far, British Columbia, Alberta, Saskatchewan, Manitoba, Prince Edward Island and Yukon signed the Interim Agreement on Internal Trade in Agriculture and Food Goods in 2006, which had much broader requirements than the agriculture chapter in the AIT.¹⁷⁷ The agreement included a clause that states that any jurisdiction could join the agreement at any time, and once all jurisdictions were signatories, the parties would move to amend the agriculture chapter of the AIT.¹⁷⁸ Governments agreed to amend the AIT's agriculture chapter in 2010, but did not take the broad approach of the interim agreement.¹⁷⁹

Another issue that had long been a point of contention in the AIT was the scope of the agreement. The original AIT was limited to 11 sectors. While the scope had been expanded to cover procurement by crown corporations and MASH sectors, the agreement still only covered regulation in a small section of the economy. Broad swaths of economic activity were not covered by the agreement.¹⁸⁰ While governments were limited in their ability to legislate preferential policies in areas covered by the AIT, there was little incentive to advance integration in those areas, and no mechanism to advance integration in new areas. The Council of the Federation had mandated work on these two issues: addressing gaps between the AIT and issues outside the scope of the current agreement, and accelerating the harmonization of regulations and standards. British

¹⁷⁷ Government of Saskatchewan, "Saskatchewan Signs Interprovincial Deal on Agriculture," 2006, available at: <http://www.gov.sk.ca/news?newsId=43a1cc60-cabb-4a57-938a-c4941f4a3af9>.

¹⁷⁸ Interim Agreement on Internal Trade in Agriculture and Food Goods, 2006, available at: http://www.agf.gov.bc.ca/trade/interprovtrade.htm#Interim_Agreement.

¹⁷⁹ Agreement on Internal Trade, Eleventh Protocol of Amendment, available at: http://www.ait-aci.ca/index_en/ait.htm

¹⁸⁰ Robin Hansen and Heather Heavin, "The NWPTA and the Agreement on Internal Trade Compared," in *Saskatchewan Law Review* (2010), 199.

Columbia and Alberta had been the provinces appointed to review the scope of the agreement. Nova Scotia led the review of harmonization under the Council of the Federation.¹⁸¹ When these provinces were unable to move the issues forward within the framework of the AIT, they advanced solutions bilaterally.

British Columbia and Alberta addressed their concerns with the AIT's scope and potential for harmonization by signing the Trade, Investment, and Labour Mobility Agreement (TILMA) on April 28, 2006. TILMA was the fulfillment of the agreement sought by Western provinces in the original negotiations for the AIT. Where the AIT listed legislation and sectors to which the agreement applied, TILMA covered everything unless explicitly excluded. In signing TILMA, British Columbia and Alberta trumpeted the "new standard for what interprovincial trade could and should look like."¹⁸² The agreement advanced harmonization by requiring each of the two provinces to recognize the standards set by the other without limitation. Professionals certified in one province were now eligible to work in the other, businesses no longer had to register and report in both jurisdictions, and residency requirements now recognized both jurisdictions. The agreement aimed to both immediately deepen the economic integration between the two provinces, and ensure continued integration into the future. In 2009, the two provinces announced that they had begun talks to bring Saskatchewan into the agreement. That work was completed when the three provinces signed the New West Partnership Trade

¹⁸¹ Council of the Federation, Internal Trade Workplan: Progress Report, 2006, available at: <http://www.canadaspremiers.ca/en/publications?q=/en/publications&page=2>.

¹⁸² Government of Alberta, "Alberta and B.C. Break Down Barriers to Create Single Large Market," 2006, available at: <http://alberta.ca/release.cfm?xID=19794E234DC75-C4C3-827B-FF15954C243BCDE8>.

Agreement (NWPTA) on April 30, 2010. TILMA and NWPTA are substantively equivalent agreements.¹⁸³

Nova Scotia took a different approach than the western provinces to address the same issue of scope and regulatory harmonization. In 2009, it concluded an agreement with New Brunswick that focussed on minimizing the differences between the two regulatory regimes. The Partnership Agreement on Regulation and the Economy (PARE) consisted of two parts: a list of existing regulations that challenge the flow of business between the two provinces, and a set of principles through which to view new legislation and regulations.¹⁸⁴ The agreement set out a ministerial committee supported by officials with a list of specific regulations and goals to achieve in areas such as labour mobility, energy policy, financial services, transportation, and health and safety. The agreement's ten principles committed each government to streamline, harmonize and simplify regulations. When reviewing new legislation and regulations, the parties committed to prioritize mutual recognition of regulations between the two provinces and potential harmful implications for small and medium-sized businesses. Each party agreed to notify the other 45 days in advance of the intention to adopt or modify measures with information and an offer to hear comments. The parties were further required to consult with small and medium-sized businesses bi-annually and report on progress yearly.

The PARE agreement aimed to integrate the business community within the two provinces both immediately and into the future, but it did so through a working group approach. Where the TILMA and AIT set rules in place that must be then enforced by

¹⁸³ Hansen and Heavin, "The NWPTA and the Agreement on Internal Trade Compared."

¹⁸⁴ Government of New Brunswick and Government of Nova Scotia, "Partnership Agreement on Regulation and the Economy," 2009: <http://pare-eper.ca/home.htm>

other jurisdictions, PARE took the proactive and outcomes-focussed approach of setting a work plan for governments to work together. The agreement referenced the work by the Council of the Federation, TILMA, and an impending bilateral trade agreement between Ontario and Quebec as motivation to move forward. The ten principles advanced in the agreement were established in the work done by Nova Scotia under the Council of the Federation working group on the AIT.¹⁸⁵ While the PARE had little influence on the AIT, it is clear that the process of engaging in dialogue on this issue through the Council of the Federation process led to policy innovation across the country.

Ontario and Quebec also addressed scope and harmonization through the bilateral Trade and Cooperation Agreement (OQTCA) that goes beyond the commitments of the AIT.¹⁸⁶ The OQTCA is similar in structure to the AIT in that it only covers issues listed within the agreement. The agreement advances a greater degree of integration through lower thresholds than the AIT and a private sector advisory committee that advises on new work to be included in the agreement. The rules of the agreement apply at a lower level of investment than in the AIT. Ontario and Quebec also aimed to enhance regulatory cooperation through greater and more structured dialogue by establishing a ministerial council supported by a secretariat and a private sector advisory committee. They also identified specific projects that would be used to analyze progress on the agreement. For example, the two governments would focus on ways to enhance the effectiveness of the Ontario-Quebec Continental Gateway and Trade Corridor initiative through OQTCA. This approach was an interesting way to narrow the focus of regulatory

¹⁸⁵ New Brunswick-Nova Scotia Partnership Agreement on Regulation and the Economy, 2009, available at: <http://pare-eper.ca/pdf/NB-NSAgreement-e.pdf>

¹⁸⁶ Ontario-Quebec Trade and Cooperation Agreement, 2009, available at: <https://www.ontario.ca/business-and-economy/trade-and-cooperation-agreement-between-ontario-and-quebec>.

harmonization to address regulations that directly affected the success of economic collaboration.

Asymmetry Results in AIT Reform

Provincial action to advance internal trade asymmetrically led to a major reform of the AIT. Both TILMA and OQTCA include monetary penalties within the dispute resolution process to better enforce the agreements. When it was implemented, TILMA's dispute resolution had two unique factors: monetary penalties, and a dispute resolution process by which individuals could challenge government actions. TILMA set in place provisions for penalties up to \$5 million. Under the dispute resolution process, one government would bring an issue to the other. If the two disagreed, they could bring the case before a panel. If the panel ruled against a party and that party did not move to address the issue in question, the panel could additionally fine the government up to \$5 million.¹⁸⁷ TILMA also allowed individuals or corporations to bring a case against either province. Individuals are required to consult their home province first, and could be fined for bringing frivolous cases. The Ontario-Quebec agreement adopted a similar approach for government-to-government disputes within the agreement, up to a maximum of \$10 million.

In 2009 governments agreed to amend the AIT to include a dispute resolution clause consistent with the one advanced in TILMA. Panel rulings that were not followed could result in fines up to \$5 million. The dispute resolution mechanisms remain closed to citizens; only governments can bring cases under the AIT. Interviews with AIT negotiators conducted by Lorleen Berdahl indicated that TILMA and subsequent

¹⁸⁷ Government of British Columbia and Government of Alberta, "Dispute Resolution," 2006: http://www.tilma.ca/dispute_resolution.asp.

lobbying by British Columbia and Alberta were instrumental to the eventual agreement among all governments on amendments to the dispute resolution chapter.¹⁸⁸ Once governments were able to witness the experience of British Columbia and Alberta in TILMA, they were more comfortable with advancing a similar process in the AIT.

Provincial action on labour mobility also led to amendments to the AIT. In 2009, the ninth amendment to the AIT added language that ensured that “any worker certified, licensed, registered, or officially recognized in on province or territory, upon application, will be certified, licensed, registered or officially recognized for that same occupation by any other province.”¹⁸⁹ The achievements on labour mobility reflected the broad acceptance of the principle of labour mobility across Canada. Since the AIT had been signed, seven provinces had joined in other labour mobility partnership agreements. The issue had advanced incrementally and asymmetrically across the country to the point where the parties were prepared to recast the consensus with broader obligations.¹⁹⁰

These two amendments – dispute resolution and labour mobility – were designed and advanced by provinces. They were advanced incrementally and asymmetrically through smaller agreements across the country. Provinces worked to advance aspects of the AIT in the 1990s and moved to set their own economic agendas in the 2000s. The focus of the Council of the Federation on internal trade was the locus for action. Drawing on their asymmetrical experiences, the provinces came to a shared agreement on the importance of labour mobility and British Columbia and Alberta took a particular

¹⁸⁸ Berdahl, “(Sub)national Economic Union,” 11-12.

¹⁸⁹ Internal Trade Secretariat, “Achievements,” 2015, 2: http://www.ait-aci.ca/index_en/progress.htm.

¹⁹⁰ Berdahl, “(Sub)national Economic Union,” 12.

leadership role in demonstrating the possibility of an effective dispute resolution mechanism.

Dialogue among premiers drove the process of reforming the AIT. The Council of the Federation was established as a body to demonstrate provincial leadership. As such, it is often reluctant to include federal representation in the dialogue and the initiatives it undertakes. The federal government did become involved through the federal-provincial-territorial working group of ministers responsible for internal trade. Through the ministerial body, the federal government was engaged in negotiations and its approval was received for moving forward with amendments to the AIT. The federal government was, however, in a policy-taking role. Provinces and provincial leaders were setting the policy agenda and taking action to move the issue forward.

Most notably, policy asymmetry across the country was a constructive force in promoting progress on the AIT. The bilateral agreements reached by British Columbia, Alberta, Saskatchewan, Ontario, Quebec, New Brunswick and Nova Scotia presented three unique approaches to internal trade and options to reform the AIT. The TILMA/NWPTA model intended to replace entirely the AIT with new rules and a limit on exemptions. The PARE takes an information sharing and consultation approach that could work in concert with the existing AIT. The Ontario-Quebec agreement models incremental progress through lowering of thresholds and exemptions in the existing AIT. All three approaches referenced the shortcomings of the AIT and the sense from these seven provinces that the policy issue could be addressed differently than the pan-Canadian AIT approach.

Ongoing Provincial Collaboration

Working outside of the AIT process on internal trade led to broader collaboration among provincial governments. Elements of the collaborative agreements of the early 2000s carried through into the agreements that drove policy asymmetry. TILMA was borne from the earlier collaboration agreement signed by Alberta and British Columbia in 2003. It was advocacy by these two provinces that kept internal trade on intergovernmental agendas. When the three provinces expanded the agreement to cover Saskatchewan, the relationship was formalized as the New West Partnership through an umbrella agreement. The umbrella agreement identifies NWPTA as the foundation for a collaborative relationship geared towards “on-going cooperation to strengthen [their] economy, unleash the creativity of [their] innovators and expand [their] presence around the world.”¹⁹¹ The three provinces have met routinely since that time, most recently hosting a summit on transportation and market access issues in western Canada.¹⁹²

Ontario and Quebec’s agreement highlighted a desire to work together to “foster economic development... attract business, workers and investment” and “help improve their competitive advantage on both the national and global level.”¹⁹³ The agreement contained a strong intergovernmental component in that the two provinces committed to make joint representations to the federal government on matters related to the agreement, including manufacturing, tourism and environmental issues. Regional intergovernmental collaboration cemented a commitment between the two governments to engage the

¹⁹¹ British Columbia-Alberta-Saskatchewan New West Partnership Agreement, 2009, available at: <http://www.newwestpartnership.ca/New%20West%20Partnership%20-%20Agreement.pdf>.

¹⁹² Information on the forum available at: <http://www.newwestpartnership.ca/NewsReleases.html>.

¹⁹³ Government of Ontario and Government of Quebec, “Ontario-Quebec Trade and Cooperation Agreement: Working Together to Encourage Economic Prosperity Backgrounder,” 2009: http://www.pppforum.ca/sites/default/files/ontario_quebec_accord_backgrounder_eng.pdf.

federal government as a united front. At a November 2014 joint cabinet meeting between the two provinces, they agreed to reinvigorate the OQTCA with a view to the commitments the governments could have to make under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA).¹⁹⁴

Conclusions

Tracing the last 15 years of developments on the internal trade file demonstrates the increasing importance of interprovincial collaboration to building effective policy. In the last chapter, we saw that the federal government was leading initiatives related to the economic union as policy makers and the provinces were responding as policy takers. The federal government set the policy agenda and moved the conversation with provinces forward. In the 15 years after the signing of the AIT, provinces have taken the lead in shaping the policy agenda, developing the options, and moving the issue forward. Through incremental advancements in negotiations and asymmetrical policy innovation, provinces built upon the consensus struck in the AIT.

The work by provinces began in the 1990s, building on the agreement in place. The provinces were not setting new agendas, but rather building on the old. This changed in the early 2000s. Provinces began to discuss broader agendas and expand the scope of the conversation related to the economic union. The importance of a dialogue on intergovernmental priorities was established and formalized in the Council of the Federation. Provinces committed to lead new policies that would shape the country. Provinces recognized that an ongoing conversation was critical to a functional federation and sought to bring governments together in a cooperative constructive manner.

¹⁹⁴ Government of Ontario, “Renewed Québec-Ontario Partnership Leads to Results,” 2014: <http://news.ontario.ca/opo/en/2014/11/renewed-quebec-ontario-partnership-leads-to-results.html>.

The renewed provincial commitment to cooperation led to federal-provincial policy action. Upon direction from premiers, provinces developed a work plan to address issues with the AIT. The work was quickly advanced and changes were achieved to the AIT. This is surprising for a number of reasons. The AIT is a federal-provincial agreement. Premiers set and advanced the new priorities with little input from the federal government. Premiers then set out a broad work plan to continue policy action, again without the input of the federal government. Provincial agency set and accomplished a policy agenda in the area of the economic union, a field previously dominated by the federal government.

When the multilateral process among provinces stalled, individual pairs of governments moved the issue forward through bilateral action. While there was initial action on the AIT itself, negotiations stalled on some fundamental issues including agriculture, scope, and dispute resolution. Rather than abandoning the issue, provinces shifted to smaller asymmetrical efforts, advancing their own collaborative approaches to address the issue. The unique agreements flowing from bilateral cooperation demonstrated policy innovation to provincial counterparts across the country. British Columbia and Alberta demonstrated the implications of monetary penalties within the dispute resolution leading to a major amendment to the AIT. Provinces had also grown in their familiarity with the labour mobility issue and built a new consensus on that chapter as well. On agriculture, provinces that agreed with greater integration moved forward with their own policy. On dispute resolution, labour mobility, and agriculture, we see that a breakdown in negotiations did not derail discussions on the issue. Provinces that wanted to advance the issues sought to build a consensus outside of the pan-Canadian forum.

Rather than fundamentally challenging the legitimacy of the pan-Canadian approach, the smaller consensus fed back into the pan-Canadian conversation and achieved important reforms.

There are two key conclusions to draw from these developments. First, in spite of a lack of consensus on the desired overall state of the federation, provinces are capable of assuming, and indeed have been assuming, a leadership role in setting and defining the pan-Canadian policy agenda, at least where important matters of internal trade liberalization and intergovernmental cooperation processes are concerned. The commitment to collaboration on matters of the federation is evident not just in the Council of the Federation, but also in the smaller bilateral and trilateral partnerships established in the past decade. Second, provinces can and are moving policy matters forward with or without the participation of the federal government. While unanimous policy or agreement on ideology is not always possible, progress is achievable. We will now turn to the final chapter to reflect on the implications of these developments for the federation.

Conclusion

Studying the economic union and internal trade presents two distinct eras of federalism and intergovernmental relations. In the era of constitutional negotiations (1972-1992), Canadian governments worked to build a common understanding of the federation that encompassed the diverse identities that were emerging. The Quiet Revolution in Quebec and the ideological divide between Prime Minister Trudeau and the western provinces drove conversations on the basis of the federation. These conversations included the state of the economic union. Governments discussed how best to ensure more coherent and unified economic policy across the country.

At the time of these discussions, however, the dynamics among governments were changing. Provinces were growing in their capacity for policy. In the era of cooperative federalism, they had worked closely with the federal government in designing and advancing policy. They were pushing for greater participation in international trade negotiations based on their constitutional responsibility for economic regulation. Any deference that existed to the leadership of the federal government in advancing policy was declining. Federal proposals to provide that order of government broad oversight over the economy were not well received.

The shape of the policy proposals on the economic union changed during this era. The broad policies reflecting a shift in powers between the orders of government required a consensus that was not achievable. Instead, governments reached a compromise through more incremental policy. The proposal of an economic code of conduct that would apply to all governments took shape first in the Macdonald Commission and was finally implemented in the Agreement on Internal Trade (AIT).

The end of the constitutional negotiations in 1992 and the signing of the AIT in 1995 coincided with a turning point in the federation. The constitutional negotiations sought to define the federation as a collective of the unique identities. Rejection of the Charlottetown Accord shifted the conversation from exploring diversity to questioning the foundation of the country. The conversations in the post constitutional era were about defining an associative community.¹⁹⁵ The process of coming together during the constitutional negotiations became about staying together in the 90s. The traditional understanding of the federation defined the provinces as seeking to justify their existence by promoting their diversity.¹⁹⁶ This concept was turned on its head following the constitutional negotiations; the issue became the federal government working to justify its existence.

The foundation of the federation was under question. Governments were re-evaluating the ways in which they engaged with one another. The consensus reached on the AIT was frustrating for both the federal government and western provinces because of the limited scope and the lack of enforceability. While the federal-provincial-territorial ministerial forum reformed the AIT in the years that followed its implementation, the major reforms were the result of provincial action and collaboration. This collaboration occurred both collectively through the Council of the Federation, and bilaterally. Provincial collaboration was at first incremental and asymmetrical, but ultimately resulted in a new pan-Canadian consensus. Rather than initializing a renewed vision or consensus on the economic union, provinces worked at the margins of the existing consensus. They engaged bilaterally, regionally, or with all provinces as needed to build

¹⁹⁵ Howse, "Searching for Plan A."

¹⁹⁶ Cairns, "The Governments and Societies of Canadian Federalism."

the new consensus. In the early 2000s, provinces began to include statements on the importance of economic collaboration in the outcomes from intergovernmental meetings. In particular, bilateral collaboration between British Columbia put the issue on the agenda of the first meeting of the Council of the Federation. When the issue was raised at the Council of the Federation in 2004, provinces were unable to reach a new consensus. A number of provinces took the expertise developed through the Council of the Federation process and advanced their perception of the appropriate action bilaterally. They demonstrated a path forward and the AIT was successfully amended in 2009 to include new enforcement measures and measures on labour mobility.

The constitutional negotiation era saw governments advance national visions through broad policies that would reshape the basis of the federation. In the post constitutional era, governments work outside of the pan-Canadian forums to build compromises and demonstrate effective collaboration on policy. In spite of a missing consensus on the state of the federation, provinces were capable of, and indeed have been, taking on a leadership role in setting and defining the pan-Canadian policy agenda. The commitment to collaboration on matters of the federation was evident not just in the Council of the Federation, but also in the smaller bilateral and trilateral partnerships established in the past decade. The traditional understanding of federalism places a higher value on leadership by the federal government. This thesis shows how provinces can and are moving policy matters forward with or without the participation of the federal government. While unanimous policy or agreement on ideology is not always possible, progress is achievable.

Interprovincial Relations: Opportunities

Recent developments on economic union and internal trade demonstrate the potential for effective intergovernmental relations in Canadian federalism. Provinces are working together through the Council of the Federation to explore policy options on issues of mutual concern. They are also working bilaterally and regionally to innovate on policy and demonstrate the impacts of intergovernmental policy options.

The narrative on internal trade highlights the importance of considering the potential of all intergovernmental collaboration and sites regardless of how incremental the action appears. The new consensus on AIT contained two components: labour mobility and dispute resolution. Seven different governments had concluded agreements on labour mobility. Dispute resolution was advanced through a single bilateral agreement. The various forums and agreements between provinces shape the policy outcomes that they are working together to achieve. Smaller meetings and actions shape momentum for broader intergovernmental collaboration.

These sites provide an opportunity to identify progress on an issue, evaluate the likelihood of a broader consensus, and potentially shape outcomes. Affecting outcomes of broad intergovernmental meetings can potentially be achieved through engagement of a single government or a smaller intergovernmental forum.

Interprovincial Relations: Challenges

In the lead up to the Council of the Federation 2015 Winter Meeting, much of the press coverage discussed the absence of the prime minister at the meetings. The meeting was in Ottawa and Premier Wynne of Ontario had issued an invitation for Prime Minister Harper to attend. In the closing press conference Premier Clark of British Columbia was

asked about the impact of the prime minister's failure to meet with the premiers collectively. Premier Clark responded: "I would say that premiers get a lot accomplished around this table... we haven't had a meeting with the prime minister at it since I was elected for almost four years ago now[,] [a]nd we have accomplished a lot in that period of time nonetheless... And, you know, it's not like they're not listening. They are. And they may not agree with us, but we know that... they're somewhere on the other side of that TV screen, listening to what we have to say today."¹⁹⁷ The premier's comments highlight two things. First, the premier believes that provinces are working together as needed on matters that require intergovernmental action. Second, the federal government is attuned to developments in interprovincial policy and priorities.

Prime Minister Harper has responded to critics who are concerned about the dearth of meetings between himself and all premiers by pointing to the frequency of bilateral meetings he holds with premiers. Bilateral meetings, like those between provinces, allow the two orders of government to identify issues of mutual concern and share actions each government believes is needed to advance those priority issues. The flow of communication can be positive, but the action on internal trade highlights potential shortcomings of this approach.

The Council of the Federation led action on internal trade. It was also the bilateral agreements, all advanced and signed by premiers. To achieve action on internal trade, it was important that the relevant first ministers were more directly involved. The consensuses were built through negotiations at the highest level of which the prime minister was not a part.

¹⁹⁷ Premier Christy Clark, Council of the Federation Winter Meeting Closing Press Conference, January 30, 2015.

Another important aspect of building the national consensus was policy learning. The consensus on the AIT was built through developments in international trade, the Macdonald Commission, and years of dialogue between first ministers. While federal ministers continue to engage in federal-provincial-territorial forums, first ministers bring a more fulsome and politically sensitive perspective to an issue. They set the political direction and boundaries of action for any given issue. Engaging in multilateral conversations with that full perspective best facilitates an intergovernmental consensus.

Final Thoughts

There is an assumption in Canadian political science literature that vision from the federal government is required for effective intergovernmental relations and collective policy. The debate over the economic union and internal trade policy calls that assumption into question. Provincial governments are at the forefront of emerging issues that affect Canadians and are shaping innovative policy solutions. The deference that once existed to federal leadership in areas of provincial jurisdiction is waning. The challenges faced by the country in defining a federal vision have perhaps created space for provinces to grow as leaders within the federation. In the era of Prime Minister Harper, there is often much concern over the state of the federation. Better understanding of how provinces collaborate could mitigate some of this concern.

In late January 2015, Liberal Leader Justin Trudeau unveiled his approach to managing climate change in Canada. He announced that his government would not move to set national policies, but rather support provincial actions through funding.¹⁹⁸ This suggests a rather decentralized approach to managing what could be a critical area of

¹⁹⁸ See for more information: <http://www.cbc.ca/news/politics/justin-trudeau-says-carbon-pricing-should-be-left-to-provinces-1.2927889>.

policy for a potential Liberal government. It would appear that regardless of which party forms the federal government in the fall 2015 election, the ability of provinces to work together and build a national consensus will remain a critical source of leadership within the Canadian federation.

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