NOTE TO USERS

The original manuscript received by UMI contains broken or light print. All efforts were made to acquire the highest quality manuscript from the author or school. Microfilmed as received.

This reproduction is the best copy available

UMI
The Institutions and Processes of Federalism and Industrial Policy in Canada

by

C.E. Taucar

A thesis submitted in conformity with the requirements for the degree of Master of Laws (LL.M.)
Graduate Department of Law
University of Toronto

© Copyright by Christopher E. Taucar, 1997
The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author’s permission.

L’auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L’auteur conserve la propriété du droit d’auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-29453-6
This thesis deals with considerations concerning federalism to facilitate the development and implementation of industrial policy. In the Canadian context, it is simply insufficient to speak of the latter in isolation of the former. The outlined theory of industrial policy, with criticisms noted, provide the context for the discussion on federalism. Part II examines the various processes and institutional variables of federalism and principles of intergovernmental action to facilitate such interaction. A more explicit and direct attempt is then made to discuss industrial policy and federalism by considering, in greater depth, some specific policy areas relevant to industrial policy. Institutions, including federalism and the way intergovernmentalism is structured tend to have important implications for the development and implementation of coherent and effective industrial policy, although achieving the optimal structure may not necessarily provide a solution, nor is obtaining such optimal structure necessarily possible under the prevailing circumstances.
The author would like to acknowledge the assistance of Richard Simeon, Robert Howse, Katherine Swinton and Hudson Janisch, who all provided helpful comments on earlier drafts of this thesis. It is my understanding that Richard Simeon and Robert Howse had agreed on relatively short notice to be available to review the work. In the end, responsibility for the contents of the thesis remains solely with the author. Finally, Hudson Janisch’s efforts to keep the entire process moving to its conclusion were appreciated.
## CONTENTS

### INTRODUCTION

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

### PART I: INDUSTRIAL POLICY

1. Industrial Policy

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industrial Policy</td>
<td>8</td>
</tr>
<tr>
<td>Determinants and Variables of National Competitive Advantage</td>
<td>15</td>
</tr>
<tr>
<td>The Paradigms of Competitive Advantage</td>
<td>42</td>
</tr>
<tr>
<td>Some Further Issues</td>
<td>47</td>
</tr>
</tbody>
</table>

### PART II: CANADIAN FEDERALISM

2. Political Economy and Institutional Framework

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>To Coordinate or Not</td>
<td>51</td>
</tr>
<tr>
<td>Processes of Federalism</td>
<td>68</td>
</tr>
<tr>
<td>Representation of Values, Regional Interests and Organizational Interests</td>
<td>80</td>
</tr>
<tr>
<td>Spectrum of Intergovernmental or Interprovincial Interaction</td>
<td>89</td>
</tr>
<tr>
<td>Some Notions on the Effectiveness of Institutions</td>
<td>97</td>
</tr>
</tbody>
</table>

3. Industrial Policy, Federalism and Specific Policy Areas

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal Barriers to Trade</td>
<td>105</td>
</tr>
<tr>
<td>The Making of Interprovincial Distortions</td>
<td>106</td>
</tr>
<tr>
<td>The Costs of Internal Barriers and Industrial Policy</td>
<td>110</td>
</tr>
<tr>
<td>The Agreement on Internal Trade</td>
<td>115</td>
</tr>
<tr>
<td>Conclusion</td>
<td>133</td>
</tr>
<tr>
<td>Occupational Training</td>
<td>138</td>
</tr>
<tr>
<td>The Legacy of Federalism and Training Policy</td>
<td>146</td>
</tr>
<tr>
<td>The Canada Infrastructure Works Program of the 1990's</td>
<td>179</td>
</tr>
<tr>
<td>Options for the Future</td>
<td>196</td>
</tr>
</tbody>
</table>

### CONCLUSION

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>198</td>
</tr>
</tbody>
</table>

### Selected Bibliography

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>203</td>
</tr>
</tbody>
</table>
INTRODUCTION

With increased liberalized trade characterizing the 1990's, globalization and increased competition by foreign firms, increasing attention is being paid to the development of comprehensive and effective industrial policy as a means of providing for national prosperity by facilitating the competitive advantage of a nation's firms. However, as a matter of political and constitutional reality, in the Canadian context, it is insufficient to speak about industrial policy in isolation from federalism considerations. Not unlike the new arithmetic where the right answer is only part of the answer, and the "how did you get there" part is equally or more important, so too in Canadian federalism the policy answer is not the complete answer, and the "how does one get there" part can be equally or more important. But, as indeterminate, controversial and uncertain the task is of finding the ideal and effective industrial policy for Canada, federalism adds to that indeterminacy, controversy and uncertainty by adding into the cauldron two constitutionally ordained levels of government and by giving particular salience to regional interests and cleavages. Perhaps, then, we must settle for the second best solution, at least for the purposes of this study, of identifying the major components and principles of industrial policy, as well as to identify and assess major components and principles of workable federalism frameworks.

Thus, Part I of this thesis concerns itself with the achievement of the prosperity of a nation in the context of
globalization and increased international competitiveness by facilitating the competitiveness of a nation's firms through industrial policy. The most complete and lucid theory considered, with criticisms noted, is that of John Porter, *The Competitive Advantage of Nations,* which will be largely relied on for the purposes of this study. This theory is supplemented by Canadian industrial data and some of the challenges, both emanating from federalism and otherwise, that Canada faces in developing an effective industrial policy.

The first step is to understand the determinants and variables of competitive advantage if one is to assess how it is created. One should bear in mind what determinants government can and cannot influence and in what manner.

A complete list of possible barriers or challenges to the creation and implementation of effective industrial policy is out of the purview of this study. For example, no analysis will be made regarding how the international liberalized trade regime, as it presently exists under GATT/WTO and FTA/NAFTA and as it may be amended or evolve from time to time, may reduce the scope of nations to create and implement industrial policy. Secondly, what might be an American (or other foreign) reaction to or its effect on a Canadian industrial strategy will be omitted.

---


Theories as to how conflicts between the merchant and industrialist classes may have impeded the development and growth of industrial policy will similarly be omitted. Nor will the possible constraints arising from political culture on government in developing a more extensive and coherent industrial policy be discussed in depth.

The primary intention is not to develop a comprehensive industrial policy regarding each and every industry/segment for Canada at this time. Rather, the primary intention is to assess federal institutional frameworks, both at the constitutional and sub-constitutional level, in order to facilitate the creation and implementation of industrial policy. Thus, the discussion on industrial policy provides the all important context for the institutional dimensions of federalism.

In Part II on federalism, there is a recognition not only that institutions and, particularly, federal institutions matter, but, that they have important effects. Federalism stands as a highly important institutional variable. Other important non-federalism variables such as the existence of sub-national economies are also important. These elements, of course, add to the complexity of the matter and are often difficult if not impossible to distinguish from purely federalism variables when applied to a given set of circumstances. By and large, this type of characterization exercise is not highly relevant to the question in this study and will not be pursued.
As indicated earlier, within federalism, there are further institutional variables concerning how federal relations are structured. It is especially upon this level that one must focus if one is to discuss the principles of workable frameworks to facilitate the development and implementation of industrial strategy.

As Canada lacks an effective bicameral legislature, or upper house, at the federal level, much federal-provincial adjustment has occurred at the intergovernmental level, reflecting blended/coordinated federal-provincial action. A primary issue is to assess considerations to determine whether a particular policy or a set of policies aimed at developing an industrial strategy should be pursued through blended or co-ordinated governmental action (federal-provincial or even interprovincially). This question assumes that there is even a federal role in the context of industrial strategy given the diverse nature of sub-regional economies. In concluding that, indeed, there is a strong federal role to be played, factors will be considered regarding whether or not there should be co-ordination as among governments in a given circumstance.

Furthermore, if one is to structure interactions between governments or assess what exists, one must understand the various processes of federalism. These processes include, broadly speaking, executive and non-executive federalism. The

---

non-executive processes include the Constitution, constitutional enforcement and judicial federalism, constitutional convention and the development of a rules based regime.

The processes of federalism do not necessarily represent all the values that should be articulated in the context of industrial policy and federalism. It is clear that governments represent their respective provincial and national communities, regional interests, as well as their own organizational interests. However, as we will see, the values of democracy, public participation and government accountability are often not accorded their legitimate weight in the dominant process of Canadian federalism (executive federalism), which tends to give salience to regional issues and focuses on intergovernmental relations. In the context of industrial policy, greater public involvement of relevant industrial actors is a necessity to ensure that policies serve to facilitate competitive advantage. Such involvement may also enhance the effectiveness of a given policy.

However, it is not sufficient to simply discuss issues of co-ordination, processes, representation of values and interests; one must also consider matters relating to the effectiveness of institutions in facilitating negotiation and agreement. Such a consideration will be undertaken.

In Chapter III, a more explicit and direct attempt is made to discuss industrial policy and federalism by considering in greater depth specific policy areas relevant to industrial
policy. The policy areas to be discussed are internal barriers to trade, occupational training, as well as a discussion regarding the Liberal government's recent infrastructure works program.

In the end, it becomes evident that institutions and, particularly, federalism and federal institutions and processes are highly important to the development of coherent and effective industrial policy. Just as building a successful industrial policy requires the marshalling of appropriate combinations from a rich tapestry of determinants, so too must federal institutions and interactions emanate from no less rich a tapestry of options and considerations to facilitate the development of good industrial policy. Each situation will have to be examined on its own merits with these principles and considerations in mind. Of course, in the Canadian context, the right combinations will often be subject to agreement or co-ordination among the relevant parties, in areas where co-ordinated government action is desirable. The agreement itself may reflect compromise. However, it is not always evident that co-ordination is necessary or desirable. Indeed, governments acting unilaterally may be the better option, but, ironically, that option may be constrained by those same federalism factors, among others, that make optimal co-ordinated governmental action difficult.

One must always bear in mind that although institutions and, particularly, federal institutions and processes are important elements in the development and implementation of industrial
policy, they are not always sufficient to ensure its success. Whereas institutions have important effects on federalism, they are simultaneously a product of and influenced by federalism and non-federalism variables.
PART I: INDUSTRIAL POLICY

Chapter I: Industrial Policy

I) Industrial Policy

1. What is Industrial Policy

Industrial policy has meant different things to different people at different times. With few exceptions, there has been no clear analysis as to what industrial policy means in the first place, and these differing conceptions have led to differing approaches to achieve this goal.

Industrial policy may be defined as a policy or set of policies which have for their objective the creation or facilitation of competitive advantage and, particularly, sustainable competitive advantage among the nation’s firms operating in one or more industries and/or industry segments. Policies to enhance or preserve competitiveness must be distinguished from policies to alter competitive advantage or to protect against the impact of market forces. The latter are not, strictly speaking a part of competitive advantage at all.

The facilitation of competitive advantage is, in essence, "instrumental" in that it is the way to achieve one of the principal goals of a nation - to produce a high and rising standard of living for its citizens. The means by which to achieve competitive advantage for a nation’s firms, and of

---

providing for a high and rising standard of living for a nation's citizens, is dependant on the productivity with which a nation's labour and capital are employed. Productivity may be defined as the "value of output produced by a unit of labour or capital", and it depends on the quality and features which determine prices and efficiency.

Given that the heart of competitiveness at the national level is productivity of a nation's firms, the reality is that in dynamic global and domestic spheres, competitive advantage may be won or lost depending on a variety of factors. Hence, the goal must be to sustain competitive advantage once achieved. With few exceptions, sustainability requires the constant upgrading of firms through higher orders of competitive advantage, which are more durable and which raise productivity, for example, through differentiating products or services by their quality or adding desirable features that command premium price, or, through efficiency in process technology or other methods, which help to lower price, or, the ability to access and secure a market.

2. Approaches to Industrial Policy

Not only are there differing conceptions of what industrial policy is, but, not surprisingly, governments have adopted different approaches to promote the development of their nation's industries. Indeed, within Canada there has been a shift

---

*Porter, p. 6.

*Ibid.
reflecting the flavour of the changing debate. Furthermore, given the definition of industrial policy and description of how competitive advantage arises, a good macroeconomic environment, although highly important for the overall success of the national economy and to industrial policy, does not constitute industrial policy. Trade policy is not, strictly speaking, industrial policy unless combined with a strategy or policies for promoting the competitiveness of a nation's industries. Yet, the right trade policy might be crucial to the development of internationally competitive firms.  

There are three main paradigms of industrial policy. The first paradigm is the "Interventionist" approach in which government takes an active and commanding role in promoting industrial development. One example is that of French indicative planning. There has been a shift in Canada away from this type of approach employed in the 60's and 70's. Although the approach used in Canada was never highly interventionist, the approach of DREE, for example, of direct subsidies, or, the more prevalent direct government involvement through attempting to pick winners to support are examples of the Interventionist paradigm. Other examples of the interventionist approach include bail outs or sustaining declining industries. Policy regarding the coal industry of Cape Breton is an example of the latter.

More recently, evidence from the success of the Asian tiger and the failures of other developing countries has given rise to an acceptance of trade liberalization in support of an export oriented approach, rather than infant industry protection and import substitution.
The Report of the Royal Commission on the Economic Union and Development Prospects for Canada rightly concluded that government cannot be too heavily interventionist, particularly, because governments generally lack the capability to orchestrate or formulate comprehensive detailed industrial strategy - the world is too big and complex and the need for flexibility and adaptability too great. The discussion on industrial policy will amply demonstrate this proposition. Significant problems with respect to implementation of targeted industrial policy arise such as creating selection criteria, compounded by the fact that no convincing formula has ever emerged. Canadian and American studies have indicated that there is a low average of success in "picking winners". The politics involved, including regional and federal issues, often turn the process of picking winners into propping up losers.

At the other extreme, is the free market paradigm. The extreme form is that of no government intervention in the economy other than the establishment and enforcement of "background" laws including the establishment and/or enforcement of such matters as contract and business related tort law. Such an approach would, also, preclude the erection of internal barriers to free trade within a country. This paradigm in its pure form has never

---


*Ibid.

existed and can be characterized as not being industrial policy at all. The Macdonald Commission did not advocate this approach. Porter's ten nation study showed that in none (or few) of the nations containing internationally competitive firms, could government policies be characterized as purely free market, or very close to it.

Between the two extremes is an intermediate approach which had been growing in acceptance by governments in recent years. Such an approach would involve policies consistent with a free market paradigm like a market-oriented approach to industrial policy and policies to develop a macro-economic framework (i.e. appropriate fiscal, monetary and stabilization policy that relate to the economy as a whole) to support industrial development, as well as a commitment to freer trade. It might also involve an important government role in relation to R&D, the acquisition of technology, occupational training, infrastructure, education and so on. Due to trade liberalization, fiscal restraint and, perhaps, a changing outlook on industrial policy, the use of subsidies has declined in importance as a matter of industrial policy, as has the use of public enterprise in Canada. Indeed, it has been said that the "discourse of industrial policy in Canada and the United States increasingly shares the language of high technology, human capital and market facilitation."\(^{11}\)

For the purposes of this thesis, the general theory by John Porter on industrial development is accepted as one of the best

\(^{11}\)Howse and Chandler, p. 232.
on the subject in terms of comprehensiveness, lucidity and common sense and based on comprehensive data of several nations. This is not to say that the theory is without its critics though. Alan Rugman, for example, argues that Porter's theory must be modified before it can be applied to the Canadian context, or other small open economies for that matter. His criticisms primarily relate to Porter's treatment of: inbound foreign direct investment, Canada's foreign-owned auto industry, the role of Canadian multi-national enterprises and the nature of the Free Trade Agreement (and NAFTA) and related institutional arrangements. His main point is that Canada's "home country" diamond does not have the answers to explain Canada's international competitiveness, particularly, due to its high degree of integration with the U.S.; therefore, a "North American diamond" must be conceived. John Dunning has made the point generally that the globalization of economic activity including the close and intricate cross-border networking of all kinds of commercial intercourse is highly important and, indeed, often indispensable to international competitiveness. Rugman does


accept Porter generally including the concept of the "diamond", identification of clusters and the four stages of economic development. These concepts, regardless of what one may think about the above criticisms, are the ones that will be primarily relied on in this essay.

Although cross-border linkages are indispensable to competitive advantage, the focus is on the government's role in the creation of an environment conducive to the development of "home bases" in Canada for an industry or industry segment, despite the fact that some functions may be sourced from foreign locations, or, the importance of interfirm linkages. These latter issues are in respect of firms thinking globally to be competitive and are not inconsistent with the focus of this thesis. According to Porter, the home base is important because that is where strategy is set, where core product, process development and essential proprietary skills reside. These factors contribute most extensively to the nation's prosperity. Porter argues that the home base is the platform for global strategy and ultimately nations succeed in a particular industry because the home environment is most dynamic, challenging and stimulates firms to upgrade and innovate.

Canadian industrial data will supplement the general theory. This theory and data will provide the context in which the discussion on federalism and institutions will take place.

---

15Rugman, p. 2.
16Porter, p. 69.
II) Determinants and Variables of National Competitive Advantage

The determinants of national competitive advantage serve to explain why a particular nation is a more or less desirable home base for competing in an industry or an industry segment.

It is not possible that the nation will be internationally competitive in all industries and success in an industry is dependant on the determinants. The effect of each determinant is contingent on the state of the others. The interplay of self-reinforcement of determinants are so complex as to obscure cause and effect and the diamond restructures itself over time. The evolution of the diamond can enhance or detract from competitive advantage. In the end, nations succeed in clusters of firms within a given industry connected through vertical and horizontal relationships, and the totality of the nation's industries and clusters reflect the state of the nation's economic development.

The Role of Government

Government's role is vital in the context of competitive advantage, but, the real role is in influencing the four determinants of national competitive advantage. This role can be helpful, but, can also hinder. Government policy can, also, be influenced by the determinants. Research shows that successful policies work regarding industries where the underlying determinants of national advantage are present and government policies reinforce them.\textsuperscript{17} Government policy cannot, or can

\textsuperscript{17}Ibid.
rarely, create advantage in and of itself. As the discussion on
the determinants will demonstrate, the determinants of
competitive advantage are simply too complex and require too much
information for government to be able to create or sustain
competitive advantage in its nation's industries, or even in a
particular one. Rather, the role of government is to support and
enhance the determinants of competitive advantage.

1. Factor Conditions

There are five basic factors which comprise the inputs for
production. The first is human resources, which must be
evaluated in terms of quantity, skill, cost, standard working
hours and work ethic. Second, physical resources are evaluated
by type and quality, but, also, climate, location, size, distance
to markets and suppliers. Knowledge resources are the nation's
stock of science, technology and market knowledge regarding goods
and services. A nation's knowledge resources are amassed through
such bodies as universities, private and government research,
government statistics, business and science literature, market
research and data bases, trade associations etc. The state of a
country's capital resources are evaluated in terms of amount and
cost to finance, types available, terms and conditions.

The match between industries and factors present in an
nation and how effectively and efficiently these factors are
deployed are what competitive advantage is all about. One

\*\*Ibid, p. 76.
must bear in mind that factors can also be sourced from foreign locations and that too may be a highly important aspect of a firm's competitive advantage. See, for example the views of John H. Dunning.\(^1\)

**Hierarchy Among Factors**

a) Basic and Advanced

All factors are not alike; there are different types and qualities important to competitive advantage. Basic factors include natural resources, climate, location, unskilled/semi-skilled labour and debt capital.\(^2\) Advanced factors include, presently, such factors as modern digital data communications infrastructure, highly educated and trained personnel, and university research institutes in sophisticated disciplines.\(^3\) Most factors must be developed over time through investment, except for basic inherited ones like natural resources. Advanced factors are the most significant ones to achieve higher-order competitive advantages as they are scarcer since they are harder to develop and are more difficult to procure globally. Advanced factors are often built on basic factors.

---

\(^1\)See Dunning generally.

\(^2\)Porter, p. 77.

\(^3\)Ibid.
b) Specificity

The degree of specificity of factors is another important element. Generalized factors include roads, debt capital and educated employees. Specialized factors, on the other hand, are specific to a particular field, for example, expertise in optics. These provide more decisive and sustainable bases for competitive advantage and require more focused, riskier private and social investment. These are also hard to access or procure globally.

As eluded to earlier, through competition the standard for (advanced) factors raises continually and specialized factors become generalized, therefore, firms must constantly upgrade to maintain their competitive advantage. Generally, competitive advantage based on basic/generalized factors is unsophisticated and often fleeting. However, an exception to this rule would be a nation like Saudi Arabia or Canada whose natural resources are of such abundance and/or quality that competitive advantage is nevertheless maintained. Still, even these types of economies may become increasingly vulnerable in a globalized and internationally dynamic economy.

Most of Canada's internationally competitive export industries are narrowly focused and dependent on natural resources such as agriculture, fish, forest products, minerals, fuels, or, other natural or cultivated commodities. Canada has been increasing its resource based export share, which now totals
45.8% of total exports. Indeed, most of those exports are unprocessed accounting for the highest percentage among advanced nations. Indeed, Canada's overall industrial production, both for the export and domestic market, continues to be dominated by resources and low technology manufacturing.

Internationally competitive Canadian exports are concentrated in five broad clusters. Furthermore, the fact that the top fifty firms accounted for 21.6% of Canadian exports in 1989, which is higher than the great majority of other advanced nations, is a sign of a lack of diversification. This lack of diversification results in more limited possibilities for beneficial spillovers across industries and clusters.

The forest products cluster is the most successful in terms of world export share. Most of the exports are of the less sophisticated variety such as sawn wood, newsprint and bleached

---


23 Ibid, p. 51.

24 Howse and Chandler, p. 244.

25 Clusters are groups of industries connected by buyer-supplier relationships or strong interrelationships regarding products and technology and includes end products, specialized inputs, specialized production machinery and associated services.

26 Monitor, p. 28.
chemical pulp. Canada is not competitive in machinery, equipment, or services for the forest product sector.  

The materials and metals cluster involve predominantly raw material, or, are partially processed like ores and traditional metals, mostly iron/steel powders, unwrought aluminum, non-agglomerated coal and metal slag. Imports, on the other hand, are more highly processed. Canada is not competitive in mining equipment or machinery except for tunnelling and underground elevators. With the exception of the geophysical contracting industry, there are no other internationally competitive services in this cluster.

In the petroleum and chemicals cluster, most exports comprise petroleum and natural gas; the primary strengths of which are crude petroleum products and basic chemicals like simple hydrocarbon, alcohols and derivatives and basic inorganic chemicals. Its position in specialty chemicals is weak.

The transportation cluster has the largest percentage of total Canadian exports. The Auto Pact industries dominate transportation exports. There are relatively few competitive and supporting industries in this cluster. Most auto parts and machinery for assembly are sourced outside of Canada and the Canadian cluster does not have a metal working or machinery

\footnote{Ibid, p. 33.}

\footnote{Ibid, p. 34.}
industry and has no competitive services, except for transit management and transit system design consulting.29

Food and beverages are the only major competitive cluster in the final consumption goods category. However, two-thirds are in fish, grain and food exports that are mainly unprocessed or lightly processed. Denmark, on the other hand, is also rich in agriculture, but, its products are more processed and produces more machinery and equipment to support agricultural production. Italy has upgraded to compete in differentiated foods and beverages. This is the only cluster in which Canada has a representation of a competitive machinery industry, for example, in agricultural equipment, but, less so in the higher value combines and harvesters.30

Apart from these, Canada has some isolated successes in other clusters such as and power generation and distribution, and telecommunications, which is a field of growing significance.

Although no industry appears to be inherently desirable or undesirable, what matters most is productivity, economic capacity for productivity growth and sustainable competitive advantage. The problem with competing on the basis of factor costs is that Canada is sensitive to price shifts, technological substitution and the emergence of low cost competitors, due to the accessibility of firms to the unprocessed resource industry. Technological change is reducing the resource intensity in

29Ibid, p. 35.
advanced economies. Furthermore, such economies may be vulnerable to depletion.

A concrete example may be given to illustrate the vulnerabilities of relying on low factor costs. The Canadian newsprint industry is a significant industry for Canada. While Canada is still the largest exporting nation, it has been slowly losing world market share. Recent developments of thermomechanical pulp (TMP), an alternative technology, permits the exploitation of low-cost fibre supplies in the U.S. South and several Latin American nations. Canadian trees are slower growing but of higher quality. Yet, this situation has still not prompted Canadian firms to make significant moves into the differentiated high-quality paper market.

Another threat comes from recent recycling legislation in many Canadian and U.S. jurisdictions reflecting a demand for environmentally friendly products. Regulations often require that fifty percent content of newsprint sold must be made from recycled fibre. Canada does not have enough newspapers to meet pending demand, while the U.S. has been investing heavily in recycling technology and has ready access to vast "urban" forests i.e. stocks of newspapers available for recycling.

Market conditions in some industries have eroded end markets due to synthetic substitutes or changing needs. The emphasis in the auto industry toward lightweight vehicles has resulted in steel demand giving way to aluminum and plastic substitutes.\(^1\)

\(^1\)Ibid, p. 159.
Effective mechanisms are needed for creating and upgrading factors that are advanced and specialized. Nations differ in the patterns of industries and sectors in which private and social investments in factor creation are being made. Factor creation has various influences. Firm strategy, structure and rivalry influence factor creation when a cluster of domestic rivals stimulates factor creation, as do perceived national challenges. A group of domestic rivals in an industry and/or segment may also trigger special education and training, for example, in investing in factors underpinning one’s industry and stimulating individuals to seek specialized skills and more job opportunities. The strongest effects come from the geographical concentration of rivals. The number of rivals signals the potential of industry and both industries and institutions take notice. As such, it may reduce the perceived risk of investing in specialized facilities and/or skills. Home demand influences the priorities for factor creating investments. Related and supporting industries undertake their own innovation and create or stimulate the creation of transferable factors. One example is the Danish food and brewery industries where knowledge is transferable to the industries related to insulin and enzymes.  

---

\[22Ibid, p. 256.\]
Selective Factor Disadvantage

Competitive advantage can grow out of disadvantage in some factors due to pressures to innovate around them, which may even eliminate the need for certain factors. It may seem ironic that innovation to offset selective weakness is more likely than innovation to exploit strengths, as may be witnessed by the difficulties Canada has had in upgrading fostered by a dependence on resource abundance and which has provided little incentive to innovate. The reason is that firms could earn high profits by supplying unprocessed or semi-processed goods without investing in the latest process technology, upgrading to higher value products, investing in skills development, or, utilizing labour effectively. World prices could be met despite low productivity and high costs.

As stated earlier, Canada still has the highest share of exports in unprocessed and semi-processed natural resources of advanced countries. Usually, countries tend to have a declining share of resources of their overall world market share as the economy advances. Canada’s specialty inputs in products are mainly unprocessed and resource-based, such as ores, while other nations have significant exports of industrial parts and components. Canada has few machinery exports, its world share is dropping, and large trade deficits are characteristic. Furthermore, one study has shown indications of eroding
competitiveness outside the natural resource industry, as well as worsening trade balances. These are worrisome trends.

One may examine a specific example. The Canadian newsprint industry's historical success depended on factor abundance, the advantage of location, low energy costs and proximity to the U.S. Hence, there were few pressures on Canadian firms to innovate, systematically upgrade processing technology, and move to more sophisticated products. One study concluded that Canadian firms in this industry have a competitive disadvantage in labour costs and low productivity, partially due to old small mills, outdated, inefficient technology, and advancement based on seniority rather than training or skills, which reflect low upgrading. A good balance between advantage and disadvantage seems to be the best combination, especially, where the disadvantages that are overcome are ones that other firms elsewhere will face. Still, it is necessary to have access to appropriate human resources to support innovation in the industry, supportive home demand conditions, commitment to the industry and the quality of home demand.

2. Home Demand Composition

The mix and character of home buyer needs shapes how firms perceive, interpret and respond. Home demand can contribute

---

33 Ibid, pp. 43-44.
34 Ibid, p. 90.
35 Porter, p. 86.
to the competitive advantage of firms in two ways. First, where home demand gives local firms a clearer and/or earlier picture of international demand then the rivals. It is easier to perceive home market than foreign demand. Secondly, home demand also so contributes where it pressures local firms to innovate faster.

Characteristics

Home demand reflects many national attributes like population, climate, social norms, and the mix of other industries. There are important characteristics of home market demand. The most important determinant affecting such characteristics in a positive manner is domestic rivalry. Others include:

a) The structure of the industry segment’s demand;

b) The existence of sophisticated and demanding home buyers;

In Canada, there are few examples of consumer demand conditions providing significant impetus for firms to innovate and upgrade, even though there are favourable conditions for sophisticated demand, like a high per capita GDP, high private consumption and advertising. The following outline has been identified as characterizing Canadian consumer domestic demand. Canadians are often less sophisticated regarding product design and styling. They are less inclined to embrace novelty and invention than in Japan and the U.S. They are rarely at the cutting edge

\[\text{36 Ibid, p. 86.}\]

\[\text{37 Monitor, pp. 226-7.}\]
in demanding innovation; therefore, many products are introduced in the other countries like the U.S. before Canada, although Canadians are typically fast followers. Finally, there is a greater reluctance to pressure producers for innovation and change through more formal channels, for example, in making complaints than Americans, or. in terms of the strength of the consumer movement.\textsuperscript{38}

The characteristics of industrial buyers in Canada have, also, weakened the sophistication of home demand and disadvantaged industry competitiveness.\textsuperscript{39} Such buyers have tended towards a low-cost orientation which limits the scope of supplier innovation. Whereas in other countries that rely more on performance specifications and involve potential suppliers in the early stages of design process, Canadian firms typically rely on third party engineering firms to complete most of the design work. The detailed specs are then opened for tender to the lowest bidder; therefore, suppliers are only brought in to build to specifications, without incentives to innovate beyond.

Canadian firms tend toward conservative patterns of technology adoption by investing in "safer" assets and adopt new technology in a piecemeal fashion, or, are reluctant to test a prototype.\textsuperscript{40} In Scandinavia, on the other hand, pulp and paper

\textsuperscript{38} Ibid, p. 227.

\textsuperscript{39} Ibid, p. 228.

\textsuperscript{40} Monitor, p. 230.
producers work with equipment manufacturers to test new pieces of equipment.

In isolated industries, Canadian home demand has been sophisticated. One example which links to national passions is that of hockey. As a result Canadians are among the most sophisticated buyers which companies like Canstar must satisfy. Canstar is the world’s leading exporter of hockey skates.

c) Buyer needs which are anticipatory of those in other nations;

Anticipatory buyer needs may arise because a nation’s political or social values foreshadow needs that will ultimately emerge elsewhere, as in the case of American desire for convenience and credit, and the Swedish concern for the environment.\(^1\)

On the whole, Canadian government policies have reinforced reliance on basic factors and have allowed firms to avoid innovation, for example, in historically lagging behind in environmental protection.\(^2\) Recently, tougher regulations and standards by the federal government and some provinces are expected to create more pressures to innovate in pollution and process technology. On the other hand, tough Canadian regulations regarding the transport of explosives over long distances have resulted in firms innovating to develop explosives

\(^{1}\) Porter, pp. 91-92.

\(^{2}\) Monitor, pp. 92-94, 151.
that could be ready mixed on site. Demanding conditions can even be developed by the industry itself, as in the case of manufactured housing.

d) Although the existence of large and powerful buyers can be beneficial, a number of independent buyers creates a better environment for innovation. The high concentration levels in Canada mean that buyers can bargain away supplier profits, which inevitably constrains a supplier’s ability and incentive to innovate. For example, the Canadian auto assembly industry typically subjects, with some exceptions like Magna, parts suppliers to extremely low margins on short-term contracts; whereas, Japanese original equipment manufacturers work closely with suppliers over long periods of time. Powerful buyers can have a positive role in upgrading suppliers, typically when there is intense rivalry among customer firms and competition is driven, in part, by non-price criteria.

Widespread vertical integration in an industry leads to captive buying relationships that can dampen competitive pressures. Finally, government regulated monopoly buyers are another example of a limitation on the number of independent buyers.

e) Early penetration allows local firms to become established and saturation of the home market forces continuing innovation and competition and provides pressures to export or investment abroad.

\[43\] *Ibid*, p. 231.

29
Domestic demand may become internationalized. Mobile or multinational local buyers provide an advantage because the domestic buyer is also a foreign buyer. This situation creates an opportunity of establishing an overseas presence and may lower the perceived risk, as when Japanese auto parts suppliers followed Japanese automobile companies abroad.\textsuperscript{44} Secondly, domestic demand may get transmitted to or inculcated in foreign buyers through exports, or, foreigners coming to a nation, for example, for training and who may take back that nation's values. Finally, once a national image and recognition as an important competitor is established, a spillover effect is generated to benefit an industry.\textsuperscript{45} Industrially successful complementary products will create (or pull through) foreign demand for an industry's product and vice versa.

3. Related and Supporting Industries

a) Competitive Advantage in Supplier Industries

Competitive advantages in supplier industries creates advantages in downstream industry, like efficient access to the most cost-effective inputs and, especially, through ongoing coordination, which demonstrates the importance of linkages.\textsuperscript{46} Such linkages allow firms to perceive new methods and opportunities to apply new technology. It allows for quick

\textsuperscript{44}Porter, p. 98.

\textsuperscript{45}Ibid, p. 136.

\textsuperscript{46}Ibid, p. 101.
access to information, new ideas and supplier innovation. Innovation is further accelerated by the exchange of R&D and joint problem solving. The best relation is with a domestic supplier. 47

b) Competitive Advantage in Related Industries

Competitive advantages often lead to new competitive industries. A "related industry" involves an industry in which firms can co-ordinate or share activities in the value chain when competing, like the sharing of technological development, manufacture, distribution, marketing or service. Secondly, they involve products that are complementary, like copiers and faxes. Opportunities for information flow and technological interchange may arise, for example, through alliances, including distributional networks. 48 Also, the "pull through" effect in terms of further foreign demand may occur with products and followed by service providers.

Various factors influence the development of related and supporting industries. Specialized factor pools are transferable to related and supporting industries. Large or growing home demand structures facilitates growth, as does the deepening of supplier industries. Domestic rivalry encourages the formation of more specialized suppliers and related industries. The success of the Hollywood film industry is a case in point in

48 Ibid, p. 106.
which the number of specialized suppliers like special effects firms and costume designers have proliferated. Domestic rivalry can also channel global demand and can raise the standard of competition in supplier or related industries via entry and/or may encourage entering the world market.

Canadian industry clusters tend to be narrow and shallow compared to other advanced countries. Within the five leading export industry clusters, there is an absence of competitive machinery and equipment exports and the specialized inputs that do exist are basically of the unprocessed variety. Therefore, many inputs crucial to innovation and competitive advantage are imported.

Several causes of weak related and supplying industries have been identified. The preference to source from abroad has been identified as being due historically to Canada's reliance on foreign capital, which brought a degree of dependency on foreign entrepreneurs and access to foreign supporting industries, particularly, from the United States. Secondly, there are only a few cases where foreign companies have elected to locate their home base in Canada. Canadian equipment manufacturers are

---

Monitor, pp. 268-71.

Indeed, production in Canada has increasingly relied on imported technology. Davis has reported for the period 1972-84, a drop of over 27% in the employment of domestic Canadian technology by Canadian Manufacturers. Cited in Howse and Chandler; See, also, Monitor, p. 268.
often smaller and disadvantaged in terms of technology, distribution channels and financial stability.\textsuperscript{51}

The extent of vertical integration has lessened the incentive for potential new local suppliers to enter the industry. Underdeveloped linkages among diamonds (i.e. the determinants of competitive advantage among several industries or segments) has also been a factor as has buyer behaviour.

4. Firms, Strategy, Structure and Rivalry

National success occurs where the favoured modes of organization are well suited to industry sources of competitive advantage. Aspects of the nation such as attitudes regarding authority, interpersonal interaction norms, professional standards and norms of behaviour are important and grow out of the educational system, social and religious history, family structures and national conditions.\textsuperscript{52}

1) Goals

a) Company Goals

Company goals are most strongly determined by ownership structure, motivation of owners and holders of debt, corporate governance and the incentives regarding senior managers.\textsuperscript{53} The goals of public corporations reflect the characteristics of the

\textsuperscript{51}Monitor, p. 269.
\textsuperscript{52}Porter, p. 109.
\textsuperscript{53}Ibid, p. 110.
nation's public capital markets. Porter, in his ten nation study, gives an example. In Germany, most shares are held by institutions for long periods. Therefore, day-to-day stock prices are not important. In the U.S.A., on the other hand, as shares are held by institutions which are measured on a quarterly or annual price appreciation basis, rapid trading results. There is no long term capital gains exemption. Shareholders have little influence in management except through takeovers and there is a well functioning public and quasi-public market for risk capital. These factors contribute to a shorter term investment perspective.

Private companies play an important role in terms of this determinant and their goals are more complex than that of public corporations featuring close identification and commitment to the industry. The attitudes of debt holders to the extent that they hold equity in the firm may have significant stakes and may, therefore, play a role in corporate governance as in Germany, Switzerland and Japan. The concern is for long term health, not short term cash flow and interest coverage.

Industries have different requirements for funds, different risk profiles, different investment time horizons, different average sustained rates of return. Nations succeed where the goals of owners and managers match the needs of industry. Porter

---

"Ibid.

"Ibid, pp. 110-111.

"Ibid, p. 112."
provides two examples.*’ The German circumstances tend to favour industries requiring modest initial risk capital, but, heavy and sustained investment. The U.S. circumstances favour entry into new industries requiring risk capital and industry where incentives for annual profitability are consistent with competitive advantage.

The influence of capital markets varies with the need for funds. In an industry where closely held private firms are feasible, then a firm can succeed despite counterproductive goals of public capital markets; in other words, other parts of the "diamond" govern.* In Canada, the real cost of capital tends to be relatively high.

Perhaps one of the most disappointing features of business in Canada is the lack of a strong international orientation, with the partial exception of resource industries, which are heavily dependent on shipments to the U.S. A second matter of concern, as has been alluded to earlier, is the focus on cost based strategies, rather, than on innovation, upgrading and competing in more sophisticated products.

b) Goals of Individuals

Skills must be developed and efforts made to create and sustain competitive advantage. Some factors include the reward system, social values regarding work and motivation for financial

*’Ibid.

*”Ibid, p. 113.
gain. The American model of bonus compensation for individual performance has reinforced competitive advantage in some industries, but, detracts from others, particularly, those requiring long accumulation of skills and complex coordination.

In terms of the implications for manager and employee relations, many industries require ongoing investment, skills upgrading, a better understanding of industry and an exchange of ideas across functions. In other industries, firms succeed due to the brilliance/performance of a small group, which typifies the case regarding professionals, financial services and the movie industry.

Skills development, also, stems from professional or technical training and pride as is the case in Germany. Other important influences include: geographical preference of firms, attitudes toward risk taking and immigration (as outsiders tend to take more risks).

It has been argued, and casual observation would support the view, that Canadians tend to be less driven by the goal of acquiring wealth than Americans and more concerned with economic security. There is less performance-based compensation for Canadian managers and employees than in the U.S. and such compensation tends toward shorter term horizons. Taxation in Canada, while not unusually high by European standards, is higher than in the U.S. when one considers subnational taxation, and

---

deductions. This differential may affect the willingness of some
to work as long or as hard, or take risks and the highly skilled
or educated may go to the U.S. Some have argued that the
generous Canadian social support system has created some
disincentives to those who are able to work to actually work
and/or to improve skills, as has the low earned income levels at
which social assistance is reduced. Furthermore, most of the
expenditures go to income maintenance and not employment
promotion as in Germany and other European countries.

c) Influence of National Prestige or Priority of Goals

A nation’s success depends on types of education that the
most talented seek to obtain and where. Science, technology and
engineering are important to competitive advantage. Furthermore,
prestige can be important to sustain competitive advantage. If a
nation’s priorities shift away from success in an industry or
toward an idiosyncratic conception of economic progress, then
competitive advantage can be undermined due to a lack of talented
people. Prestige is also determined by national passions.
In Italy, this means fashion and in Japan it means electronics.

See, for example, Macdonald Commission, Vol 2, pp. 539-541; Howse and Chandler, pp. 249-251.

Porter, p. 115.
2. Domestic Rivalry

Porter's ten nation study shows a strong association between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry, even in smaller countries.\(^\text{62}\) As we have seen from several examples, such rivalry creates pressures to innovate and to seek additional scale by selling worldwide.

Empirical evidence runs counter to the national champion approach. Evidence showed that there were few national champions with virtually unrivalled domestic positions that were internationally competitive.\(^\text{63}\) Rather, these were often heavily subsidized and protected in a manner by which government distorted competition. Furthermore, domestic rivalry is better than foreign rivalry for improvement and innovation.\(^\text{64}\)

Little domestic rivalry often means that firms are content to rely on home markets, while strong domestic rivalry prepares firms for international rivalry and, also, builds barriers to foreign entries.\(^\text{65}\) Finally, a good domestic rivalry provides a check on government intervention that stifles innovation and competition as opposed to the pressures for assistance when there are only two domestic rivals.

\(^{\text{62}}\)See Porter generally.

\(^{\text{63}}\)Porter, p. 117.

\(^{\text{64}}\)Ibid, p. 118.

\(^{\text{65}}\)Ibid, p. 119.
A number of diamond influences affect the level of domestic rivalry. Demand conditions are important through buyers seeking multiple sources and which may, furthermore, encourage the entry of other firms or the buyer itself to enter the industry. New entrants may emerge from related and supporting industries who often have an advantage in entering downstream industries due to their skills and/or resources. Frequently, spinoffs occur or other entrants may compete. Specialized factor creation mechanisms may result in the spawning of new entrants.

As discussed in part earlier, Canada tends to be characterized by weak domestic rivalry. Canada has high levels of industry concentration and high aggregate concentration levels. An historically ineffective competition policy has left significant room for mergers. Interprovincial trade barriers compound the weaknesses of domestic rivalry by blunting it further.

Others have argued that the domestic orientation of Canadian firms and their slow upgrading has been encouraged by a limited exposure to foreign competition, particularly, due to the higher tariff levels, even after the Tokyo Round tariff reductions. As at the same time, it must be recognized that Canada has been an open economy characterized by high levels of foreign investment. As we will see later, the essential point is that the most typical types of foreign direct investment occurring in Canada

"Monitor, p. 301."
has not been as conducive to producing a competitive environment as would more direct forms of competition.

3. New Business Formation

The process of new business formation is an aspect of domestic rivalry and feeds the process of innovation. New companies compete in new segments and try new approaches. Often these are "outsiders" who are willing to take unconventional approaches. A healthy process of new business formation, also, opens up entry into supplier and related industries.

There are two methods of healthy new business formation. The first is through the establishment of new enterprises, for example, ideas received from university research, or, through spin-offs in which employees leave and form their own companies with new innovations. Such a process is more common in internationally competitive industries, like the U.S. microcomputer industry.

The second beneficial method is through internal diversification into new industries by established firms as opposed to acquisitions into unrelated fields. Successful internal diversification, common among Japan, Korea and German firms, is usually done through related diversification and where knowledge and/or assets are transferable.
B. The Role of Chance as a Variable

Chance events create discontinuities that allow shifts in competitive position and which can nullify advantages or create new ones. Such events have asymmetrical impacts on different nations, but, national attributes play a role in what events a nation can or will exploit. One foreign example of chance events is the apparel industry in Singapore, which took off after the West placed quotas on apparel from Hong Kong and Japan.

It is surprising and, perhaps, a little disappointing, the extent to which chance events have contributed substantially to the success of many of Canada’s internationally competitive, innovation-based industries. In the central office switch industry, U.S. regulatory decrees have been significant. The 1978 U.S. anti-trust suit against AT&T’s monopoly in provision of U.S. telecommunications service, opened up opportunities for the well positioned Northern Telecom to sell more of its office switches, primarily, on the basis of its innovative and advanced digital technology. U.S. Prohibition played a significant role in the creation of the Canadian whiskey industry.

Invention and entrepreneurship are at the heart of national advantage, but, chance plays a role. It is the diamond which provides the major influence to convert invention or insight into industry. A mere invention, with nothing more, will mean that other countries will apply the idea to industry, which explains why insulin is produced and sold on a large scale by in Denmark and the U.S. and not Canada.
The Paradigms of Competitive Advantage

Four basic paradigms by which the stage of a nation's competitive advantage may be assessed have been identified on the basis of a ten nation study. They are as follows:

i) Factor Driven

At this stage, the nation draws its advantage almost exclusively from the basic factors of production, like natural resources, favourable growing conditions and abundant inexpensive labour. As such, the range of industries in which that nation can compete is limited, and the industries in which they do compete is limited to competition based on price in industries/segments that employ unsophisticated technology, largely sourced from other nations. Such nations do not tend to have direct contact with end users, and their economies tend to be sensitive to world economic cycles, exchange rates and are vulnerable to loss of factor advantage and shifting industry leadership. Although some nations, like Canada, are prosperous at this stage, many more are not, and few manage to move beyond.

ii) Investment Driven Stage

The investment driven stage characterizes a nation and its firms that invest aggressively. Investment may occur in modern, efficient and large-scale facilities with the best technology

---

*Porter, pp. 545, 546, 552, 556.

available on global markets, or, to acquire more complex foreign products and process technology through licences, joint ventures and so on, which allows competition in more sophisticated industries. Although such technology is not leading edge, they are improved upon, including in ways relevant to one’s own product models.

Investment also occurs to upgrade factors, factor creation mechanisms and the creation of a modern infrastructure. Firms begin to access some international marketing channels and have some direct buyer contact to supplant relations with foreign firms. Domestic rivalry results in investment with respect to costs, quality, new models and modernization. Firms become risk takers and new entries result. Other parts of the diamond are still relatively weak, such as unsophisticated home demand and undeveloped related and supporting industries.

It is at this stage that the role of government may be substantial in a positive way, for example, in channelling scarce capital to particular industries as Korea has done; promoting risk taking; providing temporary protection; aiding in the construction of efficient scale facilities; stimulating and influencing the acquisition of foreign technology; and, in encouraging exports. Governments take a leading role in creating and upgrading factors, but, firms also begin to play a growing role. This model requires a national consensus that favours investment and long-term economic growth over current consumption and income distribution. Although some industries may be
initially favoured, a strong domestic rivalry must be ensured and any foreign protection must be temporary.

iii) Innovation Driven

This paradigm is characterized by dynamism in a wide range of industries. The mix of industries that can compete broadens and constantly upgrades, but, the specific industries and clusters will reflect a nation’s particular environment and history.

The diamond is a fully functioning system and is self-reinforcing. Consumer demand is increasingly sophisticated, new entrants feed rivalry, which accelerates innovation and world class supporting industries develop in important clusters and related industries emerge.

Competitive advantage based on factor costs is increasingly rare. Firms now create technology, and a favourable demand and supplier base. Firms have a global strategy and form global networks and international recognition increases through exports and foreign direct investment. Competition is based on differentiated industry segments and/or on the cost of production, not factor costs.

The government role is different in an innovation based competitive system. Direct intervention, like export subsidies, lose their relevance or effectiveness and may be a hindrance. The impetus to innovate, the necessary skills and signals that guide its direction must come largely from the private sector.
Government can no longer keep track of industry. The government may still play an indirect role in stimulating the creation of more advanced factors, improving the quality of domestic demand, encouraging new business formation and preserving domestic rivalry.

iv) Wealth Driven

The economy under this paradigm is driven by past wealth, which cannot be maintained because of the shift of motivations of investors, managers and individuals in ways that undermine investment and innovation. One must bear in mind that when an industry is in decline, momentum serves to mask the decline. Once the process has begun, it is hard to arrest because the mutual reinforcement of the diamond works in reverse. Here, there is ebbing rivalry, to sustain profits and not to enhance them. Powerful firms insulate themselves by influencing government policy.

There is a narrowing of the range of industry in which competitive advantage can be sustained and these are inadequate to employ the workforce in productive jobs and to support a rising standard of living.

The ten nation study shows that each nation has its own unique process of development due to its unique diamond circumstances and national history plays an important role in

---

shaping the base of skills, prevailing values and norms of behaviour, needs, tastes and preferences that underpin demand patterns and challenges. Economies first begin upgrading either from top (upstream industries) due to natural resource abundance, as in the case of Sweden, or, bottom (final consumption goods and services) as in Korea due to low wages. Strong positions in industrial and supporting functions (or middle industry) will emerge only late in the investment driven stage or early in the innovation driven stage as it requires a pre-existing strong indigenous base of companies and higher levels of technological capability.

Canada’s "old economic order" has been described as a distinctly Canadian economic system, with an internally consistent set of attitudes and behaviour in industry, labour and government, which has proved stable for some decades, but, has simultaneously reflected misallocation of the nation’s resources and significant potential wealth lost through inefficiency and a lack of innovation.

Abundant basic factors and market protection provided little pressure to upgrade and little investment in specialized and advanced factors had occurred. Firms competed on the basis of inward looking, cost based strategies and conservative goals. There has been a lack of vigorous local rivalry. Demand

\(^7\) Ibid, p. 562.

\(^7\) Monitor, pp. 139, 150.
conditions reflect risk averse, price dominated buyer behaviour. Related and supporting industries have been weak. Government policies have reinforced reliance on basic factors and have fostered a dependency on government and protectionism.

However, this "old order" has been disintegrating due to globalization. This process has been accelerated by FTA, NAFTA. The old order is no longer adequate, and Canadian industry possesses few capabilities necessary to sustain and enhance competitive advantage. Indeed, the "old order", as we have seen, has created barriers to upgrading.

Some Further Issues

One other factor that must be considered is the extent and nature of foreign ownership and control in Canada. Foreign controlled companies dominate many leading export clusters. The transportation equipment sector is the leading export cluster and has the highest level of foreign control (75 percent), as well as dominating petroleum/chemicals and having significant positions in food/beverages, material/metals and in the computer sector.\textsuperscript{72} Foreign controlled firms have a greater participation in trade than Canadian firms and the largest share of Canadian exports to the United States is intra-firm trade.\textsuperscript{73}

Furthermore, nearly one-half of manufactured assets in Canada are controlled by foreigners. Generally, it is accepted

\textsuperscript{72}\textit{Ibid}, pp. 25, 26, 35.

\textsuperscript{73}\textit{Ibid}, p. 48.
that foreign direct investment (f.d.i.) is a good thing by bringing into the country capital, skills and technology that normally boost productivity. The Auto-Pact has been positive in these respects. Some types of f.d.i. are better than others for productivity. In Canada, factor sourcing f.d.i. is usually combined with competition based on advantages elsewhere. Such an approach is not as beneficial to Canada as f.d.i. to source selectively advanced and specialized factors as German and Swiss firms do in the U.S. with respect to electronics and software. Market access investments (jumping the tariff wall), due to tariffs and Non-Tariff Barrier's, usually means that competitive advantage is at home. By far, the most beneficial type of f.d.i. are regional or global home bases for product lines or business units. The home base is where productivity growth is based, involving core research and sophisticated production. The ability to attract and retain home bases depends on a healthy local diamond.

Although some f.d.i. in Canada is in the form of home bases, such as ICI Explosives Canada and Pratt and Whitney regarding turboprop and smaller turbofoam engines. much more of it is in the form of factor sourcing and market access.

Favourable diamonds can cause Canadian operations to upgrade to home bases, for example, Du Pont Canada has units in Canada with world product mandates. Furthermore, although the majority of Canadian home bases are located in Canada, firms have been shifting sophisticated activities elsewhere. With freer trade,
firms will locate activities in nations with true economic advantage, whereas, before, firms may have located due to trade agreements and protectionism.

The extent and type of foreign ownership hold significant implications for the cluster theory since links are across border, rather than among firms within Canada. Secondly, branch plant type firms will tend to underinvest in such important areas as R&D and in-firm training as these tend to be done at the home base.

One significant implication for a resource based economy and high levels of foreign ownership not of the "home-base" variety mean that much of the R&D and high value added work is done elsewhere, particularly in the U.S. The same is true of advanced skills training.

These issues are not the only barriers to good industrial policy - federalism also can have important impacts, as we will see from Part II of this thesis on establishing structures that facilitate the creation and implementation of industrial policy in Canada. At this point, one important example of how federalism may give particular salience to such barriers is in respect of geographical clustering of industries. Clusters run counter to revered federalism policies - regional equity and the imperatives of regional economic development, which have resulted in policies favouring diversification and not concentrations of industrial activity. These types of debates, also, occur at the intragovernmental level as can be seen by the history of
departmental restructurings in an attempt to reconcile those competing interests. However, federalism gives this tension and debate greater salience at the intergovernmental level through the division of jurisdiction by being articulated by constitutionally ordained levels of government. Furthermore, interprovincial competition to attract investment, through large incentives for firms to locate within their borders, is antithetical to the theory of geographical clustering.
PART II: CANADIAN FEDERALISM

Ch II: Political Economy and Institutional Framework

I) To Coordinate or Not

Given that Canada lacks an effective bicameral legislature at the federal level, federal-provincial adjustment tends to take place, to a disproportionate degree, at the intergovernmental level and not intragovernmentally. As we will later see, each type of blended/coordinated governmental action has taken place at one time or another in areas of interest to industrial policy. The important question is whether there should be any federal-provincial or interprovincial coordination in the area of industrial policy, or, is the process of each level of government acting unilaterally and/or competing with one another the best option? Given the vast aggregation of subject matter which may comprise industrial policy, and the vast extent of interdependence and overlap, it is unrealistic to support a watertight compartment approach, although disentanglement of responsibilities may occur in isolated policy areas.

This question presumes that there is even a federal role. It is this preliminary question that will be dealt with next by examining subnational economies and the industrial policies they have given rise to in the past as a lead into a discussion on whether a federal role exists.
1. Subnational Economies

It would be almost inconceivable for a developed country with a large territory not to have a number of sub-national economies determined by geography, location, climate, history, distinct population characteristics. Canada is no exception.

The Western provinces are rich in agriculture and in natural resources like oil, gas, potash and, in British Columbia, forestry. In Alberta, the oil boom created substantial changes in its economy, which was to negatively effect other traditional sectors, like feedlot, as it drew to it a disproportionate share of the province’s labour supply and bid up prices for production factors to a point which other industries could not compete.\(^7\) Saskatchewan is a dominant wheat producer, and exploits its new staples such as potash. British Columbia is a resource export economy, whose major industry is forestry. Nonmetallic minerals are also important. Manitoba has been growing less rapidly and has no large resource development except hydro and potash.

The economy of the Atlantic provinces is mixed, with forestry, agriculture, fishing, small scale manufacturing and the usual service industries. Its small operations and relative isolation from major economic centres means that it has a less productive and weaker economy.

Ontario and Quebec are more diversified from an economic perspective, especially the former in relation to industry and

manufacturing, and contain the largest commercial and financial centres. Ontario, also, has its resource developments. Quebec has a disproportionate share of uncompetitive manufacturing sectors in nondurable goods like forest products, clothing, textiles and food processing.

**Provincial Industrial Strategies**

Differing political economies have shaped differing provincial industrial strategies and economic policies. This is so even though the theme of government action among the provinces had been similar in the 1970's and early 80's.\(^7\)

Michael Jenkin has argued that the provinces of the West and Eastern periphery became aware of the importance of obtaining greater benefits from their resources and the need for sustained economic development for local interests.\(^6\) This awareness has given rise to such issues as resource management and diversification based on existing strengths (linkages), and an appreciation of the essential differences of economic interests between the centre and the periphery.\(^7\) Yet the policies even among the periphery provinces had differed.

---

\(^7\)Today, the actual themes of provincial industrial strategies, properly speaking, are much less clear, but, as indicated earlier, what is clear is that the policy instruments have changed.


\(^7\)Ibid, pp. 63-64.
Due to Alberta's dependency on oil (and gas) and the fact that it is nonrenewable, the goal of Albertan governments has been to stimulate and diversify the local economy, especially by small business, for example, in food processing, further upgrading of natural resources, the financial industry, forestry and tourism. Policy instruments have combined private and public sector capital in government sponsored corporations, joint ventures, administrative pressures and government ownership. Government has aided the promotion of technology to enhance natural resource exploitation, such as the Alberta Oil Sands Technology and Research Authority. Research and Development has been undertaken to harness public and private technical resources to develop key economic sectors. It emphasizes energy resources, higher level technological assistance to industry and the development of capacity in emerging technologies, especially applicable to Alberta, such as biotechnology to develop crops suitable to the province's short growing season and exploiting existing technological strengths like telecommunications.\(^7\)

Due to the concentration of a few major actors with an inordinate effect on the provincial economy, Albertan governments have had to manage project timing so as to avoid severe dislocations. The enormous revenues thereby derived had led to the almost happy problem of finding ways to invest it, particularly, through the Alberta Heritage Savings Trust Fund, to

\(^{7\text{Ibid. p. 56.}}\)
provide for diversification or to avoid upsetting the stability of the provincial economy.

Saskatchewan displayed less emphasis on diversification, perhaps, due to disappointing experiences after World War II. There was an active development policy to encourage manufacturing and resource processing, but due to the small base of large local companies and a lack of interest by foreign investors, most efforts are directed at small local entrepreneurs. The Saskatchewan government has been attempting to encourage the investments of high-tech firms through financial assistance, the development of research parks and through provincial research. During the 70's and early 80's, the thrust of government industrial development has been in favouring backward linkages to resource production like agricultural machinery.

In British Columbia, policies have been primarily directed to assist the main industries of forestry and nonmetallic minerals, especially, by supporting infrastructure projects like transportation due to the rugged terrain. Recently, more emphasis has been directed to resource management and diversification to overcome the cyclical nature of resource based economy. The Pacific Rim has been growing in importance for B.C., especially Japan. Part of B.C.'s strategy continues to be the expansion of export markets.

---

60 Ibid, p. 60.
The Atlantic provinces constitute a slow growth region and are the major beneficiaries of federal regional economic development, special aid and equalization. Nova Scotia is the most populous and the most industrially developed. Newfoundland is somewhat removed from the Maritimes both geographically and regarding policy preferences. Until recently, the East had little in the way of newly found natural resources upon which to base economic development. However, there is hope offshore oil for Newfoundland and Nova Scotia will make payoffs.

With respect to the "centre" provinces, the extent of foreign ownership and control leads to some weaknesses in economic structure in which most of the high value added work is done in the U.S., and relatively few U.S. subsidiaries have global mandates. Traditionally, the extent of Ontario's industrial, or rather economic development, has basically focused on attempting to provide a good and stable economic environment, on emphasizing export promotion and import replacement, competition for investment, and reflected in a concern over the fragmentation of the Canadian economic union. Since then, there have been some major efforts to develop high technology, but the "catch all" nature of the relevant R&D has meant that there was no clear overall strategy. For a survey of programs and policy see the work of Hugh Thorburn.

---

\(^{a1}\) Ibid, p. 74.

\(^{a2}\) Thorburn, pp. 154-160.
Although Quebec has a disproportionate share of uncompetitive manufacturing sectors in nondurable goods, Quebec's comprehensive industrial strategy is primarily a response to the socio-economic circumstances of the 50's and 60's in which anglophones dominated the world of business in Quebec. The strategy has featured a greater government role to strengthen and extend resource linkages and to ensure more processing in the province, especially through control over hydroelectricity, which is also a major export. The financial infrastructure has been built up through such initiatives as the Caisse de dépôt et de placement, Caisse Populaires and the Quebec Stock Savings Plan. Other measures included research and development regarding science and technology, the operation of research councils, and even a mineral research centre. Since the Quebec government has seen that the flourishing of its society is dependent on the flourishing of its economy, it has been a supporter of international liberalized trade, particularly, with the U.S.

2. Is there a federal role?

What are we to make of the fact that effective industrial policy must be directed at specific industries and even industry sectors as each will have differing bases of competitive advantage? Furthermore, the importance of geographical clusters has been stressed in the development and maintenance of competitive advantage. Some might even argue that the existence
of differing regional economies makes talking about a national economy difficult, or even impossible.

However, there is nothing inherent preventing or rendering relatively uncompetitive the federal government creating and implementing industrial policies as opposed to the provinces. It is, rather, a function of the collection of information, the competence to process that information and an institutional structure to design and implement policy. Indeed, many would argue that a unitary state would be more efficient in creating and implementing industrial policy than a federation.

The relevant question is not an abstract one at all, particularly, in asking a (contradictory and convoluted) question such as whether in a state of nature, without federalism, would the provinces be more efficient at devising and implementing industrial policy than the federal government? Rather, the relevant question must always be reality-based focusing on the existence of Canadian federalism and the state of the (industrial) economy as it exists today and determined on a case by case basis. This state of affairs factors in the existence of constitutionally ordained provincial and federal governments; a division of jurisdiction which is difficult, if not impossible, to alter in contemporary times through constitutional amendment; citizen conceptions of political community; citizen and group views as to industrial development and so on. All of this is not to say that changes cannot or should not be made as to how
industrial policy is developed or implemented. However, this is, in essence, quite a different question.

Thus, to ask whether there is a federal role in industrial policy is to take insufficient account of these reality based factors, as, of course, there is such a role. First and foremost, one must recognize that the federal government has substantial authority and institutional competence to develop and implement industrial policy. This state of affairs emanates from the fact that the federal government is responsible for, and seen by its citizens to be responsible for the overall management of the economy, particularly, arising from the division of jurisdiction and the existence of the federal spending power. The following is a non-exhaustive list of powers the federal government has to create and implement industrial strategy.

1) Infrastructure
   a) Transportation
      i) Aeronautics is a matter of exclusive federal authority under the Peace Order and Good Government (POGG) power. The cases of In re Aeronautics," and Johannesson v. West St. Paul," stand for the proposition that if some aspects of aeronautics were not within federal enumerated heads, then they would be supported under the national interest branch of POGG and the subject-matter is exclusively federal (as airports are not

---


severable from air flights). Although provinces cannot prohibit
the building of aerodromes formally, it can do so practically as
provinces control roads to and servicing of lots. It is
possible, as Norrie, Simeon and Krasnick have pointed out, that
federal attempts to use airline regulation as an instrument of
national economic development can be frustrated by provincial
shareholding in important regional airlines.**

ii) Railway and Trucking - the federal government has
sufficient regulatory jurisdiction under s. 92(10) of the
Constitution Act, 1867 to control, or at least substantially
affect, this area. In terms of transportation, A. - G. of Ontario
v. Winner decided that an undertaking is federal if it is as a
whole in pith and substance interconnecting or
interprovincial.** In practice, federal powers over trucking
have been delegated to provincial regulatory agencies resulting
in a system of regulations that vary from province to province.

b) Telecommunications

The goal of communications is to link citizens spread out
within Canada, facilitating exchange of goods and services and
ideas and, therefore, has some connection with transportation.

**K. Norrie, R. Simeon and M. Krasnick (eds.), Federalism
and Economic Union, (Toronto: University of Toronto Press,

**[1954] A.C. 541 (P.C.)
Under s. 92(10), the federal government has exclusive jurisdiction over telecommunications whether or not it occupies the field. However, provinces may operate telecommunication enterprises where they limit their operations to programs locally produced by them for transmission over domestic lines to their local subscribers; whereas, if extra-provincial signals are used, the federal government regulates the enterprise. See Alberta Government Telephones v. Canada (CRTC). The test is not whether the service involved (in cable distribution) is limited to intra-provincial subscribers or operated by a local concern, rather, it focuses on what the service consists of. See A.G.T., supra.

In Irwin Toy v. Quebec (A.-G.), the Supreme Court held that where the provincial legislation does not purport to apply to a federal undertaking, its incidental effect, even upon a vital part, does not normally render provincial legislation ultra vires. Provincial legislation will be struck down on any one or more of three grounds:

1) Impairment of a vital part of a federal undertaking;

2) Is the undertaking nevertheless "sterilized in all its functions and activities"; or

3) Paramountcy Doctrine - Is there an actual conflict in the operation of federal and provincial law and

---


there is a practical and functional incompatibility.

In other words, the provinces have broad room for regulation that does not purport to apply to a federal undertaking as it is easy to pass the "sterilized" test and the paramountcy doctrine is narrowly construed.

c) Financial Institutions: Debt and Capital

The "four pillars" had been limited in the sources of savings they could tap and in the types of investment each could make. The federal government has jurisdiction over banks, while the provinces control securities and the regulation over trust companies and insurance companies is more complex. The current arrangements have proved adequate for effective regulation, however, the "four pillars" are now converging.

e) Fisheries

The fisheries fall largely under federal jurisdiction, whereas, processing has provincial implications as does ownership of land adjoining water. The federal government has delegated responsibility to the province over inland waters freshwater fishing. Recently, the international aspects of overfishing has become a critical issue and one over which the federal government has authority to act.

---

Norrie, Simeon and Krasnick, p. 318.
f) Framework Policies

Important "framework" policies such as competition laws, intellectual property and bankruptcy all have important implications for the industrial policy especially regarding firms, strategy, structure and rivalry and are areas under federal jurisdiction. The first two are expressly granted to the federal government under subsections 91(21), (22) and (23) respectively. Competition laws can be made pursuant to the federal criminal law powers, as done in the past. However, more effective competition laws are ones which may attract civil law remedies, and the case of General Motors of Canada v. City National Leasing established federal authority to devise such a scheme.†


g) Natural Resources

Jurisdiction over natural resources is mixed. Ownership over territorial waters (continental shelf) falls under federal jurisdiction.‡ This situation illustrates how judicial decisions may come to play a part in executive federalism. As Peter Russell has stated:

The political strength of provincialism in Canada is such that federal politicians have not gone ahead and exercised the total and exclusive control over offshore

mineral resources to which by virtue of court decisions, they are entitled.

Indeed, the result of the process was the Atlantic Accord which would give the Newfoundland government a measure of control it would otherwise not have been entitled to.

The s. 91(A) constitutional amendment, again in response to court decisions, has given certain jurisdiction over the development, conservation and management of primary production of non-renewable natural resources and electrical energy; as well as, some ability to make certain limited laws in relation to export (with federal paramountcy) and indirect taxation where such taxation does not constitute discrimination from province to province. Sections 91 and 92 apply when such articles cease to be of primary production and become articles of commerce.

Finally the ability to regulate and control also comes with the ownership of Crown lands, be they federal or provincial. The area of the environment is also mixed. Its breakdown will not examined in any detail.

The federal spending power has been an important tool for industrial policy. This power has its origins in Employment and Social Insurance Act Reference, and is a combination of federal jurisdiction over s. 91(1A) Public Debt and Property and s. 102

---

regarding the Consolidated Revenue Fund.\textsuperscript{34} The federal government may spend in areas of exclusive provincial jurisdiction so long as such spending does not amount to a regulatory scheme falling within provincial powers - of course, the provinces could always refuse such spending. Actions that may be taken pursuant to this power include government procurement, subsidies, support for R&D and so on. The provinces also have their spending power to put to much the same uses within the province.

The provinces can also develop their industrial policies through their control over local industries, municipal affairs and, perhaps, most importantly their jurisdiction over education.

Any of a number of further examples of powers that may be used in relation to industrial policy may be cited such as corporate law, corporate and personal taxation and so on. However, although this part of the discussion initially started out as a non-exhaustive list of various powers the federal government had to create and implement industrial policy, the conclusion that one must draw is that both levels have ample authority to involve themselves in industrial policy - indeed, so much so that it makes little sense to speak about watertight

compartments, let alone that the federal government has no role in industrial policy.

Furthermore, taking what we know of industry, if one cannot say a national industrial economy exists, neither can one say that a provincial economy exists because industrial development and the clusters that are produced do not coincide with provincial boundaries either. Even if they did, all of this is not to say that provincial governments would necessarily be better at creating and implementing industrial policy than the federal government, nor that greater gains could not be achieved through the development of a national (industrial) economy.

**Thoughts on Coordination**

Having concluded that there is a strong federal role in industrial policy, the question becomes: what are the perceived benefits of co-ordinating intergovernmental action that outweigh the benefits of competitive or independent governments? Albert Breton has argued that competition between centres of power (like federal and provincial governments and bureaucracies) forges a strong behavioral connection between the quantity/quality of goods/services supplied and taxprices citizens must pay, which minimizes utility losses. Furthermore, independently acting governments enhance the autonomy of federal and provincial

---

**Albert Breton, Competitive Governments: An Economic Theory of Politics and Public Finance. (Cambridge: Cambridge University Press, 1996). Of course, the nature of the competition itself must be stable to prevent self-destructive behaviour.**
governments and fosters accountability to the public since the legislating/acting government can be easily identified. Coordinated government action can be both interprovincial and federal-provincial.

To answer the question of why coordination may be desirable is not an easy task, particularly as an abstract exercise. Without attempting an exhaustive list, the following are important factors to consider in no particular order:

1. Are the costs of duplication/overlap, in a given area or in overall terms so large as to override the benefits of unilateral and independent government action.

2. Do the externalities/spillovers regarding a certain issue justify a co-ordinated approach. Environmental considerations such as pollution affecting other provinces would clearly be a candidate under this consideration.

3. Is co-ordination even possible/practicable under the circumstances. If so, what are its costs and will it likely produce the desired results.

4. Is there an inability of a province or federal government acting alone to solve the problem. Such inability may arise due to a lack of fiscal resources, competence, divided jurisdiction etc.

5. Is there destructive competition among the provinces or with the federal government. For example, interprovincial competition for investment is antithetical to geographical clustering and allows for a firm to play off one government against another to sweeten the incentives.

6. Perhaps, one might consider political factors such as whether and to what extent the proposed unilateralism may cause friction between the various governments. Or, that the particular federal spending is occurring in areas of provincial jurisdiction.

It must be cautioned that this list of factors must not be applied rigidly as a jurisprudential test might be. Rather, one
should bear them in mind when considering the specific policy area and not to engage in some abstract exercise.

II. Processes of Federalism

The first step in the analysis on institutional framework is to characterize the processes of government action so as to be able to clearly segregate and apply/recognize each type. The main distinction to be drawn is between executive federalism and other processes of federalism.

a) Executive Federalism

One of Canada’s leading federalism scholars, D.V. Smiley, defined executive federalism as the "relations between elected and appointed officials of the two orders of government in federal-provincial interaction." More specifically, I take, as a starting point, the description given by J. Stephan Dupré of executive federalism whereby:

executive and legislative institutions, through the constitutional conventions of responsible government are fused in such a manner that what Thomas Hockin calls "the collective central energizing executive" (Cabinet) is the "key engine of the state" within each of the federal and provincial levels of government.

Thus, the processes of executive federalism, as contrasted to other processes of federalism, such as judicial federalism or

---


constitutional federalism (to be explained later), involve the interactions of the federal and provincial levels of government, which are driven, controlled, and usually determined, by the cabinets of each of the respective constitutional levels of government. Such a process, of course, may (and does) involve the interactions of the relevant institutions and bureaucracies of the two levels of government who are subordinated to their respective cabinets. As such, unless another process of federalism can be brought to bear as an outside influence, like a constitutional challenge, executive federalism will be determined by the cabinets of the two levels of government as cabinets will, generally speaking, ultimately drive the legislative process, particularly, in the context of intergovernmental relations.

b) Other Processes of Federalism

i) Unilateralism

The domain of non-executive federalism may take several forms. The first domain of non-executive federalism is the unilateral exercise of power. The essential element is the lack of consultation or agreement with the other level of government and may be made within one’s jurisdiction pursuant to the division of jurisdiction, or, may be ultra vires that level of government which is then subject to challenge under the Constitution pursuant to the process of judicial federalism. An example of the former may be the federal government creating priorities for distribution under bankruptcy, or, the provinces

69
making laws in relation to the insurance industry. An example of ultra vires legislation may be the federal government purporting to make regulations in pith and substance regarding a local industry, such as in relation to the labelling and packaging of beer*; or, the provinces creating a tax that is in effect an export tax on services or non-natural resource goods.***

For some, 'unilateralism', also, has a more pejorative sense in the context of intergovernmental relations (and executive federalism):

[Given the] circumstances of built in rigidities and vetoes, it is scarcely surprising that federal and provincial political élites increasingly resort to a unilateralism of 'act first and pick up the pieces afterwards.'**

Some examples of federal government unilateralism are Ottawa's extensive program of wage and price controls introduced as a bill in 1976 to combat inflation, and the unilateral change made to the Canada Health Act prohibiting extra-billing. In the context of regional economic development, the second phase of DREE was motivated by the federal government seeking to make its involvement in regional economic development more visible, therefore, unilaterally decided to take more of a direct delivery

---


approach. The provinces have unilaterally become involved in many areas of federal jurisdiction like Quebec and Alberta asserting a right to deal directly with foreign governments on a variety of issues and involving themselves in international trade and commerce. In the end, competing unilateralisms can destroy civility, undermine the spirit of the constitution and encourage further competing unilateralisms. As noted, Albert Breton has provided a contrary view on unilateralism and intergovernmental competition.

ii) The Constitution

The Constitution of Canada is supreme law in Canada and any law made inconsistent with it is of no force and effect. As such, the legitimacy of the constitution has a locus lying outside of the realm of executive federalism. The two aspects of this process are Constitution enforcing, the legal aspect of which will be the subject of discussion in the next section, and constitution making. In terms of constitutional amendment, the formal law of the constitution has always been that such amendment is formally a matter requiring federal and provincial government action after the passing of the 1982 Constitution Act (or, by Resolution of the federal Parliament prior to that time).

---

However, the process of Constitution making has attracted a visible, vociferous participation by public groups who have come to expect to be heard when the Constitution is on the negotiating table. The significance of public participation and constitutional convention will be discussed later.

iii) Constitutional Enforcement and Judicial Federalism

Judicial federalism is a process whereby the judiciary plays the role of umpire in the federal system in reviewing the vires of legislation enacted by either level of government. The vires of government action is determined by the Constitution, which is legally superior to and primary over that of the act of any government. Initially, the "legal" basis of this power was derived from the doctrine of paramountcy and since the Constitution Act, 1867, was, in form, a British statute, any colonial law inconsistent with that Act would be held to be outside its jurisdiction, or, ultra vires and of no force or effect. Since the repeal of the Colonial Laws Validity Act, the court has continued to play the umpire role between the federal and provincial governments. As such, in practice, judicial federalism did not evolve as an instrument of imperial control of Canadian affairs, but, rather a practical device for delineating powers respecting the two levels of government. It must be borne in mind that the process of judicial federalism is fully available to governments and private citizens with standing to
challenge, or, participation is available to such parties as may satisfy the requirements for intervenor status.

There is no clear delineation between federal and provincial jurisdiction, especially, when one considers the meaning of, and interaction between, such broad federal powers as the power over peace, order and good government, s.91(2) Trade and Commerce, s.91(27) criminal law power and the provincial powers of s. 92(13) property and civil rights and s. 92(16). Clearly, the powers overlap and if read broadly, either ss. 91 or 92 would render the other set of powers nugatory. Therefore, one set of powers has to be read in light of the other to maintain an acceptable balance in light of contemporary circumstances.102 One cannot see judicial federalism as a process removed from all others. Even as a matter of constitutional interpretation, the judiciary must contend with issues that had never been, nor could have been, contemplated by the framers of the Constitution and these issues themselves involve an overlapping of jurisdiction and an increased degree of interdependence.

On the other hand, legal results of judicial federalism (court decisions) have important effects on the political processes of federalism. The legal results of court decisions must always be borne in mind by legislatures or their laws risk being struck down by Courts. Restrictive decisions affecting one level of government could have the result of frustrating attempts

to deal with issues, as can be seen in the criticism levied at the decisions of the Judicial Committee of the Privy Council, for example, in striking down federal "New Deal" legislation enacted as a response to the Depression. An ultra vires ruling, if not circumvented by more careful legislative drafting, may exclude that level of government from a policy field. For example, in levying sales taxes, the provinces faced the not insignificant burden of crafting legislation in such a manner as to make the tax direct, in the sense of not ultimately being passed on to consumers. Through carefully crafting legislation, the province in question deemed the retailer to be the agent of the province for collection of sales taxes in the case of tobacco.\textsuperscript{102} As such, the tax was technically demanded from persons from whom the tax itself was to be collected. Secondly, even if a given level of government is not excluded from a given policy field, judicial decisions will certainly influence the choice of instruments available to that government in that field.\textsuperscript{104}

The legal results of judicial decisions are not the only aspect of the significance of such decisions. To be sure, these legal aspects may not even be the most important ones. In terms of the purely legal consequences of judicial decisions, one must keep in mind D.V. Smiley's observation that "[the] federal aspects of the Canadian constitution, using that term in its broadest sense, have come less to be what that Courts say they

\footnote{\textit{Atlantic Smoke Shops v. Conlon}, [1943] A.C. 550 (P.C.).}

\footnote{Russell, in Olling and Westmacott, p. 94.}
are than what the federal cabinets and bureaucracies in a continuous series of formal and informal interactions determine them to be."\textsuperscript{105} Indeed, the development of the critically important policy areas of social welfare, post-secondary education and hospital insurance and health care has occurred, and continues to occur, with relatively limited judicial involvement. As W.R. Lederman has pointed out, judicial interpretation remains important in the context where federal and provincial governments cannot agree on a particular measure of co-operative action, the Courts may be called upon to decide what legislative body has power to do what,\textsuperscript{106} even when the rules of the game themselves are in question.\textsuperscript{107}

Secondly, judicial decisions are a "primary element in determining the bargaining power of the federal government on the one hand, and the provincial governments on the other."\textsuperscript{108} Peter Russell has made the same point that won or lost, constitutional cases represent constitutional power and become a resource for bargaining governments, just as popularity or a good international climate are resource.\textsuperscript{109}

\textsuperscript{105}Smiley, p. 27.


\textsuperscript{107}See, for example, A.G. for Manitoba et.al. v. A.G. of Canada et.al. (Patriation Reference), [1981] 1 S.C.R. 753.

\textsuperscript{108}Lederman, p. 410.

\textsuperscript{109}Russell, in Olling and Westmacott, p. 94.
In short, "executive federalism" and "judicial federalism" are not mutually exclusive processes and in the proliferation of constitutional litigation after 1975, both levels of government have attempted to strengthen their bargaining positions against each other by resorting to the courts.\footnote{Peter Russell, R. Knopff and T. Morton, \textit{Federalism and the Charter: Leading Constitutional Decisions}, (Ottawa: Carleton University Press, 1989), p. 21.}

A less significant, but recently growing, element of judicial federalism in Canada, is that, assuming a legislature has acted with its sphere of power, the court may be called upon to decide whether it has, nonetheless, violated the Charter of Rights and Freedoms in one of its "federalism" provisions. Under the directly federal provisions of the Charter, one might include s. 6 mobility rights and s. 36. The other rights can be thought of as individual and group based, rather than 'federal' in nature. To date, only s. 6 has received legal attention.\footnote{See \textit{Black v. Law Society of Alberta} (1989), 58 D.L.R. (4th) 317.}

A third aspect of judicial federalism, in addition to division of powers cases or those regarding the federalism aspects of the Charter, is the interpretation of the economic union provision of the \textit{Constitution Act, 1867} contained in s. 121 which states:

s. 121 All Articles of Growth, Produce or Manufacture of any one of the Provinces shall from and after the Union be admitted free into each of the other Provinces.
Given the narrow scope accorded to this provision, which acts as a brake on the ability of provincial (and, perhaps, federal) governments to create barriers, many significant non-tariff barriers (NTBs) have been erected and many of them are no less effective at distorting trade than the tariff/customs type duties.\textsuperscript{112}

\textbf{iv) Constitutional Convention}

Another area falling outside the domain of executive federalism is that of constitutional convention. Once established, the locus of its legitimacy lies outside of what Cabinets may do, decide, or desire until the convention is changed. The leading case considering the matter of Constitutional Convention was the 	extit{Patriation Reference} decision:

The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period.\textsuperscript{113}

Such rules are not likely to become directly relevant to the area of industrial policy, so a discussion of them will be omitted.

\textbf{v) Development of a Rules-Based Regime}

Measures agreed to in the context of executive federalism pursuant to a federal-provincial agreement cannot be said to bind

\textsuperscript{112}For case law on s. 121 see, for example, 	extit{Gold Seal}(1921), 62 S.C.R. 424; 	extit{Atlantic Smoke Shops v. Conlon}, supra; 	extit{Murphy v. C.P.R.}, [1958] S.C.R. 626.

\textsuperscript{113}supra, at p. 880.
the respective levels of government legally to take certain action, or to refrain from taking certain action, as it is always Parliament or the legislature that is sovereign and the intergovernmental structure remains the inferior body.\textsuperscript{11} It may be valid for a federal-provincial government to make regulations binding on private citizens, but, that is another matter. The most that can ultimately be said is that Parliament or several of the legislatures may view themselves to be bound by the determinations or directives of a federal-provincial body. Otherwise, Parliament or the legislature would be abrogating its law-making function and sovereignty to a body never invested with such power under the Constitution. This situation is so even where legislation was passed to defer to the determinations or directives of such body. Accordingly, under the Canadian Constitution, resort could not be had to the courts to overturn a validly passed and otherwise constitutional Act of Parliament or of the legislature on the basis that it may, in some way, be repugnant to the decisions or directives of an intergovernmental body.

Still, the very fact that the federal and provincial governments have created a set of rules, through legislation or constitutional convention or, perhaps, even through actions

falling short of constitutional convention, against which the legitimacy of their action may by measured, is a departure from executive federalism. The reason is that the referent of legitimacy is no longer the views or action of federal and provincial governments at a given time, but, the rules themselves, even if in a Constitutional (and, ultimately, legal) sense, these governments are not so bound. For example, a Parliament or legislature, having given its consent to be bound to such a rules-based regime through legislation, may subsequently revoke such legislation.

Each regime so constituted must be examined on its own terms to determine the precise extent to which executive federalism may have been departed from. To the extent that an established regime imposes constraints or obligations on the unconstrained ability of the federal and provincial governments to act through intergovernmental relations, including a challenge based on the Constitution of Canada, one may conclude that executive federalism has been departed from.\footnote{Or, perhaps, that it was tried and failed.}

Secondly, while the element of public participation is not an element of executive federalism, it is not necessarily inconsistent with it. A federal-provincial body operating under its mandate may voluntarily choose to permit some form of public participation. The question will always be whether, and to what extent, is such public participation mandated by some rules-based regime, based in law or constitutional convention, for example,
and what is the nature of such participation. Again, there is a range of possibilities, each departing from executive federalism to varying degrees, and operating as a constraint on cabinets. One may imagine a procedural requirement of some sort of public participation before a decision could be made. One could, also, imagine a regime of public participation in determining the actual outputs pursuant to the federal-provincial agreement, or, a private party role in enforcement or dispute resolution.

II) Representation of Values, Regional Interests and Organizational Interests.

Having discussed the various processes of federalism, this section discusses how important interests are articulated within the Canadian federalism processes. Governments represent communities, their own institutional and organizational interests, regional interests and which help to explain the importance of the provinces. A second value that must be considered when discussing how solutions to problems may be structured within Canadian federalism is the often neglected one of Democracy and Accountability.

a) Government Representation

Communities

In having outlined the various processes of Canadian federalism, one should bear in mind the representation of values that are entailed in a federal context. Clearly, the interactions within the Canadian federal system entail the
representation of various interests. These interests consist of various values important in the context of Canada. The following outline refers to government representation arising as a consequence of the form of federalism. The first value is the pan-Canadian view of community, which recognizes that there are diverse elements in the Canadian polity, but, the central government is regarded as being best able to represent and accommodate diversity. The "provincialist" ideas generates division of powers proposals and views of community that are the flip side of those advanced under the pan-Canadian ideal in favour of the province. Quebec has the added element of a distinct language and identity. Many citizens of Quebec look not to Ottawa, but, the Quebec government as their "natural" level of government, and their ideas of community are as much or more related to Quebec than to Canada. These values and conceptions are directly represented by the federal government and/or the relevant provincial government, or both, as the case may be.

_Institutional and Organizational Interests_

It is not only communities that are represented by federal and provincial governments arising from the form of government as federalism, federal and provincial governments have their own

---

This is not to say that Quebecers do not feel an affinity towards the national level or see the federal government as irrelevant to them. Indeed, many, if not a majority, are federalist minded.

81
institutional or organizational interests which lead them into competition with one another. Public officials have a significant degree of autonomy from societal constraints and the way in which power is structured within the government system has an important independent effect on the behaviour of those officials and the allocative outputs of the system.\textsuperscript{117} Thus, although public officials may be influenced by elements outside government, they operate under a significant degree of autonomy.\textsuperscript{118} In short, a government structure, once established, seems to take on a life of its own. The essential dynamic that arises from this element is the phenomenon of "bureaucratic politics" in which organizations will protect and expand mandates to retain and expand authority. Given that the federal and provincial governments are supreme within their respective spheres of power, relations between the two are somewhat analogous to a mini-international system.\textsuperscript{119} The result is a dynamic for competition and conflict between the interdependent federal and provincial levels of government to expand jurisdiction and to gain "credit, status and importance and to avoid discredit and blame", especially, in highly visible areas.\textsuperscript{120}

\textsuperscript{117}Smiley, pp. 7-11.
\textsuperscript{118}Ibid; Allan C. Cairns, supra, at p. 57.
\textsuperscript{119}Cairns, p. 47.
\textsuperscript{120}Richard Simeon, Federal-Provincial Diplomacy: The Making of Recent Policy in Canada, p. 185.
Regional Interests

In addition to the representation of communities and organizational interests, the real divergences of regional interests should be borne in mind, particularly, in terms of political economy which are represented by provincial governments.

In explaining the important role of the provinces relative to other countries, Garth Stevenson has pointed to the character of the political economy of Canada, which produced conflicts between different classes and class factions, and which caused contending forces to identify their interests with different levels of government. 1.21 In particular, Stevenson points to two variables. The first is unequal regional development which made the federal government a target for resentment in both rich and poor provinces and caused the accumulation functions of provinces to be emphasized, either on the basis that rich provinces were supporting poorer ones, or that poorer provinces asserted that they were being disadvantaged. 1.22

The second variable was the emergence of three distinct sectors, each with divergent interests, class relationships and concentration in different provinces and regions. Secondary manufacture became heavily concentrated in Ontario. The


Maritimes could not compete. The National Policy protected Ontario products, particularly, through the tariff and the development of east-west trade and infrastructure. This situation featured an alliance between industrial workers and industrial capitalists against farmers and anti-tariff advocates. Interestingly enough, despite the advantages obtained from the National Policy, until recently, the Ontario government was anti-federal government and pro-provincial rights. Ontario industry and business would look to the provincial government to pursue their interests as Ontario had the means and competence to pursue favourable economic policies, and they saw the role of the federal government as redistributing Ontario's wealth to benefit voters in other provinces.\(^{123}\) Particularly, after the Second World War as manufacturing grew, with more and more American control, there was, as a result, a growing irrelevance of and indifference to the tariff. After 1971, the PC party in Ontario under Premier Davis abandoned Ontario's traditional strategy of joining with Quebec to demand decentralization and became more pro-federal and supported Trudeau on energy policy, wage and price controls, foreign direct investment. This change in position occurred at a time when Ontario was feeling the effects of increased international competition, and its secondary manufacturing was facing the threat of higher fuel, energy and transportation prices along with growing concern about the

\(^{123}\)Stevenson, pp. 77-78.
fragmentation of the Canadian market, especially if Quebec separated.

The export-oriented agricultural sector was originally dominated by Ontario, until after completion of the C.P.R. in 1885, when major growth in the Prairies occurred. Prairie wheat became Canada's major export staple, and much of the East-West economy became oriented around it. The economic interests of these farmers conflicted with that of central Canada's manufacturing sector. This concentration and geographical separation resulted in competing interests which, superficially, appeared to be regional. This led Saskatchewan and Alberta to speak for agricultural interests and to view the federal government as representing manufacturing. In this manner, this class conflict became a federal-provincial conflict.\textsuperscript{124}

The export-oriented resource industries: lumbering, mining and smelting, pulp and paper - as with agriculture, depend on the foreign, not domestic markets. Foreign direct investment, largely American, has always been important. The resource sector tends to divide provinces internally along class lines and in some cases along regional lines. More than any other sector, this sector is intimately associated with provincial governments because provinces own most of the lands and resources. It is, furthermore, indifferent to the federal government as it requires

\textsuperscript{124} Ibid. p. 78.
neither tariffs nor the elaborate financial and transportation infrastructure of the wheat economy.126

However, the discovery of oil and gas, particularly in Alberta, meant province building on a grand scale which led to a greater assertiveness and conflict with the federal government on tariffs and the National Energy Policy. Bitter federal-provincial rivalry over resource rents has seriously undermined the legitimacy of the federal government in the West. This situation is so despite the fact that prior to the rise of prices in the 70's, federal policy tended to protect Alberta producers with much of this money being reinvested in the West by the federal government. The conflict featured the line-up of the federal government and Ontario to keep energy prices low against the West, primarily, Alberta and to a lesser extent Saskatchewan, to gain maximum advantage over energy prices. Indeed, Western regional identity is based on recurring problems Westerners experience in seeking solutions to issues relating to property and resources development, especially oil and gas prices, freight rates, tariffs and the cost of supplies and the sale of products. In the past, due to the tariff structure, the West bought manufactured goods at above international market prices, while having to sell its products in the open international marketplace. Part of Western alienation sees the political system favouring central Canada.

126 Ibid, p. 79.
Another interesting example of federal-provincial and interprovincial conflict relates to the political economy of British Columbia, which is heavily reliant on the Japanese market for natural resource exports. As a result, it is favourable to imports of Japanese goods, whereas, Central Canada may prefer protectionism against Japanese imports, which in turn might lead to retaliation mostly affecting B.C.

Thus, the rise of the resources sector contributed to the growing importance of the provincial government and decline of the federal government. However, all of this is not to say that the federal government does not have levers, like the spending power, ownership of Territorial lands and so on, to be involved in resources. However, it was only industries like banking, steamships, transcontinental railways and telecommunications that are directly oriented to the federal government. However, their power was too narrowly based to enable centralization that other advanced countries were experiencing. Manufacturing and resource sectors would integrate the Canadian economy more and more with the U.S., whose firms would rely on provincial governments to pursue their interests. Since the FTA, all sectors, including Ontario manufacturing are North-South oriented.

\[126\] Ibid, p. 84.
b) The Values of Democracy and Pluralism

Another highly important value is not a "federalism" one per se, but, relates to the fundamental concepts of democracy, accountability and public representation in the context of federalism. In a democracy, the public or interest groups have the right to make their views known to the government through voting and through the freedom of expression which may be initiated through more public means such as attempting to influence public opinion, lobbying directly with government or any combination thereof. We have seen how the public can play a direct role in the context of Judicial federalism. This role is, however, less certain in the other arenas, particularly, in the domain of executive federalism. Thus, democracy ties into representation. Democracy is furthermore reflected in a parliamentary system of government through the constitutional convention of responsible government in which the executive (Cabinet) must have the confidence of the Elected Assembly.

Public accountability is, also, an essential feature of the system. First, Cabinet must be in effective control of government in all its organizational forms. Second, Cabinet must be accountable to Parliament for all executive acts, including the management of the state. Public accountability is enhanced through the access of the public and elected politicians to information, proceedings and actions of government, as well as regarding their participation or representation regarding the various decisions made or outputs of the governmental system.
instead of just cabinet ministers and bureaucrats and regarding enforcement of governmental outputs.

Of course, different regimes, even among parliamentary governments, will have different implications for the level of this democratic element, as well as for other important values such as effective government, political values, national security and so on. One large area of "democratic deficit" has been identified as that of executive federalism.\footnote{For a critique of executive federalism in this vein see D.V. Smiley, "An Outsider's Observations of Federal-Provincial Relations among Consenting Adults," in R. Simeon (ed.), \textit{Confrontation or Collaboration: Intergovernmental Relations in Canada Today}, (Toronto: Institute of Public Administration of Canada, 1979)} It is generally characterized as an affair between governments with little or no citizen participation and given the joint nature tending to characterize such relations, it is often difficult to know which level of government is to be held accountable for the results and correspondingly easy for either the provincial or federal level of government to attempt to avoid or shift blame. A second non-executive federalism area, in which the democratic element is lessened in Canada, is the tendency of interest groups to by-pass political parties and the legislatures in their attempt to influence government.

III) Spectrum of Intergovernmental or Interprovincial Interaction

The last section was concerned with the characterization of the types of actions governments may take in the Canadian federal
context, as well as the types of values that are relevant in the context of those actions. This section examines the spectrum of possible federal-provincial or inter-provincial interactions, from a level of no direct interaction, to that of a high degree of interaction or joint action.

No Blended Intergovernmental Action

The first level is that of no blended intergovernmental action, or unilateralism. At this level, one government simply takes action, takes no action, or, withdraws from taking further action without the concurrence of, or even consultation with, other governments. Consistent with this level of interaction, one level of government may monitor the action of the other level in a certain policy field. Unilateralism has been discussed in the previous section.

Consultation

The next level of interaction is that of one level of government, often the federal government, consulting with provincial governments in an effort to manage the multifaceted interdependence between the two levels either more generally, or in a given policy field. A good example of this consultation process relevant to industrial development strategy is in international trade negotiations. Canada has two sets of negotiations, one with its trade partner(s) and one domestically. Global interdependence, especially, economic interdependence, has meshed global and domestic concerns, including increasingly provincial ones, particularly during and after the Tokyo round of
GATT negotiations, in the context of a more complex and interconnected world. There is a benefit for such consultation as the provinces can provide information to the federal government in areas of concern to the specific province. However, there is a Constitutional-federalism component that, from a practical perspective, requires the federal government to seek such consultation. This situation is a legacy of the Labour Conventions case, which recognized that the treaty making power is a matter of exclusive federal jurisdiction, but, that jurisdiction over the implementation of the treaty lies with the relevant legislature(s) whose jurisdiction is affected.\textsuperscript{128}

Consultation can lead to unilateral action as in the case of negotiations which have broken down and one level of government simply acts unilaterally. It should be noted that unilateralism can also be used as a threat in the course of negotiations as in the case of B.C. in the context of the softwood lumber dispute, when it threatened to cut its own deal with the U.S.\textsuperscript{129} Equally, consultation may simply serve the intended purpose of information exchange to support the unilateral action of another level of government, for example, in informing the federal


government of the implication of treaty provisions for the province.

Secondly, and, perhaps, most importantly, consultation is used to achieve federal-provincial agreement on a procedure, for example the timing of a budget release, or, on a matter of substance, which will be the topic of the third level of blended government action, co-ordination. At this level, I also include structures or procedures to created to arrive at agreement as, up to that point, there is no blended government action.

Consultation and structures or processes devised for the purpose of facilitating consultation or negotiation may occur in the context of executive federalism or pursuant to another process of federalism, such as the Constitution, constitutional convention, or, pursuant to a rules-based regime. It may occur at a functional, or multidisciplinary level, and may involve ministerial or summit federalism.

The departmentalized model involves relations between a Minister and/or departmental officials and the corresponding Minister and/or officials in the other level of government, on the basis of an issue (or issues) involving the Minister’s specific portfolio. Summit federalism involves the relations of the First Ministers of the federal and provincial governments, usually accompanied by either the Minister of Justice or the Minister of Finance, or both. What determines whether a relation is functional or multidisciplinary is a function of the nature of the issue in question, which determines the scope of what
Ministers and/or officials are relevant to the matter and/or the institutional structure and focus to deal with an issue or an aspect thereof.

Coordination

The third level is that of co-ordination arising from consultation and negotiation. Again, there is a wide range of blended intergovernmental action that is possible at this level.

Blended Intergovernmental Action

At the lowest level of blended intergovernmental action, one level of government may simply agree not to exercise its authority over a certain area of jurisdiction. For example, the federal government's authority over the continental shelf was established in Reference re Ownership of Offshore Mineral Rights.\(^{130}\) However, the federal government chose to forego its power in favour of Newfoundland pursuant to the Atlantic Accord. This situation demonstrates the interaction of judicial and executive federalism.

The next level of blended intergovernmental action is that of allowing one level of government to act in an area in which they may not otherwise have had authority to act, such as consenting to Quebec establishing foreign relations pursuant to la francophonie, or allowing Quebec a substantial role in immigration pursuant to the Cullen-Coutre Agreement, extended by the McDougal-Gagnon-Tremblay Accord. One might note that

immigration, insofar as it deals with immigration into a province, is an area of concurrent jurisdiction with federal paramountcy.

The flip-side to this process is the non-constitutional delegation of powers to the other level of government. One particularly irksome point regarding interdelegation in the context of industrial policy has been in the area of trucking. The Winner decision had established federal control, under s. 92(10) of the Constitution Act, 1867 over an undertaking to the extent that, as a whole, it is in pith and substance interconnecting or interprovincial. 131 The federal government had delegated its authority to the provincial regulatory agencies resulting in a system that is expensive to administer, incoherent and featuring regulations that vary from province to province. 132

The next level of coordinated federal-provincial action is that of intergovernmental transfers of funds, pursuant to a shared cost program. The essential element to this level is the spending power. Traditionally, shared cost programs have been on the basis of federal spending in areas of provincial jurisdiction, for example, in building the welfare state. The federal role is not necessarily limited to giving money to the provinces as the very fact of offering money can influence the


policy choices of that level and conditions can be placed on such transfers to influence policy outcomes or implementation. Secondly, the actual program and its outputs can be more the result of intergovernmental negotiation or require federal government approval, as has been the case of regional economic development agreements.133

Along the same lines of shared cost programs is that of joint regulation, in which both levels of government agree to pool their regulatory power in an certain area. The obvious examples of this situation are the joint federal-provincial agricultural marketing/supply boards.134

Again, such shared cost programs or joint regulation may occur in the context of executive federalism or consistent with another process of federalism such as the Constitution, constitutional convention, or, pursuant to a rules based regime. It may be mandated by the Constitution itself, as in the case of equalization. Federal-provincial relations may occur at a functional or multidisciplinary level and may involve ministerial or summit federalism.

At the next level, the two levels of government, or provinces among themselves, agree not to exercise powers in a

\[\text{\textsuperscript{133}}\text{However, the trend has been towards decentralization and devolution by the federal government in the context of intergovernmentalism.}\]

\[\text{\textsuperscript{134}}\text{These supply management schemes are left untouched by the Agreement on Internal Trade, but as between Canada and its trading partners, these quotas had to be converted into tariff equivalents.}\]
certain area such as ones that do not conform to the principles laid out in an agreement. As such, this level involves a type of contract with benefits and/or obligations flowing both ways rather than one government unilaterally choosing not to act. The Agreement on Internal Trade’s prohibitions on barriers to trade is in the nature of an agreement to limit parliamentary sovereignty to achieve greater benefits of liberalizing trade within the Canadian common market. Such an agreement may be a product of executive federalism or pursuant to another process of federalism such as constitutional convention, or, pursuant to a rules-based regime. It could not arise in the context of the Constitution as, presumably, if the Constitution has forbidden certain action, then government agreements cannot alter that fact and can add nothing more to it absent constitutional amendment. This type of agreement may occur at a functional or multidisciplinary level and may involve ministerial or summit federalism.

A high degree of blended federal-provincial or inter-provincial action would be the harmonization of government action, be it legislation, regulation, standards and the like. The harmonization may occur in the context of a specific policy area such as product labelling regulations, or, it may be more comprehensive, for example, in dealing with the positive integration aspects of the internal common market. Again, such an agreement may occur in the context of executive federalism, or pursuant to another process of federalism such as constitutional
convention, or, pursuant to a rules-based regime. Such agreements may create limitations on government actions beyond those imposed by the Constitution. Specific policy harmonization may occur at a functional or multidisciplinary level and may involve ministerial or summit federalism, however, comprehensive harmonization of policy with a single agreement will inevitably require summit federalism on a multidisciplinary level.

The highest degree of co-ordination or blending of government action that may occur is that of constitutional change, which, after 1982, must comply with the provisions of the applicable amending formula set out in the Constitution Act, 1982. The Constitutional amendments of note relating to industrial policy are the equality of opportunity and regional economic development provisions of s. 36 and s. 92A which had provided to the provinces a greater measure of indirect taxation over natural resources. Once a power is so transferred, its exercise by the receiver thereafter becomes unilateral government action.

IV Some Notions on the Effectiveness of Institutions in Producing Outputs or Agreements

The structuring of institutions will have important effects on the facilitation of negotiation, consultation, exchange of information and, ultimately, achievement of a result or agreement.
A) Types

The first distinction that may be drawn is that of Departmental intergovernmental relations versus Summit relations. Summit federalism tends to be more political and politicized. The role of First Ministers Conferences (FMCs) in macroeconomic policy coordination or formation does not appear to have been significant to date, as this process has typically involved provinces attempting to expand the agenda, ganging up on the federal government, and which had nothing to do with designing policy collaboratively. Finally, future attempts will likely feature the provinces wanting more input into monetary policy and there is no incentive for the federal government to diminish its authority. This situation creates an incentive for the federal government to continue neo-conservative policies of reliance on the market, inflation control and deficit cutting to remain in the economic management driver's seat.

The second distinction that may be drawn is to characterize the intergovernmental relation in question, be it Departmentalized or Summit, on the basis of whether the type of relation is "functional" or multi-disciplinary. Functional relations, be they at the departmental or summit context are

---

136 One notable exception, as some have argued, might be that information exchange in the pre-budget process works relatively well. Others have stressed the need for more coordination.

more likely to bring about co-operative federal-provincial relations and to transcend federal-provincial differences. It has been said that executive federalism works very well when intergovernmental officials, who are of the same training and background, focus on discrete technical issues and are dealing with matters that are subject to further modification and where ongoing relations create "trust" ties in those officials.\textsuperscript{137} It is far more difficult to obtain agreement on global issues where there are numerous governmental departments of both orders of government involved.

By contrast, multidisciplinary issues requiring the participation of several different types of experts such as Dupré has outlined as entailed in the Social Security Review of 1973, are less conducive to facilitating consultation, negotiation and ultimately agreement.\textsuperscript{138} In that case, the participation of officials with diverse backgrounds like economics, manpower and social welfare eventually yielded a degree of mutual education, but not before time consuming discord; for example, employment and employment services personnel were suspicious of social work phrases like the "fullest functional potential", whereas, social workers regarded manpower people as being excessively preoccupied with employment, rather than the "whole person".\textsuperscript{139} In the end, the failure of the review was attributed to the necessity to

\textsuperscript{137}Dupré, in Olling and Westmacott. pp. 236-7.

\textsuperscript{138}Ibid, pp. 238-9.

\textsuperscript{139}Ibid.
accommodate central agencies, the diverse professional backgrounds, the ramifications being too broad thereby requiring a summit approach and, finally, the interdepartmental tensions within each level of government itself.  

By the 1970's, the change in the mode of Cabinet operation and public administration had become complete from the Departmentalized Cabinet to the Institutionalized Cabinet. The former, characteristic of the period 1940-60, featured ministerial, as opposed to collective, decision-making concerning the Minister's area of responsibility. Federal-provincial relations were based on functional lines. Along with the growth of the institutionalized cabinet was the emergence of central agencies to gain control over budgets, to increase coordination across all policy fields within governments, and the reemergence of the politics of the constitution and national unity which contributed to its development.  

This change both reflected and contributed to increased intergovernmental conflict as simultaneously representing a move away from functionalism and towards emotionally charged political and constitutional issues. All of this does not go to say that functionalism is dead - far from it; but, the existence of institutionalized cabinets and central agencies are far more likely to bring about conflictual

---

140 Ibid.

141 See R. Simeon, "Rethinking Government, Rethinking Federalism,", Draft, Department of Political Science and Faculty of Law, University of Toronto, January 21, 1997, p. 39; For a more detailed outline of central agencies see, Thorburn, pp. 57-70.
intergovernmental relations than the departmentalized cabinet was prone to.

Other Institutional Variables

Other institutional variables to executive federalism may be useful in considering whether a particular mechanism set up under the rubric of executive federalism will likely be more successful than others. The first variable is the institutional permanence of the federal-provincial created structure. Institutions of greater permanence will likely be more successful than the "one shot deal" relations in providing for a forum of consultation, negotiation and, ultimately, joint federal-provincial agreement. First, continuing federal-provincial structures may give rise to a stake in the future relationship and in cooperation, instead of getting all that one can in a one last play environment.

Secondly, although the longevity of a particular structure may not be sufficient, it is necessary, or, at least, highly important, in establishing a structure in which the members of that structure share its mandate and ethos, which goes beyond representing their particular level of government. An analogy that comes to mind is that of the European Commission. The success in creating such an institution will clearly be a matter of institutional design relating to matters such as permanence, clear responsibilities, clear procedures and a sense of independence by officials from the governments who appoint them. Depending on its composition, the institution developed may no
longer resemble executive federalism, but may take on its legitimacy, for example, from the Constitution or through the development of a rules-based regime. The agreement for the existence of the longevity of a particular structure is consistent with executive federalism, and does not necessarily detract from it.

On matters of ongoing importance and complexity, not only is some degree of institutional permanence desirable, and even necessary, so too may be the need for an expert and/or an administrative support infrastructure adequate to the task, especially in the case of coordinating bodies. It may be that a particular body is already composed of experts, but, further administrative support is necessary. The Continuing Committee on Fiscal and Economic Matters is an example in which the complexities, expert knowledge and the ongoing nature of the matter has necessitated a continuing expert infrastructure in support, even if it is not highly formalized.

**Nature of the Issue**

As alluded to earlier, the nature of the issue will have implications for the design of appropriate institutions. In particular, it may significantly influence (or determine) the extent to which the particular mechanism of federal-provincial interaction can be structured on functional lines, like fiscal federalism and adult occupational training (until recently), or, on multi-disciplinary lines, as social security review and
overall industrial policy. The former is more conducive to arriving at compromise and agreement, but, a functional issue may become multidisciplinary due to the organizational structure of the relevant federal and provincial bureaucracies, as the adult occupational training story, which will be dealt with in the next chapter, demonstrates.

The second point to bear in mind is that the nature of the issue itself may be an important factor regarding whether or not negotiations and agreement will likely be successful. For example, issues which are quantifiable, discrete and, therefore, amenable to compromise, are more likely to bring about agreement. These elements usually characterize fiscal relations. At the other extreme, are issues that are not quantifiable, are symbolic, are highly emotive with extreme publicity and political consequences and are not amenable to trade off and compromise. One typical example is constitutional relations. Such types of issues will be far more difficult agree on.

A third realm which may hold significant implications for the likelihood of agreement is a "quasi-constitutional" one in which governments, through agreements, create a regime in which the use of powers in certain ways is regarded as illegitimate or (quasi) "illegal". Also, and, perhaps more controversially, is the requirement, from a legitimacy or (quasi) "legal" perspective, that powers be exercised in a certain manner. A

---

142 The notable exception is the issue of cuts in federal transfers to provinces.
pure example of such regimes exist in the area of international trade law in which states agree to limit their sovereignty in order to achieve greater trade liberalization. A domestic example is the Agreement on Internal Trade if the Agreement is ratified by the legislatures of the Parties.

The essential point is that the more directly a regime aims to strike at the heart of political sovereignty, and the multitude of values that such a move may entail, the more difficult it will be to reach agreement. The European Union experience demonstrates this point through the relative difficulties displayed in achieving positive integration relative to negative integration. Debates over subsidies, NTBs and 'fair trade' in the context of international trade negotiation are examples of the difficulties experienced when issues strike closer to the heart of political sovereignty and lack the quantifiability of negotiations on issues like tariffs. These considerations have parallels in Canada in, for example, the elimination of internal trade barriers.
Ch III: Industrial Policy, Federalism and Specific Policy Areas

The purpose of this section is to examine specific policy areas in view of the discussion on federalism thus far, rather, than thoroughly examining possible industrial strategies for specific industries and segments. The latter inquiry is well beyond the purview of this essay, requiring detailed examination of an industry/segment within a country, as well as of the various strategies that may be employed. The analysis would necessarily be context or industry specific and is, indeed, a valuable and necessary one to undertake for government.

The policy areas to be examined, relating to industrial barriers to trade and adult occupational training have relevance across industries and segments. Analysis will also be made regarding the recent infrastructure program. To these areas one could also add such matters as R&D and technology acquisition. The analysis which follows is largely institutional nature, particularly, as it relates to federalism.

1. Internal Barriers to Trade

The building of provincial economies and industrial strategies, as well as federal government policies, have led to the proliferation of internal barriers to trade. These can be characterized as negative externalities with detrimental effects on the efficiency of the national economy and the competitiveness of firms within Canada, as well as running counter to a pan-Canadian view in which a Canadian in one part of the country...
should be able to do business in another area of the country free of discrimination or unnecessary impediment.

Clearly this is an area for co-ordinated policy necessarily including the federal government and the provinces due to the negative externalities of their policies and the inability of any government acting alone to solve the problem. Section 121 of the Constitution Act, 1867 is too narrow to deal with the situation; whereas, other provisions such as the Charter’s s. 6 are relatively untried and the scope of its effect may not be satisfactorily comprehensive enough. Therefore, the process of judicial federalism is not the first best choice to deal with the situation. Constitutional amendment is practically impossible, and unilateral federal action under s. 91 would be uncertain, at least at first, and would result in an extreme level of conflict with the provinces. As a result, it should be used as a last resort, if at all.

The Making of Interprovincial Distortions

To understand why provincial barriers have been permitted one must look at two aspects. One is the division of jurisdiction, which allows provinces to act in the first place, second is an implication of the scope of s. 121 of the Constitution Act, 1867.

It has been clearly established in case law that, with the exception of the enumerated heads of federal power, provincial jurisdiction, under s. 92(13), (16) of the Constitution Act.
1867, extends to the regulation of particular industries.\textsuperscript{14}\textsuperscript{5} In terms of interprovincial trade, a province may regulate a transaction of sale and purchase within its borders, even between a resident of that province and a person outside of the province.\textsuperscript{14}\textsuperscript{4} This jurisdiction exists because the regulation is in respect of contracts and not trade-as-trade. Provincial regulation may, in fact, affect interprovincial trade and is not necessarily outside its jurisdiction unless the regulation was made "in relation to the regulation of extraprovincial trade and commerce."\textsuperscript{14}\textsuperscript{5} The impact of the regulation is only one factor in determining the purpose of the legislation. Therefore, provincial marketing schemes, which include persons or corporations who bring their products to the province, may very well constitute a valid exercise of provincial power. See Carnation Co. v. Quebec Agricultural Marketing Board, supra. Furthermore, incidental effects on interprovincial trade do not, in and of themselves, render a measure invalid. However, a regulation controlling the free flow of trade into the province, or, obtaining the most advantageous marketing for that


province's producers, will not be acceptable. See the Chicken and Egg Reference.\(^{145}\)

In this way, a large spectrum of valid provincial measures affect and distort the free flow of goods and services from province to province despite the fact that interprovincial trade is a federal power. One might ask how this state of affairs can exist in the face of s. 121 of the 1867 Constitution Act, which states:

\(s. \,121 \,All \,Articles \,of \,Growth, \,Produce \,or \,Manufacture \,of \,any \,one \,of \,the \,Provinces \,shall \,from \,and \,after \,the \,Union \,be \,admitted \,free \,into \,each \,of \,the \,other \,Provinces.\)

This provision has been read narrowly, initially, being strictly confined to customs duties, excise duties and the like that affected interprovincial trade as the essential word in the section was seen to be "free". See Gold Seal and Atlantic Smoke Shops v. Conlon.\(^{147}\) Thus, the section would not prevent, for example, legislation prohibiting the import of liquor in aid of temperance. See Gold Seal, supra. Nevertheless, some signs of an expanded scope for s. 121 have begun to emerge, but, would not go so far as to comprehend non-fiscal impediments.\(^{148}\) Mr


Justice Rand, concurring, in *Murphy v. C.P.R.*, ¹⁴⁵ had this to say about s. 121:

I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of Commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is trade regulation that in essence and purpose is related to a provincial boundary.

As a result, provinces have been permitted to impede interprovincial trade in important respects through trade regulated in "subsidiary features" giving rise to significant non-tariff barriers to interprovincial trade. Such provincial non-tariff barriers to trade also have effects on international trade.

To be fair, many federal government policies, also, distort interprovincial trade, although one might see such policies as properly falling under the Trade and Commerce power or within responsibility over the overall management of the economy. Furthermore, the Ancillary doctrine cuts both ways and valid federal measures may be able to impinge on provincial jurisdiction. For example, in *Caloïl v. Attorney-General of Canada*, ¹⁵⁰ the court considered the National Energy Policy (NEP), which provided for regulation to control the importation

of oil to foster development of Canadian oil resources by restricting oil importation to defined areas. The Court concluded that the regulation had the character of an extraprovincial marketing scheme and impingement on provincial jurisdiction was necessarily incidental.

Some examples of federal government policies affecting interprovincial trade flows include the NEP, which created distortion through price controls which kept energy prices below would market prices, thereby, encouraging consumption of oil and gas. Secondly, subsidies were given to encourage exploration to offset the disincentive effects of price control. Federal control over tariffs has historically created a distortion by providing protection to the domestic manufacturing industry concentrated in central Canada. High tariff barriers have allowed manufacturing provinces to sell to consumer provinces at inflated prices. Finally, the federal tax system contains provisions aimed at certain industries or sectors, which indirectly favour particular regions. The breadth of the federal taxation power is extensive under the Constitution Act, 1867 and is only limited by colourability, or, if aimed at matters of provincial jurisdiction.

The Costs of Internal Barriers and Industrial Policy

Instead of listing the litany of internal barriers regarding goods, services, labour and investment, with which the reader is no doubt familiar, I will proceed with an evaluation of the costs
of such barriers. Economic barriers decrease the size of markets, which decrease opportunities for higher productivity that come from specialization, economies of scale and greater volumes of trade. This situation, in turn, diminishes Canada's ability to compete in international markets. Canada, it must be remembered, already has a small market and barriers result in further fragmentation and the risk of inefficiency and may scare away investment.

Norrie, Simeon and Krasnick, in their study, have argued:

Whichever method of analysis is used, the conclusions tend to be that the direct economic costs of internal barriers in Canada are quite small: removing them would not result in dramatic economic gains.\(^{151}\)

These authors have focused on the issue of goods as the great majority of services are traded locally. In 1979, 25% of goods were shipped interprovincially.\(^{152}\) From a national perspective, it was argued that barriers will only appear significant to the extent that they affect bilateral trade between Ontario and Quebec, except for energy products in Alberta, as no other provincial economy is large enough to distort national efficiency significantly.\(^ {153}\) The importance of interprovincial trade varies from province to province as does its relation to internal and international trade. The interprovincial movement of goods and services were found to

\(^{151}\)Norrie, Simeon and Krasnick, p. 221.

\(^{152}\)Ibid, p. 226.

\(^{153}\)Ibid.
constitute but a small proportion of the total activity of the Canadian economy, therefore, one should expect that policies that affect this subset will be relatively less important in impacts than those like excise taxes which cover a larger volume of transactions. Furthermore, since the FTA, there has been a further orientation towards North-South trade.

I do not take these authors to mean that interprovincial trade is unimportant. The Economic Council of Canada has noted that since 1984, while foreign markets have become ever more important, there has not yet been a decline in interprovincial flows, which remain important, but asymmetrical.\(^4\) For example, there are strong Ontario-Quebec ties and weak West-Atlantic ties. As a province's position in the custom union varies, therefore, so too do the impacts of trade issues.

Trebilcock has argued that the economic significance of interprovincial barriers to trade have been overplayed. He estimates that $3 billion of $43 billion of interprovincial trade falls within categories designated as embodying major discrimination policies; or, in other words, less than 1% of GNP.\(^5\) Richard, Harris and Cox have argued that it is likely that more gains are to be had from pursuing freer trade at the international level than pursuing free trade further

---


domestically. However, Trebilcock and Schwanen had later argued that:

[These] barriers [to trade and to the movement of labour within Canada], which are both discriminatory and unnecessarily costly contravene some of the most fundamental principles of a well-functioning economic union, let alone those of a well-functioning federation.¹⁵⁶

One must bear in mind that internal barriers, even if small now, have potential for growth. Nevertheless, provinces cannot afford to get too far off-side in their policies as labour and capital will move in situations in which where factor mobility is high (where it is not high, there may be greater incentives to mount barriers).¹⁵⁷ Secondly, there is always the risk of reprisals from other governments. In this context, one should not underestimate the role of dual citizen loyalty in government policy. Not only must governments be cognizant of how their policies affect the provincial and national citizen, governments themselves are part of the same country and there is, therefore, a constitutional morality keeping a check on overly discriminatory practices. Here, governments consider provincial and national implications, which may not otherwise be the case in a confederal system in which decisions would be based purely on

¹⁵⁶Ibid.


¹⁵⁸Courchene, p. 209.
considerations of "provincial" interests, modified only by the reactions of other states.

However, Courchene has argued that "focusing only on the static costs underestimates the cost of internal barriers." ¹⁵⁻³ It does not take account of resources deployed to obtain preferences or maintaining existing barriers, that is, the cost of lobbying or rent seeking. ¹⁶⁻⁰ It also ignores dynamic costs associated with fragmentation. Firms may be of less than optimal size and protectionism can lead to complacency and inefficiency, and less reward for innovative behaviour, if NTBs prevent access to larger markets.

The Macdonald Report conceded that:

... this is a field, however, where estimates are imprecise and controversial. In the foreign trade field, for example, some recent estimates suggest that the gains from international trade liberalization may be much greater than earlier models suggested.

... the costs of barriers to trade may be extremely significant for individual firms, even if aggregate costs for the national economy do not appear to be large. ¹⁶⁻¹

The argument that must be emphasized, in light of its demonstrated importance in Part I of this study, relates to the dampening of competition within Canada. Internal barriers to trade act as protectionism in favour of local industries, for example, through preferential bidding in government procurement.

¹⁶⁻⁰ Ibid.
¹⁶⁻¹ Macdonald Commission (Vol. 3), p. 120.
Internal barriers only serve to further blunt the already weak
domestic rivalry in Canada. International competition is not an
adequate substitute for weak domestic competition. Furthermore,
accessing the domestic market is an important source of attaining
advantage and the capacity to expand in global markets. These
are important, subtle and largely unmeasurable factors that have
not been considered in terms of the actual costs arising due to
internal barriers.

The Agreement on Internal Trade

The Agreement on Internal Trade (A.I.T.) signed between the
federal government and the provinces in 1994 was a response to
the problem of internal trade barriers.

A variety of relevant A.I.T. provisions will be outlined to
demonstrate its high degree of compatibility with executive
federalism. Indeed, the Agreement itself was a product of summit
executive federalism as a result of negotiations launched by the
federal government, the provinces and the territories. The first
basis of analysis will be to examine the terms of the A.I.T. and
its binding nature or legitimacy. The second basis will be to
examine its dispute resolution and enforcement mechanisms.

Positive and Negative Integration and Executive Federalism

The agreement provides for two types of integration related
to internal trade, one negative and the other positive. The
Chapter 4 general provisions of the A.I.T. apply unless a matter
is dealt with specifically in one of the sectoral Chapters, or is excluded from the purview of the Agreement under Chapter 18. The negative integration provisions are dealt with under Article 401 which contains the common trade provisions related to the intergovernmental equivalent of the National Treatment principle and the Most-Favoured Nation principle, applying to both the federal and provincial governments. Furthermore, Article 402 prohibits any measure that restricts or prevents the movement of persons, goods, services or investments across provincial boundaries, while Article 403 is to ensure that measures adopted or maintained by a Party do not operate so as to create obstacles to international trade. Article 404 permits inconsistent measures where certain criteria are met.

Sectoral Chapters, almost without exception, include some measure of negative integration as set out in the words of the Chapter. Article 504 accords the goods and services of outside suppliers treatment no less favourable to domestic suppliers in the context of procurement policies. Several example of impermissible discrimination are listed, such as conditions based on the location of supplier’s place of business, biasing technical specifications to circumvent the Chapter and price discounts/preferential margins to favour particular suppliers. Other prohibitions are specified, such as against the imposition of local content or other economic benefits criteria designed to favour goods or services from any particular region. Of course,
these prohibitions are limited by exceptions and provisions respecting the scope of the non-application of the Chapter.

Again, subject to various rules of non-application and exceptions, Chapter VI, dealing with Investments, contains prohibitions on government action. Article 603 provides an investor or investment treatment no less favourable than the best treatment it provides to that of any other Party or non-Party. Parties may not impose minimum levels of ownership of companies incorporated in a territory be held by residents, except normal qualifying shares for directors or incorporators. The federal government must ensure that its investment measures do not operate so as to discriminate. Article 604 prohibits a Party requiring an investor of another Party to be resident in its Territory as a condition for the establishment or acquisition of an enterprise; nor, can a Party require the maintenance of a representative office as a condition to carry on business, other than an address for an agent of service.

Various other negative prohibitions are contained in the sectoral Chapters such as Articles 706, 707 dealing with labour mobility, Article 806 regarding consumer related measures and standards, and so on. We next turn our attention to matters of positive integration. These include, harmonization, mutual recognition or other regulatory reconciliation.

The General Rules contained in Chapter 4, Article 405(1) oblige Parties to undertake to harmonize, mutually recognize, or otherwise reconcile their standards and related measures in order
to provide for the free movement of persons, goods, services and investment in Canada, in accordance with Annex 405.1. Aside from the "legitimate" objective exception, Parties must abide by detailed requirements such as acting consistently to address comparable situations; where practicable, specify standards in terms of performance or competence and must ensure that its standards have a scientific, factual or other reasonable basis and, where appropriate, be based on an assessment of risk; co-operate in developing national standards, and so on. In terms of regulatory measures, as opposed to standards,\textsuperscript{1152} the commitments to harmonize are significantly lower. The Parties agree to co-operate, for example, by conducting joint reviews in cases where disharmonized regulations cause substantial obstacles to trade. See Annex 405.2.

Other commitments in the various sectoral Chapters are phrased in terms suggesting varying degrees of commitment to harmonize, utilizing differing institutions. The Chapter on Labour Mobility is more detailed and set out in more authoritative language. Article 708 states that each Party undertakes to mutually recognize occupational standards and to reconcile differences in occupational standards with other Parties. Annex 708 provides detailed provisions for the

\textsuperscript{1152}In Chapter 2, a 'standard' is defined as a specification that sets out the rules, guidelines or characteristics for goods or related processes and production methods, or for service providers or their related operating methods. Regulatory measures, on the other hand, are defined as measures that do not contain a standard.
recognition of occupational qualifications and the reconciliation of occupational standards. First, the Parties are to assess occupations they regulate to determine high areas of commonality, in which case they must mutually recognize the comparable regulations. Where there is insufficient information and/or commonality, there must be an occupational analysis to determine the extent of differences and establish "thresholds of comparability" by examining the scope of practice, skills, licensing, certification etc., but, not differences related to training method. If there is high commonality among some Parties, then automatic mutual recognition regarding those Parties is to take place. If there is moderate or low commonality, the Parties may pursue the development of mutually acceptable occupational standards. This process is to be initiated within 12 months of ratifying the agreement. Article 712 establishes the Forum of Labour Market Ministers who are required to develop a work plan for the co-ordinated implementation of Party obligations and to produce an annual report on the operation of this Chapter to be submitted to the Committee on Internal Trade.

Chapter 8 on Consumer Related Measures and Standards imposes a lighter obligation on Parties to reconcile "to the greatest extent possible" their respective consumer related measures and standards. They are not required to lower their level of protection. The Committee on Consumer Related Measures and Standards comprising representatives of the Parties is
established under Article 809. However, pursuant to Annex 807.1, the Parties agree to harmonize measures in the areas of direct selling, upholstered and stuffed articles, and cost of credit disclosure, in accordance with the highest standards of consumer protection possible. The lighter commitments are contained under Chapter 19, Annex 902.5 in which the Parties agree to "work together" to develop and implement common standards, and the outcome is to be consistent with Canada’s international trade commitments. An almost non-existent commitment with respect to positive integration can be found in Chapter 10, Article 1007, which requires, for the purposes of Article 405, to "endeavour where practical to undertake" to reconcile, through harmonization or other means, standards-related measures such as labelling and packaging regulations. Other examples can be cited from those more detailed provisions which are phrased in more authoritative language, like Transportation; to other areas of virtual non-commitment, for example, regarding Chapter 11 Natural Resources Processing, Article 1103, in which Parties agree only to consult with other Parties; to leaving matters to be negotiated in the future, such as the Chapter 12 Energy.

The question arises to the extent to which the regimes of negative and positive integration arrived at in the context of an interprovincial agreement are consistent, or inconsistent, with executive federalism. The first factor to consider is the binding force of such provisions on governments. We know that a mere intergovernmental agreement cannot alter the legislative or
other authority of Parliament or of the provincial legislatures and, indeed. Article 300 is an affirmation of what is clear in law. Thus, the A.I.T. has no "legally" binding force and, therefore, there is no evidence, at this point, that the A.I.T. falls other than within the realm of executive federalism.

However, the issue becomes whether such a regime (being politically or legitimacy based) is a deviation from executive federalism or not. To the extent that an agreement or the provisions therein begin to take on a legitimacy or life of their own (through law or constitutional convention or, perhaps, even action falling short of a constitutional convention), one may say that there is a deviation from executive federalism as the important referent is the body of rules, not the actions of the relevant actors per se. Now, the two concepts are to a large extent related, since it is the actions of the relevant actors in recognizing the legitimacy of the rules, that will determine whether or not the rules will take on a life of their own regardless of whether or not an actor in a particular case may not wish to follow the rule. Once the actors consider a rule to be legitimate and a breach to be illegitimate, then they will be constrained by it.

The assessment of legitimacy will depend on two factors. The first and, perhaps, most important, it the perception of the relevant actors (i.e. federal and provincial governments) in viewing the rules to hold a legitimacy going beyond the views of any government actor. For example, if each legislature passed
legislation agreeing to observe the rule of A.I.T., this would be good evidence of its consent to be bound and, hence, constitute affirmation of the legitimacy of the regime in question. At this stage, though, it is too early to determine the ultimate success of the A.I.T. regime, as this depends upon the long-term actions of the federal and provincial governments.

The second factor is more indirect and is evidence by way of indication, as a matter of binding force and legitimacy. It relates to the indication of legitimacy as may be understood from the document itself, which serves as a prediction of the legitimacy likely to be conferred on the regime. Thus, one would look to the terms of the agreement, such as scope of the prohibitions and obligations to harmonize, the scope of applicability of the provisions and the exceptions to the prohibitions. The more exceptions and non-applications, the more the legitimacy of the agreement will be compromised. Secondly, the clarity of what is agreed to may be severely blurred and the development of a legitimacy based regime will be almost impossible without further agreement and clarifications. Some have, not without merit, doubted the resolve of governments to commit themselves to reducing the interprovincial barriers to trade:

Ultimately, however, it is not the defects of the Agreement on Internal Trade (as compared with the EEC Treaty) that matter. What really counts is the resolve of the parties ... The Contents of the Agreement on Internal Trade, and the language in which those contents are expressed, do not suggest that there currently exists in Canada a strong resolve to
harmonize legislation. If that harmonization entails surrendering provincial and territorial autonomy.\textsuperscript{163}

We have already seen examples of provisions reflecting varying commitments to harmonize, which provide an indication of the legitimacy that the Parties held with regard to harmonization, generally, and in more specific contexts. Much has been left to the future consensus of the Parties and it will be difficult to know when a Party is not truly negotiating to harmonize with the level of vigour required by the specific working of the agreement.\textsuperscript{164} Indeed, the commitment to harmonize is often phrased with various standards and often by using very soft language.

At least the language is firmer with respect to the prohibitions with respect to negative integration, yet the exceptions and scope of non-application, including reservations and grandfathering of existing provisions, are disconcertingly large, as are the areas of non-applicability of the Agreement itself. Under the general provisions of the A.I.T., Article 404 states that a measure inconsistent with Article 401, 402 or 403 is still permissible if it:

\begin{quote}
\textsuperscript{163}Alex Easson, "Harmonization of Legislation: Some Comparisons between the Agreement on Internal Trade and the EEC Treaty", in Trebilcock and Schwanen, pp. 149-150.

\textsuperscript{164}In the Final Report of the Panel Convened Pursuant to Chapter 18 of the Canada-United States Free Trade Agreement in the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk from Quebec, U.S.A.-93-1807-01, June 3, 1993, similar worded provisions were described as good faith obligations and as such have been interpreted not to be violated unless the Party has undertook actions that would make achievement of understanding impossible.
\end{quote}
a) has a "legitimate objective";

b) does not operate to impair unduly the access of persons, goods, services or investments meet the legitimate objectives;

c) is the least trade restrictive means; and

d) does not create a disguised restriction on trade.

Under Chapter 2, the general definition section, a "legitimate objective" includes such matters as: public safety and health; public order; the protection of human, animal or plant health or life; the protection of health safety and well being of workers; and affirmative action for the disadvantaged. By and large, it would appear that a relatively clear framework of exceptions has been outlined to provide for a principled basis for interpretation, which enhances the legitimacy of the regime. The scope of some matters such as the 'well being of workers' is unclear though, and if read too broadly, will call into question the effectiveness of the regime and, hence, its legitimacy.

It should be recalled that the provisions contained in a specific sector prevail and some of these contain important exceptions and/or are of a general nature. For example, under Chapter 5, Government Procurement, an exception is provided for exceptional circumstances regarding regional economic development if it is reported prior to tendering to other Parties along with an explanation and circumstances to justify the same. Under Chapter 7, on Labour Mobility, "legitimate objective" is expanded to include the broad areas of provision of adequate social and health services to all geographical regions of the jurisdiction.
and labour market development. Under Article 806 of Chapter 8 on Consumer-Related Measures and Standards, residency requirements are restricted to those which are "necessary to achieve a legitimate objective": "legitimate objective" being broadly defined to mean the protection of personal safety or economic interests of consumers. (Article 810).

Of substantial significance to industrial policy, as well as the legitimacy of the Agreement in general, is the scope of non-application of the A.I.T., reservations and the grandfathering of existing trade barriers. One area of concern is its non-applicability with respect to the particularly large and amorphous area of regional economic development. Article 1801(2) of Chapter 18 states that Part III and IV do not apply to a general framework of regional economic development if there is no undue impairment of access of persons, goods, services or investments of another Party and the least trade restrictive means have been employed. That subsection goes on to state that the exemption does not apply to: transparency or reconciliation measures, institutional and dispute settlement provisions, obligations to liberalize under Annex 1801.6A and Chapters 5 - Government Procurement, 10 - Alcoholic Beverages, 13 - Communications and 15 - Environmental Protection. Article 1801(8) defines a "general framework for regional economic development" to be a program that: is identified as such; specifies eligibility criteria or development priorities based on, but not limited to, factors like geographical area.
industrial sector or population group; is generally available to recipients that meet the established criteria; and, identifies reasonable performance or economic development objectives or targets that can be measured.

On its face, the scope of non-application may (potentially) be great and may lead to large gaps in or end runs around the A.I.T., or, provide fertile grounds for uncertainty and acrimony. Should large gaps or lack of clarity become apparent, it will reduce the Agreement's effectiveness and legitimacy as being easily evaded, or, by being subject to continual controversy as to what governments can and cannot do under the Agreement.

Another significant area of the Agreement's non-application is that concerning financial institutions (Article 1806, although some aspects of financial services are dealt with under the applicable sectoral chapter). Article 1803 exempts culture or cultural institutions. Some sectoral chapters also leave gaps. Of note is Chapter 9 on Agriculture and Food Products which only applies to technical barriers identified by the Federal-Provincial Agricultural Food Inspectors Committee. Furthermore, there is a failure to address quotas and other trade restrictions, especially, on foodstuffs like milk, poultry and eggs.

The result is that much is left up to the federal and provincial government to muddle through, assuming the commitment to do so, on the basis of executive federalism in respect of positive harmonization and regarding the efficiency of dispute
resolution, by giving clear meaning to the terms so that large gaps do not become apparent in the applicability of the Agreement and in enforcing them. Furthermore, in terms of positive integration, the strictures of executive federalism are adhered to as the Parties wishing to be bound must give their consent to further agreements and that the legislatures of the relevant governments must pass legislation to give effect to those further agreements. There is no independent lawmaking or implementation function of any of the A.I.T. bodies.

Before going on to discuss dispute resolution and enforcement, it is important to bear in mind that the intergovernmental structures, committees and working groups are all a product of executive federalism based on functional lines, which attempt to deal with discrete issues. As a result, there will be a tendency to facilitate discussion and possibly agreement. However, this assessment must be balanced with the fact that although the institutions set up and intended to be set up are more or less of an ongoing variety, particularly the Committee on Internal Trade, the A.I.T. does not provide for any real institutional structure, unlike the E.U. with its large bureaucracy. The secretariat does not appear to have resources to draft proposals for harmonization and much is left to the parties to establish mechanisms to co-operate regarding standards although, presumably, much work will be done by specialist committees.¹⁶⁵ There is no requirement in place to allow for

public participation, although that is not to say that informal mechanisms of consultation/participation will not arise. At this stage of the analysis with respect to public participation, there is no evidence that the A.I.T. reflects anything other than executive federalism.

**Dispute Resolution and Enforcement**

Another telling and, perhaps, even more important criterion in the assessment is the domain of enforcement, or dispute resolution. It is this area that ultimately determines who's views are to prevail as authoritative regarding the legitimacy of government actions within the dispute resolution procedures. Furthermore, such determinations are important from the perspective of giving clear guidance in the interpretation of the Agreement. It is at this point that one may clearly see that the A.I.T. is predominantly an affair for governments. The Accord is a political one in which the Parties have not agreed to be bound by determinations made in the context of a more legalistic dispute resolution process. Secondly, the level and type of public participation are well within the bounds of executive federalism.

1. **Procedure**
   a) **the nature of the procedure**

   Disputes are driven by governments and not private parties. Most Chapters contain their own dispute resolution provisions and such procedures must be exhausted before going on to Chapter 17's
formal dispute settlement mechanism. Where a dispute may entail more than one Chapter, the complaining party may select one, but cannot thereafter change its choice. Sectoral dispute resolution invariably requires consultations, mediation and conciliation with the view that experts should try to resolve the dispute in the first instance. They may consult and request the assistance of sectoral groups referred to in the relevant Chapter. Time constraints are imposed.

For example, under Chapter 6 on Investment, a complaining Party may request consultations with the Party complained of. Article 615 permits the Party to request the Working Group on Investment to examine the matter and make recommendations. If within 90 days a resolution satisfactory to the Parties has not been arrived at, then Chapter 17's formal dispute resolution may be resorted to. Prior to the use of Chapter 17, Article 711 on Labour Mobility imposes the requirement of consultation through an "official contact" appointed by each Party. A request for assistance from the Forum of Labour Management Ministers may be made. Again, 90 days is the minimum time before Chapter 17 may be employed. Similarly, under Chapter 10, on Alcoholic Beverages, Article 1009 states that complaints must be lodged with the Party allegedly in breach, who must then give a prompt written response. Within 30 days, the province, in which the complainant is resident, is to engage in negotiations and 60 days

---

thereafter, Chapter 17 may by resorted to. Under Chapter 14, on Transportation, Article 1412 requires consultations and the Party complained about must respond to the request within 60 days. If no reasonable solution is reached within a "reasonable period of time", a Party may request the assistance of the Council of Ministers Responsible for Transportation and Highway Safety. That body may refer the matter to fact-finding bodies, technical experts, mediators, conciliators of the Committee of Internal Trade. Chapter 17 may then be resorted to within the earlier of 90 days, or, 60 days where the Party complained against has not responded to the request for consultations.

Thus, the procedure at the sectoral level is a telling reminder that dispute resolution is an affair of federal and provincial governments in terms of negotiation and conciliation. Furthermore, in each Chapter, except for certain modifications in the alcoholic beverages and environmental protection Chapters, the parties to the dispute must be governments. In terms of alcoholic beverages, initial consultations are conducted between producers and competent government authorities; the environmental protection provisions refer to Parties and persons.

The clear emphasis in Chapter 17’s formal dispute resolution is, again, government to government. The role of the federal government is no greater than any other government. Part A is government controlled, whereas, Part B allows for private party access. Consultations, mediation and conciliation comprise the first avenue and are clearly preferred. However, under Article
1702(1)(b), this stage may be by-passed with the agreement of the parties, who may directly request either the assistance of the Committee on Internal Trade, or, the establishment of a panel. Otherwise, consultations are to begin within 10 days of the delivery of the request and there is a provision to allow any party with "substantial interest" to participate. "Substantial interest", under Article 1704.10 includes a Party with an analogous measure, or, a significant number of persons carrying on business in a province who are or will be affected. The consultations are to be conducted in private and without prejudice. There is a procedure to exchange all relevant information, but, information can be submitted on a confidential basis.

Where the issue remains unresolved, Article 1704(1) provides time limits in which to request the establishment of a Panel and even allows for Parties to agree on their own timetable. Up to five panellists are appointed by each Party to the Agreement to comprise a roster of 65. Their appointment is to be on the basis of expertise or experience in matters covered by the Agreement; they are to be independent of and not take instructions from any Party; and they are to serve for a period of five years with the possibility of renewal. See Annex 1705.1(2). Each Party to the dispute appoints two panellists from the roster, who were not originally nominated to the roster by the Party. The appointed panellists select a chairperson. In the event they cannot agree, the Secretariat selects the chairperson by lot.
Private party access to the dispute resolution process is set out in Part B of Chapter 17. Essentially, private parties may act directly only if their Party refuses to act on their behalf or refuses to request a panel. First, the private party must pass a screening. Each government Party is to appoint an individual, who is independent of government and capable of making independent decisions on the merits regarding a private party. The screener will take into account whether the complaint is frivolous or vexatious, instituted merely to harass and, finally, if there is reasonable cause of injury or denial of benefit (or, regarding a trade union, whether there is injury/denial of benefit to its members). See Article 1713(4). The actual procedure generally parallels that of governments.

The effect of a panel decision hammers home that the A.I.T. is an affair for governments. Panel decisions are not binding on the Parties and there is no recourse to the courts, except, perhaps, for judicial review. However, to beef up compliance within this executive federalism framework, an element of public accountability is introduced as the proceedings are open to the public and the panel report is to be published. Furthermore, retaliation by the complaining Party is permitted for non-compliance of the panel decision and the matter is put on and remains on the agenda of the Committee on Internal Trade. In the case of a government to government dispute, the non-complying Party must provide an annual written status report on the matter.
In terms of public participation, the process assures little or no participation because of the costs involved with such proceedings as compared with the possible benefits of a non-binding report, the lack of a panel’s ability to award damages. The only immediate benefit is that of the possibility of being awarded costs under Annex 1718.3.

**Conclusion**

The response of the A.I.T. reflects a tension. On the one hand it is a response to an economic union that is market oriented. On the other hand, the provinces tried to ensure that they hold onto their traditional powers and instruments. In the end, it may not do much for the market model and little to prevent provincial internal barriers (pursuant to building provincial economies and industries). On the other hand, the Agreement may reflect more a cautious approach than an intention to preordain its failure.

Were governments really serious about the internal common market, they would have departed from the executive federalism approach, adopted a rules-based regime and, furthermore, allowed for greater public participation. Several possibilities exist in terms of efficiency/effectiveness to strengthen the Agreement, which can be employed separately or in combination. One proposal is in terms of structure. Although, in terms of positive integration, the structures and bodies of the A.I.T. are based on functional lines and, therefore, conducive to facilitating
negotiation and agreement, it is still based on executive federalism. As noted earlier, establishing a structure in which the members share its mandate and ethos going beyond representation of their particular level of government will be more effective in ensuring those members have the appropriate level of commitment to the mandate. Such a structure would require a clear mandate, as well as some degree of independence of the members from the government which appointed them. Finally, to avoid the "joint decision trap" of requiring unanimity characteristic of executive federalism, a regime of majority or qualified majority might be instituted.

Another possibility is to provide for a regime in which adjudication is binding on the respective governments and can be enforced by the nation’s courts. The Agreement would then take on a legal, rather than political character thereby strengthening its legitimacy, especially if combined with real sanctions, like ultra vires rulings and even positive injunctions to require provincial or federal legislation or regulations to come into line with the Agreement.

In addition to such a strengthened adjudicative regime, its effectiveness would be greatly enhanced by allowing private parties direct access to adjudication in order to challenge legislation that directly affects their interests. Howse has argued that the adjudicative process, even within the current
A.I.T. context, can be strengthened in several ways.¹⁶⁷

First, the federal government may assist persons bringing actions before the dispute settlement mechanism with legal costs or by providing legal advice. Secondly, it could commission a comprehensive independent study of the costs and impacts of internal trade barriers, including extensive surveys of the private sector, which will provide a political forum in which to raise grievances, as well as providing proof that trade barriers are causing economic harm, and to whom. Such an inquiry might otherwise be too difficult for many firms, that are interested in challenging such barriers, to provide on their own.

Such a process allows for greater democratic participation and permits the holding of governments accountable for their actions. Disputes can no longer be entirely resolved behind closed doors. Private parties are more numerous and have powerful incentives to protect and/or further their interests if the means available to do so are viable. The European Union experience is ample testimony to this fact. A domestic example is in the area of the environment. The federal government was required under its Environmental Assessment and Review Process guidelines to conduct Environmental Impact Assessments and

thereby granting citizens legally enforceable claims which were used and which prevented secret settlements.\textsuperscript{162}

To this point, we have discussed public participation in terms of adjudication within the intergovernmental context. One must also bear in mind that the public may conceivably resort to judicial federalism and the Constitution to challenge internal barriers to trade under the mobility rights contained in s. 6 of the Charter.

The right to earn a livelihood under s. 6 must be linked with some element of mobility although taking up residence in the province concerned is not necessarily required.\textsuperscript{163} Howse has argued that despite limitations to s. 6, such as that the section does not apply to corporations, or, the suggestion that provincial measures not purposely discriminatory but simply conditions of doing business in the province are not violations, there are recent Court of Appeal cases that show the promise of helping to secure the Canadian economic union.\textsuperscript{170}

Furthermore, some cases have gone some way toward constitutionalizing the concept of mutual recognition, although, to date, only extending it to the interprovincial aspects of

\textsuperscript{162}Katheryn Harrison, "Federalism, Environmental Protection and Bare Avoidance", in Rocher and Smith, pp. 428-9.


Thus, prospects for the effectiveness of these provisions are quite uncertain at this time and this option will likely be a lengthy one to pursue.

Finally, where the intergovernmental and judicial processes of federalism may not be entirely successful, the federal government may conceivably adopt a more unilateralist approach in using its s. 91(2) Trade and Commerce and P.O.G.G. powers for harmonizing regulation, even in areas of provincial jurisdiction, for the purpose of securing the economic union. This option does not seem to be a likely one, in any event in the near future. Aside from the legal issues of concurrency and paramountcy that might arise, and with respect to the actual scope of federal powers to so secure the economic union, this approach could create a tremendous level of acrimony and litigation with the provinces. In the prevailing political climate, the federal government will likely think this approach too risky and costly. Yet, where all else has been tried and failed, some level of unilateral action might be undertaken, and the threat of taking such action can become a bargaining chip to secure effective measures. This assessment demonstrates, once again, that executive federalism and judicial federalism, or Constitutionalism, are by no means mutually exclusive processes.

---

171 Ibid, p. 10.
2. Occupational Training

Occupational training is an aspect of factor creation. Along with education, it is highly important, if not decisive, in national competitive advantage. In the 1990's, governments have been emphasizing investment in human capital as integral to the nation's competitive advantage, and to build a more flexible and responsive workforce by which a high-skill, high-wage economy may be created. Occupational training in this section is taken to mean technical and vocational training and not other important aspects of education. In Porter's ten nation study, it was found that in every nation, those industries that were the most competitive were often those in which specialized investment in education and training had been great, as in aerospace and pharmaceuticals in the U.S. 

Government must provide a good general system of education and policies that link education to industry, along with the encouragement of industry's own efforts to train. Government factor creating mechanisms are rarely, in themselves, a source of competitive advantage. There is a need for advanced and specialized skills that are inevitably tied to industry. Domestic rivalry, clustering and geographical concentration are vital to the rate of factor upgrading. Government efforts at creating specialized factors risk creating the wrong factors at

---


174 Ibid. p. 627.
the wrong time and are, in any event, often late in sending and responding to needs for new training. Factor creation benefits from proximity of clear economic interest, its importance to economic prosperity and the necessity of sustained investment.

One study has noted that advanced factor creation mechanisms remain a weakness in Canada and firms experience difficulties because of the lack of specialized and advanced factors. The result is that there are shortages of skilled trades at a time when fewer unskilled jobs exist which plague industry productivity and limit growth potential.

In Canada, on the other hand, the weaknesses of technical education has been attributed to several factors and has been characterized by declining enrolment in trade and vocational programs. First, technical education is not seen as a respected alternative to university training, which is accorded high value. Certification practices for trades tend to be poorly developed, particularly, as compared to standards and accreditation in professional white collar occupations, and few such occupations have national standards or mechanisms - some are not even licensed, such as in the aircraft maintenance industry. Other problems relate to antiquated program structures and restricted access. There is no formal system to channel students into trades. Access to a trade may not even be possible without becoming a union member, which may require prior work experience.

\[17^a\] Monitor, p. 155.
\[17^b\] Ibid, pp. 170-1.
Finally, the Canadian scholarship program, which is designed to encourage students to consider education in science and technology, does not extend eligibility to community colleges, nor are they eligible for R&D grants (under the federal Matching Funds Policy).\textsuperscript{177}

If one were to make gross thumb nail comparisons with another federal country having leading technical education programs like Germany, one finds that Canada has vastly fewer apprenticeable trades (170 as opposed to 450 in Germany) and that 4\% of the German labour force are presently apprentices as opposed to 0.8\% in Canada and even these are concentrated in certain occupations like construction.\textsuperscript{176} The average age of apprentices in Ontario is 26, whereas, it is 16 in Germany.\textsuperscript{177}

As for occupational training, several policy goals are applicable. The first is the establishment of respected and high-quality forms of higher education besides university, as most do not attend university. For this goal to be successfully achieved, the weaknesses of technical education in Canada must be addressed. Technical universities and vocational schools have been important in Germany, Switzerland and Korea, whereas, in Japan, companies play a heavy role in post-secondary education. It is shortsighted not to improve and institute a more generalized job apprenticeship program along the lines of

\textsuperscript{177} Ibid. p.172.

\textsuperscript{176} Ibid. p. 173.

\textsuperscript{173} Ibid.
European countries, notably Germany, rather than to reinstate an employment tax credit program as advocated by the Macdonald Commission, due to fiscal constraints.

Secondly, a close connection between educational institutions and employers is desirable. German and Swiss apprenticeship programs consist of education and on the job training lasting for approximately three to four years. Curricula for apprenticeship schools are developed by local authorities in close conjunction with industry associations and individual companies. It has been observed that ties are enhanced if individual schools, colleges or universities have flexibility to adapt to specialized needs of local industry as in Germany, but, a tension arises with maintaining standards. As we will see, evidence exists to support the argument that it is not clear that the community college system in Canada as structured is at all well suited to administer programs requiring constant modification and close collaboration with industry. Encouraging closer links between high schools and the workplace is essential, as only 30% go on to post-secondary education and few programs assist in making the transition to the workforce.¹⁰⁰

It is only recently that industry involvement with high schools or community colleges has led to some interesting, innovative and positive programs. For example, the Welland Board of Education and an auto parts supplier have initiated Canada’s

first School Workplace Apprenticeship Program (SWAP) for high school students. The program has helped to enhance the profile of skilled trades within high schools in the area and has helped to reduce the drop out rate. Quebec has its own trade-oriented "Professional Studies" diploma for high school students. Another good example is Inco's initiative with Cambrian College in developing an apprenticeship program to develop the mining and metallurgical labour force. Finally, the Society of Plastics Industry of Canada have forged community college links to launch an industry wide program for skilled trades in the plastic industry.

Third, firms should be encouraged to invest heavily in ongoing in-house training through industry associations or individually. This has been the principal approach in Japan, where, even in some firms, one must pass exams to advance. Such training is continuous and focuses on specific skills and fields relevant to the company's industry. Some studies have shown that the largest positive impact comes from industrial training at the workplace combined with work experience.

Trade associations can train with respect to the skills needed by the entire industry, and can thereby achieve critical

---

Monitor, p. 173.

Ibid.

mass in an economical way. In terms of corporate training
investment, a low priority is given to vocational training, as
opposed to white collar professions.

One survey has found that less than one-third of all
Canadian firms offer any formal training at all and they spend a
small fraction of what German employers commit to vocational
training.\textsuperscript{134} Furthermore, most training is short term in
nature (under 2 weeks).\textsuperscript{135} However, in bigger companies,
there is a tendency to provide more and better training and
training is more prevalent in firms and industries that
experience rapid technological change.\textsuperscript{136} One reason for this
lagging private sector spending on training is a business culture
preoccupied with short term profitability, but, may also reflect
the degree of foreign ownership in Canada which is not of the
home base variety and the natural resource bias characterizing
Canadian industry.

Governments should not unwittingly discourage firm or trade
association investments in human resource developments, for
example, in taxing training benefits, or, through labour laws
that discourage employer training incentives. Porter has argued
that the need for actual incentives for company training is less
clear as firms must do this anyway to maintain advantage, yet the

\textsuperscript{134}Gunderson and Ridell, p. 11 - about two-thirds of private
firms have some form of training, but, in only one-third training
is formal; Monitor, p. 182.

\textsuperscript{135}Gunderson and Ridell, p. 11.

\textsuperscript{136}Ibid.
evidence available respecting Canada is that on the whole Canadian industry is not currently meeting the training challenge. 137

Although industrial relations can be characterized as adversarial, co-operative efforts have been emerging in some areas of training, perhaps, due to the threat of international competition and the fact that technological change typically results in relatively few direct layoffs. However, such cooperation most often appears to be the result of continued crisis. Some positive initiatives have included joint management-labour committees to oversee multiskilled training and compensation linked directly to skill and knowledge, not simply seniority. Government programs that bring labour and management together are positive steps in the right direction and have basically operated outside the collective bargaining process. For example, Employment and Immigration Canada and the Ontario Government and unions and firms in the electrical and electronics industry have established the Sectoral Training Fund for workers to upgrade and broaden skills and to help companies meet specific training needs. 138 Other examples include Employment and Immigration Canada assistance, Industrialized Adjustment Service and labour and management cooperation in the Western Wood Products Council to explore issues.

137 Monitor, p. 182.

138 Ibid, p.188. Funding is equal to 1% of payroll, .25% by employees and firms and .50% by each government.
The fourth policy goal is to devise immigration policies to allow the movement of personnel with specialized skills. The division of jurisdiction is not a stumbling block as this is an area of federal responsibility and paramountcy modified by the intergovernmental immigration agreement with Quebec to attract more French-speaking people to that province. It is becoming clear, however, that Canada can no longer rely on immigration to fill its skills demand and, indeed, reliance on the same has hampered the development of indigenous training in Canada.169

Finally, Canada has been characterized as emphasizing passive income maintenance programs, like its Unemployment Insurance scheme, as opposed to adjustment assistance programs like training, especially when compared with many European countries like Sweden and Germany. One explanation is that of ideological resistance:

Proposals to transform unemployment insurance into a vehicle of positive adjustment, with benefits linked to retraining and skills development, have failed to gain ideological consensus largely because they have gone hand in hand with an erosion of the value of insurance entitlements.170

While Canada is in the middle of OECD countries in terms of total public expenditures as a percentage of GDP on all labour market programs, its was lower (6 out of 9) regarding expenditures on active programs as opposed to passive income

169 Gunderson and Ridell, p. 16.

170 Howse and Chandler, p. 250.
maintenance. Even this situation reflects an improvement from the early 90's and a new consensus as to the need for positive adjustment.

The Legacy of Federalism and Training Policy

This section on the legacy of federalism and training policy relates to its non-constitutional aspects as formal constitutional change has not been successful in this area. It covers the division of jurisdiction and divides periods of training policy into before and after 1984 and the latest devolutionary labour training initiatives.

Occupational training is, like many other areas of concern to modern Canadian society, not specifically allocated under the division of jurisdiction. Claims to support governmental action may be found in several of its provisions. The provinces' claim to jurisdiction is supported under s. 93 Education and as incidental to provincial areas of jurisdiction. Support for the federal government's claim is in relation to its overall responsibility to oversee the economy, adjustment policy in relation to unemployment, as incidental to areas of federal jurisdiction and, finally, the federal spending power.

As such, the extensive nature of the overlap makes occupational training a candidate for consideration of whether or not coordinated government action should take place. It is far

\[13^1\] Gunderson and Ridell, p. 11.
from certain from a functional perspective that this area should exclude independently acting or competitive governments.

Two overall patterns have developed in terms of federalism in relation to training policy. One reflects a kind of market imperfection or provincial inability issue regarding the province's involvement in training policy. Educational institutions, especially community colleges, have created a bias in favour of expanding "institutional training" as opposed to "individual training", which is the type provided by employers on the job. This trend is one at variance with the pattern in most countries and which has been criticized as not being responsive to business by training for skills not in demand, or, that will not be in demand when the worker completes the training program. \(^1\) It would be a reasonable conclusion that this bias can be seen as emanating from the institutional factor of education being assigned to provincial jurisdiction and, furthermore, driven by the intragovernmental bureaucratic dynamic of government organization.

The second pattern that has been observed in relation to the use of the federal spending power is that periodic federal initiatives and provincial responses have been important forces shaping the conflictual history for Canadian training policy. Indeed, with respect to this issue, were it not for federalism, these conflicts/tensions would likely emerge at the

---

\(^1\) Howse and Chandler, p. 253; Rodney Haddow, "Federalism and Training Policy in Canada: Institutional Barriers to Economic Adjustment", in Rocher and Smith (eds), p. 340.
intragovernmental level where they could be more easily resolved. However, due to federalism, such conflicts are accorded particular salience by having opposing interests represented by opposing constitutionally ordained levels of government in which one cannot gain constitutional dominance over the other. Furthermore, training benefits could be used to obtain an advantage on the social policy front, as Atlantic Canada had in using training benefits as a vehicle to extend income maintenance beyond the limits of UI, rather than for positive adjustment. It has been said by Gunderson and Ridell:

Jurisdictional splits between the federal and provincial governments over responsibility for training has led to endless wrangling and blame shifting in this area highlighting that divided or ill-defined responsibility often leads to no responsibility.¹²³

Finally, although overall comparative data is still incomplete, it still appears that the federal government remains the main provider of funding for training in Canada.¹²⁴

a) Training Policy until 1984

Federal involvement in financing technical education commenced in 1919 and related to soldiers returning home after the war. This role remained modest until the Technical and Vocational Training Assistance Act (1960) was initiated to address the problem of rising unemployment in spite of job vacancies. The solution was an executive federalism one on

¹²³Gunderson and Ridell, p. 16.
¹²⁴Ibid, p. 10.
functional lines on the basis of 50% cost sharing of the training program with few conditions attached.

It is very interesting to note that functional issues do not always facilitate discussion and agreement on functional lines. Institutional structure within a given level of government may affect relations in the context of federal-provincial relations even if it is in respect of a discrete issue. A prime example is this area of intergovernmental relations and adult occupational training where the result was, in fact, conflictual relations at the functional level in which federal and provincial officials divided along professional lines between federal economists viewing training as an adjunct of employment, and provincial educationalists espousing the "whole person" theory. Equally as ironic, on the other hand, was that the Quebec bilateral relationship was articulated by professionals whose backgrounds paralleled that of the federal officials and the "conflict between economists and educationalists was intragovernmental, being centred around the provincial cabinet table." Two further problems became apparent. First, richer provinces could make more use of the arrangement, reflecting interprovincial disparity. The second, was a worry that training was not addressing the real needs of industry. This aspect was influenced by the variable of the division of jurisdiction in

\[135\] Dupré, p. 240.

\[136\] Ibid.
which training reflected an "educationalist" bias of provincial authorities in providing academic upgrading and basic skills, rather, than job related ones.137

These shortcomings resulted in the federal initiative under the Adult Occupational Training Act (1966). This approach was an attempt to move away from the shared cost executive federalism approach in favour of a unilateral stance of the federal government "purchasing" the training from whatever "seller" it preferred, including provincial institutions. As the federal government would be paying the entire cost, it would, in principle, control content entirely, thereby assuring training was more relevant to industry and allowing it to provide more training to poorer provinces.

This was a purely unilateral move as there was no prior consultation with the provinces. As a result, the provinces attacked it bitterly, primarily on two bases. The first was a program concern in the sense that such discretion represented unwanted uncertainty for the provinces, especially, if it had to alter its training purchases from one year to the next. The second was organizational self-interest as the federal government transferring funds to the private sector meant a reduction in funding for provincial institutions.

The result of the conflict was that although federal training expenditures no longer favoured affluent provinces, the provinces were more successful in impeding the federal government.

137Haddow, p. 341.

150
in other areas. First, the federal government committed itself to making no sudden reductions in purchases from provincial institutions, thereby, maintaining provincial institutions in a dominant position.\(^{156}\) Second, the provinces, led by Ontario, were able to position themselves as exclusive brokers for federal training dollars in the province.\(^{157}\) Provincial influence, through a purely executive federalism structure based on functional lines (the Manpower Need Committees, which consisted of federal and provincial training officials), permitted provincial input into federal plans at an early stage. Further levels of co-ordination or blended policy were achieved by federal-provincial training agreements establishing general parameters of federal purchases in each province, overseen by Manpower Need Committees and their subcommittees.

This outcome, particularly the provincial brokerage role, is an example of the detrimental effects of a lack of competition in the policies of the federal and provincial governments and a corresponding "market failure" exemplified in the inability of the provinces, primarily due to intragovernmental institutional organization, to create relevant training policy. The federal government, evidently unsatisfied with its relationship with the provinces in the training field, to that point, sought to alter

---

\(^{156}\) Haddow, p. 342.

\(^{157}\) In mediating the relation between federal spending and the trainees, the provinces gained considerable influence over how the federal government spent and how the latter structured its courses.
it. Again, the federal government wished to gain greater control through the more unilateral route of purchases to adapt training to changing economic needs; whereas, not surprisingly, the provincial bureaucracy sought to protect their interest, especially, regarding their institutions in the face of federally imposed uncertainty. The federal approach was spurred by the Manpower Department's Dodge Report, 1981, which concluded that federal training dollars were still funding too much basic education upgrading and not enough was being done to provide more advanced skills desperately needed by industry. The Report recommended more private sector involvement in training by increasing training in industry and consulting more with business about the goals of training programs. Generally, the institutional employment training of the 1960's and 70's was to be recognized as a disappointing experience.\footnote{Macdonald Commission, Vol. 2, p. 759.}

The National Training Act, 1982 and related programs were intended, again, through a more unilateral approach to preserve the buyer role for the federal government and to help provinces expand training capacities in a number of 'national occupations' where skills shortages were thought to exist. Here, there was a shift of resources toward higher level skills development and from institutional to industrial training, particularly by subsidizing on-the-job training.\footnote{Ibid.} The intended two areas of focus were on skills shortages and the youth. The General

\footnote{Macdonald Commission, Vol. 2, p. 759.}
\footnote{Ibid.}
Industrial Training and Critical Trade Skills Training programs permitted the federal government to deal directly with private employers.

Haddow argues that the initiative was unsuccessful as the federal government was unable to shake its spending free of provincial institutions. The sum of advanced skills training in institutions was unchanged from 1985, and industrial expenditures rose only modestly from 15% to 17% of federal outlays.²⁰²

b) Since 1984

The two relevant initiatives in this period are the Canadian Jobs Strategy, 1985 (CJS) and the Labour Force Development strategy, 1989 (LFDS). This strategy can be characterized as market oriented liberalism with a focus on private sector leadership and budgetary restraint associated with the then Conservative government's economic policy and the attempt to target social benefits at the most needy.

The weaknesses in the programs could not be entirely (or, perhaps, even mostly) attributed to federalism. The policy framework itself had its own competing demands and imperfections. It has been argued that the federal government never clearly defined what a more market-sensitive training policy should entail in order to achieve the stated desire of training to produce advanced skills in short supply.²⁰³ Secondly, and

²⁰²Haddow, p. 343.

²⁰³Ibid.
ironically, the programs often concentrated on rudimentary skills. There were problems encountered in the transition between one program and the next. Finally, again, after 1984, the provinces would resist, with varying degrees of success, federal efforts to reduce their policy role, and, indeed, sought to reassert their role.

1) Canadian Jobs Strategy, 1985

The provinces agreed with the need for training that was economic in orientation, and which had an emphasis on small business and entrepreneurship.

The CJS approach increasingly abandoned the executive federalism mechanisms of provincial brokers and MNCs in favour of a more unilateral approach involving "direct" and "indirect" purchases. Only "direct" federal training purchases (by 1993, amounting to less than half of federal purchases) involved the old executive federalism approach of co-ordination with the provinces and agreement regarding a training plan. Even the conditions were now more detailed and far removed from the virtual open-endedness of the cost-sharing of the 1960's. The "indirect" approach was unilateral, involving the federal Canadian Employment Centres (CECs) signing detailed training agreements with private parties, which might include individual firms requiring new skills, firms willing to supply specific
training, non-profit organizations and sectoral or local committees, usually dominated by interested businesses.\textsuperscript{204}

From a public participation/accountability perspective, by 1989, CECs were devolving more decision-making authority along pluralist lines to private sector committees organized along sectoral or regional lines like the Community Industrial Training Committees in Ontario.\textsuperscript{205} Not only does such an approach increase democratic participation of directly interested parties and raises the level of accountability, it is part of the approach necessary to devise good training policy.

The implication of intertwining greater public involvement in training and decision-making with a more unilateral federal spending approach, was a redirection of large sums from provincially dominated public institutions to private trainers, thereby, stimulating substantial growth in this sector. There was a concomitant lessening of provincial influence on federal policy-making. The provinces would complain that having built up a community college system, the federal government was now strangling it. Another interesting implication was that provincial colleges would have to compete to obtain training business, resulting in some adopting an entrepreneurial approach

\textsuperscript{204} Some training could be purchased from community colleges, but, more and more was being purchased from private sector trainees, who were seen as cheaper and more sensitive to market needs than colleges. Colleges faced the competitive disadvantage of high overhead costs and high union wages. See Haddow, pp. 345-6.

\textsuperscript{205} Ibid, p. 346.
and by becoming more efficient. Other provinces were slow to adapt, resulting in their suffering heavier revenue losses. An example of the new entrepreneurial spirit was exhibited in Ontario. The Ontario Skills Development Offices opened in community colleges had a mandate to contact firms requiring training and to arrange with firms and the local CEC that their training needs be met within the college system.

It is interesting to bear in mind that while the new approach represented a rebalancing towards a pan-Canadian approach in the form of federal policy to address skills shortages in the nation and in favour of public participation, democracy and accountability, there was a decline in provincialism. However, not all provinces were treated alike. The "Quebec distinctiveness" perspective suffered no real setbacks as Quebec was relatively immune from the change. Its training agreement with Ottawa, according to federal officials at least, ensured that only a small part of federal training dollars spent in the provinces would go to private trainers.265

The new approach would also create programming problems, which supports the concern expressed earlier that the community college system as structured may not be well suited to programs requiring constant modification and close collaboration with industry. The need to bid for training dollars from a plethora of changing buyers whose demands often altered significantly at short notice, created enormous complications for provincial

institutions accustomed to planning curriculum and staff development in a predictable financial setting and unaccustomed to low-budget competition from the private sector.\textsuperscript{207}

A problem arising due to federalism, as the program was structured, was that of split responsibilities. To receive federal funds on an ongoing basis, private trainers had to be certified by provincial governments. Aside from their obvious loyalty to colleges, provincial training officials have argued that they lack the resources to undertake this assessment effectively or to maintain the certification role. Some training is beyond the grasp of provincial authority and much training is now provided through temporary arrangements with individual employers or contractors over which the provinces have no supervisory role.\textsuperscript{208}

It is reasonable to conclude that, to a large extent, the problems are not federalism based, but, rather, arise due to blurred objectives between economic efficiency and social welfare. The C.J.S. has targeted training to those at a disadvantage in the labour market - the two largest components being "Job Development" regarding the long termed unemployed and "Job Entry". A smaller component comprises Skills Investment for workers facing technological obsolescence and Community Features for communities hit by layoffs. Only Skills Shortages has an efficiency orientation.

\textsuperscript{207}Ibid.

\textsuperscript{208}Ibid.
Secondly, by 1986, it had become clear that C.J.S. training target groups provided minimal skills in relation to low paying employment and that funds were being used as wage subsidies by low wage employers, without significantly increasing the skills levels of workers, or making them more employable in new occupations. Given the greater amount of private sector participation available under this system, there is an indication that policy formation and implementation is a problem going beyond mere government structures or federalism. Perhaps, there was not enough private sector involvement or that some of those that were involved had interests inconsistent with the program. Furthermore, inexpensive training provided in courses of short duration are much easier to find among private trainers. Although this situation does not appear to have federalism causes, it, not surprisingly, has federalism implications as the poor quality of much C.J.S. training created additional friction with the provinces.

The value of federal-provincial competition in this area has demonstrated benefits in terms of efficiency as opposed to the executive federalism co-ordinated approach employed in the earlier stages of training program development and implementation. Now, it was the provinces that were correctly stressing the importance of a more sophisticated training (no doubt, a position institutionally motivated). In so doing, those

\[269\] See for example, Howse and Chandler, p. 253; Haddow, p. 349.
provinces have departed from the traditional "educationalist" preference of providing basic training. This turnabout can be seen in the Ontario Premiers' Council of the 1990's complaints that C.J.S. placed overwhelming emphasis on short-term, entry level employment training, thereby, exposing a gap regarding the long term needs of industry.

The final issue for training and federal-provincial friction has been the impact of fiscal restraint after 1985. There had been a decline in federal spending from $1.8 billion during 1985-86 to $1.636 billion during 1988-89 and the number of persons trained declined from 470,500 to 425,296.210


The LFDS reflected a redefining of federal priorities emanating from: a promise with the Free Trade Agreement to institute adjustment measures, greater fiscal restraint and expenditures along more market-enhancing lines and a bureaucratic influence to create a "training culture" by involving extensive participation by business and labour in corporatist bodies that designed and directed training policies. Pursuant to this effort, the federal Conservatives redirected $800 million from the Unemployment Insurance fund into developmental training by reducing benefit periods for various categories of U.I. claimants. In terms of policy creation procedure, a major consultation process was initiated which can be characterized as

---

210Haddow, pp. 349-350.
executive federalism on functional lines and involving a high degree of public participation of those who had direct interest. Consultation included the federal government, labour, business, the provinces, the Territories, educational training institutions and other spheres, with primary responsibility going to employers and workers. In support of this new approach, the Canadian Labour Market Productivity Centre was established by Ottawa as a research institution operated jointly by business and labour organizations and to undertake consultations.

In 1991, the federal government created the Canadian Labour Force Development Board made up of twenty-two non-government organizations in which business and labour would dominate.\textsuperscript{211} As such, the extent of its public participation was less than what was conceivably possible under the pluralistic model of the C.J.S., but, was in any event a positive approach consistent with the principles of good training policy outlined earlier. The approach was again executive federalism on functional lines with democratic accountability and representation. Again, under this approach, the provinces could not heavily influence federal spending in this area and the federal government was allocating more resources to private training. Once again, Quebec was the special case with relatively little, if anything, lost.

Initially, the Board was advisory, but, it acquired greater responsibility over priorities and expenditures. A network of private sector led provincial and local boards were to complement

\textsuperscript{211} Ibid, p. 352.
the national one. The main responsibility for the provincial boards was to review and approve local Board plans within the national framework of the CLFD and the federal Board would monitor local Board compliance. The local Boards would spend money and draw up training plans under national and provincial guidance. Haddow has argued that despite this autonomy and supposed control by private sector actors, there was much room for EIC influence as the actual administration of the contract to operationalize the plan was an EIC responsibility.212 On a conceptual level, what this meant is that federal unilateral action through the EIS could decrease the area of participation by the private sector in decision making policy.

Again, the problems and issues that have arisen do not solely emanate from federalism. Although the federal government still allocates more resources to private training, Haddow has argued that there is good reason to believe much federal training is still on rudimentary skills targeting women, the disabled, visible minorities and aboriginals.213 This situation appears to be a result of pursuing blurred objectives.

Secondly, the new system of local Boards has yet to be reconciled with the network of community training committees and

212 The contract was to ensure local Board compliance with national guidelines. See Haddow, p. 354. Note, furthermore, that in 1993, Human Resources Development Canada had assumed control of federal training programs from the EIC.

213 Haddow, p. 356.
other private sector committees under the C.J.S.\textsuperscript{214} There is a non-federalism, bureaucratic component as many members of the old structures resist replacement. As for the federalism component, some provinces have maintained that adding a new layer of local Boards has made more unmanageable the work of provincial training institutions, and in smaller provinces it may stretch the capacity of private sector constituencies to staff positions. Affluent provinces have said that local boards duplicate its own efforts and funding favours the less affluent provinces.

Federalism has been an obstacle to the implementation of the federal plan as tensions have made provinces unenthusiastic partners in creating the new boards. It has, furthermore, been argued that the federal government's ability to move forward with its preferred option is largely dependant on the capacity for resistance of individual provinces as in Ontario, B.C., Alberta and Quebec where little headway has been made or different structures are in place.\textsuperscript{215} Such conflict has created a pattern of \textit{de facto} asymmetry as in some provinces federal authority has been compromised significantly, while in others, the federal role has increased.

In Quebec, the break with the CLFDB structure is complete. Its own Board is dominated by business and labour and Ottawa has the right to appoint members, but, the CLFDB has no influence. In Ontario, the Ontario Training and Adjustment Board with its

\begin{footnotes}
\footnote{\textit{Ibid}, p. 356.}
\footnote{\textit{Ibid}, p. 357.}
\end{footnotes}
private sector composition is similar to the CLFDB and has a mandate to direct training policy in the province (as proposed by the private sector led Premier’s Council on Technology). This Board has assumed direct control over most of Ontario’s training programs as opposed to the federal model which, as envisaged, grants more modest powers to federal and provincial boards. In 1991, the federal government and Ontario issued a statement on local boards, which they committed themselves to create jointly and which will be answerable to federal and provincial Boards. OTAB will not, however, be responding to "national frameworks" envisaged by the CLFDB signifying a nation-building/province-building conflict.

B.C.’s structure is not integrated with the CLFDB and that province has not committed itself to establishing local boards. Alberta has shown little interest to create a provincial private sector training equivalent to the federal board.

Business/Labour/Government

Federalism is not the only cleavage that divides, there is also the business/labour division. Business wanted structures that constrain as little as possible firms determining their own training needs and resisted equality granted to labour on CLFDB and provincial and local Boards, and rightly sees no reason why all labour seats should be held by the unions since most workers are not even in a union.

---

As has been seen earlier and as some have argued, business has evidenced little desire to increase its spending on training. Business has also advocated voluntary options like tax deductions as opposed to the creation of a mandatory training tax on business with a rebate to firms meeting training expenditure targets. Labour wants training to be adaptable and of high quality and wants to use it to enhance labour mobility and wage levels. It wants higher standards, more centralized control of expenditures and supports compulsory tax on business, but, not on workers. There was, also, a hostile relationship between the Conservative government and much of the labour movement.

iii) Agreements on Labour Market Development

Since December 1996, the federal government has been busy entering into labour market development agreements with a majority of the provinces including Alberta, New Brunswick and Quebec. An agreement with Ontario has not been signed as at the date of this thesis. Essentially, the terms of each Agreement signed are materially similar and there is a clause in each agreement stating that if there is another agreement negotiated between Canada and another province or territory in which the terms and/or conditions are materially different from

217 The first agreement was entered into with Alberta on December 6, 1996; followed by New Brunswick, December 13, 1996; Newfoundland-Labrador, March 27, 1997; Manitoba, April 17, 1997; Quebec, April 21, 1997; British Columbia, April 25, 1997; and P.E.I., April 26, 1997. See Human Resources Development Canada and la ministre d'état de L'Emploi et de la Solidarité internet homepage and sites.
an Agreement entered into, Canada agrees, if requested to do so by such province, to amend the Agreement in order to afford similar treatment. Therefore, the federal government was able to achieve symmetry as to the form of the agreement.

Essentially, this symmetry is achieved as a result of considerable devolution of federal powers in the area of labour market development through intergovernmental agreement, by abandoning direct participation regarding matters covered in the agreement and by tying its spending with the arrangement, which ensures greater provincial control over program design and delivery. Thus, this co-ordinated approach is a far cry from federal unilateral initiatives of the past in this area. This approach will also tend to decrease federal-provincial acrimony as the federal government has essentially reserved for itself the not insignificant role of imposing discipline by jointly monitoring and evaluating, and through imposing conditions and financial limits and reporting requirements. Thus, although the agreement is symmetrical in form, due to its flexibility, and being subject to provincial discretion, it will almost without doubt produce asymmetrical programs.

The provinces gained relatively predictable federal financing, at least, for three years, as well as increased discretion regarding the use of those funds. The provinces obtained an acknowledgement from the federal government that labour market training is an area of provincial responsibility. This clause was put in the recitals and it is doubtful whether it
represents a correct statement of constitutional law if what was meant was that training is of exclusive or even a paramount area of provincial jurisdiction, as seems to be implied by the Agreement. Consider, for example, skills training in federal areas of jurisdiction over railways or telecommunications. In any event, as a political matter, the Agreement will give the provinces some ammunition in attacking any future federal unilateral initiatives in this area.

The signatory provinces will implement the benefits and measures as described in the Agreement, often spelled out in Annexes to the Agreement and may make ongoing modifications to its design in order to ensure responsiveness to client needs, changing labour market conditions and evaluation findings. In particular, the provinces will now gain discretion over funds regarding programs similar to those that have been established by the Employment Insurance Act Commission such as:

- wage subsidies to encourage employer hiring of EI clients (i.e. unemployed persons);[213]

- earning supplements to encourage EI clients to accept employment;

- financial assistance to help EI clients start businesses or facilitate self-employment;

- financial assistance to create employment opportunities through which EI clients can gain work experience; and

- financial assistance to help clients obtain skills for employment.

[213]See Interpretation section of the various agreements for greater details regarding the definition of EI client.
Additionally funding is available:

- to organizations for the provision of employment assistance services to the unemployed (and not limited to those defined as EI clients);

- to employees, employers or employer associates and communities in developing and implementing strategies for dealing with labour market adjustment and meeting human resource requirements. (It should be noted that present EIA Commission programs under this heading do not extend to assistance for employed persons unless they are facing a loss of employment); and

- for research and innovative projects.

Other devolution of authority to the provinces relates to several functions within the National Employment Service like local aspects of employment counselling, labour exchange and labour market adjustment.

Here, there is room for much factor upgrading. However, the tenor and wording of the Agreements places stress on, or gives priority to, unemployed persons, or. to those who provide services/training to the unemployed. Accordingly, the focus is on getting people back to work as opposed to upgrading factors to provide for competitive advantage. It is often times those already employed who are in the best, or, perhaps, only position to receive cutting edge skills training. Thus, there is concern as to whether, despite employing people which is extremely positive in providing valuable jobs and work experience, perhaps, there will not be enough direct and explicit attention directed to upgrading factors for competitive advantage.

The effects of provincial initiatives will be interesting to observe with respect to the furthering of industrial policy. One
might note that the Agreements provide for a mechanism of a joint federal-provincial committee/mechanism to determine whether a proposed measure dissimilar to any existing employment benefit and support measure established by the Commission will be approved. Or, one might inquire what scope does funding for "innovative projects" provide to further industrial policy. If, on the other hand, these labour market development agreements have by-and-large left out factor upgrading (of already employed persons), then the question will be what mechanisms, if any, will be provided for by the province(s) and/or the federal government acting unilaterally or in co-ordinated manner, assuming the federal government has not hamstrung itself excessively in this area from a political point of view.

The federal government, in losing direct control over "local" aspects of labour market development, gained control over its financial expenditures to reasonably predictable levels. The federal government achieved several pan-Canadian objectives through conditions in the Agreement including a prohibition on residency requirements, requiring bilingual services in areas of significant demand, and that the federal role and contributions will have to be brought in a more explicit way as outlined in the agreement, to the attention of Canadians.

---

21 "The wording in the New Brunswick Agreement is "demand" without reference to 'significant'"
Other restrictions are placed on provincial discretion. First, as previously noted, spending must be on "similar" programs as those provided by the Commission and be consistent with the purpose and guidelines of Part II of the Employment Insurance Act. Where any questions arise as to whether a proposed new benefit or measure is similar or consistent, the parties agree to refer the question to a jointly agreed upon committee/mechanism for a determination. Modifications are to be set out in an amendment to a specified Annex to the Agreement. The same is true of new benefits or measures.

Secondly, as indicated earlier, where this jointly agreed upon committee/mechanism determines that the new benefit or measure is not similar, it will determine whether or not to recommend to the Commission that it add an appropriate new employment benefit or support measures, and thereby enable the province to implement its proposed benefit or measure, again, to be set out in an Annex. The literal meaning would suggest that the mere making of such recommendation by that body will enable the province to implement its proposed benefit or measure.

Finally, in terms of the softer obligations, the provinces are to be guided by certain principles in providing these services contemplated by the agreement such as to provide convenient access to federal and provincial programs and services; provide courteous, empathetic and timely service;

---

22 See, for example, the New Brunswick Agreement, clause 3.4.
provide flexible and innovative approaches to labour market and community needs; optimize individual potential and human dignity; and, achieve measurable results within a well-defined framework of accountability.

In addition to the conditions and restrictions outlined, the federal role is indirect and passive through mechanisms or provisions to impose discipline on the provinces. To a large extent, these mechanisms or provisions are jointly federal-provincial in nature, and not unilaterally federal, structured on functional lines. One set of major discipline imposing provisions deal with planning, monitoring and evaluation, and the other set deals with fiscal arrangements.

In terms of planning, monitoring and evaluation, criteria are set out by which results of the provincial benefits and measures are to be evaluated. The primary criteria are broadly speaking:

i) the number of active EI claimants that have access to provincial benefits;

ii) returns to employment of EI clients with an emphasis on active EI clients; and

iii) savings to the EI Account.

Each of these have detailed sub-criteria. The federal government and the province agree to jointly establish in advance of each fiscal year during the period of the agreement mutually agreed results targets for the coming fiscal year using the given criteria and set out in the Annual Annex for that fiscal year. The federal and provincial government agree to set up mechanisms
to jointly set the annual targets for each fiscal year following 1997/98 and to jointly review and assess the achievement of the results. In setting targets, the parties are to take into consideration local, regional and provincial economic and labour market circumstances, the results achieved in the previous year, the amount of funding available for the coming year and mutually agreed upon improvements in the design and delivery of the benefits and measures. Additionally, the province agrees to report to the Regional HDRC quarterly on year-to-date results achieved by each Human Resource Service centre, with respect to the primary results indicators and related data elements.

Furthermore, the federal and provincial government will jointly develop an evaluation framework for short, medium and long-term measurement of results. The initial evaluation is to be conducted in the first year of implementation of the provincial benefits and measures, followed by a second phase in the third year of implementation. Subsequent evaluations will be conducted regularly, on a three-to-five year basis. Such evaluations will determine, at a minimum, the impacts and effects of the provincial benefits and measures, including: their impacts and effects on sustainability of employment; change in dependency on income transfers (employment insurance and social assistance); impact on communities; and, change in tax revenues.

It should be emphasized at this juncture, that each level of government may choose to conduct independent evaluations and each level of government will make available to each other information
and findings produced by these evaluations. Thus, the federal government has reserved for itself a further role of carrying out its own monitoring and evaluation functioning and can presumably set up its own framework and criteria.

Given that s. 3 of the Employment Insurance Act requires the Canada Employment Insurance Commission to monitor and assess the effectiveness of the benefits and assistance provided, the province is required to submit a report on its assessment to the Minister of Human Resources Development annually from 1997 to 2001, which will be laid before Parliament, and agrees to co-operate with Canada in the preparation of this information.

It is required that the Annual Annex is to set out the following:

a. to provide Canada with a breakdown of the amounts it intends to allocate for expenditures under each provincial benefit and measure;

b. the agreed annual targets for the coming fiscal year;

c. the rolling three year projection of Canada’s annual allocations for contributions towards the costs of provincial benefits and measures; and

d. the actual amount of Canada’s contribution towards provincial benefits and measures in the up-coming year.

The federal government and the province agrees to co-operate with each other in developing measures for detecting and controlling abuse and in how and by whom these measures should be carried out to avoid duplication of efforts.

Finally, Canada and the province agree to establish a joint committee (the Implementation Committee) to oversee the implementation of the Agreement. It is responsible for overseeing the transfer of human resources from the federal
government to the province, the co-ordination of co-location arrangements to deliver both federal and provincial services under one roof, and the transfer of assets and other implementation issues as are specified.

The second major set of provisions imposing discipline on the province relate to the financial arrangements. First, maximum federal contributions to the province toward the cost of provincial benefits and measures are set out, or, the methodology for determining the same is referred to.\(^{22}\) After 1999/2000, during the period of the Agreement, the maximum contribution will be mutually reviewed annually between the parties, with the agreed amount to be specified in the Annual Annex. In conducting annual reviews, the federal government agrees to provide projected three year allocations on a rolling basis, which are to be treated as "merely forecasts or estimates." As well, the federal government agrees to make maximum contributions towards the administration costs incurred by the province acting pursuant to the agreement. All federal transfers are to be made monthly, based on a forecast and estimate.

Such maximum contributions mean that the federal government's spending will not be locked into provincial spending decisions, on the one hand, and provinces will be encouraged to operate efficiently if reasonable maximums are provided, or, they will have to pay the balance. In return, the province must

\(^{22}\)For the 1997/98 fiscal year Quebec's maximum contribution is $457,298,000; Alberta's is $97,517,000 and New Brunswick's, $66,430,000.
submit to the federal government, within three months after the end of the relevant fiscal year, a financial accounting including an audited financial statement, in a form which is federally prescribed, and certified by the Provincial auditor, setting out the amount of costs the province has actually incurred for each provincial benefit and measure. Secondly, the province must provide a statement from the Provincial auditor certifying that all payments received from the federal government for administrative costs were paid in respect of administration costs actually incurred in that fiscal year. Finally, any overpayment is considered to be a debt owing to Canada upon receipt of notice to repay.

Other matters are dealt with such as information and sharing of data, as well as matters listed like provisions respecting the transfer of federal employees, federal and provincial service delivery at common sites, transitional provisions and so forth.

The Agreement is for an indefinite period and can only be amended in writing by both parties. Where the federal government is not satisfied with the performance of a province, under the terms of the Agreement, it cannot unilaterally terminate within the first three years. At that time, the federal government and the province are to review the Agreement to assess whether the mutually desired results are being achieved and if they arrangements should be contained under the Agreement.\footnote{Of course, as indicated earlier, the federal or provincial governments are entitled to make their own independent evaluations as they see fit.}
Thereafter, either party can terminate at any time by giving one fiscal year’s written notice. Should termination occur, the federal government and the province agree to work together to ensure services to clients will not be unduly affected or interrupted.

Such arrangements may be an attempt to create "matter and form" arrangements by imposing procedural requirements to review the Agreement after three years, which may legally present a barrier to unilateral termination or amendment before that time, or, without giving the required notice. However, the Alberta Agreement took the precaution of specifying that if either party wishes to terminate by providing less than the required notice, all costs of the non-defaulting party reasonably attributable to the early termination shall be the responsibility of the terminating party, the non-terminating party having a duty to mitigate such costs.

What will be crucial to the institutional success of the arrangement will centre on the ability of both levels of government to agree, or set up workable bodies, as required by the agreement. For example, what if dissimilar measures are recommended by provincial, but not federal "representatives"? Certainly, some mechanism will be required which will allow for resolution, or, in the alternative, true to executive federalism spirit, unanimity may be required. Setting targets and maximum contributions can be quite controversial, featuring provinces trying to get more money and seeking the continuation of the
arrangement and the federal government wishing to keep tight control over quality and expenditures. However, the arrangement is structured on functional lines, involving discrete and quantifiable issues, as well as federal projections of contributions and an allocation methodology, and, finally, an ongoing interaction, which will contribute towards workability.

It is clear that the arrangement will allow for less competition between the federal and provincial governments, yet, there will be occasion to assess the results of provincial experimentation. It will be interesting to see whether the progress that had been achieved in the context of provincial institutions, like community colleges, will be continued to ensure that training is of a relevant variety. Secondly, the question becomes whether or not the provinces, now facing somewhat of a conflict of interest, will tend to favour their institutions in the delivery of training over that of private sector provision. In the alternative, will the provinces be able to solve the problem community colleges had experienced in certifying private sector individuals or organizations who had been providing training? Of course, the provinces will always have to consider termination of the agreement or funding levels where the federal government is not satisfied with how federal money is being spent, or with the results thereof.

One value which has suffered *prima facie* loses is public participation. Unlike previous strategies, there is no explicit
provisions allowing for public participation. This could be worrisome as consultation/co-ordination with industry is necessary to ensure successful factor upgrading and preparedness.

Although not necessarily inappropriate in the circumstances, the terms of these agreements demonstrate that it is primarily an affair between governments. Indeed, given that these labour market development agreements are a product of executive federalism and their terms are to be characterized as executive federalism, it is not surprising that the element of direct citizen participation has been diminished. On the other hand, improvements regarding accountability have been made when compared to traditional executive federalism relations by clarifying the responsibilities of the respective levels of governments, especially, of the provinces over program design and delivery.

One final theme should be stressed about these agreements relates to the important nature and implications of the processes of federalism in influencing institutional design. In Chapter II, the processes of federalism were outlined, including that of constitutional change. However, there is a sub-process or influence that has not, until now, been specifically addressed. With the defeat of the Charlottetown Accord and the recent referendum in Quebec, present devolutionary trends including the federal government abandoning a direct role in program creation and delivery, can be seen as influenced by governments bargaining under the shadow of the constitution. Even if continuing the
unilateral federal approach might bring greater efficiency gains in terms of industrial policy and upgrading factors (and we have seen that it has done so at least in some respects). It would appear that functional considerations are being overtaken by constitutional ones, although one must also recognize the role of fiscal restraint, the growing desire to disentangle governments and accountability considerations. In so decentralizing, the federal government was simultaneously demonstrating that federalism is flexible and "works", while bringing its arrangements with the other provinces more into symmetry with Quebec who had previously enjoyed asymmetrical relations with the federal government - something reminiscent of the trends in fiscal federalism.
3. The Canada Infrastructure Works Program of the 1990's

Infrastructure is an element, among others, comprising the nation’s factor conditions and can be evaluated by its type, quality, cost, accessibility and durability. Infrastructure involves a wide range of public and private investments such as transportation, communication, energy generation and transmission, mail and parcel delivery, payments and funds transfer, and municipal waterworks and sewers. They have also been thought of as comprising health care, housing, recreational and even educational facilities, although the latter could just as easily be characterized from the perspective of competitive advantage in terms of the stock of a nation’s knowledge resources. Infrastructure is otherwise difficult to define, but, is considered to embody some of the following characteristics:

- large upfront investments (sunk costs) before services can start or revenues flow;
- costs are often greater than any individual or single firm could afford;
- use of facilities available and accessible to all;
- benefits of investments flow to the many, rather than being restricted to a few;
- external benefits outweigh direct benefits;
- often, but not always, it is difficult or inefficient to impose costs on users;
- often embody elements of natural monopoly (although this evolves with technological change). In some cases this would make competitive supply unlikely to emerge.  

---

To a large extent, infrastructure relates to competitive advantage in terms of inputs for production, like energy, or, by facilitating the carrying on of business, such as efficient transportation facilities and state of the art communications systems. Furthermore, the argument has been made that infrastructure represents an "access grid for innovative capability throughout the society" and that:

... societal investments in science and technology, and particularly those which are imbedded in agile knowledge based infrastructures such as innovative institutions and advanced electronic networks, may be the key to sustaining economic growth in advanced societies. Well-designed and adaptive infrastructures enable new ideas, originating from virtually any point in the society, to be nurtured through progressive stages of development and interchange with society's institutions to the point where they become the engines for the growth or renewal of firms in the form of wealth-generating technologies.\(^\text{\textcopyright} 224\)

Thus, it has been argued that Canada will have to transform its physical infrastructure by adding knowledge-based value, or "informationalizing" it, for example by using highway corridors for fibre optic routes, or developing airports as centres of electronic interchanges.\(^\text{\textcopyright} 225\)

However, infrastructure may affect competitive advantage more indirectly through initiatives which affect the quality of


\(^{\text{\textcopyright} Smith, pp. 18-19.}\)
life and hence worker productivity. Furthermore, the attractiveness of living in a certain place may be a factor attracting investment or talented people. Finally, the education of a nation's population (depending on how one wishes to characterize this last element in terms of competitive advantage) is important to develop a highly educated workforce and also affects quality of life.

The federal Liberal government's infrastructure program was introduced during the 1993 election campaign by way of its election manifesto, the "Red Book". Its first goal was to rejuvenate municipalities and to provide a kick start to the economy. Its second goal was to provide a sophisticated infrastructure to facilitate Canada's international competitiveness. The federal Liberals were elected in October of 1993 and by February 19, 1994, all provinces had signed bilateral framework agreements with the federal government and the territories followed a few months later. By late November 1994, 7693 projects totalling $5.06 billion had been approved.\(^2\)\(^\text{xxv}\)

The framework agreements were similar to each another, with only minor variations. One notable variation was the Canada-B.C. agreement which provided that 85% of funding would go towards local water, sewer and transportation projects and the rest towards other physical infrastructure projects also serving the

\(^{2\text{xxv}}\)Eggleton, p. 12.
provision of public services. The federal government would play an indirect role of imposing minimal criteria for project approval, as well as acting jointly with the provinces in approving projects, and, finally, the program and all reports related to it are subject to inspection and audit by the federal government or the province. Other minimal criterion relate to publicity and the receipt of equal recognition, and that all printed material and signs must be in both official languages. Finally, a separate environmental assessment and review must be completed for each project to receive federal funding.

The program was initially conceived of as a two year, $6 billion tripartite shared cost program with the provinces and the municipalities. The program was extended in the 1995 February budget without additional funding and, in 1997, for one year with additional funding. Under the extended Canada Infrastructure Works Program, the municipalities retain the ability to invest in the projects that meet their priorities, while the criteria for the selection of projects based on local needs will remain essentially the same. However, the "Purpose" section of

---


228 For example, the Canada-Saskatchewan Infrastructure Works Program was extended for the 1997-98 fiscal year with an additional $34 million in new investments. Saskatchewan has indicated that it will devote these monies to municipal projects. See http://www.sasknet.sk.ca/saskgov/newsrel.1997Mar/126.97032423.html
the Extension Agreement states that the focus for eligible projects is on rehabilitation and repair of public facilities that are essential to the future health and prosperity of communities: transportation, health care, post-secondary education, and water and sewage facilities.  

Although shared cost in nature, the provinces could determine the degree of municipal contribution. The federal government gained control over its expenditures through an allocation formula, as agreed to by the provinces, based on provincial shares of overall population and total numbers of unemployed.

Secondly, initially, all projects had to be approved before March 31, 1996 and completed by March 31, 1997. Projects financed under this agreement were intended to achieve one or more of the following objectives:

- to upgrade the quality of Canada's physical infrastructure in local communities;
- to provide for timely and effective employment creation and skills development;
- to improve national, provincial and local government competitiveness; and

---

2:29 See, for example, Guidelines and Requirements for the Funding of Capital Projects Under Canada-Ontario Infrastructure Works Extension.

2:31 Andrews and Morrison, p. 118.
to promote improved environmental quality, including the introduction of environmentally sustainable practices and technologies.\textsuperscript{231}

It was clear from the minimal criteria that for the federal government, rapid approval took precedence over long term goals. Such criteria included:\textsuperscript{232}

- short-term job creation;
- incremental basis (the project had not already been budgeted for in the partner's 1994 capital budget). However, even on this point partial exceptions were made for Manitoba and New Brunswick in which the project was allowed to have been in the municipal capital works plan as long as no actual money had been spent on it and a clear exception was made for Newfoundland.\textsuperscript{233}

- creation, renewal or enhancement of local infrastructure;
- consistency with provincial capital planning practices; and
- exclusion of operating costs.

Other criterion, which were desirable but not required were the ones more intimately connected to competitive advantage - these included long-term job creation, enhancing economic competitiveness, the use of innovative technologies, enhancing environmental sustainability and innovative financing.


\textsuperscript{232} See, for example, Guidelines and Requirements for the Finding of Capital Projects Under Canada-Ontario Infrastructure Works, 1994, pp. 8-10; Andrews and Morrison, pp. 115-6; Kitchen, p. 16.

\textsuperscript{233} Andrews and Morrison, p. 118.
Formally, the provinces gained control over program creation and implementation, as well as federal funds for projects it may have had to fund anyway. Major decisions about the form of the program in each province and the degree of municipal input in the approval process was determined by the provinces. Provincial governments could choose to include provincial projects. The formula for dividing funds among municipalities was decided upon by the provinces and only B.C. and Manitoba chose formula based on the intrinsic merit of the project. In practice, the municipalities had a decisive role in initiating projects.

Under the framework agreements, management committees were set up and chaired jointly by federal and provincial officials. These committees were responsible for project review and selection and administration and management including setting standards, procedures, forms and guidelines consistent with the Agreement. Sub-committees could also be established.

It is the province that submits recommended projects to the management committees for review and approval. Upon project approval, a letter of approval is issued and a provincial-local partner agreement (usually provincial-municipal) will be signed.

Footnotes:

234 The others divided funds with regard to population and sometimes unemployment. See Andrews and Morrison, p. 119.

235 Andrews and Morrison, p. 122.

236 Under the Canada-Ontario Guidelines, this committee consists of two members appointed by each of the federal government and the province. Each level could also appoint one representative as an ex-officio member.
covering such items as financial arrangements and payment provisions, eligible costs, financial reporting, audit and inspection provisions, public information requirements, the project details including the implementation of the project, and timelines. This situation left the provinces with responsibility for designing criteria for allocating funds within each province among types of projects and entities entitled to submit projects, as well as among municipalities.

The federal government and the province are required to ensure that proper and accurate accounts and records are maintained with respect to each project and shall make such accounts and records available for inspection. The management committee is required to approve a plan and budget for the evaluation of the program of infrastructure within six months of the signing of the agreement, the costs of which are equally shared. The management committee must submit to the Ministers an evaluation report no later than twelve months after March 31, 1996. Each party must provide the other with all relevant information as may be reasonably be required for such evaluation. The local partners are required to maintain their accounts. Under the terms of the Extension Agreement, it was explicitly stated that the services of external auditors of local parties may by engaged regarding audits of specific projects.

See, the Canada-Ontario Guidelines, 1994, p. 5.

Andrews and Morrison, pp. 116-7; see, also, Canada-Ontario Infrastructure Program Agreement, s. 3.6(a),(b).
The federal role was co-ordinated by the Office of Infrastructure and Implementation and conducted through a series of existing administrative agencies. This structure was intended to facilitate rapid implementation, minimize duplication and as federal officials were located in the various regions, they were able to work effectively with provincial officials, reflecting the lessons derived from the history of regional economic development. Furthermore, R.E.D. structures already in place, such as Western Economic Diversification, Atlantic Canada Opportunities Agency, Federal Office for Regional Development - Québec, FEDNOR, as well as the federal Department of Industry in respect of non-FEDNOR Ontario territory and the Department of Indian and Northern Affairs regarding the Territories and First Nations, were being used by the federal government.

The provincial counterparts have varied and the co-chairs have reflected different views. For example, Quebec, Nova Scotia, Newfoundland, P.E.I. displayed a municipal affairs designation, whereas, the Yukon additionally emphasized community services. In Saskatchewan, Manitoba, Ontario and New Brunswick, there was an intergovernmental focus through the lead of a central agency. In B.C., Alberta and the Northwest Territories, there was an economic development/employment focus. Relations have been cooperative, based on functional lines and any differences in focus between the federal and provincial chairs have been no doubt smoothed over by the decentralized nature of

Andrews and Morrison, p. 117.
the federal structure, the use of minimal conditions and the emphasis on rapid approval, an ongoing federal-provincial structure and the receipt of much desired federal spending.

If the strategy had a dual purpose of traditional public works to kick start the economy and to provide sophisticated infrastructure to facilitate international competitiveness, what did the program actually do for the latter? The evidence shows that with respect to all provinces and territories, traditional municipal works, clearly took precedence over the latter although the actual mix of projects did vary from province to province.240

The issue as to what are the precise links between actual projects approved and economic development is highly contested, but, not one of direct relevance to this study. Rather, the issue is, in view of the fact that there was an explicit goal to link infrastructure to international competitiveness, what projects were approved that would tend to further this goal. The evidence presented in terms of overall numbers demonstrate the traditional infrastructure focus. Furthermore, there are only a few examples in which infrastructure could be said to have been linked to economic development, let alone being directly linked to creating a sophisticated infrastructure in support of

240In terms of overall averages, water and sewer projects comprised 33% of the approved costs; non-residential construction, 30%; and road and highway projects, 33%. See Andrews and Morrison, p. 124.
competitive advantage. These projects, as outlined by the then Minister Responsible for Infrastructure, Arthur Eggleton, are:

- in Newfoundland, $12 million was approved to build 467 kilometres of roads to open up wilderness areas for economic exploitation, including tourism and recreation. One-third of the financing came from the private sector;

- a joint project with Central Gas Manitoba will provide natural gas as an alternative for 23 rural Manitoba communities;

- in Quebec, a joint project with Gaz Métropolitain will add more than 500 kilometres of gas lines to the existing network. The $34 million government investment is only part of the estimated $125 million cost for this project; and

- a $10 million investment by governments in basic infrastructure at Mont-Tremblant will be complemented by a $44 million investment by the developer, Intrawest. This will make Mont-Tremblant a year-round resort for tourists from around the world.\(^{241}\)

In terms of new technology and state of the art infrastructure, there have been very few examples. Ottawa-Carleton, desired to connect its region to OcrinetCan (an internet connection between members of the Ottawa-Carleton Research Institute, OCRI).\(^{242}\) Peel Region has projects to install a fibre-optics communication network, develop an automated water meter system and develop a police voice radio system.\(^{243}\) Finally, the Alberta County of Strathcona received approval to develop a local internet system.\(^{244}\)

\(^{241}\) Eggleton, p. 12.

\(^{242}\) Andrews and Morrison, p. 130.

\(^{243}\) Ibid.

\(^{244}\) Ibid.
If there have been only a smattering of projects related to the business aspects of infrastructure, what about the liveability aspect of competitive advantage? While there were more projects that related most directly to community liveability than to economic development, these were still far fewer than traditional infrastructure.245 In terms of recreational type facilities, again, there were clear differences among the provinces: for example, B.C. and Quebec, except for Montreal and Quebec City, had few such projects; while community enrichment projects were most numerous in Alberta, Manitoba, Nova Scotia and Ontario (particularly, the suburban municipalities in the Greater Toronto Area).246

Not only was there an institutional dynamic tending towards the type of projects least suitable for international competitiveness, there is an argument to be made that it is not clear that the program was securing the most allocatively efficient level of infrastructure spending and whether it was financed in the most fair and accountable manner. Kitchen's argument is as follows:247 to achieve an allocatively efficient level of infrastructure spending, it is critical that local government fund projects on the basis of benefits received by residents of the local community. However, it is thought the vast majority of the approved projects provide benefits that

---

245 Ibid. p. 132.
246 Ibid.
247 Kitchen, p. 17.
accrue almost entirely and solely to residents of the local community, therefore, there is an incentive for municipalities to overspend on infrastructure. The result is a redistribution of income among municipalities and the fact that local residents benefit from a project for which they pay one-third, tends to suggest accountability is less than desirable.

The question then becomes, what can account for the relatively weak orientation of the infrastructure program towards competitive advantage? There would appear to be three main causes: the first political, the second, intragovernmental structure, and the third having federalism underpinnings. It is not unreasonable to say that the political aspect was in and of itself a major cause in bringing about this situation.

The main Liberal objective, as evidenced in the Agreements themselves, was to kick start the economy. Rapid approval took clear precedence over long term goals. The criteria were minimal and the international competitiveness criterion, while considered desirable, was not required. The project was initially of limited duration, two years. Immediate results were desired in terms of creating jobs. Secondly, being a counter-cyclical program, there was a genuine concern to move rapidly, not least to avoid inflationary pressures. This "quick fix" environment alone provided incentives to gain as much spending as possible and traditional projects were much easier to contrive than ones related to competitive advantage. Designing programs geared to competitive advantage may have been too difficult to accomplish
given the short policy horizon. Thus, there was a disincentive built into the policy framework in this respect and will remain as such where the actual or perceived policy horizon is short.

In the words of the then responsible Minister, Eggleton:

To achieve its principal objectives, the program had to be launched quickly. This left little time or scope for innovation in project design or project financing, both of which would have caused delays. It is evident today that most Infrastructure Works project proposals were based on well-established approaches to the provision of these sorts of public services. This was inevitable, but took away from other aspects of the program that the federal government tried to encourage, such as technological innovation and partnership with the private sector.248

Although the provinces could propose their own projects, it would be no surprise that the municipalities would be the main engines in this respect. Municipal politicians are primarily concerned with municipal issues (and municipal elections). This factor would render such politicians unlikely to consider broader issues of international competitiveness and would heavily favour traditional infrastructure projects, which, of course, coincided with their interests. Not unlike community colleges and occupational training, this barrier arose due to intragovernmental structure within the provincial level of government (it was, however, not directly of federalism, but, "bureaucratic" origin) and would affect federal-provincial relations. As the community colleges had an institutional incentive to provide training that was not necessarily of the relevant kind, so too did municipalities have an institutional

---

248 Eggleton, p. 12.
incentive to propose infrastructure works projects which were not most directly relevant to the facilitation of international competitive advantage.

There was also the federalism variable, which contributed to this outcome. The federal Liberal caucus was very uneasy about spending in this area of perceived exclusive provincial jurisdiction. Previous federal government spending on infrastructure had concluded in 1984 insisting that infrastructure was an area of provincial jurisdiction. Thus, the understanding was reached that their assent to the program would be traded off as against strong provincial input being achieved. The provinces, under the scheme would control the area of project creation and act jointly (with the federal government) regarding approval, which was not difficult to obtain given the minimal conditions and federal desire for quick spending. Finally, there is the sense that both levels of government wanted to show that federal-provincial interaction can be co-operative as opposed to conflictual.

Finally, one must return to the variable of democracy and public participation. Again, although not undesirable in and of itself, the scheme was one of executive federalism. Furthermore, the provinces decided whether bodies other than municipalities were eligible to apply for projects under the Infrastructure program. The result was as follows: six provinces limited eligibility to municipalities; Manitoba included public utilities; Nova Scotia included universities; Ontario included
school boards, colleges and universities; while only Newfoundland included a wide variety of other bodies including private sector organizations.  

This situation reflects several trends already noted. First, the greater the degree of provincial control over project design (and delivery), the less likely will it be that explicit public participation will be provided for. Secondly, in such circumstances of provincial control, the provinces will tend to favour federal transfers going to the province or one of the institutions under its responsibility, like municipalities, and community colleges (in the case of adult occupational training), over the private sector. Thus, there appears to be an institutional dynamic of provinces favouring their own institutions.

Although the focus of the Extension Agreement is stated to be traditional infrastructure, it must be borne in mind that should there be a change in focus from traditional infrastructure to developing infrastructure to facilitate competitive advantage, a greater public sector role will be crucial, as we have seen time and time again in other areas of industrial policy. Government is simply not capable of creating the most advanced and specific factors, and that goes equally for infrastructure. Even in terms of traditional infrastructure, the trend is towards

Andrews and Morrison, pp. 119-121. Note, also, that under the Canada-Ontario Infrastructure Works Extension, 1997, funds are being made available to community health care organizations.
greater private sector involvement, for example, in the case of privatization. Such participation holds the potential for providing Canadian firms with the experience necessary to compete in foreign markets with respect to those same works and services. Indeed, it has been pointed out that "[a]fter little change in North American infrastructure construction and rehabilitation methods in the last 30 years, Canada and the US are now witnessing an influx of innovative foreign technologies" such as trenchless technology originally developed in Europe which saves on costs associated with repairs to underground services.250 Although an analysis of under which cases and circumstances or conditions such private sector involvement may be beneficial is out of the purview of this thesis, it bears noting that greater private sector involvement does pose economic and policy challenges of their own which would have to be addressed. However, it is not unsafe to conclude that the infrastructure program has not provided for adequate private sector participation in order to facilitate competitive advantage and that a greater role for the private sector has been recognized as desirable by the then Minister Responsible for Infrastructure, Arthur Eggleton.251


251 See, Eggleton, p. 15.
Options for the Future

Improvements with respect to the link between the Infrastructure program and competitive advantage can be made. First, the disincentive of designing projects tending towards international competitiveness will have to be eliminated. It may, nevertheless, be desirable to retain some traditional infrastructure programs. Accordingly, one will have to determine the desired proportion, for example 50-50, and have the framework agreement reflect that proportion and to cap federal transfers in this way. In this example, federal transfers would be $X, with a maximum of 50% x $X going to traditional infrastructure. Minimal conditionality can then be preserved for traditional projects, with more detailed criteria established for the approval of projects related to international competitiveness. Perhaps, a separate specialized federal-provincial committee could be established to focus only on the latter. This process may be more contentious, with the provinces trying to gain federal spending, while the federal government attempts to ensure its spending is being used to promote projects more consistent with international competitiveness.

A second variable that would aid the development and approval of projects, which are more consistent with competitive advantage, is by allowing the private sector to propose projects, and even to have guaranteed representation on the management committees.
Finally, the federal government should not be too shy about spending directly on infrastructure, but for the federalism sub-process of negotiating under the shadow of the constitution. As a matter of the division of jurisdiction, aside from its spending power, the federal government has vast and important powers related to the establishment of a sophisticated and advanced infrastructure which could support competitive advantage. In the previous discussion regarding some of the powers that the federal government had which were relevant to industrial policy, it was shown that the federal government had a good deal of power over all sorts of matters covered under transportation and communication for example, particularly, relating to telecommunications. The federal government could spend in these areas as ancillary to their powers without feeling any lack of legitimacy. Of course, the provinces also have important powers such as over energy, education, health care and recreation, therefore, a co-ordinated approach with the federal government might be appropriate in these areas.
CONCLUSION

Globalization, increased international trade, and competition have all been major driving forces for a growing recognition of the need to develop industrial policy to ensure that a nation's prosperity is maintained and sustained. It is, also, clear that industrial policy is not even a single subject-matter, but, a vast conglomeration of subject-matters traversing both federal and provincial jurisdictions.

Several determinants and variables affect competitive advantage. Such determinants include factors; home demand composition; the state of related and supporting industries; the nature of firms, strategy, structure and rivalry; the role of chance events, and government policy itself in influencing the determinants of competitive advantage within the nation. This "environment" is an interactive system in which each part is mutually dependent upon and influences the other. Furthermore, to add to the complexity, each industry/segment will have an "environment" which is conducive to competitive advantage being achieved, upgraded and sustained. Indeed, the interplay of the determinants can become so complex as to obscure cause and effect and the national environment is itself restructured. As a result, it is simply not possible, by and large, to develop a highly targeted industrial policy for Canada. On the other hand, a free market paradigm is equally unpalatable as the evidence shows governments can play a highly important and constructive
role in facilitating the international competitiveness of its nation's firms.

However, merely developing a theory as to what is effective industrial policy is clearly not sufficient in the Canadian case. Institutions and, particularly, federalism (as a constitutional institution) and federal institutions (at the sub-constitutional level) and processes are highly important to the ultimate success of industrial policy. Specifically, one must also understand the values, principles and processes underlying the creation of federal structures. Indeed, it will not always be that co-ordinated intergovernmental action (including interprovincial action) is necessary or desirable under the circumstances. For example, there is a strong argument to be made that unilateral federal action in the area of occupational training has made the provinces and their relevant institutions more responsive to better linking competitive advantage and training.

In addition to considering whether co-ordination may or may not be desirable regarding a given policy, one must factor in the various processes of federalism, as well as the representation of values and interests by government and non-government actors. Much federal-provincial adjustment in Canada has taken place at the intergovernmental level, through the process of executive federalism, which has tended to give less weight to the value of democracy, citizen participation and even effectiveness, as in the case of the Agreement on Internal Trade. There has appeared to be a tendency that where executive federalism is combined with
a large measure, or a predominance, of provincial control
regarding program implementation (which may also include a large
program design function), the direct influence of private sector
actors diminishes. Furthermore, in such circumstances, as the
adult occupational training and infrastructure works stories
suggest, the provinces are likely to favour institutions under
their areas of jurisdiction, especially, when the receipt of
federal funds are concerned. The results may very well be
policies and programs which are not of the most relevant or
effective variety in terms of industrial policy. Effective
private sector participation or input is often crucial to the
development of effective industrial policy. As has been
demonstrated throughout this thesis, government acting alone is
simply, in most cases, not capable of creating bases of
competitive advantage. Effective private sector participation
regarding policy design, and even implementation, is essential to
facilitate the development and innovation of cutting edge bases
of competitiveness.

Finally, when a particular institution is created, one must
bear in mind that to the greatest extent possible, it should be
structured along functional lines dealing with concrete issues,
rather than symbolic and highly political ones, and dealt with
away from the contexts of highly political and symbolic
engagements such as those typified by First Ministers
Conferences, and, finally, subject to ongoing relations. It may
be that functional interactions will not be possible due to the
intragovernmental structure of one of the levels of government, but, that is not to say that the structure will be unsuccessful. Furthermore, appropriate administrative and expert support structures may be required. Again, there has been some doubt as to whether the A.I.T., although based on functional lines, may do enough with respect to necessary administrative support.

Even when an optimal structure is evident, it may not always be possible to institute due to federalism (and non-federalism factors) as there must be agreement among the relevant parties involved. The agreement itself may be a product of compromise, as evidenced by the A.I.T. which reflected inherent tension between the free market model and the reluctance of the provinces to give up powers, including traditional instruments of provincial industrial policy. In the end, the Agreement may have lost much of its effectiveness as a result.

Ironically enough, even where unilateral government action may be beneficial in a particular instance, the story of adult occupational training indicates that even that may not be possible. Federal and provincial governments bargaining under the shadow of the Constitution has led to the federal government abandoning its unilateral approaches in favour of a devolutionary approach which would be generally consistent with provincial, and, particularly Quebec views and demands in this area.

Thus, while federalism and federal institutions and processes hold important implications regarding the ultimate successes of creating and implementing industrial policy,
federalism and its processes, as well as other factors such as the branch plant nature of Canadian industry, act to constrain or modify the former. The effects and influences go in both directions demonstrating that, whereas institution are highly important, they are simultaneously a product of, and influenced by, federalism and non-federalism variables, and may not be sufficient to bring about coherent, comprehensive and optimal industrial policy.
Selected Bibliography


"Centralization, Decentralization and Intergovernmental Competition", the 1989 Kenneth MacGregor Lecture. Institute of Intergovernmental Relations, Queen’s University, 1990.


Dupré, J. Stephan, "Reflections on the Workability of Executive Federalism", in Olling and Westmacott.


Duquette, Michel, "Conflicting Trends in Canadian Federalism: The Case of Energy Policy", in Rocher and Smith.


Haddow, Rodney, "Federalism and Training Policy in Canada: Institutional Barriers to Economic Adjustment" in Rocher and Smith.

Harrison, Katheryn, "Federalism. Environmental Protection and Bare Avoidance", in Rocher and Smith.


Lenihan, Donald G., "When a Legitimate Objective Hits an Unnecessary Obstacle: Harmonizing Regulations and Standards in the Agreement on Internal Trade" in Trebilcock and Schwanen.


Monahan, Patrick, "To the Extent Possible: A Comment on Dispute Settlement in the Agreement on Internal Trade" in Trebilcock and Schwanen.


Robinson, Ian, "Trade Policy, Globalization and the Future of Canadian Federalism", in Rocher and Smith.


Rocher, François and Richard Nimijean, "Global Restructuring and the Evolution of Canadian Federalism and Constitutionalism", in Rocher and Smith.


"The Supreme Court and federal-Provincial Relations: The Political Use of Legal Resources", in Olling and Westmacott.


"Regional Development: A Policy for All Seasons", in Rocher and Smith.

Schwanen, Daniel, "Overview and Key Policy Issues", in Trebilcock and Schwanen.


"Rethinking Government, Rethinking Federalism". Department of Political Science and Faculty of Law, University of Toronto, 1997, (unpublished)(draft).


"The Division of Powers in Canada: Evolution and Structure" in R. Simeon (ed)

Swinton, Katherine, "Law, Politics and the Enforcement of the Agreement on Internal Trade", in Trebilcock and Schwanen.


Trebilcock, Michael J. and Rambod Behboodi, "The Canadian Agreement on Internal Trade: Retrospect and Prospects" in Trebilcock and Schwanen.
