

# THE AGREEMENT ON INTERNAL TRADE, ECONOMIC MOBILITY, AND THE CHARTER

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## I. INTRODUCTION

MY PRESENTATION TODAY IS ABOUT CONSTITUTIONAL LITIGATION as an alternative mechanism to the *Agreement on Internal Trade (AIT)*<sup>1</sup> to further the project of the Canadian Economic Union. However, constitutional litigation is not without its problems. I will compare and contrast the advantages and disadvantages of constitutional litigation and the *AIT* process. Finally, I will suggest how constitutional litigation can strengthen the *AIT*, rather than simply serving as an alternative to it.

The suggestion that the Constitution as it currently stands can help to strengthen the Economic Union will be surprising to many, if not most of you, because the whole impetus to strengthen the Economic Union, whether through constitutional or non-constitutional means, assumes the inadequacy of the existing Constitution to pursue that goal. The standard story of the Constitution and the Economic Union is a story of constitutional failure. This failure can be traced to three sources. The first is the *text of Constitution Act, 1867*, which reflects a 19<sup>th</sup> century understanding of barriers to interprovincial economic mobility. Section 121 appears to only prohibit the imposition of tariffs on goods moving between provinces.<sup>2</sup> However, the provision says nothing about non-tariff barriers, although some judges have said that it could be interpreted to prohibit

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<sup>1</sup> Presented at "Strengthening Canada: Challenges for Internal Trade and Mobility", June 2001, Colony Hotel, Toronto, ON. e-mail: sujit.choudhry@utoronto.ca.

Note: I disclose that I served as Law Clerk to Chief Justice Antonio Lamer of the Supreme Court of Canada during the 1996-7 term, when *Richardson v. Canadian Egg Marketing Agency* was heard. None of the passages reveals any confidential information acquired during that time

<sup>1</sup>Canada, *Agreement of Internal Trade*, (Ottawa: Industry Canada, 1994) [hereinafter *AIT*].

<sup>2</sup> Section 121 of the *Constitution Act, 1867* provides "All Articles of the 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."

measures that are protectionist either on their face, or in intent.<sup>3</sup> Nor does it say anything about the mobility of services, capital or labour. However, the narrow wording of s. 121 need not have been fatal. Section 91(2), the federal trade and commerce power, could have done much of the same work and more, with respect to provincially created barriers to economic mobility.<sup>4</sup> However, s. 91(2) did not live up to its potential because of the second source of constitutional failure – the *interpretation* given to the *Constitution Act, 1867* by the Privy Council. Based on a desire to protect provincial autonomy, the Privy Council adopted a rather expansive interpretation of s. 92(13), which confers on the provinces jurisdiction over property and civil rights, and a correspondingly narrow interpretation of s. 91(2). Although the case-law does not allow the provinces to enact discriminatory barriers to trade,<sup>5</sup> it imposes no discipline whatsoever on provincial policies that inhibit either the inflow of factors of production from other provinces, or the outflow of factors of production to other provinces. The contrast with both the case-law under the so-called Dormant Commerce Clause of the American Constitution, as well as the European Court of Justice’s case-law interpreting the Treaty of Rome, is striking.<sup>6</sup>

This sense of failure – a sense of thwarted ambition, a sense that the Constitution has stood in the way of creating a Canada that could be more economically integrated, more prosperous and hence better equipped to pursue important national projects – put the Economic Union at the centre of the constitutional agenda in both the Patriation and Canada Rounds.<sup>7</sup> Moreover, strengthening the Economic Union was the focus of many of the recommendations of the MacDonald Commission, albeit through non-constitutional means. However, as you

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<sup>3</sup> E.g. *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626 at 642 (per Rand J.); *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 at 1268 (per Laskin C.J.).

<sup>4</sup> Section 91(2) of the *Constitution Act, 1867* confers on the federal government jurisdiction over “The Regulation of Trade and Commerce”.

<sup>5</sup> *A.G. Manitoba v. Manitoba Egg & Poultry Assoc.*, [1971] S.C.R. 689.

<sup>6</sup> See generally: G. Gunther & K. Sullivan, Gunther, *Constitutional Law* 13<sup>th</sup> ed. (Westbury, N.Y.: Foundation Press, 1997); A. Arnull, A. Dashwood, M. Ross & D. Wyatt, *Wyatt & Dashwood’s European Union Law* 4<sup>th</sup> ed. (London: Sweet & Maxwell, 2000).

<sup>7</sup> For an overview of this history, see M. J. Trebilcock & R. Behboodi, “The Canadian Agreement on Internal Trade: Retrospects and Prospects”, in M.J. Trebilcock & D. Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade* (Toronto, C.D. Howe Institute, 1995) 20 at 20-33.

know, both the Patriation package and the Charlottetown Accord contained little of the federal government's initial proposals to strengthen the Economic Union. As a consequence, even had the Charlottetown Accord been passed, it would have added nothing in the way of new constitutional restraints on the ability of provincial and federal governments to inhibit interprovincial economic mobility. Thus, alongside the inadequacies resulting from the text of the *Constitution Act, 1867* and the interpretation thereof, we should add a third – the failure of *constitutional amendment*.

To a large part, I agree with this story. However, there is a silver lining to this otherwise grim picture, which I think has been largely ignored in the vast literature on the Economic Union. The exception to the narrative of constitutional failure is the entrenchment of s. 6 of the *Canadian Charter of Rights and Freedoms* in 1982. Section 6 contains a number of mobility rights. Of central importance for our purposes is s. 6(2)(b), which enshrines the right of any citizen or permanent resident to pursue the gaining of a livelihood in any province.<sup>8</sup> Moreover, s. 6(2)(b) has been given a rather expansive interpretation, taking it far beyond the realm of labour to encompass the mobility of goods. What I want to do next is to outline the evolution of the Supreme Court's understanding of s. 6(2)(b), before I contrast constitutional litigation and the *AIT* as alternative mechanisms to promote the Economic Union.

## II. MOBILITY RIGHTS AND THE CHARTER

THE BEST PLACE TO START IS WITH THE TEXT of s. 6(2)(b). In its first *Charter* case, *Skapinker v. Law Society of Upper Canada*,<sup>9</sup> the Supreme Court of Canada clarified that s. 6(2)(b) was not, despite appearances to the contrary, a right to work unencumbered by regulations, such as professional licensing requirements. Rather, as Justice La Forest explained in a later decision, *Black v. Law Society of Alberta*,<sup>10</sup> s. 6(2)(b) enshrines a right to gain a livelihood in a province on terms that do not discriminate on the basis of residency, either between residents and non-residents of that province, or among residents on the basis of the length of residence. Although the Court did not refer to the international trade literature, the idea of non-discrimination is clearly the principle of nation-

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<sup>8</sup> Section 6(2)(b) of the *Charter* states "Every citizen of Canada and every person having the status of a permanent resident of Canada has the right ... (b) to pursue the gaining of a livelihood in any province."

<sup>9</sup> [1984] 1 S.C.R. 357 [hereinafter *Skapinker*].

<sup>10</sup> [1989] 1 S.C.R. 591 [hereinafter *Black*].

al treatment, a hallmark of negative integration. But *Black* added another element to 6(2)(b) – that there be some kind of interprovincial aspect to the gaining of a livelihood – the so-called *mobility element* of s. 6(2)(b). The central idea here is that a citizen or permanent resident should be able to earn a livelihood without regard to provincial borders, as if those borders did not exist. As with any constitutional provision, there are easy cases and hard cases for s. 6(2)(b). In the central case, an individual would shift her province of residence, in search of better employment prospects, and what s. 6(2)(b) would protect would be her right to be treated equally under the law of her new province of residence with respect to her ability to gain a livelihood. For example, s. 6(2)(b) presumptively prohibits governments from discriminating in employment on the basis of length of residence, which is tantamount to prohibiting discrimination on the basis of province of *prior* residence. Another example of an easy case was provided by the Court in *Skapinker*, that of a trans-border commuter, living in one province, but working in another, who faces restrictions in her ability to work solely because she does not reside in her province of employment. There, the discrimination would be on the basis of province of *present* residence. In both of these cases, physical movement between provinces in connection with employment would satisfy the mobility element.

But there are harder cases as well. Consider *Black* itself. The background to *Black* was the decision by McCarthy & McCarthy, now McCarthy Tétrault, to become Canada's first national law firm, with offices from coast to coast. McCarthys wanted to open an office in Calgary. Fearful of out-of-province competition, the Law Society of Alberta responded by enacting a series of by-laws designed to discourage out-of-province firms from establishing offices in Alberta and competing with Alberta-based firms. Two of these by-laws ended up before the Supreme Court. One of these by-laws (R154) prohibited resident members of the Alberta bar from entering into partnerships with non-resident members. The other by-law (R75B) prohibited members of the Alberta bar from being partners in more than one firm.

To be sure, in some ways, *Black* was an easy case. The first of these by-laws openly discriminated between resident and non-resident members of the Alberta bar; the former were able to form partnerships with resident members, whereas the latter were not. This was clearly a facially discriminatory distinction on the basis of residence. Moreover, the by-law disadvantaged non-residents in their ability to gain a livelihood in Alberta, because partnerships are the most common way of practicing law, and the inability of non-residents to enter into partnerships with residents put them at an economic disadvantage.

But there were other aspects of *Black* that were more difficult. First,

there was the mobility element itself. The challenge to the by-laws was brought by members of the Alberta Bar who were resident in Ontario, not in Alberta. Most of these lawyers made very infrequent trips to Alberta, and in fact, probably offered legal advice to Alberta clients on matters of Alberta law out of their Toronto offices. These were not trans-border commuters who crossed provincial boundaries to work everyday, but who nonetheless, did participate in the economic life of a province other than their province of residence. Faced with these facts, the Court responded by loosening up the mobility requirement, stating that it would be met if an individual pursued a living in a province, even without being physically present there. This is a decidedly 20<sup>th</sup> century conception of economic mobility. And in a later case, *Richardson v. Canadian Egg Marketing Agency*,<sup>11</sup> the Court affirmed this position, stating that in light of modern technology, what really counts is whether someone is attempting to create wealth in another province.

Another difficult point in *Black* was the rule against partnership in more than one firm. The rule applied equally all members of the Alberta bar, both resident and non-resident, and accordingly, would appear to not discriminate on the basis of residence. However, the Court reasoned that although the rule was facially neutral, it had a disparate impact on non-residents, and therefore indirectly discriminated against them. The reason the law disproportionately burdened non-residents was that very few residents would have had the need to enter into more than one partnership, whereas for non-residents, the ability to enter into multiple partnerships – one in Alberta, one in their province of residence – would be key to being able to practice in Alberta.

Faced with these breaches of s. 6(2)(b), the Court then turned to s. 6(3)(a).<sup>12</sup> As drafted, s. 6(3)(a) looks like a savings clause, and allows for the limitation of mobility rights by laws of general application other than those that discriminate primarily on the basis of province of present or prior residence. The Court held that both by-laws failed the test of justification, because they were both discriminatory.<sup>13</sup> Now this way of

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<sup>11</sup> [1998] 3 S.C.R. 157 [hereinafter *Richardson*].

<sup>12</sup> Section 6(3)(a) of the *Charter* states: “The rights specified in subsection (2) are subject to (a) any laws and practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence”.

<sup>13</sup> It is worth noting, though, that the Court shifted its analysis regarding R75B, suggesting that although facially neutral, it was discriminatory, not simply because of its unequal impact on non-residents, but because it had been enacted for a colourable motive i.e. for the purpose of putting non-residents at a competitive disadvantage.

approaching justifiable limits created a bit of a problem. The problem was that laws that contravened s. 6(2)(b) would fail the test of justification for the very reason that they contravened s. 6(2)(b), i.e. because they were discriminatory. Now to be fair, that it was not the end of the matter; all *Charter* rights, including mobility rights, are subject to a general limitation clause, s. 1.<sup>14</sup> To defenders of *Charter* mobility rights, s. 1 serves as a safety valve, allowing governments to justify mobility-restricting measures. To critics of mobility rights, the need to resort to s. 1 is extremely dangerous. The reason for concern is as follows – the simple existence of regulatory diversity between provinces can itself give rise to claims of indirect discrimination. To these critics, what this meant is that all manner of provincial public policies that create indirect barriers to economic mobility would be subject to constitutional justification under s. 1, putting courts in the position of second-guessing provincial public policy. In this connection, it worth noting that opponents of the Economic Union aspect of the federal government's proposals in the Canada Round feared that those amendments would launch a Canadian version of the *Lochner*-era, a period of American constitutional history where the U.S. Supreme Court struck down all manner of socio-economic legislation in furtherance of what we would now call a neo-liberal economic agenda.<sup>15</sup>

These concerns were raised and addressed by *Richardson*, a case that at once expanded the scope of s. 6(2)(b) and contracted it. *Richardson* involved a challenge to the national egg-marketing scheme, centred on the Canadian Egg Marketing Agency. Under the scheme, global production limits are set for each province, and within each province, federal and provincial egg marketing boards allocate that global limit to individual producers, in the form of production quotas. Only producers with quotas are entitled to market eggs interprovincially. The feature of the scheme that gave rise to the constitutional challenge is that no quota is allocated to producers in the Northwest Territories (NWT), because it was not a party to the scheme. And the NWT was not a party to the scheme because at the time the scheme was set up, in 1972, there was no egg production in the NWT. At the time of the appeal, production quotas were allocated on the basis of historical levels of production. Taken together, to an

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<sup>14</sup> Section 1 of the *Charter* states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

<sup>15</sup> For a good discussion, see D. Schneiderman, "The Constitutional Politics of Poverty", in J. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution* (Ottawa: Carleton University Press, 1992) 125.

important extent, the exclusion of the NWT can be regarded as a historical accident. Two parties, Richardson and Pineview Poultry, who owned and operated chicken farms in the Northwest Territories, and wished to market their eggs interprovincially, but because of the absence of quota, could not, brought the constitutional challenge.

The claim in *Richardson* pushed the limits of s. 6(2)(b), for three reasons. First, the claim seemed to have little to do with labour mobility rights. In *Richardson*, the only things moving across provincial borders were eggs, and as we all know, eggs do not possess constitutional rights. As a consequence, government lawyers strenuously argued that the plaintiffs were attempting, through the vehicle of s. 6(2)(b), a provision that grants rights to *people*, to craft a right to interprovincial trade in *goods* – an internal free trade provision that our Constitution currently lacks, a sort of revised s. 121. Second, the previous mobility rights cases (*Skapinker*, *Black*) involved claims brought by natural persons. But one of the plaintiffs in this case was a corporation, an artificial legal person. Now in most areas of law, nothing really turns on this difference, because artificial legal persons have many, if not most of the rights that natural legal persons do. But the *Charter* is fundamentally different, because it is a human rights document, whose *raison d'être* is the protection of the interests of natural legal persons. So it was argued that corporations should not be able to invoke the mobility rights provision, again out of concern that corporations were attempting to convert s. 6(2)(b) into a new and improved s. 121. (The legal position is actually a great deal more complicated than that, but this simplification will suffice here.) Third, the egg-marketing scheme seemed to distinguish among egg producers not on the basis of province of residence, but rather province of production. This distinction, it was argued, mattered a great deal in the particular case, because Richardson was a resident of Alberta, although his business was located in the NWT. Accordingly, since he was a resident of a province in which quota was available, it was argued that there was no discrimination on the basis of province of residence against him.

*Richardson* is a very important decision, because the Court sided with plaintiffs on all three of these points. It held that producing and shipping goods was just another way of gaining a livelihood, that stood along side selling one's labour or providing services, and hence that interprovincial economic activity of any kind is protected by the *Charter*. Presumably, the next step will be to protect capital mobility under the *Charter*, challenging the constitutionality, for example, of provincial laws that limit land ownership by non-residents. And on the issue of corporations and the *Charter*, the Court sidestepped the difficult questions raised by the case, and held that the claimants had standing to challenge the constitutionality of the egg-marketing scheme, because they launched the challenge

in defence to an application by the Canadian Egg Marketing Agency for an injunction against its attempt to market goods interprovincially. Finally, with respect to residency, the Court simply stated that “it would be an egregious formalism”<sup>16</sup> to force apart residency and production, presumably because the two are most often closely intertwined. Taken together, *Richardson* shows us how far we have traveled from the personal mobility right for wage labour that s. 6(2)(b) was originally conceived as being limited to. The Court was really on the verge of converting that provision into a revised s. 121.

However, perhaps because it was starting this prospect in the face, the Court stepped back, by making it much easier for governments to justify limits on mobility rights than had previously been the case. Reinterpreting the relationship between ss. 6(2)(b) and 6(3)(a), the Court determined that only laws that *primarily* discriminated on the basis of present or prior province of residence would violate s. 6(2)(b). What does this mean? It means that unless the dominant purpose or effect of the challenged public policy is discriminatory – be the policy facially neutral policy or facially discriminatory – there is no violation of the *Charter*. In *Richardson*, for example, a majority of the Court held that the motives behind the use of historical production patterns system were entirely valid, because they were “an equitable means of distributing quotas for the orderly and fair marketing of commodities”,<sup>17</sup> and that in terms of discriminatory effects, the claimants had not proved that they were any worse off than producers in provinces who lacked quota and were therefore precluded from marketing eggs interprovincially as well. The dissent disagreed on both counts, correctly noting, in my view, that the exclusion of the NWT arose largely as a result of historical accident, not a reasoned decision as to what was the most equitable way to regulate the marketing of eggs, and that producers in the NWT were definitely worse off than those in provinces without quota, because they were legally precluded from obtaining quota at all.

### III. CHARTER MOBILITY RIGHTS vs. THE AIT

**S**OW DO THE AIT AND S. 6(2)(B) COMPARE? If we look to how the AIT and s. 6(2)(b) as instruments of negative integration, there are two significant respects in which s. 6(2)(b) is more effective in securing this goal. First, it is a constitutional provision, which binds both the leg-

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<sup>16</sup> *Richardson*, *supra* note 11 at para. 97.

<sup>17</sup> *Ibid.* at para. 96.



islative and executive branches of government. Indeed, the section is not subject to the override. The *AIT*, by contrast, is an intergovernmental agreement, which is legally unenforceable. In light of the *CAP Reference*,<sup>18</sup> and the express language of Article 300,<sup>19</sup> the *AIT* does not operate to fetter legislative sovereignty. Moreover, even though the *CAP Reference* is open to this possibility, Article 300 makes it clear that the *AIT* does not bind either the federal or provincial executives. Because of the non-legal character of the *AIT*, the effectiveness of that document will always depend on the willingness of governments to comply with it. Governments will always be free to ignore an inconvenient ruling, or to refuse to cooperate with the dispute settlement procedure, paying at most a political price for non-performance.

Second, under Article 101(3)(a), the *AIT* only applies to new barriers to internal trade, created after the coming-into-force of the *Agreement* on July 1, 1995.<sup>20</sup> This leaves existing barriers beyond the reach of the complaints procedure, and ultimately, beyond adjudication. Assuming that many of the barriers to trade arising from measures in existence prior to 1995, this severely limits the effectiveness of the *AIT*. By comparison, no such limitation applies to the *Charter*. In *Richardson*, for example, the relevant system was created in the 1970's.

But when we turn to the substantive principles of negative integration, the picture is mixed. The *AIT* applies to the mobility of all factors of production – i.e. goods, service, capital and labour. It is fair to say that when s. 6(2)(b) was enacted, it was viewed as being limited in relevance to labour mobility, and having no direct relevance to the mobility of other factors of production. Moreover, s. 6(2)(b) was understood as a right exercisable by natural legal persons. Now, though judicial interpretation, those initial expectations have been displaced. Not only persons, but also goods and services, and likely capital are covered by the provision. Moreover, corporations can now take advantage of s. 6(2)(b), at least in some circumstances. If we compare s. 6(2)(b) and Article 401,<sup>21</sup> both pro-

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<sup>18</sup> *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525.

<sup>19</sup> Article 300 of the *AIT* states: "Nothing in this *Agreement* alters the legislative or other authority of Parliament or of the provincial legislatures or of the Government of Canada or of the provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada."

<sup>20</sup> Article 101(3)(a) of the *AIT* provides that "In the application of this *Agreement*, the Parties shall be guided by the following principles: ... Parties will not establish new barriers to internal trade and will facilitate the cross-boundary movement Canada". Under Article 1814, the *AIT* came into force on July 1, 1995.

<sup>21</sup> Article 401 of the *AIT* provides in full:

scribe facially discriminatory measures. As well, they both proscribe as measures which are neutral on their face, but which have been enacted for a protectionist or colourable purpose; an example of the latter sort of barrier to trade was the provincial regulation at issue in the *PEI Dairy* case.<sup>22</sup> Moreover, *Richardson* affirmed that s. 6(2)(b) still regulates indirect discrimination arising from regulatory diversity, whereas the *AIT*, at least on the face of Article 401, does not. However, to be fair, the relative youth of the *AIT* means that many important questions regarding its meaning remain unanswered. Moreover, the Court's comments in *Richardson* suggest that it will be very reluctant to find that indirect discrimination arising from regulatory diversity *per se* breaches the s. 6(2)(b), for doing so, in its view, would allow the *Charter* to undo what it sees as another basic objective of the Constitution – to allow provincial communities to make their own choices as to the public policies they will live by, which is bound to create regulatory diversity.

By comparison, with respect to limitation analysis, the *AIT* clearly comes out ahead. Under Article 404,<sup>23</sup> trade-limiting measures must meet a multi-part test, as explained by the panel in the *MMT* case:<sup>24</sup> that the

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1. Subject to Article 404, each Party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to:
    - (a) its own like, directly competitive or substitutable goods; and
    - (b) like, directly competitive or substitutable goods of any other Party or non-Party.
  2. Subject to Article 404, each Party shall accord to persons, services and investments of any other Party treatment no less favourable than the best treatment it accords, in like circumstances, to:
    - (a) its own persons, services and investments; and
    - (b) persons, services and investments of any other Party or non-Party.
  3. With respect to the Federal Government, paragraphs 1 and 2 mean that, subject to Article 404, it shall accord to:
    - (a) the goods of a Province treatment no less favourable than the best treatment it accords to like, directly competitive or substitutable goods of any other Province or non-Party; and
    - (b) the persons, services and investments of a Province treatment no less favourable than the best treatment it accords, in like circumstances, to persons, services and investments of any other Province or non-Party.
  4. The Parties agree that according identical treatment may not necessarily result in compliance with paragraph 1, 2 or 3.

<sup>22</sup> *Re Amendments to Dairy Industry Act Regulations*, File No. 98/99 (Jan. 18, 2000).

<sup>23</sup> Article 404 of the *AIT* provides in full:

measure pursue a legitimate objective, that the measure not unduly impair the access of factors of production, that the measure be no more trade restrictive than necessary to achieve the legitimate objective, and that the measure not be a disguised restriction on trade. I would actually collapse these into a two-part test: that the measure be motivated by legitimate, and not protectionist reasons, and that the measure minimally impair trade. Framed in these terms, Article 404 sounds a great deal like the *Oakes* test under the *Charter's* limitation clause, s. 1.<sup>25</sup> What *Richardson* has done, though, is to prevent the courts from asking addressing the second part of this test. However, I very much doubt that *Richardson* is the last word on this subject. Nothing lasts forever in constitutional law. And it is worth noting, in particular, that the current Chief Justice was in dissent.

#### **IV. CONCLUSION: HOW CONSTITUTIONAL LITIGATION CAN MAKE THE AIT MORE EFFECTIVE**

**T**HUS FAR, I HAVE BEEN VIEWING THE *AIT* and constitutional litigation as alternatives to furthering the Canadian Economic Union. By way of conclusion, I want to suggest one way that constitutional litigation can make the *AIT* more effective. The key here is to build upon an important insight in *Black*: that the simple existence of regulatory diversity can give rise to a constitutional challenge under s. 6(2)(b). Although *Richardson* has tried to shut this line of argument down, as I mentioned earlier, nothing lasts forever in constitutional law, and the logic of *Black* is likely to resurface again.

Why would this make the *AIT* more effective? The difficulty with liti-

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<sup>23</sup> Article 404 of the *AIT* provides in full:

Where it is established that a measure is inconsistent with Article 401, 402 or 403, that measure is still permissible under this *Agreement* where it can be demonstrated that:

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

<sup>24</sup> *Re Manganese-Based Fuel Additives Act*, File No. 97/99 (June 12, 1998).

<sup>25</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103.

gating indirect discrimination, as the European case of *Cassis de Dijon*<sup>26</sup> indicates, is that it creates the danger that the province with the lowest standards will set the norm for the federation as a whole, through a series of trade challenges launched by economic entities resident in that jurisdiction against the laws of other jurisdictions. As Robert Howse has suggested, the prospect of a litigated race to the bottom might provide an extremely strong incentive to the provinces and federal government to further the project of positive integration, through mutual negotiating recognition and/or harmonization.<sup>27</sup> And this kind of litigation strategy would have the additional attraction of relying on an appropriate institutional division of labour between courts and political institutions, with the former undertaking the task of negative integration, but the latter having the final say as to the substance of the public policies.

If I am right, then those entities which have an interest in the ensuring the success of the *AIT* would, ironically, help it most if they shifted their attention to the courts. And in this connection, it is worth noting that those economic interests most committed to promoting economic mobility have not intervened in Supreme Court cases where s. 6(2)(b) has been at issue. Perhaps this should change.

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<sup>26</sup> *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (No. 120/78), [1979] E.C.R. 649 [hereinafter *Cassis de Dijon*]. The subsequent case-law has modified *Cassis de Dijon* and the case it built on, *Procureur du Roi v. Dassonville* (No. 8/74), [1974] E.C.R. 837, and is quite complex. For a good overview, see C. Barnard, "Fitting The Remaining Pieces Into The Goods And Persons Jigsaw" (2001) 26 *Eur. L. Rev.* 35.

<sup>27</sup> R.J. Howse, *Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government* (C.D. Howe Institute, 1996).