Constitutional Review, Volume 12, Number 1, May 2026
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1215

Internal Trade Barriers in Canadian Federalism: Privy Council Doctrine and Supreme Court Continuity

Alex Atanasov*
Applied Science University, Manama, Bahrain
alex.atanasov@asu.edu.bh

Received: 13 March 2025 | Last Revised: 17 February 2026 | Accepted: 3 March 2026

Abstract

This Canada's internal market remains fragmented despite the consolidation of judicial authority in the Supreme Court of Canada and the availability of constitutional tools capable of supporting national economic coordination. This article examines how early interpretations of the federal trade and commerce power by the Judicial Committee of the Privy Council shaped a doctrinal framework that continues to constrain internal trade regulation. It contributes to Canadian constitutional scholarship by showing that, in the constitutional domain, common-law adjudication does not necessarily evolve toward greater economic efficiency: early doctrinal settlements may persist. Methodologically, the article adopts a doctrinal–institutional approach, analysing leading Privy Council and Supreme Court of Canada decisions on section 91(2) of the Constitution Act, 1867. The analysis focuses on purposively selected cases that structured constitutional interpretation of internal trade rather than offering an exhaustive survey. A limited comparative reference to European Union internal market law is employed illustratively, using the principle of mutual recognition as a benchmark to clarify the conceptual distinction between decentralized governance and effective market integration. The article concludes that internal trade barriers

* Alex Atanasov is an Assistant Professor of Law at the College of Law, Applied Science University, Bahrain. His research focuses on judicial systems and constitutional law. He has published extensively on economic regulation and comparative analysis. Email: alex.atanasov@asu.edu.bh. The author used Grammarly Pro and ChatGPT solely for limited language editing and stylistic refinement. All ideas, legal analysis, arguments, and substantive content of this manuscript are entirely the author's original work.

in Canada reflect durable constitutional choices rather than incidental policy failure, and that meaningful correction is more likely to depend on political coordination or legislative initiative than on judicial evolution alone.

Keywords: Canadian constitutional law; Federalism; Institutional inertia; Internal trade; Internal market fragmentation; Judicial doctrine; Trade and commerce power

I. INTRODUCTION

This Internal trade regulation in Canada has been shaped by early constitutional interpretations that became embedded in the structure of federalism and constrained later judicial recalibration. Once absorbed into foundational doctrine, these interpretations allocate regulatory authority in ways that subsequent courts are reluctant to revisit.

Early interpretations of the trade and commerce power emerged in an external trading environment that reduced pressure for internal market integration and later hardened into doctrinal reference points. Constitutional allocations of legislative authority, once judicially articulated, tend to be treated as structural settlements. As a result, doctrine may preserve regulatory fragmentation even where alternative interpretations could support greater coordination.

External market integration may partially offset domestic fragmentation, but reliance on external coordination exposes constitutional systems when economic conditions shift. Recent IMF analysis estimates that policy-related internal barriers within Canada are equivalent to roughly a 9 percent tariff nationally, underscoring persistent internal market fragmentation.[1]

This article asks why internal trade barriers persisted after the transition from the Privy Council to the Supreme Court of Canada despite doctrinal tools capable of supporting broader federal economic authority. It argues that early interpretations of section 91(2) of the Constitution Act, 1867 structured later jurisprudence and that stare decisis, the costs of overruling, and amendment rigidity limited recalibration.

[1] Federico J. Díez and Yuanchen Yang, "Canada Can Grow Faster by Unlocking Its Own Market," *IMF Country Focus*, January 27, 2026.

Canadian federalism scholarship has often treated provincial autonomy and economic regulation through distinct doctrinal lenses rather than analyzing internal market integration as a unified institutional problem.[2] This article shows how Privy Council doctrine linked provincial autonomy to the legal design of the internal market and how the Supreme Court largely absorbed that framework. The contribution is doctrinal: Canadian courts have analyzed trade and commerce disputes as questions of federal–provincial allocation of powers, without articulating internal market integration as an autonomous constitutional concern. This helps explain why fragmentation can persist even when broader federal coordination is institutionally feasible.

II. CONTRIBUTION AND DOCTRINAL CLARIFICATION

This article contributes to Canadian constitutional scholarship by clarifying a persistent doctrinal conflation between federalism analysis and internal market integration. Canadian courts and commentators have traditionally evaluated trade and commerce disputes through the lens of federal–provincial allocation of powers, treating questions of economic coordination as incidental to constitutional structure. This paper argues that this framing has obscured an analytically distinct doctrinal concern: the conditions under which constitutional interpretation facilitates or tolerates fragmentation of the domestic market. The contribution is not to advance a normative economic theory of constitutional interpretation, but to demonstrate that internal market integration has never been articulated as an autonomous doctrinal consideration within Canadian federalism jurisprudence. By separating the doctrinal logic of federal balance from the doctrinal consequences for market coordination, the article brings greater clarity to the limits of existing trade and commerce doctrine and explains why internal trade barriers have persisted even where doctrinal tools for broader federal regulation were available.

[2] Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations," *McGill Law Journal* 36 (1991): 309–313.

III. METHOD AND SCOPE

This article adopts a doctrinal–institutional approach to Canadian constitutional law, focusing on judicial interpretation of the trade and commerce power and its implications for internal trade. The analysis centres on close reading of leading constitutional decisions rather than on empirical measurement or theory testing. First, the Privy Council jurisprudence is examined. Later, Supreme Court of Canada decisions are selected for their engagement with this inherited framework and their relevance to internal market coordination. Case selection is purposive rather than exhaustive. A limited comparative reference to European Union internal market law is used illustratively, drawing on the principle of mutual recognition to clarify doctrinal distinctions rather than to propose institutional transplantation. The analysis is confined to the Canadian constitutional context and advances institutionally bounded conclusions.

This article proceeds in four stages. First, it reconstructs the doctrinal foundations of Canadian internal trade regulation, beginning with the British North America Act, 1867 and the interpretation of the trade and commerce power by the Judicial Committee of the Privy Council, with particular attention to the interpretive settlement associated with Viscount Haldane. Second, the article clarifies the doctrinal distinction between federalism, centralization, and the internal Canadian market, showing why stronger federal authority does not necessarily translate into effective market integration within the existing constitutional framework. Third, it examines the Supreme Court of Canada's post-Privy Council jurisprudence to assess how inherited constraints on federal market coordination were engaged with, adjusted, or preserved following the institutional transition to a domestic apex court. , Finally, it explains how the interaction of inherited doctrine, judicial continuity, and constitutional structure contributed to the persistence of internal trade fragmentation despite institutional change, situating the Canadian experience within a limited comparative perspective drawn from European Union internal market law.

IV. COMPETING DOCTRINAL ACCOUNTS OF FEDERAL TRADE

The Constitution Act, 1867 has long been interpreted as containing conflicting signals about the degree of centralization or decentralization in the Canadian federation, supporting both a strong central government and substantial provincial autonomy. As Hogg and Wright observe, the constitutional text itself sends "conflicting signals" about centralization and decentralization, reflecting the framers' attempt to reconcile demands for national unity with the protection of local institutions and identities.[3] The authors treat centralization and decentralization chiefly as issues of constitutional structure and judicial interpretation, rather than offering a sustained analysis of the economic consequences of either model.

Sections 91 and 92, therefore, provided a framework that could plausibly sustain either a centralization-oriented reading of federal trade and commerce power or a decentralization-oriented reading grounded in provincial control over property and civil rights. The persistence of internal trade barriers in Canada cannot be explained by constitutional text alone, but by the way these competing possibilities were resolved in early judicial interpretation.

From Confederation until 1949, the Judicial Committee of the Privy Council served as Canada's final court of appeal and supplied the interpretive framework through which these competing federal visions were reconciled. Although the text allowed for a relatively strong central authority, the Privy Council consistently adopted an interpretation that favoured provincial autonomy and treated federal and provincial governments as coordinate rather than hierarchical actors. [4] This interpretive choice structured subsequent doctrine and shaped the development of Canadian internal trade law.

4.1. **Restrictive Interpretation of Section 91(2)**

The historically dominant doctrinal account reads section 91(2) narrowly. Under this approach, federal authority over trade and commerce is largely confined

[3] For more see on how the Canadian constitution resulted in weaker federal power see Peter W. Hogg and Wade K. Wright, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism," *UBC Law Review* 38, no. 2 (2005): 329–352.

[4] Hogg and Wright, "Canadian Federalism, the Privy Council."

to interprovincial and international trade, while most economic regulation falls within provincial jurisdiction over property and civil rights under section 92(13). Privy Council jurisprudence consolidated this interpretation through decisions that emphasized provincial autonomy in matters touching local commerce, labour, and contractual relations, and that resisted efforts to justify federal regulation on the basis of coordination or efficiency.

In Hogg and Wright's account, this body of case law reflected a consistent constitutional vision: provincial legislatures were treated as coordinate governments whose jurisdiction over economic life was presumptively dominant unless federal legislation could be justified under clearly national heads of power. [5] The result was a stable doctrinal structure in which federal economic regulation was treated as exceptional rather than primary, and in which national coordination depended on fitting within narrowly defined doctrinal categories.

4.2. Continuity in Supreme Court Jurisprudence

The termination of appeals to the Privy Council in 1949 and the emergence of the Supreme Court of Canada as the final appellate authority did not produce a wholesale reorientation of this framework. Although the Supreme Court adopted a more flexible vocabulary and, in some areas, expanded federal authority,[6] it largely reasoned within the interpretive structure inherited from Privy Council jurisprudence. Federal powers in areas such as competition law and aspects of the peace, order, and good government power were developed incrementally rather than through a redefinition of the constitutional settlement governing internal trade.

The core distinction between federal authority over "general trade" and provincial authority over economic regulation remained central. As a result, internal trade barriers persisted not because of institutional incapacity but because doctrinal boundaries shaped the range of constitutionally permissible responses. The Supreme Court's jurisprudence thus reflects continuity with

[5] Hogg and Wright.
[6] Hogg and Wright.

adjustment: inherited interpretive categories were adapted to new circumstances without displacing their foundational allocation of authority.

4.3. Comparative Clarification

This article's use of a limited comparative reference to European Union internal market law serves a clarifying function. The comparison shows that the dichotomy between centralized and decentralized governance is conceptually false. Decentralization need not entail regulatory fragmentation: EU doctrine subjects barriers to cross-border trade to sustained judicial scrutiny while preserving regulatory autonomy (decentalization) at the member-state level. The contrast underscores that Canada's persistent internal trade barriers reflect specific doctrinal choices made in interpreting section 91(2), rather than an inevitable feature of federalism itself.

4.4. Doctrinal Limitation and Institutional Constraints

The endurance of the restrictive interpretive framework reflects institutional features of Canadian constitutional adjudication that favour continuity. A central constraint is the operation of stare decisis in constitutional law. While Canadian courts have recognised the possibility of revisiting precedent,[7] they have consistently emphasized the importance of stability, predictability, and institutional legitimacy in constitutional interpretation.[8] The line of cases discussed in this paper shows that the Privy Council and later the Supreme Court of Canada have treated long-standing constitutional decisions as carrying enhanced precedential weight, particularly where they structure the federal

[7] In Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101, the Supreme Court of Canada (SCC) famously departed from its own precedent established in the 1990 *Prostitution Reference*. While the principle of *stare decisis* generally requires courts to follow established rulings, the SCC clarified that this is not a «straitjacket» and laid out specific criteria for when precedents may be revisited. A clear early example is Justice Ronald Martland who authored the unanimous opinion in R. v. Paquette, [1977] 2 S.C.R. 189; In his explicit statement—"I am not in agreement with this view, see Dunbar v. The King, [1936] 4 D.L.R. 737, and I am of the opinion that it should not be followed."

[8] See, for example, *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. This is a key authority on the "horizontal" application of precedent. The Court noted that it must not overrule its own decisions lightly because "stability and predictability" are fundamental to the rule of law. It argued that frequent changes based on the shifting ideologies of judges would cause institutional respect for the Court to decline. Also, in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. The Court explicitly stated that the rule of law provides a "shield for individuals from arbitrary state action" and ensures a stable and predictable legal order. It linked the legitimacy of the entire constitutional framework to its ability to remain consistent while reflecting democratic values.

balance. As a result, early interpretations of section 91(2) developed by the Privy Council acquired a form of doctrinal entrenchment that made subsequent departure both institutionally sensitive and jurisprudentially exceptional.

Not much change was produced by the transition from the Privy Council to the Supreme Court. It altered the institutional locus of constitutional authority but did not dismantle the interpretive structure governing federal trade power. Internal trade barriers have therefore persisted because the autonomy-oriented reading of the Constitution selected by the Privy Council became embedded in constitutional doctrine and continued to shape the range of available legal solutions.

V. EVOLUTIONARY CONSTRAINTS IN CONSTITUTIONAL ADJUDICATION: DOCTRINAL PERSISTENCE AND STRUCTURAL CHOICE

This article uses an evolutionary lens to illuminate the persistence of doctrinal patterns in Canadian constitutional law. This section does not propose a unified theoretical framework of legal evolution, but draws selectively on existing accounts to illuminate the persistence of doctrinal patterns in the Canadian constitutional context.

Hayek's account of the common law as a form of spontaneous order provides a useful starting point.[9] While Hayek emphasizes the adaptive qualities of judge-made law, he also cautions that legal evolution may reach impasses where established rules persist despite changing circumstances.[10] In such cases, judges may be institutionally reluctant to alter settled doctrine, particularly where

[9] Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944).

[10] Hayek says the following "For a variety of reasons the spontaneous process of growth may lead into an impasse from which it cannot extricate itself by its own forces or which it will at least not correct quickly enough. The development of case-law is in some respects a sort of one-way street: when it has already moved a considerable distance in one direction, it often cannot retrace its steps when some implications of earlier decisions are seen to be clearly undesirable. The fact that law that has evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad.... judge can develop the law by deciding issues which are genuinely doubtful, he cannot really alter it, or can do so at most only very gradually where a rule has become firmly established; although he may clearly recognize that another rule would be better, or more just, it would evidently be unjust to apply it to transactions which had taken place when a different rule was regarded as valid. Friedrich A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge, 1982), 84.

precedent is entrenched, and legislative correction is available but politically costly. Thus, the common law, even though it resembles a spontaneous order, may reach an impasse and continue moving in the wrong direction. [11] Hayek makes another crucial point is that the law's evolution may not be able to move to an efficient path easily.[12] This insight is especially relevant to constitutional adjudication, where the combination of stare decisis and deference to democratic institutions can constrain judicial willingness to revisit foundational interpretations.

This perspective can be contrasted with a widely accepted view in the literature on common law evolution, according to which inefficient legal structures tend over time to be discarded, while more efficient arrangements persist.[13] On this account, judicial decision-making in common law systems is said to favour rules that produce superior outcomes, either because inefficient rules are more frequently challenged or because courts gradually select doctrines that better align with prevailing social and economic conditions. From this standpoint, legal persistence is often taken as indirect evidence of functional adequacy rather than institutional constraint. Thus there are two traditions: the optimists and the cautionary account of Hayek.

The Canadian constitutional experience illustrates the caution advanced by Hayek that common law development does not necessarily converge toward optimal or adaptive outcomes. Despite institutional change and evolving regulatory needs, early constitutional interpretations concerning federal trade authority remained remarkably stable. This persistence is not presented here as a test of Hayek's theory, but as an example of the institutional dynamics he described.

Roe's account provides a useful way of describing this form of stability.[14] By emphasizing the role of initial conditions and the cumulative effects of

[11] Hayek, *Law, Legislation and Liberty*, 84.

[12] Hayek, *Law, Legislation and Liberty*, 84.

[13] This view has been propagated by George L. Priest, "The Common Law Process and the Selection of Efficient Rules," *Journal of Legal Studies* 6, no. 1 (1977): 65–82; Paul H. Rubin, "Why Is the Common Law Efficient?," *Journal of Legal Studies* 6, no. 1 (1977): 51–63. Richard A. Posner also advanced this position in early editions of *Economic Analysis of Law*. For a later discussion from a supply-side perspective, see Todd J. Zywicki, "The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis," *Northwestern University Law Review* 97, no. 4 (2003): 1551–1633.

[14] Mark J. Roe, "Chaos and Evolution in Law and Economics," *Harvard Law Review* 109, no. 3 (1996): 641–68.

precedent, Roe identifies the mechanisms through which early judicial choices structure subsequent doctrinal development, narrowing the range of feasible alternatives even in the presence of later pressures for change. Roe's analysis of path dependence further refines this perspective by highlighting the significance of initial conditions. Roe argues that legal and institutional arrangements may persist not because they are optimal, but because early choices shape subsequent developments in ways that are difficult to reverse. Applied to constitutional law, this suggests that early judicial interpretations can structure the range of later doctrinal possibilities, channelling legal development along a stable trajectory that follows an institutional inertia even when alternative paths might later appear preferable.

Roe's emphasis on initial conditions provides a useful descriptive lens for understanding the stability of Canadian constitutional doctrine. In his words: "Today's road, dependent on the path taken by the trader decades ago, is not the one that the authorities would lay down if they were choosing their road today."[15] In his account, early institutional choices can shape subsequent legal development by narrowing the range of feasible alternatives, even when later circumstances change. As Roe writes, "Survival does not imply superiority to untried alternatives,"[16]

Applied to Canada, this insight helps explain the enduring influence of Privy Council interpretations of sections 91 and 92 of the Constitution Act, 1867. Once these early decisions framed federal economic authority as exceptional and provincial jurisdiction as presumptively dominant, subsequent courts inherited a doctrinal structure that constrained later reinterpretation. The significance of initial conditions in this context lies not in their efficiency or desirability, but in their capacity to stabilize constitutional meaning across judicial eras.

Gennaioli and Shleifer complement this account by emphasizing the role of cognitive and institutional simplification in judicial decision-making. Their work

[15] Roe, "Chaos and Evolution in Law and Economics."
[16] Roe, "Chaos and Evolution in Law and Economics."

shows how courts tend to rely on familiar doctrinal categories and established frameworks when confronting complex regulatory problems.[17] This tendency is associated with continuity and incremental adjustment rather than structural revision, particularly in areas such as federalism where legal categories have long been settled and deeply internalized.

Finally, Luhmann's conception of law as a self-referential system offers a useful perspective on how constitutional doctrine can adapt without fundamental transformation. [18] Legal systems respond to external pressures (economic, political, or social) through established forms of legal reasoning. In practice, this often involves incorporating new considerations within existing lines of precedent.

The constitutional architecture governing internal trade reflected interpretive choices that were well adapted to the institutional environment of their origin but increasingly difficult to reconcile with later demands for national market coordination. As Roe observes in a different context, institutional arrangements may persist because they were suited to an earlier environment, even where alternative configurations would later appear more functional.[19] This dynamic is visible in the Canadian constitutional experience, where early federalism doctrine constrained later efforts to address internal market fragmentation.

Each of these perspectives highlights a different aspect of the Canadian context. Early interpretations of federal trade authority established a doctrinal framework that remained influential across institutional transitions. The perspective adopted here does not claim that such outcomes are inevitable. It is used more modestly to clarify how doctrinal continuity can persist even where courts acknowledge new regulatory needs and adopt more flexible interpretive language.

---

[17] Nicola Gennaioli and Andrei Shleifer, "The Evolution of Common Law," *Journal of Political Economy* 115, no. 1 (2007): 43–68.

[18] Niklas Luhmann, *Law as a Social System*, trans. Klaus A. Ziegert, ed. Fatima Kastner et al. (Oxford: Oxford University Press, 2004).

[19] Roe, "Chaos and Evolution in Law and Economics."

VI. VISCOUNT HALDANE AND THE DOCTRINAL FOUNDATIONS OF CANADIAN FEDERALISM

During the formative period of Canadian constitutional adjudication, the Judicial Committee of the Privy Council played a decisive role in shaping the distribution of federal and provincial powers. In cases concerning trade, commerce, and economic regulation, Privy Council jurisprudence consistently emphasized provincial autonomy, producing a doctrinal framework in which federal economic authority under section 91(2) of the Constitution Act, 1867, was construed narrowly. This interpretive approach entrenched a decentralized conception of federalism that would structure Canadian constitutional law well beyond the Privy Council era.

The context in which the Privy Council decided cases included the substantial influence of Viscount Haldane on this jurisprudence. Under his leadership, the Privy Council confined the federal trade and commerce power to limited domains. It resisted its extension into areas associated with provincial jurisdiction over property and civil rights. Economic regulation was treated primarily as a local matter, with national coordination regarded as exceptional rather than presumptive.

As Vaughan observes, Privy Council jurisprudence during this period reflected a policy orientation that privileged constitutional structure and institutional authority over considerations of economic coordination. This orientation was expressed through a preference for state-centred constitutional ordering and a reluctance to treat market integration as a relevant interpretive consideration. The result was not merely a set of isolated outcomes, but a doctrinal framework whose early interpretive choices produced enduring structural effects in the distribution of federal and provincial powers.[20]

[20] Frederick Vaughan, *Viscount Haldane: "The Wicked Step-father of the Canadian Constitution"* (Toronto: University of Toronto Press, 2010), 188.

This orientation resulted in a relatively weak federal government, which, in turn, diminished the importance of intra-provincial trade.[21] As a matter of constitutional doctrine, this approach reflected a strong commitment to preserving provincial legislative spheres and maintaining structural federal balance.

From an internal doctrinal perspective, Haldane's jurisprudence was coherent and reflected a principled application of the classical paradigm of Canadian federalism. The Privy Council conceived its role as that of a constitutional arbiter rather than a policy-making institution, emphasizing exclusivity, judicial restraint, and the preservation of provincial autonomy. On this view, courts were tasked with safeguarding the constitutional distribution of powers as enacted, leaving questions of economic coordination to political processes or constitutional amendment.[22] As Ryder notes, the Constitution does not entrench any particular economic theory, and resistance to expansive interpretations of the trade and commerce power reflected a refusal to constitutionalize market integration through judicial doctrine.[23]

The doctrinal consequences of this framework, however, were significant. By limiting the scope of federal authority over interprovincial trade and economic regulation, Privy Council jurisprudence constrained the constitutional tools available to address internal market fragmentation. These constraints became particularly visible during periods of economic stress, including the Great Depression, when federal initiatives aimed at economic stabilization encountered constitutional barriers grounded in earlier trade and commerce decisions. The Privy Council's adherence to its established interpretive framework left little room for doctrinal adaptation in response to changing economic conditions.

---

[21] For a detailed discussion on the varying perspectives regarding a strong federal government, as well as the debates surrounding the initial design of the Canadian Constitution, see Hogg and Wright, "Canadian Federalism, the Privy Council and the Supreme Court," 329–52.

[22] Mark MacGuigan, "The Privy Council and the Supreme Court: A Jurisprudential Analysis," *Alberta Law Review* 4 (1966): 419–441

[23] Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism," *McGill Law Journal* 36 (1991): 308–356.

Subsequent commentators have been sharply critical of this legacy. His stance has been considered to be against the economy. [24,25] Vaughan notes the intensity of academic reaction to this legacy, recounting that upon Bora Laskin's appointment to the Supreme Court of Canada in 1970, Frank Scott, Dean of McGill Law School, wrote that the appointment was "the best news since [he learned of] the death of Lord Haldane.[26] Such remarks illustrate the strength of feeling in certain academic circles regarding the long-term effects of Privy Council federalism. Other commentators have adopted similarly critical language. Saywell, for example, characterized aspects of the jurisprudence as containing "bizarre dicta" and "constitutional absurdities" that constrained federal authority and shaped Canadian federalism.[27] Whether or not these assessments are accepted, their intensity underscores the extent to which early interpretive choices were understood to have lasting structural consequences for the distribution of powers within the Canadian federation.

The transfer of final appellate authority from the Privy Council to the Supreme Court of Canada did not produce a wholesale doctrinal reversal. Although the Supreme Court gradually adopted a more flexible vocabulary of cooperative federalism and permitted some expansion of federal regulatory authority, it largely operated within the interpretive architecture inherited from the Privy Council. As Hogg has observed, the abolition of appeals removed an external institutional constraint but did not erase the doctrinal foundations established during the earlier period.[28] Core limitations on the trade and commerce power remained embedded in constitutional law.

Taken together, the Haldane era illustrates how early constitutional interpretations can entrench institutional priorities and shape later adjudication. While the restrictive reading of federal economic power was defensible within the Privy Council's conception of judicial restraint and federal balance, its long-term

[24] Vaughan, *Viscount Haldane*, xvi, citing Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press / Osgoode Society for Canadian Legal History, 2005), 365.
[25] Charles Hobhouse, *Inside Asquith's Cabinet: From the Diaries of Charles Hobhouse* (London: Murray, 1977), 51–52.
[26] Vaughan, *Viscount Haldane*, xv–xvi n. 2, citing Girard, *Bora Laskin*, 365.
[27] Vaughan, *Viscount Haldane*, 217.
[28] Peter W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson Reuters, 2020), § 5.17.

effect was to limit the constitutional capacity for national market coordination, reinforcing continuity rather than correction in Canadian constitutional law..

VII. DOCTRINAL CONSTRAINTS ON FEDERAL ECONOMIC REGULATION IN PRIVY COUNCIL JURISPRUDENCE

The restriction of the trade and commerce power is commonly traced to the period in which Viscount Haldane sat on the Judicial Committee (1911–1928). In trade and commerce cases in Board of Commerce 1922, Viscount Haldane dismissed trade and commerce power and said that it is not an independent power and needs to be used only as ancillary to other federal powers. Hogg later described this formulation as an 'unfortunate sentence" that did not by itself enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words POGG (Peace. Order .Good .Government). be free to engage in the provinces.[29]

7.1. Citizens' Insurance Co. v . Parsons 1881[30]

It can be said that there is a conflict between ss. 91 2 and 92 (13). The first important case that considered the issues is Citizens' Insurance Co. v . Parsons 1881 7 App Cas. The issue was whether the provincial statute, which stipulated that certain conditions were to be included in all fire insurance policies entered into the province. The Privy Council held that the statute was valid law in relation to property and civil rights in the province. It did not come within the federal trade and commerce power because it cannot regulate by legislation the contracts of a particular business or trade such as fire insurance.[31]

7.2. The decisive formulation in Canadian Constitutional Law

The decision in Citizens' Insurance Co v Parsons (1881) established an early structural distinction between the federal power over trade and commerce and provincial jurisdiction over property and civil rights. The Privy Council suggested that federal authority might include "political arrangements in regard to trade...

[29] *Board of Commerce*, [1922] 1 A.C. 191; Hogg, *Constitutional Law of Canada*, § 20.7.
[30] *Citizens' Insurance Co. v. Parsons* (1881) 7 App. Cas. 96.
[31] *Citizens' Insurance Co. v. Parsons* (1881) 7 App. Cas. 96, 113.

regulation of trade in matters of interprovincial concern... [and possibly] general regulation of trade affecting the whole Dominion."[32] Although framed as a description of federal competence, this formulation became the basis for a narrow reading of federal economic authority. Later Privy Council jurisprudence, particularly in the Haldane era, entrenched this restrictive orientation by locating most regulatory questions within provincial jurisdiction.

From an economic perspective, by confining federal jurisdiction largely to interprovincial or political arrangements, Parsons left uncertain the scope of federal authority to coordinate national markets and reinforced provincial dominance over economic regulation. This contributed to the persistence of internal barriers to trade and to a constitutional structure in which interprovincial coordination is difficult. The resulting fragmentation of Canada's internal market cannot be attributed solely to Parsons, but the distinction it introduced between general trade regulation and regulation of particular trades provided a doctrinal foundation for later limits on federal economic powers.

A sophisticated defence of this approach is offered by Malcolm Lavoie, who argues that decisions such as Parsons reflect a coherent constitutional commitment to subsidiarity, property-based decentralization, and the preservation of provincial legal diversity, including Quebec's civilian tradition. On his account, a narrow reading of the trade and commerce power protects local autonomy while still allowing for national coordination where necessary.[33] His work is notable for taking the Constitution's economic dimension seriously and for emphasizing that integration and decentralization must coexist.

However, this defence rests on a contestable premise: that a broader federal role in facilitating interprovincial trade would necessarily undermine provincial private law.[34] Federal coordination of market access does not require the uniformization of provincial legal systems. What is required is a framework

[32] *Citizens' Insurance Co. v. Parsons* (1881) 7 App. Cas. 96, 113.
[33] Malcolm Lavoie, *Trade and Commerce: Canada's Economic Constitution*, Carleton Library Series 261 (Montreal and Kingston: McGill-Queen's University Press, 2023), 66.
[34] Lavoie, *Trade and Commerce*, 78.

ensuring that goods, services, and economic actors can move across provincial borders without facing discriminatory or duplicative barriers.

The European Union's principle of mutual recognition demonstrates that legal diversity and market integration can coexist. Under this model, goods lawfully produced in one jurisdiction must generally be admitted in others, subject only to limited public-interest exceptions. In a case shortly called Cassis de Dijon the principle of mutual recognition preserves local regulatory autonomy while preventing protectionist fragmentation.[35] Economic integration is achieved through coordination rather than uniformity.[36] In this light, the concern that a broader federal trade and commerce power would erase provincial legal identity appears overstated.

While Lavoie is right to emphasize subsidiarity and decentralization, his defence of the Parsons framework underestimates the extent to which integration and legal diversity can coexist. The economic costs of fragmented internal markets do not necessitate full harmonization of private law, only mechanisms that ensure market access across jurisdictions.

By drawing a sharp distinction between general trade regulation and regulation of particular trades, Parsons contributed to the creation of an initial economically unfavourable condition that led to a path of jurisprudence that limited federal capacity to address collective-action problems in the national economy.

---

[35] European Court of Justice, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [Federal Monopoly Administration for Spirits] (Cassis de Dijon), Case 120/78, 1979 E.C.R. 649.

[36] As to why such famous ECJ ruling such as the Cassis de Dijon has not found any traction in Canada see Ran Hirschl, "Going Global? Canada as Importer and Exporter of Constitutional Thought," in *Canada in the World: Comparative Perspectives on the Canadian Constitution*, ed. Richard Albert and David R. Cameron (Cambridge: Cambridge University Press, 2018), 305–23, esp. 320–23. He describes the inaction of the Canadian Supreme Court towards inefficiencies of Canada's constitutional structure, particularly in its handling of internal trade and federalism, "The Court's openness to engagement with foreign rulings and constitutional concepts in the area of rights and liberties often masks the fact that the comparative turn has not, by and large, penetrated the judicial, academic, or political discourse concerning some of Canada's organic constitutional failings (page 320). He further identifies the areas of law where this openmindedness of Canadian judges does not normally work "federalism, separation of powers, amending procedures) features of the constitution, where national idiosyncrasies and contingencies are more prevalent" (age. 320). Hirschl also states "Canada has become a global powerhouse in comparative constitutionalism, but this influence has not translated into meaningful self-reflection or internal constitutional renewal" (page 323). This aligns with the article's critique of Canada's internal legal frameworks, which remain rigid and resistant to necessary economic adaptations.

7.3. The Insurance Reference (1916)

This case involved the federal government's attempt to regulate the insurance industry across provincial borders through the Insurance Act of 1910. The Privy Council ruled that the federal government did not have the authority to regulate a particular trade, such as insurance, within provinces.

A more precise scope of section 92 that mostly concentrates on trade and commerce powers cases that came to the courts with interprovincial elements to be decided who is going to deal with that power federal or provincial authority. This definition was left to the Haldane period. The Insurance Reference (1916) [37] set the pattern. This case involved the federal government's attempt to regulate the insurance industry across provincial borders through the Insurance Act of 1910. The Act purported to establish a licensing regime for insurance companies, other than provincial companies carrying on business wholly within the province of incorporation. The exemption emphasized that the Act aimed to impose federal regulation on an industry that spread across the country without regard for provincial boundaries.

The Privy Council held that country the scope of the industry or particular companies was irrelevant. Viscount Haldane said: "It must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces."[38]

The main economic issue is that this case created regulatory fragmentation. The ruling limited the federal government's ability to harmonize insurance laws, leading to fragmented regulations that varied across provinces. This created inefficiencies as businesses faced different regulatory environments in each province, increasing compliance costs and administrative burdens. The result was lack of national standards or at least, an easy recognition of provincial regulation across internal Canadian borders.

[37] *A.G. Canada v A.G. Alta* (*Insurance*), [1916] 1 A.C. 588
[38] *A.G. Canada v A.G. Alta* (*Insurance*), [1916] 1 A.C. 588.

7.4. Board of Commerce Case (1922)

The trade and commerce power was also rejected as support for the legislation in the Board of Commerce case (1922). This case concerned federal attempts to regulate anti-competitive practices (such as price fixing) and hoarding under the Board of Commerce Act. The legislation included the so-called anti-combines provisions,[39] and also provisions regulating hoarding and excessive prices of certain "necessaries of life" (food, clothing, and fuel). The Privy Council ruled that the federal government lacked the constitutional authority to regulate these areas under the "trade and commerce" power.

The case arose after the Canadian government attempted to control inflation and prevent profiteering post-WWI through the Board of Commerce Act and the Combines and Fair Prices Act of 1919. These Acts empowered the Board to investigate and curtail monopolistic practices and price-gouging.[40] tasks that prompted constitutional questions regarding federal powers.

The Board of Commerce case, as well as reinforcing the lack of federal power over much economic regulation, discouraged the federal Parliament from enacting wage and price controls in peacetime until the Anti-Inflation Act of 1975. The same case forced the substitution of narrower and less effective competition laws, which could be upheld as criminal law [41,42]

---

[39] Better known under the names of competition or antitrust law

[40] Price-gouging is economically inefficient, largely due to its distortion of market equilibrium, its impact on resource allocation, and its consequences for consumer welfare and demand elasticity.

Marke[t] Distortion: Price-gouging leads to prices that significantly exceed the equilibrium price, where supply and demand naturally balance. In cases of emergency or sudden demand spikes, price-gouging takes advantage of constrained supply by sharply increasing prices. However, this increase does not necessarily correspond to increased value or improved allocation of resources but rather reflects a scarcity premium. This discrepancy reduces the ability of the market to allocate resources efficiently, as it prevents prices from adjusting based on actual production costs or sustainable demand levelsonsumer Welfare and Demand Elasticity: High prices during emergencies reduce consumer welfare by making essential goods unaffordable to many, particularly low-income consumers. The increase in price elasticity under such conditions means that consumers may drastically cut consumption, even when demand is critical. When prices are artificially high, consumers may also engage in hoarding or black-market purchases, which further skews efficient market behavior.

Supply Expansion: Although proponents argue that higher prices incentivize increased supply, price-gouging often occurs in situations where supply cannot be rapidly expanded (e.g., during a natural disaster). This situation can encourage hoarding or inefficiencies in production adjustments. Moreover, the higher prices do not attract new entrants quickly enough to alleviate the scarcity, prolonging inefficiencies and inequitable distribution.

[41] Hogg, *Constitutional Law of Canada*, §§ 20.7–20.8.

[42] Hogg, *Constitutional Law of Canada*, § 17.22.

In argument, Viscount Haldane suggested that the trade and commerce power had no independent content and could be invoked only as ancillary to other federal powers. In his actual opinion, Viscount Haldane dismissed the trade and commerce power in one uninformative sentence: s. 91(2) "did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above p.o.g.g, be free to engage in the province" [43] Haldane's reasoning was that the trade and commerce power lacked independent content and could only function as ancillary to other federal powers. This restrictive view constrained the federal government's ability to regulate critical aspects of the economy, further entrenching provincial autonomy.

Moreover, the Board of Commerce decision prompted the federal government to rely on narrower competition laws, permissible under its criminal law jurisdiction, as a substitute for comprehensive economic regulations—a shift that arguably weakened the effectiveness of federal competition policy. [44] This led to the inability of the federal government to regulate anti-competitive practices, which in turn allowed monopolies to thrive in certain sectors, ultimately resulting in inefficient market outcomes. Another problem is the familiar increased transaction costs. Without federal regulation, the provinces were left with varying standards for what constituted fair market behaviour, resulting in inconsistent legal frameworks that increased transaction costs for businesses operating in multiple provinces.

7.5. Toronto Electric Commissioners v. Sider (1925)

Subsequent cases reinforced these patterns. The ancillary theory of the trade and commerce power was repeated in Toronto Electric Commissioners v. Sider (1925),[45] where the power was again rejected, this time as a support for federal labour laws. The case involved federal attempts to regulate labour laws and competition under the Trade and Commerce Clause. The Privy Council

[43] *Board of Commerce*, [1922] 1 A.C. 191.
[44] Hogg, *Constitutional Law of Canada*, § 17.
[45] *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, 410.

ruled against the federal government's authority to use this power to regulate labour relations.

When addressing pervasive and interconnected economic issues like labour, the JCPC maintained that such matters fell within provincial authority over "property and civil rights." The inability to consider the broader implications of economic interdependence is exemplified by these judicial rulings.

Labour is one of the main factors of production that needs federal mechanisms of protection and freedom in order to be efficient, and for an internal market to function properly. The ruling created uncertainty about labour relations and restricted federal efforts to ensure a standardized and efficient labour market across Canada. Different provincial rules governing labour standards created inefficiencies, particularly for industries that operated nationally. The decision also inhibited market flexibility as businesses had to navigate a patchwork of labour laws that impeded labour, mobility and efficiency. Again, full harmonization of the labour market may not be the way forward. Allowing for different provincial labour standards is possible but under a national mechanism of regulation that provides security and a level of standardization. In the European Union, Article 45 TFEU resolved this issue with a unified but diverse way to regulate an internal labour market.[46]

7.6. The King v. Eastern Terminal Elevator Co. (1925) [47]

In this case, the Supreme Court held ultra vires a provision of the Canada Grain Act that formed part of a broader licensing-and-control scheme for terminal elevators, treating it as an attempt to regulate a local business (elevators and the property interests tied to them) rather than as valid federal regulation of trade and commerce (Duff J., concurring; Anglin C.J.C. dissenting).

The case is valuable here not because it was "Haldane's," but because it shows doctrinal continuity: even in a sector overwhelmingly tied to interprovincial movement and export, the Court applied a jurisdictional logic that made national

[46] European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, art. 45.
[47] *The King v. Eastern Terminal Elevator Co.*, [1925] A.C. 396, 410.

coordination difficult whenever effective regulation had to "fasten onto" local infrastructure. Economically, that logic predicts higher transaction costs and foregone scale efficiencies where core nodes of a national market (like elevators) remain subject to fragmented regulatory authority.

Read as a path-dependence marker, *Eastern Terminal Elevator* illustrates how the restrictive framework associated with Privy Council-era federalism could be internalized and reproduced in Canadian doctrine: the constitutional priority given to maintaining jurisdictional boundaries operated as a constraint on integrated market governance, even where the underlying trade functioned as a national (and export) system. The decision to strike down the federal regulation of grain elevators created unnecessary barriers to this integration, leading to inefficiencies in both production and transportation. The situation was amended by the Canada Grain Act, R.S.C. 1985, c. G-10, s. 55. [48]

7.7. Random Mutation, The Path Not Taken, the P.A.T.A. case (1931)[49]

In some instances, later JCPC decisions hinted at alternative interpretations but failed to overturn earlier precedents. For example, in the P.A.T.A. case (1931), Lord Atkin rejected Haldane's ancillary theory of trade and commerce power but upheld the invalidation of earlier federal attempts to regulate combines. In the P.A.T.A case (1931),the Privy Council through Lord Atkin upheld as a "criminal law" (s. 91(27)) a narrower form of anti-combines law (which has been redrafted following the Board of Commerce case). From an evolutionary economic perspective, this case could be seen as a "random mutation"—a potential turning point that might have reversed some of the inefficiencies stemming from earlier decisions, such as The King v. Eastern Terminal Elevator Co. (1925), which limited federal regulatory powers over interprovincial trade. The P.A.T.A. case raised the possibility of granting the federal government more robust authority over economic matters, including trade and commerce, potentially enabling a more unified and efficient regulatory framework.

[48] *Grain Act*, R.S.C. 1985, c. G-10, s. 55.
[49] *Proprietary Articles Trade Association v. A.-G. Can.*, [1931] A.C. 310.

7.8. Why the Potential Shift Didn't Fully Materialize

Despite Lord Atkin's suggestion, the Privy Council did not fully embrace this interpretation, and the ruling did not substantially alter the previous judicial decisions that limited the federal government's power. The absence of further legal development in this direction prevented a true shift in Canadian constitutional law, and the economic inefficiencies resulting from fragmented provincial regulation persisted.

Federal attempts to use the trade and commerce power to regulate marketing were also struck down by the Privy Council, and by the Supreme Court of Canada, while still subject to appeals to the Privy Council.

7.9. Natural Products Marketing Reference (1937) [50]

This case is not a Haldane decision but remains important for understanding the persistence of the restrictive approach to federal economic power. The Supreme Court of Canada, relying on the established Privy Council line of authority, held that the Natural Products Marketing Act and its amendment were ultra vires Parliament because the scheme regulated the marketing of particular commodities in ways that extended to intraprovincial transactions. Although the legislation was framed to address interprovincial and export markets, its practical operation necessarily attached to local production, licensing, and marketing activities within provinces. The Court therefore concluded that the scheme fell within provincial jurisdiction over property and civil rights and could not be justified under the federal trade and commerce power or the residual "peace, order and good government" power. In doing so, the Court explicitly grounded its reasoning in the interpretive framework first articulated in Citizens Insurance v Parsons and elaborated in subsequent Privy Council decisions.

The significance of the case lies in its demonstration of doctrinal continuity rather than judicial authorship. Writing for the Court, Duff C.J. treated the established jurisprudence, including Parsons, the Board of Commerce line of cases, and Snider, as binding and determinative. The judgment emphasized that

[50] *A.-G. B.C. v. A.-G. Can. (Natural Products Marketing)*, [1937] A.C. 377.

federal jurisdiction over trade and commerce did not extend to the regulation of particular trades or commodities insofar as they operated locally, even where those markets were closely tied to interprovincial or export channels. The Court acknowledged that the statute aimed to coordinate national and export markets but held that a regulatory scheme encompassing intraprovincial transactions could not be sustained without provincial cooperation. In this respect, the decision reflects the entrenchment of a structural distinction between general trade regulation and regulation of particular trades within provinces—a distinction that had become deeply embedded in Canadian constitutional doctrine.

For the purposes of this article, the *Natural Products Marketing Reference* should therefore be read not as a Haldane judgment but as evidence of the path-dependent continuation of the restrictive framework associated with the Haldane-era jurisprudence. Even in the context of Depression-era economic coordination, the Court adhered to the established division-of-powers logic and declined to expand federal authority over integrated national markets. The case thus illustrates how the interpretive approach initiated in earlier Privy Council decisions continued to shape Canadian constitutional law well beyond Haldane's tenure, reinforcing a model in which national economic coordination depended on provincial cooperation rather than robust federal regulatory authority.

7.10. Margarine Reference (1951)[51]

The Margarine Reference confirmed the continued limits on federal economic regulation. The Supreme Court held that Parliament could prohibit the importation of margarine under its trade and commerce power, but could not ban its manufacture or sale within the provinces. The Privy Council affirmed this result, emphasizing that the legislation, though framed as criminal law, was in substance economic protection for the dairy industry and not directed at a valid public evil such as health or safety.

Doctrinally, the case reaffirmed two principles: the criminal law power cannot be used to implement ordinary economic policy, and the federal trade

[51] *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, aff'd [1951] A.C. 179.

and commerce power does not extend to regulating particular trades carried on wholly within a province. The decision thus reflects the persistence of the restrictive federalism framework that limited national market regulation and required economic coordination to occur largely through provincial or cooperative mechanisms.

By preventing federal regulation of a nationally integrated market while allowing only fragmented provincial control, the decision entrenched interprovincial barriers and raised transaction costs, reducing overall market efficiency and consumer welfare.Bottom of Form

The doctrinal pattern described above can be summarized by tracing how foundational trade and commerce decisions structured both constitutional interpretation and the conditions of the internal market.

Table 1. Foundational Trade and Commerce Doctrine and Internal Market Consequences (Canada)

Case / Line	Core doctrinal rule	Constraint on federal coordination	Internal-market consequence
Parsons (1881)	Distinction between "general trade" and regulation of particular trades; much commercial regulation treated as provincial (s. 92(13)).	Federal economic regulation treated as exceptional unless clearly national in scope.	Provincial divergence in commercial rules; higher interprovincial compliance and transaction costs.
Insurance Reference (1916)	National scope of an industry insufficient to justify federal licensing/ regulation.	Limits federal harmonization even for nationwide industries.	Sector-by-sector regulatory fragmentation across provinces.

Case / Line	Core doctrinal rule	Constraint on federal coordination	Internal-market consequence
Board of Commerce (1922)	Trade and commerce power narrowly construed; broad federal economic control suspect.	Constrains federal price/competition coordination absent alternative head of power.	Potential for patchwork competition and market-stabilization regimes.
Snider (1925) and labour cases	Labour relations and production conditions largely provincial.	Federal labour-market coordination limited outside emergencies.	Segmented labour regulation and uneven burdens across provinces.
Natural Products Marketing (1937)	Federal schemes invalid where they regulate intraprovincial transactions alongside interprovincial trade.	Nationwide market-ordering schemes constitutionally fragile.	Reliance on cooperative federalism; persistent interprovincial barriers.
Doctrinal pattern	Federalism disputes framed as allocation-of-powers questions; internal market integration not treated as an explicit constitutional principle.	Federal coordination episodic and justificatory rather than structural.	Internal trade fragmentation tolerated as a by-product of provincial autonomy.

This pattern illustrates the article's central claim: internal trade fragmentation reflects durable doctrinal choices rather than episodic policy failure, and later courts largely operate within the interpretive framework established by these early decisions.

VIII. DISTINCTION BETWEEN FEDERALISM, CENTRALIZATION AND THE INTERNAL CANADIAN MARKET

This section provides the lens through which the Supreme Court case law that follows should be read. Its purpose is to explain why courts could think they were "doing federalism right" while actually propagating market fragmentation.

An important issue that warrants attention is the evolving role of federalism in Canada, particularly the way in which questions of economic coordination have been doctrinally subsumed within federalism analysis. Over time, federal authority has strengthened relative to the era of the Privy Council, yet this development should not be conflated with a distinct question concerning the operation of the internal market. In Canadian constitutional jurisprudence, disputes affecting economic efficiency and internal trade have been evaluated primarily through the lens of federal–provincial allocation of powers. The linkage between economic outcomes and federalism doctrine can therefore be understood as doctrinal rather than conceptual: courts have treated market effects as incidental consequences of constitutional structure rather than as an autonomous object of constitutional analysis. The economic sensitivity of the highest courts, accordingly, should be viewed as analytically separate from the constitutional logic governing the division of powers. It is entirely possible, as illustrated by the experience of the European Union, to maintain a weak or decentralized constitutional structure while simultaneously sustaining a strong internal market. This comparison is not invoked as a model for transplantation, but to clarify that market integration and constitutional centralization are analytically distinct.

An alternative perspective on federalism challenges the argument advanced here. On this view, authors like Tierney argue that Canada's federal structure,

despite its challenges, has allowed for diverse policy ideas about the original intent of centralization and the actual result of a degree of decentralization. They assert that Canadian federalism is not a failed centralization project, but a distinctive federal idea rooted in pluralism, accommodation of difference, and political contestation.[52] This analysis frames Canadian constitutional evolution as: legitimacy-driven, diversity-accommodating, and intentionally resistant to single, efficiency-maximizing logics. They treat decentralization not as an accident, but as a functional response to multinationalism, linguistic, cultural, and regional diversity, and the absence of a single founding "economic settlement."[53]

Crucially, such analysis does not deny inefficiencies and does not treat economic integration as a constitutional objective in its own right. This is the key to understanding these views, which can be shown to say that Canadian constitutional law has clear doctrinal commitments: federalism, democracy, diversity, accommodation, but crucially, there is no articulated commitment to internal market integration as an autonomous value.[54] That supports the idea that internal market fragmentation is not a failure of federalism, but a consequence of what Canadian federalism was never designed to optimize.

This reading contrasts with the article's claim that early Privy Council doctrine placed Canadian constitutional development on a path that tolerated persistent market fragmentation. Under the alternative view, decentralization is not a doctrinal failure but a constitutional choice that prioritizes regional autonomy, even at the cost of increased economic barriers for the Canadian internal market.

The distinction between centralization and decentralization is not merely theoretical but is closely connected to the management of economic externalities within the federation. Centralization is typically justified where regulatory spillovers generate costs beyond provincial boundaries, while decentralization is

[52] Stephen Tierney, in Richard Albert and David R. Cameron, eds., *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge: Cambridge University Press, 2018), 51–52.

[53] Tierney, in Albert and Cameron, eds., *Canada in the World*, 51–52.

[54] See for example Howse who argues that the Canadian constitutional structure prioritizes who feels uncomfortable of federal power of trade and commerce is infinitely expandable and argues for the preservation of provincial autonomy and federal balance. See Robert Howse, "NAFTA and the Constitution: Does Labour Conventions Really Matter Any More?," *Constitutional Forum Constitutionnel* 5, nos. 3–4 (1994): 54.

generally defensible where such spillovers are limited.[55] Canada's constitutional framework, however, has permitted forms of economic decentralization that generate significant and recurring externalities within the internal market. Examples include truckers being required to change tires at provincial borders due to inconsistent standards, individuals being penalized for purchasing alcohol out of province, or producers facing mandated differences in milk container sizes across provinces, necessitating the duplication of production processes in order to access multiple markets.[56] These outcomes represent predictable consequences of a constitutional doctrine that tolerates incidental trade barriers as a by-product of provincial regulatory autonomy.

The economic rationale for greater market coordination in this context does not depend on a commitment to constitutional centralization. Rather, it reflects the need to address negative externalities that disrupt the free movement of goods within the federation. Removing such barriers reduces unnecessary costs, promotes efficiency, and facilitates the operation of a national market without altering the formal distribution of legislative authority. [57]The persistence of these barriers, therefore, illustrates the central claim of this article: internal market fragmentation in Canada is not an inevitable feature of federalism itself, but the result of doctrinal choices that have treated economic integration as subordinate to federal balance rather than as a distinct constitutional concern.

IX. THE SUPREME COURT OF CANADA: DOCTRINAL CONTINUITY AND MANAGED MARKET INTEGRATION

The transfer of final appellate authority from the Judicial Committee of the Privy Council to the Supreme Court of Canada did not produce a fundamental reorientation of federal trade and commerce doctrine. Although the Court adopted more flexible language and permitted limited expansions of federal authority, it largely operated within the doctrinal framework inherited from the

[55] Jean-Jacques Laffont, "Decentralization with Externalities," *European Economic Review* 7, no. 4 (1976): 359–75.
[56] See Lavoie, *Trade and Commerce*, 4
[57] For a mechanism on how centralization and decentralization require externality analysis, see Laffont, "Decentralization with Externalities."

Privy Council. This resulted in limited adjustment within an unchanged doctrinal framework, allowing federal intervention in specific contexts while preserving structural limits on internal market integration.[58]

From the Court's perspective, tolerating fragmentation avoids judicially constitutionalizing contested economic policy and preserves democratic space for intergovernmental negotiation. Thus, this section does not argue that the Court should have decided otherwise; it explains why doctrinal continuity persisted.

9.1. Early Signs of Flexibility

In the period following the abolition of Privy Council appeals, the Supreme Court showed cautious openness to a broader understanding of federal economic power. In the *Ontario Farm Products Marketing Reference* (1957)[59], several judges suggested that federal authority could extend to transactions completed within a province where necessary to support interprovincial trade. In *Murphy v. C.P.R.* (1958)[60], the Court upheld the *Canadian Wheat Board Act*, recognizing Parliament's power to regulate grain destined for interprovincial and export markets through compulsory purchase, pooling, and price equalization.

These cases indicated a willingness to sustain federal schemes aimed at national market stabilization. Doctrinally, however, such authority remained exceptional and instrumental, justified by the interprovincial character of the regulated activity rather than by any general commitment to internal market integration.

9.2. Intrusion into Local Markets and Quota-Based Regulation

The economic implications of this approach became clearer in *R. v. Klassen* (1959)[61], where the Manitoba Court of Appeal upheld the application of the *Canadian Wheat Board Act* to a purely local feed mill. The Court accepted that regulating intraprovincial transactions was constitutionally permissible where incidental to a valid federal scheme governing interprovincial and export trade.

[58] Hogg, *Constitutional Law of Canada*, §§ 20.5–20.6
[59] *Ontario Farm Products Marketing Reference*, [1957] S.C.R. 198.
[60] *Murphy v. C.P.R.*, [1958] S.C.R. 626.
[61] *R. v. Klassen (R.E.)* (2003), 179 Man. R. (2d) 115 (Q.B.).

Doctrinally, this reasoning preserved formal federal–provincial distinctions while enabling extensive federal influence over local markets. Economically, the quota system replaced market allocation with administratively determined production limits, distorting price signals, restricting output, limiting competition, and inflating consumer prices. The doctrine thus authorized extensive administrative control over production and distribution, displacing price-based competition and entry decisions that would otherwise be governed by market forces. The consequence is that higher consumer prices become a structurally protected feature of the regulatory landscape.

9.3. Cooperative Federalism and Agricultural Marketing

The Supreme Court's one of the most significant post-Privy Council engagement with federal economic regulation occurred in *Reference re Agricultural Products Marketing Act* (1978).[62] The Court upheld a comprehensive federal–provincial egg marketing scheme involving production quotas, surplus disposal, and levies imposed on all producers, including those serving local markets. As Hogg has noted, the case was highly contextual and difficult to treat as a general precedent.[63] This intervention in local markets was especially heavy in that evidence showed that 90 per cent of all eggs produced in Canada were consumed within the province of production: it was cheaper to ship the feed for the birds than the fragile, perishable eggs.[64]

The decision rested less on a reconceptualization of the trade and commerce power than on deference to intergovernmental cooperation. As Pigeon J. observed, the scheme represented a "sincere cooperative effort," and the Court was reluctant to dismantle a fully integrated regulatory structure endorsed by all governments.[65]

Laskin C.J.'s separate reasons suggested a more restrictive approach to production-based levies, but this line of reasoning did not ultimately reshape the Court's federalism doctrine. Cooperative supply-management regimes continued

[62] *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198.
[63] Hogg, *Constitutional Law of Canada*, § 20.2(b), 20–7
[64] Hogg, *Constitutional Law of Canada*, § 20.2(b), 20–7
[65] *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198, 1296.

to expand without a clear constitutional limit grounded in internal-market integration.[66]

From an economic perspective, the scheme entrenched supply management through quotas that restricted entry, elevated consumer prices, and transformed regulatory protection into transferable producer rents. Although eggs are perishable and often consumed locally, economic geography does not always align with provincial borders: supplying a nearby town across a provincial boundary may be more efficient than complying with quota allocations that segment production by province. By fixing output shares and limiting interprovincial supply responses, the regime suppressed cross-border efficiencies and insulated producers from competition. Constitutionally, the decision illustrates how cooperative federalism can sustain regulatory structures that organize markets along jurisdictional lines but make Canadians buy more expensive eggs.

These marketing cases also exposed a broader category of internal trade barriers: grading, packaging, and marketing requirements that function as non-tariff barriers. Although framed as quality or consumer-protection measures, such rules can impose compliance costs that segment markets and restrict competition. Canadian courts evaluated these measures primarily through the lens of jurisdictional validity rather than through a doctrine focused on market access. A brief comparison with early European internal-market jurisprudence underscores this difference in orientation. By the mid-1970s, the European Court of Justice had articulated in *Dassonville* and later *Cassis de Dijon* that national measures capable of hindering trade required justification within a framework attentive to market integration. Canadian federalism doctrine, by contrast, continued to resolve analogous disputes through allocation-of-powers analysis without treating internal-market access as an independent constitutional concern.

Subsequent jurisprudence confirms this pattern of continuity. In *Air Canada v Ontario (Liquor Control Board)*[67] and related cases, trade-affecting provincial

[66] *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 1263. Laskin CJC said: "I would think it rational to limit the scope of subclause (vi) to interprovincial and export trade..."

[67] *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581.

measures were assessed primarily for jurisdictional validity, not for their impact on market integration. This can be contrasted to the approach of the European Court of Justice, which in a similar alcohol-related case, expanded the EU internal market instead of engaging in a moralistic analysis.[68] In a relatively recent case, the Supreme Court's modern decision in *R v Comeau* (2018) reinforced this continuaion.[69] The Court declined to interpret section 121 of the *Constitution Act, 1867* as guaranteeing free interprovincial trade, holding instead that provincial laws with incidental trade effects remain valid if their primary purpose is regulatory rather than protectionist. Internal-market liberalization was thus reaffirmed as a matter for political negotiation rather than constitutional adjudication.

Taken together, these decisions illustrate a consistent doctrinal orientation: Canadian constitutional law has treated internal-market fragmentation as a by-product of federalism rather than as a constitutional problem requiring independent scrutiny. Cooperative federalism has enabled extensive regulatory coordination, but without developing a doctrinal framework that evaluates how quotas, standards, and production controls shape market access and competition across provincial boundaries.

X. DOCTRINAL ABSORPTION AND PATH DEPENDENCE IN CANADIAN INTERNAL MARKET JURISPRUDENCE

Together, Supreme Court jurisprudence reflects continuity in the treatment of the restrictive framework inherited from the Privy Council. Federal authority expanded episodically through cooperative schemes, incidental powers, and contextual reasoning, yet the Court did not redefine internal market integration as a constitutional objective. Quotas, regulatory barriers, and restrictions on entry were treated as policy consequences of federalism rather than as doctrinal concerns. The post-Privy Council era therefore, reflects continuity in approach: while institutional authority shifted and doctrinal language softened, the

[68] *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [Federal Monopoly Administration for Spirits] (Cassis de Dijon), Case 120/78, 1979 E.C.R. 649.

[69] *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342.

foundational allocation of powers governing internal trade remained largely unchanged.

The persistence of this framework can be explained through mechanisms of doctrinal path dependence. First, stare decisis has operated with particular force in division-of-powers jurisprudence. Canadian courts have consistently emphasized stability in constitutional interpretation, treating foundational federalism decisions as authoritative settlements of the federal balance. Although the Supreme Court acknowledges the possibility of revisiting precedent, it has done so cautiously where reconsideration would alter entrenched allocations of legislative authority. Early interpretations of the trade and commerce power, therefore, continued to structure later adjudication even as doctrinal language evolved.

Second, the institutional costs of overruling constitutional precedent have discouraged structural recalibration. Revisiting foundational trade and commerce decisions would entail not merely doctrinal refinement but a reallocation of regulatory authority across the federation. Courts have accordingly preferred incremental adjustment to doctrinal rupture. In the Supreme Court era, this has taken the form of cooperative federalism and contextual expansion rather than a redefinition of federal economic power. Early constraints were absorbed into modern doctrine rather than displaced.

Third, the rigidity of constitutional amendment has reinforced judicial restraint. Canada's demanding amending formulas limit the capacity of political actors to correct allocations of power through formal amendment. This increases reliance on judicial interpretation while simultaneously discouraging changes that would resemble constitutional revision in substance. The combined effect has been to stabilize early doctrinal choices and reduce the likelihood of judicial reorientation.

The transition from the Privy Council to the Supreme Court of Canada therefore did not produce a fundamental recalibration of internal trade doctrine. Instead, Canadian constitutional law evolved through doctrinal absorption, preserving structural limits on federal market coordination established in the early jurisprudence.

XI. CONCLUSION

This analysis highlights several implications for Canadian constitutional law that extend beyond the specific doctrinal questions examined in the preceding sections. Most importantly, it demonstrates that internal market integration has not been articulated as an autonomous constitutional objective within Canada's division-of-powers jurisprudence. Where coordination of trade and economic regulation has occurred, it has done so indirectly through policy instruments and cooperative arrangements rather than through constitutional doctrine itself. The result is persistence of internal trade barriers.

The findings also suggest that expectations of judicial self-correction should remain measured. Interpretive developments under section 91(2) are possible, but they are likely to remain incremental and context-specific rather than transformative. Cooperative federalism and intergovernmental agreements provide mechanisms for coordination, yet their durability depends on sustained political alignment and carries the stability associated with constitutional entrenchment. The economically friendly solution is that mutual recognition frameworks and legislative initiatives offer additional avenues for reducing regulatory fragmentation, though they remain contingent on political will and institutional cooperation.

The contribution of this article is intentionally limited. It clarifies the institutional and doctrinal conditions within which debates over internal trade must occur. Constitutional interpretation has shaped the structure of Canada's economic governance, and the organization of economic activity in turn affects the broader capacity of the federation to act cohesively. In this sense, while the Constitution does not expressly mandate a unified internal market, the strength and independence of a modern state remain closely linked to the stability and coherence of its economic framework. Recognizing that connection helps situate internal trade doctrine within the wider constitutional order without transforming it into an explicit judicial objective.

What emerges from this study is a clearer understanding of the limits of constitutional adjudication as a mechanism for internal market reform. Where foundational allocations of authority have stabilized through precedent and institutional practice, significant change is more likely to depend on legislative action and political coordination than on judicial reinterpretation alone. Appreciating these constraints is essential for any realistic assessment of how Canada's internal market may evolve within its existing constitutional structure.

The present article has been deliberately confined to a doctrinal analysis of the federal trade and commerce power and the institutional continuity that has shaped its interpretation. A fuller explanation of the persistence of internal market fragmentation requires a different analytical lens. Future research will therefore develop a theoretical account of the structural forces that have influenced the evolution of Canadian federalism in this domain. Rather than focusing solely on doctrinal turning points, that work will examine how precedent, institutional incentives, and the political economy of regulatory authority have interacted to stabilize a decentralized model of market governance. By situating division-of-powers jurisprudence within these broader dynamics, the forthcoming study seeks to explain why internal market integration has not emerged as an autonomous constitutional objective and to clarify the conditions under which meaningful coordination might nonetheless occur within Canada's constitutional framework.

.

BIBLIOGRAPHY

Air Canada v. Ontario (Liquor Control Board). [1997] 2 S.C.R. 581.

Attorney-General for British Columbia v. Attorney-General for Canada (Natural Products Marketing). [1937] A.C. 377 (P.C.).

Attorney-General for Canada v. Attorney-General for Alberta (Insurance Reference). [1916] 1 A.C. 588 (P.C.).

Canada (Attorney General) v. Bedford. 2013 SCC 72, [2013] 3 S.C.R. 1101.

Canada Grain Act. R.S.C. 1985, c. G-10, s. 55.

Citizens' Insurance Co. of Canada v. Parsons. (1881) 7 App. Cas. 96 (P.C.).

Díez, Federico J., and Yuanchen Yang. "Canada Can Grow Faster by Unlocking Its Own Market." *IMF Country Focus*, January 27, 2026. https://www.imf.org/en/news/articles/2026/01/27/cf-canada-can-grow-faster-by-unlocking-its-own-market.

Dunbar v. The King. [1936] 4 D.L.R. 737.

European Union. *Consolidated Version of the Treaty on the Functioning of the European Union.* 2016 O.J. C 202/47.

Gennaioli, Nicola, and Andrei Shleifer. "The Evolution of Common Law." *Journal of Political Economy* 115, no. 1 (2007): 43–68.

Girard, Philip. *Bora Laskin: Bringing Law to Life.* Toronto: University of Toronto Press / Osgoode Society for Canadian Legal History, 2005.

Hayek, F. A. *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy.* London: Routledge, 1982.

Hayek, Friedrich A. *The Road to Serfdom.* Chicago: University of Chicago Press, 1944.

Hirschl, Ran. "Going Global? Canada as Importer and Exporter of Constitutional Thought." In *Canada in the World: Comparative Perspectives on the Canadian Constitution*, edited by Richard Albert and David R. Cameron, 305–23. Cambridge: Cambridge University Press, 2017.

Hobhouse, Charles. *Inside Asquith's Cabinet: From the Diaries of Charles Hobhouse.* London: Murray, 1977.

Hogg, Peter W. *Constitutional Law of Canada.* Student ed. Toronto: Thomson Reuters, 2020.

Hogg, Peter W., and Wade K. Wright. "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism." *UBC Law Review* 38, no. 2 (2005): 329–52.

Howse, Robert. "NAFTA and the Constitution: Does Labour Conventions Really Matter Any More?" *Constitutional Forum Constitutionnel* 5 (1994): 54.

In re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919. [1922] 1 A.C. 191 (P.C.).

Laffont, Jean-Jacques. "Decentralization with Externalities." *European Economic Review* 7, no. 4 (1978): 359–75. https://doi.org/10.1016/0014-2921(78)90012-0.

Lavoie, Malcolm. *Trade and Commerce: Canada's Economic Constitution.* Carleton Library Series 261. Montreal and Kingston: McGill-Queen's University Press, 2023.

Luhmann, Niklas. *Law as a Social System.* Translated by Klaus A. Ziegert. Edited by Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert. Oxford: Oxford University Press, 2004.

MacGuigan, Mark. "The Privy Council and the Supreme Court: A Jurisprudential Analysis." *Alberta Law Review* 4 (1966): 419–41.

Murphy v. C.P.R. [1958] S.C.R. 626.

Ontario (Attorney General) v. Fraser. 2011 SCC 20, [2011] 2 S.C.R. 3.

Priest, George L. "The Common Law Process and the Selection of Efficient Rules." *Journal of Legal Studies* 6, no. 1 (1977): 65–82.

Proprietary Articles Trade Association v. Attorney-General for Canada. [1931] A.C. 310 (P.C.).

R. v. Comeau. 2018 SCC 15, [2018] 1 S.C.R. 342.

R. v. Klassen (R.E.). 2003 MBQB 253, 179 Man. R. (2d) 115.

R. v. Paquette. [1977] 2 S.C.R. 189.

Reference re Agricultural Products Marketing Act. [1978] 2 S.C.R. 1198.

Reference re Farm Products Marketing Act (Ontario). [1957] S.C.R. 198.

Reference re Secession of Quebec. [1998] 2 S.C.R. 217.

Reference re Validity of Section 5(a) of the Dairy Industry Act. [1949] S.C.R. 1, aff'd [1951] A.C. 179 (P.C.).

Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein [Federal Monopoly Administration for Spirits] (*Cassis de Dijon* [Blackcurrant Liqueur from Dijon]). Case 120/78. 1979 E.C.R. 649.

Roe, Mark J. "Chaos and Evolution in Law and Economics." *Harvard Law Review* 109, no. 3 (1996): 641–68.

Rubin, Paul H. "Why Is the Common Law Efficient?" *Journal of Legal Studies* 6, no. 1 (1977): 51–63.

Ryder, Bruce. "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations." *McGill Law Journal* 36, no. 2 (1991): 308–381.

The King v. Eastern Terminal Elevator Co. [1925] S.C.R. 434.

Tierney, Stephen. "Misconceiving Federalism: Canada and the Federal Idea." In *Canada in the World: Comparative Perspectives on the Canadian Constitution*, edited by Richard Albert and David R. Cameron, 34–58. Cambridge: Cambridge University Press, 2017.

Toronto Electric Commissioners v. Snider. [1925] A.C. 396 (P.C.).

Vaughan, Frederick. *Viscount Haldane: "The Wicked Step-father of the Canadian Constitution."* Toronto: University of Toronto Press, 2010.

Zywicki, Todd J. "The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis." *Northwestern University Law Review* 97, no. 4 (2003): 1551–1633. https://ssrn.com/abstract=326740. http://dx.doi.org/10.2139/ssrn.326740.