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Implementing International Trade Agreements in Federal Systems: A Look at the Canada-EU CETA's Intellectual Property Issues

Jeremy DE BEER^{*}

This article examines the negotiations towards a Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU) as an example of some challenges and solutions for implementing international trade agreements in multilevel federal systems. It briefly describes Canadian constitutional law governing the domestic implementation of international treaties and then canvasses three specific examples of current challenges related to the regulation of intellectual property. While the constitutional validity of federal regulations addressing pharmaceutical data protection, digital rights management (DRM), and geographic indications is far from guaranteed, legislators and courts have used several legal means to support implementation of Canada's international obligations in these fields.

1 INTRODUCTION

The complexities of multilevel governance in federal systems are among the most interesting and challenging aspects of implementing the newest generation of trade agreements. This is true in particular of an agreement being negotiated between Canada and the European Union (EU), the Comprehensive Economic and Trade Agreement (CETA). If and when completed, this path-breaking pact between two highly developed political and economic entities could go beyond any existing trade agreement, perhaps setting a new global standard for international economic relations. In order to achieve the ambitious goals for policy convergence and regulatory and standards harmonization, an unprecedented negotiating process has directly involved the federal and all ten provincial and three territorial governments across Canada.

The reason for the complex negotiations is this: The executive branch of Canada's federal government has the constitutional authority to negotiate international treaties. Treaties, however, do not have direct legal effect in Canada.

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Where there are positive obligations, these must be implemented into domestic law. Not all obligations require legislative action; many are rather commitments to refrain from taking certain measures, that is, commitments to *not* act. However, where action is required, the authority to take such action is determined by a division of powers under the Canadian constitution. Implementation of treaty obligations may, therefore, require the cooperation of the legislative branches of the federal and all provincial governments.

The enforceability of CETA's would-be obligations in the context of Canadian federalism has proven to be a major point of interest, if not outright concern, for the EU. Of course, the EU has its own complex competence issues, for example, in respect of negotiations over possible investment provisions in an agreement. In addition, new relationships among the European Commission, European Parliament, and Member States are still being tested, for example, in the context of the recent Anti-Counterfeiting Trade Agreement (ACTA). While the EU's multilevel governance mechanisms are relatively modern and formalized, the written and unwritten constitutional principles of Canadian federalism are relatively less so. The mere fact that the Canadian and EU systems are different demonstrates one of the key challenges in negotiating a new breed of bilateral agreement.

Some of the most prominent examples of topics ostensibly falling outside of federal jurisdiction in Canada include provincial and municipal government procurement of goods and services and the regulation of occupational qualification and professional certification. More difficult to categorize are regulations covering technology-related topics, including both biotechnologies and information communications technologies. Since such matters were not contemplated when the Canadian federation was formed in 1867, allocating constitutional jurisdiction over them is a work in progress. That makes the area of technology rich for exploring the underlying controversies and uncertainties.

One of the primary (but by no means the only) areas where technology issues are likely to be addressed in CETA is a chapter on intellectual property. Following the World Trade Organization (WTO)'s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), such chapters in bilateral trade agreements have become more complex, intensive, and far-reaching. This tendency became evident even before TRIPS, through Chapter 17 of the North American Free Trade Agreement (NAFTA), for example. The clear trend has since been confirmed in almost every agreement entered into by the United States or the EU. In several respects, chapters in these agreements go beyond intellectual property *per se* and deal more broadly with knowledge policy and technology regulation. As these putative intellectual property chapters evolve, they bleed into other areas, and

those other areas may go beyond the competencies of the parties (i.e., Canada and the EU) to implement in law and practice.

This article canvasses CETA-related aspects of some of the most significant technology issues impacted by multilevel governance through Canadian federalism. A wide range of topics might be considered, such as agricultural biotechnologies, biofuels, pharmaceuticals, telecommunications policy, Internet regulation, online speech, electronic commerce, unsolicited email (spam), copyright including digital rights management (DRM), privacy, industrial designs, trademarks, confidential business information, and geographic indications. The link among all of these technology or intellectual property issues is that none are legally well established as either matters of pure federal or provincial jurisdiction. Constitutional jurisdiction in these areas is unsettled, disputable, or overlapping.

Not all of these technology-related topics may be addressed explicitly in the CETA, but the legal resolution of any particular issue discussed in this article is likely to have impact on the issues that are included. The three specific examples this article addresses are: (1) data protection regulations, (2) DRM, and (3) geographic indications. Considering such issues in the context of CETA helps shed light on the challenges of multilevel technology and intellectual property governance not only for Canada and the EU but also for the future of ambitious bilateral trade and economic relations.

2 TREATY IMPLEMENTATION IN CANADA

Case law and recent practice confirm the Crown's prerogative to conduct foreign affairs, including making treaties, through Canada's federal government.¹ However, implementing treaties after negotiations have concluded is another, more complicated and controversial, issue. The starting point for discussion of this topic is the division of legislative powers between federal and provincial governments, established by the Constitution Act, 1867.² Sections 91 and 92 of Canada's constitution allocate responsibilities for particular matters at either the federal or provincial level. While many different kinds of matters are specifically enumerated within these sections, the power to implement international treaties is not.

Perhaps that is because when Canada was constituted in 1867 it was not envisioned that anyone outside of Westminster would represent Canada internationally. Once Canada began to manage its own external affairs, however, questions about implementing newly negotiated treaties arose. In a case called *Re*

¹ See R. Sullivan, 'Jurisdiction to Negotiate and Implement Free Trade Agreements in Canada: Calling the Provincial Bluff', *University of Western Ontario Law Review* 24 (1986): 64-67, citing *Reference Re Newfoundland Continental Shelf* [1984] 1 S.C.R. 86.1.

² 30 and 31 Victoria, c. 3. (U.K.), <<http://laws.justice.gc.ca/eng/Const/page-1.html>>.

Regulation and Control of Radio Communication in Canada,³ the Judicial Committee of the Privy Council, Canada's highest court at that time, held that the performance of international obligations was a matter falling within the Parliament's power under the residual clause of section 91 to make laws of 'peace, order and good government of Canada'.

Soon after that, however, the Privy Council reversed course. It reached the opposite conclusion in what is now considered to be the touchstone case concerning treaty implementation, the *Labour Conventions* case.⁴ Federal laws addressing a variety of labour issues like minimum wages and hours of work were held unconstitutional because they dealt with provincial matters. The federal government had argued that these laws were valid because the Parliament was giving effect to conventions adopted by the International Labour Organization. However, the Privy Council rejected the notion that international action could allow the Parliament to encroach on provincial powers:

For the purposes of sections 91 and 92, i.e. the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects: and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. . . . In other words the Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth.⁵

If the federal government could acquire the power to legislate in areas of provincial jurisdiction by taking on new international obligations, noted the Privy Council, it would undermine 'probably the most essential condition' of the interprovincial compact to which the Constitution gives effect.⁶

Surprisingly, in the seventy-five years since this decision, the Supreme Court of Canada has not squarely confronted the issue of federal and provincial powers to domestically implement international law. Probably, the closest the Court came to doing so was in the case of *MacDonald v. Vapour Canada*, where former Chief Justice Laskin mentioned the possibility of reconsidering the *Labour Conventions* ruling but felt that it is unnecessary to do so in that case, because even

assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to inference.⁷

³ [1932] A.C. 304.

⁴ *Attorney General for Canada v. Attorney General for Ontario* [1937] A.C. 326, <www.bailii.org/uk/cases/UKPC/1937/1937_6.pdf>.

⁵ *Ibid.*, 8 [underscore added].

⁶ *Ibid.*

⁷ [1977] 2 S.C.R. 134, <<http://canlii.ca/s/y9lu>>, 171, 167–172.

In other words, if the Parliament is going to trench into provincial jurisdiction under the guise of an international obligation, it must, at least, clearly spell out its intention to do so. Since the Parliament had not stated that objective for the trademarks provision at issue in *Vapor Canada*, any further consideration of the question was moot. So, because the assumption of an independent federal treaty implementation power was one the former Chief Justice of Canada expressly declined to make, *Labour Conventions* therefore remains a key legal authority on this point.

Whether that case would be decided differently today is the subject of speculation. The nature of international trade and the obligations taken on by treaties have evolved dramatically in recent decades. So scholars have debated the subject, though perhaps not as often as one might expect. Most of the scholars suggest a need to revise the rule from *Labour Conventions* on account of modern global economic realities. However, the legal basis and recommended approaches for doing so vary. One idea is for courts to permit the federal government to implement international treaties in most cases, except on matters fundamental for provincial autonomy.⁸ The problem there is, basically, that all matters enumerated in section 92 were already determined in 1867 to be fundamental for provincial autonomy. There is no theoretical or legal basis for now determining a hierarchy or bright line among them.⁹

Former Supreme Court of Canada Justice La Forest, writing as a law professor prior to his judicial appointment, put a different proposal forward.¹⁰ His suggestion was to recognize that some matters ordinarily reserved to the provinces have an international dimension that requires federally coordinated action. He also argued that the Parliament should have a stronger claim to implement trade agreements as a whole, compared to piecemeal provisions addressing matters otherwise falling within provincial jurisdiction. This idea has been endorsed for its consistency with the constitutional principle that the federal government has ancillary powers to enact legislation with that is valid overall, despite necessarily incidental impacts on its provincial counterparts.¹¹

Briefly, this approach is grounded in the federal government's power over 'The Regulation of Trade and Commerce' pursuant to subsection 91(2) of the Constitution Act, 1867. Under one judicially defined branch of that power, a provision's validity depends on factors such as whether it is part of a national

⁸ W.R. Lederman, 'Legislative Power to Implement Treaty Obligations in Canada', in *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981), 351.

⁹ Sullivan, *supra* n. 1, 70.

¹⁰ G. La Forest, 'The Labour Conventions Case Revisited', *Canadian Yearbook of International Law* (1974): 137.

¹¹ Sullivan, *supra* n. 1, 71.

regulatory scheme, overseen by a regulatory agency, concerned with trade as a whole rather than a particular industry, unable to be regulated by the provinces together or alone, and undermined if one province opted out of a scheme.¹² Under the other branch of the trade and commerce power, the federal government may address ‘matters of inter-provincial concern’.¹³ The Supreme Court of Canada very recently distinguished the general trade and commerce branch with this ‘more specific federal power to regulate interprovincial and international trade and commerce’.¹⁴ While the Privy Council decision dividing trade and commerce into these two branches did not mention anything about ‘international’ trade, the Supreme Court’s obiter dicta seems to have subtly added this possibility. Which branch, if any, might cover domestic implementation of international treaties or trade agreements has never been determined.

The important thing to note is that treaty implementation through the federal trade and commerce power is not fundamentally different than the *Labour Conventions* principle requiring the federal government to act only within its areas of competence. Rather, this approach suggests that the implementation of international trade agreements is, in some circumstances, within the federal power over trade and commerce. That point is emphasized in the discussion of specific examples throughout this article, particularly regarding a recent decision of the Federal Court Trial Division on the validity of federal data protection regulations.

It appears from recent practice that Canada is relying on this principle to support implementation of three major trade agreements through omnibus statutes, the CUSFTA Act,¹⁵ the NAFTA Act,¹⁶ and the WTO Act.¹⁷ This precedent was also adopted to implement trade agreements with Colombia, Chile, Peru, Israel, Costa Rica, and the European Free Trade Association. Professor Steger has explained in convincing detail why dealing only with specific, necessary amendments and avoiding unrelated legislative changes is the federal government’s preferred and most constitutionally defensible approach to recent treaty implementation.¹⁸ In these cases, the federal government is not usurping provincial jurisdiction on a wholesale basis but rather is acting in some quite

¹² See generally *Canada (A.G.) v. Canadian National Transportation* [1983] 2 S.C.R. 206, <<http://canlii.ca/s/smbk>>; *General Motors of Canada v. City National Leasing Ltd.* [1989] 1 S.C.R. 641, <<http://canlii.ca/s/pddq>>.

¹³ *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96.

¹⁴ Reference Re Securities Act, 2011 SCC 66, <<http://canlii.ca/t/fpdwb>>.

¹⁵ Canada–United States Free Trade Agreement Implementation Act, S.C. 1988, c. 65, <<http://canlii.ca/s/4ke2>>.

¹⁶ North American Free Trade Agreement Implementation Act, S.C. 1993, c. 44, <<http://canlii.ca/s/4kg2>>.

¹⁷ World Trade Organization Agreement Implementation Act, S.C. 1994, c. 47, <<http://canlii.ca/s/4kkg>>.

¹⁸ D. Steger, ‘Canadian Implementation of the Agreement Establishing the World Trade Organization’, in *Implementing the Uruguay Round*, eds J.H. Jackson & A.O. Sykes (Oxford: Clarendon Press, 1997).

specific areas that are more or less related to an aspect of federal power, usually trade and commerce.

So there is little doubt that an omnibus statute would be Canada's mechanism of choice for implementing the CETA. However, while this is the best legal tactic, it does not avoid ambiguity or controversy altogether. Three particular issues help demonstrate the implementation challenges that might arise under either an omnibus or piecemeal approach towards implementation of new regulations in the fields of biotechnology, the Internet, and branding: pharmaceutical data protection, DRM, and geographic indications.

3 DATA EXCLUSIVITY

Data exclusivity in the pharmaceutical industry¹⁹ is a complex legal and policy issue. The basic issue is this: Government regulators require clinical trials to prove that new drugs are safe before they are approved for general marketing and use. Data to satisfy regulators are difficult and expensive to obtain. The first companies to develop new drugs, so-called innovators or originators, incur significant costs. Once drugs are proven safe and effective, it is unnecessary for companies that make equivalent products, so-called generics, to repeat the regulatory approval process. Generic drug manufacturers can simply rely on the fact that originators have already submitted adequate data to satisfy regulators.

The technological aspect of pharmaceutical production is addressed by patent law, which provides exclusive rights to an invention (e.g., a drug), normally for a period of twenty years from the time an application is filed. Although recent technological innovations have created some challenges, in Canada the federal government has constitutional jurisdiction to address at least the basic issues under subsection 91(22) of the Constitution Act, 1867, 'Patents of Invention and Discovery'.²⁰ Jurisdiction over the regulatory data-related aspect of the pharmaceutical industry is less settled. Here, the issue is exclusive rights not to the invention itself but to the data leading to the invention's regulatory approval. Data protection is very distinct from patent protection, but the issues are related in that the same firms, pharmaceutical manufacturers especially, are heavily impacted by both regulatory schemes. Exclusivity periods for relying on regulatory data apply irrespective of when, or even whether, any patent protection exists. Which level of government has the power to make laws addressing this matter?

¹⁹ Data protection laws are also relevant to agro-chemical and any other firms that are required to prove based on clinical tests, field trials, or other data the safety and efficacy of a product before obtaining regulatory approval for its sale and use. For simplicity, the discussion in this article focuses on the pharmaceutical industry as the archetypal example.

²⁰ J. de Beer & C. Brusnyk, 'Intellectual Property and Biomedical Innovation in the Context of Canadian Federalism', *Health Law Journal* (2011, forthcoming): 19.

Canada's first specific data exclusivity regime was introduced by the federal government in 1995. Generic drugs could not be approved on the basis of an innovator's data until at least five years after the innovator's drug was approved.²¹ The Governor-in-Council amended this Data Protection Regulation in 2006, extending the exclusivity term to eight years in most cases.²²

The Data Protection Regulation was first enacted and later amended specifically to comply with Canada's international obligations under NAFTA and TRIPS. Article 1711 of NAFTA, under the heading 'Trade Secrets' in the chapter on intellectual property protection, requires the five-year minimum exclusivity period. Article 39 of TRIPS on 'Protection of Undisclosed Information' requires more generally that data be protected against unfair commercial use. Ordinarily, there would be little doubt that trade secrets and confidential information are matters within provincial jurisdiction over 'Property and Civil Rights'²³ or 'Generally All Matters of a Merely Local or Private Nature'.²⁴ However, within omnibus WTO and NAFTA implementation statutes, subsection 30(3) of the Food and Drugs Act²⁵ was amended to give the federal government new regulatory authority to implement these provisions.

Following the 2006 legislative amendments, the Canadian Generic Pharmaceutical Industry Association (CGPA) and Canada's largest generic drug manufacturer, Apotex, launched a constitutional challenge.²⁶ The applicants sought a declaration that both subsection 30(3) of the Food and Drugs Act and the Data Protection Regulation promulgated under the new authority established by that subsection have no legal force or effect because they go beyond the federal government's legislative powers.

This challenge has significant, practical implications for the CETA. Although CETA negotiations are still ongoing, the European Commission has pressed for the inclusion of stronger intellectual property governance, demanding changes be made to Canada's current legal framework including its data protection

²¹ Food and Drug Regulations, C.R.C., c.870, s.C.08.004.1. This Regulation was never effective because of a narrow judicial interpretation that triggered its application only when regulatory authorities actually re-examined the originator's data, instead of merely relying on the fact of prior regulatory approval, in considering a generic manufacturer's subsequent application. See *Bayer Inc. v. Canada (A.G.)*, 1999 CanLII 8099, <<http://canlii.ca/s/2og5>>.

²² Regulations Amending the Food and Drug Regulations (Data Protection), SOR/2006-241, <www.gazette.gc.ca/archives/p2/2006/2006-10-18/html/sor-dors241-eng.html>. There exists the possibility of a further six-month period of exclusivity if clinical studies are conducted in the pediatric population.

²³ Constitution Act, 1867, *supra* n. 2, s. 92(13).

²⁴ *Ibid.*, s. 92(16).

²⁵ R.S.C. 1985, c-F27, <<http://canlii.ca/s/4k83>>.

²⁶ *Canadian Generic Pharmaceutical Association v. Canada (Health)*, 2009 FC 725, <<http://canlii.ca/s/11scv>> (hereinafter '*CGPA v. Canada*').

regulations.²⁷ Regulations in the EU adopted in 2004 mandate a harmonized eight-year data exclusivity term that includes an additional two-year market exclusivity term.²⁸ This ten-year exclusivity period can be further extended by an additional one year under certain circumstances. It is believed by many that a successful economic agreement between the two parties would require that Canada adopt the ‘8 + 2 + 1’ formula for data protection.²⁹

Extending data exclusivity would affect the profits of Canada’s generics drug manufacturers.³⁰ However, the provinces and territories, as well as private health-care insurers, would bear the brunt of the costs of expanded data exclusivity regulations. Generic drug manufacturers claim that the current data exclusivity regime already costs regional health-care systems USD 100 million dollars a year.³¹ Though one might expect the provinces, which pay most of this cost, to argue against the EU’s position, the opposite has happened. Alberta, Québec, and New Brunswick have sent letters supporting harmonization of these standards with Europe.³²

In *CPGA v. Canada*, the Federal Court Trial Division ruled against Apotex and the CGPA, upholding the validity of laws implementing the data protection provisions of NAFTA and TRIPS. Accepting the 1937 decision in the *Labour Conventions* case that there is no federal treaty implementation power per se, the issue was whether any of the specifically enumerated powers covers this matter. The legislation and regulation were, according to the Trial Division, valid exercises of the federal trade and commerce power.

As mentioned above, Canadian constitutional law divides federal jurisdiction over general trade and commerce from provincial jurisdiction over ‘Property and Civil Rights’ based on analysis of several factors. The Trial Division held that the Data Protection Regulation being attacked fell on the federal side of this line because it rounds out a valid general scheme of drug regulation overseen by the

²⁷ See Michael Geist, ‘CETA Update: EU Pressures on IP Increases’, <www.michaelgeist.ca>, 27 Apr. 2010.

²⁸ EC, Commission Directive 2004/27/EC of 31 Mar. 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, [2004] O.J. L 136/34, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0027:EN:HTML>>.

²⁹ See, e.g., BIOTE Canada, Media Release, ‘Re: Department of Foreign Affairs and International Trade Consultations on Possible Comprehensive Economic Agreement Negotiations with the European Union’, <www.biotech.ca>, 20 Jan. 2009.

³⁰ Canadian Generic Pharmaceutical Association, ‘Canada EU Trade Talks: Costly Pharmaceutical IP Measures Proposed’, <www.canadiangenerics.ca/en/advocacy/docs/CETABackgrounder.pdf>; E.M. Iacobucci, ‘Innovation for a Better Tomorrow: A Critique’, <<http://bit.ly/mRmdtT>>, 30 May 2011.

³¹ Canadian Generic Pharmaceutical Association, ‘News Release, Federal Court Decision on Extended Monopolies for Big Pharma Will Cost Canadians More than \$100 Million per Year’, <www.canadiangenerics.ca>, 22 Jul. 2009.

³² ‘Trade Deal Would Include Increased Protection for Brand-Name Drugs’, *National Post*, 25 Oct. 2010.

federal health ministry.³³ Moreover, it was held, the provinces would be legally powerless or practically unable to craft an effective scheme to deal with the matter of data protection in the pharmaceutical industry.³⁴

The Court did mention a key factor indicating this to be a provincial matter – that it concerns one particular industry rather than trade as a whole – but suggested that the international dimensions of the issue outweighed its particular industrial scope. NAFTA, TRIPS, and ‘Canada’s ability to participate in world trade’ were specifically cited to demonstrate that pharmaceutical data protection regulation is a ‘genuine national economic concern’.³⁵ The Trial Division also cited obiter dicta from *MacDonald v. Vapor Canada* mentioning that federal implementation of an international treaty might be permitted if the intention to do so is expressly manifested in the legislation and not left to inference, which it was in this case.

While the passing reference to *MacDonald v. Vapor* is interesting, it cannot be taken as reconsideration, let alone rejection, of the *Labour Conventions* rule. Indeed, in that part of its reasons, the Trial Division was not even contemplating an independent treaty implementation power but was rather determining whether the data protection provisions of TRIPS and NAFTA involved regulation of general trade and commerce. Note also that the analysis considered only the *general* branch of the trade and commerce power, not the more specific branch covering interprovincial (and according to the Supreme Court’s recent obiter dicta, international) trade. Finally, the Trial Division hinted at, but did not fully consider, a further possibility that implementing trade agreements is a new matter of national concern not existing at the time of confederation, which might allow federal legislation for the ‘Peace, Order and Good Government’.³⁶

The Federal Court of Appeal upheld the Trial Division’s decision that the impugned laws were constitutionally valid but reached that conclusion for completely different reasons. The Court of Appeal disagreed that the Data Protection Regulation is, in its pith and substance, an exercise of the trade and commerce power.³⁷ Instead, it ruled that this was a matter within the federal power over ‘Criminal Law’, enumerated in subsection 91(27) of the Constitution Act, 1867. While the Trial Division had characterized the issue as balancing commercial considerations, not public health and safety,³⁸ the Court of Appeal had a different opinion on this point.

³³ *CGPA v. Canada*, *supra* n. 26, para. 101.

³⁴ *Ibid.*, para. 106.

³⁵ *Ibid.*, paras 102–105.

³⁶ *Ibid.*, paras 108–110. See further *R. v. Crown Zellerbach Canada Ltd.* [1988] 1 S.C.R. 401, <<http://canlii.ca/s/pdk5>>.

³⁷ *Apotex v. Canada (Health)*, 2010 FCA 334, <<http://canlii.ca/s/167jp>>.

³⁸ *CGPA v. Canada*, *supra* n. 26, paras 79–80.

The Court of Appeal acknowledged that the Data Protection Regulation implements Canada's international trade obligations under NAFTA and TRIPS. However, viewed in its entire context, the Court held, it is designed to encourage development of new drugs, a valid public health and safety objective.³⁹ According to the Court of Appeal, the regulatory approval process for innovator and generic drugs was valid because it includes a prohibition and penal sanction directed at a legitimate public health evil.⁴⁰ Key to its decision was that the legislation made it an offence to market drugs without the necessary approvals. Moreover, the Data Protection Regulation was, in this context, 'not separable from the overall scheme'⁴¹ and 'in no way encroaches on matters of provincial jurisdiction'.⁴²

In the summer of 2011, an application for leave to appeal this case to the Supreme Court of Canada was dismissed. That marks the end of this particular challenge to the federal government's power to implement the data protection provisions of NAFTA and TRIPS but leaves the fundamental issues still simmering.

For one thing, in a decision released soon after the Federal Court of Appeal's ruling, *Re Assisted Human Reproduction*, the Supreme Court of Canada clarified the Parliament's criminal law power on which the Court of Appeal relied.⁴³ While the Federal Court of Appeal emphasized the general context of the particular data protection provisions, the Supreme Court proved its willingness to parse out unconstitutional aspects of a broader regulatory scheme. According to a majority of the Supreme Court, particular impugned provisions or regulations must be examined before considering their connection with a statute as a whole;⁴⁴ the Federal Court of Appeal took the opposite approach by contextualizing the whole health and safety regulation before looking at the more specific data protection regulation. Moreover, in considering the context before the particular provisions, the Court of Appeal failed to meaningfully address the fact that amendments to the Food and Drugs Act were themselves meant to implement Canada's international trade obligations, which strongly suggests that data protection is really about trade and commerce after all. Did the Federal Court of Appeal believe that NAFTA and TRIPS, which the Food and Drugs Act was amended to implement, are in pith and substance about public health and safety, or that the exercise of contextualization stops at the Canadian border?

³⁹ *Apotex v. Canada*, *supra* n. 37, paras 110–117.

⁴⁰ *Ibid.*, paras 120–121, applying *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199, <<http://canlii.ca/s/pc5h>>.

⁴¹ *Apotex v. Canada*, *supra* n. 37, para. 125.

⁴² *Ibid.*, *supra* n. 37, para. 130.

⁴³ 2010 SCC 61, <<http://canlii.ca/s/16b3v>>.

⁴⁴ *Ibid.*, para. 194, *per* LeBel and Deschamps JJ.

The Court of Appeal's characterization of federal regulations implementing the data protection provisions of international trade agreements also raises concerns about the creep of criminal law powers into provincial jurisdiction. While there are solid arguments to be made that the federal trade and commerce power should include – at least in some circumstances – the power to implement international treaties, sneaking implementation through the Trojan Horse of the criminal law or another power is only feasible for the fraction of international trade agreement provisions that can credibly claim to address such federal matters. In effect, therefore, the Court of Appeal's decision on data protection reinforces the *Labour Conventions* ruling as it has been standing since 1937.

4 DRM

Explained briefly, DRM includes various tools for controlling digital content.⁴⁵ These tools include technological protection measures (TPMs), colloquially called digital locks, like password encryption for digital files or databases, copy controls on DVDs, Blu-Ray discs, e-books, and other digital media, or geo-fences that segregate territorial markets when transmitting Internet audio, video, or other content. Rights management information (RMI) is metadata identifying rights holders, license terms, and other details related to digital content. Finally, end user license agreements (EULAs) are the click-to-agree contracts that enable electronic commerce.

It is widely believed that the intellectual property chapter of the CETA will require the EU and Canada to adopt certain measures in respect of DRM systems, including specifically prohibitions on circumventing TPMs and tampering with RMI. What is still unclear is whether the CETA will go beyond existing international norms, as is expected regarding data protection, or merely repeat the language of already binding agreements. More particularly, TPMs and RMI are matters addressed by two treaties administered by the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations. The WIPO Internet Treaties have already been implemented, albeit with considerable variability in form, throughout the EU. In addition, they are about to be implemented in Canada through long-awaited reforms to the Copyright Act⁴⁶ that, notably, are independent of the CETA.⁴⁷ The distinct question about the

⁴⁵ J. de Beer, 'Legal Strategies to Profit from Peer Production', *Canadian Business Law Journal* 46 (2008): 269, 289.

⁴⁶ R.S.C. 1985, c. C-42, <<http://canlii.ca/s/4k6t>>.

⁴⁷ Successive minority governments have tabled but, for unrelated political reasons, have not been able to pass laws addressing this matter. See Bill C-60, An Act to Amend the Copyright Act (First Reading, 20 Jun. 2005); Bill C-61, An Act to Amend the Copyright Act (First Reading, 12 Jun. 2008); Bill C-32, An Act to Amend the Copyright Act (First Reading, 2 Jun. 2010). The recently elected majority

regulation of DRM in Canada is whether international agreements like the WIPO Internet Treaties or the CETA could bolster the Parliament's jurisdictional claim when the method of implementation is *not* an omnibus statute. More particularly, does this mode of implementation undermine a claim that the subject is connected with the general trade and commerce power?

A preliminary issue is whether any other enumerated head of power provides authority to legislate in respect of DRM. That question has already been the subject of scholarly research; this author and others have determined that the federal government probably cannot constitutionally enact expansive provisions protecting TPMs and RMI within the scope of its existing powers.⁴⁸

Subsection 91(23) of the Constitution Act, 1867 gives the Parliament authority to enact laws in respect of 'Copyrights'. Although DRM systems can be used to, among other things, manage copyrights, their purposes and effects go beyond the established boundaries of current copyright laws and the constitutional powers under which those laws have historically been enacted. In that way, provisions addressing TPMs, RMI, and EULAs are 'paracopyrights', that is, beyond the conventional boundaries of copyright.

Concrete examples may help explain this point. Passwords that control access to digital content are a commonly encountered TPM that would be protected against circumvention under the new Canadian legislation. Circumventing such passwords would be prohibited regardless of whether the content being accessed is copyright-protected material or not. The materials may be works not original enough to warrant copyright protection, or public domain works in which copyright has expired, or works entirely unrelated to copyright. Moreover, just accessing materials, even if those materials are copyright-protected, is not normally a copyright-infringing activity. TPMs that control access would, however, be protected against circumvention just as TPMs that control copying. Finally, even copying copyright-protected works is not always illegal, as there are number of exceptions for fair dealing purposes of research and private study, criticism, and review and some other activities. Key exceptions that exist in current law would not be applicable wherever TPMs are encountered, skewing the balance historically and currently struck by the copyright system.

Similarly, suppose the federal government attempted to regulate the use of physical security devices used by clothing retailers to deter shoplifting, or the

government has reintroduced the latest proposal, which is expected to become law by 2012. Bill C-11, An Act to Amend the Copyright Act (First Reading, 29 Sep. 2011).

⁴⁸ J. de Beer, 'Constitutional Jurisdiction over Paracopyrights', in *In the Public Interest: The Future of Canadian Copyright Law*, ed. M. Geist (Irwin Law, 2005), 89–124; E. Crown & Y. Rozenszajn, 'DRM Roll Please: Is Digital Rights Management Legislation Unconstitutional in Canada', *Journal of Information Law and Technology* (2009): 2.

mechanisms by which grocers attempt to maintain control over shopping cart fleets, or even the electronic scanning systems that libraries use to prevent the unauthorized removal of books from a building. The first examples would almost surely trench into provincial jurisdiction over property and civil rights, and so would the last, despite the fact that some books might be protected by copyright. All of these regulations concerning what are essentially TPMs applied to physical objects would likely be seen as colourable attempts to usurp provincial powers. The fact that the TPMs to be protected by the Copyright Act relate sometimes (but not always, or even usually) to digital as opposed to physical objects and the fact that those objects are sometimes (but not always, or even usually) protected by copyright are not enough to characterize this matter as, in pith and substance, copyright. Generally, the more that the regulation of DRM systems engages issues of physical property rights, content licensing, and consumer contracts, the more it trenches into provincial jurisdiction.

While circumventing TPMs and tampering with RMI may, in certain circumstances, be undesirable activities that governments wish to prohibit, the real constitutional question is whether laws doing so are sufficiently connected to copyrights to be upheld under that head of power. The examples above suggests not. Whether DRM might be characterized as a matter related to the federal government's criminal law powers is beyond the scope of this discussion.⁴⁹ The more interesting issue here is, assuming the matter is neither copyright nor criminal law nor another federal power, whether and if so how the federal government could rely on international agreements pertaining to DRM to support its domestic implementation.

As explained, the matter of DRM will be addressed not through an omnibus treaty implementation statute but through direct revisions to one statute in particular, the Copyright Act. The summary of proposed changes explicitly mentions the objective of conformity with 'international standards'.⁵⁰ The preamble more specifically references 'opportunities and challenges that are global in scope', enhanced protection when 'countries adopt coordinated approaches, based on internationally recognized norms', and the reflection of those norms in the WIPO Internet Treaties.⁵¹

While there is no doubt that international treaties and norms motivated the government to introduce this legislation, the proposed reforms also include matters that are *not* the subject of such agreements. The domestic implementation of the WIPO Internet Treaties' provisions on DRM is via legislative reform addressing not only those treaties but also a host of other local issues. In contrast, the

⁴⁹ See further de Beer, 2008, *supra* n. 45.

⁵⁰ Bill C-11, *supra* n. 47.

⁵¹ *Ibid.*

implementation of data protection regulations from NAFTA and TRIPS was achieved through an omnibus statute. While the omnibus statutes dealt with a range of very different matters, all could be traced to chapters of the international agreement being implemented. Constitutional analysis of the omnibus statutes implementing NAFTA and WTO obligations highlighted the importance of their 'minimalist' character; they contained *only* the amendments necessary to bring Canadian legislation into conformity with the obligations of the international agreement.⁵² Whether the same considerations would be relevant to federal implementation, under the trade and commerce power, of an international treaty dealing only with a limited field, as opposed to a wide-ranging trade agreement, is an open question.

The international trade-related provisions could be considered separately from the rest of the reforms, or they could be characterized in the context of the entire statute being revised. The paradox is that viewing the DRM provisions in isolation from the rest of the reforms may strengthen their connection to a yet-to-be-affirmed international trade and commerce power, but in isolation from the rest of the statute, these provisions also look much less like copyright and more like property and civil rights. These are, therefore, risky alternative arguments to put forward. On either view – in isolation or in context – it is not clear that implementation of the WIPO Internet Treaties and similar DRM provisions of a CETA could withstand constitutional scrutiny implemented outside of an omnibus statute.

5 GEOGRAPHIC INDICATIONS

Data protection regulations are distinct from patents, although the issues are connected because they affect the same biotechnology firms in the pharmaceutical industry. Likewise, DRM regulations do not align with the contours of copyright, but both issues have significant impact in the field of information communications technologies. In somewhat similar fashion, geographic indications are, in large part, related to the regulatory framework governing the third major form of intellectual property protection aside from patents and copyrights – trademarks. Geographic indications are not trademarks per se, but in Canada the regulatory scheme protecting them has been integrated mostly into the Trademarks Act.⁵³ Note that while patents and copyrights are each enumerated federal powers in the Constitution Act, 1867, there is no mention of trademarks anywhere in the constitution. As such, the constitutional analysis of trademarks, including

⁵² Steger, *supra* n. 18, 245.

⁵³ R.S.C. 1985, c. T-13, <<http://canlii.ca/s/4kbr>>.

geographic indications, is concentrated mainly on the scope of the federal trade and commerce and provincial property and civil rights powers.⁵⁴

Like data protection and DRM regulations, new rules governing geographic indications would have major impacts on areas ordinarily regulated by provincial governments. They would impact the operations of businesses of all sizes, including purely local businesses, provincial liquor boards and retailers, and potentially some agricultural marketing systems. How deeply the impact of geographic indications would be felt depends, obviously, on the precise provisions to be contained in the CETA. That is not yet clear, but what is certain is that the EU considers the inclusion of at least some measures that go beyond current Canadian law important to an agreement.⁵⁵

Articles 22–24 of TRIPS already cover certain aspects of geographic indications. Members of the WTO must provide the legal means to prevent misleading descriptions of the geographic origin of goods or unfair competition in respect of geographic indications. Geographic indications for wines and spirits must be protected even if consumers are not misled about their origin. European law establishes the specifics of this kind of system for agricultural products and foodstuffs,⁵⁶ as well as for wine.⁵⁷ In 2003, the European Community and Canada made an agreement on wines and spirits, which made progress on winemaking standards through Canada's option of the 'VQA' system of quality assurance, for the EU protected names including 'Bordeaux', 'Chianti', 'Champagne', 'Port', 'Sherry', 'Grappa', and Ouzo, and for Canada protected 'Rye Whisky'.⁵⁸

The issue of geographic indications had also been dealt with much earlier, in the Canada–France Free Trade Agreement Act, 1933.⁵⁹ Article 11 of the treaty between Canada and France prohibited 'all forms of dishonest competition' in respect of natural or manufactured products and, in particular, 'false indications relative to the place of origin, nature, kind or substantial qualities of goods'. It also required 'respect for the appellations of origin of wine, agricultural and other products'. Interestingly, that agreement was implemented domestically in a simple

⁵⁴ See generally T. Scassa, 'The Challenge of Trade-Marks in Canada's Federal and Bijural System', in *An Emerging Intellectual Property Paradigm: Perspectives from Canada*, ed. Y. Gendreau (UK: Edward Elgar, 2008).

⁵⁵ A. Gauthier & M. Holden, 'Canada-European Union Trade Negotiations: 8. Intellectual Property Protection', Parliament of Canada Publication No. 2010-59E (3 Sep. 2010), <www.parl.gc.ca/Content/LOP/ResearchPublications/2010-59-e.htm>.

⁵⁶ Council Regulation (EC) No. 510/2006 of 20 Mar. 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, <<http://bit.ly/vIyXk>>.

⁵⁷ Council Regulation (EC) No. 479/2008 of 29 Apr. 2008 on the common organizations of the market for wine, <<http://bit.ly/uMjdOU>>.

⁵⁸ Agreement between the European Community and Canada on trade in wines and spirit drinks, Official Journal L 35, 6 Feb. 2004, 3–93, <<http://bit.ly/sTIyZU>>.

⁵⁹ 23–24 Geo.V., c. 31.

statute proclaiming that the agreement, which was appended to the legislation as a schedule, had the force of law notwithstanding any other law to the contrary.⁶⁰ Although the application of this legislation, specifically to ‘Champagne’, was the subject of a challenge that went all the way to the Supreme Court of Canada, the constitutional division of powers was not among the grounds on which that legislation was attacked.⁶¹

Had such a constitutional challenge been made, it might well have succeeded. In *MacDonald v. Vapor Canada*, mentioned earlier in this article, the Supreme Court of Canada ruled that subsection 7(e) of the Trade-marks Act is unconstitutional. That provision prohibited any ‘business practice contrary to honest industrial or commercial usage in Canada’. The Court held that this was not a matter of criminal law and also failed to satisfy the test for validly enacted legislation under the Parliament’s trade and commerce power. Note that it was in this context that the Court refused even to speculate about whether the provision was valid as implementing Canada’s international obligations under the International Convention for the Protection of Industrial Property (the so-called Paris Convention), because there was no express declaration by the Parliament of such intention.

More recently, in *Kirkbi AG v. Ritvik Holdings Inc.*,⁶² the Supreme Court of Canada upheld the constitutional validity of another part of section 7 of the Trade-marks Act, subsection 7(b), which creates a civil cause of action basically codifying the common law tort of passing off. While this would ordinarily be a matter of provincial jurisdiction, subsection (b), unlike subsection (e), was held to ‘round out’ an otherwise incomplete trademark scheme. It is valid because, according to the Supreme Court, it is concerned with trade as a whole, not a particular industry. As well, potentially uneven protection between provinces and the risk of duplicative, conflicting, or inefficient enforcement procedures for registered and unregistered trademarks suggested that the federal government was competent to fill a gap in the legislative protection of trademarks.

Both of these cases are highly relevant to geographic indications, which are protected by subsection 7(d) of the Trade-marks Act. That section expressly prohibits any person from describing wares or services to mislead the public about their character, quality, quantity, composition, geographic origin, or mode of manufacture. The basic question is whether subsection (d) is more like subsection (b), which is constitutional, or more like subsection (e), which is unconstitutional.

⁶⁰ *Ibid.*, s. 2.

⁶¹ *Chateau-GaiWines Ltd. v. Institut National des Appellationsd’Origine des Vins et Eaux-de-Vie et. al.* [1975] 1 S.C.R. 190. In 1978, after Canadian vintners had lost this case and several others, Canada withdrew from the treaty.

⁶² 2005 SCC 65, <<http://canlii.ca/s/scvo>>.

At first glance, this provision respecting unregistered geographic indications is different from the passing off provision of subsection (b), because it has more than a minimal impact on provincial jurisdiction. For one thing, provincial passing off laws had already been applied in the context of geographic indications, for example, allowing the use of the word ‘Champagne’ in Ontario as long as there is no misrepresentation of the geographic origin of Champagne-style sparkling wines.⁶³ Moreover, this matter is closely related to the management of provincial liquor boards and regulation of liquor retailers. New provisions regulating geographic indications will affect the way that these boards and retailers operate their businesses, including but not limited to the marketing of their products. If the scheme were expanded to other products, like cheese for example, one could imagine significant impacts on local agricultural marketing schemes and other provincial regulatory systems, not to mention local businesses like grocers for example.

On the other hand, while the language of the Canada-France Trade Agreement Act on geographic indications is strikingly similar to subsection 7(e), the provisions of the Trade-marks Act currently in force are more specific, and any amendments resulting from the CETA would almost surely be more precise. The more precise such provisions, the less they might trench on provincial jurisdiction and the more likely they are to be constitutionally valid.

Section 7 is not the only mechanism through which geographic indications are currently protected, or might be protected to implement the CETA, in Canada. More specifically, also pursuant to the Trade-marks Act, there is a list of geographic indications that, generally, no person shall adopt in connection with a business as a trademark or otherwise.⁶⁴ These provisions might be especially difficult to justify as matters related to general trade and commerce – as described at the outset of this article and by the Federal Court Trial Division in the data protection – given their limited impact on a particular industry or a few industries rather than on commerce as a whole.⁶⁵

It is certainly possible, even likely, that if the CETA required the list of protected geographic indications to be expanded to new wines, spirits, foods, or other specific products, a constitutional challenge to some or all of these provisions would ensue. How such a challenge would be resolved is much more difficult to predict.

⁶³ *INAO v. Andres Wines et al.*, 16 C.P.R. (3d) 385, affirmed by the Ontario Court of Appeal in 1990 (30 C.P.R. (3d) 279).

⁶⁴ Trade-marks Act, *supra* n. 53, ss 11.12-11.2.

⁶⁵ See *Canadian National Transportation* and *General Motors*, *supra* n. 12.

6 CONCLUSIONS

The issues discussed in this article are merely examples of the kinds of constitutional issues that might arise when implementing technology and intellectual property-related regulatory provisions of the CETA. While these topics are among the most certain to be included in the CETA, they are by no means an exhaustive list of the similar issues addressed in or influenced by international agreements. Concrete examples that come immediately to mind include privacy laws, biofuels, sustainability standards, and electronic commerce regulations, to name just a few.

There is little doubt that the *Labour Conventions* rule from 1937 restricting constitutional authority to implement treaties to the level of government ordinarily competent to address the subject of a particular treaty provision remains in force in Canada. However, the global economic developments of recent decades have created a credible basis to argue that the federal government's trade and commerce power includes, at least in some circumstances, an international dimension. A key issue, then, is whether impugned legislation ostensibly falling within provincial jurisdiction is sufficiently related to international trade and commerce to justify its enactment by the federal government. This is most strongly defensible where an international agreement is implemented into domestic law through an omnibus statute containing all and only strictly necessary amendments. Several leading scholars and at least one former Supreme Court justice support this approach in principle. In addition, the federal government has recently and repeatedly adopted this approach in practice, unchallenged by any provincial government.

The strength of the arguments in its favour is diluted, however, when the international agreement is not a trade agreement per se but another kind of international treaty or manner of cooperation. If the subject of the agreement is not a matter of international trade and commerce, or another federal power, that brings us back to the basic concerns about federal trenching over provincial powers, circumventing the constitution by exercising the executive power to represent Canada abroad. The imminent federal implementation of the WIPO Internet Treaties' provisions on DRM, and the failed attempt at federal implementation of unfair competition provisions of the Paris Convention on Industrial Property illustrate this point.

The arguments supporting implementation of international trade agreements under the federal trade and commerce power are also weakened when the implementing mechanism is not an omnibus statute but, rather, a legislative reform also addressing other matters not directly related to the international agreement. This problem is demonstrated, again, by the proposed amendments to the

Copyright Act, which deal with many issues other than DRM, and even on that topic, go beyond the treaties' requirements.

If provisions on DRM, geographic indications, and pharmaceutical data protection were implemented in an omnibus CETA implementation statute, their constitutionality might be relatively more assured. However, even then, some uncertainty would remain. Only the Trial Division of the Federal Court has been bold enough to rule that the international aspects of an otherwise arguably local matter – in that case pharmaceutical data protection – helped bring it within the scope of a broadened federal trade and commerce power. This precedent was, however, overruled by the Court of Appeal. In the case of data protection, the Court of Appeal happened to rule that it was valid as a matter of criminal law, although more recent case law from the Supreme Court has taken a narrower view of the criminal law power. DRM might be a matter ancillary to copyright, although, in present form, the proposed provisions are highly suspect. In addition, while geographic indications could be characterized like some other sections of the Trade-marks Act that were recently upheld, their substantial incursion into provincial jurisdiction makes them somewhat more vulnerable to attack.

Moreover, in considering the scope of the general trade and commerce power, the Supreme Court has recently rejected the federal government's claim to jurisdiction simply because a market (the securities market) 'has evolved from a provincial matter to a national matter'.⁶⁶ Similar reasoning might be applied to a jurisdictional claim based mainly on the fact that trade has evolved from local to global or interprovincial to international. In sum, there is no guarantee that the federal implementation of more expansive data exclusivity provisions, new DRM regulations and additional protection for geographic indications on the horizon as a result of the CETA, would be constitutionally valid.

There are, however, two final practical considerations. One is that provincial governments have been extensively involved in the CETA negotiation process. As long as provinces are democratically engaged and have consequently consented to the inclusion of such matters in the CETA with the expectation of federal implementation (or undertaking provincial implementation, where necessary), the risk of a constitutional challenge is diminished.

However, the second practical consideration is really the key to understanding this issue in Canada: Historical experience proves it is not always, or even normally, the provinces that bring constitutional challenges. Very often private parties raise the constitutional division of powers in a collateral attack on laws and policies enacted by one level of government or another that are unfavourable to their special interests. Private parties realize that if, for example, the federal

⁶⁶ Reference Re Securities Act, *supra* n. 14, para. 4.

government's law is invalidated or read down, provincial governments are unlikely to address the matter individually, or if they do, there might be delay or perhaps a more favourable outcome for the specific litigant. This is precisely what happened with the attack on data protection regulations brought by generic pharmaceutical manufacturers and is the most foreseeable manner in which laws on DRM or geographic indications would be challenged.

In that context, the likelihood of future challenges, and the outcome should such challenges arise, becomes much less controllable by government and, unfortunately, less predictable for the parties to an international agreement. This article has sought to help clarify at least some of the key challenges and possible solutions.

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