

The Role of Standardization in the Canadian Free Trade Agreement

Emily White, Gabrielle White, Stephen Head



Setting the Stage: Canada's Trade Agenda

Canada is actively signing free trade agreements (FTAs) with international partners. In 2006, Canada had FTAs with only five countries;¹ today, Canada has fourteen FTAs in force, one signed and awaiting implementation, and eight FTA negotiations underway.² A country of thirty-six million inhabitants, Canada accounts for 2.5 percent of global merchandise exports, illustrating that economic growth and Canadians' prosperity are fundamentally linked to the global economy.³

All of the international FTAs to which Canada is a party address technical barriers to trade (TBTs), often in a dedicated TBT chapter. TBTs are trade barriers created by unaligned requirements across jurisdictions. They result from the use of duplicative, redundant, and differing technical regulations, standards, and conformity assessment procedures. TBTs are more difficult to identify than more explicit tariff-based trade barriers, and this difficulty is compounded by the fact that regulators are often unaware of the standardization requirements referenced in their regulations. The TBT obligations in Canada's international FTAs build on,

and, in some cases, surpass, the obligations of the World Trade Organization's (WTO) TBT Agreement.

Facilitation of internal trade—that is, trade between Canada's ten provinces and three territories—has been pursued less ambitiously than international trade in past decades. In part, this is due to Canada's relatively small domestic market. Internal trade is complicated by the division of powers between the federal and provincial and territorial governments under the Canadian constitution. The federal government has jurisdiction over matters of national interest (for example, defense, currency, and citizenship), while the provinces and territories have jurisdictional authority over other areas, including education, construction, and public safety.⁴

However, this does not mean that internal trade is any less important to Canada's economy. Over the 1981-2014 period, it is estimated that the value of Canada's internal trade grew at an average rate of 4.2 percent annually.⁵ The pursuit of barrier-free internal trade in Canada has progressed gradually since the advent of the Agreement on Internal Trade (AIT). The

AIT, which came into force in 1995, was an intergovernmental trade agreement signed by the Prime Minister of Canada as well as the head of government for each Canadian province and territory.⁶ It sought to prevent Canadian governments, both at the federal and provincial and territorial levels, from creating new trade barriers and committed governments to further liberalize internal trade through continued negotiations.⁷ The AIT was characterized by its "positive list approach," whereby the Agreement covered only the eleven issue areas it listed: procurement, investment, labor mobility, consumer-related measures, agricultural and food products, alcoholic beverages, natural resources processing, energy, communications, transportation, and environmental protection.

Although the AIT included requirements to reconcile standards and conformity assessment procedures between provinces and territories through harmonization and/or mutual recognition, as well as to cooperate in reducing regulatory overlap and duplication, it was not effective in reducing TBTs between jurisdictions. One of the main reasons for this ineffectiveness was the lack

of strong institutional mechanisms to ensure coordination between provinces and territories themselves, and between the provinces and territories and the federal government. As a result, there remain many prominent internal trade barriers that significantly inhibit the growth and competitiveness of the Canadian economy; recent estimates suggest that internal trade barriers reduce Canada's gross domestic product by between \$50 billion and \$130 billion.⁸

Nearly twenty years after its signing, the need to strengthen and modernize the AIT became apparent and negotiations began on its renewal in December, 2014. The imminent implementation of the Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA), to which Canadian provinces and territories are also signatories, pushed Canadian governments to recognize the growing incompatibility between Canada's internal and international trade policies and obligations.

The resulting Canadian Free Trade Agreement (CFTA) advances Canada's internal trade framework by enhancing the flow of goods, services, investment, and labour mobility. In contrast to the AIT, the CFTA follows a "negative list approach;" its rules apply automatically to almost all areas of economic activity in Canada, with exceptions identified in Part IV of the Agreement.⁹ This approach will facilitate innovation as new goods and services, such as the sharing economy and clean technologies, will be automatically included under these trade rules designed to promote Canada's long-term economic growth.

With its comprehensive free trade rules, provisions that open procurement practices to companies operating across Canada, and a strengthened dispute settlement mechanism, the CFTA will go a long way in combating internal barriers to trade. Importantly, the CFTA, like Canada's international FTAs, contains provisions that seek to reduce TBTs in existence between Canadian governments. The CFTA creates an institutional mechanism called the Regulatory Reconciliation and Cooperation Table (RCT) that will facilitate the review and removal of internal regulatory and trade barriers between Canadian governments. The strong standardization-related provisions contained in the CFTA also create the opportunity for an increased role for the Standards Council

of Canada (SCC),¹⁰ Canada's national standards and accreditation body, to continue to strengthen and modernize Canada's standardization governance in support of internal trade.

Standards in Regulations

Standards are essential for safeguarding the health and safety of Canadian citizens and are necessary to ensure environmental protection and public safety. Certification to standards through conformity assessment procedures also helps ensure market access for Canadian products, both domestically and internationally.

Standards, and other documents, can be incorporated by reference in regulations. When a document is incorporated by reference within a regulatory text, it is the same as if it was reproduced word for word; it has the same binding effect as the regulation in which it is incorporated.¹¹ Standards incorporated by reference in regulations cover a wide range of topics from bicycle helmets to passenger car windshield wiper systems to child-resistant packaging.

The importance of standards as a regulatory tool is reflected in the Cabinet Directive on Regulatory Management (CDRM), Canada's federal regulatory policy. The CDRM contains a number of Canada's obligations under the WTO TBT Agreement, including the requirement for regulators to use international standards, guidelines, and recommendations as a basis for technical regulations and conformity assessment procedures when they meet the intended regulatory objective.

There are a number of valid reasons to use standards as a complement to regulations, including:

- standards are developed through a consensus-based process, which is designed to balance the interests of diverse stakeholders;
- standards are cost-effective, reliable, and undergo cyclical reviews and updates;
- referencing standards in regulations supports a strong regulatory system that can foster innovation and technological advancement;
- standards are written in a language that corresponds to the needs of industry and business, and they reflect the latest scientific trends in innovation and technology; and,

- standards, when adopted regionally or internationally, support global supply chains and facilitate internal and international trade.

There are over 5,000 references to standards in Canadian federal, provincial, and territorial regulations. By incorporating standards by reference, Canadian regulators are able to make use of the existing knowledge and expertise in Canada's extensive standardization network to efficiently and cost-effectively advance regulatory objectives and achieve public policy objectives in line with the WTO-TBT Agreement and the CDRM.

Similar to the WTO TBT Agreement, the CFTA safeguards the ability of governments to adopt and apply their own laws and regulations for economic activity in the public interest in order to achieve public policy objectives. Yet, because the referencing of standards can vary between countries and levels of government within a country, the referencing of different standards can create TBTs. TBTs can occur for legitimate regulatory objectives, such as referencing a standard in regulation to protect the health and welfare of Canadians. However, some regulatory differences between Canadian jurisdictions are arguably unnecessary,¹² but may be put in place because they benefit the jurisdiction financially (due to revenue collection) and/or politically.¹³

To combat TBTs, the CFTA contains Article 302 that outlines requirements for the preparation, adoption, and application of technical regulations, standards, and conformity assessment procedures. It specifies that technical regulations:

- should not be prepared, adopted, or applied if they create unnecessary obstacles to trade within Canada;
- should not be more trade restrictive than necessary to fulfil a legitimate objective;
- must be based on product requirements (in terms of performance) and relevant national and international standards, if such standards exist or their completion is imminent, as appropriate; and,
- should not be maintained if the rationale or circumstances requiring their initial adoption no longer remain or if the issue can be addressed through a less trade-restrictive means.

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Article 302 also states that, upon request, each jurisdiction must accept the results of other jurisdictions' conformity assessment procedures. This is the case even if those procedures differ from its own, provided it is satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards that are equivalent to its own procedures. If a jurisdiction chooses not to accept an equivalent conformity assessment procedure, it must provide a rationale for its decision. Relevant national or international guides and recommendations, if they exist or their completion is imminent, should also be used as a basis for conformity assessment procedures.

Importantly, Article 302 also states that if standards do not exist or are ineffective or inappropriate, jurisdictions are encouraged to cooperate to develop national standards using Canada's national standardization network. SCC can facilitate the development of new standards by SCC-accredited standards development organizations (SDOs) to achieve regulatory objectives and ensure that standards referenced in new regulations do not create internal trade barriers.

In order to help facilitate standardization in a federal system, SCC and its Provincial-Territorial Advisory Committee (PTAC) provide policy advice and recommendations to federal government departments, as well as to the sub-national, provincial, and territorial governments. Through PTAC, a statutory policy committee that consists of a representative from each province and territory appointed by that jurisdiction, SCC provided ongoing input during CFTA negotiations, including a paper outlining strong standards-related obligations to further the goal of up-to-date and aligned standards across Canada. The final text of the CFTA reflects these recommended obligations, which support the reduction of TBTs within Canada.

Standards Alignment

A key component of the CFTA is its establishment of a regulatory reconciliation process, to be overseen by a senior-level Regulatory Reconciliation and Cooperation Table (RCT).¹⁴ The RCT will reconcile existing measures that are identified by the federal government, provinces, or territories that act as barriers to trade, investment, or

labor mobility within Canada. The RCT also provides a forum for Canadian jurisdictions to discuss any future regulatory measures that a jurisdiction may identify for cooperation, including the development of common regulatory measures for emerging sectors or issues.

Standards are a key component of the CFTA. The alignment of standards incorporated by reference in federal, provincial, and territorial regulations can help to advance regulatory reconciliation, and regulatory cooperation can be strengthened through the coordination of efforts in the development of new standards to fulfill regulatory needs. Such coordination will be especially important in those emerging innovative sectors where standards and regulations are being developed to ensure that regulatory barriers do not become entrenched in areas where Canada must remain competitive.

SCC will continue to work with federal departments as well as provinces and territories to help them meet their standardization-related obligations under the CFTA, including monitoring successes and providing tools and support for the continued removal of TBTs. SCC's Monitoring Standards in Regulations (MSR) database can support regulatory reconciliation by facilitating the identification of outdated and withdrawn standards incorporated by reference in federal, provincial, and territorial regulations. SCC has already completed reports of standards referenced in regulation for a number of federal departments, provinces, and territories and supports PTAC in its current review of how the MSR can be used to support the RCT's efforts to facilitate standards alignment between jurisdictions as a key component of regulatory reconciliation.

The RCT is expected to release its first work plan in the near future, containing items for regulatory reconciliation and cooperation. SCC plans to analyze these items from a standardization perspective, including considerations related to what standards are referenced in federal, provincial, and territorial regulations, the degree of alignment of those references, and the status, clarity, and accuracy of referenced standards.

Final Thoughts

A predictable regulatory environment can foster new investment and job creation.¹⁵ For example, cooperation under the RCT

on new regulatory measures can reduce regulatory overlap and prevent business from confronting multiple regulations across jurisdictions that duplicate one another. Canada's economic growth is constrained by these differences between regulations at the federal and provincial and territorial levels.¹⁶ Diverging regulations have resulted in different rules and processes across Canada and can be found across multiple sectors, including trucking, food packaging and labelling, and professional certifications.¹⁷ The standards-related obligations in the CFTA and the creation of the RCT will reduce TBTs, thereby making a difference to Canada's internal trade regime.

The CFTA also better aligns with Canada's commitments under international trade agreements such as the Canada-EU CETA. This reduces compliance costs for Canadian firms who do business both at home and internationally. As such, the CFTA supports Canada's international priorities around regulatory cooperation, including those with the EU under CETA's Regulatory Cooperation Forum (RCF) and with the United States under the Regulatory Cooperation Council (RCC). Overall, the CFTA ensures that Canadian businesses secure the same access to Canada's market as that secured by business from Canada's international trading partners.

SCC's work in support of the successful implementation of the standards-related obligations contained in the CFTA is part of our overarching goals. This includes achieving aligned and up-to-date standards across Canada as well as the continued implementation of institutional mechanisms within Canada's standardization network that improve coordination between Canada's different levels of government. Not only will this facilitate trade within Canada, but will also enhance trade and business opportunities between Canada and our international partners.

About the Authors

Emily White is the Project Manager of Strategic Policy and Stakeholder Engagement in the Strategy and Stakeholder Engagement Branch of the Standards Council of Canada (SCC). Emily works closely with provincial and territorial stakeholders through the Provincial-Territorial Advisory Committee (PTAC) and leads SCC's initiatives to support

PTAC in pursuing standards alignment in support of internal trade. Her responsibilities also include researching and analyzing a variety of standardization, regulation, and trade-related topics to provide advice to public sector stakeholders. She can be reached at emily.white@scc.ca.



Gabrielle White is the Program Manager of Strategic Policy and Stakeholder Engagement in the Strategy and Stakeholder Engagement Branch of the Standards Council of Canada (SCC). Gabrielle's work focuses on standards and conformity assessment as they pertain to trade and regulatory policy. Her key responsibilities include providing input to Global Affairs Canada on the negotiation and implementation of Canada's Free Trade Agreements, as well as working with other government departments to promote and advance Canada's standardization system. She can be reached at gabrielle.white@scc.ca.



Stephen Head is the Manager of Strategic Policy and Sector Engagement in the Strategy and Stakeholder Engagement Branch of the Standards Council of Canada (SCC). His current responsibilities for the SCC include monitoring the files of the WTO Technical Barriers to Trade Committee, the APEC Subcommittee on Standards and Conformance, SCC's input to the standardization components of Canada's various Free Trade Agreements, and regulatory cooperation. He provides policy advice and analysis on the international, national, and regional implications of a broad range of regulatory, trade, and standardization policies, initiatives, programs, and practices. He can be reached at shead@scc.ca.



- 1 Industry Canada, "One Canada, One National Economy: Modernizing Internal Trade in Canada" (Ottawa, 2014), ii. https://www.ic.gc.ca/eic/site/081.nsf/eng/h_00007.html#p3.
- 2 For information on Canada's trade and investment agreements, see <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng>.
- 3 Mykyta Vesselovsky, et al., "Canada's State of Trade: Trade and Investment Update – 2017" (Global Affairs Canada, Ottawa, 2017), iii. http://www.international.gc.ca/economist-economiste/performance/state-point/state_2017_point/index.aspx?lang=eng#3_0.
- 4 For additional information on the distribution of legislative powers in Canada, see Sections 91 and 92 of the *Constitution Act, 1867* at <http://laws-lois.justice.gc.ca/eng/Const/>.

- 5 David Tkachuk and Joseph Day, "Tear Down These Walls: Dismantling Canada's Internal Trade Barriers" (Ottawa, The Standing Senate Committee on Banking, Trade and Commerce, June 2016), 16.: <http://publications.gc.ca/site/eng/9.819431/publication.html>.
- 6 For additional information on Canada's Premiers, see <http://www.canadaspremiers.ca/about/>.
- 7 Industry Canada, "Agreement on Internal Trade: Summary of the Agreement," last modified 2011-09-27. https://www.ic.gc.ca/eic/site/ait-aci.nsf/eng/h_i100064.html.
- 8 Tkachuk and Day, "Tear Down These Walls," 3.
- 9 For the full text of the CFTA, see <https://www.cfta-alec.ca/>.
- 10 A federal Crown corporation that reports to the Canadian Parliament through the Minister of Innovation, Science and Economic Development (ISED), SCC's mandate includes: the accreditation of SDOs and conformity assessment bodies; supporting the strategic priorities of the Government of Canada and of industry; and, representing Canada in international and regional forums, including at the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). SCC also provides ongoing input to Global Affairs Canada and Treasury Board of Canada Secretariat on the standardization-related components of Canada's FTA negotiations and supports the implementation of FTAs that are in force.
- 11 For additional information on incorporation by reference, see Visar Mahmuti, "Standards as Elements of the Regulatory Regime," *Standards Engineering*, January/February 2017.
- 12 Tkachuk and Day, "Tear Down These Walls," 15.
- 13 *Ibid.*, 21.
- 14 For additional information on the RCT, see "Chapter Four - Regulatory Notification, Reconciliation, and Cooperation" of the CFTA.
- 15 Ryan Greer, "Death by 130,000 Cuts: Improving Canada's Regulatory Competitiveness (Canadian Chamber of Commerce, May 2018), 9. <http://www.chamber.ca/publications/reports/>.
- 16 *Ibid.*, 12.
- 17 *Ibid.*, 12.