

Intelligence MEMOS



From: Robert Mysicka
To: Canada's Premiers
Date: August 23, 2018
Re: **TIME TO WALK THE TALK ON TRADE**

When the wheels of justice move too slowly to keep pace with social or economic progress, it falls on politicians to make swifter decisions to achieve modernization in the law.

So it is that in the wake of the Supreme Court's decision in *R. v. Comeau* to uphold broad provincial powers to restrict inter-provincial trade, the premiers have reportedly agreed there is urgent need to accelerate the pace of reducing those barriers within Canada.

With the legal implications of *Comeau* hanging over us, and the ever-greater threat of protectionism from the actions and rhetoric of the US Administration, the urgency to take legislative action to ensure a more consistent internal trade regime is even more pressing.

In *Comeau*, the Supreme Court reinforced a legal rule that interprets Section 121 of the *Constitution Act* very narrowly. That section states, quite plainly, that "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the Provinces." Despite this seemingly clear wording the Supreme Court took the view of predecessor justices that this section does not actually impose absolute free trade across Canada. Rather, it prevents the imposition of tariff-like effects on cross-border trade, which have as their primary purpose the impeding of trade. This ruling appears to give carte blanche to provincial governments to style or "cloak" legislation ostensibly with an aim other than restricting trade when in fact its primary effect is to restrict trade. Such laws would pass constitutional muster by virtue of the *Comeau* ruling.

In July, Premiers meeting in New Brunswick (the province where the *Comeau* case originated) agreed that there is a need to reduce barriers to trade within Canada. This is welcome news but it is important to inject serious substance into the conversation. For one thing, the Regulatory Reconciliation and Cooperation Table (RCT) established under the 2017 Canadian Free Trade Agreement to reduce regulatory measures that impede trade needs to have some serious teeth added. The table was established as an attempt to get provinces negotiating the reduction of barriers to trade. However, under the agreement, governments may opt out of negotiations if they do not have an existing measure to reconcile or if they determine that reconciliation is not a desirable option for their jurisdiction.

Whatever the Supreme Court's opinion may be on the law applicable to Section 121, it is going to take serious political willpower to get meaningful action by the provinces to implement free trade across Canada. This is especially true where there are no freestanding constitutional principles that consumers or businesses can rely on. With the uncertainties of the current political situation and the NAFTA negotiations in limbo, premiers should act swiftly to get meaningful regulatory reconciliation. For consumers (and producers) of diverse goods, including agricultural goods as well as beer and other alcoholic beverages (which were the subject of the dispute in *Comeau*), a significant increase in personal exemption and/or reduction in barriers to the free sale of these goods across provincial boundaries would be a welcome development.

We applaud the premiers' agreement to negotiate. Now it's time to ensure that negotiation materializes into something meaningful.

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