

SENATE COMMITTEE REPORT PROMOTES DISMANTLING INTERNAL TRADE BARRIERS WITHIN CANADA

Posted on July 16, 2016

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The Objective of Eliminating Internal Trade Barriers

Last month, the Standing Senate Committee on Banking, Trade and Commerce (the "**Senate Committee**") released its Report (the "**Report**") entitled "Tear Down these Walls: Dismantling Canada's Internal Trade Barriers". In choosing this title, the Senate Committee evoked President Ronald Reagan's powerful Cold War speech made at the Brandenburg Gate in West Berlin on June 12, 1987, challenging the Soviet Union's leader, Mr. Gorbachev, to tear down the Berlin Wall that impeded the freedom of movement by people and commerce between West Berlin and the Soviet controlled East Berlin. The Senate Committee called for the elimination of inter-provincial/territorial barriers that impede the free flow of people (labour mobility), goods, services and investments between the provinces/territories.

What are Internal Trade Barriers?

Different categories of internal trade barriers exist. Prohibitive barriers prevent certain inter-provincial/territorial activities. Examples of these barriers are the federal, provincial and territorial laws that explicitly prevent certain trade of alcoholic beverages from one province or territory directly to consumers of another province or territory. There are also regulatory and administrative barriers, such as the need for compliance with different safety standards in multiple provinces/territories and federally. Each province/territory and the federal government may impose its own administrative requirements to certify that a business complies with its respective standards to operate in the particular jurisdiction.

The Benefits of Eliminating Internal Trade Barriers

Inefficient, overlapping and unnecessary multiple layers of regulatory and administrative requirements emanating from different jurisdictions add to the costs of doing business across the provinces and territories. Based on recent estimates, eliminating internal trade barriers could increase Canada's annual gross domestic product by between \$50 and \$130 billion. The Senate Committee was appalled to see that Canadian goods had freer access to foreign markets through free trade agreements than to the domestic markets.

Report Recommends Modernizing and Enhancing the *Agreement on Internal Trade* (the "AIT")

Disappointed that the federal government, provinces and territories missed their self-imposed March 2016 deadline by which to re-negotiate a more robust AIT and in their failure to set a new deadline, the first recommendation in the Senate Committee's Report is for these governments to "urgently work towards concluding the negotiations for a renewed" AIT, which "should be finalized by July 1st, 2017, and should contain the following six characteristics:

- negative list approach;
- mutual recognition;
- a formal mechanism to facilitate regulatory harmonization;
- a binding investor-state dispute-resolution mechanism with enforceable prescribed remedies;
- improved consideration of trade in services; and
- the federal government as a permanent co-chair of the Committee on Internal Trade."

The Senate Committee symbolically chose the 150th anniversary of Confederation as the deadline for the conclusion of the re-negotiated AIT as a way bringing to fruition the ambition of the Fathers of Confederation to create a true economic union. The original AIT currently in effect, signed in 1994, "has, to some extent, created a framework for eliminating internal trade barriers within specific economic sectors. However, progress has been too slow and a great deal remains to be done."

Under a negative list approach in a renewed AIT, "the AIT would cover all people, goods, services and investment unless they are explicitly exempted." Under mutual recognition, a person, good, service or investment that conforms with a regulatory standard in one province/territory would be deemed to be conforming in another one. Under regulatory harmonization, the federal "and provincial/territorial governments should share the common goal of ensuring that the country has the best possible sets of laws and regulations, and that new laws and regulations are genuinely needed to meet clear public policy objectives and do not represent unnecessary barriers to trade."

The Senate Committee "is strongly of the view that the AIT's dispute-mechanism is ineffective". In the Senate Committee's opinion, an improved dispute-resolution mechanism should

1. allow private parties to have access to the complaint and adjudication process; and
2. adjudication decisions should be binding, with enforceable prescribed remedies to address situations of non-compliance by governments with these decisions.

In addition, given the "technological advancements and commercial innovations since the AIT was signed in 1994", the renewed AIT should place greater emphasis on breaking down the barriers that prevent the free flow

of services between provinces/territories.

To break the logjam in the negotiations, the Senate Committee proposes that the federal government take a leadership role in the negotiations by becoming a permanent Co-Chair on the Committee on Internal Trade (the "CIT"), which oversees the implementation, operation and re-negotiation of the AIT. Under the current system of a rotating CIT Chair, the ongoing changes to the CIT Chair have resulted in the negotiations losing momentum and direction. In a permanent leadership role, the federal government may be in a better position to advance the negotiations and balance various provincial interests and sensitivities.

The Contingency Plan

If a reinvigorated AIT is not concluded by July 1st, 2017, or if the re-negotiated agreement is inadequate, then the federal government should pursue a reference of section 121 of the *Constitution Act*, 1867 (the "**Constitution**") to the Supreme Court of Canada. The reference would focus on two questions concerning whether section 121 constitutionally protects the free flow of trade, commerce and investments between provinces/territories against non-tariff/non-duty barriers.

In this regard, the recent New Brunswick Provincial Court decision in *Gerald Comeau v. The Queen* [1] ("**Comeau**") lays the groundwork for such a reference case. Mr. Comeau was charged under the New Brunswick *Liquor Control Act* for bringing alcoholic beverages into New Brunswick from Quebec where he purchased the beverages. To protect the New Brunswick provincial government's monopoly over the distribution and sale of alcoholic beverages within the province, the New Brunswick liquor legislation prohibited (i.e., established a prohibitive trade barrier against) Mr. Comeau's cross-border purchase, unless the law was determined by the Court to be unconstitutional. The Court found Mr. Comeau not guilty of the charge because the law that he violated was unconstitutional. Specifically, the purported law impeded the constitutionally protected free flow of goods from one province to another under section 121 of the Constitution. For a more detailed analysis of this case, refer to our Bulletin at <http://www.mcmillan.ca/Let-the-Good-Times-Roll-Court-Allows-the-Free-Flow-of-Liquor-Across-Provincial-Borders>.

Other Recommendations

The Committee recommends other ways to enhance the role of the federal government in breaking down non-tariff/non-duty barriers. The federal government should:

- "work actively with provincial/territorial governments to ensure that laws, regulations, rules and policies do not unnecessarily restrict the free movement of people, goods, services and investment in Canada";
- "consult with professional regulatory bodies, including Engineers Canada, to identify ways in which it

could assist these bodies in adopting mutual recognition";

- increase funding for the Internal Trade Secretariat for the purposes of research and monitoring progress on removing internal trade barriers, and also increase funding to Statistics Canada for the purposes of expanding and improving data related to internal trade;
- conclude an agreement with provincial/territorial governments that wish to participate in a shared securities regulation regime; and
- support the creation of a "national corridor" that would allow the transportation of property and services through various means, whether pipelines, railway, fibre optic cables or other appropriate means.

What Happens Next?

The Senate Committee has challenged the federal, provincial and territorial governments to conclude by July 1st, 2017 a re-negotiated, re-invigorated AIT that meets the criteria and standards set out in the Senate Committee's Report. It will be interesting to see whether they can rise to the challenge. If the deadline is not met or the re-negotiated AIT is inadequate, the question will be whether the federal government resorts to the contingency plan laid out by the Report for a reference to the Supreme Court of Canada of section 121 in the Constitution. In this regard, the federal government may take a "wait-and-see" approach regarding the outcome of the *Comeau* appeal, which may ultimately go to the Supreme Court of Canada, giving the Supreme Court an opportunity to rule on whether section 121 covers non-tariff/non-duty barriers (contrary to Supreme Court precedent). Finally, the remaining question is to what extent the federal government assumes a leadership role in breaking down provincial/territorial barriers in accordance with the recommendations made in the Report.

We may soon know whether the federal, provincial and territorial governments intend to meet the Senate Committee's challenge. The Prime Minister and Premiers hope to approve a deal for a robust, renewed AIT when they meet later this month in Whitehorse, Yukon.

by Jamie M. Wilks

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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