

Interview with Dr. Tom Bateman, St. Thomas University

The Alberta-BC trade war is a serious problem. It boggles the mind that Canada can't get one of its most precious and abundant resources to market.

I remembered meeting Tom Bateman, then Chair of the Political Science department of St. Thomas University. He told us that he would be passing through Quebec City on his way to Ottawa to appear before the SCC on December 7, 2017, supporting the Crown's contentions in the Comeau Case.

As Tom explained, Mr. Comeau was fined some \$300 for having imported into New Brunswick a trunkload of beer purchased in Quebec. The Canadian Constitutional Foundation (CCF) took up his case in the attempt to break down the barriers to inter-provincial trade.

The CCF argued extensively that section 121 prevented both the federal and provincial government from imposing barriers to trade. Furthermore, that section 91(2) established the exclusive jurisdiction of the federal legislature over Trade and Commerce. New Brunswick argued that 92(13) assigned the exclusive jurisdiction over property and civil rights which provides the foundation of commerce. So too, the exclusive jurisdiction over matters of a local or private nature was given to enable the provinces to establish different regulatory regimes, and if these regimes clash between provinces, well welcome to Canada. Through intergovernmental negotiations mechanisms are created like the Canada Free Trade Agreement (CFTA) that are making some headway to reducing frictions.

The CCF was set on overturning the SCC's Gold Seal decision of 1921 which ruled that sec. 121 prevented only tariff barriers. The SCC ruled more widely in the Murphy vs CPR case in 1958. There justice Rand explains that sec. 121 forbids trade regulation "that in its essence is related to a provincial boundary." He also states that provincial legislation directed towards its own inhabitants cannot run afoul of sec. 121.

The CCF attempted to establish a test that would try to distinguish legitimate provincial policies with incidental effects on trade from other policies whose purpose or dominant effect would be to obstruct trade between the provinces. The Judges replied: The distinction is not that clear. It sounds like you are asking the court to make value judgments as to what are good trade restrictive policies. Parliament is where these decisions are meant to be taken.

Tom said, "If we have a quarrel with inter-provincial trade barriers, it's not obvious that litigating an end to them is necessary or desirable. It's probably something better achieved by the elected politicians in negotiations that take account of all the complexities and nuances of a policy field."

MY CONCLUSION

So what's the prognosis for the Alberta-BC trade war? Not good.

As we all know, the provinces are not represented in the Senate, so they can't participate in the legislative process of our central government to lawfully resolve these issues.

BC is holding up Alberta's pipeline to the coast based on environmental concerns. The Canadian Free Trade Agreement does not even seem to attempt harmonization provincial regulation in these matters:

Sec.604(1) Each Party has the right to establish its own environmental priorities and levels of environmental protection...

Sec. 605(2): An environmental measure shall not be considered to be inconsistent with this agreement by reason solely of the lack of full scientific certainty regarding the need for that measure.

Sec. 606: A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental measures as an encouragement for trade ...

And there is no political advantage for the Prime Minister to get involved.

I saw two different news panel discussions on the Alberta-BC trade war tonight. The courts are being asked to play a purely political role. The issue is in deadlock, as has been the separatist issue in Quebec for the last 50 years.

Maybe it is time to consider whether provincial representation in the Senate can be made to improve our governance.

Vincent Pouliot, President
Institute of Responsible Government