The Consumer Perspective of Trade & Commerce Powers

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EXECUTIVE SUMMARY

Interprovincial trade barriers are often cited by the government and economists as a costly part of doing business in Canada and a disincentive for provincial businesses to expand and participate in the full Canadian economy. These barriers allegedly increase inefficiencies in the market and adversely affect the ability of Canadian firms to compete on international markets. Removing interprovincial trade barriers could result in benefits for consumers, such as lower prices and increased choices flowing from increased efficiencies and competition in the market.

The Canadian Constitution states the principle of removing interprovincial trade barriers and maintaining a common national market in s. 121 and entrusts Parliament with exclusive jurisdiction over the regulation of trade and commerce in Canada in s. 91(2). The federal "trade and commerce" power is the source for the federal government to regulate interprovincial trade in Canada and has been the topic of several constitutional cases. Since *Canada v. Parsons*, it has been accepted that intraprovincial trade and commerce is a matter within provincial jurisdiction under s. 92(13) of the Constitution. The Supreme Court of Canada has characterized Parliament's authority to regulate interprovincial trade narrowly, limiting Parliament's ability to regulate local trade where the regulation is necessarily incidental to the effective regulation of international or interprovincial trade. In more recent cases such as *Morguard Investments Ltd. v. De Savoye* and *Hunt v. T&N plc*, the Supreme Court of Canada qualified provincial jurisdiction to legislate on matters that may have an effect on other provinces by requiring provinces to respect minimum standards of order and fairness. Legal scholars have suggested that this qualification suggests that Parliament can legislate to maintain and enhance the proper functioning of the Canadian economic union, and that where there is valid and overlapping legislation on the same matter by Parliament and a provincial legislature, the provincial law is subject to overriding by the paramount powers of Parliament.

While the definition of interprovincial trade barriers can be agreed upon by most economists and scholars, the question of what constitutes an unacceptable interprovincial trade barrier that requires reconciliation through government action has been the subject of much debate. As well, scholars and economists have put forward conflicting accounts of the true cost of interprovincial barriers on the Canadian economy or the potential gains that could flow from eliminating interprovincial barriers to trade.

There have been several efforts to eliminate interprovincial trade barriers in Canada, starting with the 1985 Royal Commission on the Economic Union and Development Prospects for Canada. As well, Canada has been working to establish internal trade agreements in order to comply with its commitments to international free trade treaties. As well, a series of interprovincial trade agreements have been signed, starting with the Agreement on Internal Trade (AIT) in 1994. The Trade, Investment and Labour Mobility Agreement (TILMA)

between Alberta and British Columbia in 2006 attempts to remove barriers to trade, investment and labour mobility between the two provinces. The federal government continues to renew its promise to eliminate interprovincial trade barriers. As well, Ontario and Quebec recently signed an Agreement on Enhancing the Ontario-Quebec Economic Region and Nova Scotia and New Brunswick signed a Partnership Agreement on Regulation and the Economy (PARE).

These interprovincial trade agreements have been criticized for ineffective dispute resolution processes and minimal changes in federal and provincial laws and regulations. Most critically, the federal and provincial governments are criticized for negotiating these agreements without consultation with the public or special interest stakeholder groups, as the agreements are often not announced until after they have been signed.

Canada's federal and provincial governments have the obligation to regulate the economy in a manner that protects the public interest and consumers. There is no doubt that the creation of a more competitive economy could be achieved by eliminating certain interprovincial trade barriers and a more competitive economy would benefit Canadian consumers. Consumers have fundamental rights such as the right to be informed, the right to choice, the right to participate in marketplace decision making and the right to redress. Striving for a more competitive economy is in line with these fundamental consumer rights and governments must live up to their responsibility of maximizing social welfare and protecting consumers in the process of removing interprovincial trade barriers. Canadian interprovincial trade agreements should be framed in the interests of Canadian consumers by balancing these agreements towards information and cooperation to achieve a competitive Canadian marketplace rather than market access or the convergence of national policies.

Three potential solutions using the federal trade and commerce power to strengthen the Canadian economic union are discussed. First, shifting to judicial oversight over s. 91(2) of the Constitution would empower courts to determine the magnitude of unacceptable burdens on commerce weighed against a wide array of policy justifications advanced by provincial governments. This approach implies that provincial laws should be struck down if they impose an undue burden on commercial activity because of differing standards and regulations in a number of provinces. However, courts might not be the most suitable or accessible venue for resolving disputes involving interprovincial barriers to trade.

A second possible solution is increased Parliamentary leadership to enhance the Canadian economic union. Parliament could enact legislation to promote the economic union by giving effect to a non-discrimination principle, prevent or eliminate obstacles to internal trade and provide a common set of rules for mutual recognition of provincial standards and regulations. Such an approach would not bar provinces from enacting legislation on the same matters. Provinces could

also voluntarily take on harmonization measures on matters affecting interprovincial trade. Any legislation or harmonization measures coming from federal and provincial governments must focus on increasing competition in the Canadian market instead of focusing on specific competitors within the market, as increased competition should be seen to directly benefit consumers and the public interest. As well, any legislative action and future interprovincial trade agreements must involve its citizens and expand consultation with stakeholders beyond industry and business firms. Consultation with consumer groups and the public are important to promote political accountability. The federal government is well placed to develop guidelines for provincial government consultation with their respective populations.

A third possible solution is the oversight of barriers to interprovincial trade by an expert agency or tribunal. The agency or tribunal should be required to provide consumers and consumer organizations with avenues to participate in their proceedings and also ensure that obstacles to effective participation are removed. Consumer groups and the public should be able to access market information that would help inform their participation.

In conclusion, as interprovincial trade agreements are struck and more efforts to remove interprovincial trade barriers to stimulate the Canadian economic union are pursued, it is imperative that governments do not fail in their responsibility to protect the public interest and strive to protect consumer interests. Increased transparency and consultation with the public and special interest stakeholder groups are crucial in interprovincial trade discussions. As well, interprovincial trade agreements should set into place conditions for a competitive environment so that firms are compelled to produce desirable goods and services in the most efficient manner but also to distribute them at the right quality and price if they are to survive. In this way, seeking solid competition policy and focusing on a properly operating competitive environment rather than specific competitors within the Canadian market will best serve consumers.

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CONCLUSION

Parliament has the exclusive jurisdiction to regulate trade and commerce in Canada and the Canadian Constitution recognizes the principle of removing interprovincial trade barriers to foster a common market in Canada. Though the degree to which interprovincial trade barriers exist and negatively affect the Canadian economy is a matter of dispute amongst economists and scholars, there is broad consensus that interprovincial trade barriers are generally inconsistent with the goal of promoting a Canadian economic union and that increased competition in the Canadian economy will benefit Canadian consumers.

There is some difficulty in defining a clear consumer interest in interprovincial trade, as consumers have an interest in lower prices and increased choices but also in maintaining consumer protection standards and regulations. When approaching interprovincial trade, great care must be taken to parse out the consumer interest and one cannot always suggest that there is a unilateral consumer interest.

However, interprovincial trade agreements should not merely focus on increased trade and trade dispute resolution at the expense of the consumer interest. Striving for market efficiency in Canada should result in benefits that flow directly back to Canadian consumers and the federal and provincial governments are entrusted with the responsibility to protect the public interest.

In structuring a properly operating market, standards must be put in place to ensure a trade environment that protects the public interest and Canadian consumers. Given that trade agreements are negotiated by politicians who are often lobbied by industry, the consumer interest must be built into the framework of interprovincial trade agreements. By ensuring that the main goal is a competitive market with the foundation of solid competition policy and not simply the removal of trade barriers or increasing trade in Canada, consumers will benefit.

As well, the process of trade negotiations should be transparent and involve wide consultation with civil society and stakeholder groups, including consumer organizations. Federal and provincial legislative bodies must be proactive in consulting with Canadian consumers on any federal and provincial legislation concerning interprovincial trade. So far, the federal and provincial governments have failed to consult with the Canadian public on the Agreement to Internal Trade and the other regional interprovincial trade agreements that have since been signed. Consultations should also involve stakeholder organizations with special interests, such as consumer group and the federal government should take the lead in setting out guidelines for provincial government consultations with the province's populations.

If an expert agency or tribunal is charged with the responsibility of overseeing interprovincial trade in Canada, the process must include consumers and consumer organizations by allowing them to meaningfully participate in trade proceedings.

In conclusion, as interprovincial trade agreements are struck and more efforts to remove interprovincial trade barriers to stimulate the Canadian economic union are pursued, it is imperative that governments do not fail in their responsibility to protect the public interest and strive to protect consumer interests. Increased transparency and consultation with the public and special interest stakeholder groups are crucial in interprovincial trade discussions. As well, interprovincial trade agreements should set into place conditions for a competitive environment so that firms are compelled to produce desirable goods and services in the most efficient manner but also to distribute them at the right quality and price if they are to survive. In this way, seeking solid competition policy, and focusing on a properly operating competitive environment rather than assisting specific competitors within the Canadian market, will best serve consumers.