

Intelligence MEMOS



From: Robert Mysicka
To: Canadians celebrating Canada's 150th birthday
Date: June 30, 2017
Re: **CALLING A TARIFF A TARIFF: STRIKE DOWN ALBERTA'S BARRIERS ON BEER**

Who would have guessed that the question of what kind of beer Canadians enjoy and the reason for this long weekend are so clearly entwined with constitutional declarations made 150 years ago. Canadians can raise a glass to our founders this weekend, and make a toast to their support of free trade across provincial boundaries.

Some [recent news](#) that the Supreme Court of Canada will be reviewing the case of a New Brunswick resident who successfully challenged laws banning possession of alcohol purchased outside of the provincial monopoly raises key constitutional issues of inter-provincial trade. Brewers looking to level the economic playing field on inter-provincial sales may be in for an opportunity.

Lawyers for two brewers, in Ontario and Saskatchewan, are challenging the constitutionality of Alberta's tax system which imposes a levy on small brewers of \$1.25 per liter sold. This levy is used by the Alberta government as a grant to prop up its own beer producers, effectively shielding them from competition by breweries outside of the province.

Lawyers for the Ontario and Saskatchewan brewers are arguing that the current levy/subsidy regime, which replaced the New West Partnership Trade Agreement (an arrangement that gave more direct tax advantages to brewers in Western Canada) economically discriminates against brewers because of their geographic location. In effect, a grant applied preferentially to Alberta-based brewers to refund a direct charge on sales is a tariff, argue the Ontario and Saskatchewan lawyers.

The allegation that the Alberta government and its liquor commission are attempting to subsidize Alberta-based breweries through the use of indirect forms of taxation is not without precedent. In the 96 years since the Supreme Court first ruled on the interpretation of section 121 of the *Constitution Act*, which requires that goods from one province to another be "admitted free," Canadian provinces have enacted an array of so-called non-tariff barriers. These nontariff barriers were not struck down because the Supreme Court took the view that prohibitions and other restrictions are valid so long as they are not specifically enacted as tariffs. In other words, outright bans on products outside of the province are valid as they are not framed as 'tariffs.'

All of this could be changing, especially as the recent scholarship used in the New Brunswick challenge shows that the framers of Canada's constitution intentionally used broad language in section 121 to ensure that provinces would not impose non-tariff barriers as the United States had done to British colonies around the time of Confederation.

With the upcoming 150th anniversary of Confederation, I encourage the Supreme Court to revisit its earlier decisions by adopting a purposive approach to the "free trade" clause in section 121. As Canada continues to take a leadership role in reducing international barriers to trade, it is time to examine our own internal barriers on issues near and dear to many Canadians – such as the price of beer. If it looks like a tariff, has the same economic effect as a tariff, and lessens competition like a tariff, it's time to strike it down like a tariff.

With perhaps a beer in hand, Canadian jurists should spend the long weekend carefully examining some of the issues that are fundamental to the Canadian constitutional identity.

Robert Mysicka is a member of the Bar of Ontario and a commercial litigation lawyer practicing in Ottawa and Toronto.