

# Supreme Court of Canada upholds trade barrier in beer import case

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### Introduction

In *R v Comeau*(1) the Supreme Court of Canada unanimously decided that New Brunswick's restrictions on the importation of beer into the province are constitutional. The case concerned a clash between two contradictory provisions:

- Section 121 of the Constitution Act 1867,(2) which states that goods must "be admitted free into each of the other Provinces"; and
- Section 134(b) of the New Brunswick Liquor Control Act,(3) which, together with Sections 43 (c) and 148(2):
  - makes it an offence to "have or keep liquor" in excess of 12 pints of beer, unless purchased from the New Brunswick Liquor Corporation; and
  - effectively limits the importation of alcohol from other provinces.

The Supreme Court of Canada adopted a purposive and flexible approach to Section 121 of the Constitution Act 1867 and held that it only "prohibits laws that in essence and purpose impede the passage of goods across provincial borders and, therefore, does not prohibit laws that yield only incidental effects on interprovincial trade".(4)

In other words, laws that form part of a broader legislative scheme and whose purpose is unrelated to impeding interprovincial trade will not infringe Section 121.

### Facts

Gerard Comeau is a resident of northeastern New Brunswick. On October 6 2012 he crossed the provincial border into Quebec where he took advantage of the cheaper alcohol prices. Comeau visited three stores and purchased a large quantity of beer and some bottles of spirits. At this time, Comeau was being monitored by the Royal Canadian Mounted Police (RCMP), who were concerned about visitors from New Brunswick sourcing large amounts of alcohol in Quebec.

The RCMP stopped Comeau when he returned to New Brunswick from Quebec and found that he had purchased quantities of alcohol in excess of the limit prescribed by the New Brunswick Liquor Control Act. As such, he was charged under Section 134(b) of the act and issued a fine.

Comeau disputed the charge on the ground that Section 121 of the Constitution Act 1867 rendered Section 134(b) of the New Brunswick Liquor Control Act unconstitutional and was therefore of no force and effect.

According to Section 121 of the Constitution Act 1867, "[a]ll 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

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the other Provinces".<sup>(5)</sup>

Section 134(b) of the New Brunswick Liquor Control Act provides as follows:

*"Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall..*

*(b) have or keep liquor,*

*not purchased from the Corporation [ie, the New Brunswick Liquor Corporation]."*<sup>(6)</sup>

The Provincial Court of New Brunswick dismissed the charge against Comeau and determined that Section 134(b) of the New Brunswick Liquor Control Act violated Section 121 of the Constitution Act 1867.

In his judgment, the trial judge referred to the Supreme Court of Canada's decision in *Gold Seal Ltd v Alberta (Attorney General)*<sup>(7)</sup> as a binding authority. The judge indicated that, based on *Gold Seal*, Section 121 of the Constitution Act 1867 prohibits direct tariff barriers on goods moving between provinces. The trial judge found that Section 134(b) of the New Brunswick Liquor Control Act imposed no tariff and did not violate Section 121 under the principles set out in *Gold Seal*.

However, the trial judge went on to find that *Gold Seal* was wrongly decided and should not be applied under the evidence-based exception to vertical *stare decisis* (ie, the doctrine of precedent). The evidence before the court consisted of historical information presented by a historian about the drafters' motivations for including Section 121 in the Constitution Act 1867 to promote free trade between the provinces. The trial judge accepted the historian as an expert and adopted the expert's opinion that the drafters' motivations informed the correct interpretation of Section 121. Accordingly, the trial judge held that the words "admitted free" in Section 121 refer to free trade, which meant barrier-free borders in the minds of the drafters.

The Crown sought leave to appeal to the New Brunswick Court of Appeal. The Court of Appeal dismissed the application for leave and the Crown appealed to the Supreme Court of Canada. While the Court of Appeal's decision was confined to the issue of leave, the substantive constitutional issue was properly before the Supreme Court of Canada.<sup>(8)</sup>

## **Law and analysis**

### ***New evidence must fundamentally shift parameters of debate***

The vertical *stare decisis* principle is a fundamental tenet of the common law and provides that a lower court must apply the decisions of a higher court to the facts before it. The courts are bound by authoritative precedent in order to promote certainty in the law.<sup>(9)</sup>

In *Canada (Attorney General) v Bedford*,<sup>(10)</sup> the Supreme Court of Canada identified one of the narrow exceptions to vertical *stare decisis* in which a legal precedent "may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate".<sup>(11)</sup>

The new evidence exception requires more than an alternative perspective on existing evidence; rather, the new evidence must fundamentally shift how judges would answer the same legal question. For example, in *Carter v Canada (Attorney General)*,<sup>(12)</sup> new evidence about the harms relating to the prohibition of assisted death, public attitudes toward assisted death and measures that can be implemented to minimise risk allowed the trial judge to revisit the Supreme Court of Canada's decision in *Rodriguez v British Columbia*,<sup>(13)</sup> which had upheld a blanket prohibition on assisted death.

The Supreme Court of Canada held that the Provincial Court of New Brunswick had erred in departing from *Gold Seal's* binding precedent on the basis of historical evidence of the drafters' intentions and the expert's opinion on how that evidence should influence the interpretation of Section 121. The historical evidence did not constitute evidence of changing legislative and social facts. A different interpretation of historical information did not fundamentally shift the legal debate in this case. In

addition, the Supreme Court of Canada determined that the trial judge had effectively substituted the binding judgment in *Gold Seal* in favour of one expert's opinion on domestic law. In this regard, the Supreme Court of Canada cautioned that "[i]f a constitutional provision could be reinterpreted by a lower court whenever a litigant finds an expert with an alternate interpretation, the common law system would be left in disarray".(14)

### ***Section 121 prohibits laws that in essence and purpose restrict or limit flow of goods across Canada***

The Supreme Court of Canada took the opportunity in *Comeau* to provide guidance on the proper interpretation of Section 121 of the Constitution Act 1867. The Crown submitted that the phrase "admitted free" in Section 121 should be interpreted as prohibiting laws that place burdens on the price of goods crossing interprovincial boundaries, such as tariffs. Based on this approach, Section 134(b) of the New Brunswick Liquor Control Act is not unconstitutional because it is part of a policy to control alcohol in New Brunswick and is not directed at impeding interprovincial trade in both essence and purpose.

Comeau, by contrast, advanced what the Supreme Court of Canada characterised as "a new and much more radical proposition".(15) In his view, the phrase "admitted free" means that provincial laws cannot do anything that impedes the flow of goods across provincial borders. Comeau argued that Section 121 of the Constitution Act 1867 is a free trade provision that prohibits any impediment to interprovincial commerce. According to Comeau, Section 134(b) of the New Brunswick Liquor Control Act infringes Section 121 of the Constitution Act because it hampers the flow of goods across the New Brunswick border by preventing him from stocking alcohol from Quebec. The Supreme Court of Canada was acutely aware that the implications of Comeau's interpretation of Section 121 were significant and, if correct, "federal and provincial legislative schemes of many types – environmental, health, commercial, social – may be invalid".(16)

The modern approach to statutory interpretation provides that "[t]he text of the provision must be read harmoniously with the context and purpose of the statute".(17) The Supreme Court of Canada summarised the following key principles that apply in the interpretation of constitutional provisions:

- constitutional provisions must be placed in their proper linguistic, philosophical and historical contexts;
- constitutional texts must be interpreted in a manner that is sensitive to evolving circumstances because they must continually adapt to cover new realities (ie, the living tree doctrine); and
- the underlying organisational principles of the constitutional texts (eg, federalism) may be relevant to their interpretation.(18)

The Supreme Court of Canada was of the view that the text of Section 121 of the Constitution Act 1867 "does not answer the question of how 'admitted free' should be interpreted. That phrase remains ambiguous, and falls to be interpreted on the basis of the historical, legislative and constitutional contexts".(19)

In that context, the Supreme Court of Canada favoured a restrained interpretation of Section 121, stating that:

*"Section 121 does not impose absolute free trade across Canada. We further conclude that s. 121 prohibits governments from levying tariffs or tariff-like measures (measures that in essence and purpose burden the passage of goods across a provincial border); but, s. 121 does not prohibit governments from adopting laws and regulatory schemes directed to other goals that have incidental effects on the passage of goods across provincial borders."*(20)

Accordingly, in order to establish a violation of Section 121, a claimant must demonstrate that:

- the law impedes the interprovincial movement of goods, such as a tariff or – as an extreme example – a total prohibition; and
- the primary purpose of the law is to restrict cross-border trade as opposed to a law that forms a rational part of a broader legislative scheme with a purpose that is unrelated to restricting interprovincial trade.(21)

Section 134(b) of the New Brunswick Liquor Control Act operates like a tariff by impeding interprovincial trade. However, the Supreme Court of Canada determined that its primary purpose was not to restrict cross-border trade. Rather, it was part of a comprehensive regulatory regime "to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick". (22) The impeding of interprovincial trade is simply an incidental effect of the regulatory objective. As a result, the Supreme Court of Canada held that Section 134(b) of the New Brunswick Liquor Control Act did not violate Section 121 of the Constitution Act 1867.

## Comment

The Supreme Court of Canada's decision in *Comeau* has confirmed that Section 121 of the Constitution Act 1867 prohibits laws that "in essence and purpose restrict or limit the free flow of goods across the country". (23) In this regard, laws that create an incidental restriction on trade – but otherwise form a rational connection to a broader regulatory regime that is not targeted at restricting trade – will not contravene Section 121. The decision is controversial, as it sets a particularly low threshold for a province to justify a law that, on its face, clearly restrains trade across provincial boundaries.

Although the Supreme Court of Canada indicated that "a law that in essence and purpose cannot be rendered constitutional under s. 121 solely by inserting it into a broader regulatory regime", it remains to be seen whether one of the unintended consequences of *Comeau* will be the proliferation of barriers to interprovincial trade. (24)

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## Endnotes

- (1) *R v Comeau*, 2018 SCC 15.
- (2) Constitution Act 1867 (UK), 30 and 31 Vict, c 3, reprinted in RSC 1985, App II, 5.
- (3) Liquor Control Act, RSNB 1973, c L-10, s 43(c).
- (4) *Comeau*, *supra* note 1 at para 8.
- (5) Constitution Act 1867, *supra* note 2, s 121.
- (6) Liquor Control Act, *supra* note 3, s 134(b).
- (7) *Gold Seal Ltd v Alberta (Attorney General)*, 62 SCR 424.
- (8) *MacDonald v City of Montreal*, [1986] 1 SCR 460; and Supreme Court Act, RSC 1985, c S-26, s 40 (1).
- (9) *Comeau*, *supra* note 1 at para 26.
- (10) *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101.
- (11) *Ibid* at para 42.
- (12) *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.
- (13) *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519.
- (14) *Comeau*, *supra* note 1 at para 41.
- (15) *Ibid* at para 49.

(16) *Ibid* at para 51.

(17) *Ibid* at para 52; and Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada Inc, 2014) at § 2.6.

(18) *Comeau, supra* note 1 at para 52.

(19) *Ibid* at para 54.

(20) *Ibid* at para 53.

(21) *Ibid* at para 114.

(22) *Ibid* at para 124.

(23) *Ibid* at para 97.

(24) *Ibid* at para 113.

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