

LET THE GOOD TIMES ROLL: COURT ALLOWS THE FREE FLOW OF LIQUOR ACROSS PROVINCIAL BORDERS

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Broad Issues Considered and Resolved in *Gerald Comeau v. The Queen*

Should liquor be allowed to flow freely between the provinces and territories in Canada? The New Brunswick Provincial Court thinks so.

In *Gerald Comeau v. The Queen*,^[1] Mr. Comeau contravened New Brunswick's *Liquor Control Act* by bringing alcoholic beverages into New Brunswick from Quebec for personal use. New Brunswick's *Liquor Control Act* establishes a prohibitive non-tariff barrier to inhibit the in-flow of liquor into New Brunswick. Despite a Supreme Court of Canada precedent to the contrary, the Provincial Court found that such a non-tariff barrier contravenes the constitutional guarantee of allowing goods "to be admitted free" from one province to another under section 121 of the *Constitution Act*, 1867 (the "**Constitution**").

Facts

Mr. Comeau's conduct, which gave rise to the offence, appears, in many respects, to be a straight-forward, benign commercial transaction. On Saturday, October 6, 2012, the New Brunswick resident drove across the border into Quebec "to purchase alcoholic beverages at a cheaper price than that which he would have paid had he purchased the alcohol in New Brunswick."^[2] He purchased numerous cases of different kinds of beer, two bottles of whiskey and a bottle of liqueur. For doing so, Mr. Comeau was charged with an offence under paragraph 134(b) of the New Brunswick *Liquor Control Act*, received a fine, and had all his alcoholic beverages confiscated.

Mr. Comeau was under surveillance by the RCMP once he arrived in Quebec. The police were targeting people who had in excess of five cases of beer in their possession once they crossed the border from Quebec into New Brunswick. It was not an isolated case. Numerous other individuals were similarly charged, and subject to fines and seizure of their alcohol, during the two-day span while this police operation was in place.

Prohibitive Barrier Preventing the In-flow of Liquor is Unconstitutional

The import prohibitions under the *Liquor Control Act* are designed to protect the New Brunswick

government's monopoly over the distribution and sale of alcoholic beverages into, and within, the province.^[3] Mr. Comeau challenged the constitutional validity of the provision under which he was charged on the basis that it contravenes section 121 of the Constitution. Under section 121:

"All Articles of Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

The issue before the New Brunswick Provincial Court was whether this constitutional protection of the free flow of goods between provinces extended beyond duty/tariff barriers to non-tariff/non-duty barriers. In the Supreme Court of Canada's judgment in *Gold Seal Limited v. Dominion Express Company and The Attorney General of the Province of Alberta*^[4] ("**Gold Seal**") issued almost 100 years ago, the Supreme Court held "that section 121 does nothing more than protect the movement of Canadian goods against interprovincial "customs duties" or "charges".^[5] In departing from this normally binding precedent and extending the scope of section 121 of the Constitution, the Provincial Court found an exception to the common law rule of *stare decisis* that requires lower courts to follow the decisions of superior courts.

Relying on this expansive interpretation of section 121, the Court found that paragraph 134(b) of the *Liquor Control Act* contravened this constitutional provision by impeding the free trade of liquor across provincial borders. Mr. Comeau was not guilty of the charge because the law that he violated was unconstitutional and unenforceable.

In *Gold Seal*, The Gold Seal Company, a liquor merchant in Calgary, Alberta carried on an interprovincial business throughout Canada as an importer, an exporter and distributor of all kinds of wines, spirits and malt liquors. Gold Seal tendered to a shipping company packages of intoxicating liquors to be shipped to a person's private dwelling outside of Alberta, but the shipper refused because the inter-provincial transaction would violate the recently enacted *Canada Temperance Amending Act*.

The Supreme Court found that section 121 of the Constitution was limited to prohibiting "the establishment of customs duties affecting inter-provincial trade" and did not extend to prohibiting non-tariff/non-duty barriers. For this reason, Parliament had the constitutional authority to validly enact laws to prohibit the inter-provincial importation of intoxicating liquor into those provinces where its sale for beverage purposes is forbidden by provincial law.

One of the exceptions from being bound under *stare decisis* to a higher court's decision is where there is a change in circumstances or evidence that "fundamentally shifts the parameters of the debate". The threshold for meeting this exception is high. Nevertheless, the New Brunswick Provincial Court found "that there has been a significant change in the evidence" to fundamentally shift the parameters of the debate and meet the criteria for this exception.^[6] Therefore, "with a great deal of trepidation", the Court found that "the *Gold Seal*

case was wrongly decided" and "the narrow and strict interpretation placed upon section 121 in the *Gold Seal* case was unwarranted and unfounded."^[7]

The Court considered the historical context in which the framers of the Constitution were formulating the Constitution during the period from June 1864 to March 1867. In their legislation before entering Confederation, the British North American colonies had legislation explicitly referring to admitting goods between them free of duties. Although section 121 of the Constitution mirrors this colonial legislation in certain important respects, section 121 substitutes "admitted free" for "admitted free from duty". In the Court's view, in light of the looming cancellation of the Reciprocity Treaty with the United States, the penalizing non-tariff barriers to trade imposed by the Americans leading up to the repeal of the Reciprocity Treaty, and the common goal of the Fathers of Confederation to create a comprehensive, harmonious and robust economic union, this change in terminology was deliberate and reflected an intention to eliminate not only tariff/duty barriers, but also non-tariff/non-duty barriers, between provinces.

What are the Implications of the Provincial Court's Decision?

This case is far from resolved. The Crown has appealed the Provincial Court's decision to the New Brunswick Court of Appeal to request the Court of Appeal reverse the dismissal of the charge against Mr. Comeau and find him guilty as charged. The Crown alleges various errors made by the Provincial Court relating to interpreting the scope of section 121 in the Constitution:

- by not following the binding Supreme Court of Canada precedent in *Gold Seal*,
- by concluding that the Supreme Court, in previous precedent cases, did not have the benefit of the historical evidence that the Provincial Court considered,
- by interpreting section 121 without regard to its placement in the category of Revenues, Debts, Assets and Taxation within the Constitution,
- by giving section 121 a meaning that is internally inconsistent and conflicts with sections 91, 92 and 94 of the Constitution, and
- by finding that section 121 was drafted as an absolute free trade provision that must be rigorously so interpreted today.

The Crown also challenges the Provincial Court judge's interpretation of section 134 of the *Liquor Control Act* for, among other reasons, finding that this section imposes a "prohibition from import" contrary to a legal interpretation by the New Brunswick Court of Appeal in another case.^[8] On a related point, the judge should have considered the legal significance of Mr. Comeau's decision not to challenge the constitutionality of section 3 of the federal *Importation of Intoxicating Liquors Act*, which specifically restricts the importation of liquor between provinces.

If the Provincial Court's decision were to be upheld on appeal, then the legal, regulatory and policy framework within which Canada's current economy operates could undergo a seismic shift, particularly in certain sectors. Numerous other restrictive non-tariff/non-duty barriers could be rendered unconstitutional. For example, the supply management (quota) regime in place in the agricultural sector, which restricts interprovincial trade in eggs, dairy products and poultry, would likely contravene section 121 of the *Constitution*.

In *Comeau*, the judge noted the significance of his decision:^[9]

"The interpretation of section 121 sought by the defence amounts to a request to this Court to dismantle a regime that has been in place since the inception of the Constitution in 1867.

...

There can be no question but that in the intervening years since *Gold Seal* has been decided, governments have put in place a multitude of restrictive measures across this country. These include marketing boards, such as for wheat, eggs, milk and poultry, provincial liquor monopolies in all provinces, and a host of existing schemes that interfere with interprovincial trade. ...

The effect on section 92 of the *Constitution Act, 1867* of defining "admitted free" as requiring free trade among provinces without any trade barriers, tariff or non-tariff, whether found in federal or provincial legislation, such as advanced by the defence, would eliminate any scheme that would interfere with the free movement of goods inter-provincially, whether for agricultural products, produce, manufactured goods, liquor or any other product regardless of whether or not such regulated scheme was enacted for the benefit or protection of the residents of the province. It would likely only allow for the regulation by the provinces of matters that would not interfere with inter-provincial movement of these goods. ... How exactly this would play out would no doubt be the subject of much political maneuvering and court interpretations."

Given the enormous national importance of this decision, this case could ultimately be appealed to the Supreme Court of Canada. In our view, it would not be surprising if the Provincial Court's decision was overturned on appeal.

In implementing significant non-tariff/non-duty inter-provincial barriers, the federal and provincial governments have reasonably assumed that these barriers are constitutionally valid under section 121 of the Constitution, relying on the Supreme Court of Canada's precedent in *Gold Seal*. For nearly 100 years, these governments have had no reason to doubt that these barriers were constitutionally permitted under section 121. Given this historical reality, the New Brunswick Court of Appeal and/or the Supreme Court might be reluctant to disregard the Supreme Court precedent in *Gold Seal*. That way, any decisions taken on how, and at what pace, to dismantle internal trade barriers, could be left to the democratically elected politicians who

erected those barriers.

To arrive at its decision, the Provincial Court revisited the historical context in which section 121 of the Constitution was formulated. Ultimately, however, this interpretation of original intention dating back more than 150 years ago may yield to the more recent historical reality validated by the *Gold Seal* decision nearly a century ago (and re-affirmed by the Supreme Court of Canada in subsequent decisions).^[10] If left to stand, this case would fundamentally alter the constitutional underpinnings of federalism, many regulatory regimes within Canada, important markets within Canada and the Canadian economy.

by Jamie Wilks

¹ 2016 NBPC 03, File: 05672010.[ps2id id='1' target='']

² *Ibid*, paragraph 8.[ps2id id='2' target='']

³ Technically, paragraph 134(b) of the *Liquor Control Act* prohibits a person from possessing certain quantities of liquor in New Brunswick that are not purchased from the New Brunswick Liquor Corporation. Section 3 of the federal *Importation of Intoxicating Liquors Act* generally prohibits the importation of liquor from one province into another, unless transferred and sold to the provincial government corporation (or agency, etc.) with the liquor distribution monopoly in the recipient province. This federal legislation protects the liquor control monopolies of the provincial governments across the country.[ps2id id='3' target='']

⁴ [1921] S.C.J. No. 43.[ps2id id='4' target='']

⁵ *Supra*, footnote 1, paragraph 51.[ps2id id='5' target='']

⁶ *Supra*, footnote 1, paragraphs 122 and 125.[ps2id id='6' target='']

⁷ *Supra*, footnote 1, paragraph 189.[ps2id id='7' target='']

⁸ *R. v. Gautreau* [1978] N.B.J. No. 107.[ps2id id='8' target='']

⁹ *Supra*, footnote 1, paragraphs 158, 160 and 161.[ps2id id='9' target='']

¹⁰ *Atlantic Smoke Shops Limited v. Conlon* [1941] S.C.R. 670, aff'd by the Privy Council in [1943] 4 D.L.R. 81; *Murphy v. CPR* [1958] S.C.R. 626; and *Re Agricultural Products Marketing Act* [1978] 2 S.C.R. 1198.[ps2id id='10' target='']

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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