

No Free Beer – *R. v. Comeau* and its Effects on Inter-Provincial Trade

By Paul Chiswell and Robert Martz

Today the Supreme Court of Canada (SCC) released its decision in *R. v. Comeau*, 2018 SCC 15 (*Comeau*), the interprovincial free trade beer case.* The Court expanded the interpretation of section 121 of the *Constitution Act* by finding that s. 121 prohibits laws that in essence and purpose impede the passage of goods across provincial borders. For those who hoped the decision would constitutionally entrench a Canadian economic union or free trade in Canada, the decision is disappointing. For those who were more tempered in their expectations, the decision balances provincial autonomy with tools to strike down, not only interprovincial tariff barriers, but also "tariff-like" laws.

Comeau was initially a case about beer. Mr. Comeau was charged and fined \$240 for bringing a few cases of beer from Quebec to his home province of New Brunswick. Rather than pay the fine, Mr. Comeau challenged it as being unconstitutional. When his case was heard by the New Brunswick Provincial Court, Judge Leblanc, agreed and not only vacated the fine, but effectively struck down part of New Brunswick's liquor monopoly laws as unconstitutional. The case went straight to the SCC.

At the SCC, Mr. Comeau argued that all trade barriers between provinces were unconstitutional. Had the SCC agreed with Mr. Comeau, this would effectively have meant the end of supply management and provincial liquor monopolies. Not surprisingly, the SCC declined to take such radical action, which could have significant effect on federal and provincial legislative schemes dealing with environmental, health, commercial and social objectives. Instead, the SCC revisited its previous decision on section 121 in *Gold Seal Ltd. v. Attorney-General for the Province of Alberta* (1921), 62 S.C.R. 424 (*Gold Seal*), and expanded its reach, potentially reinvigorating a section of the Constitution that had been effectively dead for almost one hundred years.

Section 121 of the *Constitution Act, 1867* provides that: "All 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 the other Provinces." In *Gold Seal*, the SCC interpreted section 121 as only prohibiting tariffs between provinces. In *Comeau*, interveners like the Alberta Small Brewers Association asked the SCC to revisit and update *Gold Seal* arguing that non-tariff barriers could be as or more destructive to trade than tariff barriers. The SCC agreed and expanded the scope of section 121.

The SCC found that:

...s. 121 prohibits laws that in essence and purpose restrict trade across provincial boundaries. Laws that only have the incidental effect of restricting trade across provincial boundaries because they are part of broader schemes not aimed at impeding trade do not offend s. 121 because the purpose of such laws is to support the relevant scheme, not to restrict interprovincial trade.

However, the SCC clarified that laws will infringe section 121 only if a two-part test is met. First, the essence, nature or character of the law must be to restrict or prohibit trade across a provincial barrier, like a tariff. To do so, the law must impose an additional cost on goods as a result of them coming in from outside the province, or outright prohibit goods crossing provincial borders. The SCC found the New Brunswick law in *Comeau* was tariff-like.

Second, the primary purpose of the law must be to restrict or impede trade. This will be a difficult threshold to meet as the SCC appreciated, stating: "commonly... the primary purpose requirement of s. 121 fails because the law's restriction on trade is merely an incidental effect of its role in a scheme with a different purpose. The primary purpose of such a law is not to restrict trade across a provincial boundary, but to achieve the goals of the regulatory scheme." The SCC found the New Brunswick law in *Comeau*'s primary purpose was to enable public supervision of the production, movement, sale, and use of alcohol within the province. However, the SCC did clarify that merely inserting a tariff-like measure in a broader regulatory scheme will not automatically save the law: the law must be connected in a rational way to the scheme's objective.

Going forward, section 121 may be a useful tool for invalidating certain laws and regulations that impede trade. For instance, laws like Quebec's warehousing requirements for out-of-province beer are likely inconsistent with the SCC's interpretation of section 121 in *Comeau*. It is unlikely that today's decision will have much impact on British Columbia's efforts to halt the Trans-Mountain Pipeline as such efforts are already unconstitutional under the division of powers doctrine.

The SCC declined to address certain issues such as whether section 121 applies to goods coming into Canada and then moved around the country or whether it applies to federal laws.

On the whole, those in favour of provincial autonomy and regional diversity should be happy. And advocates for free trade in Canada should be at least somewhat optimistic that section 121 may be used to strike down onerous laws that restrict interprovincial trade.

*BD&P lawyers Robert Martz and Paul Chiswell represented the Alberta Small Brewers Association, an intervenor in *R v Comeau*.