A Spirited Decision: Free Trade Wins in Liquor and Spirit Dispute

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Should Canadians be allowed to purchase liquor in one province and take it with them to another? Would provincial laws restricting this be constitutional?

Lawyers in Canada have been discussing such questions for nearly a century. A recent court ruling from New Brunswick, *R v Comeau,*[1] has started this discussion anew. Commentators speculate this ruling will have significant implications for trade barriers that exist throughout the country, and not just for liquor and spirits.

Facts of the Case

Many Canadians enjoy a can of cold beer, a glass of wine over dinner, or a shot of whiskey with friends. It would appear Mr. Comeau is one such Canadian. When he needed to purchase his favourite brews, he drove from his home in New Brunswick to a liquor store in Québec. The prices were simply better there.

On one particular beer run to Québec, Mr. Comeau purchased 15 cases of beer and 3 bottles of other liquor. After he crossed the New Brunswick border, the RCMP pulled him over. They seized the alcohol Mr. Comeau had purchased and gave him a $292.50 ticket. Unlike New Brunswickers before him, he did not pay the ticket: he chose to fight it.[2]

The Legal Issue: Is Section 134 of the *Liquor Control Act* Unconstitutional?

The RCMP ticketed Mr. Comeau under New Brunswick's *Liquor Control Act*.[3] Unless the Act or its associated regulations dictate otherwise, people within New Brunswick may only possess liquor bought from a New Brunswick liquor store.[4] Beyond a regulated amount, this law effectively prohibits the possession of liquor or spirits purchased outside the province. By limiting the amount of liquor that can be brought into the province, section 134 of the Act functions as a barrier to interprovincial trade.[5]

Mr. Comeau challenged the enactment. Before the Provincial Court of New Brunswick, he argued that the trade barrier violated section 121 of the *Constitution Act, 1867*.[6] This little-known provision of the Constitution requires that "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall … be admitted free into each of the other provinces."[7] To determine if Mr. Comeau's argument was correct, Judge LeBlanc needed to determine the meaning of the words "admitted free."[8]

Decision and Analysis: Section 134 of the Liquor Control Act is Unconstitutional

The Supreme Court of Canada had already considered section 121 of *Constitution Act, 1867*, nearly a century ago, in a prohibition-era decision.[9] In that decision, "admitted free" was

interpreted very narrowly. The court held it to mean only that a provincial government could not subject imported goods to a customs duty: it did not prohibit other barriers to interprovincial trade.[10]

However, the narrow reading of words "admitted free" in section 121 had not been supported by substantial evidence in that, or any other, previous decision.[11] On the other hand, Judge LeBlanc heard a great deal of evidence about both the meaning of these words and why they were included in the *Constitution*. Though in principle similar cases should be decided in the same way, since there had been a 'fundamental shift in the parameters of the debate' Judge LeBlanc decided that it was appropriate to reconsider the constitutional issue. [12]

Among the new evidence before Judge LaBlanc were the words of one of Fathers of Confederation: "I go heartily for the union, because it will throw down the barriers of trade and give us the control of a market of four millions of people."[13] In this sense, Canada's 1867 Constitution was one of the world's first free trade agreements.

Judge LeBlanc interpreted the above statement, and others like it, as indicating that the *Constitution* was intended to secure free trade among the provinces. On that basis, he decided that the words "admitted free" should be read as prohibiting interprovincial trade barriers generally, not merely prohibiting duty. With this in mind, he concluded that section 134(b) of New Brunswick's *Liquor Control Act* was unconstitutional.[14] The charge against Mr. Comeau was dismissed.

Reaction to the Ruling

Only higher-level courts – called superior courts – have the power to invalidate laws.[15] A provincial court such as this one can only dismiss the charge.[16] For this reason, the New Brunswick Public Prosecutions Service intends to continue enforcing the law. [17] Yet new charges may simply be dismissed if other provincial court judges follow Judge Ronald LeBlanc's reasoning. In the hopes of having the decision overturned the Government of New Brunswick has decided to appeal its loss to the New Brunswick Court of Appeal.[18]

Reaction to the ruling from outside the province has been swift. The federal government responded favourably. Minister of Innovation, Science, and Economic Development Navdeep Bains called it "a very positive development."[19] Member of Parliament Dan Albas wanted the federal government to issue a reference question on section 121 to the Supreme Court of Canada.[20] Doing this would avoid the time consuming, and potentially costly, appeal process by bringing the constitutional issue directly to the Supreme Court of Canada.

Conclusion

This ruling has the potential to be very significant. Judge LeBlanc himself recognized this. He stated: "I am certain that interpreting section 121 of the *Constitution Act, 1867* as permitting the free movement of goods among the provinces without barriers … will have a resounding impact."[21]

There remain many interprovincial trade barriers in this country. Indeed, Alberta has a similar provision in its own *Gaming and Liquor Act*. If the reasoning in *Comeau* is adopted in Alberta, this law could also be found to violate section 121 of the *Constitution*. Commentators speculate that if the *Comeau* ruling is widely adopted by the courts it will have an impact on trade all across Canada, not only in wine and other liquor,[22] but also in wheat products,[23] eggs, poultry, milk, and cheese.[24]

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[1] 2016 NBPC 3 .

[2] *Ibid* at paras 5–11.

[3] *Liquor Control Act,* RSNB 1973, c L-10.

[4] *Ibid* at s 134(b).

[5] *Ibid* at para 168.

[6] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

[7] *Ibid* at s 121.

[8] *Comeau*, *supra* note 1 at para 21.

[9] *Gold Seal Ltd.* v Alberta (Attorney General) (1921), 62 SCR 424, 62 DLR 62.

[10] *Ibid* at 466.

[11] *Ibid.*

[12] *Comeau*, *supra* note 1 at 125. See *Carter v Canada*, 2015 SCC 5 at para 44, and para 42 (citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 SCR. 1101 with approval) for an explanation on why and when such a reconsideration is permissible.

[13] P B Waite, ed, The Confederation Debates in the Province of Canada 1865 (Toronto: McClelland and Stewart, 1963); See *Comeau, supra* note 1 at para 92.

[14] *Ibid* at para 193.

[15] John Williamson, "Why New Brunswick is vowing to keep busting anyone importing beer, even after judge said it's legal" *Financial Post* (16 May 2016), online: <business.financialpost.com/fp-comment/why-new-brunswick-is-vowing-to-keep-busting-anyone-importing-beer-even-after-judge-said-its-legal>; see *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at 17, 81 DLR (4th) 121; *R v Keshane*, 2010 ABPC 275 at paras 108–112; *R v Miller*, 2015 ABPC 237 at para 2.

[16] *R v Miller*, 2015 ABPC 237 at para 2; R *v Keshane*, 2010 ABPC 275, at paras 108-112

[17] Jacques Poitras, "N.B.'s Public Prosecutions office says cross-border liquor law still in effect" *CBC News* (6 May 2016), online: <www.cbc.ca/news/canada/new-brunswick/liquor-border-quebec-n-b-comeau-1.3570453> [Poitras, "Law Still in Effect"].

[18] Kevin Bissett, "New Brunswick will appeal 'groundbreaking' court decision that tossed limits on alcohol importing" *National Post* (26 May 2016), online: <news.nationalpost.com/news/canada/new-brunswick-will-appeal-groundbreaking-court-decision-that-tossed-limits-on-alcohol-importing>.

[19] Poitras, "Law Still in Effect" *supra* note 17.

[20] *Ibid.*

[21] *Comeau*, *supra* note 1 at para 191.

[22] Gordon Hamilton, "New Brunswick court decision could help expand market for B.C. wines" (2 May 2016), online: <www.biv.com/article/2016/5/new-brunswick-court-decision-could-expand-market-b/>.

[23] Tom Kott, "Opinion: New Brunswick beer ruling will help open up interprovincial trade" Montreal Gazette (9 May 2016), online: <montrealgazette.com/opinion/columnists/opinion-new-brunswick-beer-ruling-will-help-open-up-interprovincial-trade>.

[24] Marni Soupcoff, "The Comeau decision is a 'big deal' as it could lead to free trade in all of Canada" *National Post* (2 May 2016), online: <news.nationalpost.com/full-comment/marni-soupcoff-the-comeau-decision-is-a-big-deal-as-it-could-lead-to-free-trade-in-all-of-canada>.