“Free the Beer” case falls flat at Supreme Court

On March 19th, 2018, the Supreme Court of Canada released its decision in *R v Comeau*[1]—known popularly as the “Free the Beer” case. (A summary of the facts and issues can be found here.) Though commentators speculated that the case could dramatically reduce trade barriers in Canada, this hope fizzled after the Supreme Court’s decision. Provinces remain free to place some restrictions on liquor and other goods even if they limit the movement of goods between provinces. In this case, the Supreme Court allowed New Brunswick to continue its monopoly over all liquor in the province.

Provincial Court Decision

Comeau originated from a challenge to a ticket issued for bringing too much beer into New Brunswick from a Quebec liquor store. The RCMP stopped Gerard Comeau when he drove into New Brunswick with 354 cans of beer and 3 bottles of liquor—well in excess of the 16 cans he was allowed.

Mr. Comeau challenged this ticket in court. A judge in New Brunswick initially cancelled the ticket. He ruled that since a section of the Constitution—Section 121 *Constitution Act, 1867* states that all goods must “be admitted free” between provinces—that imposing a fine for importing liquor from one province to another was unconstitutional.[2] The judge found that New Brunswick’s *Liquor Control Act* violated section 121 because it prohibited the possession of liquor bought outside of New Brunswick.

The central issue in the case was how to interpret the words “admitted free” in section 121. The prosecution and defence offered competing interpretations. The prosecution claimed that section 121 only prohibited tariffs and duties, and not regulations with other purposes. The defence claimed that section 121 prohibited *all* barriers to interprovincial trade, regardless of the purpose of the barrier. In other words, there should be free trade between the provinces, according to the words in the section. The judge preferred the defence’s interpretation, relying on new historical evidence about what the framers of the Constitution intended.

Supreme Court Decision

The Supreme Court was again asked to interpret the meaning of section 121 and the parties again presented two competing interpretations. The Supreme Court instead chose a third interpretation of its own making. In a unanimous decision, the Supreme Court said that section 121 “prohibits laws that in essence and purpose restrict trade across provincial boundaries.”[3] This means that a law must do two things for the courts to strike it down:

1. It must make it harder, more expensive, or impossible to trade goods

across a provincial border. This can be through surcharges, tariffs, outright prohibitions, and so on.

2. The restriction of trade must be its *primary* That is, limiting trade between provinces must be the main reason a province created the law. This includes goals such as raising revenue through tariffs, protecting local industry by limiting outside products, and punishing other provinces by limiting their exports. On the other hand, if the law restricts trade but has another main goal, such as protecting the health of its citizens, then section 121 will not apply.

In other words, a law must have a restrictive effect *and* a restrictive purpose. This marks a shift from earlier interpretations of section 121. The Supreme Court had earlier interpreted section 121 to prohibit laws that only had the effect of introducing tariffs. The analysis the Supreme Court used focused only on effect and not on purpose.

The Supreme Court then applied this test to the law which resulted in Mr. Comeau's ticket. New Brunswick's *Liquor Control Act* clearly restricted trade, as it created a penalty for having beer from outside the province. But the Supreme Court described the *purpose* of the act as enabling public supervision of the sale and use of alcohol in the province.[4] So, while the act in effect restricts cross-border trade, this is not its primary purpose.

What does this mean?

The *Comeau* decision largely maintains the status quo. Striking down the section of the New Brunswick *Liquor Control Act* would have led to many challenges on all sorts of legislation across Canada, including liquor control legislation in other provinces. Many provinces breathed a sigh of relief. But the decision may still affect the way provinces can regulate trade. Before *Comeau*, it was clear that provinces could not impose tariffs on goods travelling between provinces. For example, Alberta tried to tax out-of-province beer in 2016. An Ontario brewery took them to court and won.[5] After *Comeau*, such taxes may now be acceptable if they are part of a scheme where restricting trade is only a minor purpose. For example, Alberta's current scheme has the effect of restricting out-of-province trade, but has the purpose of protecting and promoting smaller breweries in Alberta. This law might be valid because of an acceptable, non-restrictive purpose.

The *Comeau* decision may have also made section 121 of the Constitution redundant. The analysis the Supreme Court set out now seems identical to the analysis for figuring out whether a law violates the division of powers. Section 91(2) of the *Constitution Act, 1867* already prevents provinces from creating laws for the main purpose of interfering with trade between provinces. But a new case in the works questions this. British Columbia recently launched a lawsuit against Alberta over Alberta's *Preserving Canada's Economic Prosperity Act*, which would allow Alberta to restrict exports of oil products (more information can be found here). British Columbia claims the act is invalid because it violates section 91(2) *and* because it violates section 121.[6] This case may soon decide how much sections 121 and

91(2) overlap.

[1] 2018 SCC 15 .

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

[3] *Comeau*, *supra* note 1 at para 106.

[4] *Ibid* at para 124.

[5] Derek James From, "Steam Whistle granted injunction against Alberta's protectionist beer tax" (16 May 2016), *Calgary Herald*, online: <http://calgaryherald.com/opinion/columnists/steam-whistle-granted-injunction-against-albertas-protectionist-beer-tax>.

[6] *British Columbia (Attorney General) v Alberta (Attorney General)* (22 May 2018), Calgary 1801 – (ABQB) (Statement of Claim) <https://news.gov.bc.ca/files/Statement_of_Claim_Final.pdf>.