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# Protecting Government from Free Trade

## The "Free the Beer" Case at the Supreme Court of Canada

*by Bruce Pardy*

## MAIN CONCLUSIONS

The Canadian Constitution says that Canada is an economic union. Under section 121 of the *Constitution Act, 1867*, goods from one province shall be freely admitted into any other.

The Supreme Court, in its decision in *R. v. Comeau*, declares otherwise. Provincial free trade, it says, cannot be allowed to impede the regulatory actions of provincial governments.

In *R. v. Comeau*, the Court upholds fines imposed upon a resident of New Brunswick for buying beer in Quebec and bringing it into New Brunswick in excess of limits under New Brunswick law. The legislation creates a monopoly for the New Brunswick Liquor Corporation for the sale of alcohol in the province.

Contrary to the words of section 121, the Supreme Court states that provinces are entitled to erect barriers that inhibit the flow of commerce as long as inhibiting trade is not their primary purpose.

The Court concludes that the primary purpose of the New Brunswick legislation is to restrict access to any liquor not sold by the New Brunswick Liquor Corporation, not just liquor from another province. Therefore, it does not offend section 121.

The Court expresses concern that free trade between provinces would undermine the ability of provincial governments to maintain supply management regimes, retail monopolies, and other regulatory programs.

To protect government regulation, the Court places the burden of proof on complainants to show that restricting trade is the primary purpose of any legislation that has the effect of impeding the flow of goods from province to province.

In preferring regulation and protectionist measures over free trade, the Court disregards both the plain meaning and historical intent of section 121 and substitutes its own vision of the proper role of government. It places aside the words of section 121 as incompatible with the functions that the Court believes the state should serve.

## Introduction

The Constitution suggests that Canada is an economic union. Goods from one province shall be freely admitted into any other. The Supreme Court, in its decision in *R. v. Comeau*,[1] declares otherwise. Provincial free trade, it says, cannot be allowed to impede government regulation.

## *R. v. Comeau*: the "Free the Beer" case

On October 6, 2012, Gerard Comeau drove from his home in New Brunswick across the Quebec border to stock up on alcohol. When he drove back into New Brunswick, the RCMP stopped him and found a large quantity of beer and some bottles of spirits in his car. Comeau was charged under section 134(b) of the New Brunswick *Liquor Control Act*[2] and fined $240 plus fees and levies.

Section 134(b) of the *Liquor Control Act* states:

> 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.

The Act creates for the New Brunswick Liquor Corporation a monopoly on the sale of alcohol in the province. In combination with other sections of the Act, section 134(b) sets a limit on the alcohol one may purchase from any Canadian source other than the Corporation. With the support of the Canadian Constitution Foundation, Comeau challenged the constitutionality of the restrictions in the *Liquor Control Act*, in what became known as the "Free the Beer" case. He argued that limits on bringing alcohol into New Brunswick were inconsistent with section 121 of the *Constitution Act, 1867*.

Section 121 states:

> 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.

Section 121 is short and the words are clear: all goods from any province shall be admitted free into any other. However, in its decision in *R. v. Comeau*, the Supreme Court finds that section 121 does not mean that goods must be admitted free from one province to another. Instead it declares that provinces are entitled to erect barriers that inhibit the flow of commerce as long as inhibiting trade is not their primary purpose.

> ... the purpose of s. 121 is to prohibit laws that in essence and purpose restrict or limit the free flow of goods across the country. Second, laws that pose only incidental effects on trade as part of broader regulatory schemes not aimed at impeding trade do not have the purpose of restricting interprovincial trade and hence do not violate s. 121.[3]

The Court concludes that the primary purpose of section 134(b) of the *Liquor Control Act* is to restrict access to any liquor not sold by the New Brunswick Liquor Corporation, not just liquor from another province. Therefore it does not offend section 121.

> The existence of a statutory threshold, as opposed to an absolute prohibition, suggests that

1 2018 SCC 15 [*Comeau*].

2 RSNB 1973, c. L10.

3 Para 97.

> the purpose of s. 134(b) is not to specifically target out-of-province liquor, but to more generally prevent defined quantities of non-Corporation liquor from entering the liquor supply within New Brunswick's borders.[4]

## Free trade within Canada: Section 121 of the Constitution

### *(a) The words of the section*

Section 121 of the *Constitution Act*, 1867 requires free trade between provinces. There are few provisions in the Canadian Constitution stated more clearly. It says that goods from any province shall be (1) admitted (not prohibited or restricted) (2) free (without tariffs or charges) into each of the other provinces.

### *(b) The intent of the drafters*

Historical evidence suggests that section 121 was intended to establish free trade within Canada.[5] In his oft-quoted speech of February 8, 1865, George Brown said that the idea behind Confederation was to "throw down all barriers between the provinces—to make a citizen of one, citizen of the whole".[6] The provincial trial judge in the *Comeau* case, relying upon historical evidence presented at trial, found that the intent of section 121 was to require unrestricted movement of goods between the provinces:

> I conclude that to the Fathers of Confederation, the Union meant free trade, the breaking down of all trade barriers as between the provinces forming part of the proposed Dominion of Canada. The free movement of goods across provincial borders was, in fact, one of the major advantages the Fathers saw in Confederation … the intention of the Fathers of Confederation is most pertinently demonstrated by the historical context during the constitutional moment leading up to the enactment of section 121.[7]

### *(c) The constitutional context*

Section 121 must be intended to mean free trade between the provinces because anything less makes the section redundant. The test adopted by the Supreme Court does exactly that. In order for a law to offend section 121, the Court says a claimant must establish "that the primary purpose of the law is to restrict trade".[8]

Sections 91 through 95 of the *Constitution Act*, 1867 distribute legislative powers between federal and provincial governments. To determine whether legislation is constitutional, courts identify the "pith and substance" of challenged

**4** Para 122.

**5** "Section 121 is about guaranteeing the commitment to free trade that was at the core of the bargain at Confederation …" (Malcolm Lavoie (2017), "*R. v. Comeau* and Section 121 of the *Constitution Act*, 1867: Freeing the Beer and Fortifying the Economic Union", *Dalhousie Law Journal* 40: 189ff., at 218). See also Brian Lee Crowley, Robert Knox and John Robson (2017), Citizen of One, Citizen of the Whole: How Ottawa Can Strengthen Our Nation by Eliminating Provincial Trade Barriers with a Charter of Economic Rights, *True North* 1, 2 (Macdonald-Laurier Institute); John Robson (2018), The Beer Ruling Shows the Supreme Court Doesn't Believe in "Truths", *Financial Post* (April 27), <http://business.financialpost.com/opinion/the-beer-ruling-shows-the-supreme-court-doesnt-believe-in-truths>; Howard Anglin (2018), The "Free the Beer" Case Shows Canada Isn't a True Economic Union, *Macleans Magazine* (April 28), <http://www.macleans.ca/opinion/gerard-comeaus-free-the-beer-case-shows-canada-isnt-a-true-economic-union>.

**6** Crowley, Knox, and Robson (2017), Citizen of One, Citizen of the Whole, at 7, citing Janet Ajzenstat, Paul Romney, Ian Gentles, and William D. Gairdner, eds. (1999), *Canada's Founding Debates* (Stoddard): 135.

**7** *R. v. Comeau*, 2016 NBPC 3, paras 101 and 182.

**8** Para 111.

legislation. Legislation on one subject can have incidental effects on other matters that may be within the jurisdiction of the other level of government. Therefore, it makes sense to figure out whether legislation is really about the first subject or the second. For example, the Criminal Code prohibits theft. Criminal law is within the jurisdiction of the federal government under section 91, but property and civil rights lie within the jurisdiction of the provinces under section 92. Because the pith and substance of prohibiting theft is criminal law and not property law, those sections of the Criminal Code are constitutional. The pith and substance inquiry is necessary because of the inevitability of incidental effects on matters outside a government's jurisdiction.

"Pith and substance" is like "primary purpose". The words "pith and substance" do not appear in the *Comeau* decision, but that is essentially the test the Court adopts to determine whether a government measure breaches section 121. The section is breached if the primary purpose of the impugned measure was to do that which the provision prohibits. As Malcolm Lavoie has pointed out,[9] under section 92 the federal government has jurisdiction over "trade and commerce". Therefore, any provincial law that has as its primary purpose, or "pith and substance", to restrict trade and commerce is already *ultra vires* the province because it is a matter over which the federal government has exclusive jurisdiction.[10]

Therefore, section 121 would serve no purpose if all that it required was that provinces abstain from measures designed to affect interprovincial trade, which they have no power to do in any event.[11] Therefore, contrary to the conclusions of the Supreme Court in *Comeau*, section 121 must prohibit any measures that have the effect of restricting the passage of goods from province to province. The Court prescribes a test under section 121 that makes the provision redundant.

## The Court's test under section 121

Instead of requiring that goods be admitted free into each province as the words of section 121 suggest, the Court says that section 121 prohibits only laws whose primary purpose is to restrict the flow of goods. Laws that have the incidental effect of doing so are not affected:

> … the purpose of s. 121 is to prohibit laws that in essence and purpose restrict or limit the free flow of goods across the country … laws that pose only incidental effects on trade as part of broader regulatory schemes not aimed at impeding trade do not have the purpose of restricting interprovincial trade and hence do not violate s. 121.[12]

**9** Malcolm Lavoie (2018), Supreme Court's "Free-the-Beer" Decision Privileges One Part of the Constitution over Another, *CBC News* (April 19), <http://www.cbc.ca/news/opinion/supreme-court-comeau-1.4627300>.

**10** Whether section 121 applies to federal laws is an open question. In *Comeau*, the Supreme Court suggests in *obiter* that it does: "There is debate about whether s. 121 applies equally to provincial and federal laws. While this Court has in previous decisions proceeded on the basis that federal laws may engage s. 121 … no federal law is properly at issue in the present appeal and so the question need not be resolved here". However, as Malcolm Lavoie points out, the federal heads of power are set out in section 91 "notwithstanding anything in this Act", while no such proviso appears in section 92, which suggests that section 121 limits provincial but not federal powers. See Malcolm Lavoie (2017), *R. v. Comeau* and Section 121 of the *Constitution Act, 1867*, at 216–217.

**11** Andrew Coyne (2018), Supreme Court Beer Ruling Ties the Constitution in Knots, and the Economy with It, *National Post* (April 20), <http://nationalpost.com/opinion/andrew-coyne-supreme-court-beer-decision-ties-the-constitution-in-knots-and-the-economy-with-it>.

**12** Para 97.

The Court places the burden of proof on complainants to show that restricting trade is the primary purpose of the legislation:

> If the law does not in essence restrict the trade of goods across a provincial border, the inquiry is over and s. 121 is not engaged. If it does, the claimant must also establish that the primary purpose of the law is to restrict trade. A law may have more than one purpose. But impeding trade must be its primary purpose to engage s. 121.[13]

"Primary purpose" is an inherently uncertain requirement. The Court suggests that when legislation pursues objectives that could otherwise be accomplished with tariffs, the primary purpose of the law could well be to restrict trade:

> The inquiry is objective, based on the wording of the law, the legislative context in which it was enacted (i.e. if it is one element of a broader regulatory scheme), and all of the law's discernible effects (which can include much more than its trade-impeding effect). If the purpose of the law aligns with purposes traditionally served by tariffs, such as exploiting the passage of goods across a border solely as a way to collect funds, protecting local industry or punishing another province, this may, depending on other factors, support the contention that the primary purpose of the law is to restrict trade.[14]

However, it concludes that the New Brunswick legislation, which restricts competition to protect the provincial monopoly, does not offend section 121 because it prevents residents from purchasing alcohol from any other source inside or outside the province:

> The text and effects of s. 134(b) indicate that its primary purpose is to restrict access to any non-Corporation liquor, not just liquor brought in from another province like Quebec … The existence of a statutory threshold, as opposed to an absolute prohibition, suggests that the purpose of s. 134(b) is not to specifically target out-of-province liquor, but to more generally prevent defined quantities of non-Corporation liquor from entering the liquor supply within New Brunswick's borders.[15]

Along the way, it admonishes the Provincial Trial Court for failing to follow precedent, and then modifies it itself. In 1921, in *Gold Seal v. Attorney-General for the Province of Alberta*,[16] the Supreme Court's first case interpreting section 121, the Court held that a federal statute prohibiting the importation of liquor into any dry province did not offend section 121 because it was not a tariff on goods crossing provincial borders.[17] In *Comeau*, the Court goes out of its way to lecture the trial judge on the sanctity of precedent before taking a different path itself. Leonid Sirota explains:

> … the Court is wrong to claim that its approach to s. 121 is consistent with precedent. However narrowly it construed s. 121, *Gold Seal* at least maintained an outright prohibition on interprovincial tariffs. Following *Comeau*, tariffs are fine—provided that they are rationally connected to some regulatory scheme that can be spun

**13** Para 111.

**14** Para 111.

**15** Para 122.

**16** (1921), 62 SCR 424.

**17** In *Gold Seal*, the Court did not consider that the federal grant of jurisdiction over Trade and Commerce in section 91 was made "notwithstanding anything in this Act", which suggests that section 121 limits provincial but not federal powers. See above, note 10.

> to appear to be directed at a public health and welfare objective. So much for *stare decisis*.[18]

The Court could have chosen a halfway house. It could have said that any provincial measure that restricted the movement of goods across provincial borders was presumptively unconstitutional unless the province established that the effects were incidental to another, primary purpose within its jurisdiction. It could have required the province to prove that the detrimental effect upon the flow of goods was proportional to a regulatory objective, or that there was no practical way to achieve the objective without affecting the flow of goods.[19] These approaches would have diluted the effects of section 121 without abandoning the objective of provincial free trade. Instead, it chose to protect the regulatory state.

## Protecting government from free trade

In *Comeau*, the Supreme Court expresses concern that requiring free trade between provinces would undermine statist programs and schemes.

> If to be "admitted free" is understood as a constitutional guarantee of free trade, the potential reach of s. 121 is vast. Agricultural supply management schemes, public health-driven prohibitions, environmental controls, and innumerable comparable regulatory measures that incidentally impede the passage of goods crossing provincial borders may be invalid.[20]

Provincial liquor monopolies are undermined when residents purchase cheaper alcohol outside the province. Provincial free trade also imperils other kinds of regulatory regimes,[21] the theory goes, because it encourages a race to the bottom. Competing jurisdictions have an incentive for comparatively lax employment, health and environmental regulations so that their industries obtain a cost advantage. Maria Banda suggest that thanks to the Court's decision in *Comeau*,

> ... [government] innovators have a shield to protect their public interest regulations from section 121 challenges. Otherwise, provinces with better standards would risk being dragged down to the lowest common denominator by those with lax or inexistent regulations. Any eventual Canadian free-trade deal should embody *Comeau*'s logic to avoid a race to the bottom.[22]

If domestic free trade and provincial regulatory regimes are truly incompatible, only one can take priority. In *Comeau*, the Supreme Court chooses the latter. It relies on federalism as a rationale for its narrow interpretation of section 121:

> ... to prohibit incidental impacts on cross-border trade would allow s. 121 to trump valid exercises of legislative power ... The federalism principle

**18** Leonid Sirota (2018), Unmaking History: In the "Free the Beer" Case, the Supreme Court Shows—Again—that It Is the Spoiled Child of the Constitution. *Double Aspect* (April 30), <https://doubleaspect.blog/2018/04/20/unmaking-history/>.

**19** Malcolm Lavoie (2017), *R. v. Comeau* and Section 121 of the *Constitution Act, 1867*, at 210–211.

**20** Para 3.

**21** The lowest common denominator argument, of course, applies to any free-trade situation, including international trade. Indeed, the "race to the bottom" risks would seem to be more acute internationally than domestically, since Canadian provinces resemble each other in terms of living standards, governance practices, and cultural expectations.

**22** Maria Banda (2018), Comeau Ruling about More than Beer and the Supreme Court Got It Right, *Toronto Star* (April 23), <https://m.thestar.com/opinion/contributors/2018/04/23/comeau-ruling-about-more-than-beer-and-the-supreme-court-got-it-right.html>.

> militates against such an interpretation—the aim is balance and capacity, not imbalance and constitutional gaps. The federal government and provincial governments should be able to legislate in ways that impose incidental burdens on the passage of goods between provinces, in light of the scheme of the *Constitution Act*, 1867 as a whole, and in particular the division of powers.[23]

Despite what the Court says, unrestricted passage of goods between provinces would not undermine federalism or prevent the exercise of provincial jurisdiction. It would not limit the ability of provinces to legislate under any of their heads of power. They could pass rules about property, contract, and tort liability; they could promulgate health, safety, and environmental standards; they could build infrastructure projects, collect taxes, borrow money, build hospitals, operate courts, and carry out the other functions enumerated in sections 92 through 95. However, constitutional free trade might indeed impede their ability to maintain supply management regimes, economic development programs, and retail monopolies. These kinds of schemes are not explicitly provided for in the Constitution and it is axiomatic that constitutional requirements limit the power of legislatures to do as they deem best. Leonid Sirota explicates the Court's nonsensical reasoning:

> ... the Court contradicts both the constitution and itself. Constitutional hiatuses are not anathema to federalism. They exist: in section 96 of the *Constitution Act*, 1867 (which limits the powers of both Parliament and the legislatures to interfere with the independence and jurisdiction of superior courts); in sections 93(1) and (2) (which limit the provinces' ability to interfere with minority rights in education, without allowing Parliament to do so); and, even on the Court's restrictive reading, in s. 121 itself. And then, of course, there is the giant constitutional hiatus usually known as the *Canadian Charter of Rights and Freedoms*, as well as the smaller but still significant one called section 35 of the *Constitution Act*, 1982. As for the court's disclaimer of authority and desire to impose a particular vision of federalism or the economy, it is simply laughable. The ideas that federalism requires judicially-imposed "balance" rather than the respect of the letter of the constitution, and any conceivable form of economic regulation must be able to be implemented are precisely the sort of preconceptions that the Court pretends to banish from our constitutional law.[24]

The requirement for open provincial borders in section 121 would not diminish federalism but could constrain the reach of the regulatory state, a result that the Court prevents:

> ... a flexible, purposive view of s. 121 ... respects an appropriate balance between federal and provincial powers and allows legislatures room to achieve policy objectives that may have the incidental effect of burdening the passage of goods across provincial boundaries.[25]

To avoid the free-trade requirement contained in section 121, the Supreme Court insists that the provision is ambiguous.

> The introductory words of s. 121 of the *Constitution Act*, 1867 are broad; the phrase "All Articles of Growth, Produce, or Manufacture of

**23** Para 99.

**24** Leonid Sirota (2018), Unmaking History.

**25** Para 89.

> any one of the Provinces" comprehensively covers all articles of trade of Canadian origin … This text on its own 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.[26]

The Court is no stranger to creative interpretations. Over the years, its decisions have reflected an enthusiasm for expansive readings of constitutional provisions, especially those in the *Charter of Rights and Freedoms*. It has found constitutional rights and requirements that do not appear in black and white, including, for example, a constitutional right to strike,[27] a Crown duty to consult Aboriginal groups,[28] and a government obligation to maintain, once established, injection sites for illegal drugs.[29] These features are not found in the text, but are products of the Court's inventiveness. Talented at finding things that are not there, the Court shows in *Comeau* that it is also able and willing to ignore things that are.

The Court denies it:

> … the federalism principle does not impose a particular vision of the economy that courts must apply. It does not allow a court to say "This would be good for the country, therefore we should interpret the Constitution to support it." Instead, it posits a framework premised on jurisdictional balance that helps courts identify the range of economic mechanisms that are constitutionally acceptable. The question for a court is squarely constitutional compliance, not policy desirability.[30]

It does what it condemns.[31] Its decision says, in effect, that regulation would be undermined by national free trade and the Court cannot accept that. Therefore, section 121 cannot be interpreted to require unrestricted passage of goods. The Court says that the "living tree doctrine" is not an open invitation to litigants "to ask a court to constitutionalize a specific policy outcome"[32] but that courts may use the doctrine to interpret Constitutional texts "in a manner that is sensitive to evolving circumstances",[33] which is a distinction without a difference. If the doctrine enables courts to disregard both the plain meaning and historical intent of Constitutional provisions, little remains with which to interpret text besides a court's own preferences. In *Comeau*, the Court again remakes the Constitution and, by extension, the country by rendering section 121 impotent and substituting its own predilections.

The alternative would have been for the Court to have done what it pretended to insist upon. The question for its deliberation should have been "squarely constitutional compliance, not policy desirability". If the Constitution says that goods are to be admitted free into all provinces, that directive was entitled to prevail. The job of the Court was to give that answer even if it would have undermined provincial supply management regimes, liquor monopolies, and myriad other policies.

**26** Para 54.

**27** *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

**28** *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

**29** *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.

**30** Para 83.

**31** John Robson (2018), The Beer Ruling Shows the Supreme Court Doesn't Believe in "Truths".

**32** Para 83.

**33** Para 52.

## Conclusion

In *Comeau*, the Supreme Court rejects the vision of Canada as a free-trade union. It insists instead on the inherent validity of an expansive regulatory state. In preferring regulation and protectionist measures over free trade, the Court disregards both the plain meaning and historical intent of section 121 and substitutes its own vision of the proper role of government. It places aside the words of the Constitution as incompatible with the functions that the Court believes the state should serve.

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