Supreme Court Releases its decision in the "Free the Beer Case"

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A man's quest for cheaper beer has led the Supreme Court to revise the interpretation of s. 121 of the *Constitution Act*. Unfortunately, it will not bring him cheaper beer!

Up until today, s. 121 of the *Constitution Act* was narrowly interpreted to prohibit only the imposition of tariffs on interprovincial trade. The Supreme Court applied a modern interpretation to s. 121 of the *Constitution Act*, that s. 121 prohibits governments from levying tariffs and **tariff-like** measures.

The Supreme Court held that s. 121 prohibits laws that **in essence and purpose** impede the passage of goods across provincial borders, but does not prohibit laws that yield only **incidental effects** on interprovincial trade.

The Supreme Court's decision can be distilled in the following two points:

1. 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.
2. Second, laws that only have the incidental effect of restricting trade across provincial boundaries because they part of broader schemes not aimed at impeding trade do not offend s. 121 if the purpose of such laws is to support the relevant scheme, not to restrict interprovincial trade.

In so doing the Supreme Court rejected Mr. Comeau's broad interpretation that s. 121 is a "free trade" provision that bars any impediment to interprovincial commerce. The Supreme Court rejected Mr. Comeau's submission that the principle of federalism supports full economic integration. Such full economic integration would curtail the freedom of action, and the Court writes, the sovereignty, of governments, especially at the provincial level.

In coming to this conclusion the Supreme Court wanted to ensure that both the federal government and the provincial governments be able to legislate in ways that may impose incidental burdens on the passage of goods between provinces.

The Supreme Court was concerned that an expansive interpretation of s. 121 would impinge on the legislative powers of the federal government and the provincial

government under ss. 91 and 92 of the *Constitution Act, 1867*. The Supreme Court cited the example of the Northwest Territories and Nunavut who have adopted laws governing the consumption of alcohol, which includes controls on liquor coming across the border. The primary objective of the laws is public health. But they have incidental effect of curtailment of cross-border trade in liquor. The Supreme Court held s. 121 cannot be interpreted in a way that renders such laws invalid despite their non-trade related objectives. To do so, would be to misunderstand the import of the federalism principle.

In other words, s. 121 allows schemes that incidentally burden the passage of goods across provincial boundaries, but does not allow them to impose such impediments only because they cross a provincial boundary.

The Supreme Court set out the following **test**. A party alleging that a law violates s. 121 must establish that the law in essence and purpose restricts trade across provincial border:

1. The first question is whether the essence or character of the law is to prohibit trade across a provincial border. If the law does not in essence restrict trade of goods, the inquiry is over.
2. If the law in essence restricts the trade of goods, the claimant must also establish that the primary purpose of the law is to restrict trade. Impeding trade must be its **primary** purpose. This inquiry is objective based on the wording of the legislation and its context.

The Supreme Court added a caveat that s. 121 may operate differently when reviewing a federal law. Therefore the above test applies to provincial legislation.

The Canadian Chamber of Commerce (the "Chamber") and the Canadian Federation of Independent Businesses ("CFIB"), retained Borden Ladner Gervais LLP, to represent them as an intervenor before the Supreme Court of Canada in the matter of *R v Comeau*.

The Chamber and the CFIB argued that the provision guaranteeing "free trade among the Provinces" in the Constitution deserves a modern interpretation which would significantly reduce existing interprovincial trade barriers. In particular, the Chamber and the CFIB pointed to other federations, including the United States, Australia and the European Union, to show how similar free trade provisions have been given a far broader interpretation than the current Canadian interpretation.

In those jurisdictions, the courts consider whether a law has as its essence and purpose to restrict trade. Such laws are found to be unconstitutional. If the law only has an incidental effect on trade, then the courts will conduct a balancing exercise between the salutary effects of the goal of the law that has incidental effects on trade and the deleterious effects of the law on interprovincial trade.

In the United States, for example, the courts determine the constitutionality of rules imposing inter-state trade barriers by determining whether they, in their purpose or in their effects, interfere with free trade. This will catch a wide range of trade barriers, from state regulations that expressly block imports of certain goods from other states, to rules applying equally to all producers but impacting out-of-state producers disproportionately

compared to local producers. Depending on the type of trade barrier involved, the courts will evaluate if the barriers can be justified in relation to the state government's interests.

The Supreme Court has in essence adopted the first parts of that jurisprudence.

The Canadian Chamber of Commerce and the Canadian Federation of Business were represented by Christopher Bredt and Ewa Krajewska.

By

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