Intelligence MEMOS

From: Ian A. Blue

To: Concerned Canadians

Date: May 16, 2018

Re: **THE NEW BRUNSWICK BEER CASE: TEMPERANCE REDUX**

What is most remarkable about the decision in the recent Supreme Court of Canada ruling on interprovincial movement of alcohol is that it allows the long arm of temperance to still govern Canada.

In 1920, the Supreme Court was asked to interpret Section 121 of the Constitution in *Gold Seal Ltd. v. Alberta (Attorney-General)*. (Gold Seal was a wholesale distributor of alcoholic beverages, among other things. Its shipments of alcohol to Calgary from Vancouver were refused by the CPR's express company, on the basis that imports of liquor into Alberta were illegal. Damages claimed were $7,260.)

The Court held that the words "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall … be admitted free into each of the other Provinces" in s. 121 meant only that provinces could not impose customs duties at the provincial border. All other forms of interprovincial trade barriers were permissible. The Court did so to save the otherwise unconstitutional *Canada Temperance Act*. Then as now, courts were supposed to apply the Constitution, not suborn it to achieve such a political objective. *Gold Seal* was a grave injustice to Canadians because it deprived them of their constitutional right to free interprovincial trade.

In the latest case, the Court had an opportunity to redress this historic wrong but, shrank from this duty. Thus, in 2018, an expedient temperance decision from 1920 remains the law.

The Court said that an interpretation of s. 121 that would allow free trade was "radical", that the words "admitted free" were "ambiguous" and that the "evidence" needed to depart from *Gold Seal* had to be of "shifting legislative and social facts", rather than what history demanded and the framers of the Constitution intended. It conjured up "significant" implications should interprovincial free trade be allowed.

The Court's invocation of the "federalism" principle in support of its pro-provincial rights decision is troubling. Despite saying that it could not bend its interpretation of the Constitution just because it would be good for the country, in its federalism analysis the Court did exactly that.

Gérard Comeau did not dispute the federalism principle that both federal and provincial powers must be respected. However, the issue was not a contest between federal and provincial powers but a dispute about the correct interpretation of s. 121. Therefore, the Court's deployment of the federalism principle against a broader interpretation of s. 121 was surprising, to say the least.

As a result, the Court said that interprovincial trade barriers "will not violate s. 121 if they have some other purpose". This is a pointless test. Any interprovincial trade barrier can be disguised as having some other provincial purpose.

In conclusion, the Court's decision is regressive, parochial and hinders Canadians. If only the Court had opened up the interpretation of s. 121 slightly, its decision could have been progressive, cosmopolitan and empowering of Canadians. It would have moved interprovincial free trade in Canada forward. The Court, however, has shut the door for many years to come.

Poor Gérard Comeau; he thought that the Constitution was there to protect him from the provincial government. However, the Supreme Court obviously thought that the Constitution was there to protect provincial governments from the likes of him – persons who believe that the Constitution means what it says.

Ian Blue is senior counsel at Gardiner Roberts LLP and was counsel for Gérard Comeau in the Supreme Court of Canada in R v. Comeau. He wishes to note the contribution of his co-counsel Arnold Schwisberg, Daria Peregoudova and Mikael Bernard.

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