

Appealing to the Supreme Court of Canada from a Refusal of Leave to Appeal by a Provincial Court of Appeal

Alcohol | Liquor Control Act | Litigation | Litigation & Dispute Resolution | New Brunswick | Supreme Court of Canada

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Readers may recall that in *R. v. Comeau, 2016 NBPC 3* in which we are acting for M. Comeau, the New Brunswick provincial court dismissed the charges against M. Comeau under s. 134(1)(b) of the *Liquor Control Act, R.S.N.B. 1973, c. L-10* for having liquor not purchased from the provincial liquor corporation (*Comeau decision*).

The charges were dismissed because s. 134(1)(b) violated s. 121 of the *Constitution Act, 1867*. The court held that s. 121 prohibited all trade barriers between provinces, whether federal or provincial, tariff or non-tariff. The *Comeau decision* changed a Constitutional rule that had stood for ninety-six years. It has profound implications for provincial programs, policies and revenues, including those that the provinces have exempted from the new *Canadian Free Trade Agreement*. It is a decision of major concern to provincial officials.

Section 121 of the *Constitution Act 1867* states that :“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.” In 1920 in *Gold Seal Ltd. v. Alberta (Attorney General) (1921)*, 62 S.C.R. 424, the Supreme Court of Canada (SCC) held that the intention of s. 121 was to prohibit tariff-type trade barriers only. The Gold Seal interpretation was applied in only three other final decisions, *Atlantic Smoke Shops Ltd v Conlon*, [1943] 4 DLR 81 (JCPC), the majority judgment in *Murphy v CPR*, [1958] SCR 626 and in *Re Agricultural Products Marketing Act*. Prior to *R. v. Comeau*, no one had successfully challenged the *Gold Seal* interpretation of s. 121.

Not surprisingly, the New Brunswick crown decided to appeal the *Comeau decision*. Under the *Provincial Offences Procedure Act S.N.B. 1987, c. P-22.1* the Crown had the option of either appealing to the New Brunswick Court of Queen's Bench as of right, or, to the New Brunswick Court of appeal, with leave to appeal, on a question of law. The Crown chose the latter option but on 19 October 2016, following an oral hearing, Larlee, J.A. refused to grant leave to appeal. By then the Crown was out of time to appeal to the Court of Queen's Bench and M. Comeau refused to consent to appealing so out of time.

The Crown, again with M. Comeau's support, then sought an order of the SCC “granting leave to appeal the judgment of the New Brunswick Court of Appeal, dated 19 October 2016, denying leave to appeal the decision of the Provincial Court of New Brunswick, dated 29 April 2016, such that this Court will hear the appeal of the decision of the Provincial Court”

The question is whether the Crown or any appellant can obtain leave from the SCC to appeal the refusal of leave to appeal below. The conventional wisdom probably is “no”, and that the Crown and M. Comeau have little hope of being successful.

In *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police [1981] 1 SCR 92*, in dismissing a motion for leave to appeal from an order of the Ontario Court of Appeal dismissing an appeal from the Ontario Divisional Court, Laskin, C.J. said as follows:

In *Ernewein v. The Minister of Employment and Immigration [1980] 1 S.C.R. 639*, this Court held that it would not entertain an application for leave to appeal from the refusal of an intermediate appellate court to grant leave to appeal to it where such leave was required to bring a case before that court. This principle, in my

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opinion, also applies in respect of any issue on which required leave to appeal is required.

In *R. v. Shea*, [2010] 2 S.C.R. 17, however, the SCC may have re-opened the door to hearing an application for leave to appeal a refusal of leave to appeal below although *Shea* was not such a case. One judge of the Ontario Court of Appeal had dismissed the appellant's motion for leave to extend the time to serve and file a notice of appeal, but a three-judge panel of the same court granted the motion. The Crown sought leave to appeal that granting of leave. Cromwell, J. said as follows:

The relevant jurisdictional provision is s. 40(1) of the Supreme Court Act which currently reads as follows:

40 (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Jurisdiction to grant leave under s. 40(1) extends to any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province in which judgment can be had in the particular case. On its face, this language is broad enough to include the order which is the subject of this leave application, subject of course to the requirement that the question involved in the case be of sufficient importance. This conclusion is reinforced by the expansive definition of "judgment" in s. 2 of the Act.

"Judgement" in s. 2 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 is defined to mean that "when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof, and when used with reference to the Supreme Court, includes any judgment or order of that Court". This definition is sufficiently broad to include a decision of a provincial court of appeal refusing leave to appeal on some issue. The denial of leave to appeal the Comeau decision by Larlee, J.A. , therefore, was a final judgment as contemplated by s. 40 of the *Supreme Court Act* .

The question involved in the appeal of the *Comeau decision* is the correctness of the finding by the trial judge that s. 121 of the *Constitution Act, 1867* guarantees interprovincial free trade. The subsidiary questions are whether provincial powers under s. 92 and the federal powers under s. 91 of the *Constitution Act, 1867* are also subordinate to s. 121, questions that arise directly from the reasoning in the *Comeau decision*.

The combined effect of the *Comeau decision* and of the New Brunswick Court of Appeal denying leave to appeal, provides a viable weapon to any individual with which to challenge any federal or provincial regulatory power that touches upon interprovincial trade. It is beyond question that these issues meet the *Shea* requirement for the SCC to grant leave to appeal a refusal of leave to appeal, that the question involved in the case "be of sufficient importance".

Whether or not to grant leave to appeal the *Comeau decision* directly to the SCC is a highly political question. It would be easy for the SCC to deny leave to appeal and hope that the s. 121 issue goes back to its long repose but that would be leaving the *Comeau decision* and its formidable reasoning in the hands of litigation lawyers and judges with libertarian tendencies. If, however the SCC remains true to its own decision in *Shea*, leave to appeal will be granted and the SCC will provide Canadians with a contemporary interpretation of s. 121.

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