



# THE GR COURT DOCKET

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## COURT HOLDS CANADA A FREE TRADE NATION WITHIN ITS OWN BORDERS: PROVINCIAL TARIFF RULED UNCONSTITUTIONAL

**By Stephen Thiele and Constantine Valettas**

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes two of Canada's largest banks, several medium to large-sized municipalities, agencies, boards and commissions and other government entities, high tech and software companies, real estate developers, lenders and investors.

A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

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Politicians have debated trade and tariffs for centuries. Proponents of capitalism often argue that there should be free trade between countries so as to permit the freer movement of goods and to stimulate job creation, particularly in those nations that are able to manufacture or produce goods in high volume and cheaply.

At the international level, Canada is a supporter of free trade, as evidenced by its participation in the North American Free Trade Agreement. However domestically, Canada has struggled with the concept of the free movement of goods between the provinces and there is often bickering among provincial politicians concerning provincial trade tariffs.

But a recent decision<sup>i</sup> demonstrates that Canada was founded on the concept of free trade between the provinces and that trade barriers between them are therefore unconstitutional.

### **Background to *R. v. Comeau***

In *R. v. Comeau*, a resident of New Brunswick challenged a charge laid under s. 134(b) of the New Brunswick *Liquor Control Act* for illegally possessing a large quantity of alcohol which he had bought in Quebec and transported into New Brunswick. Under s. 134(b), a person is prohibited from attempting

to purchase, directly or indirectly, or from keeping alcohol not purchased from New Brunswick liquor authorities.

### **Legal Arguments<sup>ii</sup>**

The resident contended that the pith and substance of s. 134(b) was a trade barrier, either tariff or non-tariff. This was contrary to s. 121 of the *Constitution Act, 1867* which the resident argued required free trade among provinces, without trade barriers, tariff or non-tariff, regardless of whether the barrier was found in provincial or federal legislation.

In addition, it was contended that a previous decision interpreting s. 121 differently, rendered by the Supreme Court of Canada in 1921 in *Gold Seal Ltd. v. Dominion Express Co.*<sup>iii</sup>, was wrongly decided and of doubtful value based on questionable practices by certain justices of the Court who participated in that case.

In contrast, the Crown argued that the rules of statutory interpretation supported the conclusion that s. 121 of the *Constitution Act, 1867* was intended to disarm only provincial law requiring cross-border tariffs and duties and that the decision made by the Supreme Court of Canada in *Gold Seal* was correct.

### **Judgment of the Court**

The court agreed with the resident and declared s. 134(b) of the New Brunswick *Liquor Control Act* unconstitutional.



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In rendering his decision, Justice LeBlanc considered the wording of s. 121 of the *Constitution Act, 1867*, its legislative history and its historical context. He then examined the relevant case law pertinent to s. 121 and the place of s. 121 within the scheme of Canadian federalism.

Section 121 provides as follows:

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.

The key phrase in the section is “admitted free”.

Applying a “flexible”, liberal or progressive interpretation to s. 121, Justice LeBlanc explained that the phrase “admitted free” was intended to have a broader, and a more comprehensive and robust meaning than the phrase “admitted free of duty” such that a province was mandated to allow a good to enter across its borders.<sup>iv</sup>

Furthermore, there was nothing in the historical context of s. 121 to suggest that the Fathers of Confederation intended to restrict the meaning of the words “admitted free” in any way. Indeed, the Fathers of Confederation wanted to create inter-colonial free trade. This was reflected in contemporary debates at the time.

For example, George-Étienne Cartier argued in favour of Confederation on the grounds that it would ensure free trade between the North American colonies, stating as follows:

It was no use whatsoever that New Brunswick, Nova Scotia and Newfoundland should have their several custom houses against our trade, or that we should have custom houses against the trade of those provinces.<sup>vi</sup>

With respect to the *Gold Seal* case and its progeny, Justice LeBlanc agreed with all of the critical arguments of the resident in connection with the decision. More specifically, the judge noted that there was little interpretation at all of s. 121 in *Gold Seal* and that the Supreme Court of Canada had failed to embark on a large, liberal or progressive interpretation of the *Constitution Act, 1867*.

Nevertheless, Justice LeBlanc felt that he was bound by legal principle to follow the decision in *Gold Seal* unless it could be demonstrated that a new issue was being raised or that there was a significant change in circumstances justifying departure from *Gold Seal*'s binding effect.

Justice LeBlanc found that there had been a significant change in evidence, which permitted him to reassess the *Gold Seal* case. This reassessment included the examination of a letter written by Justice Duff, one of the Supreme Court of Canada justices who sat on the *Gold Seal* case, in which he described that a meeting had taken place between two of the judges and the Minister of Justice at a critical time in the case, and that the three discussed the possible outcome of the case and how the two judges would be ruling. In addition, the letter implied that the two judges, explicitly or implicitly, told the Minister how to change the outcome of the case.<sup>viii</sup>

Although the judge rejected the notion that there had been judicial interference in the *Gold Seal* case based on the letter and that the letter had no relevance to the issue to be decided, he found that the Supreme Court of Canada had reached the wrong decision based on the evidence presented in connection with, among other things, the intent of the drafters of s. 121. Justice LeBlanc stated that the narrow and strict interpretation placed upon s. 121 in the *Gold Seal* case was unwarranted and unfounded.<sup>ix</sup>

The judge then concluded that s. 121 of the



*Constitution Act, 1867* permitted the free movement of goods among the provinces without barriers, tariff or non-tariff, and the charges against the resident were dismissed.

The Crown has appealed.

#### **Impact of the Decision**

The impact of this decision could be wide-ranging for all provinces since their existing trade structures and schemes were established by the rulings of the Courts, including the ruling in the *Gold Seal* case. In essence, the provinces may be required to revisit these structures and schemes or face potential legal challenge.

But as noted by Justice LeBlanc, statutes of constitutional force must be interpreted in accordance with the meaning of their words, considered in context and with a view to the purpose they were intended to serve.

Accordingly, if provincial structures and schemes need to be revisited so as to comply with the Constitution, then so be it.

#### **Legal Representation**

Ian Blue of Gardiner Roberts LLP played a significant role in the development and preparation of the successful legal argument. He was assisted in the legal representation of the New Brunswick resident by Arnold Schwisberg, Mikael Benard and Karen Selick.

*(This newsletter is published for educational purposes only and does not necessarily reflect the views or opinions of Gardiner Roberts LLP. Stephen Thiele is a partner and the firm's director of legal research. Constantine Valettas is a summer intern of the firm and will be attending graduate school, in political science, at Cambridge University in October.)*

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- i. R. v. Comeau, Court File No. 05672010 (Campbellton), N.B. Prov. Ct., LeBlanc J., April 29, 2016
  - ii. Paras 18-20
  - iii. [1921] S.C.J. No. 43
  - iv. Paras. 42, 49 and 63
  - v. Para. 69
  - vi. Para. 97
  - vii. Paras. 115-116
  - viii. Paras. 126-149
  - ix. For a comprehensive review of Justice LeBlanc's findings, see paras. 175-192

