

IN THE SUPREME COURT OF CANADA
(On Appeal from the New Brunswick Court of Appeal)

BETWEEN

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

– and –

GERARD COMEAU

RESPONDENT
(Respondents)

– and –

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ALBERTA SMALL BREWERS ASSOCIATION**

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REPRESENTED BY THE MINISTER OF JUSTICE)**
(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)

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Part I - Overview of Position and Facts

1. The Intervenor Government of Nunavut, as represented by the Minister of Justice, supports the free trade in ordinary commodities between provinces and territories. Intoxicants such as liquor are not ordinary commodities.

2. Section 121 of the *Constitution Act, 1867* should not be interpreted so as to impede the Nunavut Legislature's ability to regulate and manage the importation and sale of intoxicants, including liquor, in Nunavut. This would be inconsistent with the powers delegated to it by Parliament in the *Nunavut Act*, in which Parliament delegated the power to regulate intoxicants to the Legislature.

3. The Intervenor adopts the facts set out in the Appellant's factum.

Part II - Intervenor's Position Respecting the Question in Issue

4. The Intervenor supports the Appellant's position with respect to the interpretation of section 121 of the *Constitution Act, 1867*. The trial judge's interpretation is inconsistent with the established jurisprudence regarding the scope of section 121 of the *Constitution Act, 1867*. If adopted by this Court, the trial judge's interpretation of section 121 would severely restrict legislative measures aimed at promoting public health and safety. This interpretation impedes the Nunavut Legislature's exercise of its jurisdiction under the *Nunavut Act* respecting the definition, importation and sale of intoxicants, including liquor.

5. In the alternative, even if section 121 is broad enough to constrain section 92 legislative jurisdiction as found at trial, it does not apply to the Nunavut Legislature as section 121 applies only to trade between the provinces.

6. Finally, section 121 does not supplant or impede the legitimate exercise of Parliament's jurisdiction to regulate trade and commerce as set out in section 91.

Part III - Statement of Argument

1. Liquor Regulation in Nunavut

7. Alcohol is not an ordinary commodity. It is a potentially dangerous and addictive drug that causes real harm to individuals, their friends and families, and to communities. As a result, alcohol and other intoxicants require a different regulatory regime than other commodities.

8. The consumption, possession, purchase, sale, transportation, and importation of liquor in Nunavut are governed by the *Liquor Act*. The Act and its Regulations create a comprehensive regime for liquor regulation in Nunavut.

9. The level of liquor restriction in each Nunavut community is decided by plebiscite. Three systems are currently in place:

- a. An unrestricted system, where the community is subject only to the general liquor laws of Nunavut;
- b. A committee system, where a locally elected alcohol education committee decides who may consume, possess, purchase, sell, transport, or import liquor in the community; and
- c. A prohibition system, which prohibits the consumption, possession, purchase, sale, transportation, or importation of liquor in the community¹.

10. Unlawful possession and unlawful purchase of liquor are offences punishable on summary conviction. Upon conviction, individuals are liable to a fine between \$500 and \$5000, or 30 days' imprisonment or both².

11. Liquor must be purchased from the Nunavut Liquor Commission, except where authorized by the *Liquor Act*³. Any person who is eligible to purchase liquor at a liquor store in

¹ *Liquor Act*, RSNWT 1988, c L-9 (Nu), s 48

² *Liquor Act*, supra, ss 90-91, 116

³ *Liquor Act*, supra, s 75 (1)

Nunavut may personally import: three litres of spirits, or nine litres of wine, or 26 litres of beer if the liquor was purchased outside of Canada or if the liquor was purchased from a retail outlet, liquor board or commission in a province or in another territory.

12. The *Importation of Intoxicating Liquors Act*⁴ does not apply to the importation, sending, taking, or transportation of intoxicating liquor into Nunavut.

13. The Liquor Commission issues importation permits authorizing the importation, lawful possession, and use of liquor purchased from a retail outlet, liquor board, commission or similar body in a province or another territory, or beer purchased from breweries in another province or another territory. The Commission levies fees for importation permits based on the type and volume of alcoholic beverage⁵.

14. Liquor sales and importation permits are not a major source of income for the Government of Nunavut. In fiscal year 2015-2016, liquor sales represented \$3.8 million of the \$1.86 billion in revenue. The costs of addressing alcohol-related harms far exceed the revenue generated by liquor sales. In 2002, the Government of Nunavut's estimated substance abuse related costs totalled \$62.7 million⁶.

15. In Nunavut, bootleggers charge an average of \$300 for a 1.14 litre bottle of liquor. The economic value of bootlegging exceeds \$10 million each year⁷.

16. For some Nunavut residents, alcohol consumption contributes to poor health, family breakup, poor education outcomes, and crime. Between 1999 and 2007, 23% of accidental deaths and 30% of homicides involved alcohol⁸.

⁴ *Nunavut Act*, ss 23 (p), 26

⁵ *Liquor Act*, supra, ss 15, 75 (2); *Liquor Regulations*, RRNWT 1990, c L-34 (Nu), s 104

⁶ *Main Estimates 2017-2018* (Iqaluit: Government of Nunavut, 2017), at xi and O-VII-3; J. Rehm et al, *The Costs of Substance Abuse in Canada 2002*, (Ottawa: Canadian Centre on Substance Abuse, 2006) at 11

⁷ Nunavut Liquor Act Review Task Force, *A New Approach: Halting the Harm* (Iqaluit: Government of Nunavut, 2012) at 19

⁸ *A New Approach: Halting the Harm*, supra, at 13-14.

17. In its comprehensive review of the *Liquor Act*, the Nunavut Liquor Act Review Task Force acknowledges that the majority of consultation participants want to see laws that provide an appropriate balance between protecting society from alcohol-related harms while allowing individuals the opportunity to drink alcohol responsibly⁹.

18. The World Health Organization states that public health strategies that seek to regulate the commercial or public availability of alcohol through laws, policies, and programs are important ways to reduce the general level of harmful use of alcohol. Government monopolies are an effective means of reducing alcohol consumption levels and their related harms¹⁰.

2. Section 121 should be narrowly construed so as to allow for the valid exercise of legislative jurisdiction

19. The trial judge's interpretation of section 121 of the *Constitution Act, 1867* is inconsistent with previous decisions of this Court respecting the regulation of intoxicating liquor through provincial and territorial legislation. If accepted by this Court, this interpretation would severely restrict the Legislature's ability to regulate the purchase, transportation, and sale of liquor and other intoxicants such as tobacco and cannabis¹¹.

20. This broad interpretation of section 121 as a wholesale prohibition on tariffs and non-tariff barriers between jurisdictions would effectively eviscerate Parliament's power to regulate trade and commerce. A sound interpretation of section 121 must be balanced against Parliament's power to regulate trade and importation, including trade and importation of intoxicants. The two sections must be read together in a harmonious manner that does not

⁹ *A New Approach: Halting the Harm*, supra, at i

¹⁰ *Global Strategy to Reduce the Harmful Use of Alcohol*, (Geneva: World Health Organization, 2010) at 14

¹¹ *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 SCR 581 at paras 54-55; Rob Cunningham, "R v Comeau: Reflections from the Perspective of Health", Case Comment, CanLII Connects (www.canliiconnects.org/en/commentaries/46884).

eclipse Parliament's legislative authority, and its authority to devolve these powers to territorial legislatures¹².

21. In order to respect the principles of cooperative federalism, sections 91, 92, and 121 must be read harmoniously. Parliament and the provincial and territorial legislatures have enacted legislation promoting free trade in commodities and protecting public health and safety. Canada is a single economic unit, but the Legislatures each have an obligation to enact laws respecting intoxicants which are appropriate for their specific populations.

22. Nunavut, along with the other provinces and territories is a signatory to the Canadian Free Trade Agreement. In this agreement, the parties agree to the elimination of barriers to the free movement of persons, goods, services, and investments within Canada and the promotion of equal economic opportunity for Canadians¹³.

23. Each of the signatories to the Canadian Free Trade Agreement has explicitly excluded the purchase and sale of alcoholic beverages from the Agreement's ambit. The Government of Nunavut reserves the right to adopt or maintain any measure limiting market access to alcoholic beverages¹⁴.

24. Constitutionally, the Territories do not have the same status as Provinces; they are established by the Parliament of Canada pursuant to section 4 of the Constitution Act, 1871¹⁵:

The Parliament of Canada may from time to time make provisions for the administration, peace, order, and good government of any territory not for the time being included in any Province.

25. Upon the creation of Nunavut, Parliament vested it with the attributes of responsible government with the plenary executive, legislative and judicial powers that the country's Constitution allowed Parliament to delegate. Parliament stopped just short of the

¹² *Constitution Act*, 1867, 30 & 31 Vict, c 3 (UK), ss 91 (2)

¹³ *Canadian Free Trade Agreement* at 1

¹⁴ *Canadian Free Trade Agreement* at 326

¹⁵ *Constitution Act*, 1871, 34 & 35 Vict, c 28, s 4 (UK)

plenary powers associated with a sovereign responsible government, those powers being limited by the Constitution to the Government of Canada and the provincial governments¹⁶.

26. The legislative powers assigned to the Legislature in the *Nunavut Act* are similar to the provincial heads of power in section 92 of the *Constitution Act, 1867*¹⁷, including laws respecting property and civil rights in Nunavut.

27. Moreover, section 23 (p) of the *Nunavut Act*¹⁸ specifically gives the Nunavut legislature authority to make laws in relation to “intoxicants in Nunavut, including the definition of what constitutes an intoxicant”.

28. Accordingly, the Nunavut Legislature has the authority to make laws in relation to the importation of alcohol to the same or greater extent as any province. Section 121 of the *Constitution Act* has been interpreted narrowly to allow provinces to enact specific regulatory schemes that address their unique circumstances including with respect to the sale and importation of alcohol.

29. Section 121 must be interpreted in a manner that preserves the ability of the Legislature to enact legislation that is reflective of local realities; specifically, the rights of its majority Inuit population to determine the appropriate degree of regulation of intoxicants by means of community-wide plebiscite.

30. The established interpretation of Section 121 respects the rights of Inuit, pursuant to Article 32 of the Nunavut Agreement, to participate in the development of social and cultural policies in Nunavut¹⁹.

¹⁶ *NTI v. Canada (A.G.)*, 2008 NUCJ 11 at para 85; *Fédération Franco-ténoise v. Canada*, 2001 FCA 22 at paras 39-40

¹⁷ *Nunavut Act*, SC 1993, c 28, c 23 (l)

¹⁸ *Nunavut Act*, SC 1993, c 28, c 23 (p)

¹⁹ Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, Art. 32

3. In the alternative, section 121 does not apply to the territories

31. Section 121 of the *Constitution Act, 1867* speaks only to trade in “Articles of the Growth, Produce, or Manufacture” between Provinces. The Term “Provinces” in s.121 should be given the same meaning as “province” in s. 38 (1) of the *Constitution Act, 1982*, where it is clearly intended to exclude the Territories. The contrary is the case where s. 35(1) of the *Interpretation Act* applies, the definition there being inclusive of the Territories²⁰.

32. In the alternative, if this Court adopts the interpretation of section 121 as found at trial, it does not apply to the territories. The regulation of the importation and sale of intoxicants, including liquor in Nunavut, is a valid exercise of federal jurisdiction to establish territorial legislatures with legislative powers similar to, but not identical to that of provincial legislatures²¹.

Part IV - Costs

33. The Government of Nunavut does not seek costs, and requests that no costs be awarded as against it.

Part V - Request for Permission to Present Oral Arguments

34. Pursuant to the Order of Moldaver J. on October 10, 2017, The Government of Nunavut will present oral arguments at the hearing of this matter, not to exceed ten minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF OCTOBER, 2017

"John L. MacLean"

John L. MacLean

"Adrienne E. Silk"

Adrienne E. Silk

Counsel for the Intervenor, the Government of Nunavut as represented by the Minister of Justice

²⁰ *Canadian Egg Marketing Agency v. Richardson* (1995), 129 DLR (4th) 195, [1995] NWTJ No 71 at p 12 (NWT Sup Ct) ; *Interpretation Act*, RSC 1985, c I-21, s 35 (1)

²¹ *Constitution Act, 1871*, s 4; *Nunavut Act*, SC 1993, c 28, ss 13, 23

Part VI - Authorities

Authority	Paragraphs
<i>Air Canada v. Ontario (Liquor Control Board)</i>, [1997] 2 SCR 581	19
<i>Canadian Egg Marketing Agency v. Richardson</i>, (1995), 129 DLR (4th) 195, [1995] NWTJ No. 71 (NWT Sup Ct)	31
<i>Fédération Franco-ténoise v. Canada</i>, 2001 FCA 220	25
<i>NTI v. Canada (AG)</i>, 2008 NUCJ 11	25

Secondary Sources	Paragraphs
<i>Canadian Free Trade Agreement Consolidated Version 2017</i>	22-23
<i>Global Strategy to Reduce the Harmful Use of Alcohol</i>, (Geneva: World Health Organization, 2010)	18
<i>J. Rehm et al, The Costs of Substance Abuse in Canada 2002</i>, (Ottawa: Canadian Centre on Substance Abuse, 2006)	14
<i>Main Estimates 2017-2018</i> (Iqaluit: Government of Nunavut, 2017)	14
<i>Nunavut Liquor Review Task Force, A New Approach: Halting the Harm</i> (Iqaluit: Government of Nunavut, 2012)	15-17
<i>Rob Cunningham, “R v Comeau: Reflections from the Perspective of Health”, Case Comment, CanLII Connects</i>	19

Statute	Paragraphs
<i>An Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada</i>	30
<i>Constitution Act, 1867</i>, 30 & 31 Vict, c 3	2, 4, 19, 20, 26, 31
<i>Constitution Act, 1871</i>, 34 & 35 Vict, c 38	24, 32
<i>Constitution Act, 1982</i>, being Schedule B to the <i>Canada Act (UK)</i>, 1982, c 11	31
<i>Interpretation Act</i>, RSC 1985, c I-21	31

<u>Liquor Act, RSNWT 1988, c L-9</u> as duplicated for Nunavut by s 29 of the <u>Nunavut Act, SC 1993 c 28</u>	8, 10, 11, 12
<u>Liquor Regulations, RRNWT 1990, c L-34</u> as duplicated for Nunavut by s 29 of the <u>Nunavut Act, SC 1993 c 28</u>	12
<u>Nunavut Act, SC 1993, c 28</u>	2, 4, 12, 26, 27, 32