

The 95-year hangover: What *R v Comeau* means for Canadian internal trade

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Introduction

The recent New Brunswick Provincial Court decision of *R v. Comeau*¹ illustrates how one man seeking cheaper beer may create huge uncertainty in the laws governing inter-provincial trade of alcoholic beverages. In this case, Justice Ronald LeBlanc re-opened a constitutional question that had not been asked for 95 years, and in doing so, may have set in motion major changes to the internal trade landscape of Canada. Although *Comeau* does not necessarily have much effect alone, it may act as a catalyst that brings uncertainty in an issue that was thought to have been firmly decided nearly a century ago.

Summary of the case

Gerard Comeau, a New Brunswick resident, purchased 14 cases of beer and three bottles of liquor in Québec and then drove home. Unbeknownst to him, the RCMP had coordinated a crime-reduction initiative and was targeting people carrying more than five cases of beer across provincial borders. They tracked Mr. Comeau on his way into Québec, and radioed their New Brunswick counterparts as he returned to New Brunswick. Mr. Comeau was stopped, investigated, had his alcohol confiscated, and then was given a CA\$292.50 fine.

The charge against Mr. Comeau was that he had violated New Brunswick's *Liquor Control Act*, which stipulates that subject to certain low-volume exceptions, "No person ... shall have or keep liquor not purchased from the [New Brunswick Liquor] Corporation."² He challenged the constitutionality of that provision, arguing that it violated the spirit of free trade between the provinces under section 121 ("Section 121") of the *Constitution Act, 1867* (the *Constitution Act*).³

The thrust of Mr. Comeau's argument was that the Fathers of Confederation had explicitly intended there to be free trade between the provinces, and that the *Liquor Control Act* created a barrier to trade. While not a tariff or tax (previously recognized as a violation of Section 121),⁴ Mr. Comeau argued that restrictions on possessing alcohol not purchased from the New Brunswick Liquor Corporation creates a non-tariff trade barrier, and therefore violates the *Constitution Act*.

The Crown relied on the 1921 Supreme Court of Canada (SCC) decision of *Gold Seal Limited v. Dominion Express Company*,⁵ which held that Section 121 is limited to guaranteeing interprovincial trade that is free of taxes or tariffs. *Gold Seal* suggests that the *Liquor Control Act*, which does not prescribe taxes or tariffs, does not violate the *Constitution Act*.

After discussing the purpose of Section 121, Justice LeBlanc found that the non-tariff barrier to free trade created by the *Liquor Control Act* violates the *Constitution Act*, and was of no force or effect against Mr. Comeau. Justice LeBlanc noted that had the SCC had access to the evidence he had regarding the intentions behind Section 121, *Gold Seal* would have been decided differently.

Reaction

Current reaction to *Comeau* ranges from healthy scepticism to absolute jubilation. Sceptics (particularly from the legal community), argue that a higher court is likely to overturn the decision, particularly given its constitutional implications. For example, some commentators take issue both with Justice LeBlanc's analysis of Section 121 on a textual level, and point out that such an analysis is inconsistent with Canada's system of division of powers, which assigned to the provinces the right to regulate and/or ban certain products to further their priorities.⁶ Additionally, because *Comeau* was decided at the provincial level, the case, even if upheld by the New Brunswick Court of Appeal, represents only persuasive authority for other provinces.

Others are more positive about *Comeau's* potential implications. Some New Brunswick consumers are treating it as a get-out-of-jail-free card, as Québec sales to New Brunswickers have seen a dramatic increase since the decision was released.⁷ Others, including liquor manufacturers, claim that *Comeau* is the first chink in the antiquated liquor law armour that protects province-run liquor monopolies. BC-based wine lawyer Mark Hicken argues that if *Comeau* is granted leave to appeal to the SCC and eventually affirmed, it could, "Be the start of a new era when Canadians from one part of the country will be able to legally purchase wine, or other alcohol, from another part of the country".⁸

Analysis

Comeau has been appealed by the New Brunswick Government. In the interim, the decision means that New Brunswickers can likely purchase alcohol from Québec and carry it home for personal consumption without (for the time being), being charged under the *Liquor Control Act*. Although the New Brunswick Government has stated that the *Liquor Control Act* remains in effect, and the exemption currently only applies to Mr. Comeau, it seems unlikely that other individuals carrying liquor across the provincial border would be charged under the *Liquor Control Act* until *Comeau* is clarified.

However, although it was not considered in *Comeau*, there is another piece of legislation that prohibits this sort of behaviour. Subsection 3(1) of the *Importation of Intoxicating Liquors Act* (IILA) states that,

"Notwithstanding any other Act or law, no person shall import, send, take or transport, or cause to be imported, sent, taken or transported, into any province from or out of any place within or outside Canada any intoxicating liquor, except such as has been purchased by or on behalf of, and that is consigned to Her Majesty or the executive government of, the province into which it is being imported, sent, taken or transported, or any board, commission, officer or other governmental agency that, by the law of the province, is vested with the right of selling intoxicating liquor."⁹

Section 5 details the penalty that results from contravention of any provision of the IILA (a small fine, a larger fine, a term of imprisonment for a first, second and subsequent offence, respectively).

The fact that Mr. Comeau was not charged under the IILA does not prevent another person from being so charged should they engage in similar behaviour, even if *Comeau* is affirmed by the SCC.

However, if the SCC does affirm *Comeau*, it could be argued that the analysis Justice LeBlanc applied to the *Liquor Control Act* in light of Section 121 could be applied by another court if the IILA were to be challenged. A compelling argument could be made that subsection 3(1) of the IILA is unconstitutional to the extent that it erects a non-tariff trade barrier. In that event, liquor purchased legally in one province could be brought to another province, in any quantity.

Such an event, although exciting to some consumers, does not on its own signal the end of provincial monopolies on the sale of liquor. The power to have a monopoly comes not from the pieces of provincial legislation concurrent to the *Liquor Control Act* (which could all be subject to the same constitutional challenge as in *Comeau*) or the IILA, but from section 92(13) of the *Constitution Act*, which gives the provinces the right to regulate property and civil rights.¹⁰ There is significant jurisprudence that affirms the provincial ability to restrict the sale of certain goods or services.¹¹ *Comeau*

being affirmed by the SCC combined with the IILA being declared unconstitutional would allow legally purchased liquor to be taken anywhere in Canada, but it does not prohibit restrictions on sale. The essence of *Comeau* is only that provinces are not allowed to go so far in regulating sale as to restrict the intra-Canadian movement of legally-purchased alcohol.

This is not to suggest that *Comeau* will not impact the inter-provincial liquor trade, particularly when considering the effects of e-commerce. For example, a buyer in BC could purchase liquor from any provincially-sanctioned store in Québec and have it shipped to them. If affirmed, *Comeau* could represent a significant step in altering the liquor trade in Canada leading to freer trade in alcoholic beverages that is currently prohibited either by the IILA or provincial legislation that restricts the importation from another province.

The legal framework around liquor trade is already changing. In 2012, Bill C-311 introduced an amendment to the IILA that allowed individuals to move wine from one province to another, so long as it was purchased for personal consumption. The Federal Government has vowed to pursue an internal trade agreement that would affect a number of regulated goods (including liquor). A recently released Senate report calls for the elimination of several barriers to interprovincial trade (including those affecting alcohol)¹² – barriers that cost the country an estimated CA\$14 billion annually according to a report from the Canadian Federation of Independent Business.¹³ The result in *Comeau* thus seems to be part of a wider movement towards a more liberalized internal trade environment.

While *Comeau* did not begin the conversation, it is potentially an important step in getting the SCC to provide some clarity on the matter. The Senate's report on interprovincial trade barriers recommended that the meaning of Section 121 be referred to the SCC for clarification, and the Conservative Party of Canada has recommended that *Comeau* be referred along with it.

It is possible that Justice LeBlanc's analysis in *Comeau* could eventually apply to all goods in Canada. If the purpose of section 121 is to create completely unrestricted interprovincial trade, one could expect to see the restrictions on dairy, eggs, and poultry challenged. Taken to its fullest extent, the ruling in *Comeau* could lead to a significant shakeup of the commercial landscape of Canada. In the meantime, however, it may be wise to temper some of the enthusiasm – at least until the New Brunswick Court of Appeal releases its decision.

This article was co-authored by Eric Freilich, a student in Dentons' Toronto office.

References

¹ *R v Comeau*, 2016 CanLII 23747 (NB PC) (*Comeau*).

² *Liquor Control Act*, RSNB 1973, c L-10, s 134 (b).

³ *Constitution Act*, 1867, 30 & 31 Victoria, c 3 (U.K.).

⁴ *Atlantic Smoke Shops Limited v Conlon*, 1941 SCR 670, 4 DLR 81.

⁵ *Gold Seal Limited v Dominion Express Company*, [1921] 62 SCR 424, 62 DLR 62 (Gold Seal).

⁶ Gillman, Gary. *Garry Gillman: The Comeau Case is Not Quite a Game Changer*. National Post. 2 June, 2016.

⁷ The Canadian Press. *New Brunswick Court Ruling Boosts Beer Sales in Québec*. Business News Network. 2 May, 2016.

⁸ Hicken, Mark. *NB Case Strikes Down Interprov Liquor Restrictions*. 29 April, 2016.

⁹ *Importation of Intoxicating Liquors Act*, RSC 1985, c I-3, s3 (1).

¹⁰ *Constitution Act*, supra note 3 at s. 92(13).

¹¹ See, for example, *Parsons v Citizens' Insurance Co. of Canada*, 1881 CarswellOnt 253, AC 406.

¹² Curry, Bill. *Provincial Trade Barriers Costing Economy Billions: Report*. The Globe and Mail. 14 June, 2016.

¹³ Wingrove, Josh. *Joe Canadian Spurns Archaic Trade Laws With 15 Cases of Beer*. Bloomberg. 16 May, 2016.

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