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A new era for interprovincial shipment of liquor?

A constitutional analysis of the proposed amendment of the federal *Importation of Intoxicating Liquors Act*

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The recently released Federal Budget implementation act, Bill C-97, contains a key nugget for the Canadian liquor industry: an amendment to the Importation of Intoxicating Liquors Act (IILA) that removes the requirement of selling or consigning liquor to a provincial liquor authority in order to ship it across provincial borders. The liquor industry is beginning to hear rumblings about the importance of these amendments. The wine industry, in particular, is clamouring for a legal environment that permits wineries to ship directly to both consumers and commercial wholesale buyers, like restaurants, given the severe restrictions placed on most Canadian wineries' access to out-of-province Canadian markets. However, there is a significant risk that the importance of these amendments is being—and will be—misunderstood. The 2019 Federal Budget states as follows on page 119:

> *"Removing federal barriers to the interprovincial trade of alcohol: To facilitate internal trade, the Government intends to remove the federal requirement that alcohol moving from one province to another be sold or consigned to a provincial liquor authority. Provinces and territories would continue to be able to regulate the sale and distribution of alcohol within their boundaries."*

Bill C-97 has proposed specific amendments to the IILA. The original statute states:

> 3 (1) 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.**
>
> (Emphasis added.)

We must also consider the famous "personal import" exception to this provision in s. 3(2)(h) of the IILA:

> *(h) The importation of wine, beer or spirits from a province by an individual, if the individual brings the wine, beer or spirits or causes them to be brought into another province,* **in quantities and as permitted by the laws of the other province***, for his or her personal consumption, and not for resale or other commercial use.*
>
> (Emphasis added.)

The proposed amendments delete the personal use exemption in its entirety and redraft the s. 3(1) general prohibition as follows:

> 3(1) Despite any other Act or law, other than the Foreign Missions and International Organizations Act, a person is not permitted to import, or cause to be imported, into a province from a place outside Canada any intoxicating liquor unless the intoxicating liquor has been purchased by or on behalf of, and is consigned to, Her Majesty or the executive government of a province, or any board, commission, officer or other governmental agency of the province that, by the law of that province, is authorized to sell intoxicating liquor.

This new provision means that the IILA does not apply to liquor shipped internally within Canada, whether or not it is manufactured domestically and whether or not it is for personal use. In other words, the federal government has removed all federal restrictions on interprovincial shipment of liquor, full stop. The IILA is now only concerned with importation of liquor from outside Canada into any province within Canada.

Before anyone pops open the champagne, it is important to understand this announcement in the context of Supreme Court of Canada (SCC) jurisprudence on provincial authority to regulate liquor. First, in *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, the SCC affirmed that provinces have the jurisdiction to enact schemes to manage the supply of and demand for liquor within their borders. Second, in *R. v. Comeau*, 2018 SCC 15, the SCC upheld the section of the *New Brunswick Liquor Act* that prohibits anyone in the province from having or keeping liquor not purchased from the provincial liquor monopoly corporation and stated:

> *"The Liquor Control Act sets out diverse and extensive rules and prohibitions aimed at controlling access to liquor in New Brunswick. A companion statute, the New Brunswick Liquor Corporation Act, S.N.B. 1974, c. N-6.1 (now R.S.N.B. 2016, c. 105), establishes the province's public liquor supply management monopoly. Together, these statutes set out a comprehensive and technical scheme to ensure that the liquor trade within the province is monitored. Section 3 of the federal Importation of Intoxicating Liquors Act, R.S.C. 1985, c. I-3, endorses provinces' capacity to enact such schemes.*
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> *The objective of the New Brunswick scheme is not to restrict trade across a provincial boundary, but to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick. …*
>
> *We conclude that the primary purpose of s. 134(b) is to prohibit holding excessive quantities of liquor from supplies not managed by the province. New Brunswick's ability to exercise oversight over liquor supplies in the province would be undermined if non-Corporation liquor could flow freely across borders and out of the garages of bootleggers and home brewers. The prohibition imposed in s. 134(b) addresses both. While one effect of s. 134(b) is to impede interprovincial trade, this effect is only incidental in light of the objective of the provincial scheme in general. Therefore, while s. 134(b) in essence impedes cross-border trade, this is not its primary purpose."*

These SCC decisions mean that even if the federal government removes the federal requirement to sell or consign liquor to a provincial liquor board in order to ship it across provincial borders, the provinces still have the independent jurisdiction to enact laws that control the supply of liquor within the province. In short, the province cannot directly prevent interprovincial shipments of liquor, but they can still prohibit the having or keeping of liquor not purchased through the provincial supply system. As such, the federal amendments are not a complete answer to the direct shipping dilemma plaguing most Canadian wineries and breweries.

More importantly, an amendment to the federal law will change the context in which provincial laws, regulations and policies will be assessed under the *Comeau* test for s. 121 of the *Constitution Act, 1867*.

Section 121 states: *"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 *Comeau*, the SCC expanded the meaning of s. 121 to protect against laws that have the primary purpose of restricting interprovincial trade. The analysis of whether a law does so is contextual. It is helpful to cite the full legal test from *Comeau*:

"[111] If the law does not in essence restrict the trade of goods across a provincial border, the inquiry is over and s. 121 is not engaged. If it does, the claimant must also establish that the primary purpose of the law is to restrict trade. A law may have more than one purpose. But impeding trade must be its primary purpose to engage s. 121. The inquiry is objective, based on the wording of the law, the legislative context in which it was enacted (i.e., if it is one element of a broader regulatory scheme), and all of the law's discernable effects (which can include much more than its trade-impeding effect). If the purpose of the law aligns with purposes traditionally served by tariffs, such as exploiting the passage of goods across a border solely as a way to collect funds, protecting local industry or punishing another province, this may, depending on other factors, support the contention that the primary purpose of the law is to restrict trade: see, e.g., Murphy, at pp. 638-39, per Rand J.; Reference re Agricultural Products Marketing Act, at p. 1268, per Laskin C.J.; D. Hill, ed., National Trade and Tariff Service (loose-leaf), at §1.3; Black's Law Dictionary (9th ed. 2009), at pp. 1593-94.

[112] Stand-alone laws that have the effect of restricting trade across provincial boundaries will not violate s. 121 if their primary purpose is not to impede trade, but some other purpose. Thus a law that prohibits liquor crossing a provincial boundary for the primary purpose of protecting the health and welfare of the people in the province would not violate s. 121. More commonly, however, the primary purpose requirement of s. 121 fails because the law's restriction on trade is merely an incidental effect of its role in a scheme with a different purpose. The primary purpose of such a law is not to restrict trade across a provincial boundary, but to achieve the goals of the regulatory scheme.

[113] However, a law that in essence and purpose impedes cross-border trade cannot be rendered constitutional under s. 121 solely by inserting it into a broader regulatory scheme. If the primary purpose of the broader scheme is to impede trade, or if the impugned law is not connected in a rational way to the scheme's objective, the law will violate s. 121. A rational connection between the impugned measure and the broader objective of the regulatory scheme exists where, as a matter of reason or logic, the former can be said to serve the latter: see, e.g., RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para. 153, per McLachlin J. (as she then was), and at para. 184, per Iacobucci J. The scheme may be purely provincial, or a mixed federal-provincial scheme: Gold Seal; see also Reference re Agricultural Products Marketing Act.

[114] In summary, two things are required for s. 121 to be violated. The law must impact the interprovincial movement of goods like a tariff, which, in the extreme, could be an outright prohibition. And, restriction of cross-border trade must be the primary purpose of the law, thereby excluding laws enacted for other purposes, such as laws that form rational parts of broader legislative schemes with purposes unrelated to impeding interprovincial trade."

Given the above language, we know that liquor laws, regulations and policies that are solely designed to collect funds, protect local industries or punish other provinces, will face significant scrutiny by courts. Moreover, in upholding the New Brunswick law, the SCC cited and relied on the existence of the IILA as a federal legislation enabling of provincial supply management. If you remove the IILA provisions that dovetail with provincial liquor supply management, and add to that provincial regulations or policies that explicitly target out-of-province liquor shipments into the province (some of which already exist), you have the beginnings of a meritorious constitutional challenge.

It is almost certain that the more general provisions, such as the New Brunswick law challenged in *Comeau*, will remain constitutional despite the amendments to the IILA. As such, the provincial laws that require liquor within a province to be purchased from the local liquor corporation, without more, will remain on the books. These laws alone could prevent fully open direct shipping of liquor to the consumer.

However, regulations and policies that either favour local industries, such as subsidies to local industry (see the recent Steamwhistle case out of Alberta), or privileges granted to local industry that are not granted to out of province industries, or that are designed to target and frustrate interprovincial shipments from legitimately licensed liquor manufacturers will be open to challenge. If the federal backstop in s. 3(1) of the IILA is removed in its entirety from applying to liquor shipped between provinces, it becomes more challenging for provincial liquor boards to maintain policies that frustrate interprovincial shipments. Arguably, these could include listing policies with the provincial wholesale monopolies that, in effect, prevent interprovincial wine from accessing the province. Therefore, while the master provisions that enable provincial liquor monopolies to exist will remain constitutional, the federal amendments should spur the industry to consider whether they could mount a challenge to barriers at the regulation and policy level rather than the statutory level. While courts will never force a government retailer to stock a particular product on its retail shelves, it is likely that courts would be willing to pay close attention to decisions, policies, and procedures of provincial liquor wholesale monopolies that prevent or frustrate extraprovincial Canadian liquor from being listed and sold within the province. If provinces provide alternative sales channels within the province to government liquor retail monopolies that out-of-province wineries cannot reasonably access (many of which do), this is an opening for out-of-province Canadian manufacturers and liquor agents to demand fair access to that province's market.

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CSBrand-15922-A-new-era-for-interprovincial-shipment-of-liquor Insight-06 — 10/04/2019