The 2016 *Comeau* Decision in New Brunswick: Implications For Internal Free Trade in Canada Including Viz. Beverage Alcohol*

A recent decision of the New Brunswick Provincial Court with regard to the retail liquor and beer market, *Her Majesty The Queen v. Gérard Comeau*, has received much attention. A number of news editorials and op-ed columns welcomed the court's finding.

The court held that a resident of New Brunswick had the right to purchase alcohol for his own use in Quebec and bring it to New Brunswick, irrespective of the limit placed on such purchase by New Brunswick law.

By way of preface to this article, it should be said the writer favours freer access to alcohol in Ontario, in the sense particularly of product choice. Nonetheless from a legal standpoint, we believe the decision in *Comeau* is problematic on numerous grounds. The issues are complex and might see a different fate in the hands of an appellate court, whether in *Comeau* itself if appealed or a different case. In this sense, it strikes us that the reception given the case in the news media has been insufficiently critical, and unrealistic.

Gérard Comeau, a 62-year old retiree and New Brunswick resident, was accused of contravening Section 134(b) of the *Liquor Control Act* (New Brunswick) (the "Act"). He had bought in Quebec and brought back to New Brunswick in his vehicle 354 bottles or cans of beer and three bottles of liquor. This quantity was in excess of the amount permitted by the Act, which is 12 pints of beer or one bottle of liquor. New Brunswick police had tolerated personal importation of up to four cases of beer despite that the Act set a lower limit, but Mr. Comeau had exceeded that.

Pricing differs in each province due to differing tax rates and liquor control board mark-ups. Also, some products are available in some provinces that you cannot buy in another due to different purchasing policies and other factors. This situation attends any retail environment but is more acute where, as in most provinces and territories, a Crown corporation decides what beverage alcohol, or what wine and spirits, in some cases, will be listed for sale.

Canadians have been bringing liquor across provincial lines for personal use for a long time. Generally the practice is not lawful, subject to the personal use exemptions currently provided in most provinces and territories. This situation, as well as the phenomenon of Crown control of the liquor trade in most provinces, is a legacy of the alcohol prohibition (temperance) era, and specifically of the federal *Importation of Intoxicating Liquors Act* (Canada) (the "federal Act"), passed between the two world wars.

(When discussing the right of an individual to bring alcohol from one province to another, this article pre-supposes that the person brings it in himself: the area of wine and other alcohol shipment by a producer or another on his behalf to a customer in another province is a separate area, beyond the scope of these remarks).

Salient provisions of the Act are as follows:

"133. Except as provided by this Act or the regulations, no person shall have liquor in his possession within the Province.

134. Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall

(*a*) attempt to purchase, or directly or indirectly or upon any pretence, or upon any device, purchase liquor, nor

(*b*) have or keep liquor,

not purchased from the Corporation.

43. A person who is not prohibited by law from having or consuming liquor may have and consume in a residence or in a roomette, duplex roomette, compartment, bedroom or drawing room occupied by him in a train, but not in a public place except when authorized under a permit,

(*a*) any liquor that has lawfully been acquired by him under this Act from the Corporation,

(*b*) liquor not in excess of one bottle or beer not in excess of twelve pints purchased outside Canada by him or by the person from whom he received it as a *bona fide* gift, or

(*c*) liquor not in excess of one bottle or beer not in excess of twelve pints purchased outside New Brunswick from a liquor commission, board or similar body in any province or territory of Canada by such person or by a person from whom he received it as a *bona fide* gift."

Section 3 of the federal Act reads in part as follows:

"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.

…

(2**)** The provisions of subsection (1) do not apply to

…

(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".

Mr. Comeau was charged with violating Section 134(b) of the Act and if found guilty was liable to a fine of almost $300. He chose to contest the constitutionality of Section 134(b) on the ground that it violated Section 121 of the *Constitution Act, 1867,* which reads as follows:

"Section 121. 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".

Relying on expert testimony, the defense made a spirited and sophisticated challenge to Section 134(b). It argued that Section 121 had a wider ambit than previous cases had decided and therefore, Section

134(b) should be set aside as being in conflict with Section 121. The defense argued that "admitted free" in Section 121 means what it says and reflected the intention of the Fathers of Confederation that Canada have an internal trade which was free, not just of provincial customs rates, but also indirect trade barriers such as laws limiting purchases from other provinces.

The prosecution, for its part, relied on a number of Supreme Court of Canada cases to argue a restricted interpretation for Section 121. The prosecution also introduced expert testimony, arguing that Canadian constitutional law is partly composed of conventions, or rules observed for a long time by the provinces and federal Parliament albeit not expressly stated in the written Constitution. The prosecution urged that a reasonable balance between Section 92 of the *Constitution Act*, *1867*, which grants numerous legislative powers to the provinces, and Section 121 which envisages free inter-provincial trade, required a limited application of Section 121. Also, the prosecution pointed out that Section 121 was followed by two sections which specifically referenced customs duties and excise matters, and was in a part of the Constitution which dealt with money and financial matters generally, which suggested it was intended to deal with like matters. These are the two sections:

"122**.** The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.

123**.** Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation".

Mr. Justice Ronald LeBlanc of the New Brunswick Provincial Court delivered a carefully reasoned decision running almost 90 pages. He found that despite the fact that numerous Supreme Court decisions, one going back to the 1920s, had confined Section 121 to dealing with the imposition of custom duties on goods at a provincial boundary, Section 12 had a broader scope than that. He held it prohibited both direct trade barriers, such as customs duties, and indirect trade barriers, which can take a variety of forms. Since Section 134(b) required, subject only to a small exemption which Mr. Comeau had not observed, that liquor in the province must be obtained from the New Brunswick Liquor Corporation, Section 134(b) was an indirect trade barrier and therefore inconsistent with Section 121's free movement rule. Section 134(b), which helped keep the local liquor trade in the hands of the province and the tax revenues derived from it, was, in a word, unconstitutional.

The *Constitution Act*, *1867* was formerly called the *British North America Act* (*"*BNA Act*"*). The court looked extensively at the political background to the enactment of the BNA Act. It looked at the legislative history of Section 121, and analyzed an earlier draft of the section. That version was similar to the final one but its requirement of free entry was limited to articles entering "ports". The court held that the omission of this word in the final draft showed an intention that Section 121 have a broad scope to implement the free trade agenda which the court found was a prime object of Confederation. The court also looked at certain pre-Confederation statutes of Canada's founding provinces (Ontario, Quebec, Nova Scotia and New Brunswick) and found these had sought to promote free trade amongst them, which suggested Section 121 should be read in a similar light. The court took extensive guidance from expert testimony led by the defense with regard to all this background. It considered especially that the termination by the U.S. of the *Reciprocity Treaty* with Canada after the Civil War had imperilled

trading prospects for the British North America colonies, which impelled them to create such free trade amongst themselves, to counter-balance the loss.

The court quoted speeches from Alexander Galt and others which showed in its view that the Fathers of Confederation wanted a broad free trade in goods and services. The court held that a purposive and liberal interpretation of Section 121 required that the section be read to prevent the provinces (and Canada itself) from legislating both direct and indirect barriers to interprovincial trade.

In arriving at this conclusion, the court declined to follow numerous decisions of the Supreme Court of Canada which supported the prosecution's argument. Showing not a little independence of mind, in our view, the court held that those cases were wrongly decided. Generally, lower courts are bound by decisions of higher courts, not least of the Supreme Court of Canada. The court in *Comeau*, applying one of the exceptions to this rule, decided that because key evidence on the history and purport of Section 121 was not before the courts in the earlier cases, their consideration of Section 121 was incomplete and their findings could be revised. In particular, the court declined to follow the well-known 1921 case of *Gold Seal Ltd. v. Attorney General of Alberta*, 62 S.C.R. 424. *Gold Seal* had decided that alcohol prohibition could be instituted in Alberta pursuant (ultimately) to federal temperance legislation because the scheme did not entail placing duties on alcohol entering or leaving the province. The movement of alcohol simply had been prohibited across provincial lines, and Section 121 had no impact on that.

The court in *Comeau* acknowledged that the scheme of the *Constitution Act, 1867* includes a division of legislative authority between the federal and provincial legislatures. The court referred to certain notable powers the provinces have under Section 92 in this regard covering, for example, property and direct taxation in the province, companies with local objects, and local matters generally. The court nonetheless regarded Section 121 as primary in relation to the issue before it. It appeared to favour the view that Provincial legislative authority over property in the province, say, could only cover matters subsidiary to interprovincial trade. One thinks, for example, of Quebec's language labelling legislation and consumer protection legislation in general in that regard. Still, many examples of business regulation would, in our view, would raise difficult questions of classification.

In the result, the court in *Comeau* agreed with most of the case presented by the defense, although not quite all of it. For example, it did not agree that a fine for violating Section 134(b) amounted to a tariff. Rather, it held that Section 134(b) itself – the inability to bring liquor from Quebec into New Brunswick beyond the small amount New Brunswick allowed - was contrary to Section 121.

The judge decided as well that even though the scheme of New Brunswick's *Liquor Control Act* clearly derived from the federal Act, the court could set aside Section 134(b) without declaring the federal Act, or part of it, unconstitutional. The court declined to address the constitutionality of the federal Act since the federal government had not been notified of the intention to challenge the law as required by New Brunswick's practice laws, and had not been made a party to the litigation.

The court's decision viz. Section 134(b) of the *Liquor Control Act* (New Brunswick) clearly nonetheless has opened a large question whether the federal Act, or part of it, is unconstitutional. No doubt this will be a matter for a future court case or *Comeau* itself if the province appeals the decision.

In recent years, the federal Act has been amended to permit the provinces to set limits on the amount of liquor that individuals can bring over provincial boundaries. Ontario's current limits within the

amendments provide that a person of legal drinking age can bring into Ontario from another province or territory up to nine litres of wine, 24.6 litres of beer, and 3 litres of spirits. These rules are set out in a policy adopted by a resolution of the board of directors of the Liquor Control Board of Ontario.

These rules, as all provincial rules of this type, raise practical issues of enforcement. Nonetheless, and subject to the *Comeau* decision for New Brunswick and any appeals, or new cases, they are on the books for now.

The issues addressed in *Comeau* are complex. The decision may put into question the legality of many things taken for granted in the Canadian economy and polity such as marketing boards, provincial labour and services certification rules, and government procurement policies. There is, too, an ongoing process to promote free trade in Canada, the *Agreement on Internal Trade*…

The ensemble of these rules and policies appears to reflect a broad, long-term consensus in Canada and may be a convention of our Constitution as argued by the prosecution in *Comeau*. To be sure parts of these policies do not please many. That alone cannot argue for a wholesale change given, first, that no policy pleases everyone all the time, and second, important liquor control policies reflect a clear political process. An example is the recent modification to Ontario's beer retailing system, an initiative of the current Liberal government, the peoples' evident choice in the last election.

A wide interpretation of Section 121 seems to throw provincial legislative authority under Section 92 of the Constitution into a cocked hat. The idea that provinces would retain a subsidiary or ancillary right to legislate in regard to incoming goods seems apt to raise many difficult questions.

The *Comeau* case, too, may not give sufficient weight to the term "admitted" in Section 121. This term arguably suggests a formal act of verifying entry of goods at a customs house or post, whether at a port, as an earlier draft of Section 121 provided, or at a land crossing. In a look at some debates in Canada's House of Commons in the later 1800s, there are frequent discussions whether goods and produce imported to Canada from the U.S., or sent to the latter from Canada, should carry duty. The members frequently used the term "admitted free" to mean "free of duty". This is evident not just from the tenor of the discussions but also their reference to a "free list", which was defined in a contemporary commercial dictionary to mean, "List of articles admitted to a country free of duty". "Free" seems to have been simply a short way to say "free of duty". (Why not include the fuller term in Section 121 for certainty? I suggest why further below). It may well be that this kind of knowledge was considered trite in commercial matters in the early 1920s. At the very least, this question, in my view, requires an in-depth examination in any appeal of *Comeau* or in future cases on Section 121.

While the doctrines of liberal construction and "living tree" are certainly applicable to constitutional interpretation as confirmed in *Comeau,* the Victorian legal and commercial meanings of "admitted" and "free" are relevant in my view to a proper understanding of Section 121. The economic background to Confederation is important, but so is this other area particularly as it concerns the actual wording of Section 121.

The absence of the term "duties" in Section 121 - the use of "free" in an unqualified sense – may not in fact suggest the impropriety of indirect trade barriers. "Duties" arguably was omitted to capture the idea that charges differently characterised but related to admitting goods at a boundary should be included in the scope of Section 121, for example, harbour charges or demurrage or other administrative costs. If "duties" had been included but these others left out, arguably Section 121 didn't

cover these other boundary-related charges. The alternative was to include a list of boundary charges of various kinds in the BNA Act, which, i) could not have been exhaustive, and ii) may have been seen as inappropriate for the BNA Act – a statute to be sure but of a constitutional nature.

As well, the application of *Comeau* may well be restricted to transportation into a province for personal use. The whole commercial aspect of provincial liquor regulation, which is the main part of it, may lie outside the scope of the case. It is this aspect that reflects the important policy issues behind liquor control including minimizing alcohol's abuse.

Further, it is not clear to me that growth, produce, and manufacture in Section 121 cover, say, a bottle of Russian vodka. Such liquor wasn't grown in the province, it wasn't produced in the province, it wasn't manufactured there. Niagara peaches grow, Sudbury ore is produced, and Canadian Club whisky is manufactured, in each case in Ontario. Russian vodka? Not so much – arguably. It is this kind of difficulty that suggests to me a "boundary" interpretation of Section 121 in fact may be precisely what the draftsman of the BNA Act - an experienced British commercial lawyer – had in mind.

Gold Seal and the Supreme Court cases which applied its reasoning had the merit of giving a clear meaning to Section 121. The result may have been, as the court in *Comeau* stated, that the section "had nowhere to go", but that doesn't mean the result was inappropriate or that *Gold Seal* was wrong.

I should add there is a real question in my view whether services are comprised within the meaning of articles in Section 121. Traditionally, the two terms had separate, well-understood meanings, in Canada's competition laws, for example.

From a revenue standpoint, even if *Comeau* has the effect ultimately of dismantling New Brunswick liquor control, this doesn't necessarily mean the province would lose the related tax revenue. If a law provided that anyone can bring to Ontario, say, any amount of liquor for personal use from another province but Ontario's applicable taxes and other charges must be paid beyond a certain exempted amount, that may well be lawful, since there is no discrimination between liquor bought in Ontario and liquor bought elsewhere. Individuals could be required to complete a schedule on the point in their annual tax return, for example.

At date of writing it is not clear whether New Brunswick will appeal *Comeau*. It may decide to let the result stand until the Section 121 question reaches a higher court in a more broad-based case. Or indeed New Brunswick might appeal the case. Another possibility is that the federal government could "refer" an issue directly to the Supreme Court of Canada, for a ruling that is on a defined question(s) dealing with Section 121. We think this unlikely however, given the difficulty of phrasing the questions meaningfully, so diverse are the implications flowing from a rejection of *Gold Seal*.

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