

Intelligence MEMOS



From: Robert Mysicka
To: Provincial Premiers
Date: March 16, 2017
Re: **CHALLENGE TO LIQUOR IMPORT RESTRICTIONS MAY SET “FREE TRADE”
PRECEDENT IN CONSTITUTIONAL LAW**

Liquor control laws across Canada could be shaken up by a successful constitutional challenge in New Brunswick which the province is now seeking to appeal at the Supreme Court of Canada.

The case *R. v. Comeau* involves a resident of New Brunswick, who like many people that live close to Quebec, routinely purchased beer and liquor from Quebec retailers that sell alcohol at a lower price relative to their counterparts in New Brunswick. Mr. Comeau was charged under New Brunswick’s *Liquor Control Act* (LCA) with possessing alcohol not purchased from the New Brunswick Liquor Corporation. That entity has the exclusive right to market and sell beer and alcoholic beverages to residents in the province.

Mr. Comeau constitutionally challenged the provisions of the LCA banning possession of alcohol purchased outside of the provincial monopoly. He based his challenge on section 121 of Canada’s *Constitution Act 1867* which provides that “[a]ll 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”. Mr. Comeau argued that “admitted free” should be interpreted to mean mandating free trade between the provinces and that the LCA violates this mandate.

The Defence presented a detailed history on the *Constitution Act* and the intentions of the founding fathers of Canada. The presiding judge, Justice LeBlanc found that the LCA constitutes a trade barrier which violates section 121 of the *Constitution Act, 1867* and is therefore of no force or effect against Mr. Comeau.

The case is stirring reactions in the legal community because it challenges a nearly century-old precedent set by the Supreme Court of Canada (*Gold Seal Ltd. v. Alberta (AG)*, (1921) 62 S.C.R. 424). According to Justice LeBlanc, the old reading of section 121 constitutes “a long-standing misinterpretation” of the original intent of the clause. In the Court’s view, the historical context of the Constitution Act “leads to only one conclusion: the Fathers of Confederation wanted to implement free trade as between the provinces of the newly formed Canada. They specifically rejected an American-style of government and adopted continuity with the British system of government at a time when free trade was actively implemented in Britain.”

The ruling is significant because it opens the door to future challenges of provincial regulations. If affirmed by the Supreme Court, it is possible that provincial restrictions on alcohol, dairy, eggs, and poultry could be open to challenge. Some of these existing restrictions were reviewed in our C.D. Howe Institute study, [Beer Butter and Barristers](#), where we critiqued the plethora of provincial regimes that appear to contradict the spirit of competition laws but have persisted through judicial sanction. Applied on a national scale, the ruling in *Comeau* could substantially reform economic regulation in Canada. Indeed, as Justice LeBlanc predicts, “I am certain that interpreting section 121 of the Constitution Act, 1867, as permitting the free movement of goods among the provinces, without barriers, tariff or non-tariff will have a resounding impact”. All Canadians would benefit from *Comeau* ushering in a new era of inter-provincial free trade.

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