

Bulletin on Chamber of Commerce and Canadian Federation of Independent Business Intervention in the *R v Comeau* matter before the Supreme Court of Canada

A man's desire to purchase cheaper beer may drastically change the law governing interprovincial trade in Canada.

The Canadian Chamber of Commerce (the "Chamber") and the Canadian Federation of Independent Businesses ("CFIB"), have retained Borden Ladner Gervais LLP, to represent them as an intervenor before the Supreme Court of Canada in the matter of *R v Comeau*.

G rard Comeau will be asking the Supreme Court of Canada to revisit a precedent from 1921 that narrowly interpreted a free trade provision in the Canadian constitution.

On October 6, 2012, Mr. Comeau — a resident of New Brunswick — travelled to Quebec and purchased 15 cases of beer and three bottles of liquor for his personal consumption. As he was driving back to New Brunswick, the RCMP stopped his car, seized his alcohol, and ticketed him. The *Liquor Control Act* of New Brunswick prohibits individuals from purchasing and transporting more than twelve pints of beer from another province into New Brunswick.

Mr. Comeau challenged the ticket and the prohibitions under the *Liquor Control Act*. At trial before the New Brunswick Provincial Court, Mr. Comeau argued that the provisions of the New Brunswick's *Liquor Control Act*, are contrary to section 121 of the *Constitution Act, 1867*, which provides:

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.

The New Brunswick Provincial Court agreed with Mr. Comeau and cast doubt on *Gold Seal*, a decision of the Supreme Court from 1921, that had narrowly interpreted s. 121 of the *Constitution Act, 1867* as only prohibiting provinces from imposing tariffs and duties on interprovincial trade. Mr. Comeau convinced the New Brunswick Provincial Court that the intention of the framers at the time of Confederation was to foster free trade among the provinces and so erecting trade barriers under the guise of regulation was contrary to both the purpose and the spirit of the section.

The case is now before the Supreme Court of Canada. The Chamber and the CFIB have been given permission by the Court to present their position on this issue at the hearing in Ottawa on December 6 and 7, 2017.

The Chamber and the CFIB will argue that the provision guaranteeing “free trade among the Provinces” in the Constitution deserves a modern interpretation which would significantly reduce existing interprovincial trade barriers. In particular, the Chamber and the CFIB will point to other federations, including the United States, Australia and the European Union, to show how similar free trade provisions have been given a far broader interpretation than the current Canadian interpretation.

In the United States, for example, the courts determine the constitutionality of rules imposing inter-state trade barriers by determining whether they, in their purpose or in their effects, interfere with free trade. This will catch a wide range of trade barriers, from state regulations that expressly block imports of certain goods from other states, to rules applying equally to all producers but impacting out-of-state producers disproportionately compared to local producers. Depending on the type of trade barrier involved, the courts will evaluate if the barriers can be justified in relation to the state government’s interests.

When the Supreme Court reassesses its 1921 interpretation of “free trade among the Provinces”, we hope that our arguments regarding the best practices from other jurisdictions will guide the Supreme Court to develop a modern test for considering limits on inter-provincial free trade. In particular, the Supreme Court should draw from the common principles in the jurisprudence from other jurisdictions such as whether the restriction on trade is direct or indirect and the use of the principle of proportionality to determine whether a trade restriction is justifiable. If these tests are accepted, it will significantly reduce the scope for interprovincial trade barriers.

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