

# Intelligence MEMOS



From: Robert Mysicka  
To: Canadians Mourning the Supreme Court's Beer Decision  
Date: May 4, 2018  
Re: **NEW BRUNSWICK RULING WAS UNFORTUNATE, BUT INEVITABLE**

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The recent Supreme Court ruling on Gérard Comeau's now famous purchase of beer in Quebec for consumption in New Brunswick was both unsurprising and disappointing.

From a lawyer's standpoint, I can understand the court's reasoning. Firstly, the case was probably doomed from the start because the trial-level judge based his decision on the 'expert' evidence of a historian rather than deferring to precedent, which opens the decision to attack at the appellate level. I don't disparage historians, I think they do great work and this particular witness obviously made a compelling impression on the trial judge. But evidence matters more to trial-level jurists who typically see and hear more about facts than about precedents, whereas our appeal courts tend to be chained to the ivory tower of legal precedent.

That said, I'm surprised Mr. Comeau's lawyers were able to find a judge who was willing to consider and weigh a historical account and overrule legal precedent on the basis of such evidence. Most trial-level judges would dismiss such an approach out of hand, so the case is valuable if only to clarify an interpretation of section 121 of the *Constitution Act*, which the Supreme Court duly delivered.

On the technical legal points the problem was, of course, the precedent that already interpreted Section 121 in a way that did not impugn provincial laws where the laws had the effect of restricting trade – so long as their purpose was not simply trade restriction as such. The Supreme Court has not hesitated to protect provincial sovereignty in various produce and beer/alcohol cases such as those dealing with the interface between competition laws and [provincial regulation schemes](#). So legally speaking there is probably not much that can be done even though, factually, there exists a good case to dispute the laws and how they interact. The following summary from the SCC is a good snapshot of the approach taken by the Court in these types of federalism cases and may offer a glimpse of how it might resolve future federal-provincial tensions (such as the ongoing Kinder Morgan pipeline dispute).

[T]he federalism principle does not impose a particular vision of the economy that courts must apply. It does not allow a court to say "This would be good for the country, therefore we should interpret the Constitution to support it." Instead, it posits a framework premised on jurisdictional balance that helps courts identify the range of economic mechanisms that are constitutionally acceptable. The question for a court is squarely constitutional compliance, not policy desirability.

So the lesson from the legal perspective is – don't try to make economic policy through the courts, judges won't help you.

From the standpoint of good policy the ruling has some serious lapses in logic.

The SCC found that although the New Brunswick provincial laws function in essence like tariffs, their purpose was not to restrict trade but to enable "public supervision of the production, movement sale and use of alcohol in New Brunswick." This is where the analysis becomes suspect. If New Brunswick wanted to restrict the black market or health effects it could legislate with greater precision to achieve this purpose. Unfortunately, a doctrine of permissible 'incidental effects' is a slippery slope.

To put it simply, if you wanted to legislate to prevent dog bites and you decided to achieve this by banning all dogs, that could be fairly said to be overbroad. The same goes for liquor or beer. Banning possession of liquor not purchased from the provincial corporation is as overbroad as you can get.

In any event, if the SCC blew everything up that would throw a huge wrench into constitutional jurisprudence (notice all the agricultural marketing boards who stepped up to intervene on behalf of the New Brunswick government in the case.)

So, the lesson to take from this? If you want to get solutions vote for the electoral candidates with the determination and wherewithal to make the changes, don't rely on the courts.

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