

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK)

BETWEEN:

**HER MAJESTY THE QUEEN**

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(Applicant)

-and-

**GERARD COMEAU**

**RESPONDENT**  
(Respondent)

-and-

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## PART I – OVERVIEW AND FACTS

### OVERVIEW

1. Cannabis Culture supports the interpretation of s. 121 of his Honour Judge LeBlanc that s. 121 permits the free movement of items of growth, produce or manufacture (goods) among the provinces unrestrained by tariff and non-tariff trade barriers.

2. Small craft cannabis producers and distributors, including cannabis dispensaries such as the intervenor and the others it represents, are likely to be disproportionately affected by interprovincial trade barriers. Provincial laws that prohibit cannabis consumers from purchasing cannabis and bringing it across provincial boundaries will harm the developing licit industry and frustrate the goal of eliminating the black market. Provincial cannabis trade barriers, including provincial monopolies on retail sales, are unnecessary to accomplish legitimate provincial purposes yet have discriminatory impacts on other provinces, will slow the development of the licit cannabis industry and will unreasonably restrict opportunities for Canadians seeking economic prosperity in the burgeoning market.

3. Cannabis is expected to be legalized for recreational purposes in Canada on or before July 1, 2018. The *Cannabis Act*<sup>1</sup> as well as its various provincial counterparts will set the framework for the growth of the licit recreational cannabis industry across Canada. Further, through a form of cooperative Federalism, the Act will empower each Province and Territory to enact its own internal rules regarding the distribution and sale of cannabis and cannabis derivative products. The *Cannabis Act* retains severe criminal penalties associated with the production, distribution, and possession of cannabis and, in particular, draws a stark distinction between cannabis produced pursuant to the *Cannabis Act* and sold via Provincially licensed retailers (which is deemed to be “licit” cannabis and not subject to criminal sanction) and that which is produced outside of the *Cannabis Act* and/or sold outside of Provincial regulatory structures (which it deems “illicit” cannabis and is subject to criminal sanction).

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<sup>1</sup> Bill C-45, *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*.

4. The *Cannabis Act* will maintain a distinction between cannabis for medical and recreational purposes. Cannabis produced for medical purposes is currently regulated by the *Access to Cannabis for Medical Purposes*<sup>2</sup> regulation (“ACMPR”) promulgated pursuant to the *Controlled Drugs and Substances Act*. The ACMPR allows for personal production of cannabis and two types of production for sale; that by a “designated producer” (who must be an individual and is restricted to supplying a maximum of two patients) and that by a “Licensed Producer” (which can be entity and has no restrictions on patient numbers). There are no geographic restrictions on either designated producers or Licensed Producers; both can and do sell medical cannabis across provincial boundaries and Licensed Producers are restricted to distribution only via mail or courier.

5. In addition to the lawful cannabis industry, a large and vibrant unlawful industry exists and is the principal source of the vast majority of recreational and medical cannabis consumed by Canadians. Dispensaries such as the intervenor Cannabis Culture provide cannabis to recreational consumers. Other dispensaries, including many represented by the intervenor for purposes of this matter, confine their clientele only to those consuming cannabis for medical purposes. Medical dispensaries have arisen largely in response to the lack of reasonable access to medical cannabis provided by the federal government’s regulatory regimes. These access deficiencies have resulted in various judicial decisions including this Court’s decisions in *R v Smith*<sup>3</sup>, and the Federal Court’s decisions in *Allard v Canada*<sup>4</sup> and *Sftekopoulos v Canada*<sup>5</sup> and the decision of the Ontario Court of Appeal in *Hitzig v Canada*<sup>6</sup>. Dispensaries were described as being at “the heart of access” to medical cannabis in *Allard*, a national test case in which the regulatory predecessor to the ACMPR was declared invalid.<sup>7</sup>

6. Licensed Producers are situated in geographically diverse locations (though 5 Provinces and Territories have no licensed producers). Dispensaries exist in every province and territory in Canada. All Licensed Producers and many dispensaries are currently engaged in mail order sales

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<sup>2</sup> SOR/2016-230 [ACMPR].

<sup>3</sup> *R v Smith*, 2015 SCC 34, [2015] 2 SCR 602.

<sup>4</sup> *Allard v Canada* [2016] 3 FCR 303, 2016 FC 236 (CanLII) [*Allard*].

<sup>5</sup> *Sftekopoulos v Canada*, 2008 FC 33 (CanLII), [2008] 3 FCR 399, 78 Admin LR (4th) 171.

<sup>6</sup> *Hitzig v Canada*, 2003 CanLII 30796 (ONCA), 177 CCC (3d) 449.

<sup>7</sup> *Allard*, *supra* note 4 at para 162.

to customers throughout Canada. Interprovincial trade barriers could prevent the continuation of those sales and, for those consumers living in Provinces or Territories that enact restrictive retail regulations, could frustrate access entirely. Canadians will be unable to access certain products produced according to a Federal regulatory scheme in certain provinces and territories due to those provinces' regulatory models, in violation of section 121 of the Constitution.

7. Cannabis dispensaries fear, with good reason given the proposed legislation in several Provinces, detailed below, that cannabis trade restrictions will come into force which will limit Canadian industry in a manner that runs contrary to a purposive reading of section 121 of the *Constitution Act*. In addition, the existing illicit industry will likely continue to thrive if Provincial restrictions are overly onerous, thereby preventing dispensaries such as the intervenor from transitioning to the licit marketplace. This, too, runs contrary to the purpose of section 121.

8. The Canadian cannabis industry requires a national common market in order to be compliant with section 121 of the *Constitution Act, 1867*.<sup>8</sup> This is supported within the argument for a national common market for wine, beer, and spirits seen in the factum of Mr. Comeau as well as numerous interveners, and Cannabis Culture adopts those arguments.

### ***Proposed Provincial Cannabis Regulations***

9. Various Provinces have released their proposals for provincial cannabis regulation regarding distribution and retail. It is of some use to set out how these systems will operate when they commence on or before July 1, 2018. Some will utilize government-owned storefront retail and online distribution. Others will utilize a mixture of both models, and others will utilize entirely private models. The provincial regulations over the sale of cannabis will function in a similar manner to the *Liquor Control Act* at issue in *Comeau*.

### ***Ontario's proposed Cannabis Act, 2017 and Ontario Cannabis Retail Corporation Act, 2017***<sup>9</sup>

10. Ontario proposes to institute a monopoly over the distribution and sale of recreational cannabis in the province. This is to be accomplished through Bill 174 which grants the Ontario Cannabis Retail Corporation (OCRC) the exclusive right to sell cannabis in Ontario, with

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<sup>8</sup> 30 & 31 Vict, c 3, (UK), reprinted in RSC 1985, App II, No 5 [the Constitution].

<sup>9</sup> Bill 174 establishes the *Cannabis Act, 2017*, and the *Ontario Cannabis Retail Corporation Act, 2017*.

exceptions for (a) medical cannabis; (b) sales to the OCRC in accordance with applicable federal law; or (c) by such persons or in such circumstances as may be prescribed. Ultimately, the Liquor Control Board of Ontario (LCBO) is the governing mind behind the OCRC, and it will in effect control all non-medical cannabis sales in Ontario.

***Quebec's proposed Bill 157, Loi constituant la société Québécoise du cannabis, edictant la loi encadrant le cannabis et modifiant diverses dispositions en matière de sécurité routière***

11. Quebec proposes to institute a similar monopoly over the distribution and sale of recreational cannabis in the province. This is to be accomplished through Bill 157 which grants a provincially-owned corporation the exclusive right to distribute cannabis in Quebec, the Société Québécoise du Cannabis (SQC).

***New Brunswick Liquor will control the distribution and sale of cannabis in New Brunswick***

12. New Brunswick intends to implement a government-owned cannabis distribution and retail system which is similar to Ontario and Quebec; however, there is an important distinction: New Brunswick has signed exclusive supply contracts with federally licensed producers Organigram (based in New Brunswick) and Canopy Growth Corporation (based in Ontario).

***Alberta and Manitoba propose public-private models in their regulations***

13. Manitoba will utilize the Liquor and Gaming Authority (LGA) to regulate the purchase, storage, distribution and retail of cannabis. Manitoba Liquor and Lotteries (MBLL) will control all purchase of cannabis which will be sourced from federally licensed producers. All retail will be privately operated and owned.

14. Alberta proposes in Bill 26, *An Act to Control and Regulate Cannabis*<sup>10</sup> pursuant to which the provincial government will operate online retail sales while privately owned and operated stores will handle storefront sales. The Alberta Gaming and Liquor Commission (AGLC) will oversee compliance with the provincial regulations and will manage the

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<sup>10</sup> 2017 Bill 26, Third Session, 29<sup>th</sup> Legislature, 66 Elizabeth II, The Legislative Assembly of Alberta, *An Act to Control and Regulate Cannabis*, First Reading November 16, 2017 (passed).

distribution of cannabis. The AGLC will carry out the online sales and will license privately owned and operated cannabis stores with strong oversight and provincewide rules.

**The decision below should be upheld**

15. The question raised in this appeal is: What is the correct interpretation of section 121 of the *Constitution Act, 1867*?<sup>11</sup> Nearly one hundred years ago this Court ruled that section 121 only prohibits “customs duties” or “tariff barriers” to interprovincial trade.<sup>12</sup> In *Comeau*, Judge LeBlanc departed from this precedent and found that section 121 prohibits both tariff and non-tariff barriers to interprovincial trade. Based on this interpretation, he concluded that section 134(b) of New Brunswick’s *Liquor Control Act*<sup>13</sup> violated section 121 of the Constitution and was therefore unconstitutional.

16. Cannabis Culture submits that the *Gold Seal* precedent can and should be overturned based on new historical evidence and the new and rapidly evolving social and legislative matrix that has developed since 1921, when *Gold Seal* was decided, and which is ongoing at the time of this hearing because of the pending legalization of recreational cannabis in Canada. This Court should reconsider its previous interpretation of section 121.

**PART II – STATEMENT OF ISSUES**

17. Section 121 of the *Constitution Act, 1867* requires that the movement of items of growth, produce or manufacture (goods) among the provinces be unrestrained by tariff and non-tariff trade barriers alike.<sup>14</sup> The situation in *Comeau* clearly violates this principle. Cannabis Culture supports the rules for applying this principle set out in paragraphs 100 and 101 of the Respondent’s Factum.

18. A reconsideration of the ruling in *Gold Seal* will provide much needed clarity for the burgeoning cannabis industry on both a federal and provincial level because the cooperative federalist framework for the coming legislation requires that provincial boundaries dominate the terms of the incoming laws. Provincial liquor monopolies have thus far taken the lion’s share of

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<sup>11</sup> The Constitution, *supra* note 8 at s 121.

<sup>12</sup> *Gold Seal Ltd v Dominion Express Co*, [1921] 3 WWR 710 [*Gold Seal*].

<sup>13</sup> *Liquor Control Act*, RSNB 1973, c L-10 s 134(b) [LCA].



supervisory control over the forthcoming legal cannabis industry in a manner that will have significant discriminatory effect on trade in other provinces and that may well impair the purposes of the *Cannabis Act* generally.

19. Section 134 of the *Liquor Control Act*<sup>15</sup> is unconstitutional and should be declared inoperable. Section 43(c) of said Act also is unconstitutional and should be declared of no force and effect.

### **PART III – STATEMENTS OF ARGUMENT**

#### **Vertical *Stare decisis* – Justice LeBlanc had jurisdiction to overrule *Gold Seal***

20. The Supreme Court of Canada found in *Carter* that “*stare decisis* is not a straitjacket that condemns the law to stasis”,<sup>16</sup> and also in *Bedford* that “the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional.”<sup>17</sup> As a result, Justice LeBlanc had the authority to overrule *Gold Seal* based on the new historical evidence put before him as well as the vast sea change in Canadian society since *Gold Seal* was decided.

#### **1. *New evidence***

21. The new historical evidence put before LeBlanc J. had never before been considered by a court in its consideration of the terms “admitted free” and as a result he was obliged to consider it and rule on the constitutionality of section 121 as it related to that new historical evidence.<sup>18</sup>

#### **2. *Sea change in Canadian society***

22. In 1921 when *Gold Seal* was decided prohibition on alcohol was still in effect in certain Canadian provinces. This Court in *Gold Seal* interpreted “admitted free” in a narrow manner based, at least in part, on the social and legislative reality of prohibition. The Court explicitly states: “Prohibition of import in aid of temperance legislation is not within the purview of the

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<sup>14</sup> *R v Comeau*, 2016 NBPC 3 at para 191 [*Comeau*]

<sup>15</sup> *LCA*, *supra* note 13 ss 43(c) and 134(b).

<sup>16</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44 [*Carter*].

<sup>17</sup> *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at paras 43-44 [*Bedford*].

<sup>18</sup> *Comeau*, *supra* note 14 at para 125.

section.”<sup>19</sup> *Gold Seal* dealt with provincial prohibitions on the importation of liquor at a time when blanket provincial prohibitions on its sale existed. In modern Canada these provincial prohibitions against alcohol no longer exist, and the Federal cannabis prohibition will soon no longer exist.

23. A great deal has changed in Canada in the years since *Gold Seal* was decided. Interprovincial trade barriers relating to alcohol are divergent across provinces, sporadically enforced, and often misunderstood by Canadian citizens.<sup>20</sup>

24. Also, online sales allow consumers to purchase products from any province and have them shipped directly to their home. When *Gold Seal* was decided there was no conception of retail sales of this nature, and prohibition still existed in some provinces as did social stigma around alcohol.<sup>21</sup> At present under Canada’s *ACMPR* an individual can legally purchase their medical cannabis over the internet from a federally licensed producer in any province and have that cannabis shipped directly to them anywhere in Canada. In addition, a designated producer can supply that producers two patients with cannabis, even across provincial boundaries. This would not be possible for recreational cannabis users under the proposed provincial legislation. Meanwhile dispensaries, that have served as the primary access points for cannabis consumers, appear to have little future in many provinces due to proposed provincial monopolies on retail sales. The legislation at issue in *Comeau* and the proposed legislation relating to legal recreational cannabis are markedly similar: the provincial laws inhibit access to products from other provinces, access to retail frameworks in other provinces and participation in the licit market by existing dispensaries such as the intervenor.

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<sup>19</sup> *Gold Seal*, *supra* note 12 at 466.

<sup>20</sup> Dr. Andrew Smith Report at 129, Record of the Appellant, Volume V, Part IV-Exhibits, Tab 30; *Comeau*, *supra* note 19 at paras 11, 38, 160.

<sup>21</sup> Ian Blue, “On the Rocks? Section 121 of The Constitution Act 1867, And the Constitutionality of the Importation of Intoxicating Liquors Act” (2009) *The Advocates Quarterly* 306 at 325 [*On the Rocks*].

### **Exception to horizontal *stare decisis***

25. This Court can overturn its own precedent if, for example, it has a genuine realization of error<sup>22</sup> or if there is a change in the socio-political matrix.<sup>23</sup> *Stare decisis* should not be allowed to outweigh the need to rectify the problems caused by *Gold Seal*.

### **Provincial monopolies on alcohol and cannabis**

26. Provincial laws and policies that prohibit consumers from purchasing and bringing cannabis across provincial boundaries weaken Canadian prosperity and national unity for the purpose of protecting anticipated provincial cannabis monopoly revenues.<sup>24</sup> In *Comeau* the ‘good’ is wine, beer, and spirits, but the pertinent issues relating to section 121, interprovincial trade and provincial monopolies apply directly to cannabis as well. Legitimate provincial purposes such as health and safety regulations and direct taxation do not require laws that prohibit Canadians from purchasing directly from cannabis producers in other provinces, that force Canadians to purchase Canadian-grown cannabis and cannabis derivative products, or any other good, only from provincial monopolies, or that unreasonably restrict the quantity of cannabis, or any other good, that a Canadian can import from another province. Legitimate provincial purposes also do not require provincial retail monopolies that frustrate the growth of industry, de-incentivize illicit market participants from transitioning to licit activity and limit consumer choice.

27. It is the position of Cannabis Culture that provincial government regulations which restrict Canadians’ ability to access and purchase cannabis from private cannabis dispensaries would violate Judge LeBlanc’s interpretation of section 121 of the *Constitution Act, 1867*.

28. For these reasons, the proposed intervenors support Judge LeBlanc’s ruling and urge the Supreme Court to re-evaluate the role section 121 of the *Constitution Act of 1867* plays.

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<sup>22</sup> Michael Adams, “Escaping the ‘Straitjacket’: *Canada (Attorney General) v Bedford* and the Doctrine of *Stare Decisis*” 78 Sask L Rev 325 at 331-332 [*Adams*]. Intervener Book of Authorities (“BOA”), Tab 1

<sup>23</sup> *Carter*, *supra* note 16.

<sup>24</sup> *Comeau*, *supra* note 14 at para 40; Trial Judgment at para. 40; Appeal Record at pp. 26-32; Appellant’s Record, Vol. 2, Tab 10, Trial Transcript at Vol. 2, p. 43, ll.16-18.

**PART IV – SUBMISSIONS CONCERNING COSTS**

29. Cannabis Culture does not seek its costs on this appeal. Cannabis Culture should not be ordered to pay the whole or any part of the costs of this appeal.

**PART V – ORDERS SOUGHT**

30. Cannabis Culture takes no position on the outcome of this appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2017.**



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TOUSAW LAW CORPORATION

**Kirk I. Tousaw**  
**Jack Lloyd**

Counsel for the Intervener,  
Cannabis Culture

## PART VI – TABLE OF AUTHORITIES

Tab in BOA	Authority	Footnote in Argument
	<b>Cases</b>	
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	Bill 174 establishes the <i>Cannabis Act, 2017</i> , and the <i>Ontario Cannabis Retail Corporation Act, 2017</i> . See online: <a href="http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session2/b174_e.pdf">http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session2/b174_e.pdf</a>	9
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