LEGAL RESEARCH & WRITING

Introduction Session: Sept. 20, 2024

Samuel Greene (he/him)

'Makes no sense': New Brunswick man loses his 'free-the-beer' fight

Supreme Court of Canada decision ends Gerard Comeau's 5-year legal battle, restores cross-border limits

Bobbi-Jean MacKinnon · CBC News · Posted: Apr 19, 2018 11:23 AM AT | Last Updated: April 19, 2018

The Supreme Court of Canada unanimously ruled Thursday that Canadians do not have a constitutional right to buy and transport alcohol across provincial borders without impediments. The nine-justice panel said provinces have the right to restrict the importation of goods from another province, as long as the primary aim of the restriction is not to impede trade.

Gerard Comeau, 64, who was at the centre of the so-called "free-the-beer" case, which garnered national attention because it could have toppled interprovincial trade barriers on much more than just beer, said the decision "makes no sense at all."

… John Callahan said he didn't even realize there is a limit.

"I thought we were allowed to," he said. "So you're only allowed to take what, that's it, 12 bottles? Well I'll be darned. They make some crazy laws."

Thomas Croswell thinks "it's terrible."

Her Majesty The Queen *Appellant*

v.

Gerard Comeau *Respondent*

Sa Majesté la Reine *Appelante*

c.

Gerard Comeau *Intimé*

[23] The trial judge accepted that this Court's decision in *Gold Seal* was binding authority and that, applying *Gold Seal*, s. 134(*b*) of the *Liquor Control Act* does not violate s. 121 of the *Constitution Act, 1867*. He went on to hold, however, that *Gold Seal* had been wrongly decided and that therefore he should not follow it.

[24] The decision of this Court in *Gold Seal* was expressly affirmed by the Judicial Committee of the Privy Council in *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] 4 D.L.R. 81, at pp. 91-92, and by a majority of this Court in *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626, at p. 634. It has never been overruled, although some Justices of this Court have interpreted it to apply not only to tariffs, but to tariff-like burdens on goods crossing provincial boundaries: *Murphy*, at p. 642, per Rand J.; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, at p. 1268, per Laskin C.J. …

[25] … The trial judge's reading of s. 121 — that it precludes any laws that impede goods crossing provincial boundaries — is incompatible with both interpretations.

What is distinctive about legal research, writing and analysis?

- Relies on specific types of sources (precedents, statutes, etc.)—whether citing them or not
- Uses defined modes of reasoning (applying, distinguishing cases, interpreting statutes etc.)
- Aims at specific instrumental purposes (resolving a dispute, convincing a judge, setting rules for the future)
- Often has narrow intended audience (the parties, other lawyers, judges, the public)

So what was the Supreme Court decision in *Comeau* doing differently from the CBC article?

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How do we learn to be like the SCC? (And do we want to?)

- Legal research, writing and analysis are not innate talents
- You get better by practice (playing around with research tools, writing your results, editing them, getting feedback)
- You get better by emulation—but be careful!
- “Good” is often subjective—particularly at the high end—but there’s a dominant Canadian approach

Legal writing isn’t just SCC decisions…

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Terms of Use

We are updating our Terms of Use: Our updated Terms of Use will be effective on January 19, 2013.

By using the instagr.am/instagram.com website and Instagram service you are agreeing to be bound by the following terms and conditions ("Terms of Use").

Basic Terms

- You must be 13 years or older to use this site.
- You may not post nude, partially nude, or sexually suggestive photos.
- You are responsible for any activity that occurs under your screen name.
- You are responsible for keeping your password secure.
- You must not abuse, harass, threaten, impersonate or intimidate other Instagram users.
- You may not use the Instagram service for any illegal or unauthorized purpose. International users agree to comply with all local laws regarding online conduct and acceptable content.
- You are solely responsible for your conduct and any data, text, information, screen names, graphics, photos, profiles, audio and video clips, links ("Content") that you submit, post, and display on the Instagram service.
- You must not modify, adapt or hack Instagram or modify another website so as to falsely imply that it is associated with Instagram.
- You must not access Instagram's private API by any other means other than the Instagram application itself.
- You must not create or submit unwanted email or comments to any Instagram members ("Spam").

Re: Notice of Obligation to Preserve Documents Related to Dominion

Dear Mr. Hannity:

Our firm is defamation counsel to US Dominion Inc.[1] We write regarding patently false accusations that Dominion has somehow rigged or otherwise improperly influenced the recent U.S. Presidential election—accusations that you have featured on your programming and that you yourself have also echoed.

We trust you are aware of letters we sent last week to Sidney Powell and various media entities demanding retraction of their myriad false and conspiratorial claims about Dominion. Because you have featured, and continue to feature, the proponents of this misinformation campaign against Dominion—and have now joined them in spreading this knowingly false information—we write to you now to (1) demand that you cease and desist making defamatory claims against Dominion[2] and from featuring guests who do the same, and (2) place you on notice about your obligation to preserve and retain all documents relating to Dominion and your smear campaign against the company.

1. The Constitution of Canada ensures a single domestic market for goods and services by prohibiting the levying of inter-provincial tariffs and by giving the federal government legislative jurisdiction over inter-provincial trade. The Attorney General of Ontario submits that there is no reason to disturb this constitutional architecture which has been in place since Confederation, and is reflected in the settled jurisprudence under s. 121. Any modifications to the terms of the economic union within existing constitutional parameters should be left to the democratically accountable branches of government.

2. The interpretation of s. 121 advanced by the respondent, if accepted by this Court, would amount to a constitutional impediment to the regulation of goods in each province. It would constitutionalize a particular economic philosophy that views unfettered trade as a supreme good to be facilitated, and government regulation of goods as an evil to be minimized. Reasonable people can disagree about whether and when deregulation should be preferred to state intervention for health and safety, consumer protection, or environmental conservation. The Constitution of Canada is not meant to entrench one particular economic philosophy or view of government as the supreme law.[1]

Writing a *legal* argument: Using precedent

Properly assessing and using precedents is an *ethical obligation*…

Rules of Professional Conduct, Law Society of Ontario

5.1-2 When acting as an advocate, a lawyer shall not

…

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,

…

(i) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent

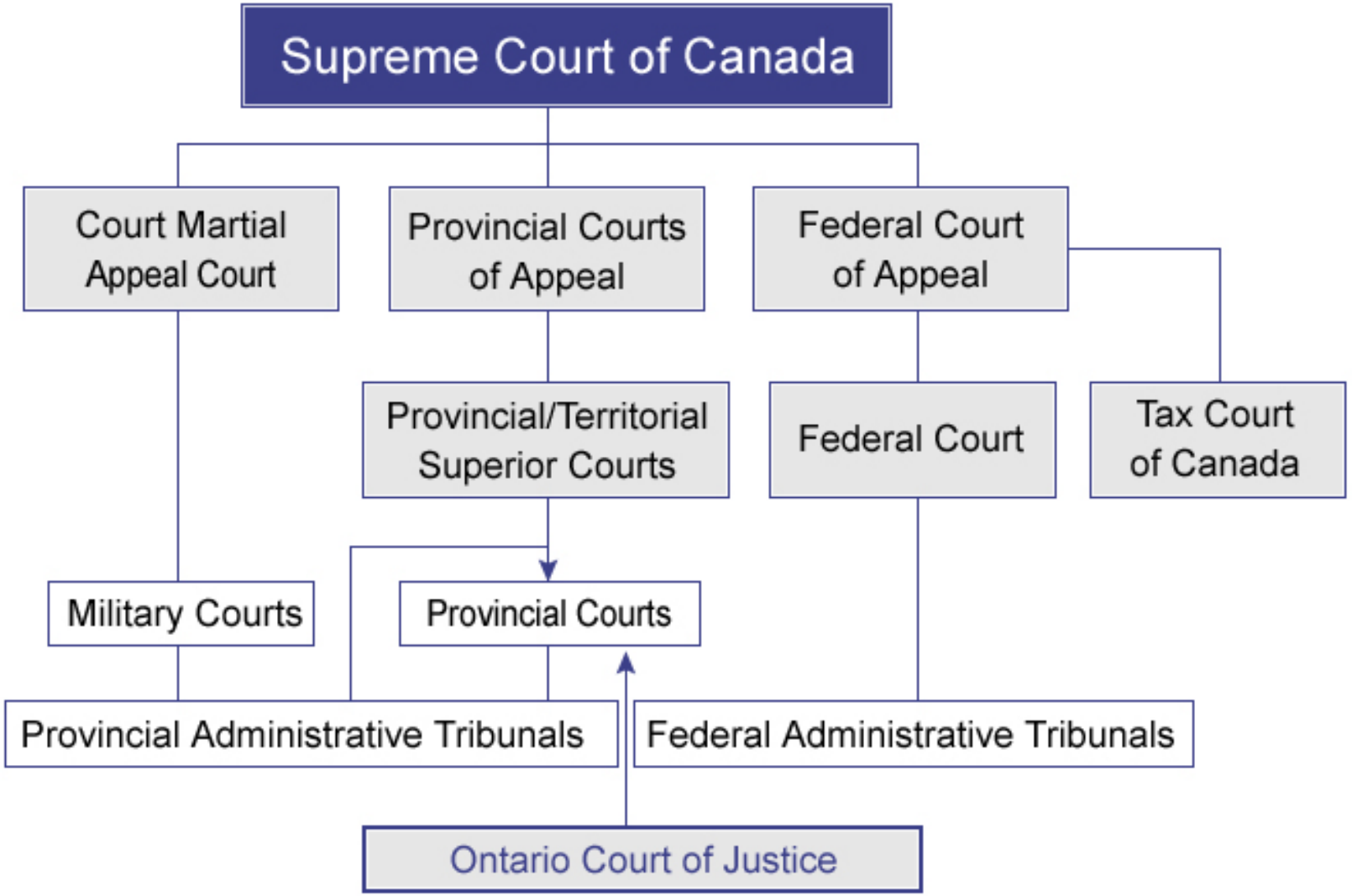
It also helps avoid you getting egg on your face…

[1] The applicant's factum correctly notes there is no binding precedent in Ontario on this issue, but studiously avoids mentioning—or even citing—a recent, unanimous decision of the B.C. Court of Appeal on identical facts: *see Smith v Jones*, 2021 BCCA XXX at paras 12-24. This omission is unsurprising, because the applicant's argument contains no answer to the compelling reasons the B.C. Court of Appeal gave for dismissing claims substantively identical to those the applicant raises here.

Steps for assessing precedent:

1. Is it relevant?
2. Is it binding?
   - What jurisdiction and level of court?
   - Ratio vs. *obiter*?
   - Still good law?
   - Per incuriam?
3. If from a binding source, does it apply, or is it distinguishable?
   - Restrictive vs. non-restrictive distinctions
4. If not binding, is it persuasive?
   - Source of authority (jurisdiction, level of court, academic writing?)
   - Quality of reasoning
   - Reputation of author

Outline of Canada's Court System



Source: https://www.ontariocourts.ca/ocj/general-public/canada-court-system/

Binding precedent:

1. **In the same jurisdiction (province, military, federal)**
2. **From a *higher level of court* than you're in**
   - Names differ in each province
     - *e.g.* Superior Courts: Alberta Court of King's Bench = Ontario Superior Court of Justice = Supreme Court of Newfoundland & Labrador (Trial Division)
     - *e.g.* Provincial Courts: Alberta Provincial Court = Ontario Court of Justice
   - Anomaly in Ontario: intermediate court of appeal
     - Divisional Court (part of Superior Court) hears appeals form Administrative Tribunal and some civil/family matters
   - When in doubt, Google it!

How can you tell whether binding?

- **Look at the citation!**
- Case citations will tell you: the court, year, page/paragraph
- What do all the abbreviations mean?
- Historically: print reporters
  - E.g. *Jones v. Tsige* (2012), 346 D.L.R. (4th) 34 (Ont. C.A.)
  - Needed to include parallel citations so people could find
- Now: neutral citations, reports, digital services
  - E.g. *Jones v. Tsige*, 2012 ONCA 32, [2012] CarswellOnt 274
- McGill Guide: not all courts follow it, or current version!

Hierarchy of authorities: exercise

Your contracts matter is before the Ontario Superior Court of Justice. You have found relevant cases from:

- B.C. Court of Appeal
- Ontario Court of Appeal
- United States Supreme Court
- English High Court, King’s Bench Division
- Supreme Court of Canada
- New Brunswick Court of King’s Bench
- *Waddams on Contract*

Rank them by strength of the authority.

Supreme Court of Canada – Binding

Ontario Court of Appeal – Binding

B.C. Court of Appeal – Strongly persuasive

Waddams on Contract – Strongly persuasive

United States Supreme Court – Potentially persuasive

English King's Bench Division – Potentially persuasive

New Brunswick King's Bench – Potentially persuasive

Explain use of persuasive authority

No formal hierarchy of persuasive sources, so have to tell a story about why you are citing:

- Widely cited case?
- Cited by leading author as typical / important?
- Most recent case?
- Only case on similar facts?
- Experienced/well-regarded judge?
- Court with special expertise (Federal Court in admin. law; Delaware Chancery Court in corporate law)

Precedent by the same court

- In practice: SCC & CoAs tend to treat own prior decisions as more binding; trial courts have departed more often from decisions of other trial judges

- *R v Sullivan*, 2022 SCC 19*:* a more stringent approach. Trial courts can only depart where:
  - The rationale of an earlier decision has been undermined by subsequent appellate decisions;
  - The earlier decision was reached *per incuriam* (“through carelessness” or “by inadvertence”); or
  - The earlier decision was not fully considered, *e.g.* taken in exigent circumstances.

- ***Per Incuriam***: two cases from the same level of court say opposite things without citing each other
  - Typically, the case with better reasoning wins.
  - But *Sullivan* says go with the earlier-in-time precedent.
  - Some courts have special procedures for dealing this (5-judge panel at ONCA)

- **No longer good law**:
  - *R v Bedford*, 2013 SCC 72 at para 42**:** A holding "may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."

Applying binding authority: Case “on-all-fours”

- Simple situation: binding case, substantively identical facts
- That’s the end!
- This is very rare.
- Only way around this: argue case is “per incuriam” or is no longer good law.

Applying binding authority: Reasoning by analogy

- Facts may not be identical, or may even be materially different, but *reason* for applying the rule may be similar

Exercise (analogy)

- Case 1: helmet required to ride a motorcycle
- Case 2: helmet on bicycle desirable but not required
- Now: is helmet required on e-bike?

- Possible arguments:
  - Driving an e-bike is similar to riding a “fast bicycle.”
  - E-bikes can’t go faster than well-oiled road bike.
  - E-bikes presents no more danger to its operator or other drivers than a bike.
  - E-bikes, like bikes, can’t be driven on highways.

- Possible counterargument:
  - E-bike resembles a motorcycle because both have quick-starting engines that may make the vehicle more dangerous when starting up.

Analogy & statutory interpretation

- Where a provision has not been interpreted before, can sometimes look to interpretations of similarly worded ones
    - Not binding, but potentially highly persuasive
- Or can look to interpretations of provisions in analogous statutes or similar statutes in other jurisdictions
- Careful, though: similar wording may not always justify similar interpretations

As for the wording of the definitions "labour expenditure" and "Canadian labour expenditure" in subsections 125.4(1) and 125.5(1), and the wording of subsection 402(7) of the *Regulations*, I do not see anything that could assist the appellants. The two definitions are in no way analogous to section 5202 of the *Regulations*, and, although the wording of subsection 402(7) of the *Regulations* is somewhat similar, the objectives pursued by Parliament in each instance are not the same. When interpreting a particular word contained in a statute or in regulations as complex as the *Act* and the *Regulations*, it is not helpful to compare that word or phrase with another one that has been taken out of context from an unrelated provision.

Quali-T-Tube ULC Inc. c. La Reine, 2005 TCC 373 at para 46.

Dealing with binding authority: *Distinguishing cases*

- Find *relevant* facts that make the case different
- Explain why those facts mean the prior rule doesn't apply or applies differently
- Two ways:
  - **Restrictive distinction**: attempts to narrow the prior rule in a way not explicitly explained in the prior case
  - **Non-restrictive distinction**: says the new case is entirely outside the scope of the prior rule

Example:

- Case 1: Owner is strictly liable for injuries her pet tiger causes, because a tiger is an “inherently dangerous animal”

- Case 2: D’s pet Jaguar bites and injures P. D argues January is “exotic” but not “inherently dangerous” (non-restrictive)

- Case 3: D’s pet tiger bites and injures P. In Case 1, tiger was from China. In Case 3, tiger was from Nepal. D argues Case 1 applies only to Chinese tigers (restrictive).

Dealing with binding authority: *Ratio* vs. *obiter*

- Not everything judges say is binding law.
- *Ratio decidendi*: the words expressing the parts of the reasoning necessary to explain the result.
- *Obiter dictum*: legal statements that aren't strictly necessary to explain the result.

Why does *obiter* show up?

- Judges explain limits of holding: “If, unlike in this case, the driver had been impaired, I might have decided differently”
- Judges sometimes provide summaries of confusing areas of the law to help future practitioners/other judges.
- Sometimes judges make comments on the policy or principles underlying the law

Why is *obiter* dubious?

- Traditional explanation: judges aren't legislators—they decide the cases before them, and nothing more.

- Modern take: if not necessary to decide the case, less likely to be a reliable statement of law—parties may not have contested the point, judge may not have looked into it as thoroughly.

SCC *Obiter* – Careful!

- SCC has said its *obiter* can be binding (sometimes):
- *R v Henry*, 2005 SCC 76 at para 57:
  - "All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative."
- *R v Puddicombe*, 2013 ONCA 506 at para 68:
  - Re: SCC, "lower courts should begin from the premise that the *obiter* was binding."

An example legal writing exercise

A key aspect of this case, which must be borne in mind, is that when a finding of fact is reviewed by an appellate court, it is permissible to set aside such a finding if and only if it is infected by an error that is "palpable and overriding", as was explained by the Supreme Court of Canada in the case of *Housen v. Nikolaisen*, 2002 SCC 33. This well-established legal principle clearly places upon the appellant, if he is to have his first degree murder conviction set aside, a not insignificant burden to provide an explanation to this Court as to why the learned trial judge was mistaken in making a finding of fact, relying on the evidence that had been entered before her, that, *inter alia*, the appellant had the requisite "*mens rea*" or mental fault element for first-degree murder, namely that the killing of the victim was "planned and deliberate", as required by section 231(1) of the *Criminal Code*.

Problems with this paragraph:

- Sentences too long
- Lots of passive voice
- Latin
- Throat-clearing
- Overstatement
- Six words where one will do (more succinctly: “wordy”)

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To a lawyer: An appellate court can only set aside a finding of fact infected by a “palpable and overriding” error: *Housen v Nikolaisen*, 2002 SCC 33. The trial judge found as a fact the appellant killed the victim in a “planned and deliberate” manner—the mental element required for first degree murder under s. 231(1) of the *Criminal Code*. To set aside the first-degree murder conviction, therefore, the appellant bears the significant burden of explaining why the trial judge’s assessment of the evidence was mistaken.

To a lay person: Appeal courts don't second guess trial judges' factual decisions. The trial judge in Ms. Blue's case decided she killed the victim in a "planned and deliberate" way, making the killing a first-degree murder. To overturn the conviction, Ms. Blue has to convince the appeal court that the trial judge made a clear mistake about the evidence.