Court File No. 37398

IN THE SUPREME COURT OF CANADA
(On Appeal from the New Brunswick Court of Appeal)

BETWEEN

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

– and –

GERARD COMEAU

RESPONDENT
(Respondents)

– and –

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PART I – OVERVIEW OF POSITION AND FACTS

1. This Intervener accepts the Statement of Facts as set out in the Appellant's factum.

2. As evidenced by the large number of interveners, this case raises matters of fundamental importance for trade matters and the relationship between vital provincial and federal powers and s. 121 of the *Constitution Act, 1867*.

3. Alberta, like other provinces, has a vital interest in the approach to s. 121 to be adopted. Alberta has a number of grant programs, one of which has been challenged in a proceeding at the Court of Queen's Bench. That matter will quite possibly proceed to an appeal before this Court. How this Court decides this matter may impact the ongoing viability of our program and could have a serious impact on an important local industry.

4. The Respondent's position at trial, that an entirely new approach to s. 121 must be adopted notwithstanding the several cases of this Court which have examined the issue, cannot be sustained. There is no reason to tear up the blueprint for s. 121 developed by Justice Rand. Instead, this Court can use this opportunity to clarify and develop aspects of the Rand approach to assist with future applications of s. 121. The Rand approach offers a purposive and balanced means of mediating between various constitutional provisions. This approach in fact interprets s. 121 in a flexible manner, allowing for its application to a wide array of trade activities.

PART II – QUESTIONS IN ISSUE

5. Does s. 121 of the *Constitution Act, 1867* render unconstitutional s. 134 of the *Liquor Control Act*, which along with s. 3 of the *Importation of Intoxicating Liquors Act*, establishes a federal-provincial regulatory scheme in respect of intoxicating liquor?

PART III – STATEMENT OF ARGUMENT

A. The Proper Interpretation of s. 121 as Developed by this Court

6. Section 121 has been the subject of a number of constitutional law matters that have been determined by this Court. The case of *Gold Seal* was simply one of several decisions and

established a test for the type of matter before the Court.[1] The learned trial Judge erred in failing to engage with this reality.

7. As the Appellant indicates, this Court has adopted a more nuanced approach in later cases, moving beyond the type of issue addressed in *Gold Seal*. The case of *Murphy v. C.P.R.*[2] contains language suggestive of a broader scope for s. 121 ("the Rand approach"). While Rand J.'s views came in his concurring judgment, the "Rand approach" has in fact been adopted and applied in later cases.

8. In *Reference Re Agricultural Products Marketing Act*, Laskin C.J. accepts the view of Rand J. on the meaning and scope of s. 121.[3] While Pigeon J., speaking for five justices in his judgment does not expressly endorse the "Rand approach," neither does he comment on Laskin's approach in relation to s. 121. As he takes the opportunity to disagree with other aspects of the Chief Justice's reasons, it is reasonable to conclude that he does not disagree on this point.[4]

9. Further and in any event this Court in *Canadian Egg Marketing v. Richardson* has acknowledged the Rand approach as a proper interpretation of s. 121.[5]

10. The Rand approach from *Murphy, supra,* is a purposive and progressive test. Although it has been criticized as somehow failing to fulfill a desirable purpose, there is no reason to jettison the approach merely because certain commentators, or indeed the Respondent in this matter, desire that s. 121 be interpreted in a manner that fulfills a broader purpose.[6] This Court in *Murphy* and even more so, in later cases, was aware of the context in which s. 121 was enacted.[7] It is aware that the constitutional framers wanted to create a "common market."[8]

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[1] *Gold Seal v. Alberta,* [1921] S.C.J. No. 43.
[2] *Murphy v. C.P.R.,* [1958] S.C.J. No. 48 at pp. 11-12, per Rand J.
[3] *Reference Re Agricultural Products Marketing Act,* [1978] 2 SCR 1198.at para. 90.
[4] *Supra,* at paras. 149-151.
[5] *Canadian Egg Marketing v. Richardson,* [1998] 3 S.C.R. 157, at paras. 63-64; see also: McConnell, W.H., Commentary on the British North America Act, 1977 at 362-3; *C.P. Air v. B.C.,* [1989] 1 S.C.R. 1133 at para. 36.
[6] See: Blue, Ian, Long Overdue: *A Reappraisal of Section 121 of the Constitution Act, 1867*, 33 Dalhousie Law Journal 161 at 189-191.
[7] See: G.V. La Forest: *The Allocation of Taxing Power Under the Canadian Constitution,* Canadian Tax Foundation, 2nd edition, 1981, at 1-3, 6, 180-82.
[8] *Supra,* at 18.

11. The essence of Rand J.'s basic approach to s. 121 (apart from customs duties or similar charges) may be summarized as follows:

(1) provisions or programs will violate s.121, if they aim at trade regulation in a manner intended to create a barrier or impediment; and
(2) regulate aspects of the free flow of trade in their primary features, and
(3) are in essence and purpose related to goods imported across the border.

12. The Rand approach is commented on by La Forest in his text on taxation powers in a manner that illuminates both the commitment to a "common market" in general terms and the requirement that provincial powers over property and civil rights and federal powers over trade and commerce be properly respected. La Forest concludes:

> As Rand J. had pointed out, section 121 does not guarantee an unregulated national market, free of legislative interference. Licence fees, taxes, quality standards and, for that matter, provincial royalties inevitably interfere with the free flow of trade.

(One can of course add various financial incentives for local business as being comparable to instruments he has listed.)

Speaking of Laskin C.J.'s comments in *Reference re Agricultural Marketing Act,* La Forest summarizes:

> What may amount to a tariff under a provincial regulatory statute may not have that character in a federal regulatory statute. What is more, the federal trade and commerce power might also impede provincial legislative attempts to protect its producers and manufacturers against entry of goods from other provinces.[9]

13. In considering Rand J.'s comments on the desirability of the benefits of the wheat board legislation being challenged, it may be noted that in a later *Charter of Rights* case, *Archibald v. Canada,* the Federal Court of Appeal upheld the trial judge's detailed findings on the evidence of the many salutary effects of this type of legislation.[10]

14. Joseph Magnet extends the analysis of La Forest, *supra,* and offers an analysis consistent with later decisions of this Court which accept the logic of the Rand approach.[11] He states that the cases reveal that s. 121 may serve as an important constitutional plank in the regulation of

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[9] La Forest, *supra*, at 182.
[10] 2000 4 F.C.R. 479 (FCA) at paras. 72-75, 93-100.
[11] Magnet, Joseph, "The Constitutional Distribution of Taxation Powers" Ottawa Law Review 473 at 529-531.

interprovincial streams of commerce. He notes that taxing legislation which has the effect of impeding interprovincial trade relationships might well fall afoul of s. 121. He adds:

> However, the *Murphy* case makes plain that section 121 does not hold interprovincial currents of trade safe from interference in any free market or *laissez-faire* sense. Canada's federal and provincial governments are not prohibited from regulating such trade so as to achieve an efficient allocation of resources; section 121 offers no impediment *per se* to state interference in the economy.[12]

B. No Need for the Court to Reconsider the Rand Approach

15. An examination of the context and drafting history of s. 121 and the history of governmental relations at the time of Confederation reveals that the language of s. 121 cannot be viewed in the absolutist terms advocated for by the Respondent. Consideration of the purposes of federating the colonies and the need to ascertain the meaning of the provision with proper acknowledgement of the nature and extent of other constitutional provisions will enable the Court to affirm the continuing validity of Justice Rand's approach.

16. Noted historian Christopher Moore has analyzed the context and the drafting history of s.121 at length, drawing on archival and other documentary research.[13]

17. Moore's careful analysis makes clear why the conclusions of both the trial judge and commentators such as Malcolm Lavoie and Ian Blue go beyond any realistic appreciation of the purpose of s. 121.

18. In his analysis he examines the Quebec Conference. Section 121 was not accompanied by any recorded statement about its implications for tariff or non-tariff barriers.[14] Moore's views are consistent with the conclusion of La Forest in his text. As Moore states:

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[12] *Supra*, at s. 531. Note that Magnet also cites *AG v. Manitoba Egg and Poultry Assn*. 18 D.L.R. (3d) at 341; s. 121 considered also on appeal at 1971 S.C.R. 689 at 717-18.

[13] Moore, Christopher "Federalism, Free Trade within Canada and The British North America Act,s. 121" http://ssrn.com/abstract=3046592. In *Steam Whistle Brewing Inc. v. Her Majesty The Queen in Right of Alberta*, Court of Queen's Bench Action No. 1501-15056, Moore provided evidence by way of affidavit and cross-examination as a historian on the drafting history of s. 121 and placed it in the context of the making of the *British North America Act.*

[14] Moore, *supra,* at 22-29.

> Given the way s. 121 emerged, and the absence of evidence that any British North American delegate saw in it a change significant enough to the terms of confederation to be worth discussing, any assumption as to how the specific words of s. 121 were "viewed by the framers of the Constitution" should be treated with caution. They had made their statement on "free interchange" during the debates on the Quebec Resolutions, long before s. 121 was drafted.[15]

19. Just as colonies enjoyed self-governance and autonomy in exercising such property and civil rights powers as supporting and maintaining the viability and growth of local trade prior to Confederation, the historical record and the decisions of the Privy Council reveal that these powers were intended to continue under the *Constitution Act*, *1867*.

20. Moore describes the important role provinces played in economic development through the use of grants and financial incentives, citing H. V. Nelles' classic work of economic history. Various provincial grants, including cash grants and grants in kind became an early model in the years prior to and immediately after Confederation.[16] He cites a Report on the policies of the Government of Ontario which emphasized assistance to local industry as part of "province building."[17] These policies were considered to be consistent with the Constitution. In that Report, Professor Tupper states that "many of the creative and innovative aspect of industrial policy today are to be found ... within provincial jurisdictions."[18]

C. Property and Civil Rights, s. 121 and the Governing Principles of the Constitution

1) Property and Civil Rights

21. In any re-examination of s. 121 this Court wishes to undertake, it is helpful to also revisit and employ the existing jurisprudence on the powers of provinces over property and civil rights and the important purposes they fulfill. One of those purposes is to support the ongoing viability and growth of local industry.

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[15] Moore, *supra*, at 30, see also 31-32, 10-13, 27-29.

[16] See: Nelles, H.V., *The Politics of Development: Forests, Mines and Hydro Electric Power in Ontario* 1849-1941 (2ed) at 22-31, 384-5. On the continuing significance of grants and financial incentives to local industries in each of the provinces, see: "Business Subsides and Their Role in Atlantic Canada," Atlantic Report 39.2 (2004) 2-7.

[17] Moore, *supra*, at 41-42, see also: 35-40, 43-44.

[18] Tupper, Alan, "Federalism and the Politics of Industrial Policy", ed. Blais, André, U of T Press (1986) at 353-4, see also 347-51.

22. Section 121 may assist in ensuring that programs and laws are not developed in a manner that creates trade barriers by, *inter alia,* discriminating against out-of-province producers through a trade regulation that is in essence and purpose directed at the provincial border. Regulatory schemes would need to be examined to determine whether in their essence they could be said to deny access or opportunity for out of province producers on an equitable basis. However, Rand J. recognizes in developing his test that this approach does not contemplate challenging all trade regulation as it impacts on the flow of goods across provincial borders.

2) Federalism

23. A way to clarify why various provincial measures and regulatory plans are to be viewed as necessary and appropriate exercises of provincial powers under s. 92 notwithstanding s. 121 is to place the analysis within the context of the underlying structure of the Constitution and its governing principles. One of these principles is federalism. Federalism recognizes that political power is shared by two order of government. Any interpretation of either the trade and commerce power or s. 121 should be avoided if it would threaten "to undermine the autonomy of the provinces."[19] In many respects s. 121 can be viewed as a supplement to, or power that is parallel to, the federal trade and commerce power. If given literal and decontextualized interpretations these provisions would risk undermining provincial autonomy in matters of trade and economic activity within provincial territories. Such an approach must be rejected

3) Democracy and the Principle of Subsidiarity

24. Another principle that must guide a proper interpretation of the nature and scope of s. 121 is that of democracy. Commentators have noted that within this principle are embraced the concepts of local autonomy and responsible government, extending to each province complete autonomy within its sphere.[20]

25. In recent years, this Court has developed what has been described by Professor Dwight Newman as the gradual emergence of a principle of subsidiarity. This principle reinforces the recognition of responsible government and provincial autonomy. It draws upon the proposition that "law-making and implementation are often best achieved at a level of government that is not

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[19] See: *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217 at paras. 55-56.
[20] *Reference re Secession of Quebec, supra,* at paras. 65-66; Moore, Christopher *supra,* at, Moore, Christopher 1867: *How The Fathers Made a Deal* at 119-128.

only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity."[21]

26. The principle of subsidiarity was further developed in this Court in *Canadian Western Bank* where a conception of interjurisdictional immunity that would be asymmetrical in nature would be viewed as undermining the principles of subsidiarity – here, focussing on provincial powers – and therefore should be rejected. This principle must surely play a role in any consideration of a potential expansion of the reach of s. 121 that could have the effect of frustrating the ability of provincial governments to fulfill their role in managing and strengthening local economies.[22]

27. In order for these two interrelated principles to operate effectively, it is necessary to reject an overly robust interpretation of s. 121. Otherwise vital objectives pertaining to local (provincial) matters, such as supporting local industry and employment, will be frustrated.

D. Considerations Relevant to the Application and Elaboration of the Rand Test

28. Having proceeded to state the parameters under which any development and elaboration of the Rand test should operate, we can turn to the application of s. 121 to matters of local trade. As Alberta is facing a constitutional challenge on the basis of this provision, to its ability to raise additional revenues by way of an increase to its proprietary charges for the sale of alcohol (its liquor mark-up) and to its ability to establish a grant program to assist and encourage local producers, our focus in this section will be on the trade in liquor.[23] The impugned provision in this matter is also one that exists as part of New Brunswick's regulatory scheme in relation to liquor.

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[21] Newman, Dwight, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity," 74 Sask. Law Rev. (2011) 21 at 27' see further, *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* [2001] 2 S.C.R. 241 at para.3.

[22] *Canadian Western Bank v. Alberta,* [2007] 2 S.C.R. 3 at para. 45.

[23] The challenge is made in *Steam Whistle Brewing Inc. v. Her Majesty the Queen in Right of Alberta, supra.* Argument concluded September 20, 2017, decision is reserved.
Alberta Agriculture provides a number of grants to local producers at present, see: *Government of Alberta: Growing Forward 2* at *http://bit.ly/2xBuD8G*. It also administers the Alberta Small Brewers Development Program, a grant program whose eligibility details are publicly available, see: Alberta Small Brewers Development Program at: http://bit.ly/2xBuD8G

29. The intervener *Artisan Ales* promises to advance a detailed plan for a new approach to s. 121. The materials filed make it clear that Artisan Ales considers Alberta's proprietary charges (its mark-up program) and linked grant program to be constitutionally suspect and speaks prematurely of the need for a constitutional remedy.[24] Given that Alberta will be filing its factum prior to Artisan Ales, the province is compelled to make brief mention of its programs, which Artisan Ales has not characterized properly. Further, it is important that the Court be aware of the significant effects a decision that might potentially expand the reach of s. 121 could have on Alberta's grant program and with it, the ongoing viability of an important local industry. The Alberta litigation promises to involve a more extensive application of s. 121, placing one province's programs in the context of a Canadian-wide industry considered as a whole.[25] We recognize that the precise nature of our programs is the subject of ongoing litigation and that the matter may at a later time be argued before this Court on appeal.[26]

30. A regulatory scheme pertaining to liquor that provides equitable access and opportunity for domestic producers beyond and within a province's borders will be consistent with s. 121. Alberta's unique open list system, for instance, provides unfettered access to any liquor product produced in Canada, for a small administration fee. As of September 30, 2017, 2,080 licensees had access to 5,925 domestic products that manufacturers, or their agents, chose to list and sell in the province.[27]

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[24] In its materials it refers to Alberta's linked programs as one program claiming that a grant amounts to discrimination.

[25] On the need to place a provincial program within the context of other provincial schemes, see: McConnell, "Commentary on the British North America Act," *supra*, at 362-3.

[26] *Steam Whistle Brewing Inc. supra,* September 20, 2017, decision reserved, a great deal of evidence was adduced at trial – 13 affidavits by Alberta, 8 of which are by Alberta small craft brewers who testify to the value of the grant program from their perspective and its importance to their ongoing viability, given serious advantages to other producers afforded them by their provincial governments. Certain of the affidavits also set forth their experiences of rejections in applying for listings in other jurisdictions.

[27] Substantial members of out of province producers have sold and continue to sell their products in Alberta under this model.

31. Section 121, as interpreted by this Court would limit the province's ability to raise revenues where this is accomplished through taxes or duties on goods imported into the province.[28] Taxes are to be contrasted with mark-ups imposed by provincial governments on the sale of liquor either to retailers or consumers. Mark-ups have been held to be valid proprietary charges in *Air Canada v. Ontario*,[29] as well as in *Toronto Distillery Company Ltd. v. Ontario*.[30] As such, they are not the type of measure contemplated to come within the potential ambit of s. 121. Revenues raised from these charges including increases to the mark-up can then be used for any provincial purpose.

32. The payment of financial incentives, including grants, are not activities coming within s. 121 as contemplated by Rand J. This is because they are not matters of trade regulation or alternatively, not matters of regulation that can be said to be in purpose and essence aimed at provincial borders. They are an exercise in the spending power and are available to all eligible producers and intended to assist economic activity within the province. They are an important aspect of the property and civil rights power unrelated to restrictions on the movement of goods. Alternatively, in the event a substantial grant or other financial incentive has the potential to come within the Rand test, it would be necessary to determine whether it amounted to a primary or a subsidiary regulation and whether or not it is "designed … to raise impediments" to trade across borders. In this respect, this Court's development of the ancillary doctrine may provide assistance in elucidating a useful test on point. With respect to the doctrine, McLaughlin C.J. states:

> The ancillary powers doctrine is not to be confused with the incidental effects rule. The ancillary powers doctrine applies where, as here, a provision is, in pith and substance, outside the competence of its enacting body. The potentially invalid provision will be saved where it is an important part of a broader legislative scheme that is within the competence of the enacting body.[31]

The concept could be adapted to situations where it might appear that a grant or financial support engages s. 121, insofar as it is alleged to create a barrier or impediment. In that event, provided it serves a valid purpose, such as creating a level playing field, or ensuring the ongoing viability of an industry, then the regulation would be characterized as subsidiary and so would be justified.

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[28] But note *Little v AG BC* (1922) 65 D.L.R. 298 (BCCA), where a direct tax imposed on a good consumed within the province in an amount that would put the province in the same position as it would have been if the liquor had been purchased from a government liquor store would not violate the provision.

[29] *Air Canada v. Ontario (Liquor Control Board),* [1997] 2 S.C.R. 581 at paras. 1-3, 7.

[30] *Toronto Distillery Company Ltd. v. Ontario (Alcohol and Gaming Commission)* 2016 ONCA 960.

[31] *Quebec (Attorney General) v. Lacombe* 2010 2 S.C.R. 453 at para. 36.

E. Section 134 Not in Essence and Purpose Contrary to s. 121

33. Returning to this Court's decision in *Air Canada*, *supra,* it is clear that just as proprietary charges such as mark-ups on liquor applied equally do not violate s. 121, so too a provision like s. 134 of the *Liquor Control Act* is valid, given that s. 121 was not intended to prevent provinces from either: (1) raising revenue from their sale of liquor within the context of the monopoly created in each province for the industry or (2) prohibiting the keeping of liquor not purchased from a liquor commission, other than in limited circumstances. One of the objectives of such a provision as s. 134 is to preserve the revenue-raising capacity of the province.[32] It would have the additional purpose of preserving the continued viability of an industry in some possible situations.

34. It is appropriate that the federal government has developed the cross-Canada liquor regime that exists, as the attendant social evils associated with excessive alcohol consumption that provinces are charged with addressing, make it logical to build in a revenue-producing component for the sale of alcohol in each jurisdiction. With regard to the issue before the Court, it is to be emphasized that s. 121 is aimed at certain restrictive practices related to goods travelling across provincial borders, not at provisions controlling, *inter alia*, the possession or storing of liquor within a province.

35. In reviewing the validity of s. 134, it will be most helpful if the Court places the issue within the framework of a detailed exploration of various aspects of the Rand approach. The additional clarity will help guide the development of government programs and regulatory schemes.

PART IV – SUBMISSIONS CONCERNING COSTS

36. The Attorney General of Alberta is not seeking costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

37. That the constitutional question be answered in the negative. Given the direct impact this matter will have an ongoing litigation in Alberta, we request 10 minutes for oral argument.

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[32] See: *Air Canada, supra*, at para. 53; Appellant's factum at paras. 110-113.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of October, 2017.

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PART VI TABLE OF AUTHORITIES

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