

**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 –

**ATTORNEY GENERAL OF CANADA; ATTORNEY GENERAL OF ONTARIO;  
ATTORNEY GENERAL OF QUEBEC; ATTORNEY GENERAL OF NOVA  
SCOTIA; ATTORNEY GENERAL OF BRITISH COLUMBIA; ATTORNEY  
GENERAL OF PRICE EDWARD ISLAND; ATTORNEY GENERAL OF  
SASKATCHEWN; ATTORNEY GENERAL OF ALBERTA; ATTORNEY  
GENERAL OF NEWFOUNDLAND AND LABRADOR; ATTORNEY GENERAL  
OF NORTHWEST TERRITORIES; GOVERNMENT OF NUNAVUT (AS  
REPRESENTED BY THE MINISTER OF JUSTICE; LIQUITY WINES LTD.;  
PAINTED ROCK ESTATE WINERY LTD. 50<sup>TH</sup> PARALLEL ESTATE LIMITED  
PARTNERSHIP, OKANAGAN CRUSH PAD WINERY LTD. AND NOBLE  
RIDGE VINEYARD AND WINERY LIMITED PARTNERSHIP; ARTISAN ALES  
CONSULTING INC.; MONTREAL ECONOMIC INSTITUTE; FEDERAL  
EXPRESS CANADA CORPORATION; CANADIAN CHAMBER OF  
COMMERCE, CANADIAN FEDERATION OF INDEPENDENT BUSINESS;  
CANNABIS CULTURE; ASSOCIATION OF CANADIAN DISTILLERS,  
OPERATING AS SPIRITS CANADA; CANADA’S NATIONAL BREWERS;  
DAIRY FARMERS OF CANADA, EGG FARMERS OF CANADA, CHICKEN  
FARMERS OF CANADA, TURKEY FARMERS OF CANADA, CANADIAN  
HATCHING EGG PRODUCERS; CONSUMER COUNCIL OF CANADA;  
CANADIAN VINTNERS ASSOCIATION; and  
ALBERTA SMALL BREWERS ASSOCIATION**

**INTERVENERS**

---

**FACTUM OF THE INTERVENER, ATTORNEY GENERAL  
OF NEWFOUNDLAND AND LABRADOR**  
(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)

---

**Attorney General of Newfoundland  
and Labrador**

4th Floor, East Block  
Confederation Bldg.  
St. John's, NL A1B 4J6  
Telephone: (709) 729-2869  
Facsimile: (709) 729-2129  
Email: [barbarabarowman@gov.nl.ca](mailto:barbarabarowman@gov.nl.ca)  
[philiposborne@gov.nl.ca](mailto:philiposborne@gov.nl.ca)

**Barbara Barrowman/Philip Osborne**

Counsel for the Intervener Attorney  
General of Newfoundland & Labrador

**The Attorney General of New  
Brunswick, Public Prosecution Services**

Carleton Place, P.O. Box 6000  
Fredericton, NB E3C 5H1  
Telephone: (506) 453-2784  
Facsimile: (506) 453-5364  
E-mail: [bill.richards@gnb.ca](mailto:bill.richards@gnb.ca)

**William B. Richards**

**Kathryn A. Gregory**  
Counsel for the Appellant

**Gardiner, Roberts LLP**

Bay Adelaide Centre, East Tower  
22 Adelaide St. W., Suite 3600  
Toronto, ON M5H 4E3  
Telephone: (416) 865-2962  
Facsimile: (416) 865-6636  
E-mail: [iblue@grllp.com](mailto:iblue@grllp.com)

**Ian Blue, Arnold Schwisberg &**

**Mikael Bernard**  
Counsel for the Respondent

**Gowling WLG (Canada) LLP**

Barristers and Solicitors  
160 Elgin Street, 26<sup>th</sup> Floor  
Ottawa, ON K1P 1C3  
Telephone: (613) 783-8817  
Facsimile: (613) 788-3500  
E-mail: [robert.houston@gowlingwlg.com](mailto:robert.houston@gowlingwlg.com)

**Robert E. Houston, Q.C.**

Ottawa Agent for Counsel for the  
Intervener Attorney General of  
Newfoundland & Labrador

**Gowling WLG (Canada) LLP**

Barristers and Solicitors  
160 Elgin Street, 26<sup>th</sup> Floor  
Ottawa, ON K1P 1C3  
Telephone: (613) 786-8695  
Facsimile: (613) 788-3509  
E-mail: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

**D. Lynne Watt**

Ottawa Agent for Counsel for the  
Appellant

**Supreme Advocacy LLP**

100- 340 Gilmour Street  
Ottawa, ON K2P 0R3  
Telephone: (613) 695-8855 Ext: 102  
Facsimile: (613) 695-8580  
E-mail: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Marie-France Major**

Ottawa Agent for Counsel for the  
Respondent

**Procureur général du Canada**  
Complexe Guy-Favreau  
200, boul. René-Lévesque Ouest,  
Pièce 1202-23  
Montréal, QC H2Z 1X4  
Telephone: (514) 283-5880  
Facsimile: (514) 496-7876  
E-mail: [francois.joyal@justice.gc.ca](mailto:francois.joyal@justice.gc.ca)

**François Joyal**  
Counsel for the Intervener Attorney  
General of Canada

**Attorney General of Ontario**  
720 Bay St., 4th Floor  
Toronto, ON M5G 2K1  
Telephone: (416) 326-3867  
Facsimile: (416) 326-4015  
E-mail: [michael.dunn@ontario.ca](mailto:michael.dunn@ontario.ca)

**Michael S. Dunn**  
Counsel for the Intervener Attorney  
General of Ontario

**Procureur général du Québec**  
a/s Ministère de la Justice 1200 Route de  
l'Église, 2e étage  
Québec, QC G1V 4M1  
Telephone: (418) 643-1477  
Facsimile: (418) 644-7030

**Jean-Vincent Lacroix & Laurie Ancil**  
Counsel for the Intervener Attorney  
General of Québec

**Attorney General of Nova Scotia**  
1690 Hollis Street, 8th Floor, PO Box 7  
Halifax, NS B3J 2L6  
Telephone: (902) 424-3297  
Facsimile: (902) 424-1730  
E-mail: [edward.gores@novascotia.ca](mailto:edward.gores@novascotia.ca)

**Edward A. Gores, Q.C.**  
Counsel for the Intervener Attorney  
General of Nova Scotia

**Attorney General of Canada**  
50 O'Connor Street, Suite 500, Room 557  
Ottawa, ON K1A 0H8  
Telephone: (613) 670-6290  
Facsimile: (613) 954-1920  
E-mail: [christopher.rupar@justice.gc.ca](mailto:christopher.rupar@justice.gc.ca)

**Christopher M. Rupar**  
Ottawa Agent for Counsel for the  
Intervener Attorney General of Canada

**Noël & Associés**  
111, rue Champlain  
Gatineau, QC J8X 3R1  
Telephone: (819) 771-7393  
Facsimile: (819) 771-5397  
E-mail: [p.landry@noelassocies.com](mailto:p.landry@noelassocies.com)

**Pierre Landry**  
Ottawa Agent for Counsel for the  
Intervener Attorney General of Québec

**Gowling WLG (Canada) LLP**  
160 Elgin Street, 26<sup>th</sup> Floor  
Ottawa, ON K1P 1C3  
Telephone: (613) 786-8695  
Facsimile: (613) 788-3509  
E-mail: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

**D. Lynne Watt**  
Ottawa Agent for Counsel for the  
Intervener Attorney General of N.S.

**Attorney General of British Columbia**  
Legal Services Branch, 1001 Douglas St.  
PO Box 9280, Stn. Prov. Govt.  
Victoria, B.C. V8W 9J7  
Telephone: (250) 356-8584  
Facsimile: (250) 953-3557  
Email: [gareth.morley@gov.bc.ca](mailto:gareth.morley@gov.bc.ca)

**J. Gareth Morley**  
Counsel for the Intervener Attorney  
General of British Columbia

**Stewart McKelvey LLP**  
65 Grafton Street  
Charlottetown, PEI C1A 1K8  
Telephone: (902)629-4513  
Facsimile: (9902)566-5283  
Email: [jgormley@stewartmckelvey.com](mailto:jgormley@stewartmckelvey.com)

**James Gormley, Q.C.**  
**Jonathan Coady**  
Counsel for the Intervener Prince Edward  
Island

**Ministry of Justice Saskatchewan**  
Constitutional Law Branch  
820-1874 Scarth St.  
Regina, Sask. S4P 4B3  
Telephone: (306) 787-6642  
Facsimile: (306) 787-9111  
E-mail: [theodore.litowski@gov.sk.ca](mailto:theodore.litowski@gov.sk.ca)

**Theodore Litowski**  
Counsel for the Intervener Attorney  
General of Saskatchewan

**Borden Ladner Gervais LLP**  
World Exchange Plaza  
100 Queen Street, suite 1300  
Ottawa, ON K1P 1J9  
Telephone: (613) 237-5160  
Facsimile: (613) 230-8842  
E-mail: [neffendi@blg.com](mailto:neffendi@blg.com)

**Nadia Effendi**, Ottawa Agent for Counsel  
for the Intervener Attorney General of  
British Columbia

**Gowling WLG (Canada) LLP**  
Barristers and Solicitors  
160 Elgin Street, 26<sup>th</sup> Floor  
Ottawa, ON K1P 1C3  
Telephone: (613) 786-8695  
Facsimile: (613) 788-3509  
E-mail: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

**D. Lynne Watt**  
Ottawa Agent for Counsel for the  
Intervener Prince Edward Island

**Gowling WLG (Canada) LLP**  
Barristers and Solicitors  
160 Elgin Street, 26<sup>th</sup> Floor  
Ottawa, ON K1P 1C3  
Telephone: (613) 786-8695  
Facsimile: (613) 788-3509  
E-mail: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

**D. Lynne Watt**  
Ottawa Agent for Counsel for the  
Intervener Attorney General of  
Saskatchewan

**Attorney General of Alberta**

4th Floor, Bowker Building  
9833 - 109th Street  
Edmonton, AB T5K 2E8  
Telephone: (780) 422-9532  
Facsimile: (780) 425-0307  
E-mail: [robert.normey@gov.ab.ca](mailto:robert.normey@gov.ab.ca)

**Robert J. Normey**

Counsel for the Intervener Attorney  
General of Alberta

**Attorney General of the Northwest  
Territories**

4903 – 49th Street  
PO Box 1320  
Yellowknife, NWT X1A 2L9  
Telephone: (867) 920-3248  
Facsimile: (867) 873-0234  
E-mail: [brad\\_patzer@gov.nt.ca](mailto:brad_patzer@gov.nt.ca)

**Bradley Patzer**

Counsel for the Intervener Attorney  
General of Northwest Territories

**Attorney General of the Nunavut  
Territory**

P.O. Box 1000, Station 540  
Iqaluit, Nunavut X0A 0H0  
Telephone: (867) 975-6172  
Facsimile: (867) 975-6349  
E-mail: [asilk@gov.nu.ca](mailto:asilk@gov.nu.ca)

**Adrienne Silk**

**John L. MacLean**

Counsel for for the Intervener  
Government of Nunavut as represented  
by the Minister of Justice

**Gowling WLG (Canada) LLP**

Barristers and Solicitors  
160 Elgin Street, 26<sup>th</sup> Floor  
Ottawa, ON K1P 1C3  
Telephone: (613) 786-8695

Facsimile: (613) 788-3509

E-mail: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

**D. Lynne Watt**

Ottawa Agent for Counsel for the  
Intervener Attorney General of Alberta

**Gowling WLG (Canada) LLP**

160 Elgin Street, 26<sup>th</sup> Floor  
Ottawa, ON K1P 1C3  
Telephone: (613) 786-0197

Facsimile: (613) 563-9869

E-mail: [guy.regimbald@gowlingwlg.com](mailto:guy.regimbald@gowlingwlg.com)

**Guy Régimbald**

Ottawa Agent for the Intervener Attorney  
General of Northwest Territories

**Gowling WLG (Canada) LLP**

160 Elgin Street, 26<sup>th</sup> Floor  
Ottawa, ON K1P 1C3  
Telephone: (613) 786-0197

Facsimile: (613) 563-9869

E-mail: [guy.regimbald@gowlingwlg.com](mailto:guy.regimbald@gowlingwlg.com)

**Guy Régimbald**

Ottawa Agent for the Intervener  
Government of Nunavut as represented by  
the Minister of Justice

**Coulson Litigation**

1500 - 885 West Georgia Street  
 Vancouver, British Columbia  
 V6C 3E8  
 Telephone: (604) 398-4481  
 E-mail: [scoulson@coulsonlitigation.com](mailto:scoulson@coulsonlitigation.com)

**Shea Coulson**

Counsel for the Intervener, Liquidity  
 Wines Ltd.; and Painted Rock Estate  
 Winery et al.

**University of Alberta**

Law Centre, 111 - 89 Avenue  
 Edmonton, AB T6G 2H5  
 Telephone: (780) 492-9809  
 FAX: (780) 492-4924  
 E-mail: [malcolm.lavoie@ualberta.ca](mailto:malcolm.lavoie@ualberta.ca)

**Malcolm Lavoie**

Counsel for the Intervener, Aritsan Ales  
 Consulting Inc.

**Osler, Hoskin & Harcourt LLP**

100 King Street West  
 1 First Canadian Place, Suite 6200,  
 Toronto, ON M5X 1B8  
 Telephone: (416) 862-4743  
 FAX: (416) 862-6666  
 E-mail: [mgelowitz@osler.com](mailto:mgelowitz@osler.com)

**Mark A. Gelowitz, Robert Carson**

Counsel for the Intervener, Montreal  
 Economic Institute

**McMillan LLP**

BCE Place, Suite 4400  
 181 Bay Street, Bay Wellington Tower  
 Toronto, ON M5J 2T3  
 Telephone: (416) 865-7911  
 FAX: (416) 865-7048

**Scott Maidment, Samantha Gordon**

Counsel for the Intervener, Federal  
 Express Canada Corporation

**Supreme Advocacy LLP**

100- 340 Gilmour Street  
 Ottawa, ON K2P 0R3  
 Telephone: (613) 695-8855 Ext: 102  
 FAX: (613) 695-8580  
 E-mail: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Marie-France Major**

Ottawa Agent for Counsel for the  
 Intervener Liquidy Wines Ltd.; and  
 Painted Rock Estate Winery et al.

**Supreme Advocacy LLP**

100- 340 Gilmour Street  
 Ottawa, ON K2P 0R3  
 Telephone: (613) 695-8855 Ext: 102  
 FAX: (613) 695-8580  
 E-mail: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Marie-France Major**

Ottawa Agent for Counsel for the  
 Intervener, Aritsan Ales Consulting Inc.

**Osler, Hoskin & Harcourt LLP**

Suite 1900  
 340 Albert Street  
 Ottawa, ON K1R 7Y6  
 Telephone: (613) 787-1015  
 FAX: (613) 235-2867  
 E-mail: [glangen@osler.com](mailto:glangen@osler.com)

**Geoffrey Langen**

Ottawa Agent for Counsel for the  
 Intervener, Montreal Economic Institute

**McMillan LLP**

50 O'Connor Street, Suite 300  
 Ottawa, ON K1P 6L2  
 Telephone: (613) 232-7171 Ext: 122  
 FAX: (613) 231-3191  
 E-mail: [jonathan.ohara@mcmillan.ca](mailto:jonathan.ohara@mcmillan.ca)

**Jonathan O'Hara**

Ottawa Agent for the Intervener, Federal  
 Express Canada Corporation

**Borden Ladner Gervais LLP**  
 Scotia Plaza, 40 King Street West  
 Toronto, ON M5H 3Y4  
 Telephone: (416) 367-6165  
 FAX: (416) 361-7063  
 E-mail: [cbredt@blg.com](mailto:cbredt@blg.com)

**Christopher D. Bredt, Ewa Krajewska**  
 Counsel for the Intervener, Canadian  
 Chamber of Commerce et al.

**Tousaw Law Corporation**  
 2459 Pauline Street  
 Abbotsford, BC V2S 3S1  
 Telephone: (604) 836-1420  
 FAX: (866) 310-3342  
 E-mail: [kirtousaw@gmail.com](mailto:kirtousaw@gmail.com)

**Kirk Tousaw, Jack Lloyd**  
 Counsel for the Intervener, Cannabis  
 Culture

**Power Law**  
 401 West Georgia Street, Suite 1600  
 Vancouver, BC V6B 5A1  
 Telephone: (604) 260-4462  
 FAX: (902) 422-5797  
 E-mail: [smscott@juristespower.ca](mailto:smscott@juristespower.ca)

**Jennifer Klinck, Marion Sandilands,  
 Madelaine Mackenzie, Kristen  
 Goodwin**, Counsel for the Intervener,  
 Association of Canadian Distillers,  
 operating as Spirits Canada

**Gowling WLG (Canada) LLP**  
 100 King Street West, Suite 1600  
 Toronto, ON M5X 1G5  
 Telephone: (416) 369-7240  
 FAX: (416) 369-7250  
 E-mail: [steven.sofer@gowlingwlg.com](mailto:steven.sofer@gowlingwlg.com)

**Steven I. Sofer, Paul Seaman**  
 Counsel for the Intervener, Canada's  
 National Brewers

**Borden Ladner Gervais LLP**  
 World Exchange Plaza  
 100 Queen Street, suite 1300  
 Ottawa, ON K1P 1J9  
 Telephone: (613) 237-5160  
 FAX: (613) 230-8842  
 E-mail: [neffendi@blg.com](mailto:neffendi@blg.com)

**Nadia Effendi**  
 Ottawa Agent for the Intervener, Canadian  
 Chamber of Commerce et al.

**Supreme Advocacy LLP**  
 100- 340 Gilmour Street  
 Ottawa, ON K2P 0R3  
 Telephone: (613) 695-8855 Ext: 102  
 FAX: (613) 695-8580  
 E-mail: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Marie-France Major**  
 Ottawa Agent for Counsel for the  
 Intervener, Cannabis Culture

**Power Law**  
 1103 - 130 Alberts Street  
 Ottawa, ON K1P 5G4  
 Telephone: (613) 702-5560  
 FAX: (613) 702-5560  
 E-mail: [amayrand@juristespower.ca](mailto:amayrand@juristespower.ca)

**Audrey Mayrand**, Ottawa Agent for  
 Counsel for the Intervener,  
 Association of Canadian Distillers,  
 operating as Spirits Canada

**Gowling WLG (Canada) LLP**  
 160 Elgin Street, Suite 2600  
 Ottawa, ON K1P 1C3  
 Telephone: (613) 786-0197  
 FAX: (613) 563-9869  
 E-mail: [guy.regimbald@gowlingwlg.com](mailto:guy.regimbald@gowlingwlg.com)

**Guy Régimbald**, Ottawa Agent for  
 Counsel for the Intervener, Canada's  
 National Brewers

**Conway Baxter Wilson LLP**

400-411 Roosevelt Avenue  
Ottawa, ON K2A 3X9  
Telephone: (613) 288-0149  
FAX: (613) 688-0271  
E-mail: [dwilson@conway.pro](mailto:dwilson@conway.pro)

**David K. Wilson, Owen M. Rees**  
**Julie Mouris**, Counsel for the Intervener  
Diary Farmers of Canada et al.

**Siskinds LLP**

100 Lombard Street, Suite 302  
Toronto, ON M5C 1M3  
Telephone: (519) 672-2121  
FAX: (519) 672-6065  
E-mail: [paul.bates@siskinds.com](mailto:paul.bates@siskinds.com)

**Michael J. Sobkin**

331 Somerset Street West  
Ottawa, ON K2P 0J8  
Telephone: (613) 282-1712  
FAX: (613) 288-2896  
E-mail: [msobkin@sympatico.ca](mailto:msobkin@sympatico.ca)

**Paul Bates, Ronald Podolny,**  
**Tyler Planeta**, Counsel for the  
Intervener, Consumers Council of  
Canada

Ottawa Agent for Counsel for the  
Intervener, Consumers Council of Canada

**Bennett Jones LLP**

Suite 3400, P.O. Box 130  
One First Canadian Place  
Toronto, ON M5X 1A4  
Telephone: (416) 777-4857  
FAX: (416) 863-1716  
E-mail: [staley@bennettjones.ca](mailto:staley@bennettjones.ca)

**Robert W. Staley, Ranjan K. Agarwal**  
**Jessica M. Starck**, Counsel for the  
Intervenors, Canadian Vintners  
Association; and, Alberta Small Brewers  
Association



## INDEX

	<b>Page</b>	
<b>PART I</b>	<b>OVERVIEW OF POSITION AND FACTS</b>	1
<b>PART II</b>	<b>QUESTIONS IN ISSUE</b>	2
<b>PART III</b>	<b>STATEMENT OF ARGUMENT</b>	2
	Constitutional Interpretation / Architecture	2
	Federalism and s. 121	4
	Section 121 and Provincial Legislative Jurisdiction under the <i>Constitution Act, 1867</i>	7
	Provincial Jurisdiction to Regulate Purchase / Sale and Possession of Alcohol	8
	Conclusion	9
<b>PART IV</b>	<b>SUBMISSIONS CONCERNING COSTS</b>	10
<b>PART V</b>	<b>ORAL ARGUMENT</b>	10
<b>PART VI</b>	<b>TABLE OF AUTHORITIES</b>	11

## PART I - OVERVIEW OF POSITION AND FACTS

1. The Attorney General of Newfoundland and Labrador (“NL”) accepts the facts as set out in the Appellant’s Factum.
2. The ruling of the trial judge that s. 134(b) of the NB *Liquor Control Act* violates s. 121 of the *Constitution Act, 1867*, and his holding that s. 121 “permit[s] the free movement of goods among provinces without barriers, tariff or non-tariff” would, if allowed to stand, as the trial judge himself recognized, have a “resounding impact” and significantly alter “the very nature of the Canadian federation.”<sup>1</sup>
3. NL submits that the sweeping re-interpretation of s. 121 urged by the Respondent is a drastic departure from existing jurisprudence that is unsupported by a principled constitutional analysis and a proper understanding of Canadian federalism. If accepted, it could lead to the dismantling of longstanding co-operative regulatory systems and a significant weakening of important and long-accepted provincial regulatory powers.
4. NL’s submissions will address the following points:
  - s. 121 must be interpreted in accordance with established principles of constitutional interpretation and in relation to the overall architecture of the Constitution;
  - a full appreciation of the constitutional principle of federalism, the division of powers in the *Constitution Act, 1867*, and the evolution of co-operative federalism in Canada is essential to a proper understanding of s. 121; and
  - the expansive interpretation of s. 121 urged by the Respondent would substantially erode long-standing provincial jurisdiction, thereby preventing provinces from addressing pressing policy concerns, such as public health, safety, and ensuring the livelihood of provincial residents, in a number of key areas, including: the regulation of alcohol and other harmful substances; food security; product standards, labelling requirements, and grading schemes; agricultural commodity supply management schemes; and provincial taxation.

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<sup>1</sup> Appellant’s Record, Vol.1, Tab 1, Reasons, Provincial Court of New Brunswick, para. 21, 191

## PART II - QUESTION IN ISSUE

5. Is s. 134(b) of the NB *Liquor Control Act* unconstitutional and of no force or effect as a result of inconsistency with s. 121 of the *Constitution Act, 1867*?

## PART III - STATEMENT OF ARGUMENT

### Constitutional Interpretation / Architecture

6. In the *Senate Reference*, this Court summarized the rules and principles of constitutional interpretation as follows:

[25] The Constitution implements a structure of government and **must be understood by reference to “the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning”**: *Secession Reference*, at para. 32; see generally H. Cyr, “L’absurdité du critère scriptural pour qualifier la constitution” (2012), 6 J.P.P.L. 293. The rules of constitutional interpretation require that **constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts**: *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at pp. 155-56; *Edwards v. Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.), at p. 136; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344; *Supreme Court Act Reference*, at para. 19. **Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law**: *Secession Reference*; *Provincial Court Judges Reference*; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721. (Emphasis added)<sup>2</sup>

7. These are not just a series of discrete rules and principles, but operate in tandem with each other and with an understanding that the Constitution has an “internal architecture” or “basic constitutional structure”<sup>3</sup>. While the term “architecture” is a relatively recent addition to the constitutional lexicon, the idea that it represents - that the Constitution is a coherent whole and that individual elements must be understood in relation to each other and to their role within the overall constitutional structure – is evident in earlier jurisprudence.<sup>4</sup>

<sup>2</sup> *Reference re Senate Reform*, [2014] 1 SCR 704 (“*Senate Reference*”) at para. 25

<sup>3</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217 (“*Secession Reference*”) at para. 50; *Reference re Supreme Court Act*, [2014] 1 SCR 433 at para. 82; *Senate Reference* at para. 26

<sup>4</sup> *OPSEU v. Ontario (Attorney General)*, [1987] 2 SCR 2 at p. 57. See also: *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] 4 DLR 81 (UK JCPC) at p. 91

8. The notion of the Constitution having an architecture or overall structure is consistent with the principles of progressive and purposive interpretation. It provides the framework within which these principles operate.
9. The famous passage in *Edwards v. Attorney-General for Canada* describes our Constitution as “a living tree capable of growth and expansion within its natural limits”<sup>5</sup> – it is the architecture of the Constitution and the underlying constitutional principles that inform those natural limits. By requiring that the individual elements of the Constitution be understood in relation to each other and to the structure of the Constitution as a whole, the constitutional architecture and foundational principles ensure that a progressive interpretation of one element is not at the expense of other vital aspects and constitutional values.
10. Similarly, this Court has cautioned that while a constitutional provision may be entitled a purposive interpretation, care must be taken not to improperly amplify the provision’s purpose.<sup>6</sup> This too derives from an understanding of the importance of the Constitution’s overall structure. An unduly broad characterization of the purpose of one section will almost inevitably result in the negation of other important constitutional provisions and values.
11. Another important contribution of the architecture metaphor to our constitutional understanding is its reminder of the importance of textual context in constitutional interpretation. The trial judge’s conclusion that the placement of s. 121 within the Constitution was of no assistance in determining its meaning runs counter to this important interpretive principle and disregards an important source of insight into its nature and scope.
12. Section 121 is not a standalone, unbridled, free trade provision which should have been given its own Part as the trial judge opined; rather, it is the first of several related sections addressing the movement of goods into the provinces and customs laws, duties, and related dues at the time of union, along with provision for their evolution. As such, s. 121 was logically grouped with these other sections and positioned within Part VIII “Revenues; Debts; Assets; Taxation”

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<sup>5</sup> *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (UK JCPC), at p. 130

<sup>6</sup> *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 SCR 377 at p. 401; *Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)*, [2001] 1 SCR 470 at para. 32

which addressed matters concerning the property and financial arrangements of the newly formed Dominion. This textual context supports an interpretation of s. 121 that focuses on tariffs.

13. The early seminal decisions on s. 121 gave due regard to this constitutional context.<sup>7</sup> In *Atlantic Smoke Shops v. Conlon*, the Judicial Committee of the Privy Council concluded that the purpose and effect of ss. 121 and 122 was plain “[w]hen the scheme of Canadian Federation is considered as a whole” and noted the role of s. 123 as “supplementing” s. 121.<sup>8</sup>
14. In considering s. 121 within the architecture of the Constitution, it is significant that the constitutional provisions most at risk from an expansive interpretation of s. 121 are the legislative power-granting provisions of Part VI of the *Constitution Act, 1867* and in particular, s. 92. These grants of legislative authority lie at the core of our constitutional structure and functioning of our federal system of government, and collectively ensure that the totality of legislative power is distributed between Parliament and the legislatures.<sup>9</sup> These powers flow from and are infused by the foundational constitutional principle of federalism.

### **Federalism and s. 121**

15. The principle of federalism has been described as “the lodestar by which the courts have been guided” in interpreting our Constitution; “the dominant principle of Canadian constitutional law” (prior to the enactment of the *Charter*); and “a central organizational theme of our Constitution.”<sup>10</sup>
16. The federalism principle recognizes the autonomy of provincial governments to develop and regulate their societies within their respective spheres of jurisdiction.<sup>11</sup> It is inherent in Canada’s federal structure that provinces can adopt legislation and policies that differ from each other and that respond to local needs and priorities in areas of provincial jurisdiction. This

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<sup>7</sup> *Gold Seal Ltd. v. Alberta* (1921), 62 SCR 424 at p. 469, per Mignault J.

<sup>8</sup> *Atlantic Smoke Shops, supra*, at p. 91

<sup>9</sup> *Reference re Same Sex Marriage*, [2004] 3 SCR 698 at para. 34

<sup>10</sup> *Secession Reference, supra*, at para. 56-57

<sup>11</sup> *Ibid.* at para. 58

diversity in regulatory approaches and requirements is not only inevitable; it is encouraged by and valued within our federal structure.<sup>12</sup>

17. This Court has recognized that diversity which flows directly from the legitimate exercise of provincial powers under the sections of the Constitution granting legislative authority cannot be the basis for an infringement of another section of the Constitution. In *R. v. S.(S.)*, Dickson C.J., for the Court, wrote:

The division of powers not only permits differential treatment based on province of residence, it mandates and encourages geographical distinction. There can be no question then, that unequal treatment which stems solely from the exercise, by provincial legislators of their legitimate jurisdictional powers cannot be the subject of a section 15(1) [*Charter*] challenge on the basis only that it creates distinctions based on province of residence.<sup>13</sup>

18. This reasoning applies similarly to s. 121. Just as s. 15(1) of the *Charter* must be interpreted in a way that accords with provincial legislative jurisdiction under s. 92 and the underlying value of diversity in areas of provincial jurisdiction, so too must s. 121. An interpretation of s. 121 which would preclude differential requirements stemming from the exercise by provincial legislators of their legitimate jurisdictional powers is antithetical to the division of powers and the principle of federalism which lie at the heart of our constitutional framework.
19. An understanding of “co-operative federalism” and its evolution is also essential to an appropriate interpretation of s. 121. Co-operative federalism is both a political concept and a legal principle. As a political concept this term describes the ways in which the federal and provincial governments maintain the division of powers in practice and evolve it conform to modern demands by “continuous redistribution of powers and resources without resort to the courts or amending process”.<sup>14</sup>
20. In recent years this Court has held that division of powers doctrines must recognize that the task of maintaining the balance of powers in practice falls primarily to governments and that constitutional doctrine must facilitate, not undermine, this co-operative federalism. This more

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<sup>12</sup> *R. v. S.(S.)*, [1990] 2 SCR 254 at p. 288; *Haig v. Canada*, [1993] 2 SCR 995 at p. 1029; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157 at para. 61

<sup>13</sup> *S.(S.)*, *supra*, at p. 288, see also p. 285; *Haig*, *supra*, at pp. 1046-1047

<sup>14</sup> *Quebec (AG) v. Canada (AG)*, [2015] 1 SCR 693 at para. 17

flexible modern notion of federalism is used to facilitate interlocking schemes and to avoid unnecessary constraints on provincial legislative action.<sup>15</sup> It provides a principled constitutional framework within which complex modern problems can be tackled and each level of government can discharge its responsibilities to the public in a coordinated fashion.<sup>16</sup>

21. The interpretation of the division of powers and a uniquely Canadian understanding of federalism, including co-operative federalism, have evolved through the interplay of political and legal developments. Governments have legislated, developed policies, and established programs, on their own and as part of coordinated federal-provincial schemes, based on an understanding of their respective constitutional powers. In many instances these government actions have been judicially tested and the resulting judgments have given further guidance to the executive and legislative branches of governments on the scope of heads of legislative power, the application of division of powers doctrines, and the meaning of other relevant sections of the Constitution such as s. 121. This judicial guidance enables governments to act with greater certainty on constitutional parameters when attempting to address the same or comparable issues in the future.
22. Government actions in negotiating internal trade agreements, such as the Agreement on Internal Trade and Canadian Free Trade Agreement, and pursuing harmonization of various regulatory requirements similarly require understandings of the relevant constitutional parameters and similarly contribute to the evolution of co-operative federalism in Canada.
23. Thus, a substantial body of regulatory activity and intergovernmental co-operation and agreement affecting multiple sectors has been carefully and incrementally built on this equally carefully and incrementally developed constitutional foundation.
24. There are many examples of the effective employment of co-operative federalism in Canada, such as agricultural commodity supply management schemes, upon which the livelihood of farmers across the country depend, which are at risk if the unconstrained interpretation of s.

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<sup>15</sup> *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3 at para. 24, 43; *Quebec (AG) v. Canada (AG)*, *supra*, at para 17

<sup>16</sup> *Reference re Securities Act*, [2011] 3 SCR 837 at para. 9

121 advocated by the Respondent is adopted. It is essential that the interpretation of s. 121 take full account of the principle of federalism, a principle that includes the notion of co-operative federalism, and that the interpretation of s. 121 not undermine the principle or practice of co-operative federalism as it has evolved in Canada.

25. The principles of co-operative federalism are also exemplified in the interlocking scheme made up of the federal *Importation of Intoxicating Liquors Act* and provincial liquor control legislation, such as the NB *Liquor Control Act*, which together provide for the coordinated regulation of the importation, transportation, delivery, storage, and sale of liquor.<sup>17</sup>
26. Harmful and potentially harmful products, including but certainly not limited to alcohol, are areas where the effective operation of co-operative federalism is particularly important, as the coordinated efforts of both levels of government may be required to successfully address pressing public health and safety concerns.

### **Section 121 and Provincial Legislative Jurisdiction under the *Constitution Act, 1867***

27. A broad interpretation of s. 121 would substantially erode provinces' constitutional authority to legislate under s. 92. The trial judge was under no illusions as to these impacts:

A robust interpretation of section 121 would **create conflict with the exercise of provincial powers under section 92** of the *Constitution Act, 1867*. (para. 157)

**The effect on section 92** of the *Constitution Act, 1867* of defining “admitted free” as requiring free trade among provinces without any trade barriers, tariff or non-tariff, whether found in federal or provincial legislation, such as advanced by the defence, **would eliminate any scheme that would interfere with the free movement of goods inter-provincially, whether for agricultural products, produce, manufactured goods, liquor or any other product regardless of whether or not such regulated scheme was enacted for the benefit or the protection of the residents of that province**. It would likely only allow for the regulation by the provinces of matters that would not interfere with inter-provincial movement of these goods. (para. 161) (emphasis added)

28. Many policy or legislative measures adopted by provinces may pose some impediment to the unfettered free flow of goods between provinces and could be characterized as non-tariff

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<sup>17</sup> *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 SCR 581 at para. 3, 57. The *IILA* recognizes, by reference, the authority of provinces to regulate liquor within their borders.



barriers to trade. These may include differential tax rates; differential product standards, labelling requirements, and grading schemes; provincial components of interlocking agricultural commodity supply management schemes; provincial liquor monopolies (or similar models which may be adopted for controlling the distribution of other harmful substances such as cannabis); and regulation or prohibition of harmful products such as tobacco, cosmetic-use pesticides, and diseased livestock.

29. Provincial measures may be adopted in response to unique geographical or other considerations. For example, NL's geographical features heighten concerns related to food security, making the optimization of local food production a pressing priority. Without the ability to impose measures that may be characterized as non-tariff barriers, the NL legislature would be without essential tools to ensure the viability of local production.
30. Under an interpretation of s. 121 that prohibits all tariff and non-tariff barriers to the free flow of goods between provinces, notwithstanding longstanding jurisprudence to the contrary and notwithstanding they were adopted in furtherance of valid and pressing provincial policy considerations, all of these measures would be incompetent to provinces. Section 92 powers would be completely subordinated to an unconstrained interpretation of s. 121.

### **Provincial Jurisdiction to Regulate Purchase / Sale and Possession of Alcohol**

31. The pith and substance of s. 134 and comparable provisions in other provinces' legislation, is the regulation and control of the purchase and possession of liquor in the province, matters clearly within provincial jurisdiction under s. 92.<sup>18</sup> This Court has recognized the extensive scope of provincial legislative jurisdiction with respect to alcohol.<sup>19</sup>
32. The sale and possession of alcohol is carefully regulated by provincial legislatures acting in furtherance of pressing public health and safety concerns and public expectations on the control of intoxicants. These are valid provincial purposes. This Court has recognized that the sale of

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<sup>18</sup> *R. v. Gautreau* (1978), 88 DLR (3d) 718 (NBCA), Appellant's BOA, Tab 1, cited in *Air Canada v. Ontario (Liquor Control Board)*, *supra*, at para. 55

<sup>19</sup> *Air Canada v. Ontario (Liquor Control Board)*, *supra*, at para. 54-55, 57.

alcohol to the general public includes attendant responsibilities to reduce the risks associated with that trade.<sup>20</sup>

33. The choice to establish a provincial monopoly for the sale of liquor is a valid public policy decision within provincial constitutional jurisdiction,<sup>21</sup> which may be based on several interrelated factors including public health, safety, pricing, taxation, and revenue considerations. Provincial legislators may determine such a model to be the best means to pursue important policy objectives including preventing the sale of alcohol to minors and others not lawfully permitted to possess it and ensuring the collection of taxes and maintenance of an administrative pricing system.
34. An interpretation of s. 121 which would negate these valid exercises of provincial jurisdiction runs counter to well-established jurisprudence on the broad scope of provincial powers in these areas and would significantly undermine provinces' abilities to regulate alcohol and other harmful substances in the public interest.<sup>22</sup>

### **Conclusion**

35. The interpretation of s. 121 urged by the Respondent and accepted by the trial judge is not based on a robust application of the fundamental interpretive principles discussed above, nor did the trial judge engage in any analysis of the interaction between s. 121 and ss. 91/92. Rather, s. 121 is examined in isolation from other important aspects of the Constitution. An originalist approach is adopted, placing great weight on particular pieces of historical evidence to conclude that one of the principal motivations for Confederation was free trade and that to the Fathers of Confederation this would have meant free trade without any barriers. This inferred goal of unfettered free trade on the part of these individuals is then placed above all other considerations in determining the scope of s. 121.
36. NL submits that the interpretation of section 121 must be grounded in a full, contextual consideration of this provision within the architecture of the Constitution and in particular,

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<sup>20</sup> *Childs v. Desormeaux*, [2006] 1 SCR 643 at para. 19-21

<sup>21</sup> *Air Canada v. Ontario*, *supra*, at para. 54

<sup>22</sup> See: R. Cunningham, "R. v. Comeau: Reflections from the Perspective of Health", CanLII Connects, October 11, 2017

taking due account of the principle of federalism, the division of powers, and the evolution of co-operative federalism in Canada. Section 134(b) is not inconsistent with s. 121 when the latter is properly interpreted in this manner.

**PART IV - SUBMISSIONS CONCERNING COSTS**

37. The Attorney General of NL seeks no costs on this appeal and requests that no costs be awarded against him.


**PART V – ORAL ARGUMENT**

38. The Attorney General of NL requests an opportunity to present oral argument at the hearing of this appeal.

**All of which is respectfully submitted this 12<sup>th</sup> day of October, 2017.**



**Barbara Barrowman**



**Philip Osborne**

Counsel for the Intervener,  
The Attorney General of  
Newfoundland and Labrador

## PART VI - TABLE OF AUTHORITIES

Cases

Appellant's BOA Tab		Para.
	<a href="#"><i>Air Canada v. Ontario (Liquor Control Board)</i>, [1997] 2 SCR 581</a>	25, 31, 33
	<a href="#"><i>Atlantic Smoke Shops Ltd. v. Conlon</i>, [1943] 4 DLR 81</a>	7, 13
	<a href="#"><i>Canadian Egg Marketing Agency v. Richardson</i>, [1998] 3 SCR 157</a>	16
	<a href="#"><i>Canadian Western Bank v. Alberta</i>, [2007] 2 SCR 3</a>	20
	<a href="#"><i>Childs v. Desormeaux</i>, [2006] 1 SCR 643</a>	32
	<a href="#"><i>Edwards v. Attorney-General for Canada</i>, [1930] A.C. 124 (UK JCPC)</a>	9
	<a href="#"><i>Gold Seal Ltd. v. Alberta</i> (1921), 62 SCR 424</a>	13
	<a href="#"><i>Greater Montreal Protestant School Board v. Quebec (Attorney General)</i>, [1989] 1 SCR 377</a>	10
	<a href="#"><i>Haig v. Canada</i>, [1993] 2 SCR 995</a>	16, 17
	<a href="#"><i>Ontario English Catholic Teachers' Assn. v. Ontario (Ontario General)</i>, [2001] 1 SCR 470</a>	10
	<a href="#"><i>OPSEU v. Ontario (Attorney General)</i>, [1987] 2 SCR 2</a>	7

	<a href="#"><i>Quebec (AG) v. Canada (AG)</i>, [2015] 1 SCR 693</a>	19
	<a href="#"><i>Reference re Same Sex Marriage</i>, [2004] 3 SCR 698</a>	14
	<a href="#"><i>Reference re Secession of Quebec</i>, [1998] 2 SCR 217</a>	7, 15, 16
	<a href="#"><i>Reference re Securities Act</i>, [2011] 3 SCR 837</a>	20
	<a href="#"><i>Reference re Senate Reform</i>, [2014] 1 SCR 704</a>	6, 7
	<a href="#"><i>Reference re Supreme Court Act</i>, [2014] 1 SCR 433</a>	7
1	<a href="#"><i>R. v. Gault</i> (1978), 88 DLR (3d) 718 (NBCA)</a>	31
	<a href="#"><i>R. v. S.(S.)</i>, [1990] 2 SCR 254</a>	16, 17

### **Secondary Sources**

	<b>Para.</b>
<a href="#"><u>Cunningham, Rob. “<i>R. v. Comeau</i>: Reflections from the Perspective of Health”, CanLII Connects, October 11, 2017</u></a>	22

**Legislation**

*Constitution Act, 1867, (30 & 31 Vict) c. 3 (UK), ss. 91, 92, 121*

*Importation of Intoxicating Liquors Act, RSC 1985, c. I-3, s. 3*

*Liquor Control Act, RSNB, 1973, c. L-10, s. 134*

*Liquor Control Act, RSNL 1990, c. L-8, ss. 2(f.1), 124.1*

*Liquor Corporation Act, RSNL 1990, c. L-19*

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