File No. 37398

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF NEW BRUNSWICK)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

- and -

GÉRARD COMEAU

RESPONDENT
(Respondent)

- and -

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(Style of cause continues next page)

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(Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW OF THE POSITION AND FACTS

1. The Government of Canada attaches great importance to facilitating Canada's economic union through an open, efficient, and stable market, enabling the free movement of goods across provincial boundaries. Section 121 of the *Constitution Act, 1867* is one of the pillars of the constitutional scheme designed to help attain this objective. That said, it is also important that this provision be interpreted in a coherent and predictable manner, consistent with the constitutional framework.

2. While the Attorney General of Canada (AGC) agrees the trial judge erred in his approach to the interpretation of s. 121, this appeal presents this Court with the opportunity to consider the scope of this provision in a more nuanced way, having regard to the need to interpret the Constitution progressively, in light of modern realities. In this context, the Court should accord weight to the fact that, since its 1921 decision in *Gold Seal v Alberta*[1], justices of the Court have construed s. 121 more broadly, albeit not in a way that supports the trial judge's conclusions.

3. The approach adopted by Rand J. in *Murphy v CPR*[2] and Laskin C.J. in *Re Agricultural Products Marketing Act*[3] - under which an enactment would violate s. 121 if it is "in essence and purpose" related to a provincial boundary - is consistent with the Constitution's underlying goal to establish and strengthen the Canadian economic union. It also strikes an appropriate balance between an interpretation that prohibits only customs duties and one that proscribes *any* impediment to interprovincial movement of goods, irrespective of its otherwise valid nature or purpose.

4. The Court's interpretation should ultimately be guided by a number of balancing factors, including respect for the constitutional principle of federalism, encouraging cooperative federalism, and maintaining certainty and predictability in the development of the law. If the Court decides to take a broader approach in interpreting s. 121 going beyond its holding in *Gold Seal*, the AGC submits it should adopt the "essence and purpose" test outlined by Rand J. and Laskin C.J.

[1] (1921) 62 SCR 424 [*Gold Seal*].
[2] [1958] SCR 626 [*Murphy*].
[3] [1978] 2 SCR 1198 [*Re APMA*].

5. The AGC relies on the facts as set out in the Appellant's factum.

PART II — INTERVENER'S POSITION ON APPELLANT'S QUESTIONS

6. The AGC intervenes to make submissions on the interpretation of s. 121 of the *Constitution Act, 1867* and takes no position on the validity of s. 134(b) of New Brunswick's *Liquor Control Act*.

PART III — ARGUMENT

A. THE INTERPRETATION OF SECTION 121 OF THE *CONSTITUTION ACT, 1867*

7. The AGC agrees with the Appellant that the trial judge's interpretive approach was deficient in several respects. The trial judge determined that s. 121 was intended to create a free-trade zone within Canada, prohibiting *any* trade barrier, either tariff or non-tariff.[4] Before the trial judge, a "non-tariff trade barrier" was defined only in a very general way, as including any "restrictions that result from prohibitions, conditions, or specific market requirements that make importation or exportation of products more difficult or more costly."[5]

8. The trial judge erroneously treated evidence about the general historical context of the negotiation and drafting of the *Constitution Act, 1867* - and what he perceived to be the original intent of the drafters[6]- as being essentially determinative of the meaning of s. 121.[7] The trial judge also wrongly accepted this historical evidence as a sufficient basis for discarding the binding precedents of higher courts, including those of this Court.[8]

9. Importantly, the trial judge, while aware his decision could have a "resounding impact", did not properly consider the wide-ranging implications of his decision on existing measures and

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4 *R v Comeau*, 2016 NBPC 3 at paras 17, 50, 185 and 191.

5 *R v Comeau*, *supra* note 4, at para 75.

6 *R v Comeau*, *supra* note 4, at paras 165 and 182-186.

7 *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, 2004 SCC 79 at paras 22-23. See also: Peter W Hogg, "Canadian Federalism, the Privy Council and the Supreme Court", (2005) 38 UBC L Rev 329 at 331; Ian Binnie, "Constitutional Interpretation and Original Intent" (2004) 23 SCLR 345 at 353 and 370-2, **Intervener's Book of Authorities, (hereinafter « IBA »), vol 1, tab 2**.

8 *Canada (AG) v Bedford*, [2013] 3 SCR 1101, 2013 SCC 72 at paras 38 and 44.

arrangements and, generally, on the Constitution's basic federal structure.[9] The approach of the trial judge creates uncertainty and thus should not be adopted.

10. Notwithstanding the trial judge's flawed approach, this appeal presents this Court with the opportunity to consider the scope of s. 121 in a more nuanced way, having regard to applicable principles of constitutional interpretation, particularly the need to interpret the Constitution in a progressive manner, in light of modern realities.[10]

11. In this context, a review of the evolution of the Court's caselaw as it relates to s. 121 is highly instructive. While the Court in 1921, in *Gold Seal*, interpreted s. 121 as barring only customs duties or like charges on the movement of goods across a provincial boundary,[11] justices of the Court, beginning in 1958 in *Murphy*, have, in some cases, taken a broader - and more nuanced - approach to s. 121.[12]

B. THE EVOLUTION OF THE COURT'S CASELAW AND THE RAND-LASKIN APPROACH

12. In *Murphy*, this Court had to consider the validity of the *Canadian Wheat Board Act*.[13] Rand J. issued concurrent reasons in which he considered at length s. 121, having regard to its wording, the scheme of the *Constitution Act, 1867* and prior caselaw. Noting that "[a]part from matters of purely local and private concern, this country is one economic unit […]", Rand J. opined that ""[f]ree", in s. 121, means without impediment related to the traversing of a provincial boundary."[14]

13. Further observing that, in *Gold Seal*, it had not been necessary for the Court to explore s. 121 beyond the scope of that case, Rand J. expressed the view that, apart from customs duties, s. 121 was aimed "against trade regulation which is designed to place fetters upon or raise impediments

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9 *R v Comeau*, *supra* note 4, at paras 152, 160-161, 189 and 191.

10 *Reference re Senate Reform*, [2014] 1 SCR 704, 2014 SCC 32 at para 25; *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 at para 23 [*Canadian Western Bank*].

11 *Gold Seal*, *supra* note 1, at 456 (Duff J.), 466 (Anglin J.) and 470 (Mignault J.).

12 Gerard La Forest, *The Allocation of Taxing Power under the Canadian Constitution,* 2nd ed., Canadian Tax Foundation, 1981, at 180, **IBA, vol 1, tab 4**.

13 RSC 1952, c 44, **IBA, vol 1, tab 1**.

14 *Murphy*, *supra* note 2, at 638.

to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist".[15]

14. Rand J., however, noted that s. 121 "does not create a level of trade activity divested of all regulation"; it preserves "a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade". Rand J. thus held that what s. 121 forbids is "a trade regulation that *in its essence and purpose* is related to a provincial boundary."[16]

15. In *Re APMA*, this Court dealt with a challenge to a comprehensive federal-provincial egg marketing scheme. In concurrent reasons, Laskin C.J., for himself and three other justices, held that s. 121 was not violated by a "federal regulatory statute which does not directly impose a customs charge but through a price fixing scheme, designed to stabilize the marketing of products in interprovincial trade, seeks through quotas, paying due regard to provincial production experience, to establish orderly marketing in such trade."[17]

16. Accepting the views of Rand J. in *Murphy*, Laskin C.J. further opined that the scheme was not "a trade regulation, [that] is *in its essence and purpose* related to a provincial boundary", adding that, if it were concluded otherwise, "a federal marketing statute, referable to interprovincial trade, could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade". Laskin C.J. held he could "find here no design of punitive regulation directed against or in favour of any Province."[18]

17. The views of Rand J. and Laskin C.J. ("Rand-Laskin approach") were cited in *Black v Law Society of Alberta*, involving an attack under s. 6 of the *Canadian Charter of Rights and Freedoms* on Alberta Law Society rules. La Forest J., for the majority, noted that the drafters of the *Constitution Act, 1867* intended to create a national economy and "[t]he creation of a central government, the trade and commerce power, s. 121 and the building of an transcontinental railway

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15 *Ibid* at 639 and 642.

16 *Ibid* at 642 (our emphasis). Although Cartwright J. wrote separate reasons, he agreed with Rand J. on this point: *Ibid* at 644.

17 *Re APMA*, *supra* note 3, at 1268.

18 *Ibid.*

were expected to help forge this economic union".[19] In *Morguard Investments Ltd. v De Savoye*, La Forest J. stated that "[b]arriers to interprovincial trade were removed by s. 121."[20]

18. More recently, this Court referred to the Rand-Laskin approach in *Canadian Egg Marketing Agency v Richardson*, concerning the validity of a federal egg marketing statute under s. 6 of the *Charter*.[21] For the majority, Iacobucci and Bastarache JJ. opined that the words of s. 121 "appear to place a limit on the competence of either the provinces or the federal government to pass legislation which interferes with the entry of goods into a province."[22] McLachlin J. (as she then was), dissenting as to the result, wrote that s. 121 bars "trade laws aimed primarily at impeding the flow of goods on the basis of provincial boundaries."[23]

19. This Court's holding in *Gold Seal* that s. 121 disallows only customs duties and like charges should thus be read in light of its subsequent caselaw, notably the Rand-Laskin approach to s. 121. This nuanced approach, by targeting instances of "gross […] provincial protectionism",[24] is in keeping with the underlying goal of the Constitution to maintain what the Court has referred to variously as an "economic union", "economic unit" or "common market" within Canada.[25]

20. In *Black*, La Forest J. underlined the importance of s. 121 to this objective, noting that this provision was "one of the pillars of the Confederation scheme for achieving the economic union sought by the Fathers of Confederation."[26] Indeed, s. 121 seeks to "facilitate Canada's economic union and prosperity through an effective and efficient Canada-wide free and common market for all products […]",[27] whether these include alcohol or any other product.

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19 [1989] 1 S.C.R. 591 at 609 [*Black*].
20 [1990] 3 SCR 1077 at 1099 [*Morguard Investments*].
21 [1998] 3 SCR 157 [*Richardson*].
22 *Ibid* at para 63.
23 *Ibid* at para 171.
24 Peter W Hogg, *Constitutional Law of Canada,* 5th ed Supp, Vol 2, (Toronto: Carswell, 2007) at 46-12, **IBA, vol 1, tab 3.**
25 *Re The Farm Products Marketing Act*, [1957] SCR 198 at 210 [*Re FPMA*]; *Manitoba (AG) v Manitoba Egg and Poultry Association*, [1971] SCR 689 at 717 [*Manitoba Egg and Poultry Association*]; *Labatt Breweries v Canada (AG)*, [1980] 1 SCR 914 at 921-922; *Black*, *supra* note 19, at 609; *Morguard Investments*, *supra* note 20, at 1099; *Richardson*, *supra* note 21, at para 123.
26 *Black*, *supra* note 19, at 609.
27 *Saputo v Canada (AG)*, 2011 FCA 69 at para 51.

21. The Rand-Laskin approach strikes an appropriate balance between an interpretation of s. 121 that proscribes only customs duties and like charges, and one that prohibits *any* barrier to interprovincial movement of goods, regardless of its otherwise valid nature or purpose.

22. This approach also is consistent with modern economic realities. As remarked by this Court, "[t]rade arrangements reaching the dimensions of world agreements are now a commonplace; interprovincial trade, in which [the Canadian federation] is a single market, is of similar importance, and equally vital to the economic functioning of the country as a whole."[28] Indeed, modern trade-liberalization agreements – for example, the World Trade Organization Agreement – have moved beyond the removal of tariffs to address other types of barriers.[29]

23. Similarly, the *Canadian Free Trade Agreement*, an agreement between federal, provincial and territorial governments which came into effect on July 1, 2017, seeks, among other objectives, to "reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investment within Canada" while "respecting the legislative authorities of Parliament of Canada and the provincial legislatures under the Constitution of Canada."[30]

C. CONSIDERATIONS RELATED TO ADOPTING A BROADER APPROACH TO S. 121

24. In formulating certain constitutional doctrines, such as "pith and substance", interjurisdictional immunity and paramountcy, this Court has been conscious of the need "to facilitate the achievement of the objectives of Canada's federal structure." In doing so, this Court has attempted to strike a balance between various critical factors, including respecting the constitutional principle of federalism, encouraging cooperative federalism, and maintaining certainty and predictability in the law.[31]

25. The Court's interpretation of s. 121 should ultimately be informed by these considerations. Thus, if the Court decides to develop a more expansive approach to the scope of s. 121 going

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[28] *Re FPMA*, *supra* note 3, at 210 (per Rand J.).
[29] Hans Van Houtte, *The Law of International Trade,* 2nd ed, (London: Sweet & Maxwell, 2002), at paras 3.32 and 3.46, **IBA, vol 1, tab 6.**
[30] *Canadian Free Trade Agreement*, preamble and art. 100 [*CFTA*].
[31] *Canadian Western Bank*, *supra* note 10, at para 24.

beyond its holding in *Gold Seal*, the AGC submits it should adopt the "essence and purpose" test as articulated by Rand J. and Laskin C.J.

26. ***Respecting the federalism principle.*** The Justices of this Court who have given s. 121 a more expansive reading have been careful to give it a meaning consistent with the Constitution's basic federal structure, as reflected in its provisions related to the distribution of legislative powers and how these provisions have been interpreted and applied.[32] As noted by McLachlin J. (as she then was) in *Richardson*, "[t]he current constitutional structure represents a historical compromise between regional interests and the vision of economic union."[33]

27. The Rand-Laskin approach, which targets an enactment that is in its "essence and purpose related to a provincial boundary", evokes the distinction, at the heart of the "pith and substance" doctrine, between a measure that relates to a given matter and one that only incidentally affects such matter. This flexible doctrine involves considering a measure's dominant purpose, taking into account its stated object and its effects, having regard to intrinsic and extrinsic evidence.[34]

28. For example, under this approach, a provincial enactment, designed to block the admission of goods produced in another province so as to benefit intra-provincial producers of the same goods,[35] would run afoul of s. 121. Conversely, an enactment – whether provincial or federal – that impedes the movement of goods across a provincial boundary only as an incident of a larger, otherwise valid legislative scheme would not be a measure "in essence and purpose" related to a provincial boundary.[36]

29. The test would thus permit a *bona fide* measure enacted for a valid regulatory purpose – for instance, protection of the environment, public order and safety, protection of public health[37]or

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32 *Murphy*, *supra* note 2, at 641 and 642-643; *Re APMA*, *supra* note 3, at 1265 and 1267.

33 *Richardson*, *supra* note 21, at para 123 (McLachlin J). See also: *Ibid* at paras 61 and 64 (Iacobucci and Bastarache JJ.).

34 *Rogers Communications v Châteauguay (City)*, [2016] 1 SCR 467, 2016 SCC 23 at paras 36-37.

35 *Manitoba Egg and Poultry Association, supra* note 25, at 703 (Pigeon J.) and 717 (Laskin C.J.).

36 *Richardson, supra* note 21, at 123 and 127 (McLachlin J.).

37 *Manitoba Egg and Poultry Association, supra* note 25, at 717 (Laskin C.J.). See also: *Food and Drugs Act*, RSC 1985, c F-27; *Safe Food for Canadians Act*, SC 2012, c 24; *Tobacco Act*, SC 1997, c 13.

protection of animal and plant health.[38] However, it would prohibit an enactment that, although "cloaked in the proper constitutional form",[39] constitutes merely a colourable attempt to restrict or limit the movement of goods across a provincial boundary contrary to s. 121.

30. At the same time, the Justices of this Court who have interpreted more broadly s. 121 have taken care to interpret this provision in light of s. 91 of the *Constitution Act, 1867*, notably s. 91(2), conferring on Parliament constitutional authority over the "regulation of trade and commerce". In doing so, they have aimed to preserve Parliament's ability to regulate interprovincial trade, recognizing its central role in the proper functioning of the Canadian economic union, and the need to prevent an interpretation that could lead to regulatory voids.[40]

31. Certain scholars have in fact expressed the opinion that the application of s. 121, because of the words "notwithstanding anything in this *Act*" in s. 91, is subordinate to the exercise of Parliament's powers under s. 91.[41]

32. Regardless, as stated by Laskin C.J. in *Re APMA*, "the application of s. 121 may be different according to whether it is provincial or federal legislation that is involved because what may amount to a tariff or customs duty under a provincial regulatory statute may not have that character at all under a federal regulatory statute."[42] The requirement of a showing of punitive design "directed against or in favour of any Province" enunciated in that case by Laskin C.J. underscores the different considerations which apply to a measure enacted by Parliament under s. 91.[43]

33. ***Encouraging cooperative federalism.*** Further, if the Court is to formulate an "essence and purpose" test along the lines suggested by Rand J. and Laskin C.J., it behooves the Court to do so

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38 *Plant Protection Act*, SC 1990, c 22; *Health of Animals Act*, SC 1990, c 21.

39 *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 at 332.

40 *Murphy*, *supra* note 2, at 641; *Re APMA*, *supra* note 3, at 1267. See also: *Caloil v Canada (AG)*, [1971] SCR 543 at 551 and 553.

41 Malcolm Lavoie, "R. v. Comeau and Section 121 of the Constitution Act, 1867: Freeing the Beer and Fortifying the Economic Union", (2017) 40 Dal LJ 189 at 216-217; Asher Honickman, "A marriage made in Britain: Section 121 and the Division of Powers", CanLII Connects, Oct. 24, 2016; *Contra*: Gerard La Forest, *The Allocation of Taxing Power, supra* note 12, p. 181, **IBA, vol 1, tab 4.**

42 *Re APMA*, *supra* note 3, at 1267.

43 Malcom Lavoie, "R v Comeau", *supra* note 41, at 217; Katherine Swinton, "Bora Laskin and Federalism" (1985) 35 UTLJ 353 at 361-362, **IBA, vol 1, tab 5**. By analogy, see also: *CFTA*, *supra* note 30, art. 201(4).

in a manner that does not disturb existing federal-provincial arrangements and related measures that go to the heart of cooperative federalism, which the Court has been committed to encouraging.[44]

34. This Court has consistently found federal-provincial schemes for the marketing of agricultural products to be consistent with both ss. 91(2) and 121 of the *Constitution Act, 1867*.[45] In *Pelland*, this Court stated that the federal-provincial chicken marketing scheme in that case "both reflects and reifies Canadian federalism's constitutional creativity and cooperative flexibility."[46] By attempting to "maintain an equilibrium between supply and demand and attenuate the inherent instability of the markets",[47] and preventing the imposition of discriminatory measures by one province against another,[48] these marketing schemes serve valid regulatory objectives, including ensuring the orderly regulation of the trade in agricultural commodities throughout Canada.

35. Additionally, the *Importation of Intoxicating Liquors Act*,[49] which the Appellant mentions as being part of "a federal-provincial regulatory scheme in respect of intoxicating liquor",[50] governs the interprovincial transportation and international importation of intoxicating liquors. It was amended in 2012 and 2014 to allow individuals to transport beer, wine and spirits across provincial boundaries for personal use "in quantities and as permitted by" provincial laws.[51] The aim of the federal amendments is to help bring about a more fully integrated market for alcohol across Canada.

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44 *Canadian Western Bank*, *supra* note 10, at para 24.

45 *PEI Potato Marketing Board v Willis*, [1952] 2 SCR 392; *Murphy*, *supra* note 2; *Re APMA*, *supra* note 3. See: *Farm Products Agencies Act*, RSC 1985, c F-4; *Canadian Dairy Commission Act*, RSC 1985, c C-15.

46 *Fédération des producteurs de volailles du Québec v Pelland*, [2005] 1 SCR 292, 2005 SCC 20 at para 15 [*Pelland*]. See also: *Re APMA*, *supra* note 3, at 1296; Peter W Hogg, *Constitutional Law*, *supra* note 24, at 21-16 and 21-17, **IBA, vol 1, tab 2.**

47 *Pelland*, *supra* note 46, at para 38.

48 *Burns Foods v Manitoba (AG)*, [1975] SCR 494 at 506 (Pigeon J.); Peter W Hogg, *Constitutional Law*, *supra* note 24, at 21-19, **IBA, vol 1, tab 2.**

49 RSC 1985, c I-3.

50 Appellant's factum at para 8.

51 *IILA*, s 3(2)(h), as amended by SC 2012, c 14, s 1 and SC 2014, c 20, s 163.

36. ***Maintaining certainty and predictability in the law.*** Finally, in interpreting s. 121, the Court should be mindful of the need to maintain certainty and predictability in the development of the law.[52] An approach by the Court that adopts the "essence and purpose" test outlined by Rand J. and Laskin C.J. would be consistent with that goal.

PART IV — SUBMISSIONS CONCERNING COSTS

37. The AGC does not ask for costs and submits that costs should not be ordered against the AGC.

PART V —PERMISSION TO PRESENT ORAL ARGUMENT

38. By order dated October 10, 2017, the Court (Moldaver J.) granted the Interveners Attorneys General permission to present oral argument not exceeding ten minutes at the hearing of the appeal.

Montréal, October 13, 2017

Me François Joyal
Me Ian Demers
Attorney General of Canada
Counsel for the Intervener

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52 *Bhasin v Hrynew*, [2014] 3 SCR 494, 2014 SCC 71 at paras 40-41.

PART VI –TABLE OF AUTHORITIES

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