SCC File No. 37398

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

BETWEEN

HER MAJESTY THE QUEEN

APPELLANT

-and-

GERARD COMEAU

RESPONDENT

-and-

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PART I – OVERVIEW AND FACTS

OVERVIEW

1. On October 6, 2012, the Royal Canadian Mounted Police (**RCMP**) charged the Respondent Gerard Comeau (**Respondent**) under s. 134(b) of New Brunswick's *Liquor Control Act*[1] (***LCA***) (**s. 134(b)**) with being in possession of liquor that he had not purchased at the New Brunswick Liquor Corporation (**NBLC**).[2] When charged, the Respondent was in possession of fourteen cases of beer and three bottles of spirits that he had purchased at Pointe-à-la-Croix and at the Listiguij First Nation Indian Reserve in Quebec, across the Restigouche River from his home in Tracadie, New Brunswick.

2. Because liquor prices typically are lower in Quebec than in New Brunswick, cross-border shopping is a common practice among the residents of New Brunswick's Acadian peninsula. Indeed, according to evidence presented at trial and admitted into the Agreed Statement of Facts,[3] fully two thirds of the customers patronizing the Société des Alcool du Quebec (**SAQ**) and convenience stores near the New Brunswick/Quebec border are New Brunswick residents.[4]

3. On April 29, 2016, Judge Ronald LeBlanc (**Judge LeBlanc**) of the Provincial Court of New Brunswick dismissed the charge against the Respondent. Judge Leblanc held that s. 134(b) violated s. 121 of the *Constitution Act, 1867* (**s. 121**)[5] and was therefore unconstitutional.[6]

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1 *Liquor Control Act*, R.S.N.B. 1973, c. L-10 [*LCA*].

2 RSNB 1973, c. L-10 at s. 134: "Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall (b) have or keep liquor, not purchased from the Corporation."

3 Appellant's Record, Vol. 2, Tab 9, Trial Transcript of *R. v. Comeau* before the Honourable Judge Ronald LeBlanc (25-28 August 2015), Campbellton 05672010 (NB Prov Ct) at Vol. 1, p. 5, l. 20 – p. 7, l. 19 [Trial Transcript].

4 Appellant's Record, Vol. 3, Tab 14, Trial Transcript at Vol. 6, p. 82, ll. 1-6 & Vol. 6, p. 87, ll. 14-24.

5 Section 121 reads as follows: "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces." There is no official French version of s. 121. The French version of the *Constitution Act, 1867* is the conventional translation. It does not have the force of

4. In doing so, Judge LeBlanc did not follow the interpretation of s. 121 articulated in the 1921 case of *Gold Seal Limited v. The Attorney General of the Province of Alberta* (***Gold Seal***),[7] which he described as "wrongly decided".[8]

5. In *Gold Seal*, the Court interpreted s. 121 as prohibiting the imposition of provincial customs duties only, which allowed non-tariff internal trade barriers to develop (***Gold Seal* Interpretation**). By contrast, Judge LeBlanc's judgment echoed the dissenting *Gold Seal* opinion of Idington, J., who stated that s. 121 renders "*ultra vires* any effort by either local legislatures or parliament to override it"[9] and that, as a general rule, an importer or exporter "cannot by virtue of local legislation be debarred from carrying on its business".[10]

6. This latter interpretation of s. 121 (***Comeau* Interpretation**), as adapted by Judge LeBlanc, may be expressed by the proposition that our Constitution requires that the movement of items of growth, produce or manufacture (**goods**) among the provinces be unrestrained by tariff and non-tariff trade barriers alike.[11]

7. The *Comeau* Interpretation illuminates the continuing failure of cooperative federalism to address the proliferation of interprovincial trade barriers. While many government leaders extol the benefits of free trade internationally,[12] they regularly condone trade barriers within Canada's own borders.

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law since this Act was enacted by the Parliament of the United Kingdom in English only; Forward, Consolidation of the Constitutional Acts 1867 to 1982, online: <http://laws-lois.justice.gc.ca/PDF/CONST_E.pdf>.

6 *R. v. Comeau*, 2016 NBPC 3 at para 193 [*Comeau*].

7 *Gold Seal Limited v. The Attorney General of the Province of Alberta*, (1921) 62 SCR 424 [*Gold Seal*].

8 *Comeau*, *supra* note 6 at paras 24 & 189.

9 *Gold Seal*, *supra* note 7 at 440.

10 *Ibid* at 443.

11 *Comeau*, *supra* note 6 at 191.

12 Canada, Global Affairs Canada, *Address by Minister Freeland on Canada's Foreign Policy* Priorities, (Ottawa: 2017); Ontario, Office of the Premier, *Premier's Statement at Opening of the 10th Annual Conference of the SEUS-CP Alliance*, (Toronto: 2017); Canada, Global Affairs Canada, *Address by Minister Champagne at a Plenary Session on*

8. The 2017 Canadian Free Trade Agreement (**CFTA**)[13] exemplifies this deficiency. The agreement purports to "reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investments within Canada and to establish an open efficient, and stable domestic market."[14] Despite this stated purpose, no fewer than 72% of its content is devoted to the enumeration of exceptions to interprovincial free trade. The exceptions are both general[15] and party-specific,[16] and they include a multi-step and time-consuming dispute resolution process.[17]

9. The Appellant presents a somewhat apocalyptic vision of the legal landscape that will result if the *Comeau* Interpretation prevails. This vision includes the destruction of cooperative federalism,[18] democracy[19] and constitutionalism[20] as we know them. To the contrary, the *Comeau* Interpretation merely requires provincial governments to align their policies with Canada's constitutional scheme in regard to the free movement of goods between provinces,[21] and it follows clearly from the principles of interpretation stated in *R. v. Kapp*.[22]

10. In paragraph 45 of the Appellant's Factum, the Appellant also states that the *Comeau* Interpretation calls into question the exhaustiveness principle described in *Reference re Same-*

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the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union (Milan, Italy: 2017); Canada, Prime Minister of Canada, *Press Conference by Prime Minister Justin Trudeau at G7 Summit* (Taormina, Sicily, Italy: 2017); Canada, Innovation, Science and Economic Development Canada, *Canadian Free Trade Agreement Press Conference* by the Hon. Navdeep Bains (Toronto: 2017); Canada, Prime Minister of Canada, *Address by Prime Minister Justin Trudeau to the European Parliament* (Strasbourg, France: 2017).

13 Canadian Free Trade Agreement, Consolidated Version (2017), online: <https://www.cfta-alec.ca/> [CFTA].

14 *Ibid*.

15 *Ibid* at 97-101.

16 *Ibid* at 101-104.

17 *Ibid* at 105-186. The dispute resolution process as set out in the CFTA can take up to 2.5 years.

18 Appellant's Factum at paras 31- 36 & 86 - 96.

19 *Ibid* at para 41.

20 *Ibid* at para 42-45.

21 *Comeau*, *supra* note 6 at para 191.

22 *R. v. Kapp*, 2008 SCC 41 [*Kapp*].

Sex Marriage (***Same-Sex Marriage***).[23] However, the Court in *Same-Sex Marriage* was careful to qualify the exhaustiveness principle. It said that while there is no topic that cannot be legislated upon, "the particulars of such legislation may be limited by, for instance, the *Charter*".[24] This qualification completely unravels the Appellant's exhaustiveness argument.

11. None of the conventions, principles and unwritten rules cited by the Appellant prevail over the plain words of the Constitution.. "The Constitution must be read as it is, and not in accordance with abstract notions of theorists"[25] or the political wishes of governments.

12. The *Gold Seal* Interpretation has created a systemic failure within Canadian federalism. It has served as an unwarranted invitation to use non-tariff trade barriers as an instrument of protectionism and has thereby undermined the integration of our national economy.

13. The design of Canada's Constitution clearly envisages a form of cooperative federalism that prioritizes free commerce between provinces over the short-term interests of politicians and their favoured constituencies. By upholding the *Comeau* Interpretation, this Court can remedy a distortion in constitutional law that has worked against this country's economic integration for generations.

FACTS

14. The Respondent accepts the facts in paragraph 1 of the Appellant's Factum and in addition relies upon the additional facts commencing under the heading Trade Barriers below. These facts are from the evidence of Dr. Andrew Smith.

15. Dr. Smith is widely acknowledged as one of the foremost Canadian experts on Confederation. Judge LeBlanc declared him to be an expert on Canadian constitutional history and entitled to provide opinion evidence on the historical background and context of the *British*

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23 *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 76 [*Same-Sex Marriage*].

24 *Ibid* at para 34.

25 *Ontario Hydro v. Ontario (Labour Relations Board),* [1993] 3 S.C.R. 327 at 370, LaForest J.

North America Act, 1867 (***BNA Act***).[26] No other historian testified at trial nor was conflicting evidence presented in any other form.

16. Dr. Smith's evidence of the legislative history of s. 121 is a necessary component of a purposive interpretation.[27] His evidence is also required to assist this Court in ascertaining the proper economic, "linguistic, philosophical and historical contexts"[28] of s. 121.

Trade Barriers

17. There are two types of trade barriers, tariff trade barriers and non-tariff trade barriers.

18. A tariff trade barrier involves a tax or other payment of money when goods enter a jurisdiction. It can be assessed on a specific volume or weight or it can be assessed as a percentage of the value of goods.[29]

19. A non-tariff trade barrier, on the other hand, is any restriction on the movement of goods that is not a tariff trade barrier. It can take many different forms. For example, if during transport, perishable goods are held up at a border for many hours as a result of a deliberately conceived bureaucratic policy or practice and thereby spoil, that would comprise a non-tariff barrier. Other non-tariff barriers are less obvious and may rely on the imposition of onerous bureaucratic duties. For instance, if sending something across a border requires substantial

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26 Appellant's Record, Vol. 2, Tab 10, Trial Transcript at Vol. 2, p. 91, l. 19-22. See also Appellant's Record, Vol. 5, Tab 29, Trial Exhibit D-5: C.V. Dr. Andrew Smith & Appellant's Record, Vol. 5, Tab 30, Trial Exhibit D-6: Expert Report of Dr. Smith: "The Historical Origins of Section 121 of the British North America Act: a Study of Confederation's Political, Social and Economic Context" [Expert Report of Dr. Smith].

27 *Kapp, supra* note 22 at para 82. "Our Court has given great importance to the need for purposeful interpretations: In *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, Iacobucci J. gives a detailed explanation of the rules of statutory interpretation, showing that one must first consider the wording of the Act, then the legislative history, the scheme of the Act, and the legislative context."

28 *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters,* [2009] 3 S.C.R. 407 at para 32.

29 Appellant's Record, Vol. 2, Tab 10, Trial Transcript at Vol. 2, p. 96, ll. 7-10.

paperwork that is not required of local producers or suppliers, that too could be an example of a non-tariff barrier.[30]

20. Non-tariff trade barriers were an issue of concern in the nineteenth century, and they became a significant preoccupation of the Fathers of Confederation (**FOC**).[31] At the time of Confederation, British North Americans were acutely conscious of the difficulties caused by non-tariff trade barriers.[32]

Early Colonial Trade Statutes

21. Before discussions on Confederation began, Nova Scotia, New Brunswick and the Province of Canada enacted reciprocal duty-free statutes. Under these statutes, colonies whose products were admitted into a market "free from duty" then had the discretion to return the gesture.[33]

The Reciprocity Treaty of 1854

22. For about ten years before the Confederation movement began, exporters prospered under the Reciprocity Treaty of 1854 (**Reciprocity Treaty**),[34] which included provisions that allowed British North Americans to send timber, fish, minerals and agricultural products freely across the border to United States markets.[35]

23. Observers from that era describe the Reciprocity Treaty period of 1854-1865 as a "golden age"[36] for commerce. As the FOC knew well, the economies of the British North American colonies "surged" thanks to their unfettered access to large markets in the United States.[37]

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30 *Ibid* at Vol. 2, p. 96, l. 10 – p. 97, l. 3.

31 *Ibid* at Vol. 2, p. 96, l. 21 – p. 97, l. 3.

32 *Ibid* at Vol. 2, p. 99, l. 22 – p. 100, l. 2.

33 An Act in relation to the Trade between the British North America Possessions, SNS 1848 (10 & 11 Vict), c 1; An Act relating to Trade between the British North American Possessions, SNB 1850 (13 Vict), c 2; An Act to facilitate Reciprocate Free Trade between this Province and other British North American Provinces, S Prov C 1850 (13 & 14 Vict), c 3, **Respondent's Book of Authorities (BOC), Tab 6**.

34 Appellant's Record, Vol. 2, Tab 10, Trial Transcript at Vol. 2, p. 93, ll. 15-22.

35 *Ibid* at Vol. 2, p. 94, ll. 1-16.

36 Appellant's Record, Vol. 3, Tab 12, Trial Transcript at Vol. 4, p. 42, ll. 12-14.

Effect of the American Civil War and Politics on Trade

24. As a result of the Civil War, American support for free trade collapsed in part because many Americans believed that British North Americans sympathized with and aided the Confederacy.[38]

25. During the Civil War, the United States imposed a variety of non-tariff trade barriers on goods from British North America.[39] This included a "search and detain" policy that discouraged the transport of perishable goods.[40] Much as in the current era, powerful forces within the ruling Republican Party called for higher tariff walls, and American sentiment became steadily more protectionist.[41]

26. In March 1865, the United States government gave one year's notice of its intention to cancel the Reciprocity Treaty. After March 1866, British North America no longer enjoyed trade reciprocity with the United States. All of these events transpired while British North American leaders were discussing their plans for Confederation and so coloured the design and substance of our Constitution.[42]

Fathers of Confederation Search for an Alternative

27. Since free trade with the United States had been compromised, the FOC were tasked with finding another way to develop the economy of British North America. To that end, they focused on free trade within the proposed British North American union. Internal free trade had already been cited as a goal of the soon-to-be confederated entity, but the loss of reciprocity with the United States gave this project new urgency.[43] The removal of trade barriers, tariff and non-

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37 Appellant's Record, Vol. 2, Tab 10, Trial Transcript at Vol. 2, p. 94, l. 20 – p. 95, l. 6.
38 *Ibid* at Vol. 2, p. 95, ll. 14-23. See also Appellant's Record, Vol. 5, Tab 29, Expert Report of Dr. Andrew Smith, *supra* note 26 at 6 & 24.
39 Appellant's Record, Vol. 2, Tab 10, Trial Transcript at Vol. 2, p. 95, l. 14 – p. 96, l. 2.
40 *Ibid* at Vol. 2, p. 97, ll. 10-16.
41 Appellant's Record, Vol. 5, Tab 29, Expert Report of Dr. Smith, *supra* note 26 at 15-16.
42 Appellant's Record, Vol. 2, Tab 10, Trial Transcript at Vol. 2, p. 98, l. 15 – p. 99, l. 3.
43 *Ibid* at Vol. 2, p. 100, l. 16 – p. 101, l. 15.

tariff alike, became a priority for the FOC,[44] and this goal was highlighted prominently in the "sales pitch" that was used to sell Confederation to the broad public.[45]

28. The Appellant states that no mention was made of mandatory free trade or of barrier-free provincial borders in the public statements leading to Confederation.[46] This is incorrect. A number of FOC speeches and statements prior to the enactment of the *BNA Act* unmistakably demonstrate a plan to implement a full free-trade program.[47] These statements are part of the publicly available historical record and are well known within the academic community.[48]

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44 *Comeau*, *supra* note 6 at para 185.

45 Appellant's Record, Vol. 2, Tab 11, Trial Transcript at Vol. 3, p. 43, l. 8 – p. 44, l. 2.

46 Appellant's Factum at para 14.

47 *Comeau*, *supra* note 6 at para 186. As Judge LeBlanc noted, examples abound: "Union of all Provinces would break down all trade barriers between us"; "Now we desire to bring about that same free trade in our own colonies"; "…the free interchange of the products of the labor of each province"; "…if we wish to…establish a commercial union, with unrestricted free trade, between people of the five provinces…"; "Union is free trade among ourselves".

48 In Halifax on September 12, 1867, George Brown said that union of all Provinces would "break down all trade barriers between us," and throw open all at once "a combined market of four millions of people"; Edward Whalen, *The Union of the British provinces: a brief account of the several conferences held in the Maritime provinces and in Canada, in September and October, 1864, on the proposed confederation of the provinces: together with a report of speeches delivered by the delegates from the provinces, on important occasions* (Charlottetown, G.T. Haszard, 1865) at pp. 36-37, **Respondent's BOC, Tab 17**. See also pages 47-48. On the same occasion, Alexander Galt said that the purpose of the Union was "free trade among ourselves"; *Ibid* at p. 142. In February 1865, in the Parliament of the Province of Canada, John A. Macdonald said that Canada wanted "unrestricted free trade, between people of the five provinces"; Canada, Parliament, Parliamentary Debates on the subject of the Confederation of the British North American provinces, 8th Parliament, 3rd Session (1865) at pp. 26-27, **Respondent's BOC, Tab 8**; *Ibid* at pp. 64-65. According to George-Etienne Cartier, "the

Evolution of the *British North America Act* and Section 121

29. At the Charlottetown Conference in 1864, representatives from the Province of Canada were able to convince representatives from the Maritimes that a possible union of Nova Scotia, New Brunswick and Prince Edward Island would be even more desirable if it also included Ontario, Quebec and, eventually, all other British territories on the continent.[49]

30. The resolutions that eventually led to Confederation were given legislative form by British North American officials working with British draftsmen in London during the winter and spring of 1867. These draftsmen were experienced in preparing statutes and treaties on matters of commerce and trade. As Judge LeBlanc noted, such draftsmen would have known to include "from customs duties or charges" in s. 121 if such restrictive language reflected the wishes of the FOC.[50] The fact that such language does not appear in s. 121 cannot be ascribed to the vagaries of language or expression, but to a deliberate decision.

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most immediate benefits to be derived from the union, will spring from the breaking down of tariff barriers and the opening up of the markets of all the provinces to the different industries of each"; *Official Reports of the Nova Scotia House of Assembly* (10 April 1865) at p. 15, **Respondent's BOC, Tab 16**. On April 10, 1865, then Provincial Secretary Charles Tupper, in a debate on Confederation in the Nova Scotia House of Assembly, cited internal free trade as one of the advantages of Confederation Nova Scotia; UK, HL, *Parliamentary Debates*, 3rd ser, vol 185, col 557-82 (19 February 1867), **Respondent's BOC, Tab 9**. The Second Reading debate on the British North America bill in the House of Lords occurred on 19 February 1867. The Earl of Carnarvon's speech in support of the bill said that internal free trade would be a significant advantage of Confederation; UK, HC, *Parliamentary Debates*, 3rd ser, vol 185, col 1090-1 (27 February 1867), **Respondent's BOC, Tab 4.** Charles Adderley, Under-Secretary of State for the Colonies, spoke for the bill. He, too, said that internal free trade was an advantage of Confederation.

49 Appellant's Record, Vol. 2, Tab 10, Trial Transcript at Vol. 2, p. 102, l. 7 – p. 103, l. 13.

50 *Comeau*, *supra* note 6 at para 181.

31. The British North America bill was introduced in the House of Lords on February 12, 1867. During the Second Reading debate on February 19, 1867, the Earl of Carnarvon listed internal free trade as a significant advantage of Confederation.[51]

32. On March 4, 1867, the British North America bill was sent to the House of Commons and referred to the Committee of the Whole. There, the Committee amended the bill so as to add Part VIII, concerning "Revenues; Debts; Assets, Taxation", which contained s. 121 in its present form.[52]

33. A previous draft of the British North America bill,[53] produced on February 9, 1867, contained an early version of s. 121 (designated as s. 125) with different wording.[54] The tabular comparison that follows shows how the wording of s. 121 that appears in our Constitution differs from this earlier iteration.

February 9, 1867 draft version	**Section 121 in its present form**
125. All Articles the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into all ports in Canada. [*sic*]	121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

34. The unqualified words "admitted free" had been a feature of all drafts of the bill in contrast to earlier statutes that used the formulation "free from duty".[55] The changes made between February 9, 1867 and the final version rendered s. 121 broader in scope. In particular,

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51 *Supra* note 48 per Lord Carnarvon.

52 British North America Bill, London, British Parliamentary Archives (SW1A0PW). Parliamentary staff made handwritten notes on the Bill to this effect. The Respondent's copy with these notes was obtained from the British Parliamentary Archives. It is 11 inches by 16.5 inches and too large to include in the Respondent's Book of Authorities. The Respondent will make available copies upon written request.

53 Gerald Peter Browne, *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969) at 302, **Respondent's BOC, Tab 7**.

54 *Ibid* at 332.

55 See e.g. note 33.

the change from "into all ports in Canada" to "each of the other provinces" showed that the drafters were now thinking specifically about the land-based trade that would increase substantially with the growth of railways in the new country.[56]

35. These changes reflect the FOC's anticipation that Canada would be a comprehensive economic union with a robust system of trade among the provinces.[57] This intention is reflected in the unqualified phrase "admitted free", words that did not exist in older statutes and colonial trade agreements.[58]

36. The placing of s. 121 in Part VIII of the *BNA Act* was itself significant. Part VIII set out the business terms governing Confederation,[59] which had as its basis the use of interprovincial free trade[60] as a means to protect and grow the Canadian economy.

37. The late nineteenth century was a time of technological leaps. In 1867, commercial telegraphy and railways were rapidly shrinking the world and bringing previously localized economies into contact with one another.[61] To take advantage of these advances, British North America required a more comprehensive economic union.[62] Free trade throughout the new country was not an abstract ideal, but a realistic goal that Confederation would achieve for the benefit of future generations.[63]

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56 Appellant's Record, Vol. 2, Tab 11, Trial Transcript at Vol. 3, p. 34, l. 19 – Vol. 3, p. 35, l. 13.
57 *Comeau*, *supra* note 6 at para 178.
58 See e.g. note 33.
59 Appellant's Record, Vol. 2, Tab 11, Trial Transcript at Vol. 3, p. 58, l. 18 – p. 59, l. 6.
60 *Ibid* at Vol. 3, p. 59, ll. 13-15.
61 *Ibid* at Vol. 3, p. 35, l. 16 – p. 36, l. 10.
62 *Ibid.*
63 *Ibid*.

PART II – ISSUES

38. This appeal raises two questions. The first is whether s. 121 renders s. 134(b) unconstitutional. The second is whether s. 121 also renders s. 3(1) of the *Importation of Intoxicating Liquors Act* (***IILA***) (**s. 3(1)**)[64] unconstitutional.

PART III – ARGUMENT

Judge LeBlanc's Analysis of Section 121 Was Contextual

39. The Appellant argues that Judge LeBlanc's "interpretation of s. 121 subordinates the principle of federalism to an overly literal and non-contextual analysis."[65] This is simply not so. A review of Judge LeBlanc's Judgment shows that he carried out a detailed contextual analysis[66] that follows the rules this Court set out in *Kapp*.[67]

Pith and Substance of Section 134

40. In order to determine whether s. 134(b) violates s. 121, it is necessary to determine its pith and substance.[68] This analysis begins with the constitutional basis of liquor regulation by the NBLC and then considers the true purpose of s. 134(b). It is then necessary to determine whether s. 134(b) constitutes a trade barrier and, if so, whether that barrier is tariff or non-tariff.

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64 *Importation of Intoxicating Liquors Act*, R.S.C., 1985, c. I-3 at s. 3(1) [*IILA*]. "… no person shall import … into any province from … within or outside Canada any intoxicating liquor, except such as has been purchased by … Her Majesty or the executive government of … the province into which it is being imported … or any … other governmental agency that, by the law of the province, is vested with the right of selling intoxicating liquor."

65 Appellant's Factum at para 35.

66 See *Comeau*, *supra* note 6; Judge LeBlanc's contextual analysis begins at paras 40-48 (*The Interpretation Of Constitutional Documents*) and continues through paras 49-69 (*Wording*), 70-90 (*Historical Context*), 91-101 (*Pronouncements of the FOC) and paras* 102-114 (*The Jurisprudence on Section 121*).

67 *Supra* note 22 at para 82.

68 *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] 1 S.C.R. 693 at paras 29-30.

41. It must be acknowledged and it is axiomatic that the jurisdiction of the NBLC is necessarily limited to the control and distribution of liquor within the province. The NBLC does not have the legal authority to prevent liquor from entering New Brunswick[69] nor does it have any jurisdiction outside of the province.

42. Parliament enacted the *IILA* in 1928 in order to enable and to complement provincial jurisdiction over liquor.[70] Section 3(1), which requires that all liquor entering a province be sold to the provincial liquor corporation, is the cornerstone of provincial liquor monopolies in Canada.

43. Richard Smith of the NBLC testified that the dominant purpose of s. 134(b) is to ensure that provincial revenue is collected when liquor purchased elsewhere enters New Brunswick.[71] Further, Mr. Smith and RCMP Constable Guy Savoie both testified that s. 134(b) can only be triggered if someone brings liquor purchased outside of the province across the border into New Brunswick.[72] Dr. Tom Bateman, the Appellant's political science expert, said that a fine imposed under s. 134(b) is a financial consequence of crossing the border.[73]

44. As admitted by Dr. Bateman,[74] s. 134(b) is therefore an interprovincial trade barrier. It is a non-tariff trade barrier because there are no duties or other charges for liquor entering the province.

Interpretation of Section 121

45. In order to determine the full and intended meaning of s. 121, it is necessary to conduct both a progressive and purposive interpretation.

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69 *Attorney General for Ontario v Attorney General for the Dominion, and the Distillers and Brewers' Association of Ontario,* [1896] A.C. 348 (JCPC) at 371; *Attorney-General of Manitoba v. Manitoba Licence Holders' Association,* [1902] A.C. 73 (JCPC) at 78, **Respondent's BOC, Tab 1**.

70 *Air Canada v. Ontario (Liquor Control Board),* [1997] S.C.J. No. 66 at para 44; *Regina v. Gautreau,* (1978) 88 D.L.R. (3d) 718 (NBCA) at 722.

71 Appellant's Record, Vol. 2, Tab 10, Trial Transcript at Vol. 2, p. 43, ll. 16-18.

72 *Ibid* at Vol. 2, p. 36, ll. 11-22 & Appellant's Record, Vol. 2, Tab 11, Trial Transcript at Vol. 3, p. 6, ll. 6-13.

73 Appellant's Record, Vol. 3, Tab 14, Trial Transcript at Vol. 6, p. 44, l. 6 – p. 45, l. 8.

74 *Ibid*.

Progressive Interpretation

46. A progressive interpretation accepts that the Constitution is a "living tree" and must be interpreted as such to give it "a large and liberal interpretation" and not to cut down its provisions by a narrow and technical construction.[75] The living tree principle is "a fundamental tenet of constitutional interpretation."[76] It follows that the Court should not read any restriction into s. 121 that is not explicit or required by necessary implication.

Purposive Interpretation

47. A purposive interpretation requires this Court to consider "the wording of the [a]ct, then the legislative history, the scheme of the [a]ct, and the legislative context."[77]

Wording of Section 121

48. Section 121 requires that goods of any province "shall be admitted free" into each of the other provinces. The first and most important part of this provision is that goods be "admitted … into each of the other Provinces". This provision is mandatory.

49. The second part of this provision is that the goods be admitted "free". The use of "free from duty" in older statutes[78] shows that the use of "free" in an unqualified form signaled an expansive meaning. The change in the formula was deliberate and reflected the drafters' intention to protect interprovincial trade from both tariff and non-tariff trade barriers.[79]

50. The definition of "free" in the dictionary commonly used at the time of Confederation, as well as dictionaries in use today, shows that "free" means "[u]ncompelled; unrestrained", in other words, unqualified.[80] It follows that the wording of s. 121 was conceived to indicate that

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75 *Henrietta Muir Edwards and others v. Attorney General for Canada*, [1930] A.C. 124 (JCPC) at 136, **Respondent's BOC, Tab 2.**

76 *R. v. Blais*, [2003] 2 S.C.R 236 at para 40.

77 *Kapp*, *supra* note 22 at para 82.

78 See e.g. note 33.

79 Appellant's Record, Vol. 2, Tab 10, Trial Transcript at Vol. 2, p. 87, l. 20 – p. 88, l. 3.

80 Samuel Johnson, *A Dictionary of the English Language* (1755) *sub verbo* "free"; Henry Hitchings, *Defining the World* (New York: Picador, 2005) at 246-247; *Shorter Oxford English Dictionary*, 6th ed, (Oxford: Oxford University Press, 2007) *sub verbo* "free" & at Preface, **Respondent's BOC, Tab 13**.

goods should be able to cross provincial borders unrestrained by either tariff or non-tariff barriers.

Legislative History

51. Dr. Smith provided detailed evidence about the legislative history and context surrounding s. 121. The historical record, he said, indicated that the FOC and the drafters of the *BNA Act* intended s. 121 to prohibit both tariff and non-tariff interprovincial trade barriers and thereby prevent future governments, both federal and provincial, from restraining free interprovincial trade.[81]

Legislative Context

52. Section 121 is an important business component of the *Constitution Act, 1867*. The underlying principle of interprovincial free trade was supported by a wide public consensus at the time the *BNA Act* was drafted.[82] Section 121 ensured that neither Parliament nor the provinces could apply their legislative powers in a way that compromised the structure of the new country's economy.

53. The legislative and socio-economic context therefore supports the conclusion that the purpose of s. 121 was to protect interprovincial free trade.

Scheme of the Act

54. The scheme of the *Constitution Act, 1867* also supports the conclusion that s. 121 was intended to protect interprovincial free trade under Confederation.

55. Part VIII contains ss. 106 to 126. Under these provisions, the assets, duties and revenues, including the sources of revenue of the colonies at the date of Confederation, were distributed and assigned in part to the control of Parliament and in part to the provincial legislatures.

56. These provisions also required the federal government to assume the public debts of the colonies and to pay an annual grant to each of the provinces, both of which were to be "in full

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81 Appellant's Record, Vol. 5, Tab 29, Expert Report of Dr. Smith, *supra* note 26 at 24. See also note 33.

82 Appellant's Record, Vol. 2, Tab 11, Trial Transcript at Vol. 3, p. 25, l. 3 – p. 28, l. 13.

settlement of all future demands on Canada."[83] In the context of Part VIII, s. 121 had an additional feature. The economic gains then known to be associated with free trade would be an important new source of provincial revenue. Section 121 therefore provided a tangible commercial dividend that was to emerge from this "treaty of union".[84]

57. Part VIII is so fundamental to the architecture of Confederation that neither Parliament, nor any province, is entitled to alter the distribution of assets, liabilities and sources of revenue, nor can it ignore any of the provisions of ss. 106 to 126, including s. 121.[85]

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83 *British North America Act, 1867* at s. 118, which was repealed and replaced by *British North America Act*, 1907, 7 Edw. VII, c. 11 (U.K.). See also *Provincial Subsidies Act*, R.S.C. 1985, c. P-26 & *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8; *Constitution Act, 1982* at Part III.

84 UK, HL, *Parliamentary Debates*, 3rd ser, Vol. 185, col. 557-82 (19 February 1867), **Respondent's BOC, Tab 9**. The Earl of Carnarvon referred to the *British North America Act, 1867* as a "treaty of union"; Gwynne, J. also described the Act as a "treaty of union" in *In re Prohibitory Liquor Laws*, (1895) 24 SCR 170 at 210, rev'd *Attorney General for Ontario v Attorney General for the Dominion, and the Distillers and Brewers' Association of Ontario*, [1896] A.C. 348 (JCPC), **Respondent's BOC, Tab 3**; Viscount Haldane also referred to the Canadian Constitution as a treaty of Union in *The Attorney-General for the Commonwealth of Australia and others v. The Colonial Sugar Refining Company Limited, and others*, [1914] A.C. 237 at 253 as cited by Rand, J. in *Murphy v. C.P.R.*, [1958] SCR 626 at 641; In *Black v. Law Society (Alberta)*, [1989] 1 S.C.R. 591 at 608-609, La Forest, J. referred to the *Constitution Act, 1867* and s. 121 as having created an economic Union. This terminology was also used in *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association et al.*, [1971] S.C.R. 689 at717-718; *In Lawson v. Interior Tree Fruit and Vegetables Committee of Direction*, [1931] S.C.R. 357 at 373, Cannon, J. said that one of the main purposes of Confederation was to form "an *economic unit* of all the provinces in British North America *with absolute freedom of trade between its constituent parts*" [emphasis added].

85 *Reference re Waters and Water-Powers*, [1929] SCR 200 at 210-211; *Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004 at 1066.

58. In paragraph 70 of its Factum, the Appellant argues that in a passage in his report, Dr. Smith conceded that certain provisions in s. 91 of the *Constitution Act, 1867* enforce national standardization[86] and that this concession degrades the force of the Respondent's argument. However, the Appellant overlooked the last sentence of the passage in which Dr. Smith also said: "the Fathers of Confederation wanted to create a complete economic union rather than simply to eliminate custom duties in British North America, by abrogating non-tariff trade barriers as well as tariff trade barriers".[87]

59. In paragraphs 66 to 73 of its Factum, the Appellant argues that the references to "duties", "dues" and "revenues" in ss. 123, 124 and 126 of the *Constitution Act, 1867* support the view that s. 121 only protects Canadians against provincial customs duties and no other trade barriers. However, this claim contradicts the uncontroverted evidence of Dr. Smith that was accepted by Judge LeBlanc. Again, this evidence was that s. 121 was included in Part VIII to ensure that future generations of Canadian politicians, both federal and provincial, would not impair our Confederation by imposing any form of interprovincial trade barrier.

Conclusion

60. This purposive analysis of s. 121 leads to the conclusion that s. 121 prohibits all internal trade barriers, both tariff and non-tariff.

Section 121 Jurisprudence

61. Since Confederation, s. 121 has been considered only five times by final appellate courts. The first was in *Gold Seal*, which gave rise to the *Gold Seal* Interpretation. The next three, *Atlantic Smoke Shops v. Conlon* (***Atlantic Smoke Shops***),[88] *Murphy v. C.P.R. (**Murphy**)*,[89] and *Reference re Agricultural Products Marketing Act (**APMA**)*,[90] all applied the *Gold Seal*

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86 Appellant's Record, Vol. 5, Tab 29, Expert Report of Dr. Smith, *supra* note 26 at 24-25.
87 *Ibid* at 26.
88 *Atlantic Smoke Shops v. Conlon*, [1943] 4 DLR 81 (JCPC) [*Atlantic Smoke Shops*].
89 *Murphy v. C.P.R.*, [1958] SCR 626 [*Murphy*].
90 *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198 [*APMA*].

Interpretation in some way. The last case, *Canadian Egg Marketing Agency v. Richardson* (***Richardson***),[91] merely discussed but did not apply s. 121.

62. In paragraph 60 of the Appellants' Factum, the Appellant cites ten decisions about s. 121 which it describes as "of binding and persuasive authority". However, the decisions that actually consider s. 121 are the five referred to above. The other decisions cited by the Appellant only mention s. 121 and rely on the correctness of the *Gold Seal* Interpretation.

63. The main issue presented in *Gold Seal* was whether the *Canada Temperance Amending Act* (***CTAA***)[92], which prohibited liquor from being transported into Saskatchewan or Manitoba from Alberta, had been properly proclaimed. In February 1921, Gold Seal Limited, a liquor merchant in Calgary, asked Dominion Express to deliver liquor to customers outside of Alberta. Dominion Express refused because doing so would be contrary to the *CTAA*, which had come into force in Alberta only a few days earlier.

64. Section 152(g) of the *CTAA* required the proclamation of the *CTAA* in Alberta to name "the day on which…[the] prohibition will go into force."[93] Inexplicably, the proclamation failed to name a specific day, and Gold Seal Limited relied upon this failure.

65. The issue before the Court was whether the proclamation had complied with the stipulated requirement. Following argument, and while the decision was reserved, Parliament enacted the *Proclamation Validation Act*,[94] which declared any proclamation of the *CTAA* to have been valid.

66. On October 18, 1921, the Court released its decision. Davies, C.J., Anglin and Mignault, JJ. held that the *Proclamation Validation Act* saved an otherwise invalid proclamation. Duff, J., as he then was, held that the original proclamation of the *CTAA* had been valid, even absent the newly enacted federal legislation.

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91 *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157 [*Richardson*].

92 *Canada Temperance Amending Act*, SC 1919 (10 Geo V), c 8 [*CTAA*], **Respondent's BOC, Tab 18.**

93 *Ibid*.

94 *Proclamation Validation Act*, SC 1921, 11 & 12 Geo V, c 20, **Respondent's BOC, Tab 19.**

67. As to the claim that the *CTAA* violated s. 121, Idington, J. offered his agreement, stating in his dissenting opinion that s. 121 renders "*ultra vires* any effort by either local legislatures or parliament to override" it.[95] Duff, Migneault and Anglin, JJ. disagreed. They held that the only thing prohibited by s. 121 was the establishment of customs duties affecting interprovincial trade in the products of any province of the Union.[96] Anglin, J., as he then was, added that "[p]rohibition of import in aid of temperance legislation is not within the purview of [s. 121]".[97]

68. In *Atlantic Smoke Shops*, the issue was whether New Brunswick's *Tobacco Tax Act*, which imposed retail sales tax on all tobacco products sold within the province, violated s. 121. The Privy Council did cite the *Gold Seal* Interpretation when it concluded that the *Tobacco Tax Act* did not run afoul of s. 121.[98] However, the law at issue might also have been defended as imposing a merely incidental restriction on commerce. It was open to the Court to hold that, since the tax applied equally to entities within and outside the province, it did not constitute a true barrier to interprovincial trade. Thus, the Court's endorsement of the *Comeau* Interpretation in the instant case would not automatically serve to overturn the result of *Atlantic Smoke Shops.*

69. In *Murphy*, the issue was whether the prohibition in the *Canadian Wheat Board Act* against farmers shipping wheat out of a province without Canadian Wheat Board approval was unconstitutional because it violated s. 121.

70. Applying the *Gold Seal* Interpretation and finding that the act did not impose any customs duties, the majority held that the prohibition did not violate s. 121. Providing his separate reasons, Rand, J. described the ambit of s. 121 in terms that fell short of the *Comeau* Interpretation:

> I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as

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95 *Gold Seal*, *supra* note 7 at 440.
96 *Ibid* at 456, 466 & 470.
97 *Ibid* at 466.
98 *Atlantic Smoke Shops*, *supra* note 88 at 569.

> incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.[99]

71. What is more, Rand, J. did not apply these principles in *Murphy*. Instead, he held that the prohibition against the movement of wheat across a provincial border without prior Canadian Wheat Board approval did not violate s. 121. To justify this holding, he said as follows:

> Section 121 does not extend to each producer in a province an individual right to ship freely…. If it, were so, what, in these days has become a social and economic necessity, would be beyond the total legislative power of the country, creating a constitutional hiatus. ... I find in s. 121 no obstacle to the operation of the scheme in any of the features challenged.[100]

72. The inconsistency in Rand, J.'s decision cannot be ignored and prevents *Murphy* from being a useful precedent. If economic and social objectives or problems of legislation were allowed to prevail over an express provision of the Constitution, many decisions regarding the application of the Canadian Charter of Rights and Freedoms[101] (***Charter***) might have had different results.[102]

73. In *APMA*, the issue was whether orders made under the *Farm Products Marketing Agencies Act*, which fixed the number of eggs that could be produced in Ontario and prohibited the "dumping" of eggs in other provinces, contravened s. 121. The Court applied the *Gold Seal* Interpretation and held that since the orders did not impose customs duties, the orders were valid.

74. In his judgment, Laskin, C.J. articulated a narrow definition of s. 121:

> It seems to me, however, that 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.
>
> … 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

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99 *Murphy*, *supra* note 89 at 642.

100 *Ibid* at 642-643.

101 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

102 See e.g. *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Symes v. Canada*, [1993] 4 SCR 695 & *Thibaudeau v. Canada*, [1995] 2 SCR 627.

> interprovincial trade, seeks through quotas, paying due regard to provincial production experience, to establish orderly marketing in such trade cannot, in my opinion, be in violation of s. 121. In *Gold Seal Ltd v. Dominion Express Co.*, both Anglin and Mignault JJ. viewed s. 121 as prohibiting the levying of customs duties or like charges when goods are carried from one Province into another.[103]

75. All of Laskin, C.J.'s reasoning in *APMA* and the ratio of his decision stemmed from the *Gold Seal* Interpretation; it did not adopt Rand, J.'s reasoning in *Murphy*.

76. Further along in the passage quoted above, Laskin, C.J., also said:

> Rand J. took a broader view of s. 121 in *Murphy v. C.P.R.* where he said this, at p. 642:
>
> > I take s. 121 apart from customs duties to be aimed against trade regulation which is designed to place fetters upon, or raise impediments to, or otherwise restrict or limit, the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation, I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as indicents of trade. What is forbidden is a trade regulation, that in its essence and purpose is related to a provincial boundary.
>
> Accepting this view of s. 121, I find nothing in the marketing scheme here that, as a trade regulation, is in its essence and purpose related to a provincial boundary. To hold otherwise would mean that 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. I find here no design of punitive regulation directed against or in favour of any Province.

77. In this statement, Laskin, C. J. was not accepting Rand, J.'s view as an accurate statement of the law. He was instead using the rhetorical device of "let's take the argument from here" and then demonstrating that the argument would still not change his conclusion. Laskin, C.J.'s ratio was based upon the narrow *Gold Seal* Interpretation.

78. Finally, in *Richardson*, the issue was whether the exclusion of the North West Territories from lawfully marketing or exporting eggs interprovincially contravened ss. 2(d) and 6 of the

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[103] *APMA*, *supra* note 90 at 1267-1268 [emphasis added].

Charter. The application of s. 121 was not directly at issue,[104] and so the Court's endorsement of the *Comeau* Interpretation in the instant case would not overturn the result of *Richardson*.

79. However, the Court did discuss s. 121 and its treatment in the case law.[105] In so doing, McLachlin, J. (as she then was) offered this synopsis of the decisions that applied the *Gold Seal* Interpretation:

> In broad outline, s. 121 of the *Constitution Act, 1867* permits legislation which incidentally impinges on the flow of goods and services across provincial boundaries, but prohibits legislation that in "essence and purpose is related to a provincial boundary". [106]
>
> and that:
>
> … [Section] 121 of the *Constitution Act, 1867*, … bars trade laws aimed primarily at impeding the flow of goods on the basis of provincial boundaries[.][107]

80. In paragraph 48 of its Factum, the Appellant cites the Australian case of *Cole v. Whitfield.*[108] The quoted passage explores the question of what restrictions apply to interstate transfers of goods in Australia. However, the facts of that case pertain to variations in standards among Australian jurisdictions in regard to the classification of undersized fish. Such analysis is not relevant in the present case because the Respondent acknowledges that once goods enter a province, they will be subject to regulation in subsidiary features such as size and weight[109].

81. Further, in a different passage of his *Murphy* judgment, Rand, J. appropriately warned against the use of Australian constitutional authorities because of the incompatibility between Canada's and Australia's constitutional history.[110]

82. In paragraph 55 of its Factum, the Appellant quotes LaForest, J. in *Ontario Home Builders Association* for the proposition that "Section 121 … might, if broadly construed, have

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104 *Richardson*, *supra* note 91 at para 66.
105 *Ibid* at paras 63-67, 123 & 171.
106 *Ibid* at para 123.
107 *Ibid* at para 171.
108 *Cole v. Whitfield*, [1988] HCA 18.
109 *Murphy*, *supra* note 89 at 642. The Respondent believes that this is what Rand, J.'s regulation "in subsidiary features" formulation in *Murphy* intended.
110 *Ibid* at 640-641.

been too restrictive of federal and provincial power."[111] This passage was taken by LaForest, J. from the second edition of his own 1966 book.[112] A review of this passage in its original source reveals that it was not supported by any authority beyond the author's own opinion. Moreover, a review of *Gold Seal*, *Atlantic Smoke Shops* and *Murphy* shows that none of the Courts that decided those cases gave any consideration to how the interpretation of s. 121 might affect federal or provincial powers.

83. In paragraphs 92 to 94 of its Factum, the Appellant suggests that the *Comeau* Interpretation will imperil Canada's system of supply management. The *Comeau* Interpretation may indeed require changes to existing restrictions to allow the sale of butter, cheese, yogurt, chicken, eggs and turkey from one province to another. It will not, however, affect import controls needed to allow the supply management system to function properly nor will it result in any new international trade agreement.[113]

<u>*Comeau* Interpretation of Section 121 is Correct; the *Gold Seal* Interpretation is Flawed</u>

84. The *Comeau* Interpretation should prevail over the *Gold Seal* Interpretation for the reasons set out in the following paragraphs.

85. As the Appellant argues, the Constitution should be interpreted progressively.[114] The Respondent adds that a progressive interpretation must reflect the full historical record presented by the evidence in *Comeau* and not in the outdated manner at work in *Gold Seal*.[115] Since the resolution of *Gold Seal* and all the above-listed cases that relied upon it, this Court has stated that provisions of the Constitution must receive a purposive interpretation. These new principles strongly support the *Comeau* Interpretation.

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111 *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 SCR 929 at para 137.

112 Gerald Vincent La Forest, *The Allocation of the Taxing Power Under the Canadian Constitution*, 2nd ed. (Canadian Tax Foundation, 1981) at 202, **Respondent's BOC, Tab 14**.

113 See Parliament, Economics, Resources and International Affairs Division, Parliamentary Information and Research Service, "Canada's Supply Management System" by Khamla Heminthavong in *In Brief*, Publication No. 2015-138-E (2015) at 3.

114 Appellant's Factum at paras 26-27.

115 *Németh v. Canada (Justice)*, [2010] 3 SCR 281 at para 46; *Castillo v. Castillo*, [2005] 3 S.C.R. 870 at para 23.

86. While Duff, Anglin and Migneault, JJ. effectively adopted Anglin, J.'s statement in *Gold Seal* that "prohibition of import in aid of temperance legislation was not within the purview of [s. 121]",[116] this conclusion was an error. Specifically, it directly contradicted the mandatory requirement in s. 121 that all goods "shall be admitted" into "each of the other provinces". In effect, the Judges held that the words "shall be admitted" could also mean "shall not be admitted".

87. Third, Duff, Anglin and Migneault, JJ. cited no authority for their interpretations. They based their statements on the "object of the clause".[117] However, no evidence exists that the object of s. 121 should be limited in any way.

88. Fourth, the *Gold Seal* Interpretation does not reflect the important fact that s. 121 does not contain any mention of "customs duties". The fact that other provisions in Part VIII do mention "duties", "charges" and "taxes" demonstrates that this is no mere accident of language and that the drafters intended s. 121 to be broad in scope.

89. Fifth, the *Gold Seal* distinction between tariff and non-tariff barriers cannot survive the scrutiny required by purposive analysis. Presumably, the reason the Court in *Gold Seal* held that s. 121 prevented "customs duties" from affecting interprovincial trade was because customs duties were meant to impose especially high costs on exporters and thereby constrain the volume of trade. However, history has shown that non-tariff trade barriers can serve to impose higher costs and constrain trade to the same degree. If the object of s. 121 was to ensure the transmission of goods freely from one province to another, why should it be interpreted only as a narrow prohibition against customs duties?

90. Finally, the Duff letter,[118] fully considered by Judge LeBlanc, stains the *Gold Seal* Interpretation with possible judicial misconduct.[119]

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116 *Gold Seal*, *supra* note 7 at 466.

117 *Ibid* at 456.

118 Appellant's Record, Vol. 5, Tab 27, Trial Exhibit D-1. The Duff Letter describes the troublesome conduct of Anglin and Mignault, JJ., and it was quoted and discussed extensively by Judge LeBlanc. It is beyond doubt that the Duff Letter by itself is

91. Today, Canada is beset by a welter of interprovincial trade barriers imposed through a variety of devices. These devices include not only explicitly protectionist instruments such as the *IILA*, but also more obscure laws and regulations relating to trucking and other transport, environmental compliance, agriculture and food products, professionals' work products and procurement.[120] While some of these restrictions may be justified by *bona fide* concerns relating to health and safety and do not discriminate against extra-provincial entities, many others have no rational basis other than the protection of influential local commercial constituencies that seek to guard themselves from competing goods.[121] More of these restrictions are codified in the 137 pages of exceptions to the CFTA.

92. Internal trade barriers have resulted in Canadians paying higher prices for Canadian goods than would otherwise be required. In one study, it has been estimated that inter-provincial trade barriers add between 8% and 14% to the cost of all goods and services in Canada and that eliminating those costs would lead to a real GDP gain of between 3% to 7% or between $50 and $130 billion annually.[122] Another study shows that there is an implied tariff equivalent of 6.9%

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sufficient proof of the incident. There is no question that Duff, C.J. authored it because the Archives of Canada has his file copy among his papers. It opens the *Gold Seal* Interpretation to the charge that Anglin and Mignault, JJ. had effectively committed the Court to dismissing Gold Seal Limited's appeal, no matter what the parties argued. Given Duff, J.'s added complicity, the *Gold Seal* Interpretation cannot be regarded as anything other than political expediency and not a judicially reached determination.

119 *Comeau*, *supra* note 6 at paras 126-149.

120 Standing Senate Committee on Banking, Trade and Commerce, "Tear Down These Walls: Dismantling Canada's Internal Trade Barriers", Report (June 2016) at 26-34, **Respondent's BOC, Tab 15**. See also: Brian Lee Crowley, Robert Knox & John Robson, "Citizen of One, Citizen of the Whole: How Ottawa Can Strengthen our Nation by Eliminating Provincial Trade Barriers with a Charter of Economic Rights", MacDonald-Laurier Institute, True North in Canadian Public Policy 1:2 (June 2010) 4 at 8-9.

121 *Ibid*.

122 Lukas Albrecht & Trevor Tombe, "Internal Trade, Productivity, and Interconnected Industries: A Quantitative Analysis" (2016) 49:1 Can J Ec 237 at 239, **Respondent's BOC, Tab 5**.

due to provincial trade barriers.[123] This contrasts with the United States where there are few comparable inter-jurisdictional trade barriers.[124]

Section 134(b) Is Unconstitutional

93. Section 134(b) is, in pith and substance, a non-tariff trade barrier designed to prohibit the entry of out-of-province goods. It violates a purposive interpretation of s. 121 of the *Constitution Act, 1867* because such an interpretation of s. 121 requires free trade among provinces that is not compromised by either tariff or non-tariff trade barriers.

94. For this Court to hold otherwise would be to countenance a system that criminalizes the conduct of many New Brunswickers, like Gerard Comeau, who are following their normal routine of buying liquor across the provincial border and bringing it home.

95. In a recent decision, Ontario's Divisional Court declined to make offenders of ordinary citizens for an everyday activity with respect to liquor purchase.[125] The Liquor Control Board of Ontario (**LCBO**) contended that Ontario's *Liquor Licence Act*[126] made it unlawful to purchase alcohol on behalf of a third party if the individual making the purchase was then reimbursed for that purchase. The Divisional Court rejected this argument stating:

> … There are several problems with this submission. First, there is a real concern that the LCBO's interpretation of its own laws renders the actions of many Ontarians who go into liquor stores every day to buy alcohol on behalf of their friends, family members or colleagues illegal. If the LCBO is right, thousands of citizens in Ontario could potentially be exposed to regulatory charges resulting in fines of up to $100,000 and/or imprisonment for up to one year.[127]

This Court should take an analogous approach in this case.

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123 Statistics Canada, Economic Analysis Division, "Going the Distance: Estimating the Effect of Provincial Borders on Trade when Geography Matter" by Robby K. Bemrose, W. Mark Brown & Jesse Tweedle in Analytical Studies Branch Research Paper Series (2017).

124 *Ibid*.

125 *Ontario (Liquor Control Board) v. Vin De Garde Wine Club,* 2015 ONSC 2537 [*Wine Club*].

126 *Liquor Licence Act*, RSO 1990, c. L.19.

127 *Wine Club*, supra note 125 at para 39.

96. For these reasons, the Respondent asks this Court to hold that s. 134(b) is inconsistent with s. 121 of the *Constitution Act, 1867,* and therefore is of no force or effect under s. 52(1) *Constitution Act, 1982.*[128] The Respondent also asks this Court to confirm that he was entitled to a dismissal of the charges against him.

Rules of Application of Section 121 Under the *Comeau* Interpretation

97. At paragraphs 95 and 96 of its Factum, the Appellant recommends adopting the analysis of Professor Malcolm Lavoie.[129] Professor Lavoie's approach would allow a restriction on the interprovincial movement of goods if the restriction has a "rational and functional relationship to the achievement of a valid, non-protectionist objective." This test fails to provide a progressive or purposive interpretation of s. 121 while adding artificially conceived qualifiers to the Constitution's plain language that are not workable in practice. It would also be too open to abuse by unrepentant governments. There is not a single protectionist trade barrier, tariff or non-tariff, to which governments could not attach some nominally plausible non-protectionist objective.

98. Some interveners also suggest that this Court should qualify the *Comeau* Interpretation in order to preserve some, if not all, existing interprovincial trade barriers. Several suggest Rand, J.'s "essentially and purposely related to a provincial boundary" test. Others, like the Alberta Small Brewers Association and Artisan Ales Consulting Inc. Breweries, propose the adoption of Professor Lavoie's test just described. Similarly, the Canadian Chamber of Commerce and the Canadian Federation of Independent Business, after a survey of the law in other federations, suggest a proportionality test. While these "middle ground" tests are offered as reasonable compromises, they would effectively entrench the status quo by allowing governments to find inventive justifications and pretexts for throttling s. 121.

99. Given anything short of a clear direction to dismantle their trade barriers, governments will do everything in their power to maintain them. Qualifying the clear meaning and purpose of

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128 *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

129 Malcolm Lavoie, "*R. v. Comeau* and Section 121 of the CA1867: Freeing The Beer And Fortifying The Economic Union," (2017) 40:1 Dal LJ 189.

s. 121 would effectively consign Canada to a continuation of the internal trade barriers that pervade this country.

100. To avoid this trap, this Court should instead adopt practical, clear and balanced rules for the application of s. 121 to putative trade barriers. The Respondent proposes the following set of interdependent rules:

(a) Section 121 of the Constitution shall be paramount over any legislative restriction on the interprovincial movement of goods made under either s. 91 or 92.

(b) Section 121 prohibits any restriction on the free flow of Canadian goods that is related to a provincial boundary. This rule goes further than Rand, J.'s formulation in *Murphy* with its qualification of "essence and purpose related to a provincial boundary". This rule eliminates the ambiguity in Rand, J.'s test and asks the straightforward factual question of whether there exists a restriction related to a provincial boundary.

(c) The constitutional law ancillary powers' doctrine does not apply to s. 121. Normally, this doctrine allows a law otherwise found to be unconstitutional under ss. 91 or 92 to operate if it is an integral part of a valid scheme. If, however, an ancillary legislative power has the effect of restricting the interprovincial movement of goods, it will be invalid no matter how *intra vires* the scheme of which it is part.

(d) Regulation of the interprovincial movement of goods in "subsidiary features" is permitted. This helpful qualification was suggested by Rand, J. in *Murphy*.[120] For example, in the sale of agricultural products, subsidiary features of regulation would include normal requirements for quality, storage, mode of transportation and labelling. In the interprovincial sale of liquor, subsidiary features would include provincial social responsibility laws relating to hours of operation, server-training, non-sale to minors and non-discriminatory taxes.

(e) "Subsidiary features" must be *bona fide* and not pretextual requirements. For example, different sizes or shapes for milk or cream containers in different provinces would be taken to be pretextual requirements as there is no need for such standards to differ from province to province.

(f) Mere inconvenience on the part of a vendor in another province is not sufficient to trigger s. 121, as long as a restriction applies equally to parties inside and outside the province as stated in subparagraph (g) below. However, it must be recognized that inconvenience is contextual. For example, a PEI potato mover could easily comply with all provincial transport requirements because potatoes can be moved by conventional trucking. On the other hand, an equipment mover may face differing requirements in other provinces with respect to the hiring of local escort vehicles and the use of trailers of a width different from that permitted in the province of origin.

(g) Incidental restrictions that affect trade but apply equally and without discrimination to entities within the province and entities outside the province do not offend s. 121.

101. This Court should leave it to future judicial incrementalism to resolve any constitutional antinomies that may arise. Rather than the "I know it when I see it" test referred to by the Alberta Small Brewers Association, judicial incrementalism is nothing more than the well-established common law rule that each case should be decided on its own facts and merits.

102. The *Comeau* Interpretation and the Respondent's proposed rules for applying s. 121 are clear, concise and practical for determining whether an interprovincial trade barrier violates s. 121. If a federal or provincial measure interferes with one's ability to transfer goods to another province and discriminates against extra-provincial entities, then it is a trade barrier and therefore impermissible. Canadian business and the Canadian economy are sufficiently dynamic, innovative and flexible to prosper and grow under such a rule.

The Constitutionality of Section 3(1) of the *IILA*

103. The Respondent relies upon the analysis of s. 121 above, as well as the following additional points.

104. In 1928, when the *IILA* was debated as Bill No. 192 of the Second Session, Sixteenth Parliament, its constitutionality was questioned in light of s. 121.[130] In response, the then Deputy Minister of Justice advised Parliament that the "effect of section 121 of the *British North America Act* upon legislation of the kind now in question" had been determined by *Gold Seal*, and he quoted passages from the Court's decision in that case.[131]

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130 *Debates of the Senate*, 16th Parl, 2nd Sess, Vol. 1 (4 May 1928) at 441, **Respondent's BOC, Tab 10**.

131 *Debates of the Senate*, Letter of Deputy Minister of Justice, 16th Parl, 2nd Sess, Vol. 1 (8 May 1928) at 474, **Respondent's BOC, Tab 11**. A transcript of the section in question is provided for clarity.

105. The *IILA* was enacted to regulate the movement of liquor across provincial boundaries.[132] Section 3(1) has enabled and allowed provincial agencies to monopolize the sale of beer, wine and liquor in each province. It has also provided an easy source of provincial revenue and allowed governments to tax their citizens without approval of the legislature. Provinces enjoy these monopolies entirely because of s. 3(1).

106. Section 3(1) is clearly an interprovincial trade barrier. By its terms, it uses the crossing of a provincial boundary as the trigger for imposing its requirements. Though it was loosened slightly in 2012,[133] it still requires that liquor entering a province be sold to the province's liquor board. This means that a provincially licensed wine producer cannot sell its vintages directly to customers in another province. This is a restriction on the free interprovincial movement of goods.

107. If this Court adopts the *Comeau* Interpretation and puts aside the *Gold Seal* Interpretation, it follows that s. 3(1) is a prohibited non-tariff interprovincial trade barrier. The Respondent asks this Court to so hold and to further hold that s. 3(1) is inconsistent with s. 121 of the *Constitution Act, 1867* and is of no force and effect under s. 52(1) of the *Constitution Act, 1982*.

108. If s. 3(1) is held to be unconstitutional, provinces could still regulate the control, distribution and public consumption of alcohol produced in the province. They would still be able to tax liquor sales under a regime of interprovincial free trade. Provinces already earn a great deal of revenue from taxes on the sale of products over which they do not exercise a

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132 *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 SCR 581 at para 44.

133 Paragraph 3(2)(h)(h) of the *IILA* was added in 2012 by S.C. 2012, c. 14, s. 1. It states: "The provisions of subsection (1) do not apply to (h) the importation of wine, beer or spirits from a province by an individual, if the individual brings the wine, beer or spirits or causes them to be brought into another province, in quantities and as permitted by the laws of the other province, for his or her personal consumption, and not for resale or other commercial use."

monopoly. For example, a province does not need to own or control all the gas stations under its jurisdiction to earn revenue on gas sales.

Stare Decisis

109. In paragraphs 63 to 65 of its Factum, the Appellant argues that there is no evidence that earlier courts did not consider the same historical evidence as Judge LeBlanc. This is incorrect. The factums in *Gold Seal* and *Murphy* do not make any reference to the legislative history, legislative context or scheme of the *BNA Act*.[134] Judge LeBlanc evaluated and weighed the evidence before him and concluded as follows:

> I believe that if the evidence that was presented before me at this trial had been brought to the attention of the justices of the Supreme Court of Canada in their deliberations on the meaning of section 121, particularly when the Gold Seal case was decided in 1921, the result would have been different.[135]

110. This Court has held that appellate courts should not interfere with such a determination. In *R. v. Bedford*[136], the Court said as follows:

> When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case.[137]

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134 *Gold Seal*, *supra* note 7 (Factum and Supplementary Factum of the Appellant, Factum of the Intervenant, The Attorney General For The Province of Alberta), **Respondent's BOC, Tab 12**; *Murphy*, *supra* note 89 (Factum of the Appellant, Factum of the Respondent, and Factum of The Attorney General of Canada).

135 *Comeau*, *supra* note 6 at para 188.

136 *R. v. Bedford*, 2013 SCC 72.

137 *Ibid* at para 49.

Closing

111. It is time for the *Gold Seal* Interpretation and all the internal trade barriers that it has generated to pass into history. By adopting the *Comeau* Interpretation, this Court will provide Canadians with a progressive and purposive interpretation of s. 121 so that it may fulfill its proper and intended constitutional role. This would release enormous economic potential that would benefit Canadians and Canada for generations to come.

PART IV – COSTS

112. The Respondent requests his costs on a substantial indemnity basis in any event of the cause both in this Court and in the New Brunswick Court of Appeal.

PART V – ORDER SOUGHT

113. The Respondent seeks an order dismissing this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 13th day of October 2017

Ian A. Blue, Q.C.
Gardiner Roberts LLP

Arnold B. Schwisberg
Barrister & Solicitor

Mikael Bernard

PART VI - TABLE OF AUTHORITIES

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LEGISLATION

Tab	Statute	Pinpoint
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	The British North America Act, 1867, SS 1867, c 3.	s. 118
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18	*Canada Temperance Amending Act*, SC 1919 (10 Geo V), c 8.	
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	Importation of Intoxicating Liquors Act, R.S.C., 1985, c. I-3.	s. 3(1)
	Liquor Control Act, R.S.N.B. 1973, c. L-10.	
	Provincial Subsidies Act, R.S.C. 1985, c. P-26.	
19	*Proclamation Validation Act*, SC 1921, 11 & 12 Geo V, c 20.	

SCC File No. 37398

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

BETWEEN

HER MAJESTY THE QUEEN

APPELLANT

-and-

GERARD COMEAU

RESPONDENT

NOTICE OF CONSTITUTIONAL QUESTION
(Pursuant to Rule 33(2) of the *Rules of the Supreme Court of Canada,* S.O.R./2002-156)

TAKE NOTICE that I, Ian A. Blue Q.C., counsel for the Respondent, Gerard Comeau, assert that the appeal raises the following constitutional questions:

1. Does s. 121 of the *Constitution Act, 1867* prohibit both tariff and non-tariff interprovincial trade barriers on items of growth, produce or manufacture moving between the provinces, as held by His Honour Judge LeBlanc?

2. If the answer to question 1 is no, then against what trade barriers does s. 121 protect Canadians?

3. Does s. 134 (b) of the *Liquor Control Act,* RSNB 1973, c. L-10 constitute a trade barrier which violates s. 121, as held by His Honour Judge LeBlanc?

AND TAKE NOTICE that an attorney general who intends to intervene with respect to these constitutional questions may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

Dated at Toronto, Ontario this 25th day of May, 2017.

SIGNED BY

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