

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

BETWEEN

**HER MAJESTY THE QUEEN**

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(Appellant)

– and –

**GERARD COMEAU**

RESPONDENT  
(Respondents)

– and –

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## **PART I: OVERVIEW**

1. This appeal presents an opportunity to further refine the constitutional boundaries of the Canadian federation. It returns the Court to the original terms of the *Constitution Act, 1867* and invites its interpretation. Prince Edward Island, by virtue of its size, is uniquely affected by changes to this constitutional bargain. The advantage of jurisdiction – as an equal partner in our federation – has special importance in a province historically noted for its “isolated and exceptional condition.”<sup>1</sup> Any constitutional direction from the Court must therefore reflect the distinctness and evolution of our federal partnership.

## **PART II: POSITION OF THE ATTORNEY GENERAL**

2. The constitutional question raised by the Attorney General of New Brunswick in this case directly engages the distribution of legislative powers between federal and provincial governments and, in doing so, the very essence of our constitutional relationship as equal partners in this uniquely Canadian federation. The Attorney General of Prince Edward Island intervenes to address three primary issues:
  - (a) the interpretation of s. 121 of the *Constitution Act, 1867*;
  - (b) the content of cooperative federalism and its meaning for Prince Edward Island;  
and
  - (c) the difficulties and concerns arising from attempts to ascertain the original intention of the framers of our Constitution.
3. The Attorney General of Prince Edward Island submits that s. 121 of the *Constitution Act, 1867* reinforced the legislative powers already distributed by ss. 91 and 92 and, by applying our existing constitutional doctrines, the Court will maintain the balance within our federation. Cooperative federalism, from the perspective of Canada’s smallest province, means that our two orders of government discharge their constitutional responsibilities as partners and not subordinates. When considering an interpretation of our Constitution that sounds in efficiency, consistency and scale, the Court is asked not to forget the virtues of smallness. Finally, the Attorney General observes that the historical record surrounding our

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<sup>1</sup> *Prince Edward Island Terms of Union* (26 June 1873), reprinted in RSC 1985, App II, No 12.

Constitution is neither contemporaneous nor complete and ought not to displace the growth of our federal-provincial partnership. Canada is not a federation like the others. And while we must be mindful of our history, the Constitution must not be held captive by it.

### PART III: ARGUMENT

#### A. Section 121 of the *Constitution Act, 1867*

4. Section 121 of the *Constitution Act, 1867* cannot be considered in isolation. Ensuring that the Constitution operates “as an internally consistent harmonious whole” has been recognized by the Court as an interpretive objective.<sup>2</sup> The powers granted by ss. 91 and 92 must therefore be respected and a balance struck.<sup>3</sup> Any interpretation that would disrupt – rather than maintain – that mutual respect and balance must be avoided.<sup>4</sup>
5. When called upon to consider s. 121 of the *Constitution Act, 1867*, the Court has consistently recognized that its scope does not prohibit laws of general application that are validly aimed at subjects listed in ss. 91 and 92. This is so even where those legislative schemes may have an interprovincial consequence or effect. In *Murphy*, Rand J. noted that s. 121 “does not create a level of trade activity divested of all regulation.”<sup>5</sup> While incidents of trade were found to be subject to regulation, a regulation “that in essence and purpose ... related to a provincial boundary” was said to be forbidden.<sup>6</sup> In *Reference re Agricultural Products*, Laskin C.J. found nothing in the impugned marketing scheme that “in its essence and purpose related to a provincial boundary” and identified no “regulation directed against or in favour of any Province.”<sup>7</sup> In *Richardson*, McLachlin J. (as she then was) observed that s.

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<sup>2</sup> See e.g. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, [2014] 3 SCR 31 at para 24.

<sup>3</sup> *Reference re Securities Act*, [2011] 3 SCR 837 at para 7 [*Securities Reference*].

<sup>4</sup> *Ibid.* See also K M Lysyk, “Reshaping Canadian Federalism” (1979), 13 UBCLR 1 at 35

[Lysyk] [Authorities at Tab 1], where it was observed: “It is essential that the Court be seen as one which can be counted on to preserve a fair balance between the central and provincial governments.”

<sup>5</sup> *Murphy v CPR*, [1958] SCR 626 at 642, per Rand J [emphasis added].

<sup>6</sup> *Ibid.* [emphasis added].

<sup>7</sup> *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198 at 1268, per Laskin CJ [emphasis added].

121 “permits legislation which incidentally impinges on the flow of goods and services across provincial boundaries.”<sup>8</sup> This was contrasted with prohibited legislation that “in essence or purpose related to a provincial boundary.”<sup>9</sup> Consistent with its current approach to balanced federalism, the Court has sought to interpret s. 121 of the *Constitution Act, 1867* in a manner that gives meaning to the jurisdiction granted to both orders of government.

6. Introduced into the fourth draft of the *British North America Act* by a draftsman in London,<sup>10</sup> s. 121 reinforced the legislative powers already distributed by ss. 91 and 92 of the *Constitution Act, 1867*. For the federal Parliament, this meant jurisdiction to legislate in most areas of economic concern: trade and commerce, taxation, postal service, navigation and shipping, currency and coinage, banking, weights and measures, bills of exchange, interest, and legal tender. As early as 1864 at Charlottetown, it was understood that the powers assigned to the central government would remove the “customs duties” that supplied eighty percent of the revenue to the Maritime provinces.<sup>11</sup> The provincial Legislatures, on the other hand, were vested with broad legislative powers in relation to property, civil rights, and all matters of a local or private nature. Section 121 of the *Constitution Act, 1867* thus served to reaffirm this “historical compromise between regional interests and the vision of economic union.”<sup>12</sup>
7. While various suggestions have been made as to how to distinguish the permissible from the impermissible in s. 121 of the *Constitution Act, 1867*, it is not clear why a new or different approach is needed. The pith and substance doctrine may be applied to legislation in whole or in part. It examines the dominant purpose of the enacting body and the effect of the law. If the impugned law relates to a matter that falls within the jurisdiction assigned to that legislator by ss. 91 or 92, then the court will declare it *intra vires*.<sup>13</sup> Secondary or incidental

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<sup>8</sup> *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 at para 123, per McLachlin J [*Richardson*] [emphasis added].

<sup>9</sup> *Ibid.* [emphasis added].

<sup>10</sup> G P Browne, *Documents on the Confederation of British North America* (Montreal: McGill-Queen’s University Press, 2009) at 289 [Authorities at Tab 2].

<sup>11</sup> P B Waite, *The Charlottetown Conference* (Ottawa: Canadian Historical Association, 1970) at 16 [Authorities at Tab 3]. See also A G Doughty, ed, “Notes on the Quebec Conference, 1864” (1920) 1(1) *Canadian Historical Review* 26 at 29-30.

<sup>12</sup> *Richardson*, *supra* note 8 at para 123.

<sup>13</sup> *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 at paras 25-29 [*Canadian Western Bank*].

effects do not, however, disturb the constitutionality of an otherwise valid law. In our modern federal state, these effects are accepted incidents of partnership. The pith and substance doctrine, by virtue of its endurance and flexibility, therefore remains “perfectly suited” to interpreting our distinctly Canadian Constitution.<sup>14</sup>

8. A law in relation to the goods and services of any province – or, in the earlier words of the Court, “a provincial boundary” – will be *ultra vires*. And a law having only an incidental interprovincial effect will not. By reinforcing our existing constitutional doctrines in s. 121 of the *Constitution Act, 1867*, the Court would not only respect the division of legislative authority in ss. 91 and 92, but also maintain the “constitutional balance between federal and provincial powers.”<sup>15</sup> And when incidental interprovincial effects do arise, “legislative power is, of course, concurrent rather than exclusive.”<sup>16</sup> The constitutional seeds for “intergovernmental cooperation” will therefore be sown.<sup>17</sup>
9. The architecture of our Constitution allows tariffs, impediments, and barriers to trade or – in the language of constitutional discourse – laws, regulations, and policies to be remedied in not less than three permissible ways:
  - (a) Barriers that relate to admission at any provincial boundary may be remedied by declarations of inconsistency. As the guardian of our Constitution, the court may determine the boundaries of s. 121 of the *Constitution Act, 1867* by reference to the powers granted by ss. 91 and 92. Our existing constitutional doctrines would be applied.
  - (b) Barriers may be remedied by either – or both – order(s) of government exercising their respective legislative powers under ss. 91 and 92 of the *Constitution Act, 1867*. This exercise may be complementary as in the case of the federal *Importation of Intoxicating Liquors Act*<sup>18</sup> and its related provincial

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<sup>14</sup> *Ibid.* at para 31.

<sup>15</sup> *Securities Reference*, *supra* note 3 at para 61.

<sup>16</sup> Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at §15.9(c) [Authorities at Tab 4].

<sup>17</sup> *Securities Reference*, *supra* note 3 at para 57.

<sup>18</sup> RSC 1985, c I-3.

statutes,<sup>19</sup> where coordinating legislative schemes interlock or connect at the recognized boundaries of federal and provincial jurisdiction. Alternatively, this exercise may be exclusive as in the case of the federal Parliament exercising its legislative authority under s. 91(2) in relation to interprovincial trade.

- (c) Barriers arising from valid exercises of federal or provincial jurisdiction under ss. 91 or 92 of the *Constitution Act, 1867* – the interprovincial incidents of our federal partnership – may be remedied by political or administrative arrangements between the two orders of government. The Canadian Free Trade Agreement entered into force on July 1, 2017 is but one example of the creativity and flexibility of the partners in our federation.<sup>20</sup>

Then as now, the structure of the *Constitution Act, 1867* has always required compromise between the two orders of government as to “the optimal *aménagement* of national markets and the search for an equitable distribution of economic benefits among the various regions of the country.”<sup>21</sup>

10. All of this is consistent with our modern understanding of Canadian federalism. Federal and provincial partners are primarily responsible for “maintaining the balance of powers in practice”<sup>22</sup> by finding “cooperative solutions that meet the needs of the country as a whole as well as its constituent parts.”<sup>23</sup> And the Court, as the impartial arbiter of jurisdictional disputes, is charged with defining – when necessary – the outer “boundaries” and “limits”

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<sup>19</sup> In Prince Edward Island, this coordinating legislation is the *Liquor Control Act*, RSPEI 1988, c L-14.

<sup>20</sup> See generally Hon Jean Chrétien, *Securing the Canadian Economic Union in the Constitution* (Ottawa: Minister of Supply and Services Canada, 1980) at 30-31 [Chrétien] [Authorities at Tab 5]. See also Michael J Trebilcock and Tanya Lee, “Economic Mobility and Constitutional Reform (1987), 37(3) UTLJ 268 at 317 [Trebilcock] [Authorities at Tab 6], where the authors note the “inherently political nature” of “freer internal trade” and conclude that future arrangements around economic relations may “increasingly reside outside the bounds of Canada’s formal constitution.”

<sup>21</sup> Chrétien, *ibid.* [Authorities at Tab 5].

<sup>22</sup> *Canadian Western Bank*, *supra* note 13 at para 24.

<sup>23</sup> *Securities Reference*, *supra* note 3 at para 132.



of the powers distributed in ss. 91 and 92 of the *Constitution Act, 1867* and recognized by s. 121.<sup>24</sup> The combined effect is to strike a fine balance between federal and provincial jurisdiction that permits two different, but equally legitimate, governmental actors to understand and exercise their respective constitutional roles.

## **B. Content and Meaning of Cooperative Federalism**

11. Federalism is “a central organizational theme of our Constitution.”<sup>25</sup> Since assuming its role as the final decision-maker in constitutional disputes, the Court has regularly embraced a flexible view of federalism that “accommodates overlapping jurisdiction and encourages intergovernmental cooperation.”<sup>26</sup> This modern conception of federalism has been found to reflect our “constitutional creativity and cooperative flexibility”<sup>27</sup> and to facilitate “interlocking federal and provincial legislative schemes.”<sup>28</sup> The practical consequence has been a constitutional balance that “allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres.”<sup>29</sup> Our two orders of government therefore discharge their responsibilities under the *Constitution Act, 1867* as coordinated partners – not subordinates of one another.
12. Our federal system of government also recognizes that there are “equally legitimate majorities in different provinces” and permits “different provinces to pursue policies responsive to the particular concerns and interests of people in that province.”<sup>30</sup> When this democratic legitimacy is coupled with the legislative authority granted by s. 92 of the *Constitution Act, 1867*, each province is, in effect, a “social laboratory” for experimentation and innovation.<sup>31</sup> Cooperative federalism encourages this capacity for political and social

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<sup>24</sup> *Ibid.* at paras 55 and 62.

<sup>25</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 57 [*Secession Reference*].

<sup>26</sup> *Securities Reference*, *supra* note 3 at para 57.

<sup>27</sup> *Fédération des producteurs de volailles du Québec v Pelland*, [2005] 1 SCR 292 at para 15.

<sup>28</sup> *Quebec (Attorney General) v Canada (Attorney General)*, [2015] 1 SCR 693 at para 17.

<sup>29</sup> *Securities Reference*, *supra* note 3 at para 7.

<sup>30</sup> *Ibid.* at para 66.

<sup>31</sup> Lysyk, *supra* note 4 at 7 [Authorities at Tab 1]. See also Peter W Hogg and Wade K Wright, “Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism” (2005), 38(2) UBCLR 329 at 343 [Hogg, “Canadian Federalism”].

self-expression at the provincial level and ensures that every province – large and small – has sufficient constitutional autonomy to be different.

13. Cooperative federalism also facilitates the distribution of legislative power to the government “most suited to achieving the particular societal objective.”<sup>32</sup> As the Court has recognized, “law-making and implementation are often best achieved at a level of government that is not only effective, but closest to the citizens affected.”<sup>33</sup> This closeness between democratic decision-makers and affected individuals encourages responsiveness and promotes diversity. In the context of a national economy, this foundational principle is at particular risk of being dismissed as inefficient and outdated; however, as Hogg has observed, “the reality is that in a country like Canada, efficiency is far from the only value that must be taken into account.”<sup>34</sup> The task of the Court in this case – like so many others before it – is to strike some form of constitutional balance in a country “with two official languages, two distinct legal systems, and a small multicultural population thinly distributed over a huge land mass.”<sup>35</sup> And when confronted with a constitutional interpretation grounded in efficiency, consistency and scale, the virtues of smallness cannot be forgotten by the Court. Canada is not a federation *comme les autres*.<sup>36</sup>
14. Given the historical absence of significant amendments to our Constitution, the Court is also “the single most important agent for constitutional change in this country.”<sup>37</sup> Each case that comes before it has the potential to, in effect, amend the powers distributed by the *Constitution Act, 1867*. The Court itself has recognized this political consequence and rightly observed that “the task of maintaining the balance of powers in practice falls primarily to governments.”<sup>38</sup> The Court has therefore favoured an “incremental” approach to interpretive questions and avoided constructions that “erode the constitutional balance

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<sup>32</sup> *Secession Reference*, *supra* note 25 at para 58.

<sup>33</sup> *Rogers Communications Inc v Châteauguay (City)*, [2016] 1 SCR 467 at para 84, per Gascon J. See also Lysyk, *supra* note 4 at 8-9 [Authorities at Tab 1].

<sup>34</sup> Hogg, “Canadian Federalism,” *supra* note 31 at 345.

<sup>35</sup> Lysyk, *supra* note 4 at 8-9 [Authorities at Tab 1].

<sup>36</sup> See generally Lysyk, *supra* note 4 [Authorities at Tab 1].

<sup>37</sup> *Ibid.* at 15 [Authorities at Tab 1].

<sup>38</sup> *Canadian Western Bank*, *supra* note 13 at para 24 [emphasis added].

inherent in the Canadian federal state.”<sup>39</sup> This concern is particularly acute in a case where a proposed amendment to s. 121 of the *Constitution Act, 1867*, which would have extended its scope beyond tariffs and goods, was rejected by nine of ten provinces at the 1980 Constitutional Conference.<sup>40</sup>

15. By way of example, in Prince Edward Island, the autonomy afforded by the *Constitution Act, 1867* has allowed our province to address a number of unique concerns, including the acquisition of real property by non-residents through the *Lands Protection Act*.<sup>41</sup> While non-residents may acquire land in Prince Edward Island, those acquisitions are subject to review, approval, and acreage limitations. Recognizing the physical size of our province and its history of absentee land ownership, the Court has found this legislation to be a valid exercise of s. 92(13) of the *Constitution Act, 1867*.<sup>42</sup> Notwithstanding that the pith and substance of the *Lands Protection Act* is in relation to land ownership in the province, some have suggested that it constitutes an impermissible barrier to interprovincial trade. The Attorney General does not share that view; however, this particular expression of provincial authority nonetheless reinforces the need to interpret s. 121 of the *Constitution Act, 1867* as a reflection of the “constitutional balance between federal and provincial powers.”<sup>43</sup>

### C. Concerns Arising from Attempts to Ascertain Original Intention

16. There are not less than three difficulties confronting the Court when it is asked to discern the original intention of the framers of the *Constitution Act, 1867*. First, the historical record is “weak” and, absent complete records of the discussions at Charlottetown, Quebec and London, it is difficult to determine – in any judicial sense – the intent of any of these architects.<sup>44</sup> This lack of contemporaneity and comprehensiveness also makes attribution to any one particular constitutional provision next to impossible. Second, intention will

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<sup>39</sup> *Securities Reference*, *supra* note 3 at para 62.

<sup>40</sup> Trebilcock, *supra* note 20 at 273-274 [Authorities at Tab 6].

<sup>41</sup> RSPEI 1988, c L-5.

<sup>42</sup> *Morgan v Prince Edward Island (Attorney General)*, [1976] 2 SCR 349.

<sup>43</sup> *Securities Reference*, *supra* note 3 at para 61.

<sup>44</sup> Hogg, “Canadian Federalism,” *supra* note 31 at 331. See also Justice Ian Binnie, “Constitutional Interpretation and Original Intent” (2004), 23 SCLR (2d) 345 at 370 [Binnie] [Authorities at Tab 7].

necessarily depend upon whom the Court regards as “the framers” of our Constitution.<sup>45</sup> The stated objectives of the Canadians, the Maritimers, and Westminster were anything but unanimous.<sup>46</sup> Exercises in “selective nostalgia” must therefore be avoided.<sup>47</sup> Third, the *Constitution Act, 1867* was drafted for the Dominion of Canada and not the independent federal state that has evolved since that time. A literal interpretation according to the expectations in 1867 would not just “startle Canadians” – to borrow a phrase from Professor Lysyk (as he then was) – but ignore the evolution of our federal-provincial partnership.<sup>48</sup>

17. The *Constitution Act, 1867* was the product of compromise. Its text is ambiguous and that is “probably intentionally so.”<sup>49</sup> After all, each of the provinces – large and small – already had constitutions of their own. The proposed union was also divided by language, religion, population, and geography. Of course, this is not uncommon for a constitutional document. Speaking of the American historical record, Brennan J. made a similar observation: “Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality.”<sup>50</sup> What is unique, however, is that the *Constitution Act, 1867* has proven itself capable of successfully accommodating and balancing – without significant amendment – “a federal union of ten provinces and three territories.”<sup>51</sup>
18. The Court, as the guardian of our Constitution, has supervised this constitutional evolution.

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<sup>45</sup> Binnie, *ibid.* at 375 [Authorities at Tab 7]. See also Hogg, “Canadian Federalism,” *ibid.* at 331-332.

<sup>46</sup> Hogg, “Canadian Federalism,” *ibid.* at 332-333.

<sup>47</sup> Lysyk, *supra* note 4 at 4 [Authorities at Tab 1].

<sup>48</sup> Lysyk, *ibid.* [Authorities at Tab 1]. This evolution has interpretive consequences for our Constitution. Consider, for example, a rigorous application of s. 9 of the *Constitution Act, 1867*, which vests executive authority in the Queen, or s. 90 of the *Constitution Act, 1867*, which vests the federal Governor General with the authority to disallow a bill passed by a provincial Legislature. See generally Binnie, *supra* note 44 [Authorities at Tab 7].

<sup>49</sup> Hogg, “Canadian Federalism,” *supra* note 31 at 338.

<sup>50</sup> Justice William J Brennan Jr, “The Constitution of the United States: Contemporary Ratification” (Paper presented at Georgetown University, Washington, DC, 12 October 1985) at 4.

<sup>51</sup> Hogg, “Canadian Federalism,” *supra* note 31 at 338.

And it has done so by considering the text of the *Constitution Act, 1867*, its historical context, and earlier judicial decisions as to its meaning and content.<sup>52</sup> This contextual interpretive exercise has also been informed by certain foundational principles in our Constitution, including: federalism, democracy, and constitutionalism.<sup>53</sup> The Attorney General has identified no reason to depart from that approach or those principles in this case. The question before the Court therefore ought to be considered in light of our whole experience – from colonies to partners – and not simply by what was said more than 150 years ago:

[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century ... to prove that they created a nation. The case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago.<sup>54</sup>

19. In the immediate wake of our *Constitution Act, 1982*, Dickson C.J. made a similar observation: “A constitution ... is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power. ... It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”<sup>55</sup>
20. In summary, while the Court must be mindful of the history of our federation, our Constitution must not be held captive by it.<sup>56</sup>

#### **PART IV: COSTS**

21. There ought to be no award of costs for or against the Attorney General.

#### **PART V: REQUEST FOR ORAL ARGUMENT**

22. The Attorney General seeks permission to present oral argument at the hearing.

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<sup>52</sup> *Secession Reference*, *supra* note 25 at para 32.

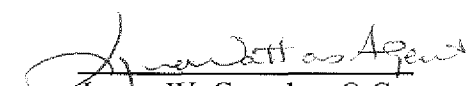
<sup>53</sup> *Ibid.*

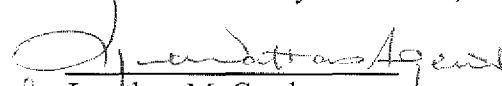
<sup>54</sup> *State of Missouri v Holland*, 252 US 416 (1920) at 433, per Holmes J.

<sup>55</sup> *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155.

<sup>56</sup> See generally Lysyk, *supra* note 4 at 22 [Authorities at Tab 1].

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

  
for James W. Gormley, Q.C.

  
for Jonathan M. Coady

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