Court File No.: **37398**

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

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

- and -

GERARD COMEAU

RESPONDENT
(Respondent)

- and -

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PART I – OVERVIEW

1. The Constitution of Canada ensures a single domestic market for goods and services by prohibiting the levying of inter-provincial tariffs and by giving the federal government legislative jurisdiction over inter-provincial trade. The Attorney General of Ontario submits that there is no reason to disturb this constitutional architecture which has been in place since Confederation, and is reflected in the settled jurisprudence under s. 121. Any modifications to the terms of the economic union within existing constitutional parameters should be left to the democratically accountable branches of government.

2. The interpretation of s. 121 advanced by the respondent, if accepted by this Court, would amount to a constitutional impediment to the regulation of goods in each province. It would constitutionalize a particular economic philosophy that views unfettered trade as a supreme good to be facilitated, and government regulation of goods as an evil to be minimized. Reasonable people can disagree about whether and when deregulation should be preferred to state intervention for health and safety, consumer protection, or environmental conservation. The Constitution of Canada is not meant to entrench one particular economic philosophy or view of government as the supreme law.[1]

PART II – POSITION

3. The constitutional question raised by the appellant is:

> Does s. 121 of the Constitution Act, 1867, 30 & 31 Victoria, C.3 (U.K.) render unconstitutional s. 134 of the *Liquor Control Act*, R.S.N.B. 1973, c-L-10, which along with s. 3 of the *Importation of Intoxicating Liquors Act*, R.S.C., 1985, c-I-3 establishes a federal-provincial regulatory scheme in respect of intoxicating liquor?[2]

4. Ontario submits that the question should be answered "No". Section 121 of the *Constitution Act, 1867* prohibits provincial and federal governments from levying inter-provincial customs, duties or tariffs. The Constitution does not prohibit or even contemplate "non-tariff barriers", an amorphous concept that is broad enough to capture any legal restraint on

[1] *Lochner v New York*, 198 US 45 at 75-76, Holmes J. dissenting.
[2] Appellant's Record, Vol I at 98.

the importation of goods into a province. If a law does not impose an inter-provincial custom, duty or tariff, which would offend s. 121, then the proper question of *vires* is simply whether the law is in pith and substance concerned with a matter falling under a head of power assigned to the relevant level of government.

PART III – ARGUMENT

A. Expanding the scope of s. 121 is contrary to the established constitutional architecture of Canada

5. This Court has held that the Constitution should be viewed as having an "internal architecture" or "basic constitutional structure", which is an expression of the principle that "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole", because it is not "a mere collection of discrete textual provisions".[3]

6. In a democratic federation, the default position must be that any given matter may be the subject of legislation by at least one level of government. This principle of exhaustiveness forms part of Canada's constitutional architecture because it is not merely a textual feature of the *Constitution Act, 1867*. Rather, it reflects a core organizing principle of the Constitution of Canada: democracy.[4]

7. Exceptions to this principle should be construed narrowly, especially outside of the area of the *Charter*, which is subject to both a limitations clause and a democratic override. While the *Constitution Act, 1867* does contain express[5] and implied[6] limitations on legislative exhaustiveness, the democracy principle requires that this Court be cautious in expanding the list of such limitations. Purposive interpretation is not a mandate for an ever-expanding list of legislative "no-go zones". This is particularly so in the area of economic regulation, which this Court has identified on many occasions as outside of the core institutional competence of

[3] *Reference re Senate Reform*, 2014 SCC 32 at paras 26-27.
[4] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 49.
[5] For example, section 125 (inter-governmental tax immunity).
[6] For example, the principle of judicial independence implied in section 96.

judges.[7] In the context of the purposive interpretation of constraints on the legislative jurisdiction of governments, it is not the Court's role to determine whether liquor monopolies are wise or unwise public policy.[8]

8. This is not to say that the *Constitution Act, 1867* does not establish an economic union, or that its drafters were not trying to achieve greater economic integration in a new country than had existed between the founding colonies. Rather, the tools for achieving that integration lay in the heads of power assigned to the exclusive legislative jurisdiction of the federal government, which allows Parliament to set the terms of internal trade based on a national vision – and reflecting national democratic will. Indeed, the speech relied on by the trial judge for the proposition that the British drafters of the *Constitution Act, 1867* were concerned about "non-tariff barriers"[9] supports the view that such concerns were addressed through the division of legislative powers.[10]

9. More broadly, the trade and commerce power in section 91 gives the federal government exclusive jurisdiction over inter-provincial and international trade, which ensures that "no local legislature should by its separate action be able to put any such restrictions on the free interchange of commodities […] as to prevent the manufactures of the rest from finding a market in any one province, and thus from sharing in the advantages of the extended Union".[11] This power "operates as a brake"[12] on provincial protectionism.

10. What flows from that fundamental feature of Canada's constitutional architecture is that where Parliament not only declines to apply the "brake", but explicitly creates legislative

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[7] *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424 at para 36, Dickson CJ.
[8] *Reference re Securities Act*, 2011 SCC 66 [*Securities Reference*] at paras 10, 127.
[9] Reasons at paras 98-99, Appellant's Record, Vol I at 44.
[10] Lord Carnarvon noted that the founding colonies had no "uniformity of banking", no "common system of weights and measures", no "identity of postal arrangements", and different currencies. Each of these area became federal heads of power in section 91, ensuring uniformity.
[11] Alexander Galt, "Speech on the Proposed Union of the British North American Provinces, delivered at Sherbrooke, on 23rd November 1864" (Montreal: Long-moore, 1864) [Emphasis added].
[12] *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198 [*Re APMA*] at 1267, Laskin CJ.

schemes governing the terms of inter-provincial trade which dovetail with provincial legislation, the courts should hesitate before concluding that either level of government has acted beyond its legislative competence. This is consistent with both the constitutional principle of democracy[13] and decades of this Court's jurisprudence in two areas where co-operative federalism has produced such schemes: agriculture and alcohol.

11. In *Pelland,* Abella J wrote for a unanimous court less than 15 years ago that the federal *Farm Products Agencies Act* and its provincial counterparts "weave together the legislative jurisdiction of both levels of government in order to ensure a seamless regulatory scheme".[14] Rejecting the suggestion that the combined scheme "choked off" interprovincial trade,[15] she wrote that there was "no principled basis for disentangling a successful federal-provincial merger," as "[e]ach level of government enacted laws and regulations, based on their respective legislative competencies, to create a unified and coherent regulatory scheme".[16]

12. *Pelland* followed *Re Agricultural Products Marketing Act*, in which both the majority and concurring judgment upheld the bulk of a federal-provincial agricultural marketing scheme. It is notable that both Laskin CJC in that case and Rand J's earlier reasons in *Murphy* also affirmed the principle of exhaustiveness in relation to agricultural marketing boards.[17] Despite the trial judge's contrary opinion,[18] no judge in any of *Pelland*, *Re Agricultural Products Marketing* or *Murphy* found that s. 121 overwhelms the principles of legislative exhaustiveness and democracy to render such schemes unconstitutional.

13. *Air Canada* offers further confirmation of the principles of legislative exhaustiveness and co-operative federalism as components of Canada's constitutional architecture in respect of the sale of beverage alcohol, at issue in this appeal. Iacobucci J, writing for a unanimous Court, noted that the federal *Importation of Intoxicating Liquors Act* was enacted to "assist the provinces in their efforts to control the traffic in liquor" and "confer a power on the provinces

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[13] *Canadian Western Bank v Alberta*, 2007 SCC 22 [*Canadian Western Bank*] at para 37.
[14] *Fédération des producteurs de volailles du Québec v Pelland*, 2005 SCC 20 [*Pelland*] at para 4.
[15] *Ibid* at para 42.
[16] *Ibid* at para 38.
[17] *Re APMA*, *supra* note 12 at 1233, *Murphy v CPR*, [1958] SCR 626 at 643.
[18] Reasons at paras 160-161, Appellant's Record, Vol I at 75-76.

that, without the intervention of the federal government, they would not have".[19] Ontario's *Liquor Licence Act* and *Liquor Control Act*, together with the federal *IILA*, "operate together to create and secure" a government monopoly over the sale, transportation, delivery and storage of liquor in Ontario.[20] The Court had no difficulty accepting that the Ontario statutes were *intra vires* and explained how the *IILA* was designed to fill the gap in provincial jurisdiction arising from federal jurisdiction over inter-provincial trade.[21] The trial judge made no mention of this decision despite issuing a ruling that strikes at the heart of Canada's federal-provincial regulation of beverage alcohol.

14. If the framers' goal of securing economic union was achieved through s. 91, what role does s. 121 actually play into the constitutional architecture? Reading Part VIII of the *Constitution Act, 1867* as a whole, instead of a collection of discrete textual provisions, suggests that it was "the financial settlement of Confederation,"[22] as it allocated the property and debts of the founding colonies as between the new levels of government. This view explains why the drafters were particularly concerned with the revenue from actual tariffs, as opposed to non-tariff barriers:

> The ultimate solution was that, in exchange for the provinces surrendering indirect taxes, which at the time were almost exclusively in the form of customs duties, the federal government would pay them grants and assume the lion's share of their debt. This was the basic quid pro quo of Confederation and the purpose of Part VIII was arguably to enshrine its terms. On this view, s. 121 contains the provincial consideration, namely the forfeiture of internal customs duties, which the provinces had imposed on one another in respect of manufactured goods until Confederation.[23]

15. This demonstrates that a purposive interpretation of s. 121 (that is, "with a view to the purpose [it was] intended to serve"[24]) should recognize the financial settlement objective of Part VIII. This purpose is served by prohibiting provinces from imposing inter-provincial customs

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[19] *Air Canada v Ontario (Liquor Control Board)*, [1997] 2 SCR 581 ["*Air Canada*"] at para 44.
[20] *Ibid* at para 3.
[21] *Ibid* at paras 39-49.
[22] DG Creighton, *British North America at Confederation: A Study Prepared for the Royal Commission on Dominion-Provincial Relations* (Ottawa: Information Canada, 1963) at 79.
[23] Michael Marin, "Speaking Notes on R. v. Comeau" (Runnymede Society Discussion Panel delivered at the University of New Brunswick, 9 November 2016).
[24] Reasons at para 191, Appellant's Record, Vol 1 at 87-88.

and leaving the raising of custom revenue to the federal government; it would not be served by a prohibition that goes beyond internal customs duties, particularly such a prohibition that applies to both levels of government.[25]

B. The trial judge's overbroad definition of trade barrier threatens valid regulation in the public interest

16. The trial judge interpreted s. 121 as constitutionally prohibiting both levels of government from imposing "prohibitions, conditions, or specific market requirements that make importation or exportation of products more difficult or more costly". If adopted, this definition of a constitutionally prohibited trade barrier is sufficiently broad to "sweep designated powers out to sea", [26] and leave behind provincial heads of power unable to respond to the regulatory needs of contemporary Canadian society. This would reverse the "dominant tide" of federalism doctrine, which favours "the ordinary operation of statutes enacted by both levels of government".[27]

17. This definition could capture any regulatory requirement that is not duplicated in substantially the same terms across ten provinces and three territories, since it becomes "more difficult or more costly" for a firm to export products when it must bear the "double burden" of complying with two different sets of rules, even when the rules in themselves are not discriminatory in the trade law sense: "…there are provisions which do not explicitly discriminate, but nevertheless, distort or increase the burdens on interprovincial trade as, for example, through the accumulated burden of health and safety, environmental, occupational and labelling standards that vary from province to province."[28]

18. Therefore, variable standards such as different safety labels being required in different provinces - responsive to local concerns or conditions - could be struck down on the basis of making exportation more costly. The Court could not remedy such a double burden by

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[25] The trial judge and the respondent appear to agree that under their theory of s. 121 it applies equally to the provincial and federal governments; see Reasons at para 151, Appellant's Record, Vol I, at 72.
[26] *Securities Reference, supra* note 8 at para 62.
[27] *Canadian Western Bank, supra* note 13 at para 37.
[28] Katherine Swinton, "Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union" (1995) 25 Can Bus LJ 280 at 295 [Swinton, "Courting Our Way"].

harmonizing the two standards, nor could it choose the one it prefers. Instead, the Court would be required to declare one of the standards to be of no force and effect. The result would be an order blocking laws which indirectly burden the free flow of goods.

19. The trial judge's approach may even capture blanket prohibitions applied equally to domestic and extra-provincial producers, since such prohibitions would make importation of the prohibited product "more difficult". Provincial health, consumer protection and environmental laws, previously viewed as firmly grounded in provincial heads of power, may be subject to the scrutiny of a single-mindedly economic constitutional prohibition which is subject to neither a limitations clause nor a democratic override.

20. The Canadian Free Trade Agreement, discussed below, recognizes that "the right to regulate is a basic and fundamental attribute of government, and the decision of a Party not to adopt or maintain a particular measure shall not affect the right of any other Party to adopt or maintain such a measure,"[29] and devotes one of its thirteen chapters to environmental protection.[30]

21. Such problems cannot be solved by substituting a more refined test for constitutionally prohibiting non-tariff barriers. Any judicially enforceable legal test on the permissibility of non-tariff barriers would necessarily require the courts to articulate their own economic theory of when inter-provincial trade in goods should not be encumbered by regulatory requirements:

> While some might argue that the failure to achieve results in the constitutional amendment process justifies judicial action to help adapt the existing constitution to meet current policy needs, another reading of the outcome of that process is the general resistance to constitutional rules to govern the economic union, especially open-ended rules enforced by the courts that allow judges to work out the appropriate balance between the state and markets and between uniformity and diversity. The constitutional route engenders concerns about the legitimacy of judicial review in this area, the competence of the judges to deal with the problem and the danger of rigidity that comes with enshrining a particular vision of state and markets rather than that allowing that vision to adapt over time.[31]

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[29] *Canadian Free Trade Agreement* (1 July 2017), p 3, art 102 [*CFTA*].
[30] *Ibid*, p 89, Chapter Six.
[31] Swinton, "Courting our Way", *supra* note 28 at 301-2.

C. Inter-government internal trade agreements demonstrate that the terms of the Canadian economic union are best left to democratically accountable representatives

22. The view that the *Constitution Act, 1867* was intended to promote the economic union of the provinces does not automatically lead to the conclusion that judicial enforcement of a dramatically expanded s. 121 is required:

> [I]n in a federal system it is not enough to conclude that a practice is discriminatory or unduly burdensome; rather one must go on to ask how integration most feasibly and legitimately result: through judicial prohibitions of the practice; through unilateral federal action; through intergovernmental co-operation and negotiations; through new institutional reforms; or through formal constitutional change.[32]

23. Since the patriation negotiations, which included a failed attempt to expand s. 121 beyond its traditional understanding, Canadian governments have pursued the option of intergovernmental co-operation and negotiation as their preferred approach to strengthening the economic union. Both the 1994 *Agreement on Internal Trade* (the AIT) and its successor the *Canadian Free Trade Agreement* (the CFTA) demonstrate that the development of internal trade is not an area in which judicial intervention is necessary or helpful. The trial judge's finding that the AIT as "not particularly successful, especially with respect to alcohol" should be disregarded given the complete lack of evidence on that point, and in any event, evaluating the effectiveness of public policy writ large is beyond the proper role for the judicial branch.[33]

24. More broadly, these agreements demonstrate the complex, polycentric decisions which must be made in setting the exact parameters of what is or is not a "non-tariff trade barrier":

> …even when [internal free trade] provisions are stated in more direct terms, there can be a variety of interpretations involving complex public policy considerations… Take, for example, the obligation [in the AIT] in Article 403 that 'each Party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.' In fact, an action that obstructs trade could be permitted by the agreement if the

[32] *Ibid* at 292.

[33] Further, it is undercut by the fact that in July 2017 an AIT panel produced a decision that deemed brewery subsidies to be inconsistent with non-discrimination obligations under the AIT: *Report of Article 1716 Panel Regarding the Dispute between Artisan Ales Consulting Inc. and Alberta Regarding Beer Mark-ups*, Agreement on Internal Trade, 28 July 2017.

> government were pursuing a 'legitimate objective' and the measure was not 'unduly' trade restrictive (Article 803). Deciding the appropriateness of a government action in these situations requires a difficult judgment about the burden that should be placed on trade when balancing it against other values, such as the optimal level of consumer protection….one person's conclusion that a particular measure is an inappropriate burden on trade may rest on an underlying assumption that minimizing costs is the most important measure of public policy, yet another person may reach a very different conclusion based on other values, such as fairness for disadvantaged groups or the importance of preserving the environment.[34]

25. The CFTA addresses this complexity through an exhaustive and detailed list of general rules and obligations, sector-specific rules, exceptions for specified policy goals, and a limitations clause not dissimilar to s. 1 of the *Charter*.[35] Determining what amounts to an impermissible non-tariff barrier, while still complex, is guided by an agreement which was negotiated against the backdrop of contemporary trade law and practice and is therefore designed to provide guidance on how to resolve the types of difficult trade-offs set out above.

26. The CFTA also includes procedural features that speak to the multiple possible approaches for reducing trade barriers. The CFTA's Chapter Four, "Regulatory Notification, Reconciliation, and Cooperation", is an example of a "positive integration" approach to trade integration, where rules in different jurisdictions are harmonized through changes made by the relevant governments, producing an outcome where the trade barrier is removed but the regulatory purpose is still served.[36] The federal proposal during the patriation process to expand s. 121 beyond its current interpretation was intended to be a positive integration mechanism.[37]

27. Negative integration, by contrast, is the model wherein the offending law is nullified.[38] Since it is by definition more likely to result in less regulation, this model of trade integration is

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[34] Katherine Swinton, "Law, Politics, and the Enforcement of the Agreement on Internal Trade" in Michael J Trebilcock & Daniel Schwanen, eds, *Getting There: An Assessment of the Agreement on Internal Trade* (Winnipeg: Hignell Printing Limited, 1995) 196 at 202-203.
[35] *CFTA, supra* note 29, p 6, art 202(3).
[36] Alicia Hinarejos, "Free Movement, Federalism and Institutional Choice: A Canada-EU Comparison" (2012) 73:1 Cambridge LJ 537 at 565.
[37] Swinton, "Courting Our Way", *supra* note 28 at 301.
[38] Hinarejos, *supra* note 36 at 565.

more associated with hostility to government intervention in the marketplace.[39] Negative integration is the only model available where trade integration is carried out by a striking down alleged non-tariff barriers. There is no question that the trial judge's approach to s. 121 would result in less government regulation; for example, an article cited in the trial judge's reasons argues that provincial regulatory inspections constitute a non-tariff barrier to trade.[40]

28. The CFTA includes both positive and negative integration features[41] as part of a balanced approach to internal trade integration. Such an approach pursues the benefits of increased trade while remaining agnostic on the ideal role played by government in regulating the economy, which is appropriate given that it applies to 14 different governments. The CFTA is not only the preferred approach of Canadians' democratically elected governments to internal trade integration, but it is also a simple counter-example to the implicit suggestion in the trial judge's reasons that there is only one possible institutional model for achieving that outcome.

PART IV – COSTS

29. Ontario seeks no order as to costs and asks that no costs be awarded against Ontario.

PART V – REQUEST FOR ORAL ARGUMENT

30. Ontario requests permission to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF OCTOBER, 2017

Michael S. Dunn	**Padraic Ryan**

Counsel for the Intervener, Attorney General of Ontario

[39] Swinton, "Courting Our Way", *supra* note 28 at 289.
[40] Ian A Blue, "Free Trade within Canada: Say Goodbye to Gold Seal" (Ottawa: Macdonald-Laurier Institute for Public Policy, 2011) at 8-9.
[41] *CFTA, supra* note 29, p 105, Chapter Ten.

PART VI – TABLE OF AUTHORITIES

Cases

Secondary Sources

3	Katherine Swinton, "Law, Politics, and the Enforcement of the Agreement on Internal Trade" in Michael J Trebilcock & Daniel Schwanen, eds, *Getting There: An Assessment of the Agreement on Internal Trade* (Winnipeg: Hignell Printing Limited, 1995) 196	**24**
	Michael Marin, "Speaking Notes on R. v. Comeau" (Runnymede Society Discussion Panel delivered at the University of New Brunswick, 9 November 2016)	**14**
	Report of Article 1716 Panel Regarding the Dispute between Artisan Ales Consulting Inc. and Alberta Regarding Beer Mark-ups, Agreement on Internal Trade, 28 July 2017	**23**