S.C.C. 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

-and-

GERARD COMEAU

Respondent

-and-

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PART 1: OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. Section 121 of the *Constitution Act, 1867* is best interpreted as it was by Justice Rand in *Murphy*[1] and Chief Justice Laskin in the *Agricultural Products Marketing Reference*.[2] It addresses laws that are "in essence and purpose" in relation to interprovincial[3] trade in articles of produce, manufacture and growth ("goods"). Section 121 prohibits laws explicitly imposing discriminatory treatment of Canadian goods based on where they were produced, manufactured or grown, unless there are legitimate federal or provincial purposes for the law. Section 121 prohibits a facially-neutral law only if its sole purpose is making Canadian goods less competitive based on origin.[4]

2. Laws creating and enabling publicly-owned provincial or territorial monopolies on the distribution and sale of alcoholic beverages do not themselves discriminate based on origin and pursue legitimate federal and provincial purposes. They are policy instruments for regulating the price of -- and access to -- Canada's most widely-used recreational drug. An unrestricted right of individuals to possess alcohol not purchased through the provincial monopoly would undermine the ability of each jurisdiction to make its own tradeoffs between consumer satisfaction, revenue and the consequences of alcohol consumption on human health, road safety, family violence and other ills.

3. Since Section 134 of New Brunswick's *Liquor Control Act* is necessarily incidental to the existence of a publicly-owned provincial monopoly on the distribution and sale of alcoholic beverages, and since such monopolies further legitimate policy objectives, section 134 is consistent with section 121 of the *Constitution Act, 1867*.

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[1] *Murphy v. C.P.R.*, [1958] S.C.R. 626 [*Murphy*], p 642, Rand J.

[2] *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198 *[Agricultural Products Marketing Referemce*], p 1268, Laskin CJC.

[3] British Columbia takes no position as to whether "province' in section 121 includes a territory.

[4] The test for section 121 proposed mirrors that for provincial competence under section 92(13) as set out in *Carnation Company Limited v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238 [*Carnation*], pp 252-3 (aim and purpose of affecting interprovincial or international trade determines pith and substance, not impact or effect).

PART II – POINTS IN ISSUE

4. The following is the Attorney General of British Columbia's proposed answers to the constitutional question asked by the Appellant and Respondent:

Appellant's Question #1	Does s. 121 of the *Constitution Act, 1867* render unconstitutional s. 134 of the *Liquor Control Act*, which along with s. 3 of the *Importation of Intoxicating Liquors Act*, establishes a federal-provincial regulatory scheme in respect of intoxicating liquor?	No.
Respondent's Question #1	Does s. 121 of the *Constitution Act, 1867* prohibit both tariff and non-tariff barriers to interprovincial trade on items of growth, produce and manufacture moving between the provinces, as held by His Honour Judge LeBlanc?	Only if the "non-tariff barriers" are in essence and purpose in relation to a provincial boundary.
Respondent's Question #2	If the answer to question 1 is no, then against what trade barriers does s. 121 protect Canadians?	See answer to Question #1.
Respondent's Question #3	Does s. 134(b) of the *Liquor Control Act* […] constitute a trade barrier which violates s. 121, as held by His Honour Judge LeBlanc?	No.

PART III - ARGUMENT

Approaches to Section 121 of the *Constitution Act, 1867*

5. The question posed by the respondent is whether s. 121 of the *Constitution Act, 1867* prohibits "non-tariff barriers" to interprovincial trade. This is too simplistic. *All* regulation and taxation has *some* effect on interprovincial trade.[5] If s. 121 banned every regulation or tax measure that causes an impediment to, or imposes an additional cost on,

[5] As noted by Justice Rand in *Murphy*, note 1, p 638. See also *Carnation*, note 4, p 252 (provincial legislation affecting the costs of export business not "in relation" to international or interprovincial trade and commerce)

trade among provinces and territories, it would be incompatible with democracy or federalism. The question is therefore not just *whether* s. 121 prohibits non-tariff barriers, but *which* "non-tariff barriers" it prohibits.

6. While a tariff is relatively easily defined as a discriminatory tax imposed on extra-provincial goods,[6] a "non-tariff barrier" is a broader and more nebulous concept.[7] It could include any of the following:

Quotas. Quantitative restrictions on the number of imports permitted from a particular jurisdiction motivated by protectionism have a similar economic effect to tariffs. Discriminatory quotas on imports must be distinguished from supply management: restrictions on the total sold in a jurisdiction for price stability or other reasons.[8]

Facial distinctions in regulation. Regulatory rules may distinguish explicitly based on origin. An example would be a product liability standard that applied only to imports from other provinces or exempted within-province producers. While these measures might be justified based on a legitimate objective, such as preventing spread of disease, they could also be motivated by a desire to protect local producers.

Non-harmonized taxation or regulation. Different taxes or regulations enacted for non-trade reasons may be inconvenient for exporters and are sometimes addressed through harmonization discussions. But "lack of harmonization" is just the flip side of the provincial sovereignty inherent in federalism.

Procurement, government enterprises and "subsidies." Non-regulatory decisions

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[6] Thus, the tax on tobacco purchased in other provinces but consumed in New Brunswick upheld in *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] A.C. 550, [1943] 4 D.L.R. 81 (J.C.P.C.) [*Atlantic Smoke Shops*] was not a "tariff" because it simply equalized the rate of tax with tobacco purchased in New Brunswick.

[7] The trial judge did not define "non-tariff barriers." The Respondent's historical expert defined them as "differences in regulation, fluctuations in exchange rates and the actions of state-owned enterprises": **Appellant Record, vol 5, p 129.** He acknowledged that the concept did not exist until the 1960s: **AR, vol 5, p 130** and would include such fundamental features of Canadian life as Quebec's distinct legal system: **AR, vol 5, p 150.**

[8] *A.G. Man. v. Man. Egg & Poultry Assn.*, [1971] S.C.R. 689, p 701 (distinguishing quotas for import from management of overall supply within the province).

of government in spending or use of public property are sometimes the subject matter of trade agreements. The issues here include procurement rules, access to natural resources, determining what considerations government enterprises can take into account, and when government programs are inappropriate "subsidies."

7. At the broadest, any taxation or regulation affecting inter-provincial trade at all, regardless of whether intra-provincial products are subject to the same treatment, could be considered a "non-tariff barrier." This sounds – and is – extreme, since it amounts to constitutionalizing a *laissez-faire* approach few Canadians would support.

8. Each of these conceptions of "non-tariff barrier" has vastly different implications for the ability of Canadian governments to tax and regulate in the interests of social equity, safety, public health, environmental protection and all the other purposes the democratic state might seek to advance. The power to make laws in relation to property and civil rights is the right to decide differently. It is important that the Court avoid creating unnecessary uncertainty about such a critical constitutional issue.

9. Approaches to s. 121 of the *Constitution Act, 1867* can be divided into three broad categories:

The "Customs Union" approach. Before Confederation, each of the British North American colonies maintained a system of customs and excise at its borders, and enforced these systems against each other. Section 122 provided these laws would continue until replaced by a national system set up by the Parliament of the new dominion. On the "Customs Union" interpretation, s. 121 just provided an exemption to these laws for the goods of the other confederating provinces pending the creation of the national customs and excise system.[9]

The "Undue Effect" approach. In the most extreme version -- which is incompatible

[9] *Atlantic Smoke Shops*, note 6, p 91 [DLR], Viscount Simon ("One essential purpose of federating such units is that they should cease to maintain customs barriers against the produce of one another, and hence s. 121, supplemented by s. 123, established internal free trade from July 1, 1867[….] It was not, however, practicable to abolish Provincial customs entirely on that date.") The *Customs Act*, 31 Vict., c. 6 (1867) (enacting clause), **British Columbia's Authorities ("BCA"), Tab 1** and *Duties of Customs – Tariff*, 31 Vict., c. 7 (1867) (enacting clause), **BCA, Tab 2** were given royal assent December 21, 1867.

with federalism -- regulations and taxes are unconstitutional if they render the admission of articles of growth, produce or manufacture into another province more costly. More realistically, a court would employ some proportionality test to determine whether the benefits of the law outweigh its effects on interprovincial trade.

The "Protectionist Essence and Purpose" approach. This approach reads s. 121 as being consistent with federal, provincial tax and regulatory measures that render interprovincial trade more expensive, so long as the essence and purpose of those measures is legitimate.

10. Like any other provision of the Constitution of Canada, s. 121 should be interpreted purposively in light of its "linguistic, historic and philosophic context."[10] The "historic context" refers not to the framers' "original intent" (how they would have applied the principle in the text to their own social context), but to the "essential components" of the legal principle as originally adopted.[11] "Historic context" includes post-adoption history,[12] especially where, as here, proposals for constitutional amendment were considered and rejected, presumably based on the existing jurisprudence. The core "philosophic context" of the provisions of the Constitution consists in its underlying principles of democracy, federalism, rule of law and protection of minorities.

11. The Customs Union approach is found in the speeches in *Gold Seal* and in the decision of the Privy Council in *Atlantic Smoke Shops.* [13] The Customs Union Approach has the benefit of certainty (a rule-of-law value), of minimal interference with the democratically-accountable branches of government (democracy) and with diverse legislative approaches within areas of provincial jurisdiction (federalism). It cannot be

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[10] *R. v. Big "M" Drug Mart*, [1985] 1 S.C.R. 295, para. 117.

[11] *Reference re Employment Insurance Act (Can.), s.. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56, paras 8-9 (s. 91(2A) of the *Constitution Act, 1867* reflects enduring concept of public insurance against social risk of unemployment, not social patterns of 1940).

[12] *Daniels v. Can.(Indian Affairs and Northern Development)*, [2016] 1 S.C.R. 99, 2016 SCC 12, para 24.

[13] *Gold Seal v. Dominion Express Co.* (1921) 62 S.C.R. 424 [*Gold Seal*] (upholding federal ban on importation of liquor into dry provinces and localities under *Canada Temperance Act*) [*Gold Seal*], p 456, Duff J; p 466, Anglin J; p 470, Mignault J; *Atlantic Smoke Shops*, note 6, p 91 [DLR]

clearly rejected on historical grounds, since the placement of s. 121 in Part VIII is consistent with its being a code for the transition period along with ss. 122 and 123.[14] In light of their assumptions of parliamentary sovereignty, they may well have seen s. 91 as the way to accomplish this. A number of s. 91 powers can be understood as based on the desire to enhance interprovincial trade.

12. The "Undue Effect" approach would radically change the relationship between the courts and legislatures – particularly provincial legislatures – in relation to taxes and economic regulation. This approach is inconsistent with the existing case law– from *Gold Seal* through *Atlantic Smoke Shops* and *Murphy* to *Re Agricultural Products Marketing Act*. This is the case law that the framers of the *Constitution Act, 1982* would have relied on when they decided not to revise s. 121. The "Undue Effect" approach would put the courts in the invidious position of balancing the social or environmental benefits of regulation against the economic costs. Since this is a core function of representative institutions, the Undue Effect approach is contrary to the principle of democracy; since court-imposed solutions would inevitably promote uniformity, it is contrary to the principle of federalism. Balancing would inevitably be unpredictable, and would involve a radical shift from long-standing jurisprudence, contrary to the principle of rule of law. Finally it could chill initiatives to benefit the disadvantaged, contrary to the protection of those minorities most vulnerable to the unregulated market.

13. The "Protectionist Essence and Purpose" approach is based on the reasons of Justice Rand in *Murphy*, considered approvingly by Chief Justice Laskin in the *Agricultural Products Marketing Reference. Murphy* was a challenge to the federal statutory monopoly of the Canadian Wheat Board over the purchase and marketing of grains for interprovincial and international trade. As a result of this monopoly, an inter-provincial exporter had to pay the Wheat Board a charge for its services. Viewed "in isolation", the prohibition on selling across provincial boundaries outside the scheme might be contrary to s. 121: if the purpose had been to change the competitive position of growers of grain in one province at the expense of another, it would call for "critical

[14] The Respondent's historical expert appeared to concede the plausibility of Viscount Simon's historical analysis of section 121 in cross-examination: **AR, vol 4, pp 25-27.**

examination." But because the charge in issue was for services rendered in administration of a scheme intended to benefit producers regardless of province, it was valid.[15] The analysis is of *purpose.* The Wheat Board monopoly did not distinguish on its face based on province-of-origin and was not discriminatory in intent. It was therefore not "*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."[16]

14. A "Protectionist Essence and Purpose" approach is consistent with the results in *Gold Seal* and *Atlantic Smoke Shops*, if not with all the *dicta.* Federal legislation banning import of alcoholic beverages from "wet" jurisdictions to "dry" ones was a prohibition "in aid of temperance legislation." It did not discriminate against products on the basis of region or province of origin, but in aid of the liquor policies of the region or province of purchase. The consumption tax upheld in *Atlantic Smoke Shops* simply equalized the rate paid between tobacco purchased in the province and tobacco purchased elsewhere and consumed in the province. In both cases, legitimate policy goals were being pursued in ways that did not discriminate between goods based on province-of-origin. A Protectionist Essence and Purpose test is also broadly consistent with the approaches of the Australian High Court[17] and the United States Supreme Court[18] to the internal free trade provisions of their constitutions. While judging sub-national regulations on their adherence to free market principles or consistency with each other is not compatible with democracy or federalism, policing intentional discrimination in law making is.

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[15] *Murphy*, note 1, pp 638-9.

[16] *Murphy* note 1, p 642 (setting out test for breach of s. 121. Emphasis added.). Justice Rand reinterpreted the decisions in *Gold Seal* and *Atlantic Smoke Shop* in light of this test, along the lines suggested in paragraph 14 of this Factum.

[17] *Cole v. Whitfield* (1988) 165 C.L.R. 360 (different minimum sizes for crayfish in different states consistent with s. 92 of the Australian Constitution because purpose conservation, not protectionism).

[18] *CTS Corp. v. Dynamics Corp. of America*, 481 US 69 (1987), p 87 ("The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce.") Regan, Donald H. "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause" 84 *Mich. L.R.* 1091 (1986), **BCA, Tab 4**.

BC's Proposed Test for Section 121

15. In BC's view, this court should give clear guidance as to the appropriate approach for analyzing section 121. BC supports the "Protectionist Essence and Purpose" approach and advocates the following test:

a. Does the tax or regulatory measure distinguish, on its face or in its intention, between articles of produce, growth and manufacture ("goods") of one province and those of another? If not, it is consistent with s. 121. Distinctions in effect are insufficient.

b. If the answer to the first question is "yes", is there a legitimate (federal or provincial, as the case may be) objective for the distinction? If so, the tax or regulatory measure is consistent with s. 121.

16. BC submits this Court should clarify that s. 121 applies only to goods, as opposed to services. Section 121 also does not apply to governments or government enterprises acting in their private capacities as purchasers or sellers. Section 121 applies equally to federal and provincial legislation.

Essence and Purpose of Provincial Liquor Monopolies

17. Although most Canadian consumers of alcoholic beverages drink responsibly, there is no question that alcohol is a leading cause of death, illness, injury, violence, loss of employment and family abuse. [19] The legitimacy of government action to address the effects of a free market in alcohol was accepted in the otherwise *laissez-faire* nineteenth century. It was also recognized that attitudes towards consumption of alcohol varied by region, ethnicity and religion. Federal legislation, upheld by the Privy Council, [20] allowed local options for prohibition. Provincial legislation to the same effect was also upheld in an early application of the double aspect doctrine.[21]

18. In *Gold Seal*, this Court rightly held that federal prohibitions on importation of

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[19] Stockwell T, Zhao J, Thomas G. "Should alcohol policies aim to reduce total alcohol consumption? New analyses of Canadian drinking patterns" 17 *Add Res Theory* 135-51 (2009), **BCA, Tab 5.**

[20] *Russell v. The Queen* (1882) 7 A.C. 829 (J.C.P.C.).

[21] *Ontario (Attorney General) v. Canada (Attorney General)*, [1896] A.C. 348 [*Local Prohibition*]

liquor in support of local or provincial choice in temperance polices are not contrary to s. 121. This would be true on any plausible view of the purpose of s. 121. In *Gold Seal*, all the justices took the Customs Union approach, but the legislation would also be easily upheld on a Protectionist Essence Purpose approach or even a balancing approach.

19. Government-owned monopolies at the wholesale or retail level are an effective way of addressing the problems of alcohol.[22] A crucial instrument for reducing problem alcohol consumption is price.[23] Making alcohol distribution in the province a public monopoly creates an important source of revenue for public purposes, albeit not usually enough to fully offset the public expenditures associated with alcohol use.[24] A public monopoly might also be a useful policy instrument to address health and safety concerns related to the decriminalization of other recreational drugs, such as cannabis.

20. The restrictions on importing alcoholic beverages upheld in *Gold Seal* were clearly necessary to protect the ability of different provinces and localities to make different choices about prohibition. Local prohibition is inconsistent with free movement of liquor. Post-prohibition, restrictions on movement were also necessary to allow for different approaches by different monopolies. Otherwise, market forces would push provinces and territories to the lowest common denominator in price and availability – depriving them of the right to decide for themselves how to balance the considerations of public health and safety, revenue, and consumer convenience and satisfaction.

21. It is beyond the scope of this appeal to determine when and whether differential treatment *by* a provincial monopoly would contravene s. 121. This would turn on whether s. 121 applies to commercial decisions of government enterprises (BC says it should not), and what legitimate reasons for the treatment exist. At trial, there was minimal evidence of a special handling fee imposed by Quebec on NB beer and, in retaliation, by NB on

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[22] Gesbrecht, N et al. "Pricing of alcohol in Canada: A comparison of provincial policies and harm-reduction opportunities" 35 *Drug and Alcohol Reivew* 289-297 (2016), **BCA Tab 3**.

[23] Stockwell T et al. "Does minimum pricing reduce alcohol consumption? The experience of a Canadian province" 107 *Addiction* 912-920 (2011) (increases in alcohol prices substantially reduce alcohol consumption), **BCA Tab 6.**

[24] Gesbrecht et al, note 22.

beer from Quebec.[25] For the purposes of *this* appeal, that evidence is irrelevant. Mr. Comeau challenges the law that allows for the very existence of a provincial liquor monopoly, *as such*.

Section 134 of the *Liquor Control Act* Is Consistent With Section 121

22. Section 134 of NB's *Liquor Control Act* simply says that – unless there is a lawful exception – no person is permitted to purchase or keep liquor in NB if they did not obtain it, directly or indirectly, from the province's publicly-owned monopoly. The necessity of some such offence is obviously a corollary of having a monopoly.

23. Section 134 does not distinguish facially between alcoholic beverages produced or manufactured in NB with those produced or manufactured anywhere else in Canada. The law is breached by the purchase of NB beer outside the monopoly, and not by the purchase of BC wine through the monopoly. Nor is it motivated solely or even primarily by protectionist purposes. A monopoly is a way for the residents of NB to decide their own fate concerning the price and availability of a socially-important recreational drug. On BC's proposed test -- and indeed any test that gives weight to provincial autonomy in matters of public health, safety and revenue -- section 134 is constitutional.

PART IV – SUBMISSIONS AS TO COSTS

24. BC does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

25. BC asks that the constitutional questions be answered as proposed in Part II.

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

J. Gareth Morley and Tyna Mason,
Attorney General of British Columbia

[25] Summary of Beer Accord, **Appellant's Record**, **Vol 5, p 9.**

PART VI: TABLE OF AUTHORITIES

	Cases	Paragraph(s)
1.	*A.G. Man. v. Man. Egg & Poultry Assn.*, [1971] S.C.R. 689	6
2.	*Atlantic Smoke Shops Ltd. v. Conlon*, [1943] A.C. 550, [1943] 4 D.L.R. 81 (J.C.P.C.) [*Atlantic Smoke Shops*]	6, 11, 12, 14
3.	*Carnation Company Limited v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238 [*Carnation*]	1, 5
4.	*Cole v. Whitfield* (1988) 165 C.L.R. 360	14
5.	*CTS Corp. v. Dynamics Corp. of America*, 481 US 69 (1987)	14
6.	*Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 S.C.R. 99, 2016 SCC 12, para 24.	10
7.	*Gold Seal v. Dominion Express Co.* (1921) 62 S.C.R. 424 [*Gold Seal*]	11, 12, 14, 18, 20
8.	*Murphy v. C.P.R.*, [1958] S.C.R. 626 [*Murphy*]	1, 5, 12, 13
9.	*Ontario (Attorney General) v. Canada (Attorney General)*, [1896] A.C. 348 [*Local Prohibition*]	17
10.	*Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198 *[Agricultural Products Marketing Referemce*]	1, 12, 13
11.	*Reference re Employment Insurance Act (Can.), s.. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56, paras 8-9	10
12.	*R. v. Big "M" Drug Mart*, [1985] 1 S.C.R. 295, para. 117.	10
13.	*Russell v. The Queen* (1882) 7 A.C. 829 (J.C.P.C.)	17
	Legislation	**Paragraph(s)**
14.	*Constitution Act, 1867*, sections 91, 121, 122, 123	1, 5, 9, 10, 11, 12, 15, 16, 21, 23
15.	*Customs Act*, 31 Vict., c. 6 (1867) (enacting clause), **British Columbia's Authorities ("BCA"), Tab 1.**	9
16.	*Customs – Tariff*, 31 Vict., c. 7 (1867) (enacting clause), **BCA, Tab 2.**	9
17.	*Liquor Control Act*, RSNB 1973, c L-10, s 134.	3, 22 ,23
	Secondary Sources	**Paragraph(s)**
18.	Gesbrecht, N et al. "Pricing of alcohol in Canada: A comparison of provincial policies and harm-reduction opportunities" 35 *Drug and Alcohol Reivew* 289-297 (2016), **BCA Tab 3**	19

19.	Regan, Donald H. "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause" 84 Mich. L.R. 1091 (1986), **BCA, Tab 4**	14
20.	Stockwell T, Zhao J, Thomas G. "Should alcohol policies aim to reduce total alcohol consumption? New analyses of Canadian drinking patterns" 17 *Add Res Theory* 135-51 (2009), **BCA, Tab 5**	17
21.	Stockwell T et al. "Does minimum pricing reduce alcohol consumption? The experience of a Canadian province" 107 *Addiction* 912-920 (2011) (increases in alcohol prices substantially reduce alcohol consumption), **BCA Tab 6**	19

PART VII: LEGISLATION

Constitution Act, 1867, sections 121-123

Canadian Manufactures, etc.

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.

Continuance of Customs and Excise Laws

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.

Exportation and Importation as between Two Provinces

123. Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation.

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

(a) attempt to purchase, or directly or indirectly or upon any pretence, or upon any device, purchase liquor, nor

(b) have or keep liquor,

not purchased from the Corporation.