

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

BETWEEN

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

– and –

GERARD COMEAU

RESPONDENT
(Respondents)

– and –

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PART I – FACTS

I. Development of Federal Responsibility for the Administration of Peace, Order and Good Government in the Northwest Territories

1. At Confederation, the areas then known as Rupert’s Land and the North-Western Territory covered over two million square miles and included what is now the Yukon, the Northwest Territories, parts of Nunavut, including the southwest portion of Baffin Island, Alberta, Saskatchewan, most of Manitoba, and the northern parts of Quebec and Ontario.

2. On December 16 and 17, 1867, pursuant to s. 146 of the *Constitution Act, 1867*,¹ Parliament made a formal Address to Her Majesty with respect to the admission of North-Western Territory and Rupert’s Land into the Union (1867 Address). The 1867 Address set out the responsibilities that Parliament assumed as a condition of the transfer of the North-Western Territory and Rupert’s Land to Canada, and in particular, the obligations and duties of government and legislation.²

3. The *Rupert’s Land Act, 1868*³ authorized the surrender of Rupert’s Land to the Crown for the purpose of admitting Rupert’s Land into the Dominion of Canada. The surrender was executed on November 19, 1869 and accepted by the Crown on June 22, 1870. Section 5 provides:

It shall be competent to Her Majesty by any such Order or Orders in Council as aforesaid, on Address from the Houses of the Parliament of Canada, to declare that Rupert’s Land shall, from a Date to be therein mentioned, be admitted into and become Part of the Dominion of Canada; and thereupon it shall be lawful for the Parliament of Canada from the Date aforesaid to make, ordain, and establish within the Land and Territory so admitted as aforesaid all such Laws, Institutions, and Ordinances, and to constitute such Courts and Officers as may be necessary for the Peace, Order and good Government of Her Majesty’s Subjects and others therein; Provided that, until otherwise enacted by the said Parliament of Canada, all the Powers, Authorities, and Jurisdiction of the several Courts of Justice now

¹ 30 & 31 Victoria, c. 3 (U.K.), reprinted in RSC 1985, App. II.

² The Address of 16 & 17 December 1867, reprinted in R.S.C. 1985, App. II, No. 9, Sch. A (1867 Address) was appended as Schedule A to the *Rupert’s Land Order 1870*. The Address to Her Majesty the Queen by the House of Commons and the Senate on May 29 and 31, 1869 which set out, out among other things, details of the Agreement between the Government of Canada and the Hudson’s Bay Company, was appended as Schedule B to the 1870 Order.

³ 31 & 32 Victoria, c. 105 (U.K.).

established in Rupert's Land, and of the several Officers thereof, and of all Magistrates and Justices now acting within the said Limits, shall continue in full force and effect therein.

4. As provided under s. 146 of the *Constitution Act, 1867* and the *Rupert's Land Act, 1868*, on July 15, 1870, Rupert's Land and the North-Western Territory were transferred to Canada by the *Rupert's Land and North-Western Territory Order (U.K.)*⁴ ("1870 Order"). The 1870 Order is a constitutional document under section 52 of the *Constitution Act, 1982*⁵ and provides:

It is hereby ordered and declared by Her Majesty, by and with the advice of the Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Acts of Parliament, [...] the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address, and that the Parliament of Canada shall from the day aforesaid have full power and Authority to legislate for the future welfare and good government of the said Territory. And it is further ordered that, [...], Rupert's Land shall from and after the said date be admitted into and become part of the Dominion of Canada upon the following terms and conditions, being the terms and conditions still remaining to be performed of those embodied in the said second Address of the Parliament of Canada, and approved of by Her Majesty as aforesaid: [...]

5. On April 8, 1875, *The North-West Territories Act*⁶ provided a constitution for the North-West Territories:

2. For the North-West Territories there shall be an officer styled the Lieutenant – Governor [...]; and the Lieutenant-Governor shall administer the government under instructions from time to time given him by Order in Council, or by the Secretary of State for Canada.

[...]

8. The Governor in Council may, by proclamation, from time to time, direct that any Act of the Parliament of Canada, or any part or parts thereof, or any one or more of the sections of any one or more of any such Acts shall be in force in the North-West Territories generally, or in any part or parts thereof to be mentioned in the said proclamation for such purpose.

⁴ 23 June 1870, reprinted in RSC 1985, App. II, No. 9.

⁵ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁶ 1875 (38 Victoria c. 49).

II. Present status of the Government of the Northwest Territories

6. The present status of the Government of the Northwest Territories (“GNWT”) has been summarized Mr. Justice Vertes in *Morin v. Crawford*⁷:

Through the instrument of the *Northwest Territories Act*, the Parliament of Canada delegated extensive powers of self-government to the Northwest Territories. The Commissioner in Council is given jurisdiction to legislate in a broad range of subjects similar to the jurisdictional powers of a province. There is *dicta* upholding the validity of this delegation: [citation omitted]. There is jurisprudence from this court that has held that, while the Commissioner in Council legislates under the authority of an act of the federal Parliament, the laws enacted are laws of the Territories passed by a legislature constituted for the Territories: [citation omitted]. The *Northwest Territories Act* does provide, in section 21(2), that the federal cabinet may disallow any statute passed by the territorial legislature within one year of its passage. In its practical effect, however, this is no different than the federal power of disallowance of provincial legislation, found in s. 90 of the *Constitution Act, 1867*, a power that by constitutional convention is not used and is now regarded as obsolete: [citation omitted] [para. 52]

[...]

The Legislative Assembly of the Northwest Territories has also achieved some limited constitutional recognition. Section 3 of the *Charter of Rights and Freedoms* guarantees: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." The right to vote has been described as the very embodiment of democracy, the right of citizens to elect their government: [citation omitted]. The rights protected by section 3 are "preferred" rights in that they are not subject to the notwithstanding clause found in s. 33 of the *Charter*. Section 30 of the *Charter* states that "a reference ... to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be." This recognition reinforces my opinion that in no way can this Legislative Assembly be considered as merely an emanation or organ of the federal government. It is a separate and distinct legislative entity. [emphasis added]

It may be technically correct to say, as Laskin C.J.C. did in *Yellowknife (City) v. Canada (Labour Relations Board)* (1977), 76 D.L.R. (3d) 85 (S.C.C.), that the Parliament of Canada has an "all-encompassing" legislative authority in the Northwest Territories (at page 86). But, considering the history, the legal powers, and the constitutional position of the Legislative Assembly of the Northwest Territories as an institution, I conclude that it is an independent legislative institution as fully effective within its sphere of jurisdiction as any other

⁷ [1999] NWTJ No. 5.

legislature.⁸

7. Further demonstration that the GNWT enjoys province-like powers is found in the fact that the Charter applies to the territories in the same manner as it applies to provinces, and also in the jurisprudence from this Court that confirmed that the territories are bound by the Honour of the Crown in its relations with First Nations.⁹

PART II – ISSUE

8. 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?

PART III – ARGUMENT

1. The federal-provincial regulatory scheme is not in pith and substance a “trade barrier”

9. There is a presumption that statutes enacted by Parliament or the legislatures are constitutionally valid.¹⁰ The onus of proving that a statute is unconstitutional lies with the party that is challenging the legislation.¹¹

10. In determining the constitutional validity of a statute, the Court first has to identify the “matter” of the statute, or its pith and substance; and second, classify the statute within the heads of power in the Constitution. The purpose of the law and its legal effects are helpful in determining the legislation’s “matter”. The determination of the pith and substance of the statute will establish whether the enacting legislature has competence over the matter.¹² A statute may also be constitutionally valid even if it “affects” or “trenches” on a matter that is under the legislative

⁸ [1999] N.W.T.J. No. 5 at paras. 52, 54-55.

⁹ *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 at paras. 57, 73.

¹⁰ *Nova Scotia (Board of Censors) v. McNeil*, [1978] SCJ No. 25, [1978] 2 SCR 662; *Rogers Communications Inc. v. Châteauguay (City)*, [2016] 1 SCR 467 at para. 81, per Gascon J., dissenting.

¹¹ See *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783 at para. 25 (SCC).

¹² *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, [2015] 3 SCR 250, at paras. 21, 30 (“*Goodwin*”).

jurisdiction of the other level of government.¹³

11. Section 121 is not included in the division of legislative powers, which are divided under sections 91 and 92 of the *Constitution Act, 1867*. Section 121 provides:

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.

12. As discussed by this Court in *Canadian Egg Marketing Agency v. Richardson*,¹⁴ the historical judicial consideration of s. 121 suggests that it limited the jurisdiction of governments to enact legislation that might interfere with the entry of goods into a province and were found to prohibit only customs duties on the transit of goods across a provincial boundary. This Court then noted the broader interpretation suggested by Rand J., concurring in *Murphy v. Canadian Pacific Railway Co.*,¹⁵ where he opined that :

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 incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary. [Emphasis added by the Court]

13. Again in *Richardson*, the Court then noted that in *Reference re Agricultural Products Marketing Act*,¹⁶ four justices adopted this approach and held that the federal-provincial egg marketing scheme was not “in its essence and purpose related to a provincial boundary”, in part because there was “no design of punitive regulation directed against or in favour of any Province” [emphasis added].¹⁷

14. Dissenting in *Richardson*, McLachlin J., as she then was, held that “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”; and that “Provinces and the federal government are permitted

¹³ *Quebec (Attorney General) v. Lacombe*, [2010] 2 SCR 453 at paras. 35-36 (“*Lacombe*”).

¹⁴ *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157 at para. 63 (“*Richardson*”).

¹⁵ *Murphy v. Canadian Pacific Railway Co.*, [1958] SCR 626 at p. 642.

¹⁶ *Reference re Agricultural Products Marketing Act*, [1978] 2 SCR 1198.

¹⁷ *Richardson*, *supra* note 15 at paras. 63-64.

to impose disadvantages on the basis of provincial boundaries so long as this effect is incidental to another purpose within their proper legislative sphere. They are not permitted, however, to create interprovincial barriers which are not incidental to such a higher purpose.” [emphasis added].¹⁸

15. It is submitted that the pith and substance doctrine applies in determining the constitutional validity of a statute that may affect the circulation of goods across provincial boundaries. Provided that the statute complies with the pith and substance, ancillary power or incidental effect doctrines,¹⁹ Parliament and provincial/territorial legislatures may enact statutes that are in pith and substance, or have a purpose, within their legislative jurisdictions under s. 91 and 92 of the *Constitution Act, 1867*, yet “affect” or even “trench” on the circulation of goods.

16. Neither Parliament nor the provincial/territorial legislatures may enact laws the “true character”²⁰ of which is solely in relation to the free circulation of goods between provinces.

17. In this case, the “matter” or “true character” of the impugned federal-provincial regulatory scheme in respect of intoxicating liquor is not solely in relation to the circulation of goods between provinces, but rather has economic and social components.

2. The GNWT has adopted similar legislation for health and social purposes

18. The “true character” or purpose of the regulation of intoxicants in the Northwest Territories is not in relation to the circulation of goods between provinces/territories. The subject of intoxicant liquor and drugs is significantly more complex in the Northwest Territories, and is not just a matter of free trade, or tariff or non-tariff barriers.

19. Rather, there are significant health and social stressors caused by alcohol use and addiction in the Northwest Territories that impact a higher proportion of the population than in the provinces. The issue requires the territorial government to adopt specific measures, not only over liquor as an intoxicant requiring import restrictions under the *Liquor Act*, but also as a necessary response to the health and social services issues that are created by the abuse of alcohol in the territories. The

¹⁸ *Richardson*, *supra* note 15 at paras. 123, 171.

¹⁹ *Lacombe*, *supra* note 14 at paras. 35-36.

²⁰ *Goodwin*, *supra* note 13 at para. 21.

GNWT has therefore made a specific and conscious choice to institute higher alcohol prices to reduce alcohol consumption, and consequently limit its harmful health and social effects.

20. The constitutional and legislative authority over healthcare is not a single matter assigned exclusively to one level of government in the *Constitution Act, 1867*.²¹ In *Eldridge v. British Columbia (Attorney General)*²², this Court confirmed that provinces had broad and extensive power over healthcare, and that the power came from subsections 92(7) (Hospitals, etc.), 92(13) (Property and Civil Rights in the Provinces), and 92(16) (Generally all Matters of a merely local or private Nature in the Provinces) of the *Constitution Act, 1867*.

21. The *Northwest Territories Act*²³ (“*NWT Act*”), which was last amended on December 16, 2014, sets out in section 18 the legislative powers of the GNWT. They are similar to those exercised by the provinces and include matters of a local nature. The GNWT derives its authority over healthcare from subsections 18(1): “(j) property and civil rights;” “(s) hospitals and charities;” and “(x) generally, all matters of a merely local or private nature;”, just as the provinces do under the equivalent provisions in section 92 of the *Constitution Act, 1867*.

22. Subsection 18(1)(r) of the *NWT Act* provides the Legislature with the authority to make laws in relation to “intoxicants, including what constitutes an intoxicant”.

23. Section 18(2) of the *NWT Act* provides the GNWT with authority to legislate regarding the importation of alcohol, and states:

“The Legislature may make laws relating to the importation of intoxicants into the Northwest Territories from another part of Canada or elsewhere and defining what constitutes an intoxicant for the purposes of those laws.”

24. Section 25 of the *NWT Act* provides a restriction on the legislative authority of the GNWT and states:

25(1) Nothing in subsection 18(1) or section 19 must be construed as giving the Legislature greater powers than are given to legislatures of provinces under sections 92, 92A and 95 of the *Constitution Act, 1867*.

²¹ *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331 at para. 53.

²² *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para. 24.

²³ R.S.C., 1985, c. N-27.

This limitation in legislative authority does not apply to the legislative authority of the GNWT over the importation of intoxicants provided to it in section 18(2) of the *NWT Act*.

25. In exercise of its authority over the importation of intoxicants, the *Liquor Act*²⁴ (“*Liquor Act*”), contains a restriction on the importation of liquor at subsections 43 and 44(1) that state:

43. A person may personally import into the Northwest Territories 1.5 L of wine, 1.14 L of spirits or 8.52 L of beer.

44(1) Subject to section 43, no person may import liquor into the Territories without an importation certificate.

26. On that basis, the GNWT, through the *Liquor Act*, has created a robust and grass-roots regulatory regime where individual communities can make decisions related to the restriction or prohibition of alcohol within their community. For example, upon resolution of a municipal council or band council, Part 3 of the *Liquor Act* provides a scheme that allows the responsible Minister to order a plebiscite in a community that would allow the community to establish a liquor restriction or prohibition system.²⁵ Sixteen (16) of the thirty-three (33) communities in the Northwest Territories have established either liquor restrictions or prohibitions to limit the use and consumption of alcohol in their communities. The reasoning of the trial judge would render these measures impermissible as non-tariff trade barriers.

27. In *Schneider v. British Columbia*²⁶, this Court held that B.C. could enact the *Heroin Treatment Act* under s. 92(16) “all matters of a merely local or private nature in the province” as the Act was primarily dealing with the subject of narcotics and the treatment of addicts “from a provincial aspect”. Similarly, the GNWT has enacted measure that are carefully tailored to respond to specific health and social issues in the Northwest Territories.

28. Moreover, the case of *Canada v. PHS Community Services Society*²⁷ concerned a safe-injection clinic established under provincial law which provided a safe, supervised environment, trained staff and clean equipment to enable injection drug addicts to inject drugs (which they brought with them). The issue was whether the clinic was subject to the federal criminal law, which

²⁴ SNWT 2007, c.15.

²⁵ See, for example, *Liquor Act*, s. 49.

²⁶ [1982] 2 SCR 112.

²⁷ [2011] 3 SCR 134.

prohibited the possession of narcotics by the patients and staff. This Court held that the clinic was entitled to a statutory exemption by the federal Minister of Health because the Minister's attempt to deny the exemption was a breach of s. 7 of the Charter in light of evidence showing the impact that the closure of the clinic would have on life, liberty and security of the person.

29. These are examples of measures that are adopted at the local level that have an impact on health, safety and social issues. These measures enlisted by the government bear a rational and functional relationship to the achievement of a valid purpose; the promotion of healthy and socially safe communities. A broader interpretation of section 121 of the *Constitution Act, 1867* may inadvertently prevent one of the more effective tools in the fight against the health and social ills caused by alcohol.

30. The pith and substance, or purpose, of the import restrictions over alcohol in the *Liquor Act*, and the taxation of same, have as much to do with the negative health and social impacts that alcohol has in the territories and the government's attempt to treat those ills through its authority and responsibility over healthcare and social services, as it does with the trade of alcohol over provincial and territorial borders. An interpretation that restricts the government's ability to provide health and social services within its jurisdiction under the *NWT Act* and otherwise regulate matters of a local or private nature, is inconsistent with the structure of Canadian federalism.

PART IV - COSTS

31. The Attorney General of the Northwest Territories does not seek costs and request that no costs be awarded against it.

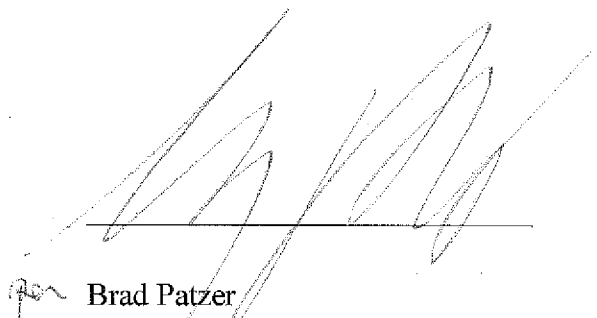
PART V – ORDER SOUGHT

32. The Attorney General of the Northwest Territories submits that the Constitutional Question should be answered in the negative.

33. Pursuant to the Order of Moldaver J. on October 10, 2017, The Government of the Northwest Territories will present oral arguments at the hearing of this matter, not to exceed ten minutes.

All respectfully submitted,

Date: October 13, 2017

A handwritten signature in black ink, appearing to read 'Brad Patzer', is written over a horizontal line. The signature is stylized and somewhat cursive.

Brad Patzer
PO Box 1320
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Counsel for the Attorney General of
the Northwest Territories

PART VI – TABLE OF AUTHORITIES

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