SCC File No. 37398

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

BETWEEN

HER MAJESTY THE QUEEN

APPELLANT

-and-

GERARD COMEAU

RESPONDENT

-and-

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PART I – INTRODUCTION

1. The Respondent will refer to the Attorney General or Minister interveners (**Interveners**) by the names of their jurisdictions. All terms and abbreviations previously defined in the Respondent's Factum have the same meaning herein.

2. Many arguments in the Interveners' factums are political or policy oriented. The role of the Supreme Court of Canada is "to settle questions about the law – including the Constitution – and how it should be applied."[1] The Court is "first and foremost a court of law, not the facts – something [the Court] prefer[s] to leave to trial courts".[2] Therefore, the Respondent's Reply is based upon the text of the *Constitution Act, 1867* and the statutory provisions in issue, decisions of this Court, and the facts as found by at trial Judge LeBlanc.

3. Many of the arguments raised in the Interveners' factums have overlapping themes. The Respondent has grouped these themes below and responds to the arguments *seriatim*.

PART II – RESPONSE

Judge LeBlanc's decision and constitutional principles

4. Ontario, Quebec and Alberta argue that the *Comeau* Interpretation ignores the architecture, exhaustiveness, and democracy principles. They also say that it reverses the "dominant tide" of the federalism doctrine, which favours "the ordinary operation of statutes enacted by both levels of government".[3]

5. None of the decisions cited by these Interveners contain any mandatory principle that Judge LeBlanc overlooked. The Interveners do not point to any antinomy or conflict of laws that the *Comeau* Interpretation creates. They use out of context passages from decisions that do not refer to s. 121 to attempt to establish that the *Comeau* Interpretation is contrary to the

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1 Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, Mayor's Breakfast Series in Ottawa, 2014, online: <http://www.scc-csc.ca/judges-juges/spe-dis/bm-2014-11-25-eng.aspx>.

2 *Ibid*.

3 *Her Majesty the Queen v. Gerard Comeau*, SCC File No. 37398 (Factum of the Intervener, the Attorney General of Ontario at para 16).

constitutional principles stated above.[4] In response, the Respondent relies upon the principle that:

> All *obiter* do not have, and are not intended to have, the same weight. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.[5] (***Henry* Principle**)

6. The Respondent agrees that the Constitution has an underlying architecture, but unlike *Reference re Senate Reform*,[6] this case does not propose an amendment to the Constitution. Instead, it involves the interpretation of s. 121, a provision *already in* the Constitution. The Respondent also accepts the principles of democracy and exhaustiveness but states that those principles may be limited by specific provisions of the written Constitution. The Respondent further notes the "dominant tide" principle mentioned in *Canadian Western Bank v. Alberta*.[7] Unlike this case, that case was about the division of powers and it was not about s. 121.

7. Similarly, Quebec and Newfoundland and Labrador (**NL**) argue that the *Comeau* Interpretation undermines the federalism principle and fails to respect the provinces' legislative autonomy. However, the decisions that these Interveners cite for that proposition go no further than saying that federalism is an important postulate of our Constitution.[8] The Respondent agrees and responds that this case is not about the extent of federal or provincial powers. Instead, it is about the limits imposed by a purposive interpretation of s. 121 on the ability of provinces and the federal government to erect trade barriers within our federation. Such limits are entirely consistent with the federalism principle.

8. The Interveners fail to recognize that Judge LeBlanc followed the correct analytical and interpretive approach in reaching the *Comeau* Interpretation. In 1984, this Court shifted the

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4 See e.g. *Her Majesty the Queen v. Gerard Comeau*, SCC File No. 37398 (Factum of the Intervener, the Attorney General of Ontario at paras 5-7 and Factum of the Intervener, the Attorney General of Alberta at para 24).

5 *R. v. Henry*, [2005] 3 SCR 609 at para 57.

6 *Reference re Senate Reform*, [2014] 1 SCR 704 at paras 26-27

7 *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3 at paras 36-37.

8 *Re Manitoba Language Rights*, [1985] 1 SCR 721; *Reference re Secession of Québec*, [1998] 2 SCR 217 at para 37.

paradigm for constitutional and statutory interpretation by stating that constitutional and statutory provisions are to be interpreted purposively.[9] A purposive interpretation requires a court to examine the wording of the provision, its legislative history, its legislative context and the scheme of the act in which it is found.[10]

9. Judge LeBlanc carried out a progressive *and* purposive analysis of s. 121 to arrive at the *Comeau* Interpretation. The Interveners have been aware of the purposive interpretation of s. 121 for years.[11] They do not meaningfully engage this interpretation or dispute its intrinsic correctness. They either deny it superficially or argue that it should be ignored in favour of a model of economic federalism in which each provincial government acts to protect its own interest rather than the interests of Canada as a whole as contemplated by s. 121.

Is the *Comeau* Interpretation "originalist"?

10. Saskatchewan, Canada, NL and Prince Edward Island (**PEI**) characterize the *Comeau* Interpretation as "originalist".

11. By using the terms "originalist" and "original intent", these Interveners imply that the *Comeau* Interpretation is an anachronistic interpretation of s. 121 extracted from foundational texts in the manner advocated by, among others, the late U.S. Supreme Court Justice, Antonin Scalia. That is not an accurate characterisation of Judge LeBlanc's analysis. Not all uses of historical evidence are "originalist" in the pejorative sense used by these Interveners. To the contrary, legislative history is a necessary component of this Court's guidance on purposive interpretation and it must be given its appropriate weight.[12] Judge LeBlanc was not seeking simply an "originalist" intent or meaning, but was rather conducting a purposive interpretation of s. 121 following this Court's precedent and instruction.

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9 *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145 at 157.

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

11 *Her Majesty the Queen v. Gerard Comeau*, New Brunswick Provincial Court File No. 05672010 (Brief on Law, Submitted on Behalf of Gerard Comeau, February 29, 2016 at paras 90-113), **Respondent's Book of Authorities (BOC), Tab 3**. See also: Ian Blue, "On The Rocks? Section 121 of the *Constitution Act, 1867*, and the Constitutionality of the *Importation Of Intoxicating Liquors Act*" (2009) 35 Adv Q 306; Ian Blue, "Long Overdue: A Reappraisal of Section 121of the Constitution Act, 1867" (2010) 33 Dal LJ 2 at 161, 163-179.

12 *Kapp, supra* note 10.

12. While some provisions of the Constitution may be ambiguous, this observation does not apply to s. 121. The succinct, plain and mandatory language of s. 121 make its requirements unmistakably clear.

Should court supplant prior interpretations of s. 121?

13. Ontario argues that there is no reason to disturb "decades of this Court's jurisprudence"[13] regarding s. 121. Saskatchewan, for its part, argues that trial courts should not supplant prior interpretations of foundational constitutional documents on the basis of new perspectives of historical intent.[14]

14. Judge LeBlanc did not offer a new perspective on historical intent. Instead, for the first time ever, he examined the legislative history of s. 121. No court had previously done this work to reach a historically-grounded interpretation of that constitutional provision. His analysis revealed the flaws in the *Gold Seal* Interpretation, which are summarized in paragraphs 84-90 of the Respondent's Factum.

15. In asking that the *Gold Seal* Interpretation not be disturbed, Ontario and Saskatchewan are swimming against the tides of contemporary legal thought. Their position is directly contrary to the rule that s. 121 must receive a progressive *and* purposive interpretation,[15] and it is contrary to the *Henry* Principle that the common law should be allowed to develop by experience. It also ignores the rule that in examining historic evidence, a court must look "at the ordinary meaning of the language used in each document, the historical context, and the philosophy or objectives lying behind the words and guarantees."[16]

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[13] *Her Majesty the Queen v. Gerard Comeau*, SCC File No. 37398 (Factum of the Intervener, the Attorney General of Ontario at para 10).

[14] *Her Majesty the Queen v. Gerard Comeau*, SCC File No. 37398 (Factum of the Intervener, the Attorney General of Saskatchewan at para 15).

[15] *Her Majesty the Queen v. Gerard Comeau*, SCC File No. 37398 (Factum of the Respondent, Gerard Comeau at paras 46-47).

[16] *Caron v. Alberta*, [2015] 3 SCR 511 at para 38.

Use of the Rand approach

16. Canada, British Columbia (**BC**), Alberta and PEI support using the approach adopted by Rand J in *Murphy v. C.P.R.*,[17] under which an enactment would violate s. 121 if it is "in essence and purpose" related to a provincial boundary. The Rand approach may look like an expedient compromise between the *Comeau* Interpretation and the constitutional principles cited by the Interveners, but it is only a siren call.

17. As argued in paragraph 98 of the Respondent's Factum, Rand's "essence and purpose" test is not a progressive or purposive interpretation of s. 121 because unlike the *Comeau* Interpretation, it was not informed by the political, socio-economic and legislative history that was in the record before Judge Leblanc. Also, like the *Gold Seal* Interpretation, this aspect of the Rand approach would require the Court to read words into s. 121 that limit the section and are simply not there. Additional words were intentionally omitted from s. 121.[18]

Placement of s. 121 in Part VIII

18. Alberta, Ontario and NL argue that the grouping of s. 121 in Part VIII with provisions mentioning "duties" supports an interpretation of s. 121 as prohibiting only tariff trade barriers. The Respondent has answered this argument thoroughly in paragraphs 30, 34-36, 40-52 and 56-57 of the Respondent's Factum. To summarize, the position of these Interveners is contrary to both the evidence adduced at trial, Judge LeBlanc's findings, and a progressive and purposive interpretation of s. 121.

Interpretation of s. 121

19. Relying on a paper by Christopher Moore, Alberta argues that the conclusions of both Judge LeBlanc and commentators such as Malcolm Lavoie go beyond any realistic appreciation of the purpose of s. 121.

20. Judge LeBlanc based his findings of fact and interpretation of s. 121 on the expert report, sworn testimony and cross-examination of professional historian Andrew Smith. Dr. Smith's

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[17] *Murphy v. C.P.R.*, [1958] SCR 626.

[18] *Her Majesty the Queen v. Gerard Comeau*, SCC File No. 37398 (Factum of the Respondent, Gerard Comeau at para 30).

expert evidence was not successfully controverted or contradicted at trial and was accepted by Judge LeBlanc. Christopher Moore is not a professional historian, was not a witness at trial, and the key paragraphs of his paper are noticeably unsupported by references.[19]

21. Mr. Moore asserts that from the 1840s to the early twentieth century, free trade in the western world was defined narrowly as only the absence of tariffs. This is simply not true. Nineteenth-century commercial treaties included articles related to non-tariff trade barriers. They included provisions related to intellectual property rights, shipping regulations, and other non-tariff measures governments have long used with protectionist intent.[20] For example, articles 10 and 12 of the Chevalier-Cobden trade agreement between France and the United Kingdom, which concluded in January, 1860, dealt with both tariff and non-tariff barriers to free trade.[21] This agreement would have been well known to Francis Reilly who was the experienced draftsman of the *British North America Act.*[22]

Merits of the *Comeau* Interpretation

22. Ontario argues that "the Constitution of Canada is not meant to entrench one particular economic philosophy or view of government as the supreme law."[23] The Respondent agrees and further submits that this argument should apply with equal force to the economic philosophy behind the *Gold Seal* Interpretation.

23. Ontario argues that the *Comeau* Interpretation makes unfettered trade a supreme good, government regulation of goods an evil, and this particular economic philosophy of government the supreme law.[24] Ontario then argues that it is the role of government, and not the courts "to

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[19] Christopher Moore, "Federalism, Free Trade within Canada and The British North America Act, s. 121" (13 Sep 2013) at 29, online: <https://ssrn.com/abstract=3046592>.

[20] Andrew Smith, "A Critical Response to Christopher Moore's 'Federalism, Free Trade within Canada, and the British North America Act, S.121" [unpublished] at 6, archived at University of Liverpool Management School [Smith], **Respondent's BOC, Tab 1**.

[21] Great Britain, Parliament, House of Commons, Parliamentary Papers, House of Commons and Command, Volume 65, "*Treaty of Commerce Between Her Majesty And The Emperor of the French*", Signed at Paris, 23 January 1860, **Respondent's BOC, Tab 2**.

[22] Smith, *supra* note 20 at 6.

[23] *Her Majesty the Queen v. Gerard Comeau*, SCC File No. 37398 (Factum of the Intervener, the Attorney General of Ontario at para 2).

[24] *Ibid*.

determine whether liquor monopolies are wise or unwise public policy." These characterizations are all irrelevant because the constitutionality of any public policy "is dictated *solely* by the text of the Constitution, fundamental constitutional principles and the relevant case law."[25]

Reach of the *Comeau* Interpretation

24. BC, Ontario, Quebec, NL and Nunavut argue that the *Comeau* Interpretation would significantly undermine the provinces' and territories' ability to regulate intoxicants in the public interest. These concerns fail to recognize that the *Comeau* Interpretation does not lessen this ability.

25. The *Comeau* Interpretation may *marginally* limit laws respecting the regulation of trade and commerce under s. 91(2) and laws respecting property and civil rights in the provinces under s. 92(13) of the *Constitution Act, 1867.*[26] However, it would only do so by preventing restrictions on the free movement of goods between provinces.

26. The Respondent proposes how the *Comeau* Interpretation would work in practice in paragraphs 100(d)-(g) of the Respondent's Factum. For clarity, the rule in paragraph 100(d) allows for forms of subsidiary regulation and the rule in paragraph 100(g) allows for forms of non-discriminatory regulation.

27. Ontario also argues that a purposive interpretation "is not a mandate for an ever-expanding list of legislative 'no-go zones', particularly in the area of economic regulation".[27] *PSAC v. Canada,*[28] which is the source of this assertion, is irrelevant to s. 121 or the issue of free trade between provinces. In fact, in *PSAC* the Court weighed a severe economic regulation, the *Public Sector Compensation Restraint Act*, in the balance and found that it was justified under the *Canadian Charter of Rights and Freedoms.*[29] Economic regulation is subject to the paramountcy of the Constitution.

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[25] *Reference re Securities Act*, 2011 SCC 66 at para 10 [emphasis added].
[26] This clarifies paragraphs 100(a)-(c) of the Respondent's Factum.
[27] *Her Majesty the Queen v. Gerard Comeau,* SCC File No. 37398 (Factum of the Intervener, the Attorney General of Ontario at para 7).
[28] *PSAC v Canada,* [1987] 1 SCR 424 [*PSAC*].
[29] *Ibid* at para 52.

28. NL, Nunavut and the Appellant cite a paper[30] that, with some schadenfreude, speculates on the worst possible effects of the *Comeau* Interpretation without any causal connection to the issues before the Court. What these suggested effects noticeably have in common is that, even in the event they did occur,[31] the provinces and territories could mitigate each and every one through true cooperative federalism.

29. There may be concern about the work that cooperative federalism requires to resolve these possible effects, such as negotiating to end competition among provinces for consumers based on price and selection. However, concern about such work does not absolve provincial officials from their duty to uphold the Constitution, nor does it allow them to argue against its proper interpretation in order to serve their parochial interests.

Should economic regulation be left to governments?

30. Ontario argues that modifications to the terms of the economic union within existing constitutional parameters should be left to the democratically accountable branches of government and it cites the CFTA as an example of how this successfully plays out in practice. This argument is in essence an appeal to read s. 121 out of the Constitution. The Respondent has answered this argument in paragraphs 7, 8, 12 and 13 of the Respondent's Factum.

Interlocking federal-provincial programs

31. BC and PEI argue that since s. 134(b) of New Brunswick's *Liquor Control Act*[32] and s. 3(1) of the *Importation of Intoxicating Liquors Act*[33] are integral parts of an interlocking federal-provincial scheme, they should not be found to be contrary to s. 121.

32. The *Comeau* Interpretation requires that these two provisions be found to contravene s. 121 for the reasons set out in paragraphs 93-96, 100(a) and 103-106 of the Respondent's Factum. For the Interveners contention to be correct, this Court would have to hold that the

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[30] Rob Cunningham, "*R v Comeau*: Reflections from the Perspective of Health", Case Comment, CanLII Connects, online: < http://canliiconnects.org/en/commentaries/46884>.
[31] The paper does not conduct or cite rigorous analysis supporting their likelihood.
[32] *Liquor Control Act*, RSNB 1973, c L-10.
[33] *Importation of Intoxicating Liquors Act*, R.S.C., 1985, c. I-3.

provincial and federal governments can contract out of the Constitution, contrary to this Court's holding in *Eldridge v. British Columbia (Attorney General).*[34]

Social and other concerns

33. BC argues that "[i]n *Gold Seal,* this Court rightly held that federal prohibitions on importation of liquor in support of local or provincial choice in temperance polices are not contrary to s. 121."[35] The Respondent has answered this contention in paragraph 86 of the Respondent's Factum.

34. The Respondent takes no position on whether s. 121 does or does not apply to either Nunavut or the Northwest Territories (**NT**).

35. If s. 121 does apply to these two jurisdictions, the *Comeau* Interpretation would not materially affect the regulation of alcohol within either. The ability of residents to buy alcohol from outside the territory would not change that jurisdiction's ability to regulate in subsidiary features, and without any discriminatory effects favouring intra-provincial products and producers over extra-provincial counterparts.

36. The NT would be able to continue a regulatory regime where individual communities could make decisions related to the restriction or prohibition of intoxicating substances within their communities. As such, the NT would retain authority over healthcare and social services. Similarly, Nunavut would be able to continue its plebiscite system and its corresponding three tiers including punishment for the unlawful purchase of liquor. Further, Nunavut could continue to effectively reduce consumption levels and their related harms without a monopoly on sales of alcohol in the same way that revenue can still be maintained without a monopoly in other sectors.

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[34] *Eldridge v. British Columbia (Attorney General),* [1997] 3 SCR 624 at 42.

[35] *Her Majesty the Queen v. Gerard Comeau,* SCC File No. 37398 (Factum of the Intervener, the Attorney General of British Columbia at paras 17-18).

Stare decisis

37. Saskatchewan asserts that historical evidence is not "evidence" in the *Canada (Attorney General) v. Bedford*[36] sense largely because the drafting history of a provision does not form the *lis*, nor does it affect the orbiting social facts. In this case, the *lis* or central issue is "what does s. 121 require?" The record established at trial about the political, socio-economic and legislative history of s. 121 provides a basis to resolve this very *lis.* This evidence was not considered in *Gold Seal* and consequently it is "evidence" in the *Bedford* sense that was ripe for consideration by Judge Leblanc.

38. There has also been a paradigm shift in constitutional interpretation since 1921. If decisions made before the shift were insulated from a *Bedford* reconsideration, *Bedford* would not be applicable to many constitutional cases. That could not be right. The Respondent also relies upon paragraphs 109-110 of the Respondent's Factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 27th day of October 2017.

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[36] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [*Bedford*].

JURISPRUDENCE

BOA Tab	Case	Paragraph(s)
	Canada (Attorney General) v. Bedford, 2013 SCC 72.	37
	Canadian Western Bank v. Alberta, [2007] 2 SCR 3.	6
	Caron v. Alberta, [2015] 3 SCR 511.	15
	Eldridge v. British Columbia (Attorney General), [1997] 3 SCR 624.	32
	Hunter et al. v. Southam Inc., [1984] 2 SCR 145.	8
	Murphy v. C.P.R., [1958] SCR 626.	16
	PSAC v. Canada, [1987] 1 SCR 424.	27
	R. v. Henry, [2005] 3 SCR 609.	5
	R. v. Kapp, 2008 SCC 41.	8, 11
	Re Manitoba Language Rights, [1985] 1 SCR 721.	7
	Reference re Secession of Québec, [1998] 2 SCR 217.	7
	Reference re Senate Reform, [2014] 1 SCR 704.	6

SECONDARY SOURCES

BOA Tab	Title	Paragraph(s)
1	Andrew Smith, "A Critical Response to Christopher Moore's 'Federalism, Free Trade within Canada, and the British North America Act, S.121" [unpublished], archived at University of Liverpool Management School.	20, 21
	Christopher Moore, "Federalism, Free Trade within Canada, and the British North America Act, S.121" (13 Sep 2017).	19, 20
2	Great Britain, Parliament, House of Commons, Parliamentary Papers, House of Commons and Command, Volume 65, "*Treaty of Commerce Between Her Majesty And The Emperor of the*	21

	French", Signed at Paris, 23 January 1860.	
3	*Her Majesty the Queen v. Gerard Comeau*, NB Provincial Court File No. 05672010 (Brief on Law, Submitted on Behalf of Gerard Comeau, February 29, 2016).	9
	Ian Blue, "Long Overdue: A Reappraisal of Section 121 of the *Constitution Act, 1867*" (2010) 33 Dal LJ 2 at 161.	9
	Ian Blue, "On The Rocks? Section 121 of the *Constitution Act, 1867*, and the Constitutionality of the *Importation Of Intoxicating Liquors Act*" (2009) 35 Adv Q 306.	9
	Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, Mayor's Breakfast Series in Ottawa, 2014.	2
	Rob Cunningham, "*R v Comeau*: Reflections from the Perspective of Health", Case Comment, CanLII Connects.	28

LEGISLATION

BOA Tab	Title	Pinpoint
	Importation of Intoxicating Liquors Act, R.S.C., 1985, c. I-3.	s. 3(1)
	Liquor Control Act, RSNB 1973, c L-10.	s. 134(b)