

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

BETWEEN:

HER MAJESTY THE QUEEN

**APPELLANT
(Appellant)**

- and -

GERARD COMEAU

**RESPONDENT
(Respondent)**

- and -

**ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL OF NOVA SCOTIA
ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF PRINCE EDWARD ISLAND
ATTORNEY GENERAL OF SASKATCHEWAN
ATTORNEY GENERAL OF ALBERTA
ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR
ATTORNEY GENERAL OF NORTHWEST TERRITORIES
GOVERNMENT OF NUNAVUT, as represented by the Minister of Justice
LIQUIDITY WINES LTD.
PAINTED ROCK ESTATE WINERY LTD., 50TH PARALLETL ESTATE
LIMITED PARTNERSHIP, OKANAGAN CRUSH PAD WINERY LTD. AND
NOBLE RIDGE VINEYARD AND WINERY LIMITED PARTNERSHIP**

(Style of cause continues next page)

INTERVENER'S FACTUM

ALBERTA SMALL BREWERS ASSOCIATION

(Rue 42 of the *Rules of Supreme Court of Canada*)

**ARTISAN ALES CONSULTING INC.
MONTREAL ECONOMIC INSTITUTE
FEDERAL EXPRESS CANADA CORPORATION
CANADIAN CHAMBER OF COMMERCE, CANADIAN FEDERATION OF
INDEPENDENT BUSINESS
CANNABIS CULTURE
ASSOCIATION OF CANADIAN DISTILLERS, operating as Spirits Canada
CANADA'S NATIONAL BREWER'S
DAIRY FARMERS OF CANADA, EGG FARMERS OF CANADA, CHICKEN
FARMERS OF CANADA, TURKEY FARMERS OF CANADA, CANADIAN HATCHING
EGG PRODUCERS
CONSUMERS COUNCIL OF CANADA
CANADIAN VINTNERS ASSOCIATION
ALBERTA SMALL BREWERS ASSOCIATION**

INTERVENERS

**Robert Martz
Paul G. Chiswell
Burnet, Duckworth & Palmer LLP
Suite 2400
525 8th avenue S.W.
Calgary, Alberta
T2P 1G1
Tel.: 403 260-0393 (Martz)
Tel.: 403 260-0393 (Chiswell)
Fax: 416 362-2610
rmartz@bdplaw.com
pchiswell@bdplaw.com
Counsel for the Intervener
Alberta Small Brewers Association**

**ATTORNEY GENERAL OF CANADA
Department of Justice
Québec regional office
12th Floor, East Tower
200 René-Lévesque Blvd. West
Montréal, Québec
H2Z 1X4
Per: François Joyal
Ian Demers
Tel.: 514 283-5880
Fax: 514 496-7876
francois.joyal@justice.gc.ca**

**DEPUTY ATTORNEY GENERAL OF
CANADA
Department of Justice Canada
Suite 500, Room 557
50 O'Connor Street
Ottawa, Ontario
K1A 0H8
Per: Christopher M. Rupar
Tel.: 613 670-6290
Fax: 613 954-1920
christopher.rupar@justice.gc.ca
Agent for the Intervener**

ian.demers@justice.gc.ca
Counsel for the Intervener
Attorney General of Canada

William B. Richards
Kathryn A. Gregory
Attorney General of New Brunswick
Specialized Prosecutions Section
6th Floor
520, King Street
Fredericton, New Brunswick
E3B 6G3
Tel.: 506 453-2784
Fax: 506 453-5364
bill.richards@gnb.ca
kathryn.gregory@gnb.ca
Counsel for the Appellant

Ian A. Blue
Arnold Schwisberg
Mikael Bernard
Gardiner Roberts LLP
Suite 3600
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, Ontario
M5H 4E3
Tel.: 416 865-6600
Fax: 416 865-6636
ibblue@grllp.com
abslegal@total.net
mike@mblg.ca
Counsel for the Respondent

Michael S. Dunn
Attorney General of Ontario
Constitutional Law Branch
4th Floor
720 Bay Street
Toronto, Ontario
M7A 2S9
Tel.: 416 326-3867
Fax: 416 326-4015
michael.dunn@ontario.ca
Counsel for the Intervener
Attorney General of Ontario

Attorney General of Canada

D. Lynne Watt
Gowling WLG (Canada) LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel.: 613 786-8695
Fax: 613 788-3509
lynne.watt@gowlingwlg.com
Agent for the Appellant

Marie-France Major
Supreme Advocacy LLP
Suite 100
340 Gilmour Street
Ottawa, Ontario
K2P 0R3
Tel.: 613 695-8855, ext. 102
Fax: 613 695-8580
mfmajor@supremeadvocacy.ca
Agent for the Respondent

Robert E. Houston, Q.C.
Burke-Robertson
Suite 200
441 MacLaren Street
Ottawa, Ontario
K2P 2H3
Tel.: 613 236-9665
Fax: 613 235-4430
rhouston@burkerobertson.com
Agent for the Intervener
Attorney General of Ontario

Jean-Vincent Lacroix
Laurie Anctil
Attorney General of Québec
Department of Justice (Aboriginal Law)
2nd Floor
1200 Route de l'Église
Québec, Québec
G1V 4M1
Tel.: 418 643-1477 ext. 20779 / 20828
Fax: 418 644-7030
jean-vincent.lacroix@justice.gouv.qc.ca
laurie.anctil@justice.gouv.qc.ca
Counsel for the Intervener
Attorney General of Québec

Edward A. Gores, Q.C.
Legal Services
Attorney General of Nova Scotia
8th Floor
1690 Hollis Street
Halifax, Nova Scotia
B3J 2L6
Tel.: 902 424-4024
Fax: 902 424-1730
goresea@gov.ns.ca
Counsel for the Intervener
Attorney General of Nova Scotia

J. Gareth Morley
Legal Services Branch
Attorney General of British Columbia
1001 Douglas Street
Victoria, British Columbia
V8W 9J7
Tel. : 250 952-7381
Fax : 250 356-9154
gareth.morley@gov.bc.ca
Counsel for the Intervener
Attorney General of British Columbia

James W. Gormley
Jonathan M. Coady
Stewart McKelvey
65 Grafton Street
Charlottetown, Prince Edward Island

Pierre Landry
Noël et Associés
111 Champlain Street
Gatineau, Québec
J8X 3R1
Tel. : 819 503-2178
Fax : 819 771-5397
p.landry@noelassocies.com
Agent for the Intervener
Attorney General of Québec

D. Lynne Watt
Gowling WLG (Canada) LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel.: 613 786-8695
Fax: 613 788-3509
lynne.watt@gowlingwlg.com
Agent for the Intervener
Attorney General of Nova Scotia

Nadia Effendi
Borden Ladner Gervais LLP
Suite 1300
World Exchange Plaza
100 Queen Street
Ottawa, Ontario
K1P 1J9
Tel. : 613 787-3562
Fax : 613 230-8842
neffendi@blg.com
Agent for the Intervener
Attorney General of British Columbia
D. Lynne Watt
Gowling WLG (Canada) LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario

C1A 8B9
Tel.: 902 629-4513
Fax: 903 566-5283
jgormley@stewartmckelvey.com
jcoady@stewartmckelvey.com
Counsel for the Intervener
Attorney General of Prince Edward
Island

Theodore Litowski
Ministry of Justice Saskatchewan
Constitutional Law Branch
Suite 820
1874 Scarth Street
Regina, Saskatchewan
S4P 4B3
Tel.: 306 787-6642
Fax: 306 787-9111
theodore.litowski@gov.sk.ca
Counsel for the Intervener
Attorney General of Saskatchewan

Robert J. Normey
Attorney General of Alberta
Constitutional Law
4th Floor
Bowker Building
9833 109 Street NW
Edmonton, Alberta
T5K 2E8
Tel. : 780 422-9532
Fax : 780 425-0307
robert.normey@gov.ab.ca
Counsel for the Intervener
Attorney General of Alberta

Barbara G. Barrowman
Attorney General of Newfoundland and
Labrador
Department of Justice and Public Safety
4th Floor, East Block
Confederation Building
St John's, Newfoundland and Labrador
A1B 4J6
Tel.: 709 729-0448
Fax: 709 729-2129

K1P 1C3
Tel. : 613 786-8695
Fax : 613 788-3509
lynne.watt@gowlingwlg.com
Agent for the Intervener
Attorney General of Prince Edward
Island

D. Lynne Watt
Gowling WLG (Canada) LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel.: 613 786-8695
Fax: 613 788-3509
lynne.watt@gowlingwlg.com
Agent for the Intervener
Attorney General of Saskatchewan

D. Lynne Watt
Gowling WLG (Canada) LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel.: 613 786-8695
Fax: 613 788-3509
lynne.watt@gowlingwlg.com
Agent for the Intervener
Attorney General of Alberta

Robert E. Houston, Q.C.
Burke-Robertson
Suite 200
441 MacLaren Street
Ottawa, Ontario
K2P 2H3
Tel.: 613 236-9665
Fax: 613 235-4430
rhouston@burkerobertson.com
Agent for the Intervener

barbarabarrowman@gov.nl.ca
Counsel for the Intervener
Attorney General of Newfoundland and Labrador

Bradley E. Patzer
Attorney General of Northwest Territories
Department of Justice
4903 49th Street
Yellowknife, Northwest Territories
X1A 2L9
Tel.: 867 767-9257, ext. 82110
Fax: 867 873-0234
brad_patzer@gov.nt.ca
Counsel for the Intervener
Attorney General of Northwest Territories

Adrienne Silk
John L. MacLean
Attorney General of the Nunavut Territory
Department of Justice
P.O. Box 1000, Station 540
Iqaluit, Nunavut
X0A 0H0
Tel. : 867 975-6172
Fax : 867 975-6349
asilk@gov.nu.ca
jmaclean@gov.nu.ca
Counsel for the Intervener
Government of Nunavut

Shea H. Coulson
Coulson Litigation
Suite 1500
885 West Georgia Street
Vancouver, British Columbia
V6C 3E8
Tel.: 604 398-4481
Fax: 604 669-8857
scoulson@dsavocats.ca
Counsel for the Intervener
Liquidity Wines Ltd.

Attorney General of Newfoundland and Labrador

Guy Régimbald
Gowling WLG (Canada) LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel.: 613 786-0197
Fax: 613 563-9869
guy.regimbald@gowlingwlg.com
Agent for the Intervener
Attorney General of Northwest Territories

Guy Régimbald
Gowling WLG (Canada) LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel.: 613 786-0197
Fax: 613 563-9869
guy.regimbald@gowlingwlg.com
Agent for the Intervener
Government of Nunavut

Marie-France Major
Supreme Advocacy LLP
Suite 100
340 Gilmour Street
Ottawa, Ontario
K2P 0R3
Tel.: 613 695-8855, ext. 102
Fax: 613 695-8580
mfmajor@supremeadvocacy.ca
Agent for the Intervener
Liquidity Wines Ltd.

Shea Coulson
Counsel Litigation
Suite 1500
885 West Georgia Street
Vancouver, British Columbia
V6C 3E8
Tel.: 604 398-4481
Fax: 604 669-8857
scoulson@dsavocats.ca
Counsel for the Intervener
Painted Rock Estate Winery Ltd., 50th
Parallel Estate Limited Partnership,
Okanagan Crush Pad Winery Ltd. and
Noble Ridge Vineyard and Winery
Limited Partnership

Malcolm Lavoie
University of Alberta, Law Centre
111 89 avenue
Edmonton, Alberta
T6G 2H5
Tel.: 780 492-9809
Fax: 780 492-4924
malcom.lavoie@ualberta.ca
Counsel for the Intervener
Artisan Ales Consulting Inc.

Mark A. Gelowitz
Robert Carson
Osler, Hoskin & Harcourt LLP
Suite 6200
1 First Canadian Place
100 King Street West
Toronto, Ontario
M5X 1B8
Tel.: 416 862-4743 (Gelowitz)
Tel.: 416 862-4235 (Carson)
Fax: 416 862-6666
mgelowitz@osler.com
rcarson@osler.com
Counsel for the Intervener
Montréal Economic Institute

Scott Maidment
Samantha Gordon
McMillan LLP

Marie-France Major
Supreme Advocacy LLP
Suite 100
340 Gilmour Street
Ottawa, Ontario
K2P 0R3
Tel.: 613 695-8855, ext. 102
Fax: 613 695-8580
mfmajor@supremeadvocacy.ca
Agent for the Intervener
Painted Rock Estate Winery Ltd., 50th
Parallel Estate Limited Partnership,
Okanagan Crush Pad Winery Ltd. and
Noble Ridge Vineyard and Winery
Limited Partnership

Marie-France Major
Supreme Advocacy LLP
Suite 100
340 Gilmour Street
Ottawa, Ontario
K2P 0R3
Tel.: 613 695-8855, ext. 102
Fax: 613 695-8580
mfmajor@supremeadvocacy.ca
Agent for the Intervener
Artisan Ales Consulting Inc.
Geoffrey Langen
Osler, Hoskin & Harcourt LLP
Suite 1900
340 Albert Street
Ottawa, Ontario
K1R 7Y6
Tel.: 613 787-1015
Fax: 613 235-2867
glangen@osler.com
Agent for the Intervener
Montréal Economic Institute

Jonathan O'Hara
McMillan LLP
Suite 200

Suite 4400
Brookfield Place
181 Bay Street
Toronto, Ontario
Tel.: 416 865-7911 (Maidment)
Tel.: 416 865-7251 (Gordon)
Fax: 416 865-7048
scott.maidment@mcmillan.ca
samantha.gordon@mcmillan.ca
**Counsel for the Intervener
Federal Express Canada Corporation**

**Christopher D. Bredt
Ewa Krajewska
Borden Ladner Gervais LLP**
Suite 3400
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, Ontario
M5H 4E3
Tel.: 416 367-6165 (Bredt)
Tel.: 416 367-6244 (Krajewska)
Fax: 416 367-6749
cbredt@blg.com
ekrajewska@blg.com
**Counsel for the Intervener
Canadian chamber of commerce,
Canadian federation of independent
Business**

**Kirk Tousaw
Jack Lloyd
Tousaw Law Corporation**
2459 Pauline Street
Abbotsford, British Columbia
V2S 3S1
Tel.: 604 836-1420
Fax: 866 310-3342
kirk tousaw@gmail.com
**Counsel for the Intervener
Cannabis Culture**

**Jennifer Klinck
Marion Sandilands
Madelaine Mackenzie
Kirsten Goodwin**

World Exchange Plaza
45 O'Connor Street
Ottawa, Ontario
K1P 1A4
Tel.: 613 691-6176
Fax: 613 231-3191
jonathan.ohara@mcmillan.ca
**Agent for the Intervener
Federal Express Canada Corporation**

**Nadia Effendi
Borden Ladner Gervais LLP**
Suite 1300
World Exchange Plaza
100 Queen Street
Ottawa, Ontario
K1P 1J9
Tel. : 613 787-3562
Fax : 613 230-8842
neffendi@blg.com
**Agent for the Intervener
Canadian chamber of commerce,
Canadian federation of independent
business**

**Marie-France Major
Supreme Advocacy LLP**
Suite 100
340 Gilmour Street
Ottawa, Ontario
K2P 0R3
Tel.: 613 695-8855, ext. 102
Fax: 613 695-8580
mfmajor@supremeadvocacy.ca
**Agent for the Intervener
Cannabis Culture**

**Audrey Mayrand
Power Law**
Suite 1103
130 Albert Street

Power Law
Suite 1660
401 West Georgia Street
Vancouver, British Columbia
V6B 5A1
Tel.: 604 265-0340
Fax: 604 265-0340
jklinck@powerlaw.ca
msandilands@powerlaw.ca
mmackenzie@powerlaw.ca

Counsel for the Intervener
Association of Canadian distillers,
operating as Spirits Canada

Steven I. Sofer
Paul Seaman
Gowling WLG (Canada) LLP
1 First Canadian Place
Suite 1600
100 King Street West
Toronto, Ontario
M5X 1G5
Tel.: 416 369-7240 (Sofer)
Tel.: 416 862-3614 (Seaman)
Fax: 604 443-6780
steven.sofer@gowlingwlg.com
paul.seaman@gowlingwlg.com
Counsel for the Intervener
Canada's National Brewer's

David K. Wilson
Owen M. Rees, M.S.M.
Julie Mouris
Conway Baxter Wilson LLP
Suite 400
411 Roosevelt avenue
Ottawa, Ontario
K2A 3X9
Tel.: 613 288-0149
Fax: 613 688-0271
dwilson@conway.pro
orees@conway.pro
jmouris@conway.pro
Counsel for the Intervener
Dairy farmers of Canada, Egg farmers
of Canada, Chicken farmers of Canada,

Ottawa, Ontario
K1P 5G4
Tel.: 613 706-1091
Fax: 613 706-1091
amayrand@juristespower.ca
Agent for the Intervener
Association of Canadian distillers,
operating as Spirits Canada

Guy Régimbald
Gowling WLG (Canada) LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel.: 613 786-0197
Fax: 613 563-9869
guy.regimbald@gowlingwlg.com
Agent for the Intervener
Canada's National Brewer's

**Turkey farmers of Canada, Canadian
hatching egg producers**

Paul Bates
Ronald Podolny
Tyler Planeta
Siskinds LLP
Suite 302
100 Lombard Street
Toronto, Ontario
M5C 1M3
Tel.: 519 672-2121
Fax: 416 362-2610
paul.bates@siskinds.com
ron.podolny@siskinds.com
tyler.planeta@siskinds.com
Counsel for the Intervener
Consumers council of Canada

Robert W. Staley
Ranjan K. Agarwal
Jessica M. Starck
Bennett Jones LLP
3400, 1 First Canadian Place
Toronto, Ontario
M5X 1A4
Tel.: 416 863-1200
Fax: 416 863-1716
staley@bennettjones.com
agarwal@bennettjones.com
starck@bennettjones.com
Counsel for the Intervener
Canadian Vinters Association

Michael J. Sobkin
331 Somerset Street West
Ottawa, Ontario
K2P 0J8
Tel.: 613 282-1712
Fax: 613 288-2896
msobkin@sympatico.ca
Agent for the Intervener
Consumers council of Canada

TABLE OF CONTENTS

	Page
<hr/>	
INTERVENER'S FACTUM	
PART I. - OVERVIEW	1
PART II. - ARGUMENT	1
A. <i>Gold Seal's</i> interpretation of s. 121 arose from an antiquated view of federalism.....	1
B. Courts should look at the effects of legislation when considering a breach of s. 121	5
C. Provincially legislated monopolies will typically infringe s. 121	6
PART III. - COSTS	10
PART IV. - REQUEST FOR ORAL ARGUMENT	10
TABLE OF AUTHORITIES	11

PART I. - OVERVIEW

1. The Alberta Small Brewers Association (**ASBA**) is a non-profit organization whose members are independent small brewers in Alberta. Its position is that this Court should interpret section 121 of the *Constitution Act, 1867*¹ to prohibit tariff and non-tariff barriers when the purpose or effect of the non-tariff barrier is to interfere with the entry of goods into a province.²

2. In support of this position, ASBA submits that the decision in *Gold Seal* reflects an antiquated approach to federalism that ought to be jettisoned in favour of the approach in *Murphy v. C.P.R.* and the s. 121 decisions that followed it.³ Second, that courts should consider the purpose and effect of impugned legislation when looking at whether it infringes s. 121 and that s. 121 applies to government bodies when they are legislated monopolies.

3. Alberta's brewers want to sell their beer in other provinces and, in our submission, s. 121 gives them a constitutional right to do so. As it stands, Alberta is the only truly open market for beer in Canada. Beers from across Canada can enter Alberta freely to compete with Alberta beers. Yet the reverse is not true and Alberta beers are effectively shut-out of most other provinces because of the non-tariff barriers to trade from provincially legislated monopolies. The current situation is neither fair, nor conducive to the economic union envisioned for Canada since Confederation.

PART II. - ARGUMENT

A. *Gold Seal's* interpretation of s. 121 arose from an antiquated view of federalism

4. Federalism is at the heart of Confederation and crucial to understanding s. 121. It provided the means at Confederation by which the new provinces would join a national economic union, leading to greater prosperity for all, while protecting their diversity. In this way, federalism was crucial in promoting national economic, social and cultural development.

¹ *Constitution Act, 1867*, (30 & 31 Vict), c.3 (U.K.).

² The terminology of interference with goods entering a province is taken from the decision of Iacobucci and Bastarache JJ. in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157 (*Richardson*) at para. 63.

³ *Murphy v. C.P.R.*, [1958] S.C.R. 626 at 642 (*Murphy*); *Reference re Agricultural Products Marketing Act*, [1978] 2 SCR 1198 at 1268.

5. Yet the Canadian Courts' application of federalism has an uneven history. Early decisions of the Privy Council laid a framework that privileged the provinces, while decisions in the latter half of the twentieth century struck a more even balance between provincial autonomy and national interests. The decision in *Gold Seal* reflects this early, pro-provincial jurisprudence, which has been largely overtaken by a more balanced approach to federalism in decisions like *Murphy v. C.P.R.*

6. In its Canadian form, federalism is a compromise between unity and diversity. Throughout Canada's history this compromise between federal and provincial interests has worked to promote a common national market in the furtherance of prosperity for all Canadians:

The Canadian federal state is one in which both federal and provincial governments have major economic roles to play in preserving a large internal market for goods, services, labour and capital and in undertaking jointly many programs of common interest.⁴

7. Recently, McLachlin J. (as she then was) characterized Canadian federalism as a reconciliation of unity and diversity in *Canadian Egg Marketing Agency v. Richardson*:

The goal of promoting economic union between the provinces is not a new one. From the time of Confederation, Canada's constitutional framers have sought to ensure that, despite its federal structure, Canada would have a national economy: *Black v. Law Society (Alberta)*, [1989] 1 S.C.R. 591 [...]. The current constitutional structure represents an historical compromise between regional interests and the vision of economic union.⁵

8. In *Reference re. Secession of Quebec*, this Court, undertook an in-depth analysis of this principle:

Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity...The Constitution Act, 1867 was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work

⁴ A.E. Safarian, *Canadian Federalism and Economic Integration: a Constitutional Study Prepared for the Government of Canada* (Ottawa: Information Canada, 1974) at 2.

⁵ *Richardson*, *supra* note 2 at para. 123 (McLachlin Dissent).

together toward common goals and a common interest. Federalism was the political mechanism by which diversity could be reconciled with unity.⁶

9. This finding accords with the historical genesis of Canadian federalism. As Peter Hogg wrote regarding the historical origin of the balance between diversity and unity:

John A. Macdonald wanted a legislative union, as did many people in Upper Canada (which became Ontario). But they had to settle for a federation because Lower Canada (which became Quebec) and the maritime provinces of New Brunswick, Nova Scotia and Prince Edward Island would not have agreed to a legislative union. Lower Canada feared that if it joined in a legislative union, its French language, culture and institutions and its Roman Catholic religion would be threatened by the English-speaking Protestant majority; the maritime provinces also feared for their local traditions and institutions. On the other hand, union would provide the military strength needed for security, and the economic strength needed for prosperity. The compromise between these conflicting impulses was a federation, providing the unity necessary for military and economic strength, while allowing diversity of language, culture, religion and local institutions.⁷

10. Yet, in their submissions on federalism, many of the provincial Attorneys General subordinate the unity aspect of federalism (and its promise of a common market) to diversity (and the protection of provincial interests). Similarly, the interpretation of s. 121 in *Gold Seal* privileges diversity over unity. This Court ought to jettison this unbalanced notion of federalism in favour of one that maintains a proper balance. The "essence and purpose" test set out by Justice Rand in *Murphy v. CPR* generally strikes this balance.⁸

11. *Gold Seal* does not accord with this modern approach to federalism. In granting provinces the freedom to erect significant barriers to interprovincial trade as long as they are not tariffs, *Gold Seal* accords with the trend in early Canadian constitutional jurisprudence privileging provincial autonomy over national concerns. As F.R. Scott explained, the "cumulative work of the courts, particularly of the Judicial Committee of the Privy Council" in the early part of the

⁶ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 43.

⁷ Peter Hogg, *Constitutional Law of Canada*, 5th Ed. at 5.1(c).

⁸ *Murphy*, *supra* note 3 at p. 642.

20th century led to an increase in the influence of the provinces in terms of federalism.⁹ Similarly, Peter Hogg has noted:

There is no doubt that the Privy Council favoured the provinces in federalism cases. In disputes between the federal and provincial governments that reached the courts, the Privy Council consistently established doctrine that favoured the provinces.¹⁰

12. This pro-provincial bias stemmed in large part from the pre-conceived notions of Lord Watson and Lord Haldane, who dominated Canadian jurisprudence at the Privy Council during this period. Their decisions reliably promoted the idea that the position of the provinces in the Canadian federation ought to be enhanced.¹¹ *Gold Seal*, while not itself a Privy Council decision, is a product of this line of thinking and can be placed within the general trend of decentralization jurisprudence of the period.¹²

13. This approach has been superseded. In 1949, with the end of appeals to the Privy Council and the entrenchment of the supremacy of this Court, the decentralizing tendency began to ebb and a less expansive view of provincial autonomy started to take hold.¹³ It was in the early part of this era, in 1958, when Justice Rand commented on s. 121 in *Murphy v. CPR*. Justice Rand's s. 121 "essence and purpose" test reflects this move toward the modern approach to Canadian federalism. It recognizes a greater balance between provincial and federal powers, emphasizing the "free flow of commerce across the Dominion":

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

⁹ F.R. Scott, *Centralization and Decentralization in Canadian Federalism*, 29 Can. B. Rev. 1095 (1951) at pp. 1103-1104.

¹⁰ Peter Hogg and Wade Wright, *Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism*, [UBC Law Review 38.2 \(2005\)](#) 329-352 at p. 339 (**Canadian Federalism**).

¹¹ *Ibid.*, at p. 341.

¹² See eg. *Gold Seal v. Alberta*, [\[1921\] SCJ No. 43](#) at paras. 41 and 113.

¹³ *Canadian Federalism*, *supra* note 10 at p. 347.

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.¹⁴

14. It is this balanced approach to federalism—which recognizes not only provincial diversity, but also the importance of the Canadian economic union—that ASBA asks this Court to consider in interpreting s. 121.

B. Courts should look at the effects of legislation when considering a breach of s. 121

15. In order to achieve the proper balance between unity and diversity under s. 121, ASBA generally agrees with the submissions of the Attorneys General of Alberta and Canada that s. 121 applies to non-tariff barriers and that Justice Rand's essence and purpose test should be adopted. If s. 121 were found not to prohibit certain non-tariff barriers, it would have little application to modern interprovincial trade: provinces can find—and have found—significant non-tariff measures that prevent products from other provinces from being "admitted free".¹⁵

16. In considering whether a law offends s. 121, a court should consider the aim, purpose, *and effect* of the law. The interveners who agree that s. 121 prohibits non-tariff barriers generally accept that the Court must consider the aim and purpose of a law. But some suggest that consideration of an impugned law's effects would be beyond the scope of a s. 121 analysis. In particular, the Attorney General of British Columbia argues that the "impact or effect" of a law ought not to be considered.¹⁶

17. Yet, precluding courts from looking at the effect of laws in a revised "essence and purpose" analysis, would represent a significant departure from this Court's constitutional jurisprudence and fail to address the type of laws and conduct that s. 121 ought to prohibit.

18. This Court has regularly considered both the purpose and effect of laws when assessing their constitutionality. In *Charter* litigation, this Court has repeatedly held that a law will infringe the *Constitution* if the law either has the purpose or effect of infringing it. As Dickson J. (as he then was) stated in *R. v. Big M Drug Mart Ltd.*:

¹⁴ *Murphy*, *supra* note 3 at p. 642.

¹⁵ See e.g. Factum of the Attorney General of British Columbia at paras. 1, 15(a) and footnote 4.

¹⁶ *Ibid.*

In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. **Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible.** Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.¹⁷ (emphasis added)

19. Similarly, when relying on the pith and substance analysis to determine the constitutional validity of legislation from a division of powers perspective, this Court examines the effects of legislation. As this Court held in the *Reference Re. Securities Act*:

The analysis looks at the *purpose* and *effects* of the law to identify its “main thrust” as a first step in determining whether a law falls within a particular head of power...¹⁸ (emphasis in original)

20. In considering whether legislation does not accord with s. 121, this Court should continue to consider both the purpose and effect of legislation.

C. Provincially legislated monopolies will typically infringe s. 121

21. The need to consider the effects of legislation can be seen by considering the question at the heart of this appeal, which is whether provincially legislated liquor monopolies are constitutional.

22. Notwithstanding their stated purposes, provincially legislated monopolies create operational barriers to inter-provincial trade in at least four ways:

- (a) Distribution (for example, some provinces only permit in province brewers to self-deliver to customers, some only require out of province beer to pass through a warehouse, while others charge more to out of province brewers for distribution;
- (b) Charges and costs of services (for example, some provinces charge out of province beer a handling charge for "warehousing services", while others permit in-province brewers to bypass the distribution and warehousing system);

¹⁷ *R. v. Big M. Drug Mart Ltd.*, [1985] 1 SCR 295 at 331-32.

¹⁸ *Reference Re. Securities Act (Canada)*, 2011 SCC 66 at para. 63.

- (c) Access to points of sale (for example, some provinces prevent out of province beer from selling through certain retail channels); and
- (d) Pricing (including mark-ups for beer brewed out of province and discounted mark-ups for beer brewed within a province).¹⁹

23. Aside from Alberta, every province in Canada has a provincially legislated monopoly on selling alcoholic beverages. While each monopoly is constructed differently and would have to be assessed as such, it is clear that there often is a divergence between the stated intention of these monopolies and their actual effects.

24. For instance, the purpose of Ontario's monopoly has been explained as to maintain public order and raise revenue for the province.²⁰ Similarly, British Columbia's monopoly is to address "the problems of alcohol" consumption and to serve as "an important source of revenue."²¹ On their face, these purposes would likely be within provincial competence and do not appear likely to offend s. 121. Moreover, the purported salutary purposes of these government monopolies, to improve people's health and raise taxes, would require the application of these laws to all beer regardless of its origin.

25. But in practice, government legislated monopolies almost always exclude or significantly restrict out-of-province beer and have the necessary effect of excluding beer from other provinces unless the alcohol is purchased by the legislated publicly owned monopoly—on terms determined by the monopoly. As a result, *whether* an Alberta brewer can even enter into another provincial market is solely within the discretion of a provincially legislated monopoly. That is even worse for interprovincial trade than tariffs.

26. The practical effects of the provincial liquor monopolies has little to do with regulating health and raising government revenue. When a government has a monopoly on selling beer—the issue is not whether the government will sell beer, the issue is what beer the government will sell. For example, Ontario prevents the sale of beer in the province unless the LCBO, or its government partner, the BeerStore, has purchased the beer. In deciding whether to

¹⁹ See Beer Canada, ["A Report Identifying Interprovincial Trade Barriers in the Canadian Beer Industry"](#) (November 25, 2015).

²⁰ *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 SCR 581 at paras. 51-53.

²¹ Factum of the Attorney General of British Columbia at para. 19.

purchase the beer, it undertakes a selection process that has the effect of excluding Alberta brewed beer unless LCBO buyers, relying on their "experience and judgment" select an Alberta-brewed beer, based on ambiguous and arbitrary criteria.²² Similarly, the LCBO sets out "mandatory requirements" that "out-of-province and imported beer" must meet to be sold in Ontario that Ontario brewed beers do not.²³

27. In addition, out-of-province breweries seeking to distribute beer in Ontario must apply for a listing at Brewers Retail (the Beer Store), and pay a required fee of \$23,870 per brand per package size, or alternatively apply to sell through LCBO stores (and the LCBO decides which provincially owned retail outlets the out-of-province beer is shipped). These regulations have a significant effect on the ability of out-of-province beer products to cross Ontario's border and be sold. For example, Ontario's Beer Store lists less than 1,000 distinct beer products while Alberta liquor stores can stock over 5,068 distinct beer products.

28. A similar disconnect between intention and effect arises in British Columbia where that province's monopoly has manifested itself in ways that go well beyond improving health and revenue. In British Columbia, the province's microbreweries receive first rights to shelf space at provincially owned liquor stores (a third of the retail outlets) and out-of-province breweries require a listing with the British Columbia Liquor Distribution Branch. This is not a mere application as part of a regulatory scheme to obtain revenue or ensure minimum health standards are complied with. Out of 3,000 annual applications, the British Columbia Liquor Distribution Branch lists only approximately 5% of applicants.²⁴

29. These regulations significantly restrict the import of out-of-province beers and effectively act as quotas protecting local producers. This type quota has been found as outside the powers of the provinces in cases like *Manitoba (Attorney General) v. Manitoba Egg and Poultry Assn.*²⁵

²² Liquor Control Board of Ontario, "[Product Management Policy & Procedures](#)", at 14-15.

²³ *Ibid.* at 27.

²⁴ Robert Hughey, "[Beer Distribution in Canada](#)".

²⁵ *Manitoba (Attorney General) v. Manitoba Egg & Poultry Assn.*, [1971] SCR 689 at paras 27-28.

30. In Alberta by contrast, while the sale of alcohol remains highly regulated—including for health and government revenue purposes—any out-of-province brewer can sell their beer. As one article put it:

[W]hen a domestic or out-of-province producer wants to sell a beer... in Alberta, it has to fill out a two-page form, pay a \$75 fee and then find someone in the province to sell its product. In comparison, an Alberta upstart looking to sell its product in the B.C. and Saskatchewan markets has to apply to each province's liquor control board and undergo a battery of questions covering everything from the quality of the packaging to the market demand for the product... Each province [other than Alberta] also has a taste test where government employees pass judgment on the merit of the product.²⁶

31. Of all the provinces, only Alberta's liquor regime lives up to the balance between unity and diversity at the heart of federalism. Alberta's regime lets anyone in, contributing to the "free flow of commerce across the Dominion" and national prosperity. This is the perspective of those who seek to do business across Canada. ASBA's concern is not with limiting provincial spheres of influence, but ensuring that a crucial part of federalism, access to a national market, is achieved.

32. Considering the effects of impugned legislation does not mean that the Constitution mandates an unregulated market without provincial control. Alberta maintains its internal diversity, including for example by restricting the sale of alcohol to those who are over 18 (a lower age than other provinces). These types of laws preventing the sale of alcohol to minors would not infringe s. 121 as long as the age is the same for all similar alcohol products regardless of where the alcohol originates. Similarly, a regulatory scheme like that of the Northwest Territories that does not discriminate against out-of-territory brewed beer but restricts the sale of all beer in certain areas within the jurisdiction, regardless of the alcohol's place of origin, would not run afoul of s. 121. And a law like Alberta's that requires all beer sold in the province to be nominally sold to the government before it can be distributed to retail stores does not infringe s. 121 because such a law does not restrict the sale of out-of-province beer in any more than Alberta brewed beer.

²⁶ Justin Giovannetti and Ian Bailey, "[Breweries, wineries face provincial bottlenecks](#)" *Globe and Mail*, July 29, 2016.

33. Considering the effects of an impugned legislation under a s. 121 analysis simply means that legal restrictions on trade must apply to all Canadian producers and one province's beer cannot effectively be excluded from another province by the creative imposition of regulations. A corollary is that provinces cannot legislate monopolies or other legal restrictions to trade that advantage local producers. As Justice McLachlin (as she then was) put it, "s. 121...bars trade laws aimed primarily at impeding the flow of goods on the basis of provincial boundaries"²⁷ The abolition of such bars is necessary to preserve the goal of a national economy as adopted at Confederation.

PART III. - COSTS

34. ASBA seeks no order as to costs and asks that no costs be awarded against it.

PART IV. - REQUEST FOR ORAL ARGUMENT

35. The October 10, 2017 order of Moldaver J. granted ASBA 5 minutes of oral argument. ASBA makes no further requests.

Calgary Alberta
November 20, 2017



Robert Martz
Paul Chiswell
Counsel for the Intervener
Alberta Small Brewers Association

²⁷ *Richardson* at para. 171 (McLachlin J. dissent).

TABLE OF AUTHORITIES

BOA Tab	Authority	Reference in Argument
	Constitutional Instrument	
	<i>Constitution Act, 1867</i> , (30 & 31 Vict), c.3 (U.K.)	1
	Case Law	
	<i>Air Canada v. Ontario (Liquor Control Board)</i> , [1997] 2 SCR 581 .	24
	<i>Canadian Egg Marketing Agency v. Richardson</i> , [1998] SCR 157 .	1, 7, and 33
	<i>Gold Seal v. Alberta</i> , [1921] SCJ No. 43 .	12
	<i>Manitoba (Attorney General) v. Manitoba Egg & Poultry Assn.</i> , [1971] SCR 689 .	29
	<i>Murphy v. C.P.R.</i> , [1958] S.C.R. 626 .	2, 10, 13, and 15
	<i>Reference re Agricultural Products Marketing Act</i> , [1978] 2 SCR 1198 .	2
	<i>Reference re Secession of Quebec</i> , [1998] 2 SCR 217 .	8
	<i>Reference Re. Securities Act (Canada)</i> , 2011 SCC 66 .	19
	<i>R. v. Big M. Drug Mart Ltd.</i> , [1985] 1 SCR 295 .	18
	Secondary Sources	
1	A.E. Safarian, <i>Canadian Federalism and Economic Integration: a Constitutional Study Prepared for the Government of Canada</i> (Ottawa: Information Canada, 1974).	6
	Beer Canada, "A Report Identifying Interprovincial Trade Barriers in the Canadian Beer Industry" (November 25, 2015).	22
2	F.R. Scott, <i>Centralization and Decentralization in Canadian Federalism</i> , 29 Can. B. Rev. 1095 (1951).	11
	Justin Giovannetti and Ian Bailey, "Breweries, wineries face provincial bottlenecks" Globe and Mail, July 29, 2016 .	30
	Liquor Control Board of Ontario, "Product Management Policy & Procedures" .	26 and 27
	Peter Hogg and Wade Wright, <i>Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism</i> , UBC Law Review 38.2 (2005) 329-352 .	11
	Peter Hogg, <i>Constitutional Law of Canada</i> , 5 th Ed. at 5.1(c).	9
	Robert Hughey, "Beer Distribution in Canada" .	28