S.C.C. File No.: 37398

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
.(Applicant)

-and-

GERARD COMEAU

RESPONDENT
(Respondent)

-and-

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PART I – OVERVIEW AND SUMMARY OF ARGUMENT

1. A national common market for Canadian-made liquor would fulfil the objects of s. 121 of the *Constitution Act, 1867*[1] by bringing greater prosperity to Canadians while also promoting national unity and Canadian cultural pride.[2] Parliament recognized and promoted these objects in 2012 when it amended the *Importation of Intoxicating Liquors Act*, R.S.C. 1985, c. I-3, (the "*IILA*") to permit direct to consumer shipping of liquor across provincial boundaries without federal restrictions.[3] This federal amendment ignited hope in small producers of Canadian-made wine who rely on direct to consumer shipping for their survival. Interprovincial trade barriers erected by the provinces extinguished this hope and subverted both s. 121 and the Parliamentary amendment to the *IILA*. Provincial liquor laws and policies that prohibit consumers from purchasing and bringing Canadian-made liquor across provincial boundaries weaken Canadian prosperity and national unity for the sole purpose of protecting provincial liquor monopoly revenues.[4] Legitimate provincial purposes such as health and safety regulations and direct taxation do not require laws that prohibit Canadians from purchasing directly from producers in other provinces, that force Canadians to purchase Canadian-made liquor only from provincial monopolies, or that unreasonably restrict the quantity of Canadian-made liquor a Canadian may import from another province.

2. Canadian provinces have explicitly recognized the impairing effects of shipping restrictions on domestic liquor manufacturers. The three provinces with significant domestic industries already permit intra-provincial manufacturers to ship directly to consumers within the

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[1] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.
[2] *Black v. Law Society Alberta*, [1989 1 SCR 591 at paras. 33-37; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157 (McLachlin J. (as she then was)) dissenting at para. 123; Malcolm Lavoie, *R. v. Comeau and Section 121 of the Constitution Act, 1867: Freeing the Beer and Fortifying the Economic Union*, Dal L.J. Vol. 40, No. 1, Spring 2017, 189 ("Lavoie Article"), at pp. 205, 208-209, 217 **[BOA Tab 7]**; *Tear Down These Walls: Dismantling Canada's Internal Trade Barriers*, Report of the Standing Senate Committee on Banking, Trade and Commerce, June 2016 ("Senate Report"), at preamble and pp. 1, 23, 25.
[3] *IILA*, s. 3(2)(h); Hansard, Commons Debates, Second Reading Chambers Sitting 33, October 20, 2011, pp. 2316-2317; *Factum of the Attorney General of Canada* at para. 35.
[4] Trial Judgment at para. 40; Appeal Record at pp. 26-32; Appellant's Record, Vol. 2, Tab 10, Trial Transcript at Vol. 2, p. 43, ll. 16-18.

province without selling their product through the provincial liquor monopoly.[5] Yet, most provinces continue to discriminate against extra-provincial manufacturers of Canadian-made liquor by prohibiting or severely restricting those manufacturers from shipping and selling directly to consumers across provincial borders.[6] These prohibitions and restrictions violate s. 121 of the *Constitution Act, 1867*.

3. The Canadian situation is remarkably like that of the United States prior to 2005 when many states prohibited or severely restricted shipments of American-made wine from producers outside of the state directly to consumers within the state. The Supreme Court of the United States changed the landscape with its decision in *Granholm v. Heald*[7], which interpreted the dormant commerce clause as prohibiting discrimination by one state against wine manufacturers in another state. Since *Granholm*, the United States has seen significant growth of small wineries, small winery production volumes, and small winery revenues.[8] The effect of *Granholm* has undoubtedly enhanced the prosperity of an American industry to the general benefit of the United States. At the same time, states have continued to impose their own unique systems of taxes, health and safety, and other regulations in relation to alcohol. A similar change to Canada's interprovincial liquor shipping laws will have an equivalent effect within Canada.

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[5] B.C. Liquor Control and Licensing Branch Manufacturer Terms and Conditions, September 2017, at p. 17; Alcohol and Gaming Commission of Ontario Wine Manufacturers' Guide May 2017, p. 5; LCBO Board Policy Direct Delivery to Licensee, September 2017; Nova Scotia Farm Winery Policy, April, 2007 at 11.3.5.

[6] *Alberta Gaming and Liquor Act*, R.S.A. 2000, C. G-1, ss. 50, 77, 86(3) and *Alberta Gaming and Liquor Regulation*, 143/1996, s. 89 and provincial direct shipping policy; *Liquor Distribution Act*, R.S.B.C. 1996, c. 268, s. 4; *Liquor and Gaming Control Act*, C.C.S.M., c. L153, s. 71; *Liquor Control Act*, R.S.N.B. 1973, c. L-10, ss. 134, 43(c); *Liquor Control Act*, R.S.N.L. 1990, c. L-18, ss. 2(f.1), 68, 124.1 and *Liquor Limitation Order*, O.C. 96-155; *Liquor Control Act*, R.S.O. 1990, c. L. 18, LCBO Policy "Transporting Beverage Alcohol Across Provincial Borders"; *Liquor Control Act* R.S.P.E.I. 1988, c. L-14, ss. 18, 33, 48(1) and *Liquor Control Act Regulations*, s. 91; *Act Respecting the Société des alcools du Québec*, 1993, c. s-13 s. 37(9.2) and *Act respecting offences relating to alcoholic beverages*, 1993, c. s-13 s. 95.1 and *Regulation respecting the possession and transportation into Québec of alcoholic beverages acquired in another province or a territory of Canada*, c. S-13, r. 6.1; *The Alcohol and Gaming Regulation Act*, S.S. 1997, c. A-18.011, s. 107(2)(e) and *The Alcohol Control Regulations*, c. A-18.011 Reg 7, Part 14, ss. 58, 59, 71.

[7] *Granholm v. Heald*, 544 U.S. 460 (2005). **[BOA Tab 4]**

[8] Rob McMillan, *State of the Wine Industry 2017*, a report of the Silicon Valley Bank Wine Division ("SVB Report"), p. 19; Sovos ShipCompliant *Direct to consumer Wine Shipping Report 2017* ("DTC Report"), pp. 2, 4, 5, 10.**[BOA Tab 8]**

4. Section 121 of the *Constitution Act, 1867* requires a "purposes and effects" test to properly achieve its objects. The proposed test is a gloss on Justice Rand's "essence and purpose" test articulated in *Murphy v. Canadian Pacific Railway Co.,*[9] as follows:

a. Outright prohibition (whether discriminatory or not) against the purchase, shipping, receipt, and possession of the growth, produce, and manufacture of one province by another province based solely on origin is impermissible unless the prohibition is necessary to achieve a legitimate provincial policy objective;

b. Facial discrimination by a province against the growth, produce, or manufacture of another province is presumptively unconstitutional. A province can only justify such a law if the discriminatory means is necessary to achieve a legitimate provincial policy objective;

c. Laws of one province that have a significant discriminatory effect on the growth, produce, or manufacture of another province are contrary to s. 121 unless the discriminatory effect is necessarily incidental to a legitimate provincial law, or there is a rational connection between the effect and a legitimate provincial policy objective. Insignificant discriminatory effects are permissible.

d. Provincial laws that impair federal laws that enable interprovincial trade are presumptively unconstitutional. A province can only justify such a law if the impairing means is necessary to achieve a legitimate provincial policy objective.

5. Remedies for a violation of s. 121 are not restricted to a declaration of invalidity. Laws that relate solely to the creation of impermissible interprovincial trade barriers may be declared invalid. Laws that do not solely relate to provincial boundaries may be declared inoperable in relation to the effected growth, produce, or manufacture.[10] The law would remain valid. This remedial approach permits scrutiny of laws with multiple purposes and effects without unduly restricting provincial jurisdiction under s. 92.

6. Section 134 of the *Liquor Control Act,* R.S.N.B. 1973, c. L-10 (the "*Act*") is unconstitutional vis-à-vis Canadian-made liquor and should be declared inoperable. Section 43(c) of *Act* is unconstitutional and should be declared of no force and effect. The interveners take no position on whether s. 121 applies to the laws of Parliament.

PARTS II & III–ISSUES AND ARGUMENT

7. The issues are as stated in the Notices of Constitutional Question.

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[9] [1958] S.C.R. 626; *Reference re: Agricultural Products Marketing Act, 1970 (Canada),* [1978] 2 S.C.R. 1198 at 1268

[10] *Schachter v. Canada*, [1992] 2 SCR 679 ("*Schachter*") at 595-597

The Economic Impact of Canadian Wine

8. The economic impact of the British Columbia wine industry is $2,770,720,000, which includes $512,362,000 in wages and $311,516,000 in taxes while also attracting 1,000,000 wine-related tourists with an economic impact of $246 million annually.[11]

9. The Senate has acknowledged that internal trade barriers impose costs between $50 billion to $130 billion to the Canadian economy, which includes the wine sector.[12] The Senate heard from wine industry witnesses who indicated national direct to consumer ("DTC") sales will increase tourism and lead to greater sales for Canadian wineries.[13]

The State of Affairs in Canada: Direct to Consumer Sales and Provincial Discrimination

10. In 2012, due to the efforts of the wine industry, Parliament passed Bill C-311 to add section 3(2)(h) to the *IILA*. The section creates an exception to the s. 3(1) prohibitions that permits an individual to import liquor from one province into another for personal consumption, "in quantities and as permitted by the laws of the other province". The provincial laws listed at footnote 6 create barriers that prohibit interprovincial shipping to all provinces other than Manitoba, Nova Scotia, and British Columbia. The dominant purpose of the provincial barriers is to protect provincial revenue.[14]

11. There is a proliferation of discriminatory treatment across Canada with provinces providing preferential treatment to their own producers they do not provide to out-of-province producers:

a. Quebec's Bill 88 authorizes only small-scale Quebec liquor producers to directly deliver and sell to grocery permit holders;[15]

b. British Columbia's Special Wine Store Licenses permit only B.C. wine on grocery store shelves;[16]

c. Ontario's Direct Delivery program for wineries permits only Ontario wineries to

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[11] Canadian Vintners Association, *The Economic Impact of the Wine and Grape Industry in Canada 2015*, March, 2017 ("CVA Report") at pp. 18, 21.
[12] Senate Report at p. 3
[13] Senate Report, p. 25
[14] *Trial Judgment* at para. 40; Appeal Record at pp. 26-32.
[15] http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-88-41-1.html)
[16] *Liquor Control Act Regulation*, BC Reg. 241/2016, ss. 67-70

deliver direct to licensees and the public in Ontario;[17] and

d. Alberta's Small Brewers Development Program gives grants only to Alberta brewers.[18]

12. This type of preferential treatment is destructive to national economic unity. A legal test for s. 121 that employs the principle of non-discrimination will create an opportunity for the provinces and the federal government to develop a national framework or model law for interprovincial shipping and sale of domestic liquor. The Canada Free Trade Agreement Alcoholic Beverages Working Group is currently developing its recommendations, which are scheduled to be released on July 1, 2018.[19]

The Constitutional Framework for Direct to Consumer Sales in the United States

13. Prior to *Granholm,* the United States saw a proliferation of preferential trade areas for liquor.[20] In *Granholm* the SCOTUS found Michigan and New York state laws that permitted direct to consumer sales by in-state wineries but prohibited such sales by out-of-state wineries to be discriminatory, violating the dormant commerce clause.[21] The Court noted that the growth of the U.S. wine industry had fast outpaced the availability of wholesale distribution and that small wine producers did not produce sufficient volume of wine to access the declining number of U.S. wholesalers. The markup imposed by U.S. wholesalers rendered small winery sales through them economically infeasible.[22]

14. Direct to consumer shipping in the U.S. is necessary for the vast majority of wines from small and boutique producers to reach the market: prior to *Granholm*, of the 25,000 wines made in the United States, only about 500 made it through the three-tier distribution system to retail shelves.[23] Fewer than 100 wineries had stable national distribution in any form and three thousand wineries had no wholesaler at all.[24] Given these challenges, the lifeblood of small U.S.

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[17] Alcohol and Gaming Commission of Ontario *Wine Manufacturers' Guide* May 2017, p. 5; *LCBO Board Policy Direct Delivery to Licensees (Ontario Wine and Cider),* September, 2017.
[18] Alberta Small Brewers Program Terms and Conditions.
[19] https://www.cfta-alec.ca/stakeholder-engagement-trade-alcoholic-beverages-within-canada/
[20] *Granholm* at pp. 10-11
[21] *Granholm* at pp. 9-12
[22] *Granholm* at pp. 4, 10
[23] James Alexander Tanford, *E-commerce in Wine,* 3 J.L. Econ. & Policy 275, 303 (2007), at 303
[24] *Ibid* at 303

wineries since *Granholm* has been direct to consumer shipping.[25] Today, small U.S. wineries producing 50,000 cases or less derive 40-70% of their total revenues from direct to consumer sales.[26] 8,745 of a total of 9,069 wineries in the U.S. have production under 50,000 cases.[27] In 2016 DTC sales for wineries under 50,000 cases represented 74.2% of all DTC sales by value in the U.S.[28] From 2015 to 2016 the wine industry saw 18.5% annual growth in DTC sales worth $2.33 billion USD.[29] The value of the DTC channel has increased 75% from 2011 to 2016.[30]

15. The *Granholm* decision both enhanced American prosperity and permitted legal challenges to discriminatory aspects of state regulation without undermining legitimate regulation.[31] For example, laws restricting the size of wineries that are permitted to ship into a state have been found both invalid and valid depending on the effect of the law.[32] Laws prohibiting big-box retailers from entering into a state market have been upheld.[33] New York laws requiring all retailers (in or out of state) to have an in-state operation in order to ship directly were upheld as non-discriminatory because they were an integral part of the state's three-tier system.[34] A Texas law that permitted local retailers to deliver directly within their county, but not across the entire state, but that also outright prohibited out-of-state retailers from shipping directly to consumers within Texas, was upheld as constitutional since the small radius of permitted local delivery was "a constitutionally benign incident of an acceptable three-tier system".[35] The state-controlled liquor monopolies that still exist in some states (E.g.

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[25] "The smaller producers would have been put out of business long ago without the subsequent evolution of direct shipping": SVB Report, p. 19

[26] SVB Report, p. 19
[27] DTC Report at p. 4
[28] DTC Report at p. 10
[29] DTC Report at p. 2
[30] DTC Report at p. 5
[31] Jerry Ellig and Alan E. Wiseman, *Price Effects and the Commerce Clause: The Case of State Wine Shipping Laws*, Journal of Empirical Legal Studies, Vol. 10, Issue 2, 196-229, June 2013 at pp. 198-204; Alexandra Thompson, *The Legacy of Granholm v. Heald: Questioning the Constitutionality of Facially Neutral Direct-Shipping Laws*, 61 Cas. W. Res. L. Rev. 309 (2010), at pp. 311, 313-314, 324-331, Footnotes 13 and 14.
[32] *Family Winemakers v. Jenkins*, 592 F.3d 28-29 **[BOA Tab 3]** and *Black Star Farms v. Oliver*, 544 F. Supp. 2d 913, 926 (2008).**[BOA Tab 2]**
[33] *The Great Atlantic & Pacific Tea Co. v. East Hampton*, 997 F. Supp. 351 (1998).**[BOA Tab 5]**
[34] *Arnold's Wines v. Boyle*, 571 F.3d 191-92 (2009).**[BOA Tab 1]**
[35] *Wine Country Gift Baskets v. Steen*, 612 F.3d 819-20 (2010).**[BOA Tab 6]**

Pennsylvania, Virginia, and Mississippi) have not been rendered unconstitutional by *Granholm*.[36]

16. Both state regulators and the private market have responded to ensure producers shipping DTC comply with the wide-variety of state laws. The National Conference of State Legislatures developed a model direct shipping law for use across the U.S.[37] Private enterprise developed a platform to ensure compliance with all state laws and assists in the orderly regulation of interstate shipping in the United States.[38] More recently, states have required carriers such as FedEx to ensure compliance with state law.[39] These examples show it is possible to incorporate a principle of non-discrimination into s. 121 without undermining the federalist principle that respects provincial sovereignty.

Justification for Proposed Legal Test for s. 121

17. The purpose of s. 121 is to promote national economic and political unity.[40] The historical and legislative evidence considered by the trial judge is consistent with an interpretation of s. 121 that includes non-tariff barriers in order to promote national economic unity. Contemporary international and interprovincial trade agreements are consistent with an interpretation of s. 121 that includes non-tariff barriers.[41]

18. Section 121 is not a jurisdictional provision and serves distinct purposes from sections 91 and 92. The interveners agree with the respondent's position that s. 121 is akin to all other structural provisions in Part VIII of the *Constitution Act, 1867* in that it is intended to be super-

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[36] See the U.S. Alcohol and Tobacco Tax and Trade Bureau for a full listing - https://www.ttb.gov/wine/state-ABC.shtml#US; DTC Report, p. 29.

[37] http://www.ncsl.org/documents/standcomm/sccomfc/NCSL_WineIndustryModelDirectShipmentBill.pdf; http://freethegrapes.org/model-direct-shipping-bill/

[38] https://www.shipcompliant.com/

[39] https://www.nytimes.com/2017/10/23/dining/drinks/interstate-wine-sales-shipping-laws.html?_r=0; https://www.wine-searcher.com/m/2017/08/consumers-short-changed-again-on-shipping

[40] *Black v. Law Society*, *supra*, at paras. 33-37; *Richardson*, *supra*, (McLachlin J. (as she then was)) dissenting at para. 123; Lavoie Article at pp. 205, 208-209, 217.**[BOA Tab 7]**

[41] Such barriers are addressed in all major international trade agreements in which Canada is a part: NAFTA, GATT, and CETA. They are also addressed in the CFTA between the provinces.

plenary.[42] Section 121 is not the only super-plenary provision in the 1867 act: sections 96-100 have been interpreted by this court to place limits on provincial authority as a matter distinct from jurisdiction.[43]

19. Section 121 is intended to capture multi-purpose statutes. It is unrealistic to restrict s. 121 to statutes that only have discrimination as their 'sole purpose'.[44] Justice Rand's "essence and purpose" test is not so restricted. Almost all modern legislative schemes have multiple purposes and effects. The test for s. 121 does not require a 'sole purpose' or 'dominant purpose' test because the required outcome is not binary. The principle of exhaustiveness does not inform s. 121 and courts scrutinizing laws under s. 121 can apply a broader, more nuanced analysis, with a broader, more complex set of remedies. A 'dominant purpose' or 'sole purpose' test will not assist the Canadian wine industry achieve economic growth and prosperity as the most problematic laws are laws of general application such as s. 134 of the New Brunswick *Act*.

20. Justice Rand's "essence and purpose" test is a starting point, but requires further nuance to properly effect the objects of s. 121. The appropriate test should look to both the purposes and effects of the legislation as articulated in paragraph 4 of this factum.

21. As the proposed test applies to multi-purpose general statutes and considers purposes and effects, the appropriate remedy will often be a "reading down" of the statute and a declaration of inoperability in relation to the provincial goods at issue.[45] This remedial approach is consistent with the principle of exhaustiveness that "there is no topic that cannot be legislated upon, though the particulars of such legislation may be limited".[46]

Sections 134 and 43(c) of the New Brunswick *Liquor Control Act* Violate s. 121

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[42] Respondent's Factum at paras. 36, 54-59.

[43] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44

[44] AGBC's Factum at paras. 1, 15, which wrongly relies on the division of powers case *Carnation Co. v. Quebec (Agricultural Marketing Board)*, [1968] S.C.R. 238

[45] *Schachter*, *supra*, at 695-697; See also *R v. Grant*, [1993] 3 SCR 223 at 244-245

[46] *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698, at para. 134; Appellant's Factum at paras. 75-77

22. This case is not about the authority of New Brunswick to enact s. 134 of its *Act*. It has that authority under s. 92(16). This case is about the limits placed on that authority by s. 121. Section 134 violates those limits for the following reasons:

a. Outright Prohibition: s. 134 creates an outright prohibition on purchasing goods directly from another province's producers;
b. Facial Discrimination: As shown in the U.S. data, direct sales are an integral aspect of the growth, produce, and manufacture of small wineries. Without it, small wineries cannot survive. Canadian small wineries are no different from American ones in this respect. Because small production and direct sales are integrally connected, s. 134 facially discriminates in favour of the single in-province vendor against out-of-province manufacturers' direct sales to consumers. Section 43(c) is facially discriminatory in aid of s. 134 by prohibiting New Brunswick residents possessing and consuming more than a single bottle of liquor or wine purchased from a vendor in another province.
c. Impairing Federal Law: Section 134 impairs s. 3(2)(h) of the *IILA* by undermining its purpose to permit direct to consumer shipping for personal consumption across Canada.[47]

23. New Brunswick attempts to justify s. 134 by relying on *Air Canada v. Ontario (Liquor Control Board)*[48] ("*Air Canada*"). *Air Canada* is limited to questions of jurisdiction. It did not address s. 121. Moreover, the court decided the case prior to the addition of s. 3(2)(h) to the *IILA*. This limits the court's holding that the purpose of the *IILA* was to prohibit the transitory shipping of liquor through a province absent consignment to the provincial crowns. In *Air Canada*, the LCBO owned the liquor brought into and stored in the province by virtue of s. 3(1) of the *IILA*. In circumstances where Canadian-made liquor is brought into a province for personal use, the provincial monopolies do not own that liquor as the *IILA* exempts such activity from s. 3(1) pursuant to s. 3(2)(h).

24. Section 3(2)(h) applies to the "importation" of liquor from one province that is "brought into" another. The section would be a meaningless exception to s. 3(1) unless it permitted the receipt of liquor by the consumer within the province. It clearly does not apply to "transitory" shipment but is intended to enable direct to consumer shipping and personal importation. Contrary to the Respondent's assertion, section 3(2)(h) does not require liquor entering the province to be sold to the province's liquor board, but rather requires compliance with the

[47] Hansard, Second Reading Chambers Sitting 33, October 20, 2011, pp. 2316-2317
[48] [1997] 2 SCR 581 at paras. 57-60

legitimate, constitutional laws of the province.[49] The section also prohibits resale and so clearly excludes resale by liquor boards. The AG Canada appears to recognize that the interaction between s. 3(2)(h) of the *IILA* and s. 134 of the *Act* is not a form of cooperative federalism in relation to the DTC importation of liquor.[50]

25. Protection of a provincial liquor monopoly's local revenues is not a legitimate basis upon which provinces can undermine the purpose of s. 121: promoting national unity and economic growth. Revenue can be raised through non-discriminatory direct taxation of Canadian goods. Just as in the United States, taxes can be collected by vendors or carriers and remitted to provincial governments.[51] Black markets can be deterred through provincial licensing and reporting requirements. Health and safety laws can be (and are) created and enforced separately from trade prohibitions and discrimination.[52]

26. Section 134 should be read down and declared inoperable in relation to Canadian-made liquor. The provision should remain valid and operable in relation to all other liquor. Section 43(c) should be declared of no force and effect.

PARTS IV & V – COSTS AND ORDER SOUGHT

27. The interveners bear their own costs and pay no costs. The interveners take no position on the order as against the parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 15th of November, 2017.

Shea Coulson/ Allan L. Doolittle

Counsel for the Interveners

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[49] Respondent's Factum at para. 106

[50] Factum of the Attorney General of Canada, at para. 35

[51] *Granholm* at p. 28: The SCOTUS did not recognize revenue protection as a valid reason to permit discrimination and favourably discussed the idea of direct taxation collected directly from vendors.

[52] This was also recognized as an effective non-discriminatory approach by the SCOTUS in *Granholm* at p. 29.

PART VI – TABLE OF AUTHORITIES

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