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 FACTS

1. The question at the heart of this appeal is how to reconcile our Constitution's commitment to free interprovincial trade with the authority of governments to regulate the economy in the public interest. Section 121 of the *Constitution Act, 1867*, read in its proper context and in light of its purpose, prohibits acts of discriminatory protectionism that restrict trade in goods across provincial boundaries.[1] In order to be meaningful, this constitutional guarantee must extend to non-tariff trade barriers. At the same time, s. 121 should be read in harmony with other constitutional provisions, including ss. 91 and 92 of the *Constitution Act, 1867*, as well as the constitutional principles of democracy and federalism. Legitimate government regulatory measures should be upheld, subject to the constitutional imperative of free interprovincial trade.

2. Artisan Ales Consulting Inc. ("**Artisan Ales**") is a private commercial enterprise engaged in interprovincial liquor transactions under existing regulatory regimes. It intervenes in this appeal in order to propose the following test for identifying impermissible non-tariff barriers to trade under s. 121 ("**the Proposed Test**"):

> i. Measures that discriminate against interprovincial trade, either directly by referencing location of origin or indirectly through the use of proxies for location of origin, should be subject to exacting scrutiny. In order to be upheld such measures must be necessary for the achievement of a significant, non-protectionist government objective.[2]
>
> ii. Measures which do not discriminate directly or indirectly against interprovincial trade, but which merely burden interprovincial trade in some incidental way, should be subject to less exacting scrutiny. Such measures should be upheld as long as they have a rational and functional connection with a valid, non-protectionist government objective.

3. Artisan Ales submits that a purposive reading of s. 121, according to established principles of interpretation, leads to this approach. Moreover, the Proposed Test is consistent

[1] (UK), 30 & 31 Vict, c 3, s 121.

[2] As discussed at para 24, *infra*, examples of significant, non-protectionist government objectives include public health and safety.

with the prior jurisprudence of this Court. It builds upon the general formulation offered by Rand J. in *Murphy v. CPR* by incorporating modern jurisprudential concepts of proportionality.[3] The Proposed Test is also consistent with the principles underlying Canadian interprovincial trade agreements, as well as foreign constitutional jurisprudence, including case law dealing with internal trade barriers in Australia and the United States. Finally, the Proposed Test finds support in academic scholarship dealing with interprovincial trade barriers.[4] Artisan Ales submits that its proposed approach draws an appropriate balance between the commitment to free trade reflected in s. 121, on the one hand, and government regulatory authority, on the other.

4. Artisan Ales adopts the statement of facts of the Respondent.

PART II: POSITION OF ARTISAN ALES

5. Artisan Ales submits that the question of whether s. 134 of the *Liquor Control Act* is consistent with s. 121 of *Constitution Act, 1867* should be assessed using the Proposed Test.[5]

PART III: STATEMENT OF ARGUMENT

A Purposive Interpretation of Section 121 Leads to the Proposed Test

6. In addition to prohibiting tariffs, section 121 must also be understood to place meaningful restraints on non-tariff trade barriers. The text, context, and purpose of the provision all lead to this conclusion.[6] The ordinary meaning of s. 121 is not restricted to tariffs; it states only that goods are to be "admitted free", without qualification. Moreover, as this Court has previously observed, s. 121 was enacted in the context of efforts to establish a Canadian common market: "The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the *British North America Act* attempted to pull down the existing internal barriers that restricted movement within

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[3] [1958] SCR 626 at 634, Rand J, 15 DLR (2d) 145.
[4] Malcolm Lavoie, "*R. v. Comeau* and Section 121 of the *Constitution Act, 1867*: Freeing the Beer and Fortifying the Economic Union" (2017) 40:1 Dal LJ 189. See also George Vegh, "The Characterization of Barriers to Interprovincial Trade under the Canadian Constitution" (1996) 34 Osgoode Hall LJ 355.
[5] RSNB 1973, c-L-10, s 134.
[6] Lavoie, *supra* note 4 at 199-201.

the country."[7] Section 121 was "one of the pillars of the Confederation scheme for achieving … economic union."[8] As the trial judge held, the purpose of s. 121 was to establish a free trade zone for Canada, a goal that continues to resonate, and tariffs are only one way that trade can be impeded.[9] Accordingly, Artisan Ales submits that the essence of s. 121 is a general prohibition on discriminatory protectionism in relation to trade in goods across provincial boundaries.

7. The trial judge correctly held that the drafting of s. 121 reflected the intention of the framers to address both tariffs and non-tariff trade barriers.[10] However, even if the framers had been mainly concerned with tariffs, a large and liberal interpretation of s. 121, in keeping with the purpose of the provision, would not restrict its meaning based on whatever contingent political issues happened to be most pressing in 1867.[11] An interpretation of s. 121 that is restricted to tariffs only would be utterly inimical to the purpose of the provision, in that it would allow governments to do indirectly – through quotas, discriminatory regulation, preferential market access, subsidies, and even outright *prohibitions* on out-of-province goods – what they cannot do directly through tariffs. A purposive reading of s. 121 ought to preclude governments from establishing measures that amount to "constructive tariffs", including unjustified discriminatory policies that single out extra-provincial goods for special burdens.

8. Section 121 must be read in harmony with other provisions of the Constitution, in particular ss. 91 and 92 of the *Constitution Act, 1867*.[12] The interpretation of s. 121 should also be informed by foundational constitutional principles, including democracy and federalism, as well as the federal structure or architecture of the Constitution.[13] The Proposed Test satisfies these considerations. Overtly discriminatory measures that target out-of-province goods directly or through a proxy for location of origin are subject to exacting scrutiny. However, even these may be upheld where they are truly necessary for the achievement of a significant, non-

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[7] *Black v Law Society of Alberta*, [1989] 1 SCR 591 at 609, La Forest J, 58 DLR (4th) 317 [*Black v Law Society*]; see also *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 at 237, McLachlin J, dissenting, 166 DLR (4th) 1 [*Richardson*].
[8] *Black v Law Society*, *ibid* at 609.
[9] *R v Comeau*, 2016 NBPC 3 at para 90; Lavoie, *supra* note 4 at 205-209.
[10] *R v Comeau*, *ibid* at paras 70-101, 182-186.
[11] See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 507-509, Lamer J, 24 DLR (4th) 536.
[12] *Supra* note 1.
[13] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 247-257, 161 DLR (4th) 385; *Reference re Senate Reform*, 2014 SCC 32 at para 25, [2014] 1 SCR 704.

protectionist government objective. By contrast, government measures that burden trade incidentally, without drawing distinctions related to provincial boundaries, are subject to a more permissive test that reflects a degree of deference to governments in matters of economic regulation. Measures rooted in discriminatory protectionism are meaningfully restricted on this approach. However, the capacity of democratically elected governments to regulate the economy in the public interest, including at the provincial level, is preserved.

The Proposed Test Is Consistent with Past Case Law

9. The Proposed Test is consistent with the approach to s. 121 that has been endorsed in the recent jurisprudence of this Court. In *Murphy v. CPR*, Rand J., in a concurring opinion, wrote the following:

> 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.[14]

10. This approach was subsequently adopted by Laskin C.J. in the *Agricultural Products Marketing Reference*, and highlighted in later Supreme Court opinions referring to s. 121.[15] Rand J.'s approach clearly seeks to reconcile a purposive understanding of s. 121 with government regulatory authority. However, it is framed at a very high level of generality. The Proposed Test provides a concrete mechanism for identifying government measures that are "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" or that relate "in essence and

[14] *Supra* note 3 at 342 [emphasis added].

[15] *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198 at 1224, 1261, 1266-1268, Laskin CJC, 84 DLR (3d) 257[*Agricultural Products Marketing Reference*]; *Black v Law Society*, *supra* note 7 at 609; *Richardson*, *supra* note 7 at 199, Iacobucci & Bastarache JJ, & at 237, McLachlin J, dissenting. But see *Gold Seal Ltd v Alberta (Attorney-General)* (1921), 62 SCR 424 at 456, Duff J, 466, Anglin J, & 469-470, Migneault J; *Atlantic Smoke Shops Limited v Conlon*, [1943] AC 550 at 567-570, Viscount Simon LC, [1943] 4 DLR 81 (PC) [*Atlantic Smoke Shops*]; *Murphy v CPR*, *ibid* at 634, Locke J.

purpose" to a provincial boundary.[16] In doing so, the Proposed Test relies upon modern jurisprudential principles of proportionality to supplement Rand J.'s analysis.

11. Measures that rely on distinctions related to province of origin or a proxy for province of origin should be treated as *prima facie* relating in essence and purpose to a provincial boundary. Governments can rebut this presumption by establishing that a measure is necessary for the achievement of a significant, *non-protectionist* government objective. If this is established, such a measure would be considered merely regulation of the incidents of trade. By contrast, a measure that draws no distinctions related directly or indirectly to a provincial boundary should be taken as *prima facie* regulation of trade in its incidental or subsidiary features. This presumption can be maintained so long as the measure is rationally and functionally related to a valid, non-protectionist government objective. If a measure that gives rise to barriers to trade cannot meet this low standard of justification, its true essence and purpose is likely protectionist and thus relates to a provincial boundary.

The Proposed Test Is Consistent with Foreign Constitutional Jurisprudence

12. The Proposed Test is broadly consistent with the principles adopted by courts in both the United States and Australia for assessing the constitutionality of internal non-tariff trade barriers. Courts in both of these federations have developed doctrines that expressly aim to counter discriminatory protectionism while preserving a wide range of government regulatory authority.[17] In doing so, both countries have adopted tests based on principles of non-discrimination and proportionality.

13. The first clause of section 92 of the *Commonwealth of Australia Constitution Act 1900* is analogous to s. 121 of the *Constitution Act, 1867*, in that both provisions guarantee internal free trade following the union of the respective colonies.[18] In interpreting s. 92, the High Court of Australia has held that measures that discriminate in a protectionist manner against out-of-state trade, either directly or indirectly, so as to impose a burden on this trade, are presumptively

[16] *Murphy v CPR*, *supra* note 3 at 342.
[17] *Cole v Whitfield* (1988) 165 CLR 360 at 391-400 (HCA) [*Cole*]; *Philadelphia v New Jersey*, 437 US 617 at 623-625 (1978).
[18] (UK), 63 & 64 Vict, c 12.

unconstitutional.[19] However, burdens on interstate trade may be upheld if they are "appropriate and adapted", or necessary, to a legitimate objective, specifically "the protection of the community from a real danger or threat to its welfare or to the enhancement of its welfare."[20]

14. In the United States, constitutional jurisprudence relating to interstate trade barriers is mostly rooted in the Commerce Clause.[21] Courts adopt different approaches for measures that are classified as discriminatory and those that are not. A measure will be classified as discriminatory if it expressly draws a distinction between in-state and out-of-state actors, but it may also be found to be discriminatory based on its purpose or effects.[22] Discriminatory measures are subject to exacting review. They are only upheld if they can be shown to be necessary to achieve an important government purpose.[23] By contrast, non-discriminatory measures that burden interstate trade are subject to less searching review, though they may still be struck down if the benefits of a measure are outweighed by the burden it places on interstate trade.[24]

15. The approaches taken by courts in Australia and the United States do not exempt measures from scrutiny merely because they are facially neutral or incidental to a larger regulatory scheme. In both countries, even a facially neutral non-tariff measure may be held to be discriminatory based on the purpose or effects of the measure, giving rise to a requirement that it be justified as being necessary to the achievement of a significant government objective.[25] This prevents governments from evading constitutional requirements by employing facially neutral distinctions that actually operate as proxies for the jurisdiction of origin.

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[19] *Cole*, *supra* note 17 at 394-400, 408; *Barley Marketing Board (NSW) v Norman* (1990), 171 CLR 182 at 199-205 (HCA).

[20] *Castlemaine Tooheys Ltd v South Australia* (1990), 169 CLR 436 at 471-474 (HCA); *Betfair Pty Limited v Western Australia*, [2008] HCA 11 at paras 99-112 [*Betfair*].

[21] US Const art I, § 8, cl 3.

[22] *Granholm v Heald*, 544 US 460, 476, 472-473 (2005); *Oregon Waste Systems, Inc v Department of Environmental Quality of the State of Oregon*, 511 US 93, 98-99 (1994) [*Oregon Waste*]; *Hunt v Washington State Apple Advertising Commission*, 432 US 333, 349-354 (1977) [*Hunt*]; *C & A Carbone, Inc v Town of Clarkstown*, 511 US 383, 390-392 (1994) [*Carbone*]; *Dean Milk Co v City of Madison*, 340 US 349 at 353-355 (1951) [*Dean Milk*].

[23] *Dean Milk*, *ibid* at 354-357; *Maine v Taylor*, 477 US 131, 138-140 (1986); *Oregon Waste*, *ibid* at 100-101.

[24] *American Trucking Associations, Inc v Michigan Public Service Commission*, 545 US 429 at 433 (2005); *Bibb v Navajo Freight Lines*, 359 US 520 at 529-530 (1959).

[25] *Cole*, *supra* note 17 at 399-400, 408; *Betfair*, *supra* note 20 at paras 101-122; *Hunt*, *supra* note 22 at 349-354; *Carbone*, *supra* note 22 at 390-392.

The Proposed Test Is Consistent with Interprovincial Trade Agreements

16. The Proposed Test is also consistent with the general principles that govern interprovincial trade under existing agreements in Canada, including the *Canadian Free Trade Agreement* (which recently superseded the *Agreement on Internal Trade*), as well as the *New West Partnership Trade Agreement*. These agreements are based on principles of non-discrimination, coupled with provisions that allow governments to engage in reasonable and proportionate regulatory activity that may impact trade.[26] None of these agreements provides that a discriminatory measure is permissible simply because it is facially neutral or incidental to a larger regulatory scheme. Each requires that a discriminatory measure must at least be *necessary* to the achievement of a legitimate government objective in order to be justified.

17. While interprovincial trade agreements provide only limited remedies, and include a range of exemptions, they demonstrate that an approach to internal trade barriers based on principles of non-discrimination and proportionality is workable. Moreover, the constitutional application of these principles through s. 121 is unlikely to be unduly disruptive given that the federal and provincial governments are already committed to upholding the same principles under these agreements. On this note, it is worth emphasizing that the approach to s. 121 adopted by this Court constitutes only the constitutional minimum, and does not rule out further action to reduce trade barriers through agreements and other means.

The Proposed Test Is Consistent with Cooperative Federalism

18. The Proposed Test is consistent with principles of cooperative federalism and with the continued existence of "interlocking" federal-provincial regulatory schemes. Recall that even discriminatory measures may be upheld under the Proposed Test, as long as they are necessary to the achievement of a significant, non-protectionist objective. Non-discriminatory measures are subject to a more permissive rational and functional connection test. Existing federal-provincial cooperative schemes can likely be maintained in some form consistent with these standards.

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[26] *Agreement on Internal Trade (Consolidated Version)* (18 February 2015), arts 401, 404, online: Internal Trade Secretariat <https://www.cfta-alec.ca/>; *Canadian Free Trade Agreement (Consolidated Version)* (1 July 2017), arts 201, 202, online: Internal Trade Secretariat <http://www.ait-aci.ca>; *New West Partnership Trade Agreement* (31 December 2016), arts 4, 6 online: NWPTA Secretariat <http://www.newwestpartnershiptrade.ca/index.asp>.

19. In disposing of this appeal, the Court does not have to address federal restrictions on interprovincial trade, including under the *Importation of Intoxicating Liquors Act*, since the Respondent was charged only under provincial legislation.[27] However, on more than one occasion, this Court has suggested that s. 121 does not necessarily apply in the same way to federal legislation as it does to provincial legislation.[28] Accordingly, the application of the Proposed Test to provincial legislation does not commit the Court to interfering in any significant way with the federal, interprovincial components of "interlocking" federal-provincial legislative schemes. This is particularly so with respect to federal measures that do not, on the whole, give preferential treatment to the goods of any one province over those of another.[29]

The Court Should Not Adopt an Unduly Permissive Approach to "Incidental Effects"

20. The Court should avoid taking an unduly permissive approach to trade barriers that are incidental to a larger legislative scheme. It has been suggested, for instance, that a province may establish trade barriers, even discriminatory trade barriers, as long as they are in some sense incidental to a legislative scheme that is otherwise within provincial jurisdiction. Such an approach would be misguided. It would undermine the purpose of s. 121 by permitting acts of discriminatory protectionism with minimal justification.

21. Section 121 should not be conflated with the division of powers under ss. 91 and 92 of the *Constitution Act, 1867*. If a provincial law relates in pith and substance to interprovincial trade by, for instance, aiming to restrict imports, it is outside a province's s. 92 jurisdiction.[30] There is no need to conduct an analysis under s. 121. By contrast with the division of powers, which addresses the pith and substance of a law, s. 121 provides simply that goods are to be "admitted free". Accordingly, the starting point for analysis under s. 121 is to ask whether, and

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[27] *Importation of Intoxicating Liquors Act*, RSC 1985, c I-3, s 3.

[28] *Murphy v CPR*, *supra* note 3 at 368, Rand J; *Agricultural Products Marketing Reference*, *supra* note 15 at 1267, Laskin CJC. See also Lavoie, *supra* note 4 at 216-217; Asher Honickman, "A Marriage Made in Britain: Section 121 and the Division of Powers", CanLII Connects (24 October 2016), online: <http://canliiconnects.org>. But see *Atlantic Smoke Shops*, *supra* note 15 at 569, Viscount Simon LC.

[29] *Murphy v CPR*, *ibid* at 368-369, Rand J; *Agricultural Products Marketing Reference*, *ibid* at 1268, Laskin CJC.

[30] *Attorney-General for Manitoba v Manitoba Egg and Poultry Association*, [1971] SCR 689 at 701-704, 19 DLR (3d) 169; Vegh, *supra* note 4 at 359-375.

how, a government measure impedes the flow of trade in goods. The nature and purpose of the wider legislative scheme of which a trade barrier is a part is relevant only to the question of *justifying* the trade barrier as a legitimate exercise of government authority. Under the Proposed Test, a government measure that draws distinctions based on goods' province of origin, or a proxy for province of origin, is presumptively inconsistent with s. 121. In order to be upheld as justified, such a trade barrier must be necessary for the achievement of a significant, non-protectionist government objective. It is not sufficient for it to be merely incidentally related to a larger, otherwise valid, legislative scheme.

22. The following scenario may help illustrate the perils of an unduly permissive approach to trade barriers that are incidental to a larger scheme. Suppose a provincial government applied a uniform tax or mark-up to all the goods sold in a particular industry in the province, regardless of the province of origin of the goods (M). Suppose that the province simultaneously established a subsidy, for in-province producers only, linked to the quantity of goods sold within the province (S).[31] The effective rate of the tax or mark-up for in-province producers would equal the tax or mark-up minus the offsetting subsidy for each item sold in the province (M – S), whereas the effective rate for out-of-province producers would equal the tax or mark-up, with no offsetting subsidy (M). Out-of-province producers would face a higher effective rate of tax or mark-up than in-province producers for each item sold (M > (M – S)). The fiscal and trade implications of such a combination of measures would be essentially the same as if the province had elected to collect a tariff on out-of-province goods in this industry. Such measures should not be upheld as being "incidental" to broader legislative schemes aiming at the collection of government revenue and incentivizing production within the province. Otherwise, a province would be able to do indirectly, through a combination of a tax or mark-up and a subsidy program, what it clearly cannot do directly by imposing a tariff at the provincial border. At the very least, s. 121 must preclude the erection of a discriminatory constructive tariff of this kind. A strict necessity test for *prima facie* discriminatory measures would achieve this result.

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[31] *Cf Report of Article 1716 Panel Regarding the Dispute between Artisan Ales Consulting Inc. and Alberta Regarding Beer Mark-ups* (28 July 2017), online: Internal Trade Secretariat <https://www.cfta-alec.ca/>.

Application of the Proposed Test

23. Artisan Ales submits that s. 134 of the *Liquor Control Act* draws a distinction in treatment based on a proxy for the province in which goods were purchased, and so it should be subject to justification on a necessity standard under the Proposed Test.[32] Section 134 accords preferential treatment to liquor purchased from the New Brunswick Liquor Corporation by prohibiting consumers from possessing all but modest quantities of liquor purchased elsewhere. The New Brunswick Liquor Corporation only sells liquor in New Brunswick, and so, from the perspective of consumers, this is a distinction based on a proxy for the province in which the liquor was purchased.

24. Artisan Ales takes no position on whether s. 134 is necessary for the achievement of a significant, non-protectionist government objective, though it stresses that this is a demanding standard. Significant government objectives include public health and safety. In order to meet this standard, a government would have to demonstrate that reasonable alternative means of achieving the objective in question could not have succeeded.

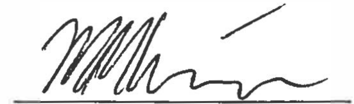
PART IV: COSTS

25. Artisan Ales does not seek costs and requests that no costs be awarded against it.

PART V: ORDER SOUGHT

26. Artisan Ales takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of November, 2017.



Malcolm Lavoie

[32] *Supra* note 5.

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