Court File No.: 37398

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

GERARD COMEAU

Respondent

- and -

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MEMORANDUM OF ARGUMENT OF THE INTERVENER, CANADA'S NATIONAL BREWERS

(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. Canada's National Brewers ("**CNB**") is an industry organization that acts on behalf of Molson Canada 2005 and Labatt Brewing Company Ltd., Canada's largest brewers of beer (collectively, the "**Brewers**"). They each employ thousands of Canadians, brew their beer in many provinces, and market and sell their beer in every province and territory.

2. Each Brewer's history predates Confederation. Since prohibition, they have operated in a regulatory environment premised on the correctness of the *Gold Seal* decision. CNB, on behalf of the Brewers, appreciates the opportunity to participate in the Court's reconsideration of s. 121 of the *Constitution Act, 1867*.

3. Section 121 is a limit on provincial action under s. 92. Professor Hogg has observed that it is part of a "small Bill of Rights".[1] CNB proposes that, like other constitutional limits, a two-part test for analyzing the limits imposed by s. 121 should apply:

(a) Purposive Interpretation: a provincial measure which, in purpose or effect, imposes a discriminatory barrier to trade, for example by treating intraprovincial goods more favourably than like, substitutable or directly competitive extra-provincial goods, *prima facie* infringes s. 121; however

(b) Possibility of Justification: a *prima facie* infringment of s. 121 may be justified if the province establishes that the impugned measure (i) has a non-protectionist objective directed to a significant health or safety concern, (ii) is rationally connected to the objective, (iii) is the least trade-impairing alternative, and (iv) has an impact on interprovincial trade proportionate to the objective.

4. This two-part test is consistent with well-established principles associated with interpreting constitutional limits that have been applied by this Court for many years. It is

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[1] Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, loose-leaf ed. Scarborough, Ont.: Thomson/Carswell, 1997 (updated 2016, release 1) at p. 34-9.

also substantially similar to the test adopted by both (i) the Australian and American courts in interpreting analogous constitutional provisions relating to interstate trade, and (ii) Canadian provinces and nations alike within negotiated free trade agreements.

5. Most importantly, this test best allows the purpose of s. 121 to be achieved, as considered against the backdrop of trade concerns at the time of Confederation, and similar concerns which continue to exist in the modern context. It also leaves room for provinces to impair interprovincial free trade when necessary to achieve non-protectionist provincial objectives directed to significant health or safety concerns.

PART II – POSITION ON QUESTION IN ISSUE

6. CNB takes no position respecting the constitutional validity of the specific provision at issue. On the test to be applied in determining its validity, CNB submits:

(a) s. 121 does not merely prohibit the imposition of tariff barriers by provinces;

(b) the two-part test set out in paragraph 3 above should be applied when determining whether an impugned provincial measure infringes s. 121;

(c) the existence of interprovincial trade agreements does not render a correct, purposive interpretation of s. 121 unnecessary; and

(d) this Court should not comment on the constitutionality of other measures.

PART III – STATEMENT OF ARGUMENT

(a) s. 121 protects against more than just the imposition of tariffs

7. CNB submits that in ascertaining the correct breadth to be ascribed to the words "admitted free", the trial judge appropriately considered them in a "broad and purposive manner and placed in their proper linguistic, philosophic, and historical context".[2]

[2] Newfoundland and Labrador Factum ¶ 6-10. See also the interpretation of s. 35(1) from *R. v. Sparrow*, [1990] 1 SCR 1075 ("***Sparrow***") pp. 1101-1107.

8. In terms of linguistics, the trial judge observed that "nothing in the plain reading of section 121" supported the theory that it was intended only to prohibit tariff barriers. Further, he regarded use of the phrase "admitted free" instead of "admitted free of duty" to be purposeful, given a well-known distinction between tariff and non-tariff barriers.[3]

9. In placing s. 121 within the relevant historical context, he canvassed the political and economic climate at Confederation, noting concerns surrounding the U.S. repeal of the Reciprocity Treaty in 1866,[4] and that the U.S. had imposed "a battery of non-tariff barriers for goods imported from the British colonies."[5] He concluded that the "issue of non-tariff and tariff trade barriers was uppermost in the minds of Canadian politicians".[6]

10. In terms of philosophy, this Court has previously accepted that Confederation was intended not just to establish a new political nationality, but also a national economy.[7]

11. CNB submits that, in furtherance of establishing a national economy, s. 121 was intended to entrench a constitutional "insurance policy" protecting provinces, consumers and market participants from undue reliance on permissive trade agreements that can be unilaterally repealed. As the trial judge noted, the Fathers of Confederation's intent in including s. 121 within the *Constitution Act, 1867* was to "replace the loss of the free trade American market with a free trade Canadian market."[8]

12. Preventing non-tariff barriers is a key aspect of this constitutional insurance policy. Indeed, s. 121 can only fully serve its intended purpose if it is interpreted broadly, as the trial judge did, to prevent the imposition of both tariff and non-tariff barriers.

13. The Australian High Court has similarly acknowledged in the context of a similar constitutional provision that non-tariff barriers can just as easily operate to undermine the

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[3] Trial decision, ¶ 57-69, 178-179, 181-182.
[4] Trial decision, ¶ 76-90, 183-185.
[5] Trial decision, ¶ 77.
[6] Trial decision, ¶ 79.
[7] Trial decision, ¶ 89; *Black v. Law Society of Alberta*, [1989] 1 SCR 591 pp. 608-609; *Daniels v. Canada*, 2013 FC 6 ¶ 339-343, aff'd *Daniels v. Canada*, 2016 SCC 12 ¶ 4.
[8] Trial decision, ¶ 90.

goal of free interstate trade as tariff barriers can.[9] Accordingly, CNB submits that both types of barriers offend s. 121.

(b) Two-part test to determine constitutionality of legislation which impacts trade

(i) Step one: is there a *prima facie* infringement of s. 121?

14. A measure is a discriminatory barrier if, in purpose or effect, it treats goods emanating from outside the province less favourably than like, substitutable or directly competitive goods emanating from within the province (the "**Discrimination Test**"). Such a measure *prima facie* infringes s. 121.

15. The Discrimination Test proposed by CNB is similar to the principles applied by American and Australian courts when interpreting analogous constitutional provisions. In the U.S., for example, state laws may violate the Commerce Clause of the U.S. Constitution if they are discriminatory in the sense that they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter".[10]

16. Australian courts, when interpreting a constitutional provision similar to s. 121, have held that laws which impose, in purpose or effect, "discriminatory burdens of a protectionist kind" on interstate commerce are unconstitutional.[11]

17. The principle of nondiscrimination is also a bedrock principle of domestic and international trade law. It aims to ensure that commercial actors within and outside a jurisdiction enjoy "effective equality of opportunity".[12] This principle already enjoys a great deal of provincial support; indeed it is manifested in the provincial trade agreements referred to by many interveners.

18. For example, the CFTA requires each province and territory to accord the goods of any other province or territory with treatment "no less favourable than the best treatment it

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[9] *Castlemaine Tooheys Ltd v South Australia*, [1990] HCA 1 ("***Castlemaine***") ¶ 23, citing from its earlier decision in *Cole v. Whitfield*, [1988] HCA 18.
[10] *Granholm v. Heald*, 544 U.S. 460 (2005) ("***Granholm***") p. 8.
[11] *Castlemaine*, *supra* note 9 ¶ 23-24.
[12] Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 2d Ed. (London: Rutledge, 1999), pp. 506-507.

accords to its own like, directly competitive or substitutable goods."[13] Many international trade agreements contain similar nondiscrimination provisions.[14]

19. The Discrimination Test will be triggered by measures that explicitly treat in-province and out-of-province goods differently in a manner that benefits the former and burdens the latter. Such measures include those that impose "burdens … through internal sales taxes, differential forms of regulation, etc. on foreign exporters where domestic producers of the same product do not bear the same burden".[15]

20. In addition, a measure that is facially neutral as between in-province and out-of-province goods may nonetheless constitute a *prima facie* infringement under the Discrimination Test if, given the nature of the measure and the particular market in question, the measure's actual effect in that market is to impose differential burdens on out-of-province goods vis-à-vis similar in-province goods.[16]

21. CNB submits that this generally accepted Discrimination Test will often be easy to apply, though at times evidence will be required which goes to whether products are "like, substitutable or directly competitive",[17] or whether a measure which facially appears to be neutral in terms of provincial origin in fact discriminates on that basis.[18]

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[13] *Canada Free Trade Agreement* ("**CFTA**"), Article 201. See also *Agreement on Internal Trade* ("**AIT**"), Article 401.

[14] *North American Free Trade Agreement*, Article 301, and *General Agreement on Tariffs and Trade* ("**GATT**"), Article III.

[15] Trebilcock, *supra* note 12 at p. 29, in the context of GATT.

[16] *Ibid*. See also *Castlemaine* where it was not clear, without evidence, how an environmental measure operated to discriminate against out-of-state brewers.

[17] Using beer as an example, CNB submits that all beer, whether it be in-province, out-of-province, premium, or discount, is beer. Accordingly, a measure which treated in-province discount beer differently than out-of-province premium beer would *prima facie* contravene s. 121.

[18] For example, evidence could reveal that legislation, which appears to impose burdens or benefits on the basis of the size of the manufacturer, is in fact discriminatory on the basis

(ii) Step two: is the infringement justified?

22. If a measure is found to *prima facie* infringe s. 121, then CNB submits that the next step is to consider whether the infringement can be justified. This would address the Appellant and certain interveners' concern that a broad interpretation of s. 121 would prevent provinces from addressing objectives directed to significant health or safety concerns.[19]

23. Although the text of s. 121 does not contain an explicit justification provision, this Court's prior jurisprudence provides a principled basis for applying a justificatory test to a constitutional provision intended to limit government action. For instance, the Court has read such a test into s. 35(1) of the *Constitution Act, 1982*, despite it being outside of the *Charter* and having no explicit limiting text.[20]

24. The Australian courts, despite the absence of an explicit justification clause, also apply a test functionally similar to *Oakes* to determine whether a discriminatory measure is justified.[21] While the U.S. case law is more nuanced, U.S. courts also apply a similar analysis, examining whether a measure "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[22]

25. In accordance with the above authorities, CNB submits that to justify infringing s. 121, a province must show the following:

(a) The measure is aimed at a non-protectionist objective directed to a significant health or safety concern;

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of provincial origin if the size of intraprovincial manufacturers is different than extraprovincial manufacturers. See discussion in *R. v. Morgentaler*, [1993] 3 SCR 463 pp. 482-485.

[19] See, *e.g.*, Appellant factum ¶ 32, 53, and 92-94, Nunavut Factum ¶ 4, NWT Factum ¶ 30, Alberta Factum ¶ 21-23, and B.C. Factum ¶ 17-18.
[20] *Sparrow*, *supra* note 2 at pp. 1108-1109.
[21] *Castlemaine*, *supra* note 9 at ¶ 38-41.
[22] *Granholm*, *supra* note 10 at p. 26.

(b) the measure has a rational connection to that objective;

(c) the means chosen to achieve the objective impairs interprovincial trade no more than necessary to achieve the objective; and

(d) the measure's burden on interprovincial trade vis-à-vis its non-protectionist objective is proportionate. Where the relevant objective is extremely pressing, greater burdens on interprovincial trade will be tolerated. But where it is not, less severe burdens may impermissibly infringe s. 121.

26. The failure of a province to establish any of the last three criteria, CNB submits, will often reveal that the provincial meaure, despite its express language or purpose, indeed relates to a protectionist purpose and is hence invalid.

27. Contemporary interprovincial trade agreements contain similar justification provisions that allow a province to justify the use of a measure to achieve specified objectives, even where it is inconsistent with non-discrimination obligations.[23] CNB submits that this shows support, from a cooperative federalism perspective, for adopting a similar justification test in relation to s. 121.

(iii) Conclusion on two-part test

28. The Appellant and many intervener Attorneys General propose an "essence and purpose" approach for analyzing s. 121's limits.[24] In CNB's submission, the two-part test described above provides the correct, workable method of identifying which provincial regulations are "in essence and purpose" related to provincial boundaries.

29. In *Gold Seal*, Idington J. (in dissent) contemplated the following hypothetical:

> There may be, however, times when the products of a province may be infected with, for example, some contagious disease rendering it absolutely necessary, as matter of public safety, to forbid transportation across the lines

[23] See, *e.g.*, Article 202, CFTA and Article 404, AIT, *supra* note 13.
[24] See Appellant's Factum ¶ 54, 102, 107, Alberta Factum ¶ 22, Canada Factum ¶ 25.

bounding a province or a district therein.[25]

30. The two-part test proposed by CNB would enable provinces, despite s. 121, to do what is "absolutely necessary" to protect their community from real dangers.[26] Indeed, the temperance-aimed provision at issue in *Gold Seal* might be valid under this analysis.

31. In CNB's submission, its proposed two-part test strikes the appropriate balance between the powers afforded to the provinces under s. 92 and the limits imposed by s. 121. It paves the way for an interpretation of s. 121 that is most consistent with its purpose.

(c) Existing interprovincial trade agreements should not preclude a broader interpretation of s. 121

32. The existence of domestic trade agreements appears to be cited by some interveners as a reason why a broad interpretation of s. 121 is unnecessary.[27] CNB disagrees for the following reasons:

(a) First, the trade agreements themselves were concluded in part because of the narrow interpretation of s. 121 from *Gold Seal*. Without these agreements, Canada found itself with not only many interprovincial barriers to free trade, but in the strange predicament that international trade, because of the requirements imposed by international trade agreements, was subject to fewer barriers.[28]

(b) Second, these agreements are inadequate substitutes to entrenched constitutional protection of free trade for the following reasons:

(i) specific products can be excluded from the agreements' purview, as in the case of alcoholic products, which were recently carved out of the CFTA;[29]

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[25] *Gold Seal Ltd. v. Alberta (Attorney General)*, (1921), 62 S.C.R. 424, p. 440.
[26] See generally NWT Factum ¶ 18-30.
[27] See Ontario Factum ¶ 22-28 and Saskatchewan Factum ¶ 18-30. See also Nunavut Factum ¶ 22-23, PEI Factum ¶ 9, and Canada Factum ¶ 22-23.
[28] Canada. Senate. Standing Committee on Banking, Trade, and Commerce. *Tear Down These Walls: Dismantling Canada's Internal Trade Barriers*, 42nd Parliament, 1st Session, p. iii.
[29] See, generally, CFTA Annex I: Exceptions for Existing Measures, *supra* note 13, in

(ii) the effectiveness of remedies contemplated under the agreements can be questioned: the conclusion that a measure contravenes an agreement's terms does not necessarily result in the measure being of no force or effect. The CFTA, for example, states that "[w]henever possible, a dispute shall be resolved by removing, amending, or not implementing the measure that is or would be inconsistent with [the CFTA]", but ultimately only capped monetary penalties can be applied if a province does not opt to do so;[30] and

(iii) typically, the parties may easily withdraw from these agreements or not renew them on expiry.[31]

33. The provinces should be lauded for concluding these agreements. However, CNB submits that their existence as an exercise in cooperative federalism cannot operate to restrict the scope of s. 121's protection.[32]

34. Indeed, there is need for a purposive interpretation of s. 121, as opposed to reliance on agreements that a newly-elected government may withdraw from. CNB submits that s. 121 represents a constitutional protection for free trade that ought to be a minimum guarantee: the Canadian federation may opt to surpass, but not lessen, that protection through these exercises of cooperative federalism.

(d) The Court should be reticent to comment on measures not before it

35. This Court has stated that "it should not decide issues of law that are not necessary to a resolution of an appeal … especially when [the issue] is a constitutional question."

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which a number of provinces exempt alcohol measures from Article 201, the CFTA's central non-discrimination clause.

[30] See Articles 1010 and 1011, CFTA, *supra* note 13.
[31] See Article 1214, CFTA, Article 1811, AIT, *supra* note 13.
[32] See *Reference Re Securities Act*, 2011 SCC 66 ¶ 61-62: "While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers." See also Respondent's Reply Factum ¶ 32 where he notes, citing this Court's decision in *Eldridge*, that there is no ability to "contract out of the Constitution".

This principle is "based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen."[33]

36. Given the potential need for evidence under the two-part test proposed by CNB as to at least a challenged measure's effect, CNB submits that this Court should not opine on the constitutionality of any law other than the one at issue in this case.

PART IV – COSTS

37. CNB does not seek costs and asks that no costs be ordered against it.

PART V – REQUEST FOR ORAL ARGUMENT

38. In view of Moldaver J.'s October 10, 2017 order, CNB makes no further request.

ALL OF WHICH IS RESPECTULLY SUBMITTED

Dated at Ottawa, Ontario this 21st day of November, 2017.

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[33] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 ¶ 6-13.

PART VI – TABLE OF AUTHORITIES

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