Court File No. 37398

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

GERARD COMEAU

Respondent

-and-

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Court File No. 37398

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BETWEEN:

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Respondent

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PART I – OVERVIEW

1. The question for the Court in this appeal is whether a legislative provision for a non-tariff interprovincial trade barrier is inconsistent with section 121 of the *Constitution Act, 1867*, and ought therefore to be struck down.

2. The intervener Montreal Economic Institute (the "MEI") is an independent, non-partisan, research and educational organization. The MEI's position is that the removal of internal trade barriers will significantly increase prosperity for Canadian businesses and citizens, and thus the MEI supports the removal of all tariff and non-tariff interprovincial trade barriers. The MEI makes four submissions:

(a) A central purpose of Confederation was to achieve economic union of the provinces by removing all trade barriers. Section 121 was "one of the pillars" of this scheme.[1] It states: "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."[2]

(b) Yet, non-tariff barriers still hinder many sectors of our economy. The Standing Senate Committee on Banking, Trade and Commerce recently agreed with estimates that existing inter-provincial barriers reduce Canada's GDP by between $50 billion and $130 billion annually.[3]

(c) The Court should give effect to the animating intention behind section 121 and eliminate non-tariff trade barriers through a broad interpretation that both respects the principles of constitutional interpretation and recognizes modern economic realities. The MEI supports the Respondent's approach as set out in paragraph 100 of the Respondent's factum, which would prohibit any restriction on the free flow of Canadian goods that is related to a provincial boundary. The MEI submits that, when constitutional conflicts arise, they could be resolved with the following test:

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1 *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591 [*Black*], p. 609 per La Forest J.

2 *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, s. 121.

3 Report of the Standing Senate Committee on Banking, Trade and Commerce, *Tear Down These Walls: Dismantling Canada's Internal Trade Barriers* (June 2016) [*Senate Committee Report*], p. 3.

Any legislative provision that constitutes a barrier to interprovincial trade, whether tariff or non-tariff, is inconsistent with section 121 unless the restriction is: (i) incidental to, and necessary to achieve, a higher purpose within a proper legislative sphere; and (ii) unrelated to the protection of a local business or industry.

(d) Experience has shown that federal-provincial cooperation is often insufficient to meaningfully eliminate protectionist barriers. It is therefore essential that this Court confirm the broad scope of section 121.

PART II – QUESTION IN ISSUE

3. The primary issue between the parties in this appeal is the effect of section 121 of the *Constitution Act, 1867* in relation to provincial legislation that makes it an offense for any person to possess liquor within New Brunswick that was not purchased from the New Brunswick Liquor Commission, except in permitted quantities.[4]

PART III – ARGUMENT

(a) A central purpose of the *Constitution Act, 1867* was economic integration through the removal of internal trade barriers.

4. A primary goal of Confederation was to form an economic unit of the provinces with "absolute freedom of trade between its constituent parts."[5] As La Forest J. observed in *Morguard*: "One of the central features of the constitutional arrangements incorporated in the *Constitution*

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[4] R.S.N.B. 1973, c. L-10, s. 134. The federal *Importation of Intoxicating Liquors Act* has a related provision, also challenged by the Respondent under section 121: "no person shall import, send, take or transport […] into any province […] any intoxicating liquor, except such as has been purchased by or on behalf of, and that is consigned to Her Majesty or the executive government of, the province into which it is being imported […], or any […] governmental agency that, by the law of the province, is vested with the right of selling intoxicating liquor" R.S.C., 1985, c. I-3, s. 3(1).

[5] *Lawson v. Interior Tree Fruit and Vegetables Committee of Direction*, [1931] S.C.R. 357 [*Lawson*], p. 373 per Cannon J; *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689 [*Manitoba Egg*], p. 717 per Laskin J. (as he then was): "to permit each province to seek its own advantage, so to speak, through a figurative sealing of its borders to entry of goods from others would be to deny one of the objects of Confederation, evidenced by the catalogue of federal powers and by s. 121, namely, to form an economic unit of the whole of Canada".

Act, 1867 was the creation of a common market. Barriers to interprovincial trade were removed by s. 121."[6]

(b) Yet, internal trade barriers still encumber the Canadian economy.

5. Barriers to interprovincial trade persist in the alcohol, agriculture, trucking, construction, and forestry industries, among many others. They include protectionist measures such as outright prohibitions (*e.g.*, Quebec's unpasteurized cheeses cannot be shipped outside the province) and technical impediments (*e.g.*, differing packaging or labelling requirements can substantially increase costs for businesses).

6. The alcohol industry is particularly illustrative. Although alcohol sales in Canada amount to about $22 billion annually,[7] the industry is hindered by a wide range of interprovincial tariff and non-tariff trade barriers, including:

(a) subject to limited exceptions, businesses and consumers cannot transport alcohol across provincial boundaries. A resident of Quebec cannot order a bottle of wine from Niagara without paying a fee to Quebec's liquor monopoly;

(b) for the purpose of selling beer in New Brunswick, beer brewed in Nova Scotia or Prince Edward Island is treated the same as beer brewed in New Brunswick. But beer brewed in Quebec must be shipped through New Brunswick's Alcool NB Liquor warehouse, which imposes a handling fee. (As the trial judge observed, that fee is, no doubt, a tariff trade barrier[8]); and

(c) provincial regulations concerning bottle sizes differ unnecessarily, forcing brewers to incur the costs of parallel production systems if they wish to sell their products to other parts of the country.

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6 *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 [*Morguard*], p. 1099.

7 Statistics Canada, *Table 183-0024 - Sales of alcoholic beverages of liquor authorities and other retail outlets, by value, volume, and beverage type, annual*.

8 *R. v. Comeau*, 2016 NBPC 03, para 32.

7. Barriers like those limit competition and entrepreneurship, and harm consumers through lack of choice and higher costs.

8. The Standing Senate Committee on Banking, Trade and Commerce (the "Senate Committee") released a report last year urging the removal of Canada's internal non-tariff trade barriers.[9] The Committee agreed with estimates from Canadian economists that existing interprovincial trade barriers reduce Canada's GDP by between $50 billion and $130 billion.[10] An Industry Canada working paper estimated that increasing interprovincial trade by 10% would increase per capita GDP by 5.1%.[11]

9. Statistics Canada recently released a study estimating that the level of trade across provincial boundaries from 2004 to 2012 was at a level that would be expected if a 6.9% tariff were imposed on interprovincial trade.[12] The study describes that figure as a "conservative, low-end estimate", and observes that it would have exceeded Canada's average tariff rate for international imports during the same period.[13]

(c) The Court should eliminate non-tariff trade barriers through a broad interpretation of section 121 that recognizes modern economic realities.

10. The continued existence of interprovincial trade barriers is due, at least in part, to the interpretation of section 121 first set out by this Court in *Gold Seal*. The Court found that the object of section 121 was to prohibit only tariff barriers: *i.e.*, customs duties and other charges imposed as a condition of admitting goods into a province.[14]

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9 Report of the Standing Senate Committee on Banking, Trade and Commerce, *Tear Down These Walls: Dismantling Canada's Internal Trade Barriers* (June 2016) [*Senate Committee Report*].

10 *Ibid*, p. 3. See also Lukas Albrecht & Trevor Tombe, "Internal trade, productivity and interconnected industries: A quantitative analysis" (2016) 49(1) The Canadian Journal of Economics 237.

11 Industry Canada Research Publications Program, *International Trade, Interprovincial Trade, and Canadian Provincial Growth* by Serge Coulombe (Working Paper Number 40, December 2003).

12 Statistics Canada, Analytical Studies Branch Research Paper Series, "Going the Distance: Estimating the Effect of Provincial Borders on Trade when Geography Matters" by Robby K. Bemrose, W. Mark Brown & Jesse Tweedle (Catalogue number 11F0019M – No. 394, September 2017).

13 *Ibid*., p. 31 (PDF).

14 *Gold Seal Ltd. v. Alberta (Attorney-General)* (1921), 62 S.C.R. 424.

11. More recent jurisprudence suggests that section 121 should be interpreted more broadly to bar both tariff and non-tariff barriers.[15] Rand J., dissenting in *Murphy v. CPR*, interpreted section 121 to forbid a trade regulation that in "essence and purpose" is related to a provincial boundary: "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."[16]

12. Laskin C.J., concurring in the result in the *Egg Reference*, accepted Rand J.'s interpretation,[17] though Laskin C.J. found that the marketing scheme in the *Egg Reference* was not in its essence and purpose related to a provincial boundary and did not violate section 121. Laskin C.J.'s decision turned, in part, on the fact that he found "no design of punitive regulation directed against or in favour of any Province".

13. In *Black*, La Forest J. observed that section 121 "was one of the pillars of the Confederation scheme for achieving the economic union sought by the Fathers of Confederation."[18] He also relied on Rand J.'s interpretation of the proper meaning of the word "free" that precludes both tariff and non-tariff barriers: "The word 'free' in the context of s. 121 was held to mean 'without impediment related to the traversing of a provincial boundary.'"[19]

14. The global economy has changed substantially since the era in which the Court heard early cases like *Gold Seal*. Since the end of World War II, international cooperation and initiatives – like the Bretton Woods Conference, the General Agreement on Trade and Tariffs ("GATT"), the World Trade Organization, and the proliferation of free trade agreements – have opened markets and allowed free trade to flourish around the world.

15. Canada's economy continues to evolve. In addition to international agreements like the GATT, Canada is now a signatory to free trade agreements with more than 40 countries. The

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15 See, *e.g.*, *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 [*Richardson*], paras. 63-65.

16 [1958] S.C.R. 626 [*Murphy*], p. 642.

17 [1978] 2 S.C.R. 1198 [*Egg Reference*], p. 1268.

18 *Black*, *supra*, p. 609.

19 *Ibid.* In contrast, Mignault J., writing for the Court in *Gold Seal*, had stated that the object of section 121 was merely to secure that goods should be admitted 'free,' "that is to say without any tax or duty imposed as a condition of their admission": *Gold Seal*, *supra*, p. 470.

immense benefits of these agreements contrast starkly, however, with our many remaining interprovincial trade barriers. The Senate Committee was "angered" to learn that the free trade agreement between Canada and the European Union would have made it easier for European businesses to trade with Canada than for Canadian businesses in one province to trade with other provinces.[20]

16. That is an inexplicable result for a country that was formed in large part to achieve the promise of an internal economic union. As a federal state, Canada was meant to have a single market, free of internal trade barriers. That originally contemplated unity can be achieved through a robust interpretation of section 121, fully in keeping with appropriate principles of constitutional interpretation.

17. The MEI supports the Respondent's approach set out in paragraph 100 of the Respondent's factum, which would prohibit any restriction on the free flow of Canadian goods that is related to a provincial boundary.

18. The MEI proposes that if legislative conflicts arise, the Court could apply the following test:

> **Any legislative provision that constitutes a barrier to interprovincial trade, whether tariff or non-tariff, is inconsistent with section 121 unless the restriction is: (i) incidental to, and necessary to achieve, a higher purpose within a proper legislative sphere; and (ii) unrelated to the protection of a local business or industry.**

19. Such a test would be consistent with both the plain wording and evolving interpretation of section 121 in the decisions of this Court.

20. The "incidental" component would incorporate Justice Rand's analysis recognizing that section 121 is aimed against regulations 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."[21] Neither the purpose nor the effect of a regulation can be

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[20] *Senate Committee Report*, *supra*, p. iii ("Executive Summary").

[21] *Murphy*, *supra*.

to protect a local business, industry or monopoly by discriminating against extra-provincial entities.

21. The "necessary" component of the proposed test would:

(a) prevent provinces from seeking to cloak protectionist regulation in a constitutionally acceptable form (thereby avoiding potential ambiguity in the "essence and purpose" test); and

(b) promote harmonization of technical standards that currently stand as non-tariff barriers.

22. As the Honourable Jean Chrétien stated in *Securing the Canadian Economic Union in the Constitution*, while legislation and regulation must be capable of variation from province to province, such variation "must be kept within the bounds of necessity."[22]

23. The "higher purpose" component of the test would recognize that, in exceptional circumstances, there may be valid and constitutional regulatory objectives that could conflict with section 121. But to meaningfully eliminate existing trade barriers, and to prevent the erection of new ones, this must be a narrow exception, limited to extraordinary circumstances.

(d) Experience shows that cooperative federalism is not a sufficient solution.

24. It is more appropriate and more effective to eliminate trade barriers through a robust interpretation of section 121 than through the federal trade and commerce power. Some litigants have succeeded in knocking down trade barriers using the latter. For example, Peter Hogg has observed that some of the Court's decisions on the division of powers in sections 91 and 92 of the *Constitution Act, 1867* have "severely curtailed" the powers of the provinces to regulate the marketing of goods imported from outside the province or to regulate the production or pricing of goods produced in the province but destined for external markets.[23] Although the results in those

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22 Jean Chrétien, *Securing the Canadian Economic Union in the Constitution* (Government of Canada, 1980), p. 30.

23 Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Thomson Reuters, 2016), para. 20.2(b), note 37, citing cases decided around the time of the *Egg Reference*, including *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689 [*Manitoba Egg*] and *Central Canada Potash Co. Ltd. et al. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42.

cases may be consistent with a broad interpretation of section 121, they were not decided on that basis.

25. The Attorney General of New Brunswick argues that the federal and provincial laws at issue in this case exemplify the principles of cooperative federalism and legislative exhaustiveness, because the federal statute contributes to the very goal of lending power to the provinces to "cement their liquor monopolies."[24] In other words, the Attorney General would like to preserve the ability to regulate the availability and retail prices of goods from other provinces. **But, surely the essence of section 121 is that the provinces are not supposed to have such monopolies at all, *vis-à-vis* the other provinces.**

26. Although relying on cooperation between the federal and provincial governments might have superficial appeal, experience has shown that our federalist approach has not succeeded in meaningfully eliminating protectionist trade barriers between provinces. The federal government and the provinces have frequently spoken of, and even tried to implement, cooperative agreements to limit barriers, but the efforts have generally achieved – at best – limited success. For example, the *Agreement on Internal Trade* was not legally enforceable and led to minimal changes in either federal or provincial laws or regulations.[25]

27. More often, such cooperative initiatives are marred by provincial recalcitrance or excessive delays. As described in *Richardson*, in the negotiations leading to the 1982 constitutional amendments, the federal government proposed revisions to expand the wording of section 121 to expressly protect the free movement of services and capital and to address a perceived "tendency in the provinces to erect interprovincial trade barriers." But nine of ten provinces rejected the amendment.[26]

28. The limits of cooperation were recently highlighted by the Senate Committee, which recommended that if the federal and provincial governments fail to conclude a satisfactory agreement on internal trade, then "the federal government must act expeditiously and make a reference to the Supreme Court of Canada with respect to the applicability of section 121" –

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24 Appellant's Factum, paras. 111-114.

25 Patrick J. Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed. (Toronto: Irwin Law, 2017), p. 316.

26 *Richardson*, *supra*, para. 65.

including to determine "whether sections 91 and 92 must be read in the context of section 121."[27] The federal, territorial and provincial governments have since released the text of the *Canadian Free Trade Agreement*, but it contains many exceptions – including broad exceptions regarding the alcohol industry in Canada.[28] It therefore remains essential to determine whether, and if so how, sections 91 and 92 must be read in the context of section 121.

29. A robust interpretation of section 121 is needed to bring Canada's approach to interprovincial trade into the modern era of international trade, to enhance the Canadian economy, and to increase prosperity for Canadians across the country.

PART IV – SUBMISSIONS ON COSTS

30. The MEI does not seek costs and asks that it not be liable to pay the costs of any party or intervener.

PART V – PERMISSION TO PRESENT ORAL ARGUMENT

31. By Order dated October 10, 2017, the Court granted the MEI permission to present oral argument not exceeding five minutes at the hearing of the appeal.

DATED at Toronto this 20th day of November, 2017.

per

Mark A. Gelowitz
Robert Carson

OSLER, HOSKIN & HARCOURT LLP
Counsel for the Intervener
Montreal Economic Institute

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27 *Senate Committee Report*, *supra*, p. iv, 9-10.

28 Available: https://www.cfta-alec.ca/. Specific exceptions are laid out in Annexes I and II, from pages 207-345.

PART VI – TABLE OF AUTHORITIES

BOA Tab	Cases	Paragraph Referred to
	Attorney-General for Manitoba v. Manitoba Egg and Poultry Association, [1971] S.C.R. 689.	4, 24
	Black v. Law Society of Alberta, [1989] 1 S.C.R. 591.	2, 13
	Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157.	11, 27
	Central Canada Potash Co. Ltd. et al. v. Government of Saskatchewan, [1979] 1 S.C.R. 42.	24
	Gold Seal Ltd. v. Alberta (Attorney-General) (1921), 62 S.C.R. 424.	10, 13
	Lawson v. Interior Tree Fruit and Vegetables Committee of Direction, [1931] S.C.R. 357.	4
	Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077.	4
	Murphy v. CPR, [1958] S.C.R. 626.	11, 20
	R. v. Comeau, 2016 NBPC 3.	6
	Reference re Agricultural Products Marketing, [1978] 2 S.C.R. 1198.	12

BOA Tab	Secondary Sources	Paragraph Referred to
1	Lukas Albrecht & Trevor Tombe, "Internal trade, productivity and interconnected industries: A quantitative analysis" (2016) 49(1) The Canadian Journal of Economics 237.	8
2	Jean Chrétien, Securing the Canadian Economic Union in the Constitution (Government of Canada, 1980).	22
	Consolidated Text of *Canadian Free Trade Agreement*	28
3	Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Thomson Reuters, 2016).	24
	Industry Canada Research Publications Program, *International Trade, Interprovincial Trade, and Canadian Provincial Growth* by Serge Coulombe (Working Paper Number 40, December 2003).	8

4	Patrick J. Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed. (Toronto: Irwin Law, 2017).	26
5	Report of the Standing Senate Committee on Banking, Trade and Commerce, *Tear Down These Walls: Dismantling Canada's Internal Trade Barriers* (June 2016).	2, 8, 15, 28
	Statistics Canada, Analytical Studies Branch Research Paper Series, "Going the Distance: Estimating the Effect of Provincial Borders on Trade when Geography Matters" by Robby K. Bemrose, W. Mark Brown & Jesse Tweedle (Catalogue number 11F0019M – No. 394, September 2017)	9
	Statistics Canada, *Table 183-0024* - *Sales of alcoholic beverages of liquor authorities and other retail outlets, by value, volume, and beverage type, annual.*	6

PART VII – STATUTORY PROVISIONS

	Legislation	Paragraph Referred to
1.	*Importation of Intoxicating Liquors Act*, R.S.C., 1985, c. I-3, s. 3(1). *Loi sur l'importation des boissons enivrantes*, L.R.C. 1985, c. I-3, s. 3(1).	3
2.	*Liquor Control Act*, R.S.N.B. 1973, c. L-10, s. 134. *Loi sur la réglementation des alcools*, L.R.N.B. 1973, c. L-10, s. 134.	3
3.	*The Constitution Act, 1867 (U.K.)*, 30 & 31 Victoria, c.. 3, ss. 91, 92, 121. *Loi constitutionnelle de 1867*, 30 & 31 Victoria, c. 3, ss. 91, 92, 121.	2