

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

B E T W E E N :

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(Appellant)

- and -

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(Respondent)

- and -

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FEDEX CANADA FACTUM

PART I - OVERVIEW AND STATEMENT OF FACTS

1. This case involves the effect of a New Brunswick enactment upon a consumer transaction that was entered and consummated entirely outside New Brunswick. The enactment, however, also affects true interprovincial e-commerce transactions: *those in which a purchaser in one province orders goods online from a seller in another province for delivery to the purchaser in her own province*. Federal Express Canada Corporation (“**FedEx Canada**”) provides an expedited delivery service that supports such e-commerce transactions.¹ These are now common transactions in the daily life of Canadians. They involve wines² and other goods, and they are an integral part of a vibrant modern economy.

2. A suitable framework for determining validity under s. 121 of the *Constitution Act, 1867*³ ought to consider not only the dominant purpose of the impugned enactment, but also the full range of its legal and practical effects. For that reason, FedEx Canada proposes a principled approach for determining constitutional validity under s. 121. That approach is grounded in the “*essence and purpose*” test that has emerged from the Court’s decisions related to s. 121. It incorporates principles from the “*pith and substance*” doctrine used in division of powers jurisprudence to determine the true nature of an enactment. Those principles require a proper consideration of the enactment’s dominant purpose, as well as its legal and practical effects.

¹ It is widely known that FedEx Canada is an intra-provincial, interprovincial and international common carrier, and that its services include express overnight delivery of consumer goods.

² For example, Nova Scotia law specifically permits the personal importation of Canadian wines into the province: *Importing Wine for Personal Use* made under clause 50(f) of the *Liquor Control Act*, R.S.N.C. 1989, c. 260, N.S. Reg. 267/2015.

³ Section 121 of the *Constitution Act, 1867* provides that “*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*”: *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), reprinted in R.S.C. 1985, Appendix II, No. 5, s. 121.

3. Such a principled approach would provide courts with an enhanced framework for addressing the validity of enactments under s. 121. It would allow judges to more readily identify whether an enactment is in “*essence and purpose*” related to a provincial boundary. It would provide courts and legislatures with improved guidance regarding impermissible effects upon the free flow of goods across a provincial border. Finally, it would encourage co-operative federalism by more precisely defining the limits of unilateral provincial action.

PART II - QUESTIONS IN ISSUE

4. FedEx Canada intervenes in this case to make submissions on the appropriate contours of a principled “*essence and purpose*” doctrine for the interpretation of s. 121.

PART III - STATEMENT OF ARGUMENT

A. The Emergence of an Essence and Purpose Test

5. In early decisions of the Court, s. 121 was found to prohibit only customs duties on the transit of goods across a provincial boundary.⁴ In 1958, however, the Court’s decision in *Murphy v. Canadian Pacific Railway* saw the emergence of an “*essence and purpose*” test for validity under s. 121. Justice Rand held that the word “*free*” as used in s. 121 means “*without impediment related to the traversing of a provincial boundary*”.⁵ As Justice Rand stated:

“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*

⁴ *Gold Seal Ltd. v. Alberta*, (1921) 62 S.C.R. 424; *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] A.C. 550, [1943] 4 D.L.R. 81 at 91-92 (J.C.P.C.).

⁵ *Murphy v. Canadian Pacific Railway*, [1958] S.C.R. 626 at 638.

upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.⁶ [emphasis added]

6. Chief Justice Laskin later applied the essence and purpose test in *Reference re Agricultural Products Marketing Act (Canada)*. The Court upheld an impugned egg marketing scheme as it was not “*in its essence and purpose related to a provincial boundary*”.⁷ The Chief Justice found the scheme intended an “*equitable basis for the flow of trade*”, and was not designed to be a punitive regulation unequally affecting the provinces.⁸

7. In *Canadian Egg Marketing Agency v. Richardson*, Justice McLachlin (as she then was) noted that s. 121 permits legislation that incidentally impinges on the flow of goods across provincial boundaries, but prohibits legislation that is in “*essence and purpose related to a provincial boundary*”.⁹

B. A Principled Essence and Purpose Doctrine is Warranted

8. No case to date involving s. 121 has required that the Court elaborate upon the application of the essence and purpose test. Features of this case, however, call for the Court to provide further guidance in the determination of validity by developing the contours of a principled “*essence and purpose*” doctrine. The need for guidance can be illustrated by comparing the commercial transaction in this case with commonplace e-commerce transactions.

9. In the present case, New Brunswick seeks to prohibit the possession within the province of a product purchased in a consumer transaction that occurred entirely outside of

⁶ *Murphy v. Canadian Pacific Railway*, [1958] S.C.R. 626 at 642.

⁷ *Reference re Agricultural Products Marketing Act (Canada)*, [1978] 2 S.C.R. 1198 at 1268.

⁸ *Reference re Agricultural Products Marketing Act (Canada)*, [1978] 2 S.C.R. 1198 at 1268.

⁹ *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at para. 123 (dissent on another point). Section 121 was also briefly discussed in the majority judgment at paras. 63-66.

the province. The transaction was consummated before the goods entered New Brunswick. No provincial boundary was interposed to prevent it. The essence and purpose test provides little guidance, however, as to whether the consumer's ability to consummate the transaction is relevant.

10. Contrast that transaction with interprovincial e-commerce transactions that occur daily in Canada involving a wide range of goods. A consumer in one province buys a good online from a seller in another province, to be delivered in her home province. Such transactions can only be consummated if the product can traverse a provincial boundary. The effect of the enactment is therefore to prohibit such transactions. The essence and purpose test provides little guidance as to relevance of this effect, however, in determining validity in this case.

C. Proposed Principles for an Essence and Purpose Doctrine

11. The “*pith and substance*” doctrine was developed to resolve a different constitutional question – one related to the division of powers.¹⁰ Nevertheless, it provides the Court with a useful model for a principled “*essence and purpose*” doctrine because it was developed to identify the true nature of an enactment.¹¹

12. A case involving the division of powers begins with an analysis of the “*pith and substance*” of the impugned legislation. This consists of an inquiry into the true nature of the

¹⁰ *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paras. 25-31, [2007] 2 S.C.R. 3; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 at para. 52, [2002] 2 S.C.R. 146.

¹¹ *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 26, [2007] 2 S.C.R. 3.

law in question to identify the “*matter*” to which it essentially relates.¹² A court must consider the purpose and the legal and practical effects of the legislation.¹³

13. To assess an enactment’s purpose, the court may consider both intrinsic evidence, such as the preamble or purpose clause in the legislation, and extrinsic evidence, such as *Hansard* or parliamentary debates.¹⁴ A provincial law is “*colourable*” if it appears to regulate local activities within the province, but if it is nevertheless directed at a matter beyond the competence of a provincial legislature.¹⁵

14. A court must consider both the legal and practical effects of the enactment – the direct effects and side effects that flow from its application.¹⁶ Consideration of those effects may reveal the true pith and substance of the law. Incidental or secondary effects do not have an impact on constitutionality, however. A law that has incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*, if the law is primarily in relation to a matter that falls within the field of provincial legislative competence.¹⁷

15. From the jurisprudence involving the application of the pith and substance doctrine, three principles emerge as useful analogs for a principled essence and purpose doctrine.

¹² *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 26, [2007] 2 S.C.R. 3.

¹³ *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paras. 25-27, [2007] 2 S.C.R. 3; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 at paras. 53-54, [2002] 2 S.C.R. 146.

¹⁴ *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 27, [2007] 2 S.C.R. 3; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 at para. 53, [2002] 2 S.C.R. 146.

¹⁵ *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14 at para. 31, [2015] 1 S.C.R. 693; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 at 318 and 332: Provincial legislation repealing a lease granted to Hydro-Quebec was colourable as the actual purpose of the law was to expropriate hydro rights under the lease contract.

¹⁶ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 at para. 54, [2002] 2 S.C.R. 146.

¹⁷ *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 28, [2007] 2 S.C.R. 3; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14 at para. 32, [2015] 1 S.C.R. 693.

i. Dominant Purpose

16. First, an enactment should be found to violate s. 121 if its dominant purpose is to restrict the free flow of commerce across a provincial boundary. If the dominant purpose of an enactment is related to a provincial boundary, it ought not to be saved by any ancillary purpose.¹⁸ As in the pith and substance doctrine, a court should consider both intrinsic and extrinsic evidence to determine the dominant purpose.

ii. Legal and Practical Effects

17. Second, the purpose of an enactment may be determined from the legal and practical effects that flow from its application.¹⁹ Reliance upon these effects to determine the purpose of legislation is well established in division of powers jurisprudence. In the present case, the practical effects of the impugned enactment can serve to illuminate its dominant purpose.

18. The impugned enactment prohibits the possession of liquor purchased in another province and then transported into New Brunswick by the purchaser. The practical effect is that a consumer who purchases liquor in another province must consume or dispose of it in that province or carry the liquor to some other place where its possession is not prohibited.

19. The practical effects of the enactment extend further than this, however. A New Brunswick resident also cannot purchase wine online from a British Columbia winery and have it delivered to her home in New Brunswick. She would be in violation of New Brunswick law immediately upon taking delivery of her goods. While the legal effect of the enactment is to prohibit possession of the British Columbia wine in New Brunswick, the

¹⁸ This is similar to the pith and substance doctrine, where a provincial law would be invalid if its dominant purpose is a matter within federal jurisdiction: *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 28, [2007] 2 S.C.R. 3.

¹⁹ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 at para. 54, [2002] 2 S.C.R. 146.

practical effect of the impugned enactment is to prohibit a true interprovincial consumer transaction based upon the place of origin of the goods.

20. A principle requiring consideration of the legal and practical effects of an enactment would provide guidance for courts and for legislators seeking to regulate goods without violating s. 121. For example, validity might depend upon whether the enactment's effects extended to interprovincial transactions. An enactment might validly prohibit possession of liquor purchased in an entirely extra-provincial transaction (as in Mr. Comeau's case) provided it expressly permitted possession of liquor purchased in a true interprovincial transaction.

iii. Colourability

21. Third, an enactment is colourable, and therefore violates s. 121, if it appears to regulate local activities within the province but it is nevertheless designed to restrict the free flow of commerce across a provincial boundary. This principle is clearly supported by the judgment of Justice Rand, but also aligns with the incidental effects principle that operates in the application of the pith and substance doctrine.

22. Colourability is particularly important in the context of s. 121. As the use of liquor is known to carry risks and impose social costs, the regulation of its possession may appear to be a matter of legitimate local concern. The use of a dangerous product may be effectively regulated, however, without improperly restricting the flow of commerce across a provincial boundary. In Ontario, for example, the provincial *Electricity Act* prohibits any person from

using or selling any electrical product or device that does not meet Ontario's requirements.²⁰ While the *Electricity Act* prohibits the use or sale of non-compliant products from other provinces, it is not a colourable attempt to restrict the flow of commerce across a provincial boundary because it does not discriminate against a good based on the province of origin.

23. The *Electricity Act* may be contrasted with the impugned enactment in this case. New Brunswick does not discriminate against liquor based upon any quality directly related to health and safety or the social costs of consumption. Rather, it discriminates based upon the province of origin. By adopting a principle of colourability, the Court could consider the basis upon which discrimination occurs as evidence of purpose. An enactment that discriminates against goods that fail to meet quality standards might be valid under s. 121, whereas one that discriminates against goods based on their place of origin might not.

D. The Doctrine Would Encourage Co-operative Federalism

24. The Appellant cautions that the decision in this case may undermine co-operative federalism, noting the benefits of co-operative marketing schemes.²¹ Co-operative federalism refers to the “*network of relationships between the executives of the central and regional governments [through which] mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process*”.²² Such marketing schemes seek to stabilize domestic markets through nation-wide production control, pricing mechanisms and limitations on

²⁰ *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, s. 113(1): The Lieutenant Governor in Council may make regulations regarding various aspects of electricity products, including prohibiting use or sale of products, unless they are inspected and approved; *Product Safety*, O. Reg. 438/07, s. 5(1), under *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A.

²¹ Appellant's Factum, at paras. 92-94.

²² *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14 at para. 17, [2015] 1 S.C.R. 693, citing P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 5-46.

foreign import.²³ Broadly speaking, they do not violate s. 121 because they do not directly control or restrict trade but attempt to establish “*an equitable basis for the flow of trade*”.²⁴

25. While there is presently no co-operative scheme for liquor,²⁵ additional clarity regarding the limits of unilateral legislative action would encourage co-operative federalism in this field.

26. Nunavut, for example, submits that its prohibition against the possession of extra-territorial liquors is essential to maintain high liquor prices that discourage consumption.²⁶ If governments were prohibited from restricting interprovincial e-commerce, liquor pricing policies could nevertheless be implemented through co-operative federalism. Co-operative tax regimes presently compel suppliers to collect and remit provincial direct taxes (which can be used to maintain liquor prices) based on a “*place of supply*” rule. In the case of a sale of goods from one province to another, the supply of the goods is generally deemed to be made in the destination province.²⁷ Where a supplier delivers or sends the goods to a recipient in

²³ K. Heminthavong, “Canada’s Supply Management System” (December 17, 2015), Economics, Resources and International Affairs Division, Parliamentary Information and Research Service, Publication No. 2015-138-E, online: Library of Parliament <<https://lop.parl.ca/Content/LOP/ResearchPublications/2015-138-e.html?cat=agriculture>>.

²⁴ *Reference re Agricultural Products Marketing Act (Canada)*, [1978] 2 S.C.R. 1198 at 1268; *Fédération des producteurs de volailles du Québec c. Pelland*, 2005 SCC 20 at para. 36-38, [2005] 1 S.C.R. 292.

²⁵ Laws regarding interprovincial trade in liquor differ in each province and federal law is merely permissive. Federal law exempts interprovincial transportation of liquor by an individual in quantities and as permitted by the provincial law, for the individuals’ own personal consumption, and expressly permits common carriers like FedEx Canada to transport unopened liquor across provincial boundaries: *Importation of Intoxicating Liquors Act*, R.S.C., 1985, c. I-3, s. 3(2)(a) and 3(2)(h).

²⁶ Factum of the Government of Nunavut, as Represented by the Minister of Justice, at paras. 17-18 and 28-30.

²⁷ The place of supply for the sale of tangible personal property is determined under sections 1 and 3 in Part II of Schedule IX to the *Excise Tax Act* (Canada), R.S.C., 1985, c. E-15 (the “ETA”). Quebec place of supply rules are harmonized with those in Part IX of the ETA: *An Act respecting the Quebec sales tax* (Quebec), CQLR, c. T-0.1, ss. 22.7 and 22.9. An explanation of how the inter-provincial place of supply rules work for sales of goods can be found under the subheading “**Tangible personal property supplied by way of sale**” in the *Draft GST/HST Technical Information Bulletin B-103, Harmonized Sales Tax – Place of supply rules for determining whether a supply is made in a province*, online: Government of Canada <<https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/b-103/harmonized-sales-tax-place-supply-rules-determining-whether-a-supply-made-a-province.html>>.

another province, the sale is subject to applicable sales tax in that province.²⁸ Such direct taxation does not violate s. 121.²⁹ Governments can regulate co-operatively in a manner that achieves valid local objectives while treating suppliers and producers across provinces equitably.³⁰ Nunavut could effectively set liquor prices for interprovincial sales through a co-operative tax regime.³¹

PART IV - SUBMISSIONS ON COSTS

27. FedEx Canada seeks no costs and asks that no costs be ordered against FedEx Canada.

PART V - PERMISSION TO PRESENT ORAL ARGUMENT

28. By Order dated October 10, 2017, the Court (Moldaver J.) granted FedEx Canada permission to present oral argument not exceeding five minutes at the hearing of the appeal.

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

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Federal Express Canada Corporation

²⁸ The sales tax is imposed at the appropriate rate imposed under Part IX of the ETA in that province, and Quebec Sales Tax in Quebec.

²⁹ *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] A.C. 550, [1943] 4 D.L.R. 81 at 92-93 (J.C.P.C.).

³⁰ *Reference re Agricultural Products Marketing Act (Canada)*, [1978] 2 S.C.R. 1198 at 1268.

³¹ Under various *Comprehensive Integrated Tax Coordination Agreements* (the “**CITCAs**”) with participating HST provinces and Quebec, each of these provinces maintains autonomous control over its own provincial tax rate and certain other features of the HST, including providing for specific provincial sales tax relief. For example, Ontario’s CITCA with the federal government may be found online: Ontario Ministry of Finance, <<https://www.fin.gov.on.ca/en/publications/2009/citca.html>>.

PART VI - TABLE OF AUTHORITIES

<u>Jurisprudence</u>	<u>Referred to at para.</u>
<i>Atlantic Smoke Shops Ltd. v. Conlon</i> , [1943] A.C. 550, [1943] 4 D.L.R. 81 (J.C.P.C.)	5, 26
<i>Canadian Egg Marketing Agency v. Richardson</i> , [1998] 3 S.C.R. 157, [1998] S.C.J. No. 78	7
<i>Canadian Western Bank v. Alberta</i> , 2007 SCC 22, [2007] 2 S.C.R. 3	11-14, 16
<i>Fédération des producteurs de volailles du Québec c. Pelland</i> , 2005 SCC 20, [2005] 1 S.C.R. 292	24
<i>Gold Seal Ltd. v. Alberta</i> , (1921) 62 S.C.R. 424, [1921] S.C.J. No. 43	5
<i>Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)</i> , 2002 SCC 31, [2002] 2 S.C.R. 146	11-14, 17
<i>Murphy v. Canadian Pacific Railway</i> , [1958] S.C.R. 626, 15 D.L.R. (2d) 145	5
<i>Quebec (Attorney General) v. Canada (Attorney General)</i> , 2015 SCC 14, [2015] 1 S.C.R. 693	13, 14, 24
<i>Reference re Agricultural Products Marketing Act (Canada)</i> , [1978] 2 S.C.R. 1198, [1978] S.C.J. No. 58	6, 24, 26
<i>Reference re Upper Churchill Water Rights Reversion Act</i> , [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1	13

<u>Secondary Sources</u>	<u>Referred to at para.</u>
<i>Draft GST/HST Technical Information Bulletin B-103, Harmonized Sales Tax – Place of supply rules for determining whether a supply is made in a province</i> , online: Government of Canada < https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/b-103/harmonized-sales-tax-place-supply-rules-determining-whether-a-supply-made-a-province.html >.	26

<p><u>K. Heminthavong, “Canada’s Supply Management System” (December 17, 2015), Economics, Resources and International Affairs Division, Parliamentary Information and Research Service, Publication No. 2015-138-E, online: Library of Parliament</u> <u><https://lop.parl.ca/Content/LOP/ResearchPublications/2015-138-e.html?cat=agriculture>.</u></p>	24
<p>Ontario Comprehensive Integrated Tax Coordination Agreement, online: Ontario Ministry of Finance, <u><https://www.fin.gov.on.ca/en/publications/2009/citca.html>.</u></p>	26

PART VII - LEGISLATION

1. *An Act respecting the Quebec sales tax* (Quebec), CQLR, c. T-0.1
2. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), reprinted in R.S.C. 1985, Appendix II, No. 5, ss. 91, 92, 121
3. *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, s. 113(1)
4. *Excise Tax Act* (Canada), R.S.C., 1985, c. E-15
5. *Importation of Intoxicating Liquors Act*, R.S.C., 1985, c. I-3, s. 3
6. *Importing Wine for Personal Use* made under clause 50(lf) of the *Liquor Control Act*, R.S.N.C. 1989, c. 260, N.S. Reg. 267/2015
7. *Liquor Control Act*, R.S.N.B. 1973, c. L-10
8. *Liquor Control Act*, R.S.N.C. 1989, c. 260
9. *Product Safety*, O. Reg. 438/07, s. 5(1), under *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A