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
(Appellant)

– and –

GERARD COMEAU

RESPONDENT
(Respondents)

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PART I

OVERVIEW OF POSITION AND FACTS

1. Gerard Comeau purchased liquor in Quebec and brought it into his home province of New Brunswick.[1] He was charged in New Brunswick with possessing liquor not purchased from the New Brunswick Liquor Corporation as is required by s. 134 of the *Liquor Control Act* ("*LCA*").[2]

2. This case began as a simple ticket offence. A simple case it is not. Section 121 of the *Constitution Act, 1867*[3] was pleaded as a defence to the charge. It 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."

3. Despite its reference to "admitted free" s. 121 has not to this date been considered as a standalone "free trade" provision. The New Brunswick trial judge ruled however that the provincial law set out in s. 134 violated constitutional law as set out in s. 121. It was therefore of no force and effect against Mr. Comeau and the charge was dismissed.

4. This "simple case" and the trial decision that resulted raise the issue of competing constitutional provisions and propose an end to Canadian federalism as it was originally conceived, has politically evolved and is judicially confirmed.

5. The relationship between s. 121 and other constitutional provisions,[4] along with its function within the Canadian constitution, have been the subject of political debate and

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[1] Appellant's Record, Vol. V, Tab 16, Ex. C-1 Agreed Statement of Facts

[2] *Liquor Control Act*, R.S.N.B. 1973, c. L-10, s. 134 ("*LCA*")

[3] *Constitution Act, 1867,* (30 &31 Vict), c.3 (U.K.)

[4] Namely, provincial s. 92 property and civil rights power, as well as ss. 91 and 94

discussion for decades.[5] This is the first time however that this Court is being asked directly to determine the relationship of s. 121 to the provincial constitutional power over property and civil rights pursuant to s. 92 of the *Constitution Act, 1867*.[6][7] The Court is also being asked to consider that s. 134 *LCA*, a provision which in its essence and purpose is aimed at the regulation of liquor within the borders of New Brunswick,[8] and the federally supportive s. 3 of the *Importation of Intoxicating Liquors Act* ("*IILA*")[9] are a constitutionally permissible example of cooperative federalism.[10]

6. An affirmation by this Court of the trial judge's interpretation of s. 121 would, however, undermine this cooperative legislative effort and would redesign Canadian federalism while at the same time implicating the courts in policy choices beyond the scope of any

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[5] See, for example, the Honourable Jean Chrétien, *Securing the Canadian Economic Union in the Constitution*, Government of Canada, 1980, pp. 19-20. This document is a discussion paper and part of the talks related to the repatriation of the *Constitution* in 1982; see also Laskin, John B. "*Mobility Rights Under the Charter*." (1982) *Supreme Court L.R.* Vol. 4, page 89

[6] *The Citizens Insurance Company v. William Parsons*, 1881 CarswellOnt 253 (J.C.P.C.) at paras. 19-20; *Reference re Natural Products Marketing Act (1934)*, [1936] SCR 398 at para. 11; *Atlantic Smoke Shops Ltd. v. Conlon*, 1943 CanLII 372 (UK J.C.P.C.) at para. 21; *Reference re Farm Products Marketing Act (Ontario)*, 1957 CarswellNat 290 (S.C.C.) at paras. 27-28, 30-31; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at paras. 64-64 and para. 123 (McLachlin J. as she then was, in dissent).

[7] Consider also that ss. 92(13) and 92(16) work together, as cited in *R. v. Gautreau*, [1978] N.B.J. No. 107 (N.B.C.A)

[8] *Gautreau, supra* at paras. 7-12

[9] *Importation of Intoxicating Liquors Act*, R.S.C., 1985, c. I-3 ("*IILA*")

[10] *Quebec v. Canada*, 2015 SCC 14, at paras. 17-19; directly implicated in this appeal is s. 3 of the *IILA, supra*, it being a practical application of the principle of cooperative federalism

judicial mandate. Essentially, the courts would then be required to reformulate Canadian federalism as it now exists.

7. The Appellant will trace the constitutional design, evolution and principles inherent in the *Constitution Act, 1867*. Section 121 of the *Constitution* will be considered from the perspective of judicial precedent, its placement in, and its relationship to other provisions in the *Constitution*. Finally, the Appellant will submit that an examination of s. 134 of the *LCA* and s. 3 of the *IILA* — in light of constitutional principles as applied to s. 121 — will allow for only one conclusion: that the trial judge's interpretation and analysis of s. 121 is flawed.

PART II
QUESTION IN ISSUE

8. Does s. 121 of the *Constitution Act, 1867* render unconstitutional s. 134 of the *Liquor Control Act*, which along with s. 3 of the *Importation of Intoxicating Liquors Act*, establishes a federal-provincial regulatory scheme in respect of intoxicating liquor?

PART III
STATEMENT OF ARGUMENT

The *Constitution Act, 1867*

The Design:

9. An interpretation of s. 121 of the *Constitution Act, 1867* must consider the social, economic and political forces that resulted in Canadian federalism in the 19th century and continue to influence its development today.

10. Sir John A. MacDonald, a noted centralist, extolled the virtues of the federal scheme agreed upon during the Quebec Conference in 1865. He described it as the best result possible given that a "…legislative union, pure and simple, was impracticable, our next

attempt was to form a government upon federal principles, which would give to the General Government the strength of a legislative and administrative union, while at the same time it preserved that liberty of action for the different sections which is allowed by a Federal Union....."[11]

11. The history of Canadian constitutional law is replete with references to the political, economic and cultural incentives behind confederation, including speeches of both Canadian and British parliamentarians.[12]

12. In the 1895 *Reference re Jurisdiction to Pass Prohibitory Liquor Laws*[13] case, Gwynne J. states the following regarding the Quebec Resolutions and Confederation: "…the *British North America Act* was passed merely for the purpose of giving legislative form to the terms and provisions of a treaty of union between the respective provinces forming the confederation and the Imperial Government, as such terms and provisions are expressed in the resolutions adopted by the framers of the constitution and by the respective legislatures of the provinces of Canada…"[14]

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[11] Excerpts from *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada.* Quebec: Hunter, Rose & Co., 1865, pp. 29-45

[12] See for example *Reference Re Jurisdiction to Pass Prohibitory Liquor Laws,* [1895] 24 S.C.R. 170, particularly the historical analysis in the reasons of Gwynne J. and Sedgewick J. starting at para. 5 and para. 48 respectively. See also *Reference re Initiative & Referendum Act (Manitoba),* [1919] AC 935 quoted in *Reference re Secession of Quebec*, [1998] 2 SCR 217; see also Savoie, Donald. J. *Looking for Bootstraps*: *Economic Development in the Maritimes*. Nova Scotia: Nimbus Publishing Limited, 2017, at pages 81-88

[13] *Reference re Jurisdiction to Pass Prohibitory Liquor Laws,* [1895] 24 S.C.R. 170, *supra*

[14] *Prohibitory Liquor Laws*, *supra* at para. 5

13. In this same case, the Supreme Court refers extensively to the speech by Lord Carnarvon, then Colonial Secretary, (and referenced by the Respondent's expert, Dr. Smith[15]) as he was presenting the second reading of the *British North America Act* to the British Parliament. The speeches of several Fathers of Confederation were also referenced. Interestingly Lord Carnarvon said in part:

> At present there is but a scanty interchange of the manufacturing, mining, and agricultural resources of these several Provinces. They stand to each other almost in the relation of foreign States. Hostile Custom Houses guard the frontiers, and adverse tariffs choke up the channels of intercolonial trade. There is no uniformity of banking, no common system of weights and measures, no identity of postal arrangements.
>
> ….
>
> Such then being the case, I can hardly understand that any one should seriously dispute the advantage of consolidating these different resources, and interests, and incidents of government under one common and manageable system.[16]

14. Note that no mention is made of mandatory free trade nor of seamless provincial borders, but tariffs and custom houses are reviled.[17]

15. As noted, the *Constitution Act, 1867* has been referred to as a "treaty".[18] It was viewed as the best deal available amongst the confederating parties. It was so considered then and is so now.[19]

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[15] Appellant's Record, Vol. V. Tab 29, Ex. D-6, Smith Andrew. "*The Historical Origins of Section 121 of the British North America Act: a Study of Confederation's Political, Social, and Economic Context* supra, pages 19-20 ("*Smith Report*")

[16] *Hansard* 1803-2005, *HL Deb 19 February 1867* vol. 185 cc. 557-582

[17] The *Quebec Resolutions* themselves do not speak of "free trade", nor even "trade" except when addressing the trade and commerce power of the "General Government"

[18] *Prohibitory Liquor Laws*, *supra* at paras. 5-6

[19] *Canadian Western Bank v. Alberta*, 2007 SCC 22, at paras. 29-31; see also *Parsons*, *supra*

16. However, as Peter Hogg notes "…the framers of the *Constitution Act*, 1867 deliberately drafted a document that included ambiguities and uncertainties that would need to be resolved later. The courts-the Privy Council (from 1867 to 1949) and the Supreme Court of Canada (from 1950 to present)--were left the unenviable task of resolving these ambiguities and uncertainties."[20] This may have been a practical necessity or political strategy.[21] In either case, the courts inherited a nation in its constitutional infancy.

17. The courts were required to rationalize what Hogg has called "…a blend of paradoxical drafting, containing both centralizing and decentralizing provisions. He describes the constitution as having to be "…designed by these final courts of appeal. This was no small task for a country with a huge land-mass, two official languages, two judicial systems, three founding peoples (English-Canadians, French-Canadians, and the Aboriginal peoples of Canada) and a multi-cultural citizenry.[22]

18. It is important to remember that the constitution is a composite of written and unwritten laws, conventions and rules, all of which play a role in the orderly resolution of any constitutional debate. Fundamental to, and at the center of an understanding of the constitution, are well recognized constitutional principles.[23]

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[20] Peter W. Hogg and Wake K. Wright, *Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate About Canadian Federalism* (2005), UBC LR 38.2, at page 352

[21] Savoie, Donald. J. *supra* at pages 81-88

[22] Hogg & Wright, *supra* at pages 329-352

[23] *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793 at page 806; *Reference re Secession*, *supra* at para. 32; Appellant's Record, Vol. V. Tab 26, Ex. C-11, *Bateman Report*, page 4

19. Ultimately, a recognition of the components of this "treaty", as it was early characterized, led to the judicial articulation of the foundational principles of Confederation,[24] the one most implicated in this case being federalism. Other principles include constitutionalism and the rule of law, democracy and minority rights.[25] These principles evoke the political philosophy of Canadian federalism and illustrate the nature of the 1867 consensus.

20. Thus the "design" of the Canadian constitution is both a political and juridical evolutionary process. This political/juridical dichotomy, in fact, has resulted in an *in tandem* development of the constitution through both the legislative/policy process and judicial incrementalism as guided by constitutional principles.[26]

21. More will be said of this below but suffice it to say that within the context of these interpretative principles, 'original intent' as relied upon by the trial judge and as advanced by the Respondent, as a single offering to constitutional understanding, must swim in deeper waters:

> It is fiction to suppose that there is an actual single intention behind any section of the Constitution. It is more accurate to describe any given constitutional provision as the outcome of the tension between numerous interacting viewpoints, as part of a continual process of evolution.[27]

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[24] *Parsons, supra*; *Edwards v. Attorney General for Canada*, [1930] AC 124; *Natural Products Marketing, supra*; *Attorney General Canada v. Attorney General Ontario*, [1937] A.C. 326; *Farm Products Marketing, supra*; *Reference re Securities Act*, [2011] 3 SCR 837; *Reference re Secession, supra*; *Reference re Senate Reform*, 2014 SCC 32

[25] *Reference re Secession, supra*; *Canadian Western Bank, supra*

[26] *Reference re Secession, supra* at para. 33; see also *Canadian Western Bank, supra* at paras 29-31

[27] Santoro, David. *The Unprincipled Use of Originalism and Section 24(2) of the Charter*. *Alberta Law Review*, 2007, 45:1, at page 20

The Evolution:

22. The requirement of an evolving balance amongst constitutional powers was very early debated. The Judicial Committee of the Privy Council first recognized that the principles of Canadian federalism allowed for a continuum of divided federal and provincial powers.[28]

23. So it is also that this country's jurisprudential history shows an increasingly nuanced approach to constitutional interpretation. In *Reference re Secession of Quebec*,[29] this Court emphasizes that "…our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order."[30]

24. This Court's statement about the federal division of powers, as it was long ago described in *Reference re Initiative & Referendum Act (Manitoba)*,[31] and quoted in *Reference re Secession of Quebec* is worthy of note. The Court there reiterates that "…each Province was to retain its independence and autonomy and to be directly under the Crown as its head." The provinces are not subordinate to "a central authority" nor are they melded together. They are to retain their differences and subject their interests to a central government "…entrusted with exclusive authority only in affairs in which they had a common interest." [32]

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[28] *Parsons, supra*; *Reference re Initiative & Referendum (Manitoba),* [1919] AC 935

[29] *Reference re Secession, supra* at para. 33

[30] *Reference re Secession, supra* at para. 33

[31] *Reference re Initiative & Referendum Act, supra*

[32] *Reference re Secession, supra* at para. 58; see also *Haig v. R.*, [1993] 2 S.C.R. 995 at 1047

25. Over time our constitutional history indicates an understanding for the requirement of both flexible political accommodation as well as constitutional reliability. Nowhere has it been proclaimed that Canada's constitutional framework is characterized by textual certainty.[33]

26. Professor Hogg observed instead that "progressive interpretation" has permitted constitutional development in the face of immense change, without the requirement for constitutional amendment. This "doctrine"[34] ensures that the "…general language used to describe the classes of subjects (or heads of power) is not to be frozen in the sense in which it would have been understood in 1867. . . . [T]he words of the Act are to be given a 'progressive interpretation', so that they are continuously adapted to new conditions and new ideas."[35]

27. Progressive interpretation recognizes the unique nature of the constitution: "…it is not a statute like any other: it is a 'constituent' or 'organic' statute, which has to provide the basis for the entire government of a nation over a long period of time." It is not easily subject to amendment as conditions change over time, thus an "…inflexible interpretation, rooted in the past, would only serve to withhold necessary powers from the Parliament or Legislatures."[36]

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[33] *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20; *Caron v Alberta*, 2015 SCC 56, at paras. 6, 38; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.J. No. 18, at paras. 1-2

[34] Peter W. Hogg, *Constitutional Law*, 5th ed., Carswell, 2007, ch. 11, pages 413-414

[35] Hogg, *Constitutional Law*, *supra* at pages 413-414

[36] *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, at para. 145

28. While it is true that courts do not enter into the arena of determining policy,[37] much about the text of the *Constitution Act, 1867* is at least ambiguous.[38] The courts therefore have been called upon to make a host of interpretative choices which have led to profound legislative and policy ramifications.[39]

29. These interpretative choices have historically been guided by the fundamental principles informing Canada's constitution as stated above. The seminal question therefore asks how the meaning of s. 121 informs its functional application after considering the constitutional text as a whole, its historical context and the relation of s. 121 to other provisions of the constitution.

30. A focus on what was both designed and achieved by the federating parties in 1867, as well as Canada's constitutional growth since, must ultimately inform the Court's analysis:[40] "…the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society… It is also important to note that the fundamental principles of our constitutional order, which include federalism, continue to guide the definition and application of the powers as well as their interplay."[41]

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[37] *Reference re Securities Act*, *supra*

[38] *Reference re Securities Act*, *supra*

[39] *Reference re Canada Assistance Plan (Canada),* [1991] 2 S.C.R. 525, at page 545; *Home Builders*, *supra* at paras. 137-138; *R v. Morgentaler*, [1988] 1 S.C.R. 30; *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698

[40] *Atlantic Smokeshops, supra* at paras. 20-22; *Canadian Western Bank, supra*; *R v. Tessling*, 2004 SCC 67, at para. 61; Binnie, Ian. "*Constitutional Interpretation and Original Intent."* (2004) 23 *Supreme Court L.R.* (2nd), at pages 345-382

[41] *Canadian Western Bank, supra* at paras. 23 and 36; consider also: "Further to the point, this Court held in *The Queen v. Beauregard* '… strict construction is rarely controlling in constitutional interpretation.' [Binnie, Ian. "*Constitutional Interpretation and Original Intent."* (2004) 23 *Supreme Court L.R.* (2nd), at pages 345-382.] At paragraphs 43 and 49, the Court rejects the literal interpretation advanced by the respondent in respect of judges' pensions as set out in section 100 of the *Constitution Act.*

The Principles of the Constitution:

Federalism:

31. The founding principles of the Canadian federation are analogously the navigation lights which illuminate a proper understanding of the issues raised herein. The three principles of federalism, democracy and constitutionalism are without doubt implicated.

32. Any interpretation of the *Constitution* must necessarily consider the extent to which the principles of the *Constitution* inform the analysis. In this case, federalism ranks high amongst those principles. A prime reminder of this requirement is found in the *Reference re Secession of Quebec*:

> It is undisputed that Canada is a federal state. Yet many commentators have observed that, according to the precise terms of the *Constitution Act, 1867*, the federal system was only partial. See, e.g., K. C. Wheare, *Federal Government* (4th ed. 1963), at pp. 18-20. This was so because, on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces. Here again, however, a review of the written provisions of the Constitution does not provide the entire picture. Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light.
> …In a federal system of government such as ours, political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other…. In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.[42]

33. The Court also states that "….Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities."[43] Certainly this statement should be borne in mind in respect of any

[42] *Reference re Secession, supra* at paras. 55-56

[43] *Reference re Secession, supra* at para. 57

analysis of s. 121.[44]

34. The principle of federalism was conceived as an essential political device in order to achieve a successful and sustainable confederation of the colonies. It has been so recognized to the present.[45]

35. The trial judge's interpretation of s. 121, in effect, subordinates the principle of federalism to an overly literal and non-contextual analysis. What the case law tells us is that, in general terms, a literal interpretation of the *Constitution* is to be avoided. Additionally, it is well established that the *Constitution* is subject to the same interpretive model as other statutes. The scheme of the Act as a whole is to be considered.

36. In this respect, the trial judge ran afoul of interpreting the *Constitution* without regard to the principles of federalism. A prime reminder of this requirement is found in the *Reference re Secession of Quebec.*[46]

Democracy:

37. In *Reference re Secession of Quebec*, the principle of democracy is articulated as follows:

> In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are "at the core of the system of representative government": *New Brunswick Broadcasting Co.*, *supra*, at p. 387. [….]
>
> …. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic

[44] *Reference re Secession, supra* at paras. 65-66

[45] *Reference re Secession, supra*; see also Appellant's Record, Vol. V, Tab 26, Ex. C-11 *Bateman Report*, page 14

[46] *Reference re Secession, supra* at paras. 55-56

> community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction….[47]

38. Section 121 as interpreted by the trial judge diminishes the role of the democratic principle. It ties Canadian constitutional democracy to the tail of a singular textual interpretation of the *Constitution*, with a singular inviolate purpose "……all articles of growth manufacture and produce….are to be admitted free….."

39. This interpretative approach is negative in its consequence, significantly stripping ss. 91 and 92 of flexible and responsive legislative purpose and reformulating the political federation achieved in 1867 through the lens of an overarching principle of economic union.

40. This error is of intrinsic importance to the operation of the Canadian political system. It constrains both the substantive and procedural character of Canadian democracy. Substantively, it is antithetical to the self-government component of democracy. It establishes an 'authority' (in this case a constitutional provision) which procedurally cannot be altered, short of a constitutional amendment. That 'authority' circumscribes the sovereign political power of the electorate[48] and the jurisdiction of federal and provincial legislatures in Canada.

41. Procedurally, s. 121 of the *Constitution*, given the trial judge's interpretation, dismantles decades of federal-provincial legislative effort and curtails Canadian federal governance as it has developed, politically, economically and judicially. That interpretation also directly impacts upon the principle of constitutionalism.

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[47] *Reference re Secession, supra* at paras. 65-66

[48] *Reference re Secession, supra* at paras. 65-66

Constitutionalism:

42. Constitutionalism refers to the supreme law through which a sovereign nation is self-governed. As stated in *Reference re Secession of Quebec*, "The Constitution binds all governments, both federal and provincial, including the executive branch… They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source."[49]

43. In *Reference re Secession of Quebec*, the constitution is described as including the:

> …constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982* [*Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11]. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules" as we recently observed in the *Provincial Judges Reference*, supra, at para. 92. Finally, as was said in the *Patriation Reference*, supra, at p. 874, the Constitution of Canada includes:
>
> …the Constitution of Canada includes the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.[50]

44. If the trial judge's reasoning is to prevail it is easy to conclude that the "…system of rules and principles which govern the exercise of constitutional authority…", as well as the constitutional balance developed over 150 years as a result of these rules and principles, and through which Canadian federalism has expressed itself for decades, no longer offer a reliable predictor for Canadians to construct political solutions through their federal arrangement.

45. Finally, but related to the principle of constitutionalism, the decision of the trial judge calls into question the principle of 'exhaustiveness'. In the *Reference re Same Sex*

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[49] *Reference re Secession, supra* at para. 72

[50] *Reference re Secession, supra* at para. 32

Marriage[51] decision, this Court holds that a fundamental interpretive principle of the *Constitution* is 'exhaustiveness': "In essence, there is no topic that cannot be legislated upon, …. A jurisdictional challenge in respect of any law is therefore limited to determining to which head of power the law relates."[52]

Section 121 of the *Constitution Act, 1867*

The Judicial Precedents and Section 121:

46. Section 121 of the *Constitution Act, 1867* does not guarantee absolute free trade. If it did it would significantly erode the authority of ss. 91 and 92 within the constitutional framework as it has been understood for 150 years. Such an interpretation would require, at minimum, a reading into the section of the word *"absolute"*. No court has previously interpreted section 121 in this manner.

47. This is consistent with the view of the former Prime Minister Jean Chrétien, in his capacity as Minister of Justice in 1980 when he wrote *"Securing the Canadian Economic Union in the Constitution"*[53] that "…absolute freedom of movement for goods, services and factors of production is neither attainable nor desirable in the real world."[54] He added:

> The constitutional securing of absolute economic mobility within Canada would obviously be incompatible with the maintenance of a federal system. The recognition of distinct political entities within the federation is

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[51] *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698, *supra*

[52] *Reference re Same Sex Marriage*, *supra* at para. 34

[53] Chrétien, Jean. *"Securing the Canadian Economic Union in the Constitution"* Government of Canada, 1980, page 30

[54] Chrétien, *supra* at page 29; see also Chrétien, Jean. *Straight from the Heart*, 1994, at pages 170-171, and Chrétien, Jean. *"Bringing the Constitution Home" Towards a Just Society*, 2000, pages 326 to 356, for context on talks around the Canadian economic union and common market during the repatriation debates

> predicated upon the existence, and continued existence, of different economic, social and cultural aspirations among the various populations they serve. Consequently, provincial legislation and regulation must be capable of variation from province to province, and such variation will inevitably cause some impediments to economic mobility; but these must be kept within the bounds of necessity."[55]

48. Comparatively, the Australian High Court in *Cole v. Whitfield*[56] determined that the word "absolute" as found in section 92 of the Australian Constitution, a similarly worded section as s. 121, has an implicit limitation to its meaning:

> Implicit in the rejection of the notion that the words "absolutely free" are to be read in the abstract as a guarantee of anarchy is recognition of the need to identify the kinds or classes of legal burdens, restrictions, controls or standards from which the section guarantees the absolute freedom of inter-State trade and commerce. As we have seen, the failure of the section to define expressly what inter-State trade and commerce was to be immune from is to be explained by reference to the dictates of political expediency, not by reference to a purpose of prohibiting all legal burdens, restrictions, controls or standards. [57]

49. This Court held in *The Queen v. Beauregard*[58] that "… strict construction is rarely controlling in constitutional interpretation." The Court rejected the literal

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[55] Chrétien, *supra* at page 30

[56] *Cole v. Whitfield*, [1988] HCA 18

[57] *Cole v. Whitfield*, *supra* at paras. 23 and 24; note also that Article 301 of India's Constitution is based on Australia's section 92 (see *Atiabari Tea Co. Ltd. v. State of Assam*, AIR 1961 SC 232). However, instead of "absolutely free", the wording is "free." While this Article has received broad interpretation by India's Supreme Court, free trade commerce and intercourse – like in Australia – have not. For an interpretation of "free" in Article 301 of India's Constitution see *Amrit Banaspati Co. Ltd. v. Union of India*, 1995 AIR 134, at para. 10

[58] *The Queen v. Beauregard*, [1986] S.C.J. No. 50

interpretation advanced by the respondent in respect of judges' pensions as set out in section 100 of the *Constitution Act,1867*.[59]

50. Again, in the majority decision this Court states, in dismissing an argument that the provinces had jurisdiction over judges' pensions that "… s. 92(14) of the *Constitution Act, 1867* cannot be read in isolation. Although it is "intended to have [a] wide meaning"…, it must be read in light of other provisions of the Constitution."[60]

51. The same principle applies to interpreting s. 121.

52. Clearly, s. 121, as envisaged by the Respondent, would significantly constrain both provincial property and civil rights powers and federal trade powers. It would undermine the goals of cooperative federalism and it would relegate the operation of political and economic business in the Canadian federation to the service of the word 'free' as found in s. 121.

53. The result would work in opposition to both judicial precedent and legislative policy initiatives. Put simply, it would re-arrange the face of the Canadian constitution as designed by both the legislative and judicial branches within the Canadian polity. As the Court states in *Caron v Alberta,*[61] tensions created by the interrelationship of constitutional principles cannot be remedied "…by resorting to broad and uncontroversial generalities, or by infusing vague phrases with improbable meanings. Rather, we must examine the text, context and purpose of our Constitution to see whether there is a constitutional constraint on the power of the province of Alberta to decide in what language or languages it will enact its legislation."[62]

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[59] *Beauregard, supra* at paras. 49 and 50
[60] *Beauregard, supra* at para. 43

[61] *Caron v Alberta,* 2015 SCC 56, *supra*

[62] *Caron, supra* at para. 6

54. As will be seen, the authorities indicate a convergence of judicial interpretation in respect of s. 121. The approach has been to acknowledge that this section was intended to prohibit provincial laws which in their essence and purpose are aimed at trade across a provincial border. There is common ground amongst the authorities however, that s. 121 neither takes constitutional precedence over, nor diminishes the legitimate exercise of powers, set out in s. 91 and s. 92.[63]

55. In *Ontario Home Builders' Association v. York Region Board of Education*,[64] LaForest J., writing for four members of this Court, makes the observation that the courts

> "…have effectively prevented the provinces from erecting tariff barriers against one another; they have supported a national market. Section 121 of the British North America Act, which was intended by the draftsman, but not in the original Quebec scheme, to perform this function might, if broadly construed, have been too restrictive of federal and provincial power. The courts could afford to interpret it narrowly by using the limitation to direct taxation to achieve the same result." [65]

56. Further, LaForest J. in the *Home Builders'* case, soliciting in aid prior judicial authority, as well as the analysis in Peter Hogg's *Constitutional Law*,[66] set out the rationale for an inherently flexible, albeit controlled, approach to constitutional interpretation. This reflects the reality of a changing Canadian society and permits "…progressive constitutional development in the face of immense changes, without constitutional amendment."[67]

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[63] *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, *supra*

[64] *Ontario Home Builders' Association v. York Region Board of Education*, *supra*; see also G.V. LaForest, *The Allocation of Taxing Power Under the Canadian Constitution*, Canadian Tax Foundation, 2nd edition, 1981, p. 202

[65] *Home Builders'*, *supra* at paras. 137-138

[66] Peter Hogg, *supra*, ch. 11

[67] *Home Builders'*, *supra*

57. Although the early authorities tended to view s. 121 as strictly a prohibition against cross border duties, subsequent cases have taken a more nuanced approach. The courts were careful, however, not to inhibit the legitimate exercise of constitutional powers even where there was an incidental impact on s.121.[68]

58. Classically exemplifying this change in judicial view over time are the 1921 *Gold Seal v. Alberta*[69] case and the 1958 *Murphy v. C.P.R.*[70] case. The former holds that s. 121 is intended to exclusively prohibit custom and excise duties in interprovincial trade. The latter case contains language suggestive of a broader scope, but also confirms the complete legislative competence of parliament and the provinces:

> Section 121 does not extend to each producer in a province an individual right to ship freely regardless of his place in that order. Its object, as the opening language indicates, is to prohibit restraints on the movement of products. With no restriction on that movement, a scheme concerned with internal relations of producers, which, while benefiting them, maintains a price level burdened with no other than production and marketing charges, does not clash with the section. If it were so, what, in these days has become a social and economic necessity, would be beyond the total legislative power of the country, creating a constitutional hiatus. As the provinces are incompetent to deal with such a matter, the two jurisdictions could not complement each other by co-operative action: nothing of that nature by a province directed toward its own inhabitants could impose trade restrictions on their purchases from or sales of goods to other provinces. It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself; and I find in s. 121 no obstacle to the operation of the scheme in any of the features challenged.[71]

59. *Murphy* establishes that s. 121 does not mandate positive individual rights, but is concerned with a legislative scheme (federal or provincial) which restrains the "movement of products". It is equally clear from the *ratio* of the decision that a

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[68] *Home Builders', supra*

[69] *Gold Seal v. Alberta*, [1921] S.C.J. No. 43

[70] *Murphy v. C.P.R.*, [1958] S.C.J. No. 48

[71] *Murphy, supra* at pages 11-12 as per Rand J.

controlled market as well as a supply management system (i.e. wheat, eggs, dairy, turkey) does not run afoul of s. 121.

60. There have been many cases of binding and persuasive authority concerning the application of s. 121 and the reach of federal and provincial powers:

a. *Gold Seal*[72]
b. *Atlantic Smoke Shops Ltd. v. Conlon* [73]
c. *Willis*[74]
d. *Murphy*[75]
e. *Reference re Agricultural Products Marketing Act*[76]
f. *CP Air v. B.C.*[77]
g. *Black v. Law Society of Alberta*[78]
h. *Dow Chemical v. B.C.*[79]
i. *Air Canada v. Ontario (Liquor Control Board)*[80]
j. *Canadian Egg Marketing Agency v. Richardson*[81]

61. These authorities arose out of constitutional challenges. Many were contests in respect of the scope of provincial powers which implicated s. 121. More generally, they concern the constitutional power over intraprovincial trade in alcohol, eggs, poultry,

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[72] *Gold Seal, supra*

[73] *Atlantic Smoke Shops Ltd. v. Conlon*, 1943 CanLII 372 (UK J.C.P.C.), *supra* at paras. 20-22

[74] *Prince Edward Island (Potato Marketing Board) v. H.G. Willis Inc.*, [1952] 2 S.C.R. 392 ("*Willis"*)

[75] *Murphy, supra*

[76] *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198

[77] *C.P. Air v. B.C.*, [1989] 1 S.C.R. 1133 at para. 36

[78] *Black v. Law Society of Alberta*, [1989] 1 S.C.R 591 (S.C.C.) at para. 49

[79] *Dow Chemical v. BC*, 1992 CanLII 1019 (BC CA) at paras. 38-40

[80] *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581 at paras. 7, 44-45, 54-55, 87-88

[81] *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, *supra* at para. 64

tobacco, or direct taxation. Unlike the present case, some of these decisions were also division of power cases. All of these cases, however, have the common juridical feature of ensuring s. 121 is not so broadly interpreted so as to impede the legitimate exercise of ss. 91 or 92 powers.

62. The cases clearly recognize the division of powers as vital to the Canadian federal system, and that s. 121 does not militate against that vital character of our constitutional structure. Consider the following:

    a. The 1921 *Gold Seal* case finds that s. 121 prohibits interprovincial customs duties and that federal prohibition laws do not offend the section.[82]
    b. *Atlantic Smoke Shops* determines that as long as provincial tobacco tax is directed at intraprovincial sales, its collateral effect on interprovincial trade is *intra vires*.[83]
    c. *Willis* is an early indication of judicial support for cooperative legislative effort between the federal and provincial authorities. This is a precursor to cooperative federalism.[84] Also consider *Air Canada* for an explanation of the 1928 *IILA* in aid of provincial liquor monopolies.[85]
    d. In *Murphy*, the Court states that s. 121 can be offended by barriers other than a customs gate at a provincial border, but is careful to endorse cooperative federalism and the concept of total legislative competence. Also consider *Reference re Same Sex Marriage*, for its discussion on total legislative competence.[86]
    e. Moving into the 1970's and beyond, the Supreme Court was again called upon to determine the constitutional scope of national marketing schemes

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[82] *Gold Seal, supra* at page 456

[83] *Atlantic Smoke Shops, supra* at para. 25

[84] *Willis, supra*

[85] *Air Canada, supra*

[86] *Murphy, supra*; *Reference re Same Sex Marriage, supra*

in the *Reference re Agricultural Products Marketing Act* decision and later in *Richardson*. Again, s. 121 is considered "…the so called free trade provision…" by Laskin C.J. in the 1978 *Reference re Agricultural Products Marketing* decision.[87] But, writing for four justices in concurrence, he finds no fault with the egg marketing legislation and adopts the reasoning of the *Murphy* decision.

f. In *Richardson*, s. 121 is discussed but not fully canvassed as the parties focused their submissions on mobility rights. The majority quotes Laskin C.J. from the *Reference re Agricultural Products* case with approval.[88] The majority further holds that s. 121 is not a free trade right (via section 6 of the *Charter*) for individuals. In her dissenting opinion, (not in respect of s. 121) McLachlin J. (as she was then) precisely sums up the meaning of s. 121 effectively juxtaposing it with ss. 91 and 92 powers.[89]

g. Section 121 is implicated in the taxation question before the Supreme Court in the 1989 *CP Air* decision. The Court gives the same answer as the J.C.P.C. does in *Atlantic Smoke Shops* and as the Supreme Court gives in *Murphy*. These authorities effectively support provincial legislation if directed at a legitimate provincial purpose. This is so even if there is a collateral effect outside provincial constitutional authority. As stated in *Richardson*:

> The current constitutional structure represents an historical compromise between regional interests and the vision of economic union. In broad outline, s. 121 of the *Constitution Act*, 1867 permits legislation which incidentally impinges on the flow of goods and services across provincial boundaries, but prohibits legislation that in "essence and purpose is related to a provincial boundary"[90]

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[87] *Reference re Agricultural Products Marketing*, *supra* at page 1261

[88] *Richardson*, *supra* at paras. 64-68

[89] *Richardson*, *supra* at para. 171

[90] *Richardson*, *supra* at para. 123 (from the dissent of McLachlin J., as she then was, but in agreement with the majority on this point, see paras. 65-66)

h. Most recently in the case of *Dow Chemical*, the Court of Appeal held that a provincial tax on rolling stock did not offend s. 121 even if there was an incidental burden on out-of-province consumers. The Court cites *CP Air* as support where Justice LaForest states:

> The out-of-province purchaser pays the tax when he "brings or sends the goods" in the province or "receives delivery" for his use or consumption. This is confirmed, I think, by the words used in the provision, and especially if one considers them in connection with the purported application of the provision to the facts of this case. What I think is contemplated is the bringing of a purchased item into the province on a permanent basis, at which time it is taxable once and for all at a stated percentage of the purchase price as the provision clearly provides….[91]

63. Remarkably, in the face of overwhelming authority, the trial judge in the case at bar found that he could depart from binding precedent because of his finding that there "…had been a significant change in evidence, one that I believe has fundamentally shifted the parameters of the debate".[92] He presumed, without any actual evidence or argument on the point, that this same evidence was never before previous courts dating back to the *Gold Seal* case.

64. Obviously, to make a finding that there was "new evidence" that justified the extraordinary decision to depart from precedent, the trial judge in this case was required to perform a detailed analysis of the nature of this new evidence before him and how this evidence differed from the evidence before the Court in previous cases. This stringent standard used to justify departing from precedent was recently emphasized by the Alberta Court of Appeal in *R v. Caswell*[93] when analyzing the *R. v. Bedford*[94] decision:

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[91] *CP Air*, *supra* at para. 27

[92] Appellant's Record, Vol. I, Trial Decision, para. 125

[93] *R v. Caswell*, 2015 ABCA 97

[94] *R. v. Bedford*, 2013 SCC 72

> In the absence of some coherent and consistent normative account that allows lower courts to distinguish instances where the a decision of a higher court no longer binds from instances where it still does, the best lower courts can do is take Bedford's stated threshold seriously by applying it strictly: *R. c. Caron*, 2014 ABCA 71 (Alta. C.A.) at para 70, (2014), 569 A.R. 212 (Alta. C.A.) ("the precedent should still be followed unless the *Bedford* test is clearly met"). The Supreme Court has, after all, directed that the threshold is "not an easy one to reach" and must account for "the need for finality and stability": *Bedford* at para 44. The concern regarding the bypassing of legislators on its own strongly militates against anything but the most demanding and stringent application of the threshold for invoking *Bedford*.[95]

65. A trial judge is not permitted without more, to conclude that there is "new evidence" before him and assume that this evidence was not before other Courts. Indeed, such an approach falls short of the demanding and stringent application of the threshold required to overturn binding precedent.[96]

The Placement of Section 121 in the *Constitution*:

66. Section 121 of the *Constitution Act, 1867* is found in *Part VIII* of the *Act*. *Part VIII* is titled "*Revenues; Debts; Assets; Taxation".* Clearly this part of the *Constitution*, which is composed of twenty four sections, is in generic terms referencing matters of revenue, duties or debt. Even a cursory reading of those twenty four sections (102-126) confirms this fact. The very first section, for example, establishes a consolidated fund for "the Public Service of Canada" out of "All Duties and Revenues" over which the provincial legislatures have the power of appropriation.

67. The subsequent sections in *Part VIII* are concerned with the subject of dividing the debt and revenue, as well as revenue powers. The very last section, s. 126, speaks about "Such Portions of the Duties and Revenues" raised by the provinces before union. The "Duties and Revenues" section refers to the "special Powers" still assigned to the

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[95] *Caswell*, *supra* at paras. 39-40

[96] See also *Ontario (AG) v. Canada Temperance Federation*, [1946] A.C. 193 at para. 13 on the issue of the precedential effect of constitutional decisions

provinces by the constitution and are to form the provincial consolidated funds. The "special Powers" are an obvious reference to section 92 powers.

68. Finally, s. 121 cannot be read in isolation of ss. 122 to 124. These sections speak about a continuation of certain custom taxes and duties until "altered" by the "Government of Canada". That, it is submitted, flies in the face of the Respondent's contention that s. 121 is a stand-alone provision of the *Constitution*, unrelated and outside the sphere of either provincial or federal powers.

69. Certainly the parties would agree that s. 121 is, at minimum, a prohibition against interprovincial duties. If so then the succeeding two sections must necessarily be related to the subject matter of s. 121. More to the point, it is incontestable that s. 121 is properly found in *PART VIII* due to this relationship.

70. Indeed, the Respondent's expert, Dr. Smith, conceded that s. 91 constitutional powers contain both trade and non-tariff barrier provisions by which national standardization was to be enforced. These powers, he admits, include much of the very constitutional rationale which he advocates is inherent in s. 121.[97] This admission, considered in tandem with the fact that s. 121 is within *Part VIII* (Revenues; Debts; Assets; Taxation) of the *Constitution Act, 1867*, and its obvious relationship with ss. 122 and 123, degrades the force of the Respondent's argument.

71. Furthermore, there is no evidence that the late entry of s. 121 into the *Constitution Act, 1867* at the London Conference was to fundamentally rearrange the principle of constitutional federalism as worked out over the course of three years.

72. Section 121 is supplementary to ss. 122 and 123 which succeed it. Its purpose was to make certain that interprovincial custom houses would fall at Confederation. The

[97] Appellant's Record, Vol. V. Tab 29, *Smith Report*, pages 24-25

custom laws of each province were to continue in force (s. 122) "…subject to the provisions of this Act…". That language must necessarily be a direct reference to s. 121 as much as it is to s. 91 powers. In other words, the provincial custom duties which were to remain in force were not interprovincial in nature, as that would violate the clear intent of s. 121. The custom duties referred to were those in respect of international trade at border crossings and ports which each of the colonies had at confederation.[98]

73. It is fundamental to an understanding of s.121 that it be placed in both textual and contextual relief vis a vis other related provisions of the *Constitution*, both within *Part VIII* as well as in relation to the purpose of ss. 91 and 92 powers.

The Relationship of Section 121 with other Constitutional Provisions:

74. Section 91(2) and s. 92(13) of the *Constitution Act, 1867* cover the broadest scope of commercial activity in Canada. Section 92(13) may appear more ambiguous as to its intended breadth than section 91(2), however jurisprudence has given a broad scope to property and civil rights beginning with the early case of *The Citizens Insurance Company v. Parsons*[99] where the Court discusses its historic roots.[100]

75. The meaning of s. 92(13) as interpreted in broad form simply reflects the principle of federalism as understood within the Canadian context. This 'made in Canada'

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[98] Appellant's Record, Vol. V, Tab 29, Ex D-6, *Smith Report*, page 26-27

[99] *The Citizens Insurance Company v. Parsons*, 1881 CarswellOnt 253 (J.C.P.C.), *supra* at paras. 19-21

[100] Also, *Quebec Act, 1774*, section VIII; *Statutes of Upper Canada* (34 George III), c. 1; see also Appellant's Record, Vol. V. Tab 26, Ex. C-11, *Bateman Report*, page 19; Also see W.H. McConnell *Commentary on the British North America Act*, MacMillan of Canada, 1977

federalism, however, clearly begins to take its form from the earlier days of this country's colonial history.

76. It is also important to note that ss. 91 and 92 powers have been held to contain the complete array of legislative competence or "exhaustiveness" [101] In the *Reference Same Sex Marriage*, this Court reiterates the views of earlier court decisions, including *Murphy*, and states the following with respect to the principle of exhaustiveness:

> The principle of exhaustiveness, an essential characteristic of the federal distribution of powers, ensures that the whole of legislative power, whether exercised or merely potential, is distributed as between Parliament and the legislatures: …In essence, there is no topic that cannot be legislated upon, though the particulars of such legislation may be limited by, for instance, the *Charter*.[102]

77. The trial judge's interpretation of s. 121 belies these principles of exhaustiveness and cooperative federalism, one example of which is the federal *IILA* and New Brunswick's *LCA*.

78. Additionally, the position of those advocating an unfettered 'free trade' interpretation of s. 121 is tenuous as a result of the constitutional implications of s. 94 of the *Constitution Act, 1867*. This provision allows for three provinces, Ontario, Nova Scotia and New Brunswick (Quebec is excluded) to legislatively assign their property and civil rights powers, as well as court procedure, to Parliament. The section reads as follows:

> Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not

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[101] E.G. Ewaschuk, *Criminal Practice and Pleadings in Canada*. Part XIV, section 34.2000; see also *Reference Re Same Sex Marriage, supra*; *Nadeau v. New Brunswick Farm Products Commission*, 2009 NBCA 48; *Pelland, supra*

[102] *Reference re Same Sex Marriage, supra* at para. 34

> have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

79. At least in respect of the three named provinces, if this section was acted upon there would be little that would remain of s. 92 powers. The breadth of s. 94 is intended to be "unrestricted"[103] following which s. 121 could be effectively reframed through federal legislation to permit interprovincial free trade as advocated by the Respondent.

80. If s. 121 was intended to be a free trade section in the sense interpreted by the trial judge and as proposed by the Respondent, s. 94 is largely superfluous. Conversely, if the constitutional option contained in s. 94 is accepted by the provinces, s. 121 becomes redundant.

81. It is apparent that the Respondent's position raises an inherent contradiction between ss. 94 and 121. Clearly s. 94, as drafted, is the all-encompassing constitutional provision which was intended to effectively achieve a legislative union amongst three of the four provinces, a union which the Quebec Resolutions failed to consummate.[104]

82. Without a s. 94 agreement, s. 121 accomplished only what the fathers of Confederation could achieve in 1867 – a federation wherein each province retained exclusive control of intraprovincial trade but without the legislative authority to arrest the flow or movement of cross-border trade by restrictions aimed directly at other provinces.[105]

Section 94 and Quebec

83. It is useful to consider s. 94 of the *Constitution Act, 1867* in parallel view. The fact that Quebec refused to be included as a participant in a potential s. 94 'union' lends more

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[103] See Dawson, R.M., *The Government of Canada*, University of Toronto Press, 4th ed., 1963, pages 94-102, concerning the scope of section 92(13), 'Property and Civil Rights'

[104] Excerpts from *Parliamentary Debates, supra*

[105] Section 91 and 92 powers

credence to the limited scope of s. 121 as compared to the overarching scope of s. 94. In his report, the Respondent's expert witness stated the following:

> …. Since one of the goals of Confederation was to create a comprehensive economic union, the possibility that such trade barriers might emerge needed to be avoided. The Fathers of Confederation recognized that Quebec was going to continue to have a distinctive legal system, which suggests that they were sometimes willing to accept the economic costs associated with a lack of harmonization. However, section 94 of the constitution did empower the federal parliament to oversee and direct the "Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick."[106]

84. This begs the question: how can s. 121 have been intended to be an absolute free trade provision when the founding Fathers recognized that Confederation was to be achieved, if at all, through an acceptance of economic and legislative diversity, rather than complete harmonization?

85. The short answer is that if s. 121 is all encompassing as the Respondent proposes, it would demand an ahistorical and literal interpretation of the *Constitution Act, 1867*, without resort to a consideration of its contextual relationship to other constitutional provisions, the factors that compelled the drive for a federation, and the ultimate victory of Canadian federalism over a legislative union.

The Principle of Cooperative Federalism and Section 121

86. The principle of cooperative federalism has been recognized by the Supreme Court of Canada as a constructive means to enhance legislative cooperation between parliament and the legislative assemblies in Canada. It is also consistent with the constitutional principle that as between parliament and legislatures there is exhaustive legislative competence.[107]

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[106] Appellant's Record, Vol. V., Tab 29, Ex. D-6, *Smith Report*, *supra* at page 25

[107] *Reference re Same Sex Marriage*, *supra*; *Reference re Secession*, *supra* at paras. 49-50

87. Quebec, for example, agrees with the historic importance of cooperative federalism in maintaining the Canadian polity, but also maintains that there has been an 'asymmetric' federalism at work which is little recognized but of fundamental importance to Canadian unity.[108] More to the point, in *Fédération des producteurs de volailles du Québec v. Pelland*,[109] this Court states: "In my view, the 1978 Federal-Provincial Agreement, like the scheme in the *Egg Reference*, both reflects and reifies Canadian federalism's constitutional creativity and cooperative flexibility."[110]

88. When one compares the non-interlocking lotteries and gaming legislation now so prevalent in Canada to the interlocking legislative scheme in *Richardson*, the differences help to illustrate the graduated complexity from basic co-legislative initiative to a complex interlocking federal-provincial legislative scheme.[111]

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[108] Secrétariat aux affaires intergouvernementales canadiennes. *Quebecers: Our Way of Being Canadian: Policy on Québec and Canadian Relations",* June, 2017, page 39; consider also s. 94 of the *Constitution Act, 1867* as an example of constitutional asymmetry

[109] *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, *supra*

[110] *Pelland*, *supra* at para. 15; also see *Quebec v. Canada*, *supra*, where the Supreme Court of Canada debates the force and effect of the principle of cooperative federalism; see also *Nadeau v. New Brunswick Farm Products Commission*, *supra*, where the Court of Appeal discusses New Brunswick's constitutional restriction to legislate in a manner which directly restricts interprovincial trade

[111] Section 134 of the *LCA* and s. 3 of the *IILA* are certainly an example of cooperative federalism; consider also the federal provincial initiatives set out in the *Canadian Free-Trade Agreement*: available online: https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf

> *"Working Group on Alcoholic Beverages*
>
> 5. The Parties shall establish a working group on alcoholic beverages ("Alcoholic Beverages Working Group")

89. The principles of cooperative federalism are exemplified in this case by the federal *IILA* with its recognition by reference of the authority of the provinces to regulate liquor within its borders. A further example may be seen in section 207(1) of the *Criminal Code* where Parliament has also recognized the right of provinces to regulate gaming and lotteries. In this regard, we can look to the decisions in *Willis*, *Miramichi Agricultural Exhibition Assn. Ltd. v. New Brunswick (Lotteries Commission),*[112] and in *R. v. Furtney.*[113]

90. Where applicable the principle of cooperative federalism must be considered when interpreting the reach of s. 121. The constitutional authority for legislation arising out of a federal-provincial legislative scheme is the underpinning of this principle which clearly was intended to, and in fact does, insinuate a reasonable degree of analytical flexibility into the federal arrangement. This is precisely what the constitutional jurisprudence has repeatedly emphasized.[114]

91. While cooperative federalism is a constitutional principle, it is also an interpretative concept fully imbedded in Canadian constitutional jurisprudence.[115]

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8. On the basis of the Alcoholic Beverages Working Group's report, the Parties shall determine how trade in alcoholic beverages within Canada can be further enhanced."

[112] *Miramichi Agricultural Exhibition Assn. Ltd. v. New Brunswick (Lotteries Commission),* 1995 CanLII 11085 (NB CA)

[113] *R. v. Furtney*, [1991] 3 S.C.R. 89; also see *Willis, supra*

[114] *Gold Seal, supra; Atlantic Smoke Shops, supra, Willis, supra, Murphy, supra, Reference re Agricultural Marketing Products Act, supra; C.P. Air, supra; Black, supra; Dow Chemical, supra; Air Canada, supra; Richardson, supra*; see also *Reference re Secession, supra* at paras. 55-56; *Quebec v. Canada* 2015, *supra; Reference re Securities Act, supra*

[115] *Quebec v. Canada* 2015, *supra*

92. Overlooking the principle of cooperative federalism, the trial judge in the case at bar adopted an interpretation of s. 121 that "…would eliminate any scheme that would interfere with the free movement of goods inter-provincially, whether for agricultural products, produce, manufactured goods, liquor or any other product regardless of whether or not such regulated scheme was enacted for the benefit or the protection of the residents of that province."[116] As noted by the trial judge this will entail the dismantling of "…a regime that has been in place since the inception of the Constitution in 1867."[117]

93. Consider the ramifications of this beyond liquor. A cogent example of the impact of such a regime "dismantling" is found in the supply management scheme relating to agricultural and farm products.[118]

94. The management system dates back to the 1960's, borne of a need to create stability when "price instability and interprovincial trade disputes were a source of major concern for the poultry, egg and dairy industries."[119] It is a complex system "embedded within the institutions of federalism and corporatists policy networks"[120] managing a myriad of economic, political, interprovincial and federal interests.

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[116] Appellant's Record, Vol. I, Trial Decision, para. 161

[117] Appellant's Record, Vol. I, Trial Decision, paras. 158 and 191

[118] Heminthavong, Khamla. *"Canada's Supply Management System."* Library of Parliament, Parliamentary Information and Research Service. Publication No. 2015-138-E, December 17, 2015

[119] Heminthavong, *supra* at page 1

[120] Skogstad, Grace. *Internalization and Canadian Agriculture: Policy and Governing Paradigms*. In *Studies in Comparative Economy and Public Policy*. Howlett, Laycock, McBride. Eds. Toronto: University of Toronto Press, 2008, page 178

95. Cooperative federalism provides for an analysis of s. 121 which some writers have suggested. Professor Malcolm Lavoie, in his paper "*R. v. Comeau and Section 121 of the Constitution Act, 1867: Freeing The Beer And Fortifying The Economic Union.*",[121] proposes an analysis and interpretation of s. 121 that attempts to incorporate the constitutional principle cooperative federalism. While his approach has certain inherent difficulties he suggests an analysis of the purpose of the provincial legislation in question. Legislative measures that have the incidental effect of burdening interprovincial trade would not offend section 121."[122]

96. At the very least the Lavoie proposal avoids the originalist perspective and consequences inherent in the trial decision and in the Respondent's position. Further, it "remains faithful to the text and purpose of s. 121, in a manner that is also consistent with the imperatives of contemporary constitutional principles and values, and the structure of Canadian federalism." [123]

Section 134 *Liquor Control Act* and
Section 3 of the *Importation of Intoxicating Liquors Act*[124]

97. Section 134 of the *LCA* states the following:

> Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall

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[121] Lavoie, Prof. Malcolm. *R. v. Comeau and Section 121 of the Constitution Act, 1867: Freeing the Beer and Fortifying the Economic Union.* 2016, Forthcoming Dalhousie Law Journal, 2017

[122] Lavoie, *supra* at page 32

[123] Lavoie, *supra* at page 36

[124] An undercurrent in the Respondent's position at trial was the questioning of the logic of the *LCA* and provincial attempts to control liquor in general. This Court has directed however, that courts should not weigh in on the wisdom of any legislation but only assess its legality: "As has been said many times, the courts are not to question the wisdom of

> (*a*) attempt to purchase, or directly or indirectly or upon any pretence, or upon any device, purchase liquor, nor
>
> (*b*) have or keep liquor,
>
> not purchased from the Corporation.

98. The conduct prohibited by section 134 of the *Liquor Control Act* is not the importation from outside the province but is "the having or keeping of liquor not purchased from the New Brunswick Liquor Corporation."[125]

99. The trial judge in the case at bar failed to attribute a difference to the distinction between an import prohibition and a legislative measure that incidentally impacts on interprovincial trade. He failed to apply the long recognized principles relating to the interpretation of legislative powers, including the "pith and substance"[126] test and the doctrine of "ancillary powers".[127]

100. The "pith and substance" test examines both the purpose and the legal effect of the impugned act. We already have a determination of the pith and substance of s. 134 in *R. v. Gautreau* by the New Brunswick Court of Appeal.[128] Laws will inevitably touch upon or incidentally affect other matters falling within the jurisdiction of another level of government.

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legislation but only to rule on its legality. In our view, the decision …is a policy choice that Parliament was constitutionally entitled to make…": *Quebec v. Canada*, *supra* at para. 3

[125] *Gautreau*, *supra* at para. 12

[126] *Great Western Bank*, *supra* at paras. 29-31

[127] *Quebec (Attorney General) v. Lacombe*, [2010] S.C.R. 453 at para. 32

[128] *R. v. Gautreau*, [1978] N.B.J. No. 107 (N.B.C.A.), *supra* at paras. 7-12

101. The ancillary powers doctrine holds that a law falling within the sphere of either a provincial or federal power may have a "valid incidental, adhesive, ancillary or consequential effect" [129] beyond the scope of that legislative authority.[130]

102. In the case at bar, the analysis overlooked by the trial judge is that of determining first the purpose of the impugned law and then assessing the nature and consequence of any impact that law might have beyond the scope of provincial legislative competence.[131] Even if the broader interpretation of s. 121 by Rand J. in *Murphy* is accepted, it is necessary to show that the measure in its essence and purpose is aimed at a provincial boundary.

103. While the trial judge referenced *Gautreau*, he stopped short in his qualitative assessment of the impact the legislation had on s. 121. In other words, the trial judge simply concluded that any effect on s. 121, whether incidental or otherwise, is impermissible.

104. This runs contrary to the principle that legislation can have an incidental impact or effect without being considered *ultra vires* if it arises as part of a legitimate regulatory scheme falling within the power of that government.[132]

105. By way of analogous argument, case law has established that ss. 91-95 of the *Constitution* are subject to the *Charter* and cannot be exercised in a manner contrary to

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[129] *Quebec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211

[130] See *Atlantic Smoke Shops*, *supra* and *Richardson*, *supra* (specifically McLachlin J.'s comments on section 121)

[131] *Pelland*, *supra* at paras. 30-31

[132] *Lacombe*, *supra* at para. 32

it.[133] However, the Supreme Court has also ruled that the *Charter* cannot wash out or override the valid exercise of s. 92 powers.[134]

106. Furthermore, the *Charter* contains its own internal limitations based on reasonableness. This contrasts with the trial judge's apparent conclusion that s. 121 has no limitations. Taken to its logical conclusion, this leads to the proposition that s. 121 is the supreme law trumping all others that impinge upon it in any way.

107. The question that should have been considered by the trial judge in the case at bar, is whether in its essence and purpose s. 134 is a trade regulation related to a provincial border. Additionally, is it a punitive regulation directed against or in favour of any province?[135] In *Gautreau*, as previously mentioned, the New Brunswick Court of Appeal found that it was neither.[136]

108. Section 134 is not directed at prohibiting the importation of liquor from outside the province. It is directed at the control of liquor within the borders of the province: "It is to be observed that the *Liquor Control Act* does not in express terms prohibit the importation of liquor but purports to regulate and control liquor when it is within the Province."[137]

109. *Gautreau* is favourably cited by the Supreme Court in *Air Canada* as authority relating to the scope of provincial power in relation to liquor:

> It follows that, even if the provinces do not have the authority to prohibit the importation of liquor -- and the decision of the Privy Council in *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896]

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[133] *R. v. S.(S.)*, [1990] 2 S.C.R. 254; see also *Reference re Bill 30, An Act to Amend the Education Act (Ont)*, [1987] 1 S.C.R. 1148

[134] *S.(S.)*, *supra* at para. 48; *Bill 30*, *supra* at para. 62

[135] *Richardson*, *supra* at para. 64

[136] *Gautreau*, *supra* at para. 8-9

[137] *Gautreau*, *supra* at para. 7

> A.C. 348, at p. 371, established that provinces do not have that authority -- they do have the authority to forbid its storage within provincial boundaries. See *R. v. Gautreau* (1978), 88 D.L.R. (3d) 718 (N.B.C.A.), at p. 722. Thus, a province, by legislation of its own, may effectively limit commerce in alcohol to the mere carrying of spirits through its territory. By prohibiting the storage of alcohol on its territory, or by making that privilege contingent on the possession of a licence, the province can leave an importer with no choice but to bear his goods back out of the province.[138]

110. *Gautreau* determined that in addition to the control and management of liquor within the province, the *LCA* is intended to maintain a lawful liquor monopoly through which the province raises revenue for provincial purposes.[139]

111. This Court has already ruled that provincial liquor monopolies are authorized pursuant to s. 92 of the *Constitution* and that in fact the federal *IILA* contributes to this very end goal. This *Act* lends "federal power to the provinces to cement their liquor monopolies".[140]

112. In fact, the *IILA* specifically recognizes provincial authority to manage all aspects of liquor once it is within provincial borders. It is clear that s. 3 of the *IILA* is not permissive, it requires mandatory compliance with provincial regulation.

113. The division of power referenced above in the *IILA* accords well with the history of the management of liquor in Canada going back to the origins of confederation. The authority over liquor as between the federal and provincial powers evolved through the years to its final and current status as an example of concurrent jurisdiction.[141]

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[138] *Air Canada*, *supra* at para. 55

[139] *Air Canada*, *supra* at para. 53 and *New Brunswick Liquor Corporation Act*, S.N.B., 1974, c. N-6.1, s. 3(e)

[140] *Air Canada*, *supra* at para. 16, 54 and 57

[141] Fish, Morris J. *"The Effect of Alcohol on the Canadian Constitution…Seriously"* McGill Law Journal, vol. 57, no. 1, September, 2011 at para. 73, citing *Ontario (AG) v. Canada Temperance Federation*, [1946] A.C. 193, 2 D.L.R. 1

114. The *IILA* and the *LCA* exemplify an application of the modern principle of cooperative federalism and legislative exhaustiveness as between the provinces and the federal government. Each *Act* complements the other within their legitimate sphere of legislative power.

Conclusion

115. Since the 1930's this Court has consistently reiterated that Canada's social and political development depends upon a reasonable degree of latitude in matters of constitutional interpretation. This is a judicially recognized fact, articulated in the case law and supported by academic authorities. Indeed, the requirement for flexibility is inherent in the very drafting of the *Constitution Act, 1867*. The historical context of the Canadian federation, the foundational principles of Canadian constitutionalism, and a proper textual understanding of the written *Constitution*, all lead to the inexorable conclusion that the decision of the trial judge is incorrect.

PART IV
SUBMISSIONS CONCERNING COSTS

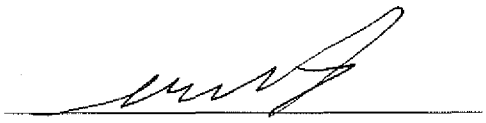
116. The Appellant makes no submission with respect to costs and leaves this question to the discretion of this Court.

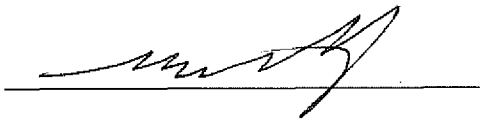
PART V

ORDER SOUGHT

117. The Appellant requests an Order of this Court allowing the appeal and answering the constitutional question in the negative to the effect that s. 134 of the *Liquor Control Act* does not violate s. 121 of the *Constitution Act, 1867*.

All of which is respectfully submitted this 18th day of August, 2017,





FOR **William B. Richards**

FOR **Kathryn A. Gregory**

Counsel for the Appellant, Her Majesty the Queen

PART VI

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