BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND ALLEGATIONS OF BAD FAITH AND UNLAWFUL ACTIVITY

SUBMISSIONS OF THE BRITISH COLUMBIA VEGETABLE MARKETING BOARD REGARDING THE IMMATERIALITY AND INADMISSIBILITY OF A TRANSCRIPT OF PROCEEDINGS BEFORE THE STANDING JOINT COMMITTEE FOR THE SCRUTINY OF REGULATIONS

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PART I - INTRODUCTION

1. Document **BCVMC-A-00001 to BCVMC-A-00025** identified in Part I of the Commission's List of Documents is a transcript of proceedings before the Standing Joint Committee for the Scrutiny of Regulations held on March 13, 2008 (the "Record").

2. The Record has been published on the Joint Committee's website and is available to members of the public.

3. Counsel for Prokam Enterprises Ltd. had previously circulated a copy of the Record in this proceeding and, as noted, it is listed in Part I of the Commission's List of Documents. However, it is the Commission's respectful position that the Record is both immaterial and inadmissible in the present proceedings.

PART II - ARGUMENT

Immateriality

4. Presumably, Prokam seeks to rely on the Record to establish the Defendants' knowledge of the Gazetting requirements arising under the *British Columbia Vegetable Order* (SOR/81-49), in accordance with the *Statutory Instruments Act*, R.S.C., 1985, c. S-22.

5. However, the existence of these Gazetting requirements, and the Defendants' knowledge of them, are not (and never were) material issues.

6. For the purposes of the present proceeding, the Commission expressly acknowledges that orders requiring federal legislative authority needed to be "Gazetted" prior to the amendment of the *British Columbia Vegetable Order* on December 23, 2020.

7. This is entirely consistent with the position taken by the Commission in the initial appeals brought by Prokam before the BCFIRB.

8. In those appeal proceedings, the Commission expressly acknowledged that orders requiring federal legislative authority must be "Gazetted". In particular, the Commission made extensive submissions with respect to this requirement in its Written Submissions dated August 13, 2018 filed in the matter of *Prokam et. al. v. BCVMC* (Files: N1715, N1716, N1718, N1719). (See: **BCVMC-A-05113** at **BCVMC-A-5156 to BCVMC-A-5158**), as follows:

> 72. The Commission exercises broad, provincial legislative powers delegated to it under the *Natural Products Marketing (BC) Act*.
>
> 73. The Commission is also able to exercise federal legislative powers by virtue of the *British Columbia Vegetable Order* (SOR/81-49) made under the *Agricultural Products*

Marketing Act. The *British Columbia Vegetable Order* provides as follows:

Short Title

1 This Order may be cited as the British Columbia Vegetable Order.

Interpretation

2 In this Order,

Act means the Natural Products Marketing (British Columbia) Act of British Columbia; (Loi)

Commodity Board means the British Columbia Vegetable Marketing Commission, established pursuant to the Act; (Office)

Plan means the British Columbia Vegetable Scheme, B.C. Reg. 96/80, as amended from time to time, and any regulations made under the Act to give effect to the Scheme; (Plan)

vegetables means all vegetables, and includes

(a) strawberries intended expressly for manufacturing purposes, and

(b) potatoes,

grown in the Province of British Columbia. (légumes)

Interprovincial and Export Trade

3 The Commodity Board is authorized to regulate the marketing of vegetables in interprovincial and export trade and for such purposes may, by order or regulation, with respect to persons and property situated within the Province of British Columbia, exercise all or any powers like the powers exercisable by it in relation to the marketing of vegetables locally within that province under the Act and the Plan.

Levies and Charges

4 The Commodity Board may, in relation to the powers granted to it by section 3,

(a) fix and impose, by order, and collect levies or charges from persons referred to in section 3 who are engaged in the production or marketing of whole

> vegetables or any part of vegetables and for that purpose may classify those persons into groups and fix, by order, the levies or charges payable by the members of the different groups in different amounts; and
>
> (b) use the levies or charges for the purposes of the Commodity Board, including the creation of reserves, the payment of expenses and losses resulting from the sale or disposal of any vegetables and the equalization or adjustment among vegetable producers of moneys realized from the sale of vegetables during any period or periods of time that the Commodity Board may determine.

74. However, there is a condition precedent to the exercise of delegated federal legislative authority that arises because of the words "regulation" and "order" as used in the *British Columbia Vegetable Order*.

75. Subsection 2(1) of the *Statutory Instruments Act*, R.S.C., 1985, c. S-22 defines "statutory instrument" in part to mean:

> … any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established (i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates…

76. Under that same *Act*, "regulation" means "a statutory instrument made in the exercise of a legislative power conferred by or under an Act of Parliament".

77. Consequently, orders or regulations made under the authority of the *British Columbia Vegetable Order* are subject to the examination, registration and publication requirements applicable to regulations under the *Statutory Instruments Act*. As well, the rules governing the coming into force of regulations set out in section 9 of the *Statutory Instruments Act* apply to such orders. Subject to certain stated exceptions, section 9 provides that regulations only come into force upon their registration.

> 78. In practical terms, this means that any order made by the Commission which depends on delegated federal legislative authority will only come into force after the order has been "Gazetted".

9. The Commission's position was further articulated as follows (See: **BCVMC-A-05160**):

> 82. …if the minimum price orders are made in relation to "property and civil rights in the province", they are valid. Conversely, if the minimum price orders are made in relation to "the regulation of trade and commerce", they are invalid.

10. The Commission's acknowledgment of these Gazetting requirements was specifically noted by the BCFIRB at paragraph 48 of its decision (See: **BCVMC-A-05201**):

> 48. But in order to actually avail itself of this authority under the federal legislation, the Commission is required to comply with the Statutory Instruments Act. **This is accepted by the Commission, which stated in its submission, "in practical terms, this means that any order made by the Commission which depends on delegated federal legislative authority will only come into force after the order has been "Gazetted"**. (emphasis added)

11. In short, the Commission never advanced the position that orders requiring federal legislative authority do not need to be "Gazetted". On the contrary, the Commission had at all times expressly acknowledged that "any order made by the Commission which depends on delegated federal legislative authority will only come into force after the order has been 'Gazetted'".

12. The immateriality of the Gazetting requirements in general, and the Record in particular, is best illustrated with reference to the central issues that were before the BCFIRB in the original appeals, namely:

(a) whether the Commission's minimum export pricing orders require federal legislative authority; and

(b) whether it was the intention of the Legislature to make available to commodity boards the full scope of regulatory powers within the constitutional competence of the Province as are necessary to provide for the effective promotion, control and regulation of the marketing of natural products.

13. With respect to its minimum export pricing orders, it was the Commission's position that:

(a) The scope of the *Natural Products Marketing (BC) Act* (the "NPMA") and the *Agricultural Products Marketing Act* (the "APMA") must be understood within the context of the *Constitution Act, 1867*. The terms of the NPMA and the APMA cannot alter the division of powers conferred on Parliament and the Provinces under the *Constitution Act, 1867*. Thus, the constitutional context arising under sections 91 and 92 of the *Constitution Act, 1867* is the first order of any valid interpretational analysis.

(b) The minimum export pricing orders, which are applicable only to British Columbia Agencies, were made for the purpose of preventing unwanted inter-Agency competition that would impede the maximization of returns for British Columbia Producers. Consequently, the minimum export pricing orders were made in furtherance of a purpose within the exclusive constitutional competence of the Province, namely, the regulation of property and civil rights within the Province within the meaning of subsection 92(13) of the *Constitution Act, 1867*.

(c) Application of the "pith and substance doctrine" means that the mere fact that the Commission's minimum export pricing orders apply to

"interprovincial transactions" is dispositive of nothing. It is the dominant purpose of the regulation that matters - not its incidental affect.

(d) Parliament is not competent to enact laws in furtherance of the regulation of property and civil rights in the Province. Consequently, the APMA could not provide authority to promulgate minimum export pricing orders imposed exclusively on British Columbia Agencies for the purpose of preventing unwanted inter-Agency competition that would impede the maximization of returns for British Columbia Producers.

(e) The Commission had the power and authority pursuant to the *Natural Products Marketing (BC) Act* and *Scheme* to promulgate the minimum export pricing orders in furtherance of the purpose as described above, and in particular:

(i) It was the intention of the Legislature to make available to commodity boards the full scope of regulatory powers within the constitutional competence of the Province as are necessary to provide for the effective promotion, control and regulation of the marketing of natural products;

(ii) The words “Without limiting other provisions of this Act“, as they appear in subsection 11(1) of the NPMA, should not be interpreted to mean “limiting other provisions of this Act”; and

(iii) Federal legislative authority under the APMA was not required to support the minimum export pricing orders as described above. More specifically, the minimum export pricing orders imposed by the Commission against British Columbia Agencies were made in furtherance of a purpose within the exclusive constitutional competence of the Province, namely, to prevent unwanted competition among British Columbia Agencies that would impede

> the maximization of returns for British Columbia Producers. Consequently, these orders did not require federal legislative authority under the APMA, and therefore did not need to be "Gazetted" under APMA.

14. Twenty-two pages were devoted to the Commission's analysis of its authority in its Written Submissions dated August 13, 2018 filed in the matter of *Prokam et. al. v. BCVMC* (Files: N1715, N1716, N1718, N1719). (See: **BCVMC-A-05113** at pages **05153** to **05177**).

15. This position was neither frivolous nor artificial. While it is true that the Commission's minimum export pricing orders affected certain transactions outside of the province, the application of those orders was restricted to regulated entities operating within British Columbia. See: G.O., Part IX, s. 9:

> 9. No Producer or Agency shall sell or offer for sale Regulated Crops subject to Commission minimum pricing, and no Person shall buy Regulated Crops subject to Commission minimum pricing, at a price less than the minimum price fixed by the Commission from time to time for the variety and grade of the Regulated Product offered for sale, sold or purchased, unless authorized by the Commission.

16. The Commission's Policy regarding Weekly Minimum Pricing for Storage Crops (See: **BCVMC-A-00476** and **BCVMC-A-00477**) identifies the goals and objectives of the policy as follows:

> GOALS:
>
> - Integrated pricing across the organization;
> - Maximize the market returns for Regulated Product;
> - Agencies compete on product quality and customer service.
>
> OBJECTIVES:
>
> - Provide a coordinated approach to pricing in the marketplace;

- Maximize market penetration of BC regulated product;
- Establish base prices for all Agencies;
- Ensure Agencies are as competitive as necessary on pricing, and regularly monitor sales.

17. In the appeal proceedings, Prokam appeared to advance a "bifurcated" view of Provincial and Federal legislative authority (i.e., that a regulation affecting intra-provincial transactions is a matter within provincial jurisdiction, regardless of the dominant purpose of the regulation; and that a regulation affecting inter-provincial or export transactions is a matter within federal jurisdiction, regardless of the dominant purpose of the regulation). Though the BCFIRB appears to have accepted this "bifurcated" view of legislative competence, the Commission reasonably relied on authorities that had rejected this approach.

18. In *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292, the Supreme Court of Canada said:

> 17 Mr. Pelland does not base his argument on the pith and substance of the provincial marketing Act and the provincial chicken regulation; instead, he urges the Court to conclude that placing quota restrictions on products destined for export is not a provincial matter. He does not challenge the validity of the provincial scheme, but argues that it cannot apply to the production of chicken destined solely for interprovincial markets. The scheme he proposes as an alternative would be bifurcated: a federal quota for export production and a provincial one for intraprovincial trade.
>
> 18 Mr. Pelland relies on Laskin C.J.'s statement in the *Egg Reference* that the provincial law and regulations at issue there would not be valid if they occurred "with a view to limiting interprovincial or export trade" (p. 1287). However, this comment was made in the context of considering whether the law and regulations were in pith and substance a provincial matter. Ultimately, as explained later in these reasons, Laskin C.J. found that they were. This comment, therefore, does not support the proposition that provincial laws found valid under a pith and substance analysis are inapplicable to export trade.
>
> 19 Contrary to Mr. Pelland's submissions, in my view the pith and substance of the provincial marketing Act and the provincial

chicken regulations are at the heart of this appeal. In order to determine whether the provincial component of the scheme is unconstitutional because it intrudes into a federal head of power, it is necessary first to determine its core character.

20 The requisite approach was recently discussed by LeBel J. in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at paras. 53-54, a case involving provisions of the Heritage Conservation Act, R.S.B.C. 1996, c. 187:

> A pith and substance analysis looks at both (1) the purpose of the legislation as well as (2) its effect. First, to determine the purpose of the legislation, the Court may look at both intrinsic evidence, such as purpose clauses, or extrinsic evidence, such as Hansard or the minutes of parliamentary committees.
>
> Second, in looking at the effect of the legislation, the Court may consider both its legal effect and its practical effect. In other words, the Court looks to see, first, what effect flows directly from the provisions of the statute itself; then, second, what "side" effects flow from the application of the statute which are not direct effects of the provisions of the statute itself: see *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 482-83. Iacobucci J. provided some examples of how this would work in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 23:
>
> The effects of the legislation may also be relevant to the validity of the legislation in so far as they reveal its pith and substance. For example, in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, the Court struck down a municipal by-law that prohibited leafleting because it had been applied so as to suppress the religious views of Jehovah's Witnesses. Similarly, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117, the Privy Council struck down a law imposing a tax on banks because the effects of the tax were so severe that the true purpose of the law could only be in relation to banking, not taxation. However, merely incidental [page302] effects will not disturb the constitutionality of an otherwise *intra vires* law. [Emphasis added.]

> (See also P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 15.5(d))
>
> . . . . .

30 As a substantive matter, neither judgment in the *Egg Reference* deviated from this Court's defining prior analysis in *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238 . In Carnation, Martland J., writing for a unanimous Court, undertook a careful review of this Court's jurisprudence, including *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, and concluded that:

> The view of the four judges in the Ontario Reference was that the fact that a transaction took place wholly within a province did not necessarily mean that it was thereby subject solely to provincial control. The regulation of some such transactions relating to products destined for interprovincial trade could constitute a regulation of interprovincial trade and be beyond provincial control.
>
> While I agree with the view of the four judges in the Ontario Reference that a trade transaction, completed in a province, is not necessarily, by that fact alone, subject only to provincial control, I also hold the view that the fact that such a transaction incidentally has some effect upon a company engaged in interprovincial trade does not necessarily prevent its being subject to such control.
>
> I agree with the view of Abbott J., in the Ontario Reference, that each transaction and each regulation must be examined in relation to its own facts... . They did not purport directly to control or to restrict such trade. There was no evidence that, in fact, they did control or restrict it. The most that can be said of them is that they had some effect upon the cost of doing business in Quebec of a company engaged in interprovincial trade, and that, by itself, is not sufficient to make them invalid. [Emphasis added; pp. 253-54.]

31 This analysis underlies the concern expressed by Laskin C.J. in the *Egg Reference*, and it arises whenever there is overlapping jurisdiction. Laws enacted under the jurisdiction of one level of government often overflow into or have incidental impact on

the jurisdiction of the other governmental level. That is why a reviewing court is required to focus on the core character of the impugned legislation, as this Court did in *Carnation*; *Attorney-General for Manitoba v. Manitoba Egg and Poultry Assn.,* [1971] S.C.R. 689; the *Egg Reference*; *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; [page307] and *Central Canada Potash Co. v. Government of Saskatchewan,* [1979] 1 S.C.R. 42. (emphasis added)

. . . . .

39 Mr. Pelland also suggested that the Court consider the analysis in *Central Canada Potash* as offering analogous guidance. With respect, however, that case is not applicable. It turned on "the true nature and character" of the operative provincial scheme (p. 75). In *Central Canada Potash*, in fact, Laskin C.J. affirmed the decision of this Court in the *Egg Reference*. At issue was the constitutional validity of provincial regulations in Saskatchewan whereby each producer's share of potash production was allocated based solely on production capacity. It was common ground that at the time the regulations were made, almost all Saskatchewan-produced potash was sold in interprovincial and export trade. The case was decided before s. 92A was added to the *Constitution Act, 1867*, enlarging provincial powers over non-renewable natural resources.

40 Laskin C.J. found that the purpose of the regulations was to regulate the marketing of potash through the fixing of a minimum selling price applicable to the permitted production quota. The only market for which the scheme had any significance was the export market. Citing the Egg Reference, he held that while it is true that production controls and conservation measures with respect to natural resources in a province are ordinarily matters within provincial authority, the situation may be different where a province establishes a marketing scheme with price fixing as its central feature. He found Saskatchewan's legislation to be *ultra vires* because it took direct aim at the production of potash destined for export and had the intended effect of regulating the export price.

41 In Mr. Pelland's case, however, quotas are not being imposed on production *with a view to limiting interprovincial trade*, the hypothetical situation left open by Laskin C.J.'s minority judgment in the *Egg Reference*. Unlike *Central Canada Potash*, where the provincial scheme took direct aim at production destined for export, or the Manitoba Egg and Poultry case in which the provincial scheme *was designed to restrict or limit the free flow of trade between provinces*, the cooperative scheme at issue in this

> case is designed, like the scheme in the *Egg Reference*, to integrate federal and provincial marketing and production programmes.
>
> 42 At best, Mr. Pelland might argue that his production was effectively "choked off" by the reduction of his quota to zero through the penalty provisions of the provincial legislation. It is true that in his case the penalty provisions had this effect. But since the purpose of the provincial legislation is not to strangle export production, and since Mr. Pelland had been entitled, if he so chose, to export his entire quota of chickens, he cannot argue that the limits on his production and marketing contradict the purpose of the provincial legislation.
>
> 43 Mr. Pelland had his quota reduced not to control what he exported to extraprovincial markets, but in proportionate and formulaic response to his overproduction, regardless of the intended market. An individual producer like Mr. Pelland receives a single production quota, regardless of marketing destination. The fact that his quota was reduced to zero had nothing to do with a provincial attempt to regulate interprovincial or export trade, and everything to do with a flagrant disregard for his production quota.
>
> 44 Accordingly, the answer to the first constitutional question is affirmative, namely, the provincial legislation is constitutional and can operate to limit the production of chickens destined exclusively for the interprovincial market. (emphasis added)

19. Similarly, in *R. v. Comeau*, [2018] S.C.J. No. 15, the Supreme Court of Canada specifically addressed the extent to which a provincial law may incidentally affect inter-provincial trade:

> [89] We have established in the preceding sections that the text, historical context, legislative context, and underlying constitutional principles do not support Mr. Comeau's contention that s. 121 should be interpreted as prohibiting any and all burdens on the passage of goods over provincial boundaries, essentially imposing an absolute free trade regime within Canada. Rather, these considerations support a flexible, purposive view of s. 121 — one that respects an appropriate balance between federal and provincial powers and allows legislatures room to achieve policy objectives that may have the incidental effect of burdening the passage of goods across provincial boundaries.

. . . . .

> [96] Finally, Rand J. explained that schemes that restrict goods crossing borders only incidentally cannot be held to violate s. 121 because this would create a constitutional hiatus, which constitutional construction abhors. A prohibition barring even incidental impacts on the passage of goods over a provincial border would render provinces incapable of dealing with important matters within their jurisdictions. At the same time, the federal government could not fill the void because the matter would not fall within its power given the division of powers — "the two jurisdictions could not complement each other by co-operative action": Murphy, at pp. 642-43, per Rand J.
>
> . . . . .
>
> [106] We conclude that a purposive approach to s. 121 leads to the following conclusion: s. 121 prohibits laws that in essence and purpose restrict trade across provincial boundaries. Laws that only have the incidental effect of restricting trade across provincial boundaries because they are part of broader schemes not aimed at impeding trade do not offend s. 121 because the purpose of such laws is to support the relevant scheme, not to restrict interprovincial trade. While *Gold Seal* did not undertake a purposive analysis of s. 121 and hence did not describe the ambit of s. 121 precisely in these terms, it is entirely consistent with it. The earlier jurisprudence of this Court on s. 121 and the broader articulation adopted by Rand J. stand as different moments on a progressive jurisprudential continuum, all consistent with the text of s. 121 , its historical and legislative contexts, and the principle of federalism. (emphasis added)

20. With respect to the interpretation and scope of the *Natural Products Marketing (BC) Act*, Prokam argued that the Act cannot be interpreted in a manner that could provide legislative support for any pricing order having an incidental extra-provincial affect, even if that pricing order is made in furtherance of a purpose within the exclusive constitutional competence of the Province. In other words, Prokam argued that there is a constitutional "hole" within the federal/provincial regulatory system. Again, while the BCFIRB accepted Prokam's argument, the Commission's position was neither frivolous nor artificial. This position was expressed by the Commission paragraphs 103 to 107 of its written submissions, (See: **BCVMC-A-05176 to BCVMC-A-05177**) as follows:

> 103. At paragraphs 334 and following, the Appellants argue that the words “in the Province” as they appear in subsection 4(1) of the Scheme operate to prevent the Commission from making an order or regulation – even one that is within the constitutional competence of the Province – if it has any incidental effect on interprovincial trade.
>
> 104. The Commission respectfully submits that the purpose and effect of the words “in the Province” is not to limit the scope of the Commission’s authority to something “less than” that which is already limited by the scope of Provincial constitutional competence – but rather to affirm that the Commission’s authority under the Scheme is subject to the limits of Provincial constitutional competence.
>
> 105. In other words, the language “in the Province” signals that the drafter of the Scheme intended to limit the scope of authority available to the Commission to that which is within the constitutional competence of the Province. Those words are, in fact, a direct reference to section 92(13) of the Constitution Act, 1867, which confers upon the provincial Legislatures the power to make laws in relation to “property and civil rights in the province”.
>
> 106. Indeed, a more restrictive interpretation would be antithetical to the principle of cooperative federalism, which requires that commodity boards be able to exercise the full scope of legislative authority available to both the Province and Parliament.
>
> 107. In short, the words “in the Province” do not limit the Commission’s ability to make orders and regulations that are within the scope of Provincial legislative competence (including orders and regulations that have an incidental effect of interprovincial trade). On the contrary, those words affirm the Commission’s ability to make such orders and regulations.

21. Ultimately, the BCFIRB found that the APMA would provide legislative authority for the minimum export pricing orders, <u>regardless of their “dominant purpose”</u>:

> 47. There is no compelling reason to stretch the interpretation of the provincial regime to find for the Commission authority to regulate minimum prices for product sold outside BC on the basis that such authority would be an integral part of an

> overall effective regime for management *within* BC. This is because the Commission already has the power to regulate minimum price setting for interprovincial transactions under the federal *Agricultural Products Marketing Act* and the supporting *British Columbia Vegetable Order*.
>
> 48. But in order to actually avail itself of this authority under the federal legislation, the Commission is required to comply with the Statutory Instruments Act. This is accepted by the Commission, which stated in its submission, "in practical terms, this means that any order made by the Commission which depends on delegated federal legislative authority will only come into force after the order has been "Gazetted". There is no dispute that Commission has not yet done so in respect of any orders related to minimum pricing. (emphasis added)

22. Nevertheless, the Gazetting requirements and the Record are immaterial in the context of this proceeding. The Commission has at all material times consistently expressed the position that any order made by it which depends on delegated federal legislative authority will only come into force after the order has been "Gazetted". Further, it was the Commission's position that the minimum export pricing orders were made in furtherance of a purpose within the exclusive constitutional competence of the Province, namely: to prevent unwanted competition among British Columbia Agencies that would impede the maximization of returns for British Columbia Producers. Consequently, it was the Commission's position that these orders did not require federal legislative authority under the APMA (and indeed, could not be supported under the APMA), and therefore did not need to be "Gazetted". Finally, it was the Commission's position that it was the intention of the Legislature to make available to commodity boards the full scope of regulatory powers within the constitutional competence of the Province as are necessary to provide for the effective promotion, control and regulation of the marketing of natural products, and that the *Natural Products Marketing (BC) Act* should be interpreted as such.

23. The BCFIRB ruled against the Commission. However, there is no basis to assert that the Defendants should be retroactively vested with knowledge of that ruling before it was made. More importantly, the record of the proceedings shows that the Commission had consistently taken the position that any order made by it which depends on delegated federal legislative authority will only come into force after the order has been “Gazetted”. For that reason, the Gazetting requirements and the Record are immaterial in the context of this proceeding.

Inadmissibility

24. Though the Record is immaterial in the context of this proceeding, it is nonetheless inadmissible as being subject to Parliamentary privilege.

25. Parliamentary privilege, an essential component of parliamentary democracy, exists to enable Parliament to function effectively and efficiently without undue impediment. In Canada, it is enshrined in the *Constitution Act, 1867*, at section 18 and through its preamble, and is further confirmed in section 4 of the *Parliament of Canada Act*, R.S.C., 1985, c. P-1.

26. Section 5 of the *Parliament of Canada Act* states that the privileges, immunities and powers of the Senate and the House of Commons “are part of the general and public law of Canada”, indicating that the courts must judicially take notice of, as well as “interpret and defend these privileges as they would any branch of law.”

27. In *Ontario v. Rothmans et al.* (2014 ONSC 3382), the Ontario Superior Court of Justice upheld the absolute immunity afforded by the privilege of freedom of speech in the context of ongoing litigation brought pursuant to the provincial *Tobacco Damages and Health Care Costs Recovery Act*.

28. In his analysis, Conway J. reviewed the application of parliamentary privilege in Canada. In deciding to strike references to the parliamentary testimony of the

defendants, he held that the defendants' testimony was protected by the privilege of freedom of speech, and while the parties incorrectly stated that such privilege can be waived, "the privilege belongs to Parliament and therefore it is up to Parliament – not the person who made the statement – to decide whether privilege is to be waived in a particular case."

29. Conway J. made the following observations about the privilege of freedom of speech:

> [12] The privilege applies not only to statements made in Parliament but to those made before parliamentary committees. According to Joseph *Maingot's Parliamentary Privilege in Canada*, "[w]hatever freedom of speech applies in either House of Parliament also applies to committees of either House", and therefore anything that is said "in one of the committees is not actionable in the ordinary courts".
>
> [13] Further, the privilege extends not only to statements made by members of Parliament but to those who participate in proceedings in Parliament or parliamentary committees. As Maingot states:
>
> > The Bill of Rights, 1689 is not restricted to Members; whatever protection is afforded the Member is equally afforded to the non-Member under the same circumstances. Accordingly, witness, petitioner, counsel, and others whose assistance the House considers necessary for conducting its proceedings are protected by the rule of Parliament … that no evidence given in either House can be used against the witness in any other place without the permission of the House.
> >
> > …
> >
> > While taking part in such proceedings, officers of Parliament, Members of Parliament, and the public are immune from being called to account in the courts or elsewhere, save the Houses of Parliament, for any act done or words uttered in the course of participating, however false or malicious the act and however malicious the

> words might be; and any member of the public prejudicially affected is without redress.

[14] As noted in the above passage, the immunity provided by the freedom of speech privilege is absolute – it is not excluded by the presence of malice or fraudulent purpose. Pepall J. (as she then was) stated in *Janssen-Ortho Inc. v. Amgen Canada Inc.* that "[t]he court may not inquire into the statements that are the subject matter of paragraph 33 of the amended statement of claim as they are protected by absolute privilege".

[15] In terms of the scope of the privilege, it is well established that statements made by a person during the course of parliamentary proceedings cannot be used against the person in a civil action. The principle was articulated in *Stopforth v. Goyer*:

> The proceedings of a legislative body are absolutely privileged and words spoken in the course of a proceeding in Parliament can neither form the basis of nor support either a civil action or a criminal prosecution.

[16] The U.K. Parliament's Joint Committee Report, which was cited extensively by Binnie J. in *Vaid*, said that freedom of speech "protects a person from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament". Its effect is that "those who participate in parliamentary proceedings should not in consequence find themselves having to account for their conduct in any form of court proceedings".

…

[28] The privilege is not premised on how the person came to attend before the parliamentary committee, whether his evidence was under oath or whether he was advancing his own interests by attending.

[29] First, as can be seen from the authorities, the privilege applies broadly to those who participate in parliamentary proceedings – a witness, counsel, a "stranger", "the public", a "person", "those who participate", or "others whose assistance the House considers necessary for conducting its proceedings". There is no suggestion in the case law that the privilege only extends to those who are compelled to attend.

> Indeed, Article IX of the Bill of Rights does not refer to any particular class of individuals, but rather insulates parliamentary "freedom of speech", "debates" and "proceedings" from external review.
>
> [30] Second, there is nothing in the authorities that ties the privilege to or justifies it on the basis that the statement in question was made under oath.
>
> [31] Third, because the immunity is absolute, any self-serving motivations of the person participating before the committees would not affect the privilege. Motive is irrelevant to an absolute privilege. In *Roman Corp. v. Hudson's Bay Oil & Gas*, the court struck out a statement of claim noting that it had "no power to inquire into what statements were made in Parliament, why they were made, who made them, what was the motive for making them or anything about them"
>
> [32] Once a person attends and participates in a parliamentary committee proceeding, the absolute privilege applies to his statements made in the course of that proceeding, with the result that the statements cannot be used in a civil action against him. The surrounding circumstances are simply not relevant. In this case, the Crown had pleaded that the defendants made the presentations to various House of Commons standing committees and federal legislative committees. That is sufficient to invoke the privilege.

30. The transcript of proceedings before the Standing Joint Committee for the Scrutiny of Regulations held on March 13, 2008 (**BCVMC-A-00001 to BCVMC-A-00025**) is therefore subject to an absolute privilege that cannot be waived except by Parliament itself, and the record cannot be used in this proceeding.

31. In any event, no order should be made by the BCFIRB to permit the use of the transcript without first providing notice of its intention to do so to Parliamentary counsel. As noted by Conway J., "the privilege belongs to Parliament."

ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 10th DAY OF JANUARY, 2022

Counsel for the British Columbia Vegetable Marketing Commission

PART III - TABLE OF AUTHORITIES

1. *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292

2. *Ontario v. Rothmans et al.* (2014 ONSC 3382)

3. *R. v. Comeau*, [2018] S.C.J. No. 15

Fédération des producteurs de volailles du Québec v. Pelland, [2005] 1 S.C.R. 292

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Major, Bastarache, Binnie,LeBel, Deschamps and Abella JJ.

Heard: December 9, 2004;

Judgment: April 21, 2005.

File No.: 29805.

[2005] 1 S.C.R. 292 | *[2005] 1 R.C.S. 292* | *[2005] S.C.J. No. 19* | *[2005] A.C.S. no 19* | *2005 SCC 20*

André Pelland, appellant; v. Attorney General of Quebec and Fédération des producteurs de volailles du Québec, respondents, and Attorney General of Canada and Chicken Farmers of Canada, interveners.

(63 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Case Summary

Catchwords:

Constitutional law — Distribution of legislative powers — Federal-provincial chicken marketing scheme — Constitutionality of provincial component of scheme — Whether provincial scheme applicable to production of chicken intended for interprovincial market — An Act respecting the marketing of agricultural, food and fish products, R.S.Q., c. M-35.1 — Règlement sur la production et la mise en marché du poulet, R.R.Q., c. M-35.1, r. 13.2 — Plan conjoint des producteurs de volailles du Québec, R.R.Q., c. M-35, r. 126.

Catchwords:

Constitutional law — Delegation of regulatory powers — Referential incorporation of provincial legislation by federal regulatory body — Federal-provincial chicken marketing scheme — Federal body, through Grant of Authority by Governor in Council, delegating its regulatory power over interprovincial and export trade to provincial marketing board and referentially incorporating provincial legislation — Whether administrative delegation and referential incorporation [page293] constitutional — Whether only Parliament can referentially incorporate provincial legislation.

Summary:

The federal and provincial governments entered into a scheme with respect to the production and marketing of

chicken in Canada. Under the scheme, the federal marketing agency set a global production quota for each province and the provincial board agreed to authorize its producers to globally produce and market no more chicken than the quantity fixed by the federal body as that province's share of the national marketing target. The federal body, through a Grant of Authority by the Governor in Council, delegated its authority to allocate and administer the federal quotas and regulate the marketing of chicken in interprovincial and export trade to the provincial body. A chicken producer in a province is thus allocated by the provincial body a single quota applicable to all of his or her production and marketing of chicken, regardless of an intention to market the product intraprovincially, [page294] extraprovincially or both. In this case, the appellant, a Quebec chicken producer, grossly exceeded his allotted quota. The bulk of this production was exported to Ontario. The provincial board, in accordance with the penalty provisions found in the provincial regulations, automatically reduced his quota to zero and imposed a monetary penalty. The Superior Court rejected the appellant's argument that the Quebec law was unconstitutional on the grounds that it affects interprovincial trade, and granted an interlocutory injunction. The Court of Appeal upheld the decision.

Held: The appeal should be dismissed.

The provincial legislative component of the federal-provincial chicken marketing scheme is constitutional and can operate to limit the production of chicken destined exclusively for the interprovincial market. The core character of the provincial legislative component does not relate to setting quotas or fixing prices for exported goods or to attempting to regulate interprovincial or export trade. Rather, its purpose is to establish rules that allow for the organization of the production and marketing of chicken within Quebec, and to control chicken production to fulfill provincial commitments under a cooperative federal-provincial agreement. Any impact of this legislation on extraprovincial trade is incidental. Chicken producers within the province who have received a quota from the provincial body are free to market their products intraprovincially, extraprovincially (with a licence from the federal body) or in some combination of the two, so long as they do not exceed their individual quotas. The fact that the appellant's quota was reduced to zero had nothing to do with a provincial attempt to regulate interprovincial or export trade, and everything to do with a flagrant disregard for his production quota. [paras. 33-34] [para. 37] [paras. 43-44]

The delegation of regulatory powers and the referential incorporation of provincial legislation by the federal body under the Grant of Authority were constitutional. The Grant of Authority, which satisfies the wording and intent of the delegation of power provision of the *Farm Products Agencies Act*, falls squarely within a well-established body of precedent upholding the validity of administrative delegation in aid of cooperative federalism. When the federal legislation and regulations and the Grant of Authority are considered together, it is clear that Parliament intended at all times to retain its administrative control over the provincial body through the federal marketing agency, and there is no indication that the Grant of Authority attempted to expand provincial legislative authority. Lastly, there is no basis in this case for elevating the claim that only Parliament can referentially incorporate provincial legislation to the level of a constitutional principle. [para. 55] [para. 57] [para. 59]

Cases Cited

Applied: Reference re Agricultural Products Marketing Act, *[1978] 2 S.C.R. 1198*; referred to: Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), *[2002] 2 S.C.R. 146*, *2002 SCC 31*; Carnation Co. v. Quebec Agricultural Marketing Board, *[1968] S.C.R. 238*; Reference re The Farm Products Marketing Act, *[1957] S.C.R. 198*; Attorney-General for Manitoba v. Manitoba Egg and Poultry Assn., *[1971] S.C.R. 689*; Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan, *[1978] 2 S.C.R. 545*; Central Canada Potash Co. v. Government of Saskatchewan, *[1979] 1 S.C.R. 42*; British Columbia (Milk Board) v. Grisnich, *[1995] 2 S.C.R. 895*; P.E.I. Potato Marketing Board v. H. B. Willis Inc., *[1952] 2 S.C.R. 392*;

Coughlin v. Ontario Highway Transport Board, *[1968] S.C.R. 569*; Attorney General of Nova Scotia v. Attorney General of Canada, *[1951] S.C.R. 31*; Peralta v. Ontario, *[1988] 2 S.C.R. 1045*.

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Statutes and Regulations Cited

An Act respecting the marketing of agricultural, food and fish products, R.S.Q., c. M-35.1, s. 1, 45, 64, 93(2), (3), (4), (5), (6), 94.

Canadian Chicken Licensing Regulations, SOR/81-517.

Canadian Chicken Marketing Agency Quota Grant of Administrative Authority, P.C. 1991-1090, ss. 2, 3, 4.

Canadian Chicken Marketing Quota Regulations, 1990, SOR/90-556, ss. 2, 3, 4, 5(1), (3), 6, 7.

Chicken Farmers of Canada Proclamation, SOR/79-158, ss. 6(1), 9.

Constitution Act, 1867, ss. 91(2), 92(10), 92A.

Farm Products Agencies Act, R.S.C. 1985, c. F-4, ss. 16(1), 21, 22.

Federal-Provincial Agreement with respect to the establishment of a Comprehensive Chicken Marketing Program in Canada (1978).

Plan conjoint des producteurs de volailles du Québec, R.R.Q., c. M-35, r. 126.

Règlement sur la production et la mise en marché du poulet, R.R.Q., c. M-35.1, r. 13.2, ss. 1, 53, 54, 90, 92.

Authors Cited

Hogg, Peter W. Constitutional Law of Canada, vol. 1, loose-leaf ed. Scarborough, Ont.: Carswell, 1992.

History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Fish, Rousseau-Houle and Chamberland JJ.A.), [2003] Q.J. No. 3331 (QL), affirming a decision of Crôteau J., [2001] Q.J. No. 5828 (QL). Appeal dismissed.

Counsel

Louis H. Lacroix, François Chevrette and Sébastien Locas, for the appellant.

Pierre-Christian Labeau, for the respondent the Attorney General of Quebec.

Pierre Brosseau and Nancy Lemaire, for the respondent Fédération des producteurs de volailles du Québec.

René LeBlanc, for the intervener the Attorney General of Canada.

David K. Wilson and M. Lynn Starchuk, for the intervener the Chicken Farmers of Canada.

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The judgment of the Court was delivered by

ABELLA J.

1 Over 25 years ago, this Court decided that a federal-provincial scheme with respect to the production and marketing of eggs was constitutional. André Pelland, a Quebec chicken farmer whose production is subject to a similar scheme, seeks a review of the scheme's constitutionality.

Background

2 In a landmark 1978 case which has come to be known as the "*Egg Reference*" (*Reference re Agricultural Products Marketing Act*, *[1978] 2 S.C.R. 1198*), this Court unanimously affirmed the constitutional validity of a national agricultural marketing scheme collaboratively crafted by Parliament and the provinces in response to the Court's evolving jurisprudence. The *Egg Reference* has since become the blueprint for federal-provincial marketing schemes.

3 After the release of the *Egg Reference*, the federal and provincial governments entered into the 1978 *Federal-Provincial Agreement with respect to the establishment of a Comprehensive Chicken Marketing Program in Canada* ("Federal-Provincial Agreement").

4 To ensure effective marketing and a dependable supply of chicken to Canadian consumers, the Federal-Provincial Agreement was designed to weave together the legislative jurisdiction of both levels of government in order to ensure a seamless regulatory scheme. The integration of the federal and provincial components of the scheme is achieved through s. 22(3) of the *Farm Products Agencies Act*, *R.S.C. 1985, c. F-4*. (The relevant provisions are attached as

appendices to these reasons.) Section 22(3) enables a federal marketing agency to authorize a provincial body to perform any function relating to interprovincial or export trade in the regulated product that the federal agency is authorized to perform. Pursuant to the *Canadian Chicken Marketing Agency Quota Grant of Administrative Authority* ("Grant of [page297] Authority"), P.C. 1991-1090, June 13, 1991, the federal marketing agency delegated its authority to Quebec's chicken marketing board, the Fédération des producteurs de volailles du Québec ("Fédération"). The Grant of Authority authorized the provincial body to allocate and administer federal quotas in accordance with both the federal *Canadian Chicken Marketing Quota Regulations, 1990*, SOR/90-556, and such relevant rules as were in force from time to time in the province.

5 Implementing its part of the terms of the Federal-Provincial Agreement, and pursuant to what is now s. 16(1) of the *Farm Products Agencies Act*, the federal government created a federal chicken marketing agency, then known as the Canadian Chicken Marketing Agency and now called the Chicken Farmers of Canada ("CFC"). It was expressly empowered by s. 22(1) of the *Farm Products Agencies Act* to implement a marketing plan and make such orders and regulations, subject to the approval of the Governor in Council, as were necessary for the execution of the plan.

6 The provincial component of the scheme in Quebec is the subject of the constitutional challenge before us and is embodied in *An Act respecting the marketing of agricultural, food and fish products*, R.S.Q., c. M-35.1, and the *Règlement sur la production et la mise en marché du poulet*, R.R.Q., c. M-35.1, r. 13.2. In 1971, the *Plan conjoint des producteurs de volailles du Québec*, R.R.Q., c. M-35, r. 126 ("Plan"), was adopted pursuant to what is now s. 45 of the provincial legislation. The Plan is administered by the Fédération and governs all production and marketing of chicken within the province of Quebec.

7 The function of the federal body is to assess the national market and set a global production quota for each province. It assigns a marketing quota to each province representing that province's share of the national market.

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8 Each provincial body then adopts as its intraprovincial production quota the exact share federally assigned to it. It agrees to authorize its local producers to globally produce and market no more chicken than the quantity fixed by the federal body as that province's share of the national marketing target. To produce and market chickens in Quebec, a farmer must receive a quota allocation from the Fédération and produce no more than his or her allocated quota for a given period. A producer in a province receives a single quota applicable to all of his or her production and marketing of chicken, regardless of intended destination.

9 In order to facilitate the integration of production and marketing quotas, the federal body delegates its authority to regulate the marketing of chickens in interprovincial and export trade to the provincial body, in this case the Fédération. Once producers obtain a production and marketing quota from the Fédération, they are free to decide where their product will be sold.

Neither the federal nor the provincial body sets distinct intraprovincial or extraprovincial marketing quotas.

10 In this way, the federal-provincial scheme combines in one body, the Fédération, provincial jurisdiction over production and intraprovincial marketing, and federal jurisdiction over extraprovincial marketing. The federally and provincially assigned quotas dovetail so that the total quantity of chicken produced in Canada does not exceed the agreed-upon national marketing total.

11 Because Mr. Pelland produced 4,425,030 kg in excess of his allotted quota for the relevant periods, the Fédération, in accordance with the penalty provisions found in the provincial regulations, automatically reduced his quota to zero and imposed a monetary penalty in the amount of $2,433,766.50. [page299] In addition, it sought an interlocutory injunction.

12 Crôteau J. granted the injunction: [2001] Q.J. No. 5828 (QL). He found that Mr. Pelland produced and sold about 29 times his quota, representing almost 50 percent of the surplus produced in Quebec for the relevant periods.

13 In the Court of Appeal of Quebec, Rousseau-Houle J.A., writing for a unanimous court (Fish and Chamberland JJ.A.), dismissed Mr. Pelland's appeal on the grounds that this Court's decision in the *Egg Reference* was determinative of the constitutional issue raised by the appellant: [2003] Q.J. No. 3331 (QL).

14 After leave was granted in October 2003, McLachlin C.J. stated the following constitutional questions:

1. Can *An Act respecting the marketing of agricultural, food and fish products*, R.S.Q., c. M-35.1, and the *Règlement sur la production et la mise en marché du poulet*, R.R.Q., c. M-35.1, r. 13.2, constitutionally apply *ex proprio vigore* to limit the production of chickens destined exclusively to the interprovincial market?
2. If not, do *An Act respecting the marketing of agricultural, food and fish products*, R.S.Q., c. M-35.1, and the *Règlement sur la production et la mise en marché du poulet*, R.R.Q., c. M-35.1, r. 13.2, nonetheless apply to limit the production of chickens destined exclusively to the interprovincial market by virtue of s. 22(3) of the *Farm Product Marketing Agencies Act*, *R.S.C. 1985, c. F-4*, and the *Canadian Chicken Marketing Agency Quota Grant of Administrative Authority*, P.C. 1991-1090?

15 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. For the reasons that follow, and based largely on a generation of constitutional jurisprudence from this Court, I would dismiss the appeal.

[page300]

Analysis

A. *The Constitutional Validity of the Provincial Production and Marketing Legislation*

16 Mr. Pelland does not dispute that he grossly exceeded his allocated quota. Rather, he challenges the interlocutory injunction obtained by the Fédération on the grounds that the entirety of his produce is exported to Ontario and not marketed in the province of Quebec. He argues that the provincial marketing Act and regulations can only apply to the production of chickens destined for Quebec markets, not those intended exclusively for interprovincial markets.

17 Mr. Pelland does not base his argument on the pith and substance of the provincial marketing Act and the provincial chicken regulation; instead, he urges the Court to conclude that placing quota restrictions on products destined for export is not a provincial matter. He does not challenge the validity of the provincial scheme , but argues that it cannot apply to the production of chicken destined solely for interprovincial markets. The scheme he proposes as an alternative would be bifurcated: a federal quota for export production and a provincial one for intraprovincial trade.

18 Mr. Pelland relies on Laskin C.J.'s statement in the *Egg Reference* that the provincial law and regulations at issue there would not be valid if they occurred "with a view to limiting interprovincial or export trade" (p. 1287). However, this comment was made in the context of considering whether the law and regulations were in pith and substance a provincial matter. Ultimately, as explained later in these reasons, Laskin C.J. found that they were. This comment, therefore, does not support the proposition that provincial laws found valid under a pith and substance analysis are inapplicable to export trade.

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19 Contrary to Mr. Pelland's submissions, in my view the pith and substance of the provincial marketing Act and the provincial chicken regulations are at the heart of this appeal. In order to determine whether the provincial component of the scheme is unconstitutional because it intrudes into a federal head of power, it is necessary first to determine its core character.

20 The requisite approach was recently discussed by LeBel J. in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at paras. 53-54, a case involving provisions of the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187:

> A pith and substance analysis looks at both (1) the purpose of the legislation as well as (2) its effect. First, to determine the purpose of the legislation, the Court may look at both intrinsic evidence, such as purpose clauses, or extrinsic evidence, such as Hansard or the minutes of parliamentary committees.

Second, in looking at the effect of the legislation, the Court may consider both its legal effect and its practical effect. In other words, the Court looks to see, first, what effect flows directly from the provisions of the statute itself; then, second, what "side" effects flow from the application of the statute which are not direct effects of the provisions of the statute itself: see *R. v. Morgentaler*, *[1993] 3 S.C.R. 463*, at pp. 482-83. Iacobucci J. provided some examples of how this would work in *Global Securities Corp. v. British Columbia (Securities Commission)*, *[2000] 1 S.C.R. 494*, *2000 SCC 21*, at para. 23:

> The effects of the legislation may also be relevant to the validity of the legislation in so far as they reveal its pith and substance. For example, in *Saumur v. City of Quebec*, *[1953] 2 S.C.R. 299*, the Court struck down a municipal by-law that prohibited leafleting because it had been applied so as to suppress the religious views of Jehovah's Witnesses. Similarly, in *Attorney-General for Alberta v. Attorney-General for Canada*, *[1939] A.C. 117*, the Privy Council struck down a law imposing a tax on banks because the effects of the tax were so severe that the true purpose of the law could only be in relation to banking, not taxation. However, merely incidental [page302] effects will not disturb the constitutionality of an otherwise *intra vires* law. [Emphasis added.]

(See also P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 15.5(d))

21 The essential character of an analogous scheme was scrutinized in the *Egg Reference*. Under the scheme at issue in that case, the Canadian Egg Marketing Agency set overall quotas for each province. It was created as a result of an agreement between the federal Minister of Agriculture, the federal marketing agency, and their counterparts in all provinces. The goal was to establish a comprehensive national egg marketing scheme . The federal Agency was given authority to set overall provincial quotas and to impose levies or charges on the marketing of eggs by egg producers, to be collected on its behalf by the provincial egg marketing boards. In Ontario, the Ontario Farm Products Marketing Board was the provincial board setting individual egg production quotas for its producers based on the province's assigned quota. The Ontario legislation also prohibited egg production by anyone who did not have a quota.

22 In the *Egg Reference*, this Court confirmed that the regulation of agricultural production is essentially a local matter within provincial jurisdiction pursuant to s. 92(10) of the *Constitution Act, 1867*. The Court reached the following relevant conclusions: although constitutional jurisdiction over marketing is divided, agricultural production is *prima facie* a local matter under provincial jurisdiction; the provincial scheme was not aimed at controlling extraprovincial trade, but was deemed to be coordinated and integrated with the regulations established under federal authority; and, most pertinently, producers could not claim exemption from provincial control over production by electing to devote their entire output to extraprovincial trade.

[page303]

23 Any effect of the provincial egg marketing and production scheme on extraprovincial trade was found to be incidental to the constitutionally permissible purpose of controlling agricultural production within the context of a cooperative federal-provincial agreement.

24 While disagreeing about the exact scope of the relevant provincial head of power, Pigeon J., for the five-person majority, and Laskin C.J., in a minority concurring opinion, agreed that the provincial component of this marketing scheme was constitutional because its purpose did not extend beyond production and trade within the province. They also both accepted that if the true purpose of the provincial legislation had been to regulate interprovincial and export trade, it would have been *ultra vires*.

25 Pigeon J. held that because agricultural production is *prima facie* within provincial jurisdiction, production quotas could be imposed by a province on all its producers, regardless of the ultimate destination of the goods produced. A producer could not evade a province's jurisdictional authority over production by producing goods destined for an export or extraprovincial market:

> No operator can claim exemption from provincial control by electing to devote his entire output to extraprovincial trade. I can find no basis for the view that there must be a division of authority at the stage of production between what will be going into intraprovincial and what will be going into extraprovincial trade. [Emphasis added; p. 1295.]

26 This is the conclusion Mr. Pelland seeks to set aside, primarily on the basis of Laskin C.J.'s minority opinion expressing the concern that if the focus of the provincial legislation had been the regulation of extraprovincial interests, it would have been beyond the province's jurisdiction. The possibility that specifically caused Laskin C.J. to articulate a caveat to Pigeon J.'s opinion was that of a province using its regulatory jurisdiction over production [page304] to "choke off" interprovincial trade at its very source:

> It is true that a Province cannot limit the export of goods from the Province, and any provincial marketing legislation must yield to this. How then, it may be asked, can it be allowed to accomplish this forbidden end by choking off interprovincial trade at its very source, at the point of production? [p. 1286]

27 Based on this analysis, Mr. Pelland submits that this Court ought to reconsider the constitutionality of a marketing scheme like the one he is regulated by, find the provincial component of the scheme to be unconstitutional, and confine the jurisdiction of provincial marketing boards to production for provincial marketing only.

28 It seems to me that the impugned legislation is constitutionally valid whether the majority or minority opinion in the *Egg Reference* is applied. Pigeon J. did not dispute that provincial legislation which is aimed at regulating extraprovincial trade is *ultra vires*. He held only that agricultural production is *prima facie* a provincial matter:

> In my view, the control of production, whether agricultural or industrial, is *prima facie* a local matter, a matter of provincial jurisdiction. [p. 1293]

He qualified this position, however, by stating:

> This does not mean that such power is unlimited, a province cannot control extraprovincial trade, as was held in the *Manitoba Egg Reference* [*[1971] S.C.R. 689*]

> and in the *Burns Foods* case [*[1975] 1 S.C.R. 494*]. However, "Marketing" does not include production and, therefore, provincial control of production is *prima facie* valid. In the instant case, the provincial regulation is not aimed at controlling the extraprovincial trade. In so far as it affects this trade, it is only complementary to the regulations established under federal authority. In my view this is perfectly legitimate, otherwise it would mean that our Constitution makes it impossible by federal-provincial cooperative action to arrive at any practical scheme for the orderly and efficient production and marketing of a commodity which all governments concerned agree requires [page305] regulation in both intraprovincial and extraprovincial trade. [Emphasis added; p. 1296.]

Laskin C.J. was in substantial agreement with this analysis:

> The primary object is to regulate marketing in intraprovincial trade. Although it would not be a valid regulation of such marketing to impose quotas on production with a view to limiting interprovincial or export trade, I am not persuaded that I should give s. 21*a*, seen in the context of the *Ontario Farm Products Marketing Act* of which it is part, that construction. [Emphasis added; pp. 1286-87.]

29 With respect, I have difficulty seeing how Laskin C.J.'s reasons in the *Egg Reference* assist Mr. Pelland or yield a fertile basis for reconsidering the constitutionality of the provincial component of the scheme in this case. In a passage of equal applicability to the present case, Laskin C.J. wrote that:

> It is clear that the intention was to mesh federal and provincial regulatory control so as to embrace both the producers who market their production in a particular Province and those who seek to export their production to another Province or beyond Canada. It was certainly open to the federal authorities to fix the respective provincial shares of Canadian egg production for the purpose of regulating the movement of eggs in interprovincial or export trade. The share so fixed for a particular Province would establish a limitation for that Province in respect of its own marketing policies. Hence, the fact that a Province has adopted the same share percentage does not *per se* rule out its connection with intraprovincial trade. The adoption provides no more than a reference point by which to measure the provincial approach to marketing quotas for producers in the Province. I do not think that the use of this reference point amounts to an invasion of federal authority in relation to interprovincial trade. Rather, and the terms of the challenged Regulation so indicate, it is enacted under a recognition of that authority and an appreciation of the control of that trade under federal legislation. In short, it envisages that there will be interprovincial and export marketing by producers in Ontario. [Emphasis added; pp. 1282-83.]

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30 As a substantive matter, neither judgment in the *Egg Reference* deviated from this Court's defining prior analysis in *Carnation Co. v. Quebec Agricultural Marketing Board*, *[1968] S.C.R. 238* . In *Carnation*, Martland J., writing for a unanimous Court, undertook a careful review of this

Court's jurisprudence, including *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, and concluded that:

> The view of the four judges in the *Ontario Reference* was that the fact that a transaction took place wholly within a province did not necessarily mean that it was thereby subject solely to provincial control. The regulation of some such transactions relating to products destined for interprovincial trade could constitute a regulation of interprovincial trade and be beyond provincial control.
>
> While I agree with the view of the four judges in the *Ontario Reference* that a trade transaction, completed in a province, is not necessarily, by that fact alone, subject only to provincial control, I also hold the view that the fact that such a transaction incidentally has some effect upon a company engaged in interprovincial trade does not necessarily prevent its being subject to such control.
>
> I agree with the view of Abbott J., in the *Ontario Reference*, that each transaction and each regulation must be examined in relation to its own facts... . They did not purport directly to control or to restrict such trade. There was no evidence that, in fact, they did control or restrict it. The most that can be said of them is that they had some effect upon the cost of doing business in Quebec of a company engaged in interprovincial trade, and that, by itself, is not sufficient to make them invalid. [Emphasis added; pp. 253-54.]

31 This analysis underlies the concern expressed by Laskin C.J. in the *Egg Reference*, and it arises whenever there is overlapping jurisdiction. Laws enacted under the jurisdiction of one level of government often overflow into or have incidental impact on the jurisdiction of the other governmental level. That is why a reviewing court is required to focus on the core character of the impugned legislation, as this Court did in *Carnation*; *Attorney-General for Manitoba v. Manitoba Egg and Poultry Assn.*, [1971] S.C.R. 689; the *Egg Reference*; *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; [page307] and *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42.

32 Turning to an examination of the essence of the provincial component of the 1978 federal-provincial chicken marketing scheme, one observes at the outset that the scheme is functionally identical to Ontario's egg marketing and production legislation considered in the *Egg Reference*. Like that case, the parties agree that the provisions of the *Constitution Act, 1867* engaged by the federal-provincial chicken marketing scheme at issue here are s. 91(2), which confers jurisdiction over trade and commerce to the federal government, and s. 92(10), which gives provincial governments jurisdiction over local works and undertakings.

33 As previously indicated, once the national quota for chicken production is divided among the provinces, a producer must be allotted an individual production quota in order to produce chicken in the province. Chicken producers within each province receive only one individual marketing and production quota.

34 The provincial chicken regulation expresses quotas in square meters of barn space, clearly tying quotas to physical production within Quebec. The quota assigned to each producer in a province does not distinguish between what can be marketed within the province and what can be marketed extraprovincially; rather, the decision whether to market internally or externally is up to each producer once he or she obtains the proper licences (*Canadian Chicken Licensing Regulations*, SOR/81-517). Quebec's chicken producers are free to market their products

intraprovincially, extraprovincially or in some combination of the two, so long as they do not exceed their individual quotas.

35 The only requirements imposed on provincial producers wishing to export their product are that they obtain a marketing and production quota from the Fédération and a licence from the federal body. A producer may not engage in the marketing of [page308] chicken in interprovincial or export trade without the appropriate licence. The licensing requirement, however, is not onerous. On receipt of a valid application, the federal body is required to issue a licence. For its part, the producer is required to abide by the applicable laws and to make regular reports detailing its extraprovincial sales. The amount of chicken that a producer may export is not specified on the licence and is, in theory, limited solely by the quota amount assigned by the Fédération.

36 It is important to stress that in examining the provincial laws at issue in the *Egg Reference*, both Laskin C.J. and Pigeon J. agreed that they were constitutional because they did not purport to, nor did they in fact, directly control or restrict export trade. The same is true of the provincial scheme in this case.

37 The core character of the provincial legislative component of the federal-provincial chicken marketing scheme is not to set quotas or fix prices for exported goods or to attempt to regulate interprovincial or export trade. As in the *Egg Reference*, its purpose is to establish rules that allow for the organization of the production and marketing of chicken within Quebec and to control chicken production to fulfill provincial commitments under a cooperative federal-provincial agreement. Any impact of this legislation on extraprovincial trade is incidental.

38 With respect, I see no principled basis for disentangling what has proven to be a successful federal-provincial merger. Because provincial governments lack jurisdiction over extraprovincial trade in agricultural products, Parliament authorized the creation of federal marketing boards and the delegation to provincial marketing boards of regulatory jurisdiction over interprovincial and export trade. Each level of government enacted laws and regulations, based on their respective legislative competencies, to create a unified and coherent regulatory scheme. [page309] The quota system is an attempt to maintain an equilibrium between supply and demand and attenuate the inherent instability of the markets. To achieve this balance, it cannot exempt producers who seek to avoid production control limits by devoting all or any of their production to extraprovincial trade.

39 Mr. Pelland also suggested that the Court consider the analysis in *Central Canada Potash* as offering analagous guidance. With respect, however, that case is not applicable. It turned on "the true nature and character" of the operative provincial scheme (p. 75). In *Central Canada Potash*, in fact, Laskin C.J. affirmed the decision of this Court in the *Egg Reference*. At issue was the constitutional validity of provincial regulations in Saskatchewan whereby each producer's share of potash production was allocated based solely on production capacity. It was common ground that at the time the regulations were made, almost all Saskatchewan-produced potash was sold in interprovincial and export trade. The case was decided before s. 92A was added to the *Constitution Act, 1867*, enlarging provincial powers over non-renewable natural resources.

40 Laskin C.J. found that the purpose of the regulations was to regulate the marketing of potash through the fixing of a minimum selling price applicable to the permitted production quota. The

only market for which the scheme had any significance was the export market. Citing the *Egg Reference*, he held that while it is true that production controls and conservation measures with respect to natural resources in a province are ordinarily matters within provincial authority, the situation may be different where a province establishes a marketing scheme with price fixing as its central feature. He found Saskatchewan's legislation to be *ultra vires* because it took direct aim at the production of potash destined for export and had the intended effect of regulating the export price.

[page310]

41 In Mr. Pelland's case, however, quotas are not being imposed on production with a view to limiting interprovincial trade, the hypothetical situation left open by Laskin C.J.'s minority judgment in the *Egg Reference*. Unlike *Central Canada Potash*, where the provincial scheme took direct aim at production destined for export, or the *Manitoba Egg and Poultry* case in which the provincial scheme was designed to restrict or limit the free flow of trade between provinces, the cooperative scheme at issue in this case is designed, like the scheme in the *Egg Reference*, to integrate federal and provincial marketing and production programmes.

42 At best, Mr. Pelland might argue that his production was effectively "choked off" by the reduction of his quota to zero through the penalty provisions of the provincial legislation. It is true that in his case the penalty provisions had this effect. But since the purpose of the provincial legislation is not to strangle export production, and since Mr. Pelland had been entitled, if he so chose, to export his entire quota of chickens, he cannot argue that the limits on his production and marketing contradict the purpose of the provincial legislation.

43 Mr. Pelland had his quota reduced not to control what he exported to extraprovincial markets, but in proportionate and formulaic response to his overproduction, regardless of the intended market. An individual producer like Mr. Pelland receives a single production quota, regardless of marketing destination. The fact that his quota was reduced to zero had nothing to do with a provincial attempt to regulate interprovincial or export trade, and everything to do with a flagrant disregard for his production quota.

44 Accordingly, the answer to the first constitutional question is affirmative, namely, the provincial legislation is constitutional and can operate to limit the production of chickens destined exclusively for the interprovincial market.

[page311]

B. *Administrative Delegation and Referential Incorporation*

45 Mr. Pelland's alternative argument is that the Grant of Authority in this case was constitutionally improper.

46 In *British Columbia (Milk Board) v. Grisnich*, *[1995] 2 S.C.R. 895*, the Court held that a provincial administrative body does not need to specify on the face of a decision the exact source of the authority to make it. So long as a provincial marketing board is properly endowed with both federal and provincial powers, the court will not look behind any given decision.

47 If, however, there is a deficiency in the federal-provincial scheme, the court may scrutinize the impugned decision of the provincial board to determine the authority under which it was made. The question then becomes whether the decision is constitutionally sustainable given the legislative or administrative defect.

48 I see no such defect in this case. The federal body, through the Grant of Authority, properly delegated its regulatory power over interprovincial and export trade to the Fédération.

49 Mr. Pelland concedes that a provincial marketing board may impose quota restrictions on products destined for export if there is a proper federal delegation of authority. It is his position, however, that the federal body, the CFC, failed to properly delegate its regulatory authority to the Fédération. He cites as the dispositive irregularity the referential incorporation by the federal body of provincial rules under s. 4 of the Grant of Authority which provides that, in allotting and administering federal quotas, a provincial board shall, in accordance with the federal regulations, apply such rules as are in force from time to time in the province in relation to the allotment and administration of provincial quotas.

50 He contends that only Parliament can referentially incorporate the legislation of a province and [page312] that Parliament must do so expressly. Unless so authorized, a federal regulatory body may not referentially incorporate provincial laws when delegating its powers to a provincial marketing board. Since s. 22(3) of the *Farm Products Agencies Act* does not expressly provide for referential incorporation, Mr. Pelland maintains that it was not open to the federal body to referentially incorporate provincial laws under s. 4 of the Grant of Authority. Section 22(3) states:

> An agency may, with the approval of the Governor in Council, grant authority to any body, authorized under the law of a province to exercise powers of regulation in relation to the marketing locally within the province of any regulated product in relation to which the agency may exercise its powers, to perform on behalf of the agency any function relating to interprovincial or export trade in the regulated product that the agency is authorized to perform.

51 Both the intent and wording of this provision are satisfied by the Grant of Authority: it was approved by the Governor in Council; the Fédération is a "body, authorized under the law of a province to exercise powers of regulation in relation to the marketing locally within the province of any regulated product"; s. 3 of the Grant virtually mirrors the language of the statute granting authority to the Fédération; and s. 4 of the Grant fulfills the obligations of the federal body under s. 9 of the *Chicken Farmers of Canada Proclamation*, SOR/79-158, to "prescribe the function that is to be performed on behalf of [Chicken Farmers of Canada]" by the Fédération and other provincial boards.

52 Moreover, a venerable chain of judicial precedent chokes off Mr. Pelland's argument. In *P.E.I. Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392 , this Court affirmed the constitutionality of an administrative inter-delegation from Parliament to a provincial administrative body. Parliament, it held, has the authority to enable a provincial body to exercise, with respect to a matter of federal jurisdiction, the same powers as it exercises within provincial jurisdiction. It is the validity of precisely such a [page313] delegation which was reaffirmed in the *Egg Reference*. While provinces cannot use their jurisdiction over local matters to regulate extraprovincial commerce, they may nonetheless use their provincial powers to complement federal regulation in the area. As previously noted, it was explicitly stated in the *Egg Reference* that no producer can claim an exemption from provincial control by electing to devote the bulk of his or her production to extraprovincial trade.

53 In *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, this Court held that Parliament may, acting within its legislative competence, incorporate provincial legislation by reference. Writing for the majority in a case concerning a federal referential incorporation of a provincial law dealing with motor vehicle transport, Cartwright J. held: "In my opinion there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist" (p. 575). Referential incorporation is thus designated to be a useful technique when there is overlapping constitutional jurisdiction and it is necessary to dovetail federal and provincial legislation.

54 In *Coughlin*, both administrative inter-delegation and referential incorporation were deemed constitutional because neither violated the constitutional bar on legislative inter-delegation. The prohibition against legislative inter-delegation was set out by this Court in *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, where it held that one legislative body cannot enlarge the powers of another by authorizing the latter to enact laws which would have no significance or validity independent of the delegation.

55 Applying the principles governing administrative delegation to the chicken marketing scheme, the federal body, the CFC, was free to referentially incorporate provincial legislation under the Grant of Authority. The Grant of Authority falls squarely [page314] within a well-established body of precedent upholding the validity of administrative delegation in aid of cooperative federalism, such as *P.E.I. Potato Marketing Board, Coughlin*, the *Egg Reference* and *Peralta v. Ontario*, [1988] 2 S.C.R. 1045.

56 The Grant of Authority must be construed in the context of other elements of the regulatory scheme. Section 6(1) of the *Chicken Farmers of Canada Proclamation* states that the CFC shall establish a quota system whereby quotas are allotted to producers in each province by the appropriate provincial board. Both ss. 3 and 4 of the Grant of Authority clearly indicate that the powers delegated to the Fédération are to be exercised subject to the federal regulations, which themselves impose a number of substantive constraints on the delegated power. They provide, for example, that a provincial producer marketing chickens in interprovincial trade must have been allotted a federal quota by the provincial board. The federal regulations also provide that the number of kilograms marketed must be equal to or less than the federal quota and that the producer must comply with the rules that the Fédération is authorized to exercise in the name of the CFC.

57 When the federal legislation, regulations and the Grant of Authority are considered together, it is clear that Parliament intended at all times to retain its administrative control over the Fédération through the CFC. There is no indication that the Grant of Authority attempted to expand provincial legislative authority. The CFC can take back the powers it delegated at any time. The federal chicken regulations in no way altered the nature of the delegation of authority from the CFC to the Fédération, and there was no impermissible legislative delegation by the Grant of Authority.

58 It is interesting to note that the argument raised by Mr. Pelland was also raised in the *Egg Reference*, where it was argued that only Parliament could incorporate provincial legislation by reference. For the Governor in Council to do so, would be unconstitutional. Laskin C.J. discussed administrative [page315] delegation and referential incorporation at some length, concluding, in a passage concurred in by Pigeon J., that:

> Involved in the appellants' submissions, as reflected in their factum and in oral argument, was the contention that there is a constitutional requirement in the delegation of authority that standards be fixed by Parliament or where, as here, there is delegation in depth, that is by orders which the Governor-in-Council is authorized to make, the orders of the Governor-in-Council should establish standards and not, by wholesale redelegation, leave their determination to the provincial boards nor, as s. 2(1) provides, adopt the various provincial standards for federal purposes. I do not think this Court would be warranted in imposing such a constitutional limitation on the delegation of authority. The matter of delegation in depth is covered by the judgment of this Court in *Reference re Regulations (Chemicals) under the War Measures Act* [*[1943] S.C.R. 1*], and I would not limit its rationale to emergency legislation. There is sufficient control on an administrative law basis through the principle enunciated and applied by this Court in [*Brant Dairy Co. v. Milk Commission of Ontario*, *[1973] S.C.R. 131*] (which arises for consideration under question 2) and I find no ground for raising it to a constitutional imperative. [Emphasis added; pp. 1225-26.]

59 The analysis remains apposite: there is no basis in the present appeal for elevating the claim that only Parliament can referentially incorporate provincial legislation to the level of a constitutional principle.

60 As envisaged by the 1978 Federal-Provincial Agreement, Parliament intended that federal and provincial legislation create an interlocking scheme for the effective regulation of chicken production and marketing. It was clearly intended that the "federal quota" and the "provincial quota", as defined in the federal chicken regulations, be integrated. Parliament could not have intended that the federal body establish 10 different sets of quota administration rules subject to modification whenever provincial quota administration rules were modified. And it is clear from s. 22(3) of the *Farm Products Agencies Act* that Parliament intended that the CFC enact regulations which would promote the integrity of the federal-provincial scheme. [page316] The federal and provincial schemes were intended to dovetail.

61 In order to give effect to this legislative intent with respect to the allocation and administration of quotas, the federal body could either have re-enacted the relevant provincial legislation in each jurisdiction as its own, or incorporated it by reference. That it chose to do so by referential incorporation does not render the choice vulnerable to constitutional censure.

62 Mr. Pelland, during oral argument, abandoned his final submission that the Grant of Authority was invalid because it was not properly published in the *Canada Gazette*.

63 I would dismiss the appeal with costs to Fédération des producteurs de volailles du Québec. No other party requested costs.

* * * * *

APPENDIX A

Relevant Federal Laws and Regulations

Farm Products Agencies Act, R.S.C. 1985, c. F-4

> **16.** (1) The Governor in Council may, by proclamation, establish an agency with powers relating to any farm product or farm products the marketing of which in interprovincial and export trade is not regulated pursuant to the *Canadian Wheat Board Act* or the *Canadian Dairy Commission Act* where the Governor in Council is satisfied that a majority of the producers of the farm product or of each of the farm products in Canada is in favour of the establishment of an agency.
>
> **21.** The objects of an agency are
>
> (*a*) to promote a strong, efficient and competitive production and marketing industry for the regulated product or products in relation to which it may exercise its powers; and
>
> (*b*) to have due regard to the interests of producers and consumers of the regulated product or products.

[page317]

> **22.** (1) Subject to the proclamation by which it is established and to any subsequent proclamation altering its powers, an agency may
>
> ...
>
> (*b*) implement a marketing plan the terms of which are set out in the proclamation establishing it or in any subsequent proclamation issued under subsection 17(2) in respect of it;
>
> ...
>
> (*f*) where it is empowered to implement a marketing plan, make such orders and regulations as it considers necessary in connection therewith, but all such orders and regulations shall, in the case of orders and regulations that are of a class to which

paragraph 7(1)(*d*) is made applicable, be submitted to the Council before the making thereof, and in any other case, be submitted to the Council either before or after the making thereof ...

...

(*n*) do all such other things as are necessary or incidental to the exercise of any of its powers or the carrying out of any of its functions under this Act.

(2) An agency may perform on behalf of a province any function relating to intraprovincial trade in any regulated product in relation to which it may exercise its powers that is specified in an agreement entered into pursuant to section 31.

(3) An agency may, with the approval of the Governor in Council, grant authority to any body, authorized under the law of a province to exercise powers of regulation in relation to the marketing locally within the province of any regulated product in relation to which the agency may exercise its powers, to perform on behalf of the agency any function relating to interprovincial or export trade in the regulated product that the agency is authorized to perform.

Canadian Chicken Marketing Quota Regulations, 1990, SOR/90-556

2. In these Regulations,

...

[page318]

"Agency" means the Canadian Chicken Marketing Agency;

...

"Commodity Board" means, in respect of the Province of

...

(*b*) Quebec, the Fédération des producteurs de volailles du Québec,

...

"federal quota" means the number of kilograms of chicken, expressed in live weight, that a producer is entitled, pursuant to these Regulations, to market in interprovincial and export trade during the year referred to in Schedule I or the period referred to in Schedule II;

...

"producer" means a person who raises chicken for processing or for sale to the public;

"provincial quota" means the number of kilograms of chicken, expressed in live weight, that a producer is entitled, pursuant to orders, regulations or policy directives made by the appropriate Commodity Board, to market in intraprovincial trade during the year referred to in Schedule I or the period referred to in Schedule II.

3. (1) Subject to subsection (2), these Regulations apply to the marketing of chicken in interprovincial and export trade.

(2) These Regulations do not apply to the marketing of chicken under quota exemptions granted by a Commodity Board.

4. No producer shall market chicken in interprovincial or export trade

(*a*) unless a federal quota has been allotted to the producer, on behalf of the Agency, by the Commodity Board of the province in which the producer's chicken production facilities are located;

(*b*) in excess of the federal quota referred to in paragraph (*a*); or

[page319]

(*c*) contrary to any rule of the Commodity Board referred to in paragraph (*a*) that the Commodity Board has been authorized by the Agency, pursuant to subsection 22(3) of the Act, to apply in performing on behalf of the Agency the function of allotting and administering federal quotas.

5. (1) Subject to subsections (2) and (3), a producer is not entitled to be allotted a federal quotas [*sic*] unless, on August 25, 1990, the producer was entitled to a federal quota pursuant to the *Canadian Chicken Marketing Quota Regulations*.

...

(3) On or after August 26, 1990, a producer is entitled to be allotted a federal quota if, pursuant to the rules of the Commodity Board of the province in which the producer's chicken production facilities are located, the producer is allotted a provincial quota.

6. The quantity of chicken that a producer is authorized to market from a province under a federal quota for the year referred to in Schedule I or the period referred to in Schedule II shall equal the provincial quota allotted to the producer for that year or period by the Commodity Board of the province minus the quantity of chicken marketed by that producer in intraprovincial trade in that province during that year or period.

7. The Commodity Board of a province shall allot federal quotas to producers in the province in such manner that the aggregate number of kilograms of chicken produced in the province and

(*a*) authorized to be marketed by producers in interprovincial or export trade under federal quotas allotted on behalf of the Agency by the Commodity Board of the province,

(*b*) authorized to be marketed by producers in intraprovincial trade under provincial quotas allotted by the Commodity Board of the province, and

[page320]

(*c*) anticipated to be marketed by producers under quota exemptions granted by the Commodity Board of the province,

during the year referred to in Schedule I or the period referred to in the Schedule II will not exceed the number of kilograms of chicken set out in respect of that province for that year or period.

Canadian Chicken Marketing Agency Quota Grant of Administrative Authority, P.C. 1991-1090, June 13, 1991

2. In this Grant of Authority,

"Agency" means the Canadian Chicken Marketing Agency;

...

"Commodity Board" means, in respect of the Province of

...

(b) Quebec, the Fédération des producteurs de volailles du Québec,

...

"federal quota" means the number of kilograms of chicken, expressed in live weight, that a producer is entitled, pursuant to these Regulations, to market in interprovincial and export trade during the year referred to in Schedule I to the Regulations or the period referred to in Schedule II to the Regulations;

...

"producer" means a person who raises chicken for processing, for sale to the public or for use in products manufactured by the producer;

"provincial quota" means the number of kilograms of chicken, expressed in live weight, that a producer is entitled, pursuant to orders, regulations or policy directives made by the appropriate Commodity Board, to market in intraprovincial trade during

the year referred to in Schedule I to the Regulations or the period referred to in Schedule II to the Regulations;

"Regulations" means the *Canadian Chicken Marketing Quota Regulations, 1990.*

[page321]

3. Subject to section 4, the Agency hereby grants to the Commodity Board of each province authority to perform on behalf of the Agency the function of allotting and administering, in accordance with the Regulations, federal quotas in the province and, for the purpose of performing that function, to exercise on behalf of the Agency all and any powers that the agency would be entitled to exercise in the performance thereof.

4. In performing the function of allotting and administering federal quotas pursuant to this Grant of Authority, a Commodity Board of a province shall, in accordance with the Regulations, apply in relation to the matters listed below such rules, if any, as are in force from time to time in the province in relation to the allotment and administration of provincial quotas:

(a) entitlement to a quota;

(b) the basis on which the amount of a quota is determined;

(c) an increase or decrease in a quota or an allotment of an additional quota;

(d) the allotment of quotas to producers who have or have not previously been allotted a quota;

(e) the period of time for which a quota is valid;

(f) maximum and minimum quota size;

(g) the determination of who is a producer including the producer's affiliates, partners, associates and subsidiaries;

(h) cancellation, suspension or variation of quotas for breach of the rules relation to quotas or for non-payment of levies imposed by the Commodity Board or the Agency;

(i) reduction or loss of a quota for failure to utilize the quota;

(j) ownership, leasing and transfer of quotas;

(k) quota banks;

(l) the definition of chicken production facilities and the application and relationship of the definition to quotas;

(m) utilization of quotas;

(n) marketing arrangements with processors; and

[page322]

(o) information and reports to be submitted by producers.

APPENDIX B

Relevant Provincial Laws and Regulations

An Act respecting the marketing of agricultural, food and fish products, R.S.Q., c. M-35.1

1. This Act establishes rules to allow orderly organization of the production and marketing of agricultural and food products and the marketing of fish products and of wild fur, whether or not such activities are carried on for purposes of sale.

45. Ten or more interested producers may transmit to the Régie a draft joint plan permitting the establishment of conditions for the production and marketing of an agricultural product originating from a designated territory or intended for a specified purpose or a particular buyer, and the constitution of a producer marketing board to administer the plan.

64. The producer marketing board is established upon the coming into force of a plan; it is responsible for administering the plan and may exercise every power conferred by this Title, subject to any restriction or condition set out in the plan or determined by the Régie.

93. A marketing board may, by by-law, fix production and marketing quotas for the product marketed under the plan it administers and, for that purpose, subject production and marketing to the conditions, restrictions and prohibitions it determines.

Without restricting the scope of the first paragraph, a board may, by by-law,

...

(2) require that every producer be the holder of an individual quota allocated by the board and authorizing him to produce or market the product marketed under the plan it administers, fix the minimum and maximum quotas the producer may hold, individually or in association with other persons, and determine the proportion of the quota each producer must produce himself within his operation;

(3) determine the conditions governing the allocation, maintenance or renewal of an individual quota, and the manner in which it is issued;

[page323]

(4) establish equivalences based on the area under cultivation or operation or the number of animals reared or marketed, for the purpose of fixing the quota of a producer;

(5) determine the manner and conditions applicable to the temporary or permanent reduction of the quota of a producer who produces or markets a larger or smaller quantity of the product marketed under the plan than is permitted by his quota;

(6) impose on any producer who contravenes a by-law made under this section, a penalty based on the volume or value of the product marketed or the area under cultivation or operation, and prescribe the use of this penalty for particular purposes;

...

94. Where a marketing board makes a by-law under section 93, no person may produce or market the product concerned unless he holds a quota, except in the circumstances and on the conditions determined in the by-law.

Règlement sur la production et la mise en marché du poulet, R.R.Q., c. M-35.1, r. 13.2

[TRANSLATION]

1. Any person who produces and markets chicken covered by the Plan conjoint des producteurs de volailles du Québec (R.R.Q., c. M-35, r. 126) shall first be the holder of a quota granted by the Fédération des producteurs de volailles du Québec in accordance with this regulation.

"Quota" (*quota*) means an authorization to produce expressed in square metres that is confirmed by a certificate.

53. In every period, every producer shall breed a number of chickens sufficient to meet his individual quota (*contingent individuel*) and shall market the quantity in kilograms provided for in his individual quota.

54. A producer's individual quota (*contingent individuel*) represents the maximum quantity of chicken, expressed in kilograms of body weight, that he may produce and market in the course of a period based on his quota (*quota*) and the percentage of use determined by the Fédération.

90. Any producer who, after the application of section 71, produces or markets chicken in a quantity exceeding his individual quota in a given period shall, during the [page324] sixth period following the one in which his overproduction occurred, reduce his production and marketing by a quantity equivalent to his overproduction.

92. Any producer who produces and markets chicken in a quantity exceeding his individual quota as adjusted in accordance with the provisions of Chapter IV shall, in addition to complying with the reduction imposed pursuant to section 90, pay to the Fédération:

(1) $0.35 per kilogram of chicken in body weight for any production up to 3% of his individual quota; and

(2) $0.55 per kilogram of chicken in body weight for any portion of his production exceeding 3% of his individual quota.

Solicitors

Solicitor for the appellant: Louis H. Lacroix, Berthierville, Quebec.

Solicitor for the respondent the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitors for the respondent Fédération des producteurs de volailles du Québec: Tremblay, Brosseau, Fleury, Savoie, Montréal.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the Chicken Farmers of Canada: Johnston & Buchan, Ottawa.

Her Majesty the Queen in Right of Ontario v. Rothmans Inc.et al.[Indexed as: Ontario v. Rothmans Inc.]

Ontario Reports

Ontario Superior Court of Justice,

Conway J.

June 12, 2014

120 O.R. (3d) 467 | *2014 ONSC 3382*

Case Summary

Civil procedure — Pleadings — Striking out — Privilege — Crown suing tobacco companies under Tobacco Damages and Health Care Costs Recovery Act — Defendant moving to strike paragraphs of statement of claim alleging that defendants had repeated misrepresentations about risks of smoking before various parliamentary committees — Motion granted and paragraphs struck on basis of parliamentary privilege — Evidentiary context not required to determine if presentations were privileged — Tobacco Damages and Health Care Costs Recovery Act, 2009, *S.O. 2009, c. 13*.

The Crown was suing the defendant tobacco companies under the *Tobacco Damages and Health Care Costs Recovery Act, 2009*. In support of allegations of misrepresentation and conspiracy, the Crown alleged in the statement of claim [page468] that the defendants continually repeated misrepresentations about the risks of smoking before House of Commons committees and federal legislative committees. One of the defendants brought a motion to strike those paragraphs on the basis of parliamentary privilege.

Held, the motion should be granted.

Parliamentary privilege, or freedom of speech privilege, applies not only to statements made in Parliament but also to those made before parliamentary committees. It extends not only to statements made by Members of Parliament but also to those who participate in proceedings in

Parliament or parliamentary committees. The privilege is absolute and not excluded by the presence of malice or fraudulent purpose. Given the absolute nature of the privilege, an evidentiary context was not required to determine if the defendants' presentations were privileged.

Cases referred to

Canada (House of Commons) v. Vaid, [2005] 1 S.C.R. 667, [2005] S.C.J. No. 28, 2005 SCC 30, 252 D.L.R. (4th) 529, 333 N.R. 314, J.E. 2005-976, 28 Admin. L.R. (4th) 1, 41 C.C.E.L. (3d) 1, [2005] CLLC Â230-016, 135 C.R.R. (2d) 189, 139 A.C.W.S. (3d) 529; *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)*, [2007] F.C.J. No. 752, 2007 FC 564, 65 Admin. L.R. (4th) 111, 313 F.T.R. 183, [2008] 1 F.C.R. 752, 158 A.C.W.S. (3d) 656; *Doucette v. Region 7 Hospital Corp.*, [2002] N.B.J. No. 46, 2002 NBQB 39, 246 N.B.R. (2d) 171, 111 A.C.W.S. (3d) 491; *Gagliano v. Canada (Attorney General)*, [2005] F.C.J. No. 683, 2005 FC 576, [2005] 3 F.C.R. 555, 265 F.T.R. 218, 253 D.L.R. (4th) 701, 30 Admin. L.R. (4th) 171, 139 A.C.W.S. (3d) 952; *Hamilton v. Al Fayed*, [2000] 2 All E.R. 224, [2001] 1 A.C. 395, [2000] E.M.L.R. 531 (H.L.); *Janssen-Ortho Inc. v. Amgen Canada Inc.*, [2005] O.J. No. 2265, 256 D.L.R. (4th) 407, 199 O.A.C. 89, 140 A.C.W.S. (3d) 58 (C.A.), varg [2004] O.J. No. 2523, [2004] O.T.C. 508, 2004 CanLII 8595, 131 A.C.W.S. (3d) 409 (S.C.J.); *Manning v. Epp*, [2007] O.J. No. 2036, 2007 ONCA 390, 229 O.A.C. 220, 157 A.C.W.S. (3d) 904, affg [2006] O.J. No. 2904, 2006 CanLII 24126, [2006] O.T.C. 657, 150 A.C.W.S. (3d) 30 (S.C.J.); *New Brunswick v. Rothmans Inc.*, [2010] N.B.J. No. 300, 2010 NBQB 291, 363 N.B.R. (2d) 341; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, [1993] S.C.J. No. 2, 100 D.L.R. (4th) 212, 146 N.R. 161, J.E. 93-231, 118 N.S.R. (2d) 181, 13 C.R.R. (2d) 1, 37 A.C.W.S. (3d) 1194; *Prebble v. Television New Zealand Ltd.*, [1995] 1 A.C. 321, [1994] 3 All E.R. 407, [1994] 3 W.L.R. 970 (P.C.); *R. v. Connolly* (1891), 22 O.R. 220, [1891] O.J. No. 44 (C.P. Div.); *Roman Corp. Ltd. v. Hudson's Bay Oil & Gas Co.*, [1973] S.C.R. 820, [1973] S.C.J. No. 70, 36 D.L.R. (3d) 413, affg [1972] 1 O.R. 444, [1971] O.J. No. 1799, 23 D.L.R. (3d) 292 (C.A.), affg [1971] 2 O.R. 418, [1971] O.J. No. 1534, 18 D.L.R. (3d) 134 (H.C.J.); *Stopforth v. Goyer* (1979), 23 O.R. (2d) 696, [1979] O.J. No. 4128, 97 D.L.R. (3d) 369, 8 C.C.L.T. 172, [1979] 1 A.C.W.S. 350 (C.A.), revg (1978), 20 O.R. (2d) 262, [1978] O.J. No. 3432, 87 D.L.R. (3d) 373, 4 C.C.L.T. 265, [1978] 1 A.C.W.S. 684 (H.C.J.); *Thompson v. McLean*, [1998] O.J. No. 2070, 63 O.T.C. 321, 37 C.C.E.L. (2d) 170, 79 A.C.W.S. (3d) 717 (Gen. Div.)

Statutes referred to

Bill of Rights, 1689 (U.K.), 1 Will and Mary, sess. 2, art. 9

Constitution Act, 1867, s. 18

Parliament of Canada Act, *R.S.C. 1985, c. P-1, ss. 4*, 5

Tobacco Damages and Health Care Costs Recovery Act, 2009, *S.O. 2009, c. 13, s. 4*

Rules and regulations referred to

Rules of Civil Procedure, *R.R.O. 1990, Reg. 194, rule 25.11* [page469]

Authorities referred to

Maingot, J.P. Joseph, *Parliamentary Privilege in Canada*, 2nd ed. (Ottawa: House of Commons and McGill-Queen's University Press, 1997)

McKay, William, ed., et al., *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed. (London: LexisNexis, 2004)

Parliament of the United Kingdom, *Report and Proceedings of the Joint Committee on Parliamentary Privilege*, vol. 1 (London: H.M.S.O., 1999)

MOTION to strike paragraphs of a statement of claim.

Craig T. Lockwood and *Carey O'Connor*, for Imperial Tobacco Canada Limited, moving party.

Lise G. Favreau and *Kristin Smith*, for Her Majesty the Queen in Right of Ontario (the "Crown").

[1] CONWAY J.: — Imperial Tobacco Canada Limited ("Imperial") moves to strike certain portions of the Crown's fresh as amended statement of claim (the "claim") pursuant to rule 25.111 on the basis of parliamentary privilege.

Background

[2] The claim is brought pursuant to the *Tobacco Damages and Health Care Costs Recovery Act, 2009*, *S.O. 2009, c. 13* (the "Act"). The Crown claims $50 billion for the cost of health care benefits resulting from tobacco-related disease or the risk of tobacco-related disease that have been or will be paid by the Crown for insured persons. The claim is against 14 defendants, both domestic and foreign.

[3] The Crown alleges that various defendants breached duties by, among other things, misrepresenting the risks of smoking and exposure to second-hand smoke. The Crown alleges that the defendants conspired in breaching these duties and are jointly and severally liable pursuant to s. 4 of the Act.

[4] The impugned subparagraphs or portions thereof (reproduced in Appendix "A" -- the "subparagraphs") are pled in support of the allegations of misrepresentation and conspiracy.2 The Crown alleges that the defendants continually repeated the misrepresentations about the risks of smoking, including in [page470] presentations and statements (the "presentations") made to the House of Commons Standing Committee on Health, Welfare and Social Affairs in 1969, to federal legislative committees in 1987 and 1988, and to the House of Commons Standing Committee on Health in December 1996. The Crown further alleges that this was one of the means by which the defendants furthered the conspiracy.

Positions of the Parties

[5] Imperial submits that the presentations are protected by parliamentary privilege -- namely, freedom of speech -- and cannot be used against Imperial in a civil action. It submits that any references to the presentations in the claim must therefore be struck.

[6] The Crown submits that it is premature to decide this issue at the pleadings stage. The Crown does not dispute that freedom of speech is a recognized category of parliamentary privilege. However, the Crown submits that it is uncertain whether the scope of the freedom of

speech privilege extends to the presentations made in this case. It submits that the factual context in which these presentations were made is relevant to that determination and that the issue of whether privilege applies must be made on a proper evidentiary record.

Parliamentary Privilege -- Freedom of Speech

[7] In *Canada (House of Commons) v. Vaid*, Binnie J. provided a summary of the accepted principles of parliamentary privilege.3 I highlight the following:

- Parliamentary privilege is the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions.4

- Parliamentary privilege is one of the ways in which the fundamental constitutional separation of powers is respected.5

- The role of the courts is to determine the existence and scope of a category of privilege. If the existence and scope of [page471] the privilege have been "authoritatively established in relation to our own Parliament or to the House of Commons at Westminster", then no further inquiry by the courts is required.6

- If the existence and scope have not already been established, then the court must make this determination, applying the "necessity test".7

- Once the existence and scope of the privilege have been established, it is for Parliament, not the courts, to determine whether the exercise of privilege is appropriate in any particular case.8

- The onus of establishing that a privilege exists is on the party claiming that privilege.9

[8] As noted, Imperial relies on the privilege known as "freedom of speech".

[9] Freedom of speech is a well-recognized category of parliamentary privilege in Canada. The privilege was codified by Article 9 of the *Bill of Rights, 1689*, which provides "[that] the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament".10

[10] Article 9 is incorporated by reference into the Canadian constitution by the combined effect of s. 18 of the *Constitution Act, 1867* and s. 4 of the *Parliament of Canada Act*.11

[11] The Supreme Court of Canada has recognized freedom of speech as an established category of privilege. Binnie J. stated [page472] that its existence would "readily be conceded".12 McLachlin J. stated that "[t]he need for the right of freedom of speech is so obvious as to require no comment".13

[12] The privilege applies not only to statements made in Parliament but to those made before parliamentary committees. According to Joseph Maingot's *Parliamentary Privilege in Canada*, "[w]hatever freedom of speech applies in either House of Parliament also applies to committees of either House", and therefore anything that is said "in one of the committees is not actionable in the ordinary courts".14

[13] Further, the privilege extends not only to statements made by members of Parliament but to those who participate in proceedings in Parliament or parliamentary committees. As Maingot states:

> The *Bill of Rights, 1689* is not restricted to Members; whatever protection is afforded the Member is equally afforded to the non-Member under the same circumstances. Accordingly, *witness, petitioner, counsel, and others whose assistance the House considers necessary for conducting its proceedings are protected* by the rule of Parliament . . . that no evidence given in either House can be used against the witness in any other place without the permission of the House.
>
> . . . . .
>
> While taking part in such proceedings, *officers of Parliament, Members of Parliament, and the public are immune* from being called to account in the courts or elsewhere, save the Houses of Parliament, for any act done or words uttered in the course of participating,

> however false or malicious the act and however malicious the words might be; and any member of the public prejudicially affected is without redress.15

[14] As noted in the above passage, the immunity provided by the freedom of speech privilege is absolute -- it is not excluded by the presence of malice or fraudulent purpose.16 Pepall J. (as she then was) stated in *Janssen-Ortho Inc. v. Amgen Canada Inc.* that "[t]he court may not inquire into the statements that [page473] are the subject matter of paragraph 33 of the amended statement of claim as *they are protected by absolute privilege*".17

[15] In terms of the scope of the privilege, it is well established that statements made by a person during the course of parliamentary proceedings cannot be used against the person in a civil action. The principle was articulated in *Stopforth v. Goyer*:

> The proceedings of a legislative body are absolutely privileged and words spoken in the course of a proceeding in Parliament *can neither form the basis of nor support either a civil action* or a criminal prosecution.18

(Emphasis added)

[16] The U.K. Parliament's *Joint Committee Report*, which was cited extensively by Binnie J. in *Vaid*, said that freedom of speech "protects a person from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament".19 Its effect is that "those who participate in parliamentary proceedings should not in consequence find themselves having to account for their conduct in any form of court proceedings".20

[17] This immunity was underscored by the Privy Council in *Prebble v. Television New Zealand Ltd.*21 Lord Browne-Wilkinson described the basic concept underlying art. 9 as "the need to ensure so far as possible that a member of the legislature and witnesses before Committees of the House can speak freely without fear that what they say will later be held against them in the courts".22 He emphasized the need for the privilege to be absolute to achieve that purpose:

> The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently,

> at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.23 [page474]

[18] In some cases, the courts have been required to consider how far the immunity extends. For example, in *Gagliano v. Canada (Attorney General)*, the court was required to determine whether a witness appearing before a commission of public inquiry could be cross-examined on evidence he had previously given to a parliamentary committee, given the commission's inability to impose any civil or criminal liability (the court held he could not be cross-examined).24 In *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)*, the court was required to determine whether an RCMP officer's testimony before a parliamentary committee could be used against her in an internal Code of Conduct investigation (the court held that the testimony could not be used).25

[19] In other cases, the court was required to determine whether the immunity applied only to statements made in Parliament or could extend to statements made by a Member of Parliament outside of Parliament.26

[20] However, while questions may arise about the precise scope of the privilege from time to time, it is clear from the authorities that, at minimum, statements made by a person in the course of participating in a parliamentary proceeding cannot be used against that person in a civil action.

[21] The parties acknowledge that parliamentary privilege can be waived. However, the privilege belongs to Parliament and therefore it is up to Parliament -- not the person who made the statement -- to decide whether privilege is to be waived in a particular case.27 [page475]

[22] Finally, it is appropriate, on a pleadings motion, to strike paragraphs that refer to statements protected by parliamentary privilege pursuant to rule 25.11.28

Analysis

[23] The subparagraphs must be struck. The Crown pleads that the defendants made the presentations to House of Commons standing committees and to federal legislative committees. Those presentations are covered by parliamentary privilege -- freedom of speech -- and cannot be used against the defendants in a civil action. That is precisely what the Crown seeks to do.

[24] The Crown's primary submission is that it is premature to strike the subparagraphs at the pleadings stage, since an evidentiary context is required to determine if the presentations were privileged. The Crown relies on the decision of *New Brunswick v. Rothmans Inc.* -- also a health care costs recovery case against the defendant tobacco companies -- in which the court held that because the factual background giving rise to the alleged privilege was absent from the record, it could not decide whether what the defendants said to parliamentary committees was privileged.29 The court held that this evidentiary determination was better left to the trial judge.

[25] With respect, I take a different view.

[26] I asked Crown counsel how, in light of the broad principles set out in the case law, an evidentiary context might lead to the conclusion that the presentations are not privileged. Counsel argued that it would be relevant to know the circumstances under which the defendants attended and made the presentations to the committees -- for example, whether the defendants were compelled to attend or came voluntarily, whether the presentations were given under oath and whether the defendants were simply advancing their own business interests by making the presentations to the committees. [page476]

[27] The problem with this argument is that nothing turns on the evidentiary context.30 The references to the presentations in the subparagraphs fall squarely within the established scope of the freedom of speech privilege.

[28] The privilege is not premised on how the person came to attend before the parliamentary committee, whether his evidence was under oath or whether he was advancing his own interests by attending.

[29] First, as can be seen from the authorities, the privilege applies broadly to those who participate in parliamentary proceedings -- a witness, counsel, a "stranger", "the public", a "person", "those who participate", or "others whose assistance the House considers necessary for conducting its proceedings".31 There is no suggestion in the case law that the privilege only extends to those who are compelled to attend. Indeed, art. 9 of the *Bill of Rights* does not refer to any particular class of individuals, but rather insulates parliamentary "freedom of speech", "debates" and "proceedings" from external review.

[30] Second, there is nothing in the authorities that ties the privilege to or justifies it on the basis that the statement in question was made under oath.32

[31] Third, because the immunity is absolute, any self-serving motivations of the person participating before the committees would not affect the privilege. Motive is irrelevant to an absolute privilege. In *Roman Corp. Ltd. v. Hudson's Bay Oil & Gas Co.*, the court struck out a statement of claim noting that it had "no power to inquire into what statements were made in Parliament, why they were made, who made them, what was the motive for making them or anything about them".33 [page477]

[32] Once a person attends and participates in a parliamentary committee proceeding, the absolute privilege applies to his statements made in the course of that proceeding, with the result that the statements cannot be used in a civil action against him. The surrounding circumstances are simply not relevant. In this case, the Crown had pleaded that the defendants made the presentations to various House of Commons standing committees and federal legislative committees. That is sufficient to invoke the privilege.

[33] I address the Crown's remaining arguments.

[34] The Crown argues that because the presentations were made in a public forum, there is no harm in leaving the subparagraphs in the claim. The Crown distinguishes this from pleadings that refer to private communications, such as solicitor-client privileged communications.34 I do not accept this distinction. The subparagraphs must be struck because they refer to presentations that are privileged, regardless of whether these were public or private communications.

[35] The Crown argues that because parliament has the ability to waive the privilege, the subparagraphs should be left in the pleading. I disagree. There is nothing in the pleading to indicate that Parliament has waived the privilege. I am required to assess the pleading at this point in time, not take a "wait and see" approach. As noted in *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)*, "[s] hort of an express waiver of the privilege by Parliament, it is premature for any outside entity to inquire into an alleged contempt of the House".35 If the claim, on its face, refers to presentations that are privileged, those portions are to be struck.

[36] Finally, the Crown argues that parliamentary privilege is primarily invoked to defend a defamation claim. It submits that there are no cases that have considered whether this privilege

protects against a misrepresentation claim -- in particular, where the statement is alleged to be a misrepresentation to the public at large. I disagree.

[37] The freedom of speech privilege is not restricted to defending a defamation claim. As Pepall J. noted in *Janssen*, how the plaintiff proposes to use the privileged statement is not relevant: [page478]

> In my view, the fact that the statements made in Parliament do not form the basis of Janssen's defamation claims but support its other various claims is immaterial.36

[38] The case law has also established that if the words spoken in a parliamentary proceeding are misleading, they are nonetheless immune from review in the civil courts. It is Parliament, not the court, which has the power to impose sanctions for the misleading statement. If the courts were permitted to adjudicate on the misleading statement, they would be intruding on the jurisdiction of Parliament:

> To mislead Parliament is itself a breach of the code of parliamentary behaviour and liable to be disciplined by Parliament . . . For the courts to entertain a question whether Parliament had been deliberately misled would be for the courts to trespass within the area in which Parliament has exclusive jurisdiction.37

[39] Further, if the court were to determine whether the statements were misleading, there would be a risk of conflicting decisions as between the court and Parliament, which is one of the very things that the privilege is intended to avoid. As stated in *Prebble*:

> Misleading the House is a contempt of the House punishable by the House: if a court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue.38

Decision

[40] The subparagraphs are struck from the claim on the basis of parliamentary privilege. If the parties require assistance on the precise words to be struck, I may be spoken to.

[41] The parties agreed that costs in the amount of $7,500, all inclusive, are payable to the successful party. Those costs are payable by the Crown to Imperial within 30 days.

Motion granted.

[page479]

APPENDIX "A" -- Subparagraphs Imperial Seeks to Strike --

Underlined Portions Only (the "Subparagraphs")

72.2. Since 1950, Rothmans Inc. and Rothmans, Benson & Hedges Inc. and their predecessors, as members of the Rothmans Group in Canada, have made all of the misrepresentations set out in paragraph 72 above. These misrepresentations have been repeated continually by Rothmans Inc. and Rothmans, Benson & Hedges Inc. and their predecessors through a variety of means, including the following:

(a) presentations to the Canadian Medical Association (May 1963), the Conference on Smoking and Health of the federal Department of National Health and Welfare (November 25 and 26, 1963), the House of Commons Standing Committee on Health, Welfare and Social Affairs (May 1969) and the National Association of Tobacco and Confectionery Distributors Convention (October 1969);

72.3. Since 1950, Rothmans, Benson & Hedges Inc. and its predecessors, as members of the Philip Morris Group in Canada, have made all of the misrepresentations set out in paragraph 72 above. These misrepresentations have been repeated continually by Rothmans, Benson & Hedges Inc. and its predecessors through a variety of means, including the following:

(a) presentations to the Canadian Medical Association (May 1963), the Conference on Smoking and Health of the federal Department of National Health and Welfare (November 1963), the National Association of Tobacco and Confectionery Distributors Convention (October 1969 and in 1995), the House of Commons Standing Committee on Health, Welfare and Social Affairs (May 1969) and federal Legislative Committees (including in November 1987 and January 1988);

72.4. Since 1950, R.J. Reynolds Tobacco Company and JTI-Macdonald Corp. and their predecessors, as members of the RJR Group in Canada, have made all of the misrepresentations set out in paragraph 72 above. These misrepresentations have been repeated continually by R.J. Reynolds Tobacco Company and JTI-Macdonald Corp. and their predecessors through a variety of means, including the following:

(a) presentations to the Canadian Medical Association (May 1963), the Conference on Smoking and Health of the federal Department of National Health and Welfare (November 1963), the National Association of Tobacco and Confectionery Distributors Convention (October 1969 and 1995), the House of Commons Standing Committee on Health, Welfare and Social Affairs (May 1969) and federal Legislative Committees (including in November 1987 and January 1988);

72.5. Since 1950, Imperial Tobacco Canada Limited and its predecessors, as members of the BAT Group in Canada, have made all of the misrepresentations set out in paragraph 72 above. These misrepresentations have been repeated continually by Imperial Tobacco Canada Limited and its predecessors through a variety of means, including the following: [page480]

(a) presentations to the Canadian Medical Association (May 1963), the Conference on Smoking and Health of the federal Department of National Health and Welfare (November 25 and 26, 1963), the House of Commons Standing Committee on Health, Welfare and Social Affairs (May 1969),39 the National Association of Tobacco and Confectionery Distributors Convention (October 1969), federal Legislative Committees (including in November 1987 and January 1988) and the House of Commons Standing Committee on Health (December 1996);

91. The Lead Companies publicly misrepresented that they, or members of their respective Groups, along with the TIRC, the CTR, CORESTA, the TRC, CTMC, TI, Verband and similar organizations, would objectively conduct research and gather data concerning the link between smoking and disease and would publicize the results of this research throughout the world. Particulars of these misrepresentations are within the knowledge of the Defendants but include:

. . . . .

(d) May 1969 presentation to the House of Commons Standing Committee on Health, We1fare and Social Affairs;

110. The conspiracy, concert of action and common design was continued when, contrary to their knowledge:

. . . . .

(d) in or about 1969, the Canadian Tobacco Company Defendants misrepresented to the House of Commons, Standing Committee on Health, Welfare and Social Affairs, that there was no causal connection between smoking and disease.

114. In furtherance of the conspiracy, concert of action and common design, CTMC on behalf of and as agent for their members which included all of the Canadian Tobacco Company Defendants:

. . . . .

(h) in June 1969 made a statement to the House of Commons Standing Committee on Health and Welfare denying that smoking is a major cause of illness or death;

. . . . .

(n) in 1987 advised a House of Commons Legislative Committee that there was uncertainty regarding the role of smoking in causing disease[.]

Notes

1 Rules of Civil Procedure, *R.R.O. 1990, Reg. 194*.

2 For clarity, it is only the portions of the subparagraphs underlined in Appendix "A" that are in issue and that are included in the definition of "Subparagraphs". Some of the subparagraphs refer to defendants other than Imperial. While Imperial

is the only moving party, the Crown concedes that any decision with respect to the subparagraphs that refer to Imperial will apply equally to those that refer to the other defendants.

3 *[2005] 1 S.C.R. 667*, *[2005] S.C.J. No. 28*, *2005 SCC 30*.

4 *Ibid.*, at para. 29.

5 *Ibid.*, at para. 21.

6 *Ibid.*, at para. 39.

7 Binnie J. articulated the necessity test as "[whether] the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body . . . that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency": *ibid.*, at para. 46.

8 *Ibid.*, at para. 29.

9 *Ibid.*

10 (U.K.), 1 Will and Mary, sess 2.

11 *R.S.C. 1985, c. P-1*; *Roman Corp. Ltd. v. Hudson's Bay Oil & Gas Co.*, *[1971] 2 O.R. 418*, *[1971] O.J. No. 1534* (H.C.J.), at p. 422 O.R., affd *[1972] 1 O.R. 444*, *[1971] O.J. No. 1799* (C.A.), affd on other grounds *[1973] S.C.R. 820*, *[1973] S.C.J. No. 70*; *Vaid*, *supra*, note 3, at paras. 35-39.

12 *Ibid.*, at para. 39.

13 *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, *[1993] 1 S.C.R. 319*, *[1993] S.C.J. No. 2*, at p. 385 S.C.R.

14 2nd ed. (Ottawa: House of Commons and McGill-Queen's University Press, 1997), at p. 31.

15 *Ibid.*, at pp. 36-37, 77 (emphasis added).

16 Parliament of the United Kingdom, *Report and Proceedings of the Joint Committee on Parliamentary Privilege*, vol. 1 (London: H.M.S.O., 1999), at para. 38.

17 *[2004] O.J. No. 2523*, *2004 CanLII 8595* (S.C.J.), at para. 31 (emphasis added), revd in part on other grounds *[2005] O.J. No. 2265*, *256 D.L.R. (4th) 407* (C.A.).

18 *(1978), 20 O.R. (2d) 262*, *[1978] O.J. No. 3432* (H.C.J.), at p. 269 O.R., revd on other grounds *(1979), 23 O.R. (2d) 696*, *[1979] O.J. No. 4128* (C.A.).

19 *Supra*, note 16, at para. 38.

20 *Ibid.*, at para. 87.

21 [1995] 1 A.C. 321, [1994] 3 All E.R. 407 (P.C.).

22 *Ibid.*, at p. 334 A.C.

23 *Ibid.*

24 *[2005] F.C.J. No. 683*, *2005 FC 576*, *[2005] 3 F.C.R. 555*.

25 *[2007] F.C.J. No. 752*, *2007 FC 564*, *[2008] 1 F.C.R. 752*.

26 *Stopforth v. Goyer*, *supra*, note 18 (defamatory statements made to reporters outside House of Commons not privileged); *Doucette v. Region 7 Hospital Corp.*, *[2002] N.B.J. No. 46*, *2002 NBQB 39*, *246 N.B.R. (2d) 171* (statements made by government minister in course of CBC interview not privileged); *Roman Corp. v. Hudson's Bay Oil & Gas*, *supra*, note 11 (press release and telegram were "extensions" of statements made in House of Commons, and therefore privileged).

27 "[F]reedom of speech is the privilege of the House as a whole and not of the individual member in his own right, although an individual member can assert and rely on it": *Joint Committee Report*, *supra*, note 16, at para. 68. According to Imperial, this privilege is rarely waived. It submits that *R. v. Connolly (1891), 22 O.R. 220*, *[1891] O.J. No. 44* (C.P. Div.) is one of the only instances in Canadian constitutional history in which parliamentary privilege was waived by Parliament (in the context of an alleged criminal conspiracy).

28 *Janssen*, *supra*, note 17, at para. 31. I note that in *Janssen*, a Member of Parliament had made the statement in question. The plaintiff had not sued the MP but proposed using the statement to support its various claims against the defendants. Pepall J. would not permit the plaintiff to use the MP's statement for any purpose and struck it from the pleading on the basis of parliamentary privilege. In the case at bar, the situation is more pronounced because the Crown proposes using the defendants' own statements against them as defendants in this civil proceeding.

29 *[2010] N.B.J. No. 300*, *2010 NBQB 291*, *363 N.B.R. (2d) 341*, at paras. 29-38.

30 This is unlike the case of *Thompson v. McLean*, *[1998] O.J. No. 2070*, *37 C.C.E.L. (2d) 170* (Gen. Div.), cited by the Crown, which involved a wrongful dismissal claim brought by the former special assistant to the Speaker of Ontario's Legislative Assembly. The court held that more evidence was needed with respect to factual issues such as the nature of her employment before it could decide whether the Speaker's actions were protected by parliamentary privilege.

31 William McKay, ed., et al., *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed. (London: LexisNexis, 2004), at p. 111; Maingot, *supra*, note 14, at p. 77; *Joint Committee Report*, *supra*, note 16, at para. 38; *ibid.*, at para. 87; Maingot, *supra*, note 14, at p. 37.

32 In neither *Gagliano*, *supra*, note 24, nor the *RCMP*, *supra*, note 25, was the court's reasoning on privilege based on the fact that the testimony in question was given under oath.

33 *Supra*, note 11, at p. 423 O.R. See, also, *Janssen*, *supra*, note 17, at para. 31.

34 *Manning v. Epp*, *[2006] O.J. No. 2904*, *2006 CanLII 24126* (S.C.J.), affd *[2007] O.J. No. 2036*, *2007 ONCA 390*, *229 O.A.C. 220*.

35 *Supra*, note 25, at para. 81. See, also, *Parliament of Canada Act*, *supra*, note 11, s. 5 (requiring the court to take judicial notice of parliamentary privileges).

36 *Supra*, note 17, at para. 31.

37 *Hamilton v. Al Fayed*, [2000] 2 All E.R. 224, [2001] 1 A.C. 395 (H.L.), at p. 231 E.R.

38 *Supra*, note 21, at p. 334 A.C.

39 It appears that these words had inadvertently not been underlined in the Crown's factum. Since this is the same reference as those in subparas. 72.2(a), 72.3(a) and 72.4(a), I have underlined this reference in subpara. 72.5(a) as well.

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R. v. Comeau, [2018] S.C.J. No. 15

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: B. McLachlin C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, R. Wagner, C. Gascon, S. Côté, R. Brown and M. Rowe JJ.

Heard: December 6, 2017;

Judgment: April 19, 2018.

File No.: 37398.

[2018] S.C.J. No. 15 | *[2018] A.C.S. no 15* | *2018 SCC 15* | *2018 CSC 15* | *2018 CarswellNB 124* | *145 W.C.B. (2d) 248* | *420 D.L.R. (4th) 199* | *2018EXP-1082*

Her Majesty The Queen, Appellant; v. Gerard Comeau, Respondent, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Prince Edward Island, Attorney General of Saskatchewan, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Attorney General of the Northwest Territories, Government of Nunavut as represented by the Minister of Justice, Liquidity Wines Ltd., Painted Rock Estate Winery Ltd., 50th Parallel Estate Limited Partnership, Okanagan Crush Pad Winery Ltd., Noble Ridge Vineyard and Winery Limited Partnership, Artisan Ales Consulting Inc., Montreal Economic Institute, Federal Express Canada Corporation, Canadian Chamber of Commerce, Canadian Federation of Independent Business, Cannabis Culture, Association of Canadian Distillers, operating as Spirits Canada, Canada's National Brewers, Dairy Farmers of Canada, Egg Farmers of Canada, Chicken Farmers of Canada, Turkey Farmers of Canada, Canadian Hatching Egg Producers, Consumers Council of Canada, Canadian Vintners Association and Alberta Small Brewers Association, Interveners

(128 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Case Summary

Civil litigation — Civil procedure — Courts — Stare decisis — Use of precedents — Courts of superior jurisdiction — Appeal from New Brunswick Court of Appeal judgment affirming decision declaring s. 134(b) Liquor Control Act (LCA) of no force or effect with respect to Comeau allowed — Comeau purchased in Quebec quantities of alcohol exceeding limits and challenged s. 134(b) LCA charge based on s. 121 of Constitution Act, 1867 — Trial judge erred in departing from Supreme Court of Canada precedent on basis of historical evidence — Section 121 prohibited laws impeding passage of goods across provincial borders but not laws that yielded only incidental effects on interprovincial trade — Because LCA's impediment to trade was incidental, s. 134(b) did not infringe Constitution — Liquor Control Act, s. 134(b) — Constitution Act, 1867, s. 121.

Constitutional law — Constitutional validity of legislation — Level of government — Provincial or territorial legislation — Interpretive and constructive doctrines — Appeal from New Brunswick Court of Appeal judgment affirming decision declaring s. 134(b) Liquor Control Act (LCA) of no force or effect with respect to Comeau allowed — Comeau purchased in Quebec quantities of alcohol exceeding limits and challenged s. 134(b) LCA charge based on s. 121 of Constitution Act, 1867 — Trial judge erred in departing from Supreme Court of Canada precedent on basis of historical evidence — Section 121 prohibited laws impeding passage of goods across provincial borders but not laws that yielded only incidental effects on interprovincial trade — Because LCA's impediment to trade was incidental, s. 134(b) did not infringe Constitution — Liquor Control Act, s. 134(b) — Constitution Act, 1867, s. 121.

Government law — Liquor control — Offences and penalties — Constitutional issues — Practice and procedure — General principles — Legislation — Interpretation — Evidence — Appeal from New Brunswick Court of Appeal judgment affirming decision declaring s. 134(b) Liquor Control Act (LCA) of no force or effect with respect to Comeau allowed — Comeau purchased in Quebec quantities of alcohol exceeding limits and challenged s. 134(b) LCA charge based on s. 121 of Constitution Act, 1867 — Trial judge erred in departing from Supreme Court of Canada precedent on basis of historical evidence — Section 121 prohibited laws impeding passage of goods across provincial borders but not laws that yielded only incidental effects on interprovincial trade — Because LCA's impediment to trade was incidental, s. 134(b) did not infringe Constitution — Liquor Control Act, s. 134(b) — Constitution Act, 1867, s. 121.

Appeal from a judgment of the New Brunswick Court of Appeal dismissing an application for leave to appeal a decision declaring s. 134(b) of the Liquor Control Act (LCA) of no force or effect with respect to Comeau. Returning from Quebec to New Brunswick, Comeau was stopped by the RCMP. The police found a large quantity of beer and some bottles of spirits in his vehicle. It was not in dispute that Comeau purchased quantities of alcohol in excess of the applicable limit prescribed by s. 43(c) LCA. Comeau was charged under s. 134(b) LCA and consequently issued a fine. Comeau challenged the charge on the basis that s. 121 of the Constitution Act, 1867 rendered s. 134(b) LCA unconstitutional and therefore of no force and effect. Comeau contended that s. 121 was essentially a free trade provision. In his view, no barriers could be erected to impede the passage of goods across provincial boundaries. The Crown argued that s. 121 was only intended to dismantle the power to impose tariffs or tariff-like charges at provincial boundaries. The trial judge agreed with Comeau. The trial judge held that, given his conclusions regarding the drafters' intent, s. 121, correctly construed, prohibited all barriers to interprovincial trade. As s. 134(b) LCA discouraged cross-border purchases and therefore limited access to extra-provincial liquor, the trial judge determined that it infringed s. 121 of the Constitution Act, 1867. The New Brunswick Court of Appeal dismissed the application for leave. The Crown now appealed this decision.

HELD: Appeal allowed.

In holding that s. 134(b) LCA was invalid because it offended s. 121 of the Constitution Act, 1867, the trial judge departed from binding Supreme Court of Canada precedent on the basis of historical and opinion evidence tendered by an expert witness. Common law courts were bound by authoritative precedent. The trial judge erred in departing from binding precedent on the basis of historical evidence and the expert's opinion of how that evidence should inform the interpretation of s. 121. Neither was new evidence that met the threshold of fundamentally shifting the parameters of the debate about how to interpret the Constitution Act, 1867. The modern approach to statutory interpretation provided a guide for determining how "admitted free" should be

interpreted. The text, historical context, legislative context, and underlying constitutional principles did not support Comeau's contention that s. 121 should be interpreted as prohibiting any and all burdens on the passage of goods over provincial boundaries, essentially imposing an absolute free trade regime within Canada. The Canadian federation provided space to each province to regulate the economy in a manner that reflected local concerns. Historical, constitutional and legislative contexts supported a flexible, purposive view of s. 121, one that respected an appropriate balance between federal and provincial powers and allowed legislatures room to achieve policy objectives that could have the incidental effect of burdening the passage of goods across provincial boundaries. Section 121 of the Constitution Act, 1867 prohibited laws that in essence and purpose restricted trade across provincial boundaries. Laws that only had the incidental effect of restricting trade across provincial boundaries because they were part of broader schemes not aimed at impeding trade did not offend s. 121 because the purpose of such laws was to support the relevant scheme, not to restrict interprovincial trade. The text and effects of s. 134(b) LCA indicated that its primary purpose was to restrict access to liquor purchased from sources other than the New Brunswick Liquor Corporation, not just liquor brought in from another province like Quebec. The objective of the New Brunswick scheme was not to restrict trade across a provincial boundary, but to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick. Therefore, while s. 134(b) in essence impeded cross-border trade, this was not its primary purpose. Section 134(b) LCA did not violate s. 121 of the Constitution Act, 1867.

Statutes, Regulations and Rules Cited:

Canadian Wheat Board Act, R.S.C. 1952, c. 44,

Constitution Act, 1867, s. 91, s. 92, s. 119, s. 121, s. 122, s. 123

General Agreement on Tariffs and Trade, Can. T.S. 1948 No. 31, Part I, art. 1

Importation of Intoxicating Liquors Act, *R.S.C. 1985, c. I3, s. 3*

Liquor Control Act, *R.S.N.B. 1973, c. L10, s. 43*(c), s. 134(b), s. 148(2)

New Brunswick Liquor Corporation Act, *S.N.B. 1974, c. N6.1*,

Provincial Offences Procedure Act, *S.N.B. 1987, c. P22.1, s. 116*(3)

Reciprocity Treaty With Great Britain, June 5, 1854, 10 Stat. 1089,

Supreme Court Act, *R.S.C. 1985, c. S26, s. 40*

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Interprovincial trade -- Provincial offences -- Restricted access to liquor from other provinces

-- New Brunswick resident charged under s. 134(b) of Liquor Control Act for having quantities of alcohol in excess of applicable limit -- Whether s. 134(b) of Liquor Control Act infringes s. 121 of Constitution Act, 1867 -- Whether s. 121 is free trade provision that bars any impediment to interprovincial commerce -- Meaning of "admitted free" in s. 121 -- Whether trial judge erred in departing from binding precedent on basis of historical evidence and expert's opinion of evidence -- Constitution Act, 1867, s. 121 -- Liquor Control Act, R.S.N.B. 1973, c. L-10, s. 134(b).

Court Summary:

Together with other provisions of the New Brunswick *Liquor Control Act*, s. 134(*b*) makes it an offence to "have or keep liquor" in an amount that exceeds a prescribed threshold purchased from any Canadian source other than the New Brunswick Liquor Corporation. C is a resident of New Brunswick who entered Quebec, visited three different stores, and purchased quantities of alcohol in excess of the applicable limit. Returning from Quebec to New Brunswick, C was stopped by the RCMP; he was charged under s. 134(*b*) and was issued a fine. C challenged the charge on the basis that s. 121 of the *Constitution Act, 1867* -- which provides that all articles of manufacture from any province shall be "admitted free" into each of the other provinces -- renders s. 134(*b*) unconstitutional. The trial judge found s. 134(*b*) to be of no force and effect against C and dismissed the charge. The Court of Appeal dismissed the Crown's application for leave to appeal.

Held: The appeal should be allowed. Section 134(*b*) of the *Liquor Control Act* does not infringe s. 121 of the *Constitution Act, 1867*.

Common law courts are bound by authoritative precedent. Subject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it. A legal precedent may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. Not only is the exception narrow, it is not a general invitation to reconsider binding authority on the basis of any type of evidence. For a binding precedent from a higher court to be cast aside, the new evidence must fundamentally shift how jurists understand the legal question at issue.

This high threshold was not met in this case. The trial judge relied on evidence presented by an historian whom he accepted as an expert. The trial judge accepted the expert's description of the drafters' motivations for including s. 121 in the *Constitution Act, 1867*, and the expert's opinion that those motivations drive how s. 121 is to be interpreted. Neither class of evidence constitutes evolving legislative and social facts or a comparable fundamental shift; the evidence is simply a description of historical information and one expert's assessment of that information. The trial judge's reliance on the expert's opinion of the correct interpretation of s. 121 was erroneous. To depart from precedent on the basis of such opinion evidence is to cede the judge's primary task to an expert. And to rely on such evidence to rebut *stare decisis* is to substitute one expert's opinion on domestic law for that expressed by appellate courts in binding judgments. This would introduce the very instability in the law that the principle of *stare decisis* aims to avoid.

The modern approach to statutory interpretation provides a guide for determining how "admitted free" in s. 121 should be interpreted. The text of the provision must be read harmoniously with the context and purpose of the statute. Constitutional texts must be interpreted in a broad and purposive manner and in a manner that is sensitive to evolving circumstances. Applying this framework to s. 121, the text, historical context, legislative context, and underlying constitutional principles do not support the contention that s. 121 should be interpreted as prohibiting any and all burdens on the passage of goods over provincial boundaries, essentially imposing an absolute free trade regime within Canada. Rather, these considerations support a flexible, purposive view of s. 121 -- one that respects an appropriate balance between federal and provincial powers.

With respect to the text of s. 121, the phrase "admitted free" is ambiguous, and falls to be interpreted on the basis of the historical, legislative and constitutional contexts. To achieve economic union, the framers of the Constitution agreed that individual provinces needed to relinquish their tariff powers. The historical context supports the view that, at a minimum, s. 121 prohibits the imposition of charges on goods crossing provincial boundaries -- tariffs and tariff-like measures. But the historical evidence nowhere suggests that provinces would lose their power to legislate under s. 92 of the *Constitution Act, 1867* for the benefit of their constituents even if

that might have impacts on interprovincial trade.

As well, the legislative context of s. 121 indicates that it was part of a scheme that enabled the shifting of customs, excise, and similar levies from the former colonies to the Dominion; that it should be interpreted as applying to measures that increase the price of goods when they cross a provincial border; and that it should not be read so expansively that it would impinge on legislative powers under ss. 91 and 92 of the *Constitution Act, 1867*.

In addition, foundational principles underlying the Constitution may aid in its interpretation. In this case, the federalism principle is vital. It recognizes the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction and requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests. Reading s. 121 to require full economic integration would significantly undermine the shape of Canadian federalism, which is built upon regional diversity within a single nation. The need to maintain balance embodied in the federalism principle supports an interpretation of s. 121 that prohibits laws directed at curtailing the passage of goods over interprovincial borders, but allows legislatures to pass laws to achieve other goals within their powers, even though the laws may have the incidental effect of impeding the passage of goods over interprovincial borders.

The lines of jurisprudential authority about the ambit of s. 121 can be distilled into two related propositions. First, the purpose of s. 121 is to prohibit laws that in essence and purpose restrict or limit the free flow of goods across the country. Second, laws that pose only incidental effects on trade as part of broader regulatory schemes not aimed at impeding trade do not have the purpose of restricting interprovincial trade and hence do not violate s. 121. Therefore, s. 121 does not catch burdens on goods crossing provincial borders that are merely incidental effects of a law or scheme aimed at some other purpose. To prohibit incidental impacts on cross-border trade would allow s. 121 to trump valid exercises of legislative power, and create legislative hiatuses where neither level of government could act.

It follows that a claimant alleging that a law violates s. 121 must establish that the law in essence and purpose restricts trade across a provincial border. The law must impact the interprovincial movement of goods like a tariff, which, in the extreme, could be an outright prohibition. The claimant must establish that the law imposes an additional burden on goods by virtue of them coming in from outside the province. And, restriction of cross-border trade must be the primary purpose of the law, thereby excluding laws enacted for other purposes, such as laws that form rational parts of broader legislative schemes with purposes unrelated to impeding interprovincial trade.

In this case, s. 134(*b*) impedes liquor purchases originating anywhere other than the New Brunswick Liquor Corporation. In essence, it functions like a tariff, even though it may have other purely internal effects. However, the text and effects are aligned and suggest the primary purpose of s. 134(*b*) is not to impede trade, but rather to restrict access to any non-Corporation liquor, not just liquor brought in from another province. The objective of the New Brunswick regulatory scheme is not to restrict trade across a provincial boundary, but to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick. Finally, s. 134(*b*) is not divorced from the objective of the larger scheme. It plainly serves New Brunswick's choice to control the supply and use of liquor within the province. The primary purpose of s. 134(*b*) is to prohibit holding excessive quantities of liquor from supplies not managed by the province. While one effect of s. 134(*b*) is to impede interprovincial trade, this effect is only incidental in light of the objective of the provincial scheme in general. Therefore, while s. 134(*b*) in essence impedes cross-border trade, this is not its primary purpose. Section 134(*b*) does not infringe s. 121 of the *Constitution Act, 1867*.

Cases Cited

Applied: *Gold Seal Ltd. v. Attorney-General*

for the Province of Alberta (1921), 62 S.C.R. 424; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] 4 D.L.R. 81; *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 ; **referred to:** *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 ; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591 ; *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Edwards v. Attorney-General for Canada*, [1930] 1 D.L.R. 98; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Blais*, 2003 SCC 44 , [2003] 2 S.C.R. 236; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 , [2014] 1 S.C.R. 433; *R. v. Mohan*, [1994] 2 S.C.R. 9 ; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ; *Reference re Senate Reform*, 2014 SCC 32 , [2014] 1 S.C.R. 704; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99; *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511 ; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Fédération des producteurs de volailles du Québec v.*

Pelland, 2005 SCC 20, [2005] 1 S.C.R. 292; *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696; *Attorney-General for Manitoba v. Manitoba Egg and Poultry Assn.*, [1971] S.C.R. 689; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581; *R. v. Gautreau* (1978), 21 N.B.R. (2d) 701.

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Canadian Wheat Board Act, R.S.C. 1952, c. 44.

Constitution Act, 1867, ss. 91, 92, 119, 121, 122, 123.

Importation of Intoxicating Liquors Act, R.S.C. 1985, c. I-3, s. 3.

Liquor Control Act, R.S.N.B. 1973, c. L-10, ss. 43(*c*), 134(*b*), 148(2).

New Brunswick Liquor Corporation Act, S.N.B. 1974, c. N-6.1 [now R.S.N.B. 2016, c. 105].

Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1, s. 116(3).

Supreme Court Act, R.S.C. 1985, c. S-26, s. 40.

Treaties and Other International Instruments

General Agreement on Tariffs and Trade, Can. T.S. 1948 No. 31, Part I, Article I.

Reciprocity Treaty With Great Britain, June 5, 1854, 10 Stat. 1089.

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History and Disposition:

APPEAL from a judgment of the New Brunswick Court of Appeal (Larlee J.A.), *2016 CanLII 73665*, *[2016] N.B.J. No. 232* (QL), 2016 CarswellNB 445 (WL Can.), dismissing an application for leave to appeal a decision of LeBlanc Prov. Ct. J., *2016 NBPC 3*, 448 N.B.R. (2d) 1, 1179 A.P.R. 1, *398 D.L.R. (4th) 123*, *[2016] N.B.J. No. 87* (QL), *2016 CarswellNB 167* (WL Can.), declaring s. 134(*b*) of the *Liquor Control Act*, R.S.N.B. 1973, c. L-10, of no force or effect with respect to Mr. Comeau. Appeal allowed.

Counsel

William B. Richards and *Kathryn A. Gregory*, *Q.C.*, for the appellant.

Ian A. Blue, *Q.C.*, *Arnold Schwisberg*, *Mikael Bernard* and *Daria Peregoudova*, for the respondent.

François Joyal and *Ian Demers*, for the intervener the Attorney General of Canada.

Michael S. Dunn and *Padraic Ryan*, for the intervener the Attorney General of Ontario.

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No one appeared for the intervener the Attorney General of Nova Scotia.

J. Gareth Morley and *Tyna Mason*, for the intervener the Attorney General of British Columbia.

Jonathan M. Coady and *Thomas Laughlin*, for the intervener the Attorney General of Prince Edward Island.

Theodore J. C. Litowski, for the intervener the Attorney General of Saskatchewan.

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Philip Osborne and *Barbara Barrowman*, for the intervener the Attorney General of Newfoundland and Labrador.

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Shea Coulson and *Allan L. Doolittle*, for the interveners Liquidity Wines Ltd., Painted Rock Estate Winery Ltd., 50th Parallel Estate Limited Partnership, Okanagan Crush Pad Winery Ltd. and Noble Ridge Vineyard and Winery Limited Partnership.

Malcolm Lavoie, for the intervener Artisan Ales Consulting Inc.

Mark Gelowitz and *Robert Carson*, for the intervener the Montreal Economic Institute.

J. Scott Maidment and *Samantha Gordon*, for the intervener Federal Express Canada Corporation.

Christopher D. Bredt and *Ewa Krajewska*, for the interveners the Canadian Chamber of Commerce and the Canadian Federation of Independent Business.

Kirk Tousaw and *Jack Lloyd*, for the intervener Cannabis Culture.

Jennifer Klinck and *Marion Sandilands*, for the intervener the Association of Canadian Distillers, operating as Spirits Canada.

Steven I. Sofer and *Paul Seaman*, for the intervener Canada's National Brewers.

David K. Wilson, *Owen M. Rees* and *Julie Mouris*, for the interveners the Dairy Farmers of

Canada, the Egg Farmers of Canada, the Chicken Farmers of Canada, the Turkey Farmers of Canada and the Canadian Hatching Egg Producers.

Paul J. Bates, *Ronald Podolny*, *Tyler J. Planeta* and *Michael Sobkin*, for the intervener the Consumers Council of Canada.

Robert W. Staley, *Ranjan K. Agarwal* and *Jessica M. Starck*, for the intervener the Canadian Vintners Association.

Robert Martz and *Paul Chiswell*, for the intervener the Alberta Small Brewers Association.

[Editor's note: A correction was released by the Court April 19, 2018; the change has been made to the text and the corrigendum is appended to this document.]

The following is the judgment delivered by

THE COURT

I. Introduction

1 In 1867, *The British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3, united individual British colonies into one new country, the Dominion of Canada. Prior to this, each colony had its own power to impose tariffs at its borders. Part VIII of that Act (now the *Constitution Act, 1867*) contains provisions for the transfer of this power to levy tariffs to the Dominion government. At the heart of Part VIII is s. 121, the provision at issue in this appeal:

> All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

2 The respondent, Mr. Gerard Comeau, contends that s. 121 is essentially a free trade provision -- in his view, no barriers can be erected to impede the passage of goods across provincial boundaries. On the other side of the debate, the appellant, Her Majesty the Queen in Right of New Brunswick ("the Crown"), argues that s. 121 was only intended to dismantle the power to impose tariffs or tariff-like charges at provincial boundaries. The trial judge agreed with Mr. Comeau. The question before us is whether he erred in doing so. What does it mean for articles to be "admitted free" as stated in s. 121? How does that requirement constrain state action? Fundamentally, does s. 121 constitutionalize some particular form of economic union? These questions lie at the core of this appeal.

3 The answers to these questions have broad implications. If to be "admitted free" is understood as a constitutional guarantee of free trade, the potential reach of s. 121 is vast. Agricultural supply management schemes, public health-driven prohibitions, environmental

controls, and innumerable comparable regulatory measures that incidentally impede the passage of goods crossing provincial borders may be invalid.

4 The dispute arises out of Mr. Comeau's assertion that s. 121 of the *Constitution Act, 1867* prevents the Province of New Brunswick from legislating that New Brunswick residents cannot stock alcohol from another province. The appeal asks whether s. 134(*b*) of the *Liquor Control Act*, R.S.N.B. 1973, c. L-10, infringes s. 121. Section 134(*b*) of the *Liquor Control Act* provides:

> **134** Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall
>
> ...
>
> (*b*) have or keep liquor,
>
> not purchased from the Corporation.

5 Together with ss. 43(*c*) and 148(2) of the *Liquor Control Act*, s. 134(*b*) makes it an offence to "have or keep liquor" in an amount that exceeds a prescribed threshold purchased from any Canadian source other than the New Brunswick Liquor Corporation.

6 In holding that s. 134(*b*) of the *Liquor Control Act* is invalid because it offends s. 121 of the *Constitution Act, 1867*, the trial judge departed from binding precedent from this Court on the basis of historical and opinion evidence tendered by an expert witness.

7 The appeal therefore raises two issues. First, did the trial judge err in departing from precedent, and second, what is the proper interpretation of s. 121? Both issues go to the primary question in this appeal: Does s. 134(*b*) of the *Liquor Control Act* infringe s. 121 of the *Constitution Act, 1867*?

8 We conclude that the trial judge erred in departing from previous decisions of this Court. Going on to interpret s. 121, we conclude that it prohibits laws that in essence and purpose impede the passage of goods across provincial borders and, therefore, does not prohibit laws that yield only incidental effects on interprovincial trade. The impediment to trade posed by s. 134(*b*) of the *Liquor Control Act* is an incidental effect of a regulatory scheme that does not, as its primary purpose, thwart interprovincial trade. Thus, section 134(*b*) does not infringe s. 121. We would therefore allow the appeal.

II. Factual History

9 The respondent Mr. Comeau is a resident of the Tracadie-Sheila region on the Acadian Peninsula in northeastern New Brunswick. On October 6, 2012, Mr. Comeau drove to Campbellton in the northwest of the province, crossed the Restigouche River, and entered Quebec. Mr. Comeau did what many Canadians who live tantalizingly close to cheaper alcohol prices across provincial boundaries probably do. He visited three different stores and stocked up.

10 Mr. Comeau was being watched. The Campbellton RCMP had become concerned with the frequency by which enterprising New Brunswick residents were sourcing large quantities of alcohol in Quebec in contravention of the law. In response, the RCMP started monitoring New Brunswick visitors to commonly frequented liquor stores on the Quebec side. Officers in Quebec

would record visitors' information and pass it on to their New Brunswick colleagues, who were waiting across the border. During his October 6, 2012 trip, Mr. Comeau was so tracked.

11 Returning from Quebec to New Brunswick, Mr. Comeau was stopped by the RCMP. The police found a large quantity of beer and some bottles of spirits in his vehicle. It is not in dispute that Mr. Comeau purchased quantities of alcohol in excess of the applicable limit prescribed by s. 43(*c*) of the *Liquor Control Act*. Mr. Comeau was charged under s. 134(*b*) and consequently issued a fine in the amount of $240 plus administrative fees and the victim surcharge levy.

12 Mr. Comeau challenged the charge on the basis that s. 121 of the *Constitution Act, 1867* renders s. 134(*b*) of the *Liquor Control Act* unconstitutional and therefore of no force and effect. It is not controversial that the beer and liquor at issue in this case are the "Articles of the Growth, Produce, or Manufacture" of a Canadian province -- that is, they were produced in Quebec or elsewhere in Canada. The question of whether s. 121 concerns non-Canadian goods imported into one province and then shipped across the country either intact or as inputs in new manufactured goods is not before the Court and therefore we do not address it.

III. Judicial History

13 The New Brunswick Provincial Court, per LeBlanc J., agreed with Mr. Comeau that s. 134(*b*) infringed s. 121 of the *Constitution Act, 1867*. The trial judge found s. 134(*b*) to be of no force and effect against Mr. Comeau and therefore dismissed the charge: *2016 NBPC 3*, 448 N.B.R. (2d) 1.

14 The trial judge accepted that this Court's 1921 decision in *Gold Seal Ltd. v. Attorney-General for the Province of Alberta (1921), 62 S.C.R. 424*, was binding authority. He noted that this Court in *Gold Seal* held that s. 121 prohibits direct tariff barriers (i.e. customs duties) on goods moving between provinces. He found that s. 134(*b*) of the *Liquor Control Act* imposed no tariff and therefore would not violate s. 121 under *Gold Seal*.

15 The trial judge went on to hold, however, that *Gold Seal* was wrongly decided and should not be applied, given the evidence on the origins of s. 121 called by Mr. Comeau. This evidence, presented by an historian whom the trial judge accepted as an expert, comprised historical information about the intentions of the drafters of s. 121, and the expert's opinion as to the import of that historical evidence for the interpretation of s. 121. The trial judge accepted the expert's opinion "without hesitation": para. 52.

16 On the basis of this evidence, the trial judge concluded that the drafters were highly motivated to open up trade between the provinces. This was a direct response to trade barriers that had been erected by the United States of America in response to anti-British sentiment in that country during the American Civil War. The trial judge accepted that the drafters would have been preoccupied with the continued economic prosperity of British North America after the American Civil War and that this depended on the availability of new barrier-free markets. The trial judge concluded that this motivation could be extracted from the expert's description of the political climate at the time, but also more specifically from the speeches of some of the Fathers of Confederation. On this basis, the trial judge agreed with the expert that the phrase "admitted free" in s. 121 alluded to free trade, and that, in the minds of the drafters, this meant barrier-free borders.

17 The trial judge first concluded that the failure of the Court to consider this historical evidence and "embark on a large, liberal or progressive interpretation" of s. 121 in *Gold Seal* rendered that decision suspect: para. 116. He then concluded that the new evidence adduced at trial allowed him to depart from *Gold Seal* under the evidence-based exception to vertical *stare decisis* approved in *Canada (Attorney General) v. Bedford*, *2013 SCC 72*, *[2013] 3 S.C.R. 1101*. The trial judge held, at para. 125:

> What has occurred is that there has been a significant change in evidence, one that I believe has fundamentally shifted the parameters of the debate. To my knowledge, in none of the cases dealing with section 121 has there been any evidence presented to the trier of fact, or to the appellate court, addressing the issues presented before me respecting the following topics: the drafting of the *British North America Act, 1867*, the legislative history of the *Act*, the scheme of the *Act* and its legislative context. It has been the presentation of evidence on these issues that changed in a substantial way the parameters of the debate on the correct interpretation of the expression "admitted free" in section 121 of the *Constitution Act, 1867*. In my opinion, this allows this Court to proceed with its analysis and indeed mandates that it do so.

18 After concluding that he was entitled to depart from binding precedent on the basis of the expert's evidence, the trial judge then held that this evidence of the "original purpose of the provision at issue" is "elemental and fundamental" in the analysis and should not be "displaced" by other considerations stemming from a "long-standing misinterpretation of the intent of the Fathers of Confederation": para. 165.

19 The trial judge held that, given his conclusions regarding the drafters' intent, s. 121, correctly construed, prohibits all barriers to interprovincial trade. As s. 134(*b*) of the *Liquor Control Act* discourages cross-border purchases and therefore limits access to extra-provincial liquor, the trial judge determined that it infringed s. 121.

20 The Crown sought leave to appeal directly to the New Brunswick Court of Appeal, as it was authorized to do in this case by virtue of s. 116(3) of the *Provincial Offences Procedure Act*, *S.N.B. 1987, c. P-22.1*. The Court of Appeal dismissed the application for leave: *2016 CanLII 73665*.

21 The Crown now appeals to this Court. Although the Court of Appeal's decision was limited to the question of leave, the substantive constitutional question is properly before this Court: *MacDonald v. City of Montreal*, *[1986] 1 S.C.R. 460*; *Roberge v. Bolduc*, *[1991] 1 S.C.R. 374*; s. 40 of the *Supreme Court Act*, *R.S.C. 1985, c. S-26*.

IV. Issues

22 The main issue is whether s. 134(*b*) of the *Liquor Control Act* infringes s. 121 of the *Constitution Act, 1867*. This raises the following subsidiary issues:

a) Did the trial judge err in departing from binding precedent and providing his own interpretation of s. 121? and

b) What is the proper interpretation of s. 121?

V. Analysis

A. *Did the Trial Judge Err in Departing From Binding Precedent and Providing His Own Interpretation of Section 121 of the Constitution Act, 1867?*

23 The trial judge accepted that this Court's decision in *Gold Seal* was binding authority and that, applying *Gold Seal*, s. 134(*b*) of the *Liquor Control Act* does not violate s. 121 of the *Constitution Act, 1867*. He went on to hold, however, that *Gold Seal* had been wrongly decided and that therefore he should not follow it.

24 The decision of this Court in *Gold Seal* was expressly affirmed by the Judicial Committee of the Privy Council in *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] 4 D.L.R. 81, at pp. 91-92, and by a majority of this Court in *Murphy v. Canadian Pacific Railway Co.,* [1958] S.C.R. 626, at p. 634. It has never been overruled, although some Justices of this Court have interpreted it to apply not only to tariffs, but to tariff-like burdens on goods crossing provincial boundaries: *Murphy*, at p. 642, per Rand J.; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, at p. 1268, per Laskin C.J.; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, at p. 609, per La Forest J.; *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133, at p. 1153, per La Forest J.; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at paras. 123 and 171, per McLachlin J. (as she then was).

25 For the *stare decisis* issue, we need not decide between these interpretations (although we address them later in these reasons). The trial judge's reading of s. 121 -- that it precludes any laws that impede goods crossing provincial boundaries -- is incompatible with both interpretations.

26 Common law courts are bound by authoritative precedent. This principle -- *stare decisis* -- is fundamental for guaranteeing certainty in the law. Subject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it. This is called vertical *stare decisis*. Without this foundation, the law would be ever in flux -- subject to shifting judicial whims or the introduction of new esoteric evidence by litigants dissatisfied by the status quo.

27 The question before us is whether the trial judge erred in rejecting this Court's precedent, which he acknowledged was binding, and re-interpreting s. 121. In doing so, he relied on one historian's evidence of the drafters' motivations for including s. 121 in the *Constitution Act, 1867* and that expert's opinion of what those motivations tell us about how s. 121 should be interpreted today.

28 The trial judge relied on one of the narrow exceptions to vertical *stare decisis* identified by this Court in *Bedford*. The respondent argues that the trial judge was entitled to do so on the basis of the expert's evidence. The appellant demurs. We agree with the appellant.

29 In *Bedford*, this Court held that a legal precedent "may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate": para. 42. The trial judge, relying on the evidence-based exception identified in that excerpt from *Bedford*, held that the historical and opinion evidence he accepted "fundamentally shifts the parameters of the debate" over the correct interpretation of s. 121, referring to this Court's treatment of the question in *Gold Seal*.

30 The new evidence exception to vertical *stare decisis* is narrow: *Bedford*, at para. 44; *Carter v. Canada (Attorney General)*, *2015 SCC 5*, *[2015] 1 S.C.R. 331*, at para. 44. We noted in *Bedford*, at para. 44, that

> a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach... . This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

31 Not only is the exception narrow -- the evidence must "fundamentally shif[t] the parameters of the debate" -- it is not a general invitation to reconsider binding authority on the basis of *any* type of evidence. As alluded to in *Bedford* and *Carter*, evidence of a significant evolution in the foundational legislative and social facts -- "facts about society at large" -- is one type of evidence that can fundamentally shift the parameters of the relevant legal debate: *Bedford*, at paras. 48-49; *Carter*, at para. 47. That is, the exception has been found to be engaged where the underlying social context that framed the original legal debate is profoundly altered.

32 In *Carter*, for example, new evidence about the harms associated with prohibiting assisted death, public attitudes toward assisted death, and measures that can be put in place to limit risk was relevant. This evidence was unknowable or not pertinent, given the existing legal framework, when *Rodriguez v. British Columbia (Attorney General)*, *[1993] 3 S.C.R. 519*, was decided. These new legislative and social facts did not simply provide an alternate answer to the question posed in *Rodriguez*. Instead, the new evidence fundamentally shifted how the Court could assess the nature of the competing interests at issue.

33 This focus on shifting legislative and social facts is conceptually linked to Lord Sankey's famous "living tree" metaphor, which acknowledges that interpretations of the *Constitution Act, 1867* evolve over time, given shifts in the relevant legislative and social context: *Edwards v. Attorney-General for Canada*, *[1930] 1 D.L.R. 98* (P.C.), at pp. 106-7. In *Edwards*, both legal and social changes that had opened the door to women's increased integration into public life after Confederation confirmed that it was no longer appropriate to read the term "person" in the impugned constitutional provision as anything other than its plain gender-neutral meaning: pp. 110-12.

34 To reiterate: departing from vertical *stare decisis* on the basis of new evidence is not a question of disagreement or interpretation. For a binding precedent from a higher court to be cast aside on the basis of new evidence, the new evidence must "fundamentally shif[t]" how jurists understand the legal question at issue. It is not enough to find that an alternate perspective on existing evidence might change how jurists would answer the same legal question.

35 This high threshold was not met in this case.

36 The trial judge accepted the expert's evidence in question on two points -- one of history, the other of law. He accepted (1) the expert's description of the drafters' motivations for including s. 121 in the *Constitution Act, 1867*, and (2) the expert's opinion that those motivations drive how s. 121 is to be interpreted. Neither class of evidence constitutes evidence, for example, of evolving legislative and social facts; the evidence is simply a description of historical information

and one expert's assessment of that information. This does not evince a profound change in social circumstances from the time *Gold Seal* was decided. It is evidence of one perspective of events that occurred decades before the Gold Seal company brought its case to the courts and a century before this Court's discussion of s. 121 in *Murphy*. Historical evidence can be helpful for interpreting constitutional texts: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R 236. However, a re-discovery or re-assessment of historical events is not evidence of social change.

37 Because the historical evidence accepted by the trial judge is not evidence of changing legislative and social facts or some other fundamental change, it cannot justify departing from vertical *stare decisis*. Differing interpretations of history do not fundamentally shift the parameters of the legal debate in this case. While one's particular collection of historical facts or one's view of that historical evidence may push in favour of a statutory interpretation different from that in a prior decision, the mere existence of that evidence does not permit the judge to depart from binding precedent.

38 The trial judge held otherwise. He concluded that this Court in *Gold Seal* did not conduct a broad and purposive interpretation of the provision -- the approach established by *Edwards* about a decade after *Gold Seal* was decided. He went on to conclude that this gap meant that the expert's "new" evidence of historical context could open the door to a re-interpretation: paras. 42 and 116.

39 Although it is true that *Gold Seal* was decided prior to *Edwards* and was arguably interpreted under a different rubric than constitutional provisions under the shadow of the living tree, it does not follow that the historical evidence permitted the trial judge to bypass an existing binding interpretation on the basis of a new understanding of the legislative context and history. First, *Atlantic Smoke Shops* and *Murphy*, which applied *Gold Seal*, were decided after *Edwards*. Second, the trial judge's interpretation was limited entirely to the words and context of the provision in light of the historical evidence. This methodology does not conform to the purposive approach to constitutional interpretation that has grown out of *Edwards* and decades of subsequent jurisprudence: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *Big M Drug Mart*, at p. 344; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at paras. 29-30; *Reference re Employment Insurance Act (Can.)*, *ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669, at para. 9; *Reference re Supreme Court Act*, *ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 19.

40 In addition to the historical evidence of the founders' intentions, the trial judge also relied on the expert's opinion of the correct interpretation of s. 121. This reliance was erroneous. As a preliminary observation, it is difficult if not impossible to contemplate a situation where evidence on domestic law (e.g. interpreting a Canadian statute) would ever be admissible as expert opinion evidence under *R. v. Mohan*, [1994] 2 S.C.R. 9. The application of contextual factors, including drafters' intent, to the interpretation of a statutory provision is not something that is "outside the experience and knowledge of a judge": *Mohan*, at p. 23. To depart from precedent on the basis of such opinion evidence is to cede the judge's primary task to an expert.

41 More to the point in the present matter: to rely on such evidence to rebut vertical *stare decisis* is to substitute one expert's opinion on domestic law for that expressed by appellate courts in binding judgments. This would introduce the very instability in the law that the principle of *stare decisis* aims to avoid. This is precisely why the exceptions provided in *Bedford* and

Carter are narrow. If a constitutional provision could be reinterpreted by a lower court whenever a litigant finds an expert with an alternate interpretation, the common law system would be left in disarray. This is not what *Bedford* and *Carter* teach. The approach to *stare decisis* is strict. *Bedford* and *Carter* do not alter that principle.

42 Moreover, a difference in opinion about the interpretation of a statutory provision does not evince a fundamental shift in the parameters of the debate. The debate and its parameters remain unchanged. The only change is the answer provided.

43 The trial judge erred in departing from binding precedent on the basis of the historical evidence and the expert's opinion of how that evidence should inform the interpretation of s. 121. Neither is new evidence that meets the threshold of fundamentally shifting the parameters of the debate about how to interpret s. 121. The historical evidence is one non-dispositive ingredient in the multi-faceted statutory interpretation exercise. The opinion evidence is simply one unique articulation of an alternate resolution flowing out of a particular appreciation of those ingredients -- the recipe remains the same.

B. *What Is the Proper Interpretation of Section 121?*

44 The trial judge refused to apply binding precedent and instead adopted a different conclusion on the basis of an expert witness' evidence about the intention of the founding fathers at the time of Confederation and the impact of that intention on how we are to understand s. 121. As just discussed, he erred in doing this. The appeal could be allowed on this ground alone.

45 However, this Court has been invited to offer guidance on the scope of s. 121. We take up this invitation in this section. First, we lay out the competing interpretations of s. 121. Then, we consider these competing interpretations of s. 121 in light of its text, its historical context, its legislative context, and the principles that guide the interpretation of constitutional provisions in the federal-provincial context. Finally, we consider the existing jurisprudence and how it accords with our purposive interpretation of s. 121 in the aim of defining the ambit of the prohibition provided in s. 121.

(1) "Admitted Free": the Competing Interpretations

46 Section 121 of the *Constitution Act, 1867*, provides:

> 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.

47 Section 121 is found in Part VIII of the *Constitution Act, 1867*, which deals with how revenues, debts, property, and fiscal authority were to be transferred between existing legislatures and the new federal government upon Confederation. The scheme specifically provides for the power to levy border tariffs to be transferred from the former colonies to the new Dominion, as described in ss. 122 and 123.

48 The appellant Crown submits that "admitted free" in s. 121 should be read as prohibiting laws that, like tariffs, place burdens *on the price of goods crossing interprovincial boundaries*. There are two versions of this position, one slightly broader than the other, which we will discuss

in due course. At this point it suffices to note that on either version, Mr. Comeau would not succeed. Even on the second broader version of this position -- that s. 121 prohibits laws that in essence and purpose impede the passage of goods across provincial borders (see *Murphy*, per Rand J.) -- s. 134(*b*) would stand, because it is part of a comprehensive scheme to control liquor in the province of New Brunswick and is not directed to impeding interprovincial trade in both essence and purpose.

49 Mr. Comeau does not quibble about the fine points of precisely what kind of charge or burden is caught by s. 121 on the basis of the jurisprudence. He advances a new and much more radical proposition -- that "admitted free" in s. 121 means that provincial laws cannot do anything that impedes, or makes more difficult, the flow of goods across provincial borders, directly or indirectly. In his view, s. 134(*b*) of the *Liquor Control Act* impedes the flow of goods across the New Brunswick border by prohibiting New Brunswickers from stocking liquor from other provinces at home. Therefore, it violates s. 121 of the *Constitution Act, 1867*.

50 Mr. Comeau essentially contends that s. 121 is a "free trade" provision that bars any impediment to interprovincial commerce. The purpose of s. 121, he says, was to foster the full unimpeded economic integration of the new federation.

51 The implications of these competing interpretations of s. 121 of the *Constitution Act, 1867* are significant. If Mr. Comeau's broad interpretation of s. 121 is correct, federal and provincial legislative schemes of many types -- environmental, health, commercial, social -- may be invalid. If a narrower interpretation is correct, the legal force of s. 121 is circumscribed to tariffs, or their functional equivalents.

52 The modern approach to statutory interpretation provides our guide for determining how "admitted free" should be interpreted. The text of the provision must be read harmoniously with the context and purpose of the statute: R. Sullivan, *Sullivan on the Construction of Statutes*, (6th ed. 2014), at s.. 2.6. Constitutional provisions must be "placed in [their] proper linguistic, philosophic and historical contexts": *Big M Drug Mart*, at p. 344. Constitutional texts must be interpreted in a broad and purposive manner: *Hunter*, at pp. 155-56; *Big M Drug Mart*, at p. 344; *Reference re Supreme Court Act*, at para. 19. Constitutional texts must also be interpreted in a manner that is sensitive to evolving circumstances because they "must continually adapt to cover new realities": *Reference re Same-Sex Marriage*, at para. 30; see also *Reference re Employment Insurance Act*, at para. 9. This is the living tree doctrine: *Edwards*, at pp. 106-7. Finally, the underlying organizational principles of the constitutional texts, like federalism, may be relevant to their interpretation: *Reference re Secession of Quebec*, *[1998] 2 S.C.R. 217*, at para. 32; *Reference re Senate Reform*, *2014 SCC 32*, *[2014] 1 S.C.R. 704*, at para. 25; *Reference re Manitoba Language Rights*, *[1985] 1 S.C.R. 721*.

53 Applying this framework to s. 121 of the *Constitution Act, 1867*, we conclude -- as detailed below -- that the interpretation of "admitted free" proposed by Mr. Comeau should be rejected. Section 121 does not impose absolute free trade across Canada. We further conclude that s. 121 prohibits governments from levying tariffs or tariff-like measures (measures that in essence and purpose burden the passage of goods across a provincial border); but, s. 121 does not prohibit governments from adopting laws and regulatory schemes directed to other goals that have incidental effects on the passage of goods across provincial borders.

(2) Text

54 The introductory words of s. 121 of the *Constitution Act, 1867* are broad; the phrase "All Articles of Growth, Produce, or Manufacture of any one of the Provinces" comprehensively covers all articles of trade of Canadian origin. (We need not decide in this case whether s. 121 applies to articles coming into Canada and then moved around the country.) This text on its own does not answer the question of how "admitted free" should be interpreted. That phrase remains ambiguous, and falls to be interpreted on the basis of the historical, legislative and constitutional contexts.

(3) Historical Context

55 Historical circumstances surrounding the adoption of s. 121 form part of the contextual interpretation of the provision. Historical evidence serves to put a provision in its "proper linguistic, philosophic and historical contex[t]": *Big M Drug Mart*, at p. 344. Evidence of the intent of the drafters for the purpose of interpreting constitutional texts is not conclusive: *R. v. Tessling*, *2004 SCC 67*, *[2004] 3 S.C.R. 432*, at paras. 61-62; *Daniels v. Canada (Indian Affairs and Northern Development)*, *2016 SCC 12*, *[2016] 1 S.C.R. 99*, at para. 44.

56 For our purposes, the relevant historical context can be summarized as follows. Economic issues were among the most important drivers of Confederation -- the union in the Dominion of Canada of certain colonies of the Maritimes and and the Province of Canada. The economies of the colonies were driven by resource exports.

57 For a long period, England was a predictable and lucrative market for these colonial exports. However, by 1850, British preferences for Canadian exports had declined: J. H. Perry, *Taxes, tariffs, & subsidies: A history of Canadian fiscal development* (1955), at p. 24.

58 Loss of British markets provoked two developments. First, Lord Elgin, Governor General of the Province of Canada (now Ontario and Quebec) was pushed to negotiate a trade agreement between British North America and the United States of America. The result was the 1854 *Reciprocity Treaty*, 10 Stat. 1089, which opened new markets for Canadian exports that mimicked the provinces' earlier access to British demand: Perry, at p. 25. Under the Treaty, prescribed products flowed across the international border free from customs duties.

59 Second, the colonies began negotiating reciprocal trade agreements with each other. Many of these arrangements meant "substantial freedom from duty" for interprovincial "natural" imports: Perry, at p. 25.

60 For a while, the economies of the colonies developed with the aid of reciprocity with the United States and the other intercolonial agreements. However, in 1866 the United States abrogated the *Reciprocity Treaty*. Once again the colonies found themselves cut off from an accessible and profitable market for their exports. Forced to look for a new solution, they plotted their continued economic growth by looking to increased economic integration.

61 However, that integration faced a roadblock: the colonies' general power to impose tariffs like customs duties and other burdens on goods crossing borders for the purpose of generating revenues. The pre-Confederation colonies could not rely solely on exports. By the early 1850s, the colonies had considerable autonomy over tariffs, particularly for manufactured goods. They controlled their own tariff-based income-generating activities, which were important revenue-

generating measures: Perry, at pp. 26-28; J. A. McLean, *Essays in the Financial History of Canada* (1894), at pp. 33-34.

62 These regional tariff powers were incompatible with economic integration. To achieve economic union, the framers agreed that individual provinces needed to relinquish their tariff powers. As this Court stated in *Black*, at pp. 608-9, per La Forest J.:

> The attainment of economic integration occupied a place of central importance in the scheme. "It was an enterprise which was consciously adopted and deliberately put into execution.": [D. Creighton, *British North America Act at Confederation: A Study Prepared for the Royal Commission on Dominion-Provincial Relations* (1939)]; see also *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, *[1931] S.C.R. 357*, at p. 373. The creation of a central government, the trade and commerce power, s. 121 and the building of a transcontinental railway were expected to help forge this economic union. The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the *British North America Act* attempted to pull down the existing internal barriers that restricted movement within the country.
>
> Section 121 of the *Constitution Act, 1867*, was one of the pillars of the Confederation scheme for achieving the economic union sought by the Fathers of Confederation.

63 Excerpts from speeches given by political leaders at the time of Confederation provide a sense of their vision of economic union as the new nation was forged. In some passages, leaders refer to abolishing customs houses that existed on provincial boundaries pre-Confederation: trial reasons, at paras. 97-98. Other passages, however, indicate concern for impediments on interprovincial trade beyond formal tariffs: trial reasons, at para. 93. Still other passages refer more generally to unencumbered trade across boundaries: trial reasons, at paras. 92, 96 and 100.

64 The framers of the Constitution were familiar with tariffs and charges on goods crossing borders. But, in drafting s. 121, they chose the broad phrase "admitted free" rather than a narrower phrase like "free from tariffs". We do not know why they chose this broader, and arguably ambiguous, phrase. We do know there were debates on the issue, and those that wanted a more expansive term than "tariffs" or "customs duties" won the day.

65 What light does this history shed on the question that divides Mr. Comeau and the Crown? Was s. 121 conceived to eradicate *all* impediments on trade at provincial borders, direct and indirect, as Mr. Comeau contends? Or was it conceived as a provision to eradicate tariffs and charges at provincial borders, and to otherwise allow the adoption of valid laws that may have the incidental effect of impeding trade across interprovincial boundaries, as the Crown argues?

66 Mr. Comeau's expert witness acknowledged that what he interprets as the drafters' broad view of "free trade" was not specifically grounded in how fiscal measures were operating on the ground at the time of Confederation. He characterizes what he sees as the drafters' intent to eliminate *all* barriers to trade as anticipatory and prescient in light of how certain observers understand the benefits of free trade *in our time* (A.R., vol. V, at pp. 129 and 151). He also notes that "[t]he Fathers of Confederation saw no contradiction between supporting [free trade] with a pragmatic willingness to adopt forms of state intervention" that implicated the economy (A.R., vol. V, at p. 135).

67 We conclude that the historical context supports the view that, at a minimum, s. 121 prohibits the imposition of charges on goods crossing provincial boundaries -- tariffs and tariff-like measures. At the same time, the historical evidence nowhere suggests that provinces, for example, would lose their power to legislate under s. 92 of the *Constitution Act, 1867* for the benefit of their constituents even if that might have impacts on interprovincial trade. The historical evidence, at best, provides only limited support for the view that "admitted free" in s. 121 was meant as an absolute guarantee of trade free of *all* barriers.

(4) Legislative Context

68 Section 121 is found in Part VIII of the *Constitution Act, 1867*, which is entitled "REVENUES; DEBTS; ASSETS; TAXATION". Its provisions describe the establishment of Canada's Consolidated Revenue Fund; the timing for the cessation of certain provincial revenue-generating activities, like tariffs, inconsistent with consolidation; the terms by which the federal government would assume provinces' debts; and stipulations about provincial fiscal matters that would continue after Confederation. The placement of s. 121 within Part VIII of the *Constitution Act, 1867* is significant for three reasons.

69 First, s. 121 is part of a trio of provisions that concern interprovincial trade. Section 122 states that the excise and customs laws of the provinces are to be maintained until otherwise determined by Canada. Section 123 provides that where more than one province has comparable excise and customs laws, proof of payment in one province constitutes payment in the other. Read together, it is apparent that ss. 121, 122, and 123 address the shifting of customs and excise levies from the provincial level to the federal level. Sections 122 and 123 are concerned with how the shift is accomplished; s. 121 reflects the new arrangement once the shift is accomplished.

70 Sections 121, 122, and 123 may be read together as covering the field with respect to re-arranging customs and excise duties upon union. Interprovincial tariffs would be abandoned and international tariffs would become the responsibility of Canada. The reference to excise laws suggests that the provisions were drafted in recognition that other fiscal tools like excise taxes could operate to impede trade in a manner equivalent to customs duties.

71 Second, Part VIII is concerned with revenue-generating instruments and their consolidation: excise taxes, customs duties, levies. All of these are measures that attach to commodities and function by increasing the price of goods. Nothing in Part VIII suggests that s. 121 should be read to capture merely incidental impacts on demand for goods from other provinces; the focus of Part VIII is direct burdens on the price of commodities.

72 Third, s. 121's position in Part VIII, as well as its text, make it clear that it does not confer power, but limits the exercise of the powers conferred on legislatures by ss. 91 and 92 of the *Constitution Act, 1867*. The federal and provincial heads of power delineated in ss. 91 and 92 are exhaustive: *Reference re Same-Sex Marriage*, at para. 34. Limits on these powers by provisions like s. 121 must be interpreted in a way that does not deprive Parliament and provincial legislatures of the powers granted to them to deal effectively with problems that arise. Otherwise, there would be constitutional hiatuses -- circumstances in which no legislature could act. This is something constitutional interpretation does not countenance: see, e.g., *Murphy*, at p. 642, per Rand J. Prohibition of impediments to interprovincial trade engages several of these

heads of power, including trade and commerce (s. 91(2)), taxation (ss. 91(3) and 92(2)), property and civil rights (s. 92(13)), provincial sanctions (s. 92(15)), and local matters (s. 92(16)). It follows that s. 121 should be interpreted in a way that allows governments to enact proactive policies for the good of their citizens and in a way that maintains an appropriate balance between federal and provincial powers -- even if the exercise of those powers may have an incidental effect on other matters, like bringing goods across provincial boundaries.

73 We conclude that the legislative context of s. 121 indicates that it was part of a scheme that enabled the shifting of customs, excise, and similar levies from the former colonies to the Dominion; that it should be interpreted as applying to measures that increase the price of goods when they cross a provincial border; and that it should not be read so expansively that it would impinge on legislative powers under ss. 91 and 92 of the *Constitution Act, 1867*. Before leaving the legislative context, we deal with an additional argument.

74 It is suggested by some that the legislative context shows that s. 121 was a purely transitional provision and was "spent" once the transfer of powers from the former colonies to the new Canada was accomplished. Some of s. 121's neighbouring provisions -- ss. 119 and 122 for example -- are clearly transitional and time-limited.

75 Declaring a constitutional provision to be "spent" amounts to judicial excision of the provision from the constitutional text in question. Absent clear language, a court should not hold that a constitutional provision is of no continued application. To do so would overstep the court's interpretive role, and would instead confer on it a legislative one.

76 Comparison of the text of s. 121 to the text of ss. 119 and 122 undermines the argument that s. 121 is spent. The required clear language is absent. Section 121 is not only transitional. Both ss. 119 and 122 impose explicit temporal limits on their continued operation. Section 119 establishes a 10-year scheme for debt reconciliation between Canada and New Brunswick from the time of Confederation -- the provision is clearly spent. Section 122 includes a condition by which the provision becomes spent: "The Customs and Excise Laws of each Province shall [...] continue in force until altered by the Parliament of Canada".

(5) Foundational Principles

77 In *Reference re Secession of Quebec*, at para. 32, this Court held that foundational principles underlying the Constitution may aid in its interpretation. Three of these -- the federalism principle, the democratic principle and the protection of minorities principle -- were raised in this case. The latter two do not shed much light on how s. 121 should be interpreted, in our view. However, the federalism principle is vital.

78 Federalism refers to how states come together to achieve shared outcomes, while simultaneously pursuing their unique interests. The principle of federalism recognizes the "autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction": *Reference re Secession of Quebec*, at para. 58; see also *Caron v. Alberta*, *2015 SCC 56*, *[2015] 3 S.C.R. 511*, at para. 5. The tension between the centre and the regions is regulated by the concept of jurisdictional balance: *Reference re Secession of Quebec*, at paras. 56-59. The federalism principle requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests. The same

concern has led to, for example, the development of doctrines like the necessarily incidental doctrine and the ancillary powers doctrine.

79 An expansive interpretation of federal powers is typically met with calls for recognition of broader provincial powers, and vice versa; the two are in a symbiotic relationship. Many of the doctrinal tools used by courts in division of powers cases reflect the tension between federal and provincial capacity: see, e.g., H. L. Kong, "Republicanism and the division of powers in Canada" *(2014), 64 U.T.L.J. 359*, at pp. 393-97. As this Court noted in *Reference re Securities Act*, *2011 SCC 66*, *[2011] 3 S.C.R. 837*, at para. 7:

> It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres.

80 This Court has consistently interpreted the scope of economic powers under the *Constitution Act, 1867* through the lens of jurisdictional balance. An example is the development of the "necessarily incidental" indicator for tolerated provincial/federal overlap under the trade and commerce power: *General Motors of Canada Ltd. v. City National Leasing*, *[1989] 1 S.C.R. 641*; *Canadian Western Bank v. Alberta*, *2007 SCC 22*, *[2007] 2 S.C.R. 3*; *Reference re Securities Act*.

81 Much has been written on the principle of federalism as an interpretive aid. Some say it leads to divergent outcomes and is inherently policy driven: see, e.g., P. J. Monahan, "At doctrine's twilight: The structure of Canadian federalism" (1984), 34 U.T.L.J. 47, at p. 48. Others argue that it boils down to a principle of efficiency that favours centralization and privileges federal heads of power: see, e.g., J. Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" *(2003), 28 Queen's L.J. 411*, at p. 423. Still others counter by pointing to the vast scope of regional autonomy promised by the powers conferred on the provinces by ss. 92(13) and 92(16): see, e.g., S. Wexler, "The Urge to Idealize: Viscount Haldane and the Constitution of Canada" (1984), 29 McGill L.J. 608, at pp. 641-42.

82 For our purposes, it suffices to state that the federalism principle reminds us of the careful and complex balance of interests captured in constitutional texts. An interpretation that disregards regional autonomy is as problematic as an interpretation that underestimates the scope of the federal government's jurisdiction. We agree with Professor Scott that "[t]he Canadian constitution cannot be understood if it is approached with some preconceived theory of what federalism is or should be": F. R. Scott, "Centralization and Decentralization in Canadian Federalism" (1951), 29 *Can Bar R.* 1095, at p. 1095; see also P. W. Hogg and W. K. Wright, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism" *(2005), 38 U.B.C.L. Rev. 329*, at p. 350.

83 Thus, the federalism principle does not impose a particular vision of the economy that courts must apply. It does not allow a court to say "This would be good for the country, therefore we should interpret the Constitution to support it." Instead, it posits a framework premised on jurisdictional balance that helps courts identify the range of economic mechanisms that are constitutionally acceptable. The question for a court is squarely constitutional compliance, not policy desirability: see, e.g., *Reference re Securities Act*, at para. 90; *Operation Dismantle Inc. v.*

The Queen, [1985] 1 S.C.R. 441, at pp. 471-72, per Wilson J.; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at pp. 424-25, per Laskin C.J. Similarly, the living tree doctrine is not an open invitation for litigants to ask a court to constitutionalize a specific policy outcome. It simply asks that courts be alert to evolutions in, for example, how we understand jurisdictional balance and the considerations that animate it.

84 With these cautions in mind, we turn to the parties' submissions on the principle of federalism. Both Mr. Comeau and the Crown refer to the federalism principle to support their own particular views of desirable policy outcomes -- in Mr. Comeau's case, the policy of no impediments, direct or incidental, on trade across provincial borders; in the Crown's submission, a view of cooperative federalism that poses few, if any, limits on provinces' authority to impose such impediments. Asserting what they see as the contemporary goals of federalism by pointing to the living tree doctrine (*Edwards*, at pp. 106-7), the parties urge the Court to interpret s. 121 in accordance with their preferred visions of how federalism functions. We will consider each of these arguments in turn.

85 We begin with Mr. Comeau's submission that the principle of federalism supports full economic integration. We cannot accept this submission. The federalism principle emphasizes balance and the ability of each level of government to achieve its goals in the exercise of its powers under ss. 91 and 92 of the *Constitution Act, 1867.* Full economic integration would "curtail the freedom of action -- indeed, the sovereignty -- of governments, especially at the provincial level": K. Swinton, "Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union" (1995), 25 *Can. Bus. L.J.* 280, at p. 291; see also D. Schneiderman, "Economic Citizenship and Deliberative Democracy: An Inquiry into Constitutional Limitations on Economic Regulation" (1995), 21 Queen's L.J. 125, at p. 152. Reading s. 121 to require full economic integration would significantly undermine the shape of Canadian federalism, which is built upon regional diversity within a single nation: *Reference re Secession of Quebec*, at paras. 57-58; *Canadian Western Bank*, at para. 22. A key facet of this regional diversity is that the Canadian federation provides space to each province to regulate the economy in a manner that reflects local concerns.

86 The federalism principle supports the view that provinces within a federal state should be allowed leeway to manage the passage of goods while legislating to address particular conditions and priorities within their borders. For example, the Northwest Territories and Nunavut have adopted laws governing the consumption of liquor, which include controls on liquor coming across the border into their territories. The primary objective of the laws is public health, but they have the incidental effect of curtailing cross-border trade in liquor. The Northwest Territories and Nunavut argue that these sorts of laws do not fall under the spectre of s. 121. We agree that to interpret s. 121 in a way that renders such laws invalid despite their non-trade-related objectives is to misunderstand the import of the federalism principle.

87 The Crown and other intervening Attorneys General, for their part, advocate interpreting s. 121 narrowly to give governments expansive scope to impose barriers on goods crossing their borders. This interpretation, they argue, is a natural consequence of their position that "cooperative federalism" is a distinct foundational principle for constitutional interpretation, as such principles are understood in *Reference re Secession of Quebec*. Cooperative federalism describes situations where different levels of government work together on the ground to leverage their unique constitutional powers in tandem to establish a regulatory regime that may be *ultra vires* the jurisdiction of one legislature on its own. In division of powers cases where

interlocking regulatory schemes have been impugned, the concept of cooperative federalism has often informed this Court's assessment of *vires*: see, e.g., *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292; *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696. However, that is a distinct inquiry from the interpretative question raised here. The foundational principle that forms part of the architecture of constitutional texts as we described in *Reference re Secession of Quebec* is *federalism* -- and that principle does not mandate any specific prescription for how governments within a federation should exercise their constitutional authority.

88 We cannot therefore accept either the arguments of Mr. Comeau or the Crown on the principle of federalism. This does not mean, however, that the principle is unhelpful to the interpretation of s. 121. The need to maintain balance embodied in the federalism principle supports an interpretation of s. 121 that prohibits laws directed at curtailing the passage of goods over interprovincial borders, but allows legislatures to pass laws to achieve other goals within their powers, even though the laws may have the incidental effect of impeding the passage of goods over interprovincial borders.

(6) Defining the Ambit of Section 121: The Jurisprudence

89 We have established in the preceding sections that the text, historical context, legislative context, and underlying constitutional principles do not support Mr. Comeau's contention that s. 121 should be interpreted as prohibiting any and all burdens on the passage of goods over provincial boundaries, essentially imposing an absolute free trade regime within Canada. Rather, these considerations support a flexible, purposive view of s. 121 -- one that respects an appropriate balance between federal and provincial powers and allows legislatures room to achieve policy objectives that may have the incidental effect of burdening the passage of goods across provincial boundaries.

90 This established, the next question to be answered is: What does s. 121 of the *Constitution Act, 1867* actually prohibit? Before us, the debate was framed as a conflict between two lines of authority -- the *Gold Seal* line of authority, which is said to confine s. 121 to the prohibition of tariffs, and the line of authority based on the judgment of Rand J. in *Murphy*, which sets out the view that s. 121 prohibits not only tariffs, but extends to laws that in essence and purpose are directed to impeding the passage of goods across provincial boundaries.

91 For the reasons that follow, we do not see these lines of authority to be in conflict. Properly understood, they represent a single, progressive understanding of the purpose and function of s. 121 in the broader constitutional scheme. This understanding is entirely consistent with our earlier conclusion that s. 121 -- understood through the lens of its text, its historical and legislative contexts and the principle of federalism -- is best conceived as preventing provinces from passing laws aimed at impeding trade by setting up barriers at boundaries, while allowing them to legislate to achieve goals within their jurisdiction even where such laws may incidentally limit the passage of goods over provincial borders.

92 *Gold Seal*, decided in 1921, was the first case to interpret s. 121 of the *Constitution Act, 1867.* It concerned a federal statute that prohibited the importation of liquor into any dry province. The federal law was complementary to provincial prohibition laws, passed because the provinces were not competent under the division of powers to regulate interprovincial trade -- an

early example of cooperative federalism. The Gold Seal liquor company argued that the trade barrier installed by the federal law violated s. 121. The Court's discussion of s. 121 in *Gold Seal* was cursory. Duff and Mignault JJ., in the majority, each held that the law at issue was not caught by s. 121 because it was not a tariff on goods crossing provincial borders. Mignault J. added that this was consistent with a similar provision in the United States Constitution addressing the same concerns: *Gold Seal*, at p. 470. Anglin J. agreed, but offered no analysis: *Gold Seal*, at p. 466.

93 *Gold Seal* was endorsed by the Judicial Committee of the Privy Council in *Atlantic Smoke Shops*, at p. 92. At issue was a New Brunswick law that made tobacco importers liable to a tax on tobacco brought into the province. The tobacco retailer argued that the tax constituted a trade barrier contrary to s. 121. Viscount Simon L.C. accepted this Court's analysis in *Gold Seal* and concluded that s. 121, read in the context of Part VIII, was the death knell for provincial tariffs. However, the tax was held not to infringe s. 121 on the ground it was a general consumption tax, and thus did not impose a burden on the basis of a provincial border: *Atlantic Smoke Shops*, at pp. 91-92.

94 In 1958, the majority of this Court in *Murphy* adopted *Gold Seal* and *Atlantic Smoke Shops*: at p. 634. A grain producer had attempted to arrange an interprovincial shipment of wheat contrary to the *Canadian Wheat Board Act*, R.S.C. 1952, c. 44. The question was whether the Act's prohibition on cross-border shipments violated s. 121. The majority, *en passant*, held it did not because it did not impose a tariff. *Murphy* was decided primarily on the basis of the division of powers. Nevertheless, this Court briefly addressed s. 121.

95 Rand J. in his concurring reasons in *Murphy* undertook a more substantive, purposive analysis of s. 121. He did not criticize *Gold Seal*, which he accepted as the foundational case, but sought to draw out the rationale underlying *Gold Seal*, s. 121, and its constitutional implications. His reasons read like a series of reflections on the nature and purpose of s. 121. He began by noting that apart from matters of purely local and private concern, the country was one economic unit: *Murphy*, p. 638. He went on, however, to explain why provincial marketing schemes that may enable different charges in different regions do not violate s. 121. Such schemes "embody an accumulation" of various charges because they are concerned with realizing objects for all producers across the relevant sector -- from transportation to wages to insurance. Charges that are merely "one item in a scheme that regulates their distribution" do not have cross-border trade as their object or purpose and therefore do not violate s. 121. They are "items in selling costs and can be challenged only if the scheme itself is challengeable": *Murphy*, at pp. 638-39. Section 121 "does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary": *Murphy*, at p. 642, per Rand J.

96 Finally, Rand J. explained that schemes that restrict goods crossing borders only incidentally cannot be held to violate s. 121 because this would create a constitutional hiatus, which constitutional construction abhors. A prohibition barring even incidental impacts on the passage of goods over a provincial border would render provinces incapable of dealing with important matters within their jurisdictions. At the same time, the federal government could not fill the void because the matter would not fall within its power given the division of powers -- "the two

jurisdictions could not complement each other by co-operative action": *Murphy*, at pp. 642-43, per Rand J.

97 These excerpts reflect many of the themes that emerge in our earlier discussion of historical context, legislative context, and federalism. However, they can be distilled into two related propositions. First, the purpose of s. 121 is to prohibit laws that in essence and purpose restrict or limit the free flow of goods across the country. Second, laws that pose only incidental effects on trade as part of broader regulatory schemes not aimed at impeding trade do not have the purpose of restricting interprovincial trade and hence do not violate s. 121.

98 These propositions are consistent with the decisions in *Gold Seal* and *Atlantic Smoke Shops*. First, while the Court in these cases spoke of s. 121 forbidding tariffs, and while Rand J. in *Murphy* spoke of s. 121 forbidding laws that purposely act like tariffs (i.e. laws that in essence burden the passage of goods over provincial borders), this is a distinction without a difference. Constitutional limits must operate on the level of principle and function, not on what label is applied to a particular kind of law. Constitutional compliance is not a matter of semantics. Clearly, traditional tariffs would offend the purpose of s. 121, as Rand J. describes it. But so might other measures that function in the same way. It follows that s. 121 applies not only to tariffs, but also to the functional equivalents of tariffs.

99 Second, *Gold Seal* and *Murphy* support the proposition that s. 121 was not intended to catch burdens on goods crossing provincial borders that were merely incidental effects of a law or scheme aimed at some other purpose, holding that because the restrictions on the shipment of goods over provincial borders were part of a larger valid federal scheme, they did not offend s. 121. As Rand J. pointed out in *Murphy*, to prohibit incidental impacts on cross-border trade would allow s. 121 to trump valid exercises of legislative power, and create legislative hiatuses where neither level of government could act: *Murphy*, at pp. 638 and 642-43. The federalism principle militates against such an interpretation -- the aim is balance and capacity, not imbalance and constitutional gaps. The federal government and provincial governments should be able to legislate in ways that impose incidental burdens on the passage of goods between provinces, in light of the scheme of the *Constitution Act, 1867* as a whole, and in particular the division of powers: *Murphy*, at pp. 638 and 641, per Rand J. This is illustrated by *Gold Seal.* If the federal government had not been able to enact its law prohibiting liquor from crossing the borders of the dry provinces, there would have been a legislative hiatus, and the cooperative scheme aimed at allowing these provinces to keep liquor out would not have been possible.

100 Put another way, s. 121 allows schemes that incidentally burden the passage of goods across provincial boundaries, but does not allow them to impose such impediments *only* because they cross a provincial boundary. In Rand J.'s view, the gravamen of s. 121 was to prohibit laws directed to erecting barriers to trade at provincial boundaries -- whether customs duties or other measures that are intended to fill the role of such tariffs: *Murphy*, at p. 642.

101 One may argue about whether Rand J.'s view states the logical underpinning of *Gold Seal*, or extends it. But if one accepts the underlying principle that animates s. 121 -- that s. 121 prohibits laws that in essence and purpose seek to set up trade barriers between the provinces -- the debate is sterile. *Gold Seal*, *Atlantic Smoke Shops* and *Murphy* are all consistent with this basic proposition, even if they did not explicate it. None of them endorsed a law that was directed in essence and purpose to impeding goods crossing provincial borders.

102 Rand J.'s description of the ambit of s. 121 has found favour with subsequent jurists. Laskin J. (as he then was) in his concurring reasons in *Attorney-General for Manitoba v. Manitoba Egg and Poultry Assn.*, [1971] S.C.R. 689, at p. 717, noted that s. 121 is meant to address measures that lead to the "figurative sealing of [...] borders". As Chief Justice in his concurring reasons in *Reference re Agricultural Products Marketing Act*, at p. 1268, he adopted Rand J.'s interpretation of s. 121 and noted that s. 121 is about identifying whether the "essence and purpose" of the impugned law is to erect a trade barrier at a provincial boundary. The majority in the first case did not comment on s. 121. In *Reference re Agricultural Products Marketing Act*, the majority concluded that the impugned law did not offend s. 121, and while it offered no analysis of its own, it indicated no disagreement with Chief Justice Laskin's discussion of s. 121.

103 In *obiter* comments in two subsequent decisions, La Forest J., writing for the Court, similarly noted that the functional approach articulated by Rand J. stemmed from the view established in *Gold Seal*: *Black*, at p. 609; *Canadian Pacific Air Lines*, at p. 1153.

104 Most recently in *Richardson*, Iacobucci and Bastarache JJ. for the majority and McLachlin J. (as she then was) in dissent, agreed (though, again, in *obiter*) that Rand J.'s interpretation of s. 121 was the operative authority for that provision: paras. 63-65, per Iacobucci and Bastarache JJ., paras. 123 and 171, per McLachlin J. In dissent but not on this point, McLachlin J. noted, at paras. 123 and 171:

> 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": *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626, at p. 642, *per* Rand J.; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, at p. 1268, *per* Laskin C.J. interpreting s. 121... .
>
> ...
>
> ... Provinces and the federal government are permitted to impose disadvantages on the basis of provincial boundaries so long as this effect is incidental to another purpose within their proper legislative sphere. They are not permitted, however, to create interprovincial barriers which are not incidental to such a higher purpose. The primary/incidental distinction in s. 6(3)(*a*) mirrors the jurisprudence under s. 121 of the *Constitution Act, 1867*, which bars trade laws aimed primarily at impeding the flow of goods on the basis of provincial boundaries: *Murphy v. Canadian Pacific Railway*, *supra*; *Reference re Agricultural Products Marketing Act*, *supra*.

105 The comments of Justices of this Court on s. 121 in the post-*Gold Seal* jurisprudence have never acquired the status of binding law, being made without majoritarian status or in *obiter*. But they do not conflict with *Gold Seal* and *Atlantic Smoke Shops*; rather, they offer a principled and robust articulation of the holdings from those earlier decisions.

106 We conclude that a purposive approach to s. 121 leads to the following conclusion: s. 121 prohibits laws that in essence and purpose restrict trade across provincial boundaries. Laws that only have the incidental effect of restricting trade across provincial boundaries because they are part of broader schemes not aimed at impeding trade do not offend s. 121 because the purpose of such laws is to support the relevant scheme, not to restrict interprovincial trade. While *Gold Seal* did not undertake a purposive analysis of s. 121 and hence did not describe the ambit of s.

121 precisely in these terms, it is entirely consistent with it. The earlier jurisprudence of this Court on s. 121 and the broader articulation adopted by Rand J. stand as different moments on a progressive jurisprudential continuum, all consistent with the text of s. 121, its historical and legislative contexts, and the principle of federalism.

107 It follows that a party alleging that a law violates s. 121 must establish that the law in essence and purpose restricts trade across a provincial border. "Essence" refers to the nature of the measure -- "'what a thing is'; ... [its] character": *The Oxford English Dictionary* (2nd ed. 1989), at p. 400. "Purpose" focuses on the object, or primary purpose, of the measure.

108 The first question is whether the essence or character of the law is to restrict or prohibit trade across a provincial border, like a tariff. Tariffs, broadly defined, are "customs duties and charges of any kind imposed on or in connection with importation or exportation": *General Agreement on Tariffs and Trade* (World Trade Organization), Can. T.S. 1948 No. 31, Part I, Article I. The claimant must therefore establish that the law imposes an additional cost on goods by virtue of them coming in from outside the province. Put another way, a claimant must establish that the law distinguishes goods in a manner "related to a provincial boundary" that subjects goods from outside the province to additional costs: *Murphy*, at p. 642, per Rand J. A prohibition on goods crossing the border is an extreme example of such a distinction.

109 The additional cost need not be a charge physically levied at the border, nor must it take the form of an actual surcharge; all that is required is that the law impose a cost burden on goods crossing a provincial border. A law that provides that "rum produced in the Maritime provinces will be subject to a 50% surcharge upon entering Newfoundland" has the same effect, in principle, as a law that states that "any person who brings rum produced in the Maritime provinces into Newfoundland is guilty of an offence and liable to a fine". Both laws impose a burden on the cost of goods that cross a provincial boundary.

110 In some cases, evidence may be required to determine if an impugned law imposes a charge on the basis of a provincial border. Consider a fictional law that requires Alberta distillers to get a special licence to import rye. It is not plain on the face of the law whether the law (1) imposes any sort of charge on the movement of rye or (2) whether any such charge is linked to a distinction between goods related to a provincial boundary. If the cost of the licence is substantial or if it is very difficult to acquire, the measure may impede cross-border trade in rye. Similarly, if the only rye available to Alberta distillers is from Saskatchewan, the licence requirement may function like a tariff against a Saskatchewan good. On the other hand, if the licence is not burdensome to acquire or if the licensing requirement applies equally where Alberta enterprises have access to rye from within Alberta, the law may not impose a burden or charge based on a provincial border and s. 121 is not violated.

111 If the law does not in essence restrict the trade of goods across a provincial border, the inquiry is over and s. 121 is not engaged. If it does, the claimant must also establish that the primary purpose of the law is to restrict trade. A law may have more than one purpose. But impeding trade must be its primary purpose to engage s. 121. The inquiry is objective, based on the wording of the law, the legislative context in which it was enacted (i.e. if it is one element of a broader regulatory scheme), and all of the law's discernable effects (which can include much more than its trade-impeding effect). If the purpose of the law aligns with purposes traditionally served by tariffs, such as exploiting the passage of goods across a border solely as a way to collect funds, protecting local industry or punishing another province, this may, depending on

other factors, support the contention that the primary purpose of the law is to restrict trade: see, e.g., *Murphy*, at pp. 638-39, per Rand J.; *Reference re Agricultural Products Marketing Act*, at p. 1268, per Laskin C.J.; *National Trade and Tariff Service* (loose-leaf), at s.. 1.3; *Black's Law Dictionary* (9th ed. 2009), at pp. 1593-94.

112 Stand-alone laws that have the effect of restricting trade across provincial boundaries will not violate s. 121 if their primary purpose is not to impede trade, but some other purpose. Thus a law that prohibits liquor crossing a provincial boundary for the primary purpose of protecting the health and welfare of the people in the province would not violate s. 121. More commonly, however, the primary purpose requirement of s. 121 fails because the law's restriction on trade is merely an incidental effect of its role in a scheme with a different purpose. The primary purpose of such a law is not to restrict trade across a provincial boundary, but to achieve the goals of the regulatory scheme.

113 However, a law that in essence and purpose impedes cross-border trade cannot be rendered constitutional under s. 121 solely by inserting it into a broader regulatory scheme. If the primary purpose of the broader scheme is to impede trade, or if the impugned law is not connected in a rational way to the scheme's objective, the law will violate s. 121. A rational connection between the impugned measure and the broader objective of the regulatory scheme exists where, as a matter of reason or logic, the former can be said to serve the latter: see, e.g., *RJR-MacDonald Inc. v. Canada (Attorney General)*, *[1995] 3 S.C.R. 199*, at para. 153, per McLachlin J. (as she then was), and at para. 184, per Iacobucci J. The scheme may be purely provincial, or a mixed federal-provincial scheme: *Gold Seal*; see also *Reference re Agricultural Products Marketing Act*.

114 In summary, two things are required for s. 121 to be violated. The law must impact the interprovincial movement of goods like a tariff, which, in the extreme, could be an outright prohibition. And, restriction of cross-border trade must be the primary purpose of the law, thereby excluding laws enacted for other purposes, such as laws that form rational parts of broader legislative schemes with purposes unrelated to impeding interprovincial trade.

115 The decided cases, while not numerous, illustrate how the essence and purpose test works. In *Gold Seal,* a federal law aimed at assisting dry provinces in keeping liquor out of their territories was held not to infringe s. 121. The law did not impede the flow of goods across provincial boundaries as its primary purpose; rather, it was part of a larger federal-provincial scheme to facilitate provinces' decisions, as informed by local referendums, to impose temperance to avoid harms associated with alcohol consumption. Therefore, it did not violate s. 121. Similarly, in *Murphy,* a federal law prohibiting farmers from shipping grain across provincial boundaries was held not to violate s. 121 because it was part of a larger marketing scheme to enable the distribution of grain. The impugned tax in *Atlantic Smoke Shops* failed because it did not distinguish between local and extra-provincial tobacco. In other words, it was not in essence tariff-like.

116 There is debate about whether s. 121 applies equally to provincial and federal laws. While this Court has in previous decisions proceeded on the basis that federal laws may engage s. 121 (see, e.g., *Gold Seal* and *Murphy*), no federal law is properly at issue in the present appeal and so the question need not be resolved here. We agree with Laskin C.J.'s statement in *Reference re Agricultural Products Marketing Act*, at p. 1267, that "the application of s. 121 may be different according to whether it is provincial or federal legislation that is involved because

what may amount to a tariff or customs duty under a provincial regulatory statute may not have that character at all under a federal regulatory statute".

VI. Application

117 Does s. 134(*b*) of the *Liquor Control Act* contravene s. 121? We conclude that it does not. To reiterate, s. 134(*b*) provides:

> **134** Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall
>
> ...
>
> (*b*) have or keep liquor,
>
> not purchased from the Corporation.

118 Our task is to determine if the essence and purpose of s. 134(*b*) is to restrict trade in liquor across New Brunswick's border.

119 The first question is whether s. 134(*b*), in its essence or character, functions like a tariff by impeding cross-border trade. Section 134(*b*), in conjunction with other provisions, makes it an offence to stock excessive amounts of liquor obtained from anywhere other than the New Brunswick Liquor Corporation. Liquor from the Corporation can be stocked for free, while liquor from elsewhere cannot, without running the risk of incurring a fine and having the alcohol confiscated. These penalties act to burden the cost of such liquor both directly and indirectly. First, the penalties imposed for stocking liquor purchased from outside the Corporation function to directly increase the cost of acquiring such liquor. Second, the risk of fine and confiscation indirectly acts as a general disincentive for New Brunswickers who would otherwise seek lower-priced liquor than that available through the Corporation, where it exists.

120 By making people who stock liquor acquired from outside the provincial Corporation pay fines and thus more generally depriving them of cheaper goods, the law burdens the cost of the targeted liquor. If the authorities seize any liquor identified when a charge is laid under s. 134(*b*) -- as occurred in Mr. Comeau's case -- the law, in practical terms, prohibits, and therefore completely bars access to, non-Corporation liquor. This prohibition functions like a tariff at the extreme end of the spectrum. With respect to out-of-province liquor, the liquor is not just prevented from being "admitted free"; it cannot be admitted at all.

121 This restriction is related to a provincial boundary. Section 134(*b*) impedes liquor purchases originating outside of the provincial Corporation above a certain threshold. The law thus has two effects. The first effect is to restrict access to liquor from other provinces. The other effect is to restrict access to liquor within the province that is not controlled by the Corporation. But although the fine functions to restrict purchases of liquor from the black market within New Brunswick, this does not negate the fact that it also imposes a burden on bringing liquor across a provincial boundary. The presence of the first effect -- restricting access to liquor from other provinces -- is sufficient to establish that s. 134(*b*), in essence, functions like a tariff, even though it may have other purely internal effects.

122 The next question is whether this restriction on trade is the *primary purpose* of s. 134(*b*). As discussed, the text, the effects and the legislative context assist in identifying the primary

purpose of s. 134(*b*). Here, the text and effects are aligned and suggest the primary purpose of s. 134(*b*) is not to impede trade. Section 134(*b*) prohibits "hav[ing] or keep[ing]" liquor above a certain threshold "not purchased from the Corporation". In effect, it restricts holding liquor obtained from non-Corporation sources within New Brunswick *and* restricts holding liquor from non-Corporation sources coming into New Brunswick. The text and effects of s. 134(*b*) indicate that its primary purpose is to restrict access to *any* non-Corporation liquor, not just liquor brought in from another province like Quebec. This is reinforced when one reads s. 134(*b*) in conjunction with s. 43(*c*), the provision that sets the maximum amount of allowable non-Corporation liquor that can be kept by someone within New Brunswick. The existence of a statutory threshold, as opposed to an absolute prohibition, suggests that the purpose of s. 134(*b*) is not to specifically target out-of-province liquor, but to more generally prevent defined quantities of non-Corporation liquor from entering the liquor supply within New Brunswick's borders.

123 This conclusion is confirmed when one considers the broader scheme of which s. 134(*b*) forms part -- a scheme that governs New Brunswick's capacity to regulate how liquor is managed within the province. The *Liquor Control Act* sets out diverse and extensive rules and prohibitions aimed at controlling access to liquor in New Brunswick. A companion statute, the *New Brunswick Liquor Corporation Act*, *S.N.B. 1974, c. N-6.1* (now *R.S.N.B. 2016, c. 105*), establishes the province's public liquor supply management monopoly. Together, these statutes set out a comprehensive and technical scheme to ensure that the liquor trade within the province is monitored. Section 3 of the federal *Importation of Intoxicating Liquors Act*, *R.S.C. 1985, c. I-3*, endorses provinces' capacity to enact such schemes.

124 The objective of the New Brunswick scheme is not to restrict trade across a provincial boundary, but to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick. It is common ground that provinces are able to enact schemes to manage the supply of and demand for liquor within their borders: *Air Canada v. Ontario (Liquor Control Board)*, *[1997] 2 S.C.R. 581*, at para. 55, citing *R. v. Gautreau* *(1978), 21 N.B.R. (2d) 701* (S.C. (App. Div.)). Governments manage liquor prices, storage and distribution with a view to diverse internal policy objectives. Although the Crown conceded that New Brunswick generates revenue from its legislative scheme, this is not the primary purpose of the scheme, but an offshoot of it. Finally, s. 134(*b*) is not divorced from the objective of the larger scheme. It plainly serves New Brunswick's choice to control the supply and use of liquor within the province.

125 We conclude that the primary purpose of s. 134(*b*) is to prohibit holding excessive quantities of liquor from supplies not managed by the province. New Brunswick's ability to exercise oversight over liquor supplies in the province would be undermined if non-Corporation liquor could flow freely across borders and out of the garages of bootleggers and home brewers. The prohibition imposed in s. 134(*b*) addresses both. While one effect of s. 134(*b*) is to impede interprovincial trade, this effect is only incidental in light of the objective of the provincial scheme in general. Therefore, while s. 134(*b*) in essence impedes cross-border trade, this is not its primary purpose.

126 Section 134(*b*) does not violate s. 121 of the *Constitution Act, 1867.*

VII. Conclusion

127 For the foregoing reasons, the Crown's appeal is allowed. The Court answers the

appellant's constitutional question as follows:

> Question: Does s. 121 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, render unconstitutional s. 134(*b*) of the *Liquor Control Act*, R.S.N.B. 1973, c. L-10, which along with s. 3 of the *Importation of Intoxicating Liquors Act*, R.S.C. 1985, c. I-3, establishes a federal-provincial regulatory scheme in respect of intoxicating liquor?
>
> Answer: No.

128 This Court has already ordered that the appellant will bear the costs of this appeal: leave to appeal judgment, [2017] S.C. Bull. 778.

Appeal allowed with costs to the respondent.

Solicitors:

Solicitor for the appellant: Attorney General of New Brunswick, Fredericton.

Solicitors for the respondent: Gardiner, Roberts, Toronto; Matchim Bernard Law Group, Campbellton, N.B.; Arnold Schwisberg, Markham, Ontario.

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Solicitor for the intervener Artisan Ales Consulting Inc.: University of Alberta, Edmonton.

Solicitors for the intervener the Montreal Economic Institute: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener Federal Express Canada Corporation: McMillan, Toronto.

Solicitors for the interveners the Canadian Chamber of Commerce and the Canadian Federation of Independent Business: Borden Ladner Gervais, Toronto.

Solicitors for the intervener Cannabis Culture: Tousaw Law Corporation, Abbotsford, B.C.

Solicitors for the intervener the Association of Canadian Distillers, operating as Spirits Canada: Power Law, Vancouver.

Solicitors for the intervener Canada's National Brewers: Gowling WLG (Canada), Toronto.

Solicitors for the interveners the Dairy Farmers of Canada, the Egg Farmers of Canada, the Chicken Farmers of Canada, the Turkey Farmers of Canada and the Canadian Hatching Egg Producers: Conway Baxter Wilson, Ottawa.

Solicitors for the intervener the Consumers Council of Canada: Siskinds, London and Toronto; Michael Sobkin, Ottawa.

Solicitors for the intervener the Canadian Vintners Association: Bennett Jones, Toronto.

Solicitors for the intervener the Alberta Small Brewers Association: Burnet, Duckworth & Palmer, Calgary.

* * * * *

Correction Released: April 19, 2018

Please note the following change in the English version of R. v. Comeau, *2018 SCC 15*, released April 19, 2018:

Paragraph 56, the second sentence should read: "Economic issues were among the most important drivers of Confederation - the union in the Dominion of Canada of certain colonies of the Maritimes and the Province of Canada."

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