SUPREME COURT OF CANADA

CITATION: R. *v.* Comeau, 2018 SCC 15

APPEAL HEARD: December 6, 2017
JUDGMENT RENDERED: April 19, 2018
DOCKET: 37398

BETWEEN:

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

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

REASONS FOR JUDGMENT: The Court
(paras. 1 to 128)

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

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*

Indexed as: R. *v.* Comeau

2018 SCC 15

File No.: 37398.

2017: December 6; 2018: April 19.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

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).

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.

Statutes and Regulations Cited

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.

Authors Cited

Black's Law Dictionary, 9th ed. by Bryan A. Gardner. St. Paul, Minn.: Thompson Reuters, 2009, "tariff".

Hill, Derek, ed. *National Trade and Tariff Service*. Toronto: LexisNexis, 1999 (loose-leaf updated February 2018).

Hogg, Peter W., and Wade 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.

Kong, Hoi L. "Republicanism and the division of powers in Canada" (2014), 64 *U.T.L.J.* 359.

Leclair, Jean. "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003), 28 *Queen's L.J.* 411.

McLean, James A. *Essays in the Financial History of Canada*. New York: Columbia College, 1894.

Monahan, Patrick J. "At doctrine's twilight: The structure of Canadian federalism" (1984), 34 *U.T.L.J.* 47.

Oxford English Dictionary, 2nd ed. Oxford: Clarendon Press, 1989, "essence".

Perry, J. Harvey. *Taxes, tariffs, & subsidies: A history of Canadian fiscal development*. Toronto: University of Toronto Press, 1955.

Schneiderman, David. "Economic Citizenship and Deliberative Democracy: An Inquiry into Constitutional Limitations on Economic Regulation" (1995), 21 *Queen's L.J.* 125.

Scott, F. R. "Centralization and Decentralization in Canadian Federalism" (1951), 29 *Can. Bar R.* 1095.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

Swinton, Katherine. "Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union" (1995), 25 *Can. Bus. L.J.* 280.

Wexler, Stephen. "The Urge to Idealize: Viscount Haldane and the Constitution of Canada" (1984), 29 *McGill L.J.* 608.

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.

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.

Jean-Vincent Lacroix and *Laurie Anctil*, for the intervener the Attorney General of Quebec.

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.

Robert J. Normey, for the intervener the Attorney General of Alberta.

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

Bradley Patzer, for the intervener the Attorney General of the Northwest Territories.

John L. MacLean and *Adrienne Silk*, for the intervener the Government of Nunavut as represented by the Minister of Justice.

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.

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 §. 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 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 §. 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.

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.

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

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the Attorney General of Prince Edward Island: Stewart McKelvey, Charlottetown.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitor for the intervener the Attorney General of the Northwest Territories: Attorney General of the Northwest Territories, Yellowknife.

Solicitor for the intervener the Government of Nunavut as represented by the Minister of Justice: Attorney General of Nunavut, Iqaluit.

Solicitors 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: Coulson Litigation, Vancouver; Gudmundseth Mickelson, Vancouver.

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.