

Court File No.

**IN THE SUPREME COURT OF CANADA**  
(On Appeal from the New Brunswick Court of Appeal)

BETWEEN

**HER MAJESTY THE QUEEN**

Applicant (Appellant)

– and –

**GERARD COMEAU**

Respondent (Respondents)

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**APPLICATION FOR LEAVE TO APPEAL**

(Pursuant to section 40 of the *Supreme Court Act* R.S.C. 1985, c. S-26)

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## MEMORANDUM OF ARGUMENT

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### PART I – OVERVIEW AND STATEMENT OF FACTS

#### OVERVIEW

1. The New Brunswick Court of Appeal, without reasons, has denied leave to appeal a provincial court decision<sup>1</sup> that ignores nearly a century of precedents from this Court.<sup>2</sup> The decision holds that federal and provincial trade powers pursuant to section 91 and 92 of the *Constitution Act, 1867* are subordinate to section 121 of the *Constitution*.<sup>3</sup> The combined effect of these two decisions calls into question several judgments of this Court beginning in 1921 as well as 150 years of constitutional compromise.
2. The scope and content of the trial judge’s finding of a constitutional right to free trade currently stands judicially unchallenged. This is a decision of polarizing national interest.<sup>4</sup> Given the

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<sup>1</sup> *R. v. Comeau*, 2016 NBPC 3; *R. v. Comeau*, NBCA Order denying leave to appeal dated October 19, 2016, Larlee J.A.

<sup>2</sup> *Gold Seal Ltd. v. Alberta (Attorney General)* (1921), 62 S.C.R. 424; *Murphy v. C.P.R.*, [1958] S.C.R. 626; *Canadian Egg Marketing Agency v. Richardson*, [1998] S.C.J. No. 78; *Reference re Agricultural Products Marketing Act*, [1978] SCJ No. 58, among others

<sup>3</sup> *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), sections 91 and 92. Section 121 reads as follows: “All articles of the growth, produce, or manufacture of any one of the provinces... shall be admitted free into each of the other provinces.”

<sup>4</sup> Lavoie, M., *R. v. Comeau and Section 121 of the Constitution Act, 1867: Freeing the Beer and Fortifying the Economic Union* (October 16, 2016) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2840845](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2840845)  
*New Brunswick asks Supreme Court to Rule on Cross-Border Liquor Limits*. Retrieved December 12, 2016, from <http://www.cbc.ca/news/canada/new-brunswick/beer-border-new-brunswick-supreme-court-comeau-1.3872524>; The Globe and Mail. (December 5 2016). *The Beer that Could Change Canada*. Retrieved December 12, 2016, from <http://www.theglobeandmail.com/opinion/editorials/the-beer-that-could-change-canada/article33209730/>; Honickman, A. *A Marriage made in Britain: Section 121 and the Division of Powers*, October 24, 2016 <http://canliiconnects.org/en/commentaries/43804> ; Advocate Daily, *Ruling may bring sweeping change to laws around wine, liquor sales*, June 13, 2016, <http://canliiconnects.org/en/commentaries/42221> ; Mancini, M., *The Comeau Decision is a*

appellate court's refusal to hear the substantive appeal, there could be no case better suited for appellate review by this Court.

3. It may appear that a more definitive appellate record would be appropriate and that the impact of this provincial court decision is essentially minimal. However, deeper consideration of the judgment is warranted. For New Brunswick, the effect of the Court of Appeal refusing leave, without reasons, establishes a plausible defence to both federal and provincial regulatory control over matters impacting inter-provincial trade. This is so even though the decision itself is not precedential.

4. This decision also creates the basis for confusion and unease in the area of provincial regulatory authority extending beyond the New Brunswick border. As national attention to this case attests, this is a matter of constitutional import for all of Canada. There are at least two other jurisdictions in which court challenges to provincial regulatory authority are proceeding which directly involve section 121.<sup>5</sup>

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*Welcome Example of Serious Doctrinal Analysis* in Advocates for the Rule of Law Aug., 3, 2016, <http://www.ruleoflaw.ca/the-comeau-decision-is-a-welcome-example-of-serious-doctrinal-analysis/>; Whalen, Christian. "R. v. Comeau and Judicial Activism." Canadian Bar Association, Dec 2, 2016, <https://www.cba.org/Sections/Constitutional-and-Human-Rights/Articles/2016/R-v-Comeau>; See Anglin, Howard. "Alberta's beer policy still unconstitutional" Toronto Sun (Aug 2, 2016) <https://theccf.ca/albertas-beer-policy-still-unconstitutional/>; <http://www.cbc.ca/news/canada/new-brunswick/stephen-harper-calls-border-alcohol-limits-ridiculous-1.3209687>; <http://www.cbc.ca/news/canada/new-brunswick/justin-trudeau-cross-border-beer-rules-1.3211117>

<sup>5</sup> Two cases in Alberta, *Steam Whistle Brewing Company Inc v. Alberta* and the *Great Western Brewing Company Ltd. v. Alberta* are winding their way through the Court of Queen's Bench both involving an application against the Alberta Liquor Corporation alleging discriminatory pricing mark-up in violation of s.121 of the *Constitution Act*. In Newfoundland, a regulatory prosecution involving a fish and wildlife prosecution is in the provincial court alleging a violation of s.121 as a defence to the charge: *R. v. Fontaine*, court file no. 2015-I-057-171.

5. The judgment of the provincial court lays the base for a national contest between inter-provincial free trade and the regulatory authority of the provinces and the federal government. It posits a tug-of-war between section 121 and the foundational principles of the Canadian federation. At the same time it creates uncertainty across provincial boundaries.

6. The issue at the heart of the decision also implicates international trade agreements signed by Canada, which generally stipulate that foreign competitors will be treated with terms no less favourable than inter-provincial trade arrangements.<sup>6</sup> If section 121 dominates interprovincial trade relations as the trial judge determined it does, then Canadian legislative capacity is obviously encumbered to that extent.

7. This case well illustrates the dynamic tension between a constrained reading of the constitutional text on the one hand, and our national political, judicial and economic evolution on the other. The resolution of these tensions can only be determined if this Court speaks to them.

### **STATEMENT OF FACTS**

8. The parties filed the following *Agreed Statement of Facts*<sup>7</sup> at trial:

- a. The defendant is charged with an offence pursuant to section 134(b) of the *Liquor Control Act*, L.R.N.-B. 1973, c. L-10.
- b. The facts are as follows as agreed upon by the parties exclusively for the purpose of this prosecution:
- c. The defendant is a resident of Tracadie-Sheila, New Brunswick.
- d. On Saturday, October 6, 2012, the RCMP had the defendant under surveillance as he was driving a gold colored Honda with New Brunswick license plates GHC 188. He was seen entering the Wysote convenience store, the *Société des alcools du Québec (SAQ)* and the Provigo Supermarket, each of which is located either on the Listuguj First Nation Indian Reserve or in the neighboring community of Pointe-à-la-Croix, and each being in the province of Québec.

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<sup>6</sup> Trial Exhibit #C-6 and Trial Transcript vol. 1, page 53-54

<sup>7</sup> Trial Exhibit #C-1

- e. The defendant was the sole occupant of the said vehicle.
- f. While under surveillance in Quebec, as described above, the defendant purchased several cases of beer, as well as wine and spirits, which were placed in the trunk of the defendant's vehicle.
- g. The defendant then accessed the J. C. Van Horne interprovincial bridge, and drove into the city of Campbellton, New Brunswick.
- h. The defendant was intercepted in his vehicle by the RCMP on Val D'Amour Street in Campbellton, New Brunswick.
- i. The defendant was offered his choice of language, identified and informed that he was being detained for being in possession of liquor in the province of New Brunswick not having purchased it from the Liquor Control Corporation in New Brunswick. The liquor was seized and the defendant was issued a ticket.
- j. The quantity and description of liquor seized from the defendant is as follows:
  - i. 2 cases of 24 bottles of Sleeman Light beer
  - ii. 2 cases of 24 bottles of Miller Genuine Draft beer
  - iii. 2 cases of 24 bottles of Molson M beer
  - iv. 3 cases of 20 bottles of Budweiser Light beer
  - v. 3 cases of 20 bottles of Budweiser beer
  - vi. 2 cases of 30 cans of Coors Light beer
  - vii. 2 - 750 ml bottles of Whiskey
  - viii. 1 - 1.14 L bottles of Stingner Premixxx liqueur
- k. The parties further agree as follows:
  - a. That the defendant violated the provisions of the *Liquor Control Act* as alleged, being a category E offence pursuant to the *Provincial Offences Procedure Act*.
  - b. That the sole issue between the parties is the constitutionality of section 134(b) of the *Liquor Control Act*, and consequently the infringement of the defendant's section 7 Charter rights, his entitlement to such remedy pursuant to section 24(1) of the Charter, and section 52(1) of the Constitution Act 1982, as is appropriate.
  - c. That this agreed statement of facts and issue will be filed with the court as an exhibit.
  - d. That New Brunswickers purchase liquor from Quebec and transport it themselves into New Brunswick is done regularly.

9. The trial of this matter was held before the Honourable Judge Ronald LeBlanc in Campbellton, New Brunswick on August 25-28, 2015. In an 87 page decision dated April 29, 2016, Judge LeBlanc dismissed the Information against the Respondent (“Comeau”). He did so on the basis that “Section 134(b) of the *Liquor Control Act* of New Brunswick constitutes a trade barrier which violates section 121 of the *Constitution Act, 1867* and is therefore of no force or effect as against Gérard Comeau.”<sup>8</sup>

10. The Applicant filed a Notice of Appeal pursuant to section 116(3) of the *Provincial Offences Procedures Act*<sup>9</sup> on May 27, 2016. Section 116(3) allows for a direct appeal to the Court of Appeal, subject to leave of that Court. The hearing for leave was held on October 13<sup>th</sup>, 2016 before a single judge. On October 19, 2016, the leave to appeal application was denied without reasons.

## **PART II – QUESTIONS IN ISSUE**

11. What is the jurisdiction of this Court to hear the substantive appeal in this case?

12. Is section 121 of the Canadian *Constitution* a free trade provision to which section 91 federal trade powers and section 92 provincial regulatory powers are subordinate?

## **PART III – STATEMENT OF ARGUMENT**

### **WHAT IS THE JURISDICTION OF THIS COURT TO HEAR THIS APPEAL?**

13. Section 40 of the *Supreme Court Act* allows for an appeal to be heard, with leave of this Court, where “...the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it...”<sup>10</sup>

14. This case meets the three criteria established by this Court to determine the jurisdiction to hear an appeal pursuant to section 40:

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<sup>8</sup> *R. v. Comeau*, 2016 NBPC 3 at para. 193

<sup>9</sup> *Provincial Offences Procedures Act*, S.N.B. 1987, c. P-22.1, s. 116(3)

<sup>10</sup> *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40

- i The decision of the New Brunswick Court of Appeal is a “final or other judgment”
- ii The judgment was rendered by the highest court of final resort in the province
- iii The question involved is by reason of its public importance one that ought to be decided by the Court.<sup>11</sup>

15. In the case at bar, the Applicant determined that there were significant issues of national and public importance arising from the provincial court decision which were matters of pure law. An appeal was thus sought directly to the New Brunswick Court of Appeal pursuant to section 116(3) of the *Provincial Offences Procedures Act*.<sup>12</sup>

16. The leave application to the Court of Appeal was unopposed by the Respondent who agreed that the issue was one of pure law and of national importance. Intermediate appellate review was deemed by the Applicant and the Respondent to be unnecessary and of additional cost. As well, the parties agreed that the questions addressed in this case are of such national importance that they will in all likelihood reach the level of the Supreme Court of Canada.

17. Despite the consolidated position of the parties on the issues, leave was denied without reasons.

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<sup>11</sup> Brown, Henry. *Supreme Court of Canada Practice*. Toronto: Thomson Reuters Canada Limited, 2015 at page 80 citing *Therrien, Re*, [2001] 2 S.C.R. 3; see also *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3S.C.R. 835

<sup>12</sup> *Provincial Offences Procedures Act*, S.N.B. 1987, c. P-22.1, s. 116(3): “... the prosecutor or the Attorney General may, with leave of the Court of Appeal or a judge of that Court, appeal directly to the Court of Appeal against a conviction, acquittal, dismissal, order or determination by a judge on a ground of appeal that involves a question of law alone.” Section 116(3) of the *Provincial Offences Procedures Act* is interpreted by Richard J.A. in *R. v. Fraser Papers*, 2006 N.B.J. No. 92 at para. 12: “Section 116(3) of the *Act* allows an appeal directly to the Court of Appeal with the requisite leave and only with respect to a ground that involves a question of law alone. While in appropriate cases it allows direct access to the Court of Appeal without the intermediate step of an appeal to the Court of Queen's Bench, s. 116(3) does not provide a right of appeal from interlocutory decisions.”

18. The Applicant concludes that the denial of leave to appeal is in fact a denial of leave to hear the substantive appeal, rather than a denial of leave to proceed directly to the Court of Appeal as per section 116(3) of the *Provincial Offences Procedures Act*. At this point an application for extension of time to appeal to the Court of Queen's Bench would certainly be redundant given an unsuccessful leave application to the Court of Appeal. Logically no other appellate avenue is available except to apply for leave to appeal to this Court.

19. Chief Justice Lamer in *R. v. Rowbotham*<sup>13</sup> states the following concerning needless procedural steps, which the Applicant suggests applies in this context: "This unnecessary delay and needless formality flies in the face of the legal maxim "*lex neminem cogit ad vana seu inutilia*" -- "the law constrains no man to do that which is vain or futile" (*Wills & Sons v. McSherry*, [1913] 1 K.B. 20, at p. 25, and *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A.*, [1977] 1 Lloyd's Rep. 133 (Q.B. (Com. Ct.)), at p. 160)."<sup>14</sup>

20. Given the national significance and public importance of the issue, the Applicant submits that this is an appropriate case for this Court to exercise its jurisdiction pursuant to section 40 of the *Supreme Court Act*.

21. Though a denial of leave to appeal is a discretionary decision by the New Brunswick Court of Appeal, this Court in *R. v. Shea*<sup>15</sup> concludes that the jurisdiction of this Court is expansive, and includes the jurisdiction to hear a substantive appeal following a denial of leave by the highest court of a province:

A similar evolution may be observed with respect to the Court's jurisdiction to grant leave to appeal when the highest appellate tribunal in the province has refused leave to appeal to it. ...In *MacDonald v. Montreal (City)*, [1986] 1 S.C.R. 460 (S.C.C.), the Court considered its jurisdiction to consider the appellate court's refusal to grant leave to appeal and overturned *Ernewein* and expanded upon its reasoning in *Hill, Gardiner* and subsequent cases thereby indicating that "final or other judgment" provides jurisdiction to this Court to hear any issue it deems to be of sufficient importance as long as resort to s. 40 is not excluded by s. 40(3) of the *Supreme Court Act*.<sup>16</sup>

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<sup>13</sup> *R. v. Rowbotham*, [1994] 2 S.C.R. 463

<sup>14</sup> *R. v. Rowbotham*, *supra* at para. 22

<sup>15</sup> *R. v. Shea*, 2010 SCC 26

<sup>16</sup> *Shea*, *supra* at para. 9

22. It is demonstrably clear that this is just such a case that ought to be decided by this Court given the contest it provokes between sections 91, 92 and 121 of the *Constitution Act, 1867*.

## **IS SECTION 121 OF THE CANADIAN CONSTITUTION A FREE TRADE PROVISION?**

### **The Trial Judge's Error**

23. The trial judge determined in error that section 121 is a standalone free-trade provision. In so concluding he determined that he was not bound by this Court's precedential decisions in respect of trade and supply management regulations within Canada. His reasoning effectively subordinates federal and provincial constitutional trade powers to section 121.

24. As a result, and if correct, any law that serves to operate as either a direct or indirect trade barrier (sometimes referred to as a "non-tariff trade barrier") within Canada would invite an *ultra vires* finding by a court. This is so whether the law is provincial or federal, or borne out of a double aspect power and subject to a federal/provincial consultative process giving rise to impugned market regulations.

25. Section 121 is not an absolute free trade provision and it does not subordinate sections 91 and 92 constitutional trade and regulatory powers. Such an interpretation serves to dismantle many of the federal and provincial trade arrangements and regulatory agreements under which Canada has operated for the past century. The Quebec Court of Appeal in *UI Canada Inc. c. Quebec*,<sup>17</sup> stated that "Our Constitution does not provide for a common market. ...A search for an alleged underlying principle of Canadian federalism providing for a common market which would contradict what clearly results from the application of the constitutional text is not warranted."<sup>18</sup>

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<sup>17</sup> *UI Canada Inc. c. Quebec*, [2003] RJQ 2729 (Q.C.C.A.), appeal to the S.C.C. dismissed without reference to s. 121, 2005 SCC 10

<sup>18</sup> *UI Canada*, supra at para. 71, further noting: "It is erroneous to contend, as does Appellant, that there is an underlying principle in our Constitution which provides for a type of common market whereby goods and products must be allowed to enter a Province free from any constraint which may result from the Province regulating commercial activity within the Province. The applicable principles are in the text of the Constitution Act 1867, particularly at sections 91(2), 92(13) 92(16) and 121."

26. The Applicant's interpretation of section 121 is best determined by reference to the scheme of the Canadian federation and the juridical nature of the *Constitution*, along with the proper interpretative approach of the constitutional text.<sup>19</sup> This includes reference to the following principles enunciated by this Court:

- A. The scheme of the Canadian federation
- B. The juridical nature of the *Constitution*
- C. The foundational principles of the *Constitution*
  - i. The principles of federalism
  - ii. The principles of democracy
  - iii. The principles of constitutionalism
- D. Interpreting the constitutional text

**A. The Scheme of the Canadian Federation and Section 121:**

27. It is readily apparent that the trial judge erred in applying an interpretative approach which consisted of a high degree of deference to what he determined to be original intent on the part of the Fathers of Confederation. Indeed, he was persuaded by the fact that in legislative debates preceding Confederation many of the Fathers declared themselves as adherents to the principles of free trade. The trial judge deductively concluded that section 121 was the embodiment of that free trade spirit.

28. If, as set out below, the scheme of the Canadian federation was to maximize political and economic advantage, through the necessary accommodation of economic, social and cultural diversity, then the trial judge's approach unbalanced the scales of this accommodation in favor of a unified common market approach. The result is that the thoughtful distribution of economic powers worked out from 1864 to 1867 is subordinated to another constitutional provision. This

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<sup>19</sup> See for example *Reference Re Jurisdiction to Pass Prohibitory Liquor Laws*, [1895] 24 S.C.R. 170 particularly the historical analysis in the reasons of Gwynne J. and Sedgewick J. starting at para. 5 and para. 48 respectively; *Reference re Initiative & Referendum Act (Manitoba)*, [1919] A.C. 935 (Man P.C.); *Reference re Secession of Quebec*, [1998] S.C.J. No. 61

design which Peter Hogg has described as the ‘progressive’ characterization to constitutional interpretation<sup>20</sup> was wholly overlooked by the trial judge. Thus, the foundational principles of the Canadian federation are remarkable for their absence in the logic of the trial judge’s conclusion.

29. The correct interpretative approach recognizes that the constitutional text is the most important component of the Canadian *Constitution*. Granted, without historical context it is a bare text of limited value. That context is provided however by what is referred to as the rules of the ‘unwritten constitution’ as recognized by judicial authority.<sup>21</sup> What is of critical importance is that this significant feature of the Canadian *Constitution* has been developed through an understanding of the political and social culture of the Canadian federation. It comprises an understanding of founding principles, principles of interpretation, and constitutional conventions, all of which inform an understanding of the text itself and give meaning to the federal scheme.

30. In this sense the goals of the federation are achieved through the exercise of constitutional powers. The constitution itself is a composite of written and unwritten rules, as well as guiding principles of a generalized nature which serve to express the political philosophy of the federating colonies. All of this is instrumental in giving expression to the treaty of union by the provinces negotiated prior to Confederation.<sup>22</sup>

31. The constitutional scheme, therefore, is essentially one designed to accommodate the interests of both the collective and individual members of the federation. The goal was to achieve economic and political power through the cohesiveness of union. As was stated as early as 1895 by this Court in *In re Prohibitory Liquor Laws*:<sup>23</sup>

So likewise must we keep ever present to our minds the fact that the main object of these provincial statesmen, who were the authors and founders of our new constitution, in framing their project of confederation, was to devise a scheme by which the best features of the constitution of the United States of America, rejecting

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<sup>20</sup> *Ontario Home Builders’ Assn. v. York Region Bd. Of Education*, [1996] 2 S.C.R. 929 at para.38

<sup>21</sup> *Quebec v. Canada* 1982 CarswellQue 124; *Reference re Senate Reform*, 2014 SCC 32; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3

<sup>22</sup> *In re Prohibitory Liquor Laws* (1895), 24 S.C.R. 170

<sup>23</sup> *Prohibitory Liquor Laws*, *supra*.

the bad, should be grafted upon the British constitution; and to vest in the provincial legislatures exclusive jurisdiction over all matters of a purely provincial, local, municipal and domestic character, and in the general or central legislature exclusive jurisdiction over all matters in which, as being of a general, quasi-national and sovereign character, the inhabitants of the several provinces might be said to have a common interest...<sup>24</sup>

32. It is therefore critical that courts embark upon that interpretation with an appreciation of the essential components of our *Constitution* which together express the federal scheme.

33. The written constitution comprises the *Constitution Act, 1867* and the amended and repatriated *Constitution* by way of the *Constitution Act, 1982*, along with various other amendments over the course of the country's existence, such as the *Statute of Westminster*, orders in council and constitutional statutes.<sup>25</sup>

34. The unwritten rules of the constitution are typically referred to as conventions. They provide guidance to the effective operation of the Canadian federation and context to the written *Constitution*. Clearly some of these rules can become constitutionalized, but in either case there can be no doubt about the importance and effectiveness of these rules: "Thus there is general agreement that a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom."<sup>26</sup>

35. Of course, the assigned division of powers between the federal and provincial legislatures are a part of the written *Constitution* as contained in sections 91 and 92 respectively. It is principally within the context of these powers that the Supreme Court has stated in *Reference re Same Sex Marriage*<sup>27</sup> that "...there is no topic that cannot be legislated upon..."<sup>28</sup>

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<sup>24</sup> *Prohibitory Liquor Laws, supra.*

<sup>25</sup> R. MacGregor Dawson, *The Government of Canada*, University of Toronto Press, 4<sup>th</sup> edition, 1963, pp 63-67, also see generally the discussion in *R v. Caron*, 2015 SCC 56

<sup>26</sup> *Quebec v. Canada, supra* at para. 31; see also see *Reference re Remuneration, supra*; *Quebec v. Canada*, [1982] 2 S.C.R. 794

<sup>27</sup> *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698

<sup>28</sup> *Reference re Same Sex Marriage, supra* at para 34

36. While the trial judge's reasoning belies the importance of the political and cultural diversity of Canada, this Court has recognized that Confederation was a compromise to engender that diversity, not to undermine it: "The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity."<sup>29</sup>

37. As an example of this compromise in the context of taxation, in *Ontario Home Builders Assn. v. York Region Bd. Of Education*,<sup>30</sup> La Forest J, concurring in the result and writing for four members of the Court, allows for an interpretation of section 121 which harmonizes with sections 91 and 92: "I elsewhere indicated how the courts had in their interpretation of direct and indirect taxation fostered the basic underpinnings of the federation. At p. 94 of my book, *supra*, I wrote:

Section 121 of the British North America Act, which was intended by the draftsman, but not in the original Quebec scheme, to perform this function might, if broadly construed, have been too restrictive of federal and provincial power. The courts could afford to interpret it narrowly by using the limitation to direct taxation to achieve the same result....<sup>31</sup> [emphasis added]

38. This explanation is a classic example of how this Court has interpreted the *Constitution* in response to the expressed goals and balancing of power of the federating provinces in 1867. It stands in stark contrast to the approach taken by the trial judge in his approach to the foundational principles of the Canadian federation.

### **B. The Juridical Nature of the Canadian Constitution:**

39. The juridical nature of the constitution refers to its legal foundation through which the scheme of the federation has developed and continues to do so. As described below, the legal foundation of the constitution is composed of both written and unwritten sources.

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<sup>29</sup> *Reference re Secession of Quebec*, [1998] Carswell Nat 1299 at para. 58

<sup>30</sup> *Home Builders'*, *supra*.

<sup>31</sup> *Home Builders'*, *supra* at para. 137

40. The trial judge erred in law by concluding that section 121 was intended as preeminent in its reach. A finding that section 121 is effectively an overriding provision of the *Constitution* is a significant departure from accepted standards of constitutional interpretation. To that extent it essentially denies the goals of the Canadian federal scheme worked out through the political and judicial employment of the constitutional text. In the context of a power struggle over language rights, this Court explains how rights are balanced, not hierarchically determined:

We therefore cannot, as the appellants ask us to do, allow the pursuit of language rights to trample on areas of clear provincial legislative jurisdiction. Neither can we resolve the tension arising from the interplay of fundamental constitutional principles, as the appellants ask us to do, by resorting to broad and uncontroversial generalities, or by infusing vague phrases with improbable meanings. Rather, we must examine the text, context and purpose of our Constitution to see whether there is a constitutional constraint on the power of the province of Alberta to decide in what language or languages it will enact its legislation.

....

Thus, we must assess the appellants' arguments by looking at the ordinary meaning of the language used in each document, the historical context, and the philosophy or objectives lying behind the words and guarantees. We cannot simply resort to the historical evidence of the desires and demands of those negotiating the entry of the territories, and presume that those demands were fully granted.<sup>32</sup>

41. It has long been determined that given the nature of the Canadian *Constitution* it can and often does take cooperation of both provincial and federal powers to legislate in particular spheres of activity.<sup>33</sup> This has led to the current situation where conflicts in respect of the division of constitutional powers are more often resolved than litigated, according to the Crown's expert, Dr. Bateman.<sup>34</sup> This fact also underscores the depth of influence exerted by the unwritten constitution in the evolution of the Canadian polity.

42. In the *Reference re Remuneration*, this Court expounds upon the textual and non-textual sources of the *Constitution*. The Court holds that central components of the *Constitution*, such as the 'rule of law', parliamentary democracy, federalism, and legislative privilege, are unwritten

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<sup>32</sup> *R. v. Caron*, 2015 SCC 56 at paras. 6, 38

<sup>33</sup> *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 129, 148-149

<sup>34</sup> Transcript, vol. 4, pp. 79-83

principles embedded within the Canadian constitutional landscape. This theme was further articulated and refined in the *Reference re Secession of Quebec*, summarized as follows:

Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.<sup>35</sup>

43. There can be no greater explicitness. The Canadian constitution is not exclusively written; it is necessarily a living (written and unwritten) constitution. It must and does evolve in order to address and to be responsive to the nature of the Canadian federation. Most particularly, the *Constitution* must be interpreted in a manner consistent with those founding principles, which comprise the internal ‘architecture’ of the *Constitution*.<sup>36</sup>

44. In *Ontario Home Builders’*, Justice La Forest articulates how the Canadian *Constitution* is best understood as the legal adhesive of the federation, more flexible than rigid, so as to serve the goals of modern Canadian society. He repeats the well-known phrase that our Constitution “...is a “living tree capable of growth and expansion within its natural limits.” Laforest J. expands on this by citing Professor Hogg: “The doctrine of progressive interpretation is one of the means by which the Constitution Act, 1867 has been able to adapt to the changes in Canadian society. What this doctrine stipulates is that the general language used to describe the classes of subjects (or heads of power) is not to be frozen in the sense in which it would have been understood in 1867.”<sup>37</sup>

45. The trial judge erred by failing to approach the issue before him with the interpretative flexibility required. He failed to consider the terms of the written *Constitution* and the

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<sup>35</sup> *Reference re Secession of Quebec*, *supra* at paras. 49-50

<sup>36</sup> *Reference re Secession of Quebec*, *supra* at paras. 50-51

<sup>37</sup> *Ontario Home Builders’*, *supra* at para. 145

pronouncements of this Court concerning its juridical nature. In *Reference re Senate Reform*, this Court states:

Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law: ....

....In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.<sup>38</sup>

46. The above quote demonstrates the linkage between the nature of the constitution, the principles which underpin it, and its relationship to the scheme of the federation. Our federal scheme without a constitution would be a meaningless chimera, and a constitution without an agreed federal scheme would be rudderless and lacking context. The foundational principles bridge both of these elements conceptually and allow for a practical working arrangement.

47. Interpreting the *Constitution* begins with an understanding of the role played by each of these components. In this sense Peter Hogg's progressive interpretation<sup>39</sup> has both legal credence and the boundaries defined by the foundational principles.

### **C. The Foundational Principles of the *Constitution*:**

#### **i. The Principles of Federalism**

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

49. As early as 1865 Sir John A. MacDonald delivered a speech in the legislative assembly of Canada (Upper and Lower Canada) in respect of the *Quebec Resolutions*. He extolled the virtues

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<sup>38</sup> *Reference re Senate*, *supra* at paras. 25-26

<sup>39</sup> Hogg, Peter. *Constitutional Law of Canada*. (1977), pp. 413-414.

of the federal scheme agreed upon during the Quebec Conference as the best result possible given that a legislative union was not achievable:

...The Conference having come to the conclusion that a legislative union, pure and simple, was impracticable, our next attempt was to form a government upon federal principles, which would give to the General Government the strength of a legislative and administrative union, while at the same time it preserved that liberty of action for the different sections which is allowed by a Federal Union.....<sup>40</sup>

50. The principle of federalism was therefore conceived as an essential political device in order to achieve a successful and sustainable confederation of the colonies. It has been so recognized to the present.<sup>41</sup>

51. The trial judge's interpretation of section 121, in effect, subordinates the principle of federalism to an overly literal and non-contextual analysis. The most immediate example of this principle in operation is the federal *Importation of Intoxicating Liquors Act*<sup>42</sup> and the province's *Liquor Control Act*. Together they comprise a cooperative legislative acknowledgement of inter-jurisdictional powers. Courts have accepted and deferred to this principle over time.

52. Abella J. wrote in *Fédération des producteurs de volailles du Québec v. Pelland*,<sup>43</sup> a case which implicated federal and provincial marketing quotas for chickens: "In my view, the 1978 Federal-Provincial Agreement, like the scheme in the *Egg Reference*, both reflects and reifies Canadian federalism's constitutional creativity and cooperative flexibility. For the reasons that follow, and based largely on a generation of constitutional jurisprudence from this Court, I would dismiss the appeal."<sup>44</sup>

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<sup>40</sup> "John A. Macdonald on the Federal System": excerpts from *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada*. Quebec: Hunter, Rose & Co., 1865, p. 29-45

<sup>41</sup> *Reference re Secession of Quebec, supra*

<sup>42</sup> *Importation of Intoxicating Liquors Act*, R.S.C., 1985, c. I-3

<sup>43</sup> *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20

<sup>44</sup> *Pelland, supra* at para. 15

53. In this respect, the trial judge ran afoul of interpreting the *Constitution* through the principles of federalism. A prime reminder of this requirement is found in the *Reference re Secession of Quebec*:

It is undisputed that Canada is a federal state. Yet many commentators have observed that, according to the precise terms of the *Constitution Act, 1867*, the federal system was only partial. See, e.g., K. C. Wheare, *Federal Government* (4th ed. 1963), at pp. 18-20. This was so because, on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces. Here again, however, a review of the written provisions of the Constitution does not provide the entire picture. Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light.

...In a federal system of government such as ours, political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other.... In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.<sup>45</sup>

54. Furthermore, the Court states that "...Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities."<sup>46</sup> Certainly the same comment can be made in respect of a section 121 challenge to the federalism, which this case clearly illustrates.<sup>47</sup>

## ii. The Principles of Democracy

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

In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are "at the core of the system of representative government": *New Brunswick Broadcasting Co.*, *supra*, at p. 387. [...]

.... A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens

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<sup>45</sup> *Reference re Secession of Quebec*, *supra* at paras. 55-56

<sup>46</sup> *Reference re Secession of Quebec*, *supra* at para. 57

<sup>47</sup> *Reference re Secession of Quebec*, *supra* at paras. 65-66

construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction....<sup>48</sup>

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

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

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

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

### **iii. The Principles of Constitutionalism**

60. Constitutionalism refers to the supreme law through which a sovereign nation is self-governed. As stated in *Reference re Secession of Quebec*, “The Constitution binds all governments, both federal and provincial, including the executive branch... They may not transgress its provisions:

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<sup>48</sup> *Reference re Secession of Quebec*, *supra* at paras. 65, 66

indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.”<sup>49</sup>

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

...constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982* [*Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11]. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also “embraces unwritten, as well as written rules” as we recently observed in the *Provincial Judges Reference*, supra, at para. 92. Finally, as was said in the *Patriation Reference*, supra, at p. 874, the Constitution of Canada includes:

...the Constitution of Canada includes the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.<sup>50</sup>

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

63. Finally, but related to the principle of constitutionalism, the decision of the trial judge puts in question the principle of ‘exhaustiveness’. In the *Same Sex Marriage* case, this Court holds that a fundamental interpretive principle of the *Constitution* is ‘exhaustiveness’: “In essence, there is no topic that cannot be legislated upon, .... A jurisdictional challenge in respect of any law is therefore limited to determining to which head of power the law relates.”<sup>51</sup>

64. In a similar vein, this Court has made reference to the purpose of section 121 and indicated that federal and provincial powers, in unison, achieve the same result:<sup>52</sup>

One of the central features of the constitutional arrangements incorporated in the Constitution Act, 1867 was the creation of a common market. Barriers to interprovincial trade were removed by s. 121. Generally trade and commerce

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<sup>49</sup> *Reference re Secession of Quebec*, supra at para. 72

<sup>50</sup> *Reference re Secession of Quebec*, supra at para. 32

<sup>51</sup> *Same Sex Marriage*, supra at para. 34

<sup>52</sup> *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at page 1099

between the provinces was seen to be a matter of concern to the country as a whole; see Constitution Act, 1867, s. 91(2). The Peace, Order and Good Government clause gives the federal Parliament powers to deal with interprovincial activities. ...And the combined effect of s. 91(29) and s. 92(10) does the same for interprovincial works and undertakings.<sup>53</sup>

65. The historical purpose of the Canadian federation, the foundational principles of our constitution, and a proper textual understanding of the written *Constitution*, all lead to the inexorable conclusion that the decision of the trial judge is incorrect. At the very least, this decision, along with the Court of Appeal denial of leave to appeal, raises significant public law questions in respect of provincial and federal regulatory authority. Left standing, it exerts an authority beyond the provincial court which issued it and the provincial boundaries which might be assumed to contain it. The important public issues this case invokes require the clarification of this Court.

#### **PART IV – SUBMISSIONS CONCERNING COSTS**

66. Given the Respondent's position before the New Brunswick Court of Appeal, agreeing that this case raises issues of national and public importance, the Applicant does not anticipate opposition to its request for leave from this Court.

67. Although the Applicant takes the position that an award of costs at the leave to appeal stage is rare,<sup>54</sup> should this Court determine costs to be appropriate relating to the request for leave to appeal, the Applicant leaves the amount to the discretion of this Court.

#### **PART V – ORDER SOUGHT**

68. The Applicant seeks an order for leave to appeal the decision of the New Brunswick Court of Appeal denying leave to appeal the provincial court decision and requests that this Court hear the substantive appeal of the provincial court decision.

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<sup>54</sup> *Carter v. Canada (Attorney General)*, 2015 SCC at paras. 139-143; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para. 36

Dated at Fredericton, New Brunswick this    day of January, 2017.

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## **PART VI – TABLE OF AUTHORITIES**

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1.	<a href="#"><u>Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A., [1977] 1 Lloyd’s Rep. 133 (Q.B. (Com. Ct.))</u></a>	19
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5.	<a href="#"><u>Fédération des producteurs de volailles du Québec v. Pelland, 2005 SCC 20</u></a>	52
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11.	<a href="#"><u>Ontario Home Builders’ Assn. v. York Region Bd. Of Education, [1996] 2 SCR 929</u></a>	28, 37, 44
12.	<a href="#"><u>Quebec v. Canada, [1982] 2 SCR 794</u></a>	29, 34
13.	<a href="#"><u>R. v. Caron, 2015 SCC 56</u></a>	6, 33, 40, 41
14.	<a href="#"><u>R. v. Comeau, 2016 NBPC 3</u></a>	1, 2, 9
15.	<i>R. v. Comeau</i> , NBCA Order denying leave to appeal dated October 29, 2016, Larlee J.A.	1
16.	<i>R. v. Fraser Papers</i> , 2006 N.B.J. No. 92	15
17.	<a href="#"><u>R. v. Rowbotham, [1994] 2 S.C.R. 463</u></a>	19

18. [R. v. Shea, 2010 SCC 26](#) 21
19. [Reference re Agricultural Products Marketing Act, \[1978\] SCJ No. 58](#) 1
20. [Reference re Remuneration of Judges of the Provincial Court \(P.E.I.\), \[1997\] 3 SCR 3](#) 29, 34, 42
21. *Reference re Secession of Quebec*, [1998] Carswell Nat 1299 26, 36, 42, 43, 50, 53-55, 60, 61
22. [Reference re Same Sex Marriage, \[2004\] 3 SCR 698](#) 35, 63
23. [Reference re Senate Reform, 2014 SCC 32](#) 29, 45
24. [Tsilhqot'in Nation v. British Columbia, 2014 SCC 44](#) 41
25. *UI Canada Inc. c. Quebec*, [2003] RJQ 2729 (QCCA) 25
26. *Wills & Sons v. McSherry*, [1913] 1 K.B. 20 19
27. Advocate Daily, *Ruling may bring sweeping change to laws around wine, liquor sales*, June 13, 2016, <http://canliiconnects.org/en/commentaries/42221>
28. Brown, Henry. *Supreme Court of Canada Practice*. Toronto: Thomson Reuters Canada Ltd, 2015.
29. CBC News. *New Brunswick asks Supreme Court to Rule on Cross-Border Liquor Limits*. Retrieved December 12, 2016, from <http://www.cbc.ca/news/canada/new-brunswick/alcohol-border-new-brunswick-supreme-court-comeau-1.3872524>
30. Dawson, R. MacGregor. *The Government of Canada*, University of Toronto Press, 4<sup>th</sup> edition, 1963.
31. The Globe and Mail. (December 5 2016). *The Beer that Could Change Canada*. Retrieved December 12, 2016, from <http://www.theglobeandmail.com/opinion/editorials/the-beer-that-could-change-canada/article33209730/>
32. Hogg, P. *Constitutional Law of Canada*. (1977).
33. Honickman, A. *A Marriage made in Britain: Section 121 and the Division of Powers*, October 24, 2016 <http://canliiconnects.org/en/commentaries/43804>

34. "John A. Macdonald on the Federal System": excerpts from *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada*. Quebec: Hunter, Rose & Co., 1865, p. 29-45
35. Lavoie, M., *R. v. Comeau and Section 121 of the Constitution Act, 1867: Freeing the Beer and Fortifying the Economic Union* (October 16, 2016) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2840845](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2840845)
36. Mancini, M., *The Comeau Decision is a Welcome Example of Serious Doctrinal Analysis* in *Advocates for the Rule of Law* Aug., 3, 2016, <http://www.ruleoflaw.ca/the-comeau-decision-is-a-welcome-example-of-serious-doctrinal-analysis/>
37. Whalen, Christian. "R. v. Comeau and Judicial Activism." Canadian Bar Association, Dec 2, 2016, <https://www.cba.org/Sections/Constitutional-and-Human-Rights/Articles/2016/R-v-Comeau>

## **PART VII – LEGISLATIVE AUTHORITIES**

[Constitution Act, 1867, 30 & 31 Victoria, c. 3 \(U.K.\)](#)

[Provincial Offences Procedures Act, S.N.B. 1987, c P-22.1](#)

[Supreme Court Act, R.S.C. 1985, c. S-26](#)

[Importation of Intoxicating Liquors Act, R.S.C., 1985, c. I-3](#)

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Argument.PDF.Hyperlinks.Final.pdf.docx