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Free Trade within Canada:
Say Goodbye to Gold Seal

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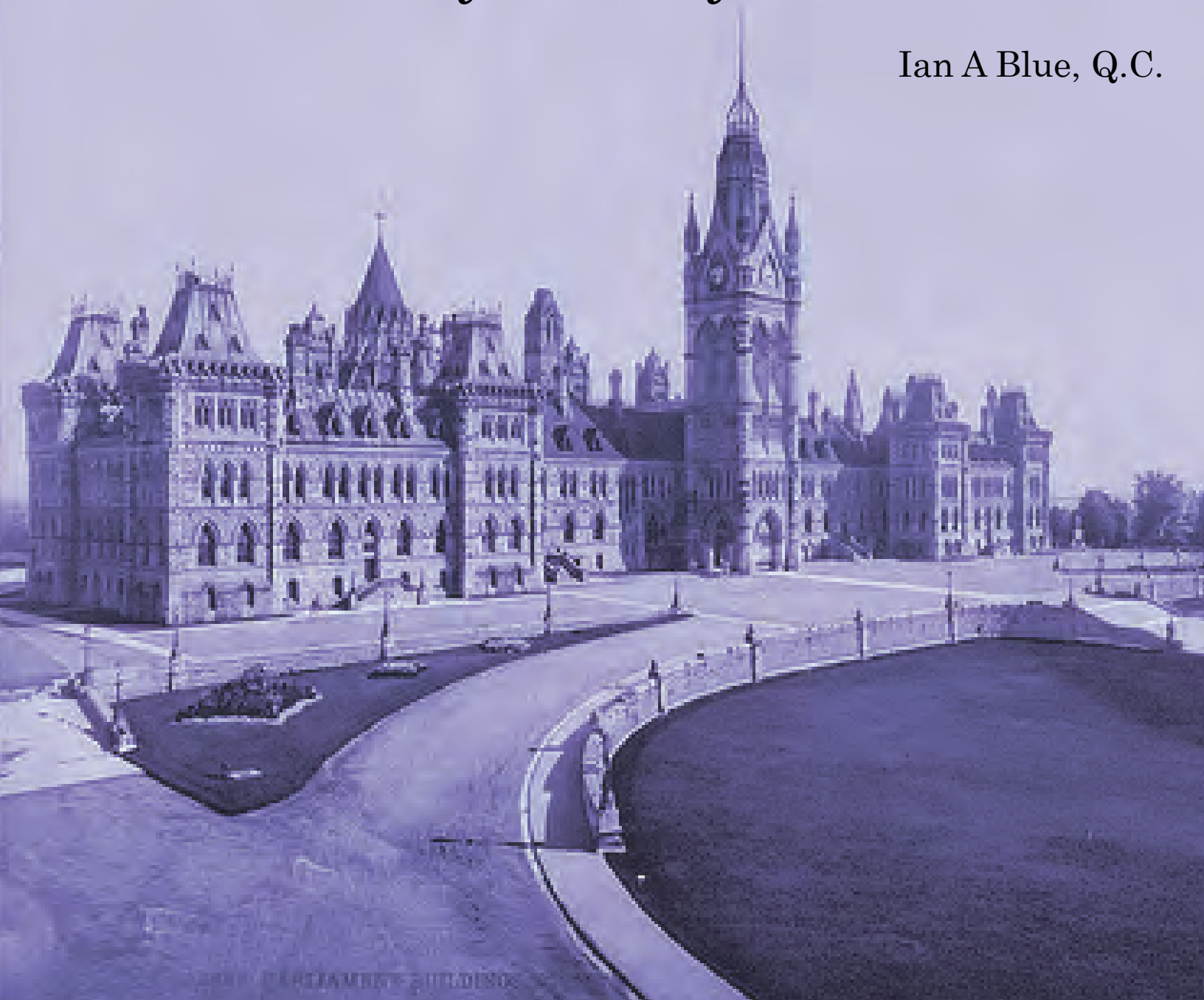

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Executive Summary

This paper argues that a single wrong-headed legal decision from Canada's distant past has obscured and virtually destroyed our Constitution's strong guarantees of free trade within the country. This argument implies that many of the existing barriers to the free movement of goods, including provincial liquor monopolies, agricultural marketing boards, the Canadian Wheat Board, provincial product regulations, and others, are not only inefficient but unconstitutional and subject to legal challenge before the courts.

The paper's analysis focuses on section 121 of the Constitution Act, 1867. Section 121, which requires interprovincial free trade, has traditionally been interpreted in the light of the *Gold Seal Limited* v. *The Attorney General of the Province of Alberta case* ("Gold Seal, 1921"). That interpretation limited the application of section 121 to prohibiting interprovincial "customs duties", something that had not been an issue since Confederation in 1867. In other words, the constitutional protection prohibiting provincial trade barriers has historically been interpreted very narrowly to include only provincial customs duties.

The study includes an analysis of section 121 based on the Supreme Court's contemporary rules for interpreting our Constitution: the provision's wording, legislative history, legislative context, and its place within the scheme of the broader Act. The paper concludes that the Gold Seal interpretation is inconsistent both with our founders' vision for Canada and this present-day approach to constitutional interpretation, and clearly resulted from political expediency rather than honest legal reasoning. It maintains that a purposive and progressive interpretation requires a more robust role for section 121. Specifically, section 121, properly understood and applied, would prohibit any legal or financial impediment to the free flow of goods across Canada.

The conclusion that section 121 offers much broader scope for prohibiting provincial trade barriers, if supported through legal challenges, could result in dramatic and profound changes to provincial and even federal economic policies.

Sommaire

Cette étude défend l'idée qu'une seule mauvaise décision juridique prise dans le lointain passé du Canada a obscurci et pratiquement détruit les garanties solides en faveur de la liberté de commerce au sein de notre pays que l'on retrouve dans la Constitution. Cet argument implique que plusieurs des barrières existantes à la libre circulation des biens, y compris les monopoles provinciaux sur la vente d'alcool, les offices de commercialisation agricole, la Commission canadienne du blé, la réglementation provinciale des produits, et d'autres encore, sont non seulement inefficaces mais également inconstitutionnelles et sujettes à être contestées devant les tribunaux.

L'analyse se concentre sur l'article 121 de la Loi constitutionnelle de 1867. Cet article, qui prescrit le libre-échange entre les provinces, a traditionnellement été interprété à la lumière de l'affaire *Gold Seal Limited* c. *Procureur général de la province d'Alberta* (« Gold Seal, 1921 »). Cette interprétation a limité l'application de l'article 121 à l'interdiction de mettre en place des « droits de douane » entre les provinces, ce qui n'avait jamais été un problème depuis la Confédération de 1867. En d'autres termes, la protection constitutionnelle prohibant les barrières interprovinciales au commerce a historiquement été interprétée de façon très étroite pour n'inclure que les droits de douane appliqués par les provinces.

L'étude comprend une analyse de l'article 121 qui s'appuie sur les règles contemporaines de la Cour suprême pour interpréter la Constitution : la formulation de la clause, l'histoire législative, le contexte législatif et l'emplacement de la clause au sein de la Loi dans son ensemble. Le document conclut que l'interprétation donnée à Gold Seal est incompatible à la fois avec la vision qu'avaient les Fondateurs du Canada et avec cette approche contemporaine pour interpréter la Constitution, et qu'elle s'appuie clairement sur l'opportunisme politique plutôt que sur un raisonnement juridique honnête. L'étude soutient qu'une interprétation réfléchie et progressiste exige d'accorder un rôle plus ambitieux à l'article 121. Plus spécifiquement, si l'article 121 était compris et appliqué de façon appropriée, il interdirait tout obstacle légal ou financier à la libre circulation des biens à travers le Canada.

Si cette conclusion voulant que la portée de l'article 121 pour interdire les barrières au commerce interprovincial est en réalité beaucoup plus large était confirmée par une contestation juridique, elle pourrait se traduire par des transformations considérables et profondes dans les politiques économiques des provinces et même du gouvernement fédéral.

Introduction

A host of restrictive measures, including agricultural marketing boards and provincial liquor monopolies are probably unconstitutional and supported only by an obscure Supreme Court of Canada decision over eighty years old which rests on no principle of constitutional interpretation acceptable today.

We are not accustomed to thinking of our Constitution as defending economic freedom throughout our country, but one provision takes a strong stand against obstacles to the free movement of goods within Canada's borders; this is the Cinderella-like section 121[2] ; a provision that contains a strong, perhaps surprisingly strong, endorsement of internal free trade;

> 121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.[3]

Cinderella-like, because in 1921 the Supreme Court of Canada (Supreme Court) consigned section 121 to neglect and oblivion. In the Gold Seal case[4] of that year, it held that the only trade barriers which section 121 protected Canadians against were customs posts at provincial borders. It is the contention of this paper that the Gold Seal interpretation is risibly wrong, contrary to the intention of the framers of the Constitution, and inimical to one of the main purposes of Confederation, namely, to create a strong national economic union with no internal trade barriers[5].

Since the mid 1980s the Supreme Court has tried to limit judicial capriciousness.

While the author offers those views and will attempt to prove them in this paper, it should be understood by everyone that the Gold Seal case has enabled a plethora of existing schemes that interfere with interprovincial trade in one way or another. This means that there may be some noisy stakeholder criticism and pushback about the conclusions of this paper.

Interpretation of Section 121

How courts have or should interpret the Constitution has always been fertile ground for debate among legal scholars. Fortunately, we can bypass all that discussion because it is beside the point. In the mid 1980s following enactment of the Canadian Charter of Rights and Freedoms (Charter)[6], there was a paradigm shift in the rules for interpreting the Constitution. From 1867 until the Charter, a provision in the Constitution was looked at by itself and given the meaning decided upon, more or less subjectively, by final appellate courts. Since the mid 1980s, as a result of the increase in constitutional cases resulting from the Charter, the Supreme Court has tried to limit such judicial discretion. Essentially, the Supreme Court has provided Canadians with two overlapping rules for interpreting the Constitution, the progressive and the purposive.

Progressive Interpretation

In the "Persons" case, most famous for its declaration that women were persons under the Canadian Constitution, the Judicial Committee of the British Privy Council (PC), then Canada's highest court of appeal, said that our Constitution was a "living tree" and must be interpreted so as to not cut down its provisions by a narrow and technical construction, but rather to give them "a large and liberal interpretation". [7] In 2003 the Supreme Court said that this living tree principle is a fundamental tenet of constitutional interpretation.[8] It implies two requirements when applied to section 121 (or any other part of the Constitution): first, we should not read any restriction into section 121 that is not explicit or required by necessary implication; second, we should not freeze its meaning according to the conditions in 1867. Instead, we should determine its meaning from time to time as new circumstances arise, which is the way Courts are supposed to interpret any other statutory provision.[9]

Purposive Interpretation

The post-Charter Supreme Court has said that provisions in the Constitution should receive a "purposive" interpretation. That requirement helps restrict the possibilities for misuse of the potentially open-ended "progressive" interpretation by insisting that when judges seek a modern meaning in sometimes dated language, they must do so in keeping with the purpose of the Constitutional provision in question. And in 2008 the Court explained precisely which four factors judges must weigh in determining that purpose.

They must consider (1) the wording of the act, (2) the legislative history, (3) the scheme of the act, and finally (4) the legislative context. These four components of a purposeful interpretation are broad enough to reflect both a progressive and purposive interpretation of section 121, so I will refer to them together as a "purposive" interpretation.

It is this late twentieth century shift to a purposive interpretation requirement that allows the author to say with some confidence that the Gold Seal interpretation of section 121 is wrong. Yes, this is a presentist's view, but the common law has always reflected presentist views; they, of course, need to be updated from time to time, as the author is doing in this paper. He will show that the Gold Seal interpretation was not even a valid presentist, or for that matter a correct historical, view when it was given in 1921.

When one looks at the wording of section 121, the intriguing question is, what is meant by "free"?

Section 121 Purposively Interpreted

Wording of the Act

While provisions of the Constitution are always ambiguous[11], the Supreme Court has nevertheless said that their wording is one of the four factors that must be considered in a purposeful interpretation. When one looks at the wording of section 121, the intriguing question is what is meant by "free" in the phrase "shall .... be admitted free".

We know that the draftsman of the British North America Bill was a British government lawyer named Frank Reilly.[12] All legal draftsmen work by adapting precedents and, doubtless, Reilly did too. In 1867, there happened to be good legislative precedents which he might have used to fashion section 121. After 1846,[13] the colonies of Nova Scotia,[14] New Brunswick[15] and the Province of Canada[16] enacted reciprocal statutes which provided that if another British North American colony allowed their products into their market "free from Duty", then they might return the gesture.

The Nova Scotia and Province of Canada statutes had similar wording. The Nova Scotia statute said:

> 1. Be it enacted, by the Lieutenant-Governor, Council, and Assembly, That whenever, from time to time, the importation into any other of the British North American Provinces hereinbefore mentioned, of all articles the growth, production, manufacture, of this Province, ..., shall by Law be permitted free from Duty, the Governor, with the advice of the Executive Council, shall forthwith cause a Proclamation to be inserted in the Royal Gazette, fixing a short day thereafter on which the Duty on all articles, ..., being the growth, production, or manufacture, of any such Province into which the importation of all articles, the growth, production, or manufacture, of this Province, (excepting Spirituous Liquors), shall be so permitted free from Duty, ... [17]

The wording of section 121 suggests that articles of growth, produce or manufacture should be able to cross provincial borders without facing any tradebarriers.

We, of course, don't know whether Reilly used these or similar precedents when he drafted section 121, but it certainly looks that way, because section 121 appears to be a pastiche formed from their words. In section 121, we see "articles of growth, production and manufacture" as in the precedent provision. Significantly, however, we don't see the "shall be .... permitted free from duty" formula from the precedent but, instead, "shall .... be admitted free," a much less restrictive requirement. What then did "free" in section 121 mean? Logically it had to mean something a lot wider than the "free from Duty" formula.

Until publication of the Oxford English Dictionary in 1884, the dictionary most used in England was Dr. Samuel Johnson's Dictionary of the English Language.[18] It shows the meaning of "free" detached from the qualifier "from duty," as Reilly might have understood it.[19] In Dr. Johnson's dictionary, "free" meant:

> 1. At liberty; not a vassal; not enslaved; not a prisoner; not dependent.
>
> 2. Uncompelled; unrestrained.
>
> 4. Permitted; allowed.
>
> 11. Guiltless; innocent.
>
> 12. Exempt: with of anciently; more properly from.

13. Invested with franchises; possessing any thing without vassalage; admitted to the privileges of any body: with of.

14. Without expense; by charity, as a free-school.[20]

Even if the justices, working after 1884, preferred a contemporary dictionary to that probably used by the drafters, the Shorter Oxford English Dictionary shows that the contemporary definition of "free" has not changed materially:

11. Exempt from, or not subject to, some particular jurisdiction or lordship. Also, possessed of particular rights and privileges. ME.

13. Given or provided without charge or payment, gratuitous. Also, admitted, carried, or placed without charge or payment. ME.

14. Invested with the rights or immunities of or of, admitted to the privileges of or of (a chartered company, corporation, city or the like). LME. b Allowed the use or enjoyment of (a place etc.). L17.

15. Exempt from restrictions with regard to trade; not subject to tax, toll, or duty; allowed to trade in any market. [21]

Thus, under both the historical and contemporary definitions of a wider "free" than "free from duty," the wording of section 121 suggests that articles of growth, produce or manufacture should be able to cross provincial borders without facing any trade barriers, not just customs duties.

Legislative History

A purposive interpretation must place a provision in its proper linguistic, philosophical and historical contexts.

Here we will take an excursion into relevant Canadian history. It is important to note that we consider legislative history, not to advance a backward-looking "originalist" interpretation of section 121 (or any other part of the Constitution) that ties a current interpretation to its possible historical meaning, but rather to assist us in ascertaining a purposive interpretation that contemporizes the meaning of section 121 in accordance with its original purpose.[22]

Thus, a purposive interpretation must be flexible enough to account for that which was unforeseen in 1867 and must place a provision in its proper linguistic, philosophical and historical contexts.[23] We will return to this point, but for now, we will look at history in order to see the historical context of section 121. When we do so, the result is quite clear: It must be read broadly.

Before Confederation, the wealth of the British North American colonies derived from their ability to export timber, agricultural products, minerals and fish to Britain. Until 1846, they enjoyed a preferential tariff which allowed them to sell their products to a rising British Empire at customs duties that were lower than those on products from outside the British Empire. In 1846, however, the British Parliament dismantled all its protective trade legislation, and enacted a free trade tariff to come into force in 1849.[24] This legislation, known to history as the Repeal of the Corn Laws, removed the preferential tariff that the British North American colonies had enjoyed. In 1846, the United States Congress, by a majority of one senate vote, enacted legislation to reduce United States customs tariffs for Britain sufficiently to ensure that there would

be free trade between the United States and the British Empire.[25] The British North American colonies suddenly found themselves competing in a free trade world.

These economic developments caused deep concern in British North America. The House of Assembly of Lower Canada told the U.K. Parliament that the Repeal would, first, discourage those engaged in agricultural pursuits from extending their operations; second, discourage the influx of immigrants; and lastly, cause the inhabitants of Canada to "doubt whether their remaining a part of the British Empire would be to their advantage". [26] The historian Ged Martin notes that by 1849 these concerns had revived the recurring question of a union of the British North American colonies. Outraged over losing their monopolies of local power due in part to losing trading privileges with Britain, pro-British parties began to threaten self-annexation to the United States. [27]

The British North American colonies then asked Britain to secure a reciprocity agreement with the United States for a mutual reduction of duties charged on goods exchanged between those colonies and the United States. This movement toward reciprocity began in 1846-50. Until 1852, British diplomats negotiated in Washington without success, but then a dispute developed over the rights of American fishermen in British North America coastal waters. Both governments wanted a comprehensive settlement to resolve the reciprocity and the fisheries issues. The Reciprocity Treaty was signed by Lord Elgin and United States Secretary of State William Marcy on June 6, 1854. It was accepted by the United States Congress in August of that year. The three principal provisions were to allow American fishermen into Atlantic coastal waters of British North America; a similar privilege to British North American fishermen in US coastal waters; and the establishment of free trade in a long list of natural products. Trade between the US and the colonies flourished after 1854, although other factors such as the Canadian railway boom and the effects of the American Civil War assisted.[28]

As the Confederation debates show, considerable value was placed upon the free-trade-within-Canada advantages.

In December 1864, the British North American colonies learned that due to American hostility to Britain, the United States intended to abrogate the Reciprocity Treaty. This development informed discussions on Confederation which had taken place.[29] John A. Macdonald was acutely aware of this development and cited the disastrous effect the impending abrogation of the Reciprocity Treaty would have on the trade of the British North American colonies as a reason for Confederation. [30]

Here, it is necessary to pause briefly to come back to the question not addressed above when discussing the wording of section 121 and ask what happened between the late 1840s and 1867 to cause the "permitted free from duty" formula used in earlier statutes to change to the less restrictive "admitted free" formula used in section 121. One event in particular seems to explain this change.

In December 1864, when President Lincoln gave the United States Congress notice that he intended to change the Reciprocity Treaty of 1854, he also announced that his administration would "modify the rights of transit [of goods] from Canada through the United States."[31] Until then, goods from Canada had been allowed to travel across the United States to Atlantic ports, in bond. Now Canadian goods would be stopped and inspected in the United States, with attendant delays and costs and interference with Canada's trade. This was nothing less than a non-tariff, non-impost, non-duty trade barrier, and it was present in the minds of the founders in 1865-67 when Confederation was being discussed.[32]

Imagine, as our Founders surely did, what might have happened if provincial governments had been allowed to give their own producers, manufacturers or farmers a preference using similar practices. They could easily impose time-consuming stop and inspect procedures on goods entering their province from any other in a way that created significant obstacles to interprovincial trade and a "free from duty" formula would not have prevented them from doing so. But the wider "admitted free" formula would. This consideration was important given the arguments made for Confederation in the mid-1860s.

Confederation was greatly influenced by the expected economic advantages of union, especially to Canadian industrialists, Montreal financial and forwarding interests, as well as to the producers of natural products. After 1864, the economic benefits of Confederation increased in importance. As the Confederation debates show, considerable value was placed upon the free-trade-within-Canada advantages which were expected to mitigate the effect of pending exclusion from the American market. Great benefits were anticipated from opening the markets of all the provinces to the industries of each. The Canada of Confederation would possess a diversity of resources. Prosperity would be achieved by a commercial system which combined the wheat-growing area of Ontario and the coal and fisheries of the Maritimes with the finest navigable river in the world, the Saint Lawrence. Canada was to have free trade internally, with external trade barriers against others. [33] Such a country, it was believed, would speedily develop a foreign trade quite as profitable as what had been carried on by the colonies with the United States. [34]

After repeal of the Corn Laws, but before discussions on Confederation had begun in earnest, Nova Scotia, New Brunswick and the Province of Canada[35] enacted numerous laws to impose and increase duties on goods coming into them from elsewhere, including from other British North American colonies. The colonies also had in place other trade barrier legislation, such as anti-smuggling acts, acts regulating the importation of books and acts regulating illicit trade. [36] In addition, as already mentioned, they passed conditional reciprocal duty-free statutes. It is apparent from the Confederation debates that reciprocal deals were never worked out among the colonies because it was the dismantling of inter-colonial trade barriers that was seen as a major advantage of Confederation.

The dismantling of inter-colonial trade barriers was seen as a major advantage of Confederation.

Of course one must be careful in drawing historical conclusions from pre-Confederation debates. But political scientist Janet Ajzenstat rightly argues that it is important to examine such original sources because in the absence of such study, fanciful and misleading ideas about Confederation abound. [37] Historians have certainly relied on historical debates in other contexts and it is hard to see how else one could get a proper sense of what those who made Canada thought they were doing. [38] Moreover, Ajzenstat argues, the founders were educated men knowledgeable about Canada's history, law and politics. The majority of the Supreme Court, in the Fastfrate case, agreed with her, quoting from a speech of Sir John A. Macdonald in the Confederation debates to ascertain the meaning of section 92(10) of the Constitution Act, 1867. So it is fair to consider the Confederation debates in ascertaining the historical context of section 121.

Discussions about Confederation began in September 1864 when a delegation from the Province of Canada joined the Charlottetown Conference originally convened to discuss Maritime union. While the conference proceedings were unrecorded, mem-

bers of the Canadian delegation spoke publicly about Confederation and said that one of its main benefits would be free trade among the provinces. For example, in Halifax on September 12, 1867, George Brown said that union of all Provinces would "break down all trade barriers between us," and throw open all at once "a combined market of four millions of people." [39] On the same occasion, Alexander Galt said that the purpose of the Union was "free trade among ourselves." [40]

The Charlottetown delegates reconvened at the Quebec Conference in October 1864. This meeting resulted in the Quebec Resolutions[41] of 1864, the main source for the British North America Act, 1867.[42] They did not mention interprovincial trade or free trade among the provinces. Politicians, however, continued to argue that interprovincial free trade was a major advantage of Confederation. At Ottawa on November 1, 1864, Alexander Galt said that the desire of Confederation was to bring about "free trade in our own colonies." [43] At Toronto, on November 2, 1864, Edward Palmer, the Attorney General of Prince Edward Island, said that "we agreed that we should, between and amongst ourselves, enjoy free trade". [44]

At Sherbrooke, on November 23, 1864, Alexander Galt commented on Quebec resolution 29(2), which said that the "general government" would regulate trade and commerce. His comments reveal why the Quebec Resolutions did not need to mention internal free trade:

> [The general government] would have the regulation of all the trade and commerce of the country, for besides that these were subjects in reference to which no local interest could exist [sic], it was desirable that they should be dealt with throughout the confederation on the same principles. The regulation of duties of customs on imports and exports might perhaps be considered so intimately connected with the subject of trade and commerce as to require no separate mention in this place; he would however allude to it because one of the chief benefits expected to flow from the confederation was the free interchange of the products of the labor of each Province, without being subjected to any fiscal burden whatever; and another was the assimilation of the tariffs. It was most important to see that no local legislature should by its separate action be able to put any such restrictions on the free interchange of commodities as to prevent the manufactures of the rest from finding a market in any one province, and thus from sharing in the advantages of the extended Union.[45]

According to George-Etienne Cartier, the union will break down [tariff] barriers and open the markets of all the provinces to the different industries of each.

In February, 1865, the Parliament of the Province of Canada debated Confederation.[46] John A. Macdonald said that Canada wanted "unrestricted free trade, between people of the five provinces", [47] while according to George-Etienne Cartier, the most immediate benefits to be derived from the union will spring from the breaking down of [tariff] barriers and the opening up of the markets of all the provinces to the different industries of each.[48] George Brown said "I go heartily for the union because it will throw down the barriers of trade and give us control of a market of four million people."[49] Hector Langevin said: "There are also as many different tariffs as there are different provinces, as many commercial and customs regulations as provinces."[50] On April 10, 1865, Charles Tupper, then Provincial Secretary, in a debate on Confederation in the Nova Scotia House of Assembly, cited internal free trade as one of the advantages of Confederation.[51]

In the fall of 1866, delegates from the British North American colonies prepared for and attended the London Conference of December 1866. This resulted in the London Resolutions of 1866[52] which added to the agreements in the Quebec Resolutions and were also used in drafting the British North America Act, 1867. Like the Quebec Resolutions of 1864, they made no mention of interprovincial free trade.

Following the London Resolutions of 1866, John A. Macdonald stayed in London to supervise legislative drafting and see Confederation enacted into law. The first version of section 121 only appeared during the first week of February, 1867[53] in the Fourth Draft of the British North America Bill. The Final Draft of February 9, 1867[54] contained another version, while the present section 121 only appeared when the British North America Bill was going through Parliament.[55] The following comparison shows that the final section 121 differed from what had been in the February 9th Final Draft as section 125:

IX – February 9, 1867 Final DRAFT	Section 121 in its present form
Canadian Manufactures, &c.	
125. All Articles the Growth or Produce or Manufacture of Ontario, Quebec, Nova Scotia, or New Brunswick, shall be admitted free into all Ports in Canada.	121. 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.

The changes made between February 9 and March 4, 1867 made section 121 a wider and more encompassing provision than its initial version. The "admitted free" formula rather than the "permitted free from duty" one, however, had been a prominent feature of the first expression of section 121 and was maintained in both the Final Draft and the version which is our present section 121.

The Earl of Carnarvon said that internal free trade would be a significant advantage of Confederation.

The British North America Bill was introduced in the House of Lords on February 12, 1867.[56] The Second Reading debate in the Lords occurred on February 19, 1867.[57] The Earl of Carnarvon's speech in support of the bill was a masterpiece. He said that internal free trade would be a significant advantage of Confederation.[58] On February 22, 1867, the bill was considered by a Committee of the Lords and reported back with minor amendments.[59] On February 26,[60] it received Third Reading in the House of Lords which then sent a message to the Commons requesting its concurrence.[61]

On February 26th, the Commons ordered that bill be reprinted and on February 27, it was given First Reading there.[62] The Second Reading Debate in the Commons occurred on February 28, and Charles Adderley, Under-Secretary of State for the Colonies, spoke for the bill. He too said that internal free trade was an advantage of Confederation.[63] On March 4, the bill was referred to Committee of the Whole where it was considered clause by clause. The major amendment made there was the addition of the new "Part VIII: Revenues; Debts; Assets, Taxation" which contained section 121 in its present form.[64] On March 7, the Commons considered the bill "as Amended" without debate.[65] On March 8, the bill, as amended, was given Third Reading and referred back to the House of Lords for its concurrence with the Commons amendments.[66] On March 12, the Commons amendments were read twice in the House of Lords and were agreed to.[67] On March 29, a Commission of Lords gave Royal Assent

to the British North America Bill and it became the British North America Act, 1867.[68]

This legislative history shows that the context in which section 121 was enacted was a situation where the Fathers of Confederation wanted Canada to be a strong and harmonious economic union with no internal trade barriers. It shows that one of the major advantages seen in Confederation was the creation of a Canada-wide free market.

The idea here was manifestly not merely the absence of monetary penalties for moving goods across provincial borders. Macdonald wanted "unrestricted free trade." Galt wanted freedom from "restrictions on the free interchange of commodities." Brown wanted to breakdown "barriers." Langevin wanted freedom from "different commercial regulations." Tupper wanted "free trade." Carnarvon spoke of "one common and manageable system,"[69] and Adderley spoke of "the most perfect reciprocity" among provinces.[70]

These conclusions concerning the context of section 121 are supported by statements from the Supreme Court. In *Lawson* v. *Interior Tree Fruit and Vegetables Committee of Direction* ("Lawson case"),[71] Cannon, J. said that the purpose of Canada was to form an economic unit of all the provinces in British North America with absolute freedom of trade between its constituent parts.[72] In *Manitoba* (Attorney General) v. *Manitoba Egg & Poultry Association* ("Manitoba Egg case"),[73] Laskin, J. (as he then was) agreed that one of the objects of Confederation was to form an economic unit of the whole of Canada.[74] In *Black* v. *Law Society* (Alberta),[75] La Forest, J. said the attainment of economic integration occupied a place of central importance in the scheme of Confederation.[76]

The Fathers of Confederation wanted Canada to be a strong and harmonious economic union with no internal trade barriers.

This history also tells us that section 121 developed through an intense legislative process, resulting in a provision with clear, unrestricted, and mandatory language. Moreover, this provision was consciously approved by both the House of Commons and the House of Lords, and then enacted into law. This history also indicates that Parliament intended the provision to be a plenary and effective part of the British North America Act, 1867, applicable to all interprovincial trade barriers and not to be rendered completely otiose once Canada had been created.

This may be fairly concluded from the historical context of section 121 that the framers of the Constitution saw it as essential to achieving a national economy by providing Canadians with the ability to trade freely within Canada without interprovincial trade barriers.

Legislative Context

Legislative context shows that section 121 was an important provision of the British North America Act, 1867 and for the Confederation project; a provision in a constitutional statute that created a new federal country having both a federal and provincial governments, each possessing defined legislative authority subject to the limitations set out elsewhere in the Constitution.

The Quebec and London Resolutions were the product of intense political debate between 1864 and 1866. They contained the agreements of the colonies of Canada (to become Ontario and Quebec), Nova Scotia and New Brunswick to form a union. The Earl of Carnarvon made it clear that the British North America Act, 1867 was a treaty of union.[77] So did Rand, J. in *Murphy* v. *CPR*.[78]

Scheme of the Act

Section 121 is found in Part VIII: Revenues; Debts; Assets; Taxation of the Constitution Act, 1867. This part sets out what each of the provinces would receive in return for agreeing to Confederation. Why would Macdonald and Riley have considered it necessary to include section 121? Recall that Alexander Galt had said in his Sherbrooke speech that the regulation of customs duties on imports among the provinces was "so intimately connected" with the then proposed federal trade and commerce power that it hardly required separate mention. He believed that the federal power to regulate trade and commerce would be wide enough to prevent provinces from imposing customs duties at the provincial border.[79]

Macdonald, a capable lawyer and the shrewdest parliamentary tactician of his time, would have known that the federal trade and commerce power would not restrict Parliament from imposing its own interprovincial trade barriers if it so decided. If members of Parliament seeking to protect provincial producers were to form a parliamentary majority, they could enact protective trade barriers at any provincial border. In 1867, party discipline in Parliament was not as strict as it is today, and members often voted across party lines on issues of common provincial concern.

Macdonald would have known that the federal trade and commerce power would not restrict Parliament from imposing its own interprovincial trade barriers.

Purposive Interpretation of Section 121 Considered

As the preceding survey shows, the wording, legislative history, legislative context and the scheme of the Constitution Act, 1867 all indicate that section 121 was intended to ensure free trade among provinces without trade barriers, whether found in federal or provincial legislation. Section 121 restrains both federal and provincial legislative authority. Neither may interfere with the free movement of Canadian products from one province to another.

Until President Lincoln's December 1864 announcement about stopping Canadian goods in transit through the United States, the significant trade barriers enacted may have been customs duties at the colonial border, but the historical evidence shows that "stop and inspect" rules, "trade regulations" and other barriers were also of concern. Again, the historical context analysis of a purposeful interpretation does not dictate an originalist interpretation of section 121 nor suggest that it should be confined to prohibiting interprovincial customs duties. The Supreme Court requires that a purposive interpretation of the Constitution be flexible enough to deal with situations not foreseen at the time of Confederation.[80]

Today, Canada has numerous barriers to interprovincial trade in items of agriculture, produce, or manufacture imposed under various legislative schemes which might not have been foreseen at the time of Confederation. These include the Importation of Intoxicating Liquors Act[81] which restricts to whom in a province intoxicating liquor may be sold, the Canadian Wheat Board Act[82] which restricts to whom within Canada wheat may be sold, and the Agricultural Products Marketing Act[83] which restricts interprovincial sales of eggs, milk and poultry products. We also need to mention different sizes or shapes for milk or cream containers in different provinces, different standards for equipment and different repackaging requirements: all exist to make life difficult for out-of-province suppliers and protect local producers.[84]

It would be difficult for anyone who reads the Confederation debates and pre-1867 intercolonial trade legislation to argue that contemporary trade barriers would not have been as hotly condemned by the founders as customs duties. A purposeful interpretation of section 121 should be versatile enough to prohibit these contemporary trade barriers.

A purposive interpretation of section 121 suggests that, prima facie, those schemes do not comply with section 121. How could they, if facilitating and promoting interprovincial free trade was its purpose? Those who might argue that the Constitution should allow for programs to benefit certain groups or regions, even if they have the effect of restricting interprovincial trade, need to remember La Forest, J.'s view that the Constitution must be read as it is, and not in accordance with abstract notions of theorists.[85]

Section 121 restrains both federal and provincial legislative authority. Neither may interfere with the free movement of Canadian products from one province to another.

Rounding the Legal Bases

At this point, it is necessary to touch some additional legal bases.

Dominant tide

First, it might be argued that what the Supreme Court has called the "dominant tide" of federalism jurisprudence allows the ordinary operation of statutes by both levels of governments, with considerable interplay between them, so that schemes restricting interprovincial marketing are valid.[86] The dominant tide, however, would break upon the shoals of a progressive and purposive interpretation of section 121. The dominant tide principle is confined to interpreting competing legislative authority under sections 91 and 92 and therefore is not applicable to section 121.

Exhaustive distribution

Second, it might be argued that sections 91 and 92 of the Constitution Act, 1867 provide an exhaustive distribution of legislative power and therefore allows schemes that interfere with interprovincial trade. So too it might be argued that the phrase (notwithstanding anything in this Act) preceding the grant of the list of specific federal heads of legislative authority in section 91 of the Constitution Act, 1867 trumps section 121. Those arguments, however, are attenuated by the fact that there are clear limits on total and federal legislative power: the Charter and section 96 of the Constitution Act, 1867 are examples: and now, so is section 121.[87]

All trade and commerce

Third, it may be argued that overreaching provincial legislation has always been challenged as trenching upon the federal Trade and Commerce power under section 91(2), as Alexander Galt had correctly anticipated in his 1864 Sherbrooke speech. But this does not diminish the power of section 121. Since Parliament has jurisdiction over interprovincial and international trade, any provincial law that would violate section 121 would also trench on federal jurisdiction under section 91(2), thus explaining the use of section 91(2), and not section 121 in those instances.

Section 121 Jurisprudence

If the foregoing analysis is accurate, why is Canada riddled with barriers to interprovincial trade that courts have not struck down? How did the 1921 Gold Seal case obstruct the logical flow of constitutional analysis by courts? What jurisprudence exists on the subject, and what basis might exist for the author's contention that Gold Seal lies unacceptably far outside the judicial mainstream?

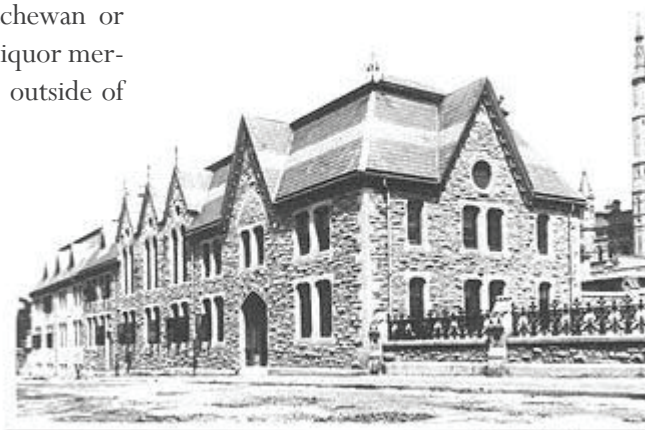
Looking at how the courts have dealt with section 121, it is important to consider their decisions against the backdrop of a purposeful interpretation. Since Confederation, section 121 has been considered four times by final appellate courts (the Supreme Court three times and the JC once) with scant jurisprudence on it in the courts below.

In the final appellate court rulings one finds two different interpretations. The first is the "Gold Seal interpretation" found in the Gold Seal case[88], *Atlantic Smoke Shops* v. *Conlon* ("Atlantic Smoke Shops case")[89,90] in 1943, the majority judgment in *Murphy* v. *C.P.R.* ("Murphy case") in 1958, and Laskin, C.J.C.'s 1978 judgment in Re Agricultural Products Marketing Act ("APMA case")[91]. The second is Rand, J.'s 'purposive interpretation' found in his concurring judgment in the Murphy case and referred to in Laskin, C.J.C.'s judgment in the APMA case.

What basis might exist for the contention that Gold Seal lies unacceptably far outside the judicial mainstream?

The Gold Seal Interpretation

The issue in the Gold Seal case[92] was whether the Canada Temperance Amending Act ("CTAA"),[93] which prohibited carrying liquor from Alberta into Saskatchewan or Manitoba, had been properly proclaimed. In February, 1921, Gold Seal, a liquor merchant in Calgary, asked Dominion Express to deliver liquor to customers outside of Alberta. Dominion Express refused on the grounds that doing so would violate the CTAA which had come into force in Alberta only a few days previously. Making the CTAA effective in Alberta had taken some effort. First, there had been a political campaign for and against temperance. Next, as required by the new section 152 of the Canada Temperance Act,[94] the legislature had enacted a statute prohibiting the sale of liquor in Alberta. It then needed to adopt, and the Alberta government had to present, a resolution requesting the federal government to hold a vote on whether the CTAA should come into force in Alberta. Next, as required again by new section 152,[95] the federal government had to hold



The Old Supreme Court Building at the foot of Parliament Hill (1876 - 1946)

L'ancien édifice de la Cour suprê au pied de la colline du Parlemen

a province-wide vote and record the result. Finally, the federal cabinet had to issue a proclamation bringing the CTAA into force in Alberta. New section 152(g) required the Proclamation to name "the day on which…[the] prohibition will go into force." Somehow, the proclamation failed to do that, and Gold Seal seized upon that failure. Naturally, the federal Unionist government of the day would have been embarrassed.

Before the Supreme Court, the key issue was whether or not the federal cabinet's proclamation had complied with new section 152(g). The factums of both Gold Seal and the Attorney-General focused on that issue but also sparred lightly over whether the Canada Temperance Act was ultra vires Parliament. Neither factum addressed section 121.[96] During oral argument, on May 10 and 11, 1921, Gold Seal must have suggested that the Canada Temperance Act contravened section 121. The Supreme Court reserved its decision and counsel went home to Alberta. Less than a month later, on June 4, 1921, Parliament enacted a new statute ("Proclamation Validation Act") which declared any proclamation of the CTAA to have been valid.[97] In light of this development, the Supreme Court allowed the parties to submit supplementary factums.

On October 18, 1921, the Supreme Court released its judgment. Davies, C.J., Anglin and Mignault, JJ. held that the Proclamation Validation Act saved an otherwise invalid proclamation. Duff, J. held that the proclamation of the CTAA had been valid in any case. As to Gold Seal's argument that the Canada Temperance Act violated section 121, Duff, J. said:

> The capacity of the Parliament of Canada to enact the amendment of 1919 is denied. With this I do not agree. And, first, I am unable to accept the contention founded upon section 121 of the B.N.A. Act; the phraseology adopted, when the context is considered in which this section is found, shews, I think, that the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the products of any province of the Union.[98]

The Gold Seal interpretation comes down firmly in favour of a narrow reading of section 121.

Similarly, Mignault, J. said:

> I think that, like the enactment I have just quoted, the object of section 121 was not to decree that all articles of the growth, produce or manufacture of any of the provinces should be admitted into the others, but merely to secure that they should be admitted "free," that is to say without any tax or duty imposed as a condition of their admission. The essential word here is "free" and what is prohibited is the levying of custom duties or other charges of a like nature in matters of interprovincial trade. [99]

Anglin, J.'s comments on section 121 echoed Mignault, J.'s.[100]

In the Atlantic Smoke Shops case in 1943,[101] the issue was whether New Brunswick's Tobacco Tax Act, which imposed retail sales tax on tobacco products sold within the province, violated section 121. The Privy Council held that it did not, and applied the Gold Seal case interpretation. Viscount Simon noted that section 121 had been the subject of full and careful exposition by the Supreme Court of Canada in *Gold Seal, Ld.* v. *Attorney-General for Alberta*.[102]

In the Murphy case in 1958,[103] the issue was whether a prohibition in the Canadian Wheat Board Act against farmers shipping wheat out of a province was unconstitutional because it violated section 121. Applying the Gold Seal interpretation and find-

ing that the act did not impose any customs duties or charges, the majority held that the prohibition[104] did not violate section 121.

Finally, in the APMA case in 1978,[105] the issue was whether orders made under the Farm Products Marketing Agencies Act contravened section 121.[106] Under these orders, a proclamation fixed the number of eggs that could be produced in Ontario[107] and prohibited dumping of eggs in other provinces.[108] It fixed the location of egg production and employment. Quebec was protected from increased competition from Manitoba or Ontario. The appellants contended that the order contravened section 121. The Supreme Court held that the order was valid.

The Gold Seal Interpretation Considered

Thus, on the critical point of whether "free" refers only to duties or restrictions more generally, the Gold Seal interpretation comes down firmly in favour of a narrow reading of section 121, saying it prohibits only "the establishment of customs duties affecting interprovincial trade" (Duff, J.) or "the levying of custom duties or other charges of a like nature in matters of interprovincial trade" (Mignault, J.). This interpretation has several significant weaknesses.

We can safely assume that the members of the Gold Seal court were as familiar with the history of Confederation as we are today. We also assume they were aware of the approach to interpreting the British North America Act, 1867, expressed in Clement's The Law of the Canadian Constitution (1916). This view was cited and approved in the Edwards or "Persons" case as authority for the living tree principle.[109] Clement said that the British North American Act, 1867 should be on all occasions interpreted in a large liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words.[110]

This summary consideration is a sufficient reason why the Gold Seal interpretation does not deserve much weight.

So, how did the judges' narrow view of section 121 come about? Citing no authority, they said they based their statements on the "object of the clause", but there is nothing in Confederation history suggesting that the object of section 121 was so limited. No constitutional law textbooks published prior to the Gold Seal case suggested such an interpretation.[111] And, prior to Confederation, as the history shows, the founders were concerned about all trade barriers within British North America, not just customs duties.

The Gold Seal interpretation also appears to ignore the fact that section 121 doesn't use the word "duties". It also ignores that other provisions in Part VIII do. Section 102 required that, after the union, all the now ultra vires "duties" being received by a province go into the federal Consolidated Revenue Fund. Section 126 required all the now intra vires "duties" received by a province go into the provincial Consolidated Revenue Fund. Section 123 provided that, after Confederation, it would only be necessary to pay "duties" once on goods imported from abroad into any province. Sections 102 and 103 refer to items that are to be "charges" to the Consolidated Revenue Funds. It is clear, therefore, that the framers of the British North America Act, 1867, could mention "duties" or "charges" when they wanted. The fact that they mentioned duties or charges in other provisions of Part VIII, but not in section 121 suggests that the framers

did not intend section 121 to be confined to prohibiting interprovincial customs duties and charges.

Looking at the record of Gold Seal case in the Supreme Court at face value, it is evident that Gold Seal would have won, had it not been for the enactment of the Proclamation Validation Act while the Supreme Court was deliberating. It is also apparent that the Supreme Court decided Gold Seal's section 121 argument summarily, something that sometimes happens to points raised for the first time in oral argument. This summary consideration, though, is a sufficient reason why the Gold Seal interpretation does not deserve much weight.

The Backroom Politics

If the foregoing were all we could rely upon in analyzing Gold Seal, it would still appear to be an eccentric judgment that could not stand under contemporary standards of Canadian jurisprudence. But in fact, thanks to Duff's biographer, David Richard Williams, we know something more about the ruling, something that brings it sharply into disrepute, and furnishes the most compelling ruling why judges should distance themselves from this interpretation.

We know something more about the ruling, something that brings it sharply into disrepute and furnishes the most compelling ruling why judges should distance themselves from this interpretation.

In *Duff: A Life in the Law*, his biographer quotes from a letter Sir Lyman Duff wrote to Viscount Haldane, the Lord Chancellor of Great Britain, in 1925 that reveals that the foundation of the judgment was raw politics and not jurisprudence of any sort.[112] In the letter, Duff explained why he thought that appeals to the JCPC should be allowed to continue; he was concerned about possible political interference with the Supreme Court's judgments should there be no recourse to the JCPC, and then told this story:

> An instance of what I am referring to occurred a couple of years ago, in [Prime Minister Arthur] Meighen's time when [Charles] Doherty was Minister of Justice. A question was before this court as to the validity of a proclamation to bring the Canada Temperance Act into force in Alberta. The temperance people were making a row about it, and the Minister of Justice, being anxious to ascertain the probable result of the appeal then pending, sent for two members of the Supreme Court, Anglin and Mignault, and obtained from them information as to their own opinions and the opinions of their colleagues and the probable result of the appeal, and as a consequence legislation curing the defect was introduced before our judgment was delivered. Doherty felt safe in that case, because he and the two judges mentioned were educated at the same Jesuit college in Montreal, with, as you may imagine, very close reciprocal affiliations.[113]

That case, Duff's biographer tells us, was the Gold Seal case.[114] So at some time between May 11 and June 4, 1921, and after the judges had reached but not written their opinions, Anglin and Mignault, JJ., met with their fellow graduate of College St. Marie,[115] the former Superior Court Justice and the then Minister of Justice, Charles Doherty, a man who Mignault, J. greatly respected. [116]

The two judges and the Minister of Justice discussed the Gold Seal case in the absence of the parties. Anglin and Mignault, JJ. disclosed to Doherty their own opinions and those of the other judges. Explicitly or implicitly, they told him how he could change

the outcome of the case. The enactment of the Proclamation Validation Act followed shortly after this meeting.

Anglin and Mignault, JJ. disclosed this meeting neither to the parties, nor in the Gold Seal judgment. They wrote their decisions as if the Proclamation Validation Act, which had decisively reversed the outcome of the appeal, was a deus ex machina.

While one wonders what Anglin and Mignault, JJ. must have been thinking, their conduct undermines the credibility of the Gold Seal Interpretation. But does their conduct also undermine the judgment of Duff, J. who did not attend the meeting? If one can believe Duff's biographer, it probably does. Duff, J. throughout his career liked to engage in politics. For example, he personally burned all records of appeals he heard under the World War I Military Service Act[117] because, he said, the papers would be "a living menace to national unity," something that was not in his province as a judge to decide.[118] Moreover, as a puisne judge of the Supreme Court, he allowed himself to be wooed as a potential leader of the Union Government and then as a cabinet minister;[119] he campaigned against the abolition of appeals to the JCPC; and during World War II, he took it upon himself to whitewash the wartime government's handling of the Hong Kong affair, which in 1941 had caused the men of Royal Regiment of Canada and the Winnipeg Rifles to be decimated and taken prisoner-of-war by the Japanese.[120] Given this record, it is conceivable that Duff might have agreed to treat section 121 in the way Mignault and Anglin did in the Gold Seal case in order to save the Union government political embarrassment.

And is Duff's letter sufficient proof of the incident? There is no doubt Sir Lyman Duff wrote it. The Archives of Canada has his file copy of the letter. The incident is not mentioned in Mr. Justice Pierre-Basile Migneault's biography[121] nor would one expect him to have recorded it any more than you would expect him to have recorded an illicit affair. Mr. Justice Frank Angin has no biography nor does the Honourable Charles Doherty. One would not expect either of them to have recorded such an unattractive display of judicial behaviour either. But is the story true? There is certainly no contrary evidence that the author could find, and the timing of events and the similarities of all three judgments in length, tone and substance are difficult to ignore. Furthermore, how else did Duff know the story if he was not a party to the agreement?

Given Anglin and Mignault, JJ.'s actions, the Court's Gold Seal interpretation cannot be regarded as anything other than expediency.

The judges' conduct opens the Gold Seal interpretation to the charge that having advised the minister, ex parte, and the minister having responded with the Proclamation Validation Act, they had effectively committed the Supreme Court to dismissing Gold Seal's appeal, no matter what Gold Seal had argued. While we don't know how much their advocacy might have influenced the other judges, we cannot assume that it had no effect. Given Anglin and Mignault, JJ.'s actions, the Court's Gold Seal interpretation cannot be regarded as anything other than expediency. Since Mignault's and Anglin's meeting with Doherty went undisclosed, under stare decisis rules of the time, the Gold Seal interpretation became a binding authority and, as such, it was applied without much further thought in the Atlantic Smoke Shops, the Murphy and the APMA cases, despite Viscount Simon's praise of it in Atlantic Smokeshops.[122]

Referring to the Gold Seal interpretation, in his judgment in the APMA case, Laskin, C.J.C. commented:

> .... It seems to me, however, 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. It must be remembered too that the federal trade and commerce power also operates as a brake on provincial legislation which may seek to protect its producers or manufacturers against entry of goods from other Provinces.
>
> A federal regulatory statute which does not directly impose a customs charge but through a price fixing scheme, designed to stabilize the marketing of products in interprovincial trade, seeks through quotas, paying due regard to provincial production experience, to establish orderly marketing in such trade cannot, in my opinion, be in violation of s. 121. In *Gold Seal Ltd.* v. *Dominion Express Co.*, both Anglin and Mignault JJ. viewed s. 121 as prohibiting the levying of customs duties or like charges when goods are carried from one Province into another.[123]

Laskin, C.J.C. suggested that the application of section 121 could be different according to whether it involves provincial or federal legislation because, as he said, what may amount to a tariff or customs duty under a provincial regulatory statute might not have that character at all under a federal regulatory statute. This statement resulted from holding that the egg order did not impose a "customs charge", but was, instead, a price-fixing scheme designed to stabilize prices. His logic, of course, was based on the implicit assumption that the Gold Seal interpretation was correct, which is a highly dubious assumption.

The Gold Seal interpretation has enabled the creation of federal schemes that are contrary to a purposive interpretation of section 121.

The Way Forward

The Gold Seal interpretation, in effect, has rendered section 121 completely impotent: no province has attempted to establish interprovincial customs duties since 1866, and federal governments have had no need to do so.[124] It has enabled the creation of federal schemes that have imposed interprovincial trade barriers in the form of mandatory sale requirements, prohibitions of interprovincial shipments, and imposition of provincial quotas. These schemes are contrary to a purposive interpretation of section 121. While they have made Canada a much different place than it otherwise would be, they would all be vulnerable to a purposeful interpretation of section 121.

As long as the Gold Seal interpretation is allowed to stand, Canadians will be deprived of the benefits of free interprovincial trade and will be prevented from such pleasures as buying artisanal cheeses from Nova Scotia or bringing home specialty pinot noir from the Okanagan. It is not the place of judges to substitute their policy preferences for the plain meaning of Constitutional provisions, obvious from the text or deduced from rational scrutiny of the legislative history, scheme of the act, and legislative context. But it is the Gold Seal case that takes this improper approach; it cannot be described as either a progressive or purposive interpretation of section 121.

Rand, J.'s Purposive Interpretation Considered

Rand, J.'s purposive interpretation from the Murphy case is found in this passage:[125]

> I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.[126]

Rand, J.'s interpretation is consistent with the wording of section 121, its legislative history, legislative context and the scheme of the Constitution Act, 1867. In short, it fulfills all the requirements of a purposeful interpretation. It lays out three limitations on federal and provincial legislative power:

1. It prohibits levying customs duties or charges or imposing any restriction that places fetters on, raises impediments to, or limits the free flow of Canadian goods across Canada as if provincial boundaries did not exist.

2. It prohibits the regulation of the free flow of Canadian goods except in subsidiary features.

3. It prohibits the imposition of any obligation on the movement of Canadian goods that in its essence and purpose is related to a provincial boundary.

As Rand, J. said, a purposeful interpretation of section 121 would allow the regulation of interprovincial trade in "subsidiary matters." What would constitute subsidiary matters? Consider the trade in western Canadian wheat. It is arguable that section 32(1)(a) and (b) and section 45(c) of the Canadian Wheat Board Act[127] violate section 121 because they require a mandatory sale to the government and prohibit the interprovincial sale of wheat, without government approval. Regulation in respect of subsidiary matters might include the requirements for quality, storage, and labelling of wheat set out in the Canada Grain Act and Regulations.[128]

It is not the place of judges to substitute their policy preferences for the plain meaning of Constitutional provisions,but the Gold Seal case takes this improper approach.

Consider the interprovincial liquor business. Section 3 of the Importation of Intoxicating Liquors Act[129] violates section 121 because it requires liquor made in one province to be sold to the liquor board of any other province to which it is shipped, a mandatory sales requirement. Regulation of interprovincial liquor sales in subsidiary matters would allow regulation of liquor stores, imposition of direct taxes on liquor, and the regulation of the age of consumption.

A purposeful interpretation of section 121 would not prevent appropriate government regulation. What would be prohibited would be schemes to interfere with a free interprovincial market in items of agriculture, produce, or manufacture in order to benefit specific provinces, regions, or stakeholders, including government agencies.

Rand, J. received no support for his purposive interpretation from any of the other judges in the Murphy case. Laskin, C.J.C. referred to but did not adopt it in his decision in the APMA case. As attractive as it is, therefore, we cannot say that Rand, J's interpretation is authoritative. We can only commend it to the Supreme Court when section 121 is next reconsidered.

Unfortunately, when it came to applying his purposive interpretation to whether the prohibition of selling wheat in another province without prior approval violated section 121 in the Murphy case, Rand J. seems to have lost his way, holding that the provision did not violate section 121 even though it restricted the free movement of prairie grain across provincial borders. But, how could the Canadian Wheat Board Act provision be tied any more closely to a provincial boundary, or limit the interprovincial wheat trade any more restrictively than it did?[130] Rand, J. said that a trade regulation, which in its essence and purpose was related to a provincial boundary, violated section 121, but then held that a prohibition against selling wheat out of a province was not related to a provincial boundary. He may have seen the absurdity himself because he tried to justify it. To find otherwise, he said, would mean that:

> what, in these days has become a social and economic necessity, would be beyond the total legislative power of the country, creating a constitutional hiatus. .... It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself ; and I find in s. 121 no obstacle to the operation of the scheme in any of the features challenged.[131]

Thus, the economic and social objectives of the Canadian Wheat Board Act could trump section 121; in other words, a government's social and economic objectives could trump a provision of the Constitution. Would anyone agree with that today? We may, therefore, fairly conclude that Rand, J.'s application of his own purposive interpretation of section 121 in the Murphy case should not be followed in the future.

A purposeful interpretation of section 121 would not prevent appropriate government regulation. What would be prohibited would be schemes to interfere with a free interprovincial market.

When Laskin, C.J.C. referred to Rand, J.'s interpretation of section 121 in the APMA case[132] but did not apply it, he said:

> Rand J. took a broader view of s. 121 in *Murphy* v. *C.P.R.*, where he said this, at p. 642:
>
> > I take s. 121 apart from customs duties to be aimed against trade regulation which is designed to place fetters upon, or raise impediments to, or otherwise restrict or limit, the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation, I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation, that in its essence and purpose is related to a provincial boundary.
>
> Accepting this view of s. 121, I find nothing in the marketing scheme here that, as a trade regulation, is in its essence and purpose related to a provincial boundary. To hold otherwise would mean that a federal marketing statute, referable to interprovincial trade, could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade. I find here no design of punitive regulation directed against or in favour of any Province.[133]

Reading Laskin, C.J.C.'s judgment with thirty-three years' hindsight, one struggles with his holding that the power to control the sale of eggs from Ontario to Quebec was not, in its essence and purpose, related to a provincial boundary. It is difficult to see how the federal government could implement any scheme designed to protect

patterns of production in specific provinces in order to promote equity in the flow of trade, the policy which he upheld.

Protecting patterns of production and ensuring an equitable flow of trade is not what the wording, legislative history, legislative context of section 121, or scheme of the Constitution Act, 1867 suggests was the purpose of section 121. Instead, they suggest that its object was free trade of goods within Canada so that each province could benefit from its comparative advantages. Laskin, C.J.C. also said that he found no "design of punitive regulation directed against or in favour of any Province" in the egg-marketing controls. This statement implied that section 121 contains such a requirement, but that does not appear to be true. Reading in such a requirement would be adding a limitation that simply is not present and was never intended. Section 121 does not require a punitive intent before it can be invoked.

Since neither Laskin, C.J.C.'s nor Rand, J.'s application of the purposive interpretation of section 121 stand up to scrutiny, the Supreme Court should be free to depart from both of them when next interpreting section 121.

Conclusion

It seems inescapable that the Supreme Court has essentially ignored the terms, purpose and intent of section 121. As a result, for example, Canadians have lived with and had to pay for entrenched federal marketing board schemes and provincial liquor monopolies a purposive interpretation of section 121 would never have permitted. Sadly, the losers in this subordination of the Constitution are the excluded Canadian producers and the consumers and taxpayers. By now, each scheme violating the principle of interprovincial free trade has its powerful stakeholders who would steadfastly oppose any dismantling efforts.

Bearing in mind that constitutional interpretation is discretionary and often political, if one of these federal schemes were challenged, based on arguments similar to those offered here, would the Supreme Court be prepared to declare the scheme unconstitutional, if that is where a purposive interpretation took it? Or would the Court avoid a purposive interpretation and apply a results-directed analysis in order to protect some established scheme?

The logic of the law, as well as the economic interests of all Canadians, point firmly toward the former. There is no question from the wording, legislative history, scheme, or legislative context that section 121 is meant to create free internal trade and rightly so. Next time section 121 comes before the Supreme Court, Gold Seal should be decisively overruled and the barriers it has upheld should be dismantled.

Next time Section 121 comes before the Supreme Court, Gold Seal should be decisively overruled and the barriers it has upheld should be dismantled.

Endnotes

1. This paper is a slightly less lawyerly version of the author's paper *Long Overdue: A Reappraisal of Section 121 of the Constitution Act, 1867*, forthcoming in (2010) 33 Dal LJ. This paper is published with the kind permission of the Dalhousie Law Journal. The author is publishing both versions in order to reach as wide an audience as possible.
2. Constitution Act, 1867, Stats. UK,1867 (30 & 31 Victoria), c.3, s. 121.
3. Ibid.
4 *Gold Seal Limited* v. *The Attorney General of the Province of Alberta* (1921), 62 S.C.R. 424.
5. I could not say this in quite these terms in "Long Overdue"!
6. Canadian Charter of Rights and Freedom, Constitution Act, 1982, Stats. U.K. 1982, c. 11, Schedule B, Part I.
7. *Edwards* v. *Attorney General for Canada*, [1930] A.C. 124, at 136 (J.C.P.C.).
8. *R.* v. *Blais,* [2003] 2 S.C.R. 236, at para. 40.
9. See: Interpretation Act, R.S.C. 1985, c. I-21, section 10. Similar provisions appear in the legislation of each province.
10. *R.* v. *Kapp*, [2008] S.C.J. No. 42, at para. 82.
11. See for instance Richard Risk, "Here Be Cold and Tygers: A Map of Statutory Interpretation in Canada in the 1920s and 1930s" (2000) 63 Sask. L. Rev. 195, at 197, 201, 202, 203, 205 and 206.
12. Donald Creighton, John A. Macdonald, *The Young Politician* (1965), at 456; Francis ("Frank") Savage Reilly was admitted as a member of Lincoln's Inn on 17th November 1847 and is described in the Inn's Admissions Register as, "of Trinity College, Dublin (22), second son of James Myles Reilly of Clooncavin, County Down, Esquire." He was called to the bar of Lincoln's Inn on 7th May 1851 and was appointed QC on 29th March 1882. He was a Parliamentary draftsman. In 1882 he was also made a Knight Commander of the Order of St. Michael and St. George (KCMG) for services to the foreign and colonial departments. He died on 27th August 1883. He appears in Frederic Boase's *Modern English Biography* (London: F. Cass, 1965), A.B. Schofield's *Dictionary of Legal Biography: 1845-1945* (Chichester: Barry Rose Law, 1998) and Sir John Sainty's *A List of English Law Officers, King's Counsel and Holders of Patents of Precedence* (London: Seldon Society, 1987).
13. See infra pp. 8-9.
14. An Act in relation to the Trade between the British North America Possessions, Stats. N.S. 1848, c. I.
15. An Act relating to Trade between the British North American Possessions, Stats. N.B. 1850, c. I.
16. An Act to facilitate Reciprocity Free Trade between this Province and other British North American Provinces, Stats. Prov. Can. 1850, c. 3.
17. Supra, note 13.
18. Published in 1755 and then again in subsequent editions, Henry Hitchings, *Defining the World* (New York: Picador, 2005) at 246-247; Shorter Oxford English Dictionary, 6th ed., preface.
19. The United States Supreme Court has used Dr. Johnson's dictionary many times to ascertain the meaning of words used in the US constitution of 1787 and the

Bill of Rights, *District of Columbia* v. *Heller,* 128 S. Ct. 2783, at 2828, 2849 (2008); *Baze* v. *Rees*, 128 S. Ct. 1520 at 1558 (2008); *Kelo* v. *City of New London*, 545 U.S. 469 (2005), at 508; *Eldred* v. *Ashcroft*, 537 U.S. 186 (2003), at 199, 248; *Utah* v. *Evans*, 536 U.S. 452 (2002), at 475, 492; *INS* v. *St. Cyr,* 533 U.S. 289 (2001), at 337; *Doc* v. *United States House of Representatives,* 525 U.S. 316 (1999), at 347; *United States* v. *Baj*, 524 U.S. 321 (1998), at 335; *Camps Newfound/Owatonna* v. *Town of Harrison*, 520 U.S. 564 (1997), at 638; *United States Term Limits* v. *Thornton,* 514 U.S. 779 (1995), at 858; *United States* v. *Lopez*, 514 U.S. 549 (1995), at 585; *Nixon* v. *United States*, 506 U.S. 224 (1993), at 230; C*ounty of Allegheny* v. *ACLU,* 492 U.S. 573 (1989), at 648-49; *Browning-Ferris Indus*. v. *Kelco Disposal,* 492 U.S. 257 (1989), at 295; *Morrison* v. *Olson*, 487 U.S. 654 (1988), at 719; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952), at 536. Interestingly, in the Atlantic Smoke Shops case referred to at footnote 35, Viscount Simon too referred to Dr. Johnson's dictionary for the meaning of "excise" in dealing with the indirect-tax/direct-tax issue in that case.

20. 6th ed., s.v. "free" [quotations omitted].
21. *Shorter Oxford English Dictionary on Historical Principles*, 6th ed., s.v. "free", at 11, 13-15 [quotations omitted].
22. Hogg, supra, note 5.
23. *Consolidated Fastfrate Inc*. v. *Western Canada Council of Teamsters*, [2009] 3 S.C.R. 407 ["Fastfrate"], at para. 32.
24. An Act to Amend the Laws relating to the Import of Corn, Stats. U.K. 1846 (9&10 Vict.) c. 22; An Act to Alter Certain Duties of Customs, Stats. U.K. 1846 (9&10 Vict.), c. 23; An Act to Enable the Legislatures of Certain British Possessions to Reduce or Repeal Certain Duties of Customs, Stats. U.K. 1846 (9&10 Vict.), c. 94. Though beyond the scope of this paper, a bitter political battle in Britain preceded the Repeal of the Corn Laws.
25. An act reducing the duty on Imports and for other purposes, United States Statutes at Large, 1846, c. 74: The story of this tariff reduction act is told in Robert W. Merry, *A Country of Vast Designs* (Simon & Schuster, 2009), at 273-277.
26. HL Deb. 04 June 1846, Vol. 87, cc. 1-9.
27. Ged Martin, *Britain and the Origins of Canadian Confederation,* 1863-67 (UBC Press 1995), at 89.
28. D.C. Masters, "Reciprocity", *The Canadian Encyclopedia*, online version.
29. Donald Creighton, John A. Macdonald, *The Young Politician* (MacMillan, 1965), 392-393.
30. Canada, Parliament, Parliamentary Debates on the subject of Confederation, 3rd Sess., 8th Provincial Parliament of Canada, 1865, at 32.
31. Abraham Lincoln, State of the Union Speech (December 6, 1984).
32. Supra, note 28.
33. See: Andrew Smith, *British Businessmen and Canadian Confederation* (McGill-Queen's University Press, 2008), at 114.
34. Donald C. Masters, *The Reciprocity Treaty of 1854* (Longmans, Green and Company, London, 1937), reprinted by McLelland and Stewart (1963), at 131-132.
35. Stats. N.S. 1846, cs. 83 and 84; 1847, cs. 13 and 18; 1848, cs. 6 and 40; 1849, c. 10, 1850, c. 3; 1853, c. 28; 1854, c. 9; 1855, c. 3; 1856, c. 1; 1857, c. 1; 1858, c. 4; 1859, c. 2; 1860, c. 1; 1861, c. 16; 1862, c. 3; 1863, c. 1; 1864, c. 2; 1865, c. 22; 1866. c. 2. Stats. N.B. 1846, cs. 1 and 3; 1847, c. 26; 1848, c. 2; 1848, c. 8; 1849, c. 18; 1850, c. 1; 1851, cs. 5 and 9; 1852, c. 37; 1855, c. 2; 1859, c. 1; 1860, c. 19;

1862, cs. 9 and 12; 1863, c. 1; 1866, c. 1. Stats. Prov. Can. 1846, c. 1; 1847, cs. 31 and 32; 1849, c. 1; 1850, c. 5; 1851, c. 68; 1856, c. 10; 1960, c. 18; 1860, c. 19; 1863, c. 4; 1864, c. 2; 1866, c. 6.

36. Stats. N.S. 1846, c. 86. Stats. N.S. 1847, c. 14. Stats. N.B. 1849, c. 67.

37. Janet Ajzenstat, *The Canadian Founding*, (McGill-Queen's University Press 2007), at XV.

38. See for instance Andrew Smith, Toryism, *Classical Liberalism, and Capitalism: The Politics of Taxation and the Struggle for Canadian Confederation* (2008), and Donald C. Masters, The *Reciprocity Treaty of 1854* (1937), reprinted by McLelland and Stewart, 1963.

39. Edward Whalen, ed., *The Union of the British Provinces, A Brief Account of the Several Conferences Held in the Maritime Provinces and in Canada, in September and October, 1864, on the Proposed Confederation of the Provinces, Together with a Report of the Speeches, delivered by the Delegates from the Provinces, on Important Public Occasions* (Charlottetown, G.T. Haszard, 1865), at 36-37. The full quote is as follows:

> [u]nion of all Provinces would break down all trade barriers between us, and throw open at once at all a combined market of four millions of people. You in the east would send us your fish and your coals and your West India produce, while we would send you in return the flour and the grain and the meats you now buy in Boston and New York. Our merchants and manufacturers would have a new field before them – the barrister in the smallest provinces would have the judicial honors of all of them before him to stimulate his ambition – a patentee could secure his right over all British America – and in short all the advantages of free intercourse which has done so much for the United States, would at once be open to us all.

40. Ibid., at 47-48. The full quote is as follows:

> I believe the Union of these Provinces must cause a most important change in their trade.Union is free trade among ourselves. Perhaps insurmountable difficulties may prevent us carrying out any such thing whilst separated, but when united our intercourse must be as free as between Lancashire and Yorkshire. The free intercourse between the States of the American Union – free trade in the interchange of products, has had more to do with their marvellous progress than anything that was put in their constitution. Give us Union and the East shall have free trade with the West.

41. G.P. Browne, ed., *Documents on the Confederation of British North America: A Compilation Based on Sir Joseph Pope's Confederation Documents Supplement by Other Official Material* (Toronto, McClelland and Stewart, 1968), at 154 and ff.

42. In this paper, while discussing anything prior to 1982, I refer to the Constitution Act, 1867 by its original name the British North America Act, 1867. When talking prospectively, I refer to it by its current name.

43. Supra, note 49, at 142. The full quote is as follows:

> Now we desire to bring about that same free trade in our own colonies. It is almost a disgrace to us, if I may use the term, that under the British flag, in the dominions of our Sovereign in British North America, there should be no less than five or six tariffs and systems of taxation; and we cannot have trade between one Province and another without being subjected to all the inconveniences which occur in a foreign country. Surely it is our business to remove these difficulties, and we ought as subjects of the Crown, whose interests are identical, to be united.

44. Ibid., at 182-183.

45. Alexander Galt, "Speech on the Proposed Union of the British North American Provinces, delivered at Sherbrooke, on 23rd November 1864" (Montreal: Long-

moore, 1864). My thanks to Professor John Saywell, former Dean of the History Department at York University for referring me to this document.

46. Canada, Parliament, Parliamentary Debates on the Subject of the Confederation of the British North America Provinces. My thanks to the late Professor John Saywell.

47. Ibid., at 26

48. Ibid., at 64.

49. Ibid., at 99.

50. Ibid., at 366.

51. Nova Scotia, Official Reports of the Nova Scotia House of Assembly (April 10, 1865).

52. Browne, Op. Cit., at 230 and ff.

53. In the fourth draft of the British North America Bill, Browne, Op. Cit., at 278.

54. Browne, Op. Cit., at 302.

55. British North America Bill, London, British Parliamentary Archives (SW1A 0PW). Parliamentary staff made handwritten notes on the Bill.

56. U.K., H.L., Parliamentary Debates, 3rd ser., vol. 185, col. 278 (12 February 1867); U.K., Journal of the House of Lords, vol. 99 (12 February 1867), at 21-23.

57. U.K., H.L., Parliamentary Debates, 3rd ser., vol. 185, col. 557-82 (19 February 1867).

58. Ibid. The full quote is as follows:

Now these districts, which it may almost be said that nature designed as one, men have divided into many by artificial lines of separation. The Maritime Provinces need the agricultural products and the manufacturing skill of Canada, and Canada needs harbours on the coast and a connection with the sea. That connection, indeed, she has, during the summer, by one of the noblest highways that a nation could desire, the broad stream of the St. Lawrence; but in winter henceforth she will have it by the intercolonial railway. At present there is but a scanty interchange of the manufacturing, mining, and agricultural resources of these several Provinces.They stand to each other almost in the relation of foreign States. Hostile Custom Houses guard the frontiers, and adverse tariffs choke up the channels of intercolonial trade. There is no uniformity of banking, no common system of weights and measures, no identity of postal arrangements. The very currencies differ. … Such then being the case, I can hardly understand that any one should seriously dispute the advantage of consolidating these different resources, and interests, and incidents of government under one common and manageable system.

59. Ibid., col. 804-7 (26 February 1867).

60. Ibid., col. 1011-20 (26 February 1867).

61. U.K., *Journal of the House of Lords*, vol. 99 (26 February 1867), at 48.

62. U.K., H.C., Parliamentary Debates, 3rd ser., vol. 185, col. 1090-1 (27 February 1867).

63. Ibid. The full quote is as follows:

The commercial advantages are, perhaps, the most prominent, and the least open to question or dispute. The idea is absurd of retaining a system of different commercial tariffs amongst these contiguous Provinces which are ruining and keeping down their trade. Why, the effect of the reciprocity treaty between the United States and Canada was to develop the commerce between these countries in one year from 2,000,000 to 20,000,000 dollars. That treaty has now ceased; but

surely that is a reason why, at least amongst themselves, there should be the most perfect reciprocity. Well, then, as to their mutual interests, who can doubt that these three Provinces – the wheat-growing West, the manufactures Centre, and the fisheries and outlet on the coasts, are necessary to each other to make one great country jointly developing diverse interests. Was there ever, let me ask, a country so composed by nature to form a great and united community? By their mutual resources – by the assistance of their different interests, they would make together a powerful and prosperous nation. As long as they remain separate they are a prey to the commercial policy of other nations, and mutual jealousies among themselves.

64. Ibid., col. 1310-22. The author can only conclude that Parliamentary officials considered that, because of its money provisions in sections 105, 118 and 199, Part VIII could only be validly introduced in the House of Commons under the constitutional principle on which section 53 of the Constitution Act, 1867 is based, namely that bills that spend money or impose taxes must be introduced in the House of Commons.
65. Ibid., col. 1443 (7 March 1867).
66. Ibid., col. 1547 (8 March 1867).Third Reading was given without debate.
67. U.K., *Journal of the House of Lords*, vol. 99 (12 March 1867), at 76.
68. Ibid., (29 March 1867), at 139.
69. Supra, fn. 68.
70. Supra, fn. 73.
71. [1931] S.C.R. 357.
72. Ibid., at 373.
73. [1971] S.C.R. 689.
74. Ibid., at paras. 58 and 59 [emphasis added].
75. [1989] 1 S.C.R. 591.
76. Ibid., at para. 34.
77. Supra, note 68, at c. 558.
78. [1958] S.C.R. 626, at 641.
79. To assess Galt's prescience, see: *Citizens Insurance Co. of Canada* v. *Parsons* (1881), 7 App. Cas. 96, at 113; *Lawson* v. *Interior Tree Food & Vegetable Committee*, supra, note 52, at 366; Reference re Natural Products Marketing Act, [1936] S.C.R. 398, at 410; *Attorney-General of British Columbia* v. *Attorney-General of Canada*, [1937] A.C. 377, at 386; *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A.C. 708, at 719; *P.E.I. Potato Marketing Boards* v. *H.B. Willis Inc. and A.- G. Canada*, [1952] 2 S.C.R. 392, at 396; Re Farm Products Marketing Act [1957] S.C.R. 198, at 205 and 209-210.
80. Supra., fn. 24.
81. R.S.C. 1985, c. I-3.
82. R.S.C. 1985, c. C-24.
83. R.S.C. 1985, c. A-6
84. Examples are taken from Brian Lee Crowley, Robert Knox and John Robson, "Economic Freedom for Canadians", MacDonald-Laurier Institute, *True North, Vol. 1, Issue 2*, June 2010, at 8-9.
85. *Ontario Hydro* v. *Ontario* (Labour Relations Board), [1993] 3 S.C.R. 327, at 370. La Forest said, "It was argued that the declaratory power must be read narrowly to

make it conform to principles of federalism. There is no doubt that the declaratory power is an unusual one that fits uncomfortably in an ideal conceptual view of federalism. But the Constitution must be read as it is, and not in accordance with abstract notions of theorists. It expressly provides for the transfer of provincial powers to the federal Parliament over certain works. That is clearly set forth in the statement of Duff J. in "Reference re Waters and Water-Powers", [1929] S.C.R. 200, at p. 220, cited by Iacobucci J. at pp. 397-98. This is scarcely an isolated statement. Mignault J. had expressed the same thought in at least as strong terms in the following passage in *Luscar Collieries Ltd.* v. *McDonald,* [1925] S.C.R. 460, at p. 480."

86. See *Canadian Western Bank* v. *Alberta*, [2007] 2 S.C.R. 3, at paras. 36-37.
87. See *MacMillan Bloedel Ltd.* v. *Simpson*, [1995] 4 S.C.R. 725, at paras. 35-37.
88. Supra, note 4.
89. [1943] A.C.550 (JCPC).
90. Supra, note 78
91. [1978] 2 S.C.R. 1198.
92. Supra, note 4.
93. S.C. 1919 (10 Geo.V), c. 8.
94. Ibid., at s. 1.
95. Ibid.
96. The factums referred to are available from the Records Section of the Supreme Court of Canada.
97. S.C. 1921 (11-12 Geo. V), c. 20.
98. Supra, note 4.
99. Ibid., at 470.
100. Ibid., at 466.
101. Supra, note 89
102. Ibid., at 569.
103. Supra, note 87.
104. Now section 45 of the Canadian Wheat Board Act, supra, note 91.
105. Supra, note 101.
106. S.C. 1971, 1972 & 1973, c. 65.
107. S.O.R./73-1, section 3.
108. S.O.R./73-1, section 11.
109. W.H.P. Clement, *The Law of the Canadian Constitution*, 3rd ed. (Toronto, Carswell, 1916), at 137 [Clement].
110. Clement, Op. Cit., at 347-348.
111. Joseph Doutre, Q.C., *Constitution of Canada, The British North America Act, 1867* (Montreal: Lovell, 1880); J.E.C. Munro, *The Constitution of Canada* (Cambridge: Cambridge University Press, 1889); Clement, Op. Cit., at 640-649; A.H.F. LeFroy, *A Short Treatise on Canadian Constitutional Law* (1918).
112. David Ricardo Williams, in *Duff: A Life in the Law* (Toronto: Osgoode Society, 1984), at 130 and 294.
113. Lyman Poore Duff to Viscount Haldane, Ottawa, National Archives of Canada, Lyman Poore Duff Fonds (MG 30 E 141, vol. 2). The above quote is from the letter itself, not from the quote in Williams' biography of Duff. The letter is typewritten

but unsigned. Viscount Haldane's archives do not contain the signed letter which the author tried to obtain but the British archivist informed him that its absence in Viscount Haldane's archives does not mean he did not receive it. Apparently, Viscount Haldane was not a stellar correspondence keeper. Viscount Haldane's archives do, however, contain other letters from Duff and a copy of one signed one is in the author's possession.

114. David Ricardo Williams, Loc. Cit., Supra, note 120.

115. Jesuit College St. Marie was located at that time at the corner of Bleury and St. Catherine's Street in Montreal.

116. See P.B. Mignault, "The Right Honourable Charles J. Doherty: An Appreciation" (1931) 9 Can. Bar Rev. 629. Charles Doherty was an eminent Canadian and had been Canada's representative at the Paris Peace Conference in 1919.

117. S.C. 1917 (7-8 Geo.V), c. 19.

118. David Richard Williams, *Duff: a Life in the Law* (Osgoode Society, 1984), pp. 91-95.

119. Ibid., p. 89.

120. Ibid., c. 16.

121. Me Armand Marin, *L'Honorable Pierre-Basil Migneault* (Montreal, 1946).

122. Whatever else you might say about the Gold Seal case, you cannot say that its treatment of section 121 was a "full and careful exposition". Sir John Simon was a British lawyer and politician who had been Solicitor General and Attorney General in Lloyd-George's government, Chairman of the Statutory Commission on government in India and Home Secretary in Neville Chamberlain's appeasement cabinet in the late 1930s. When Churchill became Prime Minister in May 1940, he made Simon Lord Chancellor. Simon's only apparent connection to Canada had been to argue a couple of division of powers cases before the JCPC and an address to the Canadian Bar Association in 1921 on the safe topic of the historic contribution of lawyers to liberty. There is nothing in his biography or his resume that indicates he was familiar with Canadian history, the Canadian economy, or what lay behind the British North America Act, 1867. As judges will do, he may have been repeating something one of the Respondent counsel had said in oral argument (See: Viscount Simon, *Retrospect: The Memoirs of the Rt. Honourable Viscount Simon* (1952)).

123. Supra, note 78, at 1267-1268.

124. The Gold Seal interpretation cannot be described as a purposive interpretation of section 121.

125. Supra, note 78, at 642.

126. Ibid.

127. Supra, note 93.

128. Canada Grain Act, R.S.C. 1985, c. G-10; Canada Grain Regulation, C.R.C. c. 889.

129. Supra, note 92.

130. Section 32's successor is now Canadian Wheat Board Act, supra, note 90, s. 45.

131. Supra, note 78, at 643.

132. Supra, note 91.

133. Ibid., at 1267-1268.

About the Author

Ian A. Blue, Q.C. is a senior counsel and advisor at Gardiner Roberts LLP in Toronto, Ontario. Mr. Blue handles a number of complex areas of law including business, administrative, energy and environmental, and constitutional matters for private and public sector clients. He has appeared before all levels of courts in Ontario, Alberta, and Nova Scotia and before both levels of the Federal Court. He also has appeared before the Supreme Court of Canada.

He received both his Bachelor's Degree in Commerce (1966) as well as his law degree (1969) from Dalhousie University. He was appointed Queen's Counsel by the Lieutenant Governor-in-Council in 1985.

Mr. Blue has been widely credited with having made significant contributions to the legal profession as a Bar Admission Course Instructor, a convenor of numerous Continuing Legal Education Programs on Administrative Law and Practice, Head of the Practice Skills Program of the Bar Admission Course, a Bencher of the Law Society of Upper Canada and as a past Chair of the Administrative Law and Environmental Law Sub-Section of the Ontario Bar Association.

Mr. Blue is also a prolific legal writer and speaker on practice and legal topics and is a contributor to various lawyers' publications. His most recent articles include "On the Rocks; The Gold Seal Case: A Surprising Second Look" (2010), "Off the Grid: Federal Jurisdiction and the Canadian Electricity Sector" (2009), "Snuff Acts and the Rule of Law" (2009), and "On the Rock? Section 121 of the Constitution Act, 1867, and the Constitutionality of the Importation of Intoxicating Liquors Act" (2009).

Mr. Blue has drafted energy legislation and regulations for the Province of New Brunswick and also assisted in drafting legislation in Ontario and federally. Early in his career, after two years as a litigator, Mr. Blue became Legislative Counsel to the then President of the Privy Council, the Honourable Alan A. MacEachen P.C. who was also Government House Leader.

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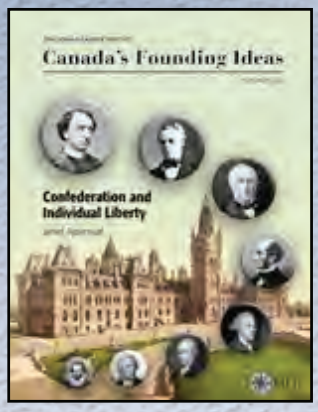

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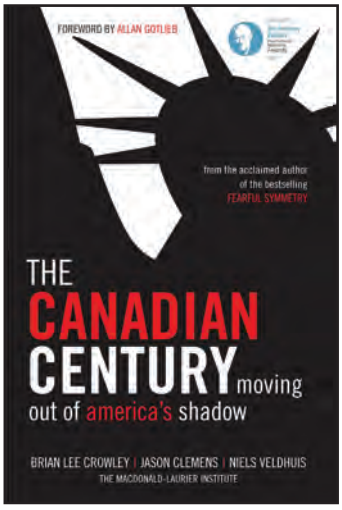

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