

This article offers a new interpretation of s. 121 of the Constitution Act, 1867. The author re-evaluates the traditional interpretation of s. 121, found in Gold Seal Limited v. The Attorney General of the Province of Alberta. That interpretation limited the application of s. 121 to prohibiting interprovincial “customs duties” but nothing else. The author analyzes s. 121 using a purposive approach. After reviewing the provision’s wording, legislative history, legislative context and its place within the scheme of the Act, the article concludes that a purposive and progressive interpretation leads to a more robust role for s. 121. Thus interpreted, s. 121 would prohibit any impediment to the free flow of goods across Canada and the imposition of any obligation on the movement of Canadian goods that in its essence is related to a provincial boundary, subject to regulation of subsidiary features. The author also analyzes Gold Seal and other s. 121 jurisprudence. He contends that the Supreme Court’s interpretation of s. 121 in Gold Seal is inconsistent with the modern purposive approach to constitutional interpretation and resulted from expediency.

L'article présente une nouvelle interprétation de l'art. 121 de la Loi constitutionnelle de 1867. L'auteur réexamine l'interprétation traditionnelle de l'art. 121 énoncée dans Gold Seal Limited v. The Attorney-General for The Province Of Alberta. Cette interprétation limitait l'application de l'art. 121 à interdire l'imposition de droits de douane interprovinciaux, mais rien d'autre. L'auteur analyse l'art. 121 en utilisant une interprétation téléologique. Après avoir examiné la formulation, l'historique législatif, le contexte législatif et la place de l'article dans la structure de la Loi, il conclut qu'une interprétation téléologique et progressiste mène à un rôle plus important pour l'art. 121. Interprété de cette façon, l'art. 121 interdirait tout obstacle à la libre circulation de biens partout au Canada et l'imposition de quelque restriction sur le mouvement de produits canadiens qui, essentiellement, est assimilable à une frontière provinciale, sous réserve de réglementation de ses aspects secondaires. L'auteur a en outre analysé l'arrêt Gold Seal et une partie de la jurisprudence mettant en cause l'art. 121. Il prétend que l'interprétation de la Cour suprême dans l'arrêt Gold Seal est incompatible avec l'approche téléologique moderne de l'interprétation constitutionnelle et qu'elle est le fait de l'opportunisme.

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Introduction

The *Constitution Act, 1867*¹ contains a specific provision that appears to ensure internal free trade. Section 121 states:

All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted *free* into each of the other Provinces.²

Yet in Canada today, we have a body of complex rules and restrictions on the interprovincial movement of Canadian goods. Liquor, wheat, barley, eggs, dairy and other agricultural products are all controlled by a web of

1. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

2. [Emphasis added.] While several writers have expressed the view that s 121 does not protect free trade within Canada from non-tariff barriers based on cases considered in this paper, whether that view is correct is a question that this paper reassesses. See: Noemi Gal-Or, *In Search of Unity in Separateness: Interprovincial Trade, Territory, and Canadian Federalism* (1998) 9 NJCL 307 at 313-15; Armand de Mestral & Jan Winter, *Mobility Rights in the European Union and Canada* (2001) 46 McGill LJ 979 at 985; Joseph E Magnet, *Constitutional Law of Canada*, 9th ed (Edmonton: Juriliber, 2007) at 116-19; RJ Sharpe & K Roach, *The Charter of Rights and Freedoms*, 3d ed (Toronto: Irwin Law, 2005) at 108; David Schneiderman, *Economic Citizenship and Deliberative Democracy: An Inquiry into Constitutional Limitations on Economic Regulation* (1995) 21 Queen's LJ 125 at 126, 136; Sujit Choudhry, *The Agreement on Internal Trade, Economic Mobility, and the Charter* (2002) 2 Asper Rev of Int'l Bus & Trade L 261 at 261; Bryan Schwartz, *Lessons from Experience: Improving the Agreement on Internal Trade* (2002) 2 Asper Rev Int'l Bus & Trade L 301 at 315; Katherine Swinton, *Courting our Way to Economic Integration: Judicial Review and the Canadian Economic Union* (1995) 25 Can Bus LJ 280; Sujit Choudhry, *Strengthening the Economic Union: The Charter and the Agreement on Internal Trade* (2002) 12(2) Const Forum 52 at 52; and Ian B Lee, *Free Movement of Goods in the European Community: A Critique of the Jurisprudence on Article 30 of the Treaty of Rome* (1993) 24 RDUS 121 at 138.

trade regulations and constraints. Given the clarity of s. 121, Canadians can be forgiven for asking how these trade barriers became possible.

They would be surprised to learn that the answer lies in an obscure decision of the Supreme Court of Canada, *Gold Seal Limited v. The Attorney General of the Province of Alberta*.³ In this case in 1921, the Supreme Court stated that s. 121 protected the movement of Canadian goods against interprovincial “customs duties” or “charges,” but not from any other trade barriers. Given the clear terms of s. 121, one must ask how such an interpretation could possibly be correct.

It is high time to reappraise s. 121, and to assess whether the *Gold Seal* interpretation is correct under contemporary norms of constitutional interpretation.

I. *Interpretation norms*

How to interpret Canada’s *Constitution* and to comb out biases inherent in common law approaches has been an area of scholarly comment since Confederation. Professor Hogg offers a taxonomy⁴ of interpretation norms but those may not adequately describe the complexities and prejudices inherent in common law principles, or their implications. Professor Risk points out that interpretation of the *Constitution* by our courts is essentially a discretionary, and therefore political, exercise.⁵ While that might be so, the post-*Charter* Supreme Court has tried to limit judicial capriciousness, and it would probably do so again in interpreting s. 121. It has provided us with two overlapping approaches to interpreting the *Constitution*, the “progressive” and the “purposive.” This paper suggests that these are the ones that should be employed in interpreting s. 121.

II. *Progressive interpretation*

In the “Persons” case, the Judicial Committee stated that the *Constitution* is 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.”⁶ In 2003 the Supreme Court said that this living tree principle is “a fundamental tenet of constitutional interpretation.”⁷ It implies two requirements when applied to s. 121: first, we should not

3. *Gold Seal Limited v The Attorney General of the Province of Alberta* (1921), 62 SCR 424, 62 DLR 62 [*Gold Seal*].

4. Peter W Hogg, “Canada: From Privy Council to Supreme Court” in Jeffrey Goldsworthy, ed, *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006) 55 at 82-90.

5. 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 204 and 206.

6. *Reference re Section 24 of the BNA Act*, [1930] 1 DLR 98 at 106-07 (JCPC) [“Persons” case].

7. *R v Blais*, [2003] 2 SCR 236 at para 40.

read any restriction into s. 121 that is not explicit or required by necessary implication; and second, we should not seek an originalist interpretation or attempt to freeze the meaning of s. 121 according to conditions that prevailed in 1867. Instead, we should determine its meaning from time to time as new circumstances arise; that is, we should treat it as always speaking, the way we treat any other statutory provision.⁸

III. *Purposive interpretation*

The post-*Charter* Supreme Court has also said that provisions in the *Constitution* should receive a “purposive” interpretation.⁹ Such an interpretation requires the court to first consider the wording of the act, then the legislative history, then the scheme of the act, and finally, the legislative context.¹⁰ These four components of a purposeful interpretation are broad enough to reflect both a *progressive* and *purposive* interpretation of s. 121; we will refer to them together as a “purposive” interpretation.

1. *Wording*

While, as Risk notes, the wording of any provision in the *Constitution* can be ambiguous,¹¹ the Supreme Court has nevertheless stated that its wording is one of the four factors that must be considered in a purposeful interpretation. When one looks at the wording of s. 121, the intriguing question is what is meant by “free” in the phrase “shall ... be admitted free.”

The draftsman of the British North America Bill was a British government lawyer named Frank Reilly.¹² All legal draftsmen in the common law world work by adapting precedents and, doubtless, Reilly did too. In 1867, there happened to be good legislative precedents which

8. See *Interpretation Act*, RSC 1985, c I-21, s 10. Similar provisions appear in the legislation of each province.

9. 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. In 2008 the Court explained precisely what four factors judges must weigh in determining that purpose.

10. *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 82.

11. Risk, *supra* note 5 at 197, 201-03, 205-06.

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 17 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 7 May 1851 and was appointed QC on 29 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 27 August 1883. He appears in Frederic Boase’s *Modern English Biography* (London: F Cass, 1965), AB 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).

he might have used to fashion s. 121. After 1846,¹³ the colonies of Nova Scotia,¹⁴ New Brunswick¹⁵ and the Province of Canada¹⁶ enacted reciprocal statutes which provided that if another colony allowed their products into its 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 read as follows:

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

We, of course, do not know whether Reilly used this or similar precedents when he drafted s. 121, but it certainly looks that way, because s. 121 appears to be a pastiche formed from its words. In s. 121, we see “articles of growth, production and manufacture” as in the precedent provision. Significantly, however, we do not see the “shall be ... permitted free from duty” formula used in the precedent but, instead, “shall ... be admitted free,” a much less restricted requirement. What then did “free” in s. 121 mean? Logically it had to mean something wider than the “free from duty” formula used in other earlier statutes on the same subject.

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

13. See below at 168 and 169.

14. *An Act in relation to the Trade between the British North America Possessions*, SNS 1848 (10 & 11 Vict), c 1.

15. *An Act relating to Trade between the British North American Possessions*, SNB 1850 (13 Vict), c 2.

16. *An Act to facilitate Reciprocate Free Trade between this Province and other British North American Provinces*, S Prov C 1850 (13 & 14 Vict), c 3.

17. *Supra* note 14.

18. Published in 1755 and then again in subsequent editions: Henry Hitchings, *Defining the World* (New York: Picador, 2005) at 246-47; *Shorter Oxford English Dictionary*, 6th ed, preface.

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

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. ...
13. Given or provided without charge or payment, gratuitous. Also, admitted, carried, or placed without charge or payment.
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.).
15. Exempt from restrictions with regard to trade; not subject to tax, toll, or duty; allowed to trade in any market.²¹

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: see *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 US 469 (2005) at 508; *Eldred v Ashcroft*, 537 US 186 (2003) at 199, 248; *Utah v Evans*, 536 US 452 (2002) at 475, 492; *INS v St Cyr*, 533 US 289 (2001) at 337; *Doc v United States House of Representatives*, 525 US 316 (1999) at 347; *United States v Baj*, 524 US 321 (1998) at 335; *Camps Newfoundland/Owatonna v Town of Harrison*, 520 US 564 (1997) at 638; *United States Term Limits v Thornton*, 514 US 779 (1995) at 858; *United States v Lopez*, 514 US 549 (1995) at 585; *Nixon v United States*, 506 US 224 (1993) at 230; *County of Allegheny v ACLU*, 492 US 573 (1989) at 648-49; *Browning-Ferris Indus v Kelco Disposal*, 492 US 257 (1989) at 295; *Morrison v Olson*, 487 US 654 (1988) at 719; and *Joseph Burstyn, Inc v Wilson*, 343 US 495 (1952) at 536. Interestingly, in *Atlantic Smoke Shops* referred to at note 98, 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. *Dictionary of the English Language*, 6th ed, *sub verbo* “free.”

21. *Shorter Oxford English Dictionary on Historical Principles*, 6th ed, *sub verbo* “free”, at 11, 13-15.

Thus, under both the historical and contemporary definitions of a wider “free” than “free from duty,” the *wording* of s. 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.

2. *Legislative history*

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 s. 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 s. 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 s. 121. When we do so, the result is quite clear. It must be read broadly.

Of course we must be careful about drawing historical conclusions from the Confederation debates. The political scientist Janet Aizenstat believes such conclusions are reliable. She argues for the examination of such original sources and believes that in the absence of such study, fanciful and misleading ideas about Confederation abound.²⁴ The historian Andrew Smith examined the role of taxation “in the debates over Confederation”²⁵ to advance a thesis that 1867 was the birth of a “Tory-interventionist order” in Canada rather than a liberal one.²⁶ Donald C. Masters, the foremost historian on the Reciprocity Treaty of 1854, also relied on those debates.²⁷ So scholars consider debates on Confederation to be relevant evidence of the founders’ intent. And so they should because, as Aizenstat notes, the founders were educated men knowledgeable about Canada’s history, law and politics.²⁸ The majority of the Supreme Court in *Fastfrate* was in agreement, quoting from a speech of Sir John A. Macdonald in the Confederation debates to ascertain the meaning of s. 92(10) of the

22. Hogg, *supra* note 4.

23. *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 SCR 407 at para 32 [*Fastfrate*].

24. Janet Aizenstat, *The Canadian Founding* (McGill-Queen’s University Press 2007) at xv.

25. Andrew Smith, “Toryism, Classical Liberalism, and Capitalism: The Politics of Taxation and the Struggle for Canadian Confederation” (2008) 89 CHR 1 at 3.

26. *Ibid* at 5.

27. Donald C Masters, *The Reciprocity Treaty of 1854* (1937), reprinted by McLelland & Stewart, 1963.

28. *Ibid* at 7.

Constitution Act, 1867.²⁹ For these reasons, it is appropriate to consider the Confederation debates in ascertaining the historical context of s. 121.

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 on products from outside the Empire. In 1846, however, the British Parliament dismantled all of its protective trade legislation, and enacted a free trade tariff to come into force in 1849.³⁰ This legislation, known to history as *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, also 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.³¹ The British North American colonies suddenly found themselves competing in a free trade world.

These economic developments caused concern in British North America. In an address to the British Parliament, the House of Assembly of Lower Canada said that the Repeal would, first, discourage those engaged in agricultural pursuits from extending their operations; second, prevent 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.³² The historian Ged Martin notes that by 1849 these concerns had revived the recurring question of a union of the British North American colonies since the pro-British parties, outraged at losing their monopolies of local power due to both representative government and losing trading privileges with Britain, began to threaten self-annexation to the United States.³³

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 the British North American

29. *Fastfrate*, *supra* note 23 at para 33.

30. *An Act to Amend the Laws relating to the Import of Corn*, 1846 (UK), 9 & 10 Vict, c 22; *An Act to Alter Certain Duties of Customs*, 1846 (UK), 9 & 10 Vict, c 23; *An Act to Enable the Legislatures of Certain British Possessions to Reduce or Repeal Certain Duties of Customs*, 1846 (UK), 9 & 10 Vict, c 94.

31. *An act reducing the duty on Imports and for other purposes*, US 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 273-77.

32. UK, *Parliamentary Debates*, vol 87, cols 1-9 (4 June 1846).

33. Ged Martin, *Britain and the Origins of Canadian Confederation, 1863-67* (Vancouver: UBC Press, 1995) at 89.

colonies and the United States. This movement toward reciprocity began in 1846-50 in the Province of Canada and then in the Maritimes, particularly New Brunswick. Until 1852, British diplomats negotiated in Washington without success, but then a dispute developed over the rights of American fishermen in coastal waters of British North America. Both governments became anxious for 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 6 June 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 were largely responsible.³⁴

In December 1864, the British North American colonies learned that due to Britain's hostile actions to the Union side in the American Civil War, the United States intended to abrogate the Reciprocity Treaty, and this development informed discussions on Confederation which had taken place.³⁵ Macdonald 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 why there should be Confederation amongst the colonies.³⁶ Here, it is necessary to pause briefly to ask what may have happened between the late 1840s and 1867 to cause the "permitted free from duty" formula used in earlier statutes to change to the broader "admitted free" formula used in s. 121. One likely event that explains this change occurred.

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."³⁷ 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 interfere

34. DC Masters, "Reciprocity", online: The Canadian Encyclopedia <<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006710>>.

35. Donald Creighton, *John A. Macdonald, The Young Politician* (MacMillan, 1965) at 392-93.

36. Canada, Parliament, Parliamentary Debates on the subject of Confederation, 3rd Sess, 8th Provincial Parliament of Canada, 1865 at 32.

37. Abraham Lincoln, State of the Union Speech (6 December 1864).

with Canada's winter trade. This was nothing less than a non-tariff, non-impost, non-duty trade barrier, and was present in the minds of the founders in 1865-67, when confederation was being discussed.³⁸ Now, imagine, what might have happened if provincial governments had wanted to give their own producers, manufacturers or farmers a preference using similar rules. They could easily use stop and inspect procedures on goods entering the province from other provinces and interfere with interprovincial trade. A "free from duty" formula would not have prevented them from doing so; the wider "admitted free" formula would. Now, back to confederation.

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 hoped 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, 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.³⁹ 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.⁴⁰

After *Repeal of the Corn Laws*, but before discussions on Confederation had begun in earnest, Nova Scotia,⁴¹ New Brunswick⁴² and the Province of Canada⁴³ enacted numerous laws to impose and increase duties on goods

38. *Supra* note 33.

39. See Andrew Smith, *British Businessmen and Canadian Confederation* (2008) at 114.

40. Donald C Masters, *The Reciprocity Treaty of 1854* (London: Longmans, Green & Company, 1937), reprinted by McLelland & Stewart (1963), at 131-32.

41. See e.g. *An Act to continue the Act for granting a Colonial Duty of Impost for the support of Her Majesty's Government within this Province, on Flour and Molasses, in certain cases*, SNS 1846 (9 Vict), c 83; and *An Act to continue the Acts for the General Regulation of the Colonial Duties*, SNS 1846 (9 Vict), c 84.

42. See e.g. *An Act to continue and amend the Act, intituled "An Act imposing Duties for raising a Revenue"*, SNB 1846 (9 Vict), c 1; *An Act to provide for the Collection and Protection of the Revenue of this Province*, SNB 1848 (11 Vict), c 2; and *An Act imposing Duties for raising a Revenue*, SNB 1849 (12 Vict), c 18.

43. See e.g. *An Act to alter and amend the Laws imposing Provincial Duties of Customs*, S Prov C 1846 (9 Vict), c 1; and *An Act to amend the Law relative to Duties of Customs*, S Prov C 1849 (12 Vict), c 1.

entering from elsewhere, including from other British North American colonies. The colonies also had in place other trade barrier legislation, such as anti-smuggling acts,⁴⁴ acts regulating the importation of books⁴⁵ and acts regulating illicit trade.⁴⁶ In addition, as already mentioned, they passed conditional reciprocal duty-free statutes.⁴⁷ It is apparent from the Confederation debates, though, that no reciprocal deals were ever worked out among the colonies because it was the dismantling of inter-colonial trade barriers that was seen as a major advantage of Confederation.

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, members 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 12 September 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.”⁴⁸ On the same occasion, Alexander Galt said that the purpose of the Union was “free trade among ourselves.”⁴⁹

44. *An Act to continue the several Acts of the prevention of Smuggling*, SNS 1846 (9 Vict), c 86.

45. *An Act to Regulate the Importation of Books and to protect the British Author*, SNS 1847 (10 Vict), c 14.

46. *An Act for the better prevention of Illicit Trade*, SNB 1848 (11 Vict), c 67.

47. *Supra* notes 14, 15, and 16.

48. 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: GT Haszard, 1865) at 36-37. The full quote is as follows:

Union 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.

49. *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.

The Charlottetown delegates reconvened at the Quebec Conference in October 1864. This meeting resulted in the *Quebec Resolutions*⁵⁰ of 1864, a basic source for the *British North America Act, 1867*.⁵¹ 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 1 November 1864, Alexander Galt said that the desire of Confederation was bring about “free trade in our own colonies.”⁵² At Toronto, on 2 November 1864, Edward Palmer, the Attorney General of Prince Edward Island, said that “we agreed that we should, between and amongst ourselves, enjoy free trade.”⁵³

At Sherbrooke, on 23 November 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

50. GP 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 & Stewart, 1968) at 154ff.

51. 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.

52. *Supra* note 48 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.

53. *Ibid* at 182-83.

one province, and thus from sharing in the advantages of the extended Union.⁵⁴

In February 1865, the Parliament of the Province of Canada debated Confederation.⁵⁵ John A. Macdonald said that Canada wanted “unrestricted free trade, between people of the five provinces,”⁵⁶ 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.⁵⁷ 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.”⁵⁸ Hector Langevin said: “There are also as many different tariffs as there are different provinces, as many commercial and customs regulations as provinces.”⁵⁹ On 10 April 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.⁶⁰

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 1866⁶¹ 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 s. 121 only appeared during the first week of February 1867⁶² in the Fourth Draft of the British North America Bill. The Final Draft of 9 February 1867⁶³ contained another version, while the present s. 121 only appeared when the British North America Bill was

54. Alexander Galt, *Speech on the Proposed Union of the British North American Provinces, delivered at Sherbrooke, on 23rd November 1864* (Montreal: Longmoore, 1864) [emphasis added]. My thanks to the late Professor John Saywell, former Dean of the History Department at York University for referring me to this document.

55. Canada, Parliament, *Parliamentary Debates on the Subject of the Confederation of the British North America Provinces*.

56. *Ibid* at 26.

57. *Ibid* at 64.

58. *Ibid* at 99.

59. *Ibid* at 366.

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

61. Browne, *supra* note 50 at 230ff.

62. In the fourth draft of the British North America Bill, Browne, *ibid* at 278.

63. *Ibid* at 302.

going through Parliament.⁶⁴ The following comparison shows that the final s. 121 differed from what had been in the February 9th Final Draft as s. 125:

IX – February 9, 1867 Final DRAFT

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.

Section 121 in its present form

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 9 February and 4 March 1867 created a wider and more encompassing s. 121 provision than its initial version. The “admitted free” formula rather than the “permitted free from duty” one used elsewhere, however, had been a prominent feature of the first expression of s. 121 in the Fourth Draft and was maintained in both the Final Draft and the final version which is our present s. 121.

The British North America Bill was introduced in the House of Lords on 12 February 1867.⁶⁵ The Second Reading debate in the House of Lords occurred on 19 February 1867.⁶⁶ 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.⁶⁷ On 22 February 1867, the bill was considered by a Committee of the Lords and reported back with minor

64. British North America Bill, London, British Parliamentary Archives (SW1A0PW). Parliamentary staff made handwritten notes on the Bill.

65. UK, HL, *Parliamentary Debates*, 3rd ser, vol 185, col 278 (12 February 1867); UK, *Journal of the House of Lords*, vol 99 (12 February 1867) at 21-23.

66. UK, HL, *Parliamentary Debates*, 3rd ser, vol 185, col 557-82 (19 February 1867).

67. *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.

amendments.⁶⁸ On 26 February⁶⁹ it received Third Reading in the House of Lords which then sent a message to the House of Commons requesting its concurrence.⁷⁰

On 26 February, the Commons ordered that bill be reprinted and on 27 February, it was given First Reading.⁷¹ The Second Reading Debate in the Commons occurred on 28 February, 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.⁷² On 4 March, 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 new part “VIII, Revenues; Debts; Assets, Taxation” which contained s. 121 in its present form.⁷³ On 7 March, the Commons considered the bill “as Amended” without debate.⁷⁴ On 8 March, the bill, as amended, was given Third Reading and referred back to the House of Lords for its concurrence with the Commons amendments.⁷⁵ On 12 March, the Commons amendments were read twice in the House of Lords and were agreed to.⁷⁶ On 29 March, a Commission of Lords gave Royal Assent to the British North America Bill and it became the *British North America Act, 1867*.⁷⁷

68. *Supra* note 66 at col 804-7 (26 February 1867).

69. *Ibid* col 1011-20 (26 February 1867).

70. UK, *Journal of the House of Lords*, vol 99 (26 February 1867) at 48.

71. UK, HC, *Parliamentary Debates*, 3rd ser, vol 185, col 1090-1 (27 February 1867).

72. *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.

73. *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.

74. *Ibid* col 1443 (7 March 1867).

75. *Ibid* col 1547 (8 March 1867). Third Reading was given without debate.

76. UK, *Journal of the House of Lords*, vol 99 (12 March 1867) at 76.

77. *Ibid* (29 March 1867) at 139.

This legislative history shows that the context in which s. 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 imposts 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 break down “barriers.” Langevin wanted freedom from “different commercial regulations.” Tupper wanted “free trade.” Carnarvon spoke of “one common and manageable system,”⁷⁸ and Adderley spoke of “the most perfect reciprocity” among provinces.⁷⁹

These conclusions concerning the context of s. 121 are supported by statements from the Supreme Court. In *Lawson v. Interior Tree Fruit and Vegetables Committee of Direction*,⁸⁰ Cannon J. stated 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.⁸¹ In *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*,⁸² 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.⁸³ In *Black v. Law Society of Alberta*,⁸⁴ La Forest J. stated the attainment of economic integration occupied a place of central importance in the scheme of Confederation.⁸⁵

This history also tells us that s. 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 s. 121 that the framers of the *Constitution* saw it as essential to achieving a national

78. *Supra* note 66.

79. *Supra* note 71.

80. *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, [1931] SCR 357.

81. *Ibid* at 373.

82. *Attorney-General for Manitoba v Manitoba Egg and Poultry Association*, [1971] SCR 689 [*Manitoba Egg*].

83. *Ibid* at paras 58 and 59 [emphasis added].

84. *Black v Law Society of Alberta*, [1989] 1 SCR 591.

85. *Ibid* at 609.

economy by providing Canadians with the ability to trade freely within Canada without interprovincial trade barriers.

3. *Legislative context*

Legislative context shows that s. 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.⁸⁶ So did Rand J. in *Murphy v. CPR*.⁸⁷

4. *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 s. 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.⁸⁸

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

86. *Supra* note 66 at col 558.

87. *Murphy v CPR*, [1958] SCR 626 at 641.

88. To assess Galt’s prescience, see *Citizens Insurance Co of Canada v Parsons* (1881), 7 App Cas 96 at 113; *Lawson*, *supra* note 80 at 366; *Re Natural Products Marketing Act*, [1936] SCR 398 at 410; *Re Natural Products Marketing Act*, [1937] AC 377 at 386, [1937] 1 DLR 691 (JCPC); *Shannon v Lower Mainland Dairy Products Bd*, [1938] AC 708 at 719, [1938] 4 DLR 81 (JCPC); *PEI Potato Marketing Board v Willis*, [1952] 2 SCR 392 at 396; *Re Farm Products Marketing Act*, [1957] SCR 198 at 205 and 209-10.

discipline in Parliament was not as strict as it is today, and members often voted across party lines on issues of common provincial concern.

IV. *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 s. 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 s. 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.⁸⁹ Today, we have 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*⁹⁰ which restricts to whom in a province intoxicating liquor may be sold, the *Canadian Wheat Board Act*⁹¹ which restricts to whom within Canada wheat may be sold and the *Agricultural Products Marketing Act*⁹² which restricts interprovincial sale 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 there to make life difficult for out-of-province suppliers and protect local producers.⁹³ 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

89. *Fastfrate*, *supra* note 23.

90. *Importation of Intoxicating Liquors Act*, RSC 1985, c I-3.

91. *Canadian Wheat Board Act*, RSC 1985, c C-24.

92. *Agricultural Products Marketing Act*, RSC 1985, c A-6.

93. Examples are taken from Brian Lee Crowley, Robert Knox & John Robson, "Citizen of One, Citizen of the Whole: How Ottawa Can Strengthen our Nation by Eliminating Provincial Trade Barriers with a Charter of Economic Rights", *MacDonald-Laurier Institute, True North in Canadian Public Policy* 1:2 (June 2010) 4 at 8-9.

founders as customs duties. A purposeful interpretation of s. 121 should be versatile enough to prohibit these contemporary trade barriers.

A purposive interpretation of s. 121 suggests that, *prima facie*, those marketing schemes do not comply with s. 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.⁹⁴

At this point, it is necessary to touch some additional legal bases. First, it might be argued that the “dominant tide” of federalism jurisprudence allows the ordinary operation of statutes by both levels of governments, with considerable interplay between them, thus schemes restricting interprovincial marketing are valid.⁹⁵ The dominant tide, however, would break upon a purposive interpretation of s. 121. The dominant tide principle is confined to interpreting competing legislative authority under ss. 91 and 92 and, therefore, is not applicable to s. 121.

Second, it might be argued that ss. 91 and 92 of the *Constitution Act, 1867* provide an exhaustive distribution of legislative power which 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 s. 91 of the *Constitution Act, 1867* trumps s. 121. Those arguments, however, are attenuated by the fact that there are clear limits on total and federal legislative power: the *Charter* and s. 96 of the *Constitution Act, 1867* are examples, and now so is s. 121.⁹⁶

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

94. *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 370.

95. See *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at paras 36-37.

96. See *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at paras 35-37.

V. *Section 121 jurisprudence*

We should look at how the courts have dealt with s. 121 historically against the backdrop of the purposeful interpretation we have just considered. Since Confederation, final appellate courts have considered s. 121 only four times. From these decisions two separate interpretations emerge. The first is the “*Gold Seal* interpretation” found in *Gold Seal*,⁹⁷ *Atlantic Smoke Shops v. Conlon*,⁹⁸ the majority judgment in *Murphy v. CPR*,⁹⁹ and Laskin C.J.’s judgment in *Re Agricultural Products Marketing Act*.¹⁰⁰ The second interpretation is Rand J.’s “purposive interpretation” found in his concurring judgment in *Murphy* and referred to in Laskin C.J.’s decision in *APMA*.

VI. *The Gold Seal interpretation*

The issue in *Gold Seal*¹⁰¹ was whether the *Canada Temperance Amending Act*,¹⁰² 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 its new s. 152 of the *Canada Temperance Act*,¹⁰³ 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 s. 152,¹⁰⁴ the federal government had to hold 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 s. 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.

97. *Supra* note 3.

98. *Atlantic Smoke Shops Ltd v Conlon*, [1943] 4 DLR 81 (JCPC) [*Atlantic Smoke Shops*].

99. *Supra* note 87.

100. *Re Agricultural Products Marketing Act*, [1978] 2 SCR 1198 [*APMA*].

101. *Supra* note 3.

102. *Canada Temperance Act*, RSC 1906, c 152 [*CTA*], as amended by the *Canada Temperance Amending Act*, SC 1919 (10 Geo V), c 8 [*CTAA*]. At issue is the validity of Part IV, as added by the *CTAA*.

103. *Ibid* at s 1.

104. *Ibid*.

Before the Supreme Court, the key issue was whether or not the federal cabinet's proclamation had complied with new s. 152(g). The factums of both Gold Seal and the Attorney General focused on that issue but also sparred lightly over whether the *CTA* was *ultra vires* Parliament. Neither factum, however, addressed s. 121.¹⁰⁵ During oral argument on 10 and 11 May 1921, in addition to its submissions on the disputed proclamation, Gold Seal must also have suggested that the *CTA* contravened s. 121. The Supreme Court reserved its decision and counsel went home to Alberta. Less than a month later, on 4 June 1921, Parliament enacted a new statute (*Proclamation Validation Act*) which declared any proclamation of the *CTAA* to have been valid.¹⁰⁶ In light of this development, the Supreme Court allowed the parties to submit supplementary factums.

On 18 October 1921, the Supreme Court released its written 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. As to Gold Seal's argument that the *Canada Temperance Act* violated s. 121, Duff J. disagreed:

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.¹⁰⁷

Similarly, Mignault J. stated:

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.¹⁰⁸

Anglin J.'s comments on s. 121 echoed that of Mignault J.¹⁰⁹

105. The factums referred to are available from the Records Section of the Supreme Court of Canada.

106. *Proclamation Validation Act*, SC 1921, 11 & 12 Geo V, c 20.

107. *Supra* note 3 at 456.

108. *Ibid* at 470.

109. *Ibid* at 466.

In *Atlantic Smoke Shops* in 1943,¹¹⁰ the issue was whether New Brunswick's *Tobacco Tax Act*,¹¹¹ which imposed retail sales tax on tobacco products sold within the province, violated s. 121. The Privy Council held that it did not, and in applying the *Gold Seal* interpretation, Viscount Simon said that s. 121 had been the subject of full and careful exposition by the Supreme Court of Canada in *Gold Seal*.¹¹²

In *Murphy* in 1958,¹¹³ the issue was whether a prohibition in the *Canadian Wheat Board Act*¹¹⁴ against farmers shipping wheat out of a province was unconstitutional because it violated s. 121. Applying the *Gold Seal* interpretation and finding that the *Act* did not impose any customs duties or charges, the majority held that the prohibition¹¹⁵ did not violate s. 121.

Finally, in *APMA* in 1978,¹¹⁶ the issue was that orders made under the *Farm Products Marketing Agencies Act* contravened s. 121.¹¹⁷ Under these orders, a proclamation fixed the number of eggs that could be produced in Ontario¹¹⁸ and prohibited dumping of eggs in other provinces.¹¹⁹ It fixed the location of egg production and employment. Quebec was thus protected from any increased competition from Manitoba or Ontario. The appellants contended that the *Act* contravened s. 121. The Supreme Court disagreed and held that the order was valid.

VII. *The Gold Seal interpretation considered*

The *Gold Seal* interpretation holds that s. 121 prohibits only “the establishment of customs duties affecting interprovincial trade”¹²⁰ (Duff J.) or “the levying of custom duties or other charges of a like nature in matters of interprovincial trade”¹²¹ (Mignault J.). This interpretation has several significant weaknesses.

We must assume that the members of the *Gold Seal* court were as familiar with the history of Confederation as we are today. We also can safely assume they were aware of the approach to interpreting the *British North America Act, 1867*, expressed in Clement's *The Law of the Canadian*

110. *Supra* note 98.

111. *Tobacco Tax Act*, SNB 1940, c 44.

112. *Supra* note 98 at 569.

113. *Supra* note 87.

114. *Canadian Wheat Board Act*, RSC 1952, c 44.

115. Now s 45 of the *Canadian Wheat Board Act*, *supra* note 91.

116. *Supra* note 100.

117. *Farm Products Marketing Agencies Act*, SC 1970-71-72, c 65.

118. SOR/73-1, s 3.

119. SOR/73-1, s 11.

120. *Supra* note 3 at 456.

121. *Ibid* at 470.

Constitution (1916). This view was cited and approved in the “Persons” case as authority for the living tree principle.¹²² Clement said that the *British North America 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.¹²³

So, how did the judges’ narrow view of s. 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 s. 121 was so limited. No constitutional law textbooks published prior to *Gold Seal* suggested such an interpretation.¹²⁴ And prior to Confederation, as history shows, the founders were concerned about all trade barriers within British North America, not just customs duties.

The *Gold Seal* interpretation also ignores the fact that s. 121 does not 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” on goods imported from abroad into any province once. 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 s. 121 suggests that the framers did not intend s. 121 to be confined to prohibiting interprovincial customs duties and charges.

Looking at the record of *Gold Seal* 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 s. 121 argument summarily, something that occasionally happens to issues 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.

Duff J.’s biographer provides perhaps the most compelling reason why judges should distance themselves from the *Gold Seal* interpretation. He

122. WHP Clement, *The Law of the Canadian Constitution*, 3d ed (Toronto: Carswell, 1916) at 137.

123. *Ibid* at 347-48.

124. Joseph Doutre, QC, *Constitution of Canada, The British North America Act, 1867* (Montreal: Lovell, 1880); JEC Munro, *The Constitution of Canada* (Cambridge: Cambridge University Press, 1889); Clement, *supra* note 122 at 640-49; and AHF LeFroy, *A Short Treatise on Canadian Constitutional Law* (Toronto: The Carswell Company, 1918).

quotes from a letter Sir Lyman Duff wrote to Viscount Haldane, the Lord Chancellor of Great Britain, in 1925.¹²⁵ In the letter, Duff J. explained why he thought that appeals to the Judicial Committee of the Privy Council (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.¹²⁶

That case, Duff J.'s biographer tells us, was *Gold Seal*.¹²⁷

So some time between 11 May and 4 June 1921, and after the judges had reached but not written their decisions, Anglin and Mignault JJ. met with their fellow graduate of College St. Marie,¹²⁸ the former Superior Court Justice and then Minister of Justice, Charles Doherty, a man who Mignault J. greatly respected.¹²⁹ The two judges and the Minister of Justice discussed *Gold Seal* 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

125. David Ricardo Williams, *Duff: A Life in the Law* (Toronto: Osgoode Society, 1984) at 130, 294.

126. 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.

127. Williams, *supra* note 125.

128. Jesuit College St Marie was located at that time at the corner of Bleury and Ste Catherine Street in Montreal.

129. See PB 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.

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 J.'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*¹³⁰ 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.¹³¹ 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;¹³² 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 the Royal Regiment of Canada and the Winnipeg Rifles to be decimated and taken prisoner-of-war by the Japanese.¹³³ Given this record, it is conceivable that Duff J. might have agreed to treat s. 121 in the way Mignault and Anglin JJ. did in *Gold Seal* in order to save the Union government political embarrassment. The timing of events and the similarities of all three judgments in length, tone and substance are difficult to explain, and how else did Duff J. know the story if he was not a party to the agreement?

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. Why would he have written it if the story was not true? The incident is not mentioned in Mr. Justice Pierre-Basile Migneault's biography¹³⁴ nor would one expect him to have recorded it any more than you would expect him to have recorded an illicit connection. Mr. Justice Frank Anglin 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

130. *Military Service Act*, SC 1917, c 19.

131. Williams, *supra* note 125 at 91-95.

132. *Ibid* at 89.

133. *Ibid* at 16.

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

contrary evidence that the author could find, and the timing of events and again, the similarities of all three judgments in length, tone and substance are difficult to ignore.

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 do not 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. Under the old rule of *stare decisis*, since Mignault and Anglin JJ.'s meeting with Doherty went undisclosed, the *Gold Seal* interpretation became a binding authority and, as such, it was applied without much further thought in *Atlantic Smoke Shops*, *Murphy* and *APMA*, despite Viscount Simon's praise of it in *Atlantic Smoke Shops*.¹³⁵

Referring to the *Gold Seal* interpretation, in *APMA* Laskin C.J. wrote as follows:

The authorities on s. 121 were brought into the submissions to support the contentions that s. 121 applies to federal legislation no less than to provincial legislation and that the marketing plan here exhibits a protectionist policy as among Provinces, impeding the flow of trade in eggs between and among Provinces. Reference was made to the observation of Viscount Simon in *Atlantic Smoke Shops Ltd. v. Conlon*, at p. 569 that "the meaning of s. 121 cannot vary according as it is applied to dominion or to provincial legislation". 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

135. Whatever else you might say about *Gold Seal*, you cannot say that its treatment of s. 121 was a "full and careful exposition." John Simon was a British politician who had been Solicitor General and Attorney General in Lloyd-George's government, Chairman of the Statutory Commission on government in India and both Home Secretary and Foreign 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 was to have acted as counsel in two division of powers cases and his 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 the genesis of 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)).

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.¹³⁶

Laskin C.J. suggested that the application of s. 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 now seems dubious.

The *Gold Seal* interpretation, in effect, has rendered s. 121 completely impotent: no province has attempted to establish interprovincial customs duties since 1866, and federal governments have had no need to do so.¹³⁷ 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 the imposition of provincial quotas. These schemes are contrary to a purposive interpretation of s. 121. While they have made Canada a much different place than it otherwise would be, they would all be vulnerable to purposeful interpretation of s. 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 in British Columbia. 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 *Gold Seal* that takes this improper

136. *Supra* note 100 at 1267-1268 [emphasis added].

137. The *Gold Seal* interpretation cannot be described as a purposive interpretation of s 121.

approach; it cannot be described as either a progressive or purposive interpretation of s. 121.

VIII. *Rand J.'s purposive interpretation considered*

Rand J.'s purposive interpretation from *Murphy* is found in this passage:

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.¹³⁸

Rand J.'s interpretation is consistent with the wording of s. 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 s. 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 s. 32(1)(a) and (b) and s. 45(c) of the *Canadian Wheat Board Act*¹³⁹ violate s. 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*.¹⁴⁰

138. *Supra* note 87 at 642.

139. *Supra* note 91.

140. *Canada Grain Act*, RSC 1985, c G-10; *Canada Grain Regulations*, CRC c 889.

Consider the interprovincial liquor business. Section 3 of the *Importation of Intoxicating Liquors Act*¹⁴¹ violates s. 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 s. 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 *Murphy*. Laskin C.J. referred to but did not adopt it in his decision in *APMA*. 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 s. 121 is next reconsidered.

When it came to applying his purposive interpretation to whether the prohibition of selling wheat in another province without prior approval violated s. 121 in *Murphy*, Rand J. seems to have lost his way, holding that the provision did not violate s. 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?¹⁴² Rand J. said that a trade regulation, which in its essence and purpose was related to a provincial boundary, violated s. 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 stated, 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.¹⁴³

141. *Supra* note 90.

142. Section 32's successor is now *Canadian Wheat Board Act*, *supra* note 91 at s 45.

143. *Supra* note 87 at 643.

Thus, the economic and social objectives of the *Canadian Wheat Board Act* could trump s. 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 s. 121 in *Murphy* should not be followed in the future.

When Laskin C.J. referred to Rand J.'s interpretation of s. 121 in *APMA* but did not apply it, he stated:

Rand J. took a broader view of s. 121 in *Murphy v CPR*, 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.¹⁴⁴

Reading Laskin C.J.'s judgment with thirty-two 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 s. 121 or scheme of the *Constitution Act, 1867* suggests was the purpose of s. 121. Instead, they suggest that its object was free trade of goods

144. *Supra* note 100 at 1267-1268 [emphasis added].

within Canada so that each province could benefit from its comparative advantages. Laskin C.J. 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 s. 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.’s application nor Rand J.’s application of the purposive interpretation of s. 121 stand up to scrutiny, the Supreme Court should be free to depart from both of them when next interpreting s. 121.

Conclusion

It seems inescapable that to date the Supreme Court has essentially ignored the terms, intent and purpose of s. 121. As a result, Canadians have lived with and had to pay for entrenched federal marketing schemes a purposive interpretation of s. 121 would never have permitted. Sadly, the losers in this subordination of the *Constitution* are the excluded Canadian producers and, us, the consumers and taxpayers.

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? These are questions that can only be answered the next time s. 121 comes before the Supreme Court.

Until then, in the belief that, as Sir Francis Bacon said: “truth is the daughter of time, not of authority,”¹⁴⁵ it is hoped that this paper has shone some light on, and will create renewed interest in, this intriguing provision of our *Constitution*.

145. Sir Francis Bacon was a polymath, lawyer and Lord Chancellor in Elizabethan England. The attributed quote is paraphrased from Francis Bacon, *Novum Organum* (1620), chapter LXXXIV, in Sidney Warhaft, *Francis Bacon: A Selection of His Works* (Toronto: MacMillan of Canada, 1965). Bacon’s actual words were: *Recte enim Veritas filia Temporis dicitur, non Auctoritatis.*

