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Long Overdue: A Reappraisal of Section 121 of the *Constitution Act, 1867*

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

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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 taxonomy[4] 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

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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 Brunswick[15] and the Province of Canada[16] 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

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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.
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> 2. Uncompelled; unrestrained.
>
> 4. Permitted; allowed.
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> 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. ...
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> 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]

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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 Newfound/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 Ajzenstat 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 Ajzenstat 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 Ajzenstat, *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 Brunswick[42] and the Province of Canada[43] 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 books[45] 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]

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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.