ON THE ROCKS? SECTION 121 OF THE CONSTITUTION ACT, 1867, AND THE CONSTITUTIONALITY OF THE IMPORTATION OF INTOXICATING LIQUORS ACT

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1. Introduction

As counsel who has argued interprovincial energy issues, I have been aware of s. 121 of the *Constitution Act, 1867* for a long time.

Using wording that has remained unchanged since enactment, s. 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."[1] Section 121 explicitly requires

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1. (Emphasis added.) 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 or not that view is correct is an open question that this article addresses. See Noemi Gal-Or, "In Search of Unity in Separateness: Interprovincial Trade, Territory, and Canadian Federalism" (1998), 9 Nat'l J. Const. L. 307 at pp. 313-15; Armand de Mestral and Jan Winter, "Mobility Rights in the European Union and Canada" (2001), 46 McGill L.J. 979 at p. 985; Joseph E. Magnet, *Constitutional Law of Canada*, 9th ed. (Edmonton: Juriliber, 2007), pp. 116-19; R.J. Sharpe and K. Roach, *The Charter of Rights and Freedoms*, 3rd ed. (Toronto: Irwin Law, 2005), p. 108; David Schneiderman, "Economic Citizenship and Deliberative Democracy: An Inquiry into Constitutional Limitations on Economic Regulation" (1995), 21 Queen's L.J. 125 at pp. 126 and 136; Sujit Choudhry, "The Agreement on Internal Trade, Economic Mobility, and the Charter" (2002), 2 Asper Rev. of Int'l Bus. and Trade Law 261 at p. 261; Bryan Schwartz, "Lessons from Experience: Improving the Agreement on Internal Trade" (2002), 2 Asper Rev. Int'l Bus. & Trade L. 301 at p. 315; Katherine Swinton, "Courting our Way to Economic Integration: Judicial Review and the Canadian Economic Union" (1995), 25 C.B.L.J. 280; Sujit Choudhry, "Strengthening the Economic Union: The Charter and the Agreement on Internal Trade" (2002), 12 Constitutional Forum 52 at p. 52; 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 R.D.U.S. 121 at p. 138.

that Canadian products "be admitted free into each of the other provinces".

During a consultation,[2] I learned for the first time about the *Importation of Intoxicating Liquors Act* (IILA),[3] an obscure federal statute requiring that all liquor entering a province be sold to the provincial liquor board. Subsection 3(1) of that Act states:[4]

> 3(1) Notwithstanding any other Act or law, no person shall import, send, take or transport, or cause to be imported, sent, taken or transported, into any province from or out of any place within or outside Canada any intoxicating liquor, except such as has been purchased by or on behalf of, and that is consigned to Her Majesty or the executive government of, the province into which it is being imported, sent, taken or transported, or any board, commission, officer or other governmental agency that, by the law of the province, is vested with the right of selling intoxicating liquor.

How, I wondered, could that be constitutional in view of s. 121?

It turns out that the IILA is an important piece of legislation. Passed in 1928, at the request of provincial governments, it effectively grants the liquor board in each province a monopoly over the sale and distribution of liquor that was not granted under that board's constitutive statute.[5]

That's right! It is a federal statute, not provincial Acts, that gives provincial liquor boards their monopolies. Only British Columbia's *Liquor Distribution Act* purports to give that province's Liquor Distribution Branch a monopoly, but it does so only by citing the IILA.[6] No other provincial Act purports to give a monopoly to provincial liquor boards. Except for New Brunswick's and Quebec's Acts, which do not have general "objects" or "powers" provisions, all other provinces give their liquor boards only the power to "control"

2. With the author's friend Arnold B. Schwisberg, barrister and solicitor, an expert in liquor law. Thanks to Mr. Schwisberg for reading a draft of this paper and making valuable suggestions.
3. R.S.C. 1985, c. I-3.
4. Section 3 has some exceptions that are not material. The IILA also contains enforcement provisions.
5. Constitutive statutes: *Gaming and Liquor Act*, R.S.A. 2000, c. G-1; *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267; *The Liquor Control Act*, C.C.S.M., c. L160; *Liquor Control Act*, R.S.N.B. 1973, c. L-10; *Liquor Control Act*, R.S.N.L. 1990, c. L-18; *Liquor Act*, S.N.W.T. 2007, c. 15; *Liquor Control Act*, R.S.N.S. 1989, c. 260; *Liquor Act*, R.S.N.W.T. 1988, c. L-9 (Nunavut); *Liquor Control Act*, R.S.O. 1990, c. L.18; *Liquor Control Act*, R.S.P.E.I. 1988, c. L-14; *An Act Respecting Liquor Permits*, R.S.Q. c. P-9.1; *Alcohol and Gaming Regulation Act, 1997*, S.S. 1997, c. A-18.011, as amended; *Liquor Act*, R.S.Y. 2002, c. 140.
6. See footnote 7, *infra*.

the sale and distribution of liquor, not an omnipotent monopoly over it.[7] They do not contain a requirement that every person must sell his or her liquor to the provincial liquor board. It is only the IILA that does so and thereby creates provincial liquor monopolies.

These monopolies exist despite private liquor stores in Alberta, a few winery stores in wine-producing provinces, online sale of wine, and the sale of wine and beer in Quebec dépanneurs. Provincial liquor boards regulate these ostensibly private entities closely and collect a mark-up and taxes on their sales, even though the regulators take no risk on them.

So tight are these requirements that every time you go on a trip out of Canada and bring home a duty free bottle of wine or liquor, you are breaking the law. All that the personal exemptions applicable to persons returning to Canada for 1.5 litres of wine and 1.14 litres of alcohol do is relieve you from paying duty.[8] They do not exempt you from s. 3(1) of the IILA. Similarly, if you go to British Columbia or Montreal on business and bring home a bottle of wine or take your family on a car trip to Quebec and pack one to drink in your hotel room, you are breaking the law because you have failed to comply with s. 3(1) of the IILA.

Why should this be so? Why can Canadians not carry liquor from one province into another without breaking the law? And why in most provinces can Canadians not buy wine from someone other than a provincial liquor store? The answer to these questions is s. 3(1) of the IILA, which effects these limitations.

Why did Parliament enact the IILA? One reason is historic: Canada's old temperance politics described below. The other is financial: provincial governments obtain substantial revenue from

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7. *Gaming and Liquor Act*, R.S.A. 2000, c. G-1, para. 3(a); *Liquor Distribution Act*, R.S.B.C. 1996, c. 268, s. 2(2): "(2) The branch has the sole right to purchase, both in and out of British Columbia, liquor for resale and reuse in British Columbia in accordance with the provisions of the Importation of Intoxicating Liquors Act (Canada)"; *Liquor Control Act*, C.C.S.M., c. L160, s. 8(1)(b); *Liquor Control Act*, R.S.N.B. 1973, c. L-10 — no "objects" provision, no reference to "monopoly", provisions refer to "controlling" liquor; *Liquor Control Act*, R.S.N.L. 1990, c. L-18, s. 17(1)(a); *Liquor Act*, R.S.N.W.T. 1988, c. L-9, s. 56(1); *Liquor Control Act*, R.S.N.S. 1989, c. 260, s. 4(3); *Liquor Control Act*, R.S.O. 1990, c. L.18, s. 3(1)(b); *Liquor Control Act*, R.S.P.E.I. 1988, c. L-14, s. 7(b); *An Act Respecting Liquor Permits*, R.S.Q. c. P-9.1 — no "objects" provision, no reference to a monopoly; *The Alcohol and Gaming Regulation Act, 1997*, S.S. 1997, c. A-18.011, s. 12; *Liquor Act*, R.S.Y. 2002, c. 140, s. 8.

8. Canadian Border Services Agency, Memorandum D2-3-1, Personal Exemptions for Residents Returning to Canada.

their liquor monopolies. In 2007-2008, for example, they made some $5.4 billion from liquor sales.

Table 1: Revenue from Liquor Sales 2007-2008

Province	*Annual Report*	*Amount Transferred to Government*
Alberta	Alberta Gaming and Liquor Commission Annual Report 2007-08 p. 12	$678 million
British Columbia	British Columbia Distribution Branch Annual Report 2007-08 p. 9	$857 million
Manitoba	Manitoba Liquor Commission Annual Report 2008 p. 5	$219 million
New Brunswick	New Brunswick Liquor Corporation Annual Report 2007-08 p. 2	$145 million
Newfoundland and Labrador	Newfoundland and Labrador Liquor Corporation Annual Report 2008 p. 5	$125 million
Northwest Territories	Northwest Territories Liquor Commission & Liquor Licensing Board Annual Report 2006-2007 p. 5	$20 million
Nova Scotia	Nova Scotia Liquor Commission Annual Report 2008 p. 67	$289 million
Nunavut	N/A	N/A
Ontario	Liquor Control Board of Ontario Annual Report 2006-07 p. 5	$1.28 billion
Prince Edward Island	Prince Edward Island Liquor Control Commission Annual Report 2007-2008 p. 5	$40 million

Province	*Annual Report*	*Amount Transferred to Government*
Quebec	Societe des alcools du Quebec Annual Report 2007 p. 24	$1.40 billion
Saskatchewan	Saskatchewan Liquor and Gaming Authority Annual Report 2007-2008 pp. 7 and 19	$174 million
Yukon	Yukon Liquor Corporation Annual Report 2006-2007 p. 5	$9 million

Despite the reasons for the IILA, the presence of s. 121 in the Constitution invites an examination of whether it is constitutional.

This article does that by looking at two issues — what is a living tree and purposive interpretation of s. 121? And is the IILA constitutional in light of that interpretation? That analysis leads to the conclusion that the IILA is probably unconstitutional. Analysis of provincial jurisdiction over liquor also leads to the additional conclusion that provincial legislatures would not be able to replace s. 3(1) of the IILA by provincial legislation if it were to fall.

While there may be many arguments against changing Canada's system of liquor control — among them neo temperance and social responsibility concerns,[9] fear of opening the "national treatment"

9. See Eric Single, "The Impact of Privatization" (presentation at the Information Symposium on Alcohol Privatization/Deregulation, Toronto, November 20, 1995) [unpublished]; M. Swaine, "The Case for Privatization" (presentation at the Information Symposium on Alcohol Privatization/ Deregulation, Toronto, November 20, 1995) [unpublished]; G. Flanagan, *Sobering Result: The Alberta Liquor Retailing Industry Ten Years After Privatization* (Canadian Centre for Policy Alternatives and Parkland Institute, 2003); Consumers' Association of Canada — B.C., *Privatisation of BC's Retail Liquor Store System — Implications for Consumers* (2003); Robin Room, "The evolution of alcohol monopolies and their relevance for public health" (1993), 20 Contemp. Drug Probs. 169; Wine Council of Ontario, *The privatisation experience in North America: An overview* (manuscript. St. Catharines, Ontario, 1994); M. Her, N. Giesbrecht, R. Room and J. Rehm, "Privatizing alcohol sales and alcohol consumption: evidence and implications" (1999), 94 Addiction 1125; N. Giesbrecht and B. Mackenzie, "Alcohol retailing by government liquor boards in Canada in the 1990s", in E. Österberg, ed. *Themes from Finland* (International Seminar on Alcohol Retail Monopolies: Exchange of Information and Experience, Ivalo, Finland, September 21-23, 1999), pp. 47-82. Helsinki: National Research and

floodgates to imported wine and liquor and consequent loss of provincial revenue[10] — they are no answer to s. 121 nor do they alter the legal conclusion that the IILA is probably unconstitutional.

2. Constitution Act, 1867, Section 121

Since s. 121 appeared in Canada's legal firmament first and the IILA must be measured against it, it is necessary to begin with a consideration of this important provision. But how should one approach interpreting s. 121?

Since 1930, the Supreme Court has said that the Constitution is a "living tree" and must be interpreted accordingly. The living tree principle has been described as "a fundamental tenet" of constitutional interpretation.[11] Sankey L.C. in *Edwards v. Attorney General* said:[12]

> The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention;" *Canadian Constitutional Studies, Sir Robert Borden* (1922) p. 55.
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> Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.

This principle requires that s. 121 receive a "large and liberal interpretation" according to its terms. It precludes a court from

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Development Centre for Welfare and Health; Bjoern Trolldal, "An investigation of the effect of privatization of retail sales of alcohol on consumption and traffic accidents in Alberta, Canada" (2005), 100 Addiction 662; Bjorn Trolldal, "The Privatization of Wine Sales in Quebec in 1978 and 1983 to 1984" (2005), 29 Alcoholism: Clinical and Experimental Research 410; Norman Giesbrecht, "Alcohol policy in Canada: Reflections on the role of the alcohol industry" (2006), 23 Nordic Studies on Alcohol and Drugs 445; Roy Hrab, *Privatization Experience and Prospects* (2004) [unpublished, archived at University of Toronto Law Library].

10. See The North American Free Trade Agreement, Articles 300, 301, 312 and Annex 312.2; Canada-United States Free Trade Agreement, Articles 501, 502 and 801; General Agreement on Tariffs and Trade, Article III.
11. *R. v. Blais*, [2003] 2 S.C.R. 236 at para. 40, 230 D.L.R. (4th) 22, [2004] 11 W.W.R. 199.
12. *Edwards v. Attorney General* for Canada, [1930] A.C. 124 at p. 136 (J.C.P.C.).

reading any restrictions or qualifications into the wording that are not explicit.

The post-Charter Supreme Court has also held that provisions in the Constitution require a "purposive" or "purposeful" interpretation. In interpreting s. 25 of the Charter, Iacobucci J. said:[13]

> Our Court has given great importance to the need for purposeful interpretations. In *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56 . . . Iacobucci J. gives a detailed explanation of the rules of statutory interpretation, showing that one must first consider the wording of the Act, then the legislative history, the scheme of the Act, and the legislative context.

Let us now examine how s. 121 addresses free trade within Canada using Iacobucci J.'s analytical framework.

(1) The Wording, Legislative History and Context of Section 121

The key question is what did the framers mean by the word "free" as it is used in s. 121?

We know that until publication of the initial letters of the *Oxford English Dictionary* in 1884, the dictionary most often used in England was Dr. Samuel Johnson's *Dictionary of the English Language*.[14] This dictionary, in all likelihood, is the one used by Mr. Frank Reilly,[15] the draftsman of the *Constitution Act, 1867*, and shows the meaning of the words as he probably understood them.[16] It can be assumed

13. *R. v. Kapp*, [2008] S.C.J. No. 42 at para. 82 (QL), 294 D.L.R. (4th) 1, [2008] 2 S.C.R. 483.
14. Published in 1755 and then again in subsequent editions, Henry Hitchings, *Defining the World* (Picador, 2005), pp. 246-47; *Shorter Oxford English Dictionary*, 6th ed., preface (*SOED*).
15. Francis Savage Reilly was admitted as a member of Lincoln's Inn on November 17, 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 May 7, 1851 and was appointed Queen's Counsel on March 29, 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 August 27, 1883. He appears in Frederic Boase's *Modern English Biography*, A.B. Schofield's *Dictionary of Legal Biography 1845-1945* and Sir John Sainty's *A List of English Law Officers, King's Counsel and Holders of Patents of Precedence*.
16. The United States Supreme Court has used Dr. Johnson's dictionary many times to ascertain the meaning of words used in the U.S. constitution of 1787 and the Bill of Rights: *District of Columbia v. Heller*, 128 S. Ct. 2783 at pp.

therefore that the word "free" in s. 121 had the meaning commonly ascribed to it at the time.[17] In Dr. Johnson's dictionary, "free" is defined as follows:[18]

> FREE, adj.
> 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*.

The modern definition of "free" is just as wide. The relevant *SOED* definitions are as follows:[19]

> 11. Exempt from, or not subject to, some particular jurisdiction or lordship. Also, possessed of particular rights and privileges. ME.
> 13. Given or provided without charge or payment, gratuitous. Also, admitted, carried, or placed without charge or payment. ME.
> 14. Invested with the rights or immunities of or *of*, admitted to the privileges of or *of* (a chartered company, corporation, city or the like). LME. b Allowed the use or enjoyment *of* (a place etc.). L17.
> 15. Exempt from restrictions with regard to trade; not subject to tax, toll, or duty; allowed to trade in any market.

Looking at both the historical and contemporary definitions of "free" therefore leads to the conclusion that articles produced in one province should be able to cross provincial borders free from *any* legal or financial impediments or restrictions. That conclusion also

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2828 and 2849 (2008); *Baze v. Rees*, 128 S. Ct. 1520 at p. 1558 (2008); *Kelo v. City of New London*, 545 U.S. 469 at p. 508 (2005); *Eldred v. Ashcroft*, 537 U.S. 186 at p. 199 and 248 (2003); *Utah v. Evans*, 536 U.S. 452 at p. 475 and 492 (2002); *INS v. St. Cyr*, 533 U.S. 289 at p. 337 (2001); *Doc v. United States House of Representatives*, 525 U.S. 316 at p. 347 (1999); *United States v. Baj*, 524 U.S. 321 at p. 335 (1998); *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 at p. 638 (1997); *United States Term Limits v. Thornton*, 514 U.S. 779 at p. 858 (1995); *United States v. Lopez*, 514 U.S. 549 at p. 585 (1995); *Nixon v. United States*, 506 U.S. 224 at p. 230 (1993); *County of Allegheny v. ACLU*, 492 U.S. 573 at pp. 648-49 (1989); *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 at p. 295 (1989); *Morrison v. Olson*, 487 U.S. 654 at p. 719 (1988); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 at p. 536 (1952).

17. Interestingly, in the *Atlantic Smoke Shops* case referred to at footnote 33, 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.
18. 6th ed. (1785), s.v. "free" (quotations omitted).
19. *SOED*, *supra*, footnote 14, s.v. "free", 11 and 13-15 (quotations omitted).

accords with interpreting s. 121 in a large and liberal manner required by the living tree principle.

Now looking at the legislative history of s. 121, neither the Quebec Resolutions of 1864[20] nor the London Resolutions of 1866,[21] which were the bases for drafting the *Constitution Act, 1867*, contained any principle similar to s. 121 dealing with interprovincial trade of Canadian goods. Provisions similar to s. 121 did not appear in the Confederation documents until the undated Fourth Draft of the British North America Bill in early 1867. Clauses 69 and 70 of that draft stated:[22]

> 69. From and after the Union, the Customs and Excise Laws of each Province shall continue to be in force until altered by Parliament; and in any case where the duties enacted to be collected are the same, it shall be lawful for the Governor-General in Council, by proclamation to be issued from time to time, to declare that such goods, wares, and merchandises may be imported free into any port in the Kingdom of Canada from any of the Provinces of Ontario, Quebec., Nova Scotia, and New Brunswick, upon proof of having already paid duty, and in case where any larger duties are enacted in any Province, it shall be lawful for the Governor-General in Council in like manner to authorize the importation of such goods, wares and merchandise on payment of the difference of duty between the said Provinces.
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> 70. All articles, the growth or produce, or manufacture of the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, shall be admitted free into all Ports in Canada, from and after the Union.

A later version of those provisions was also found in the final draft of the British North America Bill, February 9, 1867. Clauses 124 and 125 of the final draft stated:[23]

> *Customs and Excise*
>
> 124. The Customs and Excise Laws of each Province shall continue in force until altered by Parliament: and in any Case where the Duties enacted to be collected on any Goods, Wares, or Merchandise are the same, the Governor-General in Council may from Time to Time, by Proclamation, declare that such Goods, Wares and Merchandise may be imported free into any Port in Canada from Ontario, Quebec, Nova Scotia, or New Brunswick, on Proof of Duty having been already paid thereon; and where larger Duties are leviable in any Province on any Goods, Wares, or Merchandise, the Governor-General in Council may

20. G.P. Browne, ed., *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969), pp. 153-65.
21. Browne, *ibid.*, at pp. 217-28.
22. Browne, *ibid.*, at pp. 278-301.
23. Browne, *ibid.*, pp. 302-37.

> from Time to Time, by Proclamation, authorize the Importation into Canada of such Goods, Wares, and Merchandise on Payment of the Difference of Duty.
>
> *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.

Sections 121 to 123 of the *Constitution Act, 1867*, enacted on March 29, 1867 were much differently worded than the two previous drafts:

> 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.
>
> 122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.
>
> 123. Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation.

Examination of the changes in wording between the fourth and final drafts and ss. 121 to 123 puts the intended meaning of s. 121 into perspective. It shows that, from the outset, the phrase "admitted free" was used to describe how interprovincial trade of Canadian products should be handled. It also shows that the "admitted free" formula was dropped from earlier drafts of s. 123 in describing how imported goods should be handled within Canada.

The use of the "admitted free" formula in s. 121 but nowhere else in the *Constitution Act, 1867* indicates that the framers of the Constitution intended special treatment for Canadian goods and no legal or financial impediments or restrictions on their interprovincial movement.

Now looking at the context of s. 121, the purpose of the *Constitution Act, 1867* was to unite Ontario, Quebec, New Brunswick and Nova Scotia into a new federal country to be called "Canada". In *Black v. Law Society (Alberta)*,[24] La Forest J. said: "A dominant intention of the drafters of the *British North America Act*

24. *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, 58 D.L.R. (4th) 317, [1989] 4 W.W.R. 1.

(now the *Constitution Act, 1867*) was to establish 'a new political nationality' and, as the counterpart to national unity, the creation of a national economy . . . The attainment of economic integration occupied a place of central importance in the scheme."[25] He continued, "The creation of a central government, the trade and commerce power, s. 121 and the building of a transcontinental railway were expected to help forge this economic union."[26]

Similar statements that one of the objects of Confederation was an economic union of the whole of Canada can be found in earlier Supreme Court decisions. In *Manitoba (Attorney General) v. Manitoba Egg and Poultry Assn.*,[27] Laskin J. (as he then was) said:[28]

> the Manitoba scheme cannot be considered in isolation from similar schemes in other provinces; and to permit each province to seek its own advantage, so to speak, through a figurative sealing of its borders to entry of goods from others would be to deny one of the objects of Confederation, evidenced by the catalogue of federal powers and by s. 121, namely, to form an economic unit of the whole of Canada: see the *Lawson* case.

In *Lawson v. Interior Tree Fruit and Vegetables Committee of Direction*,[29] Cannon J. said: "this legislation is an attempt to impose by indirect taxation and regulations an obstacle to one of the main purposes of Confederation, which was, ultimately, to form an economic unit of all the provinces in British North America with absolute freedom of trade between its constituent parts".[30]

Section 121, providing the ability to trade Canadian goods without hindrance, was therefore viewed by the framers of the Constitution as an essential ingredient in achieving a national economy. The ability to trade between provinces without legal or financial impediment was a national necessity.

Section 121 is found in Part VIII, "Revenues; Debts; Assets; Taxation" of the *Constitution Act, 1867*. It is widely separate from Part VI "Distribution of Legislative Powers", which distributes legislative authority between the Parliament of Canada and provincial legislatures. That separation is an intrinsic aid to interpretation indicating that the framers of the Constitution intended s. 121 to be a limit on both federal and provincial power.[31]

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25. *Ibid.*, at para. 46.
26. *Ibid.*
27. [1971] S.C.R. 689, 19 D.L.R. (3d) 169, [1971] 4 W.W.R. 705 (*Manitoba Egg*).
28. *Ibid.*, at p. 717.
29. [1931] S.C.R. 357, [1931] 2 D.L.R. 193.
30. *Ibid.*, at p. 373.
31. See text at footnote 52, *infra*.

This analysis, and especially the statements in the *Black* case and the *Egg Marketing* case, strongly suggests that all of Canada should be viewed as a free trade zone and that liquor has to be let into all parts of the zone without the imposition of legal or financial impediments at the borders of provinces. The purpose of s. 121 was to guarantee that such liquor, upon being taken into another province, is to be treated exactly in the same way as liquor manufactured in that province. In other words, there has to be a level playing field for manufacturers throughout the entire country.

It follows, and is not disputed, that once liquor is brought from one province into another without restriction at the border, its use must then be governed just as if it were local liquor. There is nothing in s. 121 that says that its owner is entitled to privileges that are not available to owners of local liquor. Once liquor is brought into a province, its use can be controlled by the applicable licensing regulations and laws restricting the use of liquor. For example, it could not be a defence to a charge of having an open bottle in a public place that the bottle contained liquor that was brought in from another province and the local laws restricting its use did not apply. The way liquor is regulated within a province has nothing to do with its admission into that province unless, of course, the regulation is colourable and really is a substitute for the imposition of a financial or legal impediment at the border.

If a person brings in liquor for his own personal use, there should be nothing in the IILA prohibiting him from using the liquor just as if it were local liquor. It is in this way that the IILA overreaches.

(2) Jurisprudence on Section 121

Over the years, the Supreme Court has given s. 121 two separate and distinct interpretations. The first is what will be described as "the *Gold Seal* interpretation" found in *Gold Seal Ltd. v. Alberta (Attorney General)*[32] *Atlantic Smoke Shops Ltd. v. Conlon*[33] and the majority judgment in *Murphy v. C.P.R.*[34] The second is described as "Rand J.'s purposive interpretation" found in his concurring judgment in the *Murphy* case, and in Laskin C.J.C.'s judgment in *Agricultural Products Marketing Act (Re)*.[35]

Beginning with the *Gold Seal* interpretation, the *Gold Seal* case[36]

32. (1921), 62 S.C.R. 424, 62 D.L.R. 62.
33. [1943] A.C. 550, [1943] 4 D.L.R. 81 (J.C.P.C.).
34. [1958] S.C.R. 626, 15 D.L.R. (2d) 145.
35. [1978] 2 S.C.R. 1198 (*APMA*).
36. *Supra*, footnote 32.

examined whether s. 152 of the *Canada Temperance Amending Act*,[37] which prohibited carrying liquor into Alberta, Saskatchewan or Manitoba, had been properly proclaimed. The Supreme Court held that an amending statute had made the dubious proclamation valid.[38] Gold Seal Limited, however, also argued that the prohibition violated s. 121. Duff J. disagreed:[39]

> 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.

Similarly, Mignault J. said:[40]

> 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.

Anglin J.'s comments on s. 121[41] were similar to Mignault J.'s.

In the *Atlantic Smoke Shops* case,[42] the issue was whether s. 121 was violated by New Brunswick's *Tobacco Tax Act*. The Privy Council applied the *Gold Seal* case interpretation, saying:[43]

> Sect. 121 was the subject of full and careful exposition by the Supreme Court of Canada in *Gold Seal, Ld. v. Attorney-General for Alberta* (4), where the question arose whether the parliament of Canada could validly prohibit the importation of intoxicating liquor into those provinces where its sale for beverage purposes was forbidden by provincial law . . . [T]heir Lordships agree with the interpretation put on the section in the *Gold Seal* case (4).

In the *Murphy* case, the issue was whether a prohibition in Canadian *Wheat Board Act* against farmers shipping wheat out of a province

37. S.C. 1919, c. 8 (10 Geo. V.)
38. *Supra*, footnote 32, at p. 435.
39. *Ibid.*, at p. 456.
40. *Ibid.*, at p. 470.
41. *Ibid.*, at p. 466.
42. *Supra*, footnote 33.
43. *Ibid.*, at p. 569.

was unconstitutional because it violated ss. 92(16) and 121 of the *Constitution Act, 1867*. The Supreme Court held that the Act was legislation in relation to trade and commerce under s. 92(2) and was therefore constitutional. The majority also applied the *Gold Seal* interpretation of s. 121 and held there was no violation because the Act did not impose any duties or charges.

Does the *Gold Seal* interpretation of s. 121, holding that the only things it prohibits are provincial customs duties or charges, make sense today? Probably not!

Part VIII of the *Constitution Act, 1867*, containing s. 121, comprises ss. 102 to 126, a potpourri of provisions. Apart from s. 121, none of those provisions relate to interprovincial trade of Canadian products. Section 121 does not contain the words "charges" or "custom duties". Only ss. 102, 123 and 126 mention "duties". Section 102 requires that after union all *ultra vires* duties continued to be received by a province go into the federal Consolidated Revenue Fund. Section 126 requires that after union all *intra vires* duties received by a province go into the provincial Consolidated Revenue Fund. The only references to "charges" are in ss. 102 and 103, which describe obligations that are "charges" to the Consolidated Revenue Funds.

Now consider ss. 121, 122 and 123 again:

> 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.
>
> 122. The Customs and Excise Laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada.
>
> 123. Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, or Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation.

Because Parliament has long since enacted customs and excise laws applicable to Canada as a whole, replacing colonial customs and excise laws, s. 122 must now be considered a spent provision. Section 123 provides that if before the union customs duties on any imported product were separately payable in any two provinces, after union it was only necessary to pay the customs duties once. Again, colonial

duties were replaced by federal duties after Confederation, so s. 123 must also be considered as spent.

Again, s. 121 does not mention either "customs duties" or "charges". It is certainly apparent that the framers of the Constitution were quite able to mention customs duties or charges when they wanted. The fact that they expressly mentioned them in other provisions but did not mention them in s. 121 is convincing evidence that they agreed and intended to allow Canadian products to cross provincial borders within Canada free of all legal and financial impediments, not just customs duties and charges.

The "admitted free" formula in s. 121, by itself, is further evidence that the framers agreed and intended that the application of s. 121 was to free interprovincial trade of Canadian products from all legal and financial impediments related to provincial borders, not just customs duties and charges.

In addition, Rand J. in the *Murphy* case and Laskin C.J.C. in the *APMA* case, two of Canada's greatest judicial minds, both avoided using the *Gold Seal* case's interpretation of s. 121. The use of Rand J.'s purposive interpretation in those two cases is a further indication that s. 121 is aimed at all legal and financial restrictions and impediments to interprovincial trade of Canadian goods, not just customs duties or charges.

In the twenty-first century, the *Gold Seal* case's interpretation of s. 121 would confine it to a meaningless role. That could not be a purposive or a broad and liberal interpretation. For these reasons, the Supreme Court should depart from the *Gold Seal* case interpretation of s. 121 in a proper case.

Turning now to Rand J.'s purposeful interpretation of s. 121, it is found in this passage in the *Murphy* case:[44]

> 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.

In the *APMA* case,[45] the issue was whether s. 121 was contravened by federal legislation controlling who could market eggs

44. *Supra*, footnote 34, at pp. 642.
45. *Supra*, footnote 35.

interprovincially, the number of eggs such persons could market, and the price at which they could sell them. Laskin C.J.C. said:[46]

> 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 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. Rand J. took a broader view of s. 121 in *Murphy v. C.P.R.,* where he said this, at p. 642:
>
> > I take s. 121 apart from customs duties to be aimed against trade regulation which is designed to place fetters upon, or raise impediments to, or otherwise restrict or limit, the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation, I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as indicents 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

46. *Ibid.*, at pp. 1267-268.

> 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.
>
> I would accordingly answer question 3 in the negative in respect of the statute as a whole and in respect of the provisions that were particularly impugned.

While both Rand J. and Laskin C.J.C. cited Rand J.'s purposive interpretation of s. 121, it must be said, with respect, that they both failed noticeably when it came to applying it to the legislation that they considered.

In the *Murphy* case,[47] Rand J. held that the prohibition against farmers in one province selling wheat in another did not violate s. 121. While he said that a trade regulation which in "its essence and purpose" related to a provincial boundary violated s. 121, he somehow held that a prohibition against selling wheat out of a province was not related to a provincial boundary. He said that to find otherwise would mean that:[48]

> 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. As the provinces are incompetent to deal with such a matter, the two jurisdictions could not complement each other by co-operative action: nothing of that nature by a province directed toward its own inhabitants could impose trade restrictions on their purchases from or sales of goods to other provinces. 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.

In effect, Rand J. suggested that economic and social objectives of federal legislation can trump s. 121, that is, trump the Constitution. Today, no one would agree with that. The pithy observation of La Forest J., Rand J.'s New Brunswick successor on the Supreme Court, that "the constitution must be read as it is, and not in accordance with the abstract notions of theorists" came only 34 years later.[49]

Looking at Rand J.'s reasoning after 50 years, one wonders how a rule that a farmer in Manitoba cannot sell his wheat to a customer in Ontario could be tied more closely to a provincial boundary. One also

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47. *Supra*, footnote 34.
48. *Ibid.*, at p. 643.
49. *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327 at p. 370, 107 D.L.R. (4th) 457, 66 O.A.C. 241.

wonders how that prohibition could limit or hinder the interprovincial wheat trade more restrictively.

In the *APMA* case[50] which, again, was about whether federal egg marketing controls violated s. 121, it is necessary to repeat part of Laskin C.J.C.'s earlier statement:[51]

> Accepting [Rand J.'s] 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.

Viewed 30 years later, one tries to understand how the power to control the sale of eggs from, say, Ontario to Quebec was not in its essence and purpose related to a provincial boundary. That egg marketing scheme was all about protecting provincial markets from eggs from other provinces. One also tries to understand how those restrictive powers were not legal hindrances to or restrictions on interprovincial trade.

Under a purposive application of s. 121, it may well turn out that Canada cannot have legislative schemes that take into account patterns of production in the various provinces in order to promote equity in the flow of trade. Equity in the flow of trade may not have been what the framers of the Constitution agreed to or intended; they may have simply intended free trade of Canadian products within Canada. After all, free trade was a leitmotif of economists in the 19th century, just as its grandchild "globalism" is today.

And despite Laskin C.J.C.'s statement that he found no "design of punitive regulation directed against or in favour of any Province", s. 121, by its terms, does not require a design of punitive regulation directed against or in favour of a province before it can be invoked. Its clear wording and purposive interpretation require it to be applied to any legal or financial requirement that restricts or limits interprovincial trade in Canadian products based on the existence of a provincial border.

Laskin C.J.C. in the *APMA* case, therefore, did not apply a purposive interpretation of s. 121.

Since neither Rand J.'s nor Laskin C.J.C.'s application of s. 121 reflect a purposive interpretation of s. 121, the Supreme Court should

50. *Supra*, footnote 35.
51. *Ibid.*, at p. 268.

depart from Rand J.'s opinion in the *Murphy* case and the *APMA* case in a court challenge to the IILA.

(3) Reach of Section 121

Finally, we should consider the constitutional reach of s. 121. The *Gold Seal* case, the *Atlantic Smoke Shops* case, the *Murphy* case and the *APMA* case show that otherwise valid federal legislation can be challenged as unconstitutional under s. 121. Section 121 therefore trumps federal legislation under any of the enumerated powers of s. 91 of the *Constitution Act, 1867*. But would it also trump federal legislation made under the Peace, Order and Good Government (POGG) clause in s. 91? The answer probably is "yes". To hold otherwise would be to hold that by invoking POGG, the federal Parliament could unilaterally override other provisions of the Constitution, beyond the incidental affection of provincial powers contemplated in *Attorney General of Ontario v. Canada Temperance Federation*.[52] The implications of such a holding, especially for Charter rights, would invite some serious discussion.

It is beyond question that provincial legislation too could be challenged under s. 121. That, however, has rarely happened because overreaching provincial legislation has usually been attacked using the federal trade and commerce power under s. 91(2) of the *Constitution Act, 1867*. Every provincial law that would violate s. 121 would also violate s. 91(2). Section 91(2), however, is a much more trodden path to constitutional challenge of provincial legislation than s. 121.

(4) Conclusions re Section 121

Rand J.'s purposive interpretation of s. 121 says that it prohibits regulation that places fetters upon or raises impediments to or otherwise restricts or limits the free flow of commerce across Canada as if provincial boundaries did not exist. He said that it allows some regulation in subsidiary features, in the terms of trade, but forbids trade regulation that in its essence and purpose is related to a provincial boundary.

In the *Black*, *Manitoba Egg* and *Lawson* cases, the Supreme Court said that the purpose of Confederation was to have a single economic union of the whole of Canada and that the Constitution should be

52. *Attorney General of Ontario v. Canada Temperance Federation*, [1946] A.C. 193 at p. 205, [1946] 2 D.L.R. 1.

interpreted in a manner furthering that purpose. This constitutional goal also informs Rand J.'s purposive interpretation.

Since 1928, societal changes along with the development of Canada's wine manufacturing industry in British Columbia, Ontario and Nova Scotia, the growth of other manufacturers of beverage alcohol and the increased mobility and sophistication of consumers throughout the country have made Canada, today, a different country from Canada in 1928. These changes too must be considered in applying Rand J.'s purposive interpretation of s. 121 to s. 3 of the IILA.

This analysis leaves Canadians with Rand J.'s purposive but unrequited interpretation of s. 121. It can be summarized by saying that s. 121 requires any federal or provincial statute to meet three requirements:

1. It may not levy provincial customs duties and charges or impose any trade regulation that places fetters on, raises impediments to or limits the free flow of Canadian goods across Canada as if provincial boundaries did not exist (Provincial Boundary Impediments).
2. It may regulate a free flow of Canadian goods in subsidiary features, in the incidents of trade (Subsidiary Features).
3. It may not impose a trade regulation on the movement of Canadian goods that in its essence and purpose is related to a provincial boundary (Related to a Provincial Boundary).

3. Constitutionality of the IILA[53]

It is now time to consider whether the IILA would be constitutional under Rand J.'s purposive interpretation, purposively applied.

(1) History

In the introduction, it was noted that the IILA resulted from old temperance politics in Canada. To understand the IILA's context, we need a thumbnail history of liquor regulation in Canada.

Initially, Canada-wide, the temperance movement supported by the Women's Christian Temperance Movement and the National Council of Women of Canada[54] forced a national referendum on

53. *Supra*, footnote 3.
54. Naomi Black and Gail Cuthbert Brandt, "Alcohol and the First Canadian Women's Movement" (1993), Revue Interdisciplinaires des Études Canadiennes en France 95 at p. 104.

prohibition in 1898. The temperance activists won the referendum by a narrow margin, but due to Quebec resistance the Laurier government refused to impose prohibition. The temperance battle then went provincial. An Ontario referendum on prohibition in 1902 defeated the temperance forces, but again only by a narrow margin. In 1918, citing the exigencies of World War I, the Borden government imposed Canada-wide prohibition from March 1918 until January 1920. Then, control of liquor returned to the provinces, although the federal government maintained a legislative ban on shipments to any dry province that asked for one.

In the early 1920s, while Quebec anti-prohibition sentiment continued, in Ontario a large and politically strong distilling industry was demanding to sell its products inside Canada. Those interests were in opposition to the temperance movement. Moreover, due to the ineffectiveness of the provincial governments at enforcing prohibition, liquor revenues were ending up in the hands of bootleggers. After a fierce political struggle between 1921 and 1927, all provinces, with the exception of Prince Edward Island, gave up attempts at temperance and opted for a model in which the government controlled the sale of liquor.[55]

In April 1928, to complement provincial control of liquor and give provincial boards a monopoly over the sale and distribution of liquor, the federal government enacted the IILA.[56] Subsection 3(1) became the lynchpin and means of synchronizing Canada's liquor control system. Materially unchanged from its initial enactment,[57] again, s. 3 states:[58]

55. Ruth Dupré, "Why Did Canada Nationalize Liquor Sales in the 1920s?: A Political Economy Story" (paper presented at the 42nd Annual Meetings CEA (Canadian Economics Association), Vancouver, June 6-8, 2008) [unpublished].
56. In *Air Canada v. Ontario (Liquor Control Board)*, [1997] S.C.J. No. 66 (QL) at para. 44, 148 D.L.R. (4th) 193, [1997] 2 S.C.R. 581, Iacobucci J., for the Supreme Court, commented on the IILA, s. 44: "As all the parties concede, and as the historical record makes clear, Parliament enacted the *IILA* to assist the provinces in their efforts to control the traffic in liquor. See *House of Commons Debates*, vol. II, 2nd sess., 16th Parl., April 27, 1928, at p. 2482." In *R. v. Gautreau* (1978), 88 D.L.R. (3d) 718 at p. 722, 21 N.B.R. (2d) 701, 42 C.C.C. (2d) 305 (C.A.), Hughes C.J.N.B. was even more frank. His description of the purpose of s. 3 of the IILA was as follows: "This prohibition was apparently enacted to supplement and protect the monopoly in intoxicating liquors in Provinces where the Government has assumed responsibility for regulating and controlling transactions in liquor within the Province."
57. S.C. 1928 (18th & 19th Geo. V), c. 31, s. 3.
58. Subsection 3(1) has some exceptions that are not material. The IILA also contains enforcement provisions.

> 3(1) Notwithstanding any other Act or law, no person shall import, send, take or transport, or cause to be imported, sent, taken or transported, into any province from or out of any place within or outside Canada any intoxicating liquor, except such as has been purchased by or on behalf of, and that is consigned to Her Majesty or the executive government of, the province into which it is being imported, sent, taken or transported, or any board, commission, officer or other governmental agency that, by the law of the province, is vested with the right of selling intoxicating liquor.

(2) Reach of the IILA

With that background in mind, what is the reach of the IILA? Constitutionally, is it really that important? These questions arise from the Supreme Court's decision in *Air Canada v. Ontario (Liquor Control Board)*[59] where Iacobucci J. offered a view that is problematic.

In the *Air Canada* case, the airline challenged the LCBO's right to levy mark-ups on liquor used on Air Canada's flights. It argued that the IILA did not apply because the liquor was not intended to be consumed in Ontario. Iacobucci J. held that since all liquor entering Ontario, whether intended for use in Ontario or not, could "potentially" come within provincial licensing, it was subject to the IILA. But Iacobucci J. also said:[60]

> [T]he *IILA* must accomplish something that it was not within the competence of the provinces to accomplish themselves. Otherwise, the *IILA* would be surplus legislation . . .
>
> The provision of the *Constitution Act, 1867* that authorizes the establishment of provincial liquor monopolies is s. 92(16). See *Attorney-General of Manitoba v. Manitoba Licence Holders' Association*, [1902] A.C. 73 (P.C.), at p. 78. That section gives the provinces jurisdiction over "[g]enerally all Matters of a merely local or private Nature in the Province". Section 92(16) has been understood to permit regulation by a province of the keeping of liquor within its boundaries. Indeed, s. 92(16) authorizes the provinces entirely to prohibit the keeping of liquor within their boundaries. See *ibid.* at pp. 74, 80. Therefore, federal assistance is not needed to close the borders of a province to liquor that is imported for storage.
>
> It follows that, even if the provinces do not have the authority to prohibit the importation of liquor — and the decision of the Privy Council in *Attorney-General for Ontario v. Attorney-General for the Dominion*,

59. *Supra*, footnote 56.
60. *Ibid.* at paras. 53-55, 57 and 58 (emphasis added).

> [1896] A.C. 348, at p. 371, established that provinces do not have that authority — they do have the authority to forbid its storage within provincial boundaries. See *R. v. Gautreau* (1978), 88 D.L.R. (3d) 718 (N.B.C.A.), at p. 722. *Thus, a province, by legislation of its own, may effectively limit commerce in alcohol to the mere carrying of spirits through its territory. By prohibiting the storage of alcohol on its territory, or by making that privilege contingent on the possession of a licence, the province can leave an importer with no choice but to bear his goods back out of the province. Obviously one who imports something into a jurisdiction where it is forbidden to store what he has imported must necessarily soon depart with his goods, because to stay would be to violate the prohibition.*
>
> . . . . .
>
> Nevertheless, my conclusions about the extent of provincial jurisdiction over the regulation of liquor are important for the implications that they have for the meaning of the *IILA*. As I have said, if the *IILA* does anything to assist the provincial liquor monopolies, it can only be by conferring on the provinces an authority that they do not have under the *Constitution Act, 1867*. And it appears on the basis of the foregoing that the only relevant authority that the provinces do not possess as a matter of constitutional law is the power to prohibit the carrying of alcohol through provincial territory. It is only this kind of importation, which does not involve the manufacture, keeping, sale, purchase, or use of liquor, that the provinces are not competent to prohibit on their own. *Accordingly, it follows that the IILA, to the extent that it makes any distinctively federal contribution to the securing of provincial liquor monopolies, employs the exclusive federal power over the importation of alcohol to consign to the provinces any alcohol that is carried through their territory.*
>
> In addition, of course, the *IILA* consigns to the provinces liquor that the provinces could consign to themselves; and indeed it is this role that the *IILA* plays in this appeal. *However, what is distinctive about the IILA is that it consigns to the provinces liquor that has only a transitory presence inside provincial boundaries.*

This reasoning is questionable because in *Attorney General for Ontario v. Attorney General for the Dominion*[61] and in *Attorney General of Manitoba v. Manitoba Licence Holders' Association*,[62] the Privy Council had held that provincial legislation may not affect *bona fide* liquor transactions between a person in one province and a person in another.[63] Iacobucci J.'s judgment basically ignores this constitutional principle, overlooking an important federal

61. [1896] A.C. 348 (J.C.P.C.) (*Local Prohibitions*).
62. [1902] A.C. 73 (J.C.P.C.) (*Manitoba Licence Holders*).
63. *Supra*, footnote 61, at pp. 364-65; *ibid.*, at pp. 79-80.

contribution made by the IILA. The Privy Council never said, as he said it did,[64] that s. 92(16) authorizes the province *entirely* to prohibit the keeping of liquor within their boundaries.

In result, therefore, the constitutional reach of the IILA is probably wider than Iacobucci J. indicates, but there is uncertainty about where the boundary lies because of his judgment.

(3) Constitutionality Analysis

Turning, now, to the question of whether the IILA violates s. 121, one must apply the elements of Rand J.'s purposive interpretation discussed earlier.

Looking at the first element, provincial boundary impediments, by its terms, s. 3 of the IILA uses the crossing of a provincial boundary as the trigger for imposing its requirements. It requires that liquor be sold to the liquor board of the receiving province if it is transported "into any province from or out of any place within . . . Canada". In addition, s. 59 of the *Excise Act, 2001* states: "For greater certainty, the *Importation of Intoxicating Liquors Act* continues to apply to the importation, sending, taking and transportation of intoxicating liquor *into a province*."[65]

Section 3 clearly impedes interprovincial trade in Canadian liquor; it is difficult to see how it does not. The requirement to sell to the liquor board of the receiving province prevents the free flow of Canadian liquor within Canada. It means that a licensed wine producer cannot sell to whom it wants at the price it wants and prohibits privity of contract between a seller in one province and customers in another. It prevents Ontario vintners from obtaining a licence, permit or authorization to offer wine for retail sale to consumers in other provinces in which such licences are available. It prevents a restaurant in Newfoundland from taking direct delivery of a case of wine from a British Columbia winery. It prevents an individual from taking home to Toronto wine purchased in the Okanagan. No one can seriously argue that the s. 3 restrictions do not fetter free interprovincial sales of Canadian wine and liquor.

Rand J.'s second element says that s. 121 allows regulation of subsidiary features of interprovincial trade and the "terms of trade". Presumably, Rand J. was thinking of regulations like those found in Part 4 of the *Excise Act, 2001* or the regulation of liquor store licence fees, store hours, required training of sales staff, security of retail premises covered in, say, the policies for Class D liquor retailers in

64. *Supra*, footnote 56, at para. 54.

65. *Excise Act, 2001*, S.C. 2002, c. 22, s. 59 (emphasis added).

Alberta — rules of general application to liquor within a province.[66] Section 3 of the IILA, however, goes well beyond regulation of such subsidiary features.

Last, one must apply Rand J.'s third element. As discussed in regard to provincial boundary impediments above, the IILA is a trade regulation that, in its essence and purpose, is related to a provincial boundary. As noted,[67] the IILA was enacted to complete provincial liquor board monopolies and protect the revenues therefrom. When it was enacted in 1928, it may not have been found to violate s. 121 because it complied with the *Gold Seal* interpretation, which was current at that time. However, time has passed the *Gold Seal* interpretation by and constitutional jurisprudence has made it obsolete.

For these reasons, one must conclude that the IILA appears to contravene s. 121 of the *Constitution Act, 1867* and must be unconstitutional. If challenged in the courts, the Supreme Court should have no other respectable choice but to strike the IILA down.

4. Constitutionality of Provincial Liquor Legislation

If the IILA is declared unconstitutional, it is doubtful whether provincial legislation could fill the gap and require liquor that comes into the province to be sold to the provincial liquor commission.

Provincial jurisdiction over liquor is not exclusive. *Russel v. The Queen*[68] held that the Parliament of Canada has jurisdiction to legislate with respect to liquor control under the POGG clause in s. 91 of the *Constitution Act, 1867* if the legislation is intended to "remedy an evil which is assumed to exist throughout the Dominion". That ruling was upheld in the *Canada Temperance Federation* case.[69] While the Canada temperance Acts upon which those cases were decided have now passed into history,[70] the jurisdiction of provincial legislatures over liquor is always subject to federal legislation under the POGG clause and to other provisions of the constitution and is therefore by no means exclusive.

In the *Local Prohibitions* case,[71] the Privy Council noted that provinces cannot prohibit the importation of liquor:[72]

66. *Alberta Gaming and Liquor Commission, Policies, Handbook Terms and Conditions & Operating Guidelines* at the AGLC website, <http://aglc.ca>.
67. *Supra*, footnote 56.
68. (1882), 7 App. Cas. 829.
69. *Supra*, footnote 52.
70. Repealed S.C. 1984, c. 40, s. 69.
71. *Supra*, footnote 61.
72. *Ibid.* at pp. 364-65.

> A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the province.

It did so again in the *Manitoba Licence Holders* case.[73]

The correlative conclusion is that a provincial law that does affect a sale of liquor by a person in one province to a person in another province would be *ultra vires* a provincial legislature.

If provincial legislatures cannot affect transactions in liquor between a person in one province and a person in another, it is forcefully arguable that any provincial requirement, intended to replace s. 3 of the IILA, requiring out-of-province producers to sell liquor brought into the province to the provincial liquor board would be unconstitutional for the same reasons.

Even if provincial powers are limited as just described, provinces would still be able to regulate liquor from outside the province as mentioned above. The new regime, however, would allow individuals in one province to buy liquor in another and bring it home legally. It would allow restaurants to buy their wine from producers or distributors in another province. It would allow merchants to open stores selling wines and liquor bought from producers and distributors in other provinces. It would allow individuals to buy liquor from whom they choose instead of from a provincial monopoly.

The province could still license liquor stores, regulate the sale and distribution of liquor and impose direct taxes authorized by the legislature on liquor sold, just as it does now. What it could not do is require that wine from another province be sold to the provincial liquor board. What it would lose is the mark-ups now charged on such liquor. Mark-ups are in addition to the taxes on liquor and are, in effect, hidden taxes but not ones that are ever reviewed or authorized by the legislature.

If a provincial government wanted to recover revenue lost by not being able to mark up liquor from out of the province, it could make the political decision whether to increase direct taxes on all liquor, including liquor sold in government stores, and submit that decision to the legislature. That could not be an objectionable outcome.

In summary, if the IILA were held unconstitutional, other forms of liquor control and regulation would need to be found. Canada is

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73. *Supra*, footnote 62.

capable of doing that even if it involves a lot of work. But surely it would be better to apply s. 121 in accordance with its purpose as the framers intended rather than to perpetuate flawed interpretations in order to save the IILA.

5. A Court Challenge?

The jurisprudence would present a high hill to climb for anyone thinking about using s. 121 to question the constitutionality of the IILA. The *Gold Seal* case, the *Atlantic Smoke Shops* case and the majority decision in the *Murphy* case are decisions of the highest authority and have stood a long time. Furthermore, in the *Murphy* case and in the *APMA* case, neither Rand J. nor Laskin C.J.C. explicitly stated that Rand J.'s purposive interpretation of s. 121 was the correct interpretation. It would be asking a lot to request a judge of first instance not to follow those decisions.

Those considerations though, while significant, do not preclude a successful court challenge because the Supreme Court continues to state that it is prepared to depart from its own precedents in suitable cases.[74] In *R. v. Binus*,[75] Cartwright J. said:[76]

> I do not doubt the power of this Court to depart from a previous judgment of its own but, where the earlier decision has not been made *per incuriam,* and especially in cases in which Parliament or the Legislature is free to alter the law on the point decided, I think that such a departure should be made only for compelling reasons.

It is hard to think of a more compelling reason for the Supreme Court to depart from old judgments than that they do not reflect a purposive interpretation of the Constitution. As we have now seen, the *Gold Seal* interpretation and the *Murphy* and *APMA* applications of s. 121 do not do so.

In the Supreme Court, a purposive argument, plausibility and a popular cause have often triumphed over well established laws.[77] A

74. See *Khosa v. Canada (Citizenship and Immigration)*, 2009 SCC 12 at para. 88; *R. v. Robinson*, [1996] 1 S.C.R. 683 at para. 46, 133 D.L.R. (4th) 42, [1996] 4 W.W.R. 609; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, 61 O.A.C. 1, 79 C.C.C. (3d) 257; *R. v. Salituro*, [1991] 3 S.C.R. 654, 50 O.A.C. 125, 68 C.C.C. (3d) 289; Canada (*Minister of Indian Affairs and Northern Development) v. Ranville*, [1982] 2 S.C.R. 518, 139 D.L.R. (3d) 1, 44 N.R. 616.
75. *R. v. Binus*, [1967] S.C.R. 594, [1968] 1 C.C.C. 227, 2 C.R.N.S. 118.
76. *Ibid.*, at p. 601.
77. This sentence was inspired by a passage from Kenneth Grahame, *The Wind in the Willows*, chapter XI: ". . . no criminal laws had ever been known to prevail against cheek and plausibility . . . combined with the power of a long purse."

constitutional challenge of the IILA under s. 121 would have all those elements.

6. Conclusion

Since 1928, the IILA has created provincial liquor monopolies and has prevented free interprovincial trade in Canadian wines and liquors. An evaluation of the Supreme Court's and Judicial Council's jurisprudence on s. 121 in light of the requirement that provisions of the Constitution be interpreted purposively and consistently with a contemporary developing society and on the extent of provincial jurisdiction over liquor, however, leads one to the conclusion that those decisions do not reflect either a purposive interpretation of s. 121 or its proper application. When the IILA is tested against a purposive interpretation of s. 121, it obviously violates it, leading to the conclusion that the IILA is probably unconstitutional. Since provincial jurisdiction over liquor is not complete, if the IILA were to fall what would happen is not immediately clear, but such a holding would result in new forms of liquor regulation in Canada.