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"

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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.