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R. v Comeau and Section 121 of the Constitution Act, 1867: Freeing the Beer and Fortifying the Economic Union

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A recent decision from the New Brunswick Provincial Court may have significant implications for Canada's constitutional structure. R. v. Comeau held that s. 121 of the Constitution Act, 1867, the constitution's internal free trade provision, prohibits both interprovincial tariffs as well as non-tariff trade barriers. In doing so, the court departed from a line of precedents holding that s. 121 prohibits only the erection of outright tariffs or duties on interprovincial trade. Ultimately, the court held that s. 134(b) of New Brunswick's Liquor Control Act, which effectively prohibits the possession of all but small quantities of liquor purchased out of province, constituted a non-tariff barrier in contravention of s. 121. The Supreme Court of Canada recently granted leave to appeal. The author argues that the judge was correct in holding that s. 121 should extend at least to some non-tariff barriers. Yet the decision leaves important questions unanswered, including how s. 121 can be reconciled with provincial regulatory authority, how a construction of s. 121 should be informed by the constitutional principles of democracy and federalism, and how doctrine can be developed so as to appropriately distinguish between permissible and impermissible non-tariff barriers. The author proposes a framework that aims to reconcile the trial judge's analysis with these additional considerations.

Une décision récente de la Cour provinciale du Nouveau-Brunswick pourrait avoir d'importantes conséquences pour la structure constitutionnelle du Canada. Dans R. c. Comeau, le tribunal a déclaré que l'art. 121 de la Loi constitutionnelle de 1867, disposition de la Constitution traitant du libre-échange intérieur, interdit tant l'imposition de droits tarifaires interprovinciaux que les barrières non tarifaires au commerce. Ce faisant, le tribunal s'est éloigné de la jurisprudence qui soutient que l'art. 121 interdit uniquement l'imposition de tarifs ou droits tarifaires sur le commerce interprovincial. En fin de compte, le tribunal a jugé que le par. 134(b) de la Loi sur la réglementation des alcools du Nouveau-Brunswick, qui interdit carrément la possession d'alcool acheté ailleurs que dans la province, sauf de très petites quantités, constitue une barrière non tarifaire, en contravention de l'art. 121. La Cour suprême du Canada a récemment accordé la permission d'en appeler de la décision. L'auteur fait valoir que le juge a eu raison de considérer que l'art. 121 doit s'appliquer au moins à certains obstacles non tarifaires. La décision laisse néanmoins d'importantes questions en suspens : comment l'art. 121 peut-il être rapproché de l'organisme de réglementation provincial, comment une interprétation de l'art. 121 devrait-elle s'inspirer des principes constitutionnels de démocratie et de fédéralisme, et comment la doctrine peut-elle être développée de façon à ce que la distinction appropriée puisse être faite entre les obstacles non tarifaires admissibles et les obstacles inadmissibles. L'auteur propose un cadre qui vise à concilier l'analyse du juge de première instance et ces considérations additionnelles.

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Introduction

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Introduction

On 29 April 2016, the New Brunswick Provincial Court released a decision with unusually significant implications for the political and economic structure of Canadian federalism.¹ Though sometimes referred to as the New Brunswick beer case,² because it involved a prosecution for possession of beer imported from another province, *R. v. Comeau* is about a lot more than just alcoholic beverages. Put simply, the case concerned whether section 121 of the *Constitution Act, 1867* prohibits only the levying of outright tariffs or duties on interprovincial trade, or whether it also extends in some manner to bar non-tariff trade barriers, which can include essentially any measure that serves to disadvantage trade from outside a jurisdiction.³ Non-tariff barriers range from production and sale quotas, to inspection requirements, to licensing schemes and other regulatory standards that differ from one jurisdiction to the next. In *Comeau*, the barrier in question was an effective ban on possession of modest quantities of liquor purchased outside of New Brunswick.

Section 121 reads: “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.” Despite the open-ended wording of section 121, several cases from the Privy Council and Supreme Court of Canada, starting with *Gold Seal v. Alberta*, have construed the provision in a restrictive manner, to prohibit only the erection of tariffs or duties on

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1. *R v Comeau*, 2016 NBPC 3 [*Comeau*].

2. See, e.g., “New Brunswick judge dismisses charges in cross-border beer case” (29 April 2016), online: Toronto Star <www.thestar.com>.

3. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 121.

interprovincial trade.⁴ The trial judge in *R v. Comeau*, however, departed from this line of precedent, relying on the “new evidence” exception to vertical *stare decisis* articulated in *Canada v. Bedford* and *Carter v. Canada*.⁵ Judge Ronald LeBlanc held that the text, historical context, and purpose of section 121 all lead to an interpretation that extends to both tariff and non-tariff trade barriers. In relation to the case before the court, that meant holding that s. 134(b) of the New Brunswick *Liquor Control Act*, which prohibits possession of more than a small quantity of alcohol not purchased from the New Brunswick Liquor Corporation, violates section 121 of the *Constitution Act, 1867*.⁶ The defendant, a New Brunswick man who had been charged under section 134(b) for stocking up on cheap beer in Québec and then returning to New Brunswick, was therefore acquitted.

The provincial Crown sought leave to appeal the acquittal directly to the New Brunswick Court of Appeal, attempting to bypass the Court of Queen’s Bench.⁷ Remarkably, the Court of Appeal refused to grant leave.⁸ The Crown then sought leave to appeal to the Supreme Court of Canada, which the court granted on 4 May 2017.⁹ The rather unusual result is that the Supreme Court will hear an appeal on the merits of a case that comes to it directly from a provincial court, a fact that underscores the importance of the case. Indeed, given the amount of economic regulation in Canada today that gives rise to non-tariff barriers to interprovincial trade, both directly via overtly protectionist measures and indirectly via such mechanisms as variable provincial production, transportation, and licensing standards, this case could be one of the most significant the court hears in the coming year.

The *Comeau* trial decision has already been the subject of significant media commentary, much of it focusing on the implications for

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4. *Gold Seal Ltd v Alberta (Attorney-General)* (1921), 62 SCR 424 at 456, Duff J, 466, Anglin J, and 469-470, Mignault J [*Gold Seal*]; *Atlantic Smoke Shops Limited v Conlon*, [1943] AC 550 at 567-570, Viscount Simon LC, [1943] 4 DLR 81 (PC) [*Atlantic Smoke Shops*]; *Murphy v CPR*, [1958] SCR 626 at 634, Locke J, but see 638-643, Rand J, concurring, 15 DLR (2d) 145. See also *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198 at 1224, 1261, 1266-1268, Laskin CJC, 84 DLR (3d) 257 [*Agricultural Products Marketing Reference*], in which Laskin CJC, writing for four of nine judges, applies an approach to s 121 that is not restricted to tariffs. Other cases dealing with s 121 include *R v Nat Bell Liquors Ltd*, 1922 [2] AC 128 (PC); *Little v Attorney-General of British Columbia* (1922), 65 DLR 297 (BC CA).

5. *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 38-44, [2013] 3 SCR 1101 [*Bedford*]; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44, [2015] 1 SCR 331 [*Carter*].

6. *Liquor Control Act*, RSNB 1973, c L-10.

7. Kevin Bissett, “New Brunswick will appeal “groundbreaking” court decision that tossed limits on alcohol importing” (27 May 2016), online: National Post < www.nationalpost.com >.

8. *R v Comeau*, [2016] NBJ No 232 (CA).

9. *R v Comeau*, [2017] SCCA No 25.

interprovincial alcohol sales specifically.¹⁰ Some coverage, though, also acknowledges the effect a holding like this could have on a range of other regulatory schemes that interfere with interprovincial trade, including supply-managed agriculture.¹¹ In addition, academic commentators and others have noted the markedly originalist orientation of the decision, in the sense that the trial judge devotes a great deal of his judgment to the legislative history and historical context of section 121.¹² The trial decision came at an auspicious time, only a month and a half before a Senate report that called for the dismantling of interprovincial trade barriers and specifically recommended a reference to the Supreme Court of Canada on interprovincial trade barriers and the meaning of section 121.¹³ A motion brought by the Official Opposition in the House of Commons similarly called for a Supreme Court reference on section 121.¹⁴ Political momentum towards reducing interprovincial trade barriers has only continued to grow, as evidenced by the recently concluded federal-provincial *Canadian Free Trade Agreement*.¹⁵

This paper will argue that the trial judge in *Comeau* makes a compelling case that the text, historical context, and purpose of section 121 all favour an interpretation that extends both to tariffs and at least to some non-tariff trade barriers. However, as has been observed elsewhere,¹⁶ *Comeau* also leaves questions unanswered. Perhaps most significantly, the judgment

10. See, e.g., Alan White, "New Brunswick judge throws out cross-border booze limits" (29 April 2016), online: CBC News <www.cbc.ca/news>; Shane Fowler, "New Brunswickers thirsty for cheap Quebec booze after court ruling" (2 May 2016), online: CBC News <www.cbc.ca/news>; Kevin Bissett, "Beer sales in Quebec boost after New Brunswick cross-border ruling" (2 May 2016), online: Toronto Star <www.thestar.com>; Graham Slaughter, "Uncorking old laws: Canadian wine could soon be sold across provinces, lawyer says" (29 April 2016), online: CTV News <www.ctvnews.ca>.

11. Marni Soupcoff, "The Comeau decision is a 'big deal,' as it could lead to free trade in all of Canada" (2 May 2016), online: National Post <www.nationalpost.com>.

12. Benjamin Oliphant, "Originalism, Beer, and Interprovincial Trade Barriers" (6 May 2016), online: Policy Options <policyoptions.irpp.org/>; "A toast to Canadian history, freer trade and cheaper beer" (4 May 2016), online: Macleans <www.macleans.ca>. For other views on the case, see Asher Honickman, "A Marriage Made in Britain: Section 121 and the Division of Powers" (21 October 2016), online: Advocates for the Rule of Law <www.ruleoflaw.ca>; Mark Mancini, "The Comeau Decision is a Welcome Example of Serious Doctrinal Analysis" (3 August 2016), online: Advocates for the Rule of Law <www.ruleoflaw.ca>.

13. Senate, Standing Senate Committee on Banking, Trade and Commerce, *Tear Down These Walls: Dismantling Canada's Internal Trade Barriers* (June 2016) (Chair: David Tkachuk) [Senate Internal Trade Report].

14. House of Commons Debates, 42nd Parl, 1st Sess, No 72 (14 June 2016) at 1020; Laura Payton, "Liberals vote down 'free-the-beer' motion" (15 June 2016), online: CTV News <www.ctvnews.ca>.

15. Janyce McGregor, "Premiers reach 'unprecedented' Canadian free-trade deal in Whitehorse," *CBC News* (22 July 2016), online: <www.cbc.ca/news>; *Canadian Free Trade Agreement (Consolidated Version)* (2017), online: Internal Trade Secretariat <<http://www.ait-aci.ca>>.

16. Oliphant, *supra* note 12; Gary Gillman, "The Comeau case is not quite a game changer" (2 June 2016), online: National Post <www.nationalpost.com>.

fails to outline how, exactly, constitutional doctrine can be developed so as to prohibit *some* non-tariff trade barriers while still leaving space for provincial and federal regulatory activity that affects interprovincial trade. This is an important question. The very existence of regulatory regimes that differ from one province to the next adds costs to interprovincial trade and thus gives rise to non-tariff trade barriers. Presumably, section 121 cannot extend so far as to mandate a completely laissez-faire approach to economic regulation. The prospect of developing doctrine to deal with non-tariff barriers raises further questions not addressed by the trial judge. One might ask how a robust interpretation of section 121 will fit within the structure or “architecture” of the Constitution,¹⁷ including the existing balance between provincial jurisdiction over property and civil rights and the federal trade and commerce power. Relatedly, questions arise as to the role of constitutional principles such as democracy and federalism, which may be implicated given the potential for constitutional doctrine in this area to restrict the ability of democratic majorities—especially at the provincial level—to regulate the economy. Finally, by relying so heavily on originalist reasoning, Judge LeBlanc’s judgment might raise questions from those who favour a “progressive” interpretation of the Constitution. His reasons do not address the question of how changes in the values and structure of the Constitution might inform a construction of the provision based on text, original purpose and historical context alone.¹⁸

This paper will proceed in five parts. In the next section, I briefly summarize the key elements of the decision. Section II provides a preliminary evaluation of the decision. Leaving aside questions relating to vertical *stare decisis*, I argue that the trial judge is right to claim that the text, purpose and context of section 121 all favour an interpretation that extends to some non-tariff barriers. However, I also argue that he

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17. To use the language of the *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 [*Senate Reference*].

18. It should be noted that the degree and scope of relevance of changes of this nature is contested. For instance, the claim that the Supreme Court of Canada has definitively rejected “originalist” reasoning in constitutional cases has recently been persuasively called into question. See Benjamin Oliphant & Léonid Sirota, “Has the Supreme Court of Canada Rejected ‘Originalism’?” (2016) 42:1 *Queen’s LJ* 106; Léonid Sirota & Benjamin Oliphant, “Originalist Reasoning in Canadian Constitutional Jurisprudence” 49:3 *UBC L Rev* [forthcoming in 2017]. As noted by Oliphant & Sirota, however, many forms of “new” originalism do acknowledge the potential relevance of non-textual factors like constitutional structure and principles to constitutional adjudication. For instance, these factors might be relevant to the development of constitutional doctrine where the original public meaning of the text employs vague or open-textured language. The analysis that follows in this article is thus potentially relevant both on a “living constitutionalist” approach and on an “originalist” approach that acknowledges the potential for the constitutional text to underdetermine outcomes in specific cases, including possibly in relation to the development of doctrine on non-tariff barriers.

leaves important questions unanswered, including those relating to constitutional structure, constitutional values, the possible imperatives of a “progressive” interpretation of the Constitution, and, ultimately, how to develop doctrine in relation to non-tariff barriers. The rest of the paper seeks to provide answers to these questions. Section III outlines the policy objectives underlying a constitutional free trade provision, arguing that section 121 aims at both the economic goal of increased prosperity as well as political objectives relating to national unity. This section sets up a tension between the objectives of the provision on the one hand, and the competing principles of democratic governance and the federal structure of the Constitution, on the other. Any interpretation of section 121 must seek to resolve this tension in an appropriate manner, within the constraints imposed by the text of the Constitution. Section IV of the paper then looks to comparative constitutional jurisprudence for illustrations of how this kind of tension can be resolved. Both Australia and the United States have constitutional jurisprudence barring both interstate tariff and non-tariff trade barriers. This section looks to see what lessons can be derived from those countries’ constitutional doctrines relating to non-tariff barriers.

Section V draws upon the theoretical and comparative analysis in the preceding sections, and proposes a means of reconciling the text and purpose of section 121 with Canada’s constitutional structure and principles. I argue that the essence of section 121 is a prohibition against discriminatory protectionism in relation to interprovincial trade. Accordingly, a conceptual distinction should be drawn between two types of measures, which should be assessed differently. Measures that discriminate on their face against interprovincial trade, either by relying on geographic distinctions directly or by using geographic proxies, should be subject to exacting scrutiny. Such measures should only be upheld if they are necessary for the achievement of a significant, non-protectionist policy objective. By contrast, measures that do not rely on geographic distinctions, either directly or through proxies, but which nevertheless negatively affect interprovincial trade, should be subject to a less exacting review. These measures should be upheld so long as they bear a rational and functional relationship to the achievement of a valid, non-protectionist objective. This provides an interpretation consistent with the text and purpose of section 121, but which also respects provincial legislative authority and the constitutional values of democracy and federalism. Finally, while section 121 should be interpreted so as to provide reasonable guards against protectionist provincial legislation affecting interprovincial trade, I also argue that section 121 does not restrict Parliament’s section 91(2) power over trade and commerce. This is consistent with the text of

section 91 of the *Constitution Act, 1867*, which states that Parliament's section 91 powers exist "notwithstanding anything in this Act." It is also consistent with constitutional principles of democracy and federalism in that it ensures that a democratic body not beholden to provincial interests is able to regulate interprovincial trade in the public interest.

I. *The decision*

Comeau was the product of a two-day enforcement operation undertaken by the RCMP Campbellton Detachment. The operation targeted New Brunswickers who entered Québec to buy liquor and then returned to New Brunswick. While this was apparently a common practice in the area, in light of the lower prices available on the Québec side of the border, the practice seemed to contravene section 134(b) of the *Liquor Control Act*, which states: "Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall... (b) have or keep liquor, not purchased from the Corporation."¹⁹ Section 43 of the Act provides an exemption for small quantities of out-of-province liquor, namely an amount under one bottle of liquor or twelve pints of beer.²⁰ The defendant, Gérard Comeau, travelled from his home in New Brunswick to the Québec side of the border, where he was observed entering stores that sold liquor. Upon crossing the bridge back to New Brunswick, his car was pulled over by the RCMP, at which time they discovered 15 cases of beer and three bottles of spirits. These were seized, and Comeau was issued a ticket under section 134(b), an offence with a minimum fine of \$240.²¹

At trial, Comeau's principal argument was that section 134(b) of the provincial Act constitutes a barrier to interprovincial trade which contravenes section 121 of the *Constitution Act, 1867*. The main obstacle to the success of this argument was a series of precedents from the Supreme Court of Canada and Judicial Committee of the Privy Council, starting with *Gold Seal*, which held that section 121 prohibits only the establishment of duties or tariffs on interprovincial trade.²² Since the trial judge ultimately concluded that section 134(b) could not be construed as a tariff,²³ he was forced to consider whether section 121 also prohibited non-tariff trade barriers. The "barrier" in question in this case was an effective

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19. *Supra* note 6.

20. *Ibid.*

21. *Comeau*, *supra* note 1 at paras 9, 13.

22. *Gold Seal*, *supra* note 4 at 456, 466, and 469-470; *Atlantic Smoke Shops*, *supra* note 4 at 567-570; *Murphy v CPR*, *supra* note 4 at 634.

23. *Comeau*, *supra* note 1 at paras 166-168.

prohibition on possession of certain amounts of alcohol purchased outside the province. Given that the defendant was charged only under provincial legislation, the trial judge declined to assess the constitutionality of section 3 of the federal *Importation of Intoxicating Liquors Act*, which prohibits the act of importing liquor into a province except on behalf of the government of the province in question.²⁴

Judge LeBlanc begins his analysis by considering how to interpret section 121 from first principles, only later going on to contend with the precedents in the *Gold Seal* line of cases. He sets out general statements of constitutional interpretation, endorsing a progressive and purposive interpretation, with proper regard to the text, legislative history, scheme of the Act, and legislative context.²⁵ Noting first that the wording of section 121 does not qualify the term “admitted free” in any manner that would limit its application to tariffs or duties,²⁶ Judge LeBlanc observes that over the course of its drafting history, restrictions on the scope of the provision were actually removed. For instance, while the provision initially referred to goods being admitted free “into all Ports in Canada,” it later read “into each of the other Provinces.”²⁷ Perhaps most persuasively, the judge, relying on expert historical evidence, notes that the language of the provision mirrors the language of pre-Confederation reciprocal free trade statutes among the British North American colonies, with an important difference. While the pre-Confederation enactments provided that articles of “growth, production or manufacture” were to be admitted “free from Duty,” section 121 states that they are to be “admitted free,” without the “duty” qualifier.²⁸ The judge finds this to be a significant indication going to the meaning of the provision, showing that it was not limited in scope to the removal of tariff-based trade barriers.²⁹ While the judge acknowledges that section 121 is found in Part VIII of the *Constitution Act, 1867*, entitled “Revenues, Debts, Assets, Taxation,” he does not regard this as limiting the scope of section 121 to fiscal matters. Rather, Part VIII is said to be the best fit for section 121, a provision that does not easily fit in any of the other sections of the *Constitution Act, 1867*.³⁰

Having concluded that the text of the provision suggests an interpretation that extends beyond tariffs, the judge goes on to consider

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24. RSC 1985, c 1-3; *ibid* at paras 19-20.

25. *Comeau*, *ibid* at paras 41-48.

26. *Ibid* at paras 53, 177.

27. *Ibid* at para 60.

28. *Ibid* at paras 61-62.

29. *Ibid* at paras 63, 179-181.

30. *Ibid* at para 68.

the historical context of the Act. Again relying on expert evidence, he notes that the creation of a free trade area was a central political concern at the time of Confederation, and that the mid-19th century was a time of widespread belief in the free trade, particularly in Britain and its colonies.³¹ More particularly, the trial judge observes that Canadian politicians at the time of Confederation were aware of the importance of removing both tariff and non-tariff trade barriers, in light of the use of non-tariff “search and detain protocols” by the United States under the Reciprocity Treaty that was in force from 1854 to 1865.³² Citing contemporary speeches by politicians outlining the centrality of an internal free trade area to the Confederation project, along with the historical context more generally, the trial judge holds that the purpose of section 121 was to provide for a robust conception of free trade, extending to non-tariff barriers.³³

While the text, purpose, and historical context of section 121 are all said to indicate that it is not limited to tariffs, the trial judge acknowledges precedent from the *Gold Seal* line of cases to the effect that the provision should be so limited. However, Judge LeBlanc then goes on to consider the exception to vertical *stare decisis* that the Supreme Court laid out in *Bedford* and *Carter*.³⁴ This exception allows trial courts to reconsider settled rulings of higher courts “where a new legal issue is raised” or “where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.”³⁵ The trial judge concludes that there was neither a truly new legal issue raised before him, nor have “new circumstances” arisen since *Gold Seal*.³⁶ However, the trial judge holds that he was presented with “new evidence” in the case, relating to “the drafting of the *British North America Act*, the legislative history of the Act, the scheme of the Act, and its legislative context.”³⁷ This evidence was not before the court in *Gold Seal*, where the court dealt with section 121 in a rather perfunctory manner.³⁸ Accordingly, following *Bedford* and *Carter*, the trial judge determines that the court should not be bound by the *Gold Seal* line of precedent in interpreting section 121.³⁹ While the judge was also presented with some evidence that the court in *Gold Seal* was

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31. *Ibid* at paras 81, 89.

32. *Ibid* at paras 78-80.

33. *Ibid* at paras 90, 101, 182-186.

34. *Bedford*, *supra* note 5 at paras 38-44; *Carter*, *supra* note 5 at 44.

35. *Comeau*, *supra* note 1 at paras 119-120, citing *Carter*, *ibid*.

36. *Comeau*, *ibid*, at paras 123-124.

37. *Ibid* at para 125.

38. *Ibid* at paras 115-116.

39. *Ibid* at para 125.

improperly influenced by the federal Justice Minister, he does not rely on this as a basis for revisiting the decision.⁴⁰

Ultimately, Judge LeBlanc holds that section 121 prohibits the erection of both tariffs *and* non-tariff barriers to trade.⁴¹ While he acknowledges that this finding may significantly limit provincial legislative authority, and disrupt long-standing arrangements relating to economic policy in this country,⁴² he concludes that a faithful interpretation of the provision requires such an approach. He holds that section 134(b) constitutes a trade barrier in contravention of section 121 of the *Constitution Act, 1867*, and is therefore of no force or effect. The charge against Comeau is consequently dismissed.

II. *Unanswered questions*

This is a startling opinion in a number of respects. Of course, the very fact that the court explicitly departs from what it regards as binding precedent makes it unusual,⁴³ although perhaps not as unusual as it might have been prior to *Bedford*. Whether historical evidence relating to the drafting history and historical context of a constitutional provision can be said to constitute “new evidence” for the purposes of *Bedford* is an open question. The Supreme Court in that case, and in *Carter*, seemed more concerned with new evidence going to the nature and proportionality of *Charter* infringements than evidence going to the drafting history and historical context of a constitutional provision. There may be no principled reason to exclude this type of evidence from the “new evidence” exception, but this is a question that may have to be addressed on appeal.

40. *Ibid* at para 190.

41. *Ibid* at para 191.

42. *Ibid* at paras 156-161.

43. It is worth noting that the question of whether the court was actually bound by the *Gold Seal* interpretation of s 121 is at least somewhat ambiguous. It is true that the majority opinions in *Gold Seal* and two subsequent high court cases adopt an approach to s 121 that would prohibit only tariffs. *Gold Seal*, *supra* note 4 at 456, 466, 469-470; *Atlantic Smoke Shops*, *supra* note 4 at 567-570; *Murphy v CPR*, *supra* note 4 at 634. However, in *Murphy v CPR*, Rand J, in a concurring opinion, articulates an approach to s 121 that encompasses non-tariff barriers. *Supra* note 4 at 638-643. In his view s 121 prohibits measures that restrict trade and that in their “essence or purpose” relate to a provincial boundary, regardless of whether they constitute a “tariff.” He contrasts such measures with those that regulate mere “incidents” of trade, which are permitted. In the most recent Supreme Court of Canada case to deal with s 121, the *Agricultural Products Marketing Reference*, Laskin CJC, writing for four of nine judges, applies and appears to endorse Rand J’s approach, though he also mentions the more restrictive interpretation from *Gold Seal*. Referring to Rand J’s concurring opinion, he writes: “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.” *Supra* note 4 at 1268, emphasis in original. Pigeon J’s majority opinion in the *Agricultural Products Marketing Reference* is essentially a gloss on Laskin CJ’s opinion, and does not address s 121 at all. While Laskin CJC was not technically writing for a majority in the *Agricultural Products Marketing Reference*, he was not contradicted by the majority in relation to s 121.

Beyond issues relating to vertical *stare decisis*, the *Comeau* decision is also startling in its potential policy implications, and in the potential uncertainty it portends. The trial judge acknowledges this, stating at various points that “[t]he interpretation of section 121 sought by the defence amounts to a request to this Court to dismantle a regime that has been in place since the inception of the Constitution in 1867,” and “...interpreting section 121...as permitting the free movement of goods among the provinces without barriers, tariff or non-tariff, will have a resounding impact.”⁴⁴ Despite the significant potential policy implications of the decision, the trial judge offers little in the way of clarity as to specifically *how* impermissible non-tariff barriers are to be identified, at one point noting simply that “[h]ow this would play out would no doubt be the subject of much political maneuvering and court interpretations.”⁴⁵ This is probably true, but setting out a framework for analysis might have helped reduce the associated uncertainty.

All that said, the analysis of section 121 offered by the trial judge in light of the text, purpose and historical context of the provision is actually quite persuasive. The ultimate source for many of the arguments and evidence put forward at trial and accepted by the court appears to be a series of articles on section 121 by Ian Blue.⁴⁶ In these articles, Blue, like the trial judge, relying mostly on the drafting history, historical context, purpose, and text of section 121, argues that section 121 was misinterpreted in *Gold Seal*. A purposive interpretation of section 121, according to Blue, would encompass both tariff and non-tariff trade barriers.⁴⁷

It is difficult to contradict the arguments of Blue and the trial judge on these specific points. The plain meaning of section 121 is not restricted to tariffs. The text says goods are to be “admitted free,” and tariffs are only one way that free trade can be impeded. This position is reinforced by the drafting history, which seems to indicate that the narrower “free from duty” language from colonial free trade enactments would have been considered and rejected in favour of the broader “admitted free” language. The historical context of Confederation further underscores that the concept of non-tariff trade barriers would have been familiar to

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44. *Comeau*, *supra* note 1 at paras 158, 191.

45. *Ibid* at para 161.

46. Ian Blue, “Long Overdue: A Reappraisal of Section 121 of the *Constitution Act, 1867*” (2010) 33 Dal LJ 161 [“Long Overdue”]; Ian Blue, “On the Rocks? Section 121 of the *Constitution Act, 1867*, and the Constitutionality of the *Importation of Intoxicating Liquors Act*” (2009) 35 Advocates’ Q 306; Ian Blue, “On the Rocks: The *Gold Seal* Case: A Surprising Second Look” (2010) 36 Advocates’ Q 363; Ian Blue, *Free Trade within Canada: Say Goodbye to Gold Seal* (May 2011), online: Macdonald-Laurier Institute <<http://www.macdonaldlaurier.ca>>.

47. Blue, “Long Overdue,” *ibid*, at 191.

the drafters, such that the broad language of the provision was designed specifically so that it would catch non-tariff barriers. Moreover, one of the central, overriding purposes of Confederation was to create a free trade zone. An interpretation of section 121 that does not extend to any non-tariff trade barriers would be utterly inimical to this purpose, by allowing governments to do indirectly—through quotas, discriminatory regulation, outright prohibitions on imported goods, and other means—what they cannot do directly through tariffs.

The location of section 121 in Part VIII, entitled “Revenues, Debts, Assets, Taxation,” might give one pause. One could argue, as the prosecution did, that the provision’s scope is limited to fiscal matters. Perhaps the provision simply serves to rule out tariffs on interprovincial trade as a source of revenue. Yet this is unconvincing. A tariff on interprovincial trade would likely be construed as a form of indirect taxation, and thus beyond the jurisdiction of provincial legislatures.⁴⁸ At least as regards provincial measures, if section 121 were construed as only applying to fiscal matters, it would be superfluous.

Further, headings such as the one in Part VIII are normally given only limited weight in statutory and constitutional interpretation.⁴⁹ At the time the *Constitution Act, 1867* was passed by the British Parliament, titles and marginal notes were not viewed as forming part of the authoritative statutory enactment.⁵⁰ Moreover, the location of the provision in Part VIII can be explained by the fact that section 121 does, *in part*, relate to government revenues in that it clearly rules out a source of revenue: interprovincial tariffs. But that is not the same thing as saying that this is *all* that section 121 does. As there was no other part of the Act that would more appropriately capture the idea of free trade among the provinces, the provision may simply have been placed in Part VIII because there was nowhere better to put it. If there had been a section entitled “Interprovincial Trade” and section 121 had not been placed there, but rather had been placed in a section dealing with government revenues, then perhaps one

48. See Gérard V La Forest, *The Allocation of Taxing Power under the Canadian Constitution*, 2nd ed (Toronto: Canadian Tax Foundation, 1981) at 179-180. In making this point, La Forest merely seeks to argue that courts have been comfortable with a restrictive interpretation of what constitutes an impermissible barrier under s 121 because the limit on indirect taxation precludes many forms of provincial fiscal interference with interprovincial trade. He also notes that this limit on provincial indirect taxation may explain why s 121 emerged so late in the drafting process of the *Constitution Act, 1867*, despite the fact that free trade was a high priority for the framers.

49. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis, 2014) at 464-465; *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 at 376-377, 9 DLR (4th) 161.

50. See Peter Benson Maxwell, *On the Interpretation of Statutes* (London: Maxwell & Son, 1875) at 33-35. This is the traditional common law approach. Sullivan, *ibid* at 460.

could infer that section 121 related only to fiscal matters, not to trade more generally. As it stands, though, the simplest explanation for the location of section 121 seems to be that Part VIII was the best fit for the provision, although it was not a perfect fit.⁵¹ In any event, a heading seems a slender basis on which to contradict convincing evidence based on the text, historical context, legislative history, and purpose of the provision.

Accordingly, both Blue and the trial judge appear to be correct in arguing that the text, context, and purpose of section 121 yield an interpretation contrary to *Gold Seal*. In other words, it seems as though the provision must extend at least to some non-tariff barriers. How, then, did the court in *Gold Seal* get things wrong? In part, the answer lies with the manner in which section 121 was addressed in that case. As the trial judge observes, *Gold Seal* dealt primarily with whether a part of the federal *Canada Temperance Amending Act* had been validly proclaimed.⁵² Section 121 was an afterthought in *Gold Seal*, raised for the first time during oral arguments at the Supreme Court of Canada. The judges in *Gold Seal* deal with section 121 in a perfunctory manner, in the course of arriving at a judgment in an appeal that had seemingly been rendered moot by the retroactive *Proclamation Validation Act*.⁵³ Neither of the subsequent Supreme Court and Privy Council cases that adopt the *Gold Seal* interpretation analyzes the provision in any depth.⁵⁴ In other words, it is entirely plausible that, as Blue argues, the Supreme Court erred in *Gold Seal*, and this error was carried forward more or less uncritically in two subsequent high court treatments of the provision.

Yet for all its strength in dealing with the text, historical context, and purpose behind section 121, Judge LeBlanc's decision leaves several crucial questions unanswered. Most pressingly, as alluded to above, it fails to provide a mechanism for determining when a government policy or action will be found to constitute an impermissible non-tariff barrier. This is a complex question, one that has been the source of a great deal of uncertainty, litigation, and doctrinal development in the United States and Australia—jurisdictions whose constitutions have been interpreted to bar non-tariff trade barriers between states.⁵⁵ Moreover, non-tariff trade

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51. This is the explanation accepted by the trial judge. *Comeau*, *supra* note 1 at para 68.

52. RSC 1906, c 152.

53. SC 1921 (11 & 12 Geo V), c 20.

54. *Atlantic Smoke Shops*, *supra* note 4 at 567-570; *Murphy v CPR*, *supra* note 4 at 634. Justice Rand's concurring opinion in *Murphy v CPR* does examine the provision in some depth, but he departs from the restrictive *Gold Seal* approach. *Supra* note 4 at 638-643.

55. See Suri Ratnapala & Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory*, 3rd ed (Melbourne: Oxford University Press, 2012) at 303-315; Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 5th ed (New York: Aspen, 2015) at 443-478.

barriers are often the subject of intricate negotiations and interpretations in international trade agreements.⁵⁶ If section 121 is to be extended to non-tariff barriers, the next question is how constitutional doctrine will be developed so as to distinguish impermissible trade barriers from valid exercises of provincial (or federal) regulatory authority. Unfortunately, Judge LeBlanc makes little attempt to show how this can be done. The uncertainty that this creates may alone be enough to lead some observers to prefer the relative clarity of a bright-line distinction that prohibits outright tariffs but permits everything else.

Other, related questions emerge with respect to constitutional structure, constitutional values, and the demands of a “progressive” interpretation of the Constitution. In terms of constitutional structure, one might ask what this interpretation of section 121 means for provincial legislatures’ jurisdiction over property and civil rights, and for the balance between federal and provincial spheres of jurisdiction. All non-uniform provincial regulations can add to the cost of trading across provincial borders, and thus can be construed as non-tariff trade barriers. More specifically, as argued at trial, differential licensing, production, transportation, and marketing standards across provinces all create barriers to trade.⁵⁷ In addition, certain forms of regulation and market intervention, including supply management in agriculture and various economic development schemes, may require giving privileged market access to in-province suppliers or restricting supply from outside the province. The creation of government-run or government-backed monopolies on certain products, like alcohol or marijuana, may also require restrictions on out-of-province suppliers. Due to the geographic limits of provincial jurisdiction, interprovincial barriers to trade are much more likely to arise when regulatory policies are pursued at the provincial level than at the federal level.

Accordingly, one structural concern that a robust interpretation of section 121 raises is that it might unduly restrict provinces’ ability to regulate the economy according to local values and concerns, while having the practical effect of redistributing regulatory power to Parliament, which is in a much better position to create uniform regulations across the country. The concern is particularly acute given the significant regulatory apparatuses that have been built up at the provincial level over the past century. Canada’s constitutional structure long ago departed from the

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56. See, e.g., *North American Free Trade Agreement*, 1 January 1994, arts 301, 1202, online: Global Affairs Canada <www.international.gc.ca/>; *Re Cross-Border Trucking Services (Mexico v United States)* (2001), USA-MEX-98-2008-01 (Ch 20 Panel), online: NAFTA Secretariat <www.nafta-sec-alena.org/>.

57. *Supra* note 1 at para 152.

centralized vision of many of the framers. While this is seen most clearly in the broad interpretation given to the provincial power over property and civil rights, and the correspondingly narrow interpretation given to the federal trade and commerce power, the *Gold Seal* approach to section 121 could also be seen as part of this trend.

In establishing regulatory schemes, provinces have implicitly relied on a narrow construction of section 121, as well as on the body of jurisprudence dealing with provinces' ability to affect matters within Parliament's section 91(2) jurisdiction over interprovincial trade.⁵⁸ Canadian constitutional jurisprudence has struck a fine balance between the federal power over trade and commerce and provincial powers over property and civil rights; and political actors have also played their part in giving practical effect to the division of powers through legislation, executive agreements, and cooperative schemes. The approach to section 121 adopted by the trial judge threatens to shift the structure of federalism, as well as the structure of economic regulation in Canada. The trial judge actually acknowledges this concern, but does not really address it.⁵⁹ Accordingly, one might well ask how section 121 can be interpreted in a manner that is consistent with the structure of Canadian federalism.

Another set of questions relates to constitutional principles. Among the core principles that underlie the Constitution and guide its interpretation are federalism and democracy.⁶⁰ Federalism is implicated in that *Comeau* may have the practical effect of redistributing power to Parliament, albeit arguably in a manner consistent with the drafters' vision of a strong economic union. But perhaps even more significantly, section 121 may be seen to limit the scope of democratic action. Constitutionally entrenched economic rights are controversial for this very reason.⁶¹ While the tension between democratic and communitarian values, on the one

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58. The key cases on the limits of provincial power to affect interprovincial trade include *Home Oil Distributors Ltd v Attorney-General of British Columbia*, [1940] SCR 444, [1940] 2 DLR 609; *Carnation Company Limited v Quebec Agricultural Marketing Board*, [1968] SCR 238, 67 DLR (2d) 1; *Attorney-General for Manitoba v Manitoba Egg and Poultry Association*, [1971] SCR 689, 19 DLR (3d) 169 [*Manitoba Egg Reference*]; *Agricultural Products Marketing Reference*, *supra* note 4; *Central Canada Potash Co Ltd v Government of Saskatchewan*, [1979] 1 SCR 42, 88 DLR (3d) 609. See also Peter W Hogg, *Constitutional Law of Canada*, 5th ed Supp (Toronto: Carswell, 2007) at 21-16 to 21-23; George Veigh, "The Characterization of Barriers to Interprovincial Trade under the Canadian Constitution" (1996) 34 Osgoode Hall LJ 355 at 355-375.

59. *Supra* note 1 at paras 156-161.

60. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 247-257, 161 DLR (4th) 385; *Senate Reference*, *supra* note 17 at para 25.

61. See, e.g., *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 116-118, Rothstein and Wagner JJ, dissenting, [2015] 1 SCR 245; *Lochner v New York*, 198 US 45 at 65-66, Holmes J, dissenting (1905).

hand, and negative economic liberties, on the other, has been more often explored in the context of constitutionally entrenched property rights,⁶² David Schneiderman has observed that similar tensions exist with respect to constitutional free trade protections.⁶³ There is simply no question that a robust interpretation of the Constitution's free trade provision would restrict the power of democratic majorities, especially at the provincial level, to set economic policies. Certain types of intervention, particularly those aiming at price control through supply management or at protecting local industries, will be more difficult or impossible to implement without discriminating against trade from outside the province. This is not to say that such policies are necessarily good or worthy pursuits. It is merely to observe that democratic majorities are more constrained in setting economic policy under a robust interpretation of section 121 than they otherwise would be. The trial judge does not address how a balance is to be struck between governments' power to regulate the economy and the constitutional protection against trade barriers, an important consideration given the democratic values that animate the Constitution.

Next, one might ask, what about a progressive interpretation of the constitution? It has already been observed that while the court in *Comeau* "starts out its analysis by singing from the Canadian constitutional hymnal," with references to the "living tree" and a progressive interpretation, the nuts and bolts of the decision do not necessarily reflect this.⁶⁴ The trial judge's overarching concern seems to be with the meaning and purpose of section 121 in 1867. The original purpose, historical context, and original public meaning of the text are obviously important, and are often determinative. Yet even a skeptic of progressive interpretation would have to acknowledge, as the trial judge does, Supreme Court precedent to the effect that the "living tree" is supposed to inform constitutional interpretation in this country.⁶⁵ So one might readily ask how the evolution in Canada's constitutional structure and values over the past 150 years should inform our understanding of section 121. For instance, Alexander Alvaro has observed that in the time since Confederation, Canadian political and constitutional values have shifted away from a preoccupation with property rights and negative economic liberty and

62. See, e.g., Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24(2) Can J Political Science 309; Richard W Bauman, "Living in a Material World: Property Rights in the Charter" (1991) 3(1) Const Forum 49.

63. David Schneiderman, "Economic Citizenship and Deliberative Democracy: An Inquiry into Constitutional Limitations on Economic Regulation" (1995) 21 Queen's LJ 125 at 151-165.

64. Oliphant, *supra* note 12.

65. See, e.g., *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras 21-23, [2004] 3 SCR 698. But see Oliphant & Sirota, *supra* note 18; Sirota & Oliphant, *supra* note 18.

toward “democratic-communitarian” values that privilege the power of democratic majorities to set economic policy in the public interest.⁶⁶ While it is certainly possible to contest this historical narrative,⁶⁷ the challenge this could pose to the *Comeau* interpretation of section 121 should be apparent. Something should be said about how a proposed construction of section 121 can be reconciled with Canada’s present-day constitutional structure and values, in order to persuade those committed to progressive constitutional interpretation.

Finally, *Comeau* raises the question of what a constitutionally entrenched free trade provision is for. This is an important question, particularly if one seeks to reconcile section 121 with the competing imperatives of constitutional values and constitutional structure. In other federations with constitutionally entrenched free trade provisions, a number of purposes have been seen to underlie these protections, including economic efficiency, fostering national unity, protecting unrepresented out-of-state interests, and preventing trade wars among states.⁶⁸ Greater clarity as to the purposes that section 121 aims to promote would help us understand which non-tariff barriers specifically should be prohibited.

Assuming that Judge LeBlanc’s call to reconsider the *Gold Seal* line of precedent is heeded, the questions set out above will have to be confronted sooner or later. In what follows, I will show how the questions raised by the trial judge’s able but incomplete analysis can be answered.

III. *What is free trade for?*

Judge LeBlanc makes a persuasive case that the purpose behind section 121 was the creation of a free trade area for the newly united Canada. But why free trade? This section seeks to outline the policy objectives that lie behind the free trade provision, with the goal of clarifying its effect on non-tariff barriers. I also aim to show the extent to which a commitment to free trade continues to accord with the present-day values of Canadian society.

The first and most prominent objective associated with free trade is economic efficiency. Free trade has long been defended on the basis that it enhances prosperity by allowing different regions to produce goods

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66. Alvaro, *supra* note 62 at 310-317.

67. See Dwight Newman & Lorelle Binnion, “The Exclusion of Property Rights from the Charter: Correcting the Historical Record” (2015) 52 *Alta L Rev* 543 at 546-550.

68. Donald Regan, “The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause” (1986) 84 *Mich L Rev* 1091 at 1112-1116; Amelia Simpson, “Grounding the High Court’s Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone” (2005) *Fed L Rev* 445 at 463-465; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) at 83-84.

and services in line with their comparative advantage in the production process, that is, their cost of production in various products relative to other regions.⁶⁹ By creating larger markets for goods, free trade can also help lower costs of production overall and increase competition among suppliers. Free trade is therefore seen by most economists as welfare-enhancing. These are not novel insights, and would have been familiar to politicians drafting a constitution during the heyday of classical liberal political and economic thought. Indeed, the wealth-generating potential of a Canadian free trade zone is clearly a prominent consideration in the Confederation-era speeches cited by the trial judge.⁷⁰

The economic case for free trade continues to resonate across a relatively wide swath of the political spectrum in Canada. Following the Canada-US Free Trade Agreement of 1988, Canada has entered into a number of international free trade deals, including recent far-reaching agreements with the European Union and a coalition of Pacific Rim nations.⁷¹ At the same time, efforts to reduce internal trade barriers have been undertaken. The 1995 Agreement on Internal Trade was a start, though one hobbled with exceptions and limited enforcement mechanisms.⁷² The more ambitious New West Partnership among Western Canadian provinces is another prominent example of efforts to lower trade barriers so as to enhance economic efficiency.⁷³ The federal government and the provinces recently reached an agreement to lower trade barriers in a broader array of sectors than those covered by the Agreement on Internal

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69. See, e.g., David Ricardo, *On the Principles of Political Economy and Taxation*, 3rd ed (London: John Murray, 1821) at 139.

70. Comeau, *supra* note 1 at paras 92, 95, 96, citing a speech by George Brown on 12 September 1864, a speech by John A Macdonald on 7 February 1865, and a speech by Alexander Galt on 12 September 1867. The speeches, originally cited by Blue, "Long Overdue," *supra* note 46, may be found in: Edward Whalen, ed, *The Union of the British Provinces, A Brief Account of the Several Conferences Held in the Maritime Provinces and in Canada, in September and October, 1864, on the Proposed Confederation of the Provinces, Together with a Report of the Speeches, delivered by the Delegates from the Provinces, on Important Public Occasions* (Charlottetown: GT Haszard, 1865) at 36-37, 47-48; Canada, Parliament, *Parliamentary Debates on the Subject of the Confederation of the British North America Provinces* at 27-28.

71. *Canada-European Union: Comprehensive Economic and Trade Agreement*, 5 August 2014, online: Global Affairs Canada <www.international.gc.ca/>; *Trans-Pacific Partnership*, 5 October 2015, online: Global Affairs Canada <www.international.gc.ca/>.

72. *Agreement on Internal Trade*, 1 July 1995, online: Agreement on Internal Trade <www.ait-aci.ca/>; *Agreement on Internal Trade Implementation Act*, SC 1996, c 17. For criticism of some of the shortcomings of the Agreement, see Vegh, *supra* note 58 at 405-410.

73. *New West Partnership Trade Agreement*, 1 July 2010, online: New West Partnership Trade Agreement <www.newwestpartnershiptrade.ca/>.

Trade.⁷⁴ This agreement was justified largely in economic terms.⁷⁵ Even on a progressive interpretation that takes into account changing values, the economic objectives underlying section 121 still seem to have significant currency today.

Yet free trade can also serve political objectives. In both the United States and Australia, the goal of fostering political unity among the states has been identified as motivating the free trade commitments in those countries' constitutions.⁷⁶ In the European Union as well, free trade has been viewed by many as a prelude to and facilitator toward greater political unification. According to this line of reasoning, economic protectionism is incompatible with political union. It indicates a hostility to outsiders that undermines notions of common citizenship. In the words of one scholar, protectionism "is the economic equivalent of war."⁷⁷ This is further underscored when one considers the potential for provinces to engage in escalating acts of protectionism in a cycle of retaliation, a fear that has actually manifested itself from time to time in Canadian history.⁷⁸ This kind of hostility undermines political unity. Furthermore, constitutionalized free trade can also be seen as a means of protecting the interests of outsiders who are not represented in the political institutions of a given jurisdiction.⁷⁹ Due to the electoral incentives they face, provincial legislatures and governments might be tempted to enact policies that benefit constituencies within the province at the expense of those outside the province. Differential tax rates or preferential regulatory treatment for in-province parties are two examples of policies that might follow from these incentives. Constitutional protection of free trade could be seen as a means of preventing this type of political pathology, in a manner that reinforces the common citizenship of all Canadians.

Political rationales along these lines were clearly present in the arguments of Confederation-era politicians. The case for free trade at Confederation was not expressed solely in economic terms. Free trade was also seen as a way to promote political union among the British North

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74. McGregor, *supra* note 15. *Canadian Free Trade Agreement*, *supra* note 15.

75. See Bob Weber, "Premiers agree to 'historic' interprovincial trade deal but details on changes unclear" (22 July 2016), online: National Post <www.nationalpost.com>.

76. Regan, *supra* note 68 at 1112-1116; Simpson, *supra* note 68 at 463-465.

77. Regan, *ibid.*, at 1113.

78. *Ibid.* at 1114; Simpson, *supra* note 68 at 464. The "chicken and egg war" leading up to the *Manitoba Egg Reference*, *supra* note 58, is but one example of an escalating internal trade dispute from Canada's history. See Hogg, *supra* note 58 at 21-19.

79. Ely, *supra* note 68 at 83-84; Kathleen M Sullivan & Noah Feldman, *Constitutional Law*, 18th ed (St Paul: Foundation Pres, 2013) at 221-222.

American colonies. For instance, George Brown argued as follows on 8 February 1865:

If a Canadian goes now to Nova Scotia or New Brunswick, or if a citizen of these provinces comes here, it is like going to a foreign country. The customs officer meets you at the frontier, arrests your progress, and levies his imposts on your effects. But the proposal now before us is to throw down all barriers between the provinces—to make a citizen of one, citizen of the whole....⁸⁰

This argument from Brown, a key politician at the time of Confederation, draws an explicit link between internal free trade and a conception of common citizenship. Other Confederation-era politicians also referenced the idea that restricted trade meant treating other colonies in a “hostile” manner, as “foreign” nations,⁸¹ and that commercial union would bring together provinces belonging “to the same nation.”⁸² Among the goals of free trade at Confederation, then, was the aim of reinforcing the political union among the provinces.

Like the economic goals associated with free trade, the imperative of fostering political unity among Canadian provinces and regions has not noticeably diminished with time. National unity remains an important Canadian preoccupation, and to this day rhetoric around removing provincial trade barriers is often wrapped in the mantle of encouraging national unity as well as economic prosperity.⁸³ Accordingly, even allowing for changing values, it is possible to articulate both a political and an economic purpose underlying the section 121 free trade provision.

80. Janet Ajzenstat et al, eds, *Canada's Founding Debates*, Paperback ed (Toronto: University of Toronto Press, 2003) at 135 [emphasis added].

81. Comeau, *supra* note 1 at paras 93, 98, 100, citing speeches by Alexander Galt on November 1, 1864, Lord Carnarvon on 19 February 1867, and Charles Adderley on 28 February 1867. The speeches, originally cited by Blue, “Long Overdue,” *supra* note 46, may be found in Whalen, *supra* note 70 at 142; UK, HL, Parliamentary Debates, 3rd ser, vol 185, col 557-82 (19 February 1867); UK, HC, Parliamentary Debates, 3rd ser, vol 185, col 1090-1 (27 February 1867).

82. Comeau, *supra* note 1, citing a speech by John A Macdonald on 6 February 1865. The speech, originally cited by Blue, “Long Overdue,” *supra* note 46 at 173, may be found in Canada, Parliament, *Parliamentary Debates on the Subject of the Confederation of the British North America Provinces* at 27.

83. See, e.g., *Senate Internal Trade Report*, *supra* note 13, epigraph: “As a fundamental right, Canadians should be able to practise their profession or trade, operate a business whose goods and services can cross provincial/territorial borders, and purchase goods and services both freely and without penalty anywhere in this great country. The inability to do any of these diminishes us as a country, and makes citizens and businesses more tied to their region than to their nation.” A constitutional amendment aimed at strengthening s 121 that was proposed by the Mulroney government in the early 1990s was similarly couched in the unifying rhetoric of common “economic citizenship.” See *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services, 1991), cited by Schneiderman, *supra* note 63 at 126.

The provision aims at furthering economic efficiency, but also at fostering political unity by reinforcing the importance of common citizenship, and ruling out acts of economic hostility rooted in parochial political considerations.

IV. *Lessons from comparative jurisprudence*

Before setting out a proposed interpretation of section 121, I wish to pause briefly to identify certain lessons that might be drawn from the experiences of the United States and Australia with constitutionalized free trade extending to non-tariff barriers. These are comparable federations, each with its own extensive body of constitutional free trade jurisprudence. In Australia, this jurisprudence has been built around the first clause of section 92 of the Constitution, which states: “On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.”⁸⁴ In the United States, constitutional free trade jurisprudence has mostly, though not exclusively,⁸⁵ been built upon the so-called Dormant Commerce Clause. This is essentially a structural corollary of the Interstate Commerce Clause.⁸⁶ The idea is that since the Constitution grants Congress the power to regulate interstate commerce, it should be interpreted as denying this power to the states. Accordingly, states are seen to be under fairly strict constitutional limits in their ability to discriminate against interstate trade, or even to burden it unduly. Considerations of space make a full exposition of these countries’ approaches impossible.⁸⁷ In what follows, I wish merely to highlight three lessons that emerge from their jurisprudence.

1. *Courts must determine a mechanism for distinguishing permissible trade barriers from impermissible trade barriers.*

The first point relates to the kind of doctrinal development that the consideration of non-tariff barriers requires. In parts of his judgment, the trial judge in *Comeau* seems to underestimate the complexity of the problem, simply stating that section 121 prohibits both tariff-based and non-tariff barriers alike. But non-tariff barriers, understood to encompass any policy or government action that impedes trade across borders, come in many different forms, including the simple fact of regulatory standards that differ from one jurisdiction to the next. As a result, drawing a balance

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84. *Commonwealth of Australia Constitution Act 1900* (UK), 63 & 64 Vict, c 12.

85. See also Privileges and Immunities Clause, US Const art IV, § 2.

86. US Const art I, § 8, cl 3.

87. For those interested in a general overview of each country’s approach, see Ratnapala & Crowe, *supra* note 55 at 303-315; Chemerinsky, *supra* note 55 at 443-478.

between the economic regulatory authority of individual jurisdictions, on the one hand, and a commitment to free trade, on the other, is a central preoccupation of all free trade arrangements, whether they come in the form of constitutional provisions or international agreements. In light of this fact, and in light of the commitment to federalism in Australia, the United States, and Canada, it would neither be practical nor desirable to eliminate all non-tariff barriers. In both the United States and Australia, doctrine has been developed targeting certain types of non-tariff barriers, particularly those that can be labelled “discriminatory” or “protectionist.”⁸⁸ Even in Australia, where the constitutional text relating to free trade is uncompromising, requiring that trade and commerce among the states be “absolutely free,” a body of jurisprudence has been developed permitting some non-tariff barriers and prohibiting others.⁸⁹

2. *Courts are faced with an important jurisprudential choice as to the level and type of scrutiny to apply to trade barriers.*

This second point follows from the first. Given that some non-tariff barriers must be permitted, a means of distinguishing permitted from proscribed barriers must be developed. Both Australia and the United States have adopted approaches that are based in some sense on the proportionality of measures that give rise to trade barriers, though the jurisdictions differ in the level of scrutiny applied.⁹⁰

In Australia, the modern approach to the section 92 free trade provision rests on the idea that the provision protects interstate trade from discriminatory protectionism.⁹¹ Measures that discriminate in a protectionist manner against out-of-state trade, either directly or indirectly, so as to impose a burden on this trade, are presumptively unconstitutional.⁹² However, burdens on interstate trade that do not aim at protectionist objectives but which might otherwise be considered protectionist may nevertheless be upheld if they are “appropriate and adapted” to a legitimate

88. See, e.g., *Cole v Whitfield* (1988) 165 CLR 360 at 398 (HCA) [*Cole*]; *Philadelphia v New Jersey*, 437 US 617 at 623-625 (1978).

89. Ratnapala & Crowe, *supra* note 55 at 304-305.

90. Gonzalo Villalta Puig, “A European Saving Test for Section 92 of the Australian Constitution” (2008) 13 Deakin L Rev 99 at 106-112; Jeremy Kirk, “Constitutional Guarantees, Characterisation and the Concept of Proportionality” (1997) 21 Melbourne UL Rev 1 at 9, 12-16; Simpson, *supra* note 68 at 455-462.

91. *Cole*, *supra* note 88 at 398.

92. The Court in *Cole* gave the following non-exhaustive list of means by which discriminatory burdens of a protectionist kind have been imposed on interstate trade: “tariffs that increase the price of foreign goods, non-tariff barriers such as quotas on imports, differential railway rates, subsidies on goods produced and discriminatory burdens dealing with imports.” *Ibid* at 393. See also *Barley Marketing Board (NSW) v Norman* (1990), 171 CLR 182 (HCA), upholding a scheme requiring the sale of barley grown in the state to a marketing board as non-discriminatory.

objective, specifically “the protection of the community from a real danger or threat to its welfare or to the enhancement of its welfare.”⁹³ A recent case has gone further, requiring that at least some burdens on interstate trade actually be *necessary* to achieve such an objective.⁹⁴ In *Betfair*, state legislation prohibiting certain types of gambling exchanges was struck down. Despite the fact that the legislation did not discriminate on its face against out-of-state exchanges, its practical effect was to eliminate out-of-state competition in a manner than was not necessary for the achievement of the state’s regulatory objectives.⁹⁵

In the United States, different approaches are used for measures that are classified as discriminatory and those that are not.⁹⁶ A measure will be classified as discriminatory if it expressly draws a distinction between in-state and out-of-state actors.⁹⁷ However, even “facially neutral” measures can be characterized as discriminatory based on their purpose or effects.⁹⁸ Discriminatory measures are subject to exacting review. They are only upheld if they can be shown to be necessary to achieve an important government purpose.⁹⁹ By contrast, non-discriminatory measures that burden interstate trade are subject to less searching review, though they may still be struck down if the benefits of a measure are outweighed by the burden it places on interstate trade.¹⁰⁰ For instance, in *Bibb v. Navajo Freight Lines*, the Supreme Court struck down a state law requiring the use of curved mudguards on semi-trailers.¹⁰¹ This created a burden on interstate commerce, since straight mudguards were allowed in most other states. The law was not found to be discriminatory, but was nevertheless struck down on the basis that its negative effects on interstate commerce outweighed any benefits of the measure.¹⁰²

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93. *Castlemaine Tooheys Ltd v South Australia* (1990), 169 CLR 436 at 471-474 (HCA).

94. *Betfair Pty Limited v Western Australia*, [2008] HCA 11 at paras 102-112 [*Betfair*]; Puig, *supra* note 90 at 126-129.

95. *Betfair*, *ibid* at paras 106-112.

96. Chemerinsky, *supra* note 55 at 453.

97. See, e.g., *Granholm v Heald*, 544 US 460 at 476, 472-473 (2005); *Oregon Waste Systems, Inc v Department of Environmental Quality of the State of Oregon*, 511 US 93, 98-99 (1994); *Philadelphia v New Jersey*, *supra* note 88 at 624.

98. See, e.g., *Hunt v Washington State Apple Advertising Commission*, 432 US 333, 350-354 (1977); *C & A Carbone, Inc v Town of Clarkstown*, 511 US 383, 390-392 (1994) [*Carbone*]. But see *United Haulers' Association, Inc v Oneida-Herkimer Solid Waste Management Authority*, 550 US 330 (2007).

99. See, e.g., *Dean Milk Co v City of Madison*, 340 US 349 at 354-357 (1951); *Maine v Taylor*, 477 US 131, 138-140 (1986); *Carbone*, *ibid* at 392-395.

100. *Pike v Bruce Church, Inc*, 397 US 137, 142 (1970); *Minnesota v Clover Leaf Creamery Co*, 449 US 456, 473 (1981); *American Trucking Associations, Inc v Michigan Public Service Commission*, 545 US 429 at 433 (2005).

101. 359 US 520 (1959).

102. *Ibid* at 529.

As mentioned above, both these approaches can be classified as adopting proportionality tests of some form.¹⁰³ Both jurisdictions prohibit measures that actually aim to discriminate against trade from outside the jurisdiction. Accordingly, both require that regulations giving rise to non-tariff barriers be rationally related to a valid objective other than protectionism. Both jurisdictions then go beyond this, to a second level of proportionality. They also assess the *necessity* of at least some negative effects on interstate trade. Where a measure that is rationally related to a non-discriminatory objective nevertheless discriminates on its face against interstate trade or gives rise to discriminatory effects, there is a requirement in both countries that the discrimination in question be in some sense *necessary* for the achievement of a valid, non-protectionist objective. Assessing the purpose, rationality, and necessity of a measure giving rise to a trade barrier is as far as the Australian approach goes.¹⁰⁴ The U.S. jurisprudence goes further, however, embracing outright balancing of effects. Even where a measure giving rise to a trade barrier is found to be neither discriminatory in its purpose nor in its effects, U.S. jurisprudence still mandates a balancing of the state objective against any negative effect on interstate commerce.

Rather than thinking in terms of the proportionality of regulatory measures that burden interprovincial trade, it is also possible to deal with the problem in conceptual terms, assessing whether a measure fits within permitted categories of regulation or not. In his concurring opinion in *Murphy v. CPR* Rand J. raises this as a possibility. His proposed approach relies on a distinction between regulation that in essence or purpose relates to provincial boundaries, on the one hand, and regulation that merely addresses the “subsidiary features” of interprovincial trade:

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.*¹⁰⁵

103. Puig, *supra* note 90 at 106-112; Kirk, *supra* note 90 at 12-16; Simpson, *supra* note 68 at 455-462.

104. Puig, *supra* note 90 at 126-129.

105. *Murphy v CPR*, *supra* note 4 at 642 [emphasis added].

Much more could be said about the approaches set out above. What should be clear, however, is that courts face an important choice regarding the level and type of scrutiny to apply to non-tariff barriers.

3. *It is possible for the jurisprudence relating to non-tariff barriers to become highly complex and uncertain.*

In both Australia and the United States, constitutional jurisprudence relating to internal free trade has become complex, contentious, and uncertain, spurring a great deal of litigation. In a landmark 1988 decision that revamped the High Court of Australia's approach to the Australian Constitution's section 92 free trade provision, which is in many ways an analogue of Canada's section 121, the High Court wrote:

No provision of the Constitution has been the source of greater judicial concern or the subject of greater judicial effort than s. 92. That notwithstanding, judicial exegesis of the section has yielded neither clarity nor certainty of operation. Over the years the Court has moved uneasily between one interpretation and another in its endeavours to solve the problems thrown up by the necessity to apply the very general language of the section to a wide variety of legislative and factual situations.¹⁰⁶

Similar observations could be made about the United States, where the body of Dormant Commerce Clause jurisprudence is both very large and difficult to fully reconcile.¹⁰⁷ The contrast with Canada could not be starker. By restricting the scope of section 121 to tariffs only, *Gold Seal* achieved clarity and certainty, if nothing else. If section 121 is to be extended to non-tariff barriers, care must be given to ensuring that the jurisprudence associated with it does not become unduly complex or uncertain. The experiences of Australia and the United States demonstrate that this is a very real threat, indicating the need for doctrinal clarity and, to the extent this is possible, simplicity.

V. *Reconciling text, structure, and principles*

In what follows, I tentatively propose a means of reconciling the important insights relating to the text, historical context, and purpose of section 121 that emerge from *R. v. Comeau* with a contemporary understanding of Canada's constitutional structure and the values of democracy and federalism. In doing so I hope to propose answers to the unanswered questions stemming from *Comeau* that I identified in a previous section, including, first and foremost, the question of how, specifically, doctrine

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106. *Cole*, *supra* note 88 at 383-384.

107. Chemerinsky, *supra* note 55 at 457-458.

can be developed so as to police non-tariff barriers while also providing reasonable clarity to governments and other actors.

At the outset, it should be noted that section 121, by its express terms, deals only with barriers to trade in goods. Services are not “Articles of ...Growth, Produce, or Manufacture,” and so barriers to interprovincial mobility in relation to regulated occupations, for example, are beyond the scope of section 121. Building on Rand J.’s approach, as well as Australian and American jurisprudence, I would suggest two standards for barriers to trade in goods: one for measures that discriminate against interprovincial trade by creating special burdens based on geographic distinctions, and one for measures that merely have the incidental effect of burdening interprovincial trade. This mirrors the distinction Rand J. draws between regulation that “in its essence or purpose is related to a provincial boundary” and regulation of “subsidiary features” or “incidents” of trade. Measures which can be said to discriminate against interprovincial trade, either directly by referencing location or indirectly through the use of proxies for location, should be subject to exacting scrutiny. In particular, in order to be upheld such measures must be necessary for the achievement of a significant, non-protectionist objective. By contrast, measures that do not discriminate on their face, either directly or through proxies, but merely have the effect of burdening interprovincial trade, should be subject to lesser scrutiny. A requirement that such measures bear a rational and functional relationship to a valid, non-protectionist objective is sufficient.¹⁰⁸ This approach aims at distinguishing between protectionist measures, which are contrary to the text and purpose of section 121, and justifiable exercises of regulatory authority, especially provincial powers under section 92(13).

Examples may help. If a province imposed more restrictive rules for the sale of wine produced inside the province than wine produced outside the province, this would be seen to discriminate against out-of-province trade on its face, in the sense that it imposes a burden solely on the basis of location of origin. In order to be upheld, such a measure would have to be found to be necessary for the achievement of a significant, non-protectionist objective, such as health or public safety. A similar approach would apply to regulations that create burdens using a proxy for location. For instance, if British Columbia were to create more favourable rules for the marketing of Pacific salmon as compared with other fish, this could

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108. The “necessary” and “rational and functional” standards used here mirror those used in the Supreme Court of Canada’s ancillary power jurisprudence. See *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 668-671, 58 DLR (4th) 255.

be seen to relate to a proxy for province of origin. In order to be upheld it would have to be shown to be necessary in order to achieve a significant, non-protectionist objective. By contrast, most trade barriers that emerge simply as a result of differences in regulatory standards across provinces would be subject to the lower “rationality” standard. For example, setting regulatory standards for tires used in transport trucks that differ from one province to the next would have the effect of impeding interprovincial trade.¹⁰⁹ Yet regulatory standards of this nature do not draw distinctions that are based on location or a proxy for location. They should be upheld as long as they bear a rational and functional relationship to a valid, non-protectionist objective, such as road safety.¹¹⁰

This approach stays mostly at a “conceptual” level, assessing the types of distinctions drawn by regulatory measures. Unlike the American Dormant Commerce Clause jurisprudence it avoids directly weighing the beneficial effects of a given regulatory measure against the burden it places on trade, and only goes so far as to assess “necessity” in overt cases of discrimination against interprovincial trade. While some have advocated approaches that incorporate a balancing of the benefits of regulations against burdens on trade,¹¹¹ there are reasons to be skeptical of these approaches. First, such balancing may require a higher degree of economic policy-making expertise than is normally expected from the judiciary. Governments, and in particular the federal government, are in a better position to weigh economic effects of this nature than the courts. Second, focusing on effects rather than on the distinctions drawn by legislation leads to problems with complexity and indeterminacy that have bedeviled the jurisprudence in the United States, and to a lesser extent in Australia. Indeed, it has been observed that indeterminacy follows from any approach based on balancing effects, because such approaches require courts to weigh incommensurables: the “burden” on interjurisdictional trade vs. the “benefits” of the regulation.¹¹²

Third, this kind of policy-based balancing requires courts to effectively assess the merits of the regulations in question, because the central question is whether the benefits outweigh the burdens. This may be seen as a task

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109. The example comes from the *Senate Internal Trade Report*, *supra* note 13 at 29.

110. These examples all relate to barriers to trade in goods, as opposed to services. While trucking is a service, it is a service that deals with the transportation of goods, such that regulatory measures relating to it could give rise to barriers to trade in goods.

111. Vegh, *supra* note 58 at 393-400; Puig, *supra* note 90 at 119-125; Grégoire Webber, “The Ancillary Power Doctrine: An Analogy with Section 1 of the *Charter*” (2002) 36 RJT 121 at 150-167.

112. *Bendix Autolite Corp v Midwesco Enterprises, Inc*, 486 US 888 at 897, Scalia J, dissenting (1988).

more properly undertaken by elected officials in a democracy. This is an especially important point if one recognizes that the federal power over trade and commerce includes some power to regulate interprovincial trade barriers, as has been suggested.¹¹³ On questions that come down to open-ended policy choices, it may be preferable for the elected federal Parliament and government to take the lead, rather than unelected judges. One should also bear in mind that the standard under section 121 is the constitutional minimum, and it does not rule out either concerted provincial action or unilateral federal action to further reduce trade barriers.

While the proposed approach is conceptual, it avoids some of the pitfalls of formalism or nominalism, which at its worst simply affixes conceptual labels to sets of facts in order to rationalize results that are driven by other considerations.¹¹⁴ Despite the ascendancy of balancing tests in constitutional jurisprudence, there remains a place for analysis based on conceptual categories.¹¹⁵ As long as the categories are clearly defined and their justifications are understood, conceptual categorization can provide a reasonable amount of *ex ante* certainty, in a way that compares favourably to more open-ended balancing tests. In an area of constitutional doctrine that has the potential to affect much of Canada's economic regulatory structure, and which other countries' jurisprudence has shown to have the potential to become highly complex and indeterminate, providing certainty to economic and political actors should be a key concern. In this area, conceptualism has much to recommend itself.

Finally, section 121 should apply only to provincial legislatures. It should not bind the federal Parliament, despite some past judicial statements to this effect.¹¹⁶ The text of the *Constitution Act, 1867* supports this approach. Parliament's section 91 powers are set out in terms that expressly state that they exist "notwithstanding anything in this Act." Accordingly, there is a strong textual argument to be made that Parliament's section 91(2) power to regulate trade and commerce, which encompasses interprovincial trade,

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113. *Senate Internal Trade Report*, *supra* note 13 at 38.

114. Webber, "The Ancillary Power Doctrine," *supra* note 111 at 151-152.

115. See Ian B Lee, "Balancing and its Alternatives: Jurisprudential Choice, Federal Securities Legislation and the Trade and Commerce Power" (2011) 50 Can Bus LJ 72 at 80-92; Grégoire Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23(1) Can JL & Jur 179.

116. *Atlantic Smoke Shops*, *supra* note 4 at 569; *Agricultural Products Marketing Reference*, *supra* note 4 at 1267.

trumps any limits laid out in section 121.¹¹⁷ The purposes underlying section 121 also support this approach. In terms of political purposes, federal regulation that burdens interprovincial trade does not pose the same threat to national unity as provincial regulation, in that, for instance, there is little worry of escalating acts of retaliation, or of provinces seeking to benefit local interests at the expense of other Canadians. In terms of economic efficiency, the federal Parliament is theoretically in a position to consider the welfare of all Canadians in weighing the benefits and costs of a given regulation burdening interprovincial trade, unlike provinces which might be unduly swayed by parochial concerns.

In my view, the overall approach outlined above remains faithful to the text and purpose of section 121, in a manner that is also consistent with a contemporary understanding of constitutional principles and values, and the structure of Canadian federalism. Many of the economic benefits of free trade would be secured on this approach, in a manner that extends well beyond prohibiting outright tariffs. Moreover, the political objectives of free trade relating to national unity would likewise be achieved. Provinces would be mostly unable to act overtly or through the use of proxies to disadvantage interprovincial trade. This limits the potential for acts of hostility among provinces, or for provinces to impose burdens on outsiders in order to serve local interests, helping to encourage a conception of common economic citizenship among all Canadians. At the same time, this approach would support the basic structure of Canadian federalism. Provinces would remain largely free to exercise their section 92(13) jurisdiction over property and civil rights, with only clear acts of protectionism or truly indefensible incidental trade barriers ruled out. In other words, the potential threat that section 121 poses to local regulatory differences that pursue legitimate local objectives would be mitigated. Finally, this approach is consistent with the important constitutional principle of democracy. It goes only as far as is necessary in restricting the power of democratic majorities to regulate economic matters in the public interest. Provincial legislatures, which pose the greater threat to economic unity, are constrained from acting on protectionist impulses. By contrast, the federal Parliament, as the body that represents Canadians as a whole,

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117. Ian Blue notes that despite the existence of this language in s 91, s 96 of the *Constitution Act, 1867* has been found to trump Parliament's s 91 powers. Blue, "Long Overdue," *supra* note 46 at 179. While this is true, the Supreme Court's s 96 jurisprudence is somewhat anomalous. It relies heavily on the constitutional principle of the rule of law, and has little basis in the constitutional text. See *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at 751-754, 130 DLR (4th) 385. In my view, this jurisprudence does not provide a basis for disregarding the express words of s 91 in relation to other provisions of the *Constitution Act, 1867*.

would be unconstrained by section 121 in regulating interprovincial trade. This ensures that the people, acting through their elected representatives, ultimately have the last word on economic regulation.

A possible objection might be raised at this stage. One could argue that giving such weight to the original meaning and purpose of section 121 is inappropriate since Canadian federalism jurisprudence long ago departed from the framers' plan for a centralized federation. This is seen in the narrow construction given to the federal trade and commerce power, and perhaps even more clearly in the claim that the federal power to reserve or disallow provincial legislation has fallen into desuetude. Seen in this light, the narrow interpretation of section 121 coming out of *Gold Seal* is just one part of the broader shift toward decentralization and away from constraints on provincial power. Further, the decentralizing shifts in the jurisprudence have been confirmed by political practice.¹¹⁸ On this view, the narrow *Gold Seal* approach ought to be retained because it accords with a trend toward decentralization that has long been accepted by political actors at all levels of government.¹¹⁹

This approach ought to be rejected, mainly because section 121 is not solely, or even principally, concerned with the division of powers. Section 121 is about guaranteeing the commitment to free trade that was at the core of the bargain at Confederation, a commitment that continues to accord with contemporary Canadian values. To the extent that section 121 has incidental practical effects on the division of federal and provincial spheres of jurisdiction, these can be mitigated through the approach outlined above. Provincial authority should only be restricted to the extent that this is truly necessary to maintain the integrity of the common market. However, to

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118. For instance, in the early 1990s the Government of Canada proposed an amendment to s 121 that would have prohibited any measures that impeded the mobility of persons, capital, services, and goods within Canada. This implicitly recognized existing jurisprudence limiting the scope of s 121. See *Shaping Canada's Future Together: Proposals*, *supra* note 83. More recent initiatives, such as the 2016 federal-provincial accord on trade barriers might also seem to reflect a view that eliminating these barriers is a matter for the political branches of government to work out. That said, it is probably more correct to say that politicians are responding to the circumstances created by the courts rather than necessarily endorsing the *Gold Seal* approach to s 121.

119. The argument that s 121 has itself fallen into "desuetude" was correctly rejected by the trial judge. *Comeau*, *supra* note 1 at paras 169-174. Unlike the federal reservation and disallowance powers, which political actors have unilaterally refrained from exercising, the restrictive interpretation given to s. 121 came from the judiciary. Political actors have merely responded to the conditions created by *Gold Seal*. Moreover, it would be a stretch to say that a political consensus emerged favouring the narrow *Gold Seal* interpretation of s 121. For instance, the formal constitutional amendment to s 121 proposed by the Mulroney government in the 1990s would have repudiated the courts' narrow interpretation of s 121. *Ibid.* On the necessary conditions for constitutional amendment by desuetude, see Richard Albert, "Constitutional Amendment by Desuetude" (2014) 62 Am J Comp L 641 at 673-675.

insist on the formalistic *Gold Seal* interpretation of section 121 in order to avoid having any effect whatsoever on the division of powers would be to unaccountably privilege one set of constitutional values over another. It would also freeze our understanding of the Constitution in time, with the late 20th century rather than 1867 as the reference point.

Conclusion

Judge LeBlanc's opinion in *R. v. Comeau*, building upon the scholarly work of Ian Blue, makes a very strong case that section 121 of the *Constitution Act, 1867* prohibits both tariffs and non-tariff barriers alike. The text, purpose, and historical context of section 121 all support this position. Yet the decision also leaves important questions unanswered. We are left to wonder how this interpretation affects the structure of Canadian federalism, as well as how a 21st century understanding of constitutional values, including democracy and federalism, should inform our interpretation of section 121. Most urgently, Judge LeBlanc fails to address the question of how doctrine can be developed so as to appropriately distinguish between permissible and impermissible non-tariff barriers. These questions will likely occupy the minds of the judges hearing the appeal from the *Comeau* decision. In this paper, I have provided some tentative answers. No doubt, in the months to come, other approaches will be suggested. It seems that with the "New Brunswick beer case," Canada may be approaching an important constitutional moment, in which the issue of interprovincial trade barriers is finally addressed. Let's drink to that.