THE SUPREME COURT'S STRANGE BREW: HISTORY, FEDERALISM AND ANTI-ORIGINALISM IN *COMEAU*

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Introduction

Canadian beer enthusiasts and originalists make unlikely fellow travellers. However, both groups eagerly awaited and were disappointed by the Supreme Court of Canada's decision in *R v Comeau*.[1] The case came to court after Gerard Comeau was stopped and charged by the RCMP in a "sting" operation aimed at New Brunswickers bringing cheaper alcohol from Quebec across the provincial border to be enjoyed at home.[2] Eschewing Gerard Comeau's plea to "Free the Beer", the Court upheld as constitutional provisions in New Brunswick's *Liquor Control Act*, which made it an offence to possess liquor in excess of the permitted amount not purchased from the New Brunswick Liquor Corporation.[3]

The Court's ruling was based on section 121 of the *Constitution Act, 1867*, which states that "[a]ll articles of Growth, Produce, or Manufacture of any one of the Provinces…be admitted free into each of the other Provinces."[4] In the Court's view, this meant only that provinces could not impose tariffs on goods from another province. It did not apply to non-tariff barriers, like New Brunswick's monopoly on liquor sales in favour of its Crown corporation. In so deciding, the Court upheld the interpretation set out in a nearly 100-year-old precedent, *Gold Seal Ltd v Attorney-General for the Province of Alberta*,[5] albeit amending its interpretation of section 121 to prohibit both tariffs and "tariff-like" barriers. The Supreme Court also criticized the trial judge's failure to respect *stare decisis* in overturning this precedent. The trial

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[1] 2018 SCC 15 [*Comeau*].

[2] In the trial decision, the judge describes how the New Brunswick and Quebec RCMP cooperated. The latter would look for New Brunswick license plates at outlets selling liquor in the town across the border. They would follow New Brunswick customers in unmarked vehicles onto the bridge, radioing ahead to their New Brunswick counterparts and providing them the licence plate number and description of the vehicle involved. In general, two-thirds of those doing business at these border town outlets were from New Brunswick (*R v Comeau*, 2016 NBPC 3 at paras 7, 11 [*Comeau* (Trial)].

[3] *Liquor Control Act*, RSNB 1973, c L-10, s 134(b). "Free the beer" was a short-hand slogan for the case that was picked up by various media: see, for example, Shannon Proudfoot, "Why the Supreme Court Didn't 'Free the Beer'", *Maclean's* (19 April 2018), online: <macleans.ca>.

[4] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 121 [*Constitution Act, 1867*].

[5] (1921), 62 SCR 424, 62 DLR 62 [*Gold Seal*].

judge did so based on new expert evidence of the historical context surrounding the drafting of section 121.

For beer lovers, the only positive outcome to the decision was that it inspired an Ottawa and a Quebec brewery to launch a new style of beer, a Brut IPA, named after the claimant.[6] However, those hoping that the Court would update its outdated conception of originalism or at the least, adopt a more transparent and principled approach to the use of historical evidence in constitutional interpretation, had little reason to open bottles of Gerard Comeau in celebration.

In *Comeau*, the Court attempted to foreclose reconsideration of precedent based on research advancements in constitutional history. It introduced new limitations on its previously broad doctrine of *stare decisis* pronounced in *Canada (Attorney General) v Bedford*[7] and *Canada (Attorney General) v Carter*,[8] which seem aimed at stopping any attempt to use originalist methodology to challenge old precedents that misconstrued or disregarded legislative history surrounding the framing and entrenchment of constitutional provisions.

But perhaps more significantly, the Court has doubled down on its previous inconsistent approach to the use of history in constitutional interpretation, using the rationalization of purposive, "living tree constitutionalism."[9] Under "living tree" doctrine, interpreters are permitted to change the meaning of the constitutional text over time as society changes to avoid "frozen rights" based on the original intent of the drafters. The excessive discretion that living tree allows meant that the Court in *Comeau* was able to employ historical evidence in an arbitrary and haphazard fashion, even as it criticized the trial judge's approach.[10] Its analysis of the historical context and original meaning of section 121 displays some the worst qualities of "law office history"[11] that has been criticized, ironically, by opponents to originalism. These qualities include a "results-based" orientation to the selection and weight of the evidence.

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[6] Josh Dehaas, "Brewers in 2 Provinces Make 'Gerard Comeau IPA' to Highlight Trade Laws", *CTV News* (12 July 2018), online: <ctvnews.ca>.

[7] 2013 SCC 72 [*Bedford*].

[8] 2016 SCC 4 [*Carter*].

[9] E.g. *Reference re Employment Insurance Act (Can), ss 22 and 23*, 2005 SCC 56 [*EI Reference*], discussed later in this article. There, Deschamps J for the Court criticized the Quebec Court of Appeal's adoption of an "original intent approach" to interpretation, yet she herself relied on historical federal government correspondence articulating the amendment's objective to uphold the federal legislation as *intra vires.* In *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28, the Court misapplied a *post-patriation* work of Pierre Trudeau as support for the contention that an emphasis on human dignity was "present in s. 15 since the beginning." The Court later removed the requirement that a claimant prove a violation of human dignity in order to succeed in a section 15 claim.

[10] Kerri A Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms* (PhD Thesis, Faculty of Law, Queen's University, 2015) [unpublished] at 34–59 [Froc, *Untapped Power*].

[11] John P Reid, "Law and History" (1993) 27 Loy LA L Rev 193 at 197.

Our contention is that the Court need not have taken this tack to support its interpretation of section 121 and save Canada's complex matrix of provincial protections for intra- and interprovincial trade arrangements. A principled approach to history in constitutional interpretation, such as that advocated by "new originalists", would have led the Court to the same result. Using readily available historical evidence from the record and secondary sources consulted by the experts in the case, we will show that the trial judge was right to revisit *Gold Seal* but wrong to have uncritically accepted the evidence of the expert witness for Comeau that "admitted free" meant free from any and all barriers to interprovincial trade. In fact, a more accurate analysis of the original meaning of section 121, based upon the text and historical context, demonstrates that "admitted free" means free from interprovincial tariffs and border measures only.

This came as a surprise to Kerri Froc, who initially found the expert evidence admitted by the trial judge compelling on its face for a broader, originalist interpretation of "admitted free" in section 121 than the narrower perspective adopted in the Court's previous interpretation of section 121 in *Gold Seal*.[12] Judge LeBlanc, the Provincial Court trial judge in *Comeau*, took notice of the fact that none of the facta filed with the Supreme Court in *Gold Seal* contained argument on section 121; the case itself contained little interpretation, no citation of authority (jurisprudential or academic), and no serious consideration of history.[13] *Stare decisis* notwithstanding, it was a seriously flawed precedent.

However, Michael Marin's research regarding the text and history of Confederation debates presents a more persuasive interpretation that supports the outcome in *Comeau*. His analysis of the original meaning of "admitted free" places section 121 in the context of the broader financial arrangements between the federal government and the provinces. In particular, the federal government assumed jurisdiction over indirect taxation and a muscular set of economic powers that permitted economic integration and distribution of Canada's wealth on a non-discriminatory basis. In exchange, the provinces would receive subsidies from the federal government and neither level of government would be permitted to impose interprovincial tariffs. Only this latter aspect of the financial arrangement is enshrined in section 121.

In the first part of this article, we will provide a detailed critique of the Court's decision in *Comeau*, both in terms of its attempts to limit its prior expansive dicta on overturning *stare decisis* to thwart future originalist arguments and its methodology to ascertain section 121's historical context. In the second part of this article, we will summarize for readers the tenets of "new originalism." New originalism bears little resemblance to the Court's *sub rosa* caricature of "old

[12] See the interview of Kerri Froc on CBC, *The Current* (6 December 2017), online: <cbc.ca/radio/thecurrent/the-current-for-december-06-2017-1.4433556/december-6-episode-transcript-1.4436828>.

[13] *Comeau* (Trial), *supra* note 2 at paras 105, 115–16, 188. To that extent at least, then, the Court referring to *Comeau* and *Gold Seal* taking "[d]iffering interpretations of history" (*Comeau*, *supra* note 1 at para 37) is simply not correct.

originalism" that relies on original intent. Bradley Miller, Grant Huscroft (now justices of the Ontario Court of Appeal), Benjamin Oliphant, Léonid Sirota, Asher Honickman, as well as Froc are part of a growing body of Canadian scholars advocating a new Canadian originalism.[14] New originalist theories are grounded in original meaning (an assessment of the semantic meaning – or linguistic usage – of the terms at the time of framing and ratification), rather than the psychological states of those who drafted and ratified a constitutional provision. They are also consistent with a more principled "purposive" methodology that regards a constitutional provision's legislative history as important evidence of meaning. In the third part, we will provide a textually and historically grounded analysis of the original meaning of section 121 of the *Constitution Act, 1867*. We will thus demonstrate that it was unnecessary for the Court to use its version of "living tree" interpretation misapplying the historical evidence to arrive at its result.

I. *Comeau* — The Court's Tactical Interpretive Approach to "Save" Federalism

The beginning of the Court's decision in *Comeau* (published *per curiam*) hints that more than principle will be driving its analysis. It remarked that interpreting "admitted free" to mean an absence of both tariff and non-tariff barriers would mean undoing complex federal-provincial institutional relationships such as "[a]gricultural supply management schemes, public health-driven prohibitions, environmental controls, and innumerable comparable regulatory measures that incidentally impede the passage of goods crossing provincial borders".[15] The judgment repeats in similar language throughout these dire predictions about the future of such schemes should the trial judge's historically driven interpretation of section 121 stand.[16] In the past, the Supreme Court has not shied away from overturning conventional wisdom on constitutionality, even with dramatic results. In addition to more recent decisions setting firm time lines for criminal trials, as well as overturning decades-old precedent concerning the constitutionality of prostitution and assisted suicide prohibitions, one could also look to the *Manitoba Language Reference*, in which the Court declared unconstitutional Manitoba's entire body of unilingual laws (based on a historical reading of section 23 of the *Manitoba Act, 1870* and section 133 of the *Constitution Act, 1867*).[17] However, the spectre both of the Court undoing complex inter-provincial trade policy, as well as upending the primacy of the living tree constitutionalism (in

[14] See e.g. Benjamin Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42 Queen's LJ 107 [Oliphant & Sirota, "Rejected Originalism?"]; Bradley W Miller, "Beguiled by Metaphors: The Living Tree and Originalist Constitutional Interpretation in Canada" (2009) 22 Can JL & Jur 331; Grant Huscroft, "The Trouble with Living Tree Interpretation," (2006) 25:1 UQLJ 1; Asher Honickman, "The Original Living Tree" (2019) 28:1 Const Forum Const 29; Kerri A Froc, "Is Originalism Bad for Women? The Curious Case of Canada's 'Equal Rights Amendment"' (2015) 19:2 Rev Const Stud 237; Kerri A Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (2018) 38 NJCL 35.

[15] *Comeau*, *supra* note 1 at para 3.

[16] See e.g. *ibid* at para 51.

[17] *R v Jordan*, 2016 SCC 27; *Bedford*, *supra* note 7; *Carter*, *supra* note 8; *Re Manitoba Language Rights*, [1985] 1 SCR 721, 35 Man R (2d) 83.

principle if not always in practice) supported a trajectory towards its interpretation of section 121. This was the one established by *Gold Seal* and extended only slightly to include "tariff-like" barriers, following a small number of later judicial opinions.[18] Below, we identify the Court's strategic moves straying from doctrine and coherent interpretive methodology that lead to our conclusion.

A. The Anti-Originalism Subtext Behind the Revision of *Stare Decisis* Doctrine

In its "Judicial History" commentary, the Court referred to Judge LeBlanc's acceptance "without hesitation" of expert evidence "about the intentions of the drafters" and "minds of the drafters" as underlying his rationale for departing from the *Gold Seal* precedent.[19] These references hearken back to disapproval members of the Court previously expressed towards lower courts that relied overly on "framers' intent," which it equates with originalism. In *Reference re Employment Insurance Act (Can), ss 22 and 23*, Justice Deschamps criticized the Quebec Court of Appeal for adopting an "original intent approach" to interpretation by giving "predominant weight" to the "debates or correspondence relating to the constitutional amendment" concerning unemployment insurance.[20] In another federalism case, the Court pronounced, "[t]his Court has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the framers of the Constitution."[21]

The focus on evidence of original intent, said the Court, is what led the trial judge to err and depart from the precedent in *Gold Seal.* Judge LeBlanc believed he was entitled to do so because of the "new evidence exception" to *stare decisis* in *Bedford* and *Carter.* In *Bedford*, Justice McLachlin stated that trial judges may revisit legal issues determined by binding precedent from higher courts if there has been "a change of circumstances or evidence that fundamentally shifts the parameters of debate."[22] But, the Court in *Comeau* added a qualifier on the new evidence exception to avoid precedent being overturned by "shifting judicial whims or the introduction of new esoteric evidence by litigants dissatisfied by the status quo."[23] The evidence may be accepted only if it is needed to implement "living tree" constitutionalism.[24] Such

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[18] *Comeau*, *supra* note 1 at para 24. Political scientist, Emmett Macfarlane calls the contemporary political unpalatability of a "true economic union" the "dominant explanation" for the reasoning in *Comeau:* "In Its 'Free-the-Beer' Ruling, the Supreme Court Reveals its Contradictions" *Maclean's* (19 April 2018), online: <macleans.ca>. See also Léonid Sirota, "Unmaking History" (20 April 2018), *Double Aspect* (blog), online: <doubleaspect.blog/2018/04/20/unmaking-history/> [Sirota, "Unmaking History"].

[19] *Comeau*, *supra* note 1 at paras 15, 16.

[20] *Supra* note 9 at para 9.

[21] *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at paras 152–53, 107 DLR (4th) 457.

[22] *Bedford*, *supra* note 7 at para 42.

[23] *Comeau*, *supra* note 1 at para 26.

[24] *Edwards v Attorney General for Canada*, [1930] AC 124, [1930] 1 DLR 98 (JCPC) [*Persons Case*].

an approach "acknowledges that interpretations of the *Constitution Act, 1867* evolve over time, given shifts in the relevant legislative and social context."[25]

In other words, in the context of "living tree" constitutionalism, evidence capable of allowing judges to depart from precedent must be that of "changing legislative or social facts or some other fundamental change"[26] that would justify an evolutionary shift in the meaning of a constitutional term. By this, the Court attempted to confine the new evidence exception to evidence that comes into existence (and could only come into existence) *after* the prior binding interpretation:

> It is not enough to find that an alternate perspective on *existing* evidence might change how jurists understand the legal question at issue […] [A] re-discovery or re-assessment of historical events is not evidence of social change […] The approach to *stare decisis* is strict. *Bedford* and *Carter* do not alter that principle.[27]

Thus, not only would historical primary evidence (such as historical documents) not qualify, neither presumably would a new expert opinion on historical facts derived from sources that pre-date the precedent.[28] This is an exceedingly narrow basis for the seemingly generous "evidentiary exception" to *stare decisis* that the Court previously articulated, and closes the door on any reconsideration based on evidence of original meaning. Reading into the Court's stated concern, it could be argued that if the exception were taken too far in relation to evidence concerning pre-precedent facts, the "floodgates" would open. It risks destabilizing precedent with each new discovery of "esoteric" historical evidence or "judicial whims" imposing new glosses on existing evidence. But *Comeau* is hardly the exemplar of such circumstances. Again, there was no serious examination of the history behind section 121's origins in *Gold Seal*.

It is a particular stretch for the Court to have argued that the evidence in *Carter* would have met its new, narrower criteria for the new evidence exception (which it seemed to acknowledge when it says that this evidence was "unknowable or *not pertinent*" at the time of *Rodriguez v British Columbia (Attorney General)* in 1993).[29] For one thing, key elements of the *Rodriguez* trial record were subsumed into the *Carter* record. For another, the *Carter* evidence on the ethics of medical assistance in dying (whether it may be distinguished from palliative care that might hasten death), was one of three elements the Court pointed to as supporting a change in the "matrix

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[25] *Comeau*, *supra* note 1 at paras 33–34.

[26] *Ibid* at para 37.

[27] *Ibid* at paras 33–34, 41. If the Court is intimating that it did not introduce any new element of flexibility/discretion into the doctrine of vertical *state decisis*, this is clearly not the case. However, it is true that the convention to follow precedent from higher courts remains strong: Debra Parkes, "Precedent Revisited: Carter v Canada (AG) and the Contemporary Practice of Precedent" (2016) 10:1 McGill JL & Health 123 at 158.

[28] *Comeau*, *supra* note 1 at para 34.

[29] *Ibid* at para 32 [emphasis added].

of legislative and social facts." However, this evidence was entirely knowable and pertinent in *Rodriguez* albeit that Justice Sopinka preferred to base his analysis on the legal distinction and did not have expert ethicist testimony in the record.[30] One might question why greater reliance on ethics plus additional expert evidence in *Carter* provides sufficient evidence of "fundamental shift" 20 years after the relevant precedent, whereas a greater reliance on legislative history plus additional expert evidence would not in *Comeau* some 100 years after *Gold Seal*, if the Court was applying the same standard.

If the Court's real concern was not blocking prospective avenues for revisiting precedent based on historical evidence and originalist interpretation but instead the aforementioned "floodgates" argument, it had other options. Justice Rothstein in *Ontario (Attorney General) v Fraser*, suggested a few that are consistent with the purpose of *stare decisis* doctrine, such as asking the question: "[h]ave facts so changed, *or come to be seen so differently*, as to have robbed the old rule of significant application or justification."[31] This sets a high standard without completely eliminating a court's consideration of pre-precedent evidence under the *stare decisis* exception. It could easily have been applied to permit the reconsideration of *Gold Seal* and the evidence of circumstances surrounding the drafting of section 121, while ensuring that the new evidence exception remained "exceptional."

To further show the potential absurdity that results from these new evidentiary restrictions, let us imagine the following precedent. An appellate court interpreted the federal power over fisheries in section 91(12) to mean that the federal government had no jurisdiction to regulate fresh water bodies within a province that did not contain fish (even if they contained frogs).[32] The narrow definition of allowable evidence to support a "fundamental change" under *Comeau* would mean, for instance, that if there was a scientific discovery that creatures previously thought to be amphibians were in fact fish (and had always been fish), there would be no basis to revisit this decision. This discovery likely would not be a fundamental change affecting the meaning of the constitutional term "fisheries." Arguably, the term "fisheries" itself would not change meaning — it remains, essentially, fish habitat as a public resource.[33] If the precedent were to be revisited, it would merely be new evidence concerning pre-precedent facts about "fish." Perhaps more precisely on

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[30] *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 606, 82 BCLR (2d) 273 [*Rodriguez*], citing Edward W Keyserlingk, *Sanctity of Life or Quality of Life in the Context of Ethics, Medicine and Law*, a study written for the Law Reform Commission of Canada. (Ottawa: Minister of Supply and Services Canada, 1979). AG Canada made these points in its *Carter* factum at paras 86, 91–93.

[31] 2011 SCC 20 at para 126, citing the US Supreme Court majority in *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992) [emphasis added].

[32] *Constitution Act, 1867*, *supra* note 4, s 91(12) explicitly grants the federal government jurisdiction over "Sea Coast and Inland Fisheries."

[33] *Interprovincial Cooperatives Limited et al v Dryden Chemicals Ltd*, [1976] 1 SCR 477 at 495, 53 DLR (3d) 321. In *Ward v Canada (Attorney General)*, 2002 SCC 17 at para 2, the Court recognized a broader interpretation: "The federal power over fisheries is not confined to conserving fish stocks, but extends to the management of the fisheries as a public resource." Accordingly regulations concerning the seal hunt were found to be valid.

point, if at the time of Confederation "fishery" was a catch-all term to describe all bodies of water with any aquatic animal life and this meaning narrowed over time both in common parlance and judicial interpretation to refer only to fish habitat, newly discovered historical evidence of this broader usage would also not permit a trial judge to overturn our precedent.

The Court's criticism of the trial judge was grounded upon its rejection of what it understood to be originalist methodology (i.e. that the meaning of a constitutional provision is conclusively established via empirical discovery of historical fact, namely original intent). It charged that he limited his analysis to "the words and context of the provision in light of the historical evidence" (and did not "conform to the purposive approach to constitutional interpretation"). Further, he erroneously accepted expert evidence on the "correct interpretation" of section 121, and thereby ceded his role.[34] The Court cited nothing from the trial decision to support its characterization. To the contrary, the trial judge indicated that the "plain reading" of section 121 did not suggest its restriction to tariffs; his acceptance of expert evidence from Dr. Andrew Smith was to assess whether the legislative history gave rise to a different reading.

Dr. Smith is a Canadian-trained business historian based at the University of Liverpool.[35] Judge LeBlanc describes the expert as providing "important background information" on intent and historical context, which he reviews in detail. He also considers a textual analysis based on section 121's "placement […] in the structure of the *British North America Act, 1867*." One may question whether some of Dr. Smith's testimony on the significance of the placement of section 121 in Part VIII of the *Act* apart from the main "division of powers" sections (sections 91–93) veered into improper expert witness testimony on the "ultimate issue."[36] However, the trial judge explicitly rejected this evidence. [37]

With respect, while we disagree with the inferences the trial judge drew from the expert evidence, there is no basis to conclude that the judge had turned section 121's interpretation over to Dr. Smith.[38] Above, we noted the trial judge's analysis of section 121 in the larger context of the document and in its historical context. He indicated that while framers' intent is important, it was "not a decisive factor" in his analysis.[39] Why, then did the Supreme Court come to the conclusion that he ceded

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[34] *Comeau*, *supra* note 1 at paras 39, 40.

[35] See Dr. Smith's CV, online (pdf): <andrewdsmith.files.wordpress.com/2013/11/cv-5-november-2013-andrew-smith-finalized.pdf>.

[36] *R v Mohan*, [1994] 2 SCR 9 at 24, 114 DLR (4th) 419.

[37] *Comeau* (Trial), *supra* note 2 at paras 53–54, 64.

[38] The trial judge does refer to competing expert witness interpretations of section 121, *ibid* at para 173, but makes clear that he has his own interpretation ("my interpretation") based on "a number of factors."

[39] *Ibid* at para 163. Ironically, one of the reasons that the trial judge decided to depart from *Gold Seal* was the fact that the Court there did not undertake a "large, liberal or progressive interpretation" of the Constitution, whereas he approached his task as one that eschewed a "narrow and technical interpretation"

interpretation to Dr. Smith? Given the lack of evidence on the face of the trial decision to support it, the finding is perhaps only understandable in light of remarkably similar dicta in *Reference re s 94(2) of Motor Vehicle Act (British Columbia)*. There, the Court attempted to limit any constraints on interpretation posed by "framers' intent."[40] Chief Justice Lamer (as he then was) said that to give more than "minimal weight" to evidence from two legislative drafters about why "fundamental justice" was used in section 7 of the *Charter*[41] would give rise to "frozen rights" that were antithetical to living tree constitutionalism. However, in a later decision, *R v Prosper*, he attempted to limit his "minimal weight" comment to cases where the Court deems acceptance of historical evidence as going too far and usurping the judicial role in interpretation.[42]

Consequently, the Supreme Court *has* referred to "framers' intent" and *has* assigned significance to historical evidence in its constitutional decisions. Sometimes it assigns very weighty significance to the "historical context" or the "constitutional bargains" of Confederation when it supports its preferred result.[43] Rather than excluding historical evidence, therefore, *Comeau* represents the Court's desire to maintain, under the auspices of "living tree" doctrine, maximum discretion to use or discard such evidence as it sees fit.

B. Lack of principle in the decision on the interpretation of section 121

After criticizing the trial judge's lack of adherence to *stare decisis*, the Court decided to itself reconsider *Gold Seal* and take up the "[invitation] to offer guidance on the scope of section 121."[44] In overturning the trial decision, the Court was able to embark on its own, relatively unstructured examination of section 121's meaning. In its one-paragraph textual analysis, the Court noted that the text of section 121 is broad and "does not answer the question of how 'admitted free' should be interpreted." In light of this ambiguity (which the Court "told" us exists rather than "showing" us), it went on to analyze the relevant context behind the provision, starting with the historical context.[45] It then conducted its *own* historical analysis with the justification that it was not regarding framers' intent as conclusive. It did so with little reliance on the record amassed in the trial court, but rather upon its own review of some secondary literature

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for a progressive interpretation in accordance with "living tree" constitutionalism, as the Privy Council introduced in the *Persons Case*, *supra* note 24: *Comeau* (Trial), *supra* note 2 at paras 42, 116.

[40] *Reference re s 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486, 69 BCLR 145 [*Re BC Motor Vehicles* cited to SCR].

[41] *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

[42] *R v Prosper*, [1994] 3 SCR 236 at 267, 133 NSR (2d) 321 [*Prosper*].

[43] Oliphant & Sirota, "Rejected Originalism?", *supra* note 14 at 158.

[44] *Comeau*, *supra* note 1 at para 45.

[45] One difficulty in simply presenting the ambiguity as self-evident is the fact that the plain meaning of "admitted free" without qualifiers appears to undermine it being limited to tariffs (or barriers that are "tariff-like") (Malcolm Lavoie, "R. v. Comeau and Section 121 of the Constitution Act, 1867: Freeing the Beer and Fortifying the Economic Union" (2017) 40:1 Dal LJ 189 at 199). The ambiguity only becomes apparent with deeper analysis.

regarding the history of Canada's economic development, a paragraph from a prior precedent interpreting mobility rights for lawyers, and (like the trial judge) excerpts from Confederation debates.[46]

The Court remarked upon the conflicting evidence in speeches from the Fathers of Confederation as to whether their concern was confined to tariffs or included other impediments to interprovincial trade. However, it decided not to resolve the issue of how these conflicting statements (together with other available evidence) would bear upon the decision to use the broader language of "admitted free" without the qualifier of "from tariffs." Instead, the Court deemed this unknowable even without the support of an assiduous evidentiary review. It stated: "[w]e do not know why they chose this broader, and arguably ambiguous phrase. We do know there were debates on the issue and those that wanted a more expansive term than 'tariffs' or 'customs duties' won the day." Consequently, it pronounced that the historical evidence was capable of showing only that section 121 "at a minimum" prohibits tariffs and tariff-like measures.[47]

Turning separately to what it referred to as the "legislative context," the Supreme Court discussed the significance of section 121's placement in Part VIII of the *Constitution Act, 1867*. While we agree that the Court was absolutely correct to consider this context, it noted that these provisions do not confer but rather limit the power of both levels of government. Accordingly, their interpretation must be circumscribed to avoid "constitutional hiatuses — circumstances in which no legislature could act." While it is sensible to regard sections 91 and 92 as exhaustive such that together, the levels of government collectively are empowered to address every class of subject that a legislative matter may fall under, the same type of consideration does not pertain in relation to legislative *limitations.* As Léonid Sirota comments:

> Here, the Court contradicts both the constitution and itself. Constitutional hiatuses are not anathema to federalism. They exist: in section 96 of the *Constitution Act, 1867* (which limits the powers of both Parliament and the legislatures to interfere with the independence and jurisdiction of superior courts); in sections 93(1) and (2) (which limit the provinces' ability to interfere with minority rights in education, without allowing Parliament to do so); and, even on the Court's restrictive reading, in s. 121 itself. And then, of course, there is the giant constitutional hiatus usually known as the *Canadian Charter of Rights and Freedoms*, as well as the smaller but still significant one called section 35 of the *Constitution Act, 1982*.[48]

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[46] *Comeau*, *supra* note 1 at paras 55–63, citing *Black v Law Society (Alberta)*, [1989] 1 SCR 591, 96 AR 352. Neither of the two secondary sources the Court relies upon it its "historical context" section are mentioned in any of the facta before the Court. The 1939 government study included in the passage from *Black* was cited by one intervener, the Attorney General for Ontario. It went on to conduct a separate textual analysis based on the surrounding legislative context of section 121, discussed below.

[47] *Comeau*, *supra* note 1 at paras 64, 67.

[48] Sirota, "Unmaking History", *supra* note 188.

What is more, it denied that section 121 is a transitional provision and accordingly is "spent," saying that this would amount to "judicial excision of the provision from the Constitutional text."[49] Leaving aside how this positions the Court as "innocent" in relation to its judicial marginalization of other constitutional provisions (if not outright excision),[50] it does not address the question of what substantive content is contained in section 121 after its interpretation. As Peter Hogg concludes, the Supreme Court has already interpreted sections 91(2) and 92(13) and (16) to "severely curtail [...] the powers of the provinces to regulate marketing of goods imported from outside the province [...] or to regulate the production or pricing of goods produced in the province but destined for out-of-province markets."[51] Perhaps its answer would be that the residual meaning of section 121 concerns federal government limitations only — but without posing the question in the first place, we may only speculate as to its answer.

Last, the Supreme Court maintained that the unwritten, "foundational principle" of federalism is "vital" to the interpretation of section 121 — it promotes "jurisdictional balance" in the interpretation of powers over federal/provincial economic regulation. How we understand "jurisdictional balance" can change over time, as living tree constitutionalism permits courts to be "alert to evolutions in […] how we understand [it]." [52] The Court devoted several paragraphs to "protest too much" that applying this "interpretive aid" is not constitutionalizing a certain formulation of federalism. Certainly, to have a truly federal state, an interpreter should have regard for regional diversity and should not interpret the division of powers in a manner that "effectively eviscerates" one head of power in favour of another.[53] Nevertheless, much as it has in "rights balancing" cases under the *Charter*, the Court employed "balance" in *Comeau* in a manner that obscures the politicization inherent in the exercise.[54] It permitted the Court to substitute an interpretation of the Constitution as it ought to be ("balanced") rather than how it is (the actual division of powers and limitations thereto based on the original meaning of the terms).[55] This is particularly the case in light of the Court's pronouncement that what was considered

[49] *Comeau*, *supra* note 1 at para 75.

[50] Froc, *Untapped Power*, *supra* note 10.

[51] Peter W Hogg, *Constitutional Law of Canada: 2018 Student Edition* (Toronto: Thomson Reuters, 2018) at 20-7, n 37, citing *Manitoba v Manitoba Egg and Poultry Association et al*, [1971] SCR 689, 19 DLR (3d) 169; *Burns Foods Ltd et al v Attorney General for Manitoba et al*, [1975] 1 SCR 494, 40 DLR (3d) 731; *Can Industrial Gas and Oil v Govt of Saskatchewan*, [1978] 2 SCR 545, 80 DLR (3d) 449; *Central Can Potash v Govt of Sask*, [1979] 1 SCR 42, 88 DLR (3d) 609.

[52] *Comeau*, *supra* note 1 at paras 77, 78, 83. This is possibly the first time that the Supreme Court has expressly stated that living tree constitutionalism applies not only to the text of the Constitution, but to its foundational, unwritten principles. To the contrary, the *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 suggests the underlying principles are historically rooted: "[b]ehind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles" (at para 49). This potential new development adds another layer of discretionary power attached to constitutional interpretation.

[53] *Reference re Securities Act*, 2011 SCC 66 at para 7, cited in *Comeau*, *supra* note 1 at para 79.

[54] Grégoire Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23:1 Can JL & Jur 179, especially at 198: "Doing Violence to the Idea of a Constitution".

[55] Sirota, "Unmaking History", *supra* note 18, makes a similar point in relation to *Comeau*.

"balanced" federalism at Confederation need not be the same as how we understand balance today. Simultaneously, it pre-empted critique by positioning its decision as "middle of the road" — including in section 121 tariff-like barriers (which the Crown had argued against) but not all barriers to free trade (as Comeau advocated)[56] — and as applying a "balanced" perspective of federalism. Who could be against moderation and balance?

Turning to the interpretation of section 121 proper, the Court returned to *Gold Seal* and subsequent cases interpreting it, characterizing them as not in conflict but rather "represent[ing] a single, progressive understanding of the purpose and function of section 121 in the broader constitutional scheme."[57] However, the question as to whether *Gold Seal*'s dicta could be extended beyond tariffs was not answered until Justice Rand did so in *Murphy v Canadian Pacific Railway*. Speaking for himself (but forming part of the majority on the non-applicability of section 121), Justice Rand suggested that section 121's prohibition could expand beyond customs duties to "trade regulation […] designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion."[58] By using the word "progressive" the Court is suggesting that cases subsequent to *Gold Seal* recognized the "evolving" meaning of "admitted free" to include more than formal tariffs.

One might question (and we do) whether it is accurate to describe the inclusion of both formal tariffs and other barriers that act like tariffs in substance as "progressive understanding" or an "evolution" in meaning.[59] The Court itself stated that the historical and legislative context suggests, "at a minimum", that both tariffs and tariff-like measures are prescribed by section 121.[60] In essence, this would mean that section 121 had one meaning that never changed; post-*Gold Seal* decisions recognizing that section 121 prohibited more than formal tariffs but also any "trade regulation that in its essence and purpose is related to a provincial boundary" relied on its original meaning (as found by the Court).[61] This would mean that *Gold Seal*, which spoke only of section 121 prohibiting tariffs, was wrong and the Court's criticism of Judge LeBlanc for his failure to follow *stare decisis* was misplaced. If the original meaning of "admitted free" is "admitted free of tariffs" and only tariffs (such that *Gold Seal* is right and subsequent cases represent an "evolution" in meaning as the Court maintains), then its own historical and legislative contextual analysis is wrong. In either case, the Court's analysis undermines its criticism of the trial judge.

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[56] *Comeau*, *supra* note 1 at paras 85–88.

[57] *Ibid* at para 91.

[58] *Murphy v Canadian Pacific Railway*, [1958] SCR 626 at 642, 15 DLR (2d) 145 [*Murphy*].

[59] See the Court's chastisement of the federal Crown for "privileging form over substance" in the interpretation of Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*, *1982*] in *Reference re Senate Reform*, 2014 SCC 32 (a decision that makes repeated reference to upholding the meaning of the constitutional amendment procedure in a manner envisioned by the framers).

[60] *Comeau*, *supra* note 1 at para 67.

[61] *Atlantic Smoke Shops Ltd v Conlon*, [1943] 4 DLR 81, [1943] AC 550; *Murphy*, *supra* note 58, cited at paras 98–102 of *Comeau*, *supra* note 1.

What the Court might have been alluding to is the emerging notion that government does not violate section 121 if its trade regulations function as a barrier related to a provincial boundary but these effects are merely incidental to the objects of the larger regulatory scheme. At the time *Gold Seal* was decided (1921), the Supreme Court and the Privy Council were operating instead upon the premise that each level had exclusivity within their scope of power. The Court and Privy Council struck down a number of federal schemes directed towards interprovincial and export trade on the basis that they "swept up" local trade as well.[62] Again, Justice Rand in *Murphy* implied that trade regulation that imposes an impediment that unintentionally functions as a tariff-like barrier may not fall within section 121 ("s. 121, apart from customs duties, [is] 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 […] it does not create a level of trade activity divested of all regulation […] what is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary").[63] "Incidental effects" is a doctrine of relatively recent vintage;[64] it could be argued (as the Court appears to in *Comeau*) that Justice Rand essentially applied a nascent version of "incidental effects" to section 121.

It is not clear that "incidental effects" is a doctrine that can simply be imported from division of powers jurisprudence to a constitutional provision that limits government action. In relation to constitutional *limitations* imposed by the *Charter*, the Supreme Court has recognized that an infringement in purpose or effect (whether incidental or not) renders legislation invalid under section 52 of the *Constitution Act, 1982*.[65] *Murphy* did not definitively answer whether the rationale for its use in the sections 91/92 context (to give effect and functionality to these provisions by tolerating a degree of overlap in division of powers) translated to section 121 (applying as a check on both governments, breaking the longstanding economic dependency of provincial governments on tariffs and ensuring the federal government did not simply replace provinces as collecting customs on interprovincial goods).[66]

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[62] See e.g. *The King v Easter Terminal Elevator Co*, [1925] SCR 434, [1925] 3 DLR 1; *AG British Columbia v AG Canada (National Products Marketing Act)*, [1937] AC 377 (JCPC), aff'g [1936] SCR 398, [1936] 3 DLR 622.

[63] *Murphy*, *supra* note 58 at 642 [emphasis added]. The decision of Locke J, speaking for himself and three others, simply repeated the *Gold Seal* dicta about tariffs and stated, "[t]here is nothing of this nature authorized by the Canadian Wheat Board Act" (at 633).

[64] Eugenie Brouillet & Bruce Ryder identify *AG Quebec v Kellogg's Co of Canada Ltd*, [1978] 2 SCR 211, 83 DLR (3d) 314, as the case introducing the doctrine in "Key Doctrines in Canadian Legal Federalism" in Peter Oliver, Patrick Macklem & Nathalie Des Rosier, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 415 at 423.

[65] By contrast, s 15(2) of the *Charter* is an "empowering provision" that permits governments to engage in targeted ameliorative programs and is focussed on governmental purpose, despite the potential discriminatory effects on groups that are outside the scope of intended beneficiaries: *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 [*Cunningham*]; *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 [*Centrale*].

[66] See the analysis of the historical context of section 121 below.

Nevertheless, based on *Gold Seal* and subsequent cases acting as a "progressive jurisprudential continuum, all consistent with the text of section 121, its historical and legislative contexts, and the principle of federalism," the Court formulated a test for section 121 infringement:

> The law must impact the interprovincial movement of goods like a tariff, which, in the extreme, could be an outright prohibition. And, restriction of cross-border trade must be the primary purpose of the law, thereby excluding laws enacted for other purposes, such as laws that form rational parts of broader legislative schemes with purposes unrelated to impeding interprovincial trade.[67]

To the extent that the Court's rule is an application of the "incidental effects" doctrine to section 121, it should have recognized that it was an importation from another context and considered whether this new application was warranted. However, Asher Honickman argues that in fact the "primary purpose of restricting trade" test is a "novel standard in Canadian federalism that finds no support in either *Gold Seal* or *Murphy*."[68] We would instead characterize the Court here, by directing the inquiry exclusively towards "primary purpose," as narrowing the conventional incidental effects doctrine to exclude from consideration unintended effects. This, too, departs from precedent. As the Court said in *R v Morgentaler*, legal effect "is relevant in constitutional characterization even when it is not fully intended or appreciated by the enacting body."[69] Arguably, using "incidental effects" doctrine in this way *changes* section 121's meaning by inserting a "dominant intention" requirement, regardless if the legal effect is to create a functional trade barrier in pith and substance.[70] By contrast, incidental effects applying to sections 91 and 92 *fulfils* their meaning by permitting each jurisdiction to be sovereign in their own sphere, legislating matters in pith and substance within their jurisdiction largely without regard for the potential impact on the other.[71]

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[67] *Comeau*, supra note 1 at paras 106, 114.

[68] Asher Honickman, "Comeau is a Casualty of Confused Doctrine" (24 April 2018*) Advocates for the Rule of Law* (blog), online: <ruleoflaw.ca/comeau-is-a-casualty-of-confused-doctrine/> [Honickman, "Confused Doctrine"].

[69] [1993] 3 SCR 463 at 483, 125 NSR (2d) 81.

[70] In "Confused Doctrine", *supra* note 68, Honickman notes that a provision whose "primary purpose" was to interfere with interprovincial trade would render section 121 redundant, as it would fall in pith and substance within interprovincial trade in s 91(2) and likely would not be capable of being saved through rational connection to a valid scheme. Under "ancillary powers" doctrine, a serious encroachment on federal jurisdiction, like a provision whose "primary purpose" was to impede interprovincial trade, would have to meet a test of necessity. It is only in the case of minor encroachments that the Court employs a more flexible test of "rational and functional connection" to a larger, constitutionally valid scheme: *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641, 58 DLR (4th) 255.

[71] This is subject, of course, to the doctrines of paramountcy and interjurisdictional immunity. As the Court recognized in *Comeau*, *supra* note 1 at para 104, in *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 at para 171, 223 AR 201, McLachlin CJ (dissenting, but not on this point) found the provision of s 6(3)(a) of the *Charter* "mirrors" the jurisprudence under section 121, in making a "primary/incidental" distinction. However, the prohibition of discrimination among persons "primarily" on the basis of province of present or previous residence in *Charter* s 6(3)(a) is contained right in the constitutional text.

In the application section, it becomes apparent why the Court is focussed on requiring that a restriction on trade be the primary purpose (intentional objective) of an impugned regulation to infringe section 121. The Court accepted the evidence of the Crown that protecting the NB Liquor Corporation's monopoly was not about revenue generation (the Court concedes that "exploiting the passage of goods across a border solely as a way to collect funds" would support a primary purpose being the restriction of trade).[72] Instead, it was to monitor the "liquor trade" in the province with a view to "controlling access to liquor in New Brunswick" for "diverse internal policy objectives" (unnamed). Obviously, liquor *overconsumption* is a serious social and health concern for governments across Canada. But if the enforcement of NB Liquor Corporation's liquor monopoly was related to social and health reasons, one would expect greater monitoring of and limitations on liquor purchases within the province. To the contrary, one of the goals of the NB Liquor Corporation is net income growth of 1.5% per year through increased sales, and remittances back to government figure prominently in its annual report.[73]

While the focus of our article concerns the interpretation of "admitted free," the problematic way that the "incidental effects" doctrine is attached to section 121 flows from, and is connected to, the Court's unprincipled approach to interpretation under the auspices of "living tree" constitutionalism. Our analysis of the original meaning of "admitted free" in section 121 leads to the same result as the Court in relation to the interpretation of the text, but not necessarily to its construction of the section 121 test concerning "tariff-like" barriers and its application in *Comeau*. An in-depth analysis of this question, is, however, beyond the scope of this article.

Next, we address modern originalist methodology that would have permitted the Court to adopt a principled approach to the assessment of history in *Comeau*, would have avoided the flawed analysis set out above, and yet still would have supported an interpretation of section 121 that would have found "admitted free" to be limited to tariffs (whether formal tariffs or functional equivalents).

II. New Originalism and its Particular Relevance to Canadian Federalism

Originalism represents a family of theories that rely on some common understandings about the methodology for interpreting the constitution, rather than one unified, coherent theory. However, what identifies a methodology as "originalist" is commonly accepted to involve two basic premises. First, the meaning of the constitutional text is fixed at the date of framing and ratification. Second, interpreters of the Constitution are to treat the original meaning of the text as authoritative — that

[72] *Comeau*, *supra* note 1 at 111.

[73] Government of New Brunswick, *2017-2018 Annual Report – NB Liquor* (Fredericton: ANBL, 2018) at 6, 9, online (pdf): <anbl.com/medias/ANBL-Annual-Report-EN-2017.pdf>. While being recognized as a "good corporate citizen" is listed as one of its goals, none of the programs it sponsors are directed towards addiction or reducing consumption of alcohol. More typical is a program like its "Keep it Social University Program" aimed at "responsible consumption and harm reduction" (at 24–27).

is, they must provide interpretations that are consistent with this meaning.[74] Most originalists contrast their approach to the vagaries of so-called "living constitutionalism," "common law" or "dynamic" interpretation, whose adherents, like those adopting the orthodox perspective on "living tree" doctrine in Canada, view the constitutional text as loosely associated with its historical meaning (if at all).

Beyond these two basic premises, however, originalists differ. Like most families, there are various schisms and old debates between its members that are seemingly never resolved. Nevertheless, we might venture a little further in finding more commonality between most of its members. Most (though not all) contemporary originalists have abandoned reliance on original intent as authoritative in favour of original meaning — the meaning of the text commonly understood by the "framing generation" (what Lawrence Solum calls "linguistic meaning in context").[75] Why the departure from original intent to original, semantic meaning? One of the central problems raised by critics was indeterminacy due to "multiplicity of intent," a problem from both an evidentiary and epistemological perspective: "when there are multiple authors of a text that must function across decades and centuries, it is not clear that there is such a thing as the intention of the framers that could guide the application of text to future cases."[76] In the Canadian context, we might recognize this criticism from *Re BC Motor Vehicles* and Lamer J.'s refusal to give the testimony of constitutional drafters at the Joint Committee on the Constitution more than "minimal weight" because of this problem.[77]

Instead of an investigation into the subjective state of framers' minds (a borderline psychological inquiry), interpreters are attentive not only to how framers used the terms (as in legislative debates), but any other available public documents written at the time (such as newspapers or dictionaries) that would show common usage of constitutional words and phrases. Strictly speaking, original intent is concerned not with communication but with the (potentially idiosyncratic) meaning

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[74] Lawrence Solum calls this the "fixation thesis" and the "constraint thesis": Lawrence B Solum, "The Fixation Thesis: The Original Meaning of the Constitutional Text" (2015) 91 Notre Dame L Rev 1; Lawrence B Solum, "The Constraint Principle: Original Meaning and Constitutional Practice" (13 April 2018), online: <ssrn.com/abstract=2940215>; Lawrence B Solum, "Originalism and the Invisible Constitution" in Rosalind Dixon & Adrienne Stone, eds, *The Invisible Constitution in Comparative Perspective* (Cambridge, UK: Cambridge University Press, 2018) 61 [Solum, "Originalism and the Invisible Constitution"].

[75] Solum, "Originalism and the Invisible Constitution", *supra* note 74 at 64. For a discussion of contemporary intentionalism, see Stanley Fish, "The Intentionalist Thesis Once More," and Steven Smith, "That Old-Time Originalism," in Grant Huscroft & Bradley Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011) 99, 223, respectively [Huscroft & Miller, *The Challenge of Originalism*]; and Richard Kay, "Original Intention and Public Meaning in Constitutional Interpretation" (2009) 103 Nw UL Rev 703.

[76] Lawrence B Solum, "We Are All Originalists Now," in Robert W Bennett & Lawrence B Solum, eds, *Constitutional Originalism: A Debate* (Ithaca, NY: Cornell University Press, 2011) 1 at 8 [Solum, "We Are All Originalists Now"].

[77] *Re BC Motor Vehicles*, *supra* note 40 at paras 51–52.

adopted by the drafter. The emphasis on "communicative content" of the Constitution means that original meaning places more emphasis than original intent on the text.[78]

The historical context of events publicly known at the time also plays a large role in determining meaning. Original meaning is premised on the idea that the constitutional drafting is a communicative enterprise. Framers base their selection of constitutional terms on a desire to communicate meaning accurately to future interpreters, and especially for vague or ambiguous text, would assume interpreters would be able to clarify its meaning from a commonly appreciated context.[79] For instance, in the *Constitution Act, 1867*, the meaning of "civil rights" in section 92(13) may be properly understood only in the context of Québec's terms for entering the union, including preservation of its system of civil law in the private sphere, and in the context of similar protections also using the term "civil rights" in the *Quebec Act, 1774*.[80]

Thus, original meaning eliminates the concern about the indeterminacy of collective, subjective mental states, as the endeavour becomes instead an objective, empirical exercise to ascertain the meaning of terms as understood and employed by the founding generation. Part of ascertaining semantic meaning nevertheless includes available evidence from framers and ratifiers regarding the provisions, both in terms of providing evidence on the semantic meaning of the terms and the context in which they were ratified.[81] William Eskridge, a non-originalist, nevertheless remarks that public statements by "key supporters" of constitutional provisions are "potentially quite reliable for figuring out original constitutional understanding or meaning" because of their motivation to seek "common ground" in their quest to garner support while not alienating existing supporters, and because opponents would be ready to pounce on any deviation of their statements from the "plain meaning of the proposed measure."[82]

Another criticism of these older theories of originalism was their tendency to assume that original intentions could provide all the answers when courts are called upon to apply often vague constitutional provisions. One of the ways that originalists responded was to distinguish interpretation (ascertaining the abstract, linguistic, or "semantic" meaning of a term) from construction (in which "interpreters implement

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[78] Solum "We Are All Originalists Now", *supra* note 76 at 64; Keith Whittington, "On Pluralism within Originalism," in Huscroft & Miller, *The Challenge of Originalism*, *supra* note 76 at 80.

[79] Solum, "Originalism and the Invisible Constitution", *supra* note 744 at 67.

[80] *Quebec Act, 1774* (UK), 14 Geo III, c 83. See e.g. *Citizens Insurance Co v Parsons*, (1881) 7 App Cas 96 (JCPC); *Saumur v City of Quebec*, [1953] 2 SCR 299, [1953] 4 DLR 641.

[81] Steven Calabresi, "The Political Question of Presidential Succession" (1995) 48 Stan L Rev 155 at 161 (indicating this may be "essential" to show what "legally trained readers" would have thought about a particular interpretation, especially for legal terms of art); Lawrence B Solum, "Originalist Theory and Precedent: a Public Meaning Approach" (2018) 33(3) Const Commentary 451 at 456 [Solum, "Originalist Theory and Precedent"].

[82] William Eskridge, Jr, "Should the Supreme Court Read *The Federalist* But Not Statutory Legislative History?" (1998) 66 Geo Wash L Rev 1301 at 1323.

and give effect to the Constitution — for example, by creating doctrines, practices, and institutions"[83]). Original meaning in the sense meant by most new originalists helps ensure, first and foremost, that modern-day interpreters are not misled about changes in meaning over time. But original meaning is necessarily limited. The semantic meaning of many constitutional terms is extremely broad/vague or ambiguous ("underdeteriminate").[84] Part of the reason is the nature of the constitution-making enterprise: constitutions are documents meant to apply to wide-ranging circumstances far into the future and therefore require language that will accommodate such unforeseen circumstances. This means, for instance, that original meaning of constitutional terms, for the most part, will not exclude technological or even social innovations (and no originalist objects to any necessary gap-filling to address new technology in any event).[85]

If interpretation has "run out" (because the interpreter has ascertained the original meaning but it has not yielded a rule capable of being implemented in a given case), then interpreters may turn to construction, which permits "other forms of constitutional argumentation [being] given relatively free reign," and adaptations to the contemporary context as long as they are not inconsistent with the provision's original meaning.[86] For instance, an interpretation of "demonstrably justified" under section 1 tells us that the onus is on the government to justify rights violation (the original meaning of that provision has not changed). But the *Oakes* test itself (and the enduring controversy as to whether all rights violations should be assessed by the same justificatory criteria) would fall under construction.[87]

As Jack Balkin has argued, history may assist not only in the interpretation phase, but may also provide us with underlying principles to help guide the development of doctrine in constitutional construction. An interpreter may also consider post-adoption observations on how the various elements of the structure interact and work together over time.[88] One can see this in Canadian constitutional doctrine, for instance, in relation to the greater overlap in the exercise of provincial/federal powers than was initially anticipated (giving rise to doctrines of "double aspect" and "ancillary powers"), and the shifting importance of section 15(2)

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[83] Jack Balkin, "Arguing About the Constitution: The Topics In Constitutional Interpretation" 33:2 (2018) Const Commentary 101 at 103 (calling the interpretation/construction distinction "central to New Originalism"). See also, Lawrence B Solum, "Originalism and Constitutional Construction," (2013) 82 Fordham L Rev 453; Lawrence B Solum, "The Interpretation: Construction Distinction," (2010) 27 Const Commentary 95; Randy E Barnett, "Interpretation and Construction," (2011) 34 Harv J L & Pub Pol'y 65.

[84] Solum, "Originalist Theory and Precedent", *supra* note 81 at 455 (noting other sources of underdeterminacy being gaps and contradictions in the text).

[85] Bradley Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22 Can JL & Jur 331 at 337–38, citing *EI Reference*, *supra* note 9.

[86] Whittington, *supra* note 78 at 82; Randy Barnett, "An Originalism for Nonoriginalists" (1999) 45 Loy L Rev 611 at 645; Jack M Balkin, *Living Originalism* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2011) at 270 [Balkin, *Living Originalism*].

[87] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

[88] Balkin, *Living Originalism*, *supra* note 86 at 261.

from interpretive lens for *Charter* section 15(1) to stand-alone defence for government affirmative action programs against claims of "reverse discrimination."[89]

While noting the disagreement amongst originalists regarding both the existence of the distinction and the thickness of the "construction zone," noted originalists Randy Barnett and Evan Bernick maintain that "ascertaining the communicative content of a text is a different activity than giving legal effect to that meaning. Although it is not interpretation, constitutional construction — call it implementation if you like — is unavoidable."[90] One of the reasons the interpretation/construction distinction is important when combined with the switch from framer's intent to original meaning, is that it means that current generations are not bound by how framers anticipated — or hoped — the provisions would be interpreted (albeit that these intended constructions, or "original expected applications" may provide some evidence of original meaning).[91] It also means that contemporary interpreters are not in the position of having to speculate how the framers would have applied a provision to a particular problem, had it arisen during their time. Thus, the question of "what would John A. do?" vis-a-vis section 121 and provincial liquor monopolies is not of great value to the interpretation of the provision, though how section 121 was meant to function with the other financial provisions to secure the Confederation bargain is of great interest. So is the functionality of these provisions over time, at least in the realm of constructing a viable section 121 doctrine.

Another point of controversy relates to the use of non-originalist precedent. Originalists believe that the original meaning of the text is authoritative unless and until the text is changed via the (ordinarily, super-majority) constitutional amending process. Progressive "living tree" interpretation (wherein the text is not only applied to new circumstances, but the actual *meaning* of the text changes) is objectionable because it bypasses the democratic amending process and amends the Constitution by judicial fiat. The Constitution instead becomes an accretion of judge-made doctrine, with only a loose affinity with the text. There is a caveat, however. Most new originalists agree that courts should bypass originalist interpretations where non-originalist precedents are needed due to overriding rule of law considerations of stability and consistency in the law, particularly where there has been great reliance on precedent over time.[92] The spectre of instability looms large in *Comeau* and likely explains the Court's attempt to curtail the capacious exceptions to *stare decisis* it has only recently articulated.

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[89] Brouillet & Ryder, *supra* note 64 at 419–20, 422–24. In relation to s 15(2), compare *Lovelace v Ontario*, [2000] 1 SCR 950, 188 DLR (4th) 193; *Cunningham*, *supra* note 65; and *Centrale*, *supra* note 65, per Abella J.

[90] "The Letter and the Spirit: A Unified Theory of Originalism" (2018) Geo LJ 1 at 15. Huscroft JA of the Ontario Court Appeal referenced the interpretation/construction distinction in *R v Jarvis*, 2017 ONCA 778 at para 119.

[91] Jack Balkin, "Must We Be Faithful to Original Meaning?" (2013) 7:1 Jerusalem Rev of Leg Studies 57 at 64.

[92] For a discussion situated in the Canadian context, see J Gareth Morley, "Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada" (2016) 53 Osgoode Hall LJ 745 at 761–62.

Yet our explanation of new originalism (and our subsequent analysis of the historical evidence in *Comeau*) shows that overturning precedent due to new historical evidence of original meaning would probably not occur with great frequency. Even with the *Constitution Act, 1867*, a document over 150 years old, it would be rare that the meaning of the text had changed so significantly that it could lead to a potential misinterpretation that conflicts with original meaning; rarer still would be the case where constitutional interpretation of original meaning would be determinative of the case without the need to engage in constitutional construction. Much more likely in the case of vague constitutional language is that original meaning gets us only so far and most of the work will be done in the "construction zone"[93] (where history is but one factor to consider, as is precedent). There will be rare cases where prior precedents have involved the fundamental misinterpretation of the Constitution's text and distorted its meaning, and the court has available evidence of original meaning that did not exist or earlier decisions did not consider. In these cases, it is difficult to square rigid application of *stare decisis* with the usual arguments supporting the legitimacy of judicial review (namely that courts are not creating constitutional obligations but merely enforcing the already-agreed-upon terms).[94] Rule of law benefits would still weigh in favour of adhering to the precedent in many cases, particularly in cases of vertical *stare decisis.* Nevertheless, a court ought to consider the doctrine's purpose and weigh the different, relevant factors in assessing whether the case constitutes a valid exception to the principle[95] (rather than, say, adopting formalistic rules regarding the types of evidence that may warrant opening up precedent).

Before departing from this brief overview of new originalism, one other observation is worth repeating, concerning the Court's treatment of original meaning/intent. While it is true that the Supreme Court of Canada has expressed a distaste for originalism, this professed dislike actually has obscured the fact that it has relied on framers' intent (and defacto original meaning) as well as the historical context of constitution-making to support its "purposive" constitutional interpretation in dozens of cases, albeit in a wildly inconsistent fashion.[96] Acceptance of original meaning interpretive methodology would simply regularize and structure the role of history in the Court's approach. Already, a "fairly common" interpretive tack in what Oliphant and Sirota maintain amounts to a body of *originalist* jurisprudence in this area is "looking at a draft version of a constitutional provision and arguing based on

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[93] See Lawrence B Solum, "The Unity of Interpretation" (2010) 90 BUL Rev 551 at 572.

[94] These arguments are made in the US context in Randy Barnett, "Trumping Precedent with Original Meaning: Not As Radical As It Sounds" (2005) 22 Const Commentary 257. See also *Vriend v Alberta*, [1998] 1 SCR 493 at paras 135–36, 212 AR 237 (Iacobucci J, referring to the courts' "arbiter role").

[95] Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2007) 32:1 Man LJ 135 at para 55. See also, Debra Parkes, "Precedent Revisited: Carter v Canada (AG) and the Contemporary Practice of Precedent" (2016) 10:1 McGill JL & Health 123.

[96] Froc, *Untapped Power*, *supra* note 10 at 58; Leonid Sirota & Benjamin Oliphant, "Originalist Reasoning in Canadian Constitutional Jurisprudence" (2017) 50 UBC L Rev 505 at 515 [Sirota & Oliphant, "Originalist Reasoning"].

the changes made between that version and the final text that was enacted."[97] The significance of these observations will become apparent to readers in the next section.

III. Comeau History Redux

The Supreme Court's judgment in *Comeau* represents a missed opportunity to engage seriously with the historical evidence presented at trial. Indeed, the Court sidesteps what several commentators have taken as compelling evidence of section 121's broad scope, specifically the use of "admitted free" as opposed to "free from duty" and contemporary concerns about tariff and non-tariff barriers alike.[98] Had the Court confronted these arguments directly, its judgment would have been more compelling on a number of different levels.

First, rather than leave important aspects of section 121 unexplained, a robust historical analysis would have placed this provision in appropriate context and promoted a coherent theory about its object and purpose. This would have not only enhanced the credibility of its interpretation, but also provided relevant guidance regarding issues left unresolved in *Comeau*, including whether section 121 applies to federal as well as provincial action, and whether it prohibits restrictions based on point of entry as well as point of origin.[99] Second, it would have laid bare the limitations of the historical evidence accepted by the trial judge, which is incompatible with conventional explanations of section 121 and the fact that non-tariff barriers co-existed with so-called "free trade" at the time of Confederation. Third, had the Court taken a serious look at the historical evidence presented at trial, it would have perhaps realized that most of it was not in fact new, but rather a recasting of one of the familiar objectives of Confederation, that being the economic integration of the British North American colonies. This may have revealed the true nature of the trial judge's error — a misapprehension of the evidence as opposed to the misapplication of an exception to the vertical *stare decisis* rule, which, as we have discussed, the Court struggles to explain in the context of historical evidence of constitutional meaning.

This section will first summarize the historical evidence accepted by the trial judge, before presenting an alternative explanation of section 121 that is arguably more consistent with pre-Confederation political realities. It will also point out that where the trial judge actually erred was in attributing the general economic objectives of Confederation to one particular provision, as opposed to the constitutional scheme

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[97] Sirota & Oliphant, "Originalist Reasoning", *supra* note 96 at 520.

[98] See e.g. Ian A Blue, "Long Overdue: A Reappraisal of Section 121 of the Constitution Act, 1867" (2010) 33:2 Dal LJ 161; Mark Mancini, "The Comeau Decision is a Welcome Example of Serious Doctrinal Analysis" (3 August 2016) *Advocates for the Rule of Law* (blog), online: <ruleoflaw.ca/the-comeau-decision-is-a-welcome-example-of-serious-doctrinal-analysis/>.

[99] *Supra* note 1 at para 116, the Court suggests that while section 121 may apply to both levels of government, federal legislation may be easier to justify as having a legitimate regulatory purpose, as opposed to being primarily about restricting trade. But since Mr. Comeau did not challenge the federal *Importation of Intoxicating Liquors Act*, RSC 1985, c I-13, the Court did not comment further. Likewise, the Court left for another day the issue of whether section 121 would prohibit restrictions on goods produced outside of Canada but entering one province from another (see para 12).

as a whole. Indeed, "free trade" and economic integration were primarily achieved by concentrating in the hands of Parliament, pursuant to section 91, all of the major levers of interprovincial trade, not through a general ban on non-tariff trade barriers under section 121. The central observation is that had it taken history seriously, as opposed to downplaying its legal relevance and then inserting its own superficial historical analysis, the Supreme Court could have reached the same interpretation, but with considerably more coherence and force.

A. The Historical Evidence at Trial

As noted above, Judge LeBlanc broke with longstanding precedent on the scope of section 121 based largely on the historical evidence of the defence's expert, Dr. Smith.[100] Judge LeBlanc relied heavily on Dr. Smith's undisputed testimony and expert report, particularly with respect to the drafting of section 121 and its historical context.[101] Indeed, one of the revealing aspects of the *Comeau* trial is that the defence's historical evidence was not contested. While the prosecution did call an expert, he was a political scientist whose testimony focused on the structure and evolution of Canadian federalism, as opposed to the original intent of section 121.[102] As a result, it does not appear that Dr. Smith's historical account of section 121 received the rigorous scrutiny one would expect of an argument that, as Judge LeBlanc described it, asked the "Court to dismantle a regime [i.e. the division of legislative powers] that has been in place since the inception of the Constitution in 1867."[103] Before casting a critical eye on Dr. Smith's testimony, it is important to briefly summarize its main contentions and the facts supporting them.

Dr. Smith's thesis, as presented in his expert report, was that the purpose of section 121 of the *British North America Act, 1867*[104] was "the elimination of interprovincial trade barriers" in the broadest sense.[105] In taking this position, Dr. Smith was challenging the conventional wisdom that section 121 only prohibited the imposition of internal customs duties. Dr. Smith supported his claim on several

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[100] Dr. Smith's testimony on the historical context of section 121 was pivotal to the outcome at trial. "The historical context of the section in question was very ably and thoroughly described at trial by one of the world's most renowned experts on the constitutional moment, Dr. Andrew D. Smith, whose credentials were unimpeachable and whose testimony was beyond reproach. I accept his testimony without hesitation. […]" (*Comeau* (Trial), *supra* note 2 at para 52).

[101] In his discussion of the historical context of section 121, Judge LeBlanc wrote: "The historical background to be addressed in this part of my decision derives primarily from the testimony of Dr. Smith and from his report. The historical context was not disputed by the prosecution" (*ibid* at para 73).

[102] Judge LeBlanc noted that the prosecution's expert did not have expertise on the "constitutional moment", that is the social, political, and economic circumstances prevailing in the period of constitutional formation, in this case between 1864 and 1867: see *ibid* at para 150.

[103] *Ibid* at para 158.

[104] *Sub nom Constitution Act, 1867*, *supra* note 4 [*BNA Act, 1867*].

[105] Dr. Andrew Smith, "The Historical Origins of Section 121 of the British North America Act: A Study of Confederation's Political, Social, and Economic Context" [unpublished, archived at *The Past Speaks* (blog), online: <andrewdsmith.files.wordpress.com/2017/11/expert-witness-report-free-trade-comeau-case.pdf>], summarized in "The Historical Origins of Section 121 of the British North America Act: A Study of Confederation's Political, Social, and Economic Context" (2018) 61:2 Can Bus LJ 205.

grounds. He argued that the general language used in section 121 called for the unrestricted internal flow of goods and services. Specifically, Dr. Smith pointed out that unlike other statutes and treaties of the same era, which used the more precise formulation "admitted free of duty", section 121 simply said "admitted free". Second, that this more general phrase revealed a more ambitious economic agenda was consistent with several contextual factors, including the experience of the British North American Colonies with the Americans in the lead up to the repeal of the *Reciprocity Treaty of 1854*.[106] According to Dr. Smith, during the Civil War, the United States imposed a number of non-tariff trade barriers, including passport requirements for British subjects, search and detain regulations, and outright prohibitions.[107] As a result, Dr. Smith argued that, in their quest for an economic union, the framers would not have limited themselves to banning internal customs duties.

In addition, he suggested that the *BNA Act, 1867* was heavily influenced by nineteenth-century British economic thought, namely the laissez-faire philosophies of Smith, Ricardo, and Mill.[108] Dr. Smith argued that this "intellectual context" must have affected the thinking of Francis Savage Reilly, a British lawyer who played a role in drafting the *BNA Act, 1867*, including section 121.[109] Similarly, the fact that there existed in Britain a political consensus in favour of free trade and free markets at the time of Confederation is an important clue about the mindset of the framers, who were pursuing a union that reflected the British style of government.[110] Dr. Smith also suggested that an economic union tolerant of non-tariff barriers to internal trade would have been inconsistent with the increasing connection of markets due to advances in transportation and communication technologies.[111] Furthermore, Dr. Smith relied on the statements of the British government, which sponsored the bill that became the *BNA Act, 1867*. In particular, Dr. Smith quoted a speech by the Colonial Secretary, the Earl of Carnarvon, who lamented the existence of non-tariff barriers to trade in British North America, including the lack of common systems of banking, weights and measures, and currency.[112] Dr. Smith opined that this statement showed an understanding on the part of the framers that government regulations had the potential to impede internal trade. Dr. Smith also quoted a number of speeches made in the legislatures of British North America on the subject of Confederation. These speeches unquestionably support his claim that an economic union enabling interprovincial free trade was an important objective of Confederation.[113] Finally, Dr.

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[106] *Reciprocity Treaty of 1854*, 5 June 1854, online: <collectionscanada.gc.ca/confederation/023001-7101-e.html> [*Reciprocity Treaty*].

[107] See Smith, *supra* note 105 at 5.

[108] See *ibid* at 6–7, 12.

[109] See *ibid* at 6.

[110] See *ibid* at 7, 12, 18. Dr. Smith also noted that, in the mid-1800s, Britain had liberalized several aspects of its economy, namely by abolishing protectionist policies in agriculture and most import duties: *ibid* at 16.

[111] See *ibid* at 13, 17.

[112] See *ibid* at 19–20.

[113] See *ibid* at 21–23.

Smith noted that after Confederation, Parliament acted quickly to eliminate a number of traditional impediments to internal trade, specifically by using its new legislative power to standardize weights and measures and accounting practices.[114]

Based on Dr. Smith's evidence, Judge LeBlanc came to a radical conclusion about both the original intent and legal significance of section 121: "I conclude that to the Fathers of Confederation, the Union meant free trade, the breaking down of all trade barriers as between the provinces forming part of the proposed Dominion of Canada."[115] According to Judge LeBlanc, section 121 was an "attempt to gain unfettered economic exchange and a more comprehensive economic union."[116] In his view, section 121 permitted "the free movement of goods among the provinces without barriers, tariff or non-tariff […]"[117] Finally, Judge LeBlanc's broad definition of "non-tariff barrier" would potentially invalidate any government action that imposes costs on foreign producers.[118] But in the absence of an alternative historical account, or any serious challenge to the facts and logic of Dr. Smith's testimony, the question left unresolved at trial and ultimately at the Supreme Court is what history really says about the original meaning of section 121.

B. A Closer Look at the Evidence

In critically assessing Dr. Smith's testimony and Judge LeBlanc's conclusions, we will start by considering the drafting history of section 121 as well as its historical context. When combined with basic principles of constitutional interpretation, a different historical take on section 121's original meaning emerges, one that is considerably narrower than that espoused by Dr. Smith and adopted by Judge LeBlanc. Specifically, we argue that the drafting history of section 121 is at least ambiguous with respect to its original meaning and includes evidence that is inconsistent with Dr. Smith's account. Likewise, the historical context offers a sound basis to conclude, in contrast to the trial judge, that section 121's aim was to prohibit customs duties being applied to provincial products passing from one province to another. In our view, the historical context also supports the position that discriminatory border measures — restrictions applied at the border based on point of origin — are inconsistent with section 121. The additional insight we offer is that section 121 applies to federal as well as provincial government action, an issue that the Supreme Court left unaddressed.

But we challenge Dr. Smith and Judge LeBlanc's view that section 121 prohibits internal government action that inconveniences extra-provincial producers. With respect, this conclusion rests on a misapprehension of the historical evidence, one that conflates the framers' undisputed general intent to form an economic union

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[114] See *ibid* at 26.

[115] *Comeau* (Trial), *supra* note 2 at para 101 [emphasis added].

[116] *Ibid* at para 178 [emphasis added].

[117] *Ibid* at para 191.

[118] See *ibid* at para 75.

with a specific laissez-faire vision of Confederation. As we will show, the framers sought to achieve the economic union by harmonizing commercial policy through federal legislative power, not by placing an overarching fetter on all government action.

1. Drafting History

Although the trial judgment is dominated by consideration of the original intent behind section 121, neither it nor Dr. Smith's report reveal very much about the provision's drafting history. For example, while Dr. Smith contended that the omission of "from duty" was significant and revealing of a broader free trade agenda, there was no direct evidence about the relevance of this formulation. In his expert report, Dr. Smith noted several contemporaneous statutes that used the narrower phrase "admitted free from duty", but not a single one, whether from the colonies or the mother country, that featured the allegedly broader "admitted free". At trial, Dr. Smith opined that people at the time of Confederation understood the latter phrase to mean more than just tariffs, but it is unclear what direct evidence, if any, he was relying on.[119] Moreover, none of the speeches and debates cited by Dr. Smith and Judge LeBlanc actually mentions section 121. With respect to the discussion of Mr. Reilly, other than putting a name to what would otherwise be an anonymous drafter, it reveals very little about why one formulation was chosen over the other.

Even if something were known about Mr. Reilly's thought process, the choice of a public servant in England should not be conclusive of the interpretive issue. What matters more is the commonly understood meaning of section 121's text within the participating colonies at the time of its drafting. This is because the political compromise of Confederation was forged in British North America through a series of conferences involving colonial delegates, followed by debates and votes on the final proposal in the colonial legislatures. Therefore, as evidence of original meaning — that is, how those affected by the text understood it — the technical drafting choices of a single government lawyer in England and the reasons behind them are not particularly important by themselves. In the case of Confederation, drafting came after political negotiation and ratification, so we need to look elsewhere for evidence of original meaning. In our view, especially relevant sources are the precursor documents to the *BNA Act, 1867* — the Quebec Resolutions of 1864 and the London Resolutions of 1866 — neither of which contains a provision that corresponds to section 121.[120] Indeed, the Quebec Resolutions formed the basis of the colonies' ratification of Confederation, which gave colonial delegates at the subsequent London

[119] Judge LeBlanc summarized Dr. Smith's evidence on this point at para 63: "Dr. Smith stated that for contemporaries, the term 'admitted free' had a different meaning than 'admitted free of duty'. To him, 'admitted free' had a broader, more comprehensive, more robust meaning, referring to the expressions it 'Has to be allowed in, has to be waived in' […] This was no accident in his opinion."

[120] See Library and Archives Canada, The Quebec Resolutions, October, 1864, online: <collectionscanada.gc.ca/confederation/023001-7104-e.html>; MacDonald-Laurier Institute, London Resolutions, 4 December, 1866, online: <macdonaldlaurier.ca/london-resolutions-december-4-1866/> [MLI, London Resolutions].

Conference the mandate to formalize them into a bill for the British Parliament.[121] Therefore, we contend that as a reference point for original meaning, the Quebec Resolutions reveal much more about how people in the colonies understood the terms of union, and by extension the eventual text of section 121. If the original meaning behind this provision is as far-reaching as Dr. Smith's testimony suggested, then one would expect it to have been expressed somehow in the Resolutions.

Moreover, leading historical accounts of what actually happened at the London Conference further diminish the relevance of Mr. Reilly's involvement and drafting choices. Although the London Conference was supposed to be a formality, it turned out to be much more contentious, as delegates from the Maritimes came with demands for better terms.[122] As a result, Lord Carnarvon, the Colonial Secretary, who wanted to avoid "colonial controversies", encouraged the delegates to work out their differences before presenting a final set of terms that could be reduced to a bill.[123] In the end, although the London Resolutions contained a few important amendments, "the bargain struck at Quebec two years earlier remained essentially unchanged."[124] In particular, nothing resembling a general "free trade" clause, akin to Dr. Smith's interpretation of section 121, made its way into the London Resolutions. According to one historian, the drafting phase of the London Conference was relatively uneventful, as "the British North America bill went to Parliament with minimal alterations in the colonials' plan."[125] It appears that the only change the British insisted upon was authorizing cabinet to appoint additional Senators to resolve an impasse between the houses of Parliament.[126] Our point here is that Dr. Smith's evidence with respect to Mr. Reilly's mindset, even if it could be ascertained, is at best peripheral to the political reality surrounding the drafting of the *BNA Act, 1867*, which ought to have been the focus in the search for original meaning.

More importantly, both Judge LeBlanc and Dr. Smith cited an earlier version of the *BNA Act, 1867*, which was ostensibly drafted by Mr. Reilly and in which the provision appears as section 125. A closer look at this draft suggests that "free" was intended to mean "free of duty". Before Confederation, each of the provinces imposed its own customs duties on imports, whether from another province or elsewhere.[127]

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[121] See Christopher Moore, *1867: How the Fathers Made a Deal* (Toronto: McClellan & Stewart, 1997) at 154–55.

[122] See *ibid* at 210.

[123] *Ibid* at 211.

[124] *Ibid* at 213; see also MLI, London Resolutions, *supra* note 120. The amendments related to the financial terms of the union and cash payments to the provinces, a commitment to pursue the "immediate construction" of the inter colonial railway, and protections for Protestant and Catholic minorities with respect to education.

[125] See Moore, *supra* note 121.

[126] *Ibid*.

[127] See William L Marr & Donald G Paterson, *Canada: An Economic History* (Toronto: MacMillan, 1980) at 137. Although trade between the British North American colonies had liberated somewhat in the years leading up to the Confederation, free trade was limited to particular natural resource and agricultural products, and the colonies maintained their own external tariffs.X

Under Confederation, the provinces ceded this power to the federal government, but it would naturally take some time before Parliament adopted a national system. For this reason, the *BNA Act, 1867* included a transitional provision to allow for the harmonization of provincial customs duties, which were to remain in effect.[128] In order to ensure that foreign importers did not pay a separate duty as their goods crossed provincial borders after entering Canada, this provision ensured that importers would only be liable for any difference in the applicable duties. In the draft of the Bill, this provision appeared as section 124 and read as follows:

> **Customs and Excise**
> 124. The Customs and Excise Laws of each Province shall continue in force until altered by Parliament; and in any Case where the Duties enacted to be collected on any Goods, Wares, or Merchandise are the same, the Governor-General in Council may from Time to Time, by Proclamation, declare that such Goods, Wares and Merchandise may be imported free into any Port in Canada from Ontario, Quebec, Nova Scotia, or New Brunswick, on Proof of Duty having been already paid thereon; and where larger Duties are leviable in any Province on any Goods, Wares, or Merchandise, the Governor-General in Council may from Time to Time, by Proclamation, authorize the Importation into Canada of such Goods, Wares, and Merchandise on Payment of the Difference of Duty.
>
> **Canadian Manufactures, &c**
> 125. All articles the Growth or Produce or Manufacture of Ontario, Quebec, Nova Scotia, or New Brunswick, shall be admitted free into all Ports in Canada.[129]

The reason that section 124 of the draft is relevant is that it clearly uses the word "free" — without the qualifier "from duty" — in reference to the payment of customs duties, specifically those that applied to foreign imports (i.e. from outside Canada). For its part, as the heading suggests, section 125 addressed how "Canadian" products would be treated as they crossed provincial boundaries; they were to be "admitted free". If, as Dr. Smith opined at trial, "admitted free" had a broader meaning because it was not followed by "from duty", then why would Mr. Reilly have used the same construction to refer to customs duties in section 124? Given this drafting choice, it is difficult to attribute a different meaning to the equivalent phrase in the following section.[130] While the final text of these provisions differs in other respects — specifically, the deletion of "into all ports" and the use of the generic "Provinces" instead of listing the original four parties to Confederation — the principles stayed the same and neither version

[128] See *BNA Act, 1867*, *supra* note 104, ss 122–123.

[129] GP Browne, ed, *Documents on the Confederation of British North America: A Compilation Based on Sir Joseph Pope's Confederation Documents Supplemented by Other Official Material* (Montreal & Kingston: McGill-Queen's University Press, 2009) at 332 [emphasis added].

[130] The fact that section 124 says "imported free" and section 125 says "admitted free" simply reflects the post-Confederation legal reality. The former provision concerned foreign goods — i.e. those "imported" from other countries — while the latter provision concerned Canadian goods, which were to be "admitted" from one province to another. In other words, the reason why "admitted" was used in section 125 is that, under Confederation, goods from another Canadian province would no longer be considered foreign and therefore not subject to "importation".

used the supposedly narrower "admitted free from duty."[131] All of this is to say that the only historical example cited at trial of the supposedly broader formulation of "admitted free" was a draft of the document under consideration in which the phrase was actually used in the narrower sense, i.e. "free of duty".

In addition, there is at least one contemporaneous example of an Act passed by the New Brunswick Legislature after the *BNA Act, 1867* received Royal Assent in which the term "imported free" was used in reference to duties only. Coincidentally, the purpose of this statute was to maintain a duty on alcohol imported into the Province from "any part of the British Empire or foreign place".[132] Section 2 of the Act states: "[n]otwithstanding the provisions of any Act in force imposing Duties for raising a Revenue […] the following goods, wares, and merchandise shall be imported into the Province free and be exempt from the payment of any Duty whatever. […]"[133] In this example, the term "imported free" is clearly referring to duties only, despite the use of the conjunctive "and" because the whole statute is about maintaining duties on certain products and specifically exempting others from duties. Moreover, this statute was clearly adopted in contemplation of the *BNA Act, 1867*, and perhaps even section 121, since section 3 states that "[it] shall continue to be in force […] until altered by the Parliament of Canada."

Therefore, based on new originalist methodology, the evidence accepted at trial was problematic as an interpretive aid for section 121. The revelation of the identity of one of the drafters of the *BNA Act, 1867* and his possible state of mind was, in our view, a misdirection. The political process that preceded the drafting and adoption of the *BNA Act, 1867* is the relevant reference point for original meaning. In that process, colonial legislatures and their delegates were the key players and it is their likely communicative intent based on the commonly understood meaning of the text of section 121 "back home" that ought to have guided the trial judge. Moreover, in the absence of any direct evidence that "admitted free" meant something different than "admitted free of duty" and given that the former terminology was used to refer to duties in an earlier draft of the *BNA Act, 1867* and provincial legislation after it received Royal Assent, the trial judge's reliance on Dr. Smith's testimony concerning the drafting history of section 121 is questionable.

2. Historical Context

As evidence of the original meaning of section 121, its drafting history is at best ambiguous with respect to whether it prohibited both tariff and non-tariff barriers. This is why Dr. Smith and Judge LeBlanc relied so heavily on the historical context to bolster the claim that section 121 had a much broader meaning than traditionally thought. It is worth noting here that, in asserting section 121 captured non-tariff

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[131] As Dr. Smith reasonably explained in his testimony, these changes between the draft and final version reflect the expectation of the framers that more provinces would join Confederation, and that goods would increasingly cross borders by rail: see *Comeau* (Trial), *supra* note 2 at para 59.

[132] *An Act to amend the Law relating to the imposition of Duties for raising Revenue*, RSNB 1867 (30 Vict), c 2, s 1.

[133] *Ibid*, s 2 [emphasis added].

barriers to trade, neither Dr. Smith nor Judge LeBlanc attempted to limit the scope of this prohibition. In his expert report, Dr. Smith asserted that the provision was intended to "eliminate *all* government-created impediments to inter-provincial trade […]"[134] For his part, Judge LeBlanc stated that any form of government action that increases the cost of trade was potentially impermissible under section 121.[135] These are sweeping conceptions of non-tariff trade barriers that go much farther than conventional trade law analysis, which focusses on the extent to which government action is discriminatory or justifiable.[136] Under this seemingly boundless definition, a host of provincial environmental, health, and safety regulations would potentially be called into question on the basis of section 121.[137] Whatever the economic merits of totally unfettered interprovincial trade, the historical context cited at trial did not include the types of policies or practices that would cast doubt upon the constitutional legitimacy of the modern regulatory state.

Specifically, the non-tariff barriers imposed by the United States prior to its abrogation of the *Reciprocity Treaty* were discriminatory border measures, not internal ones like regulations or subsidies. The Navigation Acts of the British mercantile system, which banned foreign ships from entering ports in the Empire, were another example of a mid-nineteenth century non-tariff barrier.[138] These measures were overtly protectionist; they impeded the passage of foreign goods in order to benefit domestic producers. These examples reflect a much narrower understanding of non-tariff barriers than that adopted at trial. Moreover, while public policy in the Victorian Era was much less pervasive, the framers were not unfamiliar with internal government action designed to promote local economic interests. For example, both before and after Confederation, New Brunswick maintained a system for the promotion and subsidization of domestic agriculture.[139] While very modest in comparison to present agricultural policy, such laws were designed to enhance and showcase the productivity of local agriculture, even though there was intercolonial free trade in agricultural products by the 1850s.[140] The fact that provincial laws

[134] Smith, *supra* note 105 at 2 [emphasis in original].

[135] See *Comeau* (Trial), *supra* note 2 at para 75 ("A 'non-tariff barrier' was not specifically defined but examples were given. They can come in a variety of forms, all of which refer to restrictions that result from prohibitions, conditions, or specific market requirements that make importation or exportation of products more difficult or more costly. Government action in the form of laws, regulations, policies or restrictions can effectively increase costs and form non-tariff barriers to trade.")

[136] See Michael J Trebilcock & Robert Howse, *The Regulation of International Trade*, 3rd ed (New York: Rutledge, 2005) at 205ff.

[137] An example are vehicle safety and emissions inspections, which require all vehicles imported into the province to meet local standards: see e.g. *Environmental Protection Act*, RSO 1990, c E.19, s 22.

[138] See William L Marr & Donald P Paterson, *Canada: An Economic History* (Toronto: Macmillan of Canada, 1980) at 124.

[139] See *An Act for the Encouragement of Agriculture*, RSNB 1862 (17 Vict), c 7.

[140] This legislative scheme, which existed in various iterations in the pre-Confederation period, provided for the establishment of local Agricultural Societies, which were tasked with "elevat[ing] the agricultural character of their respective districts" (*ibid*, s 3). Furthermore, these statutes established a Provincial Board of Agriculture to which the Agricultural Societies reported their local activities and production levels. In addition, the Board would authorize the payment of subsidies to the Agricultural Societies, and

favouring local agriculture coexisted with so-called "free trade" in agriculture casts doubt over the radical understanding of that term ascribed to the framers at trial.

Perhaps even more inconsistent with the laissez-faire view of section 121 was a law passed by the Legislature of New Brunswick less than three months after the *BNA Act, 1867* received Royal Assent. The purpose of this Act was to control the sale of goods in the Province by so-called "non-resident pedlars".[141] In order to do so, the statute required non-residents who wanted to sell goods in New Brunswick to obtain a license and pay an annual fee.[142] The statute also imposed penalties for non-compliance.[143] While this statute targeted sellers from outside the province as opposed to products from outside the province, it would have affected the latter as well. This is because non-resident sellers were presumably selling extra-provincial products. The point is that such a law, enacted right on the heels of the *BNA Act, 1867*, is out of step with the unfettered free trade vision that Dr. Smith sought to ascribe to section 121.

In drafting this provision, the framers likely meant to convey a more limited view of "free trade", one that accorded with their own commercial reality. The British North American colonies had negative experiences with border measures and were seeking to eliminate tariffs between them. As emphasized at trial, they were also affected by what was lost with the end of the *Reciprocity Treaty*, namely duty-free trade in staple products and a commitment to freedom of navigation.[144] At the same time, they were familiar with and tolerant of laws that sought to promote local agricultural interests. This context suggests that, at most, section 121 was drafted to preclude discriminatory border measures, whether formally a tariff or not. The historical context does not support a meaning of "admitted free" that would prohibit internal measures, such as regulations and subsidies that may inconvenience foreign producers.

But there is another historical account that supports an even narrower reading of section 121. Contrary to Judge LeBlanc's view that the placement of section 121 in Part VIII of the *BNA Act, 1867* was irrelevant,[145] this structure arguably reflects what historian D.G. Creighton called "the financial settlement of Confederation."[146] One of the most significant obstacles to Confederation was the harmonization of colonial

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hold an Exhibition once every three years to showcase "…domestic manufactures of all kinds…natural resources of the Province…[and] implements or apparatus raised, produced, manufactured or invented in this Province" (*ibid*, s 14).

[141] See *An Act to prevent Non-Resident Pedlars travelling and selling within this province without a License*, RSNB 1867 (30 Vict), c 37.

[142] See *ibid*, s 1.

[143] See *ibid*, ss 3–5.

[144] See *Reciprocity Treaty*, *supra* note 106, arts III, IV.

[145] See *Comeau* (Trial), *supra* note 2 at para 180

[146] See DG Creighton, *British North America at Confederation: A Study Prepared for the Royal Commission on Dominion-Provincial Relations* (Ottawa: Information Canada, 1963) at 79.

tariffs. Although the colonies had already achieved free trade in agriculture and natural resources, extending that arrangement to manufactured goods proved difficult for several reasons.[147] Most significantly, the replacement of internal tariffs with a common external one would result in a significant loss of revenue for the colonies. At the time of Confederation, customs duties accounted for between sixty and eighty percent of colonial revenue, with the Maritimes being particularly dependent upon them.[148] Although Confederation promised to give the provinces the power of direct taxation, this method of raising revenue was virtually unheard of at the time.[149] Despite the assumption that provincial responsibilities would be greatly diminished under Confederation, the provinces still needed a means of financing the local responsibilities that they were to assume.

The ultimate solution was that, in exchange for the provinces surrendering indirect taxes, which at the time were almost exclusively in the form of customs duties, the federal government would pay them grants and assume the lion's share of their debts. This was the financial quid pro quo of Confederation and part of the raison-d'être for Part VIII was arguably to enshrine its terms. Up until Confederation, the provinces had imposed customs duties on one another in respect of manufactured goods.[150] The provinces gave up this power with section 92(2), which limited their ability to raise revenue to direct taxation. At the same time, while Parliament obtained the power to impose indirect taxes and regulate trade and commerce, its use of these powers to reintroduce the internal customs duties that the provinces gave up would have been inconsistent with the objective of forming an economic union coordinated by a neutral central government. Therefore, in addition to the division of legislative powers, the *BNA Act, 1867* needed to articulate the financial deal struck to make Confederation work. As explained below, this is the more plausible purpose of Part VIII, with section 121 describing what would happen to internal customs duties.

The statements of the framers in the lead up to the passage of the *BNA Act, 1867* support the view that section 121 was meant to be about customs duties, not a general prohibition on impediments to interprovincial trade. In a widely publicized speech given at Sherbrooke following the Quebec Conference in the fall of 1864, Alexander Galt, the Minister of Finance for Canada East and delegate to all three constitutional conferences, stated:

> The regulation of duties of customs on imports and exports might perhaps be considered so intimately connected with the subject of trade and commerce as to require no separate mention in this place; he would however allude to it because one of the chief benefits expected to flow from the Confederation was the free interchange of the products of the labor of each Province, without being subjected to any fiscal burden whatever. […] It was

[147] See *ibid* at 38.

[148] See *ibid* at 72.

[149] See *ibid* at 73.

[150] See e.g. *An Act to amend the Acts respecting Duties of Customs, and the Tariff of Duties payable under them*, S Prov C 1866 (29–30 Vict), c 6.

> most important to see that no local legislature should by its separate action be able to put any such restrictions on the free interchange of commodities as to prevent manufactures from the rest finding a market in any one province, and thus from sharing the advantages of the extended union.[151]

This passage is noteworthy in several respects. First, it was part of an explanation of the powers of the "general government" (i.e. Parliament), which would include the regulation of trade and commerce throughout the country. Galt's observation that including customs duties among the list of federal powers may be unnecessary helps explain why, although customshouses were included among the responsibilities of the General Government in the London Resolutions, they were not listed in section 91 the *BNA Act, 1867*. As we will explain later, this also indicates that the mechanism for achieving the economic union was through the specific powers given to Parliament in section 91, not through a vague prohibition on provincial action in section 121. Second, although Galt touted the "free interchange" of goods between provinces as a benefit of Confederation, he specified that the type of provincial barrier that would be impermissible was "fiscal" in nature, that is a customs duty. Finally, the language of this passage is reminiscent of section 121 in the sense that both emphasize the flow of goods between provinces, but Galt's statement emphasizes the authority of the central government and a prohibition on provincial customs duties as the way this would happen.

Our review of the historical context of section 121 casts doubt over the unfettered free trade meaning that Dr. Smith advanced at trial and that Judge LeBlanc accepted. The prevailing trade irritants at the time were not internal regulations, but rather tariffs and discriminatory border measures. Indeed, both before and after Confederation, New Brunswick adopted statutes that were meant to advantage local industry. The more plausible view of section 121 is that it prohibited customs duties as part of the financial settlement of Confederation, which is consistent with the statement of Alexander Galt, and also indicates that the economic objectives of the union cannot be attributed to a single constitutional provision.

3. Constitutional Scheme

The view that section 121 is limited to the prohibition on internal customs duties is not necessarily incompatible with the ambitious economic union that the framers undoubtedly envisioned. The grand economic objectives of Confederation cannot be reduced to that section alone. Both the scheme of the *BNA Act, 1867* and its historical context suggest that economic integration was to be achieved by giving Parliament all significant economic powers, rather than through a constitutional prohibition on any and all impediments to internal trade. The biggest problem with Dr. Smith's claim, and Judge LeBlanc's principle error at trial, is the attribution of the general economic objectives of Confederation, which are not contested, to one specific provision without

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[151] Speech on the proposed union of the British North American provinces: delivered at Sherbrooke, CE, by the Hon AT Galt, Minister of Finance, 23 November 1864, reprinted from the Montreal Gazette (Montreal: M Longmore & Co, 1864) at 10, online (pdf): <collectionscanada.gc.ca/obj/023012/f2/nlc013175-full.pdf> [emphasis added].

considering how those objectives may have been advanced by the broader constitutional scheme.

Of particular importance is the role of Parliament in preserving the economic union, which is evident from the legislative powers assigned to it in section 91. In addition to the trade and commerce power, Parliament was given all of the tools necessary to steer the national economy, including direct and indirect taxation, the postal services, navigation and shipping, currency and coinage, banking, etc. By ensuring national policies in these areas, the most significant barriers to trade between the provinces at the time would be eliminated. In other words, while a major objective of Confederation was undoubtedly economic integration, the heavy lifting in achieving it would be done by the detailed provisions of section 91, not by section 121. Parliament's powers were meant to maintain the national economy by preventing local interests from spawning internal trade barriers. Referring to the ongoing disagreement between the colonies over tariffs, Sir John A. MacDonald said at the Quebec Conference:

> We should concentrate the power in the Federal Government. […] It is said that the tariff is one of the causes of the difficulty in the United States. So it would be with us. Looking at the agricultural interests of Upper Canada, manufacturing of Lower Canada, and maritime interests of Lower Provinces, in respect to a tariff, a Federal government would be a mediator.[152]

Similarly, Alexander Galt, in addressing the possibility that English businessmen in Lower Canada would be discriminated against by the French majority, said:

> The interests of trade and commerce […] would be in the hands of a body where they could have no fear that any adverse race or creed could affect them. All those subjects would be taken out of the category of local questions, would be taken away from the control of those who might be under the influence of sectional feelings animated either by race or religions.[153]

These statements suggest that the linchpin of the economic union was section 91's detailed and comprehensive list of economic powers given to Parliament, as opposed to section 121, which appears in Part VIII of the *BNA Act, 1867* amidst a series of provisions dealing with financial administration.

The structure of Part VIII suggests that section 121 is more reflective of Creighton's account of the financial terms of Confederation, than the seemingly boundless interpretation advanced by Dr. Smith and adopted by Judge LeBlanc. It explains why this Part deals exclusively with the financial administration of Confederation, as opposed to the regulatory authority of Parliament and the provincial legislatures.

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[152] Browne, *supra* note 129.

[153] Galt, *supra* note 151 at 20.

In particular, Part VIII contains a number of provisions pursuant to which the provinces transferred accrued revenues and assets to the federal government.[154] At the same time, the federal government assumed a series of financial obligations, including liability for the principal and interest of provincial debts, subject to the provinces having to indemnify it for debts in excess of a stipulated amount.[155] Part VIII also detailed the annual lump sum and per person grants that the federal government would pay to the provinces.[156] In section 121, it was agreed that, "from and after the union", customs duties would not apply to products passing from one province to another. But, as suggested earlier, the framers anticipated a delay between the establishment of the Union and Parliament's adoption of customs legislation. So, pursuant to section 122, they provided for the continuance of the provincial laws, but in section 123, enacted a mechanism for harmonizing any disparate "customs duties". As the Supreme Court indicated in its judgment, sections 121–123 "may be read together" as the process for transitioning to a new customs regime, much like the preceding sets of provisions in Part VIII concerned the transition to a new fiscal arrangement.[157] If this is the case, then the reference to "customs duties" in section 123 ought to inform the meaning of "free" in section 121. To summarize, therefore, understanding Part VIII as describing the financial terms and mechanisms of Confederation is both consistent with Creighton's historical account and internally coherent. The problem with Dr. Smith's view of section 121 is that, as a purported limit on legislative power, it sits awkwardly in a Part devoted to financial settlements and administration.

Part VIII was also drafted with reference to the division of powers in sections 91 and 92. For example, section 102 provided that the federal Consolidated Revenue Fund would not include money raised using powers reserved to the provinces under Confederation. According to section 126, money collected pursuant to provincial jurisdiction would instead form a separate Consolidated Revenue Fund in each province to be used for supporting provincial functions. This ensured that each order of government could have access to revenue accrued before Confederation to fund its particular responsibilities going forward. In other words, Part VIII may be understood as addressing some of the financial implications of the division of powers. Applying this logic to section 121 suggests that it was not a standalone legislative prohibition, but rather a corollary to relevant provisions dealing with legislative competence. Specifically, by reserving for the provinces only the power of direct taxation, section 92(2) necessarily excluded the collection of provincial customs duties, and by giving Parliament authority over the regulation of trade and commerce, section 91(2) prohibited any form of provincial border measure. Therefore, as a limit on provincial power, section 121 added very little to what was provided for elsewhere in the Act. As a matter of financial implementation, however, section 121 is much more relevant.[158] Together with sections 122 and 123, it clarified when the provinces would

[154] See *BNA Act, 1867*, *supra* note 104, ss 102, 107, 108.

[155] See *ibid* ss 104, 111, 112, 114, 115.

[156] See *ibid* ss 118, 119.

[157] *Comeau*, *supra* note 1 at para 70.

[158] It may be argued that section 121 is more relevant as a limit on federal jurisdiction. Since Parliament was granted power over the regulation of trade and commerce, it should not be exercised to restore the

cease collecting customs duties, and how any disparities in provincial duty rates would be coordinated pending action by Parliament.

Conclusion

Our analysis of the *Comeau* case, and the historical evidence that it featured so prominently, demonstrates that thoughtful engagement with history is a necessary aspect of constitutional law. The biggest problem with the Supreme Court's judgment is its work to diminish the role of history in the name of doctrinal consistency. In pursuing this objective, the Court has regrettably obfuscated an important part of our past, advanced an interpretation of vertical *stare decisis* that makes the past less relevant in deciding contemporary problems, and still left unanswered basic questions about the constitutional provision at issue in the case. As we have explained, none of this was necessary. As a methodology, new originalism forces courts to seriously engage with historical facts to determine the original meaning of constitutional texts, without taking away their discretion to apply those texts in light of changing circumstances. The advantage of this approach is that courts cannot simply disregard the social and political genesis of constitutional texts in favour of what they consider to be its more appropriate meaning.

In its brief assessment of the historical evidence in *Comeau*, the Supreme Court essentially avoided the question that sparked the case to begin with — why does section 121 say "admitted free" if what was meant was "admitted free from duty"? The Court threw up its hands and answered "[w]e do not know…"[159] In fairness to the Court, the procedural posture of the case and the fact that the Crown did not call a historian at trial surely hampered its ability to delve into the historical facts. But instead of saying so, the Court's judgment virtually ignores the historical evidence presented at trial, concluding that it does not suggest the provinces would be prohibited from making internal laws that affect interprovincial trade. The Court's failure to take Mr. Comeau's historical arguments seriously and deal with the burning question undermines the credibility of its judgment. As shown above, had the Court (and the trial judge) subjected the historical evidence to critical scrutiny, it could have reached the same interpretive result but in a more principled manner. For example, the Court would not have needed to admit new evidence to show that a key component of Dr. Smith's evidence amounted to speculation about the political leanings of a single British legislative drafter, when it is general knowledge that the terms of Confederation were the result of a compromise by representatives of the putative Canadian provinces. In addition, the Court could have referred to the trial judgment, which includes an excerpt from a draft version of the *BNA Act, 1867*. This version uses the supposedly broader term "imported free" in reference to duties, which undermines the claim that the absence of "from duty" in the final version of section 121 represented a more ambitious internal free trade agenda for Confederation. And

internal customs duties that the provinces agreed to forego. Therefore, section 121 arguably outlines the economic objective of no internal customs duties and, together with sections 122 and 123, charts the course to achieve it.

[159] See *Comeau*, *supra* note 1 at para 64.

instead of just alluding to the constitutional debates, the Court could have actually cited and discussed them. Had it done so, the Court could have shown that the economic union was not predicated on a single vague provision sandwiched in a part about financial administration, but rather was to be advanced by a central government with a clear and comprehensive set of economic powers to coordinate the national economy in a neutral manner. At least then the Court's judgment would have had historical force, a quality that was needlessly sacrificed in this case.

With the benefit of additional evidence, the Court could have shown that internal regulation that disadvantaged foreign producers was prevalent in Canada both before and after Confederation. In addition, it could have pointed out that the predominant trade irritants in the lead up to Confederation were tariffs and discriminatory border measures, not the trade effects of internal regulation. And the Court could have delved into how tariffs played a crucial role in the "financial settlement" of Confederation, which helps explain section 121's placement among detailed provisions about provincial debts and federal grants.

As a result, the Court left a key question unanswered, namely whether section 121 applies to federal as well as provincial action. Based on the historical evidence presented here, we think that it must apply to both levels of government. This is because Parliament was supposed to use its extensive economic powers to be a neutral mediator of the national economy, not one that would play favourites by imposing tariffs or border measures that benefit one region over another. The provinces would never have given up the power of indirect taxation, which at the time of Confederation was their principle source of revenue, so that the federal government could raise money by doing what they were prohibited from doing. In addition, given the fact that border measures were also an important trade irritant at the time of Confederation, and since they serve the same basic purpose as tariffs, we conclude that the Court's adoption of Rand J.'s reasoning in *Murphy* is historically supported.

All of this to say that in *Comeau* history would have been a friend to the Court, but the Court did not give history much of a chance. As a result, we expect that the uncertainty and inconsistency in the Court's approach to constitutional interpretation will continue to ferment.