The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 94 Article 5

2020

R. v. Comeau: A Crack In the Wall?

Christopher D. Bredt
Borden Ladner Gervais LLP

Ewa Krajewska
Borden Ladner Gervais LLP

Ben Shakinovsky
Borden Ladner Gervais LLP

Citation Information

Bredt, Christopher D.; Krajewska, Ewa; and Shakinovsky, Ben. "R. v. Comeau: A Crack In the Wall?." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 94. (2020).
https://digitalcommons.osgoode.yorku.ca/sclr/vol94/iss1/5

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

R. v. Comeau: A Crack In the Wall?

Christopher D. Bredt, Ewa Krajewska and Ben Shakinovsky[*]

I. OVERVIEW

In 2012, one man's journey from New Brunswick to Quebec in pursuit of cheap beer sparked a fierce constitutional debate about the role of interprovincial trade in Canada. In a booze run that has since made Canadian legal history, Gérard Comeau drove from his home in Tracadie, New Brunswick to the Listiguj First Nation Indian Reserve in Quebec, where alcohol is sold at a cheap price. While there, he stocked up on 15 cases of beer and three bottles of liquor, purchased from three different stores. Unbeknownst to him, Mr. Comeau had been under surveillance in his sojourn into Quebec. When he crossed back over into New Brunswick, Mr. Comeau's vehicle was intercepted by the RCMP, the alcohol was seized, and Mr. Comeau was charged and fined close to $300 under section 134(b) of the New Brunswick *Liquor Control Act*,[1] which prohibits possession of liquor not purchased from the New Brunswick Liquor Corporation in excess of a prescribed amount.

Rather than pay the fine, Mr. Comeau chose to challenge the law. At trial, he argued that section 134(b) of the New Brunswick *Liquor Control Act* was unenforceable because it constituted a provincial trade barrier in violation of section 121 of the *Constitution Act, 1867*.[2] Section 121 of the *Constitution Act, 1867*, provides: "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, *be admitted free* into each of the other Provinces."[3] The Supreme Court of Canada had previously considered section 121 of the *Constitution Act, 1867* on only a handful of occasions. In those cases, the

---

[*] Christopher D. Bredt is a senior partner at Borden Ladner Gervais LLP and head of the public law practice group; Ewa Krajewska is a partner at Borden Ladner Gervais LLP and co-chair of the firm's appellate advocacy practice; Ben Shakinovsky is an associate at Borden Ladner Gervais LLP. The Authors would also like to recognize the research memos drafted by Mannu Chowdhury and Taha Hassan.

[1] R.S.N.B. 1973, c. L-10.

[2] (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5.

[3] *Id.* (emphasis added).

Supreme Court had adopted a narrow interpretation of section 121, holding that its scope was limited to a prohibition on customs duties on the movement of goods between provinces. Mr. Comeau argued that section 121 was in fact intended to create free trade between the provinces and that the Supreme Court precedents stating otherwise had been wrongly decided. To everyone's surprise, the trial judge agreed with Mr. Comeau. In an express departure from precedent, the trial judge held that the authoritative cases on section 121 were wrongly decided and that section 134(b) violated section 121 of the *Constitution Act, 1867*.

The quaint set of facts that landed Mr. Comeau in court belie the case's constitutional importance. To be sure, it was about more than the price of beer. As the trial judge in. *R. v. Comeau*,[4] readily acknowledged, a multitude of provincial laws, policies, and regulatory schemes in Canada have developed on the assumption that restrictions on interprovincial trade are permissible.[5] Had the trial judge's decision stood, a number of provincial regulations concerning wheat, eggs, milk, poultry, and numerous other goods would have met with similar section 121 challenges. However, the trial judge's decision did not stand. Mr. Comeau's case ended up before the Supreme Court of Canada, which, as a unanimous nine-bench panel, reversed the trial judge's decision and reaffirmed the constitutionality of section 134(b) of the New Brunswick *Liquor Control Act*. In so doing, the Supreme Court circumscribed the scope of section 121 of the *Constitution Act, 1867*, holding that the purpose of section 121 is not to impose free trade but to prohibit laws that "in essence and purpose" restrict the passage of goods across provincial boundaries.[6]

The Supreme Court's decision in *Comeau* highlighted a critical difference in approach between Canada and other similarly-constituted jurisdictions towards interstate trade. Other jurisdictions with legal structures similar to Canada's have treated burdens on interjurisdictional trade with appropriate suspicion. In advance of the Supreme Court's ruling in *Comeau*, many commentators anticipated that the Court would treat the case as an overdue opportunity to align Canadian law with the laws of other federal jurisdictions, and were accordingly disappointed when it appeared that the Court had declined this opportunity.

---

4 [2016] N.B.J. No. 87, 2016 NBPC 3 (N.B. Prov. Ct.) [hereinafter "*Comeau* NBPC"].

5 *Id.*, at para. 160.

6 *R. v. Comeau*, [2018] S.C.J., No. 15, [2018] 1 S.C.R. 342 (S.C.C.) [hereinafter "*Comeau* SCC"].

However, a more judicious reading of *Comeau* suggests that although the Court did not take full advantage of the opportunity before it, it did make a subtle change. In *Comeau*, the Court shifted the section 121 analysis towards a more purpose-driven approach. This new approach, which impugns any law whose primary purpose is to defeat trade between the provinces, represents a welcome shift away from a myopic focus on tariffs and tariff-like barriers towards a stronger guarantee of free trade within Canada's borders.

At the same time, the Supreme Court's decision in *Comeau* did not go far enough. While *Comeau* moved the analysis in the right direction, the Canadian approach remains unduly narrow when compared to the interpretation of free trade provisions that prevail in other jurisdictions. The law surrounding interstate trade in comparable common law federations, such as the United States of America and Australia, as well as the European Union, provides a compelling alternative approach to interstate trade, one that Canadian jurisprudence will hopefully adopt in coming years.

The following is an outline of this article:

- The Article begins with an examination of the handful of Supreme Court and Privy Council decisions that considered section 121 before *Comeau*.
- We then discuss *Comeau* itself, looking at the judgments rendered by both the New Brunswick Provincial Court and Supreme Court.
- Next, we provide an overview of how constitutional and treaty provisions equivalent to section 121 have been interpreted in the United States, Australia, and the European Union. This comparative approach reveals that other federal jurisdictions have adopted a more purposeful approach towards the free trade provisions of their constitutions without destroying the integrity of the federation.
- Finally, in a section entitled, "Towards a New Approach", this article examines the treatment of precedent in *Comeau* and lays out its argument that other jurisdictions offer a more suitable approach to interstate trade, both from a legal and policy perspective. We draw from our comparative law analysis to develop principles that should guide Canadian jurisprudence in the future.

II. CASE LAW ON SECTION 121 PRE-*COMEAU*

The role of judicial precedent is at the heart of the analysis in *Comeau*. A brief lesson in the history of the judicial treatment of section 121 is therefore critical to an understanding of Canada's singular attitude towards interprovincial trade as compared to other jurisdictions.

Before *Comeau*, the Supreme Court and Privy Council considered the ambit of section 121 on four separate occasions. The first of these was the Supreme Court's judgment in *Gold Seal Ltd. v. Dominion Express Co*.[7] In February 1921, the Dominion Express Company refused to ship the Gold Seal Company's liquors from Alberta to Saskatchewan or Manitoba, citing the *Canada Temperance Amending Act*, which prohibited the importing of liquor into dry provinces. The law was challenged on the basis of section 121. The Supreme Court held that the law did not violate section 121. Justices Duff, Anglin, and Mignault each adopted a highly circumscribed interpretation of the constitutional provision, agreeing that its purpose was only "to prohibit the establishment of customs duties affecting inter-provincial trade in the products of any province of the Union."[8]

Gold Seal exercised a powerful influence on the cases that followed. In *Atlantic Smoke Shops Ltd. v. Conlon*,[9] the Judicial Committee of the Privy Council endorsed *Gold Seal*'s gloss on section 121. At issue in *Atlantic Smoke Shops* was a piece of New Brunswick legislation that imposed a tax on tobacco brought in from outside provinces. Adhering to the Supreme Court's interpretation in *Gold Seal*, the Privy Council held that the legislation did not violate section 121 because it did not impose a customs duty but rather a general consumption tax.[10]

In *Murphy v. Canadian Pacific Railway*,[11] the Supreme Court again had cause to consider the ambit of section 121. In that case, the Canadian Pacific Railway had refused to ship a grain producer's grain from Manitoba to British Columbia, citing prohibitions on interprovincial transports of grain found in the *Canadian Wheat Board Act*. Justice Locke, writing for the majority, unhesitatingly adopted the holding in *Gold Seal* and *Atlantic Smoke Shops*. Justice Rand wrote a concurring opinion in which he, in the words of the Supreme Court's decision in

---

7 [1921] S.C.J. No. 43, 62 S.C.R. 424 (S.C.C.) [hereinafter "*Gold Seal*"].

8 *Id.*, at 456.

9 [1943] J.C.J. No. 1, 1943] 4 D.L.R. 81 (U.K. P.C.) [hereinafter "*Atlantic Smoke Shops*"].

10 *Id.*, at para. 8.

11 [1958] S.C.J. No. 48, [1958] S.C.R. 626 (S.C.C.) [hereinafter "*Murphy*"].

Comeau, "undertook a more substantive, purposive analysis of s. 121."[12] Of section 121, Rand J. wrote in concurrence:

> I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.[13]

Finally, section 121 was addressed by the Supreme Court in *Reference re: Agricultural Products Marketing Act, 1970 (Canada)*.[14] The case dealt with a comprehensive egg marketing scheme under a federal regulatory statute that involved quotas on interprovincial trade. The scheme was upheld and the majority at the Court did not address section 121 in its reasons. However, Laskin C.J.C., writing in concurrence, did engage with section 121. Specifically, he quoted the above passage from Rand J.'s concurrence in *Murphy* and adopted its reading of section 121, including its language of "essence and purpose". In concurring with upholding the scheme, Laskin C.J.C. wrote that there is "nothing in the marketing scheme here that, as a trade regulation, is *in its essence and purpose* related to a provincial boundary."[15]

III. THE *R. V. COMEAU* DECISIONS

1. Decision of the New Brunswick Court of Queen's Bench

At issue in *Comeau* was section 134(b) of the New Brunswick *Liquor Control Act*, which limited the amount of non-Corporation liquor that a person could possess at any given time. Section 134(b) provides that:

> **134** Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall

---

[12] *R. v. Comeau*, [2018] S.C.J. No. 15, [2018] 1 S.C.R. 342, at para. 95 (S.C.C.).

[13] *Murphy v. Canadian Pacific Railway*, [1958] S.C.J. No. 48, [1958] S.C.R. 626, at 642 (S.C.C.).

[14] [1978] S.C.J. No. 58, [1978] 2 S.C.R. 1198 (S.C.C.).

[15] *Id.*, at 1268 (emphasis added).

…

(b) have or keep liquor, not purchased from the Corporation.[16]

The "simple" issue at trial was whether section 134(b) of the *Liquor Control Act* violated section 121 of the *Constitution Act, 1867*.[17] In a surprising move, the New Brunswick Provincial Court expressly departed from the precedent established by the body of Supreme Court and Privy Council cases outlined above. Specifically, the trial judge held "with a great deal of trepidation" that *Gold Seal* was wrongly decided due to its failure to undertake a large and liberal interpretation of section 121.[18] The string of Supreme Court and Privy Council cases that followed *Gold Seal* were decided in *Gold Seal*'s shadow and were, according to the trial judge, corrupted by its influence.[19]

Reviewing the law governing departures from "vertical" precedent (*i.e.*, instances in which a lower court may depart from otherwise binding precedent), the trial judge held that the evidence before him at trial justified such a departure.[20] At trial, the defence had presented an abundance of historical evidence pertaining to the drafting of the *Constitution Act, 1867*, as well as its legislative history, scheme, and context.[21] Of particular note was evidence of pronouncements made by the Fathers of Confederation during the events leading to Confederation, evidence that, in the trial judge's opinion, established that "the Fathers of Confederation wanted free trade as between their respective jurisdictions."[22] The trial judge held that because this important historical evidence had not been before the trier-of-fact in any of the previous cases dealing with section 121, the fact of its presentation in *Comeau* constituted a "significant change in evidence" that justified departing from the precedential jurisprudence on section 121.[23]

Having found that *Gold Seal* was wrongly decided and that the evidence presented at trial allowed for departure from precedent, the trial judge held that the scope of section 121 was broader than the Supreme Court had previously construed. Acknowledging that his decision would have a "resounding impact", the trial judge held that section 121 allowed

---

16 R.S.N.B. 1973, c. L-10, s. 134(b).
17 *R. v. Comeau*, [2016] N.B.J. No. 87, 2016 NBPC 3, at para. 21 (N.B. Prov. Ct.).
18 *Id.*, at paras. 116, 189.
19 *Id*.
20 *Id.*, at paras. 117-122, 187.
21 *Id.*, at para. 125.
22 *Id.*, at para. 101.
23 *Id.*, at paras. 125, 188.

"the free movement of goods among the provinces without barriers, tariff or non-tariff".[24] The trial judge struck down section 134(b) of the *Liquor Control Act* on the basis that it constituted a trade barrier in violation of section 121 of the *Constitution Act, 1867*.[25]

2. Decision of the New Brunswick Court of Appeal

In a somewhat unusual decision, the New Brunswick Court of Appeal denied the provincial Attorney General's application for leave to appeal, citing section 116(3) of the *Provincial Offences Procedure Act*,[26] which provides that the Attorney General may only appeal to the Court of Appeal on a ground that involves a question of law alone.[27] The New Brunswick Court of Appeal decision was not longer than a page with almost no reasoning provided for why leave was denied.

3. Decision of the Supreme Court of Canada

At the Supreme Court, a unanimous nine-bench panel allowed the Crown's appeal and restored section 134(b) of the New Brunswick *Liquor Control Act*. The Court held, first, that the trial judge had erred in departing from binding precedent. The "new" evidence presented at trial — namely, historical evidence of the drafters' intentions in including section 121 in the *Constitution Act, 1867* and expert evidence that these intentions ought to inform how the provision is to be interpreted — merely constituted "a re-discovery or re-assessment of historical events".[28] This was not evidence of social change such as would justify a departure from precedent.[29] In accepting the testimony of the expert historian "without hesitation",[30] the trial judge had allowed the historian's evidence to supplant precedent and had thereby introduced "the very instability in the law" that the principle of common law precedent seeks to avoid.[31]

---

24 *Id.*, at para. 191.
25 *Id.*, at para. 193.
26 S.N.B. 1987, c. P-22.1.
27 *R. v. Comeau*, [2016] N.B.J. No. 232, at paras. 2, 3 (N.B.C.A.).
28 *R. v. Comeau*, [2018] S.C.J. No. 15, [2018] 1 S.C.R. 342, at para. 36 (S.C.C.).
29 *Id*.
30 *Id.*, at para. 15.
31 *Id.*, at para. 41.

On the substantive merits of the appeal, the Court held that the trial judge erred in his interpretation of section 121. His analysis did not conform to the purposive approach integral to constitutional analysis in that it "was limited entirely to the words and context of the provision in light of the historical evidence."[32] According to the Court, a properly purposive analysis of section 121 — one that considered the provision in light of its historical context, its legislative context, and the underlying principles of the Constitution — supported a narrower reading of section 121.[33]

On a historical level, the Court found that section 121 was devised as a means of achieving economic union in Canada.[34] The historical evidence before the Court suggested that the purpose of section 121 was, at a minimum, to prohibit the imposition of tariffs and tariff-like measures on goods crossing provincial borders.[35] Lest it seem that the Court's conclusions regarding the historical record would support a broader reading of section 121, the Court was quick to caution that "the historical evidence nowhere suggests that provinces … would lose their power to legislate under s. 92 of the *Constitution Act, 1867* … even if that might have impacts on interprovincial trade."[36]

The Court found that the provision's legislative context also militated against too expansive a reading. The Court noted that section 121 is situated in Part VIII of the *Constitution Act, 1867*, entitled "REVENUES; DEBTS; ASSETS; TAXATION". The Court deemed this significant for three reasons:

- first, because the proximity of section 121 to sections 122 and 123 suggests that the three provisions are to be read as a trio that together "address the shifting of customs and excise levies from the provincial to the federal level";[37]
- second, because Part VIII is in general concerned with "direct burdens on the price of commodities" and therefore does not support a reading of section 121 that would capture a law's incidental impacts on interprovincial trade;[38] and

---

32 *Id.*, at para. 39.
33 *Id.*, at paras. 52, 53, 89.
34 *Id.*, at para. 62.
35 *Id.*, at para. 67.
36 *Id.*
37 *Id.*, at para. 69.
38 *Id.*, at para. 71.

- third, because section 121's position in the scheme of Part VIII means that it was intended to limit the powers of the legislatures, and any such limit "must be interpreted in a way that does not deprive Parliament and provincial legislatures of the powers granted to them to deal effectively with problems ...".[39]

The Court concluded that the legislative context suggests that section 121 should not be interpreted in a way that would sap the provincial or federal legislatures of their powers, even where those powers incidentally affect interprovincial trade.[40]

Finally, the Court noted that the federalism principle, with its emphasis on jurisdictional balance, would not support full economic integration, as argued for Mr. Comeau.[41] Nor would it support the Crown's argument that section 121 ought to be interpreted narrowly so as to allow governments the power to impose barriers on goods crossing provincial borders.[42] Rather, the federalism principle invited an interpretation of section 121 that "prohibits laws directed at curtailing the passage of goods over interprovincial borders, but allows legislatures to pass laws to achieve other goals within their powers".[43]

Consequent upon the analysis, the Court concluded that

> s. 121 prohibits laws that in essence and purpose restrict trade across provincial boundaries. Laws that only have the incidental effect of restricting trade across provincial boundaries because they are part of broader schemes not aimed at impeding trade do not offend s. 121 ... .[44]

This language of essence and purpose derives directly from Rand J.'s concurrence in *Murphy*. As with Rand J.'s and Laskin C.J.C.'s respective concurring opinions in *Murphy* and *Reference Re: Agricultural Products*, the Court in *Comeau* did not explicitly reject the authority of *Gold Seal* in arriving at their conclusion. The Court held that the precedents on section 121 were not in conflict[45] and that Rand J.'s pronouncements in *Murphy* simply represented an attempt "to draw out the rationale underlying *Gold Seal*" by assuming "a more substantive, purposive

---

39 *Id.*, at para. 72.
40 *Id.*, at paras. 72, 73.
41 *Id.*, at para. 85.
42 *Id.*, at para. 87.
43 *Id.*, at para. 88.
44 *Id.*, at para. 106.
45 *Id.*, at para. 91.

analysis of s. 121."[46] (The Court did, however, acknowledge that *Gold Seal*'s treatment of section 121 was not purposive[47] and also briefly entertained the idea that Rand J.'s concurring opinion might have extended the logic of *Gold Seal* rather than merely restated it.)[48]

Elucidating the "essence and purpose" test articulated above, the Court held that "essence" refers to the law's nature or character, while "purpose" refers to the law's object or "primary purpose".[49] The test is conjunctive, requiring a claimant to show that the law defeats trade in both essence *and* purpose. In order to establish that the essence of a law restricts trade, a claimant must show that the law distinguishes between goods in a manner that relates to a provincial boundary.[50] To show that the law in purpose restricts trade, the claimant must demonstrate that the law's primary purpose is to defeat trade. This determination will be made "on the wording of the law, the legislative context in which it was enacted … and all of the law's discernible effects".[51]

Applying this test to section 134(b) of the *Liquor Control Act*, the Court held that the law in essence restricts trade in that it "functions like a tariff at the extreme end of the spectrum" by imposing fines on those who stock liquor from outside the Province.[52] However, the law's primary purpose was not to restrict trade, but rather to create public oversight over the management and use of alcohol within New Brunswick.[53] The imposition on interprovincial trade created by section 134(b) was a mere incidental effect of the law[54] and not enough to render it unconstitutional under section 121 of the *Constitution Act, 1867*.

IV. How Other Federations have Addressed Interstate Trade

The Canadian approach to interprovincial trade, both as it existed before *Comeau* and as it exists now, is somewhat an anomaly when compared to other federal jurisdictions. Other common law federations,

---

46 *Id.*, at para. 95.
47 *Id.*, at para. 106.
48 *Id.*. at para. 101.
49 *Id.*, at para. 107.
50 *Id.*, at para. 108.
51 *Id.*, at para. 111.
52 *Id.*, at para. 120.
53 *Id.*, at para. 124.
54 *Id.*, at para. 125.

such as the United States of America and Australia, as well the courts of the European Union, have assumed a markedly different approach to equivalent provisions of their constitutions and treaties. All of these jurisdictions have developed doctrines that target both tariff and certain non-tariff barriers, particularly where they are discriminatory or protectionist. A review of the law surrounding interstate trade in each of these three jurisdictions reveals two trends:

- where the objective of a measure is protectionism, the measure will be unconstitutional;
- if the measure has a valid objective but is protectionist or discriminatory in its effects on interstate trade, the courts will analyze whether the measures adopted are appropriately tailored to the objective of the legislation.

1. The Treatment of Interstate Commerce in the United States of America

Article I, section 8, clause 3 of the *Constitution of the United States of America* provides that: "The Congress shall have power to … regulate commerce … among the several states".[55] The provision is often referred to as the "dormant commerce clause", as it has been interpreted as having a "negative" or "dormant" aspect that denies states the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce. The judicial doctrine that has developed around the dormant commerce clause is sensitive to the fact that the States do not have representation in one another's legislatures, and therefore "lack recourse to the ordinary legislative means for correcting wrongs" when the interests of one state are adversely-affected by the legislation of another. The doctrine ultimately aims to "prevent parochial state legislation which inevitably stimulates reprisals by other states."[56]

The United States Supreme Court has devised a two-part test to determine whether a restriction on interstate trade violates the dormant commerce clause. At the first prong, the court will characterize the nature of the impact on interstate commerce. A court will ask whether the impugned state law discriminates against interstate commerce, or

---

[55] *U.S. Constitution*, amend. XVIII, § 1.

[56] Jerome A. Barron and C. Thomas Dienes, *Constitutional Law in a Nutshell*, 9th ed. (St. Paul: West Academic Publishing, 2017).

whether the law is neutral on its face but nevertheless burdens interstate commerce. Any law that is discriminatory in its purpose, or "facially discriminatory", falls into the former category. Examples of facially discriminatory laws include those which "block imports, tax out-of-state goods but not in-state goods, otherwise give facial preference or have a purpose or effect of giving preference to in-state resources or goods at the expense of out-of-state resources or goods".[57] A law falls into the latter category where it is *prima facie* neutral but effectively burdens out-of-state goods, or creates an "undue burden on interstate commerce".[58] Examples of laws that impose undue burdens include product requirements, such as rules relating to inspections, labelling, and safety. For instance, in *Dean v. Madison*, the Supreme Court struck down a municipal ordinance stipulating that all milk sold in Madison, Wisconsin must be pasteurized within five miles of the City limits. The purpose of the ordinance was to ensure the health and well-being of consumers in light of the difficulty of regulating the sanitary conditions of milk produced in remote areas. Although the law had a non-discriminatory purpose, it was unconstitutional in that it effectively amounted to "erecting an economic barrier protecting a major local industry against [out-of-state] competition." (It was no defence that the ordinance also applied to milk producers within the State of Wisconsin outside the five-mile limit.)[59]

The second prong of the test diverges depending on the law's characterization at the first prong. If the law falls into the first category by facially discriminating against interstate commerce, the court will apply strict scrutiny to the law and strike it down unless the state can demonstrate that the law "serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives."[60] For instance, in *Maine v. Taylor*, the Court upheld a Maine law prohibiting the importation of live baitfish into the State. Although the law discriminated against interstate commerce, the Court found that the law served a legitimate public purpose due to uncertainty about the

---

[57] Alexandra Klass and Elizabeth Henley, "Energy Policy, Extraterritoriality, and the Dormant Commerce Clause" (January 8, 2014), 5 San Diego J. of Climate & Energy L. 127 (2013-2014) Minnesota Legal Studies Research Paper No. 14-01; Minnesota Legal Studies Research Paper No. 14-01. Available online at SSRN: <https://ssrn.com/abstract=2376411> or <http://dx.doi.org/10.2139/ssrn.2376411>, at 130.

[58] *Dean v. Madison*, 340 U.S. 349, at 353 (1951).

[59] *Id.*, at 354.

[60] 477 U.S. 131, at 151 (1986) [hereinafter "*Maine*"].

ecological effect on the local wild fish population by the possible presence of non-native species.[61]

Conversely, if the law falls into the second category and burdens interstate commerce despite its facial neutrality, American courts will apply the less rigorous "*Pike* balancing test". The test was articulated by the United States Supreme Court in *Pike v. Bruce Church, Inc.*:[62]

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. … If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[63]

There are effectively three considerations under the *Pike* balancing test: (1) whether the state law has a legitimate local purpose; (2) the nature of the state interest involved (its "degree"); and (3) whether the legitimate state interest could be served through measures which have a lesser impact on interstate commerce. For instance, in *Pike*, the Court struck down an order that prohibited an Arizonan producer of high-quality cantaloupes from shipping the fruit outside of Arizona unless the Company packed the fruit in specific containers that marked the fruit as being of Arizonan origin (the Company had previously been transporting the fruit to a Californian packing facility, where the fruit would be packed and shipped out bearing the name of the California packer). The order could not withstand scrutiny under the *Pike* balancing test. While the order had a "clearly legitimate" purpose in ensuring the State's interest that the high-quality produce be accurately marked as being of Arizonan origin, this interest was "tenuous" compared to the "significant" burden the packing requirements placed on the Company.[64]

The crux of the analysis under the dormant commerce clause is categorizing the law as one that discriminates in its purpose or in its effect. Laws that purposefully impede trade will be strictly scrutinized and likely struck down. But even where a law serves a legitimate local

---

61 *Id*.

62 397 U.S. 137 (1970) [hereinafter "*Pike*"].

63 *Id.*, at 142.

64 *Id.*, at 145.

purpose, a court will inquire about the "degree" of the purpose and whether the same interest could be served through less restrictive means. The court will strike down a state law when the burden it imposes is "clearly excessive" as against the local benefit it generates.[65]

2. The Treatment of Free Trade in Australia

Section 92 of the *Constitution of the Commonwealth of Australia* provides: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."[66] The High Court of Australia has held that the provision is designed to foster a common market[67] and "to prevent the use of State and Territory boundaries as trade borders or barriers for the protection of participants in the market who are within a State or Territory, from competition from participations in that same market, who are not in that State or Territory."[68]

Two distinct legal tests have historically governed the interpretation of section 92. Until 1988, the High Court of Australia applied a legal test known as the "criterion of option" test, which generally resulted in upholding laws that only incidentally restricted interstate trade and striking down laws that in "essence" hindered interstate trade.[69] However, distinguishing the "essence" of legislation from its incidental features proved cumbersome and difficult.[70] Consequently, in 1988, in *Cole*,[71] the High Court rejected the criterion of application test and replaced it with a new test that continues to govern the application of

---

[65] *Id.*, at 142.

[66] *Commonwealth of Australia Constitution Act* [Australia], July 9, 1900. The remainder of s. 92 states:

> But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

In 1901, Australia imposed uniform customs duties, thereby rendering this latter part of s. 92 moot.

[67] *Cole v. Whitfield* (1988), 165 C.L.R .360, at para. 25 (H.C.A.) [hereinafter "*Cole*"].

[68] *Victoria v. Sportsbet Pty Ltd.* (2012), 294 A.L.R. 113, at para. 72 (F.C.A.).

[69] R. D. Lumb, *et al.*, *The Constitution of the Commonwealth of Australia*, 5th ed. (Sydney: Butterworths Publishing, 1995), at 461 [hereinafter "Lumb"].

[70] *Cole v. Whitfield* (1988), 165 C.L.R. 360, at paras. 36-38 (H.C.A.).

[71] *Id.*, para. 52.

section 92 today. The test inquires whether the law imposes "discriminatory burdens of a protectionist kind" on out-of-state businesses.[72]

The inquiry is divided into four stages.[73] Under the first prong of the test, the Court will ask whether the impugned law imposes a legislative burden on interstate trade.[74] This element of the test is satisfied when the claimant can demonstrate that the State law (1) adversely affects one's commercial interests; and (2) *prima facie* favours products from the State from which the law originates over products from another State.[75] Examples of legislative burdens include prohibitions against nationalizing banks,[76] restrictions on a national barley scheme,[77] and licensing and production quotas on margarine.[78]

Australian courts treat the second and third prongs of the test concurrently.[79] The second prong is concerned with whether the regulation discriminates between local and out-of-state business, either in its language or in its effects. If the law is found to be discriminatory, courts will proceed to the third prong and ask whether the discrimination is "protectionist" in character. Concerning discrimination and protectionism, the High Court stated in *Cole*:

> …to construe s 92 as requiring that interstate trade and commerce be immune only from discriminatory burdens of a protectionist kind does not involve inconsistency with the words 'absolutely free': it is simply to identify the kinds or classes of burdens, restrictions, controls and standards from which the section guarantees absolute freedom.[80]

---

[72] *Id*.

[73] *Betfair Pty Ltd. v. Racing New South Wales*, [2012] HCA 12, at para. 52 (H.C.A.).

[74] N. Oreb, "Betting Across Borders: Betfair Pty Limited v Western Australia" (2009) 31 Sydney L. Rev. 607, at 608-609.

[75] *Id*.

[76] *Bank of New South Wales v. Commonwealth (Bank Nationalisation Case)* (1948), 76 C.L.R. 1 (H.C.A.); *Commonwealth v. Bank of New South Wales (Bank Nationalisation Case)*, [1950] A.C. 235 (U.K.P.C.).

[77] *Barley Marketing Board (NSW) v. Norman* (1990), 171 C.L.R. 182 (H.C.A.).

[78] *Grannall v. Marrickville Margarine Pty Ltd* (1955), 93 C.L.R. 55 (H.C.A.); P. H. Lane, "The Present Test for Invalidity Under Section 92 of the Constitution" (1988) 62 *Australian Law Journal* 604, at 607.

[79] N. Oreb, "Betting Across Borders: Betfair Pty Limited v Western Australia" (2009) 31 Sydney L. Rev. 607, at 608-609; Leslie Zines, *The High Court and the Constitution*, 5th ed. (Annandale, N.S.W: The Federation Press, 2008), at 174-75; R. D. Lumb, *et al.*, *The Constitution of the Commonwealth of Australia*, 5th ed. (Sydney: Butterworths Publishing, 1995), at 446-47; Suri Ratnapala and Jonathan Crowe, *Australian constitutional law: foundations and theory*, 3d ed. (South Melbourne, Australia: Oxford University Press, 2012), at 308 [hereinafter "Ratnapala and Crowe"].

[80] *Cole v. Whitfield* (1988), 165 C.L.R. 360, at para. 24 (H.C.A.).

Discrimination has been defined as "the departure from equality of treatment."[81] Laws that grant local business an unfair competitive edge over out-of-state business are considered discriminatory in the context of section 92.[82] The inquiry is concerned with the actual effects of the law[83] and recognizes that discrimination "can occur on the face of the law or may result from the factual operation of the law."[84] In determining whether a law is discriminatory, the High Court has applied an objective standard and asked what a reasonable person would think.[85] However, in determining whether a law is protectionist, the High Court has employed both a subjective approach and an objective approach. For instance, in *Castlemaine Tooheys Ltd. v. South Australia*,[86] the Court probed whether the State's express purpose in enacting refillable bottle regulations was to deter out-of-state brewers;[87] in so doing, the Court implicitly emphasized the subjective intention of the Legislature. However, in *Cole*, the Court focused only on the objective effects of certain crayfish regulations on free trade and did not look to the animating purpose behind the regulations.[88]

If the law is found to be discriminatory and protectionist, the Court will at the fourth prong of the test ask whether the law is "reasonably necessary" to achieve a legitimate objective. This final stage of the test introduces a proportionality analysis into the overall inquiry. Factors to be weighed by courts under the proportionality analysis may include whether the burden imposed by the law is incidental, whether the burden is proportionate to the achievement of the legitimate objective, and whether the presence of other "reasonable non-discriminatory alternative means of securing the legitimate object suggests that the purpose of the law is to effect a prohibited discrimination."[89]

---

[81] Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory*, 3d ed. (South Melbourne, Australia: Oxford University Press, 2012), at 308.

[82] *Betfair Pty Ltd v. Racing New South Wales*, [2012] HCA 12, at para. 34 (H.C.A.).

[83] R. D. Lumb, *et al.*, *The Constitution of the Commonwealth of Australia*, 5th ed. (Sydney: Butterworths Publishing, 1995), at 467.

[84] Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory*, 3d ed. (South Melbourne, Australia: Oxford University Press, 2012), at 309; Lumb, *id.*, at 467; N. Oreb, "Betting Across Borders: Betfair Pty Limited v Western Australia" (2009) 31 Sydney L. Rev. 607, at 608-609.

[85] *Betfair Pty Ltd. v. Racing New South Wales*, [2012] HCA 12, at para. 36 (H.C.A.).

[86] (1990) 169 CLR 436 (H.C.A.).

[87] *Id.*, at para. 43.

[88] *Cole v. Whitfield* (1988), 165 CLR 360, at paras. 49-52 (H.C.A.).

[89] Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory*, 3d ed. (South Melbourne, Australia: Oxford University Press, 2012), at 311.

The test articulated in *Cole* admittedly has certain weaknesses. The concurrent treatment of the second and third prongs of the test has resulted in conceptual uncertainty, making it difficult to delineate between discrimination at the second prong and protectionism at the third prong. The proportionality component of the test also lacks sufficient clarity. Unlike proportionality-based tests in Canada like the *Oakes* test,[90] Australian courts have not developed a set of formal factors or criteria to guide the proportionality analysis nor have they precisely defined the "reasonably necessary" standard that governs the proportionality analysis.[91] This, along with the fact that the High Court has variously employed both a subjective and an objective approach at the third prong, means that the *Cole* test can yield any number of outcomes. But although this differentiated approach towards a law's protectionist character creates a degree of unpredictability, certain state actions will almost invariably be deemed protectionist. Such actions include: tariffs that increase the price of imports, quotas on imports, differential railway rates, and subsidies for local goods.[92]

3. The Treatment of Free Trade Among the Member States of the European Union

The European Union's primary treaty governing free trade is the *Treaty on the Functioning of the European Union* (TFEU, also known the Lisbon Treaty). Of particular importance for free trade purposes are Articles 30, 34, 35, and 36 of TFEU. Article 30 imposes an absolute prohibition on customs duties on imports and exports between Member States.[93] Articles 34 and 35 address non-tariff-based barriers and provide that quantitative restrictions on imports and exports and "all measures having equivalent effect shall be prohibited between Member States."[94] Article 36 provides that Articles 34 and 35 "shall not preclude prohibitions or restrictions on imports, exports or goods in transit that are justified on certain grounds, including public morality, public policy or

---

[90] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

[91] Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory*, 3d ed. (South Melbourne, Australia: Oxford University Press, 2012), at 311; Amelia Simpson, "Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone" (2005) 33 Fed. L. Rev. 445.

[92] Ratnapala and Crowe, *id.*, at 309.

[93] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, Art. 30 [hereinafter "TFEU"].

[94] *Id.*, Arts. 34, 35.

public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property." However, Article 36 goes on to provide that such prohibitions cannot "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."[95]

Articles 30, 34, and 35, which promote free trade among EU Member States, have been liberally interpreted by the European Courts. In *Procureur du Roi v. Benoît and Gustave Dassonville*,[96] the European Court broadly interpreted the phrase "measures having equivalent effect", to mean "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade".[97] By contrast, the enumerated exceptions under Article 36 have been narrowly interpreted. The exceptions listed under Article 36 are exhaustive and limited to non-economic objectives.[98]

The European Court has recognized some limits on the interpretation of Articles 34 and 35. The Court has held that Articles 34 and 35 specifically target state intervention in intra-community trade and do not impose restrictions on agreements that arise from private contracts, individuals, or companies.[99] Furthermore, national provisions that restrict or prohibit certain selling arrangements do not come within the reach of Articles 34 and 35 so long as the provisions "apply to all relevant traders operating within the national territory and so long as they [equally] affect…the marketing of [both] domestic and [imported] products".[100] In other words, national prohibitions and restrictions that apply equally to all Member States do not violate Articles 34 and 35. Also regarding limitations to Articles 34 and 35, the European Court held in *Cassis de Dijon*,[101] that national rules concerning imported products can be maintained provided they are "necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial

---

95 *Id.*, Art. 36.

96 Case 8/74 (E.C.).

97 *Id.*, at para. 5.

98 *Commission of the European Communities v. Italian Republic*, Case 95/81, at para. 27.

99 *Sapod Audic v. Eco-Emballages SA*, Case C-159/00, at para. 74 (E.C. (Fifth Chamber)).

100 *A.G.M.-COS.MET Srl v. Suomen valtio and Tarmo Lehtinen*, Case C-470/03, at para. 66 (E.U. (Grand Chamber)).

101 *Keck and Mithouard*, joined cases C-267/91 and C-268/91 (24 November 1993), at para. 16.

transactions and the defence of the consumer."[102] The exceptions outlined in *Cassis de Dijon* are referred to variously as "mandatory requirements" and "public interest requirements".[103]

The legal test that has emerged from the jurisprudence of the European Court adheres to a two-pronged analysis.[104] At the first prong, the Court must determine whether the national measure "impedes", "hinders" or creates an "obstacle" to interstate trade (which is to ask, does the law breach Article 34 or 35?). As stated above, courts will interpret Articles 34 and 35 liberally and the prohibition in Articles 34 and 35 on "measures having equivalent effect" includes measures that impede trade "directly or indirectly, actually or potentially".[105]

If an infringement of Article 34 or 35 is established, the Court will proceed to the second stage of the analysis and ask whether the measure (1) is permitted under Article 36 of the Treaty; or (2) genuinely serves the intended purpose and is proportional to the objective sought. As discussed above, the "mandatory requirements" or "public interest requirements" outlined in *Cassis de Dijon* can justify an infringement of Article 34 or 35. Unlike the exceptions listed under Article 36, these justifications are non-exhaustive.[106]

If the Member State establishes that the law genuinely serves the intended public interest purpose, the Court will assess the law against the criteria of a proportionality analysis. The first step of the proportionality analysis has been referred to as the "test of suitability"[107] and requires that a Member State show a "reasonable connection between the requirements laid down by the authorities and the exercise of control."[108] Other cases have characterized this step as a matter of ensuring that the "measure is appropriate for securing the attainment of the objective pursued".[109] The next two steps of the analysis are conducted concurrently and are together referred to as the "test of necessity". Under

---

[102] *Id.*, at para. 8.

[103] *Id*.

[104] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, 5th ed. (Oxford: Oxford University Press, 2016), at 102.

[105] *Procureur du Roi v. Benoît and Gustave Dassonville*, Case 8/74, at para. 5 (E.C.).

[106] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, 5th ed. (Oxford: Oxford University Press, 2016), at 173-74.

[107] *Id.*, at 179.

[108] *NV United Foods and PVBA Aug. Van den Abeele v Belgian State*, Case 132/80, at para. 28 (E.C.).

[109] *Commission of the European Communities v. Portuguese Republic*, Case C-265/06, at para. 37 (E.C. (Third Chamber)).

the test of necessity, the Court will ask whether the desired objective could be achieved through less restrictive means and whether the chosen means nevertheless have an excessive effect on traders' interests.[110]

A helpful illustration of the application of the European framework involved a Portuguese prohibition on the affixing of tinted screens on car windows. The European Court held that the prohibition violated Article 34 because it restricted the marketing of almost all tinted film legally manufactured and sold in other Member States.[111] Portugal attempted to justify the prohibition on the grounds of fighting crime and ensuring road safety, as the prohibition enabled easy and immediate inspection of the interior of a person's car (for the purpose of ensuring seat-belt use, identifying suspects *etc.*). The Court accepted that the prohibition "does indeed appear to be likely to facilitate such inspection and, therefore, appropriate to attain the objectives of fighting crime and ensuring road safety".[112] However, the prohibition failed at the "less restrictive means" stage of the proportionality analysis. The Court held that the ability to immediately inspect a car's interior was only one of several means available to authorities to fight crime and ensure proper seat-belt use. Furthermore, the existence of a wide variety of tinted film, ranging from transparent to nearly opaque, rendered the categorical prohibition on all tinted film "excessive and, therefore, disproportionate with respect to the objectives pursued."[113] In addition, the Court found that Portugal's rationale was undermined by the fact that Portugal itself allowed manufacturers to sell cars with pre-tinted windows.[114]

V. Towards a New Approach

This section begins with an examination of the Supreme Court's shift towards a purpose-driven approach in the *Comeau* decision. Second, we discuss how the Supreme Court approached overturning precedent. Finally, this section looks at the common principles that govern the approach towards interstate trade in other jurisdictions, arguing that these principles together create a compelling framework that ought to be

---

[110] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, 5th ed. (Oxford: Oxford University Press, 2016), at 179.

[111] *Commission of the European Communities v. Portuguese Republic*, Case C-265/06, at paras. 32-35 (E.C. (Third Chamber)).

[112] *Id.*, at para. 41.

[113] *Id.*, at paras. 42-47.

[114] *Id.*, at para. 43.

incorporated into the law of interprovincial trade in Canada. This framework would not support a libertarian interpretation of section 121 that bars all forms of restriction on trade. Instead, it would promote free trade between the provinces while still allowing the federal government to regulate trade at the national level. To be sure, a considerable amount of provincial legislation would be overturned as a result. However, doing away with provincial barriers to trade is a necessary consequence of creating a strong common market in Canada.

The Supreme Court of Canada rendered its judgment in *Comeau* on April 19, 2018. The decision was not particularly well received in the public sphere, as reflected by the largely critical treatment it received at the hands of the Canadian news media. Andrew Coyne, writing in the *National Post*, inveighed against the decision, arguing that it "will do the country serious harm" by saddling the country with "hundreds of existing provincial barriers to trade indefinitely" and giving provinces "the green light to put up more."[115] Howard Anglin wrote with equal derision in *The Globe and Mail* that the "commitment [of provincial liquor corporations] to limiting customer choice and dedication to preserving a Soviet-style shopping experience has survived the grim threat of a retiree looking to save a few bucks."[116] These criticisms are arguably valid: the decision was not sufficiently sensitive to the political backdrop of a global economy where trade between countries is becoming increasingly freer.

1. The Move Towards a Purpose-Driven Approach

At the same time, these criticisms ignore at least one crucial aspect of *Comeau* — namely, that the Supreme Court's decision does not present as a straightforward endorsement of the earlier jurisprudence on section 121. The Court did, for instance, acknowledge that "... *Gold Seal* did not undertake a purposive analysis of s. 121".[117] Indeed, the decision does not consist merely of a restatement of *Gold Seal*'s ratio that section 121 prohibits tariffs alone. Rather, the Court adopted the interpretation of section 121 expressed first by Rand J. in concurrence in

---

[115] Andrew Coyne, "Supreme Court beer ruling ties the constitution in knots, and the economy with it", *National Post*, April 20, 2018, online: <https://nationalpost.com/opinion/andrew-coyne-supreme-court-beer-decision-ties-the-constitution-in-knots-and-the-economy-with-it>.

[116] Howard Anglin, "Supreme Court passes the buck by refusing to free the beer", *The Globe and Mail*, April 19, 2018, online: <https://www.theglobeandmail.com/opinion/article-supreme-court-passes-the-buck-by-refusing-to-free-the-beer/>.

[117] *R. v. Comeau*, [2018] S.C.J. No. 15, [2018] 1 S.C.R. 342, at para. 106 (S.C.C.).

Murphy and later by Laskin C.J.C. also in *Reference re: Agricultural Products*: the prohibitions imposed by section 121 extend not only to laws that impose tariffs but to laws that in essence and purpose aim to defeat the passage of goods across provincial boundaries.

The Court's adoption of this interpretation of section 121 in *Comeau* effectively shifted the framework of the analysis away from a formalistic inquiry about tariff-imposing restraints and towards a more complex and subtle purpose-based approach. Admittedly, the Court denied that the adoption of this approach entailed a departure from the *Gold Seal* precedent. The Court held that *Gold Seal* and the cases that followed it are consistent with Rand J.'s "basic proposition".[118] However, this declaration is arguably belied by the Court's acknowledgment that Rand J.'s analysis in *Murphy* might extend, rather than simply restate, the logical underpinning of *Gold Seal*.[119] The Court further acknowledged that all previous jurisprudential affirmations of a purpose-driven approach to section 121 were made either "without majoritarian status or in *obiter*", meaning that this approach did not have the pedigree of binding precedent before *Comeau*.[120] At very least, the Court's decision in *Comeau* brought clarity to the law, moving it towards an analysis that requires looking beyond a law's superficial features to discern its actual purpose.

2. The Treatment of Precedent

The Court's adoption of a purpose-driven inquiry meant pushing the *Gold Seal* line of authority to the periphery, if not banishing it altogether. There is some irony to the Court's doing so, given how highly critical the Court was of the trial judge for making a similar (albeit bolder) move in the *Comeau* trial decision. As detailed above, the Court's disapprobation stemmed from its holding that the historical evidence relied on by the trial judge was not sufficient evidence of profound social change such as would justify a departure from vertical precedent.[121] And yet, the Court in this case similarly moved away from the precedent of *Gold Seal*,

---

118 *Id.*, at para. 101.
119 *Id.*
120 *Id.*, at para. 105.
121 *Id.*, at para. 36.

without so much as reviewing the legal principles that would justify a departure from horizontal *stare decisis*.[122]

Furthermore, the Supreme Court grounded its departure from *Gold Seal* partly in the same historical evidence introduced and relied upon by the trial judge. The Supreme Court cited the speeches given by political leaders at the time of Confederation[123] in support of its holding that "the historical context supports the view that, at a minimum, s. 121 prohibits the imposition of charges on goods crossing provincial boundaries — tariffs and tariff-like measures."[124] In other words, the Court relied on the new historical evidence cited by the trial judge to guide its reasoning and ultimately arrive at a conclusion distinct from the majority's holding in previous section 121 cases. This aspect of the decision fits awkwardly with the Court's holding that the trial judge erred in doing the same.

3. Common Principles from the Law of Interstate Trade in Other Jurisdictions

Other concerns arise from the Supreme Court's decision. For instance, the Court's holding that a law will fail only if its *primary* purpose is to impede trade has the disturbing potential to allow almost any protectionist measure to pass constitutional muster provided that the law has an ostensible intra-provincial purpose. Simply put, *Comeau* did not go far enough. The example offered by other jurisdictions, detailed above, presents a preferable model for dealing with protectionist measures that attempt to thwart interstate trade. A review of the legal framework of these three jurisdictions reveals the following common principles that could be constructively integrated into the Canadian approach.

(a) All Other Jurisdictions Review Both Direct and Indirect Restrictions on Interprovincial Trade

Reviewing a law's direct and indirect restrictions means looking not only at its purpose but also at its effects. In the American jurisprudence,

---

[122] See *Canada v. Craig*, [2012] S.C.J. No. 43, 2012 SCC 43, at para. 27 (S.C.C.), for an example of a case in which the Court did undertake a review of the principles relating to departures from horizontal precedent.

[123] *R. v. Comeau*, [2018] S.C.J. No. 15, [2018] 1 S.C.R. 342, at para. 63 (S.C.C.).

[124] *Id.*, at para. 67.

the difference between direct and indirect restrictions is treated as a distinction that attracts different degrees of scrutiny. This delineation means that courts will apply different tests depending on this initial characterization of the law. Where a law directly limits state trade, or is facially discriminatory, courts will strictly scrutinize it through the "legitimate local purpose" test;[125] where a law indirectly limits interstate trade, or is neutral on its face, courts will scrutinize it less strictly through the *Pike* balancing test.[126] No laws that impose potential restrictions on trade, whether direct or indirect, are given an automatic pass. Through separate analytical frameworks, both categories of law are subject to review.

The Australian and European models do not even draw a conceptual distinction between direct and indirect impositions on trade. While Australian courts have recognized that discrimination in trade may "occur on the face of the law" (*i.e.*, directly) or may "result from the factual operation of the law" (*i.e.*, indirectly),[127] they tend to collapse this distinction by focusing on the actual effects of the law.[128] The law of the European Union similarly blurs the distinction by emphasizing the law's effect over its purpose. As stated above, the European Court has interpreted Articles 34 and 35 of TFEU liberally, with the result that the phrase "measures having equivalent effect" applies to measures that impede trade "directly or indirectly, actually or potentially."[129]

By contrast, the Canadian jurisprudence has little to say regarding laws that indirectly restrict trade. *Comeau* does not offer a separate analytic framework to account for the distinction between direct and indirect restrictions, as the American courts do. Nor does *Comeau* purport to collapse the distinction and treat the two with equal scrutiny, as the Australian and European courts do. The Supreme Court of Canada's focus in *Comeau* on the purpose and essence of the law leaves little room for considering that law's effects, particularly where the law is ostensibly neutral but indirectly affects trade. Furthermore, where the

---

[125] *Maine v. Taylor*, 477 U.S. 131, at 151-62 (1986).

[126] *Pike v. Bruce Church*, 397 U.S. 137, at 142 (1970).

[127] Suri Ratnapala and Jonathan Crowe, *Australian constitutional law: foundations and theory*, 3d ed. (South Melbourne, Australia: Oxford University Press, 2012) at 309; R. D. Lumb, *et al.*, *The Constitution of the Commonwealth of Australia*, 5th ed. (Sydney: Butterworths Publishing, 1995), at 467; N. Oreb, "Betting Across Borders: Betfair Pty Limited v Western Australia" (2009) 31 Sydney L. Rev. 607, at 608-609.

[128] R. D. Lumb, *et al.*, *The Constitution of the Commonwealth of Australia*, 5th ed. (Sydney: Butterworths Publishing, 1995), at 467.

[129] *Procureur du Roi v. Benoît and Gustave Dassonville*, Case 8/74, at para 5.

Court does address the questions of effect over purpose, the analysis is largely limited to a discussion of "incidental effects", which fall outside the ambit of section 121.[130] The Court's failure to account for the difference in these two categories of laws, either by developing different analytic frameworks or by shifting the focus of the analysis to the law's effects, results in a conceptual shortcoming that is specifically addressed in other comparable jurisdictions.

(b) Direct Purposeful Restrictions on Interstate Trade are Difficult to Justify, Particularly Where They Directly Discriminate Against Out-of-State Interests

This proposition is applied with little controversy in the laws of other jurisdictions. In Australia, laws that take the form of state actions, including quotas on imports and subsidies for local goods, will almost invariably be deemed "protectionist" under the four-part test developed in *Cole*.[131] In the United States, a direct and purposeful limitation on trade will attract strict scrutiny and is likely to be struck down unless the State can demonstrate that the law "serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives."[132]

The same is not true in Canada. The strength of the Supreme Court's purpose-based analysis in *Comeau* is tempered by the Court's qualification that "purpose" in fact means "primary purpose". That is to say, it is not enough to show that one of the law's purposes is to defeat trade; section 121 is only engaged when it can be shown that the law's *primary* purpose is to defeat trade.[133] The fact that a Canadian law has a tariff-like purpose will not attract stricter scrutiny or a presumption of protectionism. At very most, the fact that a law has such a purpose can be deployed as evidence that the law's primary purpose is to defeat trade.[134]

It is to be hoped that as the law on interprovincial trade in Canada continues to develop, it will increasingly conform to the example set by other similarly-constituted jurisdictions. Any law aimed at the defeat of

---

[130] *R. v. Comeau*, [2018] S.C.J. No. 15, [2018] 1 S.C.R. 342, at para. 8 (S.C.C.).

[131] Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory*, 3d ed. (South Melbourne, Australia: Oxford University Press, 2012), at 309.

[132] *Maine v. Taylor*, 477 U.S. 131, at 151 (1986).

[133] *R. v. Comeau*, [2018] S.C.J. No. 15, [2018] 1 S.C.R. 342, at para. 111 (S.C.C.).

[134] *Id*.

interprovincial trade should be difficult to justify under section 121, irrespective of whatever other purposes that law may have.

(c) All Other Jurisdictions Apply Some Form of a Proportionality Test in Determining Whether the Restrictions on Interstate Trade are Unconstitutional

In the cases of all other jurisdictions under consideration, a proportionality analysis is integrated into the larger inquiry as to whether the law is constitutional. In the United States jurisprudence, once a law has been deemed neutral on its face, the court will analyze the law against the criteria of the *Pike* balancing test, which consists of weighing the local public interest protected by the law against the burdens on interstate commerce imposed by the law. Even where a legitimate local purpose is found, the Court will inquire into the nature of the local interest and into whether the local interest could be promoted through less restrictive means.[135] Similarly in Australia, once a court has established that a law is both discriminatory and protectionist, it will move to the final prong of the section 92 analysis and ask whether the law in question is "reasonably necessary" to achieve a legitimate objective.[136] Likewise, in the law of the European Union, a Member State must show that a breach of Article 34 or 35 is proportionate, even once the Member State has established that the law serves a genuine public interest. This means inquiring as to whether there is a reasonable connection between the justification for the law and the law itself, whether the law's objective could be achieved through less restrictive means, and, even if so, whether the means employed by the law nevertheless have an excessive effect on traders' interests.[137]

Discussion of proportionality is conspicuously absent from *Comeau*. The point at which other jurisdictions might embark on a proportionality analysis is exactly the point that Canadian courts will stop the analysis and affirm the law as constitutional. The analysis in *Comeau* begins and ends with an inquiry into purpose. Rather than stop the analysis at the determination of purpose, Canadian jurisprudence ought to follow the example of other jurisdictions and craft an analysis that looks also at the

---

[135] *Pike v. Bruce Church*, 397 U.S. 137, at 142 (1970).

[136] *Betfair Pty Ltd. v. Racing New South Wales*, [2012] HCA 12, at paras. 141-144 (H.C.A.).

[137] *NV United Foods and PVBA Aug. Van den Abeele v. Belgian State*, Case 132/80, at para. 28 (E.C.).

relationship between the law and its stated purpose, at whether the local interest served by the law could be promoted through less impairing means, and at whether the nature and extent of interference is justifiable or excessive. The Supreme Court of Canada is a known champion of proportionality and balancing tests of exactly this type, particularly in the constitutional context. Without a meaningful examination of the interests at stake and an attempt to balance those interests, the "essence and purpose" analysis ends before the inquiry is truly complete.

VI. CONCLUSION

Amidst the conceptual incoherence of the pre-*Comeau* Canadian jurisprudence, it was unclear if section 121 would be consigned to the limited task of enforcing restrictions on interprovincial tariffs. In this respect, the Supreme Court's decision in *Comeau* brought relief and clarity to the law, affirming that section 121 had enough potency to prohibit laws that in purpose or essence impeded interprovincial trade. The crystallization of the "purpose and essence" test in *Comeau* brought the Canadian jurisprudential approach into closer alignment with other jurisdictions. However, a more robust and incisive approach is still needed. While the Supreme Court may well have been correct in holding in *Comeau* that "... Section 121 does not impose absolute free trade across Canada",[138] the Court would have done well to look to the alternatives articulated in the jurisprudence of the United States, Australia, and the European Union. The approach favoured in these jurisdictions is compelling not only from a legal standpoint but also from a policy standpoint. These jurisdictions have recognized that there are strong public policy reasons that favour the development of a robust national common market, including eliminating interstate trade battles and ensuring that the parochial interests of state legislation do not prevail over the broader national or federal interest in a common market.

[138] *R. v. Comeau*, [2018] S.C.J. No. 15, [2018] 1 S.C.R. 342, at para. 53 (S.C.C.).