Court File No.: 25192

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of the Northwest Territories)

BETWEEN:

CANADIAN EGG MARKETING AGENCY

Appellant (Plaintiff)

- and -

PINEVIEW POULTRY PRODUCTS LTD.

Respondent (Defendant)

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES as represented by THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES; COUNCIL OF CANADIANS; SIERRA LEGAL DEFENCE FUND SOCIETY; ATTORNEY GENERAL OF CANADA; ATTORNEY GENERAL OF ALBERTA; ATTORNEY GENERAL OF BRITISH COLUMBIA; ATTORNEY GENERAL OF QUEBEC; ATTORNEY GENERAL OF SASKATCHEWAN; and THE ALBERTA BARLEY COMMISSION.

Interveners

AND BETWEEN:

CANADIAN EGG MARKETING AGENCY

Appellant (Plaintiff)

- and -

FRANK RICHARDSON operating as NORTHERN POULTRY

Respondent (Defendant)

- and -

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PART I - STATEMENT OF FACTS

1. The parties filed an Agreed Statement of Facts at trial, and for the purposes of this rehearing, these facts do not appear to be in dispute.

Agreed Statement of Facts, Case on Appeal, Vol. III, Tab 15, pp. 534-556

2. The Attorney General of Canada also agrees substantially with the facts as set out in the original and rehearing factums of the Respondents and Appellant.

3. The only relevant additional evidence is the Memorandum of Understanding dated October 27, 1997, whereby the governments of Canada and the Northwest Territories entered into an agreement concerning the entry of the Northwest Territories into the National Egg Marketing System.

PART II - POINTS IN ISSUE

4. In addition to the constitutional questions stated by the Chief Justice on January 15, 1997, the Court, on this rehearing, will be hearing additional submissions on:

1) The relevance, if any, of s.121 of the *Constitution Act, 1867*.

2) Whether s. 6(3) of the *Canadian Charter of Rights and Freedoms* is restricted only to provincial laws or practice and does not include federal legislation.

3) If s. 6(3) applies only to provincial laws or practice, whether an argument under s.1 of the *Charter* should be made.

5. It is the position of the Attorney General of Canada:

a) that a challenge to the constitutional validity of the impugned provisions under s.121 of the *Constitution Act, 1867* should not succeed since the Northwest Territories is not a "province" within the meaning of s. 121. In the alternative, the impugned provisions do not violate s. 121 and are at most a limited aid to the interpretation of s. 6 of the *Charter*.

b) that s. 6(3) is not restricted to provincial laws but includes federal legislation.

c) that whether s. 6(3) applies only to provincial laws or to both provincial and federal laws, arguments under s. 1 of the *Charter* can be made.

PART III - ARGUMENT

I. Section 121

A. Is N.W.T. a province under s. 121?

6. Section 121 of the *Constitution Act, 1867* reads:

121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.	121. Tous articles du crû, de la provenance ou manufacture d'aucune des provinces seront, à dater de l'union, admis en franchise dans chacune des autres provinces.

7. Mr. Justice de Weerdt's findings on the application of s.121 of the *Constitution Act, 1867* were not appealed by the Respondents. Further, the point was not argued before the Court of Appeal, or considered by that Court. Consequently, this Court does not have the benefit of the analysis of the Court of Appeal, and there is some question whether the application of s. 121 should be fully dealt with by this Court.

8. While the point was not fully argued before him, the Trial Judge expressed doubt that s.121 of the *Constitution Act, 1867* had any application to the case at hand since the Northwest Territories was not a "Province" within the meaning of that section

> *Neither in the Reference nor in Murphy v. C.P.R. was any mention made of the Territories in relation to s.121 of the 1867 Act or otherwise. And the position of the Territories, as being other than "Provinces" in the full constitutional sense evidently intended by s.121, was therefore not considered in these cases. That sense of the term*

"Provinces" clearly differs from the statutory definition of "province" to be found, for the purposes of federal legislation generally, in s.35(1) of the Interpretation Act, R.S.C. 1985, c.I-21, this definition being however inapplicable to the 1867 Act. The Term "Provinces" in s.121 of that Act is instead to be understood in the same sense as "province" in s.38(1) of the Constitution Act 1982, where it is clearly intended to exclude the Territories. The contrary is the case where s.35(1) of the Interpretation Act, applies, the definition there being inclusive of the Territories.

If, as the foregoing analysis suggests, the Northwest Territories are not ex facie one of the "Provinces" mentioned in s.121 of the 1867 Act, then even if the "living tree" doctrine could now make them so (for they were not admitted into Confederation until later), one must be careful not to ignore the use of that term elsewhere in the Constitution Acts, 1867 to 1982 and more particularly, today, in s.38(1) and s.42(1) of the 1982 Act providing for the incorporation of the Territories, or parts thereof, into existing provinces or the creation of completely new provinces from out of the Territories.

....

In all fairness, the meaning of the term "Province" under s.121 of the 1867 Act was not argued before me. The submissions made on all sides appeared instead to assume that this term has the meaning given by s.35(1) of the federal Interpretation Act, so as to include the Northwest Territories and the Yukon. However, in that I am obliged to take judicial notice of the entirety of the Constitution, and thus interpret s.121 in its full context, I have thought it necessary to outline the foregoing by way of a brief analysis.

Reasons for Judgment of de Weerdt, J., Case on Appeal, pp.1345-1346

9. It is submitted that de Weerdt, J. was correct in stating that the constitutionality of the impugned provisions may not be challenged under s.121 since the Northwest Territories are not a "Province" within the meaning of that section.

10. One of the primary rules of statutory interpretation is that the law is deemed to have been drafted in accordance with the rules of language in common use. This rule applies not only

to statutes but also to constitutions.

Coté, Pierre-André, The Interpretation of Legislation in Canada, 2nd ed., at 219, 222

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460 at 482.

11. The language employed in various parts of the constitution is quite precise when referencing provinces and territories. It follows that they can be distinctly different entities for constitutional interpretation. Provinces and territories are either specifically distinguished or made the same.

ss. 30, 32, *Charter*

ss. 37, 37.1 , *Charter* (spent)

s. 23, *Constitution Act, 1867* (Note 13) as follows:

> *"(13) Section 2 of the Constitution Act (No. 2), 1975, S.C. 1974-75-76, c. 53 provided that for the purposes of that Act (which added one Senator each for the Yukon Territory and the Northwest Territories) the term "Province" in section 23 of the Constitution Act, 1867, has the same meaning as is assigned to the term "province" by section 28 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that the term "province" means "a province" of Canada, and includes the Yukon Territory and the Northwest Territories."*

12. On a plain reading of the words of s.121, it refers only to "Provinces", not to "Provinces" and "Territories". Therefore, s. 121 is not relevant since it refers to articles "of any one of the Provinces" moving "into each of the other Provinces".

B. Assume N.W.T. a province

13. In the alternative, even if s.121 is applicable to the facts at hand, it would be of only minimal assistance to the resolution of the issues before the Court. Even though all provisions of the Constitution must be read together, s. 121 is a limited interpretive aid with respect to the analysis of s. 6 of the *Charter.*

14. While these provisions have some parallels there are also some marked differences. In particular, s. 121 deals with the mobility of "articles" while s. 6 of the *Charter* deals with the mobility of "citizens" and "persons".

15. Further, s. 121 applies to interprovincial tariff barriers with respect to goods only - not to non-tariff barriers nor to other factors of production such as labour, services or capital.

Gold Seal Ltd. v. A.G. Alberta (1921), 62 SCR 424 at 456

Atlantic Smoke Shops v. Conlon, (1943) A.C. 550

Murphy v. C.P.R. et al (1958), SCR 626 at 639, 642

16. What s. 121 forbids is a trade barrier that in its essence and purpose is related to a provincial boundary. A province cannot simply prohibit the admission of goods. In contrast, when a national marketing scheme is at issue, s. 121 must be viewed from the prism of that comprehensive national marketing scheme.

Murphy v. CPR, (supra) per Rand, J. at 642.

17. The predecessor of s. 23 of the *Farm Products Agencies Act* and the comprehensive marketing scheme enacted by the federal Parliament in concert with the provinces, has withstood constitutional challenges under s.121 of the *Constitution Act, 1867*.

Re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198

II. Section 6(3) of the *Charter* - Includes federal legislation

18. A reference in the *Charter* to a province shall be deemed to include a reference to the Northwest Territories. Hence the mobility right of any citizen to pursue a livelihood in any province (s. 6(2)(b)) clearly extends to the Northwest Territories.

s. 30, *Charter*

19. It follows from the above, and a plain reading of the language contained in s. 6(3) of the *Charter*, to wit, *"laws or practices of general application in force in a province,"* that this expression would include federal laws or practices.

20. The purpose of s. 6 is to protect the right of citizens and permanent residents to move about the country, to reside where they wish, and to pursue their livelihood without regard to provincial boundaries. Since the mobility rights delineated in s. 6(2) apply to federal laws and practices, it follows that the saving provision with respect to those rights, as contained in s. 6(3)(a), should also apply to federal laws and practices.

21. In *Demaere*, the Federal Court of Appeal considered the scope of application of s. 6(3)(a) and held that four conditions had to be met before the provision could be brought into operation. In particular, Huggessen, J.A. held that the overriding provision must be contained:

i) in a law or practice,

ii) of general application,

iii) in force in a province, and,

iv) such law or practice must not discriminate amongst persons primarily on the basis of province of present or previous residence.

Demaere v. Canada, (1984) 52 N.R. 280 at 291

22. With respect to the third condition, Huggessen, J.A. specifically considered and rejected the argument that the expression "in force in a province" excluded federal legislation.

> *The words used, "laws... in force in a province", are certainly broad enough to include federal laws. The words are not useless since it is not uncommon for federal laws to be in force in only some of the provinces. By the terms of section 32, the Charter is expressly stated to apply to the Parliament and the government of Canada and, by section 52 (of the Constitution Act, 1982), is made part of the 'supreme law' of Canada. In the absence of any words of restriction paragraph 6(3)(a), I am unable to say that a federal law which is in force in any or all of the provinces is not a law "in force in a province" for the purposes of the Charter.*
>
> *Demaere, (supra)* at 292

III. Section 6(3) and Section 1

23. For the reasons given above, the Attorney General of Canada's position is that s. 6(3) applies to federal laws or practices, so this question need not be answered.

24. On the assumption that s. 6(3) applies only to provincial laws, s. 6(3) does not usurp the function of s.1 of the *Charter*. In *Black*, La Forest, J. described the interaction between the two subsections as follows:

> *Some commentators, it is true, have suggested that s.6(3) and (4) amount to a comprehensive legislative determination of the justifiable limits to s.6(2) and thus render s.1 superfluous.... I disagree with this proposition. Section 6(2) is subject to both s.6(3) and s.1. The two provisions are significantly different and s.6(3) is by no means a legislative translation of how s.1 is to be interpreted in the context of s.6(2). Section 6(3) acts as more or less a footnote to section 6(2). It merely qualifies s.6(2); it does not usurp the function of s.1" (emphasis added)*
>
> *Black v. Law Society*, (1989) 1 SCR 591 at 624

PART IV - ORDER SOUGHT

25. For the purposes of the rehearing, the Attorney General of Canada submits that:

i) s. 121 is not relevant since for the purposes of that section the Northwest Territories are not a "Province", and even assuming that was not the case, s. 121 is of limited relevance,

ii) s. 6(3) is not restricted to provincial law but includes federal legislation,

iii) arguments under s. 1 of the *Charter* should be made whether s. 6(3) applies only to provincial laws or to both provincial and federal laws.

27. It is further submitted that the constitutional exemption ordered by the Court of Appeal is not an appropriate remedy. In view of the recent signing of the Memorandum of Understanding, it may be preferable for the Court to withhold judgment in this matter for a reasonable time only, to allow the governments to complete the necessary legislative steps to fully implement the Memorandum.

ALL OF WHICH is respectfully submitted this 13th day of March, 1998.

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PART V - AUTHORITIES

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