

**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. and
FRANK RICHARDSON operating as NORTHERN POULTRY

Respondents
(Defendants)

- and -

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

Interveners

**SUPPLEMENTAL FACTUM OF THE INTERVENER, THE COMMISSIONER
OF THE NORTHWEST TERRITORIES as represented by
THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES**

COUNSEL

Attorney General of the
Northwest Territories
Department of Justice
Legal Division
Court House
4903 - 49th Street
Yellowknife, NT X1A 2L9

James G. McConnell
Ph: (403) 920-8074
Fax: (403) 873-0234

Solicitor for the Intervener

Osler, Hoskin & Harcourt
Suite 1500
50 O'Connor Street
Ottawa ON K1P 6L2

Francois Lemieux/David Wilson
Ph: (613) 235-7234
Fax: (613) 235-2867

Solicitors to the Appellant

McLennan Ross
600 West Chambers
12220 Stony Plain Road
Edmonton AB T5J 3L2

Graham McLennan/Katharine Hurlburt
Ph: (403) 482-9200
Fax: (403) 482-9100

Solicitors to the Respondents

AGENTS

Lang Michener
Suite 300
50 O'Connor Street
Ottawa ON K1P 6L2

Eugene Meehan

Ph: (613) 232-7171
Fax: (613) 231-3191

Ottawa Agents to the Intervener,
the Government of the NWT

Gowling, Strathy & Henderson
Suite 2600
160 Elgin Street
Ottawa ON K1O 1C3

Henry Brown
Ph: (613) 232-1781
Fax: (613) 563-9869

Ottawa Agents to the Solicitors to the
Respondents

Gregory McDade, Q.C.
David R. Boyd
Suite 214
131 Walter Street
Vancouver BC V6B 1H6

Ph: (604) 685-5618
Fax: (604) 685-7813

Solicitors to the Interveners,
Council of Canadians and Sierra
Legal Defence Fund Society

George Thomson
Deputy Attorney General of Canada
Department of Justice
239 Wellington Street
Ottawa ON K1A 0H8

Per: Edward Sojonky
Senior General Counsel
Ph: (613) 957-4871
Fax: (613) 954-1920

Solicitor for the Intervener, the
Attorney General of Canada

Attorney General of Alberta
Director, Civil Law Division
Department of Justice of Alberta
Constitutional Law Branch
4th Floor
9833 - 109 Street
Edmonton AB T5K 2E8

Nolan D. Steed/Jim Bowron
Ph: (403) 498-3323
Fax: (403) 425- 0307

Gowling, Strathy & Henderson
Suite 2600
160 Elgin Street
Ottawa ON K1O 1C3

Henry Brown
Ph: (613) 232-1781
Fax: (613) 563-9869

Ottawa Agents to the Solicitors to the
Interveners, Council of Canadians and
Sierra Legal Defence Fund Society

Gowling, Strathy & Henderson
Suite 2600
160 Elgin Street
Ottawa ON K1O 1C3

Henry Brown
Ph: (613) 232-1781
Fax: (613) 563-9869

Ottawa Agents to the Intervener, the
Attorney General of Alberta

Attorney General of British Columbia
Constitutional and
Administrative Law Branch
Ministry of Attorney General
Province of British Columbia
6th Floor - 1001 Douglas Street
Victoria BC V8V 1X4

George Copley
Ph: (250) 356-9154
Fax: (250) 356-8875

Sylvie Roussel
NOEL BERTHIAUME
Barristers & Solicitors
111 Rue Champlain
Hull PQ J8X 3R1

Ph: (819) 771-7393
Fax: (819) 771-5397

Solicitors to the Intervener, the Attorney
General of Quebec

Attorney General of Ontario
Constitutional Law Branch
7th Floor, 720 Bay Street
• Toronto ON M5G 2K1

Lori Sterling/Jennifer August
Ph: (416) 326-4453/4844
Fax: (416) 326-4015

Burke-Robertson
70 Gloucester Street
Ottawa ON K2P 0A2

V. Jennifer MacKinnon
Ph: (613) 236-9665
Fax: (613) 235-4430

Ottawa Agents to the Intervener, the
Attorney General of British Columbia

Burke-Robertson
70 Gloucester Street
Ottawa ON K2P 0A2

V. Jennifer MacKinnon
Ph: (613) 236-9665
Fax: (613) 235-4430

Ottawa Agents to solicitors for the
Intervener, the Alberta Barley Commission

Dale Gibson Associates
Barristers & Solicitors
11018 - 125 Street
Edmonton AB T5M 0M1

Dale Gibson
Ph: (403) 452-9530
Fax: (403) 453-5872

Solicitors for the Intervener, the
Alberta Barley Commission

Burke-Robertson
70 Gloucester Street
Ottawa ON K2P 0A2

V. Jennifer MacKinnon
Ph: (613) 236-9665
Fax: (613) 235-4430

Ottawa Agents to solicitors for the
Intervener, the Alberta Barley Commission

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**SUPPLEMENTAL FACTUM OF THE INTERVENER
THE COMMISSIONER OF THE NORTHWEST TERRITORIES
AS REPRESENTED BY
THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES**

5

PART I - THE FACTS

1. In Paragraph 4 of its Rehearing Factum the Appellant states that “the entry process
10 contemplated in the Memorandum of Understanding is exactly as forecasted by the Agency in its
main Factum (para. 29, page 11).”

2. The entry process contemplated in the the Memorandum of Understanding (“MOU”) is
15 actually quite different from that forecast by the Appellant.

3. First, the Appellant indicated in its initial factum that a quota system:
20 will be put into place in the Northwest Territories from which federal quota will
automatically flow after the Government of the Northwest Territories establishes an egg
board and puts into place territorial quota controls, and consequential amendments are
made to certain federal regulatory provisions.

Appellant’s Factum, para. 29, page 11

25 4. The Appellant misunderstands the nature of the MOU. The MOU reflects the dovetailing
nature of the egg marketing system. The Governments of Canada and the Northwest Territories
as well as the Appellant must act in concert in order for federal quota to flow. The MOU is
drafted to reflect the co-operative nature of the marketing system and each actor must perform its
part. Indeed, in the MOU, the first section refers to Canada amending the Proclamation
30 establishing the Canadian Egg Marketing Agency. This is the key event with which the Appellant
and the Government of the Northwest Territories must act in conjunction. In short, the changes
being made to “certain federal regulatory provisions” are far from “consequential” to actions that

the Government of the Northwest Territories must undertake.

5. Second, the Appellant fails to detail the significant difference between the nature of the long running negotiations between the Appellant and the Government of the Northwest Territories and the nature of the MOU. These negotiations were between an administrative agency and a government. In contrast, the MOU is a government to government agreement. The Appellant is not a signatory.

6. The Appellant also makes factual errors in describing the details of the MOU.

7. First, the Appellant indicates in Paragraph 4(d) of its Rehearing Factum that the two governments agreed to a quota allocation to the Northwest Territories that will be an “overbase allocation”. There is no indication in the MOU whatsoever that the allocation will be overbase. This allocation could be a base allocation, given that the *Proclamation* itself will be amended.

8. Second, the Appellant states in Paragraph 4(f) that the Government of the Northwest Territories has agreed to be bound to the system once the steps described by the Appellant in Paragraphs 4(a) to (d) are completed .

9. In fact, the Government of the Northwest Territories agreed to be bound once the steps in Paragraphs 4(a) to (d) are completed and once the Appellant amends its by-laws, orders and regulations. This condition is clearly set out in Paragraph 4 of the MOU.

10. In short, as the Appellant was not a party to the MOU, the Appellant has misconstrued the agreement.

11. In Paragraph 6 of its Rehearing Factum the Appellant suggests that the volume of quota that will be allotted to the Northwest Territories is substantial relative to the population of the Northwest Territories. Yet as shown by the Chart on page 7 of the Appellant’s Factum, the

relationship between quota allocation and population already varies widely between jurisdictions. Moreover, given the fact that the Northwest Territories has been excluded from the marketing system since the early eighties, unlike other jurisdictions, the size of the quota is reasonable.

- 5 12. Further, the purpose of allocating quota in accordance with historical production was to protect the capital investment of existing producers, whether they were located across the country or concentrated in one geographical area. Thus, the population of any particular province was irrelevant to this initial quota allocation.

Exhibit 3, Legislative History, Appeal Case,
Volume IV, at 880-881

PART II - POINTS IN ISSUE

13. The Intervener will make submissions on the first point raised by the Registrar of the
5 Court in her December 19, 1998 letter. The first point pertained to the relevance, if any, of section
121 of the *Constitution Act, 1867*. The Intervener takes the position that section 121 is relevant
and that, in the unique facts posed by this case, the Regulatory Scheme infringes section 121.

14. The Intervener adopts the submissions of the Respondents in their Supplemental Factum
10 on the other two points raised in the Registrar's letter.

PART III - ARGUMENT

15 *Introduction:*

15. Section 121 of the *Constitution Act, 1867* is relevant to this case. The Intervener argues:

- 20
- A. Section 121 applies to the Northwest Territories as it does to the rest of Canada.
 - B. Section 121 is infringed by the Regulatory Scheme. It prevents the flow of trade throughout Canada, it fails to provide the legitimacy needed for a regulatory framework, and it does not provide for equity throughout the
25 Canadian common market.
 - C. Section 121 must be read in conjunction with section 6 of the *Canadian Charter of Rights and Freedoms* to ensure the comprehensive promotion of the constitutionally mandated objectives of the Canadian economic

union.

A. Applicability of Section 121 to the Northwest Territories:

I. Textual Analysis:

16. As the Respondents note in Paragraph 8 of their Reply to the Alberta Barley Commission, the learned trial judge held that the term “Provinces” in section 121 did not include the Northwest Territories. The Intervener adopts the argument of the Respondents in paragraphs 12 to 18 of their Reply to the Alberta Barley Commission on the textual interpretation of “Provinces” in section 121.

17. The Intervener adds that section 121 must be read as expressing the relationship that was to prevail within the new Confederation as a whole. The focus of the sentence is on the relationship between the Provinces that is to prevail within the new union. Section 121 did not provide the provinces with any new rights; rather, it guaranteed an important aspect of Confederation as a whole.

18. The Intervener also adds that sections 121 and 146 must read in the context of the *Quebec Resolutions, 1864* and the *London Resolutions, 1866*. Section 121 must be read in light of the statement in paragraph 69 in the *Quebec Resolutions, 1864* (paragraph 66 in the *London Resolutions, 1866*) on the importance of bringing the Northwest into the commercial life of the nation. Section 146 must be read in light of the emphasis in paragraphs 2 and 10 in the *Quebec Resolutions, 1864* (paragraphs 2 and 11 in the *London Resolutions, 1866*) on “equitable” terms of admission of the Northwest Territory.

Quebec Resolutions, 1864 from M. Ollivier, *British North American Acts and Selected Statutes, 1867-1962* (Ottawa: Queen’s Printer, 1962); Intervener’s Rehearing Book

of Authorities, Tab 1

5 *London Resolutions, 1866* from M. Ollivier, *British North America Acts and Selected Statutes, 1867-1962* (Ottawa: Queen's Printer, 1962); Intervener's Rehearing Book of Authorities, Tab 2

10 19. The Intervener also notes that in the *Rupert's Land and North-Western Territory Order* the Senate and the House of Commons in their Address to the Queen emphasize the importance of stable government to ensure "the extension of commercial intercourse through the British possessions in America from the Atlantic to the Pacific".

15 Schedule (A) to the *Rupert's Land and North-Western Territory Order*, Statutes of Canada (looseleaf edition) Appendix II, No. 9 at p.8., Intervener's Rehearing Book of Authorities, Tab 3

20 20. Thus, the new territories were clearly intended to be part of the economic union.

25 ***II. Purposive Analysis:***

21. The rationale underlying section 121 was succinctly described by Mr. Justice Rand in *Murphy v. C.P.R.* [1958] S.C.R. 626, at 638, as follows:

30 Apart from matters of purely local and economic concern, this country is one economic unit; in freedom of movement its business interests are in an extra-provincial dimension, and, among other things, are deeply involved in trade and commerce between and beyond provinces.

35 *Murphy v. C.P.R., et al*, [1958] S.C.R. 626, Intervener's Rehearing Book of Authorities, Tab 4

22. In words of Mr. Justice La Forest in *Black v. Law Society of Alberta*, [1989] 1 S.C.R.591, at 609:

5 The creation of a central government, the trade and commerce power, s. 121 and the building of a transcontinental railway were expected to help forge this economic union. The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the *British North America Act* attempted to pull down the existing internal barriers that
10 restricted movement within the country.

Black v. Law Society of Alberta,
[1989] 1 S.C.R. 591, Intervener's
Rehearing Book of Authorities, Tab 5

23. If Canada comprises a common market, then that market includes all Canadians and all parts of Canada. To exclude entire jurisdictions from the common market would defeat the entire purpose of section 121. To exclude the Northwest Territories would also make it constitutionally possible to subject the Northwest Territories to trade barriers that would not be permissible in the
20 rest of Canada.

24. It is noteworthy that the Northwest Territories is a signatory to the *Agreement on Internal Trade*, 1994. This *Agreement* is part of the continuing effort to build the common market. In Article 100 of the *Agreement on Internal Trade, 1994*, the objective of the *Agreement* is stated as
25 follows:

30 It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.

35 *Agreement on Internal Trade, 1994*,
Intervener's Rehearing Book of Authorities,
Tab 6

B. *Infringement of 121 by the Marketing Scheme:*

25. In paragraph 24 of its Rehearing Factum the Appellant argues that this Court has already determined that the Marketing Scheme does not infringe section 121. The Appellant asserts that the scheme was found in the *Reference Re Agricultural Products Marketing Act et al*, [1978] 2 S.C.R. 1198 (the “*Egg Reference*”) to not constitute trade regulation related to a provincial boundary.

Reference Re The Agricultural Products Marketing Act, et al, [1978] 2 S.C.R. 1198, Intervener's Rehearing Book of Authorities, Tab 7

26. In the *Egg Reference* the Court was dealing with different facts from the case now before the Court. Chief Justice Laskin did not direct his mind to a situation where an entire jurisdiction was excluded from the marketing system. Rather, he was concerned with the use of patterns of trade in various provinces as a means to regulate the incidents of the flow of trade within the marketing system.

27. In the instant case, an entire jurisdiction is excluded from the egg marketing system. From the perspective of the Northwest Territories the effect of this exclusion is a prohibition of trade on the basis of provincial boundaries, not regulation of the incidents or terms of trade.

28. The *Egg Reference*, therefore, does not resolve the issue before the Court. The *Egg Reference* does, however, when taken with *Murphy v. C.P.R.*, suggest a framework for analysis to use to interpret section 121.

29. Chief Justice Laskin, at 1268 of the *Egg Reference*, adopted the following statement from Mr. Justice Rand's judgement in *Murphy v. C.P.R.*:

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.

Reference Re The Agricultural Products Marketing Act, et al, [1978] 2 S.C.R. 1198, Intervener's Rehearing Book of Authorities, Tab 7

30. This statement suggests that section 121 has three aspects. First, the free flow of trade is preserved throughout Canada. "Free" is given a liberal interpretation and applies to any trade regulation that may be a barrier to the flow of trade and that is related to a provincial boundary.

31. This liberal reading reflects the application of the basic principle of the section, namely, that Canada is one economic union, to modern circumstances where there are many kinds of obstacles to trade.

Reference Re Provincial Control of Agricultural Products, [1971] 3 W.W.R. 204 (Man.C.A.), at 215, Tab 8

32. The Royal Commission on the Economic Union and Development Prospects for Canada recommended that section 121 be given a "broad reading" to give effect to the principle that Canada is one economic union.

Royal Commission on the Economic Union and Development Prospects for Canada Report, Vol. III, at 115, Intervener's Rehearing Book of Authorities, Tab 9

33. Indeed, the Royal Commission proposed a stronger rewording of section 121 through a constitutional amendment. A strengthened version of section 121 was unsuccessfully proposed by the Government of Canada in 1991.

Royal Commission on the Economic Union and Development Prospects for Canada Report, Vol. III, at 115, Intervener's Rehearing Book of Authorities, Tab 9

Canadian Federalism and the Economic Union: Partnership for Prosperity (Ottawa, Minister of Supply and Services Canada, 1991), Intervener's Rehearing Book of Authorities, at 22-23, Tab 10

34. Second, section 121 does not guarantee a right to trade free of government regulation. Government may regulate the trade in its incidental features, even if this regulation is related to provincial boundaries.

35. The third element may be taken from the following statement by Chief Justice Laskin in the *Egg Reference*:

Accepting this view of s. 121, I find nothing in the marketing scheme here that, as a trade regulation, is *in its essence and purpose* related to a provincial boundary. To hold otherwise would mean that a federal marketing statute, referable to interprovincial trade, could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade. I find here no design of punitive regulation directed against or in favour of any Province. (Emphasis added)

Reference Re The Agricultural Products Marketing Act, et al, [1978] 2 S.C.R. 1198, at 1268, Intervener's Rehearing Book of Authorities, Tab 7

36. Thus, the third element is the consideration of equity. The establishment of a trade regime and its internal regulation both involve considerations of equity in relation to the purpose and the

effects of such regimes and regulation.

37. In terms of all three elements of the analytical framework, it is clear that the Regulatory Scheme does infringe section 121.

5

Free Flow of Trade:

38. This entire case arises out of the flow of Northwest Territories produced eggs into other jurisdictions in Canada. Section 121 is clearly invoked as these eggs are articles of growth
10 flowing across provincial boundaries.

39. Canadian citizens who produce eggs in the Northwest Territories are required to obtain quotas and licences to market their eggs in interprovincial or export trade. Yet the Regulatory Scheme denies these producers the opportunity to obtain the quotas. The effect is to link a
15 provincial boundary to a prohibition on the trade of goods.

40. This may be contrasted with the *Egg Reference* case where provincial patterns were merely the indicia of trade within the system. In the instant case, eggs produced in a particular jurisdiction of Canada are excluded from the flow of interprovincial trade.
20

Regulation:

41. Perhaps a distinctive Canadian element to the notion of the common market is the importance attached to regulation. As Chief Justice Laskin put it, section 121 “preserves a free
25 flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade”.

Reference Re The Agricultural Products Marketing Act, et al, [1978] 2 S.C.R. 1198, Intervener’s Rehearing Book of Authorities, at 1268, Tab 7

30

42. For Northern producers the exclusion from the regulatory system means that there is no voice in the regime that manages their very livelihood.

5 43. More fundamentally, the exclusion of an entire jurisdiction from the regulatory regime undermines the legitimacy of that system. A regulatory scheme that is meant to promote the Canadian common market as a single economic union is a contradiction in terms if some Canadians are excluded from the participation in the regulatory scheme and the enjoyment of its
10 benefits.

Equity:

15 44. The Regulatory Scheme does not serve any equitable purpose by excluding part of Canada. This is contrary to the basis on which the Northwest Territories entered Confederation. This is also contrary to the essence of the Canadian economic union which is to secure on an equitable basis the flow of trade for Canadians. Both in terms of the equity of being in or out of the system and equity within that system, Northerners are excluded.

20 *Summary:*

45. In short, applying section 121 to the facts of the instant case shows that the Regulatory Scheme infringes the constitutional guarantee of a free flow of trade, regulated in its incidentals and carried on to ensure, on an equitable basis, benefits for Canadians. Even the learned trial
25 judge found that the Regulatory Scheme violates the spirit if not the ancient letter of section 121.

Appeal Case, vol. VI,
Tab 38, 1360

30 46. While the precise content of section 121 may be debatable given the absence of extensive

caselaw, section 121 at a minimum stands for the proposition that Canada is an economic union. The exclusion of the Northwest Territories from the Regulatory Scheme offends this fundamental principle.

5
C. Section 121 and Section 6(2):

47. These sections have a common basis. While the mobility rights in section 6 encompass a concern for the rights inhering in citizenship, they also reflect a concern for the creation of a Canadian common market free of internal barriers that restrict economic movement within the country. As Mr. Justice La Forest noted in *Black v. Law Society of Alberta*: “Citizenship and nationhood are correlative”.

15
Black v. Law Society of Alberta
[1989] 1 S.C.R. 591, at 612
Joint Book of Authorities, Intervener’s
Rehearing Book of Authorities, Tab 5

48. These two sections reinforce each other. An individual’s right to pursue his or her livelihood in any place in Canada is one aspect of a common market underpinned by, in Mr. Justice La Forest’s words, the “structural elements of federalism”, in this case section 121.

25
Black v. Law Society of Alberta
[1989] 1 S.C.R. 591, at 612
Joint Book of Authorities, Intervener’s
Rehearing Book of Authorities, Tab 5

30
D. Conclusion:

49. In *Black v. Law Society of Alberta*, Mr. Justice La Forest observed that:

A dominant intention of the drafters of the *British North America Act* (now the *Constitution Act, 1867*) was to establish “a new political nationality” and, as the counterpart to national unity, the creation of a national economy.

Black v. Law Society of Alberta, supra.
at 608, Intervener’s Rehearing Book of
Authorities, Tab 5

50. The Regulatory Scheme compromises the integrity of the national economy. It does this
by infringing section 121 of the *Constitution Act, 1867* and by infringing section 6(2) of the
Canadian Charter of Rights and Freedoms.

51. The Royal Commission on Economic Union and Development Prospects for Canada
singled out the North for special attention in its discussion of economic unity:

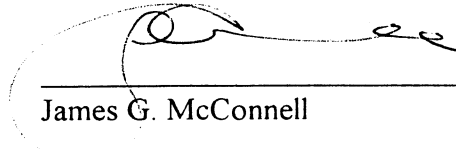
We wish to emphasize here, however, that the distinctive interests of Northerners,
both Native and non-Native, must receive the same consideration as those of
Canadians in the provinces. Canada must integrate the Northern territories into the
federation so that their people can enjoy the rights and privileges enjoyed by other
Canadians.

*Royal Commission on the Economic Union
and Development Prospects for Canada
Report, Vol. III, at 115, Intervener’s
Rehearing Book of Authorities, Tab 9*

PART IV - ORDER REQUESTED

52. The Intervener requests that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of March, 1998.



James G. McConnell

PART V - TABLE OF AUTHORITIES

CASES

Referred to at Para. No.

Black v. Law Society of Alberta, [1989] 1 S.C.R. 591

22, 47, 48, 49

Murphy v. C.P.R., et al, [1958] S.C.R. 626

21

Reference Re Provincial Control of Agricultural Products,
[1971] 3 W.W.R. 204 (Man. C.A.)

31

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

25, 26, 28, 29,
35, 40, 41,

STATUTES & OTHER MATERIALS

Agreement on Internal Trade, 1994

*Canadian Federalism and the Economic Union: Partnership
for Prosperity* (Ottawa, Minister of Supply and Services Canada,
1991)

24

33

London Resolutions, 1866 from M. Ollivier, *British North
America Acts and Selected Statutes*, (Ottawa: Queen's
Printer, 1962)

18

Quebec Resolutions, 1864 from M. Ollivier, *British North
America Acts and Selected Statutes*, (Ottawa: Queen's
Printer, 1962)

18

*Report of the Royal Commission on the Economic Union and
Development Prospects for Canada, Volume 3* (Ottawa,
Minister of Supply and Services Canada, 1985)

32, 33, 51

*Rupert's Land and North-Western
Territory Order of 1870, Schedule (A)*, Statutes of Canada
(looseleaf edition), Appendix II, No. 9, at p. 8

19

SERVICE OF A COPY HEREOF ADMITTED
THIS 13th DAY OF March 1998

Angie Cummings, Osler Hoskin + Harcourt
Solicitors for Appellant

SERVICE OF A COPY HEREOF ADMITTED
THIS 13 DAY OF March 1998

G. C. H., Gowling, Strathy & Henderson
Agents for
Solicitors for Respondents

SERVICE OF A COPY HEREOF ADMITTED
THIS 13 DAY OF March 1998

G. C. H., Gowling, Strathy & Henderson
Agents for
Solicitors for Intervenor, Council of Canadians and
Sierra Legal Defence Fund Society

SERVICE OF A COPY HEREOF ADMITTED
THIS 13 DAY OF March 1998

G. C. H., Gowling, Strathy & Henderson
Agents for
Solicitors for Intervener, A.G. of Alberta

SERVICE OF A COPY HEREOF ADMITTED
THIS 13 DAY OF March 1998

Dept. of Justice
Solicitors for Intervener, A.G. of Canada

SERVICE OF A COPY HEREOF ADMITTED
THIS 13 DAY OF March 1998

Amid Mavette, Noel Berthiaume
Solicitors for Intervener, A.G. Quebec

SERVICE OF A COPY HEREOF ADMITTED
THIS 13 DAY OF March 1998

XO Burke-Robertson
Agents for
Solicitors for Intervener, A.G. British Columbia

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THIS 13 DAY OF March 1998

XO Burke-Robertson
Agents for
Solicitors for Intervener, Alberta Barley
commission

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SIGNIFICATION DE COPIE CONFORME-

Admitted this 13th day
Acceptes le March 19 98
of
de

Randa Luthier
for
pour

George Thomson
Deputy Attorney General of Canada
Sous-procureur général du Canada

10:08 a.m.

SERVICE OF A COPY HEREOF ADMITTED
THIS 13 DAY OF March 1998

XO Burke-Robertson
Agents for
Solicitors for Intervener, A.G. Ontario