ON THE ROCKS; THE GOLD SEAL CASE: A SURPRISING SECOND LOOK

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My recent article, published in this journal ("On the Rocks"),[1] analyzed s. 121 of the *Constitution Act, 1867*, which states: "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" (emphasis added). The article suggested several reasons why a court should not follow the interpretation of s. 121 in *Gold Seal Ltd. v. Alberta (Attorney General)* ("*Gold Seal* case"),[2] which says that s. 121 is aimed only at prohibiting interprovincial customs duties on items of growth, produce or manufacture ("*Gold Seal* Interpretation").

Nevertheless, the *Gold Seal* interpretation is a formidable legal obstacle for anyone who prefers a broader and more purposeful interpretation of s. 121. Several important cases have relied upon it. It was lauded in *Atlantic Smoke Shops Ltd. v. Conlon*,[3] applied without comment in *Murphy v. C.P.R.*,[4] and left alone by the Supreme Court of Canada in *Agricultural Products Marketing Act (Re)*.[5]

My preparation for a recent winery conference has led me to some additional research into the possible reasons why the judges arrived at the *Gold Seal* Interpretation.

What had been impossible to find when "On the Rocks" was published was any basis for the Supreme Court's notion that s. 121 was confined to prohibiting interprovincial customs duties but not other trade restrictions. Section 121 itself does not say that. None of the judges had been a Father of Confederation and they were therefore not privy to discussions on the issue. No written record had been kept of the Quebec Conference of 1864 or the London

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1. Ian Blue, "On the Rocks? Section 121 of the Constitution Act, 1867, and the Constitutionality of the Importation of Intoxicating Liquors Act" (2009), 35 Adv. Q. 306.
2. *Gold Seal Ltd. v. Alberta (Attorney General)* (1921), 62 S.C.R. 424.
3. *Atlantic Smoke Shops Ltd. v. Conlon*, [1943] A.C. 550.
4. *Murphy v. C.P.R.* , [1958] S.C.R. 626.
5. *Reference re: Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257.

Conference of 1866. Section 121 appeared only in late drafts of the *British North America Act*, and there is no explanation of its intended purpose in the official Confederation documents. So where did the notion come from?

Two additional pieces of information seemed promising for possible answers: First, the factums from the *Gold Seal* and *Murphy v. C.P.R.* cases and, second, biographical material about Duff J., Anglin J. and Mignault J. However, careful examination of all these sources failed to turn up information about where the *Gold Seal* Interpretation came from.

What did turn up, however, was most intriguing. Let us start exploring this discovery by looking more closely at the *Gold Seal* case.

In February 1921, Gold Seal Limited, a liquor merchant in Alberta, asked Dominion Express to deliver liquor to customers outside of Alberta. Dominion Express refused because it felt that to do so would violate the *Canada Temperance Act* (CTA) which had come into force in Alberta on January 31, 1921 following a politically charged process involving both the federal and Alberta governments. The Alberta legislature had enacted a new law prohibiting the sale of intoxicating liquor for beverage purposes in Alberta; it then adopted, and the Alberta government presented, a resolution requesting the federal government to hold a vote on whether the CTA should come into force in Alberta; the federal government then arranged for and notified the public of a province-wide vote, held the vote and recorded the result; finally, the federal government issued a proclamation respecting when the CTA was to come into force in Alberta.

The federal cabinet's proclamation had to comply with s. 152(g) of the CTA, which required it to name "the day on which [the] prohibition will go into force". For some reason, however, it failed to specify a specific date. Gold Seal seized upon that failure. The main issue in the case therefore became: was the federal cabinet's proclamation compliant with s. 152 of the CTA?

In the Supreme Court of Canada, the factums dealt with the *vires* of s. 152 and the disputed proclamation but did not address s. 121. The appeal was argued on May 10 and 11, 1921 and, in addition to arguing the *vires* point and the invalidity of the proclamation, Gold Seal also argued that the CTA was contrary to s. 121. The court reserved its decision. On June 4, 1921, Parliament enacted S.C. 1921, c. 20, which effectively validated the disputed proclamation.[6] In light of this *deus ex machina* event, the Supreme Court allowed Gold Seal to submit a supplementary argument about it. Given the rather clear terms of

6. *Gold Seal* case, *supra*, footnote 1, at pp. 433-435.

c. 20, counsel for the Attorney General of Alberta did not even bother to respond.

On October 18, 1921, the court delivered its written reasons. Davies C.J., Anglin J. and Mignault J. all held that c. 20 saved an otherwise invalid proclamation. Duff J., alone, held that the original proclamation had been valid. As described in "On the Rocks",[7] Duff J., Anglin J. and Mignault J. also rejected the argument that the CTA violated s. 121 on the basis of the *Gold Seal* Interpretation.

Taking the factums, c. 20 and the written reasons in the *Gold Seal* case at face value, one must conclude that Gold Seal would have won the case had it not been for c. 20. One must also conclude that Gold Seal's argument saying that the CTA violated s. 121 was improvised during oral argument and the court disposed of it summarily. This, by itself, would be a sufficient reason why the *Gold Seal* Interpretation of s. 121 should be reviewed, as argued in "On the Rocks".

One of the biographical sources consulted, however, *Duff: A Life in the Law*[8] contained a surprise about the *Gold Seal* case. In it, Williams quotes from a letter Duff wrote to Viscount Haldane, the then Lord Chancellor of Great Britain in 1925.[9] In the letter, Duff explained why he believed that appeals from the Supreme Court of Canada to the Judicial Committee of the Privy Council should continue. He said he was concerned about political interference with judgments if there was no appeal to the J.C.P.C., and then told this story:[10]

> An instance of what I am referring to occurred a couple of years ago, in Meighen's time when Doherty was Minister of Justice. A question was before this court as to the validity of a proclamation to bring the Canada Temperance Act into force in Alberta. The temperance people were making a row about it, and the Minister of Justice, being anxious to ascertain the probable result of the appeal then pending, sent for two members of the Court, Anglin and Mignault, and obtained from them information as to their own opinions and the opinions of their colleagues and the probable result of the appeal, and as a consequence legislation curing the defect was introduced before our judgment was delivered. Doherty felt safe in that case, because he and the two judges mentioned were educated at the same Jesuit college in Montreal, with, as you may imagine, very close reciprocal affiliations.

7. *Supra,* footnote , at p. 318.
8. David Ricardo Williams, *Duff: A Life in the Law* (Osgoode Society, 1984).
9. *Ibid.,* at p. 130.
10. Copy of letter from Library and Archives Canada, Lyman Poore Duff Fonds, MG 30 E 141, Volume 2, Letter from Lyman Poore Duff to Lord Haldane (1925). The above quote is from the letter itself, not from the quote in Williams' biography of Duff. College St. Marie was in Montreal.

In a footnote, Williams says: "The case to which Duff refers is *Gold Seal Limited v. Alberta* (1921) 62 S.C.R. 424 (*sic*)".

What Duff's story tells us is that some time after the *Gold Seal* case was argued on May 10 and 11, 1921, and after the judges had reached their decisions but before they had rendered them in writing, Anglin J. and Mignault J., visited with their fellow graduate of College St. Marie, the former judge and the then Minister of Justice, Charles Doherty, whom Mignault greatly respected,[11] and discussed the *Gold Seal* case with him. This was a case that Doherty's Liberal-Conservative government badly wanted the Attorney General of Alberta to win. Anglin J. and Mignault J. chose to disclose to Doherty their own decisions and those of the other judges. Either explicitly or implicitly, they told him how he could change the outcome of the case as they then saw it.

Anglin and Mignault never disclosed their meeting with Charles Doherty. They wrote their decisions as if c. 20, which reversed the outcome of the appeal, had nothing to do with it. In other words, according to Duff, two judges of the Supreme Court of Canada met, *ex parte,* with someone who had an interest in the outcome of a case with which they were seized before releasing their decision.

While Duff's story raises obvious questions of judicial and ministerial ethics, its most important long-term consequence probably will be to further undermine the *Gold Seal* Interpretation of s. 121.

Duff's story now opens the *Gold Seal* Interpretation to the argument that having advised the Crown, *ex parte*, and then having sat in judgment, Anglin J. and Mignault J. were effectively committed to dismissing Gold Seal's appeal. While no one knows how their advocacy may have influenced the other judges, it cannot be presumed that it had no effect. Being bound by Anglin's and Mignault's commitment, the court's disposition of the s. 121 argument cannot now be regarded as a sound interpretation of an important provision of the Canadian constitution.

Duff's biographer, D R. Williams, did not say that his letter to Viscount Haldane diminishes the *Gold Seal* Interpretation of s. 121, but that conclusion is inescapable. It is not going too far to conclude that Duff's story now opens to challenge all of Canada's federal-provincial arrangements on liquor control, wheat, barley, dairy products, poultry and eggs that are based upon the *Gold Seal* Interpretation.

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11. See P.-B. Mignault, "The Right Honourable Charles J. Doherty: An Appreciation" (1931), 9 Can. Bar Rev. 629.

In conclusion, the time is long overdue for careful, judicial analysis of s. 121 using a purposeful, living-tree interpretation in accordance with its intention, context and wording, and for leaving any subsequent implications to be resolved by politicians and their officials.