A Critical Response to Christopher Moore's "Federalism, Free Trade within Canada, and the British North America Act, S.121"

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ABSTRACT: In a recent paper, Christopher Moore has presented historical facts and analysis that are intended to support the view that section 121 should be interpreted narrowly and as an effort by the creators of the British North America 1867 to prohibit only inter-provincial trade barriers that take the form of tariffs. [1] The most important of these points is his claim was that the creators of the British North America Act would not have been thinking about non-tariff barriers when section 121 was composed since nineteenth century people had not yet started to worry about non-tariff trade barriers. In essence, his argument is that paying attention to non-tariff trade barriers is a very comparatively recent phenomenon and one that dates from after 1970. It is likely that Moore has been misled by secondary sources that date from around the time of the GATT's Tokyo and Uruguay rounds that declare that the focus on non-tariff barriers is totally new and without precedent.[2] It is certainly true that non-tariff trade barriers became a more important issue in trade diplomacy in the 1970s and 1980s than they had been in the 1950s and 1960s. However, there is abundant evidence that nineteenth century people were indeed interested in non-tariff tariff barriers. We know from nineteenth-century treaties and US Supreme Court rulings that contemporaries were aware of the potential to non-tariff barriers to impede trade between jurisdictions even in the absence of tariffs (i.e., fiscal levies imposed at ports of entry).

Most Important Historical Argument Made by Moore: that creators of the BNA Act would not have intended s. 121 to cover non-tariff trade barriers since people in that era did not yet understand that non-tariff measures can act as trade barriers in the absence of tariffs.

Moore argues that *"mid-nineteenth century discussions of obstacles to "free trade" or "free interchange" focussed almost exclusively on tariffs and customs barriers, rather than on what we know as "non-tariff" barriers."*

To support this argument, Moore presents several supporting pieces of evidence. First, he points out that interest in non-tariff trade barriers grew only gradually after the creation of GATT in 1947. He writes that

[1] Moore, Christopher, Federalism, Free Trade within Canada, and the British North America Act, S.121 (September 13, 2017). Available at SSRN: https://ssrn.com/abstract=3046592

[2] Edward John Ray, "Changing patterns of protectionism: The fall in tariffs and the rise in non-tariff barriers." *Northwestern Journal of International Law & Business*. 8 (1987): 285.

The "Kennedy Round" of GATT, from 1964 to 1967, one in a sequence of several successful rounds of multilateral tariff reductions after the Second World War, saw the first serious consideration of non-tariff barriers as an issue needing attention in world trade negotiations. Still, the Kennedy Round considered only a few non-tariff issues, and there was no consensus on how or whether to address them. As late as 1970, the international trade scholars and free trade advocates Gerard and Victoria Curzon barely mentioned non-tariff barriers when they considered where the free trade movement would turn in the rounds to follow Kennedy.

Everything Moore says here about post-1945 developments is perfectly true, but it does not change the fact that nineteenth-century advocates of free trade also discussed both tariff and non-tariff barriers, as we show below. We will concede that discussions of trade among Western nations in the Victorian era focused on tariff barriers, but non-tariff protectionist barriers created by government were also discussed throughout the nineteenth century, and in the year immediately surrounding Confederation.

Moore also supports his view that policymakers in the mid-nineteenth century did not worry about the possibility of non-tariff barriers frustrating trade by drawing on some nineteenth century discussions about trade between Britain's self-governing colonies on the Australian continent. We will concede that this material about nineteenth century Australian developments is of somewhat greater relevance that the material about GATT presented in Moore's paper, but still it does not get to the heart of the matter.

Moore presents the Australian material with a view to supporting the contention that nineteenth-century people defined free trade as simply the absence of tariffs and customs posts and that they did not perceive that non-tariff barriers could be equally important impediments to commerce between jurisdictions. The paragraph on which Moore bases his remarks about Australia on a 1969 essay that the Australian academic John Andrew La Nauze wrote about the original intent behind Section 92 of the Australian constitution, which mandates that trade between Australian states must be "absolutely free".[3] Section 92 is the functional equivalent of Section 121 in the Canadian constitution and since the precedent-

[3] J.A. LaNauze, "A Little Bit of Lawyers' Language: The History of 'Absolutely Free' 1890-1900" in A.W. Martin, ed., *Essays in Australian Federation* (Melbourne, Melbourne University Press, 1969), pp 57-93, at p.67.

setting decision in the 1988 case of Cole v Whitfield, the Australian courts have been quite active in using Section 92 to strike down internal trade barriers. La Nauze was a great scholar, but since 1969, Australian academics have published extensively about this section of their constitution. In my view, the interest of many Australian academics in Section 92, which is without a counterpart in Canada, is likely a function of the fact courts in that country have, since 1988, frequently used Section 92 to strike down a range of regulatory impediments to interstate trade in goods and services ranging from edible fish to Video Lottery Terminals in bars to online gambling websites. Australia's courts have used Section 92 to participate in the wider project of creating an Australian common market similar to the single market that now famously links EU countries.[4]

Moore relies on La Nauze's 1969 paper and does not cite the more recent peer-reviewed paper by Professor Gonzalo Vilalta Puig (University of Hull Business School, UK) on the intentions behind section 92. Puig's study was based on a close examination of documents created at the time of the 1898 of Australian federal convention. (Canadian historians will note with a degree of envy that the documentary record related to this constitutional convention is much more extensive than that for the 1864 Quebec conference). The 1898 Australian convention, it should be noted, paved the way for the federation of the Australian colonies in 1901 just as the 1864 Quebec conference paved the way for 1867. In his paper, Puig presented evidence that the goal of the creators of the Australian constitution was that Section 92 would "ban on discrimination of **any kind** against interstate trade and commerce." He argues that the goals of the framers of this section of the Australian constitution was a true "common market for Australia" in which interstate trade would be "free from discrimination of any kind, either protectionist or not."[5] Puig's interpretation of how late nineteenth century Australians thought about trade between jurisdiction is thus very different from Moore's view that nineteenth-century people equated free trade with the mere

[4] Susan Kiefel and Gonzalo Villalta Puig. "The Constitutionalisation of Free Trade by the High Court of Australia and the Court of Justice of the European Union," *Global Journal of Comparative Law* 3, no. 1 (2014): 34-49.
For an extended discussion of this issue, see Andrew Smith and Jatinder Mann, *Federalism and Sub-national Protectionism: A Comparison of the Internal Trade Regimes of Canada and Australia*. Institute of Intergovernmental Relations, Queen's University, 2016.
[5] Gonzalo Vilalta Puig, "Intercolonial Free Trade: The Drafting History of Section 92 of the Australian Constitution." *U. Tas. L. Rev.* 30 (2011):

absence of customs duties levied at ports of entry. In this sense, it is similar in spirit to my interpretation of the genesis of Section 121.

Moore's discussion of meaning of free trade in nineteenth-century Australia is followed by a series of quotations from speeches by the Fathers of Confederation that are intended to show that people in British North America also defined free trade narrowly as simply the absence of tariffs.[6] He quotes advocates of Confederation such as Charles Tupper, Alexander Galt, Samuel Tilley, and George Brown. Moore quotes Abraham Joseph, a Quebec City merchant, who praised Confederation as a means of bringing about free trade between the colonies. Moore also quotes Albert Smith, a New Brunswick politician who argued against Confederation on the grounds that it would eliminate trade barriers within British North America. He suggests that since all of these participants in the 1860s debates on the desirability of Confederation spoke frequently about the abolition of customs barriers that then impeded trade, within British North America, they and their contemporaries must have interpreted free trade as meaning just the absence of tariffs.

Nobody disputes that the elimination of tariffs barriers was an important goal for the Fathers of Confederation and the other contemporaries who supported Confederation. The question was whether tariffs were the only type of government-created barriers to trade within British North America that the authors of the British North America Act 1867 wished to eliminate. Speaking in 1865, Father of Confederation George Brown said that "the proposal now before us is to throw down **all barriers** between the provinces". The contextual evidence taken from documents produced in the 1860s strongly suggest that the goals of the

[6] Moore uses the term "Fathers of Confederation" to denote the 36 key politicians who helped to bring about Confederation. In 1927, the number of officially recognized Fathers was stabilized at 36. The term Fathers of Confederation is a slight anachronism, as it was not used in the 1860s and only really came into common currency after 1883, when an iconic group portrait of these individuals was completed. Ged Martin, "The Fathers of Confederation: Time to Retire an Outdated Concept?" http://gedmartin.net/martinalia-mainmenu-3/236-time-to-retire-canada-s-fathers-of-confederation

In my view, the creators of the British North America Act is a set of individuals that includes the Fathers of Confederation as well as the British politicians who debated this act in the UK parliament and the lawyers and civil servants in London who made Confederation possible. I have conducted my analysis of the motivations of the creators of Section 121 on the assumption that in trying to understand the original intent behind a given section of the British North America Act, it would be useful to look at primary sources created by all of the Act's creators, not just the Fathers of Confederation narrowly defined.

creators of the Canadian constitution were far more than simply the elimination of tariff barriers. This contextual evidence means that we should interpret the quoted words of Brown to mean that he and the other Fathers of Confederation wanted more than simply the absence of tariffs.

There are two powerful pieces of contextual evidence that supports this particular interpretation. First, contemporaries, including policymakers in British North America and in London, definitely understood that non-tariff trade barriers could be important impediments to trade between jurisdictions. Second, immediately after Confederation, the new federal government, which was led by the Fathers of Confederation, swiftly moved to eliminate many of these non-tariff trade barriers. The elimination of non-tariff trade barriers during the life of the first Dominion parliament has been discussed elsewhere, where their efforts to harmonize regulations is documented in my 2015 piece.[7] This material does not need to be repeated here. However, the fact that non-tariff trade barriers were frequently discussed by nineteenth century diplomats, politicians, and courts is new to our conversation about Section 121 is therefore discussed below.

As Moore rightly notes, the precise process by which the words that became section 121 became part of the British North America Act is poorly documented, likely because the author of this section of the constitution, the London commercial lawyer Francis Savage Reilly (1825-1883), left few relevant papers to posterity. His correspondence, for instance, appears to have been destroyed after his death in 1883. In 1895, however, most of Reilly 's drafts of the BNA Bill were discovered and reproduced in a compendium of documents edited by Sir Joseph Pope, who had served as Private Secretary to Sir John A. Macdonald from 1882 until his death in 1891. [8] In saving and reproducing these documents, Pope did future scholars a great service, as it was the task of Reilly, an experienced lawyer, to render the general principles that had been established in conversations between the Fathers of Confederation and British public servants in the winter of 1866-7 into an actual statute. This

[7] Andrew Smith, The Historical Origins of Section 121 of the British North America Act: A Study of Confederation's Political, Social, and Economic Context, PAGE NUMBER REQUIRED TO MATCH ONLINE VERSION

[8] See *Confederation: being a series of hitherto unpublished documents bearing on the British North America Act"* (Toronto: Carsell). https://archive.org/stream/cihm_12074/cihm_12074_djvu.txt

statute needed to accurately and comprehensively express the goal of his client, which was the British Colonial Office rather than any of the Fathers of Confederation. Reilly produced several drafts of British North America bill in this period.[9] The material that eventually became section 121 first appeared in his Fourth Draft, which is almost certainly written in the first ten days February 1867. At that version of the bill, the material that became Section 121 was numbered Section 70. As I have noted elsewhere, Reilly then reworded this section so as to make this declaration of the principle of free trade more, rather than less, comprehensive. The version of section 121 that was finally introduced as legislation into the UK parliament and which became law used broader language than in Reilly 's earlier drafts. That is because Section 121 used the more comprehensive and broader formula "admitted free" rather than simply "admitted free of duty" or "free from duty", terms used in other contemporaneous pieces of UK and BNA legislation.

Why was section 121 worded in such a broad fashion? Reilly , an experienced commercial lawyer working the world's financial capital, was very likely aware that non-tariff trade barriers could indeed impede trade between jurisdictions. Despite what Moore has asserted, nineteenth-century commercial treaties did indeed articles related to non-tariff trade barriers as well as the reciprocal reductions to tariff agreements. Trade agreements between Western and non-Western powers in Asia often contained articles that dealt with important non-tariff issues, such as free mobility for merchants from the two contracting powers and security of the person. Indeed, my including so many non-tariff provisions, such treaties limited national sovereignty in ways that went well beyond what we might regard as a normal commercial treaty. The fact such treaties were signed in this period, and were heralded for advancing the principle of "free trade",[10] illustrates the problems with Moore's assertion that from the 1840s to the early twentieth century, free trade was defined in the Western world narrowly and as simply the absence of tariffs.

[9] Andrew Smith, The Historical Origins of Section 121 of the British North America Act: A Study of Confederation's Political, Social, and Economic Context, PAGE NUMBER REQUIRED

[10] Catherine Lynn Phipps, *Empires on the Waterfront: Japan's Ports and Power, 1858-1899* (Harvard University Asia Center, 2015; Turan Kayaoğlu, *Legal imperialism: Sovereignty and extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2010).

Moreover, even treaties among Western nations included provisions related to intellectual property rights, shipping regulations, and the other non-tariff measures that governments have long been introduced with protectionist intent. For instance, the famous and influential trade agreement between France and the United Kingdom concluded in January 1860, the so-called Chevalier-Cobden agreement, dealt with both tariff and non-tariff barriers to free trade. Article 10 of this treaty stipulated that ships from the two countries would have equal or national treatment in the harbours and on the internal waterways of the two nations. Such an article meant that the creators of this treaty were perfectly aware that a government could create an effective non-tariff trade barrier by manipulating otherwise legitimate regulations that cover the safe transport of goods. Article 12 of this same treaty also dealt with a non-tariff trade barrier. This article provided for non-discriminatory treatment in the matter of trademarks and patterns—meaning that French trademark holders would have the same rights in the UK and British holders, and *vice versa*.[11] Other examples could be provided, but the 1860 Anglo-French commercial treaty is a particular good example as its text likely would have been familiar to the Reilly , as it had discussed extensively in the British parliament and in newspapers in London and been a major issue in British politics for a brief period in early 1860 (i.e., after Reilly had been admitted to the bar and begun practicing commercial law in London).

The colonial politicians who went to London in 1866-7 and the other Fathers of Confederation also would have understood that non-tariff measures could impede the goal of having free trade. Non-tariff barriers with protectionist intent were created by governments in nineteenth-century North America. During the closing years of the American Civil War (1861-5), British North American commerce was harassed and limited by the introduction of various regulations by the US officials, including a brief-lived passport requirement that so annoyed BNA merchants. These annoying regulations were passed at a time when there was extensive lobbying by certain US business interests for the repeal of the existing Reciprocity agreement (a free trade agreement) that had previously provided for tariff-free trade is many goods between British North America and the United States. [12]

[11] Treaty of commerce between Her Majesty and the Emperor of the French. Signed at Paris, January 23, 1860.
[12] Andrew Smith, The Historical Origins of Section 121 of the British North America Act: A Study of Confederation's Political, Social, and Economic Context,

Sub-national governments in North America also created regulations that had protectionist intent and effect but which did not involve tariffs. Some of these regulations date from the years surrounding Confederation. Let us consider one such non-tariff regulation that became a cause célèbre before being declared unconstitutional by the US Supreme Court. In July 1858, the city council in Baltimore, Maryland modified the ordinances governing the public wharves of the city in a fashion that was clearly protectionist and designed to disadvantage farmers and other firms from outside the state of Maryland. These regulations were designed to protect the Baltimore market for in-state producers. It did so by discriminating against produce that had been grown on farms outside of that state. Needless to say, such a regulation would have meant higher food prices for Baltimore residents and would also have annoyed farmers and commodity brokers who lived on waterways that were conveniently near Baltimore but were outside of the state's boundaries. In June 1876, a ship arrived in Baltimore containing a merchant from Virginia and a load of potatoes that had been grown in that state. The apparent aim of this enterprising merchant was to create a test case. The authorities' discriminatory treatment of these potatoes was contested in the courts and in 1879, the US Supreme Court ruled that the regulation was unconstitutional.[13] Although we have no direct evidence that any of the Fathers of Confederation were aware of the 1858 Baltimore regulation or any other local-protectionist regulations in the US, the Baltimore episode shows that subnational protectionism was a fact of political life in 19th century North America and could be achieved by non-tariff regulations.

[13] Guy v. Baltimore, 100 U.S. 434 (1879) https://supreme.justia.com/cases/federal/us/100/434/