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Legal Challenges Brewing: Fallout From the Striking Down of Alberta's Craft Beer Policies

Tariffs and protectionism have been hot topics in the law in 2018. While NAFTA negotiations and a growing US-Chinese Trade War dominate the headlines, the issue has also spread into domestic Canadian politics this year.

In February Alberta announced a ban on B.C. wine imports as part of a spat on the Trans Mountain pipeline expansion. That ban was rescinded after only two weeks, but Alberta's policies came under fire again in June 2018, when an Alberta court struck down Alberta's unequal tariffs on craft beers from Eastern Canada. In addition to striking down Alberta's tariffs, the Court ordered over $2 million in restitution to the two craft brewery applicants, Ontario's Steam Whistle Brewing and Saskatchewan's Great Western Brewing. The restitution order has in turn spawned a class action lawsuit filed in July, seeking $100 million in restitution on behalf of restaurants and consumers who purchased out of province beer in Alberta. Alberta's Premier Rachel Notley has announced that she will appeal, while still finding ways to back her province's craft brewery industry.

The Supreme Court's Decision in Comeau

This year began with the Supreme Court's decision in *R. v. Comeau*, 2018 SCC 15, which unanimously upheld New Brunswick's restriction on the importation of liquor from other provinces as constitutional. The case involved a resident of New Brunswick who was stopped by the RCMP, driving home from Quebec, with 354 bottles of beer and 3 bottles of liquor in his car. To quote the Court's decision: "Mr. Comeau did what many Canadians who live tantalizingly close to cheaper alcohol prices across provincial boundaries probably do. He visited three different stores and stocked up."

At the centre of the decision is the interpretation of s. 121 of the Canadian constitution, which provides that "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." The Court articulated a two-part test to determine when a law will be in violation of s. 121 of the *Constitution Act, 1867*, which prohibits tariffs giving a price

advantage to locally-produced goods over similar domestically produced products.

The two-part test articulated in *R v. Comeau* to find a violation of s.121 requires:

- The law must impact the inter-provincial movement of goods like a tariff; and
- Restriction of cross-border trade must be the primary purpose.

The Court held that New Brunswick's restrictions did impede inter-provincial trade, but this was incidental to the restrictions constitutionally valid primary purpose, which was to control the supply and use of liquor in the province.

Alberta Liquor and Gaming Commission

Comeau set the stage for the Alberta Court of Queen's Bench case *Steam Whistle Brewing Inc. v. Alberta Gaming and Liquor Commission*, where the court applied the *R. v. Comeau* test and ultimately declared Alberta's beer mark-up regime to be unconstitutional.

The Alberta Liquor and Gaming Commission ("ALGC") regulates Alberta's privatized liquor industry. The ALGC serves an intermediary function between producers and private retailers, collecting a mark-up in the process. The mark-up rate charged by the ALGC varies by class of liquor, and historically beer produced by large, multi-national corporations has always been subject to higher mark-up rates than beer produced by small, domestic "craft" brewers.

In October 2015 a new mark-up came into effect applying a lower mark-up rate to craft beer produced in the New West Partnership of British Columbia, Alberta and Saskatchewan. Steam Whistle Brewing Inc., an Ontario craft brewer, commenced an application to challenge the constitutionality of the 2015 mark-up regime.

In August of 2016 the mark-up regime was again altered so that all brewers were charged a uniform mark-up rate, but with provisions to provide Alberta craft brewers with a grant through the Department of Agriculture and Forestry. The grant program for Alberta craft brewers was identical in effect to the reduced rate they would have received under the 2015 mark-up regime. Great Western Brewing Company Ltd., a Saskatchewan craft brewer, brought an application to challenge the constitutionality of the 2016 mark-up regime.

Constitutional Issues Raised

Steam Whistle Brewing, and Great Western Brewing Company

challenged the mark-ups as unconstitutional on two key grounds. First, they submitted the mark-ups were unconstitutional as they were a tax, and therefore in violation of s. 53 of the *Constitution Act*, 1867, which requires any bill which imposes a tax must originate with the legislature. Justice Marriott for the Court of Queen's Bench rejected this argument, and held that even though an express purpose of the mark-up was to generate revenue, it was in pith and substance a "proprietary charge" or "user fee", not a tax.

Secondly, the breweries argue the mark-ups are unconstitutional because they constitute a barrier to inter-provincial trade contrary to s. 121 of the Constitution Act. Justice Marriott considered Steam Whistle Brewing's challenge to the 2015 mark-up separately from Great Western Brewing Company's challenge to the 2016 mark-up.

The 2015 Mark-up

In considering the 2015 mark-up, Justice Marriott looked to a briefing note indicating the 2015 mark-up was a reconciliation of two government objectives: to increase revenue, and to protect Alberta craft breweries as part of the government's overall plan to support diversification of Alberta's resource focused economy.

In considering the first stage of the test, Justice Marriott held that the effect of the 2015 mark-up was to create a price wedge between imported and domestic products, which in essence amounted to a trade barrier related to a provincial boundary. Taking into account the objective to raise funds without prejudicing Alberta brewers, Justice Marriott found the imposition of greater charges on craft beer produced outside of the New West Partnership was a primary, not incidental, purpose of the restriction which satisfied the second stage of the test. Therefore, the 2015 mark-up was held to contravene s. 121 of the *Constitution*.

The 2016 Mark-up

In considering the 2016 mark-up the ALGC advocated strenuously that the 2016 mark-up and the grant program created for Alberta craft brewers should be considered separately. The grant program was based on the volume of beer produced and sole in Alberta, and amounted to the same financial benefit Alberta brewers received under the 2015 markup. Justice Marriott acknowledged that provincial grant programs generally do not violate s. 121, but held that in this case, the 2016 mark-up and grant program could not be considered in isolation. There was strong evidence the 2016 mark-up and grant program contemplated each other, as they were announced on the same day in the same press release.

Further, evidence was introduced of a 2016 briefing note stating a “pro” of the grant program option was to give Alberta brewers a competitive price advantage compared to other provinces, and a letter from the Finance Minister stating the 2016 mark-up and grant program are to work “in concert”.

Considering the 2016 mark-up and the grant program together, Justice Marriott determined their combined effect created a competitive price advantage for Alberta craft brewers, and therefore concluded the mark-up was a trade barrier in essence and purpose related to a provincial boundary in violation of s.121 of the *Constitution*.

Restitution

Justice Marriott found Steam Whistle Brewing was entitled to restitution of $163,964.98, and Great Western Brewing Company was entitled to restitution of $1,938,660.06 being the amounts the breweries had paid under the respective markups.

In ordering restitution, Justice Marriott was cognizant that one implication of her decision was that others would be entitled to restitution as well: “I therefore see no reason why any other party in the position of the Applicants would not be entitled immediately to the same remedy if the restitution order is not suspended.”

To prevent “fiscal chaos” the declaration and restitution orders were suspended for a period of six months from the date of the judgment.

Impact

As the first decision to apply the s. 121 test articulated in *R. v. Comeau*, *Steam Whistle Brewing Inc. v. Alberta Gaming and Liquor Commission* will provide important guidance on how the test will be applied, and the type of evidence and legislative context which will be considered. Given the announcement that the province will appeal, and the potential multimillion dollar liability if that appeal fails, it is expected that this case, and the area of law underlying it, will continue to develop over the coming months.

With notes from *Katie Glowach*