

Cheers to interprovincial trade: first application of Supreme Court of Canada's decision in *R v Comeau*

大成 DENTONS

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Litigation, Canada

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Introduction

In *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission*,⁽¹⁾ the Alberta Court of Queen's Bench struck down successive mark-ups on out-of-province craft beer as barriers to interprovincial trade contrary to Section 121 of the Constitution Act 1867.⁽²⁾ This is the first decision to apply the Supreme Court of Canada's (SCC's) interpretation of Section 121 as developed in *R v Comeau*.⁽³⁾ Further, this is the first decision in recent Canadian legal history to declare a legislative provision unconstitutional for violating Section 121.

Although this case is significant in Canada's constitutional development, its actual effect on the beer industry and, in turn, Alberta taxpayers, may be even more noteworthy. Many out-of-province craft brewers were subject to Alberta's mark-ups, now held to *be ultra vires*. These other brewers, just like Steam Whistle and Great Western in the case at hand, would equally have claims for restitution. The Alberta attorney general filed a notice of appeal in July 2018. However, if the lower court decision is upheld, substantial amounts, which continue to accrue, will likely be owed to brewers.

Background

Liquor in Alberta must pass through the Alberta Gaming and Liquor Commission (AGLC) before reaching retailers. The AGLC is a Crown corporation that warehouses liquor products and sells them to retailers at a mark-up, the cost of which often passes to consumers. Traditionally, the AGLC would impose higher mark-ups on beer produced by multinational corporations in order to protect craft brewers. Before October 2015, the mark-ups on craft beer applied equally, regardless of which province produced the craft beer.

In October 2015 Alberta instituted a mark-up regime that favourably treated craft beer produced in British Columbia, Alberta and Saskatchewan. As a result, craft beer produced outside these provinces cost Alberta retailers and consumers more.

Alberta changed the mark-up regime in August 2016 to have it apply equally to all Canadian craft brewers, at least on its face. However, on the same day on which Alberta introduced the 2016 mark-up regime, it provided a grant to all Alberta craft brewers representing the difference between the 2015 and 2016 mark-ups. Consequently, Alberta beer cost consumers the same amount in 2016 as it did in 2015. Beer from outside Alberta continued to cost retailers and consumers more.

Ontario craft brewer Steam Whistle Brewing Inc commenced an action against the AGLC in 2015. Saskatchewan craft brewer Great Western Brewery commenced a parallel action in 2016. The two breweries argued that the 2015 and 2016 mark-ups were taxes that violated Section 53 of the Constitution Act 1867 and were barriers to interprovincial trade that violated Section 121. The Alberta Court of Queen's Bench heard the applications for constitutional relief together on 19 September 2017. The decision was released on 19 June 2018.

Application decision

Although the court did not agree with the breweries' Section 53 argument, it agreed that the 2015 and 2016 mark-ups were barriers to interprovincial trade that contravened Section 121.

The court applied the SCC's interpretation of Section 121 in *Comeau*, in which the SCC had established two criteria that a plaintiff must establish to prove a Section 121 violation – namely, that:

- the impugned law imposes an additional cost on goods because of their provincial origin; and
- the impugned law's primary purpose is to restrict trade.(4)

With respect to the 2015 mark-up, the court found that its purpose had been to create additional revenue and assist Alberta craft brewers.(5) The Alberta government attempted to reconcile these two objectives by imposing higher mark-ups on craft beer produced outside Alberta, British Columbia and Saskatchewan – the signatories to the New West Trade Partnership Agreement.(6)

The court concluded that the law imposed additional costs on craft beer produced in central and eastern Canada, and that the mark-up's primary purpose had been to raise revenue without prejudicing Alberta craft brewers. This mark-up therefore violated Section 121.(7)

With respect to the 2016 mark-up, the court agreed with the two brewers that it should not view the 2016 mark-up in isolation from the grant policy.(8) The government announced the two policies on the same day, in the same press release, and the policies complemented one another.(9) As the court concluded, the primary purpose of the mark-up and grant programme together was to increase revenue while continuing to protect Alberta craft brewers.(10) Therefore, this mark-up also violated Section 121.(11)

The court suspended its declaration of invalidity for six months. Critically, the court also granted Steam Whistle and Great Western Brewery restitution for amounts paid due to unconstitutional mark-ups. The court awarded the brewers C\$163,964.98 and C\$1,938,660.06, respectively.(12)

Significance

This decision is important given its application of the SCC's interpretation of Section 121, but its practical effect is just as pressing. The 2015 mark-up applied to all craft beer produced in provinces and territories outside the New West Trade Partnership Agreement and the 2016 mark-up applied to all craft beer produced in provinces and territories outside Alberta. Consequently, the Province of Alberta may be exposed to significant restitution to those craft breweries that sold beer in Alberta and paid the 2015 and 2016 mark-ups.

Doubtless, many brewers are watching for the Alberta Court of Appeal decision. It remains to be seen whether the Alberta legislature might face the dilemma of:

- being exposed to substantial litigation; or
- enacting legislation with retroactive effect.

For further information on this topic please contact Marina E Sampson, Ara Basmadjian or Matthew Bradley at Dentons Canada LLP by telephone (+1 416 863 4511) or email (marina.sampson@dentons.com, ara.basmadjian@dentons.com or matthew.bradley@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) 2018 ABQB 476 [*Steam Whistle*].

(2) 30 and 31 Vict, c 3 reprinted in RSC 1985, Appendix II, 5, Section 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").

(3) 2018 SCC 15 [*Comeau*].

(4) *Comeau*, *supra* note 3 at paras 108 to 114.

(5) *Steam Whistle*, *supra* note 1 at paras 83 to 87.

(6) *Ibid* at para 83.

(7) *Ibid* at para 87.

(8) *Ibid* at para 91.

(9) *Ibid* at para 92.

(10) *Ibid* at para 95.

(11) *Ibid* at para 97.

(12) *Ibid* at para 145.

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Marina E Sampson Ara Basmadjian Matthew Bradley