

# Alberta Court of Appeal finds Alberta local beer preferences unconstitutional

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Authors: [Tommy Gelbman](#), Colin Feasby, Colin Feasby QC, Daniel Downie

## In this Update

- On December 2, 2019, the Alberta Court of Appeal issued a decision rendering unconstitutional portions of Alberta government mark-ups charged on the sale of beer to retailers.
- This decision applies the Supreme Court of Canada's recent *Comeau* decision to strike down discriminatory government actions that violate interprovincial trade provisions under the *Constitution Act, 1867* by favouring local and Western Canadian producers.
- The Court's analysis of whether the mark-ups are a tax is discussed.

## Overview

Alberta has had a longstanding desire to protect and promote its local brewing industry. In 2015, Alberta enacted a mark-up regime that favoured brewers based in the provinces of the New West Partnership (Alberta, B.C., and Saskatchewan). The mark-up regime was implemented through the Alberta Gaming, Liquor and Cannabis Commission (the Commission).<sup>[1]</sup> On January 18, 2016, the 2015 Mark-up was enjoined on the basis that the court found that the applicants had made out an arguable case that it was unconstitutional and that irreparable harm was likely to occur. Following that decision, Alberta enacted a new mark-up regime that applied equally to all brewers, introducing a grant program that favoured only Alberta brewers at the same time. Both the 2015 and the 2016 regimes were held to be unconstitutional by the Court of Queen's Bench.<sup>[2]</sup>

Four issues were raised: (1) whether the mark-ups violate section 121 of the *Constitution Act, 1867*; (2) whether the mark-ups are a tax and violate section 53 of the *Constitution Act, 1867*; (3) whether Steam Whistle and Great Western (the Producers) are entitled to restitution; and (4) the scope of the declarations of constitutional invalidity.

The Court of Appeal upheld the trial judge's decision which concluded that the higher mark-up on beer imported from other provinces was an unconstitutional interprovincial trade barrier that violated section 121 of the *Constitution Act, 1867*. The mark-ups were found to be a "proprietary charge" and not a tax, and therefore did not violate section 53 of the *Constitution Act, 1867*. As a result, the Producers were not entitled to restitution under the *Kingstreet* analysis, which only allows for restitution for money paid under an invalid tax, not other invalid government charges.

This decision will require all provinces to reconsider the manner in which they support local businesses. On one hand, it may serve as a limit to provinces' ability to protect nascent industries, on the other, it has the potential to empower businesses and improve market access outside their province of origin. Provincial regimes that give breaks to local businesses may serve as barriers to interprovincial trade, violating section 121 of the *Constitution Act, 1867*.

The decision also furthers the notion that the analysis required in differentiating between a tax and a proprietary charge is more rigid than as between a tax and a regulatory charge.

## Facts: The mark-up and grant regime

The Commission is a Crown agent and the only wholesaler of liquor in Alberta. It controls the sale and distribution of liquor to retailers in the province under the *Gaming, Liquor and Cannabis Act* (the *GLCA*).<sup>[3]</sup> When it sells that liquor to retailers, the Commission charges a mark-up on the price it pays to purchase liquor from producers.

In 2015, the Commission introduced a mark-up regime (the 2015 Mark-up) in which producers from Alberta, British Columbia and Saskatchewan (the New West Partnership) would pay a smaller mark-up than producers from other provinces. Steam Whistle, an Ontario brewing company, sued the Commission on the grounds that the 2015 Mark-up was unconstitutional and obtained an injunction against the regime pending the litigation.

In 2016, the Commission introduced a new mark-up that charged producers the same mark-up regardless of their provenance (the 2016 Mark-up). At the same time, the Commission introduced a grant program (the 2016 Grant Program) that gave Alberta brewers funding equal to the amount they would have saved under the 2015 Mark-up. Great Western, a Saskatchewan brewing company, sued the Commission arguing that the 2016 Mark-up and Grant Program was an *ultra vires* indirect tax and barrier to interprovincial trade, violating sections 53 and 121 of the *Constitution Act, 1867*.

## The Mark-ups violated section 121 of the *Constitution Act, 1867*

The Court rejected Alberta's argument that the *Constitution Act* did not apply in the circumstances because the Commission was operating in a commercial capacity as a private vendor, and not in a governmental capacity. Section 121 is not limited to laws but also applies to other government actions such as the imposition of "tariffs and tariff-like measures." The Court concluded that section 121 applied because the Commission had acted in a "hybrid capacity," as a commercial vendor and through the exercise of its statutory power under the *GLCA*.<sup>[4]</sup>

The Court then applied the two-part test in *Comeau* to find that the Mark-ups violated section 121: (1) the essence of the law or action limited the free flow of goods across a provincial border and (2) the primary purpose of the law or action was to restrict trade across a provincial border.<sup>[5]</sup>

The Court upheld the trial judge's findings that (i) the essence of the Mark-ups was to restrict trade by imposing higher costs on the sale of beer produced outside the New West Partnership; (ii) the 2016 Mark-up and Grant Program operated as a single policy, the essence of which was to impose higher costs on beer produced outside Alberta; and (iii) the primary purpose of the Mark-ups was to restrict trade: to protect local industry by imposing a tariff-like burden on producers from provinces outside the New West Partnership.

## The Mark-ups are not a tax

The Court upheld the trial judge's finding that the Mark-ups were properly characterized as a proprietary charge and not a tax, and therefore did not violate section 53 of the *Constitution Act, 1867*, which prevents the Crown from imposing taxes without the authority of Parliament of the legislature.

It was common ground that the Mark-ups had the characteristics of a tax as set out in *Lawson*; they are: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.

There are three types of charges that may be imposed by the government: regulatory charges, proprietary charges and taxes. The question on this appeal was whether the Mark-ups were, in pith and substance, proprietary charges or taxes. To make this determination, the Court undertook a process of elimination: the Mark-ups are only a tax if they are not a regulatory charge or proprietary charge.

The Producers argued that the Commission was not selling liquor to retailers "in a commercial way" because (1) of their limited involvement in the actual sale of liquor and (2) the Commission's ownership of the beer was a fiction. In rejecting this argument, the Court held that the commercial context requirement should not be interpreted restrictively, citing *Toronto Distillery*<sup>[6]</sup> and *Unfiltered Brewing*,<sup>[7]</sup> where government mark-ups on the sale of liquor were found to be proprietary charges notwithstanding the government's limited involvement in selling liquor to retailers. The Commission sells beer, which they legally own, to retailers at a price which includes a profit element – the Mark-up. As a result, they are selling public property to retailers in a commercial context such that the Mark-ups can be characterized as a proprietary charge.

## No restitution

The Court held that since the Mark-ups were not a tax, the Producers were not entitled to restitution under the *Kingstreet* decision, which applies to amounts paid under an invalid tax regime.

The trial judge accepted the Producers' argument that *Kingstreet* restitution applies not just to invalid taxes, but also to other invalid government levies. The Court overturned this finding, holding that the dominant view from both the jurisprudence and academic literature is that *Kingstreet* should be read narrowly so to only apply to *ultra vires* taxes as opposed to other fees and levies.

## Limitation of scope

The Court limited the trial judge's declaration of invalidity of the Mark-ups to include only those portions of the Mark-ups that violated section 121 of the *Constitution Act, 1867*. While the trial judge concluded that each Mark-up was wholly invalid, the Court accepted Alberta's argument that the doctrine of severance should apply to preserve the portions of the Mark-ups that did not violate section 121. Accordingly, the declaration of invalidity was limited only to the portions of the 2015 Mark-up that provided preferential treatment to brewers in the New West Partnership and to the 2016 Grant Program, while maintaining the valid provisions.

## Commentary

Provinces often seek to promote local businesses and industries. This appeal shows that proprietary charges that function effectively as tariffs or interprovincial trade barriers can be found to be unconstitutional. The Court's refusal to grant restitution shows that businesses seeking to protect free trade must be vigilant and bring challenges promptly as there is no certainty that losses can be recovered. However, this aspect of the decision appears ripe for consideration by the Supreme Court of Canada.

From a tax perspective, this decision adds to the shift in the analysis in determining whether a levy is a proprietary charge or a tax. The *Lawson* criteria are necessary, but insufficient to find that a charge is a tax; the Supreme Court of Canada held in *620 Connaught Ltd.* that it is the pith and substance, or the dominant purpose, of the levy should determine whether it is a tax. However, the "process of elimination"-type analysis applies when it comes to considering proprietary charges. Like the *Toronto Distillers* and *Unfiltered Brewing* decisions, the logic behind the Court's analysis in this case is that the levy cannot be tax if it is found to be a proprietary charge. The dominant purpose of the levy was not considered.

These cases are distinct from cases where the question is whether the levy is a tax or a regulatory charge, as in the recent *Greenhouse Gas Pollution Pricing Act* references from the appellate courts in Saskatchewan and Ontario.<sup>[8]</sup> Such cases necessarily require determining the levy's dominant purpose to determine whether the revenue-generating purpose of the levy is truly incidental to a broader regulatory goal. The Alberta Court of Appeal will soon consider this issue again in the context of the *Greenhouse Gas Pollution Pricing Act* reference initiated by the current provincial government.

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[1] *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission*, [2019 ABCA 468](#).

[2] [2018 ABQB 476](#).

[3] RSA 2000, c G-1.

[4] At para 72.

[5] *R v Comeau*, [2018 SCC 15](#).

[6] *Toronto Distillery Company Ltd v Ontario (Alcohol and Gaming Commission)*, [2016 ONCA 960](#).

[7] *Unfiltered Brewing Incorporated v Nova Scotia Liquor Corporation*, [2019 NSCA 10](#).

[8] *Reference re Greenhouse Gas Pollution Pricing Act*, [2019 ONCA 544](#); *Reference re Greenhouse Gas Pollution Pricing Act*, [2019 SKCA 40](#).