LITIGATION AND CASE LAW UPDATE

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S. 121 of the Constitution after *Comeau*: Steam Whistle Brewing Case

- **Basic background to case:**
  - Liquor retail in Alberta is privatized. However, at wholesale all liquor passes through the AGLC which collects a mark-up on the liquor and then sells it to private retailers.
  - The AGLC applies different mark-up rates to different classes of liquor
  - Historically, it applied higher rates to beer produced by large, multi-national corporations than to beer produced by small, domestic "craft" breweries.
  - Before October 28, 2015, the lower mark-up rate applied to all craft beer produced anywhere in Canada.
  - On October 28, 2015, a new mark-up regime came into effect, giving favourable treatment to craft beer produced in BC, Alberta and Saskatchewan (the "2015 Mark-up"). Shortly after, Steam Whistle, an Ontario craft brewer, commenced an action against the AGLC, claiming that the regime was unconstitutional.
  - On August 5, 2016 the mark-up regime was altered and all brewers were charged the same rate (the "2016 Mark-up"). However, the Province of Alberta simultaneously created a program which provided Alberta craft brewers with a grant identical to the difference they paid under the 205 Mark-up and the 2016 Mark-up.
  - Shortly after this, Great Western Brewing Company, a Saskatchewan craft brewer, commenced an action against the AGLC.
  - Steam Whistle and Great Western argued that the Mark-up is a tax that violates section 53 of the *Constitution Act*. They also argued that the Mark-up constituted a brrier to interprovincial trade in violation of s. 121 of the *Constitution Act.*

- Appeal decided last year (2019 ABCA 468).
- Trial decision in 2018 (2018 ABQB 476).
- *Comeau* decided by SCC just before *Steamwhistle* trial decision and set framework for s. 121 analysis.

Refresher on Comeau

- Comeau bought liquor in Quebec and brought it back into New Brunswick. Was charged by RCMP under provincial liquor statute.
- Challenge was made to the provisions in the liquor statute that required persons to purchase liquor from the provincial monopoly with very limited exceptions.
- Argument was that s. 121 prohibited all tariff and non-tariff trade barriers across Canada and that the provincial law prohibited the interprovincial shipment of liquor and therefore violated the section.
- Section had very little interpretation and no modern interpretation.

Refresher on Comeau

- SCC heard appeal from NB provincial court.
- Court held that s. 121 does not impose absolute free trade across Canada. The court rejected the historical argument that "admitted free" in s. 121 was meant as an absolute guarantee of trade free of all barriers.
- Instead, the court held that the legislative context for s. 121 was that it was part of a scheme that enabled the shifting of customers, excise and similar levies from the former colonies to the Dominion. It should thus be interpreted to apply to measures that increase the price of goods when they cross a provincial border, but should not be interpreted to impinge on the legislative powers in ss. 91 and 92 of the Constitution Act.
- SCC set out legal test for s. 121 of the Constitution Act:
  - A party must establish that the law in essence and purpose restricts trade across a provincial border.
  - It must be shown that (1) the law impacts the interprovincial movement of goods with a tariff or tariff-like measure. This could exclude outright prohibition of the entry of goods. (2) the restriction of cross-border trade must be the "primary purpose" of the law. This excludes laws enacted for other purposes that form rational parts of broader legislative schemes but that have incidental effects on interprovincial trade.
- SCC allowed the appeal and rejected Comeau's arguments because the NB legislation was enacted for the "primary purpose" of controlling the supply of liquor within the province and treated intra-provincial liquor and extra-provincial liquor in the same way.

Steamwhistle Trial Decision – s. 121

- The court applied *Comeau* to both the 2015 mark-up and the 2016 mark-up

<u>2015 Markup</u>

- The court considered a 2015 briefing note that stated the government indicated Alberta craft brewers are to be part of the plan to support economic diversification and exempted the craft breweries from provinces in the New West Trade Partnership Agreement (AB, BC, SASK) from markups applied to craft beer imported from other provinces.
- The court quickly concluded that the primary purpose of the 2015 markup was to impose a greater charger on craft beer produced outside of the New West partnership compared to those within it. This is a very *Granholm*-like application of s. 121.

Steamwhistle Trial Decision – s. 121

2016 Markup

- The AGLC grant program effectively gave Alberta craft brewers the same benefits as under the 2015 markup, thought he 2016 markup applied equally to all craft breweries.
- Normally grant programs supporting small business generally do not violate s. 121. However, the Court looked at the full context of the 2015 and 2016 markups and concluded the 2016 markup was not genuinely a local business grant program that could be considered distinct from the overall effect of the markup. In fact the Minister had acknowledged the grant program would work in concert with the new 2016 markup.
- As such, the court concluded the purpose of the 2016 markup combined with the grant program is to increase revenue while continuing to protect Alberta craft brewers. The practical effect of the program was that Alberta craft brewers are not affected by the increased mark-up and therefore have a competitive advantage over extra-provincial breweries.

Steamwhistle Trial Decision – s. 53

- The other part of the decision related to whether the mark-up and grant constituted a tax that could not be levied without the authority of Parliament or the legislature or if it was a "regulatory charge" or "proprietary charge".
- The court considered the legal test under s. 53. The characteristics of a tax are:
  - Enforceable by law
  - Imposed under the authority of the legislature
  - Levied by a public body
  - Intended for a public purpose (the "Lawson criteria").
- However, because these characteristics apply to most government levies, the question becomes whether these are the dominant characteristics of the levy or whether they are only incidental.

Steamwhistle Trial Decision – s. 53

- The ABQB found:
  - The Mark-up was enforceable by law under the Alberta *Gaming and Liquor Act*
  - The Mark-up was a levy arising under the *Gaming and Liquor Act* and so was imposed under the authority of the legislature
  - The AGLC was a public body; and
  - The levies were intended for a public purpose, including to fund various facilities and programs associated with the social cost of alcohol, including hospitals and addiction services.
- As such, the court held the mark-up was a tax under the Lawson Criteria.

Steamwhistle Trial Decision – s. 53

- The court's next step was to determine whether the mark-up was a "tax" or a "regulatory charge" or "proprietary charge".
- In general the court looks at the charge and the regulatory scheme to determine if they are linked.
- The ABQB found:
  - that the *Gaming and Liquor Act* was a complete code of regulation addressing liquor supply, importation, sale, marketing, transportation, consumption and use.
  - The purposes of the scheme is to influence the behaviour of persons who manufacture, import, purchase, sell, transport, give, possess, store, use, or consume liquor.
  - There are actual costs to running this scheme.
  - The government of Alberta made a policy decision to regulate alcohol in this way.
  - Nonetheless, the revenue generated by the mark up is greatly in excess of the costs of administering the regulatory scheme and thus is an indication the mark-up is not a regulatory charge.

Steamwhistle Trial Decision – s. 53

- With respect to the "proprietary charge" issue, the court found the AGLC was involved in a commercial wholesale operation and thus the mark-up was in pith and substance a proprietary charge and thus valid under s. 53 of the constitution.

Steamwhistle Trial Decision – Remedy

- The remedy issue was central to the decision. Though the legislation survived the s. 53 challenge, it failed the s. 121 challenge. What remedy were the breweries entitled to?
- The court ordered both a declaration of unconstitutionality and restitution.
- While declarations are typical remedies, the restitution principle under constitutional law is quite complex.
- The court interpreted the *Kingstreet* tax case to apply to a non-tax charge levied under an unconstitutional statute – a novel interpretation of that case.
- As such it ordered restitution of the mark-ups paid by Steam Whistle and Great Western for $164k and $1.938 million respectively.

Steamwhistle Appeal Decision, 2019 ABCA 468

- The government appealed and the ABCA confirmed that the 2015 and 2016 mark-ups violated s. 121. It narrowed the scope of the declaration of invalidity of both. The 2015 markup was narrowed to only the parts relating to small brewers and the 2016 declaration narrowed only to the grant program.
- The ABCA set aside the award of restitution.
- On 121 the court said:
  - S. 121 applies to government action as well as legislation.
  - Importantly, the ABCA held that when the AGLC charged the markups it was acting in a hybrid capacity as both a private owner of beer and also through the exercise of its statutory duties and powers. This latter point is important as government liquor monopolies regularly conflate these functions.
  - The ABCA focused on the differential in costs depending on the source province, another affirmation that *Granholm-like* principles apply in Canada under s. 121.
  - The purpose was to create revenue in a way that promotes the competitive position of local producers in the local craft beer market, not to regulate some aspect of access to alcohol (as in *Comeau*)

Steamwhistle Appeal Decision, 2019 ABCA 468

- On the restitution point, the court held:
  - It was an error of law for the ABQB to conclude that Kingstreet applies whenever government collects money in violation of the Constitution.
  - Kingstreet only creates a limited right to restitution of invalid taxes.
  - The mark-ups were proprietary charges, not taxes and thus there was no entitlement to restitution.

Steamwhistle Appeal Decision, 2019 ABCA 468

- General impressions and importance of this case:
  - *Comeau* does matter and can be used to strike down laws and government actions.
  - Laws or actions that result in discrimination that provides economic advantages to local goods over extra-provincial goods is a fertile ground for s. 121 challenges.
  - Liquor monopolies carry out two functions: commercial and regulatory. The latter function is judicially reviewable.

Unfiltered Brewing v. Nova Scotia Liquor Corporation, 2019 NSCA 10

- Unfiltered Brewing is a micro-brewery that sells beer in Nova Scotia. In order to sell its beer, it had to pay a mark-up imposed by the NS Liquor Corporation, like all other provinces.
- Case was about whether the mark-up was a tax under s. 53 (similar to Steam Whistle case).
- Consistent with the Steam-Whistle case, the application judge, affirmed on appeal, concluded the mark-up was a proprietary charge.
- The NSLC was the owner of the products via the required contractual arrangements to sell through it (as in other provinces, the liquor must be sold to the NSLC, which then resells to licensees). There was no doubt that this enabled the NSLC to impose a commercial "proprietary charge".
- The case simply reaffirms the old principle that undergirds our liquor monopolies in Canada: the provinces have jurisdiction under s. 92 to enact schemes to manage the supply and demand for liquor within the province.

R. v. The Mark Anthony Group, 2019 FCA 183

- This was an *Excise Act* case about whether MAG had to pay duties of $2 million on cider products that were fortified with foreign-sourced spirits and some of the juice was not made with Canadian fruit.
- A case about statutory interpretation of the word "wine" under the act.
- Court concluded "wine" included alcoholic beverage produced by the fermentation of an agricultural or plan product and blended with distilled spirits. This captured the MAG cider products and qualified them for the exemption.
- There was an issue about which test to apply – i.e. which stage of production was relevant. The court held fermentation was the relevant stage rather than packaging. This allowed the exemption to apply as it avoided the stage where foreign-sourced fruit was added to the product.
- Federal Court of appeal affirmed the tax court decision on the above analysis.

Litigation and Case Law Update

Thank You

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