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Tapped Out: Alberta Court Holds Interprovincial Beer Mark-ups Unconstitutional

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Case Commented On: *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission*, 2018 ABQB 476 (CanLII)

On June 19, 2018, the Alberta Court of Queen's Bench (the Court) issued its decision in *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission* (*Steam Whistle*), holding that two changes to mark-up rates on craft beer produced outside Alberta were *ultra vires* s 121 of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 (the *Constitution*). The Alberta Gaming and Liquor Commission (AGLC) applies these mark-ups to retailers based on different classes of liquors. Prior to 2015, the same mark-up was applied to all craft beer produced anywhere in Canada. However, by 2016, the mark-up regime had differential rates applied to different regions, along with a grant for Alberta brewers to offset to the mark-up they would otherwise pay.

In assessing their pith and substance, Justice Gillian Marriot held the AGLC's mark-up regime to be a valid scheme of proprietary charges under the *Gaming and Liquor Act*, RSA 2000, c G-1 (*GLA*). Ultimately, however, she found that the intention behind the changes to the mark-up regime was to advantage Alberta craft brewers, constituting a barrier to interprovincial trade under the analytical framework for s 121 established earlier this year in *R v Comeau*, 2018 SCC 15 (CanLII) (*Comeau*).

In this post, I will review the Court's decision and comment on its significance, both with respect to the mark-ups' classification, and in cementing recent s 121 jurisprudence.

Background

Since 1993, the retail market in liquor has been privatized in Alberta. Before liquor arrives to retailers, however, it passes through the AGLC, a corporation established by the *GLA*. The AGLC functions largely like a wholesaler, warehousing products and collecting a mark-up on the liquor it then sells to private retailers. The mark-up is nominally paid by retailers, but in practice is absorbed by producers. The AGLC applies different mark-ups to different classes of liquor; historically it applied higher rates to beer produced by large, multi-national brewers than to beer produced by small, domestic "craft" brewers (*Steam Whistle* at paras 1-2).

Prior to October 28, 2015, this lower mark-up applied to all Canadian-produced craft beer. On that date, the AGLC implemented changes to the mark-up regime (2015 Mark-up) that gave favourable treatment to craft beer produced in British Columbia, Alberta, and Saskatchewan.

Soon after, Steam Whistle Brewing Inc. (Steam Whistle), an Ontario brewer, brought an action against the AGLC alleging the new regime was unconstitutional.

On August 5, 2016, the mark-up regime was altered again (2016 Mark-up), this time providing that *all* brewers be charged the same rate. However, the Alberta government simultaneously created a program providing Alberta craft brewers a grant equivalent to the difference they paid between the 2015 and 2016 Mark-ups. Great Western Brewing Company Ltd. (Great Western), a Saskatchewan craft brewer, then also sued the AGLC.

Both Steam Whistle and Great Western argued that the mark-up generally constituted a tax that violated ss 53 of the *Constitution*, being an invalidly enacted tax. They also argued respectively that the 2015 and 2016 Mark-ups in particular each constituted a barrier to interprovincial trade, contrary to s 121 of the *Constitution*. They both sought declaratory relief and restitution of monies paid under the 2015 and 2016 Mark-ups.

Pith and Substance of the Mark-up

Section 53 and the Lawson Factors

The first issue before the Court was how to characterize the mark-up charged by the AGLC. Specifically: (1) is the mark-up a tax, or something else; and (2) if it is a tax, is it valid?

Section 53 of the *Constitution* states that "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons." Section 90 provides that s 53 applies to provincial legislatures as well as Parliament (*Steam Whistle* at paras 8-9).

The analysis begins with determining whether the levy charged is a tax by comparing it to the characteristics of a tax described in *Lawson v British Columbia (Interior Tree Fruit & Vegetable Committee of Direction)*, [1931] SCR 357, 1930 CanLII 91 (SCC) (*Lawson*). The *Lawson* Factors being that the levy be:

(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 (*Steam Whistle* at para 10).

Justice Marriot found the mark-up is enforceable by law by the operation of ss 50, 77, and 80 of the *GLA*. Section 50 provides that "[n]o person may, except in accordance with this Act or in accordance with a liquor license, manufacture, import, purchase, sell, transport, give, possess, store, use or consume liquor" (*Steam Whistle* at para 13). Section 77 prohibits the import of liquor to Alberta except by, or under the authority of the AGLC or the *GLA* itself. Lastly, s 80 permits the AGLC to impose a mark-up, defined therein as "the profit generated by the Commission on the sale of liquor" (*Steam Whistle* at para 14).

Section 80 also satisfies the second *Lawson* Factor, as the mark-up arises directly from statute. Steam Whistle asserted that the mark-up could not be valid, having not been "imposed by the

legislature" and was therefore contrary to s 53 of the *Constitution*. Justice Marriot contended this disclosed a misunderstanding of the law: a levy need not be imposed directly by the legislature, only "under the authority" of the legislature as the *Lawson* Factors suggest (*Steam Whistle* at para 16). In this way, the second *Lawson* Factor speaks directly to s 53 (*620 Connaught Ltd v Canada (Attorney General)*, 2008 SCC 7 (CanLII) at para 4 (*Connaught*), cited in *Steam Whistle* at para 8). Justice Marriot also cited *Re St Francis Xavier University* (1999), 7 MPLR (3d) 165 (NSSC) and *Canadian Assn of Broadcasters v Canada*, 2008 FCA 157 (CanLII) (*Canadian Broadcasters*), as exemplars that held levies arising from statute will satisfy this criterion (*Steam Whistle* at paras 17-18).

The AGLC is a public body, and thus satisfied the third *Lawson* Factor (*Steam Whistle* at para 20).

Justice Marriot found the fourth *Lawson* Factor to be satisfied by s 3 of the *GLA*, which states the objectives of the AGLC to be "to control in accordance with this Act the manufacture, import, sale, purchase, possession, storage, transportation, use and consumption of liquor" and "to generate revenue for the Government of Alberta." (*Steam Whistle* at para 21)

However, the analysis doesn't end with these Factors having been met, "[t]hese characteristics will likely apply to most government levies. The question is whether these are the dominant characteristics of the levy or whether they are only incidental" (*Connaught* at para 23). In *Connaught*, the Supreme Court endorsed the possible categories of government levies from *Westbank First Nation v British Columbia Hydro & Power Authority*, [1999] 3 SCR 134, 1999 CanLII 655 (SCC) (*Westbank*) as being: (1) a tax; (2) a regulatory charge; or (3) a charge for services directly rendered (referred to in *Steam Whistle* as a "proprietary charge").

As noted, there may exist significant overlap between these three categories of levy. The *Lawson* Factors are necessary in the definition of a tax, but may be satisfied by the other categories. Therefore, the analysis must consider whether the levy in question can be considered a regulatory or proprietary charge, and Justice Marriot continued her analysis in this fashion.

Is the Mark-up a Regulatory Charge?

Per *Westbank*, establishing a levy as a regulatory charge is a two-step process:

(1) identification of a regulatory scheme; and
(2) whether there is a relationship between the levy and that scheme. (*Steam Whistle* at para 25)

The first step looks to whether there are present indicia associated with a regulatory scheme: (1) a complete, complex code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the regulated actor(s) and the scheme where a benefit or need flows from the regulation. These indicia are not exhaustive, nor must all be present to establish the first step (*Westbank* at para 44).

The second step in establishing that a levy is a regulatory charge looks to the connection between the levy and the regulatory scheme, which "…will exist when the revenues are tied to the costs

of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behavior" (*Westbank* at para 44). In *Connaught*, at para 20, the Supreme Court suggested that significant and systemic surpluses generated by the scheme in excess of its administration would be inconsistent with a regulatory charge, pointing more toward taxation. *Canadian Broadcasters*, at para 49, advanced that where a regulatory purpose for a levy has been established, the requisite relationship between the levy and the scheme will exist even if revenues exceed the cost of administration. Both cases lay the onus on the Crown as having to prove the connections.

The *GLA* was found to create a "complete, complex and detailed code of regulation," which comprises an extensive set of provisions governing liquor supply, importation, sale, marketing, transportation, consumption and use (*Steam Whistle* at para 30). Next, the purpose of the scheme set forth in s 50 of the *GLA* is to influence the behavior of persons who, "manufacture, import, purchase, sell, transport, give, possess, store, use or consume" liquor (*Steam Whistle* at para 31). There was no dispute that there are actual costs of the scheme created by the *GLA* (*Steam Whistle* at para 32). With respect to the fourth factor, Justice Marriot pointed to the government having made a policy decision to regulate the supply and consumption of alcohol, and quoting the AGLC's brief, that "[t]he consumption of alcohol creates social costs and imposes financial burdens on government" (*Steam Whistle* at para 33). She found the relationship between the regulatory scheme and the regulated party is clear, as implementing that policy decision necessarily requires regulating the suppliers of alcohol (*Steam Whistle* at para 33). Therefore, the operation of the *GLA* and the AGLC satisfied the indicia.

It was undisputed between the parties that the mark-up generates revenue greatly in excess of the cost of administration of the *GLA*: in 2015-2016, revenues were more than $800M, whereas the AGLC's operating expenses were approximately $34M (*Steam Whistle* at para 36). The AGLC presented no arguments to the Court as to the relationship between its mark-ups and the *GLA*. This left Justice Marriot with only the revenue discrepancy to consider regarding the mark-up's relationship to the scheme, and she found the threshold had not been met, ruling the mark-up was not a regulatory charge (*Steam Whistle* at para 42).

Is the Mark-up a Proprietary Charge?

To properly define proprietary charges, Justice Marriot turned to *Connaught*, where Justice Rothstein cites Professor Peter Hogg in *Constitutional Law of Canada* at 870-871:

> ". . . [proprietary] charges are those levied by a province in the exercise of proprietary rights over its public property. Thus, a province may levy charges in the form of licence fees, rents or royalties as the price for the private exploitation of provincially-owned natural resources; and a province may charge for the sale of books, liquor, electricity, rail travel or other goods or services which it supplies in a commercial way" (*Connaught* at para 49).

The answer to whether the mark-ups could be proprietary charges would actually come through inquiry as to whether the AGLC could be considered a "commercial" operation. If so, it could then be considered a proprietor duly entitled to take a profit. Here, Justice Marriot noted the

difficulty in any such determination given the lack of definition in the case law (*Steam Whistle* at para 52), but seemed to find a common thread among Supreme Court and appellate level decisions (*Steam Whistle* at paras 53-58).

Air Canada v Ontario (Liquor Control Board), [1997] 2 SCR 581, 1997 CanLII 361 (SCC) (*Air Canada*) found the Liquor Control Board of Ontario (LCBO) was the owner of liquor through its mere presence in the province by virtue of the *Importation of Intoxicating Liquors Act*, RSC 1985, c I-3, holding it was therefore entitled to charge its mark-up on those liquors. *DFS Ventures Inc v The Manitoba Liquor Control Commission*, 2001 MBQB 245 (CanLII) (affirmed in 2003 MBCA 33 (CanLII)) (*DFS*) held at para 61 that the Manitoba Liquor Control Commission's mark-ups were proprietary charges, with the Court relying in part on *Air Canada*.

In *Toronto Distillery Company Ltd v Ontario (Alcohol and Gaming Commission)*, 2016 ONSC 2202 (CanLII) (affirmed in 2016 ONCA 960 (CanLII)) (*Toronto Distillery*), a small craft distillery was permitted to retail its own product under a contract with the LCBO, but required to pay the LCBO's mark-up. On the strength of *Air Canada* and *DFS*, the Ontario Court of Appeal rejected a narrow interpretation of "commercial context" when referring to the operations of the LCBO (paras 6-7), holding that even nominal ownership by virtue of the regulatory scheme entitled the LCBO to levy proprietary charges (at paras 33-34).

The AGLC asserted that under the *GLA*, it is the sole wholesaler of beer in Alberta. It argued that it plays an active commercial role in the sale of beer, and it is entitled to make a profit through the mark-up like any other proprietor. While the AGLC acknowledged it no longer acts as a retailer, it advanced that it carries on various functions in respect of liquor supply (*Steam Whistle* at para 45). Steam Whistle and Great Western took the position that the AGLC has delegated its wholesaling functions to its agent, Connect Logistics Services (CLS). The AGLC acknowledged that since privatization it has contracted with CLS to provide warehousing and logistics services. It was undisputed that CLS levies its own charges, separate from the mark-up, on manufacturers that use its facilities. Steam Whistle and Great Western also argued that since the privatization of liquor sales, the AGLC no longer supplies liquor "in a commercial way," and therefore cannot claim that the mark-up is a proprietary charge (*Steam Whistle* at para 49). Here they noted a policy document of the AGLC's predecessor that the AGLC "is the wholesaler in name only, as the other functions of a wholesaler, including supply chain management and product ownership are no longer the responsibility of the [AGLC]." (*Steam Whistle* at paras 50-52)

Following *Air Canada*, Justice Marriot held that even basic wholesale operations such as the AGLC's are sufficient to constitute a "commercial" operation, and as the sole wholesaler of liquor under the *GLA*, is entitled to take a proprietary charge for its dealings (*Steam Whistle* at para 62). Here, even the minimal operations of the AGCL do not fall below the apparently low threshold set by the preceding case law (*Steam Whistle* at para 63).

Thus, Justice Marriot concluded that the mark-up is in pith and substance a proprietary charge, not a tax, while also recognizing that the objective of the mark-up regime is to raise revenue (*Steam Whistle* at para 66). She also references a similar decision of the Nova Scotia Supreme Court, *Unfiltered Brewing Incorporated v Nova Scotia Liquor Corporation and the Attorney*

General of Nova Scotia, 2018 NSSC 14 (CanLII) (*Unfiltered Brewing*), which undertook a similar analysis and arrived at a similar conclusion.

Is the Mark-up a Direct or Indirect Tax?

Though she held the mark-up to be a proprietary charge, Justice Marriot continued the analysis in the alternative. Here, the Court assessed whether the mark-up's operation would be a direct tax or an indirect tax.

Though not explicitly mentioned in the judgment, provincial powers of taxation are provided for by s 92(2) of the *Constitution* as, "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes." Unlike federal taxation powers, provincial taxation powers authorize only direct taxation. Direct and indirect taxation have been distinguished through scholarship and case law:

> "A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." (*Steam Whistle* at para 68 citing Hogg at 31-6)

Courts in Canada have refined the definition of indirect taxation as having a passing-on characteristic or of being relatable to a unit of commodity:

> "If the tax is related or relatable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in the course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market." (*Steam Whistle* at para 70 quoting *CPR v AG for Saskatchewan*, [1952] 2 SCR 231, 1952 CanLII 39 (SCC) (*CPR*) at 251-252)

The AGLC had argued that the mark-up is not a tax on the grounds that it is paid voluntarily through sales agreements, rather than by compulsion. This argument was accepted in *Toronto Distillery* (*Steam Whistle* at para 64). However, Justice Marriot distinguished this case on the facts. In *Toronto Distillery*, the applicant was required to pay the mark-up as a condition of the agreement with the LCBO for selling its product through its own store. It had other options available to it, including selling through the LCBO store. By contrast, the AGLC is the sole wholesaler of alcohol in Alberta, and brewers wishing to sell their beer have no option but to go through the AGLC (*Steam Whistle* at para 65), and Justice Marriot found that contrary to the AGLC's assertion, there is a greater element of compulsion in this case.

However, the mark-up was found to bear the hallmarks of an indirect tax at law, as Steam Whistle and Great Western argued (*Steam Whistle* at para 70). It is imposed on beer on a per-litre basis at the wholesaling stage, i.e., it is relatable to a commodity unit as envisioned in *CPR*. Justice Marriot also found that the Mark-up is not intended to "rest" with the manufacturers or retailers, rather, it is intended to form a component of the retail price borne by the ultimate consumer, i.e., it has a "passing-on" characteristic (*Steam Whistle* at para 71).

Therefore, as an alternative to holding that the mark-up is a proprietary charge, it is *ultra vires* the Alberta Legislature, being an indirect tax (*Steam Whistle* at para 70).

However, the judgment proceeded on the basis of the mark-up regime being a valid scheme of proprietary charges, but considered further whether the 2015 and 2016 Mark-ups constituted barriers to interprovincial trade

Section 121

Section 121 of the *Constitution* states, "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 modern role of s 121 had been elusive until the Supreme Court's decision in *Comeau* earlier this year (*Steam Whistle* at para 74). In fleshing out its meaning in *Comeau*, the Supreme Court said:

> "Section 121 does not impose absolute free trade across Canada. We further conclude that s. 121 prohibits governments from levying tariffs or tariff-like measures (measures that in essence and purpose burden the passage of goods across a provincial border); but, s. 121 does not prohibit governments from adopting laws and regulatory schemes directed to other goals that have incidental effects on the passage of goods across provincial borders" (at para 53).

This meaning was given legal effect by the definition of two necessary elements that establish when a law violates s 121 as a barrier to interprovincial trade. Both the law's essence and purpose must restrict trade across a provincial border (*Comeau* at para 107). To demonstrate that the essence of the law is to restrict or prohibit trade across a provincial border, the claimant must show that the law imposes an additional cost on goods by virtue of them coming in from outside the province, i.e., that the law implicates a provincial boundary via additional costs (*Comeau* at paras 108-109). The claimant must also establish that the *primary* purpose of the law is to restrict trade, not being merely incidental in furtherance of some other purpose. The inquiry is objective, based on the law's wording, its legislative context, and all of its discernible effects (*Comeau* at para 111). If the purpose of the law aligns with purposes traditionally served by tariffs, this may support the contention that the primary purpose of the law is to restrict trade (*Comeau* at paras 111-112). The Supreme Court offered examples where this might be true, including exploiting the passage of goods across a border solely as a way to collect funds, protecting local industry, or punishing another province (*Comeau* at para 111).

A law that in essence and purpose impedes interprovincial trade cannot be rendered constitutional under s 121 by simply inserting it into a broader regulatory scheme. If the primary purpose of the broader scheme is to impede trade, or if the impugned law is not connected in a rational way to the scheme's objective, the law will violate s 121 (*Comeau* at para 113).

Justice Marriot canvassed much of the Supreme Court's judgment in *Comeau* to capture the meaning of s 121 in the *Constitution*. She then moved to consider the application of the essence and purpose test with respect to the Mark-ups.

2015 Mark-up

The parties provided a document entitled "Advice to Honourable Joe Ceci, President of Treasury Board and Minister of Finance" dated October 2, 2015. It states that "the government has indicated that it wishes to obtain an additional $85 million in revenue from liquor mark-ups", and that "the government has indicated that Alberta craft brewers would be part of the government's overall plan to support economic diversification." It provides various proposals to reconcile these two objectives, including increasing mark-ups on craft beer, except for that produced either within Alberta, British Columbia and Saskatchewan, the signatories to the New West Trade Partnership Agreement (*Steam Whistle* at para 83). This policy had the effect of subjecting craft beer imported from provinces outside it to a higher mark-up rate. New West craft brewers could either lower their prices relative to non-New West craft brewers and capture market share, or maintain prices and make a greater relative profit (*Steam Whistle* at para 84).

The AGLC argued that the 2015 Mark-up merely removed a benefit that formerly had been available to all Canadian craft brewers, so that the non-New West craft brewers now paid the same mark-up as larger brewers. It asserted that the proper comparison group was not "craft beer" but beer generally, and that the 2015 Mark-up had little discernible impact on the Alberta beer market as a whole (*Steam Whistle* at para 85).

However, Justice Marriot agreed with Steam Whistle that the craft beer market was the more suitable comparison group, and that the 2015 Mark-up created a price wedge between 'imported' and 'domestic' products (*Steam Whistle* at para 86). Accordingly, she found the essence of the 2015 Mark-up was to create a trade barrier related to a provincial boundary (*Steam Whistle* at para 86). The purpose of the 2015 Mark-up was to raise funds in such a way as to not prejudice Alberta craft brewers, while minimizing trade concerns by exempting the New West Partners (*Steam Whistle* at para 87). Accounting for this, Justice Marriot found that the greater charge imposed on craft beer produced outside the New West Partnership was the primary, not incidental, feature of the 2015 Mark-up (*Steam Whistle* at para 87). Thus, the essence and primary purpose of the 2015 Mark-up was to create a trade barrier related to the provincial border, concluding that it contravened s 121 of the *Constitution* (*Steam Whistle* at para 87).

2016 Mark-up

The 2016 Mark-up was composed of two parts: an increased mark-up applied to all craft beer, regardless of origin, and a grant issued to Alberta craft brewers by the Department of Agriculture and Forestry. The grants were based on the volume of beer produced and sold in Alberta and were equivalent to the difference between amounts payable under the 2015 and 2016 Mark-ups. This placed Alberta craft brewers in the same position as they had been in 2015, paying less than out of province brewers (*Steam Whistle* at para 88).

In spite of the AGLC's arguments to the contrary, the Court found that these constituents could not be considered in isolation, with Justice Marriot relying on *Rogers Communications Inc v Chateauguay (City)*, 2016 SCC 23 (CanLII) at para 36 that the purpose of an enactment "is determined by examining both intrinsic evidence, such as the preamble or the general purposes

stated in the resolution authorizing the measure, and extrinsic evidence, such as that of the circumstances in which the measure was adopted" (*Steam Whistle* at paras 89-91).

The two policies seemed to contemplate one another based on evidence adduced at trial. Both policies were announced on the same day in the same press release. Evidence included a memorandum to the Minister of Finance dated June 8, 2016 stating its purpose is to seek a decision on altering the mark-up structure to mitigate trade concerns while continuing to support Alberta craft brewers. The chosen option was to apply a universal mark-up in conjunction with a corresponding grant program tied to production and sales. A stated "pro" of this option was that "Alberta brewers will receive more of a competitive price advantage in the Alberta market compared to brewers from BC and Saskatchewan." Evidence also included a letter dated July 11, 2016 from Finance Minister Joe Ceci to the Board of the AGLC in which he requested:

> "…that [they] amend Alberta's mark-up rates for beer…to a universal flat rate of $1.25 per litre, regardless of production levels and location of the brewer...This change will work in concert with an Alberta small brewer-focused grant program…"

The Minister specifically acknowledged that the 2016 Mark-up and the grant work "in concert" (*Steam Whistle* at paras 92-94).

The Court further found that the purpose of the 2016 Mark-up, in conjunction with the grant program, was to increase revenue while protecting Alberta craft brewers. This was accomplished by subjecting all craft brewers to an increased mark-up rate, but offset for Alberta craft brewers by the grant. The practical effect was that Alberta craft brewers enjoyed a competitive advantage (*Steam Whistle* at para 95).

Justice Marriot held that the 2016 Mark-up, coupled with the grant program, was in essence and purpose, a tariff-like restriction pertaining to a provincial boundary, offending s 121 of the *Constitution* (*Steam Whistle* at para 95).

Remedy

The Court provided declaratory and restitutionary remedies on the basis of the violations of s 121 of the *Constitution*. Both the 2015 and 2016 Mark-ups (the latter in conjunction with the grant scheme) were declared *ultra vires* for violating s 121 (*Steam Whistle* at paras 106 and 109). Steam Whistle and Great Western were awarded $163,964.98 and $1,938,660.06 respectively as requested to the Court as restitution for monies paid in respect of the 2015 and 2016 Mark-ups (*Steam Whistle* at paras 129-130).

The declarations of invalidity were suspended to "prevent fiscal chaos" and allow the province time to consider its policy options (*Steam Whistle* at para 131) for six months from the publication of the judgment, June 19, 2018 (*Steam Whistle* at para 137).

Commentary

Further Clarity on s 53 and the Westbank Categories

Steam Whistle is now the latest in a series of cases that begin clarify how proprietary charges fit into the s 53 framework of *Westbank* and *Connaught*. *Westbank* sorted levies into three distinct categories: taxes, regulatory charges, and proprietary charges (at para 30). *Lawson* provided instruction on the factors that must be present in a levy to be considered a tax (at 363). But, as Justice Rothstein conceded in *Connaught* at para 23, "[t]hese characteristics will likely apply to most government levies." The jurisprudence suggests that where an impugned levy satisfies the *Lawson* factors, there are still questions as to its classification per *Westbank* (usually as to what the legislative purpose of the levy may be) and courts must also look to other potential classifications.

Westbank, at para 43, added a fifth consideration to the four *Lawson* Factors, namely that a levy would be in pith and substance a tax if "unconnected to any form of a regulatory scheme," and defined the indicia of such as scheme. This was affirmed in *Connaught*, and the analysis was replicated in *Steam Whistle*. However, this fifth step seems only to contemplate distinctions between taxes and regulatory charges, and doesn't directly engage with proprietary charges. Both *Connaught* and *Westbank* mention proprietary charges (called "user fees" in *Westbank*), though only briefly. *Connaught* distinguished proprietary charges at para 49 in *obiter*, "…goods and services supplied in a commercial context are distinct from either regulatory charges or taxes and may be determined by market forces," endorsing Hogg's definition (see above).

Toronto Distillery refined this distinction from *Connaught* by relating it to the *Lawson* Factors. There, the Ontario Superior Court of Justice (ONSC) stated, at para 28, "…a levy may avoid being found a tax, under the *Lawson* principles, if it constitutes a proprietary charge." The same notion was determinative in *Unfiltered Brewing* and was summed up in *Steam Whistle* at para 66, "So long as the levy, properly characterized, falls into one of the other categories, it is not a tax." Indeed, this recent trio of cases (all involving provincial liquor authorities) at least begin to stake out the principle that courts may only identify a levy as a tax by ruling out regulatory and proprietary charges as candidates.

Additionally, this 'three-pack' of cases further endorses the low threshold for establishing the requisite commercial relationship or context necessary to allow a public authority to levy proprietary charges. In *Toronto Distillery*, this was defined at para 29, "It is unclear…how the method of acquisition is relevant when determining whether the province or any of its delegated bodies can impose a charge over merchandise that it owns"; in *Unfiltered Brewing* at para 70, "that a provincial liquor commission can exercise proprietary rights over liquor that it neither pays for nor possesses." And now, in *Steam Whistle*, even "basic wholesale operations" will do (at para 62).

An interesting question remains with respect to how the Court would have dealt with more overlap between the mark-up as a regulatory and proprietary charge. It was left open at trial for the AGLC to demonstrate the mark-up had a regulatory purpose within the meaning of *Westbank* and *Connaught*. Had the AGCL adduced evidence of a regulatory purpose, would the Court have preferred the mark-up's classification as a regulatory charge even though it also satisfied consideration as a proprietary charge?

Rationalization of the AGLC's Mark-up

Notwithstanding that question, the distinction between regulatory and proprietary charges may be largely academic. The main advantage to provinces is in a levy simply not being a tax. Under s 92(2) of the *Constitution*, provinces are only competent to tax *directly*. This qualification on the mode of the levy does not apply to regulatory or proprietary charges, which may be authorized under ss 92(13), 92(16) or 92A of the *Constitution*. Thus, defining a levy as one of the latter would allow a province to do under another constitutional provision what it otherwise cannot do under s 92(2), namely, levy monies indirectly.

This distinction is at play in *Steam Whistle* in how the Court defined the AGLC mark-up primarily and in the alternative. The mark-up was found to operate *indirectly*, being relatable to a unit of commodity on a per-litre basis, and, while nominally paid by retailers, is absorbed as a component of the liquor's price to consumers. While this indirectness is permissible as a proprietary charge, as Justice Marriot primarily held, it is not if held in the alternative as a tax. In this way, the AGLC mark-up regime in its current form is only constitutionally permissible if rationalized as a proprietary charge. Were it held to be a tax, it would be valid under s 53 of the *Constitution* but not under s 92(2).

If a future court ruling were to ever hold this alternative, the result would be significant if the operation of the charge did not change. In this way, the entirety of the mark-up would be considered an invalid exercise in taxation by the province. Whether this judicial insight in *Steam Whistle* will result in structural changes to how the AGLC rationalizes the mark-up remains to be seen.

Interprovincial "Free Trade" Post-Comeau

Steam Whistle is among the first cases to consider whether a province is in violation s 121 of the *Constitution* since the landmark decision in *Comeau* issued by the Supreme Court in April of this year. That case, coincidentally also concerning beer "imports," established the 'essence and purpose' test under s 121. *Steam Whistle* applies the new framework established in *Comeau*, and provides a robust analysis that should cement *Comeau*'s precedence in constitutional litigation.

In summary, the essence and purpose test contends that where both a law's essence and primary purpose function to prohibit or restrict trade across a provincial border it will violate s 121 of the *Constitution*. Laws, or schemes incorporating laws, whose primary purpose is directed toward some other object will not violate s 121, even if it incidentally impacts interprovincial trade. However, incorporation into a benign scheme will not save a provision under s 121 unless it is rationally connected to that scheme (*Comeau* at paras 106-114).

In her decision, Justice Marriot reiterated the Supreme Court's interpretation of s 121 that it "does not impose absolute free trade across Canada" (*Comeau* at para 53). The specific holding in *Comeau* was that a provincial scheme in New Brunswick that forbids consumers bringing liquor purchased elsewhere into the province merely incidentally restricted interprovincial trade, its primary purpose directed toward other goals. Along these lines, Justice Marriot highlighted that grant programs similar to the 2016 Mark-up "generally do not violate s 121" and that in

large measure, effects these programs have on interprovincial trade are incidental (*Steam Whistle* at para 90). Here, she also noted that Alberta could provide financial support to craft brewers in a host of ways without implicating s 121. Indeed, she accepted as well that supporting local businesses is a policy objective that provinces are entitled to pursue under federalism as the Supreme Court also urged in *Comeau* (*Steam Whistle* at para 96).

However, even with such broad latitude s 121 seems to give provinces, Alberta's approach was doomed for its blatant implication of the provincial border. The recently passed Bill 12, *Preserving Canada's Economic Prosperity Act*, SA 2018 c P-21.5 (on proclamation) authorizes Alberta's Minister of Energy to restrict the export of various kinds of petroleum fuels from Alberta. Notwithstanding other constitutional ramifications of the legislation concerning its validity (as canvassed in Nigel Bankes' post), it is possible this implication of the provincial border will again run afoul of the *Constitution*. British Columbia has already filed a claim against Alberta, alleging this legislation is unconstitutional. Among its arguments is that it violates s 121 (Attorney General of British Columbia Statement of Claim at para 34).

Much has been made for decades in Alberta about how the provincial government can support economic diversification away from oil and gas. Perhaps this decision will be instructive to policymakers and legislators both in Alberta and throughout Canada on how they can and cannot foster growth among local industries while honouring the terms of Canada's economic union.

Conclusion

Steam Whistle is an important case, and its judgment is demonstrative of that importance. It sits at a unique constitutional nexus between legislative validity of taxation and interprovincial trade, building on the jurisprudence in both fields. In providing additional clarity on the s 53 framework and in cementing the value of the essence and purpose test, the ruling should inform public decision makers on how to craft more constitutionally compliant policies. While there remain some smaller questions from the decision, the larger one will be whether these decision makers will heed the judicial lesson from this case.

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