NOVA SCOTIA COURT OF APPEAL

Citation: *Unfiltered Brewing Incorporated v. Nova Scotia Liquor Corporation*, 2019 NSCA 10

Date: 20190213
Docket: CA 473695
Registry: Halifax

Between:

Unfiltered Brewing Incorporated

Appellant

v.

Nova Scotia Liquor Corporation and
Attorney General of Nova Scotia

Respondents

Judge: The Honourable Justice David P.S. Farrar

Appeal Heard: November 15, 2018, in Halifax, Nova Scotia

Subject: ***Liquor Control Act*, R.S.N. 1989, c. 260; *Constitution Act*, 1867, s. 53**

Summary: The appellant, Unfiltered Brewing Incorporated, is a micro-brewery which commenced operation in 2014. It manufactures and sells beer from its North Street location in Halifax under a permit issued by the Nova Scotia Liquor Corporation. To be permitted to sell its beer, Unfiltered has to remit a mark-up to the NSLC. Unfiltered applied to the Supreme Court for a declaration that the mark-up was an unlawful tax under s. 53 of the *Constitution Act*. The application judge found that the mark-up was a proprietary charge and, therefore, not an unlawful tax.

Issues: Did the application judge err in finding that the mark-up was a proprietary charge?

Result: Appeal dismissed. Costs to the Attorney General in the amount of $1,000.00. The application judge correctly

identified and applied the law with respect to proprietary charges to the facts of this case. His conclusion that the mark-up was a proprietary charge is supported by precedent, the provisions of the *Liquor Control Act*, its Regulation and NSLC policies.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 14 pages.

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Attorney General of Nova Scotia

Respondents

Judges:	Farrar, Van den Eynden and Derrick, JJ.A.
Appeal Heard:	November 15, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Van den Eynden and Derrick, JJ.A. concurring.
Counsel:	Richard W. Norman, for the appellant Edward A. Gores, Q.C., for the respondent

Reasons for judgment:

Background

[1] The appellant, Unfiltered Brewing Incorporated, is a microbrewery which commenced operations in 2014. It manufactures beer at its North Street location in Halifax under a permit issued by the respondent, Nova Scotia Liquor Corporation (NSLC). It also operates a retail store front adjacent to its North Street brewery under a separate permit from NSLC.

[2] NSLC oversees the receipt, distribution and control of alcohol in the province. It is governed by the *Liquor Control Act*, R.S.N.S. 1989, c. 260.

[3] As a condition of the permit allowing it to sell its own beer on-site, NSLC requires Unfiltered to remit a monthly amount on beer it sells, samples or gives away.

[4] Unfiltered's beer is not sold at NSLC stores. The NSLC deems Unfiltered's beer to have been purchased from the NSLC, then sold to the customers. At the time Unfiltered filed its application, it was required to remit $0.50 for each litre of beer sold, sampled or given away.

[5] The parties have referred to the amount required to be paid to the NSLC variously as the remittance, the retail sales mark-up allocation or the RSMA. I will simply refer to it as the mark-up.

[6] On January 3, 2017, the Nova Scotia Liquor Corporation Regulations were amended to specifically refer to a retail mark-up sale allocation. I will reference the regulation in more detail later.

[7] On August 15, 2016, Unfiltered filed a Notice of Application in Court alleging that the mark-up was a tax and that the NSLC did not have the authority to impose it.

[8] The application was heard on January 16 and March 7, 2017 by Justice Glen G. McDougall. On January 23, 2018, the application judge released his decision dismissing the application (reported as 2018 NSSC 14). He found that the mark-up possessed the hallmarks of a tax and was not a regulatory or administrative charge, i.e., a fee charged to recoup the cost of the regulatory regime. However, he found

that the mark-up was, in pith and substance, a propriety charge and, therefore, not a tax, and constitutionally permissible.

[9] Unfiltered appeals alleging that the application judge erred in finding that it was a proprietary charge.

[10] The question of whether the mark-up was a regulatory charge was not before the Court by way of the Notice of Appeal or a Notice of Cross-Appeal or a Notice of Contention. At the hearing of this appeal, the Court asked for additional submissions from the parties on whether the mark-up could constitute a regulatory charge.

[11] The parties filed Supplementary Submissions on that issue, however, it is not necessary to address them. For the reasons that follow, I would dismiss the appeal on the basis the application judge did not err in finding the mark-up was a proprietary charge. I would award costs to the Attorney General in the amount of $1,000.00 inclusive of disbursements.

Issue

[12] The appellant's central complaint is the application judge's determination that the mark-up is, in pith and substance, a proprietary charge. It then set out several sub-issues relating to that question. It is not necessary to address the several sub-issues the appellant raised relating to that issue.

Standard of Review

[13] Unfiltered's complaint on this appeal is that the judge failed to properly consider the law concerning proprietary charges and failed to properly apply it to the regulatory scheme.

[14] The identification of the proper legal test and its application to the facts are questions of law to be reviewed on a correctness standard (*National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47, ¶151).

Issue: Did the judge err in finding that the mark-up was a proprietary charge?

[15] To address this ground of appeal, some further background is necessary.

[16] The sale of liquor in Nova Scotia is governed by the *Liquor Control Act*.

[17] Section 137 sets out the purpose and intent of the *Act* and prohibits any transactions in liquor within the Province of Nova Scotia except through the instrumentality of the NSLC:

> **Purpose and intent of the Act**
>
> **137** The purpose and intent of this Act are to prohibit transactions in liquor which take place wholly within the Province except under Government control, and every Section and provision of this Act and of the regulations dealing with the importation, sale and disposition of liquor within the Province through the instrumentality of a Corporation …

[18] Except as provided in the *Act* or Regulations, the sale of liquor from any person other than the NSLC is specifically prohibited:

> **Unlawful purchase of liquor**
>
> **90** Except as provided by this Act or the regulations, no person shall purchase liquor from any person other than a store manager or the Corporation.

[19] Section 12 of the *Act* sets out the duties and powers of the NSLC. It provides, in part:

> **Duties and Powers of Corporation**
>
> **12** It shall be the duty of the Corporation and it shall have power to
>
> (a) buy, import, have in its possession and sell liquor and merchandise for the purpose of this Act;
>
> (b) control the possession, sale, transportation and delivery of liquor in accordance with this Act and the regulations;
>
> …
>
> (t) without in any way limiting or being limited by the foregoing clauses, generally do all such things as may be deemed necessary or advisable by the Corporation for the purpose of carrying into effect the purpose and intent of this Act or of the regulations.

[Emphasis added]

[20] The definition of "sale" in s. 2(y) of the *Act* includes the distribution of liquor by any means whatsoever:

> **Interpretation**
>
> **2** In this Act,

...

> (y) "sale" or "sell" includes exchange, barter and traffic and also includes the selling or supplying or distribution, by any means whatsoever of liquor or of any liquor known or described as "beer" or "light beer" by any partnership, or by any society, association or club, whether incorporated or unincorporated, and whether heretofore or hereafter formed or incorporated, to any partnership, society, association or club or to any member thereof;

[21] Section 42 of the *Act* permits the Corporation to prescribe by regulation the manner and prices that liquor may be sold in the province:

> **Sale of liquor**
>
> **42**(1) Subject to this Act, liquor may be sold in such manner and at such prices as the Corporation may by the regulations prescribe;

[22] NSLC's ability to prescribe prices for liquor sold in the province is set out in the Nova Scotia Liquor Corporation Regulations, N.S. Reg. 22/91:

> 13 (6) The prescribed prices for liquor under subsection 42(1) of the Act include prices determined by the Corporation in respect of all of the following:
>
> (a) liquor sold at retail from Government stores and agency stores;
>
> (b) liquor sold in the Province from other than Government stores or agency stores, including liquor sold directly by the producer of the liquor under a valid license or permit.
>
> (7) The prescribed prices for liquor under subsection 42(1) of the Act are as follows:
>
> (a) for liquor sold at retail from Government stores and agency stores, the prices set out in an official price list issued by the Corporation from time to time or as otherwise determined by the Corporation, and no store manager shall charge or receive any other price except on written instruction from the Corporation;
>
> (b) for liquor sold in the Province from other than Government stores or agency stores, including liquor sold directly by a producer of liquor under a valid license or permit, the prices determined by the Corporation from time to time and communicated to the producers, and no producer of liquor shall charge or receive any other price except on written instruction from the Corporation.
>
> (8) The prices in subsection (7) include, regardless of whether expressly stated, a retail mark-up sales allocation or similar charge, as determined by the Corporation.

[23] The policy-making power of the Corporation is found in s. 39 of those Regulations:

> **Policy guidelines**
>
> 39 The Corporation may prescribe policy guidelines setting out details and procedures required for administration and operations carried out under the Act and these regulations.

[24] The June 2011 Manufacturer's Policy is at issue in this proceeding. The policy statement in the Manufacturer's Policy provides:

> 6.1 **POLICY STATEMENT**
>
> The Policy is intended to establish guidelines for the issuance of permits and ongoing operation of manufacturers of beverage alcohol in the province of Nova Scotia.

[25] Section 6.1.16 of the Manufacturer's Policy deems that liquor sold at a Manufacturers Retail Store shall have been first purchased from the NSLC. It also provides the liquor shall be sold at prices approved by the NSLC:

> 6.1.16 **SALES, PRICING AND LISTING**
>
> 6.1.16.1 Liquor sold at a Manufacturers Retail Store shall be deemed to have been first purchased from the NSLC. Requirements for remittance and reporting of sales to the NSLC shall be provided by the NSLC to the Manufacturer as described in Section 6.1.17 of this policy, and the Manufacturer agrees to comply with such requirements as a condition of the Permit.
>
> 6.1.16.2 Liquor not listed by the NSLC shall be sold at such prices as the NSLC may approve. Manufacturers operating a retail store shall submit a retail price list for all products sold in the store to the NSLC Pricing Coordinator annually, and upon demand by the NSLC. The NSLC reserves the right to require approval of prices charged in the store. In no instance shall liquor be sold for less than the NSLC's approved social reference price.
>
> [Emphasis added]

[26] On May 20, 2015, the NSLC issued a microbrewery permit to Unfiltered which provides:

> This permit is issued and is to be used in accordance with the regulations and the Act governing the Nova Scotia Liquor Corporation as well as any special conditions stated and any changes which may be made from time to time in the

> Regulations, Act or special conditions. It is subject to withdrawal in the event of non-compliance.

[27] The Microbrewery Permit also has the following conditions:

> THIS PERMIT IS GRANTED TO UNFILTERED BREWING, CITY OF HALIFAX, PROVINCE OF NOVA SCOTIA; SUBJECT TO THE PROVISIONS OF THE NOVA SCOTIA LIQUOR CONTROL ACT, REGULATIONS AND NSLC POLICY & PROCEDURES TO MANUFACTURE AND KEEP IN ITS BREWERY PREMISES, DESIGNATED IN THE APPLICATION, BEER PRODUCTS FOR SALE TO THE NOVA SCOTIA LIQUOR CORPORATION (OR FOR EXPORT) AS PROVIDED BY THE SAID ACT AND REGULATIONS.
>
> THIS PERMIT IS GRANTED ON THE CONDITION THAT THE ABOVE NOTED FIRM WILL REMIT ALL REQUIRED REPORTING DOCUMENTS AND PAYMENTS TO THE NSLC ON A MONTHLY BASIS.
>
> [Large Font in the Original]

[28] Also, on May 20, 2015, the NSLC issued to Unfiltered a Manufacturer's Retail Store Permit to sell beer manufactured on its brewery premises. The Manufacturer's Retail Store Permit expressly provides:

> This permit is issued and is to be used in accordance with the regulations and the Act governing the Nova Scotia Liquor Corporation as well as any special conditions stated and any changes which may be made from time to time in the Regulations, Act or special conditions. It is subject to withdrawal in the event of non-compliance.

[29] The Manufacturer's Retail Store Permit also provides:

> THIS PERMIT IS GRANTED TO UNFILTERED BREWING INC., CITY OF HALIFAX, PROVINCE OF NOVA SCOTIA; SUBJECT TO THE PROVISIONS OF THE NOVA SCOTIA LIQUOR CONTROL ACT, REGULATIONS, AND NSLC POLICY & PROCEDURES TO SELL ITS MANUFACTURED BEER PRODUCTS AND PROMOTIONAL AND NOVELTY ITEMS APPROVED BY THE NSLC, TO THE PUBLIC THROUGH ITS STORE.
>
> [Large Font in the Original]

[30] The Retail Store Permit is signed by both the NSLC and Unfiltered.

[31] The *Act*, Regulations and policies establish:

1. the sale and distribution of liquor in the province can only be done through the NSLC;
2. the NSLC has the sole discretion to determine the manner in which liquor is sold and distributed in Nova Scotia;
3. the NSLC has determined that any liquor sold by a microbrewery such as Unfiltered shall be deemed to be purchased by Unfiltered from it;
4. the NSLC has the ability to set the prices for the sale of liquor at a microbrewery and the sale price can include a mark-up;
5. the only way that a microbrewery can operate to manufacture and sell liquor is through permits issued by the NSLC; and
6. as a condition of receiving a permit, the microbrewery has to agree to comply with the terms and conditions of the permit which include complying with the *Act*, the Regulations and NSLC policies.

[32] This is the scheme by which a person other than the NSLC can sell liquor in the Province of Nova Scotia.

[33] It is against this backdrop that the application judge had to determine whether the mark-up was a proprietary charge.

[34] The application judge referred to the leading authorities on the distinction between regulatory charges (which the application judge found did not apply here) and proprietary charges.

[35] After reviewing the arguments of the respondent and the authorities he concluded:

> [70] Is the remittance taken by NSLC in its character as a regulator (that is, a public authority), or as owner of the beer? Unfiltered makes various arguments to the effect that this is not actually a commercial relationship but a purely regulatory one. It seems clear, however, from such cases as *Air Canada, DFS Ventures*, and *Toronto Distillery*, that a provincial liquor commission can exercise proprietary rights over liquor that it neither pays for nor possesses. …

[36] I will review the cases referred to by the application judge to support his conclusion.

[37] In *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, the Supreme Court considered the jurisdiction of the Ontario Liquor Control Board (LCBO) to impose a mark-up on liquor transferred to the domestic section of a

bonded warehouse. The liquor was not purchased from the LCBO, which had a "monopoly over the sale, transportation, delivery, and storage of liquor in Ontario" (¶ 3). The liquor became subject to federal duty and excise taxes upon entering the domestic area but not when it entered the international area of the warehouse.

[38] Air Canada challenged the LCBO domestic mark-up as an *ultra vires* tax. Iacobucci, J., for the Court, held that the LCBO had jurisdiction to levy the mark-up on liquor purchased abroad. The liquor did not have to be in the physical possession of the LCBO for ownership to pass.

[39] In *Air Canada*, Iacobucci J. states the following about the mark-up:

> [7] … A markup is a margin of profit that the LCBO adds to the value of the alcohol that it sells. In the case of the alcohol held in bond at Pearson, the LCBO takes its markup not on the basis of any actual sale to the airlines, but on the strength of the *IILA* [*Importation of Intoxicating Liquor Act*, R.S.C. 1985, c. I-3], which, in its view, makes it the owner of all alcohol imported into Ontario, and hence entitles it to extract a profit as the price of conveying the liquor back into the airlines' possession.

[40] The Supreme Court upheld the jurisdiction of the LCBO to charge a mark-up on liquor that is transferred out of the bonded area of the customs warehouse at Pearson Airport for use on domestic flights in Canada.

[41] The *Air Canada* case is similar to this one – the liquor did not have to be in the hands of the LCBO for the Court to determine that ownership had passed. In the present case, Unfiltered brews beer on its own site, but must rely on the NSLC's authorization and deemed right of first sale of the product to the NSLC to be permitted to sell liquor at its store.

[42] The Manitoba courts in *DFS Ventures Inc. v. Manitoba (Liquor Control Commission)*, 2001 MBQB 245, affirmed at 2003 MBCA 33 (leave to appeal refused [2003] S.C.C.A. No. 209), have also approved the provincial power to impose a mark-up on liquor purchased by a duty-free store from the provincial liquor commission for the purpose of creating revenue. In DFS, the applications judge cited *Air Canada* as authority for the validity of a provincial liquor commission's mark-up on liquor purchased within the province as a proprietary charge. The Queen's Bench decision held:

> [60] Once again the *Air Canada* case is instructive and particularly the following words of Iacobucci J:

> … A markup is a margin of profit that the LCBO adds to the value of the alcohol that it sells. … [p. 588, para. 7]
>
> … it is entirely within a province's competence to charge a markup on liquor purchased within its boundaries. [p. 587, para. 2].
>
> [61] DFS argues that the Supreme Court of Canada did not address specifically the tax issues raised by Questions #4 and #5. That is true. But I find the words of Iacobucci J. persuasive nonetheless, … The markups are proprietary charges and are neither direct nor indirect taxes. If the Supreme Court of Canada had no problem in finding that the LCBO was entitled to make a profit on liquor that it had not supplied, I conclude that it is entirely within the competence of the MLCC to charge a markup on liquor that it sold to DFS.
>
> [Emphasis added]

[43] The Manitoba Court of Appeal affirmed the Queen's Bench decision. In its decision the Court of Appeal stated:

> [35] The Province has authority to control all aspects of the purchase and sale of liquor entirely within the province. In exercising that authority, the Province enacted s. 17(6) of the *LCA* pursuant to which the MLCC has the authority to appoint a person to operate a duty free liquor store on "such terms and conditions as the [MLCC] may prescribe." It is by virtue of this section that the exclusivity and the markup are prescribed by the MLCC.

[44] The Court of Appeal continues referencing Justice Iacobucci's decision in *Air Canada*, stating:

> [41] In the course of his judgment sustaining the provincial position, Iacobucci J. made it clear that, with the single exception of liquor being transported "through" a province, the provinces have absolute constitutional authority to legislate regarding liquor. …
>
> [42] Iacobucci J. referred (at para. 44) to the fact that "Parliament enacted the *IILA* to assist the provinces in their efforts to control the traffic in liquor." And (at para. 45), "[a]lmost by definition the provinces have power over any alcohol for the possession of which they can require a permit."
>
> [43] Consistent therewith, he found the powers of the Province to be extensive, and broad, and (at para. 56) "[i]t would not be *ultra vires* the Legislature of Ontario to require a licence for the keeping of liquor in Ontario for whatever purpose." He found that the trial judge was wrong in his conclusion that the Province could not require a licence for the keeping of liquor in Ontario for consumption elsewhere.
>
> [44] Iacobucci J. emphasized the virtually unlimited authority of the provinces in furtherance of their liquor monopoly (at para. 57):

> … [T]he only relevant authority that the provinces do not possess as a matter of constitutional law is the power to prohibit the carrying of alcohol *through* provincial territory. It is only this kind of importation, which does not involve the manufacture, keeping, sale, purchase, or use of liquor, that the provinces are not competent to prohibit on their own.
>
> [Emphasis added]

[45] The situation in Nova Scotia is essentially the same as it is in Manitoba. The province through the NSLC controls all aspects of the purchase and sale of liquor within the province.

[46] In *Toronto Distillery Co. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONSC 2202, a small distillery obtained from the Ontario Alcohol and Gaming Commission a Manufacturer's Licence and Retail Store Authorization to sell its spirits to the public on-site on condition that it enter into a contract with the LCBO. The LCBO's contract was non-negotiable and required the distiller to first sell its spirits to the LCBO before putting the spirits up for sale in the distillery store. The distillery would then sell the spirits to the public as the LCBO's agent.

[47] The contract also granted the LCBO the power to set mark-up and commission rates on the spirits sold.

[48] Although the scheme in *Toronto Distillery* is through an imposed contract, it is in substance the same as the Nova Scotia scheme.

[49] In 2015, the distiller brought an application for a declaration that the LCBO's mark-up was outside its lawful authority. It argued, as Unfiltered does here, it was an unconstitutional tax under ss. 53 and 90 of the *Constitution Act, 1867*.

[50] In *Toronto Distillery*, the application judge dismissed the application. He found the levy escaped classification as a tax because it was a proprietary charge, holding:

> [28] The applicant does not quarrel with the principle that a levy may avoid being found a tax, under the *Lawson* principles, if it constitutes a proprietary charge. The applicant claims, however, that the respondents cannot avail themselves of this exception as spirits cannot be defined as public property, such as natural resources, or a product generated by public agencies, such as electricity. The applicant argues that the only way in which spirits could fall within the definition of proprietary charge is if the LCBO had set up a public tendering

> system, paying for the spirits itself, physically taking possession of them after purchase, and selling them through its own distribution network.
>
> [29] I disagree: Professor Hogg's definition specifies that liquor may be subject to such a charge once it is supplied by the province commercially. It is unclear to me 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. The fact that the product remains on the applicant's premises after distillation does not change the fact that the spirits have become the property of the LCBO.
>
> [30] The applicant, in its factum, states that "absent the LCBO Contract these spirits are solely the applicant's property" thereby denying the LCBO any proprietorial right. The problem with this argument is that the contract cannot be "absented". As set out in the preceding paragraphs, the sale of liquor has long been the subject of regulations that prohibit its sale subject to a number of exceptions. One of those exceptions is the granting of a licence and authorisation on the condition that any spirits produced are sold on production to the LCBO. The applicant's ability to sell that product derives from the authorisation and its contractual terms. As a result, there is no doubt that the LCBO is the owner and commercial supplier of the spirits in question.
>
> [Emphasis added]

[51] The Ontario Court of Appeal affirmed the application judge's decision in *Toronto Distillery Co. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONCA 960. In doing so, it rejected the narrow interpretation urged by Toronto Distillery to give a narrow definition to "commercial context":

> [5] The appellant seeks to avoid this result by urging a particular interpretation of the distinction between proprietary charges and taxes that Rothstein J. made in *620 Connaught Ltd.* Rothstein J. said at para. 49:
>
>> I agree that proprietary charges for goods and services supplied in a commercial context are distinct from either regulatory charges or taxes and may be determined by market forces.
>
> [6] The appellant observes that the amount of managerial discretion in commercial contexts falls along a spectrum and advocated interpreting "commercial context" in Rothstein J.'s distinction to require the exercise of active management discretion on a transaction by transaction basis. Such an interpretation is required, he submits, to give meaning to the protection that s. 53 of the *Constitution Act* affords the public from indirect taxation.

[52] The reference to a "commercial context" comes from the Supreme Court of Canada's decision in *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7. Although in that case the Court determined that the fees paid by the hotel,

restaurant and bar owners serving alcohol in Jasper National Park were regulatory charges, Rothstein, J., writing for the Court, referred to proprietary charges in the course of his judgment:

> [49] …I agree that proprietary charges for goods and services supplied in a commercial context are distinct from either regulatory charges or taxes and may be determined by market forces. As explained by Professor Hogg in *Constitutional Law of Canada*, (5th ed. 2007) at pp. 870-71:
>
>> ... [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.
>
> [Emphasis added]

[53] Similarly, by deeming the beer produced by Unfiltered to have been purchased from the NSLC, the NSLC is supplying it in a "commercial context".

[54] The Alberta Courts have also weighed in on this issue in *Steam Whistle Brewing Inc. v. Alberta Gaming and Liquor Commission*, 2018 ABQB 476.

[55] In *Steam Whistle*, the applicant took positions similar, if not identical, to those taken by Unfiltered. The applicant brewer challenged the mark-up applied by the Alberta Gaming and Liquor Commission as an unconstitutional tax. In determining the application the court reviewed and relied on *Air Canada*, *Toronto Distillery*, *DFS* and Justice McDougall's decision in *Unfiltered Brewing* in reaching the conclusion that the mark-up in question was, in pith and substance, a proprietary charge.

[56] Recently, the Supreme Court of Canada in the case of *R. v. Comeau*, 2018 SCC 15, reiterated that the provinces are permitted to enact schemes to manage the supply and demand for liquor within their borders:

> [124] The objective of the New Brunswick scheme is not to restrict trade across a provincial boundary, but to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick. It is common ground that provinces are able to enact schemes to manage the supply of and demand for liquor within their borders: *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, at para. 55, citing *R. v. Gautreau* (1978), 21 N.B.R. (2d) 701 (S.C. (App. Div.)). Governments manage liquor prices, storage and distribution with a view to diverse internal policy objectives. Although the Crown conceded

> that New Brunswick generates revenue from its legislative scheme, this is not the primary purpose of the scheme, but an offshoot of it. Finally, s. 134(b) is not divorced from the objective of the larger scheme. It plainly serves New Brunswick's choice to control the supply and use of liquor within the province.
>
> [Emphasis added]

[57] Unfiltered argues that *Air Canada*, *Steam Whistle*, *DFS* and *Toronto Distillery* are all distinguishable from the present case because of the various schemes that were put in place by the provinces in those cases. Although there are distinguishing characteristics in those cases, there is one common thread that runs through them; the provinces were enacting schemes to manage the supply and demand for liquor within their provinces. The reality is simply this: no one can sell liquor in Nova Scotia without complying with the procedures put in place by the *Act*, Regulations and Policies of the NSLC.

[58] Unfiltered argues that it receives nothing for the mark-up which it pays to the NSLC. With respect, I disagree. Unfiltered has the ability to sell beer in this province. Without the licenses and permits issued by the NSLC and compliance with them it could not do so.

[59] The fact that Unfiltered was obligated to agree to the NSLC's terms to obtain authority to manufacture and sell beer does not affect the ability of the NSLC to impose the mark-up. In concert with the legislative regime, the NSLC Manufacturer's Policy establishes liquor sold at the Manufacturer's Retail Store shall be deemed to have been first purchased from the NSLC.

[60] The application judge did not err in finding that the mark-up was a proprietary charge. Had he found it was not a proprietary charge his decision would have been in conflict with a significant body of authoritative case law that has developed over the years.

[61] I would dismiss this ground of appeal.

Contractual Terms

[62] The appellant also raised the issue that if it were found that the mark-up was not a proprietary charge, did Unfiltered nevertheless agree to pay the mark-up to NSLC by contract?

[63] It is not necessary to address this issue in light of my conclusion it was a proprietary charge.

Conclusion

[64] The appeal is dismissed. The parties agree that the successful party should be entitled to $1,000 in costs. As a result, I would award costs to the Attorney General in the amount of $1,000 inclusive of disbursements.

Farrar, J.A.

Concurred in:

Van den Eynden, J.A.

Derrick, J.A.