SUPREME COURT OF NOVA SCOTIA
Citation: Unfiltered Brewing Inc. v. Nova Scotia Liquor Corporation, 2018 NSSC 14

Date: 20180123
Docket: Hfx No. 454423
Registry: Halifax

Between:

Unfiltered Brewing Incorporated

Applicant

v.

Nova Scotia Liquor Corporation and the Attorney General of Nova Scotia

Respondents

D E C I S I O N

Judge: The Honourable Justice Glen G. McDougall

Heard: January 16 and March 7, 2017 in Halifax, Nova Scotia

Written Decision: January 23, 2018

Counsel: Richard Norman, for the Applicant
Edward Gores and Debbie Brown, for the Respondents

By the Court:

INTRODUCTION

[1] This decision concerns the validity of a retail mark-up collected by a provincial liquor regulator on beer sold and given away by a microbrewery on its own premises.

[2] The Nova Scotia Liquor Corporation (NSLC, or the Corporation) 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 (the *Act*, or the *LCA*). The applicant, Unfiltered Brewing (Unfiltered), is a microbrewery in Halifax. It sells its beer to the public under a permit from the NSLC from its own premises. Unfiltered's beer is not sold at NSLC stores. NSLC policy deems microbreweries' beer to have been purchased first by the NSLC then sold to customers.

[3] As a condition of the permit allowing it to sell its own beer on-site, the NSLC requires Unfiltered to remit a monthly "retail sales mark-up allocation" (the RSMA, or the remittance) on beer it sells, samples, or gives away. When the application was commenced, the remittance was set at fifty cents per litre. It has since been reduced. Unfiltered says the RSMA is a tax and therefore *ultra vires* the NSLC. The respondents maintain that the NSLC can lawfully impose mark-ups and charges such as the remittance. The sale or manufacture of alcoholic beverages is prohibited except as permitted under the *Act*. The NSLC has complete control over the manner of sale. The respondents also point out that Unfiltered was aware of its obligations when it received its permit. They say the RSMA is valid either as a regulatory or a proprietary charge.

[4] In accordance with s. 30 of the *Act*, Unfiltered obtained the Attorney General's consent to bring this action against the NSLC. Unfiltered also provided notice pursuant to the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89.

[5] Unfiltered filed two affidavits by Allison Kearns, dated December 9, 2016 and January 9, 2017. The respondents filed two affidavits of Heather MacDougall, dated January 3 and February 22, 2017.

STATUTORY AND REGULATORY BACKGROUND

[6] The NSLC is governed by the *Liquor Control Act* and its attendant Regulations. The Corporation's policy-making ability appears in the Nova Scotia Liquor Corporation Regulations, N.S. Reg. 22/91, at s. 39, which permits it to "prescribe policy guidelines setting out details and procedures required for administration and operations carried out under the *Act* and these regulations."

[7] Subsection 50(4) of the Regulations requires the NSLC to "enter into a contract with a manufacturer to which a permit is issued respecting operation of the store and containing terms and conditions reflecting the spirit and intent of the Corporation's Manufacturers' Retail Stores Policy and the specific provisions thereof." Since the commencement of this application, the Regulations have been amended, so that the prescribed prices set by the NSLC "include, regardless of whether expressly stated, a retail mark-up sales allocation or similar charge, as determined by the Corporation": Regulations, s. 13(8). Previously there was no reference in either the *Act* or the Regulations to such a mark-up.

[8] The policies relevant to the RSMA are the May 2015 "Producer Giveaway Policy" and the "Manufacturer's Policy." The Producer Giveaway Policy requires microbrewers to pay a remittance per litre of beer sold, sampled, or given away but does not specify the amount or how it is calculated and does not define the term "retail sales mark-up allocation." The Manufacturers' Policy provides, *inter alia*, that liquor sold in a manufacturer's retail store "shall be deemed to have been first purchased from the NSLC" and that "[r]equirements for remittance and reporting of sales to the NSLC shall be provided by the NSLC to the Manufacturer … and the Manufacturer agrees to comply with such requirements as a condition of the Permit" (s. 6.1.16.1).

TAXATION POWERS

[9] Unfiltered says the RSMA is in pith and substance a tax and as such is beyond the powers of the NSLC to impose. The respondents say it is a valid regulatory or proprietary charge imposed by NSLC pursuant to its legislative mandate to control alcohol.

[10] Section 53 of *The Constitution Act*, 1867 (U.K.), 30 & 31 Victoria, c. 3, states that "[b]ills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons." Section 90 extends the same requirement to the provincial legislatures. Section 92 gives the

provincial legislatures exclusive jurisdiction over "[d]irect Taxation within the Province in order to the raising of a Revenue for Provincial Purposes." Accordingly, only the legislature can impose taxes. Major, J. set out the rationale underlying s. 53 of the *Constitution Act* 1867 in *Re Eurig Estate*, [1998] 2 S.C.R. 565, [1998] S.C.J. No. 72:

> 30 … The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.
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> …
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> 32 The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation… [Emphasis added.]

[11] This brings me to the question of how a tax is to be distinguished from other charges and levies of money imposed by public authorities. The Supreme Court of Canada identified the elements of a tax in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357. The *Lawson* test was summarized by Major, J. in *Re Eurig Estate*:

> 15 Whether a levy is a tax or a fee was considered in Lawson, supra. Duff J. for the majority concluded that the levy in question was a tax because it was: (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.
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> 16 The first, third and fourth criteria pertain to the nature of the levy, while the second criterion involves a consideration of the manner in which the levy was imposed… [Emphasis added.]

[12] A tax cannot arise incidentally pursuant to delegated legislation. A minister or agency cannot impose a tax under the guise of a regulatory charge or proprietary fee. Where a challenge is raised to such a levy, the issue is whether it is, in pith and substance, a tax, a regulatory fee, or a proprietary charge. Gonthier, J. described the concept of "pith and substance" in *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, [1999] S.C.J. No. 38:

> 30 In all cases, a court should identify the primary aspect of the impugned levy... Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. [Emphasis added.]

[13] Accordingly, the "pith and substance of a levy is its dominant or most important characteristic. The dominant or most important characteristics are to be distinguished from its incidental features": *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] S.C.J. No. 7, at para. 16. The law's "primary purpose", as distinguished from its "incidental effects", will be determinative: *620 Connaught* at para. 17.

THE LAWSON ANALYSIS FOR THE ELEMENTS OF A TAX

[14] The first step of the analysis then is the *Lawson* test for the attributes of a tax. At this stage the court must ask whether the measure in question is (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.

(1) Enforceability by law

[15] In *Eurig*, the majority held that the "practical compulsion" of payment made a levy enforceable by law (para. 17). In *620 Connaught* a license fee imposed on hotels restaurants and bars to allow them to sell alcohol was enforceable by law (para. 29). Unfiltered must pay the remittance before it can sell beer from its retail store. For a brewer that needs a license to sell its beer, this amounts to a practical compulsion. The respondents do not dispute this. The remittance is enforceable by law.

(2) Authority of the Legislature

[16] The two policies that underlie the remittance are made pursuant to s. 42 of the Regulations which are, in turn, made under the authority of the *Act* which also designates the NSLC an agent of the Crown (see ss. 4(2) and 42 of the *Act*). Unfiltered says this establishes that the remittance is imposed under the authority of the Legislature. The respondents agree. I am satisfied that the remittance is imposed under the Legislature's authority.

(3) Levied by a Public Body

[17] The remittance is levied by NSLC, an agent of the Crown. The respondents agree, and I find, that the NSLC is a public body.

(4) Intended for a Public Purpose

[18] NSLC's profits are deposited in the province's general revenue fund which is "the aggregate of all public money that is on deposit to the credit of the Minister [of Finance and Treasury Board]": *Finance Act*, S.N.S. 2010, c. 2, s. 2(n). Unfiltered maintains that the "public purpose" criteria is established by the fact that the remittance becomes fungible provincial revenue. The respondents do not dispute this. I am satisfied that the remittance is collected for a public purpose.

[19] Accordingly, based on the four Lawson factors, the remittance meets the criteria for a tax. It will not be a tax if it is in pith and substance a regulatory or proprietary charge.

REGULATORY CHARGES

[20] In *Westbank* the court added a fifth consideration to the *Lawson* analysis: whether the levy in question was connected to a regulatory scheme.

[21] In *620 Connaught,* Parks Canada imposed a license fee for the right to sell alcohol in hotels, restaurants, and bars in Jasper National Park. The appellants owned most of the establishments to which the charge applied. The fee included a base amount plus a percentage of gross alcohol sales. Parks Canada attributed the revenues back to the park where they were generated, although the fees did not cover the cost of operating the park. The fee had the attributes of a tax (para. 29). The Supreme Court of Canada went on to hold that the fee was a regulatory charge within the delegated authority of Minister responsible. In describing the general characteristics of regulatory charges in *620 Connaught*, Rothstein, J. observed, at para. 20, that such charges

> are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour...

[22] Gonthier, J. set out the analysis for determining whether a charge is regulatory in *Westbank*. He described a two-step analysis. The first step is to determine whether a relevant regulatory scheme exists. If so, the second step is to determine whether there is a relationship between the charge and the regulatory scheme: *620 Connaught* at para. 27. This means that there must be "a relevant relationship … between the fees paid by the persons being regulated and the regulatory scheme caused by those persons or from which those persons receive a benefit": *620 Connaught* at para. 45. In summary, Gonthier, J. said, in *Westbank*:

> 43 In order to determine whether the impugned charge is a "tax" or a "regulatory charge" for the purposes of s. 125 [of the *Constitution Act*, 1867] , several key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.
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> 44 As is evident from the fifth inquiry described above, the Court must identify the presence of a regulatory scheme in order to find a "regulatory charge". To find a regulatory scheme, a court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed 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 person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. This list is not exhaustive. In order for a charge to be "connected" or "adhesive" to this regulatory scheme, the court must establish a relationship between the charge and the scheme itself. This 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 behaviour.

Rothstein, J. summarized the *Lawson*-*Westbank* analysis in *620 Connaught*:

> 28 In summary, if there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme itself under step two, the pith and substance of the levy will be a regulatory charge and not a tax. In other words, the dominant features of the levy will be its regulatory characteristics. Therefore, the questions to ask are: (1) Have the appellants demonstrated that the levy has the attributes of a tax? and (2) Has the government demonstrated that the levy is connected to a regulatory scheme? To answer the first question, one must look to the indicia established in *Lawson*. To answer the second question, one must proceed with the two-step analysis in *Westbank*.

[23] This is the framework I will apply in considering whether the remittance is a regulatory charge, as the respondents submit. As noted earlier, the charge is conceded by the respondents to have the four attributes of a tax. This leaves the question of whether it is connected to a regulatory scheme.

(1) a complete, complex and detailed code of regulation

[24] In *Westbank* the court said:

> 5 The first factor to consider is the nature of the purported regulation itself. Regulatory schemes are usually characterized by their complexity and detail. In *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, at p. 409, the regulatory scheme there was described as a "complete and detailed code for the regulation of the gravel and soil extraction and removal trade". In *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, at para. 28, the charge was described as part of a "complex regulatory framework governing land development". And, in *General Motors of Canada Ltd. v. City National Leasing*, *supra*, at p. 676, the *Combines Investigation Act* was described as "a complex scheme of economic regulation".

[25] In *620 Connaught*, the court held that there was a "complete, complex and detailed code of regulation" on the following grounds:

> 30 … Jasper National Park exists and operates under an overarching statutory scheme which includes the *National Parks Act* and the *Parks Agency Act*, together with the regulations. Some of these regulations apply only to specific parks; there are even regulations applying specifically to the town of Jasper. However, the majority of the regulations relate to the management of all national parks. These regulations range from wildlife management to traffic provisions. Read in conjunction with the two *Acts*, these regulations establish how services, rights and privileges are obtained, what is prohibited within the parks and to whom authority is delegated. Together, these statutes and the regulations form a complete and detailed scheme of how Jasper National Park should operate. Therefore, the first of the regulatory scheme criteria is satisfied.

Unfiltered says regulation is not a statutory objective of the NSLC and that the remittance is not imposed by a regulatory code. It is true that until the Regulations were amended in January 2017, there was no regulatory basis for the RSMA. Now the Regulations stipulate that "a retail mark-up sales allocation or similar charge as

determined by the Corporation" is included in prices for liquor sold in government stores, agency stores, and other stores: ss. 13(7) and (8). There is still no reference in the *Act*, Regulations, or any policy to the amount of the remittance. By contrast, in *620 Connaught*, for instance, the fee was expressly contemplated in the statutory scheme.

[26] The RSMA arises in the context of the *Liquor Control Act* and its associated Regulations. The objects of the NSLC are set out at s 4(3) of the *Act*:

> (3) The objects of the Corporation are the
>
> (a) promotion of social objectives regarding responsible drinking;
>
> (b) promotion of industrial or economic objectives regarding the beverage alcohol industry in the Province;
>
> (c) attainment of suitable financial revenues to government; and
>
> (d) attainment of acceptable levels of customer service.

Unfiltered is correct to observe that the "objects" clause does not refer to regulation, as such. However, the duties and powers of the Corporation, as set out at s. 12, are expansive. In addition to buying, importing, storing, and selling alcohol as part of its own retail operations, the Corporation's powers and duties include the following:

> (b) control the possession, sale, transportation and delivery of liquor in accordance with this Act and the regulations;
>
> (c) determine, subject to the approval of the Governor in Council, the municipalities within which liquor may be sold;
>
> (d) make provision for the maintenance or operation of warehouses for beer or liquor and control or regulate the keeping in and delivery to or from any such warehouses;
>
> ….
>
> (j) appoint officials to issue and grant licenses and permits under this Act;
>
> (k) prescribe the days and hours when Government stores or agency stores or any of them may be open;
>
> (l) control and supervise the advertising, promotion and marketing methods and procedures of manufacturers, distributors, agents and their representatives;
>
> …

> (n) issue permits in accordance with this Act and the regulations;
>
> (o) determine the nature, form and capacity of all packages to be used for containing liquor to be kept or sold and their use;
>
> (p) determine, subject to the approval of the Governor in Council, the classes of permits and the terms and conditions thereof;
>
> (q) prescribe regulations for governing the possession and use of liquor, beer and wine by liquor, beer and wine societies;
>
> (r) provide for sampling and tasting rooms and to determine terms and conditions upon which liquor may be consumed therein;
>
> (s) examine the books of a brewer, distiller, vintner or other person required to make a return under this Act for the purpose of verifying the accuracy of the return…

[27] I am satisfied that the *Liquor Control Act* and Regulations constitute a "complete, complex and detailed code of regulation" as that term is used in *Westbank* and *620 Connaught*. The question at this stage is not whether the RSMA itself is rooted in the regulatory scheme, but whether such a scheme exists. Clearly the *Act* extends to all aspects of the possession and sale of liquor in the Province including the issuance of permits.

(2) a regulatory purpose which seeks to affect some behavior

[28] In *Westbank* the court said:

> 26 A regulatory scheme will have a defined regulatory purpose. A purpose statement contained in the legislation may provide assistance to the court in this regard. *Professor Magnet, supra,* at p. 459, correctly explains that a regulatory scheme usually "delineates certain required or prohibited conduct". For example, in *Re Exported Natural Gas Tax, supra*, at p. 1075, the levy there was held to not be a regulatory charge because "the tax belies any purpose of modifying or directing the allocation of gas to particular markets. Nor does the tax purport to regulate who distributes gas, how the distribution may occur, or where the transactions may occur". In sum, a regulatory scheme must "regulate" in some specific way and for some specific purpose.

In *620 Connaught* the court said the following about "regulatory purpose":

> 31 The second criterion is whether the operation of Jasper National Park is a regulatory scheme which is aimed at affecting individuals' behaviour. The purpose of national parks is set out in s. 4(1) of the *National Parks Act*:

> > The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this *Act* and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.
>
> The operation of Jasper National Park must be in accordance with this principle. The object of operating the park for the benefit, education and enjoyment of the people of Canada is intended to encourage the use of the park by Canadians, while preserving the integrity of the park for the future. Regulation of the behaviour of current visitors to and businesses in the park so that they do not use the park in a manner which would impair enjoyment of the park by present and future generations helps to achieve these goals. The second criterion is satisfied.

[29] NSLC says one of the purposes of the remittance is to monitor beer production. Unfiltered says the reason for this is unclear and it is further unclear why a fee would be attached to its reports of the amounts sold, given away, and sampled. The purpose of the remittance, according to Unfiltered, is simply to raise revenue for the provincial treasury. To the extent that there are regulatory codes governing beer retailing, they have nothing to do with the remittance.

[30] The *Liquor Control Act* has as one of its objects the "attainment of suitable financial revenues to government": s. 4(2)(c). I can see no basis on which this charge is designed to affect individual behavior, however. It functions as no more than a source of revenue for the general revenues of the provincial government.

(3) the presence of actual or properly estimated costs of the regulation

[31] In *Westbank* the court said:

> 27 Regulatory schemes usually involve expenditures of funds on costs which are either known, or properly estimated. In the indirect tax cases, evidence was provided demonstrating how the revenues would be used and how the regulatory costs of the scheme were estimated. In *Ontario Home Builders', supra*, at para. 55, the charge levied was "meticulous in its detail" and "clearly operate[d] so as to limit recoupment to the actual costs". In *Allard, supra*, evidence was led by city officials demonstrating the actual costs of annual road repair, based on estimates from similar repairs in the municipality. In both cases, there was a fairly close "nexus" between the estimated costs and the revenues raised through the regulatory scheme.

[32] The revenues from the remittance do not pay regulatory costs. They go into the province's general revenue fund. The respondents do not suggest that the RSMA defrays any regulatory costs.

(4) Relationship between the person regulated and the regulation

[33] The last criterion is whether there is "a relationship between the person being regulated and the regulation where the person being regulated either benefits from, or causes the need for, the regulation." In *Westbank* the court said:

> 28 Finally, the individual subject to the regulatory charge will usually either benefit from the regulation, or cause the need for the regulation: *Magnet*, *supra*, at p. 459. In *Allard*, *supra*, the gravel trucks caused the need for the repair to the roads; in *Ontario Home Builders'*, *supra*, the developers and the new home-owners caused the need for the new schools. In both cases the individuals being charged also benefited from the regulation.

[34] In *620 Connaught, supra,* the first three *Westbank* elements were met. As to whether there was a relationship between the fee and the regulated person, the court said:

> 34 The fourth criterion is the existence of a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation or benefits from it. In *Allard*, this Court recognized that companies that removed gravel benefited from the roads that were funded from the fees collected for the removal of gravel. In *Ontario Home Builders'*, the majority found that the benefit conferred on construction contractors was the creation of residential developments with adequate amenities. The same approach is applicable here. The appellants benefit from the existence of a well-maintained national park. The appellants' revenues are linked to the number of visitors coming each year to Jasper National Park. The more the park attracts visitors, the greater the potential volume of the appellants' business. Also, regulations limiting development and thus the number of businesses within the park allow the appellants to participate in a restricted market in which they are not subject to unlimited competition. These factors demonstrate that the appellants benefit from the regulation of Jasper National Park.
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> 35 However, where a regulatory scheme is very broad, the scheme may not be sufficiently related to the persons being regulated either because the regulation does not benefit those persons, or because those persons do not cause the need for the regulation, except in a very indirect manner. In such a case, the fees may be found to be a tax. Evans J.A. recognized the need for a sufficient relationship in his reasons, at paras. 44-45:

> The fees in the present case were not attributed to the operations of the Department of Canadian Heritage at large nor even, more specifically, to the administration of the entire system of national parks. The licence fees paid by the appellants were attributed to the operating budget of the very park, Jasper, in which the appellants conducted their businesses. Any aspect of the operation of Jasper National Park which makes it more attractive to visitors, including on-site heritage presentations, visitor services and through highways, increases the appellants' potential customer base.
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> In contrast, the appellants obtain only a very indirect benefit at best from the operation of other national parks and from the central administration of the responsible Department and the Parks Canada Agency. In my opinion, the analogies relied on by the appellants would be more persuasive if the Crown were arguing that the relevant regulatory scheme was the operation and administration of the national parks system as a whole.
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> 36 The safeguard against an insufficient relationship can be found in this *Westbank* criterion: "[The] relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation." Here, there is a close relationship between the appellants' businesses and the regulation of Jasper National Park.

As such, Rothstein J. held, a relevant regulatory scheme existed.

[35] Unfiltered says it gets no benefit from the RSMA; as "an unlegislated tax-grab," the applicant argues, the remittance "is pure detriment" and it "makes running a small business in Nova Scotia that much more difficult." I agree that is difficult to see how Unfiltered either benefits from, or causes a necessity for, the remittance, which has no obvious purpose beyond raising funds for the provincial government's general revenues. The only possible benefit to Unfiltered is that by agreeing to pay the RSMA, it is permitted to brew and sell its beer. In other words, paying the fee allows Unfiltered to receive the permits it needs to conduct its business in a field from which the regulator, NSLC, has the power to bar it. I question whether this is what the Supreme Court of Canada means by a "benefit." This is not a situation like *620 Connaught*, where the fees collected were reinvested in the park, to the appellants' benefit, with the additional benefit of giving the appellants access to a market in which competition was restricted. The RSMA is a burden to the applicant and the applicant does not make it necessary, other than in an indirect way by applying for NSLC permits. I am not persuaded that there is a relationship between the remittance and Unfiltered where Unfiltered either causes the need for the remittance or benefits from it.

[36] On a weighing of the foregoing factors, I am not convinced that the RSMA constitutes a regulatory scheme pursuant to the first branch of the *Westbank* analysis. In case I am wrong, however, I will consider the second stage: whether there is "a relationship between the charge and the scheme itself": *Westbank* at para. 44.

CONNECTION TO A REGULATORY SCHEME

[37] Unfiltered says there is no relationship between the remittance and the regulatory scheme. On this issue, the court must consider whether "the revenues are tied to the costs of the regulatory scheme, or [whether] the charges themselves have a regulatory purpose, such as the regulation of certain behavior" (*620 Connaught* at para. 27, citing *Westbank* at para. 44). In *620 Connaught*, Rothstein, J., having found that a relevant regulatory scheme existed, said:

> 38 In order for a regulatory charge intended to defray the costs of a regulatory scheme to be "connected", the fee revenue must be tied to the costs of the regulatory scheme. The trial judge, at para. 16, found that "[i]n general, the imposition of fees is designed to offset the costs of operating and administering each of Canada's national parks", and the policy of the government in 2003/2004 was to attribute revenue generated in a park back to that park…
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> 39 Section 23 of the *Parks Agency Act* specifies that the Minister cannot set a user fee for services or facilities that is higher than the cost to the government of providing them. On the other hand, s. 24 of the *Act* pertaining to regulatory fees for rights or privileges granted by the government does not contain such a limit. Nonetheless, where fees generated under a regulatory scheme are to be used to defray the costs of the scheme, as in this case, the fee revenue generated cannot exceed the costs of the scheme. In referring to a comprehensive and integrated regulatory scheme in *Ontario Homes Builders'*, Iacobucci J. states, at para. 85:
>
> > The carefully designed mechanics of the scheme ensure that the power of indirect taxation will not extend beyond the regulatory costs; this is crucial in order to avoid rendering s. 92(2) of the *Constitution Act*, 1867 meaningless.
> >
> > In this case, it is equally necessary that the fee revenue not exceed the regulatory costs in order to avoid rendering s. 53 of the *Constitution Act*, 1867 meaningless.
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> 40 However, as stated in *Allard*, at pp. 411-12, the government needs to be given some reasonable leeway with respect to the limit on fee revenue generation. While a significant or systematic surplus above the cost of the regulatory scheme would be inconsistent with a regulatory charge and would be a strong indication that the levy was in pith and substance a tax, a small or sporadic surplus would

> not, as long as there was a reasonable attempt to match the revenues from the fees with the cost associated with the regulatory scheme.

[38] Concluding that "the fee revenues from Jasper … likely did not exceed, and certainly did not significantly exceed, the cost of the regulatory scheme", Rothstein, J. held that the fees were "connected to the regulatory scheme governing the park" (para. 44).

[39] In this case, the respondents agree that the remittance does not defray regulatory costs. They say this does not mean it cannot be a regulatory charge. They argue that the remittance is a valid capturing of "economic rent" by a regulatory authority without a need to defray actual costs. The remittance, they say, is "part of the regulatory scheme controlling the sale and distribution of liquor in Nova Scotia" and paying the remittance allows Unfiltered to sell beer on its premises which it would not otherwise be able to do. (I have already rejected the claim that Unfiltered receives a benefit from the remittance).

[40] The respondents rely on *Canadian Association of Broadcasters v. Canada*, 2008 FCA 157, [2008] F.C.J. No. 672, where the respondent broadcasters had challenged certain fees imposed by the Canadian Radio-television and Telecommunications Commission (CRTC). The regulatory and administrative costs were defrayed by "Part I fees", which were based on actual regulatory expenses. The broadcasters objected to the "Part II fee", which was based on 1.365 percent of gross revenues above an exemption limit (paras. 19-21). The trial judge held that the Part II fee was a tax. There was no connection between the fee and any actual expenses and the judge rejected the argument that the fee could be justified as payment for the privilege of being permitted to undertake commercial broadcasting (paras. 25-34). The Federal Court of Appeal, however, held that the Part II fee was a regulatory charge. Reviewing the *Westbank* analysis, Ryer, J.A. said:

> 43 If a regulatory scheme is found to exist, Gonthier J. characterized the second step in his analysis in the following terms at paragraph 44:
>
> > In order for a charge to be "connected" or "adhesive" to this regulatory scheme, the court must establish a relationship between the charge and the scheme itself. This 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 behaviour.

> This passage informs of two situations in which a connection between a charge and a regulatory scheme will be shown to exist. The first situation is one in which the revenues generated by the charge are "tied to" the costs of the regulatory regime. The second is one in which the charges have a regulatory purpose.

[41] Ryer, J.A. held that the trial judge (whose decision pre-dated the Supreme Court of Canada decision in *620 Connaught*) had erred by interpreting the fifth *Westbank* element as requiring "that a particular levy will be a regulatory charge if there is a reasonable connection between the quantum of the levy and either the cost of a service provided or of the regulatory scheme in which the levy arises" (para. 46). Ryer, J.A. relied on the comments in *Westbank* about "regulatory purpose" as an alternative basis for a nexus between a levy and a regulatory scheme where "the quantum of the revenues raised … exceeds the costs of the regulatory scheme in which that levy arises" (para. 49).

[42] Ryer, J.A. held that where there is no "demonstrable effort to match in advance such revenues to the total costs of the regulatory scheme", this did not necessarily mean that the revenues were not tied to the regulatory costs, "provided that the amount of such revenues does not exceed the amount of such regulatory costs" (paras 67-70). In the absence of a "direct linkage" between the amount collected and the regulatory costs, Ryer, J.A. considered whether there was a "soft linkage." Finding that even when combined with other revenue, the fees were much less than the total cost of the regulatory scheme, Ryer, J.A. held that the Part II fees were "less than the costs of the Canadian broadcasting system … and as such, those fees may be said to be connected to that regulatory scheme…" (para. 85). The Part II fees were therefore in pith and substance a regulatory charge.

[43] Ryer, J.A. went on, however, to address an alternative basis for classifying the Part II fees as a regulatory charge. The Crown argued that the fees were "otherwise connected to a regulatory scheme," as referenced by Gonthier, J. at para. 44 of *Westbank*. The Crown maintained, at para. 89, that the fees were

> payment for the grant of the privilege of operating in the Canadian broadcasting system that is partially protected from full-blown competition by the Commission through its licensing function, an integral component of the regulatory scheme embodied in the *Act*. By limiting the number of licences that are issued, participation in the Canadian broadcasting system is correspondingly limited. Thus, the receipt of a licence constitutes a material benefit to each entity to whom a licence is granted. It follows, according to the Crown, that the Part II Fees have a regulatory purpose of ensuring that those deriving this benefit are required to pay more than the nominal amount for it. [Emphasis added.]

[44] Ryer, J.A. found that this reasoning was consistent with Rothstein, J.'s comment in *620 Connaught* that that regulatory charges "are normally imposed in relation to rights or privileges awarded or granted by the government" (para. 20, cited in *Broadcasters* at para. 89). It is this argument that the respondents in the present case rely on to establish that the remittance is a regulatory fee.

[45] The appellants in *Broadcasters* argued that there was no statutory authorization for the CRTC to "to impose fees for or in respect of the privilege or benefit that a licensee receives as a result of the grant of a licence" (para. 90). They also maintained that if the CRTC could "impose licence fees for or in respect of such a privilege or benefit," it was obliged "to demonstrate that the amounts charged approximate the value of the privilege or benefit" (para. 90). Ryer, J.A. rejected these arguments:

> 91 In my view, the appellants' arguments cannot be accepted. The language of section 11 of the Act specifies that licence fees may be calculated by reference to any criteria. This broad language provides sufficient authority to the Commission to charge licence fees for or in respect of the privilege or benefit that a licensee receives as a result of the grant of a licence. It is not incumbent upon the Commission to establish the value of the privilege or benefit that flows from the grant of licences by the Commission. Such a requirement would impose a significant and unnecessary burden upon the Commission since the value of the privilege or benefit would, in all likelihood, vary from licensee to licensee. In my view, a revenue based licence fee, as specifically sanctioned by paragraph 11(2)(a) of the *Act*, may be seen as a reasonable proxy for the value of the privilege or benefit that a licensee receives as a result of the grant of a licence since the amount of the licence fee will increase or decrease as the revenues of the licensee increase or decrease.
>
> 92 In my view, the licensing function of the Commission is an essential element of the regulatory scheme embodied in the *Act* and the Regulations. In carrying out that function, the Commission is empowered to confer material benefits on successful applicants for licences. Those benefits are in no small part due to the restricted levels of competition in the Canadian broadcasting industry. In granting the benefits that flow from the privilege of holding a licence, the Commission is, and must be, aware that a consequence of the restriction on the level of competition in that industry is likely to be that licensees will be able to derive higher revenues than they would if full-blown competition in that industry was permitted. It follows, in my view, that the Commission has a duty to ensure that the valuable benefit of a licence is not "given away" to licensees. [Emphasis added.]

[46] In support of this reasoning, Ryer, J.A. cited *Mount Cook National Park Board v. Mount Cook Motels*, [1972] N.Z.L.R. 481 (N.Z.C.A.), where the court held that a license fee was justified where the board was

> given the power to grant a specific person the right to enjoy in a very restricted field of competition, a trading privilege. I see no reason at all then, why the Board should not charge a licence fee for this privilege which will return to it a profit to add to its general revenue. If this were not so, then a rather odd result follows, for on the view which found favour with Wilson J., the Board would be obliged virtually to make a gift of the trading privilege to some selected person... [p. 487, cited in Broadcasters at para. 93; emphasis by Ryer J.A.]

[47] Ryer, J.A. likewise held that it would be ""a rather odd result" if the appellants were to receive a virtual gift of a right to operate in a "very restricted field of competition"" (para. 94). Accordingly, he concluded, the regulatory purpose of the Part II fees was to ensure "that licensees are required to make payments for the privilege of operating in an industry that is protected by the regulatory scheme from the rigours of full-blown competition" (para. 94). He therefore concluded that the fees were connected to the regulatory scheme under the legislation and regulations, and constituted a regulatory charge rather than a tax (para. 96).

[48] The *Broadcasters* case was a three-way decision; Létourneau and Pelletier, JJ.A. concurred in the result reached by Ryer, J.A., but each offered their own (brief) reasons. Pelletier, J.A. was of the view that there was no violation of s. 53 of the *Constitution Act* when a government made "available to those who are prepared to pay for it, a property, a commercial right or a licence to do something which can only lawfully be done by a licence holder" (para. 109). Pelletier, J.A. continued:

> 110 There is admittedly a certain circularity about this since it is the government which decides which activities require a licence and which do not. Notwithstanding this circularity, the fact remains that where the government grants a licence, or disposes of property or a commercial right to a person for a price, there is no taking of property by compulsion of law. There is simply a commercial exchange. And because there is no deprivation of property by compulsion of law, the question of democratic accountability does not arise. Money voluntarily paid to the government in exchange for a commercial right or for property is not a tax.
>
> 111 In my view, it is completely immaterial whether the House of Commons, the Governor in Council, or a Minister of the Crown acting under delegated

> authority sets the fees to be paid for broadcasting licences. The fact remains that in return for payment of the fees, the payor acquires (or maintains) the right to engage in a highly regulated, highly sheltered industry with a significant potential for economic gain. No one is bound to acquire a licence; those who feel the fees are too high are free to go into some other line of business, or to sell their licence on such terms as the regulatory scheme permits [Emphasis added].

Létourneau, J.A. essentially concurred with Ryer, J.A., with qualifications:

> 103 I agree with Justice Ryer that we should dispose of the appeal as he suggests. However, when a regulatory scheme and a regulatory purpose exist and a charge is levied for a benefit or a privilege as in this case, there is, in my respectful view, no need for a reasonable nexus between, or a linkage to, the quantum of the levy and the costs of the regulatory scheme, whatever epithet or qualifier, i.e. direct, indirect, soft or hard, may be given to that linkage. Should it happen that levies for broadcasting licenses are too high, this competitive market will take care of itself and the forces at play are likely to exert an adequate control on over-enthusiastic regulators.
>
> 104 I am comforted in this position by the approach taken by Justice Pelletier with respect to his views as to why this is not a tax. As he points out, no one here is forced to pay the levy unless he seeks the privilege of obtaining and exploiting a broadcasting license. There is not in this scheme the element of compulsion which characterizes a tax. We are dealing with free commercial enterprises which are seeking to make profits and which may or may not find their financial interests in exploiting a privilege that they have solicited. I fail to see how the charge for the license in such a case can be a tax.
>
> 105 If I am wrong in my approach and there has to be, under the existing jurisprudence, a link between the levy and the costs of the regulatory scheme to avoid the levy from being labeled "a tax", then I agree with Justice Ryer that the Part II fees are less than the costs of the Canadian broadcasting system.

[49] Professor Hogg commented on the *Broadcasters* case in his Constitutional Law of Canada, at §31.10(b):

> … The Federal Court of Appeal held that the defraying of regulatory costs was not the only connection to a regulatory scheme that would support a regulatory charge. The regulation of the broadcasting system conferred on the licensed broadcasters a valuable benefit by allowing them to operate for profit protected from full-blown competition. There was no reason why that benefit should be granted for nothing, and the capture of some part of the economic rent created by the closed regulatory system was a legitimate regulatory purpose. A revenue-based fee was a "reasonable proxy" for the value of the licence to that licensee. The Part II fee was accordingly upheld as a regulatory charge. This line of reasoning would have provided an easy answer to *620 Connaught*, where the

> charge for the business licence admitted the licensee to the profit earning business of selling liquor in Jasper National Park. But in *620 Connaught*, the Supreme Court relied only on the defraying of regulatory costs as the non-tax justification for the charge.

[50] The respondents say the RSMA is similar to the licensing fee in *Broadcasters*: a "reasonable proxy" for the value to Unfiltered of the permit to sell liquor on-site. By contrast, they submit, the Supreme Court of Canada was led in *620 Connaught* to limit its analysis to the question of whether the charge defrayed actual regulatory costs because the charge in issue was less than the cost of operating the park. Unfiltered characterizes this as a novel argument that appears to have been followed only in *Broadcasters*; according to the Supreme Court of Canada in *620 Connaught*, the fees and the regulatory costs should be linked.

[51] Unfiltered says *Broadcasters* is distinguishable. The legislation in that case specifically authorized regulations that set out a schedule of licensing fees; in this case, no regulation provides details of the remittance. Section 18 of the Regulations provides that "[a]ll fees pertaining to the Corporation's operations under the *Act* or regulations shall be prescribed by the Corporation." Unfiltered says the remittance is not prescribed. Further, the legislation in *Broadcasters* was expressly dealing with public property, that being the broadcasting system and the radio frequencies it relied upon. The fees were levied for use of a public good which was in limited supply.

[52] Whether or not the court in *Broadcasters* was correct in finding a virtually unlimited power to collect fees for the right to conduct regulated activities, there is an element of the reasoning in that case that in my view is not present here. Both Ryer and Pelletier, JJ.A. emphasized the license fee allowed the broadcasters access to a restricted market with limited competition. In Professor Hogg's words, the broadcasters were being allowed "to operate for profit protected from full-blown competition." In the liquor licensing context before me, there is no indication that the permits give access to a market where competition is limited by anything other than the licensing requirements themselves. Many commercial activities require some form of licensing. I do not believe that it follows that every license-holder is thereby "protected from full-blown competition"; this would require some additional benefit, such as the geographical advantage conferred in the license-holders in *620 Connaught* or profitable access to a restricted broadcasting spectrum as in *Broadcasters*.

[53] Accordingly, I am not convinced that there is a relationship between the remittance and the regulatory scheme.

PROPRIETARY CHARGES

[54] If the remittance is not a regulatory charge, the respondents say it is a proprietary charge. The foundation for this argument is the deeming provision of the Manufacturers' Policy which states that liquor sold in a manufacturer's retail store "shall be deemed to have been first purchased from the NSLC" (s. 6.1.16.1). Unfiltered says the remittance does not meet the requirements for a proprietary charge.

[55] In *620 Connaught*, Rothstein, J. distinguished proprietary charges for public goods and services from taxes and regulatory fees:

> 49 … [P]roprietary 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 sales of books, liquor, electricity, rail travel or other goods or services which it supplies in a commercial way…

[56] Unfiltered says there is no commercial relationship or transaction, only a regulatory one. Unfiltered receives nothing but regulatory approval from NSLC in return for providing the remittance. It says the NSLC property interest is entirely a fiction and that it receives no consideration for agreeing to the terms of the permits.

[57] In *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, [1997] S.C.J. No. 66, the Supreme Court of Canada considered the jurisdiction of the Liquor Control Board of Ontario 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" (para. 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. 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 need not be in the physical possession of the LCBO for ownership to pass.

[58] The respondents rely on *DFS Ventures Inc. v. Manitoba (Liquor Control Commission)*, 2001 MBQB 245, affirmed at 2003 MBCA 33, leave to appeal refused at 190 Man. R. (2d) 319 (note), where the Manitoba courts approved a mark-up on liquor purchased by a duty-free store from the provincial liquor commission. The applications judge cited *Air Canada* as authority for the validity of a provincial liquor commission's markup on liquor purchased within the province as a proprietary charge: 2001 MBQB 245, 2001 CarswellMan 471, at paras. 58-62. The Manitoba Court of Appeal affirmed this decision: 2003 MBCA 33, 2003 CarswellMan 79, leave to appeal refused, 190 Man. R. (2d) 319 (note), 2003 CarswellMan 480 (S.C.C.). Freedman, J.A. said, for the Court of Appeal:

> 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.
>
> ….
>
> 41 In the course of his judgment sustaining the provincial position [in *Air Canada*], 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. The exception is inapplicable here. It derives from s. 91(2) of the *Constitution Act*, 1867, whereby Parliament has the exclusive jurisdiction to legislate with respect to importation and exportation under the regulation of trade and commerce.
>
> 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.

[59] In *Toronto Distillery Co. v. Ontario (Alcohol And Gaming Commission)*, 2016 ONSC 2202, 2016 CarswellOnt 5194, the applicant distillery had a Manufacturer's Licence and Retail Store Authorization permitting it to sell alcohol on-site. The distiller had a contract with the Liquor Control Board of Ontario by which it first sold its product to the LCBO. This was a condition of the licence and authorization. The distillery then sold its spirits from the distillery store as an agent of the LCBO. The LCBO set the mark-up and commission rates keeping prices at the distillery store the same as those at LCBO stores. The distiller received a commission for acting as agent for the LCBO. The distiller argued that the mark-up was a tax. The court held that the mark-up was valid as a proprietary charge. The applications judge said:

> 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 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.]

The Ontario Court of Appeal affirmed this decision: 2016 ONCA 960 at para. 7.

[60] Unfiltered cites *Boniferro Mill Works ULC v. Ontario*, 2009 ONCA 75, [2009] O.J. No. 323, where the court held that a levy on certain timber products was a proprietary charge. The court distinguished *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545 (CIGOL), where a royalty surcharge on provincial oil and gas resources was held to be a tax:

> 33 In CIGOL the invalid royalty surcharge was held to be a tax because:
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> 1. It impacted on those who had no contractual relationship with the Crown.
>
> 2. The obligation to pay the surcharge arose pursuant to legislation and not by contract.
>
> 3. The legislation compelled producers to continue producing oil or pay a significant fine if they refused.
>
> 4. The surcharge was levied on the share of production to which, by the terms of the lease, the lessee was entitled to keep.
>
> 34 None of these factors are present in this case. Here, only those who purchase timber from the Crown are required to pay the charge as part of the price for the timber. The obligation to pay what amounts to a variable royalty is clearly set out in the licence granted to the licensee in addition to s. 31 of the Act. There is no obligation on anyone to purchase Crown timber. Mills are free to acquire timber from private sources in which event there is no obligation to pay anything to the Minister. Finally, the RVC allows the Crown to share in the profits when the market is strong. At the risk of repetition, in relation to the latter point, the Supreme Court of Canada has said that proprietary charges may be determined by market forces, see *620 Connaught, supra* at paragraph 49.

[61] In *Quebec (Attorney General) v. Algonquin Développements Côte Ste-Catherine inc. (Développements Hydroméga inc.)*, 2011 QCCA 1942, [2011] Q.J. No. 15004 (Algonquin), the Quebec government imposed a charge on electricity generated by a hydroelectric station. The company that owned the station had leased the land and deep water locations from the federal Crown; it argued that the levy was a proprietary charge that the Province could not impose against federal property. In holding that the charge was a tax, the Quebec Court of Appeal said:

> 46 The government does not levy the charge under section 69 qua owner-lessor but qua public authority: it is not exacted as an incident of crown ownership

> but rather of the crown's authority to regulate property in the province and to raise taxes on "sites and facilities in the province for the generation of electrical energy and the production therefrom" pursuant to section 92A(4)(b) of the *Constitution Act*, 1867. Not surprisingly, section 68.2 provides that the charge does not apply to Hydro-Québec or to a municipality, an electricity cooperative or to a mandatary of the crown. Section 68 is a tax, not a proprietary charge.

[62] The respondents say the RSMA is similar to the levy in *Air Canada*, with Unfiltered dependent on the NSLC's deemed right of first sale in order to sell at its on-site store. Unfiltered says *Air Canada* is distinguishable. *Air Canada* – decided before *Eurig* – was primarily concerned with issues of federal and provincial jurisdiction. While the court held that it was "entirely within a province's competence to charge a markup on liquor purchased within its boundaries", this was arguably qualified by the description of a markup as "a margin of profit that the LCBO adds to the value of the alcohol that it sells" (para. 7; emphasis added).

[63] Unfiltered offers NSLC's mark-up on beer sold in its own retail stores as an example of a valid proprietary charge. NSLC pays for and takes delivery of that beer. By contrast, Unfiltered says, the RSMA is not charged on public property as owner or lessor. It is only charged pursuant to policies under the LCA and regulations in NSLC's character as a public authority. Further, the remittance is charged at a fixed rate and is therefore not "market-oriented" like the charge in *Boniferro*. This is not a commercial relationship, Unfiltered says.

[64] Unfiltered also says the remittance is not charged pursuant to a contract by which Unfiltered transfers property to NSLC. The deemed transfer under s. 6.1.16 of the Manufacturer's Policy is a fiction, according to Unfiltered. Further, the remittance – unlike the Policy – applies not only to beer sold at the manufacturer's outlets but to beer sampled or given away. Unfiltered says its beer is private property, so the remittance, as a levy on private property, fails the "public property" criterion for a proprietary charge.

[65] Unfiltered argues that this situation is distinguishable from cases where the Crown, as owner, "delivers property in a commercial context in exchange for collecting the charge." For example, in *Bonnifero*, the Crown owned the timber. By contrast, charges have been held to be taxes where they were imposed without consideration in a commercial context. In *CIGOL*, the royalty surcharge related to oil and gas that were the subject of mineral licenses granted by the Crown so that the Crown had no proprietary interest. In *Algonquin*, there was no consideration for the charge on the deep water used to generate hydroelectricity where the Province

did not own the water. Accordingly, Unfiltered submits, the remittance is not a commercial charge because it is not levied for consideration in a commercial context.

[66] Unfiltered points out that DFS Ventures, like Air Canada, was not concerned with the issue of a manufacturer's sale of its own liquor produced in the province. The section 53 analysis, it is submitted, "was cursory and ignored pith and substance" and is not persuasive. Further, the liquor in DFS Ventures was actually purchased from the Liquor Control Commission which imposed the markup and delivered it. There were agreements in place between the parties to the transaction. By contrast, Unfiltered takes the position that it receives nothing in return for paying the remittance.

[67] This leads to Unfiltered's broader point: the monopoly enjoyed by the NSLC, it submits, pertains to control of the sale of liquor but not to its possession. There is no prohibition on the sale of liquor by anyone other than NSLC. Unfiltered points to the objects and purposes of the LCA, as described at s. 137, which provides, inter alia:

> 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, and otherwise… [Emphasis added.]

[68] Unfiltered submits that liquor sales "through the instrumentality" of the NSLC does not mean ownership and sale by NSLC alone, given the words "and otherwise." Liquor can be sold by an authorized vendor holding the necessary license or permit. It does not have to be in NSLC's possession. Section 47 of the Regulations states that the NSLC "may, after proper application, agreement or contract, and payment of fee, authorize by Special Permit the operation of a store for the sale of beer, liquor or wine as described in these regulations." These are neither agency stores nor government stores. Where a microbrewer holds an on-site retail permit, the Regulations do not require a first sale to the NSLC. The permit allows Unfiltered "to sell its manufactured beer products and promotional and novelty items approved by the NSLC, to the public through its store." Unfiltered says this means direct sale to the public.

[69] Unfiltered further argues that the retail permit "modifies and supersedes" the Manufacturers' Permit, which deems a first sale to the NSLC. Nothing in the Act

or Regulations creates a proprietary interest for the NSLC. Section 37 of the Regulations allows the NSLC to "prescribe policy guidelines setting out details and procedures required for administration and operations carried out under the Act and these regulations" (emphasis added). According to Unfiltered, "administration and operations" does not encompass a policy-making power to deem a transfer of property, and if it does, it is only a "mechanism" authorizing it to sell its beer on-site.

[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. Unfiltered has not shown a legal basis to find that the law cannot deem the beer to be property of NSLC in these circumstances.

IS THERE A CONTRACT?

[71] The Regulations require NSLC to enter a contract with Unfiltered. Unfiltered says this has not happened, as no consideration has passed. The Regulations provide, at ss. 50(4) and (5):

> (4) The Corporation shall enter into a contract with a manufacturer to which a permit is issued respecting operation of the store and containing terms and conditions reflecting the spirit and intent of the Corporation's Manufacturers' Retail Stores Policy and the specific provisions thereof.
>
> (5) A manufacturer to which a permit is issued shall comply with
>
> (a) the Act, these regulations and Corporation's Manufacturers' Retail Stores Policy, as amended from time to time; and
>
> (b) the contract entered into between the Corporation and the Manufacturer pursuant to subsection (4) of this Section.

[72] In addition to the deeming provision, the Manufacturers' Policy states that "[r]equirements for remittance and reporting of sales to the NSLC shall be provided by the NSLC to the Manufacturer … and the Manufacturer agrees to comply with such requirements as a condition of the Permit" (s. 6.1.16.1).

[73] Unfiltered says the requirement for a contract demonstrates that NSLC has no pre-existing proprietary rights over its beer. Unfiltered argues that without a contract, the Manufacturer's Policy is of no force and effect.

[74] The respondents argue that Unfiltered's applications for permits to operate a microbrewery, to operate a manufacturer's retail store, the accompanying declaration, and Unfiltered's agreement to the terms and conditions of the permits, establish a contract. Unfiltered agreed that in return for being permitted to produce beer and sell it on-site it would comply with the conditions of the permits and NSLC policies. If the terms of the retail permit were unacceptable, Unfiltered was not bound to agree to them. In *Toronto Distillery Co.*, the Ontario Court of Appeal said:

> 8 Furthermore, we agree with the application judge's alternate conclusion that the mark-up is not a tax because the appellant agreed to it in its contract. It is well-established that obligations under a contract arise from the voluntary agreement of the parties, while the obligation to pay a tax does not. Under the contract, the LCBO owns the spirits in the appellant's store. As owner of the goods, the LCBO must have the right to determine the prices for which they are sold, including the mark-up. It follows that the mark-up is not an exercise of the government's public authority but of its private law rights.
>
> 9 The appellant submits the application judge erred in finding it is not under a "practical compulsion" to obtain authorization to operate a retail store. We do acknowledge that, within the regulatory framework, this is the only way it can sell its products directly to the public, albeit through a third party. However, that requirement falls short of the restrictions discussed in *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan et al.*, [1978] 2 S.C.R. 545 ("*CIGOL*"), where a petroleum royalty surcharge was held to be a tax. We agree with the application judge's observation that the applicant entered into a contract with the LCBO for a commercial advantage and it was "clear that the applicant was not compelled to sell its products through its own store. Like others, it could sell its spirits through stores operated by the LCBO or, alternatively, to markets outside Canada."

[75] As Unfiltered points out, the parties in *Toronto Distillery* had a written contract with specific terms and conditions. The contract required the sale of the distiller's product to the LCBO at supplier price that would not be paid at the time of sale; it specified the LCBO price markup of 139.7% on the distiller's price; it declared that the distiller acted as LCBO's agent when selling the product; it provided a calculation for the amount to be remitted by the distiller after sale; and it specifically addressed reporting requirements, insurance, record-keeping, and LCBO audits. The contract was signed on behalf of the distillery. By contrast,

Unfiltered submits, the materials advanced by NSLC as establishing the alleged contract are too vague to form a contract. The amount of the remittance is not prescribed in the *Act* or Regulations, nor is it in the policy or permit application, nor are any terms of sale specified for the deemed sale of beer to NSLC. There was no consideration beyond the granting of a regulatory permit; no goods or services passed in a commercial context.

[76] According to Unfiltered, *Toronto Distillery* is also distinguishable in that the LCBO was not the regulatory authority since regulatory and supervisory power had been transferred to the Alcohol and Gaming Commission of Ontario. Accordingly, the relationship between the distillery and the LCBO was a commercial one. By contrast, the relationship between Unfiltered and the NSLC is regulatory.

[77] Even if the application and permit do provide the elements of a contract, Unfiltered says it was not freely entered into, due to the "practical compulsion" to accept the terms as decreed by NSLC. Unfiltered had no choice but to agree to the terms if it wanted regulatory approval to sell its beer on-site. Without the retail permit, Unfiltered could not sell its product without negotiating an agreement with a third party, such as NSLC, or exporting it.

[78] While there is no formal written contract, it appears to me that the elements of a contract can be found in Unfiltered's agreement to comply with the terms of the permits in exchange for being able to produce and sell its beer. The fact that Unfiltered cannot sell its beer in the Province without agreeing to these terms is not an answer.

EXPROPRIATION

[79] Unfiltered says that, in any event, a power to expropriate private property – as it says the Policy purports to do – cannot be found in the Policy alone, but must have a statutory basis. As Glube, C.J.S.C. (as she then was) said in *Farmers Co-operative Dairy Ltd. v. Nova Scotia (Attorney General)* (1988), 82 N.S.R. (2d) 238, 1988 CarswellNS 232 (S.C.T.D.)(*Farmers Co-op*), "[t]he courts have long espoused the view that expropriation with or without compensation can only occur where there is specific authority in the enabling statute" (para. 47). The respondents reply that the remittance is not an expropriation but an "element of the sale and transfer by [Unfiltered] to a consumer of liquor."

[80] Unfiltered argues, in the alternative, that if NSLC has a "right of first sale" under the Manufacturers' Policy, its property has been expropriated without

compensation (relying on *Farmers Co-op* at paras. 47-49). As such, if it is held that NSLC has the power to expropriate its beer, Unfiltered asks the court to imply a term requiring compensation.

COLOURABILITY

[81] Unfiltered argues that the fiction created by the deeming provision is an attempt to colour the transaction to avoid s. 53 of the *Constitution Act* – in other words, that its form is not consistent with its substance. Professor Hogg describes the doctrine of colourability in Constitutional Law of Canada, at §15.5(g). The doctrine "is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction." He adds that the doctrine "applies the maxim that the legislative body cannot do indirectly what it cannot do directly." Unfiltered cites Algonquin, where, after noting the trial judge's reference to "certain terminological choices that suggested to her that this reflected legislative intent", the Court of Appeal held, at para. 47, that

> [t]he better view - noted by the trial judge - is that these semantic matters on their own cannot decide pith and substance. As far as the wording of the text goes, the fact that section 68 does not refer to property in the "domain of the State" is most indicative, to my ear, that the levy is a tax and not a proprietary charge.

Similarly, Unfiltered points out, the LCA does not deem alcohol to be public property.

[82] Unfiltered says the imposition of a contract – which Unfiltered of course denies is a contract – is colourable attempt to give the appearance of a contract to a remittance which is in reality levied only by the exercise of regulatory authority and practical compulsion.

[83] The respondents deny that the Manufacturers' Policy is an attempt to colour the relevant transactions "as a provincial activity so as not be seen as an attempt to tax in a manner only available to the federal Parliament." They rely on the Manitoba Court of Appeal decision in *DFS Ventures* on this point (paras. 65-67, 73-74, 85-86). The essence of their argument is simply that the mark-up is (as in DFS Ventures) nothing more than a valid exercise of the provincial regulatory power over alcohol. I agree. I see no basis to find this a colourable attempt to address a matter outside the Province's jurisdiction.

FAILURE TO PUBLISH

[84] Unfiltered further argues that the Manufacturers' Policy is of no effect because it has not been filed with the Registry of Regulations or published in the Royal Gazette, as required, respectively, by ss. 3(7) and 4 of the *Regulations Act*, R.S.N.S. 1989, c. 393. Additionally, Unfiltered says the policy is ineffective because its quantum is apparently not prescribed in any public document. The subject of promulgation was considered in *Re Michelin Tires Manufacturing (Can.) Ltd.* (1976), 15 N.S.R. (2d) 150, 1976 CarswellNS 54 (S.C.A.D.), where MacKeigan, C.J.N.S., concurring, said:

> 58 … I conceive that for an order or regulation to have the force of law to bind a person or make him open to prosecution for its violation, it must be made, i.e., executed with due authority, and issued, i.e., promulgated or publicized in some suitable way. The necessary issuance and publicity is presumed if it is passed by the legislature, or published in the Royal Gazette, or, perhaps, tabled in the House of Assembly (as required for some rules by the *Regulations Act*, R.S.N.S. 1967, c. 266).
>
> 59 Where such formal issuance is not required, I would like to think that effective issuance involves some reasonable minimum publication, the nature and degree of which will depend on the kind of order and the persons to whom it is directed...

[85] Unfiltered accordingly submits that NSLC is relying on "two deficient policies which do not meet the necessary publication requirements to do what NSLC says they do."

[86] I am not persuaded that the obligation to publish extends as far as a policy enacted by a regulatory organization under its statutory authority.

CONCLUSION

[87] I conclude that the RSMA is in pith and substance a proprietary charge within the authority of NSLC pursuant to its statutory mandate. Accordingly, Unfiltered's application to rule the remittance invalid is dismissed.

[88] The parties have not addressed the issue of costs. I will leave it to them to resolve failing which I expect I will hear from them in due course.

McDougall, J.