**COURT OF APPEAL OF ALBERTA**

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| COURT OF APPEAL FILE NUMBER: | 1801-0220AC |
| TRIAL COURT FILE NUMBER: | 1501-15056 |
| REGISTRY OFFICE: | CALGARY |
| PLAINTIFF/APPLICANT: | STEAM WHISTLE BREWING INC. |
| STATUS ON APPEAL: | Respondent |
| DEFENDANT/RESPONDENT: | ALBERTA GAMING AND LIQUOR COMMISSION |
| STATUS ON APPEAL: | Appellant |

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DOCUMENT: **FACTUM OF THE INTERVENOR CANADIAN CONSTITUTION FOUNDATION**

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## TABLE OF CONTENTS


PART 1. FACTS ..... 1

A. Overview ..... 1

B. Historical Context of Section 121 ..... 2

C. Contemporary Effects ..... 3

PART 2. STANDARD OF REVIEW ..... 4

PART 3. GROUNDS OF APPEAL ..... 4

PART 4. ARGUMENT ..... 5

A. the Object of the Constitutional Guarantee ..... 6

B. Content of the Constitutional Guarantee ..... 6

C. The Measures Constitute a Tariff and Impermissibly Restrict Economic Freedom ..... 7

D. The Commission's Interpretation is un-Constitutional and Bad for Canadians ..... 8

PART 5. RELIEF SOUGHT ..... 9

TABLE OF AUTHORITIES ..... 10

## PART 1 – FACTS

### A. Overview

1. This appeal is not just about beer; beer is a proxy. If the government is permitted to give preferential treatment to Alberta craft brewers over those elsewhere in Canada, not only would this be unlawful, but it could cause other provincial governments to retaliate with similar discriminatory policies in an effort to "protect" their own agricultural produce, software and consumer electronics industries, and any number of other sectors. A clear statement that non-tariff trade barriers are unconstitutional is required.

2. Canadian Constitution Foundation ("CCF") intervenes in this appeal solely on the question of the scope of section 121 ("Interprovincial Trade Provision") of the *Constitution Act, 1867* ("Constitution Act") to provide a broader public policy perspective, highlighting the implications of the Interprovincial Trade Provision for economic interests beyond those of the litigants.

3. The unduly restrictive interpretation urged by the Alberta Liquor, Gaming and Cannabis Commission (the "Commission") will permit provincial governments to impose substantial economic burdens on Canadians conducting business across provincial boundaries. This runs counter to the purpose of the Interprovincial Trade Provision.

4. Any provincial measures, regardless of form, that in effect impose a tariff on out-of-province goods, violate the Interprovincial Trade Provision.[1]

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1 *R v Comeau*, 2018 SCC 15 [not reproduced]

5. The Court of Queen's Bench's decision in this action provides a guide to the application of section 121 complementary to the *Comeau* decision, which together preserve Canadians' economic freedoms, including the right to carry on business across provincial lines.

6. The Commission's interpretation would gut the Interprovincial Trade Provision and cannot be allowed to shape interprovincial trade to the detriment of Albertans and all Canadians.

## B. Historical Context of Section 121

7. The Interprovincial Trade Provision marks a distinction between tariff and non-tariff barriers. The language of section 121 chosen by the Fathers of Confederation ("admitted free", rather than "admitted free of duty")[2] was no accident. Rather, the wording demonstrates the heightened concern among pre-Confederation British North Americans with non-tariff duties imposed by the United States.

8. Prior to Confederation, and during the American Civil War, the United States had imposed a variety of non-tariff impediments to trade. These measures interfered with both trade between British North America and the United States, and between different regions of British North America. British North Americans in the 1860s were alarmed by this trend of US trade policy. This context helps explain

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2 Professor Andrew Smith, University of Liverpool, "The Historical Origins of Section 121 of the British North America Act: a Study of Confederation's Political, Social and Economic Context" (2017), online: https://andrewdsmith.files.wordpress.com/2017/11/expert-witness-report-free-trade-comeau-case.pdf. **[Intervenor's Authorities ("IA"), Tab 3]**

the attention to the issue of non-tariff trade barriers in drafting the *Constitution Act, 1867*.[3]

9. More generally, "[i]n the Victorian period, the climate of opinion strongly favoured Free Trade and the operation of free markets."[4] The Fathers of Confederation were "strongly influenced" by the prevailing intellectual climate of the day, which was "largely classical liberal," combining "widespread support for Free Trade" with a recognition of the growing role for the state in infrastructure and social welfare. In particular, Sir John A. Macdonald was "an advocate of international, and *a fortiori*, inter-provincial Free Trade" in the years preceding Confederation. [5]

C. **Contemporary Effects**

10. The Standing Senate Committee on Banking, Trade and Commerce noted in its report on interprovincial trade that, "as a fundamental right, Canadians should be able to practise their profession or trade, operate a business whose goods and services can cross provincial/territorial borders, and purchase goods and services both freely and without penalty anywhere in this great country."[6]

11. The Senate Committee observed that inter-provincial trade barriers "create 'walls' that prevent the free flow of people, goods, services and investments between provinces / territories. They also increase costs for Canadian businesses, many

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3 *Ibid.* at 12
4 *Ibid.* at. 7.
5 *Ibid.* at 10-11.
6 The Honorable David Tkachuk & The Honorable Joseph A. Day, "Tear Down These Walls: Dismantling Canada's Internal Trade Barriers" (2016), online: http://publications.gc.ca/collections/collection_2016/sen/yc11-0/YC11-0-421-5-eng.pdf. **[IA, Tab 4]**

of which are struggling to expand and compete in a fiercely competitive global marketplace."[7]

12. Professor Trevor Tombe of the University of Calgary calculates that the annual cost of inter-provincial trade restrictions amounts to 8-15% of the cost of goods and services that cross inter-provincial boundaries, costing each Canadian household approximately $7,500 per year.[8]

13. Canadian provinces export a substantial portion of their economic output across provincial lines. The share of inter-provincial economic output ranges from 16% for Newfoundland to 9% for Ontario. Accordingly, removing interprovincial trade restrictions would boost productivity by three to seven percent, adding $50 to $130 billion dollars to Canadian economy.[9]

## PART 2 – STANDARD OF REVIEW

14. The standard of review on the constitutionality of a legislative provision is correctness.[10]

## PART 3 – GROUNDS OF APPEAL

15. CCF's submissions respond only to those grounds of appeal the Commission has raised regarding section 121:[11]

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7 *Ibid.* at iii.

8 Financial Post, Media Release, "Trevor Tombe: A stunning $7,500 per household is the annual cost of unfree provincial trade" (28 March 2016), online: https://business.financialpost.com/opinion/trevor-tombe-a-stunning-7500-per-household-is-the-annual-cost-of-unfree-provincial-trade. **[IA, Tab 5]**
See also: Lukas Albrecht and Trevor Tombe, Internal Trade, Productivity, and Interconnected Industries: A Quantitative Analysis (2015), online: https://econ.ucalgary.ca/manageprofile/sites/econ.ucalgary.ca.manageprofile/files/unitis/publications/1-6131374/albrecht_tombe_2015_final.pdf **[IA, Tab 6]**

9 See Tombe, supra, note 8. **[IA, Tab 5]**: See also: Albrecht and Tombe, supra, note 8. **[IA, Tab 6]**

10 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 58 [not reproduced]

b. whether or not a proprietary charge could ever come within the ambit of s. 121 of the Constitution Act;

d. whether or not a mark-up applied equally to all could violate s. 121 of the Constitution Act;

e. whether or not a provincial grant, being an exercise of the Crown's spending power, could violate s. 121;

f. whether or not the provincial grant program that was challenged violates s. 121 in light of its purpose within the context of the current market place; and

g. whether or not the justice's determination of each of these issues involved a proper application of the jurisprudence from the Supreme Court of Canada on the meaning and intent of s. 121.

**PART 4 – ARGUMENT**

16. CCF advances the following three points:

a. Canadians have a constitutionally guaranteed right to transact in goods across provincial boundaries. The purpose of the Interprovincial Trade Provision is to safeguard this right against provincial interference;

b. The content of the Interprovincial Trade Provision is a prohibition on all measures which, in substance, fill the role of customs, duties or tariffs, whatever their form; and

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[11] Civil Notice of Appeal, filed July 16, 2018 [not reproduced]

c. The Measures impermissibly infringe upon Canadians', and in particular, Albertans', economic freedoms. If upheld, they will adversely impact interprovincial trade and economic growth.

## A. The Object of the Constitutional Guarantee

17. The Interprovincial Trade Provision states:

> All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.[12]

18. It purports to restrict government action that impinges on Canadians' ability to transact in goods across provincial lines and is "best conceived as [a provision] that prevents provinces from passing laws aimed at impeding trade by setting up barriers at boundaries, while allowing them to legislate to achieve goals within their jurisdiction even where such laws may incidentally limit the passage of goods over provincial borders."[13]

19. The Interprovincial Trade Provision protects Canadians' economic freedom from government infringement.

## B. Content of the Constitutional Guarantee

20. The Interprovincial Trade Provision constitutes a bar against laws that "restrict or prohibit trade across provincial border, like a tariff." Any law that "imposes an additional cost on goods by virtue of them coming in from outside the province" is *ultra vires*.[14]

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12 *Constitution Act, 1867*, section 121 **[Appendix A]**
13 *Comeau,* supra note 1, at para 91
14 *Ibid.* at para 98

21. While not creating a "level of trade activity divested of all regulation," the Interprovincial Trade Provision nevertheless preserves the "free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade." It forbids trade regulation that "in essence and purpose is related to a provincial boundary."[15] The Interprovincial Trade Provision prohibits "erecting barriers to trade at provincial boundaries – whether customs duties or other measures that are intended to fill the role of such tariffs."[16]

22. In other words, laws that pose only incidental effects on trade as part of a broader regulatory scheme are permitted. Laws that, in essence and purpose, restrict or limit the free flow of goods across the country, as a tariff would, are prohibited.[17]

## C. The Measures Constitute a Tariff and Impermissibly Restrict Economic Freedoms

23. The Measures constitute an impermissible tariff, which violates the Interprovincial Trade Provision.

24. The 2015 Measure imposes a differential surcharge, and thus imposes an impermissible tariff on the basis of the origin of craft beer.

25. The 2016 Measure, through the operation of a single surcharge and a refund scheme, in effect also imposes an impermissible tariff on the basis of the origin of craft beer.

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15 *Ibid.* at para 95, citing Rand J. in *Murphy v Canadian Pacific Railway Co.,* 1958 CanLII 1 (SCC), [1958] SCR 626 [not reproduced]

16 *Ibid.* at para 100

17 *Ibid.* at para 97

26. Furthermore, the 2016 Measure constitutes a colourable attempt to create an appearance of constitutionality by masquerading a tariff as a combination of a uniform surcharge and a differential refund. Canadian Courts "will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping with the statutory field. A colourable device will not avail."[18] The 2016 Measure is in pith and substance a tariff, and ought not be saved by a clever characterization of form.

27. The Commission's Measures infringe on citizens' ability to import, sell and purchase beer manufactured anywhere in the country outside Alberta. Curial approval of the Measures will negatively impact more than the free flow of beer.

## D. The Commission's Interpretation is un-Constitutional and Bad for Canadians

28. The Supreme Court's decision in *Comeau* both confirms the constitutional protection against interprovincial trade barriers and exemplifies a solitary legitimate exception.

29. Here, the Court of Queen's Bench's decision signals that provinces do not have *carte blanche* to erect trade barriers out of colourable policy objectives.

30. While the beer industry has generated these two decisions, the legitimacy of the Interprovincial Trade Provision will reverberate and impact interprovincial trade and economic growth well beyond.

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[18] *Ladore v Bennett*, 1939 CanLII 270 (UK JCPC) at 7 (per Lord Atkin) **[IA, Tab 1]**; see also *Reference re Upper Churchill Water Rights Reversion Act*, 1984 CanLII 17 (SCC), [1984] 1 SCR 297 at 332 **[IA, Tab 2]**

31. Violations of Canadians' economic freedom are not trivial and are not mere nuisances. As the Standing Committee determined, the costs imposed by inter-provincial trade barriers upon Canadian businesses and consumers are substantial. As Professor Tombe's study shows, interprovincial trade across sectors is nearly as important to Canada's economy as international trade.

32. Here, the Measures punished extra-provincial small businesses without legitimate policy objective. If the Measures are allowed to stand, they will provide a precedent for provincial protectionism.

33. Small businesses and market entrants, the attendant distribution systems, and consumers have suffered from the Measures. Interprovincial trade requires the certainty that patently unconstitutional barriers will not be tolerated; particularly as a counterbalance to the singular example in *Comeau*.

34. A purposive interpretation of the Interprovincial Trade Provision calls for the invalidation of the Measures for impermissibly infringing upon the freedom of inter-provincial trade guaranteed by the Constitution and impeding the free flow of goods among the Provinces.

## PART 5 – RELIEF SOUGHT

35. CCF supports the dismissal of the Commission's appeal and takes no position on the cross-appeal.

**CODE HUNTER LLP and ROCHON GENOVA LLP**

Per: _____

Gregory Wells, Q.C., Code Hunter LLP
Counsel for the Intervenor, Canadian Constitution Foundation

## Table of Authorities

### Case Law

### Tab

1. *Ladore v Bennett*, 1939 CanLII 270

2. *Upper Churchill Water Rights Reversion Act*, 1984 CanLII 17 (SCC) [1984], 1 SCR 297

### Texts and Articles

3. Professor Andrew Smith, University of Liverpool, "The Historical Origins of Section 121 of the British North America Act: a Study of Confederation's Political, Social and Economic Context" (2017).

4. The Honorable David Tkachuk & The Honorable Joseph A. Day, "Tear Down These Walls: Dismantling Canada's Internal Trade Barriers" (2016).

5. Financial Post, Media Release, "Trevor Tombe: A stunning $7,500 per household is the annual cost of unfree provincial trade" (28 March 2016).

6. Lukas Albrecht & Trevor Tombe, "Internal Trade, Productivity, and Interconnected Industries: A Quantitative Analysis" (2015).

### Legislation

### Appendix

A. *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 [excerpt only]