CITATION: Hughes v. Liquor Control Board of Ontario, 2018 ONSC 1723
COURT FILE NO.: CV-14-518059CP
DATE: 20180315

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
DAVID HUGHES and 631992 ONTARIO INC. Plaintiffs	*Paul Bates*, *Ronald Podolny* and *Tyler Planeta* for the Plaintiffs
– and –	
LIQUOR CONTROL BOARD OF ONTARIO, BREWERS RETAIL INC. (carrying on business as "THE BEER STORE"), LABATT BREWERIES OF CANADA LP, LABATT BREWING COMPANY LIMITED, MOLSON COORS CANADA, MOLSON CANADA 2005 and SLEEMAN BREWERIES LTD. Defendants	*Kent E. Thomson, Matthew Milne-Smith* and *Michael H. Lubetsky* for the Defendant Liquor Control Board of Ontario *Michael A. Eizenga, Ranjan K. Agarwal* and *Ilan Ishai* for the Defendant, Brewers Retail Inc. *Jeff Galway, Catherine Beagan Flood,* and *Nicole Henderson* for the Defendant Labatt Breweries of Canada LP and Labatt Brewing Company Limited *Paul Steep, Adam Ship,* and *Katherine Booth* for the Defendant Molson Coors Canada and Molson Canada 2005 *Marina Sampson* and *Ara Basmadjian* for the Defendant Sleeman Breweries Ltd. *Michael Dunn* and *Savitri Gordian* for the Ministry of the Attorney General
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: February 5-8, 2018

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Pursuant to the *Class Proceedings Act, 1992*[1], David Hughes and 631992 Ontario Inc. ("The Poacher") commenced a proposed class action. Mr. Hughes is a beer consumer, and The Poacher is his restaurant, which serves beer to its patrons. The Poacher is a Licencee under *Liquor Licence Act*[2] and the *Liquor Control Act.*[3]

[2] The Plaintiffs' action is against: (a) the Liquor Control Board of Ontario ("LCBO"); (b) Brewers Retail Inc., which carries on business as The Beer Store; (c) Labatt Breweries of Canada LP and Labatt Brewing Company Limited (collectively "Labatt"); (d) Molson Coors Canada and Molson Canada 2005 (collectively "Molson"); and (e) Sleeman Breweries Ltd. ("Sleeman"). At all material times, Brewers Retail was owned by Labatt (45%), Molson (45%), and Sleeman (10%).

[3] In their proposed class action, the Plaintiffs are seeking damages of $1.4 billion, and punitive damages of $5 million for the following causes of action: (a) damages pursuant to s. 36 of the *Competition Act*[4] for contravention of s. 45 of the *Act*, which has two versions; (b) civil conspiracy for breach of s. 45 of the *Competition Act*; (c) unjust enrichment for breach of the Uniform Price Rule of the *Liquor Control Act*; (d) waiver of tort; and (e) the freshly-invented tort of "Misconduct by a Civil Authority," which is based on *obiter dicta* in *Paradis Honey Ltd. v. Canada (Minister of Agriculture and Agri-Food).*[5]

[4] In their Statement of Claim, the Plaintiffs allege two conspiracies by all the Defendants. Of the two, the Plaintiffs are abandoning the "Prices and Fees Conspiracy".

[5] The Plaintiffs' action now focuses only on the "Market Allocation Conspiracy", which they pursue with a statutory cause of action pursuant to sections 36 and 45 of the *Competition Act* and with a concurrent common law civil conspiracy tort claim. The Plaintiffs' civil conspiracy claim is based on the same allegedly anticompetitive behaviour that is contrary to the *Competition Act.* The Plaintiffs are not alleging a conspiracy based on the predominant purpose branch of the tort of civil conspiracy.

[6] Thus, the Plaintiffs advance against all the Defendants a statutory and a common law conspiracy claim based on an alleged contravention of s. 45 of the *Competition Act*. They advance against all the Defendants except the LCBO an unjust enrichment claim based on contravention of the Uniform Price Rule. They advance only against the LCBO an invented cause of action that they brand as Misconduct by a Civil Authority.

[7] The Plaintiffs' causes of action are built on five alleged wrongdoings; namely: (1) the Defendants conspiring to enter into the 2000 Beer Framework Agreement, an agreement that was signed by the LCBO and by Brewers Retail on June 1, 2000 and that allegedly contravenes both

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[1] S.O. 1992, c. 6.
[2] R.S.O. 1990, c. L.19.
[3] R.S.O. 1990, c. L.18.
[4] R.S.C. 1985, c. C-34.
[5] 2015 FCA 89.

versions of s. 45 of the *Competition Act;* (2) the Defendants agreeing in the 2000 Beer Framework Agreement that the LCBO would not in its "Ordinary Stores" sell beer in packages greater than six containers; (3) the Defendants agreeing in the 2000 Beer Framework Agreement that the LCBO would not sell any beer product that was exclusively sold by Brewers Retail; (4) Brewers Retail, Labatt, Molson, and Sleeman unjustly enriching themselves by selling beer to Licensees in contravention of the *Liquor Control Act's* Uniform Price Rule; and (5) the LCBO misconducting itself as a public authority by entering into the 2000 Beer Framework Agreement.

[8] There are six summary judgment motions before the court; namely: (1)(2)(3) Brewers Retail, Labatt, and Molson bring a combined motion for summary judgment dismissing the Plaintiffs' action as against them; (4) Sleeman supports Brewers Retail, Labatt, and Molson's motion that the Plaintiffs' action should be dismissed, and it brings an independent motion for a summary judgment based on the fact-based argument that it was not a co-conspirator; (5) the LCBO brings a motion for a summary judgment dismissing the Plaintiffs' action as against it; and (6) the Plaintiffs bring a motion for a partial summary judgment for a variety of declarations partially dispositive of claims and defences.

[9] In their respective summary judgment motions, all the Defendants rely on the "Regulated Conduct Defence" to resist the conspiracy claim.

[10] In their respective summary judgment motions, all the Defendants assert that to the extent that there is any doubt about the legality of their conduct, that doubt has been removed by s. 10(3) of the *Liquor Control Act,* a 2015 amendment to the *Act*, which declared that the LCBO is deemed to have been directed and Brewers Retail is deemed to have been authorized to enter into the 2000 Beer Framework Agreement.

[11] In its summary judgment motion, the LCBO also submits that the Plaintiffs' claim should fail on its merits. The LCBO submits that the Plaintiffs have failed to prove a contravention of the *Competition Act* and that they have failed to prove Misconduct by a Civil Authority because the Plaintiffs have failed to show that the 2000 Beer Framework Agreement was unlawful or that it caused any harm.

[12] With respect to the unjust enrichment claim, the Defendants to that claim assert that to the extent that there is any doubt about the legality of their conduct, that doubt has been removed by s. 3(1.1) of the *Liquor Control Act*, another 2015 amendment, which these Defendants allege codified and declared their pre-existing interpretation and application of the Uniform Pricing Rule to have been lawful.

[13] For their part, in their partial summary judgment motion, the Plaintiffs seek declarations that: (a) s. 45(7) of the *Competition Act,* which codifies the Regulated Conduct Defence, does not provide a defence in civil actions; (b) if s. 45(7) of the *Competition Act* is available for civil actions, then it does not provide a defence to the LCBO and Brewers Retail with respect to the 2000 Beer Framework Agreement; (c) s. 10(3) of the *Liquor Control Act*, which retrospectively authorized the LCBO's entering into the 2000 Beer Framework Agreement, is not capable of providing a "Regulated Conduct Defence" for one or more of the Defendants within the scope of s. 45(7) of the *Competition Act*; and (d) s. 3(1.1) of the *Liquor Control Act,* which declares how the Uniform Price Rule operates, cannot retroactively provide a juristic reason for Brewers Retail having charged Licencees prices for beer that were in excess of retail prices for beer in contravention of the *Liquor Control Act's* Uniform Price Rule.

[14] It may be noted that for the Plaintiffs' summary judgment motion, if the first three declarations were granted, then the Plaintiffs would have a partial summary judgment of their conspiracy claims and the Defendants' summary judgment motions would fail and if the fourth declaration were granted, it would be partially dispositive of the Plaintiffs' unjust enrichment claim in their favour.

[15] It should be noted that in seeking the declaration that s. 10(3) of the *Liquor Control Act* does not provide a Regulated Conduct Defence, the Plaintiffs assert that the defence is not available as a matter of statutory interpretation or it is not available because s. 10(3) is *ultra vires* the legislative authority of the Province of Ontario. Because of the submission that s. 10(3) of the *Liquor Control Act* is *ultra vires*, the Ontario Ministry of the Attorney General and the Attorney General of Canada were given notice pursuant to s. 109 of the *Courts of Justice Act*[6] of a constitutional issue. The Attorney General of Ontario intervened and delivered a factum. The Attorney seeks an order rejecting the Plaintiffs' argument that s. 10(3) of the *Liquor Control Act* is *ultra vires* the province of Ontario.

[16] Should the Plaintiffs be successful, they also seek several issue estoppels. They request that if one or more of the declarations are granted, then the court should order that the Defendants are precluded on the certification motion from denying that the cause of action, common issue, and preferable procedure criteria set out in sections 5(1)(a),(c), and (d) of the *Class Proceedings Act, 1992* are not satisfied.

B. OVERVIEW #1

[17] I shall be dismissing the Plaintiffs' action in its entirety. To understand my reasons for doing so, it is helpful to have two overview descriptions. This first overview focuses on the circumstances that this proposed class action involves an astonishing litigation event that underlies and explains why there are so many issues to resolve on these summary judgment motions and why it is possible to summarily resolve the proposed class action before the certification motion.

[18] Speaking metaphorically, the astonishing litigation event is that after the Plaintiffs launched their Bismarck of a class action in 2014, they were torpedoed by the Government of Ontario, which in 2015 enacted amendments to the *Liquor Control Act*. The amendments included retroactive provisions that purported to exculpate the Defendants from the conspiracy and tort claims and from the unjust enrichment claim that are the subject matter of the cause of action. The Plaintiffs' response to the amendments to the *Liquor Control Act* was a launch of anti-submarine rockets and missiles including a constitutional challenge. The six summary judgment motions and the constitutional challenge are the litigation equivalent of the story of the Sinking of the Bismarck.

[19] By way of an overview of the positions of the parties and their legal arguments discussed below, the legal sea battle that frames the motions can be explained as follows.

[20] The Plaintiffs launched a proposed class action battleship that can be simplified to two discrete core claims; namely: one, that the 2000 Beer Framework Agreement contravened both versions of s. 45 of the *Competition Act;* and, two that the Defendants (except the LCBO) had been unjustly enriched by contravening the Uniform Price Rule of the *Liquor Control Act*. In

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[6] S.O. 1990, c. C.43.

their partial summary judgment motion, the Plaintiffs seek declarations that would advance but not be determinative of both of these big guns.

[21] With respect to the alleged contravention of the *Competition Act* claim, the Defendants' primary defence in their summary judgment motions was to rely on the Regulated Conduct Defence.

[22] The Plaintiffs' two-branched Reply to the Defendants' primary defence was that: (a) the Regulated Conduct Defence does not apply for civil claims for contravention of the *Competition Act* and was limited to being a defence to criminal prosecutions; and (b) the entering into the 2000 Beer Framework Agreement was not properly authorized and therefore it was outside the scope of the Regulated Conduct Defence. The Defendants joined issue on this point and reasserted that the Regulated Conduct Defence was available to defend civil claims and that the 2000 Beer Framework Agreement was within the scope of the defence.

[23] With respect to the alleged contravention of the *Competition Act* claim, the Defendants' secondary defence was that if the Regulated Conduct Defence was not already available, it had become available as a consequence of the Ontario Government's amendments to the *Liquor Control Act*.

[24] The Plaintiffs' reply to the Defendants' secondary defence was that the Regulated Conduct Defence was *ultra vires* the authority of the Province of Ontario. The Defendants, along with the Attorney General, joined issue on this point.

[25] With respect to the alleged contravention of the *Competition Act* claim, Sleeman advanced the defence that it was not a participant in any conspiracy. The Plaintiffs joined issue and insisted that Sleeman was a co-conspirator or that it was too early in the proceeding to say one way or the other.

[26] With respect to the alleged contravention of the *Competition Act* claim, and also with respect to the alleged tort of Misconduct by a Civil Authority, the LCBO advanced the defence that apart from the Regulated Conduct Defence, there is no merit to the Plaintiffs' claim that there was a contravention of the *Competition Act*. Essentially, the LCBO argued that there was proof that the 2000 Beer Framework Agreement was in the public interest, had occasioned no harm, and the Plaintiffs could not prove causation of damages or any damages associated with the 2000 Beer Framework Agreement. The Plaintiffs' reply was to the contrary, and they insisted that they had established all of the constituent elements of a contravention of s. 45 and essentially only the quantum of damages needed a trial.

[27] The LCBO also submitted that there is no reasonable cause of action for Misconduct by a Civil Authority. The Plaintiffs joined issue and insisted that it was not plain and obvious that they did not have a legally viable claim.

[28] With respect to the Plaintiffs' unjust enrichment claim, the Defendants' primary defence is that properly interpreted, there was no contravention of the Uniform Price Rule of the *Liquor Control Act*. The Plaintiffs join issue on the primary defence, and the parties disagreed about how the Uniform Price Rule legislation should be interpreted.

[29] With respect to the Plaintiffs' unjust enrichment claim, the Defendants' secondary defence is that any contravention of the Uniform Price Rule has been cured by the amendments to the *Liquor Control Act*. The Plaintiffs join issue on the secondary defence, which again is essentially a matter of statutory interpretation.

[30] With respect to the Plaintiffs' unjust enrichment claim, the Defendants' tertiary defence is that there was a juristic reason for any unjust enrichment and hence the unjust enrichment claim must fail. The Plaintiffs join issue on the tertiary defence.

[31] With respect to the Plaintiffs' unjust enrichment claim, Brewers Retail has the quaternary defence that it was never enriched even if there was a contravention of the Uniform Price Rule because it was a revenue conduit and it was never enriched by selling beer to Licencees.

[32] As I shall explain, the outcome of the legal battle is that the Plaintiffs' proposed class action is sunk. Save for the LCBO's arguments that a breach of s. 45 of the *Competition Act* could not and did not occur and that there are no damages from the 2000 Beer Framework Agreement, which arguments are not appropriate for a summary disposition, all of the Defendants' arguments have sunk the Bismarck.

C. OVERVIEW #2

[33] As noted in Overview #1, I shall be dismissing the Plaintiffs' action in its entirety. To understand my reasons for doing so, it is helpful to have a second overview with a second metaphor. If this proposed class action were a tennis match between the Plaintiffs and the Defendants, the score would be 6-0, 6-0, 6-0 in favour of the Defendants.

[34] Set one (the conspiracy law contest) goes to the Defendants by virtue of the Regulated Conduct Defence. Pursuant to this defence, the Plaintiffs' various competition law claims were without merit even before the Province legislated s. 10(3) of the *Liquor Control Act* to bless the 2000 Beer Framework Agreement and to immunize the Defendants from any claims associated with competition crimes.

[35] And, assuming that there was an illegal conspiracy associated with the 2000 Beer Framework Agreement, Sleeman was not a co-conspirator and the conspiracy action should be dismissed as against it in any event.

[36] Set two (the unjust enrichment contest) goes to the Defendants because the Plaintiffs' unjust enrichment claim was without merit both before and after the Province legislated s. 3(1.1.) of the *Liquor Control Act* to bless the Defendants' interpretation and application of the Uniform Price Rule. The Defendants have their primary, secondary, tertiary, and quaternary defences.

[37] Set three (the novel tort claim), where the Plaintiffs assert a Misconduct by a Civil Authority claim is without merit. They have not asserted a reasonable cause of action and in any event the LCBO is again protected by the Regulated Conduct Defence.

[38] With respect to the first set (the conspiracy law contest), as I shall explain below, there was no illegal civil conspiracy associated with the 2000 Beer Framework Agreement, because the Regulated Conduct Defence was available both before and after the 2010 amendments to the *Competition Act* and, or the Regulated Conduct Defence became available because of the 2015 amendment of s. 10(3) of the *Liquor Control Act*, which amendment was a constitutionally sound act of the Ontario legislature.

[39] As I shall explain below, although it would be inappropriate to decide the point on these summary judgment motions, the Defendants have an argument that apart from the Regulated Conduct Defence, their entering into the 2000 Beer Framework Agreement did not constitute a contravention of s. 45 of the *Competition Act* in either its pre-2010 or post-2010 versions. The

LCBO argues that under either iteration of s. 45, there was no contravention because the substance of the 2000 Beer Framework Agreement was to encourage - not discourage - competition and the agreement had nothing to do with the price or pricing of beer. Rather than being anti-competitive, the LCBO argues that the purpose of the 2000 Beer Framework Agreement was to stop the monopolistic aspirations of the LCBO to wipe out its competition. It argues that the 2000 Beer Framework Agreement was not causative of any harm to competition because it was designed to preserve the *status quo*. It argues that the 2000 Beer Framework Agreement was in the public interest and not capable of comprising a criminal competition offence. However, it is not appropriate to summarily decide these genuine issues requiring a trial, and it is unnecessary to do so because there are numerous other reasons to dismiss the Plaintiffs' action based on the Defendants' defences.

[40] With respect to the second set (the unjust enrichment contest), as I shall explain below, the Plaintiffs do not have an unjust enrichment claim because: (a) as a matter of interpretation there never was a breach of the Uniform Price Rule; (b) if there was a breach, then it was erased or cured by the 2015 amendment to the *Liquor Control Act*, which added s. 3(1.1) to the *Liquor Control Act*; (c) if there was an uncured breach of the Uniform Price Rule, then, nevertheless, the Defendants have a juristic reason for being enriched; *i.e.*, they relied on the circumstance that the prices they charged Licencees were fixed by the LCBO; and (d) if there was an uncured breach of the Uniform Price Rule, then, in so far as Brewers Retail was concerned, it was a revenue conduit and it was never enriched by selling beer to Licencees.

[41] With respect to the third set (the invented tort claim), as I shall explain below, because of the Regulated Conduct Defence, the LCBO did not do anything wrong in entering into the 2000 Beer Framework Agreement, and thus this is not the case to give birth to the Misconduct by a Civil Authority cause of action based on the *obiter dicta* of *Paradis Honey Ltd. v. Canada (Minister of Agriculture and Agri-Food)*,[7] which is the only basis for this purported innovation in tort law.

D. PROCEDURAL HISTORY, THE *COMPETITION ACT*, AND THE ASTONISHING BACKGROUND TO THE PROPOSED CLASS ACTION

[42] On December 9, 2014, the *Toronto Star* published an article by Martin Regg Cohn. Mr. Cohn described the 2000 Beer Framework Agreement as a "secret deal" between the LCBO and Brewers Retail, an "inglorious cash grab", and a "protectionist pact" that gouged both beer drinkers and the food and beverage industry.

[43] Three days later, on December 12, 2014, the Plaintiffs commenced a proposed class action against by filing a Notice of Action.

[44] On January 8, 2015, the Plaintiffs filed their Statement of Claim.

[45] On May 13, 2015, the Plaintiffs delivered a Fresh as Amended Statement of Claim.

[46] On August 1, 2015, amendments to the *Liquor Control Act*, came into force. Some of the amendments were part of a provincial initiative to allow certain supermarkets to sell six-packs of beer. Other amendments purported to exonerate some or all of the misconduct alleged by the Plaintiffs in their Fresh as Amended Statement of Claim. In particular, sections 3(1.1) and 10(3)

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[7] 2015 FCA 89.

of the amended *Act* state:

> 3(1.1) The Board's purposes and powers also include, and are deemed always to have included, the purpose and power to fix the prices at which the various classes, varieties and brands of liquor are to be sold, and such prices shall be the same at all government stores except,
>
> (a) liquor sold through an outlet designated by the Minister of National Revenue under the *Excise Act* (Canada) as a duty-free sales outlet; and
>
> (b) liquor sold to holders of a licence under the *Liquor Licence Act*, which may be sold at a price that is different from the price at which it is sold to the general public.
>
> ....
>
> 10(3) The Board is deemed to have been directed, and Brewers Retail Inc. is deemed to have been authorized, to enter into the June 2000 framework in relation to the Crown's or a Crown agent's regulation and control of the sale of beer in Ontario.

[47] In January 2016, pursuant to section 29 of the *Class Proceedings Act, 1992*, with the consent of the LCBO and with the other Defendants taking no position, the Plaintiffs sought to discontinue the action against the LCBO. In apparent response the Provincial Government's enactment of the amendments to the *Liquor Licence Act,* the Plaintiffs sought leave to deliver a Second Fresh as Amended Statement of Claim that would: (a) remove the LCBO as a party but identify it as an unnamed co-conspirator; and (b) make substantive amendments to the claims being made against the remaining Defendants, removing some claims but adding some new claims or requests for relief. I dismissed the motion, without prejudice to it being reinitiated after the close of pleadings.[8] The motion was never reinitiated.

[48] On February 22, 2016, the Plaintiffs Delivered a Second Fresh as Amended Statement of Claim.

[49] In the proposed class action, the Plaintiffs seek to represent the following class:

> All persons in Canada who purchased beer in Ontario during the Class Period. Excluded from the class are the defendants, their subsidiaries, and affiliates.
>
> Class Period means between June 1, 2000 and the date on which this action is certified as a class proceeding.

[50] In their proposed class action, the Plaintiffs are seeking damages of $1.4 billion, and punitive damages of $5 million for the following causes of action: (a) breach of s.45 of the *Competition Act*;[9] (b) civil conspiracy; (c) unjust enrichment; (d) waiver of tort; and (e) Misconduct by a Civil Authority.

[51] The Plaintiffs allege that by entering into the 2000 Beer Framework Agreement, the Defendants created a monopoly by Molson, Labatt and Sleeman. The Plaintiffs allege that the monopoly eliminated price competition, enabling Brewers Retail, Molson, Sleeman, and Labatt to set prices for beer at supra-competitive levels. The Plaintiffs allege that the implementation of the 2000 Beer Framework Agreement resulted in higher beer prices, both to them and to members of the proposed class. The Plaintiffs allege that the 2000 Beer Framework Agreement is void as being an unreasonable restraint on trade and as contrary to public policy.

[52] The Plaintiffs plead that as a direct result of the Defendants' conspiracies, Class Members continue to pay artificially inflated prices for beer manufactured, marketed, sold, or distributed

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[8] *Hughes v. Liquor Control Board of Ontario*, 2016 ONSC 867.

[9] R.S.C. 1985, c. C-34.

and have thereby suffered losses and damages. The Plaintiffs allege that the Defendants' conduct constitutes offences under Part VI of the *Competition Act*, in particular, s. 45(1) of the *Competition Act*. The Plaintiffs claim loss and damages under s. 36(1) of the *Competition Act* in respect of the unlawful conduct. Section 36(1) of the *Competition Act* is set out below.

[53] In 2010, during the Class Period, which began on June 1, 2000 and continues until certification, s. 45 of the *Competition Act* was amended. The two versions of s. 45 are set out below.

[54] The relevant provisions of the *Competition Act* are:

> *Binding on agents of Her Majesty in certain cases*
>
> 2.1 This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.
>
> ....
>
> *Recovery of damage*
>
> 36(1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> ....
>
> *Limitation*
>
> (4) No action may be brought under subsection (1),
>
> (a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
>
> (i) a day on which the conduct was engaged in, or
>
> (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
>
> whichever is the later; and ....
>
> ....

Pre-March 12, 2010 version of s.45	Post-March 11, 2010 version of s.45
Conspiracy 45(1) Every one who conspires, combines, agrees or arranges with another person (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,	*Conspiracies, agreements or arrangements between competitors* 45(1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges (a) to fix, maintain, increase or control the price for

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof, (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or (d) to otherwise restrain or injure competition unduly, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both. *Idem* (2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market. *Evidence of conspiracy* (2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt. *Proof of intent* (2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).	the supply of the product; (b) to allocate sales, territories, customers or markets for the production or supply of the product; or (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product. *Penalty* (2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both. *Evidence of conspiracy, agreement or arrangement* (3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt. .... *Common law principles - regulated conduct* (7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1). ....

[55] The Plaintiffs allege that the Defendants' conduct constitutes a civil conspiracy to use unlawful means, which resulted in loss and damages to the Plaintiffs and other putative Class Members.

[56] In their Statement of Claim, the Plaintiffs allege that the LCBO engaged in misconduct by: (a) entering into the 2000 Beer Framework Agreement; and (b) improperly fixing or approving "Licencee prices" submitted to it by Molson, Labatt, and Sleeman, contrary to

s. 3(1)(i) of the *Liquor Control Act*. The Plaintiffs allege that the LCBO's conduct was a commercially unreasonable regulatory action taken for improper purposes and without regard to the interests of the Proposed Class.

[57] The Plaintiffs allege that by entering into the 2000 Beer Framework Agreement, the LCBO acted illegally because the purpose and effect of the Agreement is not permitted by, and is contrary to, the *Competition Act*. Furthermore, the Plaintiffs plead that the 2000 Beer Framework Agreement was not authorized by a regulation, contrary to s. 8 of the *Liquor Control Act*. The Plaintiffs allege that the LCBO's breaches of the *Competition Act* and its conduct in entering into and conducting its business pursuant to the 2000 Beer Framework Agreement amounts to Misconduct by a Civil Authority warranting an award of compensatory damages against the LCBO.

[58] The Plaintiffs allege that the LCBO had no statutory authority to enter into the 2000 Beer Framework Agreement and that the Agreement is *ultra vires* because: (1) it inappropriately fettered the discretion of the LCBO to control the sale of beer; (2) it was entered into for an unauthorized purpose to control the sale of liquor in the province and to benefit three large, foreign-owned brewers, to the detriment of Ontario Licencees, individual consumers, craft brewers and taxpayers; and (3) the 2000 Beer Framework Agreement was unreasonable and its effect was to discriminate between Labatt, Molson, and Sleeman on the one hand, and all other beer manufacturers on the other, as well as between Licencee customers, on the one hand, and retail customers, on the other.

[59] On March 24, 2016, the LCBO, Brewers Retail, Labatt, and Molson delivered their respective Statements of Defence, and the LCBO and Brewers Retail respectively brought motions for summary judgment.

[60] On April 1, 2016, Sleeman delivered its Statement of Defence.

[61] On April 5, 2016, Labatt, Molson, and Sleeman respectively brought motions for summary judgment.

[62] On July 4, 2016, the Plaintiffs delivered their Reply and brought a motion for partial summary judgment.

[63] In October 2016, the Plaintiffs, Labatt, and Molson agreed to the issues to be decided on their summary judgment motions; namely:

- (1) Have Labatt and Molson established the Regulated Conduct Defence to the Plaintiffs' claim that the Defendants conspired and agreed with each other to allocate sales, territories, customers or markets for the supply of beer sold in Ontario in the 2000 Beer Framework Agreement, contrary to section 45 of the *Competition Act*?
- (2) Were differential Licencee Prices authorized by the *Liquor Control Act* in force during the proposed Class Period?
- (3) If the answer to (2) is no, do the 2015 Amendments to the *Liquor Control Act* retroactively authorize differential licencee prices?
- (4) If the answers to both (2) and (3) are no, did Brewers Retail, Labatt, Molson, and Sleeman rely on the LCBO's approval of differential prices throughout the proposed Class Period and the LCBO's interpretation of the *Liquor Control Act* as authorizing

differential licencee prices, and, if so, does such reliance provide a juristic reason for any enrichment of Labatt, Molson and Sleeman alleged in the Plaintiffs' Statement of Claim?

E. EVIDENTIARY BACKGROUND

[64] In advancing their summary judgment motion and resisting the Defendants' summary judgment motions, the Plaintiffs proffered:

- the expert's report dated April 12, 2016 of **Adam Dodek**. Mr. Dodek is the Dean of the Faculty of Law at the University of Ottawa.
- the affidavit dated June 30, 2016 of the Plaintiff **David Hughes**.
- the affidavit dated April 17, 2017 of **Elizabeth Willart**. Ms. Willart is a law clerk at Siskinds, LLP.
- the expert reports dated May 17, 2017 and September 20, 2017 of **Thomas Wilson**. Mr. Wilson is a Professor at the University of Toronto's Rotman School of Business.

[65] In advancing its summary judgment motion and resisting the Plaintiffs' partial summary judgment motion, the LCBO proffered:

- the affidavit dated September 9, 2016 of **Andrew S. Brandt**. Between 1990 and 2006, Mr. Brandt was the Chair and CEO of the LCBO. Previously he had been the mayor of Sarnia, a member of the Legislative Assembly, and a cabinet minister in a series of Progressive Conservative governments. Mr. Brandt was cross-examined.
- the affidavit dated September 8, 2016 of **Ian Loadman**. Mr. Loadman is the Senior Director, Corporate Affairs of the LCBO. Mr. Loadman answered written interrogatories.
- the affidavit dated September 2, 2016 of **Robert W. Runciman**. Mr. Runciman is a Canadian Senator. In 1999, he was the Minister of Consumer and Commercial Relations in the Progressive Conservative Government of Premier Michael Harris. Mr. Runciman was cross-examined.
- the affidavits dated July 28, 2017 and October 12, 2017 of **Ralph A. Winter**. Mr. Winter is Professor and Canadian Research Chair in Business Economics and Public Policy at the University of British Columbia Sauder School of Business.

[66] In advancing its summary judgment motion and resisting the Plaintiffs' partial summary judgment motion, Brewers Retail proffered:

- the expert reports of Mr. Winter.
- the affidavit dated September 7, 2016 of **Jeffrey Ross Newton**. Mr. Newton is the President of Canadian National Brewers, an unincorporated trade association. Mr. Newton was cross-examined.

[67] In advancing its summary judgment motion and resisting the Plaintiffs' partial summary judgment motion, Labatt proffered:

- the affidavit of Mr. Newton and the expert reports of Mr. Winter.

- the affidavit dated September 9, 2016 of **Ignacio Lares**. Mr. Lares is the Chief Financial Officer of Labatt. Mr. Lares answered written interrogatories.

[68] In advancing its summary judgment motion and resisting the Plaintiffs' partial summary judgment motion, Molson proffered:

- the affidavits of Mr. Brandt, Mr. Loadman, and Mr. Newton, and the expert reports of Mr. Winter.
- the affidavit dated September 9, 2016 of **David Perkins**. Mr. Perkins was the former CEO of Molson. Mr. Perkins was cross-examined.

[69] In advancing its summary judgment motion and resisting the Plaintiffs' partial summary judgment motion, Sleeman proffered:

- the expert reports of Mr. Winter.
- the affidavit dated September 9, 2016 of **John Sleeman**. Mr. Sleeman is the founder and Chairman of Sleeman. He was cross-examined.

F. FACTS

1. The Plaintiffs

[70] Mr. Hughes is an individual residing in Burlington, Ontario. He purchased beer at various stores owned and operated by Brewers Retail (The Beer Store) and at various restaurants, bars, and other licenced establishments.

[71] 631992 Ontario Inc. is a restaurant in Burlington, Ontario, carrying on business under the name "The Poacher." It purchased beer from Brewers Retail for sale to its patrons. Mr. Hughes is the owner of The Poacher.

2. The Regulation of the Alcohol and Beer Markets in Ontario

[72] Since the repeal of Prohibition in 1927, the distribution and sale of alcoholic beverages in Ontario has been intensely regulated and supervised by the Government of Ontario. The sale and distribution of alcohol is a major source of revenue and manufacturers, distributers, and vendors of alcohol are a major source of employment, but the public's consumption of alcohol raises serious public health, public safety, and environmental (recycling) policy issues that require detailed government oversight. It is well established that the provinces have the jurisdiction to regulate and control the sale of liquor within their boundaries and to fix the prices at which, and the conditions under which, liquor may be sold.[10]

[73] The regulatory framework applicable to the distribution and sale of beer in Ontario is set out in four pieces of legislation and their related regulations: (1) the *Liquor Control Act*; (2) the *Liquor Licence Act*; (3) the *Alcohol and Gaming Regulation and Public Protection Act, 1996*;[11] and (4) *Importation of Intoxicating Liquors Act*,[12] which is a federal statute that, with limited

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[10] *R. v. Canadian Breweries Ltd.*, [1960] O.R. 601 (H.C.J.); *In re Board of Commerce Act 1919 and The Combines and Fair Prices Act 1919*, [1922] 1 A.C. 191 (P.C.).
[11] S.O. 1996, c 26, Sch.
[12] R.S.C., 1985, c. I-3.

exceptions, bans any interprovincial or international trade in alcoholic beverages other than as carried out by provincial liquor boards.

[74] The *Liquor Control Act* sets out a regulatory framework for the sale of alcohol in the province and this subject is within the province's jurisdiction under s. 92(13) (property and civil rights) and s. 92(16) (matters of a local or private nature) of the *Constitution Act, 1867*.[13]

[75] The *Liquor Licence Act* regulates manufacturers of alcoholic beverages in Ontario as well as the sale of alcoholic beverages by licencees; for example, the sale of wine, spirits, and beer at restaurants and pubs. Section 5 of the *Act* bans the sale of liquor in Ontario except where made: (a) under the authority of a licence or permit to sell liquor; *i.e.*, by licencees; (b) under the authority of a manufacturer's licence; *i.e.*, by breweries, wineries, or distillers; or (c) under the authority of the LCBO.

[76] The *Alcohol & Gaming Regulation and Public Protection Act* is the constituting legislation for the Alcohol & Gaming Commission of Ontario, which is the body responsible since 1996 for enforcing the *Liquor Licence Act* as well as provincial gambling and lotteries legislation. Subsection 3(2) of the *Act* authorizes the Lieutenant Governor in Council, by regulation, to assign to the Commission powers and duties set out in the *Liquor Control Act*.

[77] Some of the LCBO's powers were assigned to the Commission in 2001, when the Government transferred jurisdiction relating to new store or operator authorizations to the Commission.[14]

3. The LCBO

[78] The LCBO was established by the Government of Ontario in 1927 after the repeal of Prohibition. The LCBO is a Crown agency that is responsible for the operation of retail liquor stores across the Province as well as the regulation of alcohol distribution in Ontario in conjunction with the Alcohol & Gaming Commission of Ontario.

[79] The LCBO is one of the world's largest buyers and retailers of alcohol. Net income from LCBO sales goes to the Province in the form of an annual dividend. The 2016 Annual Report of the LCBO reported that it had revenues of $5.89 billion, net earnings of $2.06 billion, and paid the Government a dividend of $2.06 billion.

[80] As a Crown agency, the LCBO derives its authority from the *Liquor Control Act*. For present purposes, the following provisions of the *Act* are significant:

PART I
DEFINITIONS

Definitions

1. In this Act,

"beer", "liquor", "spirits", "wine" and "Ontario wine" have the same meaning as in the *Liquor Licence Act*;

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[13] 30 & 31 Victoria, c 3 (UK). *Toronto Distillery Company Ltd v. Ontario (Alcohol and Gaming Commission of Ontario)*, 2016 ONSC 2202, aff'd 2016 ONCA 960; *Québec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14; *Global Securities Corporation v. British Columbia (Securities Commission)*, 2000 SCC 21.

[14] O. Reg. 141/01 (Assignment of Power and Duties-Liquor Control Act Regulation).

"Board" means the Liquor Control Board of Ontario continued under section 2;

"government store" means a store established or authorized under this Act by the Board for the sale of spirits, beer or wine;

"manufacturer" means a person who produces liquor for sale;

"Minister" means the minister responsible for the administration of this Act;

....

PART II
LIQUOR CONTROL BOARD OF ONTARIO

Board continued

2.(1) The Liquor Control Board of Ontario is continued under the name Liquor Control Board of Ontario in English and Régie des alcools de l'Ontario in French and shall consist of not more than 11 members appointed by the Lieutenant Governor in Council who shall form its board of directors.

....

Power and purposes of Board

3.(1) The purposes of the Board are, and it has power,

(a) to buy, import and have in its possession for sale, and to sell, liquor and other products containing alcohol and non-alcoholic beverages;

(b) to control the sale, transportation and delivery of liquor;

(c) to make provision for the maintenance of warehouses for liquor and to control the keeping in and delivery from any such warehouses;

(d) to establish government stores for the sale of liquor to the public;

(e) to authorize manufacturers of beer and spirits and wineries that manufacture Ontario wine to sell their beer, spirits or Ontario wine in stores owned and operated by the manufacturer or the winery and to authorize Brewers Retail Inc. to operate stores for the sale of beer to the public;

(e.1) to authorize persons to operate government stores for the sale of liquor to the public;

(f) to control and supervise the marketing methods and procedures of manufacturers and of wineries that manufacture Ontario wine including the operation of government stores by persons authorized under clause (e);

(g) subject to the *Liquor Licence Act*, to determine the municipalities within which government stores shall be established or authorized and the location of such stores in such municipalities;

(h) to determine the classes, varieties and brands of liquor to be kept for sale at government stores and maintain standards therefor;

(i) [Repealed. – Prior to its repeal and its replacement by 3(1.1) 3(1)(i) read: to fix the prices at which the various classes, varieties and brands of liquor are to be sold and, except in the case of liquor sold through an outlet designated by the Minister of National Revenue under the *Excise Act* (Canada) as a duty-free sales outlet, such prices shall be the same at all government stores;]

(j) to determine the nature, form and capacity of all packages to be used for containing liquor to be kept or sold and to administer or participate in such waste management programs for packaging as the Minister may direct;

....

(n) to promote social responsibility in connection with liquor;

....

(r) to do all things necessary for the management and operation of the Board in the conduct of its business;

(s) to do all things necessary or incidental to any of the purposes set out in this subsection.

Same, prices

(1.1) The Board's purposes and powers also include, and are deemed always to have included, the purpose and power to fix the prices at which the various classes, varieties and brands of liquor are to be sold, and such prices shall be the same at all government stores except,

(a) liquor sold through an outlet designated by the Minister of National Revenue under the *Excise Act* (Canada) as a duty-free sales outlet; and

(b) liquor sold to holders of a licence under the *Liquor Licence Act*, which may be sold at a price that is different from the price at which it is sold to the general public.

Additional powers of Board

(2) The Board has the power to establish conditions with respect to,

(a) subject to any regulation, authorizations for government stores under clause (1) (e) or (e.1);

(b) appointments of vendors of sacramental wines under clause (1) (k);

(c) authorizations granted by the Board with respect to the importation of liquor on the Board's behalf;

(d) subject to any regulation, authorizations granted by the Board with respect to the transportation and delivery of liquor;

(e) subject to any regulation, authorizations granted by the Board with respect to the maintenance of warehouses for liquor and the keeping in and delivery from any such warehouses; and

(f) any other authorizations or appointments granted or made by the Board.

....

Status of Board

4.0.3(1) The Board is a corporation to which the *Corporations Act* does not apply.

Same, Corporations Information Act

(1.1) The Board is a corporation to which the *Corporations Information Act* does not apply.

Crown agent

(2) The Board is for all purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty.

....

Regulations

8(1) The Lieutenant Governor in Council may make regulations,

(a) governing the purchase, distribution and sale of liquor;

(b) governing the keeping, storage or transportation of liquor;

(c) governing the operations of government stores or classes of government stores;

(d) governing the classes, varieties and brands of liquor to be kept for sale at government stores or classes of government stores;

(d.1) governing the prices at which the various classes, varieties and brands of liquor are to be sold at government stores or classes of government stores and may make regulations providing that liquor may be sold to holders of a licence under the *Liquor Licence Act* at a price that is different from the price sold to the general public;

(d.2) governing the prices at which the various classes, varieties and brands of liquor are to be sold by the Board to operators of government stores or classes of government stores;

(e) governing the issuance of authorizations for government stores by the Board;

(f) prescribing the conditions that apply to authorizations for government stores or to authorizations for classes of government stores;

(g) prescribing standards for liquor manufactured, purchased, distributed or sold in Ontario;

(h) prescribing criteria for the purposes of paragraph 1 of subsection 3 (6);

(i) requiring manufacturers, wineries that manufacture Ontario wine, persons operating government stores and persons importing liquor to furnish the Board with such returns and information respecting the manufacture, purchase, distribution or sale of liquor as is prescribed;

(j) governing the purchase of liquor under a permit issued under the *Liquor Licence Act*;

(k) exempting any person, product or class of person or product from any provision of this Part or the regulations.

Power to make regulations governing prices

(2) The authority to make regulations under clause 8(1)(d) of the Act, as it read immediately before section 5 of Schedule 20 to the *Building Ontario Up Act (Budget Measures), 2015* came into force, is deemed always to have included the authority to make regulations governing the prices at which liquor is sold to various classes of licence holders under the *Liquor Licence Act*, including regulations providing that liquor may be sold to holders of a licence under the *Liquor Licence Act* at a price that is different from the price sold to the general public.

Same

(3) Any provision of a regulation may be subject to such conditions, qualifications or requirements as are specified in the regulation.

[81] For present purposes of these summary judgment motions, several provisions of the *Legislation Act, 2006,*[15] namely sections 87, 78, and 92(1)(a) are relevant to understanding the powers and authority of the LCBO. Sections 87, 78 and 92(1)(a) state:

Definitions

87 In every Act and regulation, ...

"person" includes a corporation;

....

Incidental powers

78 If power to do or to enforce the doing of a thing is conferred on a person, all necessary incidental powers are included.

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[15] S.O. 2006, c.21 Sch. F.

....

Corporations, implied provisions

92 (1) A provision of an Act that creates a corporation,

> (a) gives it power to have perpetual succession, to sue and be sued and to contract by its corporate name, to have a seal and to change it, and to acquire, hold and dispose of personal property for the purposes for which the corporation is incorporated; ...

....

[82] As a Crown agency wholly owned by the Government of Ontario, the LCBO reports to Ontario's Minister of Finance. It formerly reported to the Minister of Consumer and Commercial Relations. The LCBO is required to abide by the policy decisions and directives of the Government. Pursuant to the *Management Board of Cabinet Act*,[16] the Management Board of Cabinet issued a series of directives,[17] requiring Crown agencies, including the LCBO, to execute Memoranda of Understanding ("MOU") with their supervising Ministries.

[83] Between 1989 and March 18, 2010, the LCBO was governed by the "LCBO MOU (1989)", which provided among other things that: (a) the Minister of Consumer and Commercial Relations was given express responsibility for approving all policy decisions that related to changes in the role of the LCBO; (b) the Deputy Minister had to work with the LCBO Board of Directors to provide a framework for assessing whether the LCBO's mandate was being fulfilled in concert with approved government policies; and (c) the Minister of Consumer and Commercial Relations had to approve the LCBO's annual operating plan, which included the general mandate of the LCBO, its strategic direction, its objectives and related performance measures for the upcoming period, sales forecasts and major capital or operating expenditures.

[84] The government exercised considerable control over the LCBO and required it to exercise its powers and to carry on business in a way to implement government polices. The regulation of alcohol has very significant public policy ramifications because it touches upon, among other things, public health and welfare, the environment (recycling), public safety, jobs and employment, and government finances. Complex, high-level decisions were made from time-to-time by senior Government officials or in some cases, through the enactment of legislation by the Legislative Assembly that directed the activities of the LCBO. The LCBO was expected to implement Government policy with regard to the distribution and sale of alcohol within the parameters set out by the *Liquor Control Act* and related legislation.

[85] The LCBO was never free to carry on business as if it were a private, profit-maximizing commercial enterprise free of government influence.

[86] Under the *Liquor Control Act*, the LCBO is empowered to establish "government stores" for the sale of liquor to the public and to fix or approve the prices for the goods sold at the stores. Brewers Retail is an established government store and the LCBO determines in what municipalities Brewers Retail may have stores.

[87] The LCBO itself operates two principal kinds of retail stores across Ontario that sell beer, wine and spirits. There are "Ordinary Stores" for larger communities and "Combination Stores" for smaller communities. The smallest communities are served by "Agency Stores", which are

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[16] R.S.O. 1990, c. M 1.

[17] The directives are now known as the "Agencies & Appointments Directives." They formerly were known as the "Agency Establishment and Accountability Directives."

private sector businesses such as grocery stores that are permitted to sell beer, wine and spirits.

[88] As will be seen in the discussion below, how beer could be sold and what beer could be sold at the Ordinary Stores is at the heart of the 2000 Beer Framework Agreement, which is the alleged source of the anti-competitive behaviour that is at the heart of the Plaintiffs' proposed class action.

4. Brewers Retail, Labatt, Molson, and Sleeman

[89] At the same time as the LCBO was established, the Ontario Government negotiated with the Ontario brewing industry to set up a single distribution-retail system for beer manufactured in Ontario by licensed manufacturers, and Brewers Retail, originally Brewers' Warehousing Company, Limited, a collective of Ontario brewers, was created for that purpose.

[90] As noted above, Brewers Retail was authorized under the *Liquor Control Act* to operate a government store. As may be noted above, pursuant to s. 3(1) of the *Liquor Control Act*, the LCBO has the power to authorize manufacturers of beer to sell their beer in stores owned and operated by the manufacturer or to authorize Brewers Retail to operate stores for the sale of beer to the public.

[91] Save for the beer sold at the LCBO's Ordinary, Combination, and Agency Stores, Brewers Retail is the distributor, wholesaler, and retailer of beer in Ontario. Brewers Retail is also Ontario's primary container return service (recycling). Since 1927, Brewers Retail has levied and refunded deposits on all empty beer containers purchased in Ontario. In 2007, that service expanded, and Brewers Retail now accepts returns of all alcoholic beverage containers purchased in Ontario.

[92] Brewers Retail was established for the specific purpose of providing Ontario with an efficient and cost-effective channel through which large volumes and packages of beer could be distributed and sold across the province, which was not part of the LCBO's business. The LCBO focused on wine and spirits. The LCBO did not develop the infrastructure necessary to warehouse, distribute and sell beer on a scale necessary to service Ontario's retail and licencee consumers.

[93] Brewers Retail's role in Ontario's beer distribution system is expressly recognized in the *Liquor Control Act*, which provides the LCBO with the power to authorize Brewers Retail to operate stores for the sale of beer to the public[18] and which provides the LCBO to control the sale and delivery of beer at the stores and to establish specific terms and conditions relating to Brewers Retail's operation of its stores for the sale of beer.[19]

[94] The distribution of beer requires special infrastructure for large scale-refrigeration, a transportation fleet, storage facilities, loading and unloading equipment, and bottle recovery and recycling systems.

[95] Brewers Retail operates approximately 450 retail stores, 8 distribution warehouses, and 8 cross-dock facilities. It provides beer to approximately 20,723 licencees, 650 LCBO retail locations, 141 retail partners, and 71 northern agents. Brewers Retail has approximately 7,000 employees.

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[18] *Liquor Control Act*, s. 3(1)(e).
[19] *Liquor Control Act*, ss. 3(1)(b), 3(1)(e), and 3(2).

[96] Beer is a low margin product that must be sold in significant volumes to be profitable, Brewers Retail's stores were configured to accommodate high-volume beer sales. Brewers Retail's stores had until relatively recently far greater storage space and refrigeration than LCBO outlets.

[97] In November 1988, Brewers' Warehousing changed its name to Brewers Retail Inc., which carries on business as a government store known as "The Beer Store."

[98] Labatt, Molson, and Sleeman are brewers; *i.e.* beer manufacturers in Ontario. Labatt is a Canadian corporation and a subsidiary of Anheuser-Busch InBev, a Belgium corporation. Molson is a Canadian corporation that is a subsidiary of Molson Coors Brewery Corp., a U.S. corporation. Sleeman is a Canadian corporation. It is a subsidiary of Sapporo Canada Inc., a Canadian corporation, which is a subsidiary of Sapporo International Inc., a Japanese corporation.

[99] Labatt, Molson, and Sleeman are the largest shareholders of Brewers Retail. At the time of the 2000 Beer Framework Agreement, discussed below, which is at the centre of this litigation, Labatt (45%), Molson (45%), and Sleeman (10%) were the only shareholders of Brewers Retail. (More recently the group of shareholders has expanded to add numerous other brewers.)

[100] Sleeman became a shareholder of Brewers Retail on January 29, 1996. Since that time, Sleeman has been, and remains, a minority shareholder. Sleeman has never held more than a 10% shareholding.

[101] Brewers Retail operates on a break-even basis and is not an independent profit centre for its shareholders. Brewers Retail's shareholders are responsible for its expenses and liabilities including: (a) any operating revenue deficit; (b) capital investments including expansion and modernization; (c) employee pension and benefit liabilities; (d) insurance and financing costs; (e) store termination costs; (f) equipment leases; and (g) any wind-up or restructuring costs.

5. The Pricing of Beer to Consumers and Licencees and the Uniform Price Rule

[102] How beer is priced for sale will be discussed in this section, but it must be noted at the outset of the discussion that the pricing of alcohol has historically been subject to the Uniform Price Rule of the *Liquor Control Act*, which was a manifestation of government policy that alcohol prices should be uniform across the width and breadth of Ontario. Put simply, consumers in the more remote parts of the province should pay the same for alcohol as consumers in the southern more populated parts of the Province.

[103] The source of the Uniform Price Rule was s. 3(1)(i) of the *Liquor Control Act*, which was repealed and replaced in 2015 by s. 3(1.1) of the *Act*. The interpretation of s. 3(1)(i) and its replacement s. 3(1.1) are at the heart of the Plaintiffs' unjust enrichment claim, which alleges that all the Defendants (except the LCBO) were unjustly enriched by contravening the Uniform Price Rule.

[104] Prior to its repeal and its replacement by s. 3(1.1), s. 3(1)(i) stated:

> *Power and purposes of Board*
>
> 3.(1) The purposes of the Board are, and it has power, …
>
> (i) to fix the prices at which the various classes, varieties and brands of liquor are to be sold and,

> except in the case of liquor sold through an outlet designated by the Minister of National Revenue under the *Excise Act* (Canada) as a duty-free sales outlet, such prices shall be the same at all government stores.

[105] Section 3(1.1), which replaced the repealed s. 3(1), states:

> 3 (1.1) The Board's purposes and powers also include, and are deemed always to have included, the purpose and power to fix the prices at which the various classes, varieties and brands of liquor are to be sold, and such prices shall be the same at all government stores except,
>
> > (a) liquor sold through an outlet designated by the Minister of National Revenue under the *Excise Act (*Canada) as a duty-free sales outlet; and
> >
> > (b) liquor sold to holders of a licence under the *Liquor Licence Act*, which may be sold at a price that is different from the price at which it is sold to the general public.

[106] Subject to the Uniform Price Rule, the pricing of beer in government stores, whether operated by the LCBO or by Brewers Retail, is governed by regulations promulgated under the *Liquor Control Act*. The first regulation, Ont. General Reg. 717, R.R.O. 1990, came into effect on May 1, 1996.[20] Section 2.2 of the regulation requires the LCBO to set minimum prices for beer, and s. 2.3 provides that, upon receipt of a price change request that is above the minimum price, the LCBO shall notify the applicant manufacturer and Brewers Retail that the price change will, subject to paragraph 3, go into effect.

[107] In other words, subject to the Uniform Price Rule, it is the brewer that sets the price of its product, and the LCBO's role has been to verify that the prices proposed by brewers are above the stipulated minimum prices applicable to particular classes of beer.[21] Brewers Retail does not set the price, and it has no control over the prices at which individual brewers sell their products at the Brewers Retail stores.

[108] There are two distribution channels for beer; *i.e.,* a distribution channel for retail consumers and a distribution channel for licencees. Historically, the pricing for product for retail consumers and licencees has been different because licencees can resell at significant mark-up and licencees have access to draught beer, which provides a less expensive option for high volume sales. Thus, some brewers may charge higher prices in the licencee distribution channel than for the same product in the retail consumer distribution channel. Other brewers may set prices for licencees that are lower than for retail consumers. In either case, it is the brewer not the LCBO or Brewers Retail that determines the price for the product. Thus, brewers like Labatt, Molson, and Sleeman, typically propose two prices to the LCBO for beer: one price that is charged to members of the general public, and another (typically higher) price that is charged to licencees who purchase beer for resale to their patrons.

[109] Differential pricing between licencees and retail consumers in Ontario is not unique to beer products. The price at which wine and spirits are sold to licencees by the LCBO is typically different from the price for consumers.[22]

[110] Returning to the topic of the Uniform Price Rule, since the repeal of Prohibition, it has been Government of Ontario policy to prohibit price competition between the LCBO and Brewers Retail in the retail sale of beer. Since 1972, the *Liquor Control Act* has required that the

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[20] Ont. General Reg. 717, R.R.O. 1990.

[21] In March 2010, the regime set out in sections 2.2 and 2.3 of Ont. Gen. Regulation 717 R.R.O. 1990 was moved to a stand-alone Regulation, O. Reg. 116/10 (Minimum Pricing of Liquor and Other Pricing Matters).

[22] Ont. Reg 116/10 (Minimum Pricing of Liquor and Other Pricing Matters), s.11(1).

price of beer be subject to the Uniform Price Rule and that the retail price of a particular class, variety and brand of beer be fixed and uniform across all retail stores throughout the province. This Uniform Price Rule applies regardless of whether the store in question is owned or operated by the LCBO or by Brewers Retail.

[111] Historically, since 1972, the *Liquor Control Act* has been interpreted so that the Uniform Price Rule applies separately to retail sales and to sales to licencees. In other words, a beer product to be sold to consumers is priced pursuant to the regulation and then the product is sold at that price across the province and a beer product to be sold to licencees, even the same product, is separately priced pursuant to the regulation and then the product is sold at that price to licencees across the Province. This differential pricing is the nub of the Plaintiffs' unjust enrichment case.

[112] Provincial Government documents and *Hansard* reveal that the Uniform Price Rule was enacted to ensure equity for consumers in northern and southern Ontario. For about 25 years, between 1946 and 1971, beer was exempted from the Uniform Price Rule because the charging of different prices for beer within Ontario was determined to be justified, as opposed to wine and spirits, due to the increased cost of handling and transporting beer to northern Ontario. Then, in 1972, as a matter of public policy, the government applied the Uniform Price Rule for the distribution of beer.[23]

[113] In 2015, the *Liquor Control Act* was amended to expressly confirm that liquor sold to holders of a licence may be sold at a price that is different from the price at which it is sold to the general public. What was formerly ss. 3(1)(i) of the *Act* was amended, and appears today as s. 3(1.1), which is set out above.

6. The Business Relationship between the LCBO and Brewers Retail

[114] Up until the early 1990's, the LCBO sold exclusively wine, spirits, and imported beer and it sold some beer brewed in Ontario. In the early 1990's, approximately 95% of all domestic beer sold in Ontario was sold through Brewers Retail.

[115] Over the years, the LCBO and Brewers Retail came to an arrangement or understanding about the distribution and sale of beer in Ontario. The distribution scheme, which the Defendants submit was a scheme pursuant to the *Liquor Control Act*, that has been followed for decades was as follows:

- In communities where Brewers Retail operated, the LCBO would operate Ordinary Stores and only sell beer in package sizes of 6 units or less only, and Brewers Retail would sell beer in all formats including the larger popular formats such as 12- and 24-pack formats.
- In smaller communities where there were no Brewers Retail stores, the LCBO would operate as a Combination Store and would sell beer in larger package sizes, including 12- and 24-package sizes.
- If a community with a Combination Store grew to be of sufficient size to make a Brewers

[23] Government of Ontario, Provincial Budget 1971, "Equalization of Beer Prices" (*Ontario Budget 1971*); Ontario Hansards, July 6, 1971, House in Committee on Bill 72, An Act to Amend the Liquor Control Act, at page 3579 (*1971 Hansard*).

Retail store viable, Brewers Retail would have the opportunity to build a store, in which case, the LCBO's Combination Store would revert to an Ordinary LCBO Store.

- The LCBO did not sell to licencees any beer sold by Brewers Retail. Licencees cannot purchase from the LCBO beer that is exclusively available at Brewers Retail.
- The LCBO would take first receipt of all foreign beer imported into the Province and would sell it Brewers Retail for sale and distribution to licencees.
- The LCBO would only sell to licencees the beer brands that had not been purchased by Brewers Retail for distribution to licencees.

[116] In 1984, at the request of the Government of Ontario, Brewers Retail's distribution and retail system became available to all brewers in Ontario on a fee for service basis. This change was made to accommodate the needs of a new wave of small Ontario brewers. The new brewers could not afford or did not want to become part owners of Brewers Retail, but they needed a means of distributing their product.

[117] Under the Intergovernmental Agreement on Beer Marketing Practices, effective January 1, 1991, the Government of Canada and the governments of all Canadian provinces undertook to eliminate any policies, practices, laws or regulations that discriminate against the sale of Canadian beer and beer products based on their province of origin. As a result, the Government of Ontario directed that the LCBO eliminate any discriminatory practices and amended a regulation under the *Liquor Control Act* to allow the sale through Brewers Retail of beer made in other Canadian provinces.

7. Ontario's Beer Market, Imported Beer, and the Canada-US MOU

[118] From the 1920's to the late 1980's, very little imported beer was sold in Ontario, and foreign brewers perceived that domestic brewers, who had the sales and distribution network of Brewers Retail at their disposal, enjoyed an unfair advantage in accessing the Ontario market. This led to two separate GATT (General Agreement on Tariffs and Trade) complaints, one initiated by the European Union and the other by the United States.

[119] Both GATT proceedings ended – one in 1988 and the other in 1992 – with determinations that the beer distribution system in Ontario violated Canada's international trade obligations. The United States took steps to impose retaliatory duties on beer brewed in Ontario.

[120] Resolving these trade disputes required reconfiguring Ontario's beer distribution system, and the Ontario Government made a policy decision to keep the existing role of Brewers Retail largely intact, but to provide foreign brewers with access to Brewers Retail's distribution system. Brewers Retail was authorized to carry a full line of imported beer.

[121] The Government permitted the LCBO to continue domestic and imported beer in its Ordinary Stores, but not in package sizes larger than 6-packs. This approach was acceptable to the United States. It was embodied, first, in an Agreement in Principle entered into by the Government of Canada in 1992, and, subsequently, in the Canada-US MOU in 1993. The Canada-US MOU provided that imported beer from the United States would have access to the distribution network of Brewers Retail essentially on the same terms as domestic beer. The Canada-US MOU also set out in an Annex, the fees that could be charged by the LCBO.

8. The Run-up to the 2000 Beer Framework Agreement

[122] In the mid-1990's, there were discussions in the media and by provincial government representatives about the potential privatization of the LCBO and a fundamental reorganization of the liquor and beer retail system in Ontario. The possibility of eliminating the Brewers Retail system was discussed.

[123] Privatization was ultimately not pursued, but the LCBO was encouraged to pursue an expansion of its retail operations and to invest in modernizing its stores. The LCBO responded to the Government's directives by expanding its retail system, including adding new stores.

[124] As noted above, the LCBO had the regulatory power to approve or deny Brewers Retail's requests to open new stores in Combination Store communities that had grown large enough to support an independent store.

[125] In 1995, Brewers Retail applied to the LCBO for permission to open or re-open stores in ten communities that were then being serviced by LCBO Combination Stores. This was problematic for the LCBO, which had made substantial investments in the stores. With the concurrence of then-Minister of Consumer and Commercial Relations, Norman W. Sterling, the LCBO refused all of Brewers Retail's applications.

[126] Brewers Retail and its shareholders were very unhappy with the LCBO's decisions. The result of these decisions was that Brewers Retail suffered a significant loss in market share and in the volume of its beer sales. It made numerous complaints to the Premier, Cabinet Ministers, and to MPPs representing the communities concerned. The dispute between the LCBO and the private sector brewers became increasingly contentious and in the public domain.

[127] Throughout this period, beginning in or around early 1996, Brewers Retail deferred investing further to modernize its stores because of concerns about potential privatization of the LCBO and about the LCBO's expansion of its role beyond its traditional focus on spirits and wine. Brewers Retail believed that the expansion of the LCBO threatened the viability of its distribution system and that it could not justify committing the capital for modernization and expansion without have some measure of predictability of expected beer volume and stability in its role as the primary distributor and retailer of beer in Ontario. Brewers Retail wanted a commitment from the Ontario Government that its mandate to operate Ontario's beer retail system would continue.

[128] On April 16, 1996, the Brewers of Ontario, a trade organization, wrote to the Honourable Norman Sterling, then Ontario's Minister of Consumer and Commercial Relations, and set out concerns about the LCBO's refusal to allow Brewers Retail to open new stores. Brewers of Ontario submitted that the refusals were harming the beer market in Ontario.

[129] In November 1997, representatives from Brewers of Ontario met with staff members of Ontario's Ministry of Consumer and Commercial Relations at the urging of the executive assistant of Ontario's new Minister of Consumer and Commercial Relations, the Honourable David H. Tsubouchi. The purpose of the meeting was to discuss the Ministry's ideas for modernization of the liquor industry and to ensure that Brewers of Ontario had an opportunity to provide input, with the understanding that this would lead to a process of jointly exploring and developing ideas acceptable to the principal players, namely Brewers Retail and the LCBO.

[130] In December 1997, at the Ministry of Consumer and Commercial Relations' direction, the LCBO, Brewers Retail, and Ministry officials commenced discussions to develop options for improving customer service and operational efficiency and to resolve the regulatory issues that had arisen. It was understood that a resolution would encourage increased investment in the distribution system.

[131] Minister Tsubouchi directed the establishment of a joint working group of representatives from the LCBO, Brewers Retail, and the Ministry to consider and make recommendations. The representatives, in turn, created a Steering Committee to lead the discussions, comprised of Stien K. Lal, Deputy Minister of Consumer and Commercial Relations, Andrew Brandt, Chair and CEO of the LCBO, David Perkins, CEO of Molson, and Bruce Elliot, CEO of Labatt.

[132] In April 1998, the Steering Committee sent Minister Tsubouchi a status report, which indicated that the LCBO and Brewers Retail intended to codify rules to determine which entity has primary responsibility for selling each type of alcoholic beverage including, where applicable, the different package sizes of each product.

[133] On August 10, 1998, Brewers Retail advised Deputy Minister Lal that it could not move forward with its modernization and capital investment plan without the clarification of beer selling and marketplace roles and it called for the development of operating protocols. Deputy Minister Lal directed the working group to proceed with development of a protocol to address the issues outlined in the status report.

[134] In December 1998, the LCBO and Brewers Retail reached a tentative agreement on a proposed set of protocols, that included a continuation of the traditional roles of the LCBO and Brewers Retail in the marketing and distribution of beer. The Protocols had no provisions related to the pricing of beer.

[135] Around the same time, representatives of the Ministry and Brewers Retail were engaged in discussions about the modernization of the Brewers Retail system. It was contemplated that the Working Protocols, if implemented, would form part of a broader arrangement between the Government of Ontario and Brewers Retail relating to capital investment, customer service and small brewer access commitments across the distribution system. A final draft of the Working Protocols, which incorporated revisions proposed by Ministry representatives, was sent to the Minister for review on January 19, 1999.

[136] In the early months of 1999, officials of the Ministry began to pressure the LCBO to ratify and implement the Protocols, but Mr. Brandt and others at the LCBO were reluctant to do so because they felt it might adversely affect the future revenues of the LCBO. But the Ministry favoured the Protocols and in March 1999, the Ministry drafted a strategy paper entitled "Ontario Beer Store Investment Strategy". The Strategy Paper discussed the importance of identifying and eliminating barriers to Brewers Retail's modernization, including re-affirming the historical beer selling roles and responsibilities of Brewers Retail and the LCBO.

[137] In mid-1999, Cabinet deferred approving the Working Protocols pending an upcoming provincial election. Discussions between Brewers Retail and the LCBO temporarily stopped.

[138] After the election, Brewers Retail contacted the Honourable Robert Runciman, the newly appointed Minister of Consumer and Commercial Relations. Representatives from Molson and Labatt met with Minister Runciman in November 1999 to discuss finalizing the Working Protocols and to reiterate the importance of finalizing the Protocols before Brewers Retail would

begin a significant capital investment in modernizing the distribution system and its stores.

[139] At the direction of the Premier of Ontario in early 2000, the LCBO and Brewers Retail resumed discussions to finalize the Working Protocols, which ultimately became the 2000 Beer Framework Agreement.

[140] In March 2000, the Provincial Government instructed the LCBO to negotiate with Brewers Retail and a series of meetings took place in March and April 2000. During negotiations the LCBO asked whether in exchange for allowing Brewers Retail to open or re-open stores, the LCBO would have the ability to sell 12 and 24-packs in its Ordinary Stores, but Brewers Retail regarded this as a non-negotiable deal-breaker.

[141] Minister Runciman made it clear to the LCBO that he expected it to reach an agreement with Brewers Retail, failing which the Government would impose unilateral terms similar to those set out in the proposed Protocols.

[142] Throughout the negotiations Brewers Retail wished the terms of any agreement formalized into a binding contract. It was concerned that in the absence of a contract, the LCBO could use its regulatory authority to change the rules in the future. The presidents of Molson and of Labatt confidentially wrote Minister Runciman and told him that the future agreement must be implemented either as a contract between the LCBO and Brewers Retail or in such a way that it clearly requires the LCBO to adhere to the Protocols on an ongoing basis. They told Minister Runciman that their lawyers were concerned that the Cabinet or Ministerial directive approach would not prevent the LCBO from using its regulatory powers under the *Liquor Control Act* to override any such directive. The lawyers suggested that the Protocols either be implemented as a contract or failing that, that the rules contained within the Protocols either be contained in or supported by a regulation under the *Liquor Control Act.* Brewers Retail considered that the agreement should be a commercial contract that would allow it to sustain its business objectives and reduce the business risks including the risk that the LCBO was posing to Brewers Retail's market share.

[143] The Board of Directors of the LCBO conditionally approved the 2000 Beer Framework Agreement on May 18, 2000. Mr. Brandt believed that the LCBO had no practical choice but to approve the 2000 Beer Framework Agreement.

[144] Minister Runciman ordered Mr. Brandt to sign the 2000 Beer Framework Agreement, and on June 1, 2000, an LCBO director met Mr. Brandt, who was about to depart from Pearson Airport for a business trip, and Mr. Brandt signed the Agreement. There was no written memorandum or direction requiring the LCBO to enter into the 2000 Beer Framework Agreement. The instructions to Mr. Brandt to sign the Agreement were given orally.

[145] On his cross-examination in this action, Mr. Brandt stated that the LCBO was adamantly opposed to the 2000 Beer Framework Agreement and signed it under duress. He said that if the Government had not interfered, the LCBO would not have signed the Agreement, because it impaired its ability to increase its market share and the LCBO could have competed better and it would significantly reduce Brewers Retails' sales of beer.

[146] The internal records of the LCBO during the run-up period to the 2000 Beer Framework Agreement, which were disclosed during this action, confirm that some LCBO staff and some directors were concerned that under the Protocols or proposed Agreement there would be: a significant reduction in the LCBO's profit potential; an enormous loss of revenue for the

Government of Ontario; an unlawful surrender or restriction of some of the LCBO's powers under the *Liquor Control Act*; and a sacrificing of the interests of Ontario beer consumers.

[147] Thus, on June 1, 2000, the LCBO and Brewers Retail entered into the 2000 Beer Framework Agreement, under which the Plaintiffs allege the parties to the Agreement allocated the Ontario retail beer market between themselves.

[148] The 2000 Beer Framework Agreement was a document titled "*Serving Ontario Beer Consumers: A Framework for Improved Co-operation & Planning Between the LCBO & BRI [Brewers Retail Inc.]*", dated June 1, 2000. The 2000 Beer Framework Agreement stated:

> Ontario's beverage alcohol market continues to evolve and change. Recognizing the need to respond to these changes, the Liquor Control Board of Ontario (LCBO) and Brewers Retail Inc. (BRI) are both making capital investments to modernize our respective systems.
>
> We both agree that the effectiveness of these investments in serving Ontario's beer consumers can be improved through increased cooperation and planning between the LCBO and BRI. The attached document, "Serving Ontario Beer Consumers: A Framework for Improved Co-operation & Planning Between the LCBO & BRI", outlines our agreed approach to accomplishing this important goal. Both the LCBO and BRI intend to govern themselves in accordance with the spirit of the framework. However, the relationship between the LCBO and BRI continues to be governed by applicable legislation, which will at all times, take precedence over the attached document.
>
> We understand that the government intends to transfer some of the LCBO's regulatory powers to the Alcohol and Gaming Commission of Ontario (AGCO), including the power to authorize BRI to operate stores. In this regard, we confirm our agreement to recommend that AGCO apply the criteria included in the attached framework (relating to the opening of Beer Stores in combination store communities) following such transfer.
>
> We are confident that by working together in the spirit of this framework, the Ontario beer consumer will benefit.
>
> SERVING ONTARIO BEER CONSUMERS: A FRAMEWORK FOR IMPROVED CO-OPERATION & PLANNING BETWEEN THE LCBO & BRI
>
> A. Introduction
>
> This document sets out a general framework to facilitate co-operation and planning between the LCBO and BRI in the sale and distribution of beer in Ontario. Both the LCBO and BRI intend to govern themselves in accordance with the spirt of the framework. However, the relationship between the LCBO continues to be governed by the *Liquor Control Act* and Regulations which will at all times take precedence over this document.
>
> The framework will be in effect for a minimum of five (5) years commencing the 1st day of June, 2000 and may at any time after the 31st day of May 2005 be terminated by either party by giving six (6) months prior written notice. Such written notice is to be given by BRI to the CEO, LCBO and by the LCBO to the Chairman BRI.
>
> B. Agency Stores
>
> Commercial Contracts:
>
> - Agency stores are established by the LCBO under powers granted by the *Liquor Control Act*.
> - BRI and LCBO to have separate commercial contracts with operators of agency stores
>
> ...
>
> ....

C. Combination Stores

As of May 2000, there are 177 communities across Ontario at which the LCBO operates a store that effectively serves as the local beer store, carrying a broad range of beer products and package sizes (including those containing 12 and 24 containers).

- BRI may immediately open beer stores in 4 combination store communities with domestic beer sales greater than 4000 hl [hectolitres] in the twelve-month period ending February 29, 2000.
- Effective April 1, 2001, BRI may, in any twelve-month period commencing April 1 open a maximum of 5 beer stores in combination store communities where the LCBO combination store has sold more than 4000 hl of domestic beer in the previous calendar year, giving the LCBO reasonable notice.

LCBO Conversion

- Once a new beer store has been opened in a combination store community, the existing LCBO store is to revert to a non-combination 6-pack store and will carry package sizes no greater than 6 containers.

D. Beer Selling Roles

- Consistent with historical practice, LCBO will not sell beer in on-combination stores in packages containing more than 6 containers and will not promote beer at price points greater than 6 containers.

....

- BRI will continue to sell to licensees all beer SKU's sold in beer stores; the LCBO will continue to sell to licensees beer SKU's sold exclusively by LCBO.

....

[149] As may be noted, under the 2000 Beer Framework Agreement, Brewers Retail had the right to open stores in Combination Store communities that had a certain level of beer sales volume, following which the LCBO Combination Store would revert back to an Ordinary Store.

[150] The 2000 Beer Framework Agreement did not change the different pricing models of the LCBO and Brewers Retail for the sale of beer to licencees. For the limited beer products that the LCBO sold to licencees, the LCBO applied a discount that was generally 5% of the product price. Brewers Retail did not itself apply any discount for beer products sold to licencees. The LCBO and Brewers Retail also had different pricing policies on deliveries to licencees; the LCBO generally charged for delivery, whereas Brewers Retail generally provided free delivery if a certain volume threshold was met.

[151] There is no evidence that a purpose of the 2000 Beer Framework Agreement was to increase beer prices, and there is no evidence that the price of beer was discussed by the negotiators. Whether the 2000 Beer Framework Agreement had an effect on the price of beer is a strenuously contested issue. (It is, in the language of summary judgment motions, a genuine issue requiring a trial.)

[152] A copy of the 2000 Beer Framework Agreement was delivered to government officials including the Minister and Deputy Minister of Consumer and Commercial Relations. The Small Brewers Association, the Ontario Public Service Employees, the Canadian Restaurant and Foodservices Association (now Restaurants Canada) were familiar with the 2000 Beer Framework Agreement. Consumers including licencees would have been familiar with many features of the 2000 Beer Framework Agreement because the differences in the products

available at Brewers Retails outlets, LCBO Ordinary Stores, LCBO Combination Stores, and Agency Stores and duty-free shops for that matter were well known.

9. The Acts of Sleeman

[153] Mr. Sleeman's evidence was that Sleeman played no role in the negotiation or implementation of the 2000 Beer Framework Agreement, and he denied that it was a participant in either of the two alleged conspiracies.

[154] Sleeman did not sign the 2000 Beer Framework Agreement, and it did not direct Brewers Retail, of which it was a small minority shareholder, to sign the 2000 Beer Framework Agreement.

[155] Mr. Sleeman testified that Sleeman did not even learn of the 2000 Beer Framework Agreement until sometime after it was signed. He testified that Sleeman did not receive a copy of the 2000 Beer Framework Agreement until December 2014, following publication of the *Toronto Star* article, mentioned below.

[156] Mr. Sleeman's evidence was corroborated by Mr. Perkins, the former Chief Executive Officer of Molson.

10. Post-2000 Regulatory Developments and the 2016 Beer Framework Agreement

[157] The 2000 Beer Framework Agreement did not change much in the way that the LCBO and Brewers Retail each operated. The *status quo* prevailed. Both before and after the Agreement was adopted, government policy precluded the LCBO from selling 12-packs and 24-packs at Ordinary Stores and precluded the LCBO from selling to licencees the beer that was exclusively distributed by Brewers Retail. The LCBO would have needed the Provincial Government's approval to change this *status quo*, and the Government refused to grant any such approval.

[158] In April 2014, Ontario Premier Kathleen Wynne established the Premier's Advisory Council on Government Assets led by Mr. Clark (the Advisory Council), and charged it with reviewing and identifying opportunities to modernize certain government business enterprises, including the LCBO.

[159] In November 2014, the Advisory Council presented its initial report to the Government of Ontario, which contained its overall assessment of the alcoholic beverage and electricity sectors, and the government authorized the Advisory Council to move into a second phase focusing on the beer retailing and distribution system. On April 16, 2015, the Advisory Council released its final report entitled *Striking the Right Balance: Modernizing Beer Retailing and Distribution in Ontario*.

[160] As noted above, on December 9, 2014, the *Toronto Star* published an article by Martin Regg Cohn. Mr. Cohn described the 2000 Beer Framework Agreement as a "secret deal" between the LCBO and Brewers Retail, an "inglorious cash grab", and a "protectionist pact" that gouged both beer drinkers and the food and beverage industry.

[161] On December 12, 2014, the Plaintiffs commenced a proposed class action against the LCBO, Brewers Retail, Labatt, Molson, and Sleeman by delivery of a Notice of Action.

[162] On August 1, 2015, amendments to the *Liquor Control Act*, came into force. Some of the

amendments were part of a provincial initiative to allow certain supermarkets to sell six-packs of beer. Other amendments purported to exonerate the misconduct alleged by the Plaintiffs in their Fresh as Amended Statement of Claim. In particular, sections 3(1.1) and 10(3) state:

> 3(1.1) The Board's purposes and powers also include, and are deemed always to have included, the purpose and power to fix the prices at which the various classes, varieties and brands of liquor are to be sold, and such prices shall be the same at all government stores except,
>
> (a) liquor sold through an outlet designated by the Minister of National Revenue under the *Excise Act* (Canada) as a duty-free sales outlet; and
>
> (b) liquor sold to holders of a licence under the *Liquor Licence Act*, which may be sold at a price that is different from the price at which it is sold to the general public.
>
> ....
>
> 10(3) The Board is deemed to have been directed, and Brewers Retail Inc. is deemed to have been authorized, to enter into the June 2000 framework in relation to the Crown's or a Crown agent's regulation and control of the sale of beer in Ontario.

[163] Following negotiations, in September 2015, Brewers Retail, its shareholders, and the Government of Ontario entered into a new agreement. Effective January 1, 2016, the 2016 Beer Framework Agreement replaced the 2000 Beer Framework Agreement, which was terminated.

[164] The 2016 Beer Framework Agreement mandated changes to Brewers Retail's ownership structure, corporate governance, retail and marketing practices, and customer retail experience. There are now over 30 shareholders. The 2016 Beer Framework Agreement continued the existing policy, formalized in the 2000 Beer Framework Agreement, of the LCBO not selling beer in its non-Combination Stores in formats larger than a 6-pack, subject to a new pilot program through which 12-packs are sold by the LCBO in a select number of non-Combination Stores.

[165] I asked the LCBO and Brewers Retail to provide information about the situation at the commencement and at the termination of the 2000 Beer Framework Agreement. The following chart sets out that information:

	1999	2014
LCBO Revenue	$2.3 billion	$5.1 billion
LCBO Net Earnings	$0.8 billion	$1.7 billion
LCBO Dividend	$0.7 billion	$1.7 billion
LCBO Employees	3,014	6,348
# Ordinary Stores	433	472
# Combination Stores	167	167
# Agency Stores	102	220
# Duty-Free Stores	13	15
LCBO Warehouses	5	5
# Brewers Retail Stores	430	447
# Brewers Retail Warehouses	69	8 (warehouses were consolidated)
# Closed Brewers Retail Stores	56 stores were closed between 1990 to 1999	
# Brewers Retail Employees	6,393	6,825

11. The Economists' Evidence

[166] The parties exchanged four expert reports. Dr. Wilson filed a report to which Dr. Winter

responded, to which Dr. Wilson submitted a rebuttal report, to which Dr. Wilson filed a sur-reply report.

[167] The LCBO submits that the reports show that following the 2000 Beer Framework Agreement beer prices in Ontario lagged behind the price of beer in most of the rest of Canada. Dr. Winter concluded that the 2000 Beer Framework Agreement was not the cause of any increase in beer prices in Ontario. Dr. Wilson's evidence was to the contrary, and it was his opinion that both retail and licencee prices increased as a result of the 2000 Beer Framework Agreement. The Plaintiffs argued that the Class Members suffered economic harm under the 2000 Beer Framework Agreement as a result of foregone discounts and elevated prices.

[168] In addition to challenging Dr. Wilson's qualifications to opine on price competition, the LCBO submitted that Dr. Wilson offered no plausible explanation as to how the 2000 Beer Framework Agreement could affect pricing when pricing was established outside the Agreement. Dr. Winter challenged Dr. Wilson's selection of Québec as a comparator as false and misleading. Dr. Winter concluded that as a result of Dr. Wilson's erroneous reliance on Québec as his sole comparator, his report was deficient and more about the Québec market than about Ontario.

G. DISCUSSION AND ANALYSIS

1. Methodology

[169] With the exception of the part of the LCBO's summary judgment motion that asserts that there is not and could not be a breach of s. 45(1) of the *Competition Act*, the common feature of all the Defendants' summary judgment motions is that they have defences to each of the Plaintiffs' claims that are essentially issues of law. Sleeman's motion also raises a purely fact-based defence. The parties are largely in agreement about the facts. The availability of the Defendants' Regulated Conduct Defence and the defence to the unjust enrichment claim are matters of statutory interpretation or case law interpretation. The Plaintiffs' own partial summary judgment motion seeks declarations that would rebut and deny the Defendants their various defences and once again the declarations are largely issues of law. Thus, the focus of the various summary judgment motions is about the law associated with the Defendants' defences. This focus explains why the case is suitable for a summary judgment.

[170] As may be gathered from the introduction and the two overviews, there are a plethora of legal issues. I shall decide these issues and explain my conclusion that the Plaintiffs' action should be dismissed under the following headings:

- The Availability of and the Test for Summary Judgment
- Conspiracy and Sleeman's Fact-Based Defences
- Does the Regulated Conduct Defence Apply to the 2000 Beer Framework Agreement?
    - Introduction
    - The Regulated Conduct Defence
    - The Availability of the Regulated Conduct Defence in Civil Claims for Breach of s. 45 of the *Competition Act*
    - Is s. 10(3) of the *Liquor Control Act* Constitutional?
    - May the Defendants Rely on the Regulated Conduct Defence in the Immediate Case?
- Did the Defendants Breach s. 45 of the *Competition Act*?

- Did the Defendants, other than the LCBO, Breach the Uniform Price Rule of the *Liquor Control Act*?
    - Did the Defendants Properly Apply the Uniform Price Rule of the *Liquor Control Act*?
    - Does s. 3(1.1) of *Liquor Control Act* codify and cure any breach of the Uniform Price Rule?
    - Do the Defendants have a Juristic Reason Defence to the Unjust Enrichment Claim?
- Did the LCBO Commit the Tort of Misconduct by a Civil Authority?

2. The Availability of and the Test for Summary Judgment

[171] The position of the Defendants is that there are no genuine issues requiring a trial or if there are genuine issues requiring a trial, this is, nevertheless, an appropriate case for a summary judgment in their favour that will end the litigation.

[172] The LCBO adds the argument that this is an appropriate case to decide summarily that there has not been a breach of s. 45 of the *Competition Act*.

[173] The position of the Plaintiffs is that this is an appropriate case for a partial summary judgment in the Plaintiffs' favour dismissing the various defences and deciding some of the issues associated with the conspiracy, unjust enrichment, and Misconduct by a Civil Authority claims, leaving the balance of the claims and the assessment of damages to be determined at a trial after the action has been certified as a class action.

[174] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." With amendments to Rule 20 introduced in 2010, the powers of the court to grant summary judgment have been enhanced. Rule 20.04(2.1) states:

> 20.04 (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[175] In *Hryniak v. Mauldin*[24] and *Bruno Appliance and Furniture, Inc. v. Hryniak*,[25] the Supreme Court of Canada held that on a motion for summary judgment under Rule 20, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers introduced when Rule 20 was amended in 2010. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

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[24] 2014 SCC 7.
[25] 2014 SCC 8.

[176] If, however, there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the powers under rules 20.04(2.1) and (2.2). As a matter of discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole.

[177] *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have advanced their best case and that the record contains all the evidence that the parties will present at trial.[26] The onus is on the moving party to show that there is no genuine issue requiring a trial, but the responding party must present its best case or risk losing.[27]

[178] To grant summary judgment, on a review of the record, the motions judge must be of the view that sufficient evidence has been presented on all relevant points to allow him or her to draw the inferences necessary to make dispositive findings.[28]

[179] In *Baywood Homes Partnership v. Haditaghi*,[29] the Court of Appeal held that where the motion is for a partial summary judgment, where there may be the risk of re-litigation of issues and inconsistent outcomes, the motions judge is obliged to assess the advisability of a partial summary judgment in the context of the litigation as a whole. To determine the availability of a partial summary judgment, a judge must consider the entire litigation and exercise his or her discretion to determine in the particular circumstances of the case whether something other than a trial will allow a fair and just resolution of the case that avoids the costs and expense of the trial process; each case is decided on its own merits and in accordance with its particular circumstances.[30]

[180] The Court of Appeal has refused to uphold summary judgments in cases where there is a substantial risk of re-litigation and the prospect of inconsistent results, because in such cases the opposite of an efficient, timely and proportionate and fair outcome may be achieved.[31] In other cases, the Court of Appeal has upheld partial summary judgments when it has been satisfied that notwithstanding that there are unresolved issues or causes of action, summary judgment will avoid putting the parties through/to the expense of a trial and the case can be fairly resolved in a proportionate, cost-effective, and timely manner.[32] In *Hyrniak v. Mauldin*,[33] the court prescribed caution but did not preclude summary judgment in appropriate cases.

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[26] *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 (C.A.); *Bluestone v. Enroute Restaurants Inc.* (1994), 18 O.R. (3d) 481 (C.A.); *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 11.

[27] *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 255 (Gen. Div.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. No. 3754 (C.A.).

[28] *Ghaeinizadeh (Litigation guardian of) v. Garfinkle Biderman LLP*, 2014 ONSC 4994, leave to appeal to Div. Ct., refused, 2015 ONSC 1953 (Div. Ct.); *Lavergne v. Dominion Citrus Ltd.*, 2014 ONSC 1836 at para. 38; *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001.

[29] [2014] O.J. No. 2745, 2014 ONCA 450.

[30] *Mason v. Perras Mongenais*, 2018 ONSC 1477.

[31] *Butera v. Chown, Cairns LLP*, 2017 ONCA 783; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922; *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450.

[32] *Kueber v. Royal Victoria Regional Health Centre*, 2018 ONCA 125; *Li v. Li*, 2017 ONCA 942; *Caffé Demetre Franchishing Corp. v. 2249027 Ontario Inc.*, 2015 ONCA 258, aff'g 2014 ONSC 2133.

[33] 2014 SCC 7 at para. 60.

[181] In the case at bar, there are motions and cross-motions for summary judgment, which tends to reveal that there is a consensus that the issues do not require a trial.

[182] In the case at bar, the parties have provided a fulsome record of oral and documentary evidence, and while the parties disagree about the inferences to be drawn from the facts, there is very little if any controversy about the factual circumstances of the 2000 Beer Framework Agreement or of the Uniform Price Rule. Thus, on the issues of the availability of the Defendants' several lines of defence, it appears that there is a consensus, with which I agree, that although there may be genuine issues that could be tried, a trial is not necessary. There appears to be a consensus that a summary judgment will lead to a fair and just determination of the issues raised on the Defendants' respective motions for summary judgment.

[183] As already foreshadowed, the Defendants have established all of their various defences and those defences are dispositive of the whole litigation. Thus, it is not necessary to resolve the controversy between the Plaintiffs and the LCBO about whether apart from the Regulated Conduct Defence, there was a contravention of s. 45(1) of the *Competition Act*. However, because of the prospect of an appeal, I conclude that these issues cannot be fairly and justly determined summarily. I will expand on this conclusion in the brief discussion below under the heading "Did the Defendants Breach s. 45 of the *Competition Act*?"

[184] I conclude that there are genuine issues requiring a trial about whether there has actually been a contravention of s. 45(1) of the *Competition Act*. In all other respects, the case is appropriate for a summary judgment.

3. Conspiracy and Sleeman's Fact-Based Defences

[185] Sleeman makes a free-standing fact-based argument that the Plaintiffs' conspiracy claims should be dismissed as against it.

[186] The constituent elements of the tort of civil conspiracy are: (1) two or more defendants make an agreement to injure the plaintiff; (2) the defendants (a) use some means (lawful or unlawful) for the predominate purpose of injuring the plaintiff, or (b) use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff; (3) the defendants act in furtherance of their agreement to injure; and, (4) the plaintiff suffers damages as a result of the defendants' conduct.[34]

[187] The second element of the tort of conspiracy; *i.e.*, that the defendants: (a) use some means (lawful or unlawful) for the predominate purpose of injuring the plaintiff; or (b) use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff, creates two types of conspiracy; namely: (1) the predominate purpose version; and (2) the using unlawful means version.[35]

[188] The Supreme Court of Canada summarized the essential elements of the two forms of the tort of conspiracy in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[36] a competition law

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[34] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452; *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.).

[35] *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452.

[36] 2013 SCC 57 at para. 72.

case, where the Court explained a conspiracy arises when two or more parties agree to do an unlawful act or to do lawful act by unlawful means. These two different kinds of conspiracies are known as "predominant purpose" and "unlawful means" conspiracies.

[189] In the immediate case, the Plaintiffs allege the unlawful anti-competitive behaviour and rely on the unlawful means version of the tort.

[190] As appears, one of the constituent elements of the tort of conspiracy, be it a predominant purpose conspiracy or the unlawful means conspiracy, is that there be co-conspirators who co-operate, agree, collaborate, or collude together. Mere knowledge, acquiescence, or approval of the activity, without participation, co-operation, or agreement to co-operate, does not make one a party to a conspiracy.[37]

[191] There is no genuine issue for trial that Sleeman was not a co-conspirator.

[192] Before and after the 2000 Beer Framework Agreement, Sleeman's pricing decisions for its own products were not connected to the arrangements between the LCBO and Brewers Retail about Ordinary or Combination Stores. Sleeman did not sign the 2000 Beer Framework Agreement, and it did not even see it until many years after it was signed.

[193] Sleeman was a small-holding shareholder of Brewers Retail paying attention to its own affairs and not paying any attention to the negotiations between Brewers Retail and the LCBO. The alleged wrongdoing arises from the 2000 Beer Framework Agreement to which Sleeman was not a party. Sleeman did not participate in any conspiracy and did not act in furtherance of any conspiracy.

[194] Regardless of what might have happened had the conspiracy and unjust enrichment claims gone to trial, it is just and in the interests of justice to dismiss the conspiracy claim against Sleeman and it is appropriate to do so. There was a very fulsome evidentiary record proffered for the summary judgment motions, and the Plaintiffs may be taken to have advanced their best case against Sleeman, which turns out to be no case at all. Sleeman is entitled to a summary judgment dismissing the conspiracy claims as against it.

4. Does the Regulated Conduct Defence Apply to the 2000 Beer Framework Agreement?

(a) Introduction

[195] As noted at the outset of these Reasons for Decision, the Defendants' primary defence to the conspiracy claim, which alleges that the Defendants breached either or both versions of s. 45 of the *Competition Act,* is the Regulated Conduct Defence. For the reasons that follow, the Defendants are entitled to rely on this defence, which sanitizes what in the purely private sector might otherwise be a breach of the *Competition Act*.

[196] In the immediate case, the Defendants' argument is that the activities of the LCBO, Brewers Retail, Labatt, Molson, and Sleeman were in an intensely regulated industry. The Defendants argue that the 2000 Beer Framework Agreement, which is ground-zero of the alleged breach of s. 45 of the *Competition Act*, was an authorized activity of that regulated industry.

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[37] *Saskatchewan Farm & Land Co. v. Smith*, [1923] 1 W.W.R. 1179 (Sask. K.B.); *1224948 Ontario Ltd. v. 448332 Ontario Ltd.* (1998), 22 R.P.R. (3d) 200 (Ont. Ct.).

Therefore, the Defendants rely on the Regulated Conduct Defence.

[197] As I will explain below, I agree with the Defendants' arguments that the Regulated Conduct Defence is available to them both before and after the 2015 amendments to the *Liquor Control Act*. I find that the Defendants were operating under a regulated provincial regime governing commerce in alcohol and that the 2000 Beer Framework Agreement was authorized conduct within the scope of the Regulated Conduct Defence.

[198] I disagree with the Plaintiffs' arguments that there was some absence of formality to the authorization of the 2000 Beer Framework Agreement. But if there was an absence of formality, it was rectified by the 2015 amendments to the *Liquor Control Act* that made it clear that the Defendants were always entitled to the Regulated Conduct Defence. I disagree with the Plaintiffs' arguments that s. 10(3) of the *Liquor Control Act* has the effect of the Province legislating the content of the criminal law, which would be beyond its authority under the *Constitution Act, 1867*.[38] The Province was operating in the leeway provided by the Regulated Conduct Defence, which was available under the former version of s. 45(1) and which was expressly carried forward by s. 45(7) of the amended *Competition Act*.

[199] To explain my conclusions, after this introduction, I shall first describe the Regulated Conduct Defence. Second, I shall discuss and reject the Plaintiffs' argument that the Defence is not available in civil claims for breach of s. 45 of the *Competition Act*. Third, I shall discuss and reject the Plaintiffs' argument that s. 10(3) of the *Liquor Control Act* is *ultra vires*. Fourth, I shall explain my conclusion that the Regulated Conduct Defence is available to the Defendants.

(b) The Regulated Conduct Defence

[200] The first point to note about the Regulated Conduct Defence is that, fundamentally, it is a principle of statutory interpretation under which a criminal law statute leaves room for certain conduct that otherwise would be regarded as criminal to be innocent. For the culpable conduct to be innocent it must be mandated, directed, or authorized by a public law statute.

[201] It is helpful to understand that the Regulated Conduct Defence is a principle of statutory interpretation and that it is different from, although complimentary to, the paramountcy principle under which constitutionally *infra vires* provincial law must give way to constitutionally *infra vires* federal law in cases of conflict. Under the Regulated Conduct Defence there is no conflict between the federal criminal enactment and provincial legislation because the federal enactment leaves room for the provincial legislation to operate.

[202] The second point to note is that the Regulated Conduct Defence was originally developed as a method of dealing with potential conflicts between federal competition legislation and provincial statutes, particularly in the context of regulated industries or self-governing professions. The Regulated Conduct Defence assists in reconciling federal and provincial jurisdiction, and it helps in ensuring that the *Competition Act* serves its objectives without disturbing valid provincial regulatory schemes.

[203] As it has developed, the Regulated Conduct Defence has not been confined to

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[38] 30 & 31 Victoria, c 3 (UK). *Toronto Distillery Company Ltd v. Ontario (Alcohol and Gaming Commission of Ontario)*, 2016 ONSC 2202, aff'd 2016 ONCA 960; *Québec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14; *Global Securities Corporation v. British Columbia (Securities Commission)*, 2000 SCC 21.

competition law, but the second point reveals that in the immediate case, the Defendants are not asking for an expansion or a development of the law; rather, the Plaintiffs are interpreting the existing law narrowly or they are seeking a contraction, tightening, or retrenchment of existing law for essentially formalistic or technical reasons.

[204] As a matter of statutory interpretation, the Regulated Conduct Defence provides a solution to a problem at the interpretative intersection of the criminal law with other federal or provincial law. The problem arises because the federal government, which has authority over the criminal law, may criminalize activity that is otherwise permitted but regulated by the federal government or by a provincial Government. The case at bar is a paradigm example of the interpretative problem because a government, in this case a provincial government, has set up a marketing regime that appears to contravene the federal *Competition Act*. The solution to the problem is a matter of statutory interpretation because the federal government has the authority to craft its criminal law so that it leaves leeway for the provincial or federally regulated activity to operate without being criminalized. It is essentially a matter of statutory interpretation whether or not the federal government has done so.

[205] It is from the interpretative leeway left by the federal criminal law legislation that the Regulated Conduct Defence emerges. For the purposes of determining whether the Regulated Conduct Defence is available to a defendant, it is a legal what-comes-first-chicken-or-egg question whether the Regulated Conduct Defence is an exemption to what amounts to criminal behaviour or whether it is a substantive defence that exculpates criminal behaviour if the accused can show that he, she, or it was acting under provincial or federal regulation.

[206] To foreshadow the discussion below, the problem of statutory interpretation is particularly acute in the case at bar where the question of whether the Regulated Conduct Defence is available must be asked in the context of two versions of s. 45 of the *Competition Act*. The Defendants submit that in the pre-2010 version of s. 45, the leeway for the Regulated Conduct Defence is found in the words "unduly" that feature prominently in s. 45. The Defendants submit that in the post-2010 version of the s. 45, which removes the word "unduly," the leeway is provided by s. 45(7) of the amended section, which carries forward the Regulated Conduct Defence into the new version of s. 45.

[207] The Plaintiffs' strained counterarguments are that the Regulated Conduct Defence was not available because the 2000 Beer Framework Agreement was not properly authorized and that s. 45(7) has restricted the Regulated Conduct Defence to criminal prosecutions and it not available for civil proceedings. The Plaintiffs also argue that the Regulated Conduct Defence cannot retroactively become available by the Province's 2015 amendments to the *Liquor Control Act* that authorized the 2000 Beer Framework Agreement.

[208] The first Canadian decision mentioning the Regulated Conduct Defence was the 1929 decision of the British Columbia Court of Appeal in in *R. v. Chung Chuck*.[39] Mr. Chuck had been convicted for having unlawfully marketed potatoes without the permission of the provincial potato regulator under the *Produce Marketing Act*. On appeal, he argued that the regulator's actions constituted an anti-trust conspiracy. In dismissing the appeal, the Court stated that the regulator could not have committed an offence because its actions were authorized by the provincial regulatory scheme.

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[39] [1929] 1 D.L.R. 756 (B.C.C.A.), aff'd [1930] 1 D.L.R. 97 (P.C.).

[209] The Ontario High Court considered the Regulated Conduct Defence in *R. v. Canadian Breweries Ltd.*[40] In this case, Canadian Breweries had acquired competitor's breweries, and the issue was whether it had engaged in a criminal conspiracy under the *Combines Investigation Act*. Chief Justice McRuer held that the criminal conspiracy offence applied only to the portion of the market in which the provincial regulator permitted competition. Chief Justice McRuer acquitted Canadian Brewers because the alleged conspiracy did not affect competition in the portion of the market in which the statute and the LCBO permitted competition.

[210] The Regulated Conduct Defence is discussed in the Supreme Court of Canada's 1982 judgment in *Attorney General of Canada v. Law Society of British Columbia*,[41] which is commonly referred to as the *Jabour Case*. The facts were that Mr. Jabour was a British Columbia lawyer that had been disciplined by the Law Society of British Columbia for engaging in conduct unbecoming a member. His alleged misconduct was the manner in which he advertised services to the public, which were contrary to the rules of professional conduct, which were set out in a handbook. In defending himself, Mr. Jabour challenged the Law Society's decision as constituting a criminal antitrust conspiracy under the *Combines Investigation Act*. The Supreme Court rejected Mr. Jabour's argument because the *Legal Professions Act* did authorize the Law Society to discipline members for their advertising activities. Justice Estey, writing for a unanimous Court, noted that where possible federal legislation should be interpreted to avoid conflict with valid provincial legislation; he stated at p. 356:[42]

> ... the adoption of policies by the benchers as discussed in the handbook might be included in the alleged criminally conspiratorial conduct. That such determinations were made by the benchers pursuant to and within the provincial statute was not contested. The question is therefore: by the taking of any of these actions and proceedings have the benchers [breached the conspiracy provisions of the *Competition Act*] I do not believe so. The benchers were directed by the statute ... to establish a discipline committee with power to inquire into the conduct or competence of members. This duty is found in the context of a wide range of powers granted to the law society to govern the profession in the interest of the public and the members of the society. The words adopted by Parliament in s. 32 and restated above are not ordinarily found in language directed to the actions of persons holding office under a provincially authorized regulatory body and discharging their responsibilities to the community pursuant to their constitutive statute. ... When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

[211] For present purposes, several features of the *Jabour Case* should be noted. The Supreme Court accepted that in 1975, Parliament had introduced amendments to the *Competition Act* to include at least some aspects of the professions within the ambit of the statute. The debate in the case was whether Parliament, by its amendments, intended to bring the regulatory activities of the Benchers of the Law Society of British Columbia within the ambit of the conspiracy provisions of the statute. To foreshadow a point that is of particular significance to the case at bar, in the *Jabour Case,* it was not contested that the policy determinations of the regulator were within the provincial statutory regime. Justice Estey favoured an interpretation of the federal statute that would not interfere with the provincial statute that regulated the legal profession. The Regulated Conduct Defence was a principle of interpretation that had been used before in the goods sector of the economy and it was available for application in the professional services

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[40] [1960] O.R. 601 (H.C.J.).
[41] [1982] 2 S.C.R. 307.
[42] [1982] 2 S.C.R. 307 at p. 356.

sector of the economy. The Supreme Court decided that as a matter of interpretation, Parliament had not intended to bring the Benchers' activities within the ambit of the *Competition Act*.

[212] The Regulated Conduct Defence has been applied in other cases involving federal competition law and provincial or federal regulatory regimes. See: *Reference Re Farm Products Marketing Act*;[43] *Waterloo Law Association v. A.G. of Canada*;[44] *Industrial Milk Producers Association v. British Columbia (Milk Board)*;[45] *R. v. Independent Order of Foresters*;[46] *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.*;[47] *Law Society of Upper Canada v. Canada (A.G.)*;[48] *Rogers Communications Inc. v. Shaw Communications Inc.*;[49] *Fournier Leasing Co. v. Mercedes-Benz Canada Inc.*;[50] and *Cami International Poultry Inc. v. Chicken Farmers of Ontario*.[51]

[213] In *R. v. Independent Order of Foresters*, *supra,* the Independent Order of Foresters, which was a corporation regulated under Ontario's *Insurance Act*, was charged with contravening the misleading advertisement provisions of the *Competition Act*. The advertisements related to the recruitment of employees. The Court of Appeal held that the Regulated Conduct Defence did not apply because there was nothing in the *Insurance Act* that authorized the defendant to make false representations.

[214] In *Industrial Milk Producers Association v. British Columbia (Milk Board)*, *supra*, Justice Reed described the Regulated Conduct Defence at para. 36 as follows:

> 36. ... [As] I read the cases it is a regulated conduct defence. It is not accurate merely to identify an industry as one which is regulated by federal or provincial legislation and then conclude that all activities carried on by individuals in that industry are exempt from the *Competition Act*. It is not the various industries as a whole, which are exempt...but merely activities which are required or authorized by the federal or provincial legislation as the case may be. If individuals involved in the regulation of a market situation use their statutory authority as a spring board (or disguise) to engage in anti-competitive practices beyond what is authorized by the relevant regulatory statute then such individuals will be in breach of the *Competition Act*.

[215] Conceptually similar to the *Industrial Milk Producers* case is *Fournier Leasing Co. v. Mercedes-Benz Canada Inc.*, *supra,* where the defendants were unable to point out an express or implied provision in the regulatory regime that authorized the impugned conduct. In this proposed class action, the plaintiffs were persons who wished to import luxury vehicles from the United States. The importation of vehicles is regulated by the federal government, and the plaintiffs alleged that the defendants had conspired in a way that interfered with the importation rules and thereby breached s. 45 of the *Competition Act*. On a Rule 21 motion to strike out the plaintiffs' claim, Justice van Rensburg held that it was not plain and obvious that the Regulated Conduct Defence was available. She stated at para. 58:

> 58. The authorities are clear. In order for the regulated conduct exception or defence to apply, the actions in question must have been directed or authorized by the statute or regulation. The fact that

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[43] [1957] S.C.R. 198.
[44] (1986), 58 O.R. (2d) 275 (H.C.J.).
[45] [1989] 1 F.C. 463.
[46] (1989), 26 C.P.R. (3d) 229 (Ont. C.A.).
[47] [1989] 1F.C. 463 (T.D.).
[48] (1996), 28 O.R. (3d) 460 (Gen. Div.).
[49] 2009 (S.C.J.).
[50] 2012 ONSC 2752.
[51] 2013 ONSC 7142.

> the importation program is administered by Transport Canada and the CBSA under a legislative scheme is not sufficient. The defendants were unable to point to any express provision or necessary implication in the regulatory regime that would authorize or direct them to engage in the conduct they are alleged by the plaintiffs to have undertaken, that is to pressure the government agency to insert false statements in the admissibility list, to deny Canadian importers access to recall information, and to prevent importers from using whomever they wish to perform vehicle modifications.

[216] In the context of the six summary judgment motions now before the court, *Garland v. Consumers' Gas Co.*,[52] is an especially important case. Like *R. v. Independent Order of Foresters*, *supra*, *Industrial Milk Producers Association v. British Columbia (Milk Board)*, *supra*, and *Fournier Leasing Co. v. Mercedes-Benz Canada Inc.*, *supra*, the *Garland* case is an example of a case where the Regulated Conduct Defence failed or might fail because the impugned activities were not authorized.[53] As will be discussed further below, the *Garland* case is also very important to the claims and defences associated with the Plaintiffs' unjust enrichment claim with respect to the alleged breach of the Uniform Price Rule.

[217] In *Garland*, Mr. Garland brought a class action on behalf of the customers of Consumers' Gas, which in accordance with an Order of the Ontario Energy Board, had charged customers a late fee that amounted to charging a criminal rate of interest in contravention of s. 347 of the *Criminal Code*. After the Supreme Court held that the charge was illegal,[54] Mr. Garland moved for summary judgment for his claim for unjust enrichment. Consumers' Gas also moved for a summary judgment relying, among other things, on the Regulated Conduct Defence, and the case worked its way to the Supreme Court of Canada for a second visit.

[218] In the Supreme Court's second decision in the *Garland Case,* Justice Iacobucci explained at paras. 76-77 of his judgment why the Regulated Conduct Defence was not available to Consumers' Gas; he stated:

> 76. I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in Canada *(Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at p. 356:
>
> > When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.
>
> Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.
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> 77. Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

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[52] 2004 SCC 25.

[53] See also M. Trebilcock, "*Regulated Conduct and the Competition Act*" (2004) 41 Can. Bus. L.J. 492.

[54] *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112.

[219] Justice Iacobucci did not regard the Regulated Conduct Defence as confined to competition law cases where anti-competitive behaviour is criminalized. He regarded the case as available outside of competition law and thus possibly available to Consumers' Gas if, as a matter of statutory interpretation expressly or by necessary implication, s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. Section 347, however, was hermetically sealed, and there was no room for the Regulated Conduct Defence.

[220] The above survey of the case law reveals the following principles about the Regulated Conduct Defence: (a) the Regulated Conduct Defence is a principle of statutory interpretation that determines the scope or reach of a criminal offence including contraventions of the *Competition Act*; (b) for the Regulated Conduct Defence to be available, it is necessary but not sufficient that the person whose conduct is impugned is regulated by provincial or federal legislation; (c) for the Regulated Conduct Defence to be available, it is necessary that the impugned conduct be required, directed, or authorized by the provincial or federal legislation; and (d) the person relying on the Regulated Conduct Defence must identify in the legislation governing its industry or profession a provision that expressly or by necessary implication directs or authorizes the person to engage in the impugned conduct.

(c) The Availability of the Regulated Conduct Defence in Civil Claims for Breach of s. 45 of the *Competition Act*

[221] The above discussion reveals that the Regulated Conduct Defence was available in numerous civil cases brought before what is now s. 45(1) was amended to take effect in March 2010.[55] Addressing the pre-2010 version of what is now s. 45 of the *Competition Act,* a review of the case law reveals that courts have consistently held that conduct authorized by valid provincial or federal legislation is deemed to be in the public interest, and that such regulated conduct cannot constitute an "undue" limit on competition contrary to the conspiracy provisions of the *Competition Act*.[56]

[222] The Plaintiffs argue that with the removal of the word "unduly" in s. 45(1) of the *Competition Act*, and the enactment of what is now s. 45(7) of the *Act*, that the federal government decided to restrict the Regulated Conduct Defence to criminal prosecutions and to exclude it from being a defence to a civil claim under s. 36 of the *Act*.

[223] The Plaintiffs' argument makes no sense, and the argument has already been rejected in the case law. In *Industrial Milk Producers Association v. British Columbia (Milk Board),*[57] Justice Reed and in *Cami International Poultry Inc. v. Chicken Farmers of Ontario,*[58] Justice Henderson rejected the argument that the Regulated Conduct Defence is only available in a criminal prosecution.

[224] In his judgment at para. 23 Justice Reed stated:

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[55] *Garland v Consumers' Gas Co.*, 2004 SCC 25; *Industrial Milk Producers Association v. British Columbia (Milk Board)*, [1989] 1 F.C. 463; *Attorney General of Canada v. Law Society of British Columbia* [1982] 2 S.C.R. 307.
[56] *Attorney General of Canada v. Law Society of British Columbia,* [1982] 2 S.C.R. 307; *R. v. Canadian Breweries Ltd.*, [1960] O.R. 601 (H.C.J.).
[57] [1989] 1 F.C. 463.
[58] 2013 ONSC 7142.

> 23. While it is true that the plaintiffs are suing on the basis of a civil cause of action, pursuant to section [now s. 36] of the *Competition Act*, in my view this does not remove them from the operation of the established jurisprudence. In order to have a civil cause of action under section [now s. 36], one must prove the same elements which it is required to prove under section [now s. 45]. The fact situation on which a section [now s. 36] action is founded will also constitute a criminal offence pursuant to section [now s. 45]. I cannot therefore see that the "decriminalization" of the remedies by section [now s. 36] of the *Competition Act* can assist the plaintiffs in their argument that established jurisprudence does not apply.

[225] In his judgment at para. 50, Justice Henderson stated:

> 50. I do not accept Cami's submissions that this defence is only available in the context of a criminal prosecution. In my view, an aggrieved party cannot bring a successful civil action based on a breach of s. 45 of the *Competition Act* if the accused party has a complete defence to a prosecution under s. 45. In such a case there would be no misconduct on which to base the civil action. Thus, if the regulated conduct defence provides a complete defence to a prosecution under s. 45, then a civil action under s. 36 cannot succeed.

[226] I agree with the Defendants' argument that when the conspiracy provisions were amended, Parliament ensured that the Regulated Conduct Defence would continue to apply, despite the removal of any reference to "unduly" lessening or restraining competition. As explained by Parliament's Standing Senate Committee on Banking, Trade and Finance in its Report on the 2010 amendments to the *Competition Act*, s. 45(7) was designed to preserve the Regulated Conduct Defence despite the removal of the word "unduly" from the statutory language.

[227] The Competition Bureau has acknowledged the continued application of the Regulated Conduct Defence to criminal prosecutions in its *Competitor Collaboration Guidelines*, which were published after the amendments to the *Competition Act* received Royal Assent, and its comments cannot be understood to exclude the operation of the defence from civil claims under s. 36 of the *Act*, which are proceedings that are not criminal prosecutions.

[228] Section 45(7) of the *Competition Act* does not confine it's availability to criminal prosecutions. This is perhaps made most clear by the French version of. s. 45(7). Unlike the English version, which indicates that the prior law "continues in force and apply in respect of a prosecution under subsection (1)," the French version, "*anterieure a l'entree en vigueur du present article, demeurent en vigueur et s'appliquent a l'egard des poursuites intentees en vertu du paragraphe (1)*" which is equally authoritative to the English version, indicates that the common law defences continue in force in respect of a "poursuites," which is a word that denotes both criminal and civil proceedings.

[229] The Plaintiffs' interpretation of s. 45(7) of the *Competition Act*, which would confine the defence to criminal proceedings associated with the offences found in Part IV of the *Act* and exclude the defence for the civil claims under s. 36(1) for which the predicate misconduct is the same Part IV misconduct, affronts common sense and leads to the absurd result that Crown agencies and private entities authorized by both provincial law and the applicable regulator to act would be protected from criminal sanctions but be civilly liable for conduct expressly authorized, or even required, by valid provincial law.

[230] I conclude that the Regulated Conduct Defence is available to defend civil claims under s. 36 of the *Competition Act* both before and after the amendments to s. 45(1) of the *Act*.

(d) Is s. 10(3) of the *Liquor Control Act* Constitutional?

[231] Section 10(3) of the *Liquor Control Act* states:

> 10(3) The Board is deemed to have been directed, and Brewers Retail Inc. is deemed to have been authorized, to enter into the June 2000 framework in relation to the Crown's or a Crown agent's regulation and control of the sale of beer in Ontario

[232] Save for the criminal law, there is no constitutional impediment to either the federal or a provincial government enacting statutory law with a retroactive or retrospective application.[59] In *Benner v. Canada (Secretary of State)*,[60] at para. 39, Justice Iacobucci explained, in part, the difference between retroactivity and retrospectivity; he stated:

> 39. The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264, at pp 268-69, has offered these concise definitions which I find helpful:
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> > A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

[233] Despite the Plaintiffs' desperate arguments to the contrary, the use of the language "deemed to have been authorized to enter into" is a clear expression of the Legislature's intent to make this provision retroactive.[61]

[234] The factual narrative set out above also makes obvious (painfully obvious to the Plaintiffs) that the Legislature was responding to the Plaintiffs' class action and attempting to protect it by the Regulated Conduct Defence out of an abundance of caution. It was changing the law if it was necessary to do so to authorize the 2000 Beer Framework Agreement. As the discussion below about the Uniform Price Rule reveals, retroactive legislation can declare what the law was in the past and in this sense the legislation is retroactive but it does not change the law. In the case at bar, the Province of Ontario was transparently filling the leeway provided by either version of s. 45 of the *Competition Act*.

[235] There is no challenge to a Province's legislative authority under the *Constitution Act, 1867* to enact legislation with respect to the regulation of the beer market in Ontario, and the Plaintiffs' argument that subsection 10(3) is *ultra vires* seems tied to the notion that the provincial government is infringing upon Parliament's jurisdiction over competition and criminal law by passing retroactive legislation that intrudes on the federal competition law, but that is precisely what the Regulated Conduct Defence allows, and, if the federal government has left leeway for the provincial law to operate, it does not matter whether the conduct was provincially authorized through prospective or retroactive legislation.

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[59] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49; *Procter & Gamble Inc. v. Ontario (Minister of Finance)*, 2009 O.J. No. 939 at paras. 11-22 (S.C.J.), aff'd 2010 ONCA 149.

[60] [1997] 1 S.C.R. 358.

[61] *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *Citizens Against Amalgamation Committee v. New Brunswick*, [1998] N.B.J. No. 92 (C.A.).

[236] There is no impermissible delegation of the federal criminal law and trade and commerce powers to the Province of Ontario either prospectively or retrospectively when the federal government leaves leeway for the Regulated Conduct Defence. The provincial government does not shape the criminal law; rather, the criminal law has been shaped with a gap that can be filled by the provincial government authorizing the activity that otherwise would be criminalized. This phenomenon occurred in the case at bar, and, in any event, I conclude that s. 10(3) of the *Liquor Control Act* is constitutional; *i.e. infra vires* the distribution of powers under the *Constitution Act, 1867.*

(e) May the Defendants Rely on the Regulated Conduct Defence in the Immediate Case?

[237] The above discussion reveals that the Regulated Conduct Defence is potentially available for the alleged contraventions of the former and the current versions of s. 45 of the *Competition Act,* but the Plaintiffs argue that the defence has a narrower application or scope than the Defendants suggest.

[238] Put somewhat differently, the Plaintiffs' argument is that the Defendants do not qualify or are disqualified from relying on the Regulated Conduct Defence because the 2000 Beer Framework Agreement was a matter of contract compelled by a command from the Minister in charge of the LCBO, who ordered Mr. Brandt to sign an agreement that some staff and directors thought was illegal or, if not illegal, bad policy. Thus, the Plaintiffs submit that the 2000 Beer Framework Agreement was either in form and, or in substance: (a) outside the authority or power conferred by the *Liquor Control Act* on the LCBO as the regulator; or (b) outside the rights conferred on the LCBO and Brewers Retail to sell and distribute beer.

[239] I disagree with these arguments, there are no formal or substantial impediments to the Regulated Conduct Defence applying in the circumstances of this case.

[240] The 2000 Beer Framework Agreement was in the wheelhouse (in baseball, the part of a batter's strike zone most likely to produce a home run) of the powers and rights conferred on the LCBO and Brewers Retail under the *Liquor Control Act*. It did not require new legislation or a new regulation or a written directive to authorize the 2000 Beer Framework Agreement. The LCBO had the authority to enter into contracts as a way of implementing its regulatory authority and a regulation or new legislation was not necessary for the 2000 Beer Framework Agreement to make the Regulated Conduct Defence available both to it and to Brewers Retail.

[241] And, if contrary to my opinion, the 2000 Beer Framework Agreement did indeed require some formal legislative action act over and above a Crown Agent being ordered by its supervising Crown Minister to sign the agreement, that formal authorization came with the 2015 enactment of s. 10(3) of the *Liquor Control Act*, which for the reasons set out above was an *infra vires* and proper exercise of government power that authorized the 2000 Beer Framework Agreement.

[242] Nor does Dean Dodek's opinion about constitutional conventions change the legal analysis. Dean Dodek was very careful not to opine about the legality or the enforceability of the 2000 Beer Framework Agreement, but opined in his report that the manner in which the LCBO was instructed to enter into the 2000 Beer Framework Agreement was not consistent with the democratic norms of the day because the absence of formal legislation meant that there was

insufficient government transparency and accountability.

[243] Assuming for the sake of argument that Dean Dodek is correct, his concerns are answered by the transparency of the 2015 amendments to the *Act*, which for the reasons set out above was *infra vires* and effective legislation to authorize the 2000 Beer Framework Agreement.

[244] And, in any event, Dean Dodek's opinion is irrelevant to the question of whether or not the Regulated Conduct Defence was available to a Crown agent who historically was on a tight and short leash in taking directives from the Crown in administering its own legislation. The fact that an authorization or direction of the Government of Ontario was inconsistent with existing democratic norms of transparency and accountability does not somehow mean that, as a matter of law, the authorization or direction did not trigger the Regulated Conduct Defence.

[245] In *Attorney General of Canada v. Law Society of British Columbia,*[62] discussed above, the Law Society was entitled to the rely on the Regulated Conduct Defence notwithstanding that the Legislature had not promulgated a specific rule on the subject of advertising and the Benchers were relying on their general authority to govern the profession.

[246] In *R. v. Furlney,*[63] a bingo lottery operator was prosecuted under the *Criminal Code.* There was a statutory defence for organizations that conducted bingos in accordance with provincial licences. The defendant had a licence, but the Ontario Ministry of Consumer and Commercial Relations had not published any rules for the operation of bingo lotteries. The Supreme Court of Canada held that the non-publication of the Ministry's bingo rules was not relevant to the defence of provincial authorization. All that was necessary was that the law be ascertainable by those affected by it.

[247] My conclusions are that the alleged wrongdoings associated with the 2000 Beer Framework Agreement are not wrongdoings because the Defendants are entitled to rely on the Regulated Conduct Defence for both versions of s. 45(1) of the *Competition Act*.

5. Did the Defendants Breach s. 45 of the *Competition Act*?

[248] On its summary judgment motion, the LCBO submits that its implementation of the 2000 Beer Framework Agreement did not contravene either version of s. 45 of the *Competition Act*.

[249] The LCBO submitted that the continuance of the previously-existing market roles and responsibilities of the LCBO and Brewers Retail did not constitute a violation of s. 45 and by virtue of its status as a Crown agent, the LCBO's non-commercial activities (including its entry into the 2000 Beer Framework Agreement at the behest of the Government for the purpose of implementing Government policy) are exempt from the *Competition Act*. Relying on *Industrial Milk Producers Association v. British Columbia (Milk Board),*[64] *People Recycling Inc. v. Vancouver (City),*[65] *Liability Solutions Inc. v. New Brunswick,*[66] and *Elbaz v. Prince Edward*

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[62] [1982] 2 S.C.R. 307.
[63] [1991] 3 S.C.R. 89.
[64] [1989] 1 F.C. 463.
[65] 2002 BCSC 1395.
[66] (2007), 88 OR (3d) 101 (S.C.J.).

Island,[67] the LCBO argued that entering into the 2000 Beer Framework Agreement in compliance with cabinet directives and pursuant to ministerial control cannot be regarded as a commercial activity for which the LCBO might be exposed to liability under the *Competition Act*.

[250] The LCBO argued that the implementation of the 2000 Beer Framework Agreement did not entail the performance of unlawful acts that could reasonably have been expected to cause injury to the Plaintiffs and to members of the proposed class.

[251] Relying in part on the expert evidence, the LCBO argued that the 2000 Beer Framework Agreement did not, in fact, cause injury to the Plaintiffs or to members of the proposed class, given that the *Liquor Control Act* has, at all relevant times, forbidden competition between the LCBO and Brewers Retail on the basis of price and at all relevant times, beer manufacturers were free to propose different prices for sales to consumers compared with prices charged to licencees. And the LCBO argued that there were no damages and the 2000 Beer Framework Agreement was in the public interest.

[252] The Plaintiffs not surprisingly argued that the evidence established that the LCBO and Brewers Retail were competitors engaged in a commercial activity and the signing and implementation of the 2000 Beer Framework Agreement was a conspiracy and a contravention of s. 45 of the *Competition Act* that constituted the predicate misconduct for a civil claim for damages under s. 36 of the *Act*.

[253] There are numerous genuine issues requiring a trial associated with the competing arguments. These issues cannot fairly and justly be determined by way of a summary judgment motion.

6. Did the Defendants, other than the LCBO, Breach the Uniform Price Rule of the *Liquor Control Act*?

(a) Did the Defendants Properly Apply the Uniform Price Rule?

[254] The nub of the Plaintiffs' action for unjust enrichment is that before its replacement by s. 3(1.1) of the *Liquor Licence Act*, the Defendants other than the LCBO contravened the Uniform Price Rule that was formerly found in s. 3(1)(i) of the *Liquor Control Act*. Section s. 3(1)(l) stated:

> *Power and purposes of Board*
>
> 3.(1) The purposes of the Board are, and it has power, ...
>
> (i) to fix the prices at which the various classes, varieties and brands of liquor are to be sold and, except in the case of liquor sold through an outlet designated by the Minister of National Revenue under the *Excise Act* (Canada) as a duty-free sales outlet, such prices shall be the same at all government stores.

[255] The dispute between the parties is a matter of statutory interpretation. The Plaintiffs argue that s. 3(1)(i) states that except for beer sold at duty-free stores, the price for beer must be the same at government stores. The Plaintiffs submit that s. 3(1)(i) does not admit of the prospect of differential pricing for retail consumers and licencees who purchase beer at government stores be

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[67] 2012 PEISC 3.

they LCBO stores or The Beer Store and, therefore, the Defendants except the LCBO have been unjustly enriched by its differential pricing. The Plaintiffs submit that if the Legislature had intended to allow different charges for licencee purchasers then it could have easily added an exemption for them as it did for duty free stores.

[256] The Defendants contend that when the principles of statutory interpretation are applied to interpret s. 3(1)(i), the section does admit of the interpretation that has historically been followed by the LCBO and Brewers Retail in selling beer to consumers and to licencees.

[257] The approach to interpretation is teleological or purposeful and to interpret a statute, the words of the statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of the legislator.[68]

[258] Following this purposefully approach to interpretation, I favour the interpretation advanced by the Defendants. Their interpretation is supported by: (a) the legislative history; (b) a proper contextual and purposeful reading of s. 3(1)(li; and (c) how the section has been interpreted and applied for decades by the parties subject to it, including the LCBO which is the regulator under the legislative scheme.

[259] When interpreting a specialized public law statute, the public statements of the regulator about the scope of its home statute and the administrative practice and interpretation adopted by the regulator, while not determinative, are important factors to be weighed in interpreting the statute.[69]

(b) Does s. 3(1.1) of *Liquor Control Act* Codify and Cure any Breach of the Uniform Price Rule?

[260] Section 3 (1.1) of the *Liquor Control Act* state:

> 3(1.1) The Board's purposes and powers also include, and are deemed always to have included, the purpose and power to fix the prices at which the various classes, varieties and brands of liquor are to be sold, and such prices shall be the same at all government stores except,
>
> (a) liquor sold through an outlet designated by the Minister of National Revenue under the *Excise Act* (Canada) as a duty-free sales outlet; and
>
> (b) liquor sold to holders of a licence under the *Liquor Licence Act*, which may be sold at a price that is different from the price at which it is sold to the general public

[261] The Defendants argue that s. 3(1.1) confirms that, contrary to the Plaintiffs' assertions, the LCBO has always been able to authorize different prices for beer sold to licencees compared with prices for beer sold to retail consumers. I agree with the Defendants' argument.

[262] Section 3(1.1) is a type of retroactive provision. It declares what the law always was, and, thus, doctrinally, it does not change the law. However, to be blunt, the courts and the legislature are both law-makers, and the manifest and transparent purpose of this type of legislation is to allow a legislature to assert its superior law-making authority over the courts.

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[68] *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at paras. 18-23; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559.

[69] *Place Dome Canada v. Ontario*, 2006 SCC 1110; *Canada (Human Rights Commission) v. Canada (A.G.)*, 2011 SCC 53; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Harel v. Québec (Deputy Minister of Revenue)*, [1978] 1 S.C.R. 851.

[263] Declaratory provisions, a subset of retroactive legislation, allow the legislature to dictate the interpretation of their own law as it progresses through the courts to ensure the objects of the legislation are achieved.[70] In enacting s. 3(1.1), the Legislature patently intruded into this proposed class action to ensure that the Ontario Government's interpretation of its own legislation was applied by the court. It was demonstrating what it had in mind when it enacted the Uniform Price Rule.

[264] Legislators have the power to negate through retroactive or declaratory statutes, claims and causes of action, including in respect of matters that are pending before the courts, when the legislation in question.[71]

[265] The Supreme Court of Canada's decision in *Kelly (Trustee of) v. Québec (Regie des rentes)*, reveals that legislatures have the authority to enact retroactive declaratory provisions that dictate the result of a matter before the courts. In this case, the National Assembly of Québec enacted declaratory legislation while an appeal was pending from a decision of the Québec Court of Appeal. The Supreme Court applied the legislation and reversed the Court of Appeal's decision. Justice Wagner, as he then was, stated at paras. 1-3, 26-28:

> 1. A criticism often levelled against retroactive legislation is that it thwarts settled expectations. This case concerns expectations relating to the interpretation of certain provisions of Québec's *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1 ("*SPPA*"). It confirms that the legislature may disrupt these expectations by enacting declaratory provisions, and that such provisions apply to any ongoing dispute in which a final judgment on the merits has not yet been handed down.
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> 2. When a legislature enacts a declaratory provision that has retrospective effect, it is presumed to have weighed the need for the interpretive clarity the provision would bring against the disruption and unfairness that might result from its retroactive nature. The courts therefore owe deference to a decision by the legislature to enact such legislation.
>
> 3. In the case at bar, a final judicial determination of the rights and obligations of the parties had not yet been made. As a result, the declaratory provisions passed by the Québec legislature to aid in the interpretation of the *SPPA* were applicable.
>
> ....
>
> A. What Is the Effect of Declaratory Legislation?
>
> 26. It is settled law in Canada that it is within the prerogative of the legislature to enter the domain of the courts and offer a binding interpretation of its own law by enacting declaratory legislation: L.-P. Pigeon, *Drafting and Interpreting Legislation* (1988), at pp. 81-82. As this Court acknowledged in *Western Minerals Ltd. v. Gaumont*, [1953] 1 S.C.R. 345, such forays are usually made where the legislature wishes to correct judicial interpretations that it perceives to be erroneous.
>
> 27. In enacting declaratory legislation, the legislature assumes the role of a court and dictates the interpretation of its own law: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 562. As a result, declaratory provisions operate less as legislation and more as jurisprudence. They are akin to binding precedents, such as the decision of a court: P. Roubier, *Le droit transitoire: conflits des lois dans*

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[70] *Kelly (Trustee of) v. Québec (Regie des rentes)*, 2013 SCC 46; *Apotex Inc. v. Merck & Co.*, 2011 FCA 329; *Barbour v. The University of British Columbia*, 2010 BCCA 63, leave to appeal to the SCC ref'd [2010] S.C.C.A. No. 135: Lorne Neudorf, "Declaratory Legislation: Legislatures in the Judicial Domain?" (2014), 47 *UBC Law Review l.*

[71] *Kelly (Trustee of) v. Québec (Regie des rentes)*, 2013 SCC 46; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49; *Authorson v. Canada (A.G.)*, 2003 SCC 39; *Barbour v. The University of British Columbia*, 2010 BCCA 63, leave to appeal to the SCC ref'd [2010] S.C.C.A. No. 135.

> *le temps* (2nd ed. 1993), at p. 248. Such legislation may overrule a court decision in the same way that a decision of this Court would take precedence over a previous line of lower court judgments on a given question of law.
>
> 28. It is also settled law that declaratory provisions have an immediate effect on pending cases and are therefore an exception to the general rule that legislation is prospective. The interpretation imposed by a declaratory provision stretches back in time to the date when the legislation it purports to interpret first came into force, with the effect that the legislation in question is deemed to have always included this provision. Thus, the interpretation so declared is taken to have always been the law: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 682-83.

[266] In the case at bar, no final judicial determination of the Plaintiffs' rights has yet been made and s. 3(1.1) of the *Liquor Control Act* provides that the LCBO always had the power to fix the prices at which beer is sold and that the price shall be the same at all government stores, except that beer may be sold to licencees "at a price that is different from the price at which it is sold to the general public." This declaratory provision clarifies any uncertainty in the law about the Uniform Price Rule and confirms the historic practice of the LCBO and Brewers Retail was in accordance with the law. Subsection 3(1.1) of the *Liquor Control Act* was enacted in 2015 as a deeming provision with retroactive effect to confirm that liquor sold to licencees may be sold at a price that is different from the price at which it is sold to the general public.

[267] That last finding drives a stake through the heart of the Plaintiffs' unjust enrichment claim.

(c) Do the Defendants have a Juristic Reason Defence to the Unjust Enrichment Claim?

[268] The elements of a claim of unjust enrichment are: (1) the defendant being enriched; (2) a corresponding deprivation of the plaintiff; and, (3) no juristic reason for the defendant's enrichment at the expense of the plaintiff.[72] The conclusion immediately above means that in the case at bar, the Plaintiffs cannot establish any of the constituent elements of an unjust enrichment claim.

[269] Apart from the conclusion above, the Plaintiffs could never prove that Brewers Retail was unjustly enriched because Brewers Retail was never enriched even if there was a contravention of the Uniform Price Rule because it was a revenue conduit and it was never enriched by selling beer to licencees.

[270] However, as noted at the outset, the Defendants also submit that the Plaintiffs cannot establish that there is no juristic reason for the Defendants' enrichment at the expense of the Plaintiffs.

[271] There is support for the Defendants' argument. In *Garland v. Consumers' Gas Co.*,[73] the facts of which are described above, the Supreme Court of Canada held that reasonable reliance on a regulator's decision constitutes a juristic reason to retain an enrichment, even where the regulator has acted unlawfully. In that case, Consumers' Gas was entitled to keep illegal late penalties until it was put on notice that the charges were illegal. The Supreme Court held that an industry participant's reliance on regulatory orders should be given weight, because it would be very difficult, if not impossible, to operate in a regulated industry without confidence in the

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[72] *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.
[73] 2004 SCC 25.

regulator's orders. For a similar decision, where regulatory approval provided a juristic reason for an enrichment, see the Ontario Court of Appeal's decision in *Moreira v. Ontario Lottery and Gaming Corp.*[74]

[272] In the case at bar, the Defendants' reasonable reliance on the LCBO's approval of differential prices is a juristic reason to retain any enrichment.

7. Did the LCBO Commit the Tort of Misconduct by a Civil Authority?

[273] Relying on *Paradis Honey Ltd. v. Canada,*[75] the Plaintiffs assert that the LCBO has committed the new tort of Misconduct by a Civil Authority. They disavow advancing a claim for the tort of misfeasance in public office sometimes described as "abuse of public office", "abuse of statutory power" or "abuse of public authority")[76] The Plaintiffs submit that the LCBO is liable in tort for Misconduct by a Public Authority because: (a) it entered into the 2000 Beer Framework Agreement despite its own conclusion that the Agreement breached the *Liquor Control Act*; and (b) its failure to enforce the plain language of the Uniform Price Rule.

[274] In *Paradis Honey Ltd. v. Canada,* commercial beekeepers commenced a proposed class action challenging a policy adopted by the Minister that prohibited the importation of beehives from the United States, which the beekeepers needed to restore their hives from the ravages of Canadian winters. The plaintiffs sued the government alleging regulatory negligence and bad faith. The defendants, the Crown and several Ministries of the Crown, moved to have the claim struck for disclosing no reasonable cause of action. The motions judge dismissed the action for failure to show a reasonable cause of action. On appeal, the Federal Court of Appeal reversed the decision. Justice Stratas (Justice Nadon concurring, Justice Pelletier dissenting) concluded that it was not plain and obvious that the claim in negligence would not succeed.

[275] In *obiter dicta,* Justice Stratas said that he would allow the claim to proceed based on public law principles. He suggested that it would be an incremental change in the law to apply public law principles rather than common law tort principles to determine when damages should be awarded against a public authority. Justice Stratas suggested that in claims for damages for misconduct by a public authority, courts could grant relief where the public authority acts: (a) unacceptably or indefensibly in accordance with public law principles; and (b) where as a matter of discretion, a damages remedy against a public authority is appropriate.

[276] It is an oversimplification of a very scholarly judgment, but the essence of Justice Stratas' thesis was that applying common law principles to determine when a public authority should pay damages had historically been a doctrinal problem for the development of the law. He picturesquely described the problem by saying at para. 127:

> 127. At the root of the existing approach is something that makes no sense. In cases involving public authorities, we have been using an analytical framework built for private parties, not public authorities. We have been using private law tools to solve public law problems. So to speak, we have been using a screwdriver to turn a bolt.

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[74] 2013 ONCA 121.

[75] 2015 FCA 89.

[76] *Odhavji Estate v. Woodhouse* 2003 SCC 69; *Conway v. Law Society of Upper Canada,* 2016 ONCA 72; *Trillium Power Wind Corp v Ontario,* 2013 ONCA 683; *Gardner v. Canada,* 2013 ONCA 423; *AL v. Ontario,* [2006] O.J. No. 4673 (C.A.), leave to appeal ref'd, [2007] S.C.C.A. No 36.

[277] Justice Stratas' solution was to apply public law principles to a public law problem. Thus, he stated at para. 132:

> 132. What are the principles of the underlying public law? Today, they are found primarily in administrative law, in particular the law of judicial review. Broadly speaking, we grant relief when a public authority acts unacceptably or indefensibly in the administrative law sense and when, as a matter of discretion, a remedy should be granted. These two components -- unacceptability or indefensibility in the administrative law sense and the exercise of remedial discretion -- supply a useful framework for analyzing when monetary relief may be had in an action in public law against a public authority. This framework explains the outcome in cases like *Roncarelli* and *McGillivray*, both above, as well as negligence cases like *Hill*, *Syl Apps*, *Fullowka*, all above, and others mentioned below.

[278] In its essence, all Justice Stratas was suggesting was that when a court would intervene to grant judicial review of an operative or policy decision of a public authority, the court should have, in addition to the discretionary remedies of *mandamus*, *certiorari*, *etc.*, the jurisdiction to grant damages in appropriate cases. Justice Stratas noted at para. 142 of his judgment that in public law, monetary relief has never been automatic upon a finding that governmental action is invalid outside the range of acceptability or defensibility[77] and that there must be additional circumstances to support an exercise of discretion in favour of monetary relief.

[279] In any event, Justice Stratas was not suggesting that the court should have a jurisdiction to award damages against a public authority based on the court's opinion of whether or not the conduct of the public authority was good or bad public policy.

[280] Assuming Justice Stratas' novel cause of action or innovation in public law was available in the case at bar, it would not assist the Plaintiffs.

[281] For the reasons expressed above, the LCBO's activities were compliant; *i.e.* compliant with the *Liquor Control Act*, the *Liquor Licence Act,* the *Alcohol and Gaming Regulation and Public Protection Act, 1996*; and the *Importation of Intoxicating Liquors Act*. Thus, there is no factual basis to apply the tort of Misconduct by a Civil Authority.

[282] If the LCBO's conduct was not compliant, then, for the reasons expressed above, that non-compliance was cured by the 2015 amendments to the *Liquor Control Act*.

[283] If in accordance with the principles of public law, the activities of the LCBO are to be measured by a reasonableness standard as opposed to a correctness standard, it was reasonable for the LCBO to enter into the 2000 Beer Framework Agreement, which essentially continued market practices that had existed for decades, and it was reasonable to interpret the Uniform Price Rule as allowing differential pricing for retail consumers and licencees, again a long-standing practice and one consistent with distribution in the private sector where wholesale and retail pricing is commonplace.

[284] If the decisions of the LCBO were neither correct nor reasonable, then as a matter of discretion, it is doubtful that a court would, in accordance with the principles of public law, order damages.

[285] In short, the case at bar is not the case to give birth to the Misconduct by a Civil Authority cause of action.

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[77] *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Holland v. Saskatchewan*, 2008 SCC 42; K.C. Davis, *Administrative Law Treatise* (1958), vol. 3 (St. Paul, MN: West Publishing, 1958) at p.487.

H. CONCLUSION

[286] For the above reasons the Plaintiffs' action is dismissed.

[287] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' and the Attorney General's submissions within 30 days of the release of these Reasons for Decision followed by the Plaintiffs' submissions within a further 30 days.

Perell, J.

Released: March 15, 2018

CITATION: Hughes v. Liquor Control Board of Ontario, 2018 ONSC 1723
COURT FILE NO.: CV-14-518059CP
DATE: 20180315

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID HUGHES and 631992 ONTARIO INC.

Plaintiffs

– and –

LIQUOR CONTROL BOARD OF ONTARIO, BREWERS RETAIL INC. (carrying on business as "THE BEER STORE"), LABATT BREWERIES OF CANADA LP, LABATT BREWING COMPANY LIMITED, MOLSON COORS CANADA, MOLSON CANADA 2005 and SLEEMAN BREWERIES LTD.

Defendants

REASONS FOR DECISION

PERELL J.

Released: March 15, 2018