

CITATION: Bacardi Canada Inc. v. Liquor Control Board of Ontario, 2026 ONSC 928
COURT FILE NO.: CV-24-00724344-00CL
DATE: 20260213

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Bacardi Canada Inc., Beam Canada Inc.,
Brown-Forman Corporation, Corby Spirit
and Wine Limited, Diageo Canada Inc.,
Forty Creek Distillery Ltd. (operating as
Campari Canada) and Remy Cointreau
USA, Inc.

Plaintiffs

– and –

Liquor Control Board of Ontario

Defendants

)
)
) *Deborah Templer, Dorothy Charach,*
) *Connor Campbell and Eli Berg, for the*
) *Applicants*

)
) *Jill Dougherty, Debra McKenna and Kelsey*
) *Ivory, for the Respondents*

) **HEARD:** June 11-12, 2025
)

CAVANAGH J.

REASONS FOR JUDGMENT

INTRODUCTION

[1] This application is brought by seven Applicants, each of which is a supplier of spirits to the Respondent, the Liquor Control Board of Ontario (“LCBO”).

[2] The application relates to chargebacks issued by the LCBO to the Applicants by way of set off to enforce section 14 of the LCBO’s standard purchase order terms and conditions for beverage alcohol products, which was a term of sales contracts for the supply of spirits made by the Applicants with the LCBO.

[3] Section 14 provides that the supplier shall not sell any products ordered to the LCBO at a price (exclusive of taxes, duties and freight) which is higher than the price at which the product, in the same quantity, is being sold by the supplier to another government liquor board or government liquor purchasing body in Canada. Section 14 provides that should the supplier breach

this provision, it shall pay to the LCBO on demand an amount equal to the difference between any amount paid by the LCBO to acquire the product which is in excess of the amount paid by any other government liquor board or government purchasing body in Canada to acquire such product.

[4] The Applicants maintain that s. 14 has been included in the terms and conditions of sale for decades and, nevertheless, the LCBO had not enforced this provision against spirits suppliers for many years, and many suppliers were not even aware of its existence. The Applicants maintain that s. 14 has never played a part in the pricing for spirits products supplied to the LCBO which, in their experience, consistently tries to achieve higher, not lower, retail prices. The Applicants submit that enforcement of s. 14 is fundamentally unfair since the LCBO made a deliberate decision not to enforce it for over 25 years.

[5] The Applicants seek an order declaring that s. 14 is unenforceable, and to order that the LCBO release to the relevant Applicant any amounts set off based on enforcement of s. 14. In support of this application, the Applicants rely on a number of legal grounds.

[6] For the following reasons, the application is dismissed.

FACTUAL BACKGROUND

[7] The following background facts provide context for the issues raised on this application.

LCBO is the sole customer for each of the Applicants

[8] The LCBO is a Crown Corporation that is both a regulator and retailer of wine, beer, and distilled spirits in Ontario. It derives its mandate and powers from the *Liquor Control Board of Ontario Act, 2019*, S.O. 2019, c. 15, Sched. 21 (the "LCBO Act"), the *Liquor License and Control Act, 2019* (the "LLCA") and associated regulations. The LCBO has a monopoly in Ontario over the purchasing of spirits for resale and over the retailing of spirits.

[9] The LCBO is, in effect, the sole customer in Ontario for each of the Applicants, as they are not allowed to sell directly to consumers or businesses.

LCBO Purchasing Process

[10] The LCBO publishes bi-monthly and bi-annual calls for products (also known as "needs letters") on its website, along with specified terms and conditions (the "Terms and Conditions"), the Supplier Code of Conduct and a price calculator (among other resources). Each product call stipulates the submission criteria, including style of product and desired retail price range. The LCBO conducts a submission review process, selects the products it wishes to purchase, and issues a notice to purchase ("NTP"), followed by a purchase order for the selected product.

[11] A NTP is a letter setting out the terms of purchase for the product. NTPs confirm that retail prices are mutually agreed to by the LCBO and suppliers. Every NTP states:

Every purchase order is subject to and incorporates by reference the LCBO's standard purchase order terms and conditions for beverage alcohol products, which are available online at PO Terms & Conditions; or by calling LCBO's Supplier Service Representative at (416) 365-5855 and requesting a copy be forwarded to you.

[12] When the LCBO then purchases products from a supplier, it generates a purchase order setting out the price per case paid to the supplier (the Free On Board or "FOB" price), which, after applying the LCBO's mark-up, will achieve the mutually agreed retail price set out in the NTP. The Terms and Conditions are incorporated by reference into those purchase orders. LCBO purchase orders state that suppliers are deemed to have accepted the Terms and Conditions by accepting the purchase order.

LCBO Mark-up

[13] In collaboration with the Ministry of Finance, the LCBO Board determines the standard mark-up for each category of liquor. The mark-up covers the LCBO's cost of operations and the profit from liquor sales goes back to the province of Ontario in the form of a dividend. The LCBO has long been required (by successive governments and the Minister of Finance) to maintain a fixed mark-up structure. It provides transparency to the LCBO's purchasing and pricing practices, demonstrates equitable, and consistent treatment of all suppliers and is needed to meet Canada's obligations under international trade agreements (which require imported products to be given "national treatment", consistent with domestic products, regarding price, listings and points of sale).

[14] The LCBO's gross margin varies by product class (e.g. vodka, or fortified wine) but, for all products within a particular class, the LCBO's gross margin must be a consistent share of the retail price.

Section 14 of the LCBO Terms and Conditions

[15] Section 14 of the Terms and Conditions provides as follows:

NO PRICE DISCRIMINATION: The Supplier shall not sell any Product(s) ordered to the LCBO at a price (exclusive of taxes, duties and freight) which is higher than the price at which the Product, in the same quantity, is being sold by the Supplier to another government liquor board or government liquor purchasing body in Canada; nor shall it sell any Product(s) to the LCBO upon terms and conditions respecting sale or delivery which are less advantageous than those offered to any other government liquor boards or government liquor purchasing bodies in Canada; nor shall it in any other way discriminate against the LCBO with respect to the sale of the Product(s) ordered or any portion thereof. Should the Supplier breach this provision, it shall pay to the LCBO on demand an amount equal to the difference between any amount(s) paid by the LCBO to acquire the Product(s) which is in

excess of the amount(s) paid by any other government liquor board or government purchasing body in Canada to acquire such Product(s).³¹

[16] The Applicants' contend that the LCBO had not enforced s. 14 for many years and that many suppliers were not aware of its existence. Each of the Applicants has led evidence from its top executive in Canada that he or she did not know about s. 14, and had never heard of it being enforced.

Minimum Price Regulation

[17] There is a minimum retail price ("MRP", or floor price) for each variety of liquor, below which that liquor cannot be sold in government stores. The MRP for different varieties of liquor has existed for decades in Ontario. Initially, MRP was established and periodically increased by the LCBO by means of board resolutions. Since 2010, MRP has been established and adjusted annually pursuant to regulation.

[18] Until April 1, 2025, O. Reg. 750/21: Minimum Pricing Of Liquor And Other Pricing Matters (the "Minimum Price Regulation") prevented spirits products from being sold to consumers below the MRP. The MRP increased annually based on inflation meaning that, every year, the price of all floor price products needed to increase.

[19] The LCBO has eliminated the MRP for spirits as of April 1, 2025.

LCBO Letter to the Trade - November 19, 2019

[20] On November 20, 2019, the LCBO sent by email a letter directed to suppliers about ongoing compliance with s. 14. The letter, dated November 19, 2019, reads, in part:

As we continue to roll out product calls for upcoming periods, a brief reminder on pricing related to products purchased by the LCBO.

As you are aware, LCBO's Purchase Order Terms and Conditions [hyperlinked] contain a requirement that any product ordered by the LCBO be made available at a price that is equal to or lower than it is made available to any other government liquor board or government liquor purchasing body in Canada, and also set out the rights of the LCBO should a supplier breach this provision:

[21] The letter then quotes the full text of s. 14, and states that "[m]oving forward, we will also be including a note regarding this requirement in individual notices to purchase issued".

[22] The letter to the trade was posted on the LCBO's "'Doing Business With the LCBO" website and was sent by email from the LCBO to various recipients. The recipients included The Association of Canadian Distillers (Spirits Canada), and Drinks Ontario. The recipients also included a senior representative of Bacardi responsible for pricing in Ontario (Clayton Blakely), and a senior representative of Diageo (Gareth King).

[23] The evidence from Diageo's senior executive in Canada, Jodi Rumble, is that her understanding is that Drinks Ontario distributed the letter to the trade electronically to its members, including Diageo. The evidence of Corby's representative, Mr. Krantz, is to the same effect. He attaches as an exhibit to his affidavit an email from Drinks Ontario with a link to LCBO's letter to the trade.

Knowledge by Applicants of s. 14

[24] Each of the seven Applicants has submitted affidavit evidence from their top executive in Canada that they did not know about s. 14 until the fall of 2023 and had never heard of it being enforced.

[25] The Applicants do not contend that s. 14 is not enforceable only because of absence of knowledge of it by senior executives. The Applicants accept that s. 14 appears in the Terms and Conditions that form part of supply contracts.

SAQ pricing policy

[26] Under the Purchasing and Merchandising Policy of the Société des alcools du Québec ("SAQ"), "[s]uppliers must sell their products to the SAQ at the best ex-cellar price less than or equal to that charged to other provincial or territorial liquor control boards in Canada, in order to obtain a competitive retail price in Canada".

LCBO actions to enforce s. 14

[27] The LCBO's evidence is that to ensure compliance with s. 14 and evaluate product performance, it monitors liquor prices in Canada. The LCBO's evidence is that significant differences in retail pricing serves as an indicator of potential noncompliance with s. 14 and triggers a follow-up with suppliers. The LCBO's evidence is that through investigations it determined that some products were being sold in Quebec by the SAQ and by liquor boards in some other provinces at retail prices significantly lower than those at the LCBO.

[28] By early 2023, the LCBO contacted the suppliers which the LCBO believed may have sold products to LCBO without complying with s. 14 and requested information about pricing of products to the SAQ. The Applicants provided such pricing information. Their evidence is that they did so under duress in order to reduce the quantum of threatened chargebacks by the LCBO.

[29] The LCBO has deducted chargebacks from amounts otherwise owing to the Applicants. The LCBO relies on its right of set-off under section 5 of the Terms and Conditions to justify the chargebacks. The LCBO did not impose chargebacks on suppliers for products priced at the MRP.

[30] As of April 23, 2025, the chargebacks assessed and deducted by the LCBO are as follows:

Applicant	Chargebacks Deducted	Chargebacks Pending	Total Chargebacks
Corby	\$8,107,501.00		\$8,107,501.00
Diageo	\$9,742,486.00	\$3,048,442.00	\$12,790,928.00
Beam	\$1,209,347.00	\$3,334,330.00	\$4,543,677.00
Bacardi	\$2,499,761.00	\$787,884.00	\$3,287,645.00
Brown-Forman	\$1,121,577.00		\$1,121,577.00
Campari	\$4,543,584.00		\$4,543,584.00
Remy-Cointreau	\$432,758.00	\$1,099,627.00	\$1,532,385.00
Total	\$27,657,014.00	\$8,270,283.00	\$35,927,297.00

ANALYSIS

[31] The Applicants seek an order declaring that s. 14 of the Terms and Conditions is of no force or effect, or, alternatively, that LCBO has no legal right to retroactively enforce s. 14. The Applicants seek, consequential to these declarations, an order declaring that the LCBO must release any amounts set off based on enforcement of s. 14.

[32] The Applicants rely on a number of grounds to support their claims for relief. I address each in turn.

A. Is s. 14 ultra vires the LCBO's statutory mandate and, therefore, void and unenforceable?

[33] The Applicants submit that as a corporation created by a special statute, the LCBO's actions are limited to those granted by that statute and that any activity beyond its statutory authority is invalid. The Applicants submit that s. 14 is contrary to, and incompatible with, the LCBO's statutory mandate and, therefore, it is void and unenforceable.

[34] The LCBO's objects are set out in section 3 of the LCBO Act:

3 The LCBO has the following objects:

1. To establish retail stores in Ontario for the sale of liquor to the public, including online stores and stores operated by its agents.

2. To buy and sell liquor, both as a wholesaler and as a retailer.
3. To import liquor and control the importation of liquor.
4. To promote social responsibility in connection with liquor.
5. To perform such other functions as may be assigned to the LCBO by this Act or any other Act.
6. To engage in any other activities that are prescribed by the regulations.
7. To engage in any other activity that is incidental to carrying out its other objects.

[35] The Applicants rely on evidence given by Aaron Campbell, the Chief of Staff and Vice-President, Corporate Affairs, Strategy and Sustainability at the LCBO who described the LCBO's statutory object of promoting social responsibility in connection with liquor as its "overriding obligation". Mr. Campbell agreed that the LCBO's pricing approach is also shaped by its commitment to regulating beverage alcohol in a socially responsible manner.

[36] The Applicants submit that a secondary role of the LCBO is to generate revenue for the Province of Ontario.

[37] The Applicants submit that the purpose of s. 14 of the Terms and Conditions is to ensure the LCBO gets the lowest FOB prices of any provincial liquor board. The Applicants submit that having the lowest price on spirits is contrary to, and incompatible with, both LCBO's social responsibility mandate to encourage responsible consumption of liquor and its obligation to generate revenue for the Province.

[38] The LCBO enjoys a monopoly over the sale, transportation, delivery, and storage of liquor in Ontario. This includes the LCBO's authority to enter into and set the terms of sale for contracts for the purchase of distilled spirits and impose a markup on their retail sale.

[39] The LCBO cites the LCBO comments in the Auditor General's 2011 Report on LCBO New Product Procurement as showing that the LCBO must achieve a balance among elements of its mandate:

It is a mandatory condition of sales to the LCBO that suppliers do not sell the same product at a lower price to other Canadian liquor retailers. Regular price surveys show that the LCBO has the lowest overall alcohol prices in Canada. ... The LCBO must achieve a balance among the elements of its mandate: generating revenue, promoting social responsibility, and providing customers with selection and value at all price points. Although the audit report states that "the LCBO does not sell its products at the lowest prices possible," in fact many products in the LCBO do sell

for the lowest price legally allowable. Under its mandate and the fixed-markup structure, the LCBO cannot currently negotiate for volume discounts.

[40] The objects of the LCBO as set out in s. 3 of the LCBO Act, in addition to requiring it to promote social responsibility in connection with liquor, require the LCBO to buy and sell liquor, both as a wholesaler and as a retailer, and to engage in any activity that is incidental to carrying out its objects.

[41] In order to fulfill its mandate to buy liquor, the LCBO is required to determine the terms and conditions for the purchase of liquor from suppliers for retail sale to the public, including the method for setting prices.

[42] The LCBO is not required under the LCBO Act to sell liquor to the public at high prices, or the highest possible prices, in order to discourage consumption of liquor. The LCBO is not a private entity which seeks to maximize profits. In discharging its mandate to buy and sell liquor as a wholesaler and as a retailer, the LCBO must engage in a process that balances its statutory objects. This process includes determining prices for the purchase of spirits that allow it to provide value to Ontario consumers while, at the same time, promoting social responsibility in the sale of spirits to the retail public through the setting of retail prices and providing revenue to the Ontario government.

[43] Section 14 of the Terms and Conditions operates to allow the LCBO to maintain fair pricing for Ontario consumers by requiring suppliers of liquor to price their products for sale to the LCBO at prices that are at least as low as prices charged to other government liquor purchasing bodies in Canada. Under government policy, the LCBO does not use its monopoly status to secure volume discounts from suppliers, but sets retail prices at a fixed mark up from wholesale prices.

[44] The inclusion of section 14 in the LCBO's Terms and Conditions for the purchase of liquor from suppliers falls squarely within the statutory objects of the LCBO as set out in s. 3 of the LCBO Act including, in particular, the statutory object of buying and selling liquor as a wholesaler and retailer.

[45] I conclude that s. 14 of the Terms and Conditions is not incompatible with the LCBO's objects. It is not *ultra vires* the LCBO's statutory mandate.

B. Is s. 14 illegal and, therefore, unenforceable?

[46] The Applicants submit that s. 14 is unenforceable due to illegality.

[47] The Applicants cite *Still v. M.N.R.* (C.A.), 1997 CanLII 6379 (FCA), [1998] 1 FC 549, where, at para. 48, the Federal Court of Appeal held that the doctrine of statutory illegality is served by the following principle: “[w]here a contract is expressly or impliedly prohibited by statute, a court may refuse to enforce it.” The Federal Court of Appeal notes that the doctrine of illegality rests on the understanding that it would be contrary to public policy to allow a person to maintain an action on a contract prohibited by statute.

[48] The Applicants submit that compliance with s. 14 requires suppliers and the LCBO to violate the Minimum Price Regulation and, therefore, s. 14 is a contractual provision that is statutorily illegal and that it would be contrary to public policy to allow the LCBO to enforce it.

[49] The Applicants refer to pricing in other provinces which is not constrained by Ontario's MRP, where FOB prices for some products in other provinces are below what would be required in Ontario to meet the MRP (after the LCBO's Standard Mark-Up is applied). They submit that such prices would violate the Minimum Price Regulation which was in place to encourage socially responsible drinking. The Applicants submit that the LCBO has tacitly conceded the illegal and unworkable nature of s. 14 by forgiving chargebacks based on products priced at the floor.

[50] The Applicants submit that s. 14 requires suppliers to give the LCBO the lowest price of any provincial liquor board in Canada, even if the price is illegally low. They submit that for many products, if suppliers were to offer the LCBO the lowest FOB price in compliance with s. 14, the fixed markup would require the LCBO to offer those products to consumers at a price that is below what the Ontario government determined was required for responsible consumption. The Applicants submit that, therefore, s. 14 is illegal and contrary to public policy.

[51] The Applicants submit that the LCBO historically accepted a higher FOB price (knowing that suppliers were not complying with s. 14) where compliance would cause the retail price to be illegally low. They submit that s. 14 put them in a difficult position because they may not have been able to comply with s. 14 and still offer their products in multiple jurisdictions. The Applicants submit that the options to comply with s. 14 are, practically, unrealistic and that it would be impossible for them to comply with s. 14 without causing the LCBO to violate the Minimum Pricing Regulation, while selling their product in each province. The Applicant point to the SAQ which does not have similar minimum pricing requirements and commonly rejects supplier's requests for price increases, or only approves a smaller price increase than that requested.

[52] The Applicants submit that the proper remedy for the illegality of s. 14 is "blue pencil" severance whereby s. 14 would be severed with the remaining provisions of the Terms and Conditions being left unaffected.

[53] I disagree that s. 14 is void for illegality. Section 14 is a contractual provision that applies to the price at which suppliers are required to sell products to LCBO. Suppliers are able to set prices for the sale of products to LCBO which comply with s. 14 and are not illegal. LCBO's standard markup is not set by statute, and it is up to the LCBO to apply policies to comply with the Minimum Pricing Regulation.

[54] In addition, even if LCBO's standard markup is taken into account, suppliers are able to comply with s. 14 without requiring the LCBO to violate the Minimum Price Regulation. Suppliers are able to price their products to another government liquor board at levels that, if not lower than prices to the LCBO, would not require the LCBO to violate the Minimum Pricing Regulation. If a

supplier is unable to do so, it can comply with s. 14 by choosing not to sell the product to another liquor board or by not selling the product to the LCBO.

[55] Each Applicant is able to determine whether the FOB price for products supplied to the LCBO under a given contract is as low as the price given to other government liquor boards. The Applicant is able to ensure that it is in compliance with s. 14 by refusing to accept the LCBO purchase order, lowering its price to the LCBO, or increasing its price to the other government liquor board.

[56] I accept that compliance with s. 14 may have presented suppliers with challenging business decisions with respect to the pricing of their products in the various provinces in which they wish to sell their products. This fact does not, however, make s.14 statutorily illegal or contrary to public policy for LCBO to enforce it.

[57] I conclude that s. 14 is not unenforceable for illegality.

[58] The Applicants also submit that s. 14 is an unreasonable covenant in restraint of trade.

[59] In *Tank Lining Corp. v. Dunlop Industrial Ltd.*, 1982 CanLII 2023 (ON CA), the Court of Appeal set out the four-part inquiry that is required by the doctrine governing contracts in restraint of trade:

- (a) Does the covenant restrain trade?
- (b) Is the restraint one of the exceptional cases where restraints of trade are permitted?
- (c) Is the restraint justifiable as reasonable between the parties? And
- (d) Is the restraint justifiable as reasonable with respect to the interests of the public?

[60] In *Stephens v. Gulf Oil Canada Ltd. et al.*, 1975 CanLII 711 (ON CA); (1976), 11 O.R. (2d) 129, at pp. 138-139, the Court of Appeal accepted that a covenant in restraint of trade is one in which a party agrees with any other party to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses.

[61] The Applicants submit that s. 14 is a covenant in restraint of trade because it is one whereby a contracting party agrees to restrict his or her liberty in the future to freely carry on trade with other persons not party to the contract. They note that if the Applicants could not lower the FOB price at the LCBO because doing so would cause the retail price of a product to drop below the MRP, s. 14 requires the supplier to either (1) raise the price in other jurisdictions; (2) no longer offer the product at the LCBO; or (3) no longer offer the product in the other jurisdiction(s) getting a lower FOB price.

[62] The Applicants submit that a covenant in restraint of trade is *prima facie* unenforceable unless it is reasonable in reference to the interests of the parties and in the interests of the public.

They submit that s. 14 is ambiguous because the term “in the same quantity” is not defined and because s. 14 has no temporal scope such that, as a result, the reasonableness of s. 14 cannot be determined. The Applicants submit that, in any event, the doctrine of *contra proferentem* should be applied with the result that this Court should prefer the interpretation advanced by the Applicants, that is, at the individual purchaser level, requiring everything to be the same, including the cases being ordered in the same quantity, and applying a narrow temporal scope.

[63] Section 14 does not restrict the liberty of a supplier to sell products in the future to customers who are not parties to a supply contract with LCBO. Section 14 operates with respect to each purchase order for a product, in a quantity and at a FOB price specified in that purchase order. It requires the FOB price to be no higher than the price at which the product, in the same quantity, is being sold by the supplier to another government liquor board. Section 14 does not prohibit suppliers from selling to other liquor boards in the future or from raising or lowering their FOB prices to other jurisdictions in the future. Section 14 does not bind a supplier to maintain their pricing to the LCBO or to any other liquor board for a specified period of time. Section 14 does not restrain trade.

[64] I conclude that s. 14 is not a covenant that restrains trade.

C. Is s. 14 an unenforceable penalty or an unconscionable forfeiture?

[65] The Applicants submit that s. 14 is a stipulated remedy provision which imposes an unenforceable penalty, not a forfeiture. They submit that the chargebacks are, in effect, payments the Applicants are required to make upon breaching s. 14.

[66] The Applicants submit that as a result of the LCBO’s fixed markup, the LCBO makes more profit when it receives a higher FOB price from suppliers and, therefore, the LCBO has actually benefited financially from higher FOB pricing, rather than suffering any damages. The LCBO’s witness, Mr. Campbell, agreed with this as a general proposition, at least in the immediate term.

[67] The Applicants submit that where the LCBO suffered no monetary damages from purchasing the Applicants’ products and, instead, profited, the chargebacks imposed by LCBO are extravagant and unconscionable in amount and constitute an unenforceable penalty.

[68] In *660 Sunningdale GP Inc. v. First Source Mortgage Corporation*, 2024 ONCA 252, the Court of Appeal for Ontario held that a “penalty” is the payment of a stipulated sum on breach of the contract, irrespective of the damage sustained. In *Peachtree II Associates - Dallas L.P. v. 857486 Ontario Ltd.*, 2005 CanLII 23216 (ON CA), Sharpe J. A. held, at para. 22, that the essence of a penalty clause “is a payment of money stipulated as in terrorem of the offending party ...”, citing *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd.*, [1915] A.C. 79, 23 C.L.T. 106 (H.L.), at pp. 86-87. The determination of whether a contractual provision is an unenforceable penalty is made at the time of contract formation. See, at para. 21; *City Star Roofers Inc. v. 2169462 Ontario Limited*, 2022 ONSC 1407, at para. 21.

[69] There is a common law rule that courts will not require a party to pay a genuine or true penalty on grounds of public policy. See *Peachtree*, at para. 23.

[70] Section 14 does not provide for payment of a sum upon non-compliance that is stipulated as *in terrorem* of a supplier of spirits. Section 14 precludes suppliers from charging prices that are higher than the price at which the product, in the same quantity, is being sold by the supplier to another government liquor board or government liquor purchasing body in Canada. The damage sustained by the LCBO where a supplier has breached s. 14 is the amount of the overcharge. The remedy for a supplier's failure to comply with s. 14 is not payment of a stipulated sum. The supplier is required to pay to the LCBO on demand an amount equal to the difference between any amount paid by the LCBO to acquire the product which is in excess of the amount paid by any other government liquor board or government purchasing body in Canada to acquire such product. This remedial payment, rather than being a sum stipulated at the time of contract formation as *in terrorem* of the supplier, is rationally connected with the breach of s. 14 because it is designed to require the supplier to pay to the LCBO an amount equal to the amount of the overcharge.

[71] I conclude that s. 14 is not properly characterized as a penalty.

[72] If I had concluded that s. 14 provides for a stipulated payment on its breach in respect of a given sale contract (where, because of the fixed mark-up, the LCBO does not suffer monetary damages on a sale of the product to its customers) because it includes a mechanism for determination of the amount to be paid on a breach, I would need to consider whether this provision is a genuine or true penalty that is unenforceable at common law.

[73] In *Peachtree*, the appellant argued that the stipulated remedy clause had been found to be a penalty and, therefore, the adjudicator was required to apply a black-letter common law rule that precludes enforcement of penalty clauses, without discretion to do otherwise. The Court of Appeal noted, at para. 27, that this proposition has been explicitly rejected in the case law, citing cases that rejected an automatic rule that penalty clauses are unenforceable. The Court of Appeal then addressed whether the impugned clause should be assessed from the perspective of the common law rule against penalty clauses or as a request for relief from forfeiture. The Court of Appeal noted its reluctance to frame the issue as a choice between common law and equity, and engaged in an analysis driven by considerations that would tend to favour, whenever possible, the equitable approach as the dominant one.

[74] The Court concluded that the appellant's case amounts to a request for relief from forfeiture. In reaching this conclusion, the Court of Appeal addressed four factors: (i) the language of the clause itself, (ii) the desirability of assimilating both the common law and the equitable doctrine under unconscionability, (iii) the proposition, well-supported by judicial authority, that the strict rule of the common law refusing to enforce penalty clauses should not be extended, and (iv) the policy of upholding freedom of contract.

[75] The language of s. 14 provides for a payment by the supplier, on demand, following a breach, although the payments were enforced by the LCBO by chargebacks by way of set-off, as opposed to actual payments by the Applicants.

[76] I consider these factors having regard to the language of s. 14 and the fact that the remedy, if it requires payment of a stipulated sum on breach, irrespective of the monetary damages sustained by the LCBO on a sale of the product to customers, does not provide for a payment *in terrorem* of the Applicants, because, as I have explained, the remedy for the overcharge is rationally connected with the breach. I consider these factors having regard to the statutory role of the LCBO in this highly regulated market and its powers as buyer and seller and as a wholesaler and retailer under the LCBO Act, including that it should have regard for the interests of consumers of spirits by ensuring that the LCBO and its customers receive fair pricing from suppliers. When I do so, I conclude that s. 14 should not be assessed as a genuine or true penalty. The Applicants' contention that s. 14 should not be enforced should be assessed as a request for relief from forfeiture.

[77] In *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, at para. 15, the Court of Appeal referred to the two-step test to determine whether relief from forfeiture should be granted: (1) whether the forfeited sum was out of proportion to the damages suffered by the other party upon the breach; and (2) whether it would be unconscionable for the other party to retain the money, an assessment to be made at the time of the breach.

[78] The analysis of unconscionability requires the court to step back and consider the full commercial context. The finding of unconscionability must be an exceptional one, strongly compelled on the facts of the case. The list of the indicia of unconscionability is never closed, especially since they are fact specific. Although a disproportionality between the damages suffered and the amount forfeited may, in some circumstances, without more, justify a finding of unconscionability, this is not so in all cases. The cases suggest several useful factors such as inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of *bona fide* negotiations, the nature of the relationship between the parties, the gravity of the breach, and the conduct of the parties. See *Redstone*, at paras. 17, 18, 25, and 30.

[79] The Applicants submit that it is plainly unconscionable for the LCBO to retain the chargebacks. They rely on the fact that the chargebacks are extraordinarily disproportionate to the damages sustained by the LCBO (none, they say). The Applicants submit that this, on its own, makes it unconscionable for the LCBO to get the benefit of higher FOB pricing and, in addition, collect the chargebacks. The Applicants rely on the evidence that the Terms and Conditions were not negotiated, and, if they wished to operate in Ontario, they were required to accept them. The Applicants submit that there is a significant inequality of bargaining power between them and the LCBO, which possesses most of the power in relation to product listing decisions. The Applicants submit that the LCBO waived any right to require compliance with s. 14, and that it has failed to meet its obligation of good faith in the performance of the supply agreements. The Applicants submit that chargebacks were imposed long after products were delivered, and that it would be

unconscionable to allow the LCBO to set off amounts owing under later contracts based on a breach of a prior contract which ended upon supply of the product.

[80] The commercial context of s. 14 must take into account that the sale of liquor in Ontario is highly regulated, and the role played by the LCBO, as an agent of the Crown, in the regulatory framework. The LCBO Act gives the LCBO authority to establish retail stores in Ontario for the sale of liquor to the public, to buy and sell liquor as a wholesaler and retailer, and to promote social responsibility in connection with liquor. All net income from LCBO sales goes to the Government of Ontario in the form of an annual dividend. Section 14 has been included in the Terms and Conditions for the purchase of liquor products by the LCBO for many years. This provision, a form of “most favoured customer” clause, operates as a tool for consumer protection.

[81] Suppliers charging higher FOB prices to the LCBO results in higher prices for Ontario customers, given that the LCBO is required to impose a fixed markup. The LCBO, as a creature of statute which plays an important role in the regulatory framework governing the sale of liquor in Ontario, has a broad and varied mandate under the LCBO Act. It is not a private, commercial entity directed toward the maximization of profit. This was well known to the Applicants when they dealt with the LCBO.

[82] The amount of a chargeback is not arbitrarily set based on a payment stipulated at the time of each contract, as I have noted. It is the amount which is equal to the amount of the overcharge resulting from a supplier’s breach of s. 14. The aggregate amount of the chargeback is large because of the suppliers’ widespread failure to comply with s. 14. In these circumstances, the fact that the amount of the chargeback is large in comparison with monetary damages suffered by the LCBO from suppliers’ failures to comply with s. 14 is insufficient to show that the contractual remedy for non-compliance, chargebacks, is unconscionable. Such a conclusion would also not take into account the purpose of s. 14 as a consumer protection tool used by the LCBO in the exercise of its statutory power to set prices for the sale of spirits to the public.

[83] The Applicants are sophisticated commercial entities. They were well aware of Ontario’s regulatory framework when they sold their products in Ontario. When they did so, they were required to comply with the Terms and Conditions of their supply contracts with the LCBO. The fact that senior executives of the Applicants did not know that s. 14 was a term of each supply contract does not excuse the Applicants from compliance. This is especially so after the Applicants received the 2019 letter to the trade from the LCBO.

[84] It is true that the LCBO has market power as the sole purchaser of spirits in Ontario. I do not, however, consider the relative strengths of bargaining power between the Applicants and the LCBO, in itself, as sufficient to show that the chargebacks are unconscionable. The consequence of a failure to comply with s. 14 is evident from a plain reading of s. 14, and the fact that chargebacks were imposed after products were delivered is contemplated by s. 14, and does not make the chargebacks unconscionable.

[85] When I consider the commercial context in respect of sale of spirits to the LCBO, and the LCBO's statutory role as an agent for the Crown in the sale of spirits to the public, and the other factors described in the jurisprudence, I conclude that the Applicants have failed to show that the imposition of chargebacks by the LCBO was unconscionable, such that relief from forfeiture should be granted.

D. Has the LCBO waived its right to enforce s. 14?

[86] The Applicants submit that s. 14 is not enforceable, as the LCBO has waived its right to enforce it.

[87] Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party. Waiver will only be found where the evidence demonstrates that the party waiving had (1) full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. This is a stringent test. See *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC).

[88] The Applicants submit that the LCBO knew about suppliers' breaches of s. 14 and failed to take steps available to it to enforce it. They submit that the LCBO has always had the means for monitoring prices and, until 2019, took steps to do so. The Applicants submit that when the LCBO monitored prices, it revealed an ongoing pattern of non-compliance with s. 14 by spirits suppliers. In support of this submission, the Applicants cite documents in evidence in 2001, 2002, and 2003 (internal LCBO reports with estimated warranty charges), and evidence from Jason Quan, a Senior Manager for LCBO, that the LCBO was aware between 2105 to 2019 that it did not have the lowest retail prices for spirits products.

[89] The Applicants submit that the LCBO unequivocally communicated its intention not to enforce s. 14 as it is written in the Terms and Conditions. They cite materials from 1992, including a notice from a January 1992 meeting with the Association of Canadian Distillers, which reads that the LCBO has "now recognized that the application of F.O.B. warranty would neither generate additional revenues to the LCBO nor be in the best interests of the industry". The Applicants submit that this was a clear communication to the spirits industry that the LCBO would not enforce an FOB warranty, and that this Court should infer that the LCBO intended to waive compliance with s. 14.

[90] The Applicants also cite a report from the LCBO to the Auditor General in 2011 stating that it did not regularly monitor or compare supplier pricing for products.

[91] The Applicants submit, generally, that the LCBO never enforced s. 14 until the fall of 2023 and, through its statements and actions, led them to believe that it would not be enforced and that its rights thereunder were abandoned.

[92] The LCBO disputes that the evidence shows that it knew of consistent and widespread breaches of s. 14 and deliberately chose not to issue chargebacks. LCBO submits that it knew that retail prices in other provinces were sometimes lower than the retail prices in Ontario, it did not

have full knowledge of information showing widespread non-compliance. The LCBO submits that when breaches were discovered, s. 14 was enforced.

[93] The LCBO relies on evidence from Abhay Garg, Vice-President, Merchandising at the LCBO, that the LCBO conducts routine monitoring of liquor prices through Canada which had been in place for many years to ensure compliance with warranty prices and (until 2019) to prepare quarterly reports of liquor pricing and sales data across Canada on behalf of the Canadian Association of Liquor Jurisdictions (“CALJ”), which disbanded in 2019. He deposes that price monitoring focuses on retail prices since supplier cost information on wholesale pricing offered to other liquor jurisdictions is not readily available. He states that significant retail price differences may serve as a red flag for suppliers’ noncompliance with their warranty price obligations under section 14. Mr. Grab deposes that it was and remains the LCBO’s general practice that it would contact a supplier when the LCBO suspected a breach of its warranty pricing clause. He deposes that the LCBO would remind the suppliers of their price warranty obligations, and its ability to issue chargebacks, and would resolve the issue with the supplier, often without resorting to chargebacks. He deposes that, generally, when non-nominal retail price differences were found, the LCBO would speak with the supplier or its agent to confirm that the LCBO is being offered prices that are equal to or lower than price offered to any other government liquor board or government liquor purchasing body in Canada. Mr. Garb deposes that this monitoring has in the past identified supplier breaches, resulting in the LCBO requiring offending suppliers to rebate the LCBO variances between the prices provided to the LCBO and those provided to other liquor jurisdictions. He references emails exchanged between the LCBO and the Diageo during 2019 and 2020 in which the LCBO raised with Diageo its non-compliance with warranty pricing.

[94] The LCBO relies on evidence from Jason Quan, a Senior Manager. Mr. Quan deposes that he was involved with monitoring warranty pricing from approximately 1995 to 2012, but not with enforcement steps being taken by the LCBO. Mr. Quan deposes that during this timeframe, the LCBO prepared annual price surveys on behalf of CALJ that included a variety of information, including pricing policies, performance ratios and statistical information. He deposes that he developed a pricing calculator for the LCBO to estimate landed costs, which is based on retail price for each jurisdiction and took into consideration the different pricing and markup policies in each jurisdiction. He deposes that the LCBO used data from Spirits Canada to reverse engineer pricing and confirm the landed cost to evaluate supplier compliance with warranty pricing. He then prepared reports for senior LCBO managers about warranty pricing compliance.

[95] The LCBO relies on evidence from Alexander Browning, a former LCBO executive. Mr. Browning deposes that when the equivalent to section 14 was first introduced, spirits suppliers, initially complied with the warranty pricing requirement voluntarily. He deposes that during that initial period, where warranty pricing breaches occurred, the LCBO generally allowed offending suppliers to make up the discrepancy by paying a like sum toward LCBO merchandising services. Mr. Browning deposes that the LCBO consistently monitored retail prices in other Canadian liquor jurisdictions and was able to use that information to calculate the approximate FOB pricing being provided by suppliers to other liquor boards. He deposes that based on that monitoring and analysis, it appeared to the LCBO that suppliers were generally complying with their warranty

pricing obligations and there was no evidence of any widespread and significant pricing breaches during that period. Mr. Browning deposes that when substantial breaches were discovered, the LCBO took action to enforce the warranty pricing provision against the offending suppliers. He cites as an example charges by a supplier of number of Vintages products from 2006 to 2009, where the LCBO requested and received rebates from the supplier totalling more than \$990,000.

[96] The LCBO relies on the letter to the trade dated November 19, 2019 which was sent to suppliers on November 20, 2019 about compliance with s. 14. This letter quotes the “NO PRICE DISCRIMINATION” provision in s. 14 (then section 12) of the Terms and Conditions, notifies suppliers of this requirement and the contractual right of the LCBO should a supplier breach this provision, and thanks them for their support in “upholding this obligation”.

[97] The Applicants discount the importance of the 2019 letter to the trade.

[98] The Applicants point to an email exchange between a Bacardi representative and the LCBO where the Bacardi representative requested a discussion about the letter to the trade. The email thread ends with a suggestion by the Bacardi representative for a discussion on November 27 or 28, 2019, with no further written communication in the email thread. The Applicants submit that a fair inference is that there was a discussion, and that Bacardi was told not to worry about the letter, at least as it relates to spirits, since there is no written record of any escalation of this issue to higher ups in either organization.

[99] The Applicants point out that the letter to the trade was circulated to members of Drinks Ontario through an email that transmitted a link to the letter, and described it as being “a reminder on pricing related to products purchased by the LCBO”. The Applicants submit that in this context, it should not be assumed that suppliers who received the email clicked on the link. The Applicants submit that the casual nature of this communication shows that the LCBO did not attach importance to the letter to the trade.

[100] The Applicants submit that it has not been proven that the letter to the trade effectively communicated to them that their prior understanding that s. 14 was not enforceable, or would not be enforced, was no longer operative.

[101] I do not accept the Applicants’ submissions in respect of the letter to the trade. The letter to the trade was distributed in accordance with the LCBO’s usual practice, including by posting it on the LCBO’s website and sending it to all industry associations, including Drinks Ontario, which sent a link to members. The reference in the covering email to the “letter to the trade” from LCBO’s VP Merchandising, “with a reminder on pricing related to products purchased by the LCBO” would have alerted industry members, including the Applicants, that the letter was relevant to their business dealings with the LCBO and concerned pricing of products. I do not accept that I should infer, from how the letter to the trade was transmitted, that it was of no importance, and could be ignored. I do not draw an inference that the Bacardi representative was told by the LCBO not to worry about the letter because, in my view, such an inference cannot reasonably be drawn in the circumstances, given the content of the letter to the trade.

[102] There is no question that upon receipt of the letter to the trade, suppliers of spirits knew, if they did not already know, that the LCBO was treating s. 14 as a binding and enforceable contractual term. The letter was sent as a “reminder”, which tends to show that from its perspective, the LCBO had previously taken the same position. If, prior to November 20, 2019, any supplier understood that the LCBO did not intend to enforce s. 14 of the Terms and Conditions, it would have known after receipt of the letter to the trade that the LCBO considered s. 14 to be an enforceable provision of each contract of sale. Each supplier was then on notice that it was required to bring its pricing practices into compliance with s. 14, or risk imposition by the LCBO of the consequence for non-compliance provided for in s. 14.

[103] It is noteworthy that each time a supplier accepts a new purchase order, a new agreement to purchase is made and the supplier accepts the Terms and Conditions. Section 1 of these Terms and Conditions includes the following language:

The Agreement is subject to all of the terms and conditions contained in this document, which will supersede and take precedence over any conflicting provisions of any document submitted by the Supplier. Any Supplier proposal for additional or different terms or conditions or any attempt by the Supplier to vary the terms and conditions in this Agreement by any means will be considered as proposals for addition to this Agreement and will not be binding unless expressly agreed to in writing by the LCBO.

[104] As this language makes clear, each new purchase agreement is subject to all of the Terms and Conditions. If a supplier did not wish to be bound by s. 14, it was incumbent on that supplier to seek to have the provision removed through the process specified in section 1 of the Terms and Conditions. None of the Applicants engaged in this process, and the LCBO did not agree in writing that s. 14 was not an effective and enforceable contractual provision. Jodi Rumble, the senior executive in Canada for Diageo, confirmed that when Diageo was notified by LCBO in 2020 about concerns regarding violations of s. 14, Diageo did not adjust its FOB pricing, even though it had been notified that the LCBO intended to enforce s. 14.

[105] The Applicants have failed to show that during the relevant period of time when chargebacks were imposed the LCBO had an unequivocal and conscious intention to abandon its contractual rights under s. 14 of the Terms and Conditions. The evidence is to the contrary.

[106] I conclude that the Applicants have failed to show that the LCBO waived compliance with s. 14 during the period of time covered by the chargebacks.

E. Should the LCBO be estopped from enforcing s. 14?

[107] The Applicants rely on the doctrine of estoppel by convention in support of their submission that the LCBO be estopped from enforcing s. 14.

[108] In *Ryan v. Moore*, 2005 SCC 38 (CanLII), [2005] 2 SCR 53, the Supreme Court of Canada, at para. 59, set out the criteria forming the basis for the doctrine of issue estoppel:

- (a) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (impliedly).
- (b) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
- (c) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

[109] In *Ryan*, at paras. 61-62, the Supreme Court of Canada noted that the crucial requirement for estoppel by convention, as distinguished from other types of estoppel, is that at the material time both parties must be of "a like mind". Each party must be aware of the assumption of the other. The estopped party must have, at the very least, communicated to the other that he or she is indeed sharing the other party's assumption. The court must determine what state of affairs the parties have accepted, and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any enforceable equity.

[110] The Applicants cite evidence of notes from a January 1992 meeting as an acknowledgement that it was not pursuing an FOB price warranty in 1992. The Applicant cite a report by the LCBO to the Auditor General in 2011 in which it referenced the equivalent provision to s. 14 and wrote that the LCBO did not regularly monitor and compare its supplier costs to those paid by other jurisdictions for the same products because it was difficult to obtain supplier cost information from other jurisdictions, citing concerns about suppliers' confidential information. The Applicants submit that the LCBO chose not to levy chargebacks against spirits suppliers prior to 2023, despite awareness of widespread breaches of section 14. The Applicants submit that each of these circumstances estops the LCBO from now pursuing retroactive enforcement of section 14.

[111] The Applicants submit that the 1992 notes of a meeting between LCBO and the Association of Canadian Distillers (now, Spirits Canada) recorded a shared assumption between them that an FOB price warranty would not be pursued. With respect to the 1992 meeting notes, the Applicants rely, in particular, on language relating to an F.O.B. Warranty where the notes read: "It is now recognized that the application of F.O.B. warranty would neither generate revenues to the L.C.B.O. nor be in the best interests of the industry". The Applicants submit that these notes record a representation by the LCBO to the spirits industry that it did not intend to pursue an FOB price warranty.

[112] The Applicants submit that this evidence shows that there were shared assumptions that spirits suppliers would comply with a "delivered cost warranty" and would make up for any breaches through trade spending. The Applications submit the LCBO acted in accordance with

their shared assumptions by not imposing chargebacks for breaches of s. 14, but accepting investments from those suppliers in the LCBO's merchandising program.

[113] Jan Westcott, the former President and CEO of the ACD, operating as "Spirits Canada", provided evidence in support of this application. With respect to the 1992 meeting notes, Mr. Westcott deposes that he was not at Spirits Canada until 1998 and only recently became aware of the 1992 notes (and a related letter). Mr. Westcott deposes that the 1992 letter and notes are about "delivered pricing" and not "FOB pricing". Mr. Westcott deposes to his understanding that in 1992, the LCBO and Spirits Canada both understood that an FOB price warranty, like s. 14, was not in the best interests of the LCBO or the industry as a whole. Mr. Westcott notes that the 1992 letter and notes did not result in the LCBO adopting a delivered pricing warranty. He confirms that each of the LCBO purchase order Terms and Conditions (which date back to 1998, when he started at Spirits Canada) includes an FOB pricing warranty.

[114] If the LCBO and the spirits industry had a shared assumption in 1992 that an FOB price warranty like s. 14 was not in the interests of the LCBO or the industry as a whole, one would expect this shared understanding to be reflected in the Terms and Conditions going forward. This did not happen. Instead, the Terms and Conditions from 1998 onward include an FOB price warranty like s. 14. This fact contradicts the Applicants' submission of a shared assumption after 1998 that the LCBO did not intend to pursue an FOB price warranty. It did exactly that.

[115] The Applicants point to evidence from Mr. Westcott of Spirits Canada that in 2011, when the LCBO raised the issue of warranty pricing with spirits suppliers, Spirits Canada, through its members, successfully resolved the issue by showing the value that the spirits industry contributed to the Ontario market. Mr. Westcott deposes that he considered the issue resolved. On cross-examination, Mr. Westcott acknowledged that the discussions related to proposed variable price markups, not to resolving warranty pricing issues or s. 14.

[116] Mr. Westcott acknowledges that Spirits Canada received the November 2019 letter to the trade from the LCBO that addressed s. 14. Upon receipt of the 2019 letter to the trade, Spirits Canada, and its members, would have known that the LCBO required compliance with s. 14 of the Terms and Conditions. If any supplier assumed otherwise before receipt of the letter to the trade, this assumption was no longer operative.

[117] The Applicants rely on evidence of communications by LCBO with Diageo in 2019 about a particular product. They note that when Diageo responded that it could not share SAQ pricing, the LCBO never followed up. The Applicants point to evidence that the LCBO did not follow up on a request by Bacardi to meet, following circulation of the letter to the industry in 2019. The Applicants submit that the clear inference from this lack of follow up is that LCBO did not intend to enforce s. 14. The Applicants point, generally, to the LCBO's failure to enforce s. 14 in the face of what they say were widespread breaches in 2013-2019, including its action to stop producing its retail pricing surveys for the CALJ, a tool to monitor compliance.

[118] The evidence cited by the Applicants does not establish that the LCBO shared an assumption with suppliers that s. 14 would not be enforced. I refer to the evidence upon which the LCBO relies that I referenced in the section dealing with waiver. This evidence shows that the LCBO considered s. 14 to be a binding and enforceable contractual term. Section 14 was included in the Terms and Conditions that were included in each sale contract during the relevant period for which chargebacks were imposed. The trade was notified through the 2019 letter to the trade that the LCBO expected compliance with s. 14. When I consider this evidence, I do not find that the LCBO shared an assumption with the Applicants that s. 14 would not be enforced.

[119] I conclude that the Applicants have failed to establish that the LCBO is estopped from enforcing s. 14 by the doctrine of estoppel by convention.

F. Did the LCBO exercise discretion to withhold money from the Applicants in bad faith?

[120] The Applicants submit that in 2023, the LCBO capriciously and arbitrarily changed the way it exercised its discretion in relation to enforcement of s. 14, and in doing so, the LCBO inappropriately disregarded the legitimate interests of the Applicants which it was required to consider. The Applicants submit that by exercising the discretionary enforcement right in s. 14 as it did, the LCBO failed to honestly perform the supply agreements in respect of which chargebacks were imposed and thereby breached these contracts.

[121] The Applicants seek a remedy of expectation damages to put them in the position they would be in had there been compliance with the duty of honest performance, that is, that their invoices be paid in full.

[122] The Applicants submit that the evidence shows that in 2023 the LCBO suddenly changed the way it exercised discretion with respect to s. 14. They submit that the LCBO did so by (i) stopping exercising its discretion to consider supplier investments in merchandising programs as an offset against breaches of s. 14, (ii) arbitrarily expanding the scope of its monitoring and enforcement, including through enforcement in respect of small price differences and in respect of products that were delisted in other provinces, (iii) initially levying chargebacks based on retail prices, putting the onus on the Applicants to prove otherwise, as opposed to reverse engineering prices to estimate supplier compliance, and (iv) upon learning that the Applicants were considering legal action, threatening to treat them differently than other suppliers.

[123] I do not accept the Applicants' submission that in 2023, the LCBO suddenly changed the way it exercised discretion with respect to s. 14. Section 14 was clearly a contractual term of each and every supply contract made by the Applicants. If there was ever any doubt that the LCBO relied on s. 14 as a binding and enforceable contractual term, and that it intended to enforce its rights thereunder, this doubt was put to rest by the 2019 letter to the trade. The fact that the LCBO confronted challenges in learning FOB pricing information of suppliers on sales in other provinces (information that was known to suppliers) does not make enforcement of s. 14 in 2023, when the LCBO was able to discover widespread violations, dishonest, or even capricious or arbitrary.

[124] The LCBO was under no obligation to allow suppliers to invest in merchandising programs as an offset for breaches of s. 14. The fact that it did so on some occasions in the past does not make enforcement of s. 14 according to its plain language dishonest, or arbitrary or capricious.

[125] The LCBO did not act dishonestly, or arbitrarily or capriciously, by following a monitoring program designed to detect violations of s. 14. Through its monitoring, the LCBO discovered widespread violations of s. 14 in 2023.

[126] The Applicants initially refused to provide FOB pricing to the LCBO, citing confidentiality concerns. To accommodate these concerns, the LCBO permitted suppliers to confirm their lowest FOB price without identifying the liquor jurisdiction in question and allowed suppliers to provide the information to a trusted neutral third party to confirm the lowest FOB price. The LCBO, upon being confronted with the positions taken by suppliers, did not act unreasonably in initially imposing chargebacks estimated based on retail price variance, subject to revision if FOB prices were provided.

[127] The LCBO extended accommodations to the Applicants by issuing chargebacks in phases and allowing repayment plans. The LCBO did not impose chargebacks on products sold at the MRP. When the Applicants refused to commit to complying with s. 14, the LCBO withdrew some accommodations. The LCBO did not act in bad faith in doing so, in the circumstances.

[128] I conclude that the Applicants have failed to show that the LCBO exercised discretion in relation to enforcement of s. 14 in bad faith.

G. Has the LCBO been unjustly enriched and, if so, should the LCBO be required to repay the Applicants the amounts of the chargebacks?

[129] The Applicants submit that the LCBO has been unjustly enriched by its withholding of substantial amounts from invoices owing to the Applicants for alleged breaches of s. 14. Each Applicant seeks restitution from the LCBO for the full amount withheld from it, plus interest.

[130] The requirements for unjust enrichment are: (i) an enrichment by the LCBO, (ii) a corresponding detriment by each supplier, and (iii) the absence of a juristic reason for the enrichment. See *Mackinnon v Ontario Municipal Employees Retirement Board*, 2007 ONCA 874 at para. 76.

[131] The LCBO received the money in question as a withholding equal to the amounts of overcharges by the Applicants as a result of breaches of s. 14 of the Terms and Conditions, which is a term of the supply contracts. The Applicants did not suffer a deprivation through the exercise by the LCBO of its contractual rights. The chargebacks corrected the Applicants' overcharges, and do not constitute deprivations by the Applicants corresponding to an enrichment by the LCBO. The LCBO received the amounts of the chargebacks pursuant to its contractual rights under the supply contracts with the Applicants. This is a juristic reasons for receipt of the chargebacks by the LCBO.

[132] The Applicants submit in their factum that the amount of chargebacks taken by the LCBO does not account for the words “in the same quantity” as they appear in s. 14, and that some chargebacks were not contractually justified because the chargebacks were not for sales of a given product “in the same quantity” to another government liquor board or government liquor purchasing body in Canada. The Applicants do not seek relief in their notice of application relief short of an order for the release of any amounts set off based on enforcement of s. 14. This is also the only remedy requested in the Applicants’ factum. I decline to grant alternative and unspecified relief based on this submission.

[133] I conclude that the Applicants are not entitled to the remedy they seek for unjust enrichment.

DISPOSITION

[134] For these reasons, the application is dismissed.

[135] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable to be agreed upon by counsel (with reasonable page limits) and approved by me.

Cavanagh J.

Released: February 13, 2026

CITATION: Bacardi Canada Inc. v. Liquor Control Board of Ontario, 2026 ONSC 928
COURT FILE NO.: CV-24-00724344-00CL
DATE: 20260213

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Bacardi Canada Inc., Beam Canada Inc., Brown-Forman Corporation, Corby Spirit and Wine Limited, Diageo Canada Inc., Forty Creek Distillery Ltd. (operating as Campari Canada) and Remy Cointreau USA, Inc.

Applicants

– and –

Liquor Control Board of Ontario

Respondents

REASONS FOR JUDGMENT

Cavanagh J.

Released: February 13, 2026