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Legal Barriers to Market Access for Canadian Wine

Alexandra V. Mayeski CCOVI Lecture Series – March 30, 2011

Outline of Presentation

Distribution of Wine – Federal

Provincial Barriers

Regulation by Municipalities

Dumping

Free Trade Agreements - Distribution

- 1989 Canada United States Free Trade Agreement (CUSTFA)
 - Chapter 5 National Treatment Provisions
 - Article 502: Provincial and State Measures

"The provisions of this Chapter regarding the treatment of like, directly competitive or substitutable goods shall mean, with respect to a province or state, treatment no less favourable than the most favourable treatment accorded by such province or state to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part."

Free Trade Agreements - Distribution

- Chapter 8 Wine and Distilled Spirits
 - Provides for the reduction of barriers to trade in wine and distilled spirits which arise from measures related to their internal sale and distribution
 - Partial derogation from the "national treatment" provisions in Chapter 5
 - Concerns listing, pricing, distribution practices, blending requirements and the standards and labelling requirements affecting distinctive products
 - Objective: to provide equal treatment for Canadian and U.S.
 wine and distilled products in each other's market over time

Free Trade Agreements Cont'd.

- 1994 North American Free Trade
 Agreement incorporates CUSTFA provisions relating to the distribution and internal sale of wine and spirits
- CUSTFA/NAFTA allow wineries to limit sales on their premises to wines produced on those premises
- Off-site winery retail outlets retained for pre-1972 wineries

Free Trade Agreements - Distribution

- Consequences:
 - Most wineries in Ontario do not have the same market access as those who are able to maintain their off-site winery retail store outlets
 - Fragmentation within the industry

Federal Distribution Laws - IILA

Section 3 (1) of the Importation of Intoxicating Liquors Act.

"Notwithstanding any other Act or law, no personal shall import, send, take or transport, or cause to be imported, sent, taken or transported, into any province from or out of any place within or outside Canada any intoxicating liquor, except such as has been purchased by or on behalf of, and that is consigned to Her Majesty or the executive government of, the province into which it is being imported, sent, taken or transported, or any board, commission, officer or other governmental agency that, by the law of the province, is vested with the right of selling intoxicating liquor."

Federal Distribution Law - IILA

- Punishment for contravention of the IILA (section 5):
 - First offence: \$200 maximum fine; default of payment
 imprisonment for any term not exceeding 3 months (s.5(a));
 - Second offence: fine between \$200-\$1,000; default in payment = imprisonment between 3-6 months (s.5(b)); and
 - Subsequent offence(s): imprisonment between 6 –
 12 months (s.5(c)).

IILA – Constitutional?

• Constitution Act, 1867, section 121:

"All Articles of Grown, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces"

Distribution Issues – US Example

- Granholm v. Heald (2005) 544 U.S. 460
 - Issue: Does the Michigan and New York regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-ofstate wineries to do so violate the dormant *Commerce Clause* in light of section 2 of the 21st Amendment?
 - Held: Both States' laws discriminate against interstate commerce in violation of the Commerce Clause and that discrimination is neither authorized nor permitted by the 21st Amendment

Provincial Barriers

- Provincial laws provide benefits to some
- Penalties to others
- Onerous listing requirements at the LCBO
- Creates division within the industry as a whole

Examples:

Wine Content and Labelling Act, 2000

Allowing certain wineries to blend Ontario grapes with foreign content into their wines

Ontario Tax Plan for More Jobs and Growth Act, 2009

- Special wine levy sold through off-site retail stores effective July 1, 2010
- No additional taxes on imported and domestic wine sold through LCBO

Municipal Restrictions

Fruit content restrictions via municipal by-laws which regulate the use of land

Case in point:

- Prince Edward County Official Plan Amendment 45 and Winery By-Law
 - Re "Farm Wineries" Fruit Content Restriction = directed that "[t]he fruit used in the annual production of wine at a Farm Winery shall consist of at least 51% of fruit grown in the County of Prince Edward by that Farm Winery operation..."
 - Decision of PEC appealed by The Winery Association of Prince Edward County Inc. to the Ontario Municipal Board (OMB)

- OMB ordered that the Fruit Content Restriction be amended to remove the 51% restriction and replace it with the word "predominantly"
- Alternatively, replace with the definition of "Farm Winery" as defined in the policy of the Town of Lincoln which states in part:
 - "...the fruit used in the production of the wine shall be predominantly from the vineyard and/or fruit farm located on the same land as the farm winery, or as part of the farmer's own farm operation"

 Zoning by-laws that mandate the amount of fruit content a winery can use in its wine exceeds the statutory authority granted to the municipalities under the *Planning Act*

Municipal Restrictions

Two Reasons:

- 1. Restricts producers of wine from sourcing grapes from other parts of Ontario which is inconsistent with provincial law under the *Vintners Quality Alliance Act, 1999* (*VQA Act*) and the Regulations thereto; and
- Does not zone the use of land or buildings, but the type of wine producers make.

1. Municipalities Exceed Jurisdiction

- VQA Ontario is the designated "wine authority" under the VQA Act
- Purpose of the VQA Act: "...to establish and maintain an appellation of origin system for Vintners Quality Alliance wine that will allow consumers to identify such wines on the basis of the areas where the grapes are grown and the methods used in making the wine." (section 1)
- Regulation 406/00: restricts a manufacturer of wine from using certain terms, descriptions and designations on a label or container of wine

- VQA legislation allows wine producers to make wine from 100% Ontario fruit without any prescribed formula based on a specific designated viticultural area.
- Because by-law is inconsistent with provincial legislation, it cannot stand

2. Regulating Wine – Not Land

- A zoning by-law regulates the use of land delineating an area and prohibits uses of land within that area
- Zoning by-laws should regulate the use of land, not the "user"
- Zoning by-laws that outline rules regarding fruit content do not regulate land – they regulate the winery's business

Dumping

Definition of Dumping per World Trade Organization: "The introduction of a product into the commerce of another country at less than its normal value"

 Anti-dumping and countervailing duty cases are widely used around the world as a legitimate tool to protect domestic producers against unfair market behaviour by foreign exporters

Dumping Cont'd.

- The Special Imports Measures Act ("SIMA") establishes the legislative framework for anti-dumping proceedings in Canada
- Designed to protect Canadian production against the harm that can be caused by dumped and subsidized imports entering the Canadian marketplace
- The Canada Boarder Services Agency ("CBSA") has established the Anti-dumping Directorate, staffed with expert officers whose mission is to assist Canadian producers defend themselves against unfairly traded imports

Dumping, Cont'd.

- Under SIMA, the imposition of anti-dumping and countervailing duties requires 2 essential findings:
 - A finding by the CBSA that imports have been dumped or subsidized; and
 - 2. A finding by the Canadian International Trade Tribunal ("CITT") that the dumping or subsidization observed by the CBSA has caused or threatens to cause material injury to domestic production
- Unless both elements exist, no dumping or countervailing duties can be imposed

Dumping, Cont'd.

CBSA Dumping Investigation

- Complaint
 - "properly documented"
 - President has 30 days within which to decide whether or not to initiate investigation
- Domestic Industry Support
 - Complicated calculation to determine whether sufficient support of domestic wine industry
 - Looks at total industry production of "like goods"
 - Issue of whether industry produces "like goods" is often in dispute
- Preliminary Determination
 - Within 60 90 days of the initiation of the investigation
- Final Determination
 - Within 90 days of the Preliminary Determination

Dumping, Cont'd.

CITT Injury Investigation:

- Preliminary Injury Investigation
 - Completed within 60 days of the initiation of the CBSA investigation
 - "reasonable indication" that dumping has caused or threatens to cause injury

Final Injury Investigation

- Culminates in a hearing around same time as the CBSA issues its final determination of dumping
- Oral and written arguments considered by the CITT during the course of the investigation and at the hearing
- Market trends typically examined as well as non-dumping factors (eg. Currency fluctuations, etc.)
- Final findings within 120 days from date of CBSA Preliminary Determination

Breaking Down the Barriers

Motion 601

- Introduced by Ron Cannan, MP for Kelowna-Lake Country
- Wording of motion:

"That, in the opinion of the House, the Canadian wine industry, the Canadian tourism industry and Canadian consumers would benefit from an amendment to the *Importation of Intoxicating Liquors Act* to allow any person to import, send, take or transport Canadian wine into any province or territory directly from a winery, liquor board, liquor commission or similar outlet for the sale of wine located in any other province or territory within Canada for consumption by that person and not for resale, further distribution, sale or for any use other than personal consumption."

Breaking Down the Barriers

Public outcry – eg. Freemygrapes.ca –
 Alliance of Canadian Wine Consumers

Government relations

Trade negotiations

THANK YOU!

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