

Current legal issues facing the Ontario wine industry

Alexandra V. Mayeski
February 10, 2014



Last time...

- Legal barriers to market access for Canadian Wine
 - Distribution of Wine – Federal/Provincial issues – always a topic of conversation
 - Municipal barriers – PEC case – zoning by-laws that exceed the statutory authority granted to municipalities under the *Planning Act*
 - Dumping – how to protect our domestic product against unfair market behaviour by foreign exporters

BRIEF OVERVIEW

- Regulatory Framework
- Privacy Issues – LCBO and wine clubs
- Distribution Laws – How far have we come?
- Change in public attitude = change in laws

Regulatory Landscape



- Overriding goal of regulatory bodies: to protect the industry and the public at large
 - Alcohol and Gaming Commission of Ontario (AGCO)
 - Liquor Control Board of Ontario (LCBO)
 - Vintners Quality Alliance Ontario (VQA Ontario)

AGCO

- Responsible for administering the *Liquor Licence Act* (LLA) - sale and service of beverage alcohol
- Powers of the Registrar
 - Liquor sales licences
 - Ferment on premise facility licences
 - Liquor delivery service
 - Manufacturer's licences
 - Manufacturer's representative licences

LCBO

- Provincial Crown corporation established to sell liquor, beer and wine through a chain of retail stores
- Powers under the *Liquor Control Act* include:
 - Controlling the sale, transportation and delivery of liquor;
 - Authorizing Ontario wineries to sell their wine in stores owned by the winery;

LCBO Powers Cont'd...

- Controlling and supervising the marketing methods and procedures of wineries; and
- Controlling the keeping of wine in and delivery of wine from warehouses.
- Powers of inspectors – compliance with LLA and *Liquor Control Act* (LCA) and the Regulations to those Acts

LCBO Inspector Powers Cont'd...



- May enter a building at which records relating to the sale, service, manufacture or storage of wine are kept
- Can request that records be produced for inspection or audit
- Wineries are required to answer any inquiries made by the inspector that are relevant to the inspection

VQA Ontario

- Ontario's wine authority
- Responsible for maintaining the integrity of local wine appellations and enforcing winemaking and labelling standards
- Primary functions: wine testing, audits, inspections and compliance
- Require that wineries demonstrate the origin of all grapes used in VQA wine

VQA vs Other Ont. Grapes

- Regulation 406/00 of the VQA Act sets out authorized grape varieties
- Newer hybrid grapes, eg. Frontenac, do not qualify for VQA designation
- Unfair tax burden even though all Ontario-grown
- Does not take into consideration fruit wines

VQA Ontario Cont'd

- VQA conducts audits – Winery and retail
- Examines winery records and inventory to determine whether VQA regulations are met and whether all volumes of VQA wines are substantiated with respect to origin and other requirements
- Information about wines offered for sale, including use of VQA terms is collected upon inspection and is checked against VQA records to determine whether wine approved and complies with labelling requirements

Cautionary Tale...

- 2008 CanLII (ON AGC) – In the matter of the VQA Act
 - Demonstrates what can go wrong if you mislabel wine and do not get *written* approval of VQA designation
 - Membership in VQA can be revoked

LCBO/Wine Clubs - Privacy



- LCBO sells approximately \$100M in liquor annually through its Private Ordering Department
- Includes sale of alcohol to members who order through clubs
- Wine clubs not licensed by AGCO and have no special status, entitlements or recognition under the *Liquor Control Act* or the *Liquor Licence Act*
- Wine clubs register with LCBO and are subject to procedures in *Business Process & Program Guidelines – Spirit, Beer or Wine Clubs*

LCBO/Wine Clubs – Privacy Cont'd...



- Section 38(2) of FIPPA
 - LCBO is prohibited from collecting personal information unless the collection is:
 - Expressly authorized by statute;
 - Used for the purposes of law enforcement; or
 - Necessary to the proper administration of a lawfully authorized activity.

LCBO/Wine Clubs - Privacy



- Order PO-3171
 - Examines LCBO policy re Private Ordering Department and collection wine club members' personal information
 - LCBO refuses to process wine club's order unless it provided the personal information of its members
 - Whether breach of *Freedom of Information and Protection of Privacy Act* (FIPPA)

LCBO/Wine Clubs – Privacy Cont'd...



- LCBO argued that its collection practices were:
 - Necessary for the purpose of administering the wine club program
 - Directly related to its authority to sell and control the sale of liquor in Ontario; and
 - To properly manage and administer the Board under the *Liquor Control Act*

LCBO/Wine Clubs – Privacy Cont'd...



- LCBO also argued, collection of personal information necessary to:
 - Process transactions;
 - Facilitate the recall of products if a defect is discovered;
 - Enable audits of the operation of the wine club program; and
 - Deter fraud, such as the illegal resale and stockpiling of liquor

LCBO/Wine Clubs – Privacy Cont'd...



- IPC held:
 - LCBO failed to establish that the collection practice was necessary to the proper administration of its spirit, beer and wine club program
 - LCBO practice was not necessary to process transactions and was not more than merely helpful for facilitating recalls and deterring illegal activities

LCBO/Wine Clubs – Privacy Cont'd...



- IPC invokes order-making powers under s. 59(b) of FIPPA:
 - LCBO to cease collecting the personal information of spirit, beer and wine club members when processing purchase orders submitted by these clubs on their behalf, except where individual intends to pick up the products ordered
 - LCBO to destroy all personal information collected from club members when processing purchase orders submitted by clubs on their behalf, except where individual member picks up products ordered

LCBO/Wine Clubs – Privacy Cont'd...



- LCBO launches judicial review before Divisional Court
- LCBO argues, among other things, that IPC erred in law and acted unreasonably in concluding that LCBO's collection of personal information was not necessary to the proper administration of a lawfully authorized activity, namely, the purchase, importation and sale of liquor to those individual members of by the LCBO pursuant to the *Liquor Control Act* **AND** the *Importation of Intoxicating Liquors Act*

A digression: *Importation of Intoxicating Liquors Act*

- Before Bill C-311 Section 3(1) of the ILLA:

“ Notwithstanding any other Act or law, no person 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”

A digression: ILA Cont'd...



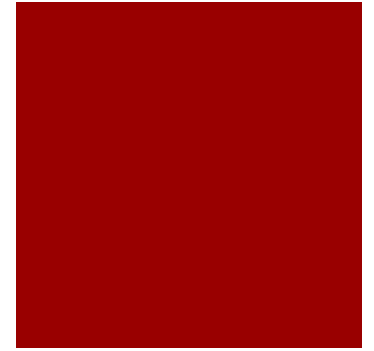
- As result of Bill C-311 – June 28, 2012 – Personal Consumption Exemption
- Section 3(2)(h):

“(2) The provisions of subsection (1) do not apply to

** * **

(h) The importation of wine from a province by an individual, if the individual brings the wine or causes it to be brought into another province, in quantities and as permitted by the laws of the latter province, for his or her personal consumption, and not for resale or other commercial use.”

A digression: ILA Cont'd...



- *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”

Back to LCBO/Wine Clubs – Privacy



- In response to LCBO putting in issue the IILA, wine club launches constitutional question
- Wine club asserts that the IILA does not apply because it is unconstitutional
- Could this be the end of the LCBO??? (nail biting time...)

LCBO/Wine Clubs – Privacy Cont'd...



- Findings of the Divisional Court
 - Process followed by IPC breached duty of fairness owed to the LCBO – LCBO not afforded a fair opportunity to be heard on the matter of remedy (ie, Order to cease and destroy personal information)
 - Remitted case back to the IPC for reconsideration
 - NO DISCUSSION OF CONSTITUTIONAL QUESTION

LCBO/Wine Clubs – Privacy Cont'd...



- Interesting observations and comments offered by Divisional Court
 - Who is the customer?
 - Club?
 - Club member?
 - IPC in its decision seems to suggest it is the club
- Court questions: If club member, what logical reason to distinguish based on where member picks up (at LCBO vs club)?

Back to the ILA – Progress in Breaking the Barriers



- Not much change for Ontario consumers of out-of-province wine
- Still requires the provinces to regulate the importation of wine for personal use
- Ontario – LCBO policy statement re Personal Consumption Exemption
 - Limit: 9 litres of wine from other provinces
 - Prohibits ordering wine online from other provinces

Back to the IILA – Progress in Breaking the Barriers



- Bill 98 – *Inter-Provincial Importation of Wine, Beer and Spirits Act, 2013*
 - Private member's bill – MPP Rob Milligan (Northumberland – Quinte West)
 - Passed 2nd reading
 - Amends the *Liquor Control Act*
 - In line with spirit of Bill C-311

Back to the IILA – Progress in Breaking the Barriers



- Bill 98
- Section 7.1(1):

“An individual who is 19 years of age or older may import or cause to be imported wine into Ontario from another province if the wine is for his or her personal consumption and not for resale or other commercial use.

(2) The Board’s powers under this Act do not apply to wine imported by an individual in accordance with subsection (1).”

Back to the IILA – Progress in Breaking the Barriers



- British Columbia:
 - Individuals allowed to have unlimited quantities of Canadian wine shipped to them

- Manitoba:
 - Individuals are able to have Canadian wine shipped to them that has been “legally purchased or acquired in any part of Canada other than Manitoba”

- Nova Scotia:
 - Government has announced that it will permit DTC shipping – still waiting changes to laws

Changes in public attitude = changes in laws



- Incremental changes create opportunities for wineries
 - Consumer awareness
 - Better quality wines
 - Wine tourism
 - Wineries growing in number
 - New areas: eg. South Coast, Southern Georgian Bay
 - New products eg. white port

Changes in public attitude = changes in laws



- Consumer outrage and grassroots support for change
 - Free My Grapes initiative
 - Great Canadian Wine Challenge
- Government support
 - Private member bills
 - Bill C-311 (federal)
 - Bill 98 (provincial)

Changes in public attitude = changes in laws



- Wine and Grape Strategy
 - Allow VQA wines to be sold at farmer's markets
 - \$75M to be injected to support local wineries and help the sector grow
 - Establishment of and "Ontario Wine Fund" to support winery and vineyard investment and enhanced marketing for wines locally and globally
- "Wine Secretariat"

Happy Ending: *Ontario Wine Week Act, 2005*



- Preamble: warm and fuzzy statements about Ontario wines

- Section 1:

“The third week in June in each year is proclaimed as Ontario Wine Week”

THANK YOU!

Alexandra V. Mayeski
Partner - Mayeski Mathers LLP
alexandra@mayeskimathers.com

Prince Edward County Office (aka Paradise)
6 Talbot Street, Suite 4
Picton, ON K0K 2T0
T: 613.476.2733

Toronto Office
First Canadian Place
100 King Street West, Suite 5700
Toronto, ON M5X 1C7
T: 416.907.1779

www.mayeskimathers.com

