Reforming Canada's Wine Laws

Enjoying the Fruits of our Success

Farris Partner Al Hudec authors this article.

Canada's elegant wines from British Columbia's Okanagan Valley are attracting international recognition. The sandy soils and long hot summer days of the northern tip of the Sonora desert, coupled with the valley's abundant irrigation, make the Okanagan Valley's Black Sage, Naramata and Golden Mile benches among the finest viticultural areas of the world. But while our wines are celebrating international acclaim on the world stage, our antiquated liquor laws are preventing Canadians from enjoying BC's bounty.

Looking back, when Canada-US free trade was implemented in 1988, Canada's then mediocre products were exposed to the glare of competition and came up very short. In response, forward looking producers pulled up their existing native and hybrid vines, replacing them with higher-quality European vinifera varietals; and established the Vinters Quality Association (VQA) as an appellation system for Canada. Twenty years later, we have a sophisticated world class industry. The 14 BC wineries which existed in 1988 have grown to 140, with another 20 pending. VQA sales have increased from $6.8 million in 1991 to $157 million in 2007.

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Unfortunately, there is a bitter side to this success. Canada's finest wines, such as Black Hills Nota Bene, Burrowing Owl's 2006 Cabernet Sauvignon and Laughing Stock's Portfolio, are effectively unavailable to most Canadians. Canada's complex array of arcane liquor laws and Byzantine government-controlled distribution channels make it all but impossible to purchase Canada's cult wines other than at the winery gate. Consumer access is severely limited in most parts of our country by laws that date back a century.

Canada's liquor laws are an 80 year hangover from the end of prohibition. They rigidly regulate every aspect of wine production, bottling, packaging, labeling, pricing, advertising and shipping. Canada's federal Importation of Intoxicating Liquors Act, enacted in 1928, gives provincial liquor control boards monopolistic power and control over the importation, inter-provincial shipment, distribution and retailing of wine in Canada. Under this law, a friend from Calgary can share a glass of pinot gris on the patio overlooking Burrowing Owl's vineyards in the south Okanagan Valley, but if she takes a bottle of Burrowing Owls' highly acclaimed merlot back home across the British Columbia- Alberta border, she commits a federal offense. Similarly, a colleague in Toronto breaches federal law by purchasing a case of Quail's Gate proprietor's reserve pinot noir or Heidi Noble's Joie Noble Blend on the internet for shipment to Ontario.

From a practical standpoint such prohibitions on the inter-provincial shipment of wine are effectively unenforceable, but provincial regulators nevertheless take them seriously. Recently, the Liquor Control Board of Ontario slapped the wrist of Mission Hills Estates, one of Canada's largest and most successful wineries, for not blocking out of province orders of wine on its web site; its equivalent in Manitoba, the MLCC, similarly told Red Rooster Winery, one of the Naramata Bench's most popular wineries, to stop offering wine sales out of province via their website.

Vancouver

2500 - 700 W Georgia St
Vancouver, BC
Canada V7Y 1B3

Tel 604 684 9151
Fax 604 661 9349

Kelowna

800 - 1708 Dolphin Ave
Kelowna, BC
Canada V1Y 9S4

Tel 250 861 5332
Fax 250 861 8772

Victoria

208 - 852 Fort Street
Victoria, BC
Canada V8W 1H8

Tel 250 405 1980
Fax 250 405 1984

www.farris.com

Currently, under the Importation of Intoxicating Liquors Act, alcoholic beverages cannot be sent or taken across provincial boundaries unless prior arrangements have been made to consign the shipment through the provincial liquor control board of the destination province. A customer from out of province wishing to obey the existing law is expected to either limit wine purchases to the products offered by his own provincial liquor control authority or to avail themselves of the special order system of the liquor control board in his home province, a process that involves extensive paper work, then waiting – often six months or longer in some provinces – and paying provincial markups.

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In the United States, similar restrictions on inter-state shipment of wines have been found to be unconstitutional as a constraint on inter-state commerce. In 2005 the US Supreme Court, in Granholm v. Heald, struck down New York and Michigan laws that prohibited the direct shipment of wine to consumers in those states from out-of-state while at the same time permitting intra-state shipments. More recently, in Family Winemakers of California v. Jenkins, the US Supreme Court struck down the efforts of certain states to circumvent the original decision.

There is a strong case to be made that such prohibitions on inter-provincial shipment of wine in Canada are similarly unconstitutional. All that is required for the outdated artifice of Canada's antiquated wine laws to come tumbling down is for someone to fund a test case challenging the constitutionality of the existing regulatory regime. Ian Blue, a prominent Canadian energy trade lawyer, has recently published a scholarly article arguing convincingly that the federal Importation of Intoxicating Liquors Act is unconstitutional. He reasons persuasively that prohibitions on the inter-provincial shipment of wine are contrary to section 121 of the Constitution Act of 1867 which requires that products made in one province must be "admitted free" into each of the other provinces.

Even within British Columbia, the existing regulatory and distribution system makes it difficult and very expensive for the average consumer to purchase Canada's best premium wines. For the most part, liquor in British Columbia is distributed and sold through the BC Liquor Control Board (LCB) at prices which are among the highest in the world. The LCB imposes a 117% ad valorem markup on a typical bottle of Canadian wine (compared with a 58% markup in Ontario, and a flat $3.34 markup in Alberta) before adding 10% provincial sales tax and 5% federal GST, plus various other bottle handling and miscellaneous charges. Under British Columbia's version of privatization, pseudo-private store licensees get only a 16-per-cent discount on the full government store retail price and, as a result, often charge higher prices than the provincial liquor board stores. Restaurants and hotels which, in most parts of the world, can buy wine at wholesale prices must pay full government retail prices.

British Columbia's successful artisan wineries can avoid the use of these antiquated government distribution channels by availing themselves of regulatory privileges that allow them to sell their wines directly to consumers from their on-site tasting rooms or over the internet. As well, they may sell directly to restaurants, QVA wine shops and certain private agency wine stores. Wineries choosing to use these non-Liquor Distribution Branch (LDB) distribution networks capture most of the margin that would otherwise go to the LDB. Consequently, most of the best lower volume estate wineries in the Okanagan Valley choose to distribute their products solely through these sales channels and not through the LDB. These premium wines are available through the LDB only in twice-a-year special promotional periods.

What is the common sense in all of this? Why, in Canada, are we denying Canadians access to the wines of their own country? The flawed policy rational articulated by the Canadian Association of Liquor Jurisdictions, which represents the country's 13 liquor control boards, is

About Al Hudec

Al Hudec is a senior practitioner with 25 years of experience in all legal aspects of securities and corporate finance, including mergers and acquisitions, public and private financings of equity and debt, corporate governance and related party transactions, regulation of listed companies, income trusts, banking and restructurings; with emphasis on the North American resource and technology industries.

Al can be contacted by phone (604) 661-9356 or email: ahudec@farris.com

the old temperance argument that wine, like liquors and spirits, constitutes a serious social and health concern. Accordingly, to protect public health and the social fabric, consumption must be limited by imposing high prices and strictly controlling sales through government operated distributionn and sales channels. Equally importantly, the government controlled sale of liquor products generates huge government revenues (over $1.2 billion annually in Ontario, and over $850 million annually in British Columbia). Profits from liquor sales are a critical source of financing for provincial health, education and other priorities, including funding the union salaries of the LCB employees.

But what does any of this sensibly have to do with a sophisticated Ontario wine consumer purchasing a case of Striped Label Pinot Noir over the internet from British Columbia's highly regarded Blue Mountain Winery? Not much. The typical purchaser of premium wines is not likely to be an abuser of alcohol and is more likely to be attracted by the health benefits of moderate consumption of wine. These benefits, as part of a balanced lifestyle, are now well recognized. A daily glass or two of fine wine is beneficial in fighting heart disease, diabetes and Alzheimer's. Modern consumers expect choice and convenience in shopping for wines as much as for other products. Canada's wine industry is now producing a wide array of excellent, small lot, single vineyard or other specialty wines, but the existing government monopoly controlled distribution system is incapable of efficiently delivering such fine products to eager consumers across the nation.

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The answer is a complete overhaul of Canada's antiquated monopoly controlled liquor distribution system, as has been proposed by Ontario's Beverage Alcohol System Review Panel. In 2005, the panel recommended that the provincial government get out of the liquor distribution and retailing business and instead regulate the minimum pricing and distribution of wine and other alcoholic beverages through the licensing of private-sector distributors and retailers. Government revenues would be maintained through the auction of wholesale and retail licenses and, in fact, enhanced through the efficiency benefits of a privatized distribution network.

In the twenty first century, Canada's extremely rigid and complex regulatory regime for the sale of wine, coupled with government ownership and operation of distribution and sales channels, is incompatible with market realities. Today's sophisticated market requires the flexibility and innovation to deal with the wide variety of products and consumers' expectations respecting choice, service quality and price. The public interest in regulating the socially responsible use of alcohol and in taxing liquor to fund other public priorities can be better achieved through a licensing regime.

Privatization of the distribution and sale of premium wines will expand opportunities for our domestic wine industry to market their many fine products at home effectively, while providing sophisticated Canadian consumers with greater convenience and selection. There are numerous examples around the world of jurisdictions that have reformed their liquor laws in this manner and which effectively regulate the social harms of liquor by means of licensing rather than government ownership and operation. Examples include the United Kingdom, Australia, New Zealand and the States of California and New York.

In most countries of the world, the local domestic wine industry is a source of national pride. Nationals in France, Germany, Australia, and Chile, for example, favour and appreciate wines grown in their local terroir. Canada has a wine industry of which all Canadians can be justifiably proud – its time our law caught up to this modern reality so that Canadians across our country can proudly drink and enjoy the fruits of our success.