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**** HIGHLIGHTS ****

* The Federal Court of Appeal has held that the Canada Food Inspection Agency has the authority to consider economic and competition issues in determining whether to grant a food processor a "test market" exemption from regulatory requirements under the Processed Products Regulations (Canada). The Court reversed a Chambers Judge's decision that a regulation authorizing the CFIA to refuse an application which might "disrupt the normal or usual trading patterns of the industry" was ultra vires, and held that the CFIA's jurisdiction under the Regulations was not limited to a consideration of matters of health, food safety and consumer protection but extended to the potential impact a test market exemption may have on the economic position of other stakeholders in the market, including competition concerns. (Select Brand Distributors Inc. v. Canada (Attorney General), CALN/2010-002, [2010] F.C.J. No. 33, Federal Court of Appeal)

**** NEW CASE LAW ****

Select Brand Distributors Inc. v. Canada (Attorney General); CALN/2010-002, Full text: [2010] F.C.J. No. 33; 2010 FCA 3, Federal Court of Appeal, Evans, Pelletier and Trudel JJ.A., January 11, 2010.

Canada Food Inspection Agency -- Application for "Test Market" Exemption under Processed Products Regulation -- Jurisdiction to Consider Economic and Competition Issues.

The Attorney General of Canada, the Minister of Agriculture and the Agri-Food and Canada Food Inspection Agency (collectively the "CFIA") appealed to the Federal Court of Appeal from a decision of Mr. Justice Hughes of the Federal Court (the "Chambers Judge") that:

(a) Section 9.1(5)(a) of the Processed Products Regulations, C.R.C., c. 291 (the "Regulations") is ultra vires section 32 of the Canada Agricultural Products Act, R.S.C. 1985, c. 20 (4th Supp.) (the "Act");

(b) The CFIA's decision to refuse an application for a test market exemption pursuant to the Regulations was, in any event, "unreasonable" and should be set aside;

(c) The CFIA must consider the application forthwith and, given there are no health concerns, to allow the test market exemption application for up to 24 months; and

(d) Awarded costs against the CFIA.

Section 32 of the Act provides:

"32. The Governor in Council may make regulations for carrying out the purposes and provisions of this Action and prescribing anything that is to be prescribed under this Act and, without limiting the generality of the foregoing, may make regulations ...

(1) regulating or prohibiting the marketing of any fresh or processed fruit or vegetable in import, export or interprovincial trade, including regulations

(i) establishing the terms and conditions governing that marketing,

...

(n) for exempting any person, establishment, agricultural product, class of agricultural products, container or other thing from the application of any or all of the provisions of this Act or the regulations;

(o) providing for the collection of market information and statistics, the publication of studies dealing with the marketing of agricultural products and the conduct of surveys on any matter related to this Act or the regulations; and

..."

Section 2 of the Act defines "marketing" as follows:

"marketing" means the preparation and advertisement of agricultural products and includes the conveyance, purchase and sale of agricultural

> products and any other act necessary to make agricultural products available for consumption or use;"

Schedule III, Table III of the Regulations prescribes the sizes of containers in which baby food may be sold, specifically 4.5 fluid ounces (128 millilitres) and 7.5 fluid ounces (213 millilitres).

Section 9.1(1) and (5) of the Regulations permit the CFIA to allow for the test marketing of products which do not comply with the Regulations. These sections provide:

> "9.1(1) The operator of a registered establishment or an importer of food products may apply in writing to the Director for an authorization to test market a food product that does not meet the requirements of these Regulations.
>
> ...
>
> (5) The Director may issue a written authorization to the operator of a registered establishment or to an importer of food products to test market a food product for a period of up to 24 months where the Director is satisfied, based on information available to the Director, that the test marketing of the food product will not
>
> (a) disrupt the normal or usual trading patterns of the industry;
>
> (b) confuse or mislead the public; or
>
> (c) have an adverse affect on public health or safety or on product pricing."

Gerber Products Company ("Gerber") manufactures and sells baby food in the United States in smaller containers than those prescribed by the Regulations.

Select Brand Distributors Inc. ("Select Brand") is the distributor of various Gerber products in Canada.

On August 9, 2006, Gerber wrote the CFIA seeking a test market authorization for the sale of its baby food in the same containers as it uses in the United States.

On January 29, 2007, the CFIA rendered an interim decision refusing Gerber's application for test marketing because it was "not satisfied that a test market of infant food in different container sizes than those presently authorized in Canada would not disrupt the normal or usual patterns of the industry" [at para. 5].

On November 2, 2007, the CFIA advised Gerber that its application for a test market authorization was refused. Gerber's proposal was to sell up to 70 million units of baby

food in the course of a 2 year test market. The CFIA observed that the current total consumption of baby food in Canada is estimated at 80 million units per year relying on an A.C. Nielsen Canada report and Statistics Canada. The CFIA decision stated, in part [at para. 6]:

> "The current total consumption of baby food in Canada is estimated at 80 million units per year (source: excerpt from A C Nielsen Canada, Grocery Manufacturers Share Reports), of which a percentage are fruit and vegetable products, and has not significantly changed over the last couple of years. However, the imports of fruit and vegetable baby food have increased considerably, since 2002 (more than 10 times; source Statistics Canada). Currently all companies are trading in Canada in the context of two regulated container sizes. Based on these facts, I am not satisfied that issuing a test market authorization for new container sizes of 70 million units as requested by your client will not disrupt the normal trading patterns pursuant to Section 9.1(5)(a) of the PPR."

The CFIA did not file an Affidavit on which it might be cross-examined in opposition to the application. It merely produced some of the documents on which it had relied. Documents obtained under the Access to Information Act revealed that it had drafted a refusal letter before it received the application.

The Chambers Judge concluded that Gerber's test marketing proposals did not raise any health concerns [at para. 10]; that the Act dealt with the "provision of food to the Canadian marketplace for its consumption and use" and not trading patterns, which are dealt with by (among other things) the Competition Act [at para. 12]; that Section 9.1(5)(a) of the Regulation which refers to "normal or usual" trading patterns was ultra vires and outside the scope of the Act and that the CFIA therefore has no mandate to regulate "normal and usual patterns of the food industry" [at para. 12]; that the Agency's decision was in any event, unreasonable because it had no evidence to establish what the "normal and usual" patterns of the industry were [at para. 13]; that the Federal Courts Act gave the Court the power to not only set aside a decision but to also provide appropriate directions to the decision maker when a decision is returned [at para. 14]; and that in the exercise of this power the CFIA was directed to reconsider the application forthwith, and given that there are no health concerns, to allow the application for up to 24 months.

On appeal, the CFIA did not challenge the Chambers Judge's direction that the CFIA should re-consider its decision, but for reasons of procedural fairness. The CFIA did however, challenge the Chambers Judge's remaining decisions. The issues on appeal included the following:

1. Is Section 9.1(5)(a) of the Regulations ultra vires the Act?
2. If Section 9.1(5)(a) is valid, should the CFIA's decisions be set aside on other grounds:
3. Should the Chambers Judge's direction to the CFIA be set aside?

Decision: Pelletier, J.A. (Evans and Trudel, J.J.A concurring), allowed the CFIA's appeal to set aside the decision of the Chambers Judge that Section 9.1(5)(a) of the Regulations was ultra vires the Act and, with the consent of the CFIA, set aside the decision of the CFIA and remitted the matter to it for re-determination in accordance with law on the basis that Section 9.1(5)(a) was valid [at para. 59]. Pelletier, J.A. also concluded that the Chambers Judge had erred in concluding the material on which the Agency had relied was unsubstantiated and that its decision was unreasonable [at para. 47], and that it was not for the Chambers Judge to assume the role of deciding whether Gerber's test marketing application ought to be granted [at para. 48].

Pelletier, J.A. considered a number of issues, including the following:

(a) Is Section 9.1(5)(a) of the Regulations is ultra vires the Act?

Pelletier, J.A. observed [at para. 22 and 23] that Gerber's position was that the Governor in Council's regulation-making power under the Act is limited to matters of health and safety and to protection in relation to advertising and did not extend to the regulation of marketing of fresh and processed agricultural products --the function of regulating the market is conferred upon others, such as the Competition Bureau.

Pelletier, J.A. observed [at para. 26 and 27] that the Act allows the Governor in Council to make regulations regarding the marketing of agricultural products, and that the Regulations deal with such matters as grades and standards, packing, and marking, as well as exemptions from these Regulations.

Pelletier, J.A. concluded the CFIA had the power to consider economic and market factors, including whether a test marketing exemption might affect competition in the marketplace, stating, at para. 29 to 33:

> "[29] ...The question is simply whether the condition as to trading patterns is implied in the power to exempt manufacturers from compliance with the Regulations.
>
> [30] Exempting a manufacturer from the duty to comply with a regulatory standard creates an opportunity for unfair competition. The manufacturer who benefits from the exemption may be able to exploit it to obtain a first-to-market advantage over other manufacturers who must comply with the regulatory standard, and thus to obtain market share at their expense. The purpose of test marketing is to see if there is a market for a product; it is not to create such a market not to displace other actors in the market. It is intended to be a test of the market's response to a given product.
>
> [31] In that context, I read the reference to "normal and usual trading patterns" as a reference to the status quo in relation to market share and product pricing. The question which the Agency must answer in deciding whether to grant a test market authorization is whether the requested test market authorization, if granted, is likely to disrupt the status quo. If, after a successful test marketing campaign, the Regulations are changed to

> accommodate a new product, the impact of that product on the market thereafter is not the Agency's concern. The Agency's only concern, in terms of normal and usual trading patterns, is in connection with a proposed test marketing authorization.
>
> [32] This is a far narrower question than the one on which the Judge purported to rule when he stated that "The CFIA has no mandate to regulate `normal and usual' patterns in the food industry.": Reasons, at paragraph 28. As noted, the issue is not the regulation of the "normal and usual" patterns in the market; the issue is the Agency's power to refuse test market authorizations which will disrupt the "normal and usual" patterns of trade in the industry.
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> [33] In my view, a condition preventing test authorizations from being used to gain an unfair market advantage is similar in kind to the condition found at paragraph 9.5(5)(c) which requires that a test market authorization not interfere with prices. Parliament clearly contemplated that the Agency could consider economic and market factors when deciding whether to allow a test marketing authorization."

(b) If Section 9.1(5)(a) is valid, should the CFIA's decision be set aside on other grounds?

Pelletier, J.A. observed that the Chambers Judge had erred in assuming that it was for the CFIA to prove facts to support its position [at para. 40]. An application for judicial review of a decision of an administrative tribunal is not a trial de novo -- the reviewing Court cannot retry the question which was before the tribunal on the strength of a record which may not correspond with the record which was before the tribunal [at para. 44], but should return the matter to the tribunal for a fresh hearing, based on procedural grounds, so that the party affected can know and respond to the evidence relied upon by the tribunal [at para. 48].

(c) Should the Chambers Judge's direction to the CFIA be set aside?

Pelletier, J.A. held [at para. 48] that:

> "[48] ...it is apparent that it is not for the Judge to assume the role of deciding whether Gerber's test market authorization ought to be granted. If there were lapses with regard to the Agency's obligations with respect to procedural fairness, those can be remedies when the matter is reconsidered. The Judge's direction to the Agency ought to be set aside."

** CREDITS **

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