

Canada's Supreme Court to Hear from Small BC Wineries Supreme Court Grants Intervenor Status at Comeau Case

Frequently Asked Questions

Q What is the original case name and docket #?

R v Comeau Date: 2016-04-29 Docket: 05672010

Q What does it mean to “intervene”?

The Supreme Court of Canada hears cases of national importance. Often there are interests in the country that are impacted by the Court's decision but who are not parties in the case itself. Such interests may apply to the Court for status as ‘intervener’. This requires the applicant to show both that it has a direct interest in the appeal and that it has a unique perspective to add to the case that is not addressed by the parties.

Q In seeking open access to interprovincial trade are Canadian wineries asking for something that is not allowed in other countries?

Other countries that are federalist constitutional democracies, such as the United States and Australia, have their own constitutional provisions that deal with interstate free trade. Those provisions have distinct wording from the Canadian provision. However, in both the United States and Australia, a type of interstate free trade is permitted and governed by a constitutional test established by the highest courts in those countries.

Q Why should Canadian readers, viewers and listeners care about this issue?

R. v. Comeau is about much more than just liquor. It is a case that goes to the heart of the meaning of the Canadian federation. It addresses the question: to what extent is Canada a common market? The economic impact of the industries that will be impacted by this decision, including the winery sector, is in the multi-billions of dollars. Moreover, this decision is taking place in the context of ongoing international trade negotiations, particularly the renegotiation of NAFTA. The scope of internal free trade within Canada is highly relevant to the negotiation of these international trade treaties.

Q Which provinces in Canada currently allow shipment of Canadian wine without trade barriers?

Currently only British Columbia, Manitoba and Nova Scotia permit unfettered access to their provincial markets to out of province growers and manufacturers of Canadian wine.

Q What's the current governance around interprovincial shipping of liquor and wine?

The current governance dealing with interprovincial shipping of wine is Byzantine. The federal government regulates shipping through the *Importation of Intoxicating Liquor Act*. In 2012 the federal Parliament amended this statute to permit interprovincial shipping of Canadian liquor for personal use. However, the amendment explicitly made that exception subject to provincial law. To date, all provinces other than British Columbia, Manitoba and Nova Scotia prohibit the interprovincial shipping of Canadian liquor and wine into the province. The provinces do so through various mechanisms. Some have prohibitions explicitly in statutes, others have prohibitions in regulations and others have prohibitions only in policy documents. The regulatory structure is inconsistent and unclear across the country.

Q How much potential business is lost in this lack of interprovincial shipping of liquor?

Currently, there is no statistical or economic analysis of lost business. However, when comparing Canada to the U.S., it is clear that in the U.S., where direct-to-consumer interstate shipping is permitted in most states, the total revenue derived from direct-to-consumer shipping by small wineries is up to four times greater than it is in Canada. As the direct-to-consumer shipping channel is the most profitable, it is clear that prohibiting direct-to-consumer shipping within Canada comes with an extreme cost to the financial sustainability of small wineries.

Q Is it not possible for small BC wineries to sell everything they produced within the province?

The British Columbia market is reaching market saturation for BC produced wine. Small producers thus need access to the rest of the Canadian market to continue to grow, like their counterparts in the United States. Many wineries are only barely profitable or unprofitable in their start-up years. Small wineries need to ensure they attain a certain volume of sales in order to find sustainable profitability. Within the saturated BC market, it is very difficult to do so. A free market across Canada would undoubtedly give small wineries a chance to grow to a size that is sustainable in the long term.

Q If the Court decides to liberalize interprovincial trade, how will this affect the price of wine/liquor for consumers across Canada?

It is impossible to predict how the price of wine will be impacted at this time.

Q Why can't the wineries just list their wines with liquor boards in each province?

Having wine listed with provincial liquor monopolies is an onerous and costly process. Liquor boards generally have requirements for large volumes of wine at low price points that small boutique producers cannot fulfil. Moreover, many liquor monopolies simply refuse to list and stock Canadian wines and the decision to do so often resides in the hands of a single or small number of buyers. Liquor boards also apply very large markups to wine listed and stocked on their shelves and these markups make the sale of Canadian wine price prohibitive. The only realistic way for small wineries to access markets in other provinces in the current regulatory environment is through direct to consumer shipping.

Q How will this affect agents representing wines in various provinces?

If the Supreme Court of Canada liberalizes free trade by creating a new test for determining whether legislation violates s. 121 of the *Constitution Act 1867* there will remain considerable scope for both the federal government and the provincial governments to create regulatory structures governing interprovincial trade and the incidental effects of interprovincial trade. As such, any companies involved in the transport, import or export of Canadian liquor within Canada will need to be certain to understand the new regulatory frameworks and all the legal compliance matters arising from those new frameworks as well as existing regulatory compliance. As such, it is very likely that even with a decision that liberalizes trade, there will remain a significant degree of legal complexity for those engaged in interprovincial shipping.

Q How would this impact other commodities such as eggs and dairy?

The Court's decision will contain considerable nuance and so it is impossible to fully predict what the impact will be. However, the marketing boards have also been granted status as interveners and they seek to protect the status quo in order to preserve the current marketing board structure within Canada. It is possible that the underlying constitutional framework for these marketing boards could be changed by the Supreme Court. It is also possible that the Supreme Court could liberalize free trade within Canada while also preserving the existing marketing boards.

Do you have a question not listed here?

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