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Examinations 2022

Charting a Course Through Challenging Appellate Terrain

The onset of the COVID-19 pandemic brought along with it many changes, inside and outside of the (virtual) courtroom. This continued in, and perhaps defined, 2021.

Once thought to be temporary, 2021 signalled that virtual hearings are here to stay. More broadly in the civil litigation context, however, is that remote legal practice has been welcomed, as evidenced in Justice Strathy's remarks at the Opening of the Courts Ceremony on September 14, 2021:

> *"Public trust in the courts, fostered by the support of the legal profession, has permitted us to introduce wholesale innovations to traditional processes and protocols and for those changes to be accepted by those who attend our courtrooms, either remotely or in person."*

As health directives and provincial closure orders come to a halt, the profession will be faced with the question of whether this remote legal practice enhances or detracts from access to justice, as well as the extent to which it will remain.

Throughout the year, we witnessed a number of civil decisions released by the appellate courts in this country that grappled with deeply systemic issues, many of which are to be re-visited by our highest court. We also saw many meaningful changes in appellate practice, procedure and personnel, perhaps most significant of which was the retirement of the Honourable Rosalie Silberman Abella, the first Jewish woman appointed to the Supreme Court of Canada ("SCC"), and the subsequent appointment of the Honourable Justice Mahmud Jamal, the first racialized person to sit on the bench.

Many of us revelled in reading Justice Jamal's application for appointment to the SCC, in awe of his diverse accomplishments, and yet were reminded through his own words that the landscape must continue to shift towards equity and inclusion:

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"I was raised at school as a Christian, reciting the Lord's Prayer and absorbing the values of the Church of England, and at home as a Muslim, memorizing Arabic prayers from the Quran and living as part of the Ismaili community. Like many others, I experienced discrimination as a fact of daily life. As a child and youth, I was taunted and harassed because of my name, religion, or the colour of my skin."

In an effort to explore the decisions and developments over the year that was, and contemplate what might lie ahead in the year that will be, the Lerners Appellate Advocacy Group presents the third edition of **Examinations**.

Part One: Interesting Developments in the World of Appellate Advocacy

The Right to be Heard: The Future of Advocacy in Canada: Final Report of the Modern Advocacy Task Force

In June 2021, the Advocates' Society published their Modern Advocacy Task Force's report on *The Right to be Heard: The Future of Advocacy in Canada*. The initial mission of the Task Force was to consider the future of oral advocacy in the Canadian justice system. As the genesis of the Task Force began before the COVID-19 pandemic, this mission evolved to also consider the future of virtual and remote advocacy.

The more than 100-page report represents the Herculean effort by the Advocates' Society to conduct a deep dive into these important topics. The report synthesizes the findings of the work conducted by the Task Force which included historical and case law research, research into Indigenous perspectives, the examination of psychological studies, and surveys and interviews with justice system stakeholders. The report is a must read for "all those concerned with modernizing our justice system and making it more accessible, without compromising the fundamental values that have informed its legacy."[1] What follows is a high level summary of the key findings of the report.

The right to be heard is well-established in Canadian law where an individual's rights, interests, or privileges are at issue. At the outset, the report notes that oral advocacy has been a part of the Canadian justice system for centuries. Orality also has and continues to play a central role in Indigenous storytelling and dispute resolution. However, heeding the call from the Supreme Court in *Hryniak v Mauldin*,[2] the principle of proportionality and the need for a more timely, affordable, and efficient civil justice system must be remembered.

"The report is a must read for 'all those concerned with modernizing our justice system and making it more accessible'…"

Drawing on their research, as well as engagement with justice system stakeholders, the report outlined the key arguments in support of maintaining a large role for oral advocacy in the legal system as well as the considerations weighing against its pre-pandemic widespread use.

1 The Advocates' Society, "The Right to be Heard: The Future of Advocacy in Canada: Final Report of the Modern Advocacy Task Force" (June, 2021) at 6.

2 2014 SCC 7.

The main reasons for the continued use of oral advocacy include:

1. The public's trust in the justice system turns on visibility and accountability. The public's confidence in the administration of justice partly depends on their ability to see and hear justice being done, for litigants to feel that they have been heard, and to literally have their "day in court."

2. Oral hearings are beneficial as they allow the decision maker to ask questions and engage the parties in discussion which allows for the ability to clarify the issues and arguments contained in the parties' written materials.

3. In-person oral advocacy advances the open court principle. The open court facilitates public access to hearings, fosters the human connection by providing the opportunity to connect with other parties, and enhances informal resolution of disputes (or "settling in the hall").

4. In-person oral advocacy facilitates access to justice. In-person advocacy is particularly important for self-represented parties who may have limited writing ability and may be unfamiliar with court procedure and processes. Maintaining in-person advocacy would enable self-represented parties to avail themselves of courthouse resources such as administrative staff, legal aid, and duty counsel. Further, many litigants may not have access to adequate technology or a stable internet connection.

5. Advocacy is generally more effective in-person in a courtroom and the principle of the integrity of the court process is furthered by in-person oral advocacy. This is because of the solemnity of the atmosphere of the courtroom, the increased ability to gauge and convey demeanour and body language, and the enhanced level of engagement naturally garnered from being in-person, as well as the avoidance of "Zoom fatigue."

Against these considerations, the main reasons espoused for a reduction in the use of in-person and oral advocacy are improvements to efficiency and access to justice. Routine, procedural, or consent matters can be effectively dealt with in writing or remotely, resulting in time and cost savings to parties who will not need to travel to court and potentially wait for hours for their matter to be heard. Litigators who practiced pre-pandemic remember all too well the inefficiency of physically attending court for a simple procedural step such as trial scheduling court or a consent motion.

In the end, the report concludes that "the challenge for the future, in the years beyond the exigencies created by COVID, will be to create the optimal combination between remote technology and in-person court settings to ensure the most reliable, accessible, and accountable system of justice possible."[3] Guided by the principles of the open court, access to justice, the integrity of the court process, and proportionality, at pages 95-98 the report outlines a proposed framework and factors to be considered when determining the mode of hearing. In general, routine administrative matters, unopposed hearings, and consent matters should be dealt with in writing or virtually. Otherwise, the general rule should be that an in-person hearing is held for any significant substantive or procedural step in a proceeding.

3 The Right to be Heard, *supra* at 88.

Given the magnitude of the report, it is difficult to do it justice in this brief commentary, but it is hoped that the information and recommendations contained in the report are seriously considered by all members of the legal profession, the judiciary, and the legislature. Even after the COVID-19 pandemic has ended, the Canadian justice system can benefit greatly from the proper balance being struck between in-person and remote advocacy.

Both in-person and remote advocacy have their place in ensuring efficient and effective access to justice—the focus for future action should be on finding that proper balance.

Pressing the Bench: Building Strong Representation on Canada's Highest Court

"The good faith in Canada's judges, the wisdom and the intelligence is extraordinary. I don't have a slight hesitation [in] their ability to deliver justice to the Canadian public."

On July 1, 2021, Justice Rosalie Abella officially retired from the Supreme Court of Canada as one of its nine justices, a position she had occupied since her appointment in 2004. Her journey to the bench was a storied one, and represented a lot of 'firsts' that undoubtedly resonated with many Canadians across the country.

She was born in what was known as a Displaced Person's Camp in Stuttgart, Germany in 1946 and came with her parents to Canada as refugees in 1950. One of her earliest memories was of her father, a trained lawyer, telling his family that he could not work in Canada as a lawyer because he was not a citizen. Her response: telling her dad "Okay, then I'm going to be a lawyer."

She went on to have an illustrious legal career with numerous highlights, including overseeing the 1984 Royal Commission on Equality in Employment, during which time she infamously coined the term "employment equity" and developed theories on equality and discrimination that were ultimately adopted by the Supreme Court of Canada in one of its first decisions dealing with equality rights under the *Canadian Charter of Rights and Freedoms*. Her report with the Commission has since been adopted internationally in countries like New Zealand, Northern Ireland, and South Africa.

"People like me—female, Jewish, immigrant, refugee—weren't exactly being appointed to the bench in droves."

Amongst the many 'firsts' Justice Abella represented, she was the first pregnant person appointed to the Court of Appeal for Ontario, and was the youngest judge in Canadian history at the age of 29. She was also the first former refugee and first Jewish woman to be appointed to the Supreme Court of Canada. Despite these milestones, she maintains that she had no mission on the Supreme Court other than simply being a good judge. She has acknowledged that Canada has not always been quick to respond to the needs of marginalized groups, but the Court has become more responsive over time. Towards the end of her tenure, she insisted that it was her turn to go to make room for somebody else. The question remained whether the appointment would be more of the same, or a decision that was long overdue.

"There is a difference between stability and stagnation."

The appointment of her successor to the bench, Justice Mahmud Jamal, was a monumental moment in Canadian history. Born in Kenya to parents from India, he was raised in England and later went to school in Alberta, and then Ontario. Among his numerous qualifications, he was previously a director of the Canadian Civil Liberties Association, and was a judge for the Court of Appeal for Ontario since 2019.

"Anybody who is from a racialized community, a minority, has a tremendous responsibility and so I am very, very mindful of that."

Justice Jamal's appointment represented a new era for the Court; he is the first person of colour to be appointed to the bench. The significance of his appointment adds a visible form of diversity to the Supreme Court that has long been absent from the bench. An appointment of this magnitude elicits the attention of people all across Canada, particularly people of colour who have longed to see themselves reflected in the country's highest Court.

"What people say is that they really do see that public institutions are open to them. That they have hope. That they can see their own faces reflected in the judiciary. I think it gives an aspiration. I think it engenders trust in public institutions."

The issue now becomes where the Supreme Court goes from here. Representation in the Court does not stop simply because one person from a marginalized group has made it onto the bench. Canadians are not monolithic in their intersectional identities, and everyone deserves to see themselves reflected in one way or another in the most influential judicial body in the country.

The recent confirmation that Judge Ketanji Brown Jackson has been nominated for an appointment to the United States Supreme Court as (potentially) its first black female justice could have a positive influence on the next vacancy to be filled on the Supreme Court of Canada. With the announcement of Justice Moldaver's impending retirement in September of 2022, the Prime Minister is now faced with a fresh and imminent opportunity to strengthen this new era of the Supreme Court with another meaningful appointment to the bench. Only time will tell if the Court will avoid stagnation and continue to strengthen its representation to better reflect the people of Canada whose lives are impacted by the decisions that these nine justices make every day.

"I know that for many people, my appointment adds another form of diversity to the Supreme Court. I am fully aware that this office carries with it an enormous responsibility, which I am very honoured to accept. And I want [Canadians] to know that I will make every effort to do so."

A Panel Discusses* the *Panel

In October 2021, Lerners partnered with Torys LLP to deliver an afternoon of virtual cross-Canada programming discussing dissent in the Supreme Court and its role in shaping the law. Entitled "Agree to Disagree – Dissent at the SCC", the event garnered a large audience who heard from an experienced panel of practitioners, academics, and an esteemed former Supreme Court Justice.

The event's opening remarks were delivered by the Honourable Ian Binnie, who served on the Supreme Court from 1998 to 2011. Justice Binnie highlighted that the main purposes served by dissenting reasons are to show transparency in judicial decision making, to influence judges in the future to overturn majority decisions, and to appeal to Parliament to make a change to the law. Justice Binnie expressed his view that dissents play an important role in the appellate judicial process and in influencing the law, however, they become less helpful when it is not clear exactly what points the majority and minority disagree on or when there is a plurality of reasons provided by the Court.

The afternoon continued with panelists discussing the topic of "What's Dividing the Supreme Court." The panelists discussed the Supreme Court's decisions in *1688782 Ontario Inc. v Maple*

Leaf Foods Inc.,[4] *Toronto (City) v Ontario (Attorney General)*,[5] and *CM Callow Inc. v Zollinger*.[6] The differences between the majority and minority reasons in these decisions demonstrated the Supreme Court's recent tendency to produce split judgments in cases involving important legal principles in doctrinally complex areas of law.

The panelists also discussed that since former Chief Justice McLachlin retired in 2017, it has also become apparent that certain groups of judges tend to stick together. These groups are: (1) Justices Abella, Martin and Karakatsanis, (2) Justices Brown, Côté, and Rowe, and (3) Justices Kasirer, Moldaver, and Chief Justice Wagner. The Justices in group one tend to be highly contextual and factually driven in their reasons, while the Justices in group two tend to be more doctrinally focused and apply the principle of *stare decisis* more strictly. The Justices in group three most often fall somewhere in between these two groups. With Justice Abella's recent retirement, the appointment of Justice Jamal, and Justice Moldaver's impending retirement in September of this year, it will be interesting to see whether, and how, the dynamic of the Supreme Court changes.

In the third segment of the event, the panelists honed in on the development of administrative law in the Supreme Court by examining decisions pre-*Dunsmuir v New Brunswick*,[7] post-*Dunsmuir*, and post-*Canada (Minister of Citizenship and Immigration) v Vavilov*.[8] There were a number of dissenting reasons in pre-*Dunsmuir* cases that subsequently influenced the development of administrative law, but most interesting is examining the impact of the two sets of dissenting reasons in *Dunsmuir*. In his dissent, Justice Binnie stated that in judicial review of administrative action on substantive grounds, the presumptive standard of review should be reasonableness and that whether there is a statutory right of appeal of an administrative decision is an important indicator that a correctness standard should be applied. In their dissent, Justices Deschamps, Charron, and Rothstein also commented on the significance of a statutory right of appeal, and suggested that the standards of review in administrative law should be similar to the regular appellate standards of review. These principles from both dissenting reasons were adopted in *Vavilov* and now form part of the current framework for determining the standard of review in cases involving judicial review of administrative decisions based on substantive grounds.

The event concluded with a lively debate between Patricia Jackson of Torys LLP and Michael Lacy of Brauti Thorning LLP on the topic of whether dissents ultimately further or fracture the Supreme Court. Ms. Jackson outlined the importance of dissenting reasons in demonstrating judicial independence in decision making, transparency, as well as the potential for dissents to be adopted in the majority or unanimous reasons in future decisions. Mr. Lacy identified the potential for dissents to damage the public's perception of the Supreme Court and opined that dissents usually do not advance the state of the law. He also contended that dissents can be particularly problematic when there is a narrowly split 5-4 decision or there are more than two sets of reasons written in a single case, as this

"...dissents can be particulary problematic when there is a narrowly split 5-4 decision, or there are more than two sets of reasons written in a single case..."

4 2020 SCC 35.
5 2021 SCC 34.
6 2020 SCC 45.
7 2008 SCC 9.
8 2019 SCC 65.

can make deciphering what the Court actually decided difficult, and raise the spectre of the same issues needing to be re-litigated and decided more clearly again in the near future.

The SCC Intervenes on the Role of Interveners

In November 2021, the Supreme Court of Canada issued an advisory Notice to the Profession reiterating the important (but limited) role of interveners.[9] In this Notice, the SCC first affirmed the importance of interveners "bringing broader perspectives before the Court" in considering the issues of national significance it is tasked with adjudicating. The Court went on to highlight some cautionary principles to guide any would-be interveners making submissions before Canada's highest court:

1. The Court expects all intervener submissions to be useful to the Court and different from those of the parties.
2. The purpose of an intervention is not to support a party but to advance the intervener's own view of a legal issue before the Court. Despite the participation of interveners, the case remains a dispute between its parties. However, the fact that an intervener's submission aligns it generally with one party over another does not, without more, make the submission inappropriate.
3. Interveners should not take a position on the outcome of an appeal, whether in written or oral argument.
4. Interveners must not challenge findings of fact, introduce new issues, or try to expand the case.
5. In considering applications to intervene, the Court will be mindful of the need not to unduly imbalance the arguments before it.
6. The Court always retains a discretion to take any steps it sees fit to prevent an unfairness to the parties arising from an intervener's participation in an appeal.

By framing this list more in terms of what *not* to do, the Court was signalling its growing dissatisfaction with the approach some appellate counsel have taken to interventions in recent years. These concerns are only compounded by the overall increase in the number of interveners granted leave to make submissions over the past two decades. As noted in Geoffrey D. Callaghan's recent overview of these trends, the percentage of SCC appeals featuring at least one intervener increased from an average of 55% (2000-2008) up to an average of 63% (2015-2018), with the average number of interveners increasing from 182 per year to 252 per year during those same periods.[10] Whether these trends reflect an increasing reliance on interveners by the Court or simply a more proactive and adept appellate bar seeking leave to contribute on issues of national importance, the Court's Notice made clear that the four corners of an intervener's role haven't changed. This Notice to the Profession wasn't the only (or the softest) signal sent from the bench on this issue. The Court has also been increasingly vocal in confronting intervener counsel's submissions that run afoul of this limited role: in *R. v.*

9 https://www.scc-csc.ca/ar-lr/notices-avis/21-11-eng.aspx.

10 "Intervenors at the Supreme Court of Canada" (2020), *Dalhousie Law Journal*, Volume 43, Issue 1, pp 34-35, citing also Benjamin Alarie & Andrew Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48:3&4 Osgoode Hall LJ 381 for comparative data.

Ste-Marie, 2022 SCC 3, heard on February 10, 2022, Justice Russell Brown admonished counsel for the intervener Ontario Attorney General for raising controversial constitutional arguments regarding the Jordan framework that were not in issue between the parties to that appeal;[11] similarly, in *Annapolis Group Inc. v. Halifax Regional Municipality*, heard on February 16, 2022, Chief Justice Richard Wagner twice interrupted intervener counsel for straying into the territory of arguing in favour of one side of the case over another.[12]

All appeals before the SCC necessarily engage issues of national importance, such that there will never be a shortage of incumbent interveners who want their voices heard. But parties (and their counsel) seeking leave to intervene would do well to consider carefully the Court's Notice and subsequent commentary on their expectations when hearing from non-parties. While interveners will continue to play an important role in framing the complex public policy context always undergirding the Court's deliberation, there is increasingly a risk of doing more harm than good when trying to make submissions that step too far out of bounds.

Can You Hear Me? Giving a Voice to the Future of the Profession

On November 25 2021, The Honourable George R. Strathy, Chief Justice of Ontario and The Honourable J. Michal Fairburn, Associate Chief Justice of Ontario released a statement imploring senior counsel across the legal profession to provide junior counsel with opportunities to develop their oral advocacy skills by participating in submissions before the Court.

As noted in the statement, "opportunities to address the Court are essential to the development and the retention of junior and intermediate litigation counsel" and the courts "have an important role to play in fostering an environment that makes space for, and welcomes hearing from, all members of a Bar that is increasingly reflective of the diversity of the province it serves."

More women, people of racialized backgrounds, 2SLGBTQIA+ persons, and other underrepresented individuals are joining the legal profession than ever before. In recent years the legal profession has taken on the crucial responsibility of making their workplaces more appealing to diverse talent in a multitude of significant and necessary ways, and this statement was additional welcome news for those who have traditionally been less visible in the profession. This is especially relevant at a time when issues of diversity and inclusion are being talked about, and called out, in every industry now more than ever before.

There are two parts to the equation when tackling issues of diversity and inclusion. While an increase in diversity represents one half of the work that needs to be done, the statement from Chief Justice Strathy and Associate Chief Justice Fairburn addresses the other half - what it means to actively contribute to the inclusion of those individuals. Opening the door for diverse and underrepresented talent is imperative, long overdue and frankly the minimum expectation in 2022. This standard though, should also involve meaningfully including that talent in advocacy before the Court. When junior counsel are not offered an opportunity to participate in a substantial way, it can unintentionally send the message that a junior is an unexpected, passive observer rather than necessary, active contributor.

11 See Supreme Court of Canada Webcast of Hearing on 2022-02-10, Her Majesty the Queen v. Mélanie Ste-Marie, et al., Online.

12 See Supreme Court of Canada Webcast of Hearing on 2022-02-16, Annapolis Group Inc. v. Halifax Regional Municipality, Online.

"Opening the door for diverse and underrepresented talent is imperative, long overdue and frankly the minimum expectation in 2022."

By creating space for and supporting opportunities for oral advocacy by junior counsel in the courtroom, senior counsel directly impact the development of young lawyers, especially those who are of backgrounds that have not been traditionally represented in the legal profession. The statement from the Chief Justices underscores the simple truth that diversity may lead you to being seated at the table, but inclusion means you have a voice when you are seated.

Part Two: The SCC Decisions That Piqued Our Interest in 2022

Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, 2021 SCC 7

The Supreme Court of Canada provided comments on the duty to exercise contractual discretion in good faith. The Appellant claimed that the Respondent exercised its discretion under a contract between the parties unfairly, and had breached its duty of good faith as articulated in the Supreme Court's decision in *Bhasin*.

The Supreme Court, in a unanimous decision, dismissed the Appellant's appeal. The majority decision (6 of the 9 Justices, with 3 releasing concurring reasons) made the following key observations related to the duty of good faith:

1. The exercise of discretion must be done so reasonably and must be connected to the purpose for which the contract provided discretion;
2. The standard that a court should use to measure and evaluate whether a party has exercised their discretion in good faith is to look at the purpose for which the discretion was created and conferred according to the bargain between the parties;
3. If it is not clear from the contract, the court must engage in contractual interpretation to determine it to ensure that the analysis is objective, and not based on a party's view of the exercise of discretion; and
4. A party will be in breach of the duty where they exercise their discretion in a capricious or arbitrary manner, or where it falls outside the range of choices connected to the underlying purpose.

The court's evaluation will be highly context-specific. Importantly, the duty does not require the party exercising discretion to subordinate its interests to the other party, or to confer a benefit that was not contemplated.

Parties to a contract that confers discretion to another party should ensure that the wording of the contract is clear as to the purpose of the discretion, and the exercising party must ensure that their conduct is consistent with same.

Sherman Estates v Donovan 2021 SCC 25

On June 11, 2021, the Court rendered its unanimous judgment in the *Sherman Estates v Donovan* case.[13] The appeal, heard on October 6, 2020, grappled with the limits of the open court principle as against the privacy interests of private parties. All of this was considered against the backdrop of the high-profile deaths of Barry and Honey Sherman, who were both found dead in their Toronto home in December of 2017.

The Sherman estate trustees sought sealing orders to protect the trustees and beneficiaries from further intrusion into their privacy, and from the perceived ongoing risks to their safety given the as-yet-unresolved homicide investigations into the Sherman's deaths. These sealing orders were challenged by Kevin Donovan, a journalist with the Toronto Star who had been reporting on the couples' deaths and ongoing investigations, on the basis that it violated the media's constitutional freedom of expression, and the open court principle.

The Ontario Superior Court of Justice initially approved the sealing orders for a two-year period, emphasizing that there was enough evidence to ground an inference, based on the ongoing homicide investigations, that there was a reasonable apprehension of risk and that the reasonably foreseeable harm was "grave".[14]

The Court of Appeal for Ontario set aside the sealing orders, since the estate trustees had not put forward any evidence that public disclosure of the estate files posed a risk to anyone's physical safety, and found that the lower court had erred in drawing an inference from mere speculation that the trustees or beneficiaries were themselves at risk.

The Supreme Court of Canada unanimously dismissed the trustees' appeal. In addition to affirming the Court of Appeal's holding that there was no objectively discernible risk of physical harm, the Court spent a great deal of time unpacking the trustees' argument that the risk to their dignity and privacy interests posed a serious enough "public interest" risk to warrant the sealing orders being reinstated, and showed a keen interest in parsing the question of "dignity" when evaluating the scope of this privacy interest as a broader public policy issue.

"*...court proceedings by their nature can be a source of discomfort and embarrassment*", so not all intrusions on privacy will automatically amount to a public policy risk serious enough to displace the open court principle..."

As noted in the reasons, "court proceedings by their nature can be a source of discomfort and embarrassment"[15], so not all intrusions on privacy will automatically amount to a public policy risk serious enough to displace the open court principle; a contextual and fact-specific analysis is required in each case to understand the sensitivity of the private information likely to be

13 2021 SCC 25.
14 2018 ONSC 4706.
15 Para 56.

disclosed, and the likely impact on an individual's dignity. The Court confirmed, however, that it still may be possible to displace the open court principle under the *Sierra Club* test where there is a serious risk that the private information to be disclosed would sufficiently threaten the dignity and integrity of an individual's "biographical core".[16]

By dismissing the trustees' appeal, even in such a high-profile and disturbing case, and a "near certainty" of ongoing media scrutiny,[17] the Court sent a strong signal that what really matters when weighing privacy interests against the open court principle is the nature and type of personal information at risk of being disclosed (not the degree of publicity or breadth of that disclosure).

Corner Brook (City) v Bailey, 2021 SCC 29

In *Corner Brook (City) v Bailey*, the Supreme Court of Canada replaced the 150 year-old rule from the 1870 House of Lords decision in *London and South Western Railway Co. v Blackmore*[18] and changed the law applicable to the interpretation of contractual releases. The *Blackmore* rule held that the general words in a release are limited always to the things which were specifically in the contemplation of the parties at the time that the release was given. However, the Court held that the *Blackmore* rule had outlived its usefulness and has been overtaken by the general principles of contract law established in *Sattva Capital Corp. v Creston Moly Corp.*[19]

The release in question in *Corner Brook* was part of a settlement reached between the City and Mr. and Ms. Bailey. While driving, Ms. Bailey hit a city employee performing road work. The employee sued the Baileys for personal injuries and in a separate action the Baileys sued the City for property damage to the car and for personal injuries. The Baileys settled their action with the City, executed a release of liability relating to the accident, and discontinued their action.

> "…the Court held that the Blackmore rule had outlived its usefulness…"

However, years later the Baileys brought a third-party claim against the City for contribution and indemnity in the action brought by the city employee. Relying on the *Blackmore* rule, the Baileys' position was that the third-party claim was not barred by the release because it was not in the parties' contemplation at the time that the release was signed.

The Court held that the language of the release as being against "all actions, suits, causes of action… past, present or future… foreseen or unforeseen… and all demands and claims of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about March 3, 2009" captured the third-party claim initiated after the release was signed.[20] With sufficient language, a release can cover unknown claims and does not need to particularize every type of claim that is captured in its scope. Although the release did not explicitly mention "third-party claims," the language of the release clearly encompassed all claims related to the subject matter of the particular accident.[21]

16 Para 85.
17 Para 90.
18 (1870), LR 4 HL 610.
19 2014 SCC 53.
20 *Corner Brook (City) v Bailey*, 2021 SCC 29 at para 51.
21 *Corner Brook* at paras 48, 54.

Consistent with *Sattva*, courts will interpret releases in the context of the dispute and what the parties appear to have objectively intended based on the surrounding circumstances known to the parties at the time of contract formation.[22] However, also consistent with *Sattva*, where the surrounding circumstances and the plain wording of a release conflict, the words will prevail.[23]

The decision in *Corner Brook* directs the drafters of releases to consider including specific wording that indicates whether the release is intended to cover unknown claims and whether the claims being released are related to a particular time frame or subject matter. Doing so will limit interpretive conflicts between the words of a release and the surrounding circumstances, and in turn will lead to greater certainty for the parties to a release.

Nelson (City) v Marchi, 2021 SCC 41

After a heavy snowfall in Nelson, British Columbia, the plaintiff suffered an injury as she stepped into the snowbank which the City of Nelson (the "City") failed to plow. The plaintiff brought an action in negligence against the City.[24]

The British Columbia Supreme Court held that the City did not owe the plaintiff a duty of care because its snow removal decisions were core policy decisions which were immune from negligence liability. The City followed its written and unwritten policies on snow removal and its decisions were dictated by the availability of resources.[25] *However, the Court of Appeal then allowed the appeal, finding that the trial judge did not properly engage with the distinction between policy and operational decisions.*[26]

The Supreme Court of Canada dismissed the appeal from the Court of Appeal.

The Supreme Court first found that the facts in this case fit within the established duty of care recognized in *Just v British Columbia*, where similarly a plaintiff alleged that they suffered personal injury as a result of the public authority's failure to maintain the road or sidewalk. As a result, there was sufficient proximity between the plaintiff and the City to find there was a duty of care.[27]

The Court went on to consider whether the "core policy" immunity applied, and summarized four factors which emerge from the jurisprudence that help in assessing whether a decision is a "core policy" decision:

1. The level and responsibilities of the decision-maker;
2. The process by which the decision was made;
3. The nature and extent of budgetary considerations; and
4. The extent to which the decision was based on objective criteria.[28]

22 *Corner Brook* at paras 35-38.
23 *Corner Brook* at para 35.
24 *Nelson (City) v Marchi* at para 7.
25 *Ibid* at para 11.
26 *Ibid* at para 12.
27 *Ibid* at paras 26-29.
28 *Ibid* at para 56.

The Court also offered two additional clarifications. Firstly, the mere presence of budgetary, financial, or resource implications does not determine whether a decision is core policy, as many government decisions involve some consideration of a department's budget or the scarcity of its resources. This is but one consideration among many for whether a decision is a core policy decision. Secondly, the focus must remain on the nature of the decision itself rather than the format or the government's label for the decision.

The fact that the word "policy" is found in a written document, or that a plan is labelled as "policy", or even that a certain course of conduct is mandated by written government documents, is similarly not determinative of whether the policy constitutes "core" policy.[29]

The Court ultimately held the trial judge was incorrect in finding the City's decision constituted a "core policy" decision. The Court first found that the trial judge described the decision too broadly by "focusing on the entire process of snow removal", and cautioned that in a duty of care analysis, "the decision or conduct at issue must be described with precision to ensure that immunity only attaches to core policy decisions.[30] The Court also found that the trial judge also placed too much weight on the label of "policy" and treated budgetary implications as determinative of the core policy question. Instead, applying the four-factors above, the Supreme Court found that the City's decision "bore none of the hallmarks of core policy."[31]

In the result, since the plaintiff did not seek to challenge a core policy decision immune from negligence liability, the City owed her a duty of care.

<u>Montréal (City) v Deloitte Restructuring Inc., 2021 SCC 53</u>

Here, the Supreme Court of Canada reviewed a creditor's right to pre-post compensation (debts arising before and after an initial order) under the *Companies' Creditors Arrangement Act* ("CCAA") after an initial order.

A firm provided services to the City, but became insolvent, subject to proceedings under the CCAA, and two of its former officers were charged with criminal offences related to collusion. The City invoked its right to effect compensation between its debt to the firm for the work done after the initial order, and two claims the City commenced against the firm for fraud that arose before the initial order, effectively negating the need for the City to pay for the services provided by the firm. The Monitor for the firm obtained a declaratory judgment stating that compensation to be paid by the City could not be effected.

The Court held that the discretion conferred by ss. 11 and 11.02 of the CCAA allows courts to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process, which includes a creditor's right to effect pre-post compensation.

"The Supreme Court noted that if a creditor could rely on compensation to refuse to pay for goods or services supplied by the debtor, the restructuring could be jeopardized as the debtor would not have funds needed for continued operations."

29 *Ibid* at paras 58-59.

30 *Ibid* at para 76.

31 *Ibid* at paras 83-84.

An initial order will normally stay a creditor's right to set up pre-post compensation against the debtor, and rarely will this be deviated from. If a court was to allow such a creditor's right to survive, it should be exercised in furtherance of the CCAA's remedial objectives. The Supreme Court noted that if a creditor could rely on compensation to refuse to pay for goods or services supplied by the debtor, the restructuring could be jeopardized as the debtor would not have funds needed for continued operations.

The Court found that s. 21 of the CCCA did not grant creditor's a right to pre-post compensation that would be protected from the court's power to order a stay under the CCAA. The Supreme Court further found that the City had failed to prove the alleged fraud that would allow their claim to survive the stay under s. 19(2)(d), and had not provided any support for the exercise of the Supreme Court's discretion to lift the stay of the City's right to pre-post compensation.

Part Three: The SCC Decisions Piquing Our Interest in 2022

Attorney General of British Columbia v Council of Canadians with Disabilities

The Council of Canadians with Disabilities ("CCD") and two individual plaintiffs brought a claim to challenge the constitutional validity of certain provisions of British Columbia's *Mental Health Act*, *Health Care (Consent) Act*, and the *Representation Agreement Act* (the "impugned provisions"). The plaintiffs allege that the impugned provisions deprive all involuntary patients, as defined under the *Mental Health Act*, of the right to consent to psychiatric treatment regardless of their actual capability to do so and preclude substitute decision makers from making treatment decisions as their representatives, in contravention of s. 7 and s. 15 of the *Charter*.[32]

After the claim was commenced, the two individual plaintiffs filed notices of discontinuance, leaving the CCD as the only remaining plaintiff. The Attorney General then brought a summary trial application seeking to dismiss the claim by arguing that the CCD lacked public interest standing.[33]

The chambers judge applied the three *Borowski factors* to determine the issue of the CCD's public interest standing:

1. Whether the case raises a serious justiciable issue;
2. Whether the party bringing the action has a real stake or a genuine interest in its outcome; and
3. Whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court.

The chambers judge found that the CCD did not have public interest standing as it did not meet the first and third parts of the *Borowski* test. With regards to a serious justiciable issue, the chambers judge found the CCD's claim lacked "a particular factual context of an individual's case" which was necessary to particularize the claim and permit the enquiry and relief sought.[34]

32 *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241 at para 15

33 *Ibid* at paras 21, 25.

34 *Ibid* at para 37.

Similarly, with regards to whether the proposed suit was a reasonable and effective means to bring the case to court, the chambers judge was not satisfied there would be "a sufficiently concrete and well-developed factual setting" upon which the constitutional questions could be decided.[35]

The British Columbia Court of Appeal reversed the decision of the chambers judge, finding that he erred in his application of the first *Borowski* factor. Specifically, the Court found that the CCD's claim does not require "a particular factual context of an individual's case".[36] Rather, the CCD's claim raised a serious judiciable issue as it was a "comprehensive and systemic constitutional challenge" to specific legislation that "directly affects all members of a defined and identifiable group in a serious, specific and broadly-based."[37]

Moreover, the Court of Appeal commented generally that the chamber's judge's decision did not apply the *Borowski* test in accordance with a flexible, purposive and pragmatic approach as mandated by the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*. The Court reiterated that the determination of public standing should be increasingly attuned to the "practical realities of providing meaningful access to justice for vulnerable and marginalized citizens affected by legislation of questionable constitutional validity."[38]

The AG's appeal was heard before the Supreme Court of Canada on January 13, 2022. 22 organizations were granted intervener status in the appeal, including the Canadian Civil Liberties Association, the Attorney General of Canada, and the Canadian Mental Health Association.

The Supreme Court of Canada is expected to clarify the scope of the *Borowski* factors, particularly following their expansion in *Downtown Eastside Sex Workers*. This appeal is also interesting for determining the threshold for public interest standing for organizations in the absence of a personal plaintiff and a particular factual context.

At the time of writing this publication, the decision remained under reserve.

Annapolis Group Inc. v Halifax Regional Municipality

On February 16, 2022, the Supreme Court of Canada heard *Annapolis Group Inc. v Halifax Regional Municipality*,[39] on appeal from the Nova Scotia Court of Appeal. At issue in the appeal was the Halifax Regional Municipality's ("HRM") partial summary judgment motion to dismiss the Annapolis Group's claim for *de facto* expropriation. HRM was initially unsuccessful on their motion,[40] but the Nova Scotia Court of Appeal reversed this decision and granted HRM summary judgment dismissing the *de facto* expropriation claim.[41]

The dispute related to development lands owned and held by Annapolis, which had made various unsuccessful attempts to develop them over a ten year period. During this time, HRM was alleged to have publicly promoted the use of part of these lands as a "public park" and made representations to the provincial government that the lands would be used in this way.

35 *Ibid* at para 45.
36 *Ibid* at para 114.
37 *Ibid* at para 112.
38 *Ibid* at para 4.
39 See Supreme Court of Canada Webcast of Hearing on 2022-02-16, Annapolis Group Inc. v. Halifax Regional Municipality, Online.
40 2019 NSSC 341.
41 2021 NSCA 3.

However, HRM never formally amended the zoning for these lands for that purpose; they were instead designated for "possible future use" as a regional park in the municipal planning strategy. In 2016, the HRM passed a resolution refusing to allow Annapolis to proceed with future development of its lands.

Annapolis brought a claim for damages against HRM for *de facto* expropriation, abuse of public office, and unjust enrichment, alleging primarily that HRM had deliberately avoided zoning the lands as a parkland to avoid having to compensate Annapolis for direct or de jure expropriation. While there was some discussion at all levels of court over whether any material facts were in dispute, the heart of the appeal revolved around whether Annapolis had any real chance of success under this cause of action. Specifically, the Court was asked to clarify (or rearticulate) the law on *de facto* expropriation and what constituted a "taking" or the acquisition of a "beneficial interest" by government.

At the hearing, counsel for Annapolis emphasized that this "taking" must broad enough to include a loss of something less than actual legal title or rights, since that was the basis for the common law distinction between *de facto* and *de jure* expropriation. Counsel for HRM in turn relied heavily on the facts, emphasizing that there needed to be a "taking" of some form or another (however one defined beneficial interest) and the HRM had not taken the requisite steps to actually acquire anything, via re-zoning or otherwise. Counsel for the intervener the Canadian Constitution Foundation proposed scrapping the "beneficial interest" element from the test entirely, and instead defining *de facto* expropriation based on the impacts or effects on the land owners' rights. In counterpoint to this proposal, the Court also heard from intervener Attorney Generals from Ontario and British Colombia as well as EcoJustice Canada, all of whom urged caution in opening up too broad a definition of "taking" such that governments would face increased exposure for various other non-expropriative regulatory conduct.

"...the Court was asked to clarify (or rearticulate) the law on *de facto* expropriation, and what constituted a "taking"..."

It remains to be seen how the Court will decide, though Justices Brown and Rowe in particular were highly critical of HRM's position throughout. At the time of writing this publication, the decision remained under reserve.

Transportation Safety Board of Canada v. Kathleen Carroll-Byrne et al*.

The Supreme Court of Canada allowed the appeal of the Nova Scotia Court of Appeal's decision that affirmed a motion judge's holding that the public interest in the proper administration of justice outweighed statutory privileges that applied to a cockpit voice recorder ("CVR").

In 2015, an Air Canada flight crash landed on final approach to the Halifax International Airport. A class proceeding was commenced on behalf of passengers of the flight, and was certified in 2016. The Transportation Safety Board of Canada ("TSB") carried out an investigation and as part of its investigation obtained the CVR.

Section 28(2) of the *Canadian Transportation Accident Investigation and Safety Board Act* (the "Act") prohibits the disclosure of the CVR or its contents, however, s. 28(6) allows a court to order the production and discovery of the CVR if the public interest in the proper administration of justice outweighs the statutory prohibition.

> "While the privilege attached to CVRs promote safety and protect the privacy interests of flight crews, they also contain data that is important to the understanding of the cause of an accident – something that was fundamentally important and relevant to the class action."

The Nova Scotia Court of Appeal found that the motion judge had not erred in ordering that the CVR be produced. While the privilege attached to CVRs promote safety and protect the privacy interests of flight crews, they also contain data that is important to the understanding of the cause of an accident – something that was fundamentally important and relevant to the class action.The CVR was evidence that was reliable, relevant, and likely contained information that would be otherwise unavailable. As such, the production of the CVR was in the public's interest.

It will be interesting to see if the Supreme Court of Canada finds that the statutory prohibition on production of the CVR is indeed overpowered by the public interest relevant to this class action as it relates to determining the cause of the accident, or whether the Supreme Court will find that there are other means of obtaining similar information by other means.

This hearing is scheduled for March 18, 2022.

**Lerners LLP acts for the respondent NAV Canada in this appeal.*

Canadian Council for Refugees et al v. Minister of Citizenship and Immigration et al.

In *Canada (Citizenship and Immigration) v Canadian Council for Refugees,* Justice Stratas, writing for a unanimous Federal Court of Appeal ("FCA"), set aside the decision of the Federal Court ("FC") to strike down the *Safe Third Country Agreement* ("STCA") as unconstitutional, on the basis that it is a breach of section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter"*). In effect, the FCA's decision has meant that the STCA remains in effect at Canadian and U.S. land ports of entry.

However, in December 2021, the Supreme Court of Canada granted leave from the decision of the FCA and will reconsider the "constitutional validity of certain legislative provisions that prevent certain refugee claimants from seeking refugee protection in Canada".[42] The SCC's finding on this issue has may have significant impact on Canada-U.S. relations.

Under the *Immigration and Refugee Protection Regulations,* S.O.R./2002-227 ("*Regulations*") and *Immigration and Refugee Protection Act,* S.C. 2001 c. 27 ("*Act*"), Canada designates countries as "safe" for refugees, including the US. Commonly known as the STCA, Canada and the US share responsibility for refugees.[43] Under the STCA, refugee claimants must request protection in the first country that they arrive in unless they qualify for an exception.[44]

42 *Canada (Citizenship and Immigration) v. Canadian Council for Refugees, 2021 FCA 72* (CanLII) at para 1.

43 *Ibid* at para 19.

44 *Ibid* at para 20.

This case stems from a group of refugee claimants who attempted to seek refuge in Canada for fear of persecution in their home country. However, because they arrived to Canada from the US, they could not seek refugee protection in Canada and were denied entry. At judicial review, the claimants argued that the *STCA* infringed their section 7 right to life, liberty, and security, as well as their section 15 rights to equality under the *Charter*. The FC found that the *STCA* was a breach of section 7 rights and, so, did not engage with the section 15 argument advanced.

The FCA determined that the *STCA* was an international instrument and did not have force of law in Canada by itself. Rather, it was implemented through Canadian legislation.[45] This legislative scheme, in the view of the FCA, included an administrative policy that required continual reviews of the designation of a foreign country under subsection 102(3) of the *Act*. Under section 102(2) of the *Act*, when designating a specific country as "safe", the Governor in Council was required to the requirements were met and since 2004, found that the U.S. met these requirements. The scheme included a mechanism to ensure compliance with the requirements occurred on an ongoing basis.[46] The FCA noted that these reviews focus on systemic issues in the U.S., and not on isolated incidents.[47]

The FCA was clear in emphasizing that it was subsection 102(3) of the *Act*, which is the specific provision that reviews whether or not the U.S. is "safe", that should have faced a challenge by the claimants, instead of 101(1)(e) of the *Act*. Given that the claimants did not challenge this administrative policy, the FCA concluded that the challenges were not properly constituted and must be dismissed. The FCA also determined that the *"alleged constitutional in this case stems from how administrators and officials are operating the legislative scheme, not the legislative scheme itself"*. [48] However, the claimants did not challenge any specific administrative conduct or decisions. In the view of the FCA, perhaps as a message to appellate advocates, Justice Stratas stated that "[c]ourts cannot go beyond the challenge and address a different challenge".[49]

The FCA also disagreed with the refugee claimants, who posited that the FC was obligated to assess their section 15 *Charter* challenge. Justice Stratas stated that a court has discretion over whether or not it will deal with issues unnecessary to the outcome of a case.[50] Moreover, section 15 did not enjoy a "superior status in the hierarchy of rights".[51] Whether or not the Supreme Court of Canada will engage with section 15 of the *Charter* in rendering its decision, and particularly the gender-based persecution arguments that may well be advanced, remains to be seen.

At the time of writing this publication, a hearing has yet to be scheduled.

"In the view of the FCA, perhaps as a message to appellate advocates, Justice Stratas stated that '[c]ourts cannot go beyond the challenge and address a different challenge."

45 *Ibid* at para 22.
46 *Ibid* at paras 30-31.
47 *Ibid* at para 40.
48 *Ibid* at para 89.
49 *Ibid* at para 59.
50 *Ibid* at para 171.
51 *Ibid* at para 172.

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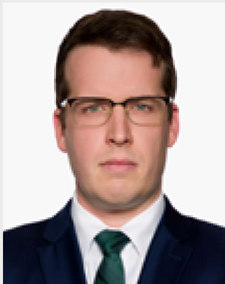

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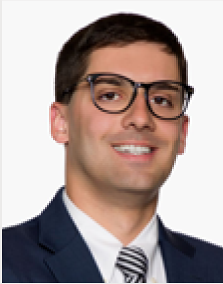

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