Appellate Fall 2022 preview: Significant cases to watch

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On August 19, 2022, Prime Minister Justice Trudeau announced the historic nomination of Justice Michelle O'Bonsawin to the Supreme Court of Canada (SCC), making her the first Indigenous person to sit on Canada's highest court. Justice O'Bonsawin was sworn in on September 1, 2022.

In this article, we highlight significant cases that the SCC and appellate courts across Canada will hear in Fall 2022, covering issues such as privacy and freedom of expression, the use of the notwithstanding clause, the regulation of cannabis, discrimination by internet platforms, and the constitutional authority over child and family services in Indigenous communities.

Appointment of the Honourable Michelle O'Bonsawin to the SCC

Justice O'Bonsawin is fully bilingual in English and French, and brings a broad and diverse background to the SCC, having practiced in law in public and private sectors with specializations in mental health, employment, labour, human rights, Indigenous, criminal and privacy law. Most recently, Justice O'Bonsawin was appointed to the Ontario Superior Court of Justice in 2017. Her parliamentary hearing took place on Aug. 24, 2022.

For more information about the process for appointing a justice to the SCC and the historic nature of Justice O'Bonsawin's appointment, please see our recent article.

Significant cases on the docket

Janick Murray-Hall v. Attorney General of Québec (SCC 39906)

On Sept. 15, the SCC will hear Janick Murray-Hall v. Attorney General of Québec, an appeal that addresses the constitutionality of the Québec government's complete prohibition against possessing cannabis plants and cultivating cannabis for personal

purposes. At issue is whether the Québec provincial legislature had the jurisdiction to enact sections 5 and 10 of the *Cannabis Regulation Act*.

If the court affirms Quebec's jurisdiction to enact the prohibition, it will need to determine whether the provisions should be declared of no force and effect because the doctrine of federal paramountcy would require Québec to yield to the federal *Cannabis Act*. The Superior Court and Québec Court of Appeal (QCCA) disagreed on the constitutionality of these provisions. This appeal to the SCC will provide important guidance on whether provinces and territories can regulate the possession of cannabis, and if so, how.

Lyse Beaulieu v. Facebook Inc., Facebook Canada Ltd. (QCCA 500-09-029679-214)

On Sept. 21, the QCCA will hear *Lyse Beaulieu v. Facebook Inc., Facebook Canada Ltd.,* an appeal that addresses whether a class action for discrimination under the Québec *Charter of Human Rights and Freedoms* should be authorized.

The Superior Court held that the plaintiff had satisfied the requisite legal and evidentiary threshold to claim moral and punitive damages against Facebook for allegedly allowing companies and employers to discriminate against Facebook users by excluding them from receiving targeted advertisements on the basis of sex, age and race. Authorization was refused, however, due to the proposed class being overbroad and undefinable. The Superior Court left open the question of whether Facebook should bear liability as an intermediary platform – a question that the QCCA may weigh in on.

Canadian Council for Refugees, et al. v. Minister of Citizenship and Immigration, et al. (SCC 39749)

On Oct. 6, the SCC will hear *Canadian Council for Refugees, et al. v. Minister of Citizenship and Immigration, et al.*, an appeal that will consider the constitutionality of the Safe Third Country Agreement (STCA) between the U.S. and Canada, as implemented into Canadian law. As a result of the STCA, in which the US is agreed to be "safe" for refugees, migrants arriving to Canada via the US land border are deemed ineligible for refugee protection under the *Immigration and Refugee Protection Act* (IRPA).

The lower courts disagreed on the constitutionality of the STCA. The Federal Court (FC) held that the operation of the STCA violated the claimants' rights to liberty and security of the person under s. 7 of the *Charter* because they are often subject to imprisonment, detention conditions, and a heightened risk of refoulement upon return to the US. The STCA was declared of no force or effect. The FC declined to rule on the applicants' s. 15 Charter arguments. The Federal Court of Appeal (FCA) granted the minister's appeal on two separate grounds. The FCA first concluded that the *Charter* challenge against the claimants' deemed ineligibility was not properly constituted. The STCA is an international instrument implemented into law through legislation, and therefore, any *Charter* breach would have resulted from how the government carried out the administrative policies to implement and operate the STCA under the *IRPA* (including its requirement to review whether countries are deemed "safe").The breach could not be found in the deemed ineligibility itself. As such, the FCA held that the FC erroneously addressed the s. 7 and s. 15 challenges before it. In any event, it also disagreed with the

FC's findings under s. 7, and declined to address the s. 15 arguments. The FCA overturned the declaration that the STCA is of no force or effect.

The SCC's decision may have implications for Canada-US relations and immigration policy, how cases with multiple *Charter* claims ought to be adjudicated, and whether a court can abstain from deciding a *Charter* claim when it has decided against a claimant on alternative grounds.

Glen Hansman v. Barry Neufeld (SCC 39796)

On Oct. 11, the SCC will hear *Glen Hansman v. Barry Neufeld*, an appeal that addresses whether a defamation action should be dismissed pursuant to section 4 of the *Protection of Public Participation Act* – British Columbia's anti-SLAPP legislation. Under this provision, a lawsuit may be dismissed if it is based on the defendant making an expression related to a matter of public interest, unless the harm suffered by the expression justifies proceeding, among other things.

In this case, a high school teacher who is president of the British Columbia Teacher's Federation, commented on criticisms made by an elected public school board trustee about educational resources that promote inclusivity in sexual orientation and gender identity. The Supreme Court and British Columbia Court of Appeal (BCCA) disagreed on whether the action should be dismissed. The SCC will determine whether the action should be allowed to continue, and in doing so, clarify how anti-SLAPP legislation applies where a defendant's expression is made in defence of a vulnerable group in society.

Deans Knight Income Corporation v. Her Majesty the Queen (SCC 39869)

On Nov. 2, the SCC will hear *Deans Knight Income Corporation v. Her Majesty the Queen*, an appeal that addresses the meaning of "control" for the purpose of the *Income Tax Act*'s general anti-avoidance rule (GAAR).

In this case, a corporation had approximately $90 million of unused non-capital losses and other deductions. It sought to realize the value of these tax attributes by entering into an agreement with a corporation that had expertise in arranging such transactions. The CRA denied deductions on the basis that the GAAR was triggered because "control" of the company had been acquired. The Tax Court and the FCA disagreed on whether the deductions should be allowed. This appeal will help corporations understand what it means to gain "control" of a corporation for the purpose of the GAAR and promote certainty in how to manage corporate tax liabilities.

Broutzas v. Rouge Valley Health System (Div Ct No. 760-18)

On Nov. 14 and 15, the Ontario Divisional Court will hear *Broutzas v Rouge Valley Health System*. This appeal addresses whether certification should be granted in two proposed class actions alleging that two hospitals are liable for negligence and intrusion upon seclusion because hospital employees sold patients' contact information to RESP sales representatives.

The lower court found no basis in fact for either claim and refused to grant a certification. It found that the tort of intrusion upon seclusion only covers significant invasions of privacy, a high bar that is not reached by the disclosure of a patient's contact information or the facts of pregnancy or birth. The court further found that the negligence claim had no basis because there was no evidence that any of the representative plaintiffs and class members suffered any compensable damage. This appeal will clarify the parameters of the relatively new tort of intrusion upon seclusion.

Earl Mason, et al. v. Minister of Citizenship and Immigration, et al. (SCC 39855)

On Nov. 29, the SCC will hear *Earl Mason, et al. v. Minister of Citizenship and Immigration, et al*. This appeal addresses how s. 34(1)(e) of the *Immigration and Refugee Protection Act* ought to be interpreted. This section provides that if foreign nationals or permanent residents engage in violent conduct that could endanger the lives or safety of people in Canada, they will not be admissible to Canada on grounds of security. The central issue is whether this provision was reasonably interpreted by an administrative body to apply to conduct that does not have a nexus with national security. The administrative bodies found two foreign nationals inadmissible to Canada for having engaged in conduct that falls within the ambit of s. 34(1)(e). These decisions were overturned by the FC (*Dleiow v Canada (Minister of Citizenship and Immigration)* & *Mason v Canada (Minister of Citizenship and Immigration)*). The FC's decisions were overturned by the FCA, which unanimously found that although the FC correctly identified that reasonableness is the proper standard of review, the FC's did not appropriately conduct the reasonableness review.

The SCC will consider the appropriate approach to reasonableness review, as applied to statutory interpretation by an administrative decision maker, especially in light of *Canada (Minister of Citizenship and Immigration) v Vavilov*. On a more practical level, this decision will impact the ability of permanent residents and foreign nationals who have engaged in violent conduct that could endanger people in Canada to enter or remain in Canada.

Hak c. Procureur général du Québec (QCCA 500-09-029546-215)

In November, the QCCA will hear Hak c. Procureur général du Québec, the highly anticipated appeal considering the constitutionality of Bill 21, *Act respecting the laicity of the State* (the *Secularism Act*). Sections 6 and 8 of the *Secularism Act* prohibit those who work for a number of public institutions from wearing religious symbols at work and from covering their faces while exercising public functions. The Québec legislature passed the statute by using the notwithstanding clause in section 33 of the *Charter*. The clause allows legislation to be enacted even if there is breach of sections 2 or 7 to 15 of the *Charter*.

The lower court's decision left most of the Act intact, finding that the notwithstanding clause weighed against subjecting most of Bill 21 to *Charter* scrutiny because it would remain operative notwithstanding any finding of a *Charter* violation.

The only parts struck down were the provisions that were found to infringe section 3 (democratic rights) and section 23 (minority language rights) – two *Charter* rights that

cannot be overridden by the notwithstanding clause. Courts across the country have had few recent opportunities to opine on how section 33 applies to legislation alleged to infringe a *Charter* right.

Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis (SCC 40061)

On Dec. 7 and 8, the SCC will hear the appeal of a reference decision regarding the constitutionality of the federal statute, An Act respecting First Nations, Inuit and Métis *children, youth and families*.

In June 2019, the federal government passed this statute to govern the design and delivery of child and family services in Indigenous communities. The QCCA concluded that the statute is not *ultra vires* the federal government's jurisdiction because its use of general language renders it compatible with Québec's child protection legislation.

However, it also concluded that provisions conferring an absolute right on Indigenous peoples to regulate child and family services are *ultra vires* federal jurisdiction because the provisions alter the existing constitutional architecture. This appeal will provide important guidance on the extent to which the federal government can govern private matters in Indigenous communities, particularly with respect to family and child services.

Not on the docket

One much-anticipated appeal that will not be on the docket is *Environnement Jeunesse v. Attorney General of Canada* (SCC 40042). Although the case garnered significant attention due to the unprecedented scope of the class action the plaintiffs sought to authorize – the proposed class included all people under the age of 35 in Québec, claiming against the Government of Canada for failing to establish sufficient measures and greenhouse gas reduction targets to prevent client change – the SCC recently refused to grant leave to appeal. Both the Superior Court and the QCCA refused authorization.

If you have questions about any of the above cases or other upcoming appeals of interest, please reach out to any of the key contacts listed below.

The authors thank Anthony Cianfarani, Bunisha Samuels, Hülya Miclisse-Polat*, Mohit Sethi, Natalia Paunic and Rachel Toope* for their assistance with *preparing an earlier article, also featuring some of these upcoming hearings*.

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