Provincial appellate court cases in Canada

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Appellate courts are shaping the Canadian legal landscape through cases on timely issues that include the rights to privacy and expression, the implication of corporate transactions, the regulation of cannabis, and the constitutionality of child and family services in Indigenous communities and environmental impact legislation. We have identified key provincial appellate decisions and upcoming hearings to watch out for in 2022.

Ontario

Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner), 2022 ONCA 74

Key takeaways

- The Court of Appeal for Ontario (ONCA) was divided on the proper statutory interpretation approach to section 12(1) of the *Freedom of Information and Protection of Privacy Act*, which exempts materials from disclosure if it would "reveal the substance of deliberations of the Executive Council or its committees".
- The purpose of section 12(1) is to strike a balance between the public interest in disclosure of government activities and the government's right to deliberate behind closed doors.
- Documents fall under the Cabinet privilege exemption if there is a link between the document in question and the substance of Cabinet deliberations.

Background

A Canadian Broadcasting Corporation (CBC) journalist requested access to the mandate letters Premier Doug Ford sent to Ontario's Cabinet ministers following the 2018 election. The Cabinet Office refused the request based on the Cabinet privilege exemption under section 12(1) of the *Freedom of Information and Protection of Privacy Act* (the Act).

On appeal by the CBC, the Information and Privacy Commissioner of Ontario (the IPC) ordered disclosure of the letters, finding that section 12(1) did not apply and that the

Attorney General of Ontario (the AGO) had not discharged its burden to prove a link between the letters and past or future Cabinet deliberations.

The Divisional Court dismissed the AGO's application for judicial review on the basis that the IPC's determination was reasonable. A majority of the ONCA dismissed the appeal, over dissent by Justice Lauwers who found that section 12(1) had been interpreted too narrowly. Justice Sossin, writing for himself and Justice Gillese, held that the IPC's exercise of statutory authority to grant a right of access to the letters was reasonable and consistent with the purposes of the Act and the Cabinet privilege exemption.

The majority of the ONCA found that section 12(1) protects documents with a deliberative nature. A document that sets out decisions, without disclosing the deliberative process used to arrive at those decisions, does not fall under the exemption. The IPC recognized that section 12(1) strikes a balance between a citizen's right to know what the government is doing and a government's right to consider what it might do behind closed doors.

However, the saga is not over. On May 19, 2022, the Supreme Court of Canada (SCC) granted leave to appeal, with the hearing yet to be scheduled. Interpretation of section 12(1) of the Act will likely be the main issue considered in the appeal.

British Columbia

Teal Cedar Products Ltd. v Rainforest Flying Squad, 2022 BCCA 26

Key takeaways

- The British Columbia Court of Appeal (BCCA) confirmed that the rule of law is the dominant public interest when considering whether to grant or extend injunctions.
- Injunctions are still the preferred tool for parties facing substantial interference with their private activities.
- The BCCA affirmed that private entities could seek and rely on injunctions when their rights are infringed by acts of civil disobedience, which may be subject to police enforcement.

Background

The logging of old growth forests in British Columbia has been a matter of intense public debate and protest for decades. In August 2020, protesters upset with the destruction of old growth forests in the Fairy Creek watershed on Vancouver Island, blocked roads at various locations in and around the lands controlled by a logger, Teal Cedar Products Ltd. (Teal Cedar). The company obtained an injunction.

In 2021, Teal Cedar applied for a one-year extension of the injunction. The chambers judge declined the extension. In doing so, the judge placed emphasis on his finding that extending the injunction would damage the reputation of the court due to police misconduct.

The chambers judge found that there was no “enforcement gap” on the part of the Attorney General and the police such that injunctions would need to fill that gap. The judge concluded that the absence of this “enforcement gap” diminished the weight to be given to the public interest in upholding the rule of law by restraining the acts of civil disobedience through a civil injunction.

In a unanimous decision, the BCCA allowed Teal Cedar’s appeal and extended the injunction restraining the unlawful acts of the demonstrators. The BCCA found the chambers judge erred in conducting an “enforcement gap” analysis, finding that the court’s reputation would be diminished by continuing the injunction, and giving insufficient weight to the public interest in upholding the rule of law.

The BCCA stressed that the mere availability of the criminal law is not a factor weighing against the granting or extension of a civil injunction protecting a private party from unlawful interference with its rights. The court noted that while a party’s conduct may be a relevant consideration in granting or extending an injunction, the actions of third parties, like the crown or police, is not a relevant factor. The BCCA also held that the conduct of the police does not tarnish the reputation of the court, as the police and the court are constitutionally distinct.

On March 28, 2022, an application for leave to appeal to the SCC was filed. Canada’s highest court may weigh in on whether police misconduct is a relevant consideration in deciding whether to extend an injunction.

Alberta

Reference re Impact Assessment Act, 2022 ABCA 165

Key takeaways

- This decision represents a major update to constitutional law regarding federal authority over environmental assessments, which the SCC has not considered since 1993.
- The case contributes to a growing body of recent case law etching out the provincial and federal jurisdictional boundaries with respect to modern environmental legislation spurred by the actions of various levels of government increasingly motivated to regulate environmental issues.

Background

On May 10, 2022, the Alberta Court of Appeal (ABCA) issued its highly anticipated decision on the constitutionality of the federal *Impact Assessment Act* (the Act) and Physical Activities Regulations. The ABCA considered complex legislative and constitutional issues and ruled that the Act “would permanently alter the division of powers and forever place provincial governments in an economic chokehold controlled by the federal government.”

The majority of the ABCA began with the foundation that the “environment” is not a head of power that has been assigned to Parliament or the provinces under the *Constitution Act, 1867*, and therefore an environmental matter may have some

provincial and some federal aspects. The majority held that projects will only be subject to federal environmental oversight if they are connected in some way to a federal head of power.

The majority characterized the Act's pith and substance in light of its purpose and its legal and practical effects. The majority concluded that the main purpose of the legislation is to establish a federal impact assessment and regulatory regime that requires assessment, federal oversight and approval of all the effects of activities designated by the federal executive.

Characterized in this way, the majority concluded that the legislation fatally intruded into provincial jurisdiction and the province's proprietary rights as owners of their public lands and resources. In the opposite analysis, the majority concluded that the legislation did not fall under any federal head of power (including Peace, Order and Good Government).

Notwithstanding the majority of the ABCA's strong rebuke of Canada's position on the Act, the SCC will have the final say. The federal government filed a Notice of Appeal on June 8, 2022. Until then, and since the decision is a "reference" or "advisory opinion", it is expected that the Act will remain in force.

Québec

Chandler v. Volkswagen Aktiengesellschaft, 2022 QCCA 272

Key takeaways

- In a Québec class action, territorial jurisdiction arguments can be raised at the authorization stage, the merits stage, or both. Failing to raise them at the authorization stage is not an admission of the court's territorial jurisdiction or waiver to make the argument.
- It is possible to dismiss a class action at the merits stage for lack of territorial jurisdiction, even though such jurisdiction was found to be *prima facie* sufficient at the authorization stage.
- The Québec Court of Appeal (QCCA) clarified the factors to be taken into account when establishing the place of the economic loss suffered in the context of the loss of value of securities.

Background

Lawrence Chandler (Chandler) was authorized to bring a class action against Volkswagen AG on behalf of all Québec investors. The class action stemmed from loss of value of the securities they had purchased or held in Volkswagen AG in connection with the diesel engine emission scandal. Volkswagen AG publicly issued the securities in question outside of Québec, with the exception of the bonds, which were privately issued by Volkswagen Credit Canada Inc. (VCCI), a subsidiary of Volkswagen AG. VCCI was not a party to the action. The shares and American depository receipts were issued and traded on European and U.S. stock exchanges, respectively.

Chandler argued that Volkswagen AG chose to submit to the jurisdiction of Québec courts, primarily through actions taken at the authorization stage. The QCCA reaffirmed the distinction between the authorization stage and the merits stage of a class action. The QCCA clarified that a declinatory exception may be raised on the merits, even though it was not presented or was dismissed at the authorization stage, since the issue is not *res judicata*.

The QCCA found that none of the connecting factors were attributive to the jurisdiction of the Québec courts, as enumerated in Article 3148 C.C.Q.. The QCCA concluded that the source of the injury in this case was determined by where the contract to purchase the securities was formed, *i.e.*, in Europe and the U.S.

The fact that the investors instructed their Québec broker to purchase the securities is irrelevant to determining the place where the contract was formed. As for the bonds issued by VCCI, the QCCA confirmed the ruling of the first instance judge and agreed with her conclusion that no public distribution took place in Québec. The fact that there were a limited number of private placements within the province was not sufficient to give jurisdiction to the Québec courts, as this jurisdiction must be assessed globally for all members of the group. Lastly, the QCCA ruled that it did not have jurisdiction under section 236.1 of the *Securities Act*.

Spotlight on upcoming appeals across Canada

Working Families et al. v. Attorney General of Ontario (ONCA C70178/C70197/C70212)

On June 15 and 16, the ONCA heard *Working Families et al. v. Attorney General of Ontario*, an appeal that addresses the constitutionality of the Ontario government's amendments to the *Election Finance Act* on the grounds of democratic rights. The appeal particularly addresses the right to vote under section 3 of the *Charter*.

These amendments, which further restrict third party political advertising, were found to be contrary to the freedom of expression under section 2 of the *Charter*. They were then repassed through the Ontario legislature with the use of the notwithstanding clause in section 33 of the *Charter*. Courts across the country, including the ONCA and the SCC, have had few opportunities to rule on both section 3 and section 33, particularly in the context of legislation that has been found to infringe a *Charter* right. The ONCA reserved its decision.

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

On September 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 it did have the jurisdiction, the court 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 QCCA disagreed on the constitutionality of these provisions. This appeal to the SCC will

provide important guidance on how provinces and territories can regulate the possession of cannabis.

Glen Hansman v. Barry Neufeld (SCC 39796)

The week of October 10, 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 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)

The week of October 31, 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 Federal Court of Appeal 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 November 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.

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)

The week of December 5, the SCC will hear a reference on 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 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.

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

In the fall, the QCCA will hear *Hak c. Procureur général du Québec*, the highly anticipated appeal on the constitutionality of Bill 21, *Act respecting the laicity of the State* (the Secularism Act). Sections 6 and 8 of the 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. Similar to the significance of the upcoming appeal in *Working Families*, courts across the country have had few recent opportunities to opine on how section 33 applies to a legislation alleged to infringe a *Charter* right.

Reference re Impact Assessment Act (SCC 40195)

In a hearing yet to be scheduled, the SCC will hear a reference on the constitutionality of the *Impact Assessment Act* (the Act) and Physical Activities Regulations (the Regulations), federal instruments that provide for the assessment of the environmental (and other) impacts of projects carried out on federal lands. The majority of the five-judge panel of the ABCA found that the Act primarily targets fossil fuel projects and other intra-provincial projects, such as rail transit, flood control, and solar and wind farms.

As a result, the majority held that the Act is *ultra vires* the federal government because it would subject the provincial development of natural resources to federal legislation. One

panel member dissented, concluding that the Regulations target effects within the federal jurisdiction. The member called for the federal and provincial legislatures to work together under the double aspect doctrine. The SCC's decision will help delineate where the jurisdictional boundaries lie for government officials eager to regulate environmental issues across the country.

If you have further questions about any of the above cases, reach out to the key contacts listed below.

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