Appellate Fall 2023 preview: Significant cases to watch

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In this article, we highlight significant cases that the Supreme Court of Canada (SCC) and appellate courts across Canada will hear in the Fall of 2023, as well as a key reserve expected to be released this fall. The cases cover a broad array of issues, such as the privacy rights of teachers in the workplace; the rights of defendants in the military justice system to an independent and impartial tribunal; the jurisdictional boundaries between the Federal Court and the Tax Court; the availability of judicial review where there is a right of appeal; the Crown's obligations to augment an annuity payable under a treaty with First Nations; the right of a criminal accused to a trial in their preferred official language; the degree to which the open court principle permits a criminal trial to be conducted in secret; and causation and standards of care in complex, multi-tortfeasor medical malpractice cases.

SCC vacancy and appointment process

On June 12, 2023, Justice Russell Brown retired suddenly after eight years on Canada's highest court. The process for filling this SCC vacancy was commenced on June 20, 2023, when the Prime Minister invited applications from qualified candidates from Western and Northern Canada by July 21, 2023. On August 22, 2023, the Prime Minister announced the appointment of the members of the Independent Advisory Board tasked with considering the applications received and submitting a short list of candidates for the Prime Minister's consideration. For more information about the process for appointing a justice to the SCC, please see our article.

Justice Brown's retirement leaves open a void on the SCC bench in place since he took a leave of absence in February 2023 following a complaint to the Canadian Judicial Council. It remains to be seen whether the process of appointing his replacement will be completed in time to restore the SCC bench to a full complement of nine judges when the SCC resumes hearing cases for the fall session starting in October 2023.

Significant cases on the docket – SCC

The SCC has a busy upcoming docket, with a number of interesting civil and criminal cases scheduled to be heard this fall.

Franck Yvan Tayo Tompouba v. His Majesty the King (40332)

On October 11, the SCC will hear an appeal concerning the right to a trial in the accused's official language of choice. The accused had been charged with sexual assault and was not advised of his right to apply for a trial in French. The Court was obligated to inform him of that right under s. 530 (3) of the *Criminal Code*.

At trial, the British Columbia Supreme Court convicted the accused, explaining that he had given a completely different version of events to the police that was credible, reliable, and incriminating and that the Court was unable to then accept his trial evidence. The Court's decision was focused on the relative reliability of the accused's statements to the police and as a witness during trial.

The British Columbia Court of Appeal acknowledged that not advising the accused of his s. 530 (3) right was an error but applied the curative proviso to dismiss the appeal. It held the right under s. 530 (3) is procedural and not substantive, and that the fact that the accused was a native French speaker did not mean that this was his official language of choice for trial purposes. The assertion of language rights is a prerequisite to a s. 530 application.

The SCC will have to determine who bears the onus of demonstrating a s. 530(3) breach (and if the onus differs depending on the circumstances), and the appropriate remedy for a breach of s. 530(3), balancing it with the curative proviso.

Leading Seaman C.D. Edwards, et al. v. His Majesty the King (39820); *Sergeant S.R. Proulx, et al. v. His Majesty the King* (39822); *Corporal K.L. Christmas v. His Majesty the King* (40046); *Lieutenant (Navy) C.A.I. Brown v. His Majesty the Ki*ng (40065); *Sergeant A.J.R. Thibault v. His Majesty the King* (40103)

Appealed from: 2021 CMAC 2; 2021 CMAC 3; 2022 CMAC 1; 2022 CMAC 2; 2022 CMAC 3.

On October 16, the SCC will hear a group of five appeals concerning whether an accused's right to an independent and impartial tribunal in criminal matters, guaranteed by s. 11(d) of the *Charter*, is infringed by a military judge continuing to be a member of the Canadian Armed Forces (CAF). These appeals arise from a series of decisions by military judges Courts Martial, in each case granting stays of proceedings sought by the accused on the grounds that their *Charter* right to an independent and impartial tribunal was infringed because the military judges lacked institutional independence.

The Court Martial Appeal Court of Canada (CMAC) reversed the Court Martial decisions and concluded that there was no infringement of s. 11(d), reasoning that an informed person would not find a reasonable apprehension of bias or compromised independence where a military judge continues to be a CAF officer. The CMAC highlighted that the unique and dual role of the military justice system had been recognized by the SCC and held that the premise that one cannot be both a military judge and an officer is contrary to binding SCC precedent and would defy the rationale and purpose of the military justice system.

The appeals will require the SCC to consider whether military judges who continue to be members of the CAF create a reasonable apprehension of bias and whether civilianization of military judges constitutes a possible remedy.

York Region District School Board v. Elementary Teachers' Federation of Ontario (40360)

On October 18, the SCC will hear *York Region District School Board v. Elementary Teachers' Federation of Ontario*. This appeal will consider whether the *Charter* applies to school boards in a public school employment context and, if so, the scope of a teacher's right to a reasonable expectation of privacy under s. 8 of the *Charter*, which protects against unreasonable search and seizure. In the underlying dispute, two teachers were disciplined by the school board based on information they maintained in a private cloud-based log that was accessible to the school principal through a laptop computer owned by the school board.

The Ontario Divisional Court dismissed judicial review of an Arbitrator's decision upholding the disciplinary measures after finding that the teachers had a *diminished* reasonable expectation of privacy over the log and the search did not violate *Charter* rights. The Court of Appeal allowed the appeal and found there was a violation of the *Charter* right and that the Arbitrator erred in finding the teachers had a *diminished* expectation of privacy simply because they were accessing the log using the school's computer.

The SCC's decision could have significant implications for the workplace right to privacy of public sector employees and limits on the freedom of public sector employers to investigate workplace matters.

Attorney General of Ontario, et al. v. Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers and Roger Daybutch, on their own behalf and on behalf of all Members of the Ojibewa (Anishinaabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850, et al. (40024)

On November 7, the SCC will hear an appeal that will consider treaty interpretation and whether an augmentation clause in the 1850 Robinson Treaties entitles the Ojibewa (Anishinaabe) Nation to an increase in annuity payments, payable to the Anishnaabe in perpetuity in exchange for cessation of a vast territory of land in Northern Ontario.

The plaintiffs brought this action against Canada and Ontario on behalf of all members of the Anishinaabe claiming that there should be an increase to the annuity based on the proper interpretation of the treaty terms. The amount of the annuity paid to the Anishnaabe on a per-person basis had not been increased since the 1870s. The Ontario Superior Court (in two decisions delivered in 2018 and 2020) held that the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the Crown's net resource-based revenues from the treaty territories allow an increased payment without causing the Crown to suffer a loss. The Court of Appeal sat a five-judge panel to hear the appeal. The Court split on the issue of standard of review and whether the trial judge erred in her interpretation of the Treaties and determination of remedy. The panel unanimously held that the doctrine of the Honour of the Crown is applicable in this case, with the majority concluding that Honour requires the Crown to

increase the annuities, and the minority concluding the Honour requires, at a minimum, that the Crown consider from time to time increasing the annuities. Both courts rejected the Crown's defences of Crown immunity and provincial limitations legislation.

The SCC's decision will consider the standard of appellate review for treaty interpretation, and the degree to which the Crown's discretion in implementing the augmentation clause is fettered by the principle of the Honour of the Crown.

Dow Chemical Canada ULC v. His Majesty the King (40276)

On November 9, the SCC will hear an appeal concerning the jurisdiction of the Tax Court of Canada and the Federal Court when reviewing decisions and opinions of the Minister of National Revenue. The Court will decide which court can review the Minister of National Revenue's discretionary powers under s. 247(10) of the *Income Tax Act*.

In this case, the corporate taxpayer asked the Minister to exercise her discretionary power to adjust the value of a non-arm's length transaction, which would have reduced the taxpayer's assessment. The Minister declined. The taxpayer wished to challenge the Minister's decision, but it was unclear which court had jurisdiction, so a stated question was put to the Tax Court to determine the jurisdictional issue. The Tax Court found that the Federal Court was not the proper forum, as the Minister's decision was an essential component of the assessment and it could be reviewed by the Tax Court under its exclusive appellate jurisdiction to determine correctness of assessment.

The Federal Court of Appeal (FCA) found that this was outside the exclusive jurisdiction of the Tax Court. The relief that the taxpayer sought required downward adjustment, which could only be ordered in Federal Court, and reassessment of taxes, which could only be ordered in Tax Court. The FCA found that the Tax Court has no inherent jurisdiction to quash the Minister's opinion. Additionally, remedies available under s. 171(1) of the *Income Tax Act* did not include the ability to vary or quash the Minister's opinion. Instead, the Federal Court had the power to judicially review the Minister's opinion and quash it.

The SCC's decision will help clarify jurisdictional boundaries in tax litigation to ensure that taxpayers understand which court has jurisdiction prior to commencing proceedings.

Ummugulsum Yatar v. TD Insurance Meloche Monnex, et al. (40348)

On November 15, the SCC will hear an appeal about the extent to which legislatures can limit judicial review and the interplay between statutory rights of appeal and the availability of judicial review.

The case involves a parallel appeal and application for judicial review from a decision of the Licensing Appeal Tribunal that a claim for insurance benefits arising from a motor vehicle accident had been brought outside the limitation period. The Divisional Court dismissed the appeal because an appeal was available only on questions of law, but no question of law was raised. On the application for judicial review, the Court held that judicial review would only be available where there is a statutory right of appeal in "exceptional circumstances". The statutory right of appeal in this case was held to be an adequate alternative remedy.

The Ontario Court of Appeal upheld the Divisional Court's decision in finding that the existence of an adequate alternative remedy was a valid reason not to hear and determine a judicial review application, but noted that the court's framing of the test in terms of "exceptional circumstances" was not properly articulated and could give rise to confusion. Additionally, the Court of Appeal stated that judicial review remains a discretionary remedy and outlined a process for how parties should consider judicial review where there is also a statutory right of appeal.

The SCC will have the opportunity to weigh in on a point of inconsistency among appellate decisions: the extent to which legislatures can limit judicial review (*i.e.*, the sorts of questions that can be restricted), and the interplay between statutory rights of appeal and the availability of judicial review.

Attorney General of Canada v. Joseph Power (40241)

On December 7, the SCC will hear an appeal concerning whether the Crown is absolutely immune from *Charter* damages arising from a civil suit relating to the enactment of legislation later declared unconstitutional. The SCC will reconsider *Mackin*, its 2002 decision that established limited Crown immunity for these damages. The *Mackin* threshold is an onerous one and requires a plaintiff to prove that state conduct is clearly wrong, in bad faith, or an abuse of power.

In this case, the respondent lost his job and became ineligible for membership with the medical radiation technologist governing bodies of New Brunswick and Québec as a result of his criminal record. He brought an action for damages pursuant to s. 24(1) of the *Charter* based on his inability to apply for a pardon/record suspension because of legislation limiting pardons, the retroactive application of which was later declared unconstitutional. The Attorney General brought an application prior to trial seeking determinations of law as to whether the Crown could be held liable for preparing and enacting legislation later declared unconstitutional.

The application judge found that the Crown could be held liable for legislation which is later declared unconstitutional. The Court rejected the Crown's argument that there had been a trend in the case law towards absolute immunity from claims for *Charter* damages. The Court of Appeal of New Brunswick agreed that Crown immunity from these damages is not absolute and that this is not an improper judicial impingement into the duties and responsibilities of the legislative branch. The Court commented that it was bound to apply *Mackin* unless the SCC overrules or limits its application. The Attorney General's appeal was dismissed.

The SCC will therefore have the opportunity to either affirm the continuing viability of its previous decision or to redraw the scope of Crown immunity in light of arguments surrounding the separation of powers and the role of the legislative branch.

Canadian Broadcasting Corporation, et al. v. His Majesty the King, et al. (40371)

On December 12, the SCC will hear an appeal concerning balancing the open court principle as protected by s. 2(b) of the *Charter* with the absolute right of informer's privilege. The key issue in this case is whether a trial court can conduct proceedings

entirely *in camera* without creating a court record or even a court file. The SCC will also consider a framework to be applied in determining which information will be considered to have revealed the identity of an informer. Further, the Court will decide whether a third party will be informed and afforded a hearing involving punishable conduct in consideration of protecting informer identity.

In the underlying secret trial, a police informer was convicted of offences based on information provided to the police as an informer. The Québec Court of Appeal overturned the informer's conviction and stayed the criminal proceedings against the informer on the grounds that they were an abuse of process. The trial judgment had not been made public, the proceedings had been held entirely *in camera*, and the appeal file was sealed. The Court of Appeal redacted its judgment overturning the conviction and held that this case was an exception to the open court principle as it involved informer privilege, which is an absolute or quasi-absolute privilege. The Court of Appeal then dismissed motions brought by several applicants to have the confidentiality orders concerning the appeal record and trial judgment lifted. The Court of Appeal also dismissed the Attorney General of Québec's motion to vary the sealing order applicable to the appeal record.

This case will have substantial implications for the future of the open-court principle and the informer privilege. In particular, the Supreme Court will be called to determine how far it is willing to go to protect both of these fundamental legal principles, which could impact the way criminal investigations are conducted.

Significant cases on the docket – Provincial Appellate Courts

Look for the following cases scheduled to be heard by the Courts of Appeal of Ontario and Québec this fall.

Hemmings, et al. v. Peng, et al. **(ONCA) (Court File No. C70752)**

On October 4, the Court of Appeal for Ontario will hear an appeal from a complex medical malpractice case concerning a patient who suffered an anoxic brain injury following cardiac arrest while undergoing a caesarean section. The key issues on appeal are the standards of care applicable to the various medical professionals involved, as well as causation in a complex, multi-tortfeasor medical malpractice case.

The patient was initially treated by an obstetrician from whom she sought contraception, not knowing she was already pregnant, shortly after beginning a sexual relationship. The Superior Court of Justice found that the plaintiff's initial treating obstetrician breached his standard of care by failing to order a timely pregnancy test plaintiff, by failing to document multiple risk factors and a management plan related to the pregnancy, and by failing to raise the termination of the pregnancy with the plaintiff and to determine her wishes. The Court also found that the obstetrician who delivered the plaintiff's child by caesarean section and the anesthetist assisting with the caesarean section breached their standards in the care they provided to her that day, and a nurse (and vicariously, the hospital) breached their standard of care by failing to review the plaintiff's antenatal records when the plaintiff called the hospital almost two weeks prior to her delivery. On causation, the Court found that the negligence of the initial treating

physician, the anesthetist, and the hospital (but not the delivery obstetrician) was causally related to the plaintiffs' cardiac arrest and brain injury and apportioned liability equally among these three defendants.

Ilgun c. R. (QCCA) (Court File No. 200-10-004052-234)

On October 23, the Court of Appeal of Québec will hear an appeal from a decision of the Superior Court dismissing an application for a stay of proceedings as well as the writ of prohibition and auxiliary certiorari. The appeal concerns the decision of the Court of Québec to stop traveling to Quaqtaq, one of the northernmost inhabited places in the Province of Québec, as part of its itinerary court program. The accused's criminal trial was supposed to be held in Quaqtaq, however after the decision of the Court of Québec to cancel its trips to Quaqtaq, the judge ordered the appellant to travel to Kuujjuaq for his trial the following day. The trial commenced, but then the Court of Appeal granted a stay of proceedings pending the hearing of the appeal. Among other things, the appeal invokes the rights protected by the James Bay and Northern Québec Agreement – the first modern comprehensive land claim agreement signed in 1975 between the governments of Canada and Québec and Cree and Inuit representatives.

Samsung Electronics Canada c. Arial (QCCA) (Court File Nos. 500-09-030262-224; 500-09-030263-222)

Also on October 23, the Court of Appeal of Québec will hear two appeals by Samsung and Apple of a Superior Court decision authorizing a class action against both of them but limited the proceeding to a claim for punitive damages. The Court of Appeal granted leave to appeal that decision in December 2022. (The plaintiffs have also filed an incidental appeal of the refusal to authorize other claims.)

The appeal is from a decision of the Québec Superior Court to grant in part a motion for authorization to institute a class action against Samsung and Apple. The proposed class action alleged that Apple and Samsung mobile phones do not meet the minimum requirements for radiofrequency emissions (which they also alleged should be more stringent) and constitute a health risk that is hidden from consumers. While the Superior Court refused to authorize a claim for compensatory damages on the basis that the plaintiffs had not alleged any injury or prejudice, it authorized the class action based solely on the plaintiffs' claim for punitive damages. Samsung and Apple obtained leave to appeal the authorization decision, arguing that this is the first class action authorized where class members are not alleged to have suffered any harm and for which the only basis for recovery is punitive damages, which the defendants argued was purely speculative. The appeal by the defendants will therefore consider the issue of whether a consumer class action can be authorized in Québec in respect of only punitive damages where no misconduct that would support punitive damages has been alleged.

Significant case under reserve – Court of Appeal of Québec

The following notable decision is one to watch for that is likely to be released this fall by the Court of Appeal of Québec.

Hak c. Procureur general du Québec (QCCA) (Court File No. 500-09-029546-215)

In November 2022, the Court of Appeal of Québec heard the 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 a breach of sections 2 or 7 to 15 of the *Charter* (including freedom of religion and freedom of expression).

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. The Court of Appeal's much-anticipated decision is likely to be released this fall.

For more information on upcoming appellate cases, please reach out to one of the key contacts listed below.

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By

Nadia Effendi, Pierre N. Gemson, Laura M. Wagner, Nadine Tawdy

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749