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Examinations

An Appellate Review and Forecast for 2020

Pivotal decisions with sweeping repercussions for business and individuals. Provincial appeal decisions with impacts felt by ordinary Ontarians. Long-awaited immigration decisions that set a new test for administrative review. 2019 was an interesting year for appellate decisions in Ontario and Canada more broadly, with the second half of the year, in particular, seeing numerous important Supreme Court of Canada ("SCC") decisions. While the Administrative Law Trilogy were arguably the most eagerly anticipated decisions of the year, the SCC also weighed in on class actions, limitation periods, "plain and obvious" and discoverability in *Pioneer Corp. v. Godfrey*; Crown copyright in *Keatley Surveying Ltd. v. Teranet Inc.*; liability for unlawful arrest and the right to refuse to comply in *Kosoian v. Société de transport de Montréal*; and so many more.

The SCC heard and reserved on a number of cases last year, the decisions for which will be released in 2020. Class action lawyers from across the country no doubt eagerly await the decision in the Mr. Sub franchisee and Maple Leaf Foods class action appeal, which could have significant implications for tort law and the duty of care. The decisions in Platnick and Pointes Protection Association will be the first time the Court considers the anti-SLAPP legislation.

The slate of SCC cases to be heard (and we hope decided) in 2020 will similarly promise to develop Canadian jurisprudence in a number of areas while having real practical effect for litigants, individuals and businesses. Some of the most anticipated will be *Uber Technologies Inc. v. Heller* on arbitration clauses, anti-deprivation rules in *Chandos Construction Ltd. v. Capital Steel Inc.*, the duty of honest performance in *C.M. Callow Inc. v. Zollinger*, and the media challenge of sealing orders in *Estate of Bernard Sherman v. Donovan*.

In an effort to reflect on SCC decisions of the past year, and contemplate what lies in store from an appellate law perspective, the Lerners Appellate Advocacy Group presents **Examinations**, our annual review and forecast on the state of appellate law. This year, we've considered some of the most impactful decisions of 2019 and those we expect to play a significant role in shaping the law moving forward.

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Looking back on 2019

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65

In this landmark decision, the SCC significantly altered the existing framework for determining the standard of review. Departing from existing jurisprudence, the seven-justice majority firmly establishes the presumption of reasonableness as the standard, emphasising the need to respect legislative intent and avoid interference with administrative decision makers. This new starting point requires reviewing courts to presume the standard of reasonableness applies, which may only be rebutted in two situations: (1) where clear legislative intent can be found, or (2) where the rule of law requires the standard of correctness be applied.

A legislature may prescribe the appropriate standard through statute or may provide for a statutory appeal mechanism. Where a statutory appeal mechanism is provided, the applicable standard is to be determined with reference to the nature of the question and in conjunction with the established appellate standards of review. Correctness review must be applied where required by the rule of law, particularly for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies. The Court left open the possibility that another category for correctness review could be recognized in very exceptional cases.

Emphasising a "culture of justification", the Court also made clear that in reviewing an administrative decision, the focus must be on the decision *actually* made and the justifications provided by the decision maker. The reviewing court must only consider whether the decision made was unreasonable. If a decision does not have internal coherence and a rational chain of analysis that relies on the constraining facts and law, it will be deemed unreasonable. In conducting this analysis, a reviewing court must account for the history and context of the proceeding and may consider whether the administrative decision maker appropriately justified their interpretation of a statute or properly relied on the evidence at issue, the submissions of the parties, the practices and decisions of the administrative body, or the potential impact of the decision on the individual subject to it.

Frank v. Canada (AG), 2019 SCC 1

In *Frank*, the SCC examined the voting rights of non-resident Canadian citizens who have lived abroad for more than five years. The Attorney General of Canada ("AGC") conceded that the limit on voting rights of non-residents found in the *Canada Elections Act* breached s. 3 of the *Charter*, leaving the central issue being whether the breach could be justified under s. 1 of the *Charter*. The Court found that the breach could not be justified and the relevant sections of the Act to be of no force or effect.

This case represents a shift in the jurisprudence on the voting rights of Canadians living abroad. Emphasising the centrality of voting to Canada's democracy, Wagner C.J., writing for the majority, held that the voting rights afforded to all Canadian citizens under s. 3 of the Charter is not essentially bound to residence. Taking a broad and purposive approach to s. 3, he finds that residence does not operate as an internal limit on the right to vote, but instead is a countervailing consideration which must be justified. Wagner C.J. supported this position through examining the historical context of the electoral system in Canada,

noting that while the right to vote was once tied to land ownership and gender, this right has since developed to be inclusive of all citizens and should include those abroad who often maintain strong socio-cultural and economic connections to Canada. While maintaining the integrity and fairness of the electoral system is a sufficiently important objective to ground the s. 1 analysis, the justification for the legislation failed at the minimal impairment stage of the *Oakes* test.

TELUS Communications Inc. v. Wellman, 2019 SCC 19

This case is another in a series of cases that deal with the application of arbitration clauses, here in the context of class proceedings. At issue in TELUS was the validity of an arbitration clause found in mobile phone service contracts between TELUS and consumers and non-consumers, the latter being business customers. TELUS brought a motion for a partial stay for all non-consumer class members under s. 7(1) of the *Arbitration Act* (the "Act"), arguing that the business customers should be bound by the arbitration clause in their agreements. The SCC found that while consumers were protected from the arbitration clause by virtue of the *Consumer Protection Act* and could proceed with their claims, non-consumers were not protected and their claims were stayed.

Applying the modern approach to statutory interpretation, Moldaver J., writing for a five-justice majority, determined that the purpose and scheme of the Act continues to be premised on the concept of party autonomy and the principle of limited court intervention. While consumers enjoy the protections of the *Consumer Protection Act*, non-consumers do not enjoy the same protections and can no longer piggy-back onto consumer claims. A single matter – alleged overbilling – is explicitly dealt with in their arbitration agreements with TELUS. Therefore, their claim is stayed pursuant to s. 7(1) of the *Arbitration Act*. The dissent would have allowed the non-consumers to access the class proceedings on the basis that to do so would avoid duplicative proceedings, increased costs, and the risk of inconsistent results.

Pioneer Corp. v. Godfrey, 2019 SCC 42

In *Godfrey*, the SCC again discussed the discoverability principle, now in the context of its implication for the limitation period established under s. 36(4) of the *Competition Act*. As limitation periods continue to be the subject of considerable jurisprudence (at the provincial appellate level and otherwise), it is hopeful that this will finally provide whatever guidance was needed.

Writing for an eight-justice majority, Brown J. sought to clarify the general rule of discoverability: the "discoverability rule will apply when the requisite limitation statue indicates that time starts to run from when the cause of action arose (or other wording to that effect)."[1] Conversely, discoverability will not apply "where the triggering event does not depend on the plaintiff's knowledge or is independent of the accrual of the cause of action." An examination of the statutory text must be done to assess what triggers the running of the limitation period in question, within the context of the statutory scheme and the legislature's intention in enacting it. Applying it to this case, the statutory limitation period contained within s. 36(4) of the *Competition Act* is triggered by an element of the underlying cause of action.[2] Accordingly, it is subject to discoverability.

1 *Pioneer Corp. v. Godfrey, 2019 SCC 42 at para 37.*

2 *Ibid at para 41.*

Looking Forward to 2020

1688782 Ontario Inc. v. Maple Leaf Foods Inc., et al. ("Mr. Sub")

Mr. Sub was heard by the SCC on October 15, 2019 and the decision is under reserve. Lerners LLP acts for the franchisees.

This case stems from a listeria outbreak that contaminated Maple Leaf brand meats in 2008. At this time, Maple Leaf supplied these meats to the franchisees of Mr. Submarine Ltd. ("Mr. Sub"). Due to the outbreak, Maple Leaf temporarily closed their production plant, which affected the supply of meats to Mr. Sub. Following this interruption, franchisees of Mr. Sub proceeded with a class action against Maple Leaf for damages in negligence, claiming that Maple Leaf (a) negligently manufactured and supplied potentially contaminated meat; and (b) negligently represented that the supplied meats were fit for human consumption, resulting in economic loss to the franchisees. After the action was certified, Maple Leaf brought a summary judgment motion seeking dismissal on the basis that Maple Leaf owed no duty of care to the class. While the motion judge found that Maple Leaf owed a duty of care to the franchisees, the Court of Appeal overturned the decision, concluding that any economic loss was not reasonably foreseeable.

The SCC heard arguments on whether a manufacturer of food products can be found liable to franchisees for reasonably foreseeable economic losses that have arisen out of the negligent supply of dangerous products by the manufacturer to those franchisees. The decision should provide further guidance and clarity on the issues of economic loss and reputational harm, and whether manufacturers have limited liability for harm caused through the supply of contaminated products to the marketplace.

Uber Technologies Inc., et al. v. David Heller

Heller v. Uber was heard by the SCC on November 6, 2019 and the decision is under reserve. Like *TELUS*, it is another opportunity for the SCC to consider the limits of applicability of arbitration agreements.

In this proposed class action, the plaintiff Uber driver seeks a declaration that Uber drivers in Ontario are employees of Uber governed by the *Employment Standards Act* (the "ESA") and that the arbitration provisions within the service agreement between the parties are void and unenforceable under the ESA. The arbitration clause in the service agreement requires all disputes to be dealt with through mediation and arbitration, with the law of the Netherlands governing. Uber brought a motion to stay the action in favour of arbitration which was granted at first instance. The Court of Appeal set aside the decision to stay the action on the basis that the arbitration clause amounts to an illegal contracting out of the ESA, and is unconscionable at common law, emphasising the inequality of bargaining power between the parties.

While the SCC will need to address whether the arbitration clause in this particular service agreement is valid and enforceable, the decision will likely have significant implications for all businesses that use contracts of adhesion or are otherwise in a position of superior bargaining power.

Attorney General of Ontario v. Attorney General of Canada ("Greenhouse Gas Reference")

Following losses in the Ontario and Saskatchewan Courts of Appeal, the provincial governments have appealed to the SCC. The *Greenhouse Gas References* ("GG References") will determine the constitutionality of the *Greenhouse Gas Pollution Pricing Act* (the "Act") which implements the federal carbon pollution pricing system.

In finding the Act constitutional, the Ontario Court of Appeal characterized the purpose of the Act as to establish minimum national standards to reduce greenhouse gas emissions, by including a minimum national standard of stringency for the pricing of emissions. Applying the first part of the test from *Crown Zellerbach*, the Court of Appeal then found that the Act's purpose is singular, distinctive, and indivisible from matters of provincial concern. The minimum national standards established by the Act ensure that the purpose of reducing emissions cannot be undermined by the inaction of one province.

Applying the second part of the *Crown Zellerbach* test, the Court of Appeal found that the scale of impact of the Act is reconcilable with the distribution of federal and provincial powers under the Constitution. The Act does not entrench upon provincial powers; the environment is an area of shared constitutional responsibility. The Act is constitutionally valid under the national concern branch of the POGG power contained in s. 91 of the Constitution.

It remains to be seen if the SCC will agree with the lower court's interpretations of the national concern doctrine and applications of the *Crown Zellerbach* test.[3] The doctrine has been largely untested and if accepted could be interpreted as an expansion of the federal government's POGG powers.[4]

About Lerners' Appellate Advocacy Group

At Lerners, we know that the Canadian appellate landscape is ever-changing. We are passionate about the unique nature of appeals and our lawyers have the battle-tested specialized knowledge and experience with the appeal process and appellate courts that delivers results.

We represent a broad range of clients and have argued a wide variety of appeals in insurance law, family law, tort law, class actions, commercial law and municipal law as well as questions of constitutionality. We regularly appear before the Ontario Court of Appeal and the Supreme Court of Canada and have been involved in some of the most important appeals in judicial history.

For more information, visit our website, and follow us on twitter @LernersAppeals every #LernersAppealWednesday to stay abreast of the latest developments in Canadian appellate law.

3 Natasha Novac, *"Appeal Watch: Fate of Federal Greenhouse Gas Legislation is Up in the Air" (TheCourt.ca: July 2019), website: http://www.thecourt.ca/appeal-watch-fate-of-federal-greenhouse-gas-legislation-up-in-the-air/.*

4 *Ibid.*