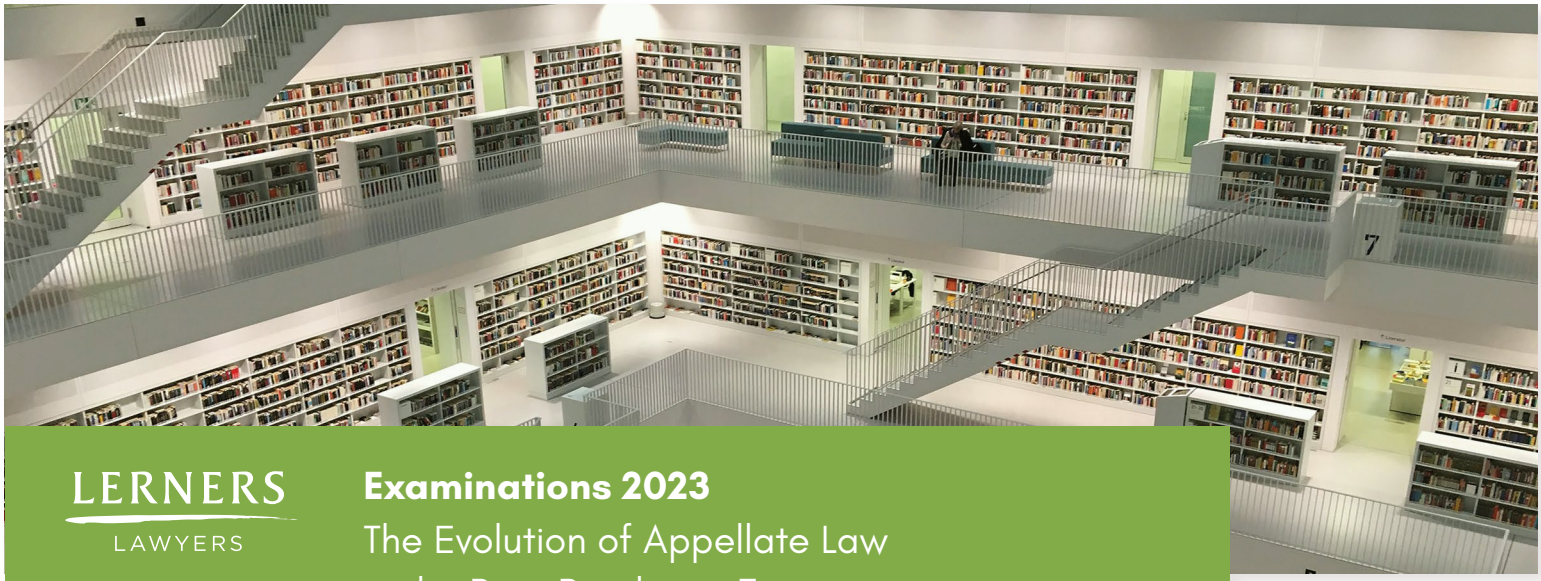

LERNERS
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# Examinations 2023

## The Evolution of Appellate Law in the Post-Pandemic Era

There's no denying that the COVID-19 pandemic has had an unmistakable impact on Canada's legal system. Over the last three years, the courts were faced with closures and forced to continually adapt to a situation that frankly, nobody saw coming.

You may remember last year's edition of examinations, where the topics of virtual hearings and remote legal practice were discussed along with the questions of their impact on access to justice, whether they would remain, and if so, to what extent. As we emerge from the pandemic, many of the practice directions laid out over the last few years remain, along with the efficiencies gained from the evolution of older rules.

Over the last year, a number of important decisions were made. Members of the Lerners Appellate Advocacy Group appeared before the Supreme Court of Canada on two occasions, and we saw the Honourable Michelle O'Bonsawin become the first Indigenous judge to sit on the Supreme Court of Canada Bench. Our partner Peter Kryworuk, as president of the Advocates' Society, was among those welcoming her to the bench at her swearing in.

It is with this that the Lerners Appellate Advocacy Group presents the fourth edition of Examinations, an annual review of noteworthy decisions and developments and a forecast of what's to come for the state of appellate law in the post-pandemic era.


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## CASES OF INTEREST

### Reconciliation Matters: The SCC's Decision on Advanced Costs in Anderson

In *Anderson v Alberta (Attorney General)*, 2022 SCC 6, the Supreme Court of Canada (SCC) held that advanced costs may be available to a First Nation even where that Nation has funds to pay litigation fees. A First Nation seeking a remedy related to treaty rights need not be on the verge of insolvency to qualify for advanced costs. Notably, the SCC took the position that advancing costs determinations involving Indigenous peoples should include consideration of the process of reconciliation and the purpose of Aboriginal rights protections embedded in s. 35 of the *Constitution Act, 1982* (Schedule B to the Canada Act 1982 (UK), 1982, c 11; *Anderson*, paras 25-27).

In Anderson, the SCC applied the test for advanced costs articulated in the SCC's decision in *Little Sisters Book and Art Emporium v Canada*, 2007 SCC 2. This test requires that the applicant: (i) demonstrate impecuniosity, (ii) present a prima facie meritorious case, and (iii) raise an issue of public importance (*Little Sisters*, para 37; see also *Anderson*, para 11).

In the action underlying the SCC's decision in Anderson, Beaver Lake Cree Nation ("Beaver Lake") claims against the Crown for infringement of its treaty rights and damages flowing from the Crown's decision to allow industrialization and natural resource development in the area. Under Treaty 6, Beaver Lake was promised that its people would be able to continue their way of life in their traditional territory.

In advancing this claim, Beaver Lake sought advanced costs to litigate the 120-day trial set for 2024 and estimated to cost $5,000,000. At the Court of King's Bench of Alberta, the case management judge held that even though Beaver Lake had approximately $3,000,000 in available funds, it could still satisfy the impecuniosity requirement of the test "given the impoverished state of the community and the other needs it was required to meet" (para 6). On appeal, this decision was reversed. The Court of Appeal of Alberta found there was insufficient evidence to support an advanced costs award.

In 2022, the SCC split the difference. Although the matter was ultimately referred back to the Court of King's Bench of Alberta, the SCC held that Beaver Lake could demonstrate impecuniosity where its resources are being directed toward addressing essential issues in its community.

From a practical point of view, this decision is very positive for First Nations. The SCC has opened the possibility of First Nations litigating crucially important treaty relationships and constitutional questions without allocating substantial portions of the community's revenues to litigation.

"Beaver Lake could demonstrate impecuniosity where its resources are being directed toward addressing essential issues in its community."

## An Education in Expropriation: Expanding the Constructive Expropriation Test in *Annapolis Group Inc. v Halifax Regional Municipality*, 2022 SCC 36

Released in late 2022, the SCC clarified the application of the two-part test establishing constructive expropriation.

Annapolis acquired land in Halifax and planned to develop it into residential communities. Halifax zoned these lands via municipal policy, which allowed residential development on these lands upon further policy resolution by the city. Annapolis repeatedly applied to permit residential development on the land, but the city refused its applications. Annapolis then sued Halifax for constructive expropriation (also known as constructive taking) in the Nova Scotia Supreme Court.

Halifax sought to have the action dismissed on summary judgment, but was unsuccessful.

The Nova Scotia Court of Appeal unanimously overturned the lower court's decision and granted partial summary judgment, dismissing the claim for constructive expropriation. This outcome was based on a finding that mere restriction of the land, in the absence of Halifax physically acquiring the land, would not satisfy the two-part test for constructive expropriation set out by the SCC in *Canadian Pacific Railway Co. v Vancouver (City)*, 2006 SCC 5.

The SCC reversed the dismissal of the claim and ordered that the issue proceed to trial. In doing so, the Court affirmed the test laid out in Canadian Pacific Railway, confirming that constructive expropriation requires (1) acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property.

The SCC clarified that "acquiring beneficial interest" does not necessarily need to include acquiring the land itself. The analysis should focus on the effect of the regulatory measure, not whether the government acquired a proprietary interest. The Court further clarified that government intention is a relevant consideration in the second prong of the test: while intention alone is neither necessary nor sufficient, government objectives may constitute a material fact in context.

> "The analysis should focus on the effect of the regulatory measure"

The majority's approach appears to expand the constructive expropriation test to include more situations where regulatory measures constrain land use absent the physical taking of land. In a pointed dissent, the minority criticizes this potential expansion. In their view, the majority unnecessarily raised the issue of whether the SCC should depart from precedent and alter the existing test, where lower courts have applied the test without difficulty and without concern.

Prior to this decision, a "refusal to up-zone" (i.e. a refusal to expand the permissible uses of land) was not considered to be "constructive taking". Practitioners should keep an eye out for future applications of this clarified constructive expropriation test, and consider whether it might engage other changes to existing understandings of constructive expropriation.

## A Win for Access to Justice: *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27

In a June 2022, the SCC released its decision in *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 and re-affirmed the test for public interest standing.

By way of background, the Council of Canadians with Disabilities (the "CCD") and two individual plaintiffs sought to challenge the constitutional validity of British Columbia's mental health legislation, which allowed doctors to administer psychiatric treatment to patients with mental disabilities without consent. After the claim was commenced, the two plaintiffs filed notices of discontinuance, leaving the CCD as the only remaining plaintiff. The Attorney General brought a summary trial application seeking to dismiss the claim on the basis that the CCD lacked public interest standing.

The chambers judge relied on the three factors set out in *Borowski v Canada*, a 1989 SCC decision, in determining whether the CCD had public interest standing:

1. Whether the case raises a serious justiciable issue;
2. Whether the party bringing the action has a real stake or 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 on the basis that the CCD lacked "a particular factual context of an individual case," which was necessary to particularize the claim and permit the relief sought. The chambers judge also was not satisfied that there would be "a sufficiently concrete and well-developed factual setting" upon which the constitutional questions could be decided.

The Court of Appeal for British Columbia ("BCCA") reversed the chambers judge's decision, finding that the CCD's claim raised a serious justiciable 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 manner." The BCCA further noted that the chambers judge did not apply the public interest standing test in a flexible, purposive and pragmatic manner, as mandated by the SCC in *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.

On further appeal, the SCC upheld the BCCA's decision and confirmed that it was appropriate to grant public interest standing, finding that the CCD met all three Borowski factors.

In coming to this conclusion, the Court specifically considered how the third Borowski factor could be met in circumstances where a litigant seeks public standing interest with no directly affected plaintiff. Wagner C.J., writing for the Court, clarified that public interest litigation may proceed without the participation of a directly affected plaintiff as long as a concrete and well-developed factual setting can be established. Public interest litigants may be able to rely on affected non-plaintiff witnesses or experts to establish such a setting, instead of having a directly affected plaintiff.

The SCC reiterated that the decision to grant or deny public interest standing is discretionary and that each Borowski factor must be appropriately considered, with no one factor taking priority over the others. Courts will take a factual, contextual approach that considers the stage of litigation, the nature of the case and the issues before the court.

The outcome of this appeal is significant, as it aims to remove significant barriers to access to justice and discourages courts from using "the blunt instrument of a denial of standing." To deny the CCD, and other interested parties, from partaking in important proceedings without directly affected plaintiffs would have a profound effect on access to justice. This decision supports meaningful access to justice for vulnerable groups affected by legislation with questionable constitutional validity.

## NOTEWORTHY APPOINTMENTS IN 2022

On September 1, 2022, the Honourable Michelle O'Bonsawin became the first Indigenous judge to sit on the SCC bench, marking an important milestone in Canadian history.

Prior to her appointment to the SCC, Justice O'Bonsawin was the first Indigenous woman to be appointed to serve as a judge at the Ontario Superior Court of Justice in Ottawa in 2017. She has expertise in the application of Gladue principles to mental health law, and in labour, employment, human rights and privacy law.

Justice O'Bonsawin brings unique expertise to her new appointment as a working-class woman, Indigenous advocate, and practitioner in mental health law. These are competencies which place her ideally to add diversity of identity, experience and intellectual orientation to Supreme Court jurisprudence and the development of the common law.

Also in 2022 came another judicial appointment worthy of celebration: the appointment of Justice Michael H. Tulloch as Chief Justice of the Court of Appeal for Ontario. Justice Tulloch was the first Black person to be appointed to the Court of Appeal for Ontario, and is now the first Black Chief Justice of Ontario — an important milestone for representation at our province's highest court.

Aside from his own role as a racialized member of the judiciary, Chief Justice Tulloch has worked to reduce race-based discrimination and increase equity and diversity among lawyers in real and substantive ways. Among other noteworthy contributions, Chief Justice Tulloch was the chair of Osgoode Hall Law School's review of its admissions policy in 2006, which ultimately resulted in the adoption of a holistic admissions policy aimed at creating a law student class representative of the diverse population future lawyers will serve. Additionally, Chief Justice Tulloch's work in restructuring police oversight brought about significant reform which positively shaped the criminal justice system in Ontario.

## THE PRIVACY TRILOGY: TRACING THE BOUNDARIES OF INTRUSION UPON SECLUSION

In 2022, the Court of Appeal for Ontario ruled on a trio of appeal cases that changed the landscape of privacy law, providing much-needed clarity on the relatively new tort of "Intrusion upon seclusion."

*Owsianik v Equifax Canada Co.*, 2021 ONSC 4112 *("Owsianik")*, Obodo v Trans Union of Canada Inc., 2022 ONCA 814 *("Obodo")*, and *Winder v Marriott International, Inc.*, 2022 ONCA 815 ("*Winder*") were proposed class actions arising from large-scale data breaches where third party hackers gained unlawful access to personal information collected and stored by the defendant companies. At the certification stage, the representative plaintiffs argued that the defendants were reckless in their collection and storage of private information, and that the intrusion would be considered highly offensive by a reasonable person. The main issue in the appeals was whether the defendants could be held liable for intrusion upon seclusion where third party hackers, as opposed to the defendants themselves, invaded the class members' privacy interests.

The Court of Appeal for Ontario confirmed that the tort of intrusion upon seclusion did not apply to the facts of these cases, as the defendants themselves did not intrude on or invade the plaintiffs' privacy. Rather, the alleged intrusions were committed by unknown third-party hackers, and there was no legal basis on which their conduct could be attributed to the defendants.

In coming to this conclusion, the court, in *Owsianik* (and applying its reasoning to *Obodo* and *Winder*), simplified the tort of intrusion upon seclusion, affirming that defendants who store personal information of individuals cannot be held liable in circumstances where that personal information is illegally accessed or stolen by a third party.

The tort of intrusion upon seclusion was first recognized in the Court of Appeal for Ontario's decision in *Jones v Tsige*, 2012 ONCA 32. The three elements of the tort were set out as follows:

1. The defendant invaded or intruded the persons private affairs or concerns without lawful excuse;
2. The defendant's conduct was intentional and/or reckless; and
3. A reasonable person would find the invasion highly offensive, causing distress, humiliation or anguish.

Applying these elements in *Owsianik*, the court found that the appellants had not pleaded a legally viable cause of action. There were no facts establishing intentional conduct by the defendants. Further, the defendants' conduct did not amount to an invasion or intrusion of the appellants' privacy interests. While the defendants may have been negligent or reckless in storing the personal information, they could not be held liable because they did not invade the appellants' privacy interests themselves. To suggest otherwise would broaden the scope of the tort beyond its intended purpose and create a new basis for imposing liability for intentional torts.

The court in *Owsianik* further stressed the importance of judicial efficiency and disposing of unmeritorious claims at an early stage; in this case, at the certification stage. This falls within the jurisdiction of the court in finding that a proceeding will be denied if it is plain and obvious that it will not succeed. Courts will not artificially delay the determination of a legal issue if it can be addressed and settled at the certification stage.

The key takeaway from the court's decisions is that companies who fall victim to a third-party cyberattack will not be held liable for the tort of intrusion upon seclusion, even if they were negligent or reckless in failing to secure or safeguard the information, absent a clear legal basis for attributing the intrusive conduct to them. Claims for intrusion upon seclusion generally should be limited to cases against the direct intruder, and where there is a deliberate invasion of privacy. However, negligence and breach of contract claims may still be pursued in response to cyberattacks.

"Companies who fall victim to a third-party cyberattack will not be held liable for the tort of intrusion upon seclusion"

In recognizing the tort of intrusion upon seclusion, the court in *Jones* made it clear that it did not intend to open the floodgates to claims that were not significant invasions of privacy. The recent appellate decisions in *Owsianik*, *Obodo*, and *Winder* demonstrate that the court is taking this approach seriously.

This trilogy of cases provides important clarity on the scope of intrusion upon seclusion and reaffirms the court's crucial role in screening out unviable claims at the certification stage. This is reassuring for defendants who may utilize preliminary motions to dispose of unmeritorious claims at early stages.

## UPDATE ON *VAVILOV*

### *Vavilov*-olution?

Administrative law practitioners had high hopes that the SCC's 2019 decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65 *[Vavilov]* would render the ever-shifting reasonableness standard clear in meaning and predictable in application. The decision considered the meaning of "reasonableness" and provided direction on how and when Courts should be applying the standard of review.

The framework seemed simple enough. As a starting point, reasonableness — a deferential standard of review — is presumed to apply. This is, however, a presumption that can be rebutted where there exists a "clear indication of legislative intent" or where the rule of law requires it. A correctness standard would therefore be applied to constitutional questions, general questions of law that are of central importance to the legal system as a whole and questions regarding jurisdictional boundaries between administrative bodies. New exemptions were expected to be few and far between.

In 2022, two decisions prompted reconsideration of *Vavilov*: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 [*Abrametz*] and *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30 [*SOCAN*].

In *Abrametz*, the SCC considered whether the implications of "undue delay" in the criminal context should be extended to administrative proceedings. The majority concluded that they should not, though delays in administrative matters could attract remedies in certain circumstances.

The appellant's right of appeal arose from a statutory mechanism: *The Legal Profession Act, 1990*. The court determined that — per *Vavilov* — it therefore attracted an appellate standard of review. The question of whether an abuse of process had occurred was determined to be a question of law attracting a correctness standard.

"In administrative law, however, abuse of process is a question of procedural fairness"

In administrative law, however, abuse of process is a question of procedural fairness. Traditionally, such questions were not subject to any standard of review.

To make a long decision short, *Abrametz* brought procedural fairness into the *Vavilov* framework but avoided confirming whether procedural fairness questions should attract a different standard of review even when raised through a statutory appeal mechanism.

While the majority found that *Vavilov* applied and correctness was the appropriate standard of review, Justice Côté dissented, arguing that procedural fairness is a concept that exists "independently of statutorily confined administrative regimes" and that *Vavilov* did not apply to it regardless of the statutory appeal mechanism.

The SCC also disagreed about how to apply *Vavilov* in *SOCAN*, a case that arose from a dispute over royalties paid for online music. The dispute began at the Copyright Board of Canada, a federal administrative body. The majority held that because Parliament provided concurrent first instance jurisdiction over the *Copyright Act* to the Copyright Board and the courts, it intended to involve the judiciary. Board decisions should be subject to a correctness rather than reasonableness review.

Over the dissents of Justices Karakatsanis and Martin, *SOCAN* carved out another exception to the reasonableness standard: cases where administrative bodies and courts have concurrent first instance jurisdiction over a legal issue in a piece of legislation. According to Justice Rowe writing for the majority, this "accords with legislative intent and promotes the rule of law."

In considering *Vavilov*, the SCC had before it its own prior decision in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35. This case involved concurrent jurisdiction over a legal issue in the same way that *SOCAN* did and the Court applied the correctness standard. They declined to carve out an explicit exemption for this situation when deciding *Vavilov*. Why, then, did they apparently backtrack in *SOCAN*? The majority's determination that Parliament "intended" to involve the judiciary in matters of concurrent jurisdiction went too far, undermining the intended certainty of *Vavilov*.

While the downstream effects of *Abrametz* may take time to materialize, *Vavilov* remains the starting point for standard of review in administrative law. *SOCAN* demonstrates that the list of exceptions set out in *Vavilov* is almost certainly not closed, and that the case may not promote the consistency it was expected to. We anticipate that courts in future cases will continue to struggle with and fine-tune the application of *Vavilov* to the wide variety of administrative law issues.

## UPDATE ON DISCLOSURE OF PARTIAL SETTLEMENT AGREEMENTS

### To Disclose or Not to Disclose? Ontario's Immediate Disclosure Rule for Partial Settlement Agreements

Over the course of 2022, the Court of Appeal for Ontario repeatedly confronted the relatively little-known, yet risk-fraught, requirements regarding the disclosure of partial settlement agreements.

Relying on the Court of Appeal for Ontario's decisions in *Aecon Buildings v Stephenson Engineering Limited*, 2010 ONCA 898, and *Handley Estate v DTE Industries Limited*, 2018 ONCA 324, Ontario courts have crafted a rule requiring that, where a partial settlement agreement (i.e., a settlement agreement with some, but not all, parties) that "changes entirely the landscape of the litigation" is not disclosed to the non-settling parties immediately, this *necessarily* amounts to an abuse of process that can *only* be remedied by a stay of proceedings.

Several cases engaging this rule came to the attention of the Ontario Court of Appeal in 2022, most notably:

- *Tallman Truck Centre Limited v K.S.P. Holdings Inc.*, 2022 ONCA 66, where the Court of Appeal for Ontario upheld the permanent stay of an action in circumstances where a partial settlement agreement was not disclosed for three weeks;
- *Waxman v Waxman*, 2022 ONCA 311, where the Court of Appeal for Ontario upheld the permanent stay of an action in circumstances where conditional settlements involving the collection of evidence were not disclosed for a few years, until after the conditions were fulfilled; and
- *Poirier v Logan*, 2022 ONCA 350, where the Court of Appeal for Ontario upheld the permanent stay of an action in circumstances where a partial settlement agreement was not disclosed for six months.

Applications for leave to appeal to the SCC were brought, and dismissed, in all three of these cases.

Many legal practitioners were surprised by the SCC's declining to consider the immediate disclosure rule, which is unique to Ontario. The rule significantly departs from the legal principles generally applicable to the doctrine of abuse of process and the circumstances warranting stays of proceedings, which were affirmed by the SCC as recently as July 2022 in *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29: the doctrine of abuse of process generally is rooted in the court's discretion, and stays of proceedings generally are ordered only as a last resort, in the clearest of cases — a marked difference from how they are treated in the context of the immediate disclosure rule.

We hope that appeal courts find opportunity to address and clarify this discrepancy in the near future. In the meantime, the recent cases engaging the immediate disclosure rule are an important reminder to counsel of the obligation to immediately disclose partial settlement agreements, and of the serious consequences should they fail to comply.

We have recently learned that the rules committee, chaired by Justice Kathryn Feldman, is in the process of considering a new rule to deal with this issue.

## LERNERS IN THE SCC:

2022 was an exciting year for the Lerners Appellate Advocacy Group, with two Supreme Court of Canada appearances.

In March 2022, Stephen Ronan and Rob Bell represented *NAV Canada in Canada (Transportation Safety Board) v Carroll-Byrne*, 2022 SCC 48, which related to the circumstances in which an on-board airplane recording can be released. Generally, on-board recordings, such as cockpit voice recorders on planes, are protected by statutory privilege under s. 28 of the *Canadian Transportation Accident Investigation and Safety Board Act*. In its November 2022 decision, the SCC set out a balancing test for considering disclosure of an on-board recording pursuant to s. 28(6) of the *Act*, which allows a court or coroner to request the production and discovery of an on-board recording: the public interest in the administration of justice, balanced against the public interest underlying the legislative protection of the on-board recordings.

*Stephen R.*

*Rob B.*

*Lindsey L.*

*Bryan S.*

In April 2022, Bryan Smith and Lindsey Love-Forester represented the respondent in *F v N*, 2022 SCC 51, a case concerning international child abduction from the United Arab Emirates to Canada. This case marked the first time the SCC has addressed an abduction of a child from a country that is not a signatory to the *Convention on the Civil Aspects of International Child Abduction*. In dismissing the appeal, a 5/4 decision, the SCC majority confirmed that the appellant mother had wrongfully brought her two young children to Canada from the UAE without the consent of their father, who remained in Dubai. The SCC further found that the parents' ongoing custody dispute was properly resolved by the courts in the UAE, where the children had their closest connection.

Bryan and Lindsey appeared in person in April 2022, the first in-person hearing that the court had held in many months.

## COVID-19 UPDATE

### Supreme Court of Canada and Ontario Court of Appeal: Status Quo in the Post-Pandemic Era

The COVID-19 pandemic brought with it many positive changes for the legal profession. As we move away from voluminous coil-bound briefs and toward electronic documentation, it has been challenging to keep track of the many Practice Directions and Notices to the Profession that described the rapid evolution of our old rules.

Looking to the Supreme Court of Canada and Ontario Court of Appeal, we're pleased to see that several digital additions to practice requirements continue to operate, maintaining some of the efficiencies gained from the past years.

Below, we summarize some of the key practice points that arise from the current operative practice directions.

#### *Ontario Court of Appeal*

The most recent revision of the Consolidated Practice Direction Regarding Proceedings in the Court of Appeal During the COVID-19 Pandemic was released on March 28, 2023. Key points to note are the following:

- Electronic filing of court documents is now required. Parties can file by email or save documents to a USB key and deliver it to the Court, labelled with the file number.
- Motions before a single judge are conducted by Zoom. Motions before a panel and appeals presumptively are heard in person, but parties can elect to appear by Zoom.
- Those making oral submissions in person can attend with up to two other support individuals.
- Members of the public and media can observe hearings by Zoom.
- Individuals attending hearings in person are expected to abide by the Protocol for In-Person Hearings During the COVID-19 Pandemic. Masks are no longer required (but they are permitted). Anyone experiencing COVID-19 symptoms should self-isolate and avail themselves of remote options.

***Supreme Court of Canada***

The most recent Notice to the Profession was released on January 2023. The Supreme Court of Canada has now introduced an e-filing portal for filing documents — All documents, whether they pertain to an application for leave to appeal or to an appeal, with the exception of documents that are subject to a sealing or confidentiality order, are to be filed through the Electronic Filing Portal.

Below are some key aspects of the Supreme Court of Canada's current hearing practices:

- The Supreme Court of Canada building began re-opening to visitors in October 2022, with access to members of the public and media being granted on a first-come, first-serve basis.
- Hearings will continue to be livestreamed, with some exceptions.
- In order to limit the number of people in attendance at hearings, counsel for interveners will attend via Zoom unless otherwise directed by the Chief Justice.
- Service and filing deadlines remain the same.
- Certain documents must also be filed in hard copy: on an application for leave to appeal: notice of application for leave (including all the reasons and judgments of the lower courts and/or tribunals), memorandum of argument, respondent's response and the applicant's reply (original and 2 copies); on appeal: factum (original plus 23 copies), any volume of the record containing Part I (20 copies), respondent's record (2 copies) and the condensed book (14 copies).
- As with all levels of court, anyone experiencing COVID-19 symptoms should self-isolate and opt for remote options.

## A NOTE ON THE FUTURE:

**Cynthia Kuehl, Partner:** "2022 saw the rise of decisions from the bench; something with which we are familiar in the provincial courts of appeal but relatively new at the SCC. This quick adjudication of issues stands in contrast with the limited number of leaves that the SCC grants."

**Jennifer Hunter, Partner:** "I think civil liability for privacy may reach the Supreme Court this year. With conflicting decisions at the appellate level on whether or not a class action claim for intrusion upon seclusion can be certified in circumstances where the defendant was the victim of a cyber incident, it may be time for the Supreme Court to weigh in on whether a defendant who fails to prevent a cyber attack may be found reckless in a matter that establishes liability beyond negligence or contract."

**Earl Cherniak, K.C., LL.B., FCIArb, Partner:** "While in-person appearances in the Court of Appeal for Ontario and SCC are now (happily) the norm, the COVID-19 pause has resulted in some benefits and challenges for counsel and parties."

Chief among them is the digital revolution forced on the courts and counsel. Paper for the appellate courts is now a thing of the past. Facta must be digitized and hyperlinked to the documents, transcript references and case paragraphs cited. Appeal books and transcripts must be sent online. This is especially true for the oral argument compendium required by the ONCA and the SCC. The judges will have their laptops in front of them at the hearing, but no paper. Judges may link to what counsel cite before counsel still using paper can get to it. Judges can click on a link to what counsel cite.

Motions can be done virtually, saving both time and expense.

Counsel can opt to argue virtually, a boon to out of Toronto counsel. Parties and the public can opt to watch the ONCA appeals on Zoom, a feature long available at the SCC. Counsel, especially those new to appellate work, must be alive to these changes, and ensure that they have the technology and assistance to make them work.

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Earl Cherniak is one of Canada's leading trial and appellate counsel. He has more than 60 years of litigation experience and over 30 years of specializing in commercial litigation, arbitration and appellate advocacy. His practice focuses on trial and appellate work, arbitrations and mediations across a broad spectrum of complex commercial, insurance and public litigation matters. He has been counsel in several precedent setting appeals over the course of his career.

## 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 Court of Appeal for Ontario and the Supreme Court of Canada and have been involved in some of the leading appeals in Canadian jurisprudence.

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