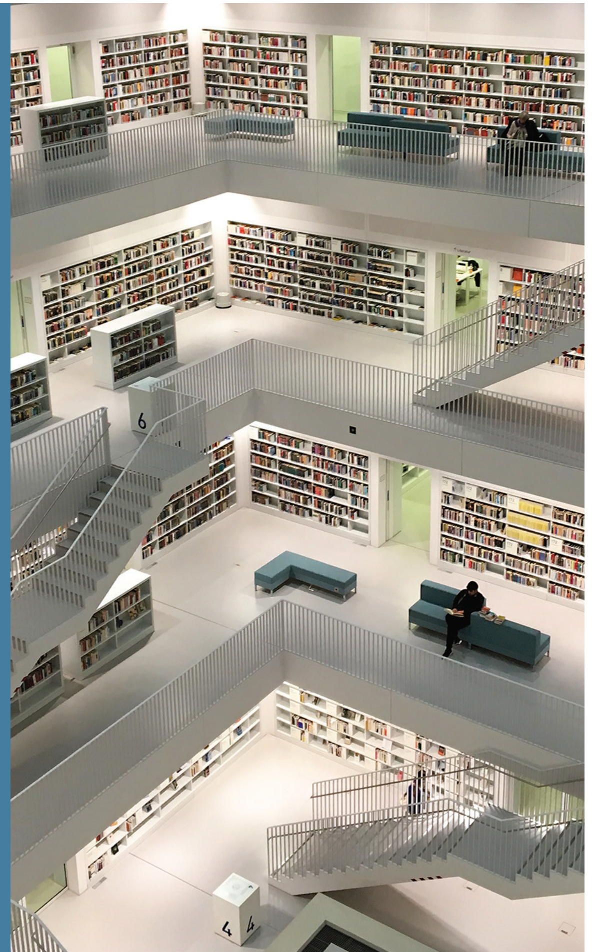
LERNERS

EXAMINATIONS 2024



WELCOME TO THE 2024 EDITION OF EXAMINATIONS FROM THE LERNERS APPELLATE ADVOCACY PRACTICE GROUP

As in previous years, we examine some of the leading appellate decisions of the past year in the Supreme Court of Canada and the Court of Appeal for Ontario. We also provide commentary on the Supreme Court of Canada's recent trends in granting leave to appeal, a matter of keen interest to all appellate lawyers.

As a bonus this year, we honour and profile the 12 women who have been appointed to and graced the Supreme Court of Canada, including the five who now make up its majority, a first in the common law world and likely anywhere.

- Earl A Cherniak, KC, Chair,
  Lerners Appellate Advocacy Practice Group

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CASES OF INTEREST

HANSMAN V NEUFELD AND THE IMPORTANCE OF COUNTER-SPEECH PROTECTING MARGINALIZED GROUPS

In 2023, the Supreme Court of Canada (SCC) decided an appeal of the first decision made pursuant to British Columbia's anti-SLAPP legislation, the 2019 *Protection of Public Participation Act* (the "*PPPA*"). The dispute involved a high-profile public debate between a school board trustee, who was publicly critical of the provincial government's introduction of sexual orientation and gender identity programming into schools, and a teacher, who regarded the trustee's public comments as bigoted and transphobic. In its decision in *Hansman v Neufeld*, 2023 SCC 14, a majority of the SCC affirmed that "counter-speech" intended to protect vulnerable and marginalized groups is deserving of protection under anti-SLAPP legislation.

In 2016, the British Columbia Ministry of Education implemented certain initiatives to promote inclusion and address discrimination against transgender and other 2SLGBTQIA+ children and youth in schools. The Ministry ordered B.C. school boards to add gender identity or expression as a prohibited ground of discrimination in student codes of conduct. The Ministry also collaborated with others to develop Sexual Orientation and Gender Identity 123 ("SOGI 123"), an initiative aimed at guiding schools on instruction about sexual orientation and gender identity to foster inclusion and respect.

Neufeld, a school board trustee, criticized the new curriculum on social media. He called SOGI 123 a "weapon of propaganda" that teaches the "biologically absurd" theory that gender is not biologically determined but a social construct. He called SOGI 123 a "fad" that was nothing short of child abuse. He also lauded certain regimes that had taken a hard line on 2SLGBTQIA+ rights.

One of Neufeld's more vocal critics was Hansman, who publicly accused Neufeld of promoting transphobia and bigotry. Hansman called on Neufeld to step down or be removed as a school board trustee. Based on these public criticisms, Neufeld sued Hansman for defamation in the B.C. Supreme Court. Hansman applied to have the action dismissed under the provisions of the *PPPA*.

The chambers judge dismissed Neufeld's action on the basis that Hansman had a valid, fair comment defence. Therefore, Neufeld failed to overcome the merits-based hurdle. In the alternative, the public interest in protecting Hansman's expressions was held to outweigh the harm likely suffered by Neufeld. Key to this conclusion was the fact that Neufeld had submitted almost no evidence of damages suffered and no evidence causally linking any alleged harm to Hansman's statements.

The court overturned the chambers judge's decision and ordered that the action proceed to a trial. With respect to Hansman's defence of fair comment, the court commented that at least some of Hansman's expressions could be characterized as statements of fact rather than comment. Further, in carrying out the public interest weighing exercise, the chambers judge failed to give full effect to the presumption of damages in defamation and failed to consider the potential chilling effect on future expressions by those who might wish to engage in debates on highly charged matters of public interest should the availability of defamation claims be limited.

On further appeal, the SCC reversed the court's conclusion and restored the dismissal of the action.

The majority of the SCC was critical of the court's approach to the public interest weighing exercise. While damage may be presumed in defamation, the plaintiff still must demonstrate that the harm suffered is sufficiently serious to outweigh the public interest in protecting the defendant's expression. In other words, the presumption of damage may establish the *existence* of harm, but it cannot establish the *seriousness* of harm.

The court was also criticized with respect to its consideration of the "chilling effect" allegedly flowing from a plaintiff's inability to pursue a defamation claim. Anti-SLAPP jurisprudence addresses the concern that the imposition of a legal penalty will cause speakers to refrain from commenting on matters of public interest.

However, the B.C. court held that the "inability to inflict a legal penalty on Mr. Hansman would chill Mr. Neufeld's expression and those of others who wish to express unpopular views," turning the concept of "chilling effect" on its head. The SCC explained that "there is no chilling effect in barring potential plaintiffs from silencing their critics and collecting damages through a defamation suit." The public interest weighing exercise considers the impact of the defendant's expression on the plaintiff's reputation, not the "chilling effect" on the plaintiff if he or she is unable to proceed with a defamation suit. In making this finding, the SCC remedied what many viewed as the most controversial aspect of the court's decision.

"THERE IS NO QUESTION THAT THE CONTENT OF HANSMAN'S EXPRESSIONS PLAYED A SIGNIFICANT ROLE IN THE SCC'S ANALYSIS, WHICH MAY OPEN THE DOOR TO SIMILAR ANALYSES WITH RESPECT TO EXPRESSIONS RELATING TO OTHER DEMONSTRABLY MARGINALIZED GROUPS."

Importantly, the SCC acknowledged the importance of counter-speech and its role in public discourse on matters of public interest. Hansman's expressions were found to be deserving of significant protection because they were motivated by a desire to protect the rights of transgender and other 2SLGBTQIA+ persons, "undeniably a marginalized group in Canadian society." The court cited research indicating that transgender people are at increased risk of violence, report high rates of poor mental health, suicidal ideation, and substance abuse, and are disadvantaged with respect to housing, employment, and healthcare. While there have been legal advancements in transgender rights over the last 35 years, the court recognized that transgender people remain among the most marginalized in Canadian society.

There is no question that the content of Hansman's expressions played a significant role in the SCC's analysis, which may open the door to similar analyses with respect to expressions relating to other demonstrably marginalized groups.
In the meantime, this decision serves as a powerful affirmation of the continued need for advocacy to protect the rights and freedoms of 2SLGBTQIA+ persons, supported by the principles of equality enshrined in section 15 of the *Canadian Charter of Rights and Freedoms*.

ARBITRATION CONSTERNATION: ONCA ADDRESSES DISPUTES ABOUT THE EXISTENCE OF AN ARBITRATION AGREEMENT

In *Husky Food Importers & Distributors Ltd. v JH Whittaker & Sons Limited*, 2023 ONCA 260, the Court of Appeal for Ontario addressed the issue of how courts will handle a dispute between parties as to whether there exists an agreement to arbitrate between them.

In late 2014, Husky Food and JH Whittaker entered into an initial distribution arrangement under which Husky Food would import, distribute, and market JH Whittaker products in Canada. The terms of the agreement were part oral and part written. Between 2016 and 2020, the parties sought to negotiate a more formal, long-term, exclusive distribution agreement. In early 2020, drafts were exchanged.

Drafts of the main body of the agreement contained a section providing that the parties submitted to the non-exclusive jurisdiction of the courts of Wellington, New Zealand, to hear and determine disputes arising from the agreement. A draft delivered by JH Whittaker included a schedule of "Whittaker's Standard Terms of Sale," one of which was an arbitration clause referring disputes to the New Zealand International Arbitration Centre. The parties ultimately did not sign a new long-term agreement.

In 2021, a dispute arose about the re-routing of two product shipments, and Husky Food commenced an action. JH Whittaker sought a stay of the court proceeding under s. 9 of the *International Commercial Arbitration Act* on the basis that the matter in dispute was subject to an arbitration agreement. The motion judge granted the stay; Husky Food appealed to the court.

In most cases, pursuant to the competence-competence principle, courts will refer challenges to an arbitrator's jurisdiction to the arbitrator.

However, as recognized by the court, the competence-competence principle is not absolute. A court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves pure questions of law or questions of mixed fact and law that require only superficial consideration of the evidentiary record. Where questions of fact alone are in dispute, courts generally should refer the case to arbitration, given the broad scope granted to arbitrators to determine issues respecting their own jurisdiction at first instance.

Here, the court held that the motion judge applied the correct legal principles to the analysis, which stem from the Supreme Court of Canada's 2022 decision in *Peace River Hydro Partners v Petrowest Corp.*, 2022 SCC 41. A two-stage test applies where a stay of proceedings is sought under s. 9 of the *International Commercial Arbitration Act*, and both stages were satisfied here:

1. There was an arguable case that an agreement to arbitrate existed, as the record contained evidence going both ways on the issue; and
2. Husky Food did not establish, on a balance of probabilities, that a statutory exception to the granting of a stay applied: determining the existence of an arbitration agreement would require a thorough review of the parties' competing evidence.

Having found no error in the motion judge's analysis, the court dismissed the appeal and upheld the stay of proceedings.

This is a useful case for arbitration practitioners in Ontario, clarifying that the principles set out in the 2022 *Peace River* decision – which arose in the context of domestic, rather than international, arbitration legislation – apply equally in the context of international commercial arbitrations.

ONCA DECIDES THE MATTER OF THE NATURE OF HEARINGS ARISING FROM PRELIMINARY RULINGS ON ARBITRAL JURISDICTION IN *RUSSIAN FEDERATION V LUXTONA LIMITED*

Russian Federation v Luxtona Limited, 2023 ONCA 393 was a highly anticipated decision within the arbitration community in 2023, addressing the muddy issue of the nature of the hearing where a court is asked to "decide the matter" of an arbitral tribunal's jurisdiction where the tribunal has ruled on the issue "as a preliminary question."

This case was grounded in a contractual dispute between the Russian Federation and Luxtona Limited, a Cyprus company. Luxtona alleged that Russia had violated provisions of an international treaty relating to the protection of investments. Russia is a signatory to the treaty but has not ratified it and took the position that it was not bound by the treaty's arbitration provisions. Russia provisionally agreed to apply the arbitration principles, and the parties appointed an arbitral tribunal seated in Toronto to determine the jurisdiction issue. The issue was highly contested. Ultimately, in an interim award, the tribunal held that it had jurisdiction to arbitrate Luxtona's claim against Russia.

Russia applied to the Ontario Superior Court to set aside the arbitral tribunal's jurisdiction decision under Articles 16(3) and 34(2) of the UNCITRAL Model Law on International Commercial Arbitration, which is enacted in Ontario under the International *Commercial Arbitration Act*. Article 16(3) provides that an arbitral tribunal may rule on a jurisdiction objection "either as a preliminary question or in an award on the merits," and where the tribunal rules that it has jurisdiction "as a preliminary question," a party may request that the court "decide the matter." Russia sought to introduce fresh evidence on the application, which raised the question of the extent to which the court was confined to the record that was before the arbitral tribunal on such an application.

The issue made its way from the Ontario Superior Court (Commercial List) to the Divisional Court, and finally to the Court of Appeal for Ontario in 2023. The Court of Appeal confirmed that a party challenge to an arbitral tribunal's jurisdictional determination

> "...PARTIES ARE ENTITLED, AS OF RIGHT, TO SUBMIT FRESH EVIDENCE ON THE COURT APPLICATION."

decided "as a preliminary question" proceeds as a hearing *de novo*, rather than simply a review of the tribunal's decision based on the record before it. As a result, parties are entitled, as of right, to submit fresh evidence on the court application. However, the failure to introduce evidence at the hearing before the arbitral tribunal may go to its weight in the court challenge.

This will be an interesting issue to follow over the coming years. In coming to its decision in *Luxtona*, the Court of Appeal (as well as the Divisional Court before it) relied on the "strong international consensus" in favour of a *de novo* hearing in these circumstances, specifically citing the U.K. Supreme Court's 2010 decision in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (a leading international case on the issue). However, the Law Commission of England & Wales recently recommended reform of England's *Arbitration Act* 1996, and specifically raised concerns with the current approach of requiring a "rehearing" in this context. Adopting the recommended reforms may impact the "strong international consensus" on which the *Luxtona* decision is premised and potentially call for a more widespread change in approach internationally.

EXPRESS YOURSELF, WITH CAUTION: LITIGATION AS EXPRESSION IN ANTI-SLAPP CONTEXTS AND *BOYER V CALLIDUS CAPITAL CORPORATION*

Boyer v Callidus Capital Corporation, 2023 ONCA 233, is an interesting addition to the rapidly expanding body of case law on anti-SLAPP motions. A unique feature of the case is that the "expression," within the meaning of the applicable statutory framework, at issue was a party's Statement of Claim in a lawsuit, with the result that a retaliatory counterclaim was held to be a SLAPP (strategic lawsuit against public participation).

This was an employment case where the appellant, Boyer, was a former employee of the respondent, Callidus. Boyer resigned from his position, citing a toxic work environment, and commenced litigation against Callidus, alleging constructive dismissal. Callidus counterclaimed for $150 million in damages, alleging that Boyer had breached fiduciary duties during his employment. Boyer brought a motion seeking, among other things, to have the counterclaim dismissed under the anti-SLAPP provisions of the *Courts of Justice Act* (the "*CJA*.").

Sections 137.1-137.5 of the *CJA*, known informally as the "anti-SLAPP provisions," permit a party to litigation to seek a dismissal of a claim against them on the basis that the proceeding limits freedom of expression on a matter of public interest. A multi-step test, imposing evidentiary burdens on both parties, applies to motions brought pursuant to these provisions. The threshold step of the test requires the moving party to establish that the proceeding "arises from an expression made by the person that relates to a matter of public interest."

The motion judge dismissed Boyer's anti-SLAPP motion. Boyer's allegations about his workplace contained in his Statement of Claim were held to constitute "expression" and relate to a matter of public interest, as Callidus was a prominent publicly traded company, and its business practices previously had attracted news coverage. However, the motion judge held that Callidus' counterclaim did not arise from Boyer's pleaded expressions about his work environment; rather, the counterclaim arose from distinct allegations of misconduct. Boyer appealed to the Court of Appeal for Ontario.

The court held that the motion judge had erred in his anti-SLAPP analysis by interpreting the statutory language "arising from" too narrowly and failing to consider the context of Callidus' counterclaim. Drawing on the Supreme Court of Canada's 2020 decision in *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22, the court acknowledged that a "broad and liberal interpretation" is warranted at the threshold stage of the analysis; the moving party's burden is not intended to be onerous, and there need not be a "precise level of causation." Here, the full context of Callidus' counterclaim was sufficient to establish the requisite level of causation: the counterclaim was thinly pleaded, issued only

15 days after Boyer commenced his claim, and based on events that allegedly occurred years earlier; no basis was provided for the significant damages claimed; and cross-examinations revealed the allegations to be unsubstantiated.

"...CALLIDUS' COUNTERCLAIM, AT ITS CORE, WAS AN ATTEMPT TO SILENCE BOYER AND CREATE A CHILLING EFFECT FOR OTHER EMPLOYEES."

Having corrected the error in the threshold stage of the analysis, the court easily found that Callidus had failed to meet its own burden on the motion. Callidus could not establish that its counterclaim had substantial merit or that the defences put in play by Boyer were not valid. Further, Callidus failed to establish that the harm it had or would suffer as a result of Boyer's expression was sufficiently serious that the public interest in permitting Callidus' counterclaim to continue outweighed the public interest in protecting Boyer's expression: Callidus had neither pleaded nor established that it would be harmed by the statements made in Boyer's claim.

In context, Callidus' counterclaim, at its core, was an attempt to silence Boyer and create a chilling effect for other employees. The appeal was allowed, and Callidus' counterclaim was dismissed.

NOT-SO-OPEN COURT: SCC REAFFIRMS LIMITS ON THE OPEN COURT PRINCIPLE IN *CANADIAN BROADCASTING CORP V MANITOBA*

In October 2023, the Supreme Court of Canada released its decision in *Canadian Broadcasting Corp v Manitoba*, 2023 SCC 27, and reaffirmed the test for limiting the open court principle.

The case related to a publication ban issued by the Manitoba Court of Appeal in 2018 with respect to an affidavit that an accused sought to introduce as evidence during wrongful conviction proceedings. The affidavit concerned the death of a witness involved in the proceedings. The Canadian Broadcasting Corporation ("CBC") filed a motion to set aside the publication ban over the affidavit, but the court held that it had no jurisdiction to hear the motion or set aside the ban because it was *functus officio*. The CBC then sought and obtained leave to appeal both the initial publication ban and the 2019 jurisdiction judgment to the SCC.

In 2021, the SCC allowed CBC's appeal of the jurisdiction judgment, and remanded the set-aside motion to the provincial appeal court. In the interim, the appeal of the initial publication ban was adjourned *sine dine*.

In early 2023, the court dismissed CBC's motion to have the publication ban set aside on the bases that a) CBC had no standing to bring the motion, as it had notice of the ban, and b) that CBC had failed to act with due dispatch in seeking to have the ban set aside. Alternatively, the court would have dismissed the motion on its merits because, applying the test sourced in the SCC's 2021 decision in *Sherman Estate v Donovan*, 2021 SCC 25, the ban was necessary to prevent a serious risk to privacy and dignity, and the benefits of the publication ban outweighed any negative effects on court openness. CBC then called on the SCC to decide its adjourned appeal of the initial publication ban.

The SCC dismissed CBC's appeal. Applying the test set out in the *Sherman* decision, the court held that all three branches of the test were satisfied:

1. There was "a strong public interest in protecting the privacy of the witness's spouse with respect to the witness's death in order to prevent an affront to the spouse's dignity," which is an important public interest;
2. The ban was not overbroad or vague and should be permanent; there were no reasonable alternatives available; and
3. The benefit of protecting the witness's spouse's dignity outweighed the "minimal deleterious effect on the right of free expression and, by extension, the principle of open and accessible court proceedings."

As such, there was no error in the granting of the publication ban in 2018 and no basis on which to rescind or vary it.

REFINING THE DUTY OF HONEST PERFORMANCE: *BHATNAGAR V CRESCO LABS INC*. AND THE REQUIREMENT OF EVIDENCE OF HARM

In *Bhatnagar v Cresco Labs Inc*, 2023 ONCA 401, the Court of Appeal for Ontario provided important interpretive guidance in respect of the Supreme Court of Canada's 2020 decision in *CM Callow Inc. v Zollinger*, 2020 SCC 45.

In *Zollinger*, the SCC revisited the duty of honest performance, which it first recognized in *Bhasin v Hrynew*, 2014 SCC 71, and held that the duty not only precludes a contract party from directly lying to a counterparty, but also precludes a party's silence while a counterparty operates under a misapprehension created by the first party. The Court of Appeal has further refined this duty in *Bhatnagar*, finding that there is no legal presumption of loss where a breach of the duty of honest performance is established; rather, a claimant is required to adduce evidence establishing a loss of opportunity.

In *Bhatnagar*, the appellants had sold their vape products company (operating as "180 Smoke") to CannRoyalty Corp., operating as "Origin House," pursuant to a share purchase agreement (the "SPA"). The SPA provided for two earn-outs: one tied to revenue milestones over the 2019, 2020, and 2021 calendar years, and one tied to obtaining a standard processing license for cannabis products within a defined time period. Additionally, the SPA provided that, should there be a change of control at Origin House during the three-year earn-out period, the appellants would be paid an "Unearned Milestone Payment Commitment" equal to the amount of all future entitlements to unearned milestone payments.

A change of control occurred when Cresco agreed to purchase Origin House. The appellants took issue with the lack of proper communication related to the closing date of the transaction and brought an application seeking, among other things, the revenue and license payments for 2019 despite neither milestone having been reached. The appellants claimed that Origin House had breached its duty of good faith in contractual dealings.

The application judge found that Origin House had breached its duty of honest performance by failing to advise the appellants that the closing date for Cresco's purchase would move from late 2019 to early 2020. Despite the finding of a breach, the application judge awarded no damages, because the appellants had provided no evidence of lost opportunity resulting from the breach.

On appeal, the court considered whether the *Zollinger* decision creates a presumption of damages for breach of the duty of honest performance. The court held that the application judge correctly rejected such a presumption. Rather, as held by the court, *Zollinger* requires that the claimant "show some evidence on which the court can find that the breach of the duty of honest performance resulted in the claimant failing to have a fair opportunity to protect its interests or caused it to lose an opportunity." In *Zollinger*, the facts rendered it appropriate for lost opportunity to be presumed because the breaching party's own dishonesty precluded the victim from being able to conclusively prove a lost opportunity; those circumstances did not exist in *Bhatnagar*.

The court ultimately rejected all grounds of appeal advanced by the appellants and dismissed the appeal, finding that the application judge did not err in her analysis and determinations with respect to the duty of good faith in contractual dealings. The court also allowed a cross-appeal in respect of the finding that any breach of that duty occurred, because the finding of breach failed to account for evidence establishing that the appellants knew of the delayed closing date in 2019. As a result, the application judge's finding that Origin House had breached its duty of honest performance was set aside.

THERE'S NO "SPLITTING" OBLIGATIONS: EXPANDING THE OHSA HEALTH AND SAFETY OBLIGATIONS OF "OWNERS" IN *R V GREATER SUDBURY (CITY)*

In a highly anticipated decision released in late 2023, the Supreme Court of Canada significantly expanded the health and safety obligations of "owners" under Ontario's *Occupational Health and Safety Act* (the "*OHSA*"). A unique procedural feature of the case is that it resulted in a 4-4 "split" decision, with the result that the decision of the Court of Appeal for Ontario was upheld.

R. v Greater Sudbury (City), 2023 SCC 28 related to a contract between The Corporation of the City of Sudbury and Interpaving Limited, a general contractor, in respect of water main repairs. Interpaving assumed day-to-day control and management over the repair project, and per the contract, was responsible for ensuring compliance with the *OHSA* for both its workers and its subcontractors. The City had minimal involvement in the project and was responsible only for occasional monitoring through quality control inspections.

In September 2015, while operating a road grader through an intersection within the construction zone (which was closed but had a functional traffic light), an Interpaving employee struck and killed a pedestrian who was attempting to cross at the intersection. The Ministry of Labour charged the City and Interpaving under the *OHSA* for failing to ensure that certain safety requirements were met. Interpaving pled guilty. The City pled not guilty, taking the position that it was not an "employer" as defined in the *Act* due to its lack of direct control over the workers or that it acted with due diligence.

The City succeeded at trial and on the Crown's appeal to the Ontario Superior Court. On the Crown's further appeal, the court set aside the lower decision, finding that the City was, indeed, an "employer" under the *OHSA*, and remitting the appeal in respect of the City's due diligence defence back to the Superior Court for hearing. The City appealed to the SCC.

A majority of the SCC is required to overturn a finding of a provincial appeal court. In this unusual situation, a full nine-member panel of the SCC heard the appeal, but only eight judges participated in the final disposition. Ultimately, the court's decision was 4-4. Accordingly, there was no "majority" decision, and the provincial appeal court's decision was not reversed.

Half of the SCC judges participating in the decision agreed with the Court of Appeal that the City was an "employer" under the *OHSA*. The contracting of Interpaving to undertake the repair project created an "employment" relationship; therefore, the City was the employer of Interpaving as the general contractor, as well as its quality control inspectors. As Interpaving's employer, the City was required to ensure that *OHSA* safety measures were carried out during the project. Leading up to the pedestrian's death, there was a lack of fencing and site signalers around the at-issue intersection. The City, as the employer, was at fault for failing to follow the *OHSA*.

"...THE COURT'S DECISION WAS 4-4. ACCORDINGLY, THERE WAS NO "MAJORITY" DECISION, AND THE PROVINCIAL APPEAL COURT'S DECISION WAS NOT REVERSED."

As a result of this case, it appears that project owners (including, but likely not limited to municipalities) can no longer confidently cede complete control of and responsibility for projects to general contractors. However, because the SCC did not issue a governing majority decision on the issue, it may return to the court in the future for further consideration. In the meantime, due diligence remains an available defense to project owners facing an *OHSA* charge: an employer may assert that they took all reasonable preventative measures to ensure a safe workplace.

NOT IN MY BACKYARD: ONCA'S TAKE ON ADVERSE POSSESSION OF MUNICIPAL PARKLAND IN *KOSICKI V TORONTO (CITY)*

Kosicki v Toronto (City), 2023 ONCA 450 was a contentious case in which the Court of Appeal for Ontario determined that a private homeowner cannot adversely possess municipal parkland in Ontario, although the municipality may acquiesce or waive its ownership. The case confirms that the common law continues to play a limited role in adverse possession law, notwithstanding the comprehensive statutory scheme in the *Real Property Limitations Act* (the "*RPLA*").

Between 1958 and 1971, the owners of residential property near the Humber River in Toronto fenced off an area of municipal property behind their single-family house, enclosing it within the backyard of the house. Since that time, the municipal land had been inaccessible to the public and used exclusively by the owners of the house. The owners also paid realty taxes on the municipal land until 2020, when the City of Toronto ceased accepting the tax payments.

The appellants, who were then the owners of the residential property, sought to purchase the disputed land in 2021; the City refused. The appellants then brought a claim for adverse possession.

When faced with adverse possession claims in relation to municipal land, where no complete bar or immunity is available, courts will apply a common law "public benefit" test on the basis that land dedicated to the "enjoyment of the public" is immune from adverse possession claims. Applying the common law test, the application judge in *Kosicki* found that the disputed lands would have met the test for adverse possession, but for the immunity from adverse possession of lands that serve a "high public purpose." The appellants appealed.

The court dismissed the appeal. The majority held that adverse possession claims against municipal lands generally should be resolved by recourse to the "public benefit" test at common law. Land acquired by a municipality and zoned as parkland or publicly accessible space presumptively should be treated as in-use for the public benefit, unless there is evidence that the municipality has acknowledged or acquiesced to its private use. Although the majority rejected the idea that municipal parklands are automatically immune to claims for adverse possession, they upheld the application judge's finding that adverse possession had not been established with respect to the segment of municipal land at issue.

Brown J.A., in dissent, would have allowed the appeal on the basis that the *RPLA* ousts the common law, and the "public benefit" test does not apply. Brown J.A. believed the appellants had satisfied the *RPLA*'s requirements to extinguish title.

The Court of Appeal's decision will be helpful to municipalities responding to claims for adverse possession of municipal lands. Under the applicable common law test, as applied in this case, it appears there can be no adverse possession of municipal lands, including parklands, absent evidence that the municipality has waived its presumptive rights or acknowledged or acquiesced to the private use of its land.

CONSTITUTIONALITY CROSSROADS: *IMPACT ASSESSMENT ACT* UNDER SCC SCRUTINY IN *REFERENCE RE IMPACT ASSESSMENT ACT*

In *Reference re Impact Assessment Act*, 2023 SCC 23, the Supreme Court of Canada held that the federal *Impact Assessment Act* (the "*Act*") – a legislative scheme designed to protect the environment from certain human activities – was, in part, *ultra vires* federal jurisdiction.

The *Act* and its regulations create two separate and distinct schemes. One scheme deals with projects carried out or financed by federal authorities on federal lands or abroad. The balance of the *Act* deals with "designated projects", which include projects designated by the *Physical Activities Regulations* (the "*Regulations*" enacted under the *Act*) and the Minister of Environment.

The SCC considered two questions referred by Alberta's Lieutenant Governor in Council: (1) whether the Act was unconstitutional by virtue of exceeding the legislative authority of Parliament, and (2) whether the *Regulations* were unconstitutional by virtue of purporting to apply to certain listed activities that relate to matters within the legislative authority of the provinces.

The "designated projects" scheme under the *Act* was found to be *ultra vires*, as its pith and substance exceeded the bounds of federal jurisdiction.

Parliament is empowered to enact impact assessment legislation that is directed at the federal aspects of projects. However, the "designated projects" scheme treated all "designated projects" the same way, regardless of whether Parliament was vested with broad jurisdiction over the activity itself or narrower jurisdiction over the activity's impacts on federal heads of power.

In particular, at the screening stage of the impact assessment process, the Impact Assessment Agency of Canada would determine whether an impact assessment was required for a particular project based on certain mandatory factors (some of which were outside federal jurisdiction). At the decision-making stage, the decision maker would assess whether a project's adverse effects within federal

> "THE LEGISLATIVE SCHEME, IN PITH AND SUBSTANCE, WAS NOT DIRECTED AT REGULATING PROJECT EFFECTS WITHIN FEDERAL JURISDICTION."

jurisdiction are in the public interest, and choose to impose conditions on a project in the public interest or axe a project not in the public interest. Factors applied at the decision-making stage were not limited to general legislative competence, and some were framed in relation to the assessment of the project *as a whole* rather than the adverse effects within federal jurisdiction.

Many of the physical activities caught by the scheme were primarily regulated through the provincial legislatures' powers over local works or natural resources. The legislative scheme, in pith and substance, was not directed at regulating project effects within federal jurisdiction.

Additionally, the *Act*'s defined term, "effects within federal jurisdiction," went far beyond the limits of federal legislative jurisdiction under s. 91 of the *Constitution Act, 1867*. That definition was central to decision-making functions under the legislative scheme, leading to overbreadth and a further diluted focus on the federal aspects of designated projects. The Minister of Environment effectively had broad discretion to designate projects based on non-federal effects and impose conditions or halt projects outside federal control. Moreover, because the defined "effects within federal jurisdiction" formed the basis of certain prohibitions under the *Act*, prohibitions were cast extremely broadly, extending conduct prohibited by the *Act* beyond the range of conduct that Parliament validly can regulate pursuant to its assigned heads of power.

In contrast, the *Act*'s secondary scheme targeted a specific subset of projects on federal lands or abroad. Instead of an impact assessment, it required federal entities funding or executing these projects to determine if significant adverse environmental effects were likely. Undisputedly, this scheme was *intra vires*.

In summary, the SCC held that the *Act*'s "designated projects" scheme overstepped federal jurisdiction due to its lack of focus on federal impacts, broad decision-making structure, and overbroad prohibitions. This case serves as a reminder of the clear limits on federal powers under the *Constitution Act*, and of the important role served by the courts in checking Parliamentary power and ensuring compliance with constitutional limits.

THE BOUNDARIES OF REFUGEE PROTECTION: THE SCC'S CONSTITUTIONAL ANALYSIS OF THE *IRPA* IN *CANADIAN COUNCIL FOR REFUGEES V CANADA (CITIZENSHIP AND IMMIGRATION)*

In *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17, the Supreme Court of Canada affirmed the constitutional validity of s. 159.3 of the *Immigration and Refugee Protection Regulations* (the "*IRPR*"), which deals with the eligibility of refugee protection claims in Canada.

The *Immigration and Refugee Protection Act* (the "*IRPA*") and its regulations (the *IRPR*) give effect to the *Safe Third Country Agreement*, a bilateral treaty between Canada and the United States pursuant to which the two countries share responsibility for considering refugee status claims. Under the *IRPA*, refugee status claims are ineligible to be considered in Canada if the claimant comes from a country designated by the *IRPR*. Countries may be so designated if they are viewed as complying with their *non-refoulement* obligations under international law, which prohibit the return of a person to a place where they would face certain kinds of irreparable harm (including threats to life or freedom, torture, and cruel or degrading treatment). The United States is a designated country under s. 159.3 of the *IRPR*.

This case related to individuals who arrived in Canada from the United States, seeking refugee status. As the United States is a designated country, their refugee claims were considered ineligible. The claimants challenged this decision, asserting that the *IRPR*'s designation of the United States exceeded the authority granted by the *IRPA* and violated ss. 7 (right to life, liberty, and security of the person) and 15 (right to equality) of the *Charter*.

The SCC held that the *IRPR* was not *ultra vires* the authority granted by the *IRPA*. The appellants' argument on this issue was based on post-promulgation constraints on the statutory authority to maintain a county's designation; specifically, the appellants argued that it was unreasonable for the United States' designation to be maintained,

and that the Governor in Council had breached its obligation to ensure continuing review of designations. However, regulations derive validity from the enabling statute and, for the purpose of a *vires* challenge, must align with the statute at the time of promulgation – not after it. There was insufficient evidence in the record to justify deviating from the presumption of validity from which regulations benefit.

With respect to the s. 7 challenge, the SCC acknowledged that the risk of detention upon return to the United States, as well as certain detention conditions, fell within the scope of liberty and security of the person. The SCC also found that some of these risks – such as the risk of detention, the "one-year bar" (a rule under which asylum claims must be advanced within a year of a claimant's arrival), the treatment of gender based persecution claims, and the widespread practice of medical isolation – were foreseeable results of, and thus causally connected to, Canadian state action.

However, the s. 7 challenge failed on the assessment of the applicable principles of fundamental justice: overbreadth and gross disproportionality. Section 159.3 was held not to be overbroad or grossly disproportionate. For the scheme to be overbroad, the American detention system would need to be fundamentally unfair. Detention of refugees is not prohibited under international law, provided safeguards exist, and safeguards do exist with respect to the risk of detention in the United States, such as opportunities for release and review.

If the impugned provision mandated return to a real risk of *refoulement*, then the court would have considered it to be overbroad and bear no relation to the purpose of the legislation, which at its core respects the *non-refoulement* principle. However, curative mechanisms in the broader statutory scheme were sufficient to ensure that individuals are not subjected to a real, and not speculative, risk of *refoulement*.

> "...CURATIVE MECHANISMS IN THE BROADER STATUTORY SCHEME WERE SUFFICIENT TO ENSURE THAT INDIVIDUALS ARE NOT SUBJECTED TO A REAL, AND NOT SPECULATIVE, RISK OF REFOULEMENT."

As a result, the SCC concluded that the impugned legislative scheme did not infringe s. 7 of the *Charter*.

With respect to the s. 15 challenge, where the appellants asserted that women fearing gender-based persecution were adversely affected by the legislative scheme, the SCC remanded the issue to the Federal Court. The Federal Court had declined to rule on the s. 15 claim, and the SCC was not prepared to address this challenge as a court of first instance, given the seriousness of the matter, the size and complexity of the record, and the conflicting affidavit evidence on the issue.

In coming to this conclusion, the SCC upheld the constitutionality of s. 159.3 of the *IRPR*, while acknowledging the intricate interplay between Canadian law, international obligations, and the rights of refugee claimants.

BEYOND VIRTUAL BORDERS: ONCA'S VIEW ON *FORUM NON-CONVENIENS* AND LOCATION OF WITNESSES

In *Black & McDonald Limited v Eiffage Innovative Canada Inc.*, 2023 ONCA 91, the Court of Appeal for Ontario affirmed that the location of a witness is still a relevant consideration in the *forum non conveniens* analysis, despite the increasing prevalence of virtual proceedings and witnesses appearing remotely in the post-COVID era.

The case involved two proceedings arising out of the construction of a bridge over the Fraser River in Delta, British Columbia. The appellant, a subcontractor, initiated separate proceedings in Ontario against Eiffage, the general contractor, and Liberty Mutual Insurance Company, which had issued a payment bond on the project. Eiffage and Liberty Mutual sought to have the actions dismissed or stayed on the basis that they were not commenced in the proper forum, and argued that British Columbia was either the required or the more convenient forum.

The motion judge granted the motions, staying the proceedings on the basis that British Columbia was the more convenient forum. In coming to this conclusion, the motion judge applied the recognized factors for a *forum non conveniens* analysis sourced in

the Court of Appeal's 2008 decision in *Young v Tyco International of Canada Ltd.*, 2008 ONCA 709, Among those factors relevant to the analysis is the location of witnesses. In respect of this factor, the motion judge considered submissions about "the post COVID reality that converted court proceedings from in person to virtual" and stated that "this new alternative method of hearing evidence significantly reduces the weight to be given to this factor", ultimately regarding it as a neutral.

On appeal, the court disagreed with the motion judge's analysis with respect to the location of the witnesses. In the court's view, the availability of virtual appearances would not render the "location of witnesses" factor neutral for several reasons:

1. Virtual appearances by witnesses cannot safely be equated to appearances in person in terms of their impact on fact finding; and
2. At the time of the motion/appeal, it was not known whether the trial would proceed virtually, in person, or a combination of both, or which witnesses might appeal in person vs. virtually.

Assessing all relevant factors properly did not clearly favour one jurisdiction over the other for the action against Eiffage. As a result, the court found that the high standard to displace the plaintiff's chosen jurisdiction was not met. With respect to the action against Liberty Mutual, the court held that the actions should proceed together, and did not give effect to the forum selection clause that Liberty Mutual claimed would apply. The appeal was allowed, and the actions were permitted to proceed in Ontario.

This case is an interesting addition to the body of case law on the effectiveness of virtual evidence. Several judges have rejected submissions that virtual testimony results in some loss to the judge's ability to assess credibility, citing the sophistication of modern videoconferencing technology. Indeed, many contested proceedings continue to proceed remotely, despite the fact that we are now largely beyond the COVID-19 pandemic era. However, this decision signals that the Court of Appeal may not be convinced entirely as to the quality of virtual evidence, and that there remains value in witnesses giving evidence in person. As a result, the location of witnesses continues to be a relevant factor in the *forum non conveniens* analysis.

A REFLECTION ON SCC LEAVE APPLICATIONS

In last year's edition of Examinations, we highlighted three 2022 cases from the Court of Appeal for Ontario relating to the relatively little-known requirements regarding the disclosure of partial settlement agreements, and the severe consequences where disclosure is not made immediately: *Tallman Truck Centre Limited v K.S.P. Holdings Inc.*, 2022 ONCA 66, *Waxman v Waxman*, 2022 ONCA 311, and *Poirier v Logan*, 2022 ONCA 350. In light of the uniqueness of Ontario's approach to this disclosure rule, and the discrepancy between how the doctrine of abuse of process is treated in this context compared to others, we anticipated that these cases had a reasonable likelihood of being granted leave to appeal to the Supreme Court of Canada. However, as noted last year, we were surprised that leave was denied in all three of these cases. Since then, the potential injustice arising from the approach applied in these cases has been recognized and, we hope, soon will be remedied: the Court of Appeal's Civil Rules Committee created a Partial Settlement Subcommittee, chaired by Justice Julie Thorburn, to consider the issue, and we understand that an amendment to the *Rules of Civil Procedure* which addresses the issue, including timely disclosure and the range of remedies for failure to disclose, is forthcoming.

Similarly, in last year's edition of Examinations, we featured a trio of Ontario appellate cases that changed the landscape of privacy law in 2022, clarifying the relatively new tort of intrusion upon seclusion. We expected that these privacy law issues might reach the SCC in 2023; that this trio of cases – *Owsianik v Equifax Canada Co.*, 2022 ONCA 813, *Obodo v Transunion of Canada Inc.*, 2022 ONCA 814, and *Winder v Marriott International, Inc.*, 2022 ONCA 815 – might be granted leave to appeal to the SCC However, applications for leave to appeal to the SCC were dismissed in these cases in 2023.

The results in these cases appear to reflect an interesting trend in SCC process and jurisprudence over recent years: a notable decrease in the number of cases that are being granted leave to appeal to the SCC, felt most significantly by those seeking leave in private law cases.

Over the last few years, the percentage of granted applications for leave to appeal to the SCC generally has decreased:

- 2020: leave granted in 7.8% of cases, with less than 500 leave applications decided
- 2021: leave granted in 8.2% of cases, with less than 500 leave applications decided
- 2022: leave granted in 5.6% of cases, with less than 500 leave applications decided (51% public law, 27% criminal law, 22% private law)

This trend appears to have continued in 2023. As of December 7, 2023, there were over 500 applications for leave to appeal to the SCC filed in 2023 – a marked increase from prior years. Yet, only 7% of those leave applications were granted. While this percentage is higher than that in 2022, it is lower than that in previous years, and is not as high as might have been expected given the increased number of leave applications filed.

Of those cases that have been granted leave, just over half are related to public law issues, while just over a quarter are related to criminal law, and the remainder are related to private law. These ratios are relatively on par with previous years; however, given the increased number of leave applications and the relatively lower percentage of those being granted, the result is that fewer private law cases are receiving leave to appeal to the SCC.

These statistics appear to support the general feeling among civil and commercial litigators that it is harder than ever to obtain leave to appeal to the SCC in cases that do not involve public law or criminal law issues. Cases involving significant issues of private law, which SCC practice veterans consider to have reasonable chances of getting leave, routinely are being rejected for consideration by the country's highest court.
We will be watching these leave statistics closely over the coming year. In the meantime, practitioners advising their clients on potential applications for leave to appeal to the SCC should tread carefully, particularly where a case does not involve public law or criminal law elements.

CELEBRATING THE WOMEN OF THE SCC

In November 2023, Justice Mary T. Moreau was announced as the latest Supreme Court of Canada appointee – giving Canada, for the first time in its history, a women-majority SCC bench. In recognition of this exciting milestone, we feature the 12 women who have been appointed to the Supreme Court Bench throughout Canadian history.

JUSTICE BERTHA WILSON 1982-1991

Justice Wilson was the first woman to serve on the SCC bench. Prior to her elevation to the bench, she was the first female associate and partner at Osler, Hoskin & Harcourt L.L.P.

Justice Wilson's concurring opinion in *R. v Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 SCR 30 altered the course of *Charter* Section 7 jurisprudence. Until 1988, it was a crime for a physician to perform or induce an abortion. In her concurring decision, agreeing with the majority's decision to overturn the *Criminal Code*'s restrictions on abortion, Justice Wilson described the unavailability of abortions as a violation of a woman's right to "security of person".

In *R. v Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 SCR 852, Justice Wilson's majority decision recognized the defence of battered spouse syndrome in a case where a long-time sufferer of intimate partner violence argued self-defence in the murder of her abusive husband. This was the first Canadian case to recognize the psychological dimensions of intimate partner violence.

As Justice Wilson wrote on the importance of increased diversity on the bench: "If women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they will make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human."

JUSTICE CLAIRE L'HEUREUX- DUBÉ 1987-2002

Justice L'Heureux-Dubé was the first Quebecois woman judge appointed to the SCC bench. Beginning her law career as one of the first woman lawyers to work on divorce cases in Quebec, she ultimately was the first woman judge appointed to the Quebec Superior Court of Justice and the Quebec Court of Appeal. In 1987, Justice L'Heureux-Dubé was appointed to the SCC, where she became known as "The Great Dissenter" for her powerful and dynamic dissenting opinions.

Among her many contributions to the bench and to the profession, Justice L'Heureux-Dubé wrote the majority decision in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, the landmark case establishing procedural fairness in administrative law. She also wrote a concurring decision in *R. v Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 SCR 330, which famously challenged the twin myths of sexual assault and included a scathing critique of her male colleagues' position.

Justice L'Heureux-Dubé's advice to the profession was: "Don't work for money, work for justice—you will make money anyway but the focus is quite different."

CHIEF JUSTICE BEVERLEY MCLACHLIN 1989-2017

Chief Justice McLachlin practiced with several large law firms in British Columbia and Alberta and taught law at the University of British Columbia before her elevation to the Vancouver County Court in April 1981. She quickly rose to the Supreme Court of British Columbia in September 1981, and was subsequently appointed to the British Columbia Court of Appeal in December 1985, of which she became Chief Justice in 1988. She was appointed to the SCC in 1989, and became the first woman Chief Justice of Canada in 2001. She served on the SCC bench for 28 years.

Chief Justice McLachlin's notable contributions include the development of a body of robust *Charter* jurisprudence and key principles of "living-tree" and purposive constitutional interpretation.

Among her numerous contributions, Chief Justice McLachlin authored the SCC's decision in *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101, where the Court de-criminalized sex work in Canada pursuant to section 7 of the *Charter*. This case is the first recognizing the unique vulnerabilities of sex workers and affirming the universal application of the right to safety and security of the person.

By virtue of the sheer number of decisions she authored during her tenure, Chief Justice McLachlin has been described as one of the most prolific Chief Justices in history. She also is famous for the number of unanimous decisions issued during her time at the Court. From 2001 to 2017, the SCC issued over 700 unanimous decisions, with over 60% of decisions delivered "By the Court".

JUSTICE LOUISE ARBOUR 1999-2004

Justice Arbour has an extensive resume spanning the fields of law reform, civil liberties, and international law.

In the 1970s, Justice Arbour served as Research Officer for the Law Reform Commission of Canada. In the 1980s, she taught at Osgoode Hall Law School as a Professor and Associate Dean, and she was the Vice President of the Canadian Civil Liberties Association. She was appointed to the Ontario Superior Court in 1987, and to the Court of Appeal for Ontario in 1990. In the 1990s, she was appointed as a Commissioner to conduct an inquiry into certain events at the Prison for Women in Kingston, Ontario, 1995, which resulted in the famous "Arbour Report." She was appointed by the Security Council of the United Nations as Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda from 1996 to 1999, when she ultimately was appointed to the SCC bench.

Justice Arbour is known for her strong and controversial decisions and dissents while on the SCC bench. For example, she criticised the rape shield provisions of the *Criminal Code*, raising concerns about protecting the presumption of innocence.

Since retiring from the SCC, Justice Arbour has continued her distinguished career at the United Nations and in private practice.

JUSTICE MARIE DESCHAMPS 2002-2012

Justice Deschamps began her career in 1975 as a civil trial lawyer, and was appointed to the Quebec Superior Court in 1990. She was then appointed to the Quebec Court of Appeal in 1992, and to the SCC in 2002. After her retirement in 2012, Justice Deschamps was honoured with the Order of Canada in 2013 for her contributions as a jurist and dedication to youth development.

Justice Deschamps' most well-known decision is *ABB Inc. v Domtar Inc.*, 2007 SCC 50 (CanLII), [2007] 3 SCR 461., a product liability case in which she authored the majority decision holding that the ordinary limitation period under the *Civil Code of Quebec* does not apply to products with latent defects. In that decision, she established a test for latent defect liability which mirrors the common law discoverability rule enshrined in the various provincial limitations statutes outside Quebec.

Justice Deschamps also is known for her work on the nation-wide inquiry into sexual misconduct and harassment in the Canadian Armed Forces. Following the external review, she authored a 2015 report making a number of recommendations, including the creation of an independent agency to handle reports of sexual misconduct and provide support to victims.

JUSTICE LOUISE CHARRON 2004-2011

Justice Charron worked as a criminal and civil litigator in Ottawa before becoming an Assistant Crown Attorney in 1978. She also taught law at the University of Ottawa from 1978 to 1988. Justice Charron subsequently was appointed to the Ontario District Court and High Court of Ontario before her elevation to the Court of Appeal for Ontario in 1995. She served on the SCC bench from 2004 until 2011.

Justice Charron's decision in *R. v Grant*, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, delivered jointly with Chief Justice McLachlin, specified a three-part test under section 24 of the *Charter* for determining the inadmissibility of evidence obtained in breach of an accused person's *Charter* rights. The *Grant* test is foundational in criminal law and has had important implications for the development of *Charter* jurisprudence and privacy law principles.

JUSTICE ROSALIE SILBERMAN ABELLA 2004-2021

Justice Abella is one of Canada's most famous jurists. She is the child of Holocaust survivors, born in a displaced-persons camp after WWII. From 1972 to 1976, Justice Abella practiced criminal law and civil litigation. In 1976, she became a judge of the Ontario Family Court at age 29 and while pregnant (both historically unprecedented accomplishments for an Ontario judge). Among her numerous accomplishments, Justice Abella served as the sole commissioner of the federal Royal Commission on Equality in Employment and coined the term "employment equity." When she was appointed to the SCC in 2004, Justice Abella was the first Jewish woman to sit on the Supreme Court bench.

Justice Abella's decisions reveal a deep commitment to social justice, protecting the vulnerable, and honouring humanity. For example, in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (CanLII), [2015] 1 SCR 245, Justice Abella wrote the decision holding that freedom of association under the *Charter* protects unionized workers' right to strike. In *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII), [2020] 3 SCR 113, she authored the decision finding that the Royal Canadian Mounted Police's pension scheme adversely impacted and systematically discriminated against women. In *Dionne v Commission scolaire des Patriotes*, 2014 SCC 33 (CanLII), [2014] 1 SCR 765, she issued a decision protecting the occupational health and safety rights of pregnant women in the workplace.

Justice Abella authored a powerful dissent in *R. v N.S.*, 2012 SCC 72 (CanLII), [2012] 3 SCR 726, defending a Muslim woman's right to religious freedom and to testify in a sexual assault cause while wearing a *niqab*. She defended the rights of refugee children in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (CanLII), [2015] 3 SCR 909, holding that the exercise of humanitarian and compassionate discretion under section 25(1) of the *Immigration and Refugee Protection Act* always must consider the best interests of any children involved.

As Justice Abella famously said, "Justice is the application of law to life, not just the application of laws to facts."

JUSTICE ANDROMACHE KARAKATSANIS 2011-PRESENT

Justice Karakatsanis began her career in litigation, practicing in the areas of criminal, civil and family law. She then spent 15 years in public service, holding various positions. Justice Karakatsanis served as a judge of the Ontario Superior Court from 2002 to 2010, and as a justice of the Court of Appeal for Ontario from 2010 to 2011 prior to her appointment to the SCC in 2011.

Justice Karakatsanis has been actively involved in education reform in administrative justice. In 1996, she was awarded the Society of Ontario Adjudicators and Regulators Medal for outstanding service to the administrative justice system. She is known and admired for the straightforward language she uses in her legal decisions, as part of her personal effort to increase the accessibility of justice.

One of Justice Karakatsanis' most significant and oft-cited decisions since being appointed to the SCC is *Hryniak v Mauldin,* 2014 SCC 7 (CanLII), [2014] 1 SCR 87, a decision clarifying the purpose and availability of summary judgment. She also authored the majority decision in *R. v Goldfinch,* 2019 SCC 38 (CanLII), [2019] 3 SCR 3, where the SCC confirmed that evidence of a sexual assault complainant's prior sexual history is not admissible only for the purpose of supporting "twin-myth" inferences.

Justice Karakatsanis continues to serve on the SCC today, and is the longest serving member of the current bench.

JUSTICE SUZANNE CÔTÉ 2014-PRESENT

Justice Côté is the first and only woman appointed to the SCC directly from private practice.

Before her appointment to the SCC in 2014, Justice Côté practiced as a civil litigator. She began her career in the Gaspé Peninsula, where she was born. She spent 23 years practicing at Stikeman Elliott L.L.P., where she was head of the Montréal office's litigation group. She then became a partner at Osler, Hoskin & Harcourt L.L.P., where she was head of their Montréal office's litigation group. Justice Côté's practice specialized in complex civil and commercial litigation, including cases involving manufacturer liability, class actions, shareholder disputes, and public law.

Now an SCC justice, Justice Côté is known as one of the court's most frequent dissenters. She links her dissents to her "forward-thinking" perspective, recognizing disagreements as a necessary part of evolving the law. Her dissents are particularly common in the context of court review of non-judicial decisions, with Justice Côté authoring or co-authoring dissenting opinions in such decisions as *Quebec (Attorney General) v Guérin*, 2017 SCC 42 (CanLII), [2017] 2 SCR 3 (relating to the review of an arbitrator's determination of whether he could hear a case), *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 (CanLII), [2016] 2 SCR 293 (relating to the review of a local Assessment Review Board decision), and *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29 (CanLII), [2016] 1 SCR 770 (relating to the review of a labour adjudicator's decision).

Justice Côté continues to serve on the SCC today.

JUSTICE SHEILAH MARTIN 2017-PRESENT

Justice Martin was trained in both civil law and common law before moving from Montreal to Alberta. In the 1980s, she worked as a researcher and law professor at the University of Calgary, and also was a visiting professor at Osgoode Hall Law School. From 1991 to 1996, Justice Martin was Acting Dean, and then Dean, of the University of Calgary's Faculty of Law.

In private practice from 1996 to 2005, Justice Martin practiced criminal law in Calgary, and was actively involved with the Women's Legal Education and Action Fund and the Alberta Association of Sexual Assault Centres. At the invitation of National Chief of the Assembly of First Nations, Phil Fontaine, she joined the team tasked with finding a new approach to redress the harms caused by the forced attendance of Indigenous children at residential schools. Her work, alongside many others, contributed to the Indian Residential Schools Settlement Agreement.

Justice Martin was appointed to the Court of Queen's Bench for Alberta in 2005, and to the Courts of Appeal of Alberta, the Northwest Territories, and Nunavut in 2016. She also served as a Deputy Judge for the Supreme Court of Yukon since 2009. She was appointed to the SCC in 2017 and continues to serve today.

JUSTICE MICHELLE O'BONSAWIN 2022-PRESENT

Justice O'Bonsawin is an Abenaki member of the Odanak First Nation and, in 2022, became the first Indigenous person 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 as a judge of the Ontario Superior Court of Justice in 2017.

Justice O'Bonsawin had a long career in the public sector before being appointed to the bench. Her public sector legal experience spans roles with the Royal Canadian Mounted Police, Canada Post, and Royal Ottawa Health Care Group. Through these roles, she gained significant and specialized experience in such issues as 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 relatively 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 SCC jurisprudence and the development of the common law.

JUSTICE MARY T. MOREAU 2023-PRESENT

Justice Moreau began her legal career in 1980 in Alberta, working primarily in criminal law, constitutional law, and civil litigation. Her practice included cases involving minority language rights issues, and she is a co-founder of the Association des juristes d'expression française de l'Alberta.

In 1994, Justice Moreau was appointed to the Court of the Queen's Bench of Alberta. She was appointed as a deputy judge of the Supreme Court of the Yukon in 1996, and of the Supreme Court of the Northwest Territories in 2005. In 2017, she was appointed Chief Justice of the Court of King's Bench of Alberta.

During her time as a trial judge, from 2017 to 2023, Justice Moreau was a member of the Canadian Judicial Council. Over the course of her tenure, she served on the Council's Executive Committee, Judicial Conduct Committee, and its Technology Subcommittee (which she chaired). She also was a member of the Action Committee on Modernizing Court Operations.

Until recently, Justice Moreau chaired the Judicial Advisory Committee for Military Judge Appointments and the Commissioner for Federal Affairs' Judicial Advisory Committee on International Engagement.

After serving as a trial judge for almost 30 years, in early November 2023, Justice Moreau was appointed to the SCC. The same month, she was awarded a Lifetime Achievement Award from Women in Law Leadership.

As the newest member of the Supreme Court bench, Justice Moreau's arrival marks the first time in Canada's history that the SCC has had a women-majority bench.

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