April 20, 2021

The SCC Leave Project: Predictions for April 22, 2021

Here's a look at the leave application decisions that the Supreme Court of Canada will be releasing on April 22, 2021.

Each week, we'll be providing a short blog post that summarizes some of the upcoming cases and gives a prediction of the probability that leave will be granted. These predictions will be based on our proprietary machine learning model and dataset of every leave application decision released by the Supreme Court of Canada from January 1, 2018 onward.

Each week, we'll group cases into four categories:

- **Cases to Watch** – These are cases where our model predicts greater than a 25% chance that leave will be granted. These cases have a much better than average chance that leave will be granted. While this doesn't mean that all of them will get leave, they are worth watching as strong candidates.
- **Possible Contenders** – These are cases where our model predicts between a 5% and 25% chance that leave will be granted. These cases have an average to somewhat above-average chance of getting leave. While most cases in this category won't get leave, on average, we expect to see a healthy minority of cases in this category being granted leave.
- **Unlikely Contenders** – These are cases where our model predicts between a 1% and 5% chance that the case will get leave. The safe bet is against leave being granted in these cases, but we do expect to see it from time to time.
- **Long-Shots** – These are cases where our model predicts a less than 1% chance that the case will get leave. Although it will happen from time to time, it would be an outlier for our model for these cases to be granted leave. We will not be providing summaries for these cases.

If this is your first time reading our weekly SCC leave predictions blog, have a look at an explanation and caveats about our model here.

THIS WEEK'S CASES

There are 13 leave applications decisions coming out on April 22, 2021. Our model only predicts the probabilities of successful leave applications in cases where leave was sought from the Court of Appeal. We will not comment or provide a prediction on cases where leave was sought directly from a Superior Court decision or on cases in which we are involved. That leaves 10 cases in which we'll give a prediction.

You can find a detailed summary of all of the cases that are up for leave decisions this week here.

Possible Contenders

Fuller Landau Group Inc. in its capacity as trustee in bankruptcy of 7636156 Canada Inc v OMERS Realty Corporation

This is a commercial dispute surrounding a letter of credit executed by a tenant in favour of the landlord, OMERS Realty. After the tenant made an assignment in bankruptcy, OMERS Realty drew on the line of credit. After the tenant's trustee in bankruptcy disclaimed the lease, OMERS Realty went on to make two further draws on the remaining credit. The issues raised on this appeal include whether a landlord can retain amounts in excess of its preferred claim, whether there is conflict between bankruptcy law and principles of law governing letters of credit, how the anti-deprivation rule is properly applied, and how *Crystalline Investments Ltd v Domgroup Ltd* is properly applied.

- **Our Model's Prediction:** This case has a 16% chance of getting leave.

Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association, Entertainment Software Association of Canada, Apple Inc., Apple Canada Inc.

- and between -

Music Canada v Entertainment Software Association, Entertainment Software Association of Canada, Apple Inc., Apple Canada Inc.

This is a copyright case concerning the meaning of the term "making available" a work to the public. The Copyright Board found that s. 2.4(1.1) of the *Copyright Act* deemed the act of making a work available to the public a "communication to the public" within s. 3(1)(f) of that Act and, thus, an act that triggers a tariff entitlement. The Federal Court of Appeal quashed the Board's decision regarding the meaning of the "making

available" provisions. Leave to appeal to the Supreme Court was sought by SOCAN and Music Canada, and motions to be added as respondents were filed by major ISPs including Bell, Quebecor, Rogers, and Shaw.

- **Our Model's Prediction:** This case has a 14% chance of getting leave.

André Delorme v Agence du revenu du Québec and Attorney General of Quebec

This case involves a constitutional question of whether the Court of Quebec had jurisdiction to hear and settle an income tax dispute, in particular the question of maintaining or cancelling an assessment issued by the Agence du Revenu du Quebec (ARQ). In a first judgement, the Court of Quebec refused to decline jurisdiction and rendered a second judgement which found the plaintiff had failed to rebut the presumption that the assessment was valid. The issues on appeal include the question of jurisdiction and whether the courts below correctly applied sections of the *Taxation Act*, existing jurisprudence, and rules on deductions for doubtful debts.

- **Our Model's Prediction:** This case has a 6% chance of getting leave.

Corey Leonard Smelie v Her Majesty the Queen; Jermaine Gager v Her Majesty the Queen

These two cases were heard together at the Court of Appeal for Ontario. In both cases, the defendants were convicted of murder. This case raises the topical issues of whether expert evidence on gangs, and the regular use of gang association of young Black men in our criminal justice system, is an example of systemic racism in the courts, and whether the use of this kind of evidence embeds systemic racism in the criminal justice system. The issues on appeal include actual or apparent unfairness or bias on the part of the trial judge, and whether the Court of Appeal erred in finding that material relied upon by a Crown expert for his expertise and opinion was not first party disclosure.

- **Our Model's Prediction:** This case has a 6% chance of getting leave.

Gideon Koren v RG - and between - Hospital for Sick Children, Joey Gareri v RG

This case concerns the certification of a class action against the Motherisk Drug Testing Laboratory, which the class alleges was

negligent and produced false positive, unreliable testing of the presence of drugs or alcohol in individuals' hair. The certification of the class was dismissed. An order was subsequently issued that declared the limitation period of all former putative class members continued to be suspended under s. 28(1) of the *Class Proceedings Act*. The issue on appeal is whether the denial of certification in a proposed class proceeding ends the suspension of limitation periods provided for in s. 28 of the *Class Proceedings Act*.

- **Our Model's Prediction:** This case has a 5% chance of getting leave.

Unlikely Contenders

Labourers' International Union of North America, Local 183 v GDI Services (Canada) LP, Owen Gray

This is an employment case relating to collective agreements and whether an employer can evade an obligation under a collective agreement by entering into a contract. In this case, GDI Services (Canada) LP entered into a contract with Cadillac Fairview Corporation Limited to perform cleaning and maintenance services. The contract required GDI Services to replace any personnel whose performance or conduct, in Cadillac Fairview's sole opinion, was regarded as unsatisfactory. This case resulted from the dismissal of an employee pursuant to this provision in the contract. The grievance was dismissed by an arbitrator and the Ontario Superior Court, Divisional Court dismissed an application for judicial review. The Court of Appeal denied leave to appeal.

- **Our Model's Prediction:** This case has a 4% chance of getting leave.

Guillaume Lemay v Her Majesty the Queen

This is a criminal case. The issue on appeal is whether the Court of Quebec erred in finding that the applicant had breached a condition of a modified conditional sentence order that was allegedly not understood by or given to him.

- **Our Model's Prediction:** This case has a 4% chance of getting leave.

Long-Shots

Ingrid Hayden c Bradley J. Hayden, Bradley J. Hayden Professional Corporation, William Armstrong and Affiliates, Norton Rose Fulbright Canada LLP

- **Our Model's Prediction:** This case has a less than 1% chance of getting leave.

Olive Landry v Attorney General of New Brunswick

- **Our Model's Prediction:** This case has a less than 1% chance of getting leave.

UPDATE ON APRIL 22: WHAT HAPPENED THIS WEEK?

Another strong week for our predictive model. The Supreme Court granted leave to 1 of 13 cases this week, namely *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association, Entertainment Software Association of Canada, Apple Inc., Apple Canada Inc. - and between - Music Canada v Entertainment Software Association, Entertainment Software Association of Canada, Apple Inc., Apple Canada Inc*. This decision was one of the cases that our model identified as a Possible Contender, with a predicted probability of 14% (in other words, a case like this would get leave a little less than 3 out of 20 times). Of our predictions, this case was predicted to have the second highest chance of getting leave (the highest probability was 16%; the remaining cases had a 6% chance or below).

Recall that this week, our model did not identify any cases in the Cases to Watch category, meaning of the leave decisions this week, the Possible Contender cases had the highest probability of being granted leave. None of the cases that our model had identified as relatively low likelihood cases were granted leave.

Here is the full list of leave application decisions this week.