July 28, 2021

The SCC Leave Project: Predictions for July 29, 2021

Here's a look at the leave application decisions that the Supreme Court of Canada will be releasing on July 29, 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 seven leave application decisions coming out on July 29, 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. This week, we'll provide predictions for all seven cases.

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

Possible Contenders

Actava TV, Inc, et al v Matvil Corp

The applicants sought enforcement of a letter of request from the United States District Court, Southern District of New York, to compel the respondent, an Ontario company and non-party to a U.S. action, to produce its confidential and proprietary financial and valuation documents to assist the respondents' expert in the U.S. action. One of the parties in the U.S. action is a competitor of the respondent and the other is a potential competitor with whom it had a referral agreement. The Ontario Superior Court of Justice granted an order enforcing the letter of request and ordered the respondent to deliver the requested information and to have a representative appear for examination, subject to the U.S. Court ordering certain restrictions on access to the financial data. The Ontario Court of Appeal allowed the appeal, overturning the lower court's analysis of the considerations of relevance, public policy, and sovereignty.

- **Our Model's Prediction:** This case has a 18% chance of getting leave.

Barrick Gold Corporation, et al v Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund, et al

In 2009, Barrick Gold Corporation began construction of the Pascua-Lama mine, a multi-billion-dollar gold mining project in the high Andes of Chile and Argentina. During the project, the estimated cost of the project soared, and environmental issues arose. By 2013, Barrick Gold concluded that the project was no longer financially viable and decided to cease operations. Following the closure, several shareholders launched a class action based on secondary market misrepresentations allegedly made by Barrick Gold. A motions judge granted leave to proceed under s. 138.3 of the *Ontario Securities Act* for only

one proposed misrepresentation claim. The Court of Appeal of Ontario granted the subsequent appeal in part, returning several other issues for determination by the lower court.

- **Our Model's Prediction:** This case has a 15% chance of getting leave.

David Gelerman, et al v Baylin Technologies Inc, et al

Mr. Gelerman, president and CEO of Spacebridge Inc., entered into an asset purchase agreement with Baylin Technologies Inc., a public company listed on the Toronto Stock Exchange, in January 2018. Pursuant to the agreement, Baylin was required to "honestly and in good faith" assist Mr. Gelerman to obtain enough votes to be elected to Baylin's Board at both the 2018 and 2019 annual general meetings. However, in 2019, following the passing of Baylin's draft majority voting policy, Mr. Gelerman was advised by email that the chair of the Board and a Baylin majority shareholder would not be supporting his re-election. At the 2019 AGM, Mr. Gelerman did not receive enough votes to be re-elected, and Baylin requested his resignation per the terms of the Baylin draft voting policy. Mr. Gelerman refused to resign and instead brought an application seeking an oppression remedy to allow him to complete his term as director until the 2020 AGM, as contemplated by the asset purchase agreement. The Ontario Superior Court of Justice granted an order setting aside Baylin's majority voting policy and permitting Mr. Gelerman to remain a director until the 2020 AGM. The Ontario Court of Appeal allowed the Respondent's appeal and declared the Baylin draft voting policy to be in force and compliant with the TSX Requirements.

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

Unlikely Contenders

Awet Mehari v Her Majesty the Queen

Mr. Mehari, charged with sexual assault, testified that the sexual encounter he had with the complainant was consensual. The complainant testified that she recalled nothing after entering Mr. Mehari's bedroom until she awoke to find Mr. Mehari having intercourse with her. Following the trial by a judge sitting without a jury, Mr. Mehari was convicted of sexual assault. The majority of the Court of Appeal for Saskatchewan allowed Mr. Mehari's appeal, finding that the trial judge applied greater scrutiny to Mr. Mehari's testimony than to the complainant's, set aside the

conviction, and ordered a new trial. The Supreme Court of Canada allowed the appeal and remitted the matter to the Court of Appeal to decide the grounds of appeal the majority did not address. The Court of Appeal for Saskatchewan dismissed Mr. Mehari's appeal.

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

Long-Shots

Karl Talbot v Sébastien Talbot

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

Wesley Casbohm v Winacott Spring Western Star Trucks and Geo Holdings Ltd.

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

Marie-Josée Murray, personally v 9197-5748 Québec inc., et al

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

UPDATE ON JULY 29, 2021: WHAT HAPPENED THIS WEEK?

The Supreme Court did not grant leave to any cases this week. This outcome is consistent with our model's predictions, which indicated that there were 3 Possible Contenders (none with higher than a 20% change of getting leave), 1 Unlikely Contender and 3 Long-Shots. There were no "Cases to Watch" this week (greater than 25% chance that leave will be granted).