Blerta Gjoci
416-238-7505
bgjoci@litigate.com

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The SCC Leave Project: Predictions for July 8, 2021

Here's a look at the leave application decisions that the Supreme Court of Canada will be releasing on July 8, 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 nine leave application decisions coming out on July 8, 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 nine cases.

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

Cases to Watch

Susan Riddell Rose v PricewaterhouseCoopers Inc.

Perpetual Energy sold a large amount of gas wells and related lands and infrastructure (the "Goodyear Assets") along with associated asset retirement obligations. The interests of the Goodyear Assets were held in trust through the Perpetual Operating Trust (POT) and the Perpetual Energy Operating Corp (PEOC). They were then sold to Sequoia Resources Corp., which later assigned itself into bankruptcy. PricewaterhouseCoopers Inc (PwC) was appointed Sequoia's bankruptcy trustee. PwC alleged that the purchase of the Goodyear Assets was undervalued and non-arm's length, that PEOC operated in an oppressive manner, the sale was contrary to public policy, and Ms. Rose breached her fiduciary duties and duty of care. The Alberta Court of Queen's Bench declined to strike or dismiss the arm's length issue but struck the claims for oppression and public policy grounds, and in a separate decision, awarded solicitor-client costs to Ms. Rose. PEOC and its related companies appealed the arm's length issue, while PwC appealed the oppression and public policy issues. PEOC's appeal was dismissed, PwC's appeal was allowed.

- **Our Model's Prediction:** This case has a 31% chance of getting leave.

Possible Contender

J.R. Simplot Company v McCain Foods Limited

The respondent, McCain Foods Limited, owns a patent relating to a food-related system. A German company, Elea, manufactures and supplied the system at issue to the applicant, J.R. Simplot Company and Simplot Canada Limited (together, "Simplot"). The respondent sued the applicant, alleging a

violation of their patent. Simplot filed a statement of defence and a counterclaim. Elea refused indemnity to Simplot. Simplot then filed a motion to amend its statement of defence and counterclaim to include defences related to Elea, and to serve and file a third-party claim against Elea. The motion was granted by a Prothonotary of the Federal Court. The respondent appealed the order and filed a motion to strike the third-party claim. The Federal Court struck portions of the statement of defence and counterclaim but granted leave to amend them. The Court of Appeal unanimously struck the third-party claim. The appeal of the statement of defence and counterclaim was dismissed.

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

Interlake Reserves Tribal Council Inc v Government of Manitoba, as represented by the Minister of Conservation and Climate, as represented by the Director of Conservation and Climate, as represented by the Department of Infrastructure, and as represented by the Lieutenant Governor in Council

Several First Nations communities brought an action against the government of Manitoba for a series of claims, including a request for injunctive relief. The government of Manitoba planned a new flood control management system and sought to authorize a permit for land clearing in anticipation of the project, and a license to upgrade the winter road to an all-season road. The First Nations communities contested these decisions, expressing concerns about the impact of the work on the environment, traditional knowledge and cultural identity, and Aboriginal and treaty rights. The motion judge granted two injunctions. The Court of Appeal unanimously allowed the province's appeal, and both injunctions were set aside.

- **Our Model's Prediction:** This case has a 8% chance of getting leave.

Kerry Alexander Nahanee v Her Majesty the Queen

The applicant plead guilty to two counts of sexual assault. The sentencing judge rejected sentencing submissions from the Crown and the defence, imposing a higher sentence than sought by the Crown. The sentencing judge did not alert counsel that she intended to exceed the Crown's proposed sentence. The appeal was dismissed.

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

Unlikely Contenders

Kenneth Ignacio v Her Majesty the Queen

The complainant and the applicant engaged in consensual touching and other sexual activity. They agreed that this included sexual intercourse but disagreed as to whether there was consent. The issue in the trial was whether the complainant had a motive to fabricate a sexual assault. The applicant was convicted of sexual assault, and the appeal was dismissed.

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

Canadian Union of Public Employees v Attorney General of Nova Scotia

The unions were added as interveners to a Reference regarding the constitutionality of the *Public Services Sustainability (2015) Act.* The applicant unions brought a motion seeking two orders, an order authorizing the unions to rely on certain affidavits and expert reports, and an order that the Attorney General of Nova Scotia add relevant Cabinet documents to the record. The motion was dismissed by the Court of Appeal.

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

Amgen Inc v Pfizer Canada ULC

Amgen owned the 537 Patent in issue, which is sold and distributed commercially as Neupogen, with the active ingredient being filgrastim. Pfizer filed a new drug submission for the issuance of a notice of compliance for its filgrastim biosimilar "Nivestym", using Neupogen as the reference biologic drug to receive regulatory approval. Amgen claimed that the making, selling and distribution of Nivestym would infringe certain claims of its 537 Patent. Pfizer counterclaimed that the 537 Patent was invalid and void, due to, *inter alia*, obviousness. The trial judge held that the 537 Patent was invalid for obviousness. The decision was upheld on appeal.

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

Samborski Environmental Ltd v Government of Manitoba

An environmental license was issued by Manitoba's then Department of Environment to a garden supply business with a composting component on a property, which was never

established. The property was purchased by a new owner, and the applicant had an interest based on an option to purchase. The applicant attempted to obtain approval for a composting operation on the property and discovered that the Department had issued a license to the previous business. The applicant commenced an action against the Government of Manitoba for damages for negligence and breach of statutory duty for failing to advise the applicant of the license's existence. The respondent moved for summary judgment, which the motion judge granted. The judge held that the license was not valid, because it was issued for a previous development not acquired by the new owner. It was cancelled or revoked when the previous owner abandoned the development. The appeal was dismissed.

- **Our Model's Prediction:** This case has a 2% chance of getting leave.

Martin Lajeunesse c Investissement Québec

The applicant was the majority shareholder and principal officer of GPM Ripe Inc. As part of a financial plan, the respondent was to provide loans to GPM and the applicant was required to grant a temporary suretyship as a condition of the loans. After paying out part of the loans, the respondent informed the applicant that it would not pay out additional amounts to GPM due to risk factors. At a later date, GPM was deemed to have made an assignment of its property. The applicant brought an action against the respondent, claiming a total of $35 million in damages. The respondent sued the applicant as surety for the amounts loaned to GPM, claiming $80,000 from him. The Superior Court dismissed the applicant's application, and allowed the respondent's application, ordering the applicant to pay $80,000. The appeal was dismissed.

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

UPDATE ON JULY 8: WHAT HAPPENED THIS WEEK?

The Supreme Court granted leave to one case this week. A possible contender, *Kerry Alexander Nahanee v Her Majesty the Queen*, was granted leave, despite having only a 6% chance based on our model. This case demonstrates that a low probability does not mean that there is no chance for a case to get leave; cases with a 6% probability should get leave 6% of the time. In this case, the Court will add to the jurisprudence regarding the requirements of a trial judge in sentencing an

accused.

With respect to the other cases, none were granted leave, which is generally consistent with our model's predictions. However, there was one surprising decision, as our model's most likely contender, *Susan Riddell Rose v PricewaterhouseCoopers Inc*., with a 31% chance of getting leave, was denied leave.