May 18, 2021

The SCC Leave Project: Predictions for May 20, 2021

Here's a look at the leave application decisions that the Supreme Court of Canada will be releasing on May 20, 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 10 leave application decisions coming out on May 20, 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 give a prediction on all 10 cases.

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

Cases to Watch

Eugene Ndhlovu v Her Majesty the Queen

This is an application for leave by the accused in a criminal case. The applicant pled guilty to two charges of sexual assault. The applicant was sentenced to 6 months imprisonment and 3 years' probation, and was also required, under ss 490.012 and 490.013(2.1) of the Criminal Code, to register and report for life under the *Sex Offender Information Registration Act*. The applicant successfully argued at sentencing that the lifetime registration requirement violates s 7 of the Charter. The result was overturned on appeal. The issue raised in this case is whether requiring mandatory lifetime registration pursuant to the *Sex Offender Information Registration Act* violates s 7 of the Charter, and if so, whether it can be saved under s 1.

- **Our Model's Prediction:** This case has a 52% chance of getting leave.

KPMG Inc., en sa qualité de liquidateur de Dessau inc. suivant l'Ordonnance de la Cour supérieure portant le numéro 500-11-056442-193 c Ville de Lorraine

The respondent Ville de Lorraine (the "Town") decided to build a sound abatement wall. The applicant, Dessau inc., was retained to assist with the project. After construction started, part of the wall collapsed and several lawsuits were initiated relating to the collapse, including the Town's lawsuit against Dessau. This case concerns the general duty of good faith, and whether that duty requires a party to minimize injury by considering alternatives in collaboration with other contracting parties before unilaterally abandoning construction on the basis that the work cannot be completed as initially designed. It also touches on whether evidence that work cannot be completed as designed is sufficient to give rise to a presumption of total loss, such that the client can claim damages for the entire price paid.

- **Our Model's Prediction:** This case has a 34% chance of getting leave.

Nova Chemicals Corporation v Dow Chemical Company

During the liability phase of a trial, the Federal Court found that the applicant, Nova Chemicals, had infringed on a patent held by Dow. Dow elected to have its damages flowing from the infringement calculated based on an accounting of profits received by Nova. The issue in this case is the proper approach in calculating disgorgement of profits in patent cases, including the issue of whether "springboard profits" on products sold after the patent expired ought to be included.

- **Our Model's Prediction:** This case has a 32% chance of getting leave.

Possible Contenders

E.W. v Windsor-Essex Children's Aid Society

This is a family law case involving child protection laws. The mother, E.W., and her two children are Métis. The children were placed in care and the Children's Aid Society applied for a permanent extended care placement. This case raises issues about the best interests of Indigenous children, including whether they are statutorily entitled to special considerations relating to meaningful access to Indigenous parents to retain cultural, heritage, language, and familial ties.

- **Our Model's Prediction:** This case has an 9% chance of getting leave.

Charles Bordeleau v Matthew Skof

This is a civil action. The respondent, Mr. Skof, was a police officer with the Ottawa Police Service. He was suspended in 2019 after he was charged with offences under the Criminal Code. Mr. Skof commenced an action against the Chief of Police (Mr. Bordeleau) and the Ottawa Police Services Board, alleging breaches of Mr. Skof's Charter rights and misfeasance in public office. The applicants brought a motion to dismiss the action based on lack of jurisdiction, which was ultimately dismissed by the Court of Appeal. This case raises questions about the jurisdiction of courts to determine police discipline and employment matters when collective agreements and other legislation create a complete procedural and substantive code.

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

Unlikely Contenders

James Andrew Beaver v Her Majesty the Queen and *Brian John Lambert v Her Majesty the Queen*

These are two applications by co-accused's in a criminal case. The applicants were detained by police at the scene in relation to the death of their roommate. The detention was under a non-existent act. The applicants were later arrested for murder. One accused confessed and the other later admitted participation when confronted with the other's confession. At trial and on appeal, the applicants' request for a stay and to have the evidence excluded was denied. Although the first detention was a breach of the applicants' Charter rights, the subsequent arrest was a "fresh start", and the confessions were not tainted by the previous breaches. This case involves legal questions about whether a "fresh start" insulates evidence subsequently obtained from prior breaches and whether the reasonable and probable grounds of the arresting officers ought to be subject to greater scrutiny in cases where there was a prior unlawful detention.

- **Our Model's Prediction:** These cases have a 4% chance of getting leave.

Long-Shots

Lionel Ravvin v Canada Bread Company Limited

This is a class proceeding commenced in Alberta relating to alleged price fixing in the packaged bread market. The applicant, Mr. Ravvin, commenced one of two proposed class proceedings filed in Alberta. Several other class proceedings were filed across the country. The Alberta class proceedings were stayed on the basis that they were duplicative of a national class action proceeding in Ontario. The Court of Appeal dismissed the appeal. The issue in this case is whether a court in British Columbia, Alberta or Saskatchewan may adjudicate multijurisdictional priority issues in advance of considering the merits of the remaining certification criteria in the proposed class action.

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

Michel Labonté, personnellement et en sa qualité de tuteur ou représentant d'un enfant mineur c Commission Scolaire de la Capitale

In this case, the applicants are parents to a child with autism spectrum disorder. They allege that the respondent school board discriminated against their child by failing to provide adapted educational services and refusing to transfer the child to a specialized class. Both lower courts concluded the school board did not engage in discrimination. The main issue in this case is whether the application gives rise to an issue of public importance.

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

Claude Pierre Bouvier v Jo-Ann Marie Bouvier

This is a family law dispute relating to the division of assets on separation. Ms. Bouvier obtained unequal division of the family home and property after Mr. Bouvier failed to respond to the pleadings and make financial disclosure. The issue in this case is whether the Court appropriately departed from the presumption of equal distribution, in an uncontested proceeding based on material from only one party in the proceeding.

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

UPDATE ON MAY 20: WHAT HAPPENED THIS WEEK?

This week, the Supreme Court of Canada granted leave to appeal for 4 out of 10 cases:

- *Eugene Ndhlovu v Her Majesty the Queen* – our model predicted this case had a 52% chance of getting leave.
- *Nova Chemicals Corporation v Dow Chemical Company* – our model predicted this case had a 32% chance of getting leave.
- *James Andrew Beaver v Her Majesty the Queen* and *Brian John Lambert v Her Majesty the Queen* – our model predicted these cases had a 4% chance of getting leave.

For the first time in our model's history, a case with a less than 5% chance of getting leave was granted leave to appeal. As we've noted before, cases with a 5% chance of getting leave should get leave, on average, 5% of the time. This week's results are therefore still in line with our overall expectations of

our model’s performance.