May 26, 2021

The SCC Leave Project: Predictions for May 27, 2021

Here's a look at the leave application decisions that the Supreme Court of Canada will be releasing on May 27, 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 May 27, 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 six 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.

Cases to Watch

Attorney General of Quebec v Alexandre Bissonnette

This is an application for leave to appeal from the Quebec Court of Appeal. The respondent pleaded guilty to 12 counts, including 6 counts of first degree murder, for his involvement in the Great Mosque of Quebec shooting in January 2017. The sentencing judge and the Quebec Court of Appeal both held that section 745.51 of the *Criminal Code*, which allows for consecutive periods of parole ineligibility in cases of multiple murders, infringed both sections 7 and 12 of the *Charter of Rights and Freedoms* and is, therefore, of no force and effect. The applicant, the Attorney General of Quebec, is appealing the declaration of unconstitutionality.

- **Our Model's Prediction:** This case has a greater than 60% chance of getting leave.

2538520 Ontario Ltd v Eastern Platinum Limited

This is an application for leave to appeal from the British Columbia Court of Appeal. The applicant is a shareholder in the respondent corporation, and applied under the provincial *Business Corporations Act* for leave to commence a derivative action against both past and present directors of the respondent corporation. The Chambers Judge dismissed the applicant's motion for failing to show that, although a derivative action may be in the best interests of the corporation, the applicants were acting in good faith. A majority of the Court of Appeal agreed with the Chambers Judge on the basis that the good faith and best interests requirements are distinct – and the evidence that the applicant was acting in their own self interest rather than in good faith was supportable on the record.

- **Our Model's Prediction:** This case has a 48% chance of getting leave.

Her Majesty the Queen v Jordan Michael Ellis

This is an application for leave to appeal from the Nova Scotia Court of Appeal in a criminal law case surrounding the presumptive ceilings on the right to be tried within a reasonable time. The respondent was successful before the trial judge of obtaining a stay of proceedings due to a net delay of 20.5 months from the time he was charged to the conclusion of trial. The Court of Appeal dismissed the appeal by the Crown.

- **Our Model's Prediction:** This case has a 43% chance of getting leave.

Unlikely Contenders

Karl Bégin v Her Majesty the Queen

This is a criminal law case originating out of Quebec. The applicant in this matter was convicted of driving a motor vehicle with a blood alcohol level above the legal limit, which ultimately brought about an accident causing death. At trial, he was sentenced to imprisonment for a term of 6 years and 6 months; and a driving ban of 10 years with no possibility of enrolling in an ignition interlock device program for 5 years. The applicant appealed the sentence – but only with respect to the 10 year global driving ban and 5 year prohibition on enrolling in an interlock ignition device program. The basis for the appeal was that the trial judge had given insufficient reasons and the punishment, in any event, was demonstrably unfit. The Quebec Court of Appeal dismissed the appeal.

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

Ziad Mohamad Jeha v Her Majesty the Queen

This is an application for leave to appeal from the Alberta Court of Appeal in a criminal law case surrounding the presumptive ceilings on the right to be tried within a reasonable time. The applicant's trial was scheduled to conclude more than 30 months after the date he was charged and, therefore, he brought an application for a stay of proceedings. The motions judge deducted from the total delay the time which defence counsel was unavailable but the Crown and the Court were, and dismissed the applicant's motion. The Court of Appeal agreed with the motion judge on appeal.

- **Our Model's Prediction:** This case has a 3% chance of getting leave.

Long-Shots

Tom Engel v James Prentice, PC, QC, as President of Executive Council of the Province of Alberta

This is an application for leave to appeal from the Alberta Court of Appeal. The fundamental issue in the courts below relates to a decision made by the Premier of Alberta in April 7, 2015 to advise the Lieutenant Governor to dissolve the Alberta Legislature and set a polling date of May 5, 2015 – prior to a statutory election date and without a vote of non-confidence. The Lieutenant Governor accepted this advice and dissolved the legislature. The applicants sought a declaration that the Premier's actions contravened the Alberta *Election Act* and was contrary to section 3 of the *Charter of Rights and Freedoms*. The Court of Queen's Bench and Court of Appeal both disagreed and stated that the decision to call an early election is a political decision that is not justiciable.

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

UPDATE ON MAY 27: WHAT HAPPENED THIS WEEK?

This week, the Supreme Court of Canada granted leave to appeal for one out of the seven cases it released leave decisions in:

- *Attorney General of Quebec v Alexandre Bissonnette* – our model predicted this case had a greater than 60% chance of getting leave.

This week's results are in line with our model's predictions. The *Bissonnette* case represents the highest odds to date that our model has generated; and the only case that was more likely than not to receive leave. Although our model believed that both *2538520 Ontario Ltd* and *Jordan Michael Ellis* would potentially have been of interest to the Supreme Court of Canada, the dismissal of these leave applications is in line with our general expectations.

Bissonnette promises to be an interesting case for the Supreme Court of Canada, and one that will make headline news across the country. The Court will be asked to determine whether consecutive periods of 25-year parole ineligibility for convictions of first-degree murder is unconstitutional and, if so, what the appropriate remedy is. Recall that the trial judge read in that the court could impose consecutive periods of less than 25 years,

but the Court of Appeal disagreed and believed this remedy was not appropriate. As an indication of the intrigue surrounding this case, the Court has also allowed the Attorney General of Quebec to file a 40-page factum on the constitutional issues; and Her Majesty the Queen the right to file a 20-page factum strictly on the determination of a just and appropriate ineligibility period for the respondent.