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# *The Five Most Significant Decisions of the Courts in 2004-2005*

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## How we chose the five most significant cases

- Impact on Canadian society - cases which may create important change
- Change can be effected by adopting a new standard
- Change also occurs when the Courts refuse to follow a trend
- Court's expression of Canadian values is a barometer of significance



# And the Winners Are . . .

- ***Chaoulli v. Quebec***  
*Right to private health insurance*
- ***Reference re Same-Sex Marriage***  
*May gay and lesbian couples marry?*  
*Must clergy perform same-sex marriages?*
- ***British Columbia v. Imperial Tobacco***  
*Can BC sue for tobacco wrongs health costs?*
- ***Newfoundland v. N.A.P.E.***  
*Does a financial crisis trump pay equity?*
- ***Peoples Department Stores v. Wise***  
*Do directors have a fiduciary duty to creditors?*
- ***Three honourable mentions***



## *Chaoulli v. Quebec - SCC*

### *June 9, 2005 and August 4, 2005*

- George Zeliotis and his doctor, Jacques Chaoulli, are live in Quebec. Mr. Z had serious health problems which require prompt attention. Dr. C wished to offer home-delivered in a private hospital.
- Que. Health Insurance Act and Que. Hospital Insurance Act prohibit private insurance for such medical and surgical procedures.
- There are long waiting lists for medical services at public hospitals.
- Are these two statutes constitutional?



## *Chaoulli v. Quebec - SCC*

### *June 9, 2005 and August 4, 2005*

- Evidence showed waiting time delays for heart and live-saving surgery increase patient's risk of mortality or risk that injuries will become irreparable.
- Patients on non-urgent waiting lists are in pain and have poor quality of life.
- *Deschamps J.*: long waiting lists for critical medical services are deprivations under s.7 of *Cdn Charter* (right to life, liberty and security of the person) and under s. 1 of *Que. Charter* (right to life, personal security, inviolability and freedom).



## *Chaoulli v. Quebec - SCC*

### *June 9, 2005 and August 4, 2005*

- Objective of HOIA and HEIA is to promote highest possible quality health care for all regardless of their ability to pay.
- Was public health care policy saved under s.1 of Cdn Charter (reasonable limits in a free and democratic society) and parallel clause in s. 9.1 of Que. Charter?
- *Deschamps J*: Que. had not shown ban on private insurance was essential for integrity of public health care system.
- Applies *Oakes* test: Is the remedy proportional, rationally connected and provide minimal impairment to objective?





## *Chaoulli v. Quebec - SCC*

### *June 9, 2005 and August 4, 2005*

- *Deschamps J., Mchlachlin CJ, Major & Bastarache JJ*: not proportional. Complete ban on private insurance not essential.
- *Deschamps J.*: Que. Acts don't survive s.9.1 of *Que. Charter*. Rest of majority also found violation of s. 7 of *Cdn Charter*.
- ***Dissent***: *Binnie, LeBel & Fish JJ*: waiting times for medical services are a relative matter. Valid legislative goal of public health care system is unchanged.
- SCC should not enter public debate on health care – a matter of government policy and not for the court to resolve.
- 4-3 decision permitting private health insurance. . . but the plot thickens. . . .



## *Chaoulli v. Quebec - SCC*

### *June 9, 2005 and August 4, 2005*

- Quebec brings motion to suspend the effect of judgment for 12 months to permit Que. to bring legislation in line.
- August 4, 2005 – SCC grants the motion. Decision is suspended for 12 months.
- The dissent had a point that waiting times are relative. In a future case, if evidence shows 20% shorter waiting times, will result be different?
- There will 33% turnover on the Court.
- Too early to say if this case will have a national impact but it can't be ignored.





## *Reference re Same-Sex Marriage*

### *December 9, 2004*

- In 2003, Ont., B.C. and Que. Courts held same sex-marriage was constitutional (Halpern v. Ontario – Ont. C.A.).
- Feds proposed Bill c-38 *Civil Marriage Act* to codify right to same-sex marriage.
- This case was a reference to SCC for an advisory opinion on constitutionality of the proposed Act.
- Act also protects freedom of clergy to refuse to perform same-sex marriages



## *Reference re Same-Sex Marriage*

### *December 9, 2004*

- Fed Gov't posed four questions to SCC, which the Court answered as shown:  
*(full questions - see paper p. 17)*
1. Is the Act *intra vires* of Parliament?  
**(s.1 YES; s.2 NO)**
  2. If is yes, is section 1 consistent the Charter? **(YES)**
  3. Does s. 2(a) of the Charter (freedom of religion) protect clergy from having to perform same sex marriages? **(YES)**
  4. Is the opposite-sex requirement for marriage at common law consistent with the Charter? **(DECLINED)**



## *Reference re Same-Sex Marriage*

### *December 9, 2004*

- Gay marriage has been approved in Holland, Belgium and Spain. Same same-sex unions also sanctioned, but not called "marriage in Denmark, Iceland, Norway, Sweden, Finland and New Zealand.
- Germany, France and Luxembourg have accorded some financial rights to same-sex unions.
- Some US Courts have permitted same sex marriage in Mass and Calif. but Pres Bush wants to prevent it by constitutional amendment.
- With same sex marriage, come same sex divorce – see paper p. 23



## *Reference re Same-Sex Marriage*

### *December 9, 2004*

- Neither Ont. nor Feds appealed *Halpern*
- The public mood had swung in favour of recognizing same sex marriage even though conservatives still oppose
- Clergy are protected and are not obliged to perform a same sex marriage
- The right says that the concept of the family will break down
- The left and moderates says gays and lesbians have same rights to be family as heterosexuals
- Despite their new rights, many gays and lesbians are not rushing into marriage



## *British Columbia v. Imperial Tobacco Canada Ltd. – SCC – Sept. 29, 2005*

- In mid-1990's US states passed legislation to require tobacco mfg'ers to cover health costs caused by tobacco-related torts.
- June 1997: 40 states settled with 5 tobacco companies for \$368 billion over 25 years.
- BC passed similar law in 1997 but BCSC struck it down as "extra-provincial".
- In this case, BC sued 5 large tobacco cos. under the new *Tobacco Damages and Health Care Costs Recovery Act*.
- Defendants argued Act was also unconstit.
- SCC unanimously held Act was valid



## *British Columbia v. Imperial Tobacco Canada Ltd. – SCC – Sept. 29, 2005*

- Act gives BC gov't retroactive right of action to sue tobacco companies for cost of tobacco-related wrongs.
- Gov't may bring an aggregate claim.
- There is a reverse onus of proof: see p. 25
- *Major J.* held that Act fell with s. 92 as the health care expenses were connected with tobacco mfg's breaches.
- Ont. and Nfld/Lab. have similar legislation but gov'ts must be careful not to kill the goose that lays the golden egg.
- Damages could worth billions but will it put the tobacco companies out of business?





## *Newfoundland v. N.A.P.E.* *SCC - October 28, 2004*

- 1988, Nfld gov't agreed to pay equity for ♀ hospital workers to begin in 1991.
- By 1991, Nfld passed *Public Sector Restraint Act* to prevent pay equity from starting.
- Gov't said Nfld economy was in crisis and it could not afford the \$24 million for pay equity. Other programs were also cut.
- Gov't said if pay equity went ahead, Nfld's credit rating would be dropped and unemployment would increase.
- Hospital workers claimed Act violated s. 15 of Charter



## *Newfoundland v. N.A.P.E.* *SCC - October 28, 2004*

- *Binnie J. for unanimous 7-judge court:*  
Clearly s.15 is violated but is it a reasonable limit under s. 1 of *Charter*;
- In a “dollars vs. rights” debate under s.1:
  - a) financial purpose alone not enough to justify s. 1;
  - b) there might cases where impact on public purse is so great as to justify limiting rights of citizens;
  - c) financial considerations combined with other public policy considerations could qualify as sufficiently important objectives under s.1.



## *Newfoundland v. N.A.P.E.* *SCC - October 28, 2004*

- *Binnie J.*: strong scepticism at attempts to justify Charter rights violations based on budgetary constraints.
- But courts cannot close their eyes financial emergencies when measures must be taken to see a gov't through the crisis.
- Binnie J. concludes financial crisis required serious measures even if these measures infringed on the rights of female workers temporarily.
- The fiscal measures did more good than harm, despite the adverse effects on the women hospital workers – because a large financial crisis was averted.



## *Newfoundland v. N.A.P.E.* *SCC - October 28, 2004*

- As a result, lack of dollars trumped rights of female hospital workers
- Decision shows conservative pragmatism by the 7 judges who heard the case
- By the time the case got to SCC, it was just over the money lost by the workers during the delay period.
- Case is instructive to governments in the next fiscal crisis. It shows how easily rights we consider as “sacred cows” can be legislated away.



## *Peoples Department Stores v. Wise SCC - October 29, 2004*

- Wise Bros. department stores bought Peoples' dept stores
- Tried to merge the two corps. but there were accounting problems
- On advice of accountant, Wise Bros. decided Peoples would purchase for NA and Wise for the rest of the world
- Peoples went bankrupt
- Wise brothers profited from this plan
- Trustee alleged that Wise Bros. breached fiduciary duty to creditors under CBCA s.122(1)



# Peoples Department Stores v. Wise

## SCC - October 29, 2004

- Did Wise brothers have a duty to creditors to avoid an accounting process which did not benefit Peoples' creditors?
- *Major & Deschamps JJ* for a unanimous Court: the directors' duty is to the corporation.
- Directors must act honestly and in good faith for the benefit of the corporation.
- If director acts honestly even if he enjoys a personal gain, he will not be liable to a creditor even if the creditor suffers a loss.
- There was no fraud by Wise brothers – So no personal liability.





## **Peoples Department Stores v. Wise – SCC - October 29, 2004**

- This case deals only with fiduciary duty under s. 122(1) of CBCA. A creditor may have standing to bring an oppression remedy claim under CBCA s. 238(d) and OBCA s.245(c).
- Perfection is not demanded.
- Courts won't second-guess business expertise in corporate decisions but can determine whether enough prudence and diligence was applied the business decision.



## Honourable Mention Cases

- ***Tierney-Hynes v. Hynes***  
Ont. C.A. – June 28, 2005 p. 38  
Terminated spousal support can be reinstated where circumstances warrant
- ***Keays v. Honda Canada Inc.***  
Ont. Sup. Ct. Just. – Mar.17, 2005 p.39  
Employer who disbelieved employee's disability pays \$500K punitive damages
- ***Mugesera v. Canada (Minister of Citizenship and Immigration)***  
SCC - June 28, 2005 p.40  
Permanent stay denied. Bias rejected.  
Counsel crossed the line.



## Conclusion

- As in previous years, the “Five Most Significant Cases” express Canadian values but some of these decisions are troublesome.
- As lawyers, we have to understand the hot button issues of our time. Learning about these cases could help in this process.
- Thank you for your attention.

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