

The Five Most Significant Decisions of the Courts in 2002-2003¹

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Introduction

In the two years since Igor Ellyn and Sharissa Ellyn last embarked on the task of selecting the five most significant cases, the case names and the subject matter may have changed, but there has been at least one constant. The task has not become any easier. The courts are as busy as ever and generate thousands of decisions across the spectrum of human activity. The task of selecting the five most important cases remains daunting.

This article was published for presentation at a *continuing legal education seminar for lawyers in 2003*. It is NOT intended as legal advice. It has been placed on our website to inform readers in a general way of the authors' view of the law at the time of its presentation. No reliance may be placed on its contents. Some principles of law or procedure may have changed or may no longer be applicable since its publication. The authors and Ellyn-Barristers disclaim any liability arising from reliance on any aspect of this article.

¹ And A Few Others Which Deserve "Honourable Mention"

² We express our sincere thanks to Sharissa M. Ellyn, of Blake Cassels Graydon LLP, Toronto, who edited the original manuscript of this paper and made many useful suggestions. Sharissa Ellyn co-authored "The Five Most Significant Decisions" in 2000-2001 and 1997-98.

Our barometer of judicial “significance” has been to select those cases which will impact the greatest change in Canadian society. Our nominees deal with these important topics:

1. a new definition of marriage, which includes same sex marriage³;
2. the rights of Mitis to enjoy aboriginal hunting rights⁴;
3. the legalization of non-medical use of small amounts of marijuana;⁵
4. the refusal to allow patenting of mice for cancer and other research;⁶
5. the right to re-open entitlement to spousal support⁷

Each of these cases will impact on the lives of thousands of people in Canada and to some extent, beyond Canada’s borders. The cases we have selected do not fall into any particular class. We do see in them, however, particularly, in the same-sex marriage and marijuana possession cases, a trend toward judicial activism, which troubles many observers of the Courts in our society. How this trend impacts upon our society is still an open question which is our beyond our scope to assess.⁸

³ *Halpern v. Canada (Attorney General)*. [2003] O.J. No. 2268 (Ont. C.A., McMurtry C.J.O., MacPherson and Gillese JJ.A., June 10th, 2003)

⁴ *R. v. Powley* 2003 SCC 43, (SCC, Full Court, September 19, 2003)

⁵ *R. v. J.P.* [2003] O.J. No. 1949 (Ont. S.C., Rogin J., Windsor, Ontario, May 16, 2003)

⁶ *Harvard College v. Canada (Commissioner of Patents)* 2002 SCC 76 (SCC Full Court, Dec. 5, 2002)

⁷ *Miglin v. Miglin*, 2003] S.C.J. No. 21 (SCC, Full Court, April 17, 2003)

⁸ For our purposes, “judicial activism” is intended to refer to the recent tendency of Courts to make aggressive decisions striking down legislation or applying the law in new ways, which some may argue, is more the role of Parliament than the Courts. For more on this topic, please refer to Quicklaw’s Legal Textbooks,

Because the selection of the five most significant cases is always so difficult, we have included two “honourable mentions”:

- 1) *Mazza v. Hamilton Township Mutual Insurance Co.*¹¹, where a jury awarded \$2,000,000 in punitive damages to a farmer against his insurance company for its high-handed and malicious refusal to pay a fire claim.
- 2) *Lupsor Estate v. Middlesex Mutual Insurance Co.*¹², where a motions judge refused to strike out a class action against a defendant class of insurance companies even though the representative plaintiff did not have a cause of action against every insurance company in the class.

Same Sex Marriage becomes legal in Canada

In *Halpern v. Canada (Attorney General) (Ontario Court of Appeal, June 16, 2003)*,¹³ Chief

Journals, Articles and Newsletters database (TJAN) which searches legal textbooks, law reviews, collections of articles and research papers legal newsletters. A search for “judicial activism” produced 40 articles and papers in 2002 and 2003 alone.

¹¹ *Mazza et al. v. Hamilton Twp. Farmers Mutual Ass.Co.* (unreported, July 16, 2003, Ont. S.C. Bain J. at St. Catharines before a jury). We thank Alfred Kwinter of Singer, Kwinter LLP, Toronto, Plaintiff’s counsel, for information about this case. An appeal to the Ontario Court of Appeal is pending.

¹² [2003] O.J. No. 1038 (Ont. S.C., Haines J. at London, March 20, 2003)

¹³ [2003] O.J. No. 2268 (Ont. C.A., McMurtry C.J.O., MacPherson and Gillese JJ.A., June 10, 2003) Because of the importance and media interest created by this decision, the Court of Appeal released a synopsis of its decision, which can be found on the Ontario Courts website, www.ontariocourts.on.ca/decisions/2003/june. We have referred liberally to this helpful synopsis and some of the description of the case quotes from it.

Justice Roy McMurtry and Justices James MacPherson and Eileen Gillese of the Ontario Court of Appeal heard a constitutional challenge to the definition of marriage. The definition of marriage, which is found only in the common law, requires that marriage be between “one man and one woman”. This opposite-sex requirement was challenged by eight same-sex couples as offending their right to equality as guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms* (“the Charter”) on the basis of sexual orientation.

The opposite-sex requirement was also challenged by the Metropolitan Community Church of Toronto (“the Church”) as violating its right to freedom of religion under s. 2(a) of the *Charter* and its equality rights under s. 15(1) of the *Charter* on the basis of religion.

In an unanimous judgment, the Court of Appeal upheld the decision of the Divisional Court¹⁴ and made the following landmark rulings:

- a. the common law definition of marriage offends the rights of same sex couples’ equality rights under s. 15(1) of the Charter in a manner that cannot be justified in a free and democratic society.
- b. the Church’s rights as a religious institution are not violated.
- c. the current common law definition of marriage is invalid;

¹⁴ (2002) 60 O.R. (3d) 321 (Ont. Div. Ct. Smith A.C.J.S.C., Blair R.S.J. and LaForme J., July 12, 2002)

- d. the definition of marriage was reformulated to be “the voluntary union for life of two persons to the exclusion of all others”; and
- e. the declaration of invalidity and the reformulated definition have immediate effect and as a result, same sex couples are entitled to receive a licence to marry from the local marriage licence office immediately.

The Court of Appeal’s decision to make the declaration of the invalidity of the common law definition of marriage effective immediately was an important variation of the decision of the Divisional Court. The Divisional Court was divided on the appropriate remedy and decided to suspend its declaration for two years to allow Parliament to fashion an appropriate remedy. This led to an appeal of the decision by all parties and the more activist decision of the Court of Appeal.

However, in this case, the “activism” of the Court of Appeal was welcomed by Prime Minister Jean Chrétien, who announced on June 17, 2003 that the government would not appeal the Court of Appeal’s decision.¹⁵

Decision of the Ontario Court of Appeal: Section 15(1) Analysis

¹⁵ In a *Globe & Mail* report on June 17, 2003, found at www.globeandmail.com, “The federal government won’t appeal three recent rulings that said banning same-sex marriages is unconstitutional. Prime Minister Jean Chrétien made the announcement Tuesday at the conclusion of a Liberal cabinet retreat in Ottawa. “We won’t be appealing the recent decision on the definition of marriage. Rather, we’ll be proposing legislation that will protect the right of churches and religious organizations to sanctify marriage as they define it. At the same time, we will ensure that our legislation includes and legally recognize the union of same-sex couples,” he said. He said the government plans to move quickly on the bill, and then refer the legislation to the Supreme Court. After that, it will be put to a free vote in the House of Commons”

The Court of Appeal utilized the three-stage inquiry articulated in *Law v. Canada (Minister of Employment and Immigration)* (“*Law*”).¹⁶ The Court reasoned that there was no doubt that the common law definition of marriage created a formal distinction between opposite-sex couples and same-sex couples on the basis of their sexual orientation. The Attorney-General of Canada’s argument that marriage is heterosexual because it “just is” as circular reasoning that sidesteps the entire s.15(1) analysis. The Court found that the opposite-sex requirement in the definition of marriage creates a formal distinction between opposite-sex and same-sex couples on the basis of sexual orientation, an analogous ground of discrimination under s.15(1) of the Charter.

Citing extensively from decisions of the Supreme Court of Canada in *Law, Egan v. Canada*,¹⁷ *Vriend v. Alberta*¹⁸ and *M. v. H.*,¹⁹ the Court of Appeal found the common law requirement that persons who marry be of the opposite sex denies persons in same-sex relationships a fundamental choice - whether or not to marry their partner. The opposite sex requirement would not accord with the ‘needs, capacities and circumstances’ of same-sex couples. The Court had no problem in finding that same-sex couples are a group who have experienced

¹⁶ [1999] 1 S.C.R. 497

¹⁷ [1995] 2 S.C.R. 513

¹⁸ [1998] 1 S.C.R. 493

¹⁹ [1999] 2 S.C.R. 3

historical discrimination and disadvantages. The Court cited with approval the principle from *Law* that “[u]nderinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination.”

In examining the definition of marriage in the context of whether there was a violation of s.15 of the Charter, the Court held that:

In this case, same-sex couples are excluded from a fundamental societal institution - marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

The Court concluded that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage.

Reasonable Limits under Section 1 of the Charter

The Court of Appeal conducted the s. 1 analysis utilizing the test formulated in *R. v. Oakes* to determine whether a law is a reasonable limit on the Charter right or freedom in a free and democratic society. In the first stage of the *Oakes* test the AGC submitted three specific purposes of marriage:

- 1) uniting the opposite sexes;
- 2) encouraging the birth and raising of children of the marriage; and
- 3) companionship.

The Court found that the first purpose would result in favouring one form of relationship over another and suggest that uniting two persons of the same sex is of lesser importance:

Accordingly, a purpose that demeans the dignity of same-sex couples is contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial. A law cannot be justified on the very basis upon which it is being attacked.

While the Court found the second purpose to be a laudable goal, they failed to see how the encouragement of procreating and childrearing is a pressing and substantial objective of maintaining marriage as an exclusively heterosexual institution. Disregarding AGC's "natural procreation" argument the Court pointed out that heterosexual married couples would not stop having or raising children because same-sex couples were permitted to marry, and moreover, an increasing percentage of children are being born to and raised by same-sex couples. In the Court's view the objective put forth by the AGC was based on a stereotypical assumption that is not acceptable in a free and democratic society.

The Court also found companionship to be a laudable goal of marriage, but did not consider it to be a pressing and substantial objective for the exclusion of same-sex couples.

Encouraging companionship between only opposite sex couples perpetuates the view that same-sex couples are not equally capable of providing companionship and forming lasting and loving relationships.

The Court concluded that the AGC did not demonstrate any pressing and substantial objective for excluding same-sex couples from the institution of marriage and as such the violation of the Couples' rights under s. 15(1) of the Charter cannot be saved under s. 1 of the Charter. Even though the conclusion in the first stage of the Oakes test made it unnecessary for the Court to consider the second stage of the test, the Court did briefly consider the proportionality analysis and found the AGC also failed to show that the means chosen to achieve its objectives are reasonable and justified in a free and democratic society.

Remedy

To remedy the infringement, the Court of Appeal declared the existing common law definition of marriage to be invalid to the extent that it refers to "one man and one woman" and reformulated the definition as "the voluntary union for life of two persons to the exclusion of all others". Unlike similar judgments in British Columbia and Quebec, the Ontario Court of Appeal Judgment has immediate effect.²⁰ The Court of Appeal rejected the AGC's request

²⁰ *EGALE Canada v. British Columbia (Attorney General)* [2003] B.C.J. No. 994 and *Hendricks v. Quebec (Procureur general)* [2002] J.Q. No. 3816. Both of these judgments gave the Government until July 12, 2004 to amend legislation. On July 8, 2003, B.C. became the second province to allow same sex marriage *Barbeau v. British Columbia (Attorney General)* 2003 BCCA 406.

to suspend this declaration and reformulation:

We are also of the view that the argument made by the AGC and several of the intervenors that we should defer to Parliament once we issue a declaration of invalidity is not apposite in these circumstances. *Schacter [v. Canada]*²¹ provides that the role of the legislature and legislative objectives is to be considered at the second step of the remedy analysis when a court is deciding whether severance or reading in is an appropriate remedy to cure a legislative provision that breaches the Charter. These considerations do not arise where the genesis of the Charter breach is found in the common law and there is no legislation to be altered. Any lacunae created by a declaration of invalidity of a common law rule are common law lacunae that should be remedied by the courts, unless to do so would conflict with the principles of fundamental justice.

The court also ordered the Province of Ontario to register the two marriage certificates issued to two same sex couples, who became the first same-sex couples to be legally married in Canada. The Court ordered the City of Toronto to issue marriage licences to the seven couples whose license applications had been stalled pending the outcome of the appeal.

Apart from the decision not to appeal, the federal government announced that a draft bill changing the definition of marriage in Canada to include same-sex marriages was referred to the Supreme Court of Canada²² on July 17, 2003. The bill is designed to provide equality for all Canadians by recognizing the unions of same-sex couples and at the same time protect freedom of religion by allowing officials of religious groups to refuse to conduct marriage

²¹ [1992] 2 S.C.R. 679

²² News Release on the Justice, Canada website: canada.justice.gc.ca/en/news/nr/2003/doc_30944.html

ceremonies that do not fit their religious beliefs. Once passed, the same sex marriage law will be the third in the world.²³

While questions remain about same-sex marriage rights in Canada, the decision in *Halpern* has made great strides toward equality between same sex and heterosexual marriage. The issue is not without its opponents. On September 17, 2003, the *Globe and Mail* reported:²⁴

The Liberal government's plan to legalize gay marriage left a deeply divided House of Commons after MPs narrowly defeated a Canadian Alliance motion last night that called on Parliament to preserve the definition of marriage as "the union of one man and one woman, to the exclusion of all others."

The outcome of the vote, though the motion was largely symbolic, was a clear indication of the discord in Parliament and across the country over this emotional issue. Although Prime Minister Jean Chrtien's government supports national legalization of same-sex marriage, more than 50 Liberal backbenchers voted in favour of the opposition motion.

"It should send a warning signal to them that they've got some big problems on this issue," Canadian Alliance Leader Stephen Harper said after his party's motion was defeated 137 to 132.

While the trend to the recognition of same sex marriage is undeniable, the content of the proposed legislation and result of the proposed reference to the Supreme Court of Canada suggests that the last word on this topic has yet to be written.

Mitis Hunting Rights Protected

²³ So far as we know only Belgium and the Netherlands permit same sex marriage.

²⁴ The *Globe & Mail*, September 17, 2003 online at www.globeandmail.com/servlet/ArticleNews/TPPrint/LAC/20030917/USAMEN/TPFront/

*R. v. Powley - Supreme Court of Canada - September 19, 2003*²⁵

On September 19, 2003, the Supreme Court of Canada defined the scope of the rights of Mitis people for the first time. In *R. v. Powley*, the Supreme Court affirmed the decision of the Ontario Court of Appeal²⁶ and ruled that the Mitis community at Sault Ste Marie had an Aboriginal right to harvest, protected by s. 35(1) of the *Constitution Act, 1982*.

The case involved Steve Powley and his son Roddy who shot a bull moose in October 1993 for their winter harvest. The Powleys were charged with unlawfully hunting moose without a hunting licence and with unlawful possession of moose meat in contravention of s. 46 and 47(1) of Ontario's *Game and Fish Act*²⁷.

At trial the Powley's asserted they were exercising their Aboriginal right to hunt as Mitis. The trial judge found that the Mitis community in and around Sault Ste. Marie have under s. 35(1), an Aboriginal right to hunt for food that is infringed without justification by the Ontario hunting legislation. The Supreme Court found that Ontario did not recognize any Mitis rights whatsoever and found that "[t]his lack of recognition, and the consequent

²⁵ [2003] S.C.J. No. 43 (SCC, Full Court, September 19, 2003)

²⁶ (2001) 53 O.R. (3d) 35, 196 D.L. R. (4th) 221

²⁷ R.S.O. 1990, c. G.1, ss. 46, 47(1) Affirming the decision of the Superior Court of Justice (2000), 47 O.R. (3d) 30, [2000] O.T.C. 49, [2000] 2 C.N.L.R. 233, which upheld the judgment of the Ontario Court (Provincial Division), [1999] 2 C.N.L.R. 153, 58 C.R.R. (2d) 149, [1998] O.J. No. 5310 (QL).

application of the challenged provisions to the Powleys, infringe their Aboriginal right to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Mitis community.”

Recognizing that Aboriginal rights of the Mitis exist, the Supreme Court set out the test that a Mitis must meet in order to exercise their Aboriginal harvesting rights. The court said that any person who self identified themselves as Mitis and can prove a connection to a stable continuous community can also invoke the Aboriginal right to hunt. The Supreme Court went on to state:²⁸

While our finding of a Mitis right to hunt for food is not species-specific, the evidence on justification related primarily to the Ontario moose population. The justification of other hunting regulations will require adducing evidence relating to the particular species affected. In the immediate future, the hunting rights of the Mitis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where threatened species may be involved. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Mitis right to hunt, a right that we recognize as part of the special Aboriginal relationship to the land.

Based on the 2001 Census, about 295,000 people in Canada are identified as Mitis.²⁹ The Mitis National Council (MNC), which represents the historic Mitis Nation from Ontario

²⁸ [2003] S.C.J. No. 43 para. 50 of the Court’s decision.

²⁹ Statistics Canada website: www.statcan.ca/english/freepub/89-589-XIE/context.htm#6

westward, estimates there are closer to 350,000 to 400,000 Mitis in Canada.³⁰

Prior to this decision the rights of the Mitis were never defined under the Constitution. Although, the Supreme Court only ruled on whether the Mitis community at Sault Ste Marie had an Aboriginal right to hunt, the decision is seen as the first step toward granting full hunting rights for every Mitis. While the decision does not define the entire scope of Mitis rights it is hoped that it will lead to negotiating rights similar to those of the First Nations. The decision could have a far reaching impact as it may lead to the Mitis accessing rights such as health care and natural resources.

According to Jason Madden, General Counsel for the MNC,³¹

“It's a new day for the Mitis people! Governments in Canada (federal and provincial) are going to have to come to grips with Metis rights. Current policies of denial are going to have to change and s. 35 is now going to have to have meaning for the Mitis. *Powley* adds a significant new dimension to Aboriginal jurisprudence in Canada. Specifically, it sets out the test to be used for establishing a Mitis right to hunt for Mitis communities across Canada. However, it provides a solid framework for future negotiations and litigation relating to the Aboriginal rights of the Mitis. Hopefully, governments will choose negotiations rather than on-going litigation. We will have to wait awhile to see where this goes from here; however, to paraphrase the trial judge in *Powley*, for the short term, Mitis people who meet the test established in *Powley* will not have to 'skulk through the bushes like common criminals when they are exercising their constitutional rights'.”

³⁰ Discussion with J. Madden, General Counsel for Mitis National Council on October 1, 2003

³¹ Discussion with J. Madden, General Counsel for Mitis National Council on October 1, 2003

Possession of Small Amounts of Marijuana not an Offence

R. v. J.P. - Ontario Superior Court of Justice - May 16, 2003³²

In this case, Rogin J., a judge of the Superior Court of Justice, sitting as a summary conviction appeal court judge, upheld a provincial offences court decision declaring there was no prohibition known to law for the simple possession of marijuana. This legislative gap arose because of the decision in *R. v. Parker*,³³ where the Ontario Court of Appeal struck down the section of the *Controlled Drugs and Substances Act*³⁴ which prohibited the possession of less than 30 grams of marijuana.

The Court in *Parker* gave the government a year to replace the possession law. In the aftermath of *Parker*, the government enacted marijuana medical-access regulations, however the government failed to replace the law that was struck down in *Parker*.³⁵

On April 12, 2002, J. P., a young offender, was charged with possession under 30 grams of cannabis marijuana, contrary to s. 4(1) *Controlled Drugs and Substances Act* (“CDSA”). J.P. made an application to the Ontario Court of Justice to declare that s.4(1) of the CDSA no

³² *R. v. J.P.* [2003] O.J. No. 1949 (Ont. S.C., Rogin J., Windsor, Ontario, May 16, 2003)

³³ 2000), 146 C.C.C. (3d) 193 (C.A.)

³⁴ 1996, c. 14 [hereinafter “CDSA”]

³⁵ SOR/2001-227

longer prohibits simple possession of marijuana, and as a consequence the charge did not disclose offences known to law. On January 2, 2003, a provincial offences court judge quashed the possession charge.³⁶ While regulations were enacted, the gap in the regulatory scheme was not addressed.

Summary Conviction Appeal Court

The Crown appealed the decision and on May 16, 2003, Rogin J. upheld the lower court decision declaring that s. 4(1) of the CDSA was no longer in effect as it relates to marijuana. The Court held that the Medical Marihuana [sic] Access Regulations (“MMAR”) were not a proper re-enactment of s.4 of the CDSA. Rogin J. considered whether the MMAR, could, by implication, proscribe possession except under those terms. Rogin J. noted that the CDSA was a penal statute, which must be strictly construed and any doubts must be resolved in favour of the accused.³⁷ Moreover, in choosing between two possible interpretations, the interpretation most consistent with the terms of the provision must be chosen. If freedom is at stake, it must be clearly expressed not implied.³⁸

Rogin J. took into account s. 19 of the *Criminal Code*, which provides that ignorance of the

³⁶ *R. v. J. P.* [2003] O.J. No. 1 (Rogin J. Ont. S.C.)

³⁷ *R. v. Pare* [1987]2 S.C.R. 618

³⁸ *R. v. Macintosh* [1995] 1 S.C.R.686

law is no excuse to criminal liability. This demanded that courts would not adopt interpretations of penal provisions which relied on the reading-in of words which do not appear on the face of the provision. He noted the special nature of the *Criminal Code* requires an interpretive approach which is sensitive to liberty interests. He concluded that an ambiguous penal provision must be interpreted in the manner most likely to provide clarity and certainty in the criminal law. Accordingly, Rogin J. held the charges did not contain an offence known to law. Rogin J. cited with approval the principle of the necessity of law expressed by Cartwright J. in *Frey v. Fedoruk*.³⁹

Ontario Court of Appeal

On June 10, 2003, Charron J.A. of the Ontario Court of Appeal dismissed⁴⁰ an application from the Crown for a stay of Rogin J.'s decision. The Crown sought, *inter alia*, an order expediting the hearing of the appeal and an order staying the judgment of the summary conviction appeal court, which concludes that possession of marijuana is not an offence known to law. Charron J.A found there was no authority to grant to suspend the application of the doctrine of *stare decisis* pending the hearing of an appeal. An appeal is pending.

³⁹ [1950] S.C.R. 517, 97 C.C.C. 1

⁴⁰ *R. v. J. P.* [2003] O.J. No. 2354 (Ont. C.A., Charron J.A., in chambers, June 16, 2003)

As a result of this decision, there is no longer prosecution for simple possession of small amounts of marijuana. Because Rogin J. was sitting as a summary conviction appeal court judge, the decision is binding on every other lower court in Ontario. In *R. v. Clarke*,⁴¹ Judge Buchan of the Nova Scotia provincial court, held that it would be “oppressive and vexatious” to allow the federal Crown to continue to prosecute charges of simple possession of marijuana when a law has been found to be invalid by several courts in separate jurisdictions in Canada.⁴²

Across the province, police chiefs have instructed their officers not to lay charges of simple possession.⁴³ Recently the federal government has introduced Bill C-38, legislation that would decriminalize marijuana possession. But this legislation if adopted will not be in force for several months. Under the proposed legislation, those caught with possession would be fined instead of charged with a criminal offence. The federal Crown is not taking any of the current possessions cases to trial until the situation is sorted out. Instead the cases are being adjourned or given a stay of proceedings.

⁴¹ [2003] N.S.J. No 124

⁴² Judge Buchan cited the cases of *R. v. J.P.*, *Hitzig v. Canada*, [2003] O.J. No. 12 (Ont. S.C.) and *R. v. Stavert*, [2003] P.E.I. J. No. 28 (P.E.I. Prov. Ct.)

⁴³ Globe and Mail, June 6, 2003.
www.globeandmail.com/servlet/story/RTGAM.20030606.umari0606/BNStory/National/

This case reflects the change in societal views on marijuana. Public opinion polling indicates a significant percentage of the Canadian population supports the decriminalization of marijuana. The change is starting to leak into the courts. In *R. v. Schedel*,⁴⁴ Southin J.A. of the B.C. Court of Appeal stated:

While at one time I accepted the received wisdom that marijuana offences were serious crimes, I now am of a different opinion... The growing, trafficking in, and possession of marijuana is the source of much work, not only for peace officers but also for lawyers and judges. Whether that work contributes to peace, order and good government is another matter.... In my years on the bench I have sat on over 40 cases which had something to do with this substance, which appears to be of no greater danger to society than alcohol....I have been driven to the conclusion that, in the eyes of those who led not only their own country but also this country into making criminals of those who are no better or worse, morally or physically, than people who like a martini, marijuana was the first weapon of mass destruction.

More recently, Chief Justice McLachlin speaking to the Council of the Canadian Bar Association has these surprising remarks:⁴⁵:

“We had moments of elation and high spirits when one party confessed to the press, after appearing before us, that he had consumed a considerable amount of marijuana as an aid to spontaneity in oral argument. I am not here to say that the Bar should recommend this, as we have reserved judgment.”

⁴⁴ [2003] B.C.J. No. 1430

⁴⁵ Chief Justice McLachlin speaking to the Canadian Bar Association Annual Meeting, Montreal on August 16, 2003, as quoted by Eugene Meehan in the Lang Michener Supreme Court of Canada L@wletter No.34, August 28, 2003, on the internet at www.eugenemeehan.com/english/images/hp_side3b_hi.gif

The non-medical use of marijuana has been studied for four decades. For those who agree that use of marijuana should be decriminalized, the time appears to have arrived.

Court refuses to patent cancer research mouse

Harvard College v. Canada - Supreme Court of Canada - December 5, 2002⁴⁶

Colloquially known as the “Harvard Mouse” case, this is a decision of the Supreme Court of Canada regarding the patentability of higher life forms. The touchy issue sparked debate amongst the biotech industry, church and environmental groups. In a split decision,⁴⁷ the Supreme Court ruled that genetically modified higher life forms are not patentable as inventions under the *Patent Act*.⁴⁸

In the early 1980’s, researchers at Harvard University developed a mouse that was genetically modified to make it better suited for cancer research. The DNA of the mouse had been altered to make the mouse more susceptible to certain types of cancer. The mouse would quickly respond to small amounts of carcinogenic materials and develop tumours.

Harvard sought patents around the world for the process by which the mouse was engineered

⁴⁶ *Harvard College v. Canada (Commissioner of Patents)* [2002] S.C.J. No. 77 (SCC, Full Court, Dec. 5, 2002)

⁴⁷ McLachlin C.J.C, Major, Binnie and Arbour JJ. dissented and would have patented the mouse

⁴⁸ R.S.C. 1985, c. P-4

and for the mouse itself. The Harvard Mouse, also called the Oncomouse, has been patented in the United States, much of Europe and Japan. In those countries anyone wishing to use the Oncomouse for research has to pay a license fee to Du Pont the license holder until the patent expires. In June 1985, Harvard filed a patent for the Oncomouse in Canada.

The Canada Patent Office granted Harvard a patent on the process to create the Oncomouse, however denied protection for the mouse itself. While no one could utilize Harvard's process to create their own Oncomouse, nothing would prevent them from mating a pair of Oncomouse for their offspring. That judgment was upheld by the Commissioner of Patents and the Federal Court. The appeal to the Federal Court of Appeal was allowed and the Commissioner appealed the decision to the Supreme Court of Canada. On December 5, 2002 the Supreme Court of Canada, in a five-to-four judgment,⁴⁹ allowed the appeal and held that the mouse does not qualify as an invention under the *Patent Act*.

The Patent Act

The Court found that it was irrelevant whether the Court believed that higher life forms ought to be patentable, that determination would be more appropriately dealt with by parliament. The only issue for the Court was to determine, based upon the definition of "invention" under

⁴⁹ The majority of L'Heureux-Dube, Gonthier, Iacobucci, Bastarache and LeBel with McLachlin C.J., Major, Binnie and Arbour JJ dissenting.

the *Patent Act* whether a higher life form could fit in the definition. The definition is provided under s. 2 of the *Patent Act*:

“Invention” means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter.

The only question in the appeal was whether the words “manufacture” and “composition of matter” were sufficiently broad enough to encompass higher life forms. Bastarache J. recognized that statutory interpretation cannot be based on the wording of the legislation alone, he noted the Court’s adoption of the principle that “words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Patent Act*, the object of the Act, and the intention of Parliament.”⁵⁰

Bastarache J. found the word “manufacture” in the context of the *Patent Act* is commonly understood to mean a non-living mechanistic product or process. The Court concluded that “manufacture” should be limited in its interpretation to denote a non-living mechanistic product or process.

In considering the phrase “composition of matter” Bastarache J. noted that a collective term that completes an enumeration is often restricted to the same genus as those words, even

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Bastarache J. citing E.A. Driedger, *Construction of Statutes* (2nd ed.) 1983

though the collective term may ordinarily have a much broader meaning. Since the terms “machine” and “manufacture” would not imply a conscious, living creature, there would be *prima facie* support that “composition of matter” would also not include such life forms.

Bastarache J. found the words “manufacture” and “composition of matter” to be somewhat imprecise and ambiguous but determined that the best reading of the Act would support the conclusion that higher life forms are not patentable. It did not appear that parliament had intended to include higher life forms in the definition of “invention”. His conclusion was supported by the fact that the patenting of higher life forms would raise unique concerns which would not be addressed in the scheme of the Act and would involve a radical departure from the traditional patent regime. It was acknowledged that higher life forms raised complex matters and raised serious practical, ethical and environmental concerns.

Bastarache J. considered the object of the *Patent Act* and noted that whether a proposed invention ought to be patentable does not provide an answer to the question of whether that proposed invention is patentable. He agreed with the respondents that the object of the *Patent Act* is to encourage and reward the development of innovations and technology and as such, should be given liberal encouragement. However, he did not believe that it would warrant the broadest reading of the definition of invention as possible.

Related Legislation

The unpatentability of higher life forms was also supported by the existence of the *Plant Breeders's Rights Act*.⁵¹ It was significant that Parliament had enacted special legislation for the protection of plant breeders, however it did not address other higher life forms. Bastarache J. noted that many of the issues that arose with respect to the patenting of plants also arise when considering the patentability of other higher life forms. If a separate legislative scheme was necessary to deal with plants, a subset of higher life forms then perhaps a separate scheme was also necessary for patenting higher life forms in general.

Lower Life Forms v. Higher Life Forms

While the Supreme Court of Canada has disallowed patenting of higher life forms, Canada has allowed the patenting of genetically modified crops and single-celled organisms such as bacteria bioengineered for specific industrial jobs. The Court was aware that the distinction between lower life form and higher life form was not clear. The Court suggested the following characteristics of higher life form:

- 1) sentience and capacity for emotion;
- 2) difficulty in defining a life form by a limited number of properties; and
- 3) incapable of mass production.

⁵¹ S.C. 1990, c. 20

Although not explicit in the *Patent Act*, Bastarache found the distinction between lower and higher life forms defensible based on the common sense differences between them. He noted that the nonpatentability of human life was also not explicit in the *Patent Act*. The fact that lower life forms were patentable in Canada, would not lead to the conclusion that higher life forms were as well. Bastarache J. stated:

Patentable micro-organisms are formed in such large numbers that any measurable quantity will possess uniform properties and characteristics. The same cannot be said for plants and animals. It is far easier to analogize a micro-organism to a chemical compound or another inanimate object than it is to analogize an animal to an inanimate object. Moreover, several important features possessed by animals distinguish them from both micro-organisms and plants and remove them even further from being considered a "composition of matter" or a "manufacture". Given the complexity of the issues involved, it is not the task of the Court to situate the line between higher and lower life forms.

Binnie J. writing the dissent was in favour of a much more expansive sense of the words "composition of matter". The minority of McLachlin C.J., Major, Binnie and Arbour JJ. held that the Oncomouse was patentable and found that the "extraordinary scientific achievement of altering every single cell in the body of an animal which does not in this altered form exist in nature, by human modification of the genetic material of which it is composed, is an inventive 'composition of matter' under s. 2 of the Patent Act." Binnie J. noted that the *Patent Act* has always had the objective of encouraging the "disclosure of the fruit of human inventiveness in exchange for the statutory rewards."

The decision makes Canada the only industrialized country that prohibits patenting of higher life forms. The decision has been praised by Church and environmental groups, and highly criticised by the biotechnology industry. The prevailing fear in the biotech industry is that the potential gap in patent coverage could lead to biotech researchers leaving the country since they wouldn't have protection for their work. The biotech industry also fears the ruling may deter foreign investment.

Spousal Support Agreements may not be final

Miglin v. Miglin - Supreme Court of Canada - April 17, 2003⁵²

In this case, the Supreme Court of Canada revisited the oft-discussed issue of spousal support in circumstances where a former spouse had previously released claims for spousal support. The full Court, Justices Bastarache and Arbour writing the majority decision (Justices LeBel and Deschamps, dissenting), held that the narrow test enunciated in the Pelech trilogy⁵³ for interfering with a pre-existing agreement is not appropriate in the current statutory context.

The most important change brought about by Miglin is that the traditional test of demonstrating that the circumstances of a spouse had changed materially, radically or catastrophically since the making of the agreement or court order is no longer relevant. As

⁵² *Miglin v. Miglin*, 2003] S.C.J. No. 21 (SCC, Full Court, April 17, 2003)

⁵³ *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Caron v. Caron*, [1987] 1 S.C.R. 892

the Court has noted:⁵⁴

Agreements concluded with the intent that they be final may, in limited circumstances, be overridden on grounds other than those defined in the Pelech trilogy, which established that a court was permitted to override a final agreement on spousal support only where there has been a radical and unforeseen change in circumstances that was causally connected to the marriage. Judicial and societal understandings of spousal support have changed since the release of Pelech, and recognize different models of support as appropriate in different circumstances.

*Pelech v. Pelech*⁵⁵ was decided at the time of the 1968 *Divorce Act*⁵⁶. In 1985, a new *Divorce Act*⁵⁷ was in place which set out Under s. 15.2(4) of the revised 1985 Divorce Act, that the Court is required to consider the condition, means, and other circumstances of each spouse on the basis of several criteria, namely⁵⁸,

- a) the length of time the spouses cohabited;
- b) the functions performed by each spouse during cohabitation; and
- c) any order, agreement or arrangement relating to support of either spouse.

Section 15.2(6) of the Divorce Act sets out additional factors that an order for spousal support should take into account, namely,

⁵⁴ Miglin, supra. para.

⁵⁵ See f..n. 50, supra.

⁵⁶ Divorce Act, R.S.C. 1970, c. D-8

⁵⁷ Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [am. 1997, c. 1], ss. 9(2), 15.2 [formerly s. 15], 15.2(4) [formerly s. 15(5)], 15.2(6) [formerly s. 15(7)], 17, 17(1), 17(4.1) [formerly s. 17(4)], 17(7).

⁵⁸ Divorce Act, 1985, excerpted from the internet at laws.justice.gc.ca/en/D-3.4/47860.html#rid-47945

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage;
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

The majority in *Miglin* analyzed the differences between the 1968 Divorce Act and revised the 1985 Act in these words:⁵⁹

Whereas the 1968 Act refers only to the “conduct of the parties and the condition, means, and other circumstances of each of them” (s. 11(1)), the 1985 Act abandons the reference to the conduct of the parties and makes explicit both the objectives of spousal support and the factors to be considered in making an order. That these objectives can and do often conflict and compete suggests an intention on the part of Parliament to vest in trial judges a significant discretion to assess the weight to be given each objective against the very particular backdrop of the parties’ circumstances. Moreover, we agree that the importance given to self-sufficiency and a “clean break” in the jurisprudence relying on the trilogy is not only incompatible with the new Act, but too often fails to accord with the realities faced by many divorcing couples.

The Court assessed the applicability of the test in the Pelech trilogy and concluded that the language of the new statute prevented its application. Under the 1985 Divorce Act, s. 15.2(6)

⁵⁹ Miglin, *supra*. para 39, Judgment of Bastarache and Arbour JJ.

contemplates four criteria but does not give paramountcy to any of them. Therefore, the objective of self-sufficiency is no longer the overriding consideration. However, that is not to say that judges now have an unfettered discretion to rewrite an agreement that the parties have considered mutually acceptable and fair.

The Supreme Court approved what Wilson J. said in *Pelech*, to the effect that where parties, instead of resorting to litigation, have acted in a mature and responsible fashion to settle their financial affairs in a final way and their settlement is not vulnerable to attack on any other basis, it should not be undermined by courts concluding, with the benefit of hindsight, that they should have done it differently.⁶⁰

The Court also emphasizes s.9(2) of the Divorce Act, which imposes a duty on lawyers to advise divorce clients of the advisability of a negotiated settlement in lieu of litigation.

The Court devised a two-stage approach to the exercise of the Court's discretion in awarding spousal support under s.15.2 of the Divorce Act, summarized as follows:⁶¹

- (a) *Stage One:* Where there is a pre-existing agreement, the court should first look to the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it, such as oppression,

⁶⁰ Miglin, *supra.* para. 45

⁶¹ Miglin, *supra.* paras. 79-90

- pressures, imbalance between the parties or other vulnerabilities, to take into account all of the circumstances, including those set out in s. 15.2(4)(a) and (b) and the conditions under which the negotiations were held, such as their duration and whether there was professional assistance, even if it does not amount to unconscionability.
- (b) Where vulnerabilities are not present, the court should be loathe to interfere with the agreement freely negotiated between the parties as an indication of their intentions. On the other hand, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.
 - (c) The court must determine the extent to which the agreement takes into account the factors and objectives listed in s.15.2(6) of the Act, thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown. Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act.
 - (d) The court must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.
 - (e) A determination that an agreement fails to comply substantially with the Act does not necessarily mean that the entire agreement must be set aside and ignored.
 - (f) *Stage Two:* Where the agreement itself is not under attack, the court should defer to the wishes of the parties and afford the agreement great weight but if post-agreement events were not contemplated, the court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.
 - (g) Although the change need not be "radically unforeseen," and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the

Act, keeping in mind that a certain degree of change is foreseeable most of the time.

The conclusion of the majority was that the Court need not consider "change" of any particular nature to be a threshold requirement which, once established, entitles the court to jettison the agreement entirely. Rather, the court should be persuaded that both the intervention and the degree of intervention are warranted.

Honourable Mention Cases

Mazza v. Hamilton Township Mutual Insurance Co. - Ont. S.C. - June 16, 2003⁶²

In February 1993, Frank Mazza, a mechanic purchased a property to operate a mushroom farm. On August 13, 1993, a fire broke out at Mr. Mazza's farm. The hillside land and two apartments burned to the ground. Following the fire, Mr. Mazza filed a proof of loss in the amount of \$20,866.00 to his insurer, Hamilton Township Mutual Insurance Co.

Shortly thereafter, Mr. Mazza's lawyer looked over the claim and advised Mr. Mazza that his policy allowed him to claim the current market value of the property not just the purchase price. Mr. Mazza submitted a revised claim for \$43,052.01, which Hamilton Mutual refused to pay, claiming fraud. Mr. Mazza's tenant, Adelia Pereira was forced to relocate after the fire and claimed \$30,000 against Mr. Mazza's insurance policy.

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Unreported, Bain J. Ont. S.C. at St. Catharines July 16, 2003. No written reasons.

Hamilton Mutual immediately suspected arson, and after investigating, refused to pay the claims on those grounds. At trial Hamilton Mutual tried several defences to prove arson and when the physical evidence didn't support the claim, it tried to argue that Mazza's policy was invalid because he hadn't begun to grow mushrooms when the fire broke out.

At trial before Bain J. in St. Catharines, the jury was asked to answer a number of questions. It decided that Hamilton Mutual breached its duty of good faith to the insured and in doing so, it acted in a "high-handed" and "malicious" manner. On the recommendation of the jury, Bain J. awarded damages of \$450,000 for loss of property and contents, \$1.2 million for loss of profit and \$2 million in punitive damages for being "malicious" and "highhanded" in its refusal to pay the insured after his farm burned down. The Court also awarded Ms. Pereira \$500,000 in punitive damages. Counsel for Mazza, Alfred Kwinter, said the jury's award reflected its "outrage" at the insurer's treatment of his client.⁶³

This awarded represents the largest award for punitive damages in Canadian history. It comes shortly after a Supreme Court of Canada ruling in *Whiten* which held that punitive damages should be awarded cautiously and with skepticism. In *Whiten* the punitive damage award by the jury was given as a result of the breach of the insurer's duty of good faith and

⁶³ Gambrill, David "Jury awards record \$2 -million punitive damages" Law Times Vol. 14, No. 26

fair dealing. In upholding this award, the Supreme Court of Canada held that such awards are rare, and are limited to misconduct that represents a marked departure from ordinary standards of decent behaviour. In its judgment, the Supreme Court of Canada established guidelines for future cases in which punitive damages are likely to arise.

In *Whiten*, the Supreme Court noted that punitive damages should be awarded only in exceptional cases and with restraint. In *Whiten* the Supreme Court refused to reduce the jury's punitive damages award of \$1,000,000 and concluded the award was within the bounds of reason - although just within bounds. The punitive award in *Mazza*, seems to fly in the face of this.

The Supreme Court also noted that juries in civil cases should receive more guidance and help from the courts in assessing an appropriate award of damages. In *Mazza*, Hamilton Mutual's counsel objected to the trial judge telling the jury the upper range of \$1 million for punitive damages awards established in *Whiten*. Without guidance from the trial judge about the acceptable range of punitive damages, the jury came back with a \$2,000,000 award.

In the past, defence counsel for insurers would prefer jury trials, assuming that juries would be reluctant to award large damages. With this decision, insurers will think twice before requesting their next jury trial. We understand that the decision is under appeal.

It remains to be seen what the Court of Appeal will do with this award. Will the Supreme Court of Canada will have reconsider the punitive damages issues in a year or two? An interesting issue is whether the Supreme Court of Canada really intended that \$1,000,000 should be the upper limit of punitive damages. Further, having objected to the trial judge instructing the jury about a range of punitive damages, will it still be open to counsel for the insurer to complain about the punitive damages award the jury gave to the Plaintiffs.

*Lupsor Estate v. Middlesex Mutual Insurance Co. - Ont. S.C. - March 20, 2003*⁶⁴

In *Lupsor*, the defendant insurer brought an application for an order striking portions of the plaintiff's statement of claim on the basis that it disclosed no reasonable cause of action. The insurer was the proposed representative of a defendant class of automobile insurers. Haines J. held that the law was not sufficiently settled to conclude that it was plain and obvious that the plaintiff, in an intended class action, had to have a cause of action against each member of a putative defendant class in order to proceed with a motion for certification and the appointment of a representative defendant.

The ruling permits the representative plaintiff to seek certification against a defendant class of up to 129 insurers, even though her claim is limited to only one of the insurers. In this

⁶⁴ [2003] O.J. No. 1038 (Ont. S.C., Haines J. at London, Ont. March 20, 2003) [hereinafter "*Lupsor*"]

class action , the plaintiff is seeking the return of the \$300 deductible withheld by an insurer for a car accident that left the automobile a writeoff. However, the result could cost insurers millions of dollars. Lupsor's case relies on the decision in *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*⁶⁵, where the Ontario Court of Appeal held that when an insurer elects to take title to a damaged vehicle it must pay the insured the actual cash value of the vehicle without application of any deductible provided for in the policy.

In the past, the formation of a defendant class has been rare.⁶⁶ Depending on the success of this action it could open Pandora's box for defendant-class class actions. Much of the success will depend on whether those caught in the defendant class will opt out of the proceeding under Section 9 of the *Class Proceedings Act*.⁶⁷ Parties who opt out will not share in any judgment or settlement obtained in the class action and are denied both the benefit and burden of *res judicata*.

⁶⁵ (2001), 54 O.R. (3d) 704 (C.A.)

⁶⁶ See *Berry v. Pully* [2001] O.J. No. 911 and *The Chippewas of Sarnia Band v. Attorney General of Canada et al.* [1996] O.J. No. 2475

⁶⁷ S.O. 1992, c. 6,