

# **17TH ARIL CONFERENCE VANCOUVER, FEBRUARY 2020**



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## **THE HONOURABLE DONALD BRENNER MEMORIAL KEYNOTE ADDRESS**

**HONOURABLE CLÉMENT GASCON  
RETIRED JUSTICE – SUPREME COURT OF CANADA**



# **THE TALK – MY THOUGHTS**

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**ADJUDICATING IN CANADA'S  
INSOLVENCY/RESTRUCTURING  
REGIMES:**

**HINDSIGHT, FORESIGHT, AND  
“20/20” VISION . . . ?**



# I – Adjudicating / “Insider” Hindsight ...

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- The Canadian Judiciary
  - Competence
  - Independance
  - Hierarchy
  - Appeal Process



# 1) The Superior Courts

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- Insolvency / restructuring contexts
- First shot = best shot?
- 3 reasons:
  - Specialized judges (*Sun Indalex*, 2013 SCC 6, *Century Services*, 2010 SCC 60)
  - Facts / Context matters
  - Discretion often in play
- Consequence: sometimes limited role for intermediate and final appellate courts



## 2) The Courts of Appeal

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- Appeal : not a new trial, but trial of the judgment
- Findings of facts, credibility often decisive
- Exercise of discretion normally deferred to
- Generalist judges / specialized judges



## 2) The Courts of Appeal (continued)

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- On questions of facts and mixed questions of facts and law:
  - Lower courts entitled to deference (*Abitibi*, 2012 SCC 67)
  - Need palpable and overriding error (« erreur manifeste et déterminante »)
  - Need to put one's finger on the crucial flaw (« pointer du doigt ») (*Housen*, 2002 SCC 33; *H.L.*, 2005 SCC 25; *Vavilov*, 2019 SCC 65)
  - « In the nature not of a needle in a haystack, but of a beam in the eye » (*Salomon*, 2019 CSC 14; *Benhaim*, 2016 CSC 48 (both quoting with approval *Nadeau*, 2016 QCCA 167))



## 2) The Courts of Appeal (continued)

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- On the exercise of discretion:
  - Lower courts entitled to great deference (*Jodoin*, 2017 SCC 26)
  - Was discretion exercised based on erroneous principle? (*Sun Indalex*, 2013 SCC 6)
  - Was sufficient weight given to all relevant considerations? (*Green*, 2015 SCC 60)
  - Was an unreasonable decision reached ? (*R.S.*, 2019 SCC 49)
- On questions of law: correctness / the last word... (*Housen*, 2002 SCC 33; *Vavilov*, 2019 SCC 65)



### **3) The Supreme Court of Canada**

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- Role
- Docket
- Leave process
- Insolvency/restructuring contexts: lessons from the past 15 years?





## A) Appeals as of right

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- References : ss. 35.1, 36, 53-54 *Supreme Court Act*
- *Criminal Code* : ss. 691, 692, 693
- Not applicable in the insolvency and restructuring contexts . . .



## B) Leaves to appeal

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- Applications for leave to appeal generally brought under s. 40(1) of the *Supreme Court Act* (or ss. 691-693 of the *Criminal Code*)
- Leave to appeal provided for under other statutes: e.g. *BIA*, s. 194; *CCAA*, s. 15; *Winding Up and Restructuring Act*, s. 107
- No hearing; submissions in writing (*SCA*, s. 43)
- Large discretion to decide
- No reasons provided: yes or no; why? to preserve Court's unfettered discretion (*Hinse*, [1995] 4 R.C.S. 597)



## C) Some statistics : 2018 and 2019

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	<b><u>2018</u></b>	<b><u>2019</u></b>
➤ Appeals heard	66	69
➤ Judgments rendered	59 (64 cases)	67 (72 cases)
➤ Leave applications	525	508
➤ Leave granted	39 (around 8%)	29 (around 6%)
➤ Appeals as of right	26	25



## C) Some statistics : 2018 and 2019

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### Appeals by principal areas of law

	<b><u>2018</u></b>	<b><u>2019</u></b>
➤ Criminal / Charter	50%	47%
➤ Constitutional law	9%	15%
➤ Civil Procedure / Courts	9%	3%
➤ Others I: (Administrative law, torts contract, family law, tax, ...)	3 – 8 %	3 – 8%
➤ Others II: (Insolvency ? / Restructuring? commercial law?...)	Less than 2%	Less than 2%



## D) The leave process

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- Not always from a Court of Appeal
- Leave to appeal can be from a denial of leave by the lower court: *AbitibiBowater*, 2012 CSC 67; *MacDonald*, [1986] 1 S.C.R. 460; *Roberge*, [1991] 1 S.C.R. 374;
- Denial of leave by SCC is not approval of result or reasoning of the court appealed from



## E) The test

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- The statutory test (s. 40) is “public importance”:
  - SCC is not a court of error
  - Its role is the orientation/development of the law in Canada
  - Distinct from "national importance"



## E) The test

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- Public importance ?:
  - Questions of general or wide interest, beyond that of the parties alone
  - Interpretation of the Constitution
  - Conflicting decisions of appellate courts
  - Reconsideration of a precedent (but... *Craig*, 2012 SCC 43; *Bedford*, 2013 SCC 72; *Carter*, 2015 SCC 5; *Vavilov*, 2019 SCC 65)



## F) Practical considerations

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- Leave application is not a re-argument of the appeal below
- Parties should be able to state why the case is/isn't appropriate for leave in one paragraph
- Some key questions for both sides :
  - Is this the right issue?
  - Is this the right record?
  - Is now an appropriate time?
- Is there substantial injustice?... but use sparingly
- Not simply that lower court was arguably wrong...





## II – SCC and the *BIA/CCAA* contexts:

### 1) SCC 2005-2009 (4 decisions)

#### *D.I.M.S. Construction*, 2005 SCC 52 (Que.)

- Appeal allowed – **Deschamps J.** (unanimous, 7-0)
- *BIA*, ss. 97(3) (set-off or compensation), 121 (claims provable) and 136-147 (scheme of distribution); **also**, *Act respecting industrial accidents and occupational diseases*, s. 316 (Que.); *Act respecting labour relations, vocational training and manpower management in the construction industry*, s. 54 (Que.)
- Statutory interpretation/Constitutional issue (paramountcy; no conflict)

#### *GMAC*, 2006 SCC 35 (Ont.)

- Appeal allowed – **Abella J.** (split, 7-1) (Major J. took no part in the judgment)
- *BIA*, ss. 47 (interim receiver), 72(1) (application of other law) and 215 (immunity for receivers/trustees); **also** *Labour Relations Act, 1995*, ss. 69(2), 69(12), 114(1) and 116 (Ont.)
- Statutory interpretation



# 1) SCC 2005-2009 (4 decisions)

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## *Saulnier, 2008 SCC 58 (N.S.)*

- Appeal dismissed – **Binnie J.** (unanimous, 8-0) (Bastarache J. took no part in the judgment)
- *BIA*, ss. 2 (definition of “property”) and 67 (property of the bankrupt); **also**, *Fisheries Act*, ss. 7 and 9 (leases and licences) (CAN), *Personal Property Security Act*, ss. 2(w) and (ad) (N.S.)
- Statutory interpretation

## *Caisse Populaire Montmagny, 2009 SCC 49 (Que.)*

- Appeals dismissed – **LeBel J.** (unanimous, 7-0)
- *BIA*, ss. 67 (property of the bankrupt) and 86 (Crown claims); **also**, *Excise Tax Act*, s. 222 (Can.); *Act respecting the Ministère du Revenu*, s. 20 (Que.)
- Statutory interpretation



## 2) SCC 2010-2014 (4 decisions)

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### *Century Services*, 2010 SCC 60 (B.C.)

- Appeal allowed – **Deschamps J.** (split, 7-1-1)
- *CCAA*, ss. 11 (powers of the court) and 18.3(1) (Crown deemed trusts); **also**, *Excise Tax Act*, s. 222(3) (Can.)
- Statutory interpretation

### *Schreyer*, 2011 SCC 35 (Man.)

- Appeal dismissed – **LeBel J.** (unanimous, 7-0)
- *BIA*, ss. 69.4 (exemption from stay), 121 (claims provable) and 178(2) (claims released); **also**, *The Family Property Act*, ss. 15 and 17 (Man.)
- Statutory interpretation



## 2) SCC 2010-2014 (4 decisions)

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### *AbitibiBowater, 2012 SCC 67 (Que.)*

- Appeal dismissed – **Deschamps J.** (split, 7-1-1)
- *CCAA*, ss. 2(1) (definition of claim), 11 (powers of the court) and 12 (determination of amount of claim); *BIA*, ss. 2 (definition of claim) and 121 (claims provable); **also**, Newfoundland and Labrador *Environmental Protection Act*, s. 99 (N.L.)
- Statutory interpretation/Constitutional issue (ancillary powers; IJI)

### *Sun Indalex, 2013 SCC 6 (Ont.)*

- Three appeals allowed, one dismissed – **Deschamps and Cromwell JJ.** (split, 2-3-2) (Deschamps and Cromwell JJ. wrote separately)
- *CCAA*, ss. 2 (definition of secured creditor) and 11 (powers of the court); **also**, *Pension Benefits Act*, ss. 57(4) and 75(1) (Ont.)
- Statutory interpretation/Constitutional issue (paramountcy; prov. law inoperative)



## 3) SCC 2015-2019 (4 decisions)

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### ***Moloney, 2015 SCC 51 (Alta.)***

- Appeal dismissed – **Gascon J.** (unanimous in the result, 7-2)
- *BIA*, ss. 72(1) (application of other law) and 178(2) (claims released); **also**, *Traffic Safety Act*, s. 102(2) (Alta.)
- Constitutional issue (paramountcy; prov. law inoperative)

### ***407 ETR, 2015 SCC 52 (Ont.)***

- Appeal dismissed – **Gascon J.** (unanimous in the result, 7-2)
- *BIA*, ss. 178(2) (claims released); **also**, *Highway 407 Act, 1998*, s. 22 (Ont.)
- Constitutional issue (paramountcy; prov. law inoperative)



### 3) SCC 2015-2019 (4 decisions)

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#### *Lemare Lake, 2015 SCC 53 (Sask.)*

- Court of Appeal's conclusion regarding paramountcy set aside – **Abella and Gascon JJ.** (split, 6-1)
- *BIA*, s. 243 (court may appoint receiver); **also**, *The Saskatchewan Farm Security Act*, ss. 9 to 22 (Sask.)
- Constitutional issue (paramountcy; no conflict)

#### *Orphan Well, 2019 SCC 5 (Alta.)*

- Appeal allowed – **Wagner C.J.** (split, 5-2)
- *BIA*, ss. 14.06(2) (environmental liability of trustees) and 14.06(4) (non-liability re certain orders); **also**, *Oil and Gas Conservation Act*, *Pipeline Act*, *Environmental Protection and Enhancement Act* (Alta.)
- Constitutional issue (paramountcy; no conflict)



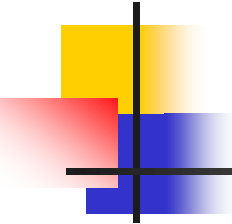
## 4) SCC 2020-... (2 cases, so far...)

### *Chandos* (38571) (Alta.)

- Judgment **reserved** (January 20, 2020)
- Common law anti-deprivation rule
- *BIA*, ss. 65.1, 66.34, 84.2, 95, 96 and 97(3); *CCAA*, s. 34

### *Callidus* (38594) (Que.)

- Appeal allowed (**unanimous**, 7-0) (January 23, 2020)
- Creditor voting rights and litigation funding; *CCAA*, ss. 11.2, 18.6 and 22; *BIA*, s. 4(3)(c)
- “We are all of the view to allow the appeal, reinstate the decision of the Superior Court rendered by Justice Jean-François Michaud on March 16, 2018, with costs in this Court and in the Court of Appeal, reasons to follow.”



## III – Adjudicating / “Outsider” foresight... and “20/20” vision... ?

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- Some decisive concerns for the judicial system:
  - Access (societal imperatives, rule of law considerations, confidence in law and courts, delays/costs)
  - Efficiency (prompt resolution of disputes, fair and just process, active case management)
- The impact for and the place of insolvency / restructuring





### **III – Adjudicating / “Outsider” foresight... and “20/20” vision... ?**

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- The way forward ? The next challenges ?
  - better focus ?
  - tighter limits ?
  - clarity/simplicity ?
- Your role/your contribution
- 2020 vision vs 20/20 vision...

**Hon. Clément Gascon**  
**February 2020**