



Court of Appeal grants leave to bypass Divisional Court and hear special case

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A recent decision focussed on whether the plaintiffs could bypass the Divisional Court's appellate jurisdiction and have a special case determined by the Court of Appeal pursuant to Rules 22.01 and 22.03 of the *Rules of Civil Procedure*.

In [*Taylor v. Canada \(Attorney General\)*](#), the representative plaintiff brought a claim against the federal government for the alleged negligence of Health Canada with respect to its regulation of TMJ implants. The action was initially certified in 2007 by the motion judge. In denying leave to appeal, the Divisional Court, adopted the reasons of the Court of Appeal in *Sauer v. Canada (Attorney General)*, [2007] O.J. No. 2443 (C.A.) with respect to the government's duty of care.

Subsequent to the Divisional Court's decision, however, the Court of Appeal released its decisions in *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.) and *Attis v. Canada (Minister of Health)*, [2007] O.J. No. 1744 (S.C.), which considered similar issues to those of the immediate and appeared to conflict with the Sauer decision.

In light of the Court of Appeal's findings in *Drady* and *Attis*, the defendant moved for a reconsideration of the certification of the action. The motion judge subsequently struck the statement of claim subject to amendments to remedy the pleadings. The plaintiff then moved to amend its Statement of Claim, which was granted. The defendant subsequently sought leave to the Divisional Court.

While the parties disagreed on the lines of authority that should govern this case, both parties took the position that *Sauer* could not co-exist with *Drady/Attis*. In order to save the time and expense of arguing the motion before the Divisional Court knowing that the issue would inevitably end up at the Court of Appeal, the parties sought to invoke Rules 22.01 and 22.03 of the *Rules of Civil Procedure* to have the Court of Appeal grant leave to have a special case determined by the Court of Appeal. The applicable rules provide as follows:

22.01(1) Where the parties to a proceeding concur in stating a question of law in the form of a special case for the opinion of the court, any party may move before a judge to have the special case determined.

(2) Where the judge is satisfied that the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, the judge may hear and determine the special case.

...

22.03(1) A motion under rule 22.01 may be made to a judge of the Court of Appeal for leave to have a

special case determined in the first instance by that court and the judge may grant leave where subrule 22.01(2) is satisfied and where the special case raises an issue in respect of which,

- (a) there are conflicting decisions of judges in Ontario and there is no decision of an appellate court in Ontario;
- (b) there is a conflict between decisions of an appellate court in Ontario and an appellate court of another province, or between decisions of appellate courts of two or more other provinces; or
- (c) one of the parties seeks to establish that a decision of an appellate court in Ontario should not be followed.

In ultimately granting leave, the Court of Appeal indicated that it would bypass the Divisional Court's appellate jurisdiction only in rare cases. This action, however, was commenced in December 1999 and pleadings had not yet closed. According to the Court of Appeal, it was "time to get this case moving ahead." The Court of Appeal cited the fact that 30 other cases depended on the resolution of the issue relevant to the appeal and ultimately relied on a number of circumstances to support its exercise of discretion, namely: (i) the current state of the jurisprudence at the appellate level on an important issue of law; (ii) the inevitability that the issue would have to be decided by the Court of Appeal in the proceeding; (iii) the fact that an additional step (the appeal to the Divisional Court) would add significant expense to the proceeding and would be very unlikely to assist in the ultimate determination of the issue by the Court of Appeal; (iv) the "enormous delay and expense" that have already occurred; (v) the importance of the case; and (vi) the fact that both parties are consenting to the matter being heard by the Court of Appeal as a first instance motion.

On the issue of whether such a finding was precluded by the wording of Rule 22.01 regarding a special case being determined *in the first instance*, the Court of Appeal took a liberal reading of the provision. Specifically, the Court of Appeal found that "[w]hile a special case could be viewed as an appeal from the order of the motion judge" it took the view "that the position of the parties taken in post-argument submissions could be treated by this court as a separate motion or application."

As such, the Court of Appeal found that the circumstances of this case provided for the exercise of its discretion and granted leave to have a special case determine the issue in question.

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