

April 15, 2013

## Supreme Court Renders Leave to Appeal Decisions in Several Alberta Cases

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### Cases Considered:

*R v Mack*, [2012 ABCA 42](#), leave to appeal granted, April 11, 2013 (SCC); *Métis Nation of Alberta Region 1 v Joint Review Panel*, [2012 ABCA 352](#), leave to appeal dismissed April 11, 2013 (SCC); *Fitzpatrick v Alberta College of Physical Therapists*, [2012 ABCA 207](#), leave to appeal dismissed April 11, 2013 (SCC)

On April 11, 2013 the Supreme Court of Canada handed down leave to appeal decisions in three cases from Alberta.

*R v Mack*, the sole Alberta case where leave to appeal was granted (by Justices LeBel, Karakatsanis and Wagner) is described by the [SCC](#) as follows:

Dax Richard Mack, Robert Levoir and Michael Argueta went hunting on land owned by Mack's father on November 6, 2002. Only Mack and Argueta returned. Levoir had been shot and killed. Soon after Levoir had been reported missing, Jay Love went to police saying that Dax Mack had confessed to killing Levoir. An undercover investigation ensued with undercover operators, posing as members of a criminal organization, approaching Mack to recruit him into the fictitious organization. Although the recordings of the utterances made by Mack to the operators were not admitted into evidence, as the authorizations for the wiretaps had been obtained in a manner that violated Mack's *Charter* rights, the prosecution was permitted to adduce *viva voce* evidence from the undercover operators. At trial, Mack and Argueta blamed the other for the murder. The trial judge's charge to the jury addressed how to assess the evidence of the undercover officers and the testimony of Argueta. Mack was convicted of first degree murder. His appeal to the Court of Appeal of Alberta was dismissed.

The issues on appeal include whether Mack's statements to undercover officers should be excluded under section 24(2) of the *Charter*, and the adequacy of the trial judge's charge to the jury on (1) the danger of relying on those statements, and (2) the alternate suspect witness.

The *Métis Nation of Alberta* case is one that Nigel Bankes commented on in an [ABlawg post](#) from December 2012. As he notes in that post, the Alberta Court of Appeal

denied the application of the Metis Nation and of the Athabasca Chipewyan First Nation (ACFN) for leave to appeal the decision of the Joint Review Panel (JRP) constituted to deal with Shell's Jackpine Mine Expansion Project application.

The Athabasca Chipewyan First Nation’s application for leave to appeal raised issues including whether the JRP had a duty to decide if the Crown had discharged its duty to consult First Nations before making its public interest determination, and whether it was premature for the JRP to assess the adequacy of consultation. Leave to appeal was denied by the SCC (Justices LeBel, Karakatsanis and Wagner) with costs to the respondents Shell Canada Limited, Minister of Justice and Attorney General of Alberta and Attorney General of Canada.

In the third decision, *College of Physical Therapists of Alberta v Marilyn Fitzpatrick*, SCC Justices Fish, Rothstein and Moldaver denied leave to appeal to the College, with costs. That case is described by the [Supreme Court](#) as follows:

[Fitzpatrick] is a physical therapist in Alberta and a member of the ... College. The [College] received complaints that [Fitzpatrick] was diagnosing a disproportionate number of patients with “Whiplash Associated Disorder Level III”. At a disciplinary hearing, the [College]’s Discipline Committee found [Fitzpatrick] guilty of misconduct in the form of misdiagnoses or upgrades in respect of 56 patients, of making those misdiagnoses or upgrades without taking appropriate care, failing to maintain patient charts, and inappropriately seeking guidance from a lawyer regarding the treatment of patients and the conduct of practice. [Fitzpatrick] appealed to the [College]’s Council. The Council confirmed the Discipline Committee’s conclusions on liability and sanction but for two of thirteen particulars relating to the allegation of improper record keeping.

The issues raised in the leave to appeal application included whether criminal law rules and a burden of strict proof should apply to professional discipline hearings, whether a tribunal hearing professional discipline matters can rely on statistical evidence or patterns to prove allegations of professional misconduct, and issues relating to administrative law principles.

On March 28, 2013, the SCC also denied leave to appeal in another professional discipline case, *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, [2012 ABCA 267](#). Linda McKay Panos blogged on the ABCA decision in *Wright* [here](#), and I will be posting a comment soon on the Supreme Court’s decision not to hear the appeal in the *Wright* case, and the impact that decision has on human rights law in Alberta.

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