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Narrow, complex decision has SCC decide on eligibility for preliminary hearings

By **Terry Davidson**

Law360 Canada (November 1, 2024, 5:54 PM EDT) -- Canada's Supreme Court has ruled that two men accused of sex crimes and each facing a maximum of 10 years in prison were entitled to preliminary inquiries — even though legislative changes made during their criminal proceedings restricted such hearings to those facing a maximum of 14 years.

The Supreme Court of Canada's Nov. 1 decision in *R. v. Archambault,* 2024 SCC 35, involves the separate Quebec-based cases of Agénor Archambault and Gilles Grenier, who in 2019 were each charged with historical sex crimes against a child.

Archambault was charged with allegedly committing crimes against a young boy between the years 1958 and 1960 while Grenier was charged with crimes of sexual interference and sex assault against someone under 14 between 2003 and 2007.

Both first appeared in the Court of Quebec in the summer of 2019.

But two things happened: One, between when Archambeault and Grenier allegedly committed the crimes and when they were charged in 2019, the maximum penalty for the crimes they allegedly committed increased from 10 years imprisonment to 14. Then, on Sept. 19, 2019, changes to s. 535 of the *Criminal Code* made it so preliminary inquiries were available only to those charged with offences that carry a maximum of 14 years of imprisonment.

In 2020, Archambault and Grenier requested preliminary inquiries — a type of hearing done to determine if there is enough evidence for a case to head to trial.

Crown prosecutors conceded that, based on the timing, Archambault and Grenier could only face the 10-year maximum if convicted. But they argued that the men were not eligible for the preliminary inquiries due to the legislative changes that came into force in September 2019.

Two of Quebec's lower courts sided with the Crown.

But the province's appeal court sided with the two men, finding that they were entitled to the preliminary inquiries because the changes to s. 535 came after they allegedly carried out their crimes.

(The men have since had those preliminary hearings.)

The Crown then turned to the Supreme Court of Canada.

In the end, a 5-4 majority of Canada's High Court dismissed the Crown's appeal — albeit for varying reasons amongst the majority judges — finding that Archambault and Grenier were entitled to their preliminary inquiries because the old version of the rules still applied to them.

Justice Suzanne Cote

Certain Supreme Court Judges in the majority — Justices Suzanne Côté and Malcolm Rowe, specifically — had reasons differing from that of Quebec's appeal court, finding instead that the eligibility for a preliminary inquiry should be based on the date the charges were laid — as in if the charges were laid before the changes to preliminary inquiries came into force.

The court's written decision states that this "better acknowledges the flexibility of criminal procedure."

"Such an interpretation has the advantage of preserving fairness and legal certainty in addition to allowing for the uniform application of the new legislative provision across the country," it states.

Other Justices had their own reasons.

Four of the nine, including Chief Justice Richard Wagner and Justice Andromache Karakatsanis, were in dissent and would have allowed the Crown's appeal. They found that the new s. 535 rule should apply to those who had not made a request for a preliminary hearing before the legislative changes came into effect Sept. 19, 2019.

Photo of Justice Suzanne Côté: SCC Collection

If you have any information, story ideas or news tips for Law360 Canada, please contact Terry Davidson at t.davidson@lexisnexis.ca or 905-415-5899.