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CIVIL APPEALS

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HIGHLIGHTS

This release features updates to the commentary in Chs. 1 to 9.

Introduction

The Supreme Court of Canada has provided guidance as to appellate review of jury charges in the context of a criminal trial. However, the observations and advice apply equally to review of jury charges in civil cases.

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Some of the recent cases in the intermediate appellate courts are of significance, albeit in some instances particularly to their own jurisdictions. These include a trilogy of decisions, two Ontario Court of Appeal decisions and one from the Nova Scotia Court of Appeal, that focus on the test for the "merit" of an appeal in the context of a stay application. As well, Justice David Brown of the Ontario Court of Appeal provided a pithy explanation of the nature and purpose of an Oral Compendium as well as advice as to how to maximize its value. And in Saskatchewan, a decision of the Court of Appeal clarified the procedure to be followed where there is doubt as to whether a particular order is final or interlocutory. Also, the Court addressed the test for striking a claim or defence and the standard of review of discretionary decisions.

The "Merits" in the Context of the Criteria for Granting a Stay, an Interim Injunction

In the leading decision in Canada, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, a tripartite test is put forward for determination of whether or not a stay of proceedings pending appeal ought to be granted. One aspect is to assess the "merits" of the appeal. As to that the Court noted that with two exceptions "a prolonged examination of the merits is generally neither necessary nor desirable," since the main purpose of examining the merits is to screen out frivolous cases. However, subsequent appellate courts have addressed "the merits" in a more nuanced manner. Accepting that the threshold is low, they nevertheless have proceeded to make a more extensive analysis of the merits to determine whether these may override any shortcomings in the remaining two aspects, namely "irreparable harm" and "the balance of convenience." In Nova Scotia, this has been seen as part of the secondary "exceptional circumstances" test, as illustrated by *MacGillivary v. Brown*, 2023 NSCA 65, where the Court concluded the strength of the appeal overrode the fact that the tripartite test was not met. In Ontario, under the overall requirement that the decision give effect to "the justice of the case," it has been found that the strength of the merits could offset weakness in the other two criteria (*Lithium Royalty Corporation v. Orion Resource Partners*, 2023 ONCA 697 at para. 49) and that, more generally, the strength of one of the criteria might override weakness in one of the others (*Sase Aggregate Ltd. v. Langdon*, 2023 ONCA 644 at para. 10).

In a different but related context, the British Columbia Court of Appeal examined and elaborated upon the appropriate test for "the merits" in the context of defamation. In *Yu v. 16 Pet Food & Supplies Inc.* , 2023 BCCA 397, the Court, in considering whether an interim injunction ought to issue, noted that its operation would restrain the speech of a party before trial. The court concluded that the low threshold of the "serious issue to be tried" criterion

was ill suited to and inappropriate in a defamation context and formulated the test as follows:

> 1. The applicant must demonstrate that the impugned words are manifestly defamatory such that a jury finding otherwise would be considered perverse. To do so, the applicant must establish that:
> a. the impugned words refer to them, have been published, and would tend to lower their reputation in the eyes of a reasonable observer; and
> b. it is beyond doubt that any defence raised by the respondent is not sustainable.
> 2. If the first element has been made out, the court should ask itself whether there is any reason to decline to exercise its discretion in favour of restraining the respondent's speech pending trial.

Three Significant Saskatchewan Court of Appeal Decisions

(1) **Procedure for Addressing Whether Leave to Appeal is Required in Saskatchewan**

In *Aecon Mining (Aecon Mining Construction Services, a division of Aecon Construction Group Inc. v. K+S Potash Canada GP*, 2023 SKCA 102), Chief Justice Richards provides directions where there is doubt as to whether a particular order is final or interlocutory, which determination is critical as to whether leave to appeal is required. At paragraphs 34-41, the conundrum of having to elect between filing a Notice of Appeal and making an Application for Leave to Appeal is addressed. Two basic routes are set forth. However, in short, where there is a real doubt, an applicant ought to file an Application for Leave to Appeal, and within it make a request for directions, together with a request to extend the time for filing a Notice of Appeal when there is a risk that the time for filing a Notice of Appeal will have expired.

(2) **Test for Striking a Claim as Not Disclosing a Cause of Action**

There was some earlier authority in Saskatchewan and elsewhere to the effect that whether to strike a claim as not disclosing a cause of action, or a defence as not viable, is an exercise of discretion. However, in Saskatchewan, Chief Justice Richards has confirmed that the "plain and obvious" test applies, and that its application by a lower court is to be reviewed on appeal on the basis of correctness (*Smith v. The Toronto-Dominion Bank*, 2023 SKCA 81 at para. 11).

(3) **Formulation of the Standard of Appellate Review of a Disretionary Decision**

The Court in *Stromberg v. Olafson*, 2023 SKCA 67 at paras. 117-22, adopted the earlier statement in *Kot v Kot*, 2021

SKCA 4, 63 ETR (4th) 161 at para. 20, which summarized the discretionary standard of review as follows:

> …appellate intervention in a discretionary decision is appropriate where the judge made a palpable and overriding error in their assessment of the facts, including as a result of misapprehending or failing to consider material evidence. Appellate intervention is also appropriate where the judge failed to correctly identify the legal criteria which governed the exercise of their discretion or misapplied those criteria, thereby committing an error of law. Such errors may include a failure to give any or sufficient weight to a relevant consideration.

The Court noted that this formulation had been applied generally.

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