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CIVIL APPEALS

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HIGHLIGHTS

This release features updates to the commentary in Chs. 10 to 16. This release includes the following noteworthy decisions:

Note of Significant Developments

There are several decisions worthy of note that address matters that arise in the context of Civil Appeals, as well as the Supreme Court's decision affirming the independence of military judges. Matters include: raising a new issue on appeal, ineffectiveness of counsel, the duty of a judge regarding an unrepresented litigant, cautionary instructions to a jury, and the standard of appellate review of decisions of Associate Judges in British Columbia.

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Independence of Military Judges

In *R. v. Edwards*, 2024 SCC 15, the Supreme Court of Canada addressed the issue of the judicial independence of Court Martial Judges who are military officers. It concluded that military judges' being officers under the *National Defence Act* is not incompatible with their judicial functions for the purposes of s. 11(d) of the *Charter*. While acknowledging that accused members of the Canadian Armed Forces who appear before military judges are entitled to the same guarantee of judicial independence and impartiality under s. 11(d) as accused persons who appear before civilian criminal courts, the Court said this does not require that the two systems be identical. The Court stated that as presently configured Canada's system of military justice fully ensures judicial independence for military judges in a way that takes account of the military context, and specifically of the legislative policies of maintaining discipline, efficiency and morale in the Armed Forces and public trust in a disciplined military. Accordingly, the requirement that military judges be officers was found to be not contrary to s. 11(d) of the *Charter*.

Raising a New Issue on Appeal

The British Columbia Court of Appeal had two occasions to address the question of the appellant's raising an issue on appeal that was not dealt with in the court below. In both instances it refused to hear argument on the new issue. In *Forjay* (*1052387 B.C. Ltd. v. Forjay Management Ltd.*, 2024 BCCA 81) the question was one of statutory interpretation which could have been dealt with without additional evidence. The Court declined to hear the issue for two basic reasons: one, the appellant had raised and then dropped the issue in the court below; and two, there was another avenue to have the matter addressed. Accordingly, the Court rested its decision on the "justice of the case" in declining to permit the issue to be raised. In *Deissner (Deissner v. Boorsma*, 2023 BCCA 476) the argument sought to be raised was not only new, but it was also entirely inconsistent with the position taken in the court below. The Court commented that not only would it not be in the interests of justice, but to the contrary, it would amount to an abuse of process, to permit the argument to be raised.

Ineffectiveness of Counsel as a Ground for Vitiating a Civil Judgment-Conflict of Interest

In *Nguyen v. 1108911 B.C. Ltd.*, 2024 BCCA 48, the British Columbia Court of Appeal compared "ineffectiveness of counsel" in criminal and civil contexts. In doing so it most emphatically concluded that the differences between a civil proceeding and a criminal case made it highly exceptional that such a basis could operate to set aside a civil judgment. The specific allegation was that counsel had a

conflict of interest. That alone, however, was held not be sufficient. As the Court stated:

> …a civil appeal that relies on the ineffective assistance of counsel, and that is based on a purported conflict of interest without any suggestion of knowledge or complicity by the other party, should only succeed if the court is satisfied that trial counsel was actually aware of the conflict and nevertheless chose to act "in the face" of that conflict… First, …civil appeals based on the ineffective assistance of counsel should be carefully circumscribed. They should be extraordinary and will often be grounded in some form of fraud or impropriety. Second, whether counsel "should have known" of a conflict of interest will frequently require factual determinations that may be inappropriate when there is no requirement that trial counsel's evidence be before the court.

Duty of a Judge regarding an Unrepresented Litigant

In *J.L. v. T.T.* (2024 SKCA 38), the Saskatchewan Court of Appeal allowed an appeal where the trial judge failed to discharge her duty to assist a self-represented litigant. The breach was threefold. One, the trial judge provided information about the rules of evidence and the examination of witnesses that was legally inaccurate. Two, the trial judge made incorrect evidentiary rulings and improperly limited the scope of cross-examination. Three, counsel for the other party was permitted to lead hearsay evidence that the trial judge improperly considered for the truth of its contents. The cumulative effect of these errors was to deny the unrepresented litigant an opportunity to fairly present his case. In the course of an extensive and helpful judgment, the Court observed that, where a party is self-represented, this creates a complex situation for trial judges. Specifically, while they must provide adequate assistance to the self-represented person, at the same time they must not cross the line from being an impartial adjudicator into the realm of offering assistance in a manner that is unfair to the other party. Accordingly, while trial judges are not permitted to act as the lawyer for a self-represented litigant, as part of their duty to ensure a fair process they may be required to provide guidance on procedure and the law of evidence. In doing so, however, the advice must be legally correct.

In the result, since there had been no mistake, inadvertence or misunderstanding and it would be difficult to succeed on the merits since the issue had not been raised in the court below, Justice Pepall concluded that it was not in the interests of justice to set aside the Notice of Abandonment.

Unfair Jury Trial – Absence of Cautionary Instructions

The Ontario Court of Appeal, in *Jarvis (Jarvis v. Oliveira*, 2024 ONCA 200), an appeal in a straightforward negligence action, ad-

dressed in some detail several aspects of a judge's role in a jury trial, including the need for clear rulings as to the admissibility of evidence, specifically, evidence of the character of the plaintiff. However, the Court's focus was the absence of a clear caution, both as to the use of such evidence — that it could not be used to impugn the character of the plaintiff — and as to inflammatory comments made by opposing counsel. Moreover, the absence of an objection to the charge was held not to be fatal to the appeal. The appeal was allowed and a new trial ordered.

Standard of Appellate Review of Decisions of Associate Judges in British Columbia

In *Ningbo Zhelun Overseas Immigration Service Co. Ltd. v. USA-Canada International Investment Inc.*, 2024 BCSC 682, the appeal judge took occasion to comment upon the standard of appellate review of an Associate Judge's interlocutory decisions. British Columbia is the last provincial jurisdiction to follow the Abermin test that requires a distinction to be made between decisions that have a final effect on the case and those that do not. In the course of the judgment, the appeal judge criticized the test as breeding "uncertainty, scholasticism and unnecessary complexity," and noted that it was an anomalous exception to the standards established in *Housen v. Nikolaisen*, 2002 SCC 33. However, the conclusion was that "whatever the merits of criticisms of *Abermin*, they are beside the point unless and until a five-member division of the Court of Appeal reconsiders it."