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THE LAW OF DAMAGES S.M. Waddams Release No. 1, December 2024

What's New in this Update:

Charter Damages — In *Canada (Attorney General) v. Power*, 2024 SCC 26, 2024 CarswellNB 344, 2024 CarswellNB 345, the Supreme Court of Canada has confirmed that damages under section 24(1) of the *Charter* are available against the Crown, in its executive capacity, when Parliament enacts a bill into law, which legislation is later declared invalid by a court pursuant to section 52(1) of the *Constitution Act, 1982*. The state may be liable for *Charter* damages if the legislation is clearly unconstitutional at the time of enactment or was enacted by the state in bad faith or as an abuse of power.

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Punitive Damages — In *Baker v. Blue Cross Life Insurance Company of Canada*, 2023 ONCA 842, 2023 CarswellOnt 20147, the Ontario Court of Appeal upheld a jury award of \$1,500,000 in punitive damages against the defendant insurer, noting in particular the deterrence function of punitive damages: “deterrence is impossible unless the punishment is meaningful.”

Loss of Chance Damages — In *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2023 BCSC 1758, 2023 CarswellBC 2931, additional reasons 2024 BCSC 18, 2024 CarswellBC 17, the trial judge found that the plaintiff lost an 18% chance to achieve a completed and profitable hydro-electric project because of the misfeasance of government representatives and awarded post-contingency damages of \$10.125 million.

The Normal Measure of Damages for a Failed Estate Purchase — In *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2023 ONCA 814, 2023 CarswellOnt 19166, additional reasons 2024 ONCA 7, 2024 CarswellOnt 36, the Ontario Court of Appeal has reaffirmed that the normal measure of damages for a failed real estate purchase is the difference between the contract price and the market value of the land on the “assessment date,” which is usually the date on which the purchase was scheduled to close.

Mental Distress Damages — In *Krmpotic v. Thunder Bay Electronics Limited*, 2024 ONCA 332, 2024 CarswellOnt 6339, the Ontario Court of Appeal upheld an award of \$50,000 for harm beyond the normal distress and hurt feelings that result from dismissal, notwithstanding the absence of medical evidence concerning a diagnosable psychological injury.

Damages Because of the Breadth of Distribution of Defamatory Statements — In *I Buy Beauty LLC v. Dong*, 2024 BCSC 815, 2024 CarswellBC 1373, general damages of \$250,000 were awarded in part because of the “breadth of distribution” of the defamatory statements of the defendant, a popular YouTuber.

The Presumptive Prejudgment Interest Rate on Non-Pecuniary Damages in Ontario — In *Aubin v. Synagogue and Jewish Community Centre of Ottawa (Soloway Jewish Community Centre)*, 2024 ONCA 615, 2024 CarswellOnt 12242, additional reasons 2024 ONCA 681, 2024 CarswellOnt 13656, the Ontario Court of Appeal has confirmed a presumptive prejudgment interest rate of 5% on non-pecuniary damages for personal injury claims in Ontario (excluding motor vehicle accident claims). The Court also provided guidance on the criteria governing the exercise of discretion to vary the presumptive rates of interest for non-pecuniary damages and past

pecuniary damages under section 130 of the Ontario *Courts of Justice Act*.