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CIVIL APPEALS

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Release No. 2, May 2026

HIGHLIGHTS

This release features updates to commentary in Chs. 9 to 16. This release includes the following noteworthy decisions:

Noteworthy Decisions

Overview

Appellate courts made several decisions in the latter part of 2025 that are worthy of note. The standard of review applicable to instances of "abuse of process" received the attention of the Supreme Court of Canada and the Ontario Court of Appeal. In two instances, the British Columbia Court of Appeal rendered significant decisions relating to appeals pursuant to the *Arbitration Act*. Also, there were three specific standard-of-review decisions worthy of note. And two contrasting Ontario Court of Appeal decisions addressed the principle of "proportionality" in assessing costs and upon appellate review.

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Standards of Review

Findings of Mixed Fact & Law in Constitutional Appeals

As with the standard to be applied to questions of law under the *Arbitration Act*, there is a difference of opinion as to whether deference is to be accorded to findings of mixed fact and law in civil constitutional appeals. The difference in this instance arises from the Supreme Court of Canada's decision in *Société des casinos du Québec inc. c. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13. In that case, the majority of the court endorsed Côté J.'s concurring reasons, which held that findings of mixed fact and law made in connection with a constitutional question are subject to review for correctness and that only findings of "pure" fact that can be isolated from the constitutional analysis are entitled to deference. The Ontario Court of Appeal reviewed its own diverging views in *Fair Voting BC v. Canada (Attorney General)*, 2025 ONCA 581 (at paras. 82-5), referring to two of the Court's decisions in 2024 holding the standard to be "correctness" and two others in the same year that applied the "palpable and overriding error" standard, concluding that "[i]t is enough to note that the law requires clarification, not least because the distinction between findings of pure fact and findings of mixed fact and law — where both are made in connection with a constitutional question — may be subtle at best".

Proportionality in Costs Appeals

Two Ontario Court of Appeal judgements deal with the principle of "proportionality" in connection with appeals of costs awards. While noting that awards of costs are highly discretionary and that intervention on appeal is exceptional, these decisions elaborate on when an appeal court will intervene on the basis of a lack of proportionality. The proportionality principle, which is expressly set forth in Rule 1.04(1.1) of the *Rules of Civil Procedure* is a consideration in making and reviewing awards of costs. As the Court stated in *Barry v. Anantharajah*, 2025 ONCA 603, "so long as trial judges have turned their minds to the issue of proportionality either expressly or impliedly, deference is owed to the costs award absent an error in principle or a decision that is plainly wrong. In this sense, proportionality is akin to reasonableness and fairness, the overarching principles to be applied in a costs award." In this instance, an insurer had undertaken the defense and simply made an offer to settle based on withdrawal of the claim without costs. In the result, after a jury trial, the net damages awarded amounted to $16,160.50. Nevertheless, costs of $300,000, consisting of $164,148.33 in fees, $21,339.29 for HST, and $114,512.38 in disbursements, were upheld as not offending the principle of proportionality. By way of contrast,

in *100 Bloor Street West Corporation v. Barry's Bootcamp Canada Inc.*, 2025 ONCA 447, notwithstanding that the trial judge had considered the principle of proportionality, the Court held that, on its face, the award in the amount of $462,102.60 plus $125,706.30 in disbursements for a total of $587,808.90, and for the motion, $121,208.49, for an all-inclusive total of $709,017.39 was "a staggering costs award" that was manifestly out of line with usual costs awards in comparable cases. The Court went on to conclude that it was "plainly wrong" and substituted an order for costs for all proceedings in the cumulative amount of $300,000, saying that even that award was "generous".