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CIVIL APPEALS

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HIGHLIGHTS

This release features updates to commentary in Chs. 1 to 8. 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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Abuse of Process

In two cases in the Ontario Court of Appeal and one in the Supreme Court of Canada the decision-making classification of "abuse of process" was addressed. In *Saskatchewan (Environment) v. Métis Nation—Saskatchewan*, 2025 SCC 4 (at para. 31), the Supreme Court stated that abuse of process is a question of law alone and that the applicable standard of review is correctness. The Ontario Court of Appeal disagreed. In *Pine Glen Thorold Inc. v. Rolling Meadows Land Development Corporation*, 2025 ONCA 604 (at para. 37), it noted that it has characterized abuse of process as a question of mixed fact and law subject to the palpable and overriding standard of review. Subsequently, in *Becker v. Walgate,* 2025 ONCA 696 (at para. 36), the Court stated that, ultimately, the decision to dismiss a proceeding as an abuse of process was discretionary, which conceptually raises a question of mixed fact and law. The Supreme Court will probably address this difference of opinion in the future and is likely to uphold its non-deferential review standard as the "abuse of process" doctrine concerns judicial integrity.

Arbitration Act, S.B.C. 2020, c. 2, s. 59

In two decisions the British Columbia Court of Appeal deals with two appellate procedure questions. One decision dealt with the standard of review when leave is granted to appeal a question of law and the other dealt with the timelines for issuing a cross-appeal given that no reference is made to a cross-appeal in the *Arbitration Act*. In *Green Light Solutions Corp. v. Kern BSG Management Limited.*, 2025 BCCA 408, the Court determined that a breach of procedural fairness, in this instance a failure to provide an opportunity to make submissions, was an "error of law" within the meaning of the *Act* and thus was capable of being appealed to the Court of Appeal. In the decision about cross-appeals (*Sinclair v. T.D.M.C. Holdings Ltd*., 2025 BCCA 322), the Court held that the *Court of Appeal Act* and Rules filled the gap in the *Arbitration Act*: for the appeal provision to be practical, the procedural provisions in the *CAA* and Rules applied once an appeal was brought. Accordingly, the Court concluded that s. 14 of the *Court of Appeal Act* governed the issuance of a cross-appeal.

Standards of Review

Failing to Draw Adverse Inference

The New Brunswick Court of Appeal created an exception to the accepted view that drawing or not drawing an adverse inference is a matter of discretion reviewable on appeal applying a deferential standard. In the circumstances, on a second appeal from a small-claims decision, the Court concluded that the failure to draw an

adverse inference constituted "a reversible error of law." It reached that conclusion by stating the failure was "so impactful" and that drawing the inference was "so compelling" that, in effect, the judge did not decide the case on its merits, thereby failing to make a just determination as required under the *Small Claims Act*.

Question of Law under Arbitration Acts

In *Buffalo Point First Nation v. Buffalo Point Cottage Owners Association Inc*, 2025 MBCA 72, the Manitoba Court of Appeal addressed the issue of whether the standard of review for appeals of commercial arbitration awards remains as set out in *Sattva Capital Corp v. Creston Moly Corp*., 2014 SCC 53, and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, or whether it is to be governed by the later decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. Applying the *Vavilov* analysis to an appeal on a question of law would result in the standard's being "correctness." However, the Manitoba Court of Appeal noted that *Vavilov* was an administrative law decision and that the Supreme Court did not expressly or impliedly overturn *Sattva*, or *Teal Cedar* in which it stated there was a "preference for a reasonableness standard . . . with the key policy objectives of commercial arbitration, namely efficiency and finality." In the result, the Manitoba Court of Appeal concluded that the standard of review to be applied was "reasonableness" not "correctness."