Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. *Distribution List*
☐
☐
☐
☐

CIVIL APPEALS

Donald J.M. Brown, K.C.

Release No. 3, October 2026

HIGHLIGHTS

This release features updates to commentary in Chapters 1 to 8. There have been a number of appellate court decisions that are of interest from the perspective of civil appellate practice and procedure, some of which are noted below:

Thomson Reuters®

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
E-mail CustomerSupport.LegalTaxCanada@TR.com

This publisher's note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

Costs Payable by Counsel Personally

The use of AI-assisted research has resulted in Courts requiring counsel to verify the accuracy of citations. For example, in Alberta this resulted in the issuance of the Notice to the Public and Legal Profession dated October 6, 2023, titled *Ensuring the Integrity of Court Submissions When Using Large Language Models*, to ensure that litigants do not provide inaccurate or misleading information to courts and waste the time and resources of the judiciary and other litigants. In *Reddy v. Saroya*, 2026 ABCA 20 (Alta. C.A.), lead counsel filed a factum with unchecked and non-existent citations. Because of

that, coupled with counsel's casual attitude to dealing with the errors, the Court concluded that there was such a marked departure from reasonable conduct that it seriously interfered with the administration of justice: costs were ordered to be paid by lead counsel personally.

Moot Issues Evasive of Review

In two decisions, one by the Supreme Court (*Taylor v. Newfoundland and Labrador*, 2026 SCC 5 (S.C.C.)) and the other by the Federal Court of Appeal *(Mackinnon v. Canada (Attorney General)*, 2026 FCA 78), mootness was found not to be a basis for declining to hear the appeal as, in each instance, the issues were likely to be evasive of review in the future. In the *Taylor* case, the COVID pandemic led to a partial travel ban's being imposed in Newfoundland and Labrador. The Court of Appeal declined to hear the moot appeal but the Supreme Court, in an application of the *Borowski (Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.)) criteria, concluded otherwise. It found that there was a proper adversarial presentation; that the issue was evasive of review; and that since the issue involved the application of a *Charter* right to an unprecedented provincial travel restriction and since it raised legal issues of manifest public importance, it would not be a misuse of judicial resources to hear the appeal. Moreover, the Court noted that doing so was a judicial function that lay at the core of the Court's jurisdiction and would not inappropriately encroach on the role of the legislature. In *Mackinnon*, the issue was the justiciability and reviewability of a Prime Minister's advice to a Governor General to prorogue Parliament. The Federal Court concluded that it was an issue that was evasive of review in that the time periods of prorogation were shorter than the time practically required to challenge its legality. The court was satisfied that an adversarial context existed and concluded that it was worthwhile devoting scarce judicial resources to resolving the issue.

Jurisdictional Issues in Ontario: Court of Appeal or Divisional Court

The jurisdictional divide between the Ontario Court of Appeal and the Divisional Court continues to be bedeviling. In *Powell (Powell v. Ledroit Sabo Litigation*, 2026 ONCA 68 (Ont. C.A.)), an issue arose as to whether the balance outstanding following an assessment of costs should be the basis of determining whether the appeal fell win the monetary jurisdiction of the Divisional Court. In concluding that the balance owing was the proper basis, the Court of Appeal made an extensive review of the existing case law and attempted to give guidance as to the future. In *Castle Homes (Castle Homes Design Inc. v. Deborah McKenzie et al,* 2026 ONCA 98 (Ont. C.A.)), the question was whether the order dismissing a lien action and discharging

the liens was made pursuant to the *Construction Act* or pursuant to the *Rules of Civil Procedure*. Since there were conflicting decisions of the Court of Appeal addressing this question, the Court retained jurisdiction on the ground that clarity was required as to the appropriate appeal route in construction disputes.