Publisher's Note

March 2019
Release 2019-1
Previous update was 2018-4

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Civil Appeals

Overview

There have been a number of interesting decisions in the past six months by appellate courts addressing issues that are of particular interest to appellate decision-making and supervision of trial processes. The Supreme Court of Canada has provided some particularly forceful directions to judges and counsel alike as to the right of a party and witnesses in federal courts to have the proceedings conducted in the official language of their choice. In addition, the Federal Court of Appeal elaborated upon the tests for not following or overruling a past decision of the Court, and Mr. Justice Stratas has provided a useful analysis of the ground of "incompetence of counsel" in a Notice of Appeal. Finally, the Ontario Court of Appeal, somewhat unusually, on its own motion adjourned an appeal to permit parties to consider adding evidence of "legislative facts" to assist the Court in its law-making function where it was concerned about the implications of the decision.

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What's New in this Update

Appellate Remedies for Breach of Language Rights

1. In ***Mazraani*** (*Mazraani v. Industrial Alliance Insurance and FinancialServices Inc.*, 2018 SCC 50) the Supreme Court had occasion to elaborate on the requirement that a person appearing in any federal court is entitled to give evidence and participate in either one of the two official languages. It reaffirmed that the right to do so is different from the right to have an interpreter and stated that it was a substantive and not a procedural right. This right is not only contained in the *Official Languages Act* (R.S.C. 1985, c. 31 (4th Supp.)) but it is also guaranteed by s. 133 of the *Constitution Act, 1867* and s. 19 of the *Canadian Charter of Rights and Freedoms*.
2. The Court went on to state that the presiding judge, when it appears that a party will be calling a witness or arguing in an official language that the other party does not understand, has a duty to inform the other party of his right to an interpreter and to adjourn proceedings to ensure that the appropriate arrangements are made.
3. The Court also addressed the remedy to be applied by an appellate court where there has been a violation of these language rights. It stated that because language rights are not procedural rights the fact that a violation has had no impact on the fairness of the hearing is, in principle, not relevant to the remedy. Accordingly, it noted that a new hearing will generally be the appropriate remedy for most language rights violations. In the case before it, the conclusion was that a new hearing was required given the evidence in the transcript of witnesses' being uncomfortable with English and preferring to speak in French. In its reasons, the Court contemplated a refusal to order a new hearing where there was evidence of tactics, and also noted that practicalities had to be considered and that a lesser remedy such as an order for costs could be appropriate, but not in the circumstances before it.

Stare Decisis in the Federal Court of Appeal

4. ***Tan*** (*Tan v. Canada (Attorney General)*, 2018 FCA 186) is of interest in relation to the doctrine of *stare decisis* and the standards to be applied in the Federal Court of Appeal in relation to "horizontal *stare decisis*" as opposed to "vertical *stare decisis*".

The Court in *Tan* was constituted as a five-judge panel by the Chief Justice in response to a request that the Court reconsider and overrule an earlier decision relating to the interpretation of the phrase "lawfully present in Canada" as contained in the Canada Human Rights Code.

5. In the course of its reasons, the Court stated that there were two standards that applied: one where a three-judge panel was free not to follow an earlier decision and the other when the Court was constituted as a five-judge panel. In the first instance, it was said that the Court could disregard the earlier decision only if it was "manifestly wrong", which could arise only if the earlier decision was *per incuriam*, or it had been "overtaken" by later decisions of the Supreme Court of Canada, or there were "compelling reasons to do so and correctness prevails over certainty". The Court went on to say that where the panel was constituted as a five-judge panel the "manifestly wrong" criterion did not apply. Rather, the Court postulated a "compelling reasons" test, where the circumstances outweigh any considerations of certainty, but it is not entirely clear what these circumstance may include.
6. In the result, a majority of the Court concluded that its earlier decision ought to be overruled, and that "lawfully present in Canada" included being incarcerated when a deportation order was stayed pending completion of the prison sentence.

"Incompetence of Counsel" as a Ground of Appeal

7. ***Mediatube*** (*Mediatube Corp. v. Bell Canada*, 2018 FCA 127) is a decision of Stratas, J.A., in response to a motion that leave be granted to amend the Notice of Appeal to add the ground of "incompetence of counsel", after the appellant became aware of the fact that the law firm that represented it in the trial had, at an earlier time, also represented the respondent in unrelated matters. Justice Stratas, in the course of his reasons for not granting leave to amend, canvassed the history of "incompetence of counsel" as a ground of appeal and noted its rarity in civil cases. More importantly, Justice Stratas analyzed the basis for such an appeal and provided guidance as to the considerations that could lead to setting aside a trial decision on that ground. Beginning with the "strong presumption" that counsel's conduct fell within the "wide range" of "reasonable professional assistance", he noted that, in the absence of a miscarriage of justice, the question of the competence of counsel is a matter of professional ethics and not a question for the appellate courts. As to what could result in a

miscarriage of justice, apart from the obvious ground of fraud or conduct amounting to fraud, he conceded that a "conflict of interest" could possibly have that effect. However, he observed that, post-judgment, "the appellant must demonstrate the conflict of interest and that the conflict adversely affected the lawyer's performance on behalf of the appellant." Moreover, such proof may require additional evidence to show that the integrity of the trial itself was undermined. In the result, in the particular instance, leave to add the ground of incompetence of counsel was denied and Mediatube was left to its more obvious remedy of a civil suit in the provincial courts.