# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Nguyen v. 1108911 B.C. Ltd.,*
2024 BCCA 48

Date: 20240216
Docket: CA48861

Between:

**Thi Tinh Nguyen**

Appellant
(Defendant)

And

**1108911 B.C. Ltd.**

Respondent
(Plaintiff)

And

**Lit Nail Spa Ltd. and Thanh-Thanh Truong**

Respondents
(Defendants)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated July 22, 2022 (*1108911 B.C. Ltd. v. Lit Nail Spa*, Vancouver Docket S1910347).

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| Counsel for the Appellant: | J.E. Shragge |
| Counsel for the Respondent: | C.N. Mangan |
| Place and Date of Hearing: | Vancouver, British Columbia<br>December 8, 2023 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>February 16, 2024 |

**Written Reasons by:**
The Honourable Mr. Justice Voith

**Concurred in by:**
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Hunter

***Summary:***

*The appellant appeals an order from a summary trial on the exceptional basis that a miscarriage of justice had occurred because she was denied the effective assistance of counsel. She argues there was a conflict of interest between herself and her co-defendants, all of whom were jointly represented by her lawyer. Held: Appeal dismissed. In criminal appeals, there is a two-part enquiry to determine whether a conflict of interest on the part of counsel denied an appellant effective representation: whether there was an actual conflict of interest and whether that conflict adversely affected counsel's performance. In this case, there was a conflict of interest between the appellant and her co-defendants, as they were joint debtors responsible for the same financial obligations under the same agreements. However, in the civil context, there is a third element to the enquiry. Counsel must have actual knowledge of the conflict that exists and nevertheless persist in acting in the face of that conflict. This third requirement is consistent with the general framework within which civil appeals based on the ineffective assistance of counsel can be brought, prior civil cases involving allegations of a conflict of interest giving rise to a miscarriage of justice, and the common law. Civil appeals based on the ineffective assistance of counsel are extraordinary and should be carefully circumscribed. In this case, there was no evidence that counsel knew of the conflict he faced.*

**Reasons for Judgment of the Honourable Mr. Justice Voith:**

[1] The appellant, Ms. Thi Tinh Nguyen, appeals an order from a summary trial in which the respondent, 1108911 B.C. Ltd. ("110"), was granted a monetary award arising from the breach of a commercial lease. Ms. Nguyen brings her appeal on the exceptional basis that the judge's order creates a miscarriage of justice as she was "constructively denied" the assistance of her counsel who was in a conflict of interest.

[2] For the reasons that follow, I would dismiss the appeal.

## 1) Background and the Judge's Reasons

[3] 110 is the owner of a commercial property located in Burnaby, British Columbia.

[4] On or about October 25, 2018, the respondent Thanh-Thanh Truong, as tenant and indemnifier, and 110 as landlord, executed an offer to lease one of the

units at 110's property. Ms. Truong, who is the appellant's daughter, planned to operate a nail salon in the unit through the respondent Lit Nail Spa Ltd. ("Lit Nail").

[5] On November 15, 2018, Ms. Truong, Lit Nail, the appellant, and 110 executed an addendum to the offer to lease which, among other things, confirmed that the appellant would "be added as an additional indemnifier".

[6] At some point, Lit Nail as tenant and 110 as landlord executed a lease dated for reference November 1, 2018, for a 10-year term commencing on March 1, 2019 (the "Lease"). Both Ms. Truong, as the principal of Lit Nail, and the appellant executed an indemnity agreement, attached as Schedule "D" to the Lease, that was also dated for reference November 1, 2018 (the "Indemnity Agreement"). Under the Indemnity Agreement, Ms. Truong and the appellant were deemed to be principal debtors and obligors and were responsible, together with Lit Nail, for the rent and other amounts due under the Lease.

[7] In March 2019, a dispute arose between Lit Nail and 110. The dispute caused Lit Nail to ultimately abandon the proposed salon and cease paying rent by May 2019.

[8] On May 16, 2019, 110 terminated the Lease. It then took steps to re-let the premises. It did so in June 2021 for a new lease commencing on March 1, 2022.

[9] On September 17, 2019, 110 commenced an action for breach of contract against Lit Nail, Ms. Truong and the appellant. On October 16, 2019, the three defendants, through their counsel, Mr. Golden, filed a Response to Civil Claim. Counsel also filed a counterclaim on October 21, 2019 on behalf of Lit Nail alleging a breach of the covenant of quiet enjoyment.

[10] On June 29, 2022, 110 applied for judgment under Rule 9–7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. On July 12, 2022, Mr. Golden filed an Application Response and an Amended Response to Civil Claim that sought relief from forfeiture.

[11] On July 22, 2022, 110's summary trial application was heard. In reasons delivered from the bench, the judge granted judgment against all defendants in the amount of $347,961.56 with interest accruing at the rate of 24% per annum, and costs. The judge dismissed the counterclaim. The appellant emphasizes the following parts of the judge's reasons:

> [29] In my view, there is no merit to the defendants' position that the landlord's April 5 letter indicated a breach of the covenant of quiet enjoyment, let alone a breach entitling the tenant to terminate the lease.
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> …
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> [34] Counsel for the tenant offers no caselaw that would in any way support a finding of a breach of the covenant of quiet enjoyment in these circumstances, let alone a case supporting this being a fundamental breach or repudiation by the landlord entitling the tenant to terminate the lease.
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> …
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> [36] In these circumstances, the tenant's abandonment and refusal to pay rent was a repudiation and a fundamental breach of the lease, which entitled the landlord to terminate and seek its remedies under the lease.
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> [37] This is a very strong landlord lease and therefore exposes the tenant to substantial liabilities in circumstances where the principals of the tenant have given personal indemnities. Counsel for the defendants raised no defence regarding those indemnities.
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> [38] I must somewhat reluctantly say that I am troubled by the position the defendants took when they abandoned the premises and repudiated the lease on April 18, 2019, without any apparent legal basis. I reluctantly must say I am concerned about the legal advice they may have received in that regard. I, of course, know nothing about that, but it does trouble me given the significant ramifications that the defendants faced. If the defendants were not clearly told about the risks they were taking and the weaknesses of any apparent defences, they must now be told to obtain independent legal advice regarding those issues.

[12] On February 6, 2023, the appellant filed a Notice of Appeal. On April 26, 2023 the appellant's application for an extension of time to file her appeal was allowed.

## 2) The Fresh Evidence Issue

### a) The Legal Framework

[13] The appellant seeks to file two affidavits in support of her appeal, one of which deposed by Ms. Nguyen and the other by Ms. Truong. 110, in turn, seeks to file an affidavit which attaches various documents and pleadings.

[14] 110 does not oppose the filing of the appellant's affidavit, so long as its own affidavit evidence is also accepted. 110 opposes the filing of Ms. Truong's affidavit and it does so primarily on the basis that the affidavit was filed "late".

[15] The parties agree that, in light of the issues raised on appeal, the usual criteria governing the admissibility of fresh evidence on appeal, as set out in *R. v. Palmer*, [1980] 1 S.C.R. 759, 1979 CanLII 8, should be modified. That is because the fresh evidence is being tendered to serve a specific and different purpose. It is not being tendered, as is generally the case, to undermine a substantive finding made at trial. Instead, the evidence is being tendered so the Court can properly evaluate whether the integrity of the trial process has been adversely affected in a way that gives rise to a miscarriage of justice. Nevertheless, the evidence being adduced "must be admissible (applying the usual rules of evidence), relevant to the issue raised on appeal, and credible": *Boone v. Jones,* 2023 BCCA 215 at para. 34; *R. v. Aulakh*, 2012 BCCA 340 at paras. 59–67; see also *Beaulieu v. Winnipeg (City of)*, 2021 MBCA 93 at paras. 28–35, 54–63, where the Manitoba Court of Appeal addressed, in some detail, the rules governing the admissibility of fresh evidence in the context of a civil appeal based on the alleged ineffective assistance of counsel.

**b) The Fresh Evidence the Appellant Relies on**

[16] With these criteria in mind, I would admit each of the affidavits I have identified. I accept that Ms. Truong's affidavit was filed somewhat late and after 110 had filed its factum. Nevertheless, its apparent purpose was to respond to the assertion, made in 110's factum, that the absence of evidence from Ms. Truong was noteworthy and ought to militate against the appellant. Further, those portions of Ms. Truong's affidavit that are particularly relevant serve to corroborate the evidence of the appellant and add little that is new.

[17] The appellant deposed that she is a 62-year-old immigrant who, though she has lived in Canada for decades, is only able to carry on "a simple conversation" in English and whose reading comprehension is "very basic". She deposed that her daughter told her that i) in order to rent space for the salon, she required "a partner"

on the Lease; ii) if a problem arose on the Lease, her daughter would remain solely responsible for all obligations; and iii) the home the appellant then owned with her husband would not be placed at risk. She also deposed that when she went to an office to sign various documents, she was not capable of reading those documents, she "was presented with what [she] was told was the Lease", and she was unaware that she "was actually signing a guarantee, in which [she] promised to perform [her daughter's] obligations under the Lease if [her daughter] failed to do so". She deposed that none of the individuals present, other than her daughter, appeared to speak Vietnamese, no one suggested she speak to a lawyer before she signed any documents, and no one explained the contents of the documents she was signing to her.

[18] Finally, the appellant deposed that after she and her daughter were sued by 110, her daughter retained a lawyer, Mr. Golden, who she said would "take care of everything" for both of them and would go to court for both of them. Her affidavit states that Mr. Golden never asked to meet or speak with her "regarding the Lawsuit", she was never asked for an affidavit for the proceedings that gave rise to the orders being appealed from, and she never signed a retainer agreement with him.

[19] In her affidavit, Ms. Truong confirmed that she told her mother she needed a partner to sign the Lease with her and that if there was a problem with the Lease, she alone (and not her mother) would be responsible for the obligations under the agreement. She accepts she told her mother that the home her mother and father owned would not be at risk and she accepts that what she told her mother was not "correct". By this I understand her to say that she had not been forthright.

[20] Ms. Truong further confirms that when her mother signed the Lease and Indemnity Agreement none of the individuals present spoke Vietnamese, no one explained the documents to her mother or suggested she first speak to a lawyer. She confirms her mother was not capable of reading the Lease and Indemnity Agreement. Finally, Ms. Truong confirms that after they were sued by 110, she told

her mother Mr. Golden would “take care of everything for both of them”. She confirms Mr. Golden said he would act for the appellant, Ms. Truong, and Lit Nail. She confirms that after 110 commenced its action, Mr. Golden never met with her mother. Ms. Truong has, however, deposed that Mr. Golden met with Ms. Truong and both her parents on an earlier occasion and prior to the commencement of the action to discuss the Lease and Indemnity Agreement and the appellant’s obligations under those agreements. She says that at that earlier meeting, her father told Mr. Golden the appellant did not understand what she was signing when she executed the Lease and Indemnity Agreement.



### 3) The Positions of the Parties

[21] The appellant accepts that civil appeals based on the ineffective assistance of counsel are rare. She contends, however, that such claims can be advanced where counsel for an appellant acted in a conflict of interest resulting in a miscarriage of justice. The appellant further contends that Mr. Golden was in a conflict of interest when he acted on her behalf as well as on behalf of Lit Nail and Ms. Truong. The appellant also contends Mr. Golden failed to advance defences that were available to her with the result that his conduct created a miscarriage of justice that warrants appellate intervention.

[22] 110 primarily relies on the various principled reasons that civil appeals based on the ineffective assistance of counsel are rarely entertained. 110 also argues that no actual conflict existed between the appellant and her daughter and, to the extent any conflict did exist, that conflict did not adversely affect counsel’s performance. Finally, 110 relies on inadequacies in the record on appeal and, in particular, on the absence of any evidence from Mr. Golden.

### 4) The Legal Framework for Appeals Based on the Ineffective Assistance of Counsel

[23] The right to advance a criminal appeal based on the ineffective assistance of trial counsel is well-established. So too is the legal framework within which such appeals are brought: see e.g., *R. v. G.D.B.,* 2000 SCC 22 at paras. 26–29; *R. v.*

*Joanisse* (1995), [1996] 102 C.C.C. (3d) 35, 1995 CanLII 3507 (Ont. C.A.), leave to appeal to SCC ref'ed, [1996] S.C.C.A. No. 347; *R. v. Ball*, 2019 BCCA 32 at paras. 106–110; *Aulakh* at paras. 53–54; *R. v. Archer* (2005), [2006] 202 C.C.C. (3d) 60 at paras. 118–131, 2005 CanLII 36444 (Ont. C.A.).

[24] Because civil appeals based on the ineffective assistance of counsel are rare, these decisions necessarily borrow heavily from the criminal law jurisprudence. In many instances this is helpful, at least as a starting point, but care must be taken to ensure that the differences in the interests and practices that are involved in criminal and civil appeals, respectively, are properly recognized.

[25] In the criminal law, where the liberty rights of an accused are engaged, the right to the effective assistance of counsel at trial is a principle of fundamental justice. That principle is derived from the common law, from s. 650(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, and from ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11: *G.D.B*. at para. 24; *R. v. Mehl*, 2021 BCCA 264 at para. 132. The effective assistance of counsel is an important aspect of an accused's right to make full answer and defence and right to a fair trial.

[26] Further, the roles of the parties and the manner in which evidence is perfected for criminal appeals involving allegations of ineffective assistance of counsel is governed by various protocols and practice directives. In British Columbia, for example, a Criminal Practice Directive issued on November 12, 2013 and titled *Ineffective Assistance of Trial Counsel* is relevant. That Practice Directive details the steps to be taken by counsel and requires the progress of an appeal to be overseen by a case management judge. The Practice Directive contemplates that the appellant's trial counsel will file an affidavit. While either party may elicit the affidavit, it generally falls to the Crown to do so: *Archer* at para. 164. The practical effect is that the court will have available "the full picture of the relevant events" and the trial counsel will have a full response to the appellant's allegations: *Archer* at

paras. 155–166; *R. v. Widdifield* (1995), [1996] 25 O.R. (3d) 161 at 170–171, 1995 CanLII 3505 (C.A.) [*W(W)*].

[27] Importantly, for present purposes, a criminal appeal based on the ineffective assistance of counsel can take many forms. The nature of trial counsel's purported act or omission governs the inquiry required to determine whether a miscarriage of justice has occurred: *Mehl* at para. 140, relying on *Joanisse* at 62. This framework was explained in *Mehl*:

> 139 As noted in *G.D.B.* at paras. 28 and 34, miscarriages of justice may take many forms in the context of an ineffective assistance of counsel claim, including: (1) where trial counsel's incompetence compromises the reliability of the verdict: *Joanisse* at para. 74; (2) where the impact of trial counsel's incompetence affects the fairness of the process through which the outcome was achieved: *G.D.B.* at para. 28; *Joanisse* at para. 75; and (3) where trial counsel's failure to provide reasonable professional representation undermines the fairness of the trial or the appearance of trial fairness: *Hamzehali* at para. 54; *Archer* at para. 120; and *R. v. Stark*, 2017 ONCA 148 at para. 14.
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> 140 The nature of the incompetence will dictate the kind of inquiry required to determine whether a miscarriage of justice has occurred: *Joanisse* at para. 76. We do not suggest that these analytical routes can always be neatly compartmentalized. There will be overlap in some cases. For example, an act or omission found to give rise to procedural unfairness will very likely also undermine the fairness of the trial or at least the appearance of trial fairness. In addition, it is possible that the same act or omission will work to undermine the reliability of the verdict.
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> 141 Most ineffective assistance of counsel claims take the first route and involve allegations that the unreasonable acts or omissions of trial counsel render the verdict unreliable. An appellant pursuing this route will usually argue that trial counsel failed to: provide reasonable professional representation in the cross-examination of a Crown witness; bring a necessary application; and/or make duly diligent efforts to adduce relevant defence evidence: *Aulakh* at para. 46; *Joanisse* at para. 78. The complaint on appeal may also involve an assertion that trial counsel was generally unprepared for trial. A failure to include the client in a fundamental decision in the conduct of the defence may also undermine the reliability of the verdict: see *G.D.B.* at para. 34; *R. v. D.A.*, 2020 ONCA 738 at paras. 39–40, 44. To succeed on these grounds, the appellant must generally establish a reasonable probability that, but for counsel's ineffective assistance, the result would have been different: *Joanisse* at para. 78, 81; *R. v. Jex*, 2007 ONCA 737 at para. 4; *Lundrigan* at paras. 67–68.
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> 143 The second route to a miscarriage of justice invites examination of whether the acts or omissions of counsel found to fall outside the range of

> reasonable professional assistance resulted in a fundamentally unfair adjudicative process. An unfair adjudicative process alone is generally understood as being sufficient to establish a miscarriage of justice. It is not necessary for a reviewing court to ask whether the verdict would have been the same absent the incompetent provision of professional representation, because the unfair process itself gives rise to a miscarriage of justice: *R. v. D.G.M.*, 2018 MBCA 88 at para. 6. As Doherty J.A. noted in *Joanisse* at para. 75, "[a] reliable verdict may still be the product of a miscarriage of justice if the process through which that verdict was reached was unfair". Procedural unfairness may arise if, for example, counsel is impaired, acts in a conflict of interest, fails to include the appellant in a fundamental decision, or fails to comply with the instructions of the appellant: *R. v. Le (T.D.)*, 2011 MBCA 83 at para. 187, leave to appeal ref'd [2011] S.C.C.A. No. 526; *Aulakh* at para. 47; *Joanisse* at paras. 76–77; *Lundrigan* at para. 67; *R. v. Louie*, 2015 BCCA 23 at paras. 17, 19. As with the first analytical route, the cumulative effect of pervasive incompetence may result in an unfair adjudicative process: *Hamzehali* at paras. 43, 88–89.
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> 144 The third analytical route to a miscarriage of justice—which will often be subsumed under the first two—is where the incompetent performance of counsel undermines trial fairness or the appearance of trial fairness. Section 686 (1)(a)(iii) authorizes appellate intervention on any ground where there was a miscarriage of justice. The provision reaches all errors or events that result in a miscarriage of justice. It includes events that lead to actual unfairness as well as to the appearance of unfairness: *R. v. Khan*, 2001 SCC 86 at para. 69, per LeBel J., concurring in the result. The appearance of justice is assessed "in relation to a reasonable and objective observer, by asking if the irregularity would be such as to taint the administration of justice in his or her eyes": *Khan* at para. 73. The fairness of the trial may, in fact or appearance, be undermined where there has been a pervasive failure by counsel to properly advocate for his or her client: *Hamzehali* at paras. 53–54; *J.B.* at para. 6.
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> 145 The appearance of trial fairness, if not the actual fairness of the trial, may also be undermined where an appellant has been denied the right to make a fundamental decision about the conduct of the defence, such as whether to testify or elect the mode of trial: *R. v. K.K.M.*, 2020 ONCA 736 at para. 91; *D.G.M.* at paras. 32; *Stark* at para. 20. This will occur when counsel makes the decision, or when counsel provides no advice or advice so deficient that the appellant is effectively precluded from making an informed choice about a matter of fundamental importance to the conduct of the defence: *K.K.M.* at para. 91; *Stark* at para. 20; *R. v. Trought*, 2021 ONCA 379 at paras. 69, 74–75.

[28] What is noteworthy about the foregoing analysis, and why I have quoted from *Mehl* at length, are the diverse categories of act or omission on the part of counsel, that can ground an ineffective assistance of counsel claim. Further, though these various forms of act or omission are often governed by distinct principles, there is no hierarchy within these various categories of conduct. Thus, for example, both the

obligation to provide an accused with reasonable advice about whether or not to testify and the obligation that counsel be free of any conflict of interest are assessed on the basis of different principles: see e.g., *R. v. D.A.*, 2020 ONCA 738 at paras. 33–40, *Archer* at para. 139, *W(W)* at 184–185, and *Joanisse* at 62–64. However, the failure of counsel to adhere to one or the other of these obligations is not necessarily, without more, viewed as more or less serious.

[29] Civil appeals based on the ineffective assistance of counsel, and the framework within which they operate, are fundamentally different.

[30] In most civil appeals, statutory and *Charter* rights are not engaged. The liberty interests of the litigants are generally not at stake. Instead, the interests engaged are often primarily financial in nature. Further, the nature of the evidence that is adduced to address the adequacy of trial counsel's representation of an appellant is varied and inconsistent. There are cases where, as here, counsel's evidence is not before the court: *OZ Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2021 ONCA 520 at para. 45 and footnote 4. There are cases where counsel's evidence is filed but not relied on, as in *Mediatube Corp. v. Bell Canada*, 2018 FCA 127 at para. 3, or where it is filed but parts may not be admissible, as in *Beaulieu* at paras. 41–45. There are also cases where counsel seek to intervene in the proceeding so that their evidence is made available: *Abuzeid v. Canada (Citizenship and Immigration)*, 2018 FC 34 at paras. 7–9; *Caledon (Town) v. Darzi Holdings Ltd.*, 2022 ONCA 513 at para. 24; *Withenshaw v. Withenshaw*, 2023 NSCA 59 at paras. 7 and 21.

[31] In this case, neither party filed any evidence from Mr. Golden with the result that there is some concern the Court has only a partial picture of what transpired between the appellant and Mr. Golden.

[32] Importantly, the role of the Crown and an appellant in a criminal appeal are markedly different from the usual roles of the parties to a civil proceeding and civil appeal. The Crown is required to "consider the public interest and the administration of justice, be alert to miscarriages of justice, and act as a minister of justice":

*Mediatube* at para. 40, relying on *Boucher v. The Queen*, [1955] S.C.R. 16, 1954 CanLII 3.

[33] A respondent in a civil appeal has no such obligations. Indeed, the respondent generally has nothing to do with the concerns raised by the appellant. The appellant's focus is on the professional conduct and performance of their counsel. However, the consequences of a successful appeal based on the ineffective assistance of counsel are not visited on counsel, but rather on an innocent respondent who has already gone through a trial to secure a remedy and who, "through absolutely no fault of its own", is being directed to do so again: *Dominion Readers' Service Ltd. v. Brant* (1982), [1983] 41 O.R. (2d) 1 at 8, 1982 CanLII 1771 (C.A.); see also *D.W. v. White*, [2004] 189 O.A.C. 256 at paras. 47 and 52, 2004 CanLII 22543 (Ont. C.A.), leave to appeal to SCC ref'd, [2004] S.C.C.A. No. 486; *Wood v. Van Bibber*, 2013 YKCA 15 at para. 74; *Mediatube* at para. 40; *Withenshaw* at para. 28.

[34] Further, and again importantly, in circumstances where, as in this case, the consequences of counsel's alleged failures result in a monetary judgment against an appellant, that appellant has an alternative and conventional remedy. The appellant has a civil claim against their lawyer: *White* at para. 51; *Mediatube* at para. 62; *OZ Merchandising* at para. 44.

[35] Thus, the nature of the interests engaged, finality, issues of process and evidence, the role of a respondent in a civil appeal, fairness to the respondent in a civil appeal, and the availability of an alternative remedy that can provide an appellant with redress all distinguish civil and criminal appeals and all militate against reliance on the ineffective assistance of counsel in civil appeals.

[36] These considerations have caused courts to comment that civil appeals based on the ineffective assistance of counsel succeed in the "rarest of cases": *White* at para. 55; *Mediatube* at para. 41 and the additional authorities referred to therein. The court in *Mediatube* observed that "in order to meet the 'rarest of cases'

threshold in the civil context, an appellant must demonstrate some exceedingly special interest or truly extraordinary situation”: para. 42.

[37] A common description of what might constitute such extraordinary circumstances is found in *White*. There, the court said:

> [55] … I would not be prepared to close the door to the viability of ineffective assistance of counsel as a ground for a new trial in a civil action. But… I would limit the availability of that ground of appeal to the rarest of cases, such as (and these are by way of example only) cases involving some overriding public interest or cases engaging the interests of vulnerable persons like children or persons under mental disability or cases in which one party to the litigation is somehow complicit in the failure of counsel opposite to attain a reasonable standard of representation. The present action is not such a case.

See also *Kedmi v. Korem*, 2012 NSCA 124 at para. 8; *Van Bibber* at paras. 71–72.

[38] Though the appellant argued in passing that she, too, was vulnerable on account of her lack of proficiency in English, I do not consider that difficulty, which is widespread in society, is the type of limited and exceptional circumstance contemplated by the authorities: see *Mediatube* at para. 43; see also *D.B. v. Director of Child, Family and Community Service,* 2002 BCCA 55 at para. 31 and *Gligorevic v. McMaster*, 2012 ONCA 115 at paras. 57 and 60–61 for examples of where such interests can be engaged.

[39] The appellant also adverted, for example, to the concerns of the trial judge referred to earlier, the poor pleadings that were filed on her behalf, counsel’s failure to raise or plead obvious defences, or to obtain instructions, or to obtain a retainer letter. While these matters are disconcerting, recognizing we do not have the benefit of Mr. Golden’s evidence, they do not constitute deficiencies that are sufficient to advance a civil appeal based on the ineffective assistance of counsel.

[40] Instead, this appeal turns on the primary issue identified at the outset: whether Mr. Golden was in a conflict of interest and, if so, whether that conflict can ground a successful appeal.

### 5) Conflicts of Interest

[41] I have identified that a conflict of interest on the part of counsel for an accused can constitute a form of procedural unfairness that establishes a miscarriage of justice. In *Mediatube* at paras. 55 and 57, the court concluded that a conflict of interest on the part of counsel for an appellant can, in the civil context, similarly form the basis for an appeal based on the ineffective assistance of counsel: see also *Beaulieu* at paras. 6 and 36. *Mediatube* is central to the appellant's submissions because it contains a thorough analysis of why a conflict of interest can, in concept, ground a civil appeal based on the ineffective assistance of counsel. Accordingly, it is important to understand the decision properly.

[42] Mediatube had unsuccessfully sued Bell Canada for patent infringement. It unsuccessfully applied for an order to amend its notice of appeal to add the ground of ineffective assistance of counsel. It argued that its counsel also acted for Microsoft, albeit in matters unrelated to the infringement action. Nevertheless, it contended that Bell Canada's allegedly infringing product used certain Microsoft software. Mediatube argued its counsel "had an interest in soft-peddling Mediatube's case in the infringement action in order to protect Microsoft's commercial interests and to advance its own interests": para. 65. It argued that counsel had "'pulled its punches' and failed to advance a theory of infringement based on Microsoft's software…": para. 66.

[43] The court, relying on *W(W)* at 171–172 and *R. v. Baharloo*, 2017 ONCA 362 at para. 29, recognized that in the criminal context, a conflict of interest can ground an appeal based on the ineffective assistance of counsel: para. 45. The court also referred to *R. v. Neil*, 2002 SCC 70 at para. 38 where the Court had confirmed an appellant can raise counsel's conflict of interest "'as a ground to set aside the trial judgment'": para. 46.

[44] The court, again relying primarily on *W(W)*, *Baharloo*, and *Neil*, adopted the following propositions and legal tests. First, the test to disqualify counsel on the basis of a conflict of interest during a pending trial is different from the test to set

aside a judgment that has been rendered. In the former case, the court's focus is prophylactic and relies on the presence of "a substantial risk" the lawyer's representation of their client will be adversely affected. In the latter instance, the test is more onerous as it involves reversing a judgment: paras. 47–55. The test, sometimes described as a two-part test, then becomes whether counsel had an actual conflict of interest and whether that conflict of interest adversely affected counsel's performance: paras. 52–54; *R. v. Louie*, 2015 BCCA 23 at para. 19; see also *Beaulieu* at paras. 37–38.



**6) Analysis**

[45] The appellant argues that Mr. Golden was in a conflict of interest as a result of his joint representation of the appellant and Ms. Truong. This conflict of interest appears to be based, in significant measure, on the fact that Ms. Truong misled her mother about the legal effect of the Lease and Indemnity Agreement she signed. It was Ms. Truong's dishonesty, it is argued, that "laid the foundation for the defences of *non est factum* and unilateral mistake", neither of which was pleaded. Further, that dishonesty gave rise to a potential third-party claim in deceit in which the appellant could have sought to hold Ms. Truong responsible for any liability imposed on her under the Indemnity Agreement. These factors, it is contended, raised "a hopeless conflict" between Ms. Truong and the appellant.

[46] The appellant accepts there is no evidence Mr. Golden "had actual knowledge" of Ms. Truong's misrepresentations, or that the "penny had dropped" for Mr. Golden, causing him to appreciate that acting for Ms. Truong and the appellant created a conflict of interest. She argues, however, that this is of no moment, "as he ought to have known that the circumstances in which the Indemnity Agreement was signed were troubling and cried out for further enquiry". Specifically, it is submitted that "[a]ny reasonably competent solicitor presented with the Indemnity Agreement and a client without fluency in the English language would have been put on immediate notice that the circumstances in which the agreement was executed would be highly relevant to the client's defence".

[47] Several points arise from these submissions. First, emphasizing facts that should have "alerted" Mr. Golden to the existence of potential defences that might have been raised on behalf of the appellant misses the point and does not, without more, advance the appellant's position.

[48] In *W(W)*, Doherty J.A. explained that "a failure to give adequate consideration to possible defence strategies can lead to a finding that counsel provided ineffective assistance if that failure can properly be characterized as incompetence…": 177.

[49] However, we have established that incompetence on the part of counsel in the civil context is not enough to ground an appeal based on the ineffective assistance of counsel. More is needed. In order to establish a conflict of interest, it is necessary to "link the alleged failure to give adequate individual consideration to each appellant's defence to an existing conflict between the interests of the appellants": *W(W)* at 177. The inquiry therefore begins with whether an actual conflict of interest exists.

[50] The second point made by the appellant, that there was no need for Mr. Golden to actually be aware of a conflict between Ms. Truong and the appellant in order to establish the ineffective assistance of counsel, is accurate in the criminal context.

[51] In *W(W)*, for example, trial counsel had jointly represented the appellants. On appeal, appeal counsel raised the issue of a conflict with trial counsel who then, on reflection, acknowledged that his joint representation of the appellants gave rise to conflicts he had not earlier considered. The court in *W(W)* did not, however, accept that the various issues raised created any actual conflict of interest. The salient point, for present purposes, is that counsel's earlier failure to identify a potential conflict was immaterial to the court's analysis. Rather the court focused on whether an actual conflict of interest existed: see also *R. v. Silvini* (1991), [1992] 5 O.R. (3d) 545 at 551–552, 1991 CanLII 2703 (Ont. C.A.), *R. v. Kim*, 2007 BCCA 25 at para. 21, and in the context of concurrent retainers, see *Baharloo* at paras. 49–50.

[52] In *W(W)*, the court explained that an actual conflict of interest exists "[i]n the context of joint representation of co-accused… where a course of conduct dictated by the best interests of one accused would, if followed, be inconsistent with the best interests of the co-accused": *W(W)* at 176. This test has been consistently applied in the criminal context: *R. v. Barbeau* (1996), [1997] 110 C.C.C. (3d) 69 at 80–81, 1996 CanLII 6391 (Que. C.A.); *R. v. Phalen*, 1997 NSCA 127 at paras. 22-23; *Kim* at paras. 23, 25–26 and 28–29; *R. v. Sherif*, 2012 ABCA at paras. 17–18; *R. v. Walsh*, 2014 BCCA 326 at paras. 45–46. It has also been applied in civil appeals based on the ground of ineffective assistance of counsel: *Beaulieu* at para. 39.

[53] In this case, I am of the view there was a conflict between the interests of the appellant and Ms. Truong. This conflict arose not only because Ms. Truong was not straightforward with her mother, but more obviously because the two parties were joint debtors responsible for the same financial obligations under the same agreements. Any defence raised on behalf of either the appellant or Ms. Truong or Lit Nail necessarily had the prospect of shifting either all or more of the financial obligations under the Lease and Indemnity Agreement from one of them to the others. Advancing the defences of *non est factum*, or of mistake, or of any other defence on behalf of the appellant necessarily had the prospect of adversely affecting the financial interests of Ms. Truong and Lit Nail: *Canadian Imperial Bank of Commerce v. Finlan* (1999), [1999] O.J. No. 54 at paras. 2, 4–5, 78 O.T.C. 241 (Gen. Div.), aff'd [2000] O.J. No. 1510, 2000 CanLII 27007 (C.A.); Eugene A.G. Cipparone & Ted Tjaden, *Conflicts of Interest: Principles for the Legal Profession* (Aurora, ON: Thomson Reuters) (loose-leaf updated 2023, release 2023-5), at § 4:57, 4:64.

[54] The second part of the enquiry referred to earlier asks whether the conflict adversely affected counsel's performance: *W(W)* at 176–177; *Mediatube* at paras. 54 and 67; *Beaulieu* at paras. 37–38. This is a distinct enquiry: *W(W)* at 177. Nevertheless, once a "conflict is demonstrated, the conclusion that at least one of the co-accused [or in this case, at least one of the defendants] did not receive

effective representation will follow in most cases": *W(W)* at 178; *Baharloo* at para. 53.

[55] In a criminal appeal these two enquiries will determine whether a conflict of interest on the part of counsel denied an appellant effective representation.

[56] However, I am of the view that in a civil appeal, a third enquiry or condition is required. In particular, counsel must have actual knowledge of the conflict that exists and nevertheless persist in acting in the face of that conflict. I say this for several reasons.

[57] First, this conclusion is consistent with the general framework within which civil appeals based on the ineffective assistance of counsel can be brought. As noted earlier, an appellant "must demonstrate some exceedingly special interest or truly extraordinary situation": *Mediatube* at para. 42. One of the examples provided in *White* of such an extraordinary situation would be a circumstance where "one party to the litigation is somehow complicit in the failure of counsel opposite to attain a reasonable standard of representation": para. 55.

[58] A failure on the part of counsel to recognize a conflict of interest would not be "truly extraordinary", it would not arise in only the "rarest of cases", and it would not engage the kind of concern or impropriety described in *White*.

[59] In saying this I do not wish to suggest it is not a serious matter for counsel to act in a conflict of interest. Lawyers owe their clients a duty of undivided loyalty. That duty is essential to effective legal representation in an adversarial system: *Louie* at para. 16; *W(W)* at 171–172; *Neil* at para. 12. Clients whose lawyers have inadvertently acted in a conflict of interest may have a civil remedy available to them: see e.g., *Neil* at para. 37, *GMP Securities Ltd. v. Stikeman Elliot LLP* (2004), [2005] 71 O.R. (3d) 461 at paras. 22, 24-25, 2004 CanLII 6213 (Sup. Ct.), *Mediatube* at para. 62, and *OZ Merchandising* at para. 44. Lawyers who inadvertently act in a conflict of interest may also face disciplinary action by their governing regulatory body: *Neil* at para. 37.

[60] Second, a requirement that counsel know of an existing conflict is consistent with the court's analysis in *Mediatube*. In *Mediatube*, the court emphasized there was no evidence that counsel was aware his firm also acted on behalf of Microsoft and reasoned that "[a]bsent that knowledge, there [was] no basis to suggest that counsel had any incentive to soft-peddle Mediatube's case or do anything other than put Mediatube's interests first": para. 70.

[61] More fundamentally, the court in *Mediatube*, when describing what might constitute an extraordinary circumstance, said:

> 44 An extraordinary situation may be present where there is fraud or conduct tantamount to fraud, such as where the opposing party undermines the effectiveness of opposing counsel by supplying an inducement, such as a bribe, to disregard his or her duty or is otherwise complicit with opposing counsel: *D.W.* at para. 55; *Saskatchewan Valley Land Co. v. Willoughby* (1913), 24 W.L.R. 40, 6 Sask. L.R. 62 (S.C.). While one might assert this as "ineffective assistance of counsel," it is perhaps better seen as the sort of fraud that can vitiate a judgment: *Imperial Oil Ltd. v. Lubrizol Corp.* (2000), 6 C.P.R. (4th) 417 (F.C.); *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2011 FCA 215, 420 N.R. 337 at paras. 20-21; *Federal Courts Rules*, SOR/98-106, Rule 399(2)(*b*).

[62] In explaining why a conflict of interest that is first identified on appeal, rather than before a trial court renders judgment, requires a higher standard, the court said:

> 55 This test is quite congruent with cases such as *D.W., Saskatchewan Valley Land Co., Imperial Oil*, and *Pfizer Canada*, above, which all suggest that conduct tantamount to a fraud on the court process wholly subverts the integrity of that process and the judgment resulting from that process. Such conduct places the court in the position where it cannot countenance or condone that conduct by leaving the judgment on the books. Equally, counsel who have reduced their performance due to an actual conflict of interest thereby betraying their clients have wholly subverted the integrity of the court process. In such circumstances, the judgment is tainted fatally and must be set aside.
>
> [Emphasis added.]

[63] Both these passages emphasize concerns that are misplaced in a civil appeal where trial counsel, who jointly represents two or more defendants, is unaware such representation creates a conflict of interest.

[64] Finally, the further requirement that counsel know that a conflict exists, before a claim based on the ineffective assistance of counsel in a civil appeal can be established, is generally consistent with the common law.

[65] Lawyers are fiduciaries and owe their clients a duty of loyalty. One element of that duty is the need to avoid conflicts of interest: *Strother v. 3464920 Canada Inc.,* 2007 SCC 24 at paras. 34–35. Such conflicts can arise in different ways. A lawyer may take a personal financial interest in one client that is at odds with another competing client: *Strother* at paras. 44, 46. Or they may use confidential information gleaned from a client to advance their own interests or the interests of another client: see e.g., *Szarfer v. Chodos* (1986), 27 D.L.R. (4th) 388, 1986 CanLII 2508 (Ont. H.C.J.), aff'd 54 D.L.R. (4th) 383, 1988 CanLII 4778 (Ont. C.A.) and *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 at paras. 23–26. Or they may act for one client against another client they represent on unrelated matters: see e.g., *McKercher* at paras. 50–53.

[66] These various types of conflicts engage different concerns. In *McKercher*, the Court explained that the law of conflicts "is mainly concerned with two types of prejudice: prejudice as a result of the lawyer's misuse of confidential information obtained from a client; and prejudice arising where the lawyer 'soft peddles' his representation of a client in order to serve his own interests, those of another client, or those of a third person": para. 23.

[67] In this case, there is no issue concerning the misuse of confidential information. Nor, in circumstances where a lawyer is unaware of a conflict in a joint representation, can there be any question that the lawyer was "tempted to prefer other interests over those of his client: the lawyer's own interests, those of a current client, of a former client, or of a third party: *McKercher* at para. 26, relying on *Neil* at para. 31.

[68] These distinctions will frequently, but not always, help distinguish between claims advanced as a breach of fiduciary duty and claims advanced in negligence.

This is pertinent because negligence on the part of counsel will not, as we have established, support a civil appeal based on the ineffective assistance of counsel.

[69] Thus, a solicitor-client relationship is overlaid with certain fiduciary responsibilities, but not every legal claim arising out of a fiduciary relationship will necessarily ground a claim for breach of fiduciary duty: *Strother* at para. 34; *Perez v. Galambos*, 2009 SCC 48 at para. 36; *Meng Estate v. Liem*, 2019 BCCA 127 at para. 33.

[70] In *Meng Estate*, this Court explained:

> [35] … Typically, a breach of fiduciary duty captures circumstances in which there is a breach of the duty of loyalty owed by the fiduciary and includes circumstances involving acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith, or a variety of similar or related circumstances.

[71] A lawyer who has knowledge of facts that may impact their client's wishes and withholds that information is viewed differently than a lawyer who errs inadvertently. Thus, in *PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412, the court observed that "[l]awyers breach [their fiduciary] duty when they have material information, which they know, or ought to know, might affect their client's decisions and fail to disclose that information to the client": para. 51. Conversely, the court was of the view that a "lapse" in the nature of "an oversight" would ground "a claim in negligence, not breach of fiduciary duty": para. 54.

[72] Similarly, cases where lawyers have actual or constructive knowledge of a conflict of interest may support a claim for breach of fiduciary duty: *St. Mars v. Bell* (1990), [1991] 70 D.L.R. (4th) 224, 1990 CanLII 273 (B.C.S.C.); *Dimitry Investments Ltd. v. Stein*, [1991] O.J. No. 2182 at para. 24, 30 A.C.W.S. (3d) 722 (Gen. Div.), varied [1992] O.J. No. 1864, 35 A.C.W.S. (3d) 737 (C.A.). But a failure to identify a conflict of interest will likely not do so.

[73] I would draw one further distinction. In some contexts, actual and constructive knowledge are treated similarly. In my view, a civil appeal that relies on the ineffective assistance of counsel, and that is based on a purported conflict of interest

without any suggestion of knowledge or complicity by the other party, should only succeed if the court is satisfied that trial counsel was actually aware of the conflict and nevertheless chose to act "in the face" of that conflict. I say this for two reasons. First, for the reasons I have described, civil appeals based on the ineffective assistance of counsel should be carefully circumscribed. They should be extraordinary and will often be grounded in some form of fraud or impropriety. Second, whether counsel "should have known" of a conflict of interest will frequently require factual determinations that may be inappropriate when there is no requirement that trial counsel's evidence be before the court.

[74] The appellant accepts there is no evidence Mr. Golden actually knew of the conflict he faced. In my view, that is dispositive of this appeal.

**Disposition**

[75] In my view, the appeal should be dismissed.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Hunter"