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Fresh Evidence Motions and New Issues on Appeal

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FRESH EVIDENCE MOTIONS AND NEW ISSUES ON APPEAL

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I. Introduction

The subject of this paper is the jurisdiction of an appellate court hearing a civil case to consider new matters not raised by the litigants at the original hearing.[1]

An appellate court generally will be reluctant to entertain new matters on appeal. Ordinarily an appeal will proceed based on the record in the court below.

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1 My thanks to Emma Irving and Steve Chasey (articled student) of Dentons Canada LLP for their assistance in the preparation of this paper.

> [T]he interests of justice are not properly served when litigants go to trial on certain issues and those issues are resolved in a way that one litigant considers unsatisfactory, and he or she then seeks to put before [the Court of Appeal] a wholly new theory and to raise evidence in support of a theory that is completely different from that which engaged the learned trial judge.[2]

Nevertheless, in recognition that the interests of justice will not always favour exclusion, an appellate court does possess discretion to entertain fresh points on appeal. Those fresh points may take the form of new arguments or additional evidence not presented initially. Distinct tests have emerged to guide the exercise of the discretion to consider new matters on appeal, varying with the nature of the fresh material. But the common thread is the court's assessment of what the interests of justice require.

This paper will discuss the approach taken by the Court of Appeal for British Columbia in the following three situations:

a) hearing new issues on appeal;

b) admitting fresh evidence; and

c) re-hearings in the Court of Appeal.

The paper will conclude with a discussion of some of the strategic considerations that counsel will wish to have in mind when dealing with attempts to introduce new matters before the Court of Appeal.

II. New Arguments on Appeal

The Court of Appeal's discretion to allow a litigant to raise new issues on appeal will be guided by a balancing of the interests of justice as they affect all parties.[3]

The court will exercise its discretion sparingly[4] and generally only in situations where:

- all of the relevant evidence to the submission can be found in the record; and
- the respondent will not suffer prejudice by the failure of the appellant to raise the new argument at trial.[5]

A. Reluctance of the Court of Appeal to Allow New Arguments

The general statement of the factors to be considered by an appellate court in determining whether it should permit a new issue to be raised on appeal, and the exacting standard to be applied, traces to the following passage from the Supreme Court of Canada in *Joint Stock Steamship Co. v. "Euphemia" (The)*:

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2 *Osborne v. Pavlick*, 2000 BCCA 11 at para. 10, *per* Southin J.A.

3 *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, 2010 BCCA 519 at para. 27 [*Ulmer*].

4 Holly Brinton, *Civil Appeal Handbook*, (Vancouver: The Continuing Legal Education Society of British Columbia, 2014) at §6.22.

5 *Suen v. Suen*, 2013 BCCA 313 at para. 67, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 51-52.

> The principle upon which a Court of Appeal ought to act when a view of the facts of a case is presented before it which has not been suggested before, is stated by Lord Herschell in *The "Tasmania"* [15 App. Cas. 223], at p. 225, thus:
>
> > My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal ought to be most jealously scrutinized. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
> >
> > It appears to me that under these circumstances a court of appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.[6]

Pinto v. Revelstoke Mountain Resort provides a succinct, recent example of the application of the test. In *Pinto*, a developer appealed from a decision via summary trial in which the developer was found to have breached a section of the *Real Estate Development Marketing Act* (B.C.). The trial court held that the developer's failure to deliver to the purchasers copies of four amendments to its initial disclosure statement rendered two contracts of purchase and sale unenforceable. On appeal, the developer argued that such amendments were not required to be delivered under the Act, an issue that was not raised in the summary trial. The Court of Appeal did not allow the new issue to be heard, despite the factual record being complete, finding that the "interests of justice do not require that [the developer] be permitted to raise this issue for the first time on appeal."[7]

B. All Relevant Evidence for the New Argument Must be in the Record

The Court of Appeal has been clear that the onus is on the party seeking to raise a new issue to persuade the court that all of the facts required to address the issue are before the court, as fully as if the issue had been argued at trial.[8] It follows, therefore, that new issues are more likely to be heard where they are issues of pure law that can be addressed solely on the record before the court.[9]

Unless the parties have addressed a factual issue fully at trial in the evidence, and preferably in argument for the benefit of the trial judge, courts will be concerned that the appellate record will not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an

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6 *Joint Stock Steamship Co. v. "Euphemia" (The)* (1908), 41 S.C.R. 154 at pp. 163-64, cited as authority in *O'Bryan v. O'Bryan* (1997), 43 B.C.L.R. (3d) 296 (C.A.) [*O'Bryan*]; and *Baker v. British Columbia Insurance Co.* (1993), 76 B.C.L.R. (2d) 367 (C.A.) [*Baker*]. Also see *Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2011 BCCA 210 at para. 26 [*Pinto*]; and *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at para. 21.

7 *Pinto* at paras. 1, 16, 31.

8 *On Call Internet Services Ltd. v. Telus Communications Company*, 2013 BCCA 366 at para. 66 [*On Call*]; *Ulmer* at para. 27; and *R. v. Winfield*, 2009 YKCA 9 at para. 18.

9 *On Call* at para. 66; *Pinto* at para. 27; and *Emmett v. Arbutus Bay Estates Ltd*. (1994), 95 B.C.L.R. (2d) 346 at para. 9 (C.A.).

explanation that might have been offered in testimony by a party or one or more of its witnesses never was elicited.[10]

However, in a case where the equities favoured the appellant being able to raise a new issue on appeal, but the factual record did not allow the Court of Appeal to make the order sought, the Court exercised its discretion to return the matter to the trial court to hear further evidence and to make a determination based on the amended pleadings.[11]

C. Opposite Party Should Not Suffer Prejudice by Reason of Failure to Raise the New Argument at Trial

The regard for evidentiary issues reflects that the caution around permitting one party to raise a new issue on appeal is "primarily to prevent prejudice to the party against whom the issue is raised."[12]

O'Bryan illustrates the approach taken to the matter of prejudice. The Court of Appeal found that there was no prejudice and hence allowed a new issue to be raised. *O'Bryan* was a family case. For the purposes of dividing assets, the trial court found that the husband's shares in a company were family assets on the basis that two companies operated by the husband functioned as one entity. The husband appealed. Despite the fact that the issue was not raised at trial, the husband argued that the companies did not function as one but were in fact separate. In finding no prejudice to the wife in entertaining the issue on appeal, the Court of Appeal noted that the evidentiary record was sufficient to examine the question and that:

> [T]he pleadings had raised the question of whether the husband's shares in each company were family assets, such that counsel may be taken to have been aware of the issue. This is a significant factor leading to my determination that it is appropriate to deal with this issue on the record as it stands.[13]

The prejudice experienced by the respondent due to the lack of opportunity to respond to the issue at the trial level was detailed by the Court of Appeal in *Orange Julius*:

> [70] In my respectful view, the Court should decline to hear or adjudicate upon this issue. The appellants did not plead an implied contract of indemnity in the third party notices issued against Laing or its employees, and no evidence of such an implied contract was adduced before the learned summary trial judge. Further, no submissions respecting this issue were made to the learned summary trial judge. Consequently, the respondents on this appeal are not able to make a full answer and defence to the allegation. The Court is asked to decide the issue on the hypothesis that the appellants' allegations of fact are well founded and cannot be contradicted.
>
> [71] To allow the appellants to advance this argument now would undermine the efficacy of the summary trial procedure. In *Baker v. B.C. Insurance Co*. (1993), 76 B.C.L.R. (2d) 367 (C.A.) Madam Justice Rowles said at 373:

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10 Brinton at §6.22, citing *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd*., 2002 SCC 19 at para. 32, Binnie J.; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras. 40–41; and *Sulz v. Minister of Public Safety and Solicitor General*, 2006 BCCA 582 at para. 48.

11 *Banville v. White*, 2002 BCCA 239 at para. 63.

12 *On Call* at para. 66; *Pinto* at para. 27; and *O'Bryan.*

13 *O'Bryan* at para. 26.

> [22] The trial proceeded under Rule 18A. The issues were defined by the pleadings. Had the point the defendant now wishes to argue been pleaded, it is impossible to say what additional evidence would have been put before the court, or what conclusions the trial judge would have reached on that evidence or where the trial judge would have placed this case within the law. See *Gaines v. Patio Pools Ltd.* (1984), 51 B.C.L.R. 121 (C.A.), at 124. To allow the defendant's argument to be made for the first time in this Court would, in my view, invite an injustice and, as well, undermine the efficacy of Rule 18A.[14]

The presumption against hearing new issues on appeal will be even stronger where the issue did not come before the trial court due to a deliberate choice by the party seeking to resurrect the issue on appeal.[15] For example, where a party made a concession in the court below to permit adjudication by summary trial, the potential for prejudice to the other party likely will preclude the first party from raising issues not pled or argued at the summary trial.[16] Similarly, a litigant who deliberately adopts a position in the trial court rarely is permitted to resile from that position in the Court of Appeal.[17] In a further example, in *Gray v. Cotic,* the appellant was prohibited from advancing an argument before the Ontario Court of Appeal and the Supreme Court of Canada on an issue that the Supreme Court found had been put aside by agreement of the parties before trial.[18]

D. Alternative Arguments by the Respondent

Consistent with the fact that appeals are from orders, not reasons, a respondent need not have a cross appeal in order to advance an argument supporting the order under appeal which was made in the court below but not accepted by the first instance judge.

The Supreme Court of Canada, in *R. v. Perka*, established that the respondent in an appeal will not be considered to be raising new issues if the respondent re-introduces arguments that were made at the trial level but which were not accepted or considered.

> In both civil and criminal matters it is open to a respondent to advance any argument to sustain the judgment below, and he is not limited to appellant's points of law. A party cannot, however, raise an entirely new argument which has not been raised below and in relation to which it might have been necessary to adduce evidence at trial: see *Brown v. Dean et al.,* [1910] A.C. 373; *Dormuth et al. v. Untereiner et al.* (1963), 43 D.L.R. (2d) 135, [1964] S.C.R. 122, 46 W.W.R. 20; *SS. "Tordenskjold" v. Horn Joint Stock Co. of Shipowners* (1908), 41 S.C.R. 154; *Dairy Foods, Inc. v. Co-operative Agricole de Granby* (1975), 64 D.L.R. (3d) 577, 23 C.P.R. (2d) 1, [1976] 2 S.C.R. 651. That is not the case here. The necessity defence

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14 *Orange Julius et al v. Surrey et al*, 2000 BCCA 467 at paras. 70-71 [*Orange Julius*].

15 John Sopinka & Mark Gelowitz. *The Conduct of an Appeal*, 3rd ed. (Markham, O.N.: LexisNexis Canada, 2012) at 95.

16 Brinton at §6.22, citing *Baker*; *Orange Julius* at paras. 71 and 72; and *Pinto* at para. 28.

17 Brinton at §6.22, citing *VIH Aviation Group Ltd. v. CHC Helicopter LLC*, 2012 BCCA 125; *More v. Bauer Nike Hockey Inc*., 2011 BCCA 419; *Sahlin v. Nature Trust of British Columbia, Inc*., 2011 BCCA 157 at para. 38; *Protection Mutual Insurance Co. v. Beaumont* (1991), 58 B.C.L.R. (2d) 290 at 296 (C.A.), citing *Teller v. Sunshine Coast (Regional District)* (1990), 43 B.C.L.R. (2d) 376 at 380–81 (C.A.); *Armstrong v. North West Life Insurance Co. of Canada* (1990), 48 B.C.L.R. (2d) 131 (C.A.); and *Chung Estate v. Chan* (1995), 13 B.C.L.R. (3d) 157 (C.A.).

18 *Gray v. Cotic,* [1983] 2 S.C.R. 2.

> was raised and fully argued in both courts below. Therefore, if we regard the Crown's submission as an argument to sustain the judgment below, this Court undoubtedly has jurisdiction to hear and decide the issue.[19]

III. Fresh Evidence Motion

Under Rule 31,[20] a party may adduce evidence that was not before the court of first instance with leave of the court or a justice. The notice of motion is to be made returnable on the date set for the hearing of the appeal unless a justice orders otherwise.[21]

A. Requirements for Fresh Evidence to be Admitted

The traditional factors governing the admission of fresh evidence on appeal are well known.[22] The following conditions, articulated by the Supreme Court of Canada in *R. v. Palmer*,[23] should be satisfied before an appellate court will exercise its discretion to admit fresh evidence:

- The evidence was not discoverable by reasonable diligence before the end of the trial;
- The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
- The evidence must be credible in the sense that it is reasonably capable of belief; and
- The evidence must be conclusive in the sense that it could reasonably be expected to have affected the result.[24]

The Court of Appeal has noted that new evidence will rarely be admitted, but a court should admit such evidence when failure to do so would result in a long-term injustice.[25]

In *Golder*, the Court of Appeal clarified that the four requirements of the *Palmer* test, even when applied outside of the criminal context, have at their root the interests of justice:

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19 *R. v. Perka*, [1984] 2 S.C.R. 232, Dickson J. (as he then was).

20 British Columbia, *Court of Appeal Rules*, r. 31.

21 Brinton at §6.9. If the application is set down before a justice in advance of the appeal, it must be served at least five business days before the hearing of the application; a party wishing to file an affidavit in opposition to the motion must do so at least two business days before the application is to be heard by the justice. If the application is returnable at the hearing of the appeal, it must be served at least 30 days before the hearing date; in that circumstance a party wishing to file an affidavit in opposition to the motion must do so at least seven days before the application is to be heard by the court.

22 Sopinka at 99.

23 *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 [*Palmer*].

24 Brinton at §6.9, citing *Coulter v. Ball*, 2005 BCCA 199 at para. 82, leave to appeal refused [2005] S.C.C.A. No. 289; *Topgro Greenhouses Ltd. v. Houweling*, 2004 BCCA 39 at para. 26; *Cresbury Screen Entertainment Ltd. v. Canadian Imperial Bank of Commerce*, 2006 BCCA 270 at para. 35; *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 at para. 28 (C.A.), leave to appeal refused [1993] S.C.C.A. No. 137; and *Gemex Developments Corp. v. Assessor of Area No. 12—Coquitlam,* [1998] B.C.J. No. 2169 at para. 3 (C.A.).

25 *Albu v. University of British Columbia*, 2015 BCCA 41 at para. 30 [*Albu*], citing *Jens v. Jens*, 2008 BCCA 392 at paras. 31-34.

> In my view, the *Palmer* criteria reflect the caution with which the admission of fresh evidence must be considered, but they are not absolute. The source of the criminal law admissibility of such evidence is the present s. 683(1)(d) of the *Criminal Code*, R.S.C. 1985, c. C-46, which provides for the admission of evidence "in the interests of justice". That, I think, must be the overarching consideration in civil as well as criminal appeals.[26]

In *Golder*, a question arose about evidence given as to the date of a garnishing order and counsel for Golder informed the chambers judge that the evidence contained a mere typographical error. The judge did not press the point further. The Court of Appeal dealt with the appeal on another basis, but noted the following regarding the fresh evidence:

> The decision of counsel not to apprise the judge fully of the circumstances, led to Golder's request to introduce fresh evidence in this Court. This easily could have, and should have, been avoided, but if I were not satisfied that this appeal can be dealt with without the fresh evidence, I would consider seriously whether to admit it in the interests of justice notwithstanding the evidence clearly was available to Golder at the time of the hearing.[27]

The stance taken in *Golder* may represent a shift in the approach to fresh evidence motions in civil cases. Generally speaking, the explicit consideration of the interests of justice has been confined to the criminal context. An example is the articulation of the test by the Supreme Court of Canada in *R. v. Sipos,* which seemed to limit to the criminal context the ability to relax the due diligence requirement in the interests of justice:

> That test, as is well known, sets out four criteria concerned with due diligence, relevance, credibility and impact on the result: *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), at p. 775. Generally, fresh evidence should not be received if it could have been obtained at trial by exercising due diligence, although this criterion is not strictly applied in criminal matters when it would be contrary to the interests of justice to do so. The evidence must be relevant in the sense that it relates to a potentially decisive issue and reasonably worthy of belief. Finally, the evidence, if accepted, must reasonably be expected to have affected the result when considered along with the trial evidence.[28]

The approach in *Golder* also has been recognized by the Ontario Court of Appeal in *Vernon v. General Motors of Canada*,[29] although in *Vernon* the interests of justice were seen as falling into the court's residual discretion, not as the guiding principle behind the *Palmer* test.[30] Furthermore, the two subsequent cases to cite *Vernon* either did not rely on the principle or rejected the fresh evidence motion,[31] leaving no Ontario cases where the *Palmer* test has not been met but the court has exercised its discretion in the interests of justice regardless.

The contrasting perspective to *Golder* was expressed recently by the Alberta Court of Appeal in *Nelson v. Stelter.*[32] In *Nelson*, Justice Paperny, in dissent, cited *Golder* as authority for the overarching

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26 *Golder Associates Ltd. v. North Coast Wind Energy Corp.,* 2010 BCCA 263 at para. 37.

27 *Ibid* at para. 39.

28 *R. v. Sipos*, 2014 SCC 47 at para. 29.

29 *Vernon v. General Motors of Canada Ltd*. (2002), 163 O.A.C. 182 (C.A.) [*Vernon*].

30 *Ibid* at para. 2.

31 *Kerr v. CIBC World Markets Inc*., 2013 ONSC 7685; and *David J. Harvey Holdings Inc. v. Hercules Food Equipment Ltd*., 2006 CarswellOnt 5603 (Sup. Ct. J.).

32 *Nelson v. Stelter*, 2011 ABCA 203.

importance of the interests of justice in fresh evidence motions, and would have allowed evidence to be adduced on that basis even though it did not meet the due diligence requirement of the *Palmer* test.[33] The majority decision of Justice McDonald, however, rejected that approach, noting that the "evidence in question utterly fails on the first criteria of the test … This, in my view, is a fatal flaw."[34]

In contrast Justice Paperny, in dissent, was prepared to relax the test in the interests of justice:

> In my view the unique circumstances of this case, including its litigation history, its significance not only to private but to public interests, and the type of document sought to be admitted, one that is not subject to controversy in credibility or legal effect, demand that the document be considered on appeal notwithstanding that it could have been, and should have been, presented at trial. … Moreover, the matter at stake here is not merely between these parties. It affects the title to both the Stelter Lands and the Nelson Lands now and in the future, and will affect any future owners of those lands and their users, namely the public. There is a public interest in having the title of these lands settled.[35]

B.C. cases subsequent to *Golder* where fresh evidence motions have been rejected have first considered whether the *Palmer* test was met, and then considered whether it was in the interests of justice for the evidence to be admitted nonetheless.

The result is that in British Columbia the Court of Appeal retains a discretion to admit fresh evidence even where the due diligence prong of the *Palmer* standard is not satisfied. While said to be confined to "unusual cases", the Court of Appeal may admit fresh evidence, where the interests of justice require, even if the evidence ought to have been adduced in the court below.[36]

B. Factors that Can Improve or Hinder the Chance of Success of a Fresh Evidence Motion

The following topics are intended to give some guidance on the circumstances in which fresh evidence motions may have a greater or lesser chance of success in order to assist counsel's assessment when faced with the issue.

1. The Test for Admission of Fresh Evidence is Applied More Stringently in the Civil Context

Golder does not displace the reality that the requirement of due diligence generally will be applied more strictly in the civil context.[37] Additionally, some courts have held that in the civil context, the evidence must be "practically conclusive" as to the result at trial.[38]

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33 *Ibid* at para. 52.

34 *Ibid* at paras. 71-72.

35 *Ibid* at para. 52.

36 *Petrelli v. Lindell Bosch Holiday Resort Ltd.*, 2011 BCCA 367 at para. 50 [*Petrelli*]

37 *Golder* at para 35; *On Call* at para. 48; and *Albu* at para. 29.

38 Sopinka at 106, citing *Dormuth v. Untereiner*, [1964] S.C.R. 122 at 132-33; and Henry s. Brown. *Supreme Court of Canada Practice* (Toronto, O.N.: Carswell, 2015) at 146, citing *Harper v. Harper* (1979), [1980] 1 S.C.R. 2 and noting that as per Justice Major in *The City of Vancouver v. Ribeiro* (May 14, 2003), Doc. 29622 (S.C.C.), "this test has not been rigidly applied."

The distinction between the application of the test in civil and criminal contexts is based on a principled argument first articulated in *R. v. Buckle*:

While it is manifest from the decisions in civil cases, a successful litigant should not be divested of his judgment by the discovery of new evidence unless that evidence is of a cogent and compelling character, in my view it is equally true, and of more vital importance in the administration of public justice, that a convicted man should not be denied the right to a new trial when he discovers, after his trial, fresh evidence, which, if believed, and while not conclusive, might still raise a reasonable doubt as to his guilt. The Crown is not in the position of a successful litigant with a vested right in a conviction.[39]

The distinction was critical in *Spoor v. Nicholls*, in which the Court of Appeal highlighted the danger that admitting fresh evidence in a civil context may allow a party to split its case and thus distort the trial process to the detriment of the opposing party.[40]

In *Spoor*, the respondents made a deliberate choice not to adduce the evidence of an expert for tactical reasons. However, in considering damages, the trial judge sought further evidence and the respondents sought to tender the previously non-tendered expert evidence. Though the trial judge admitted and relied on such evidence, the Court of Appeal overturned that decision, holding that "once the defence evidence was concluded at trial … there was evidence upon which the trial judge could have and should have assessed damages. It may have been difficult for him to do so because of the state of the evidence but that is a situation that often faces trial judges in assessing damages."[41]

Similar concern about the use of fresh evidence motions to circumvent the judicial process has been expressed in several recent Court of Appeal cases.

In *On Call Internet Services Ltd. v. Telus Communication*, the appellant had agreed to arbitrate its dispute with the respondent; however, the Court of Appeal found that "soon after execution of the arbitration agreement [On Call] sought by all means to avoid or frustrate the arbitration"[42] and did not, in the end, attend the arbitration. On appeal, On Call sought to admit fresh evidence to demonstrate the falseness of an affidavit critical to the arbitrator's decision. The Court rejected this motion on the basis that On Call should have "filed the evidence it now seeks to rely on, and made arguments before the arbitrator."[43]

To similar effect, the Court in *Albu v. University of British Columbia* rejected an application for admission of fresh evidence on the basis that the application was simply "another attempt to have this Court consider material that was not part of the record before the chambers judge and which he properly refused to consider."[44]

As the above analysis demonstrates, practitioners will face significant hurdles when making an application to admit fresh evidence in the civil context. As a result, particular attention should be paid to the following factors, which could improve the chances of success for a fresh evidence motion:

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39 *R. v. Buckle*, [1949] D.L.R. 418 at para. 8 (B.C.C.A.), followed by *R. v. McMartin*, [1964] S.C.R. 484.

40 *Spoor v. Nicholls*, 2001 BCCA 426 at para. 16.

41 *Ibid* at para. 17.

42 *On Call* at para. 56.

43 *Ibid*.

44 *Albu* at para. 31.

- Whether documentation exists of a diligent effort to discover the evidence in question before trial;
- If the evidence in question would clearly have had a chance to affect the outcome at trial; and
- Whether admission of the evidence raises questions about whether the applicant is seeking to circumvent the judicial process;
    - Examples from the case law include whether the proposed evidence amounts to a splitting of the applicant's case, a validation of the applicant's refusal to participate in an alternative dispute resolution process, or an attempt to tender evidence previously rejected at trial.

2. Evidence that Seeks to Clarify Procedural Issues is More Likely to be Admitted

Fresh evidence motions may be more likely to succeed if the evidence in question goes to judicial process relevant to the proceedings. In Petrelli v. Lendell Beach Holiday Resort, the Court of Appeal noted that there was a "somewhat more relaxed test to the reception of fresh evidence where the purpose of that evidence is to clarify and amplify the procedural history of the matter under appeal."[45]

Petrelli concerned an attempt by the purchasers of a "holiday home" in the defendant's trailer park to rescind the contract. Friends of the plaintiffs, the Bahrys, purchased a home in the trailer park, without knowledge that municipal bylaws prohibited the use of the park for holiday homes. The Bahrys were successful in an action against the defendant to have their contract for purchase of the home rescinded and the plaintiffs brought a similar action. They argued that for the defendant to contend that a holiday home was a permitted use under municipal bylaws was an abuse of process, in light of the result of the Bahrys' action. The chambers judge agreed and struck the statement of defence.

On appeal, the Court found that there was not sufficient evidence to support the order to strike the statement of defence. The pleadings and evidence in the Bahrys' case were not in evidence before the chambers judge. The Court of Appeal allowed the Bahry record to be admitted on appeal as fresh evidence "notwithstanding the fact that it ought, with due diligence, to have been adduced in the court below."[46] The Court noted two factors that distinguished the fresh evidence motion in that case: (1) the fresh evidence was seen as essential to both the plaintiffs' and the defendant's cases before the chambers judge, and in front of the Court of Appeal, and (2) a trend in the case law towards a more relaxed test where the purpose of that evidence is to clarify and amplify the procedural history of the matter under appeal.[47]

Cases from other jurisdictions support the principle that the *Palmer* test will not be applied as rigorously in relation to evidence about the judicial process. The Ontario Court of Appeal has gone so far as to say that where the proposed fresh evidence "demonstrates that the judicial process was fundamentally unfair and brings the administration of justice into disrepute", the *Palmer* test need not be applied.[48]

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45 *Petrelli* at para. 60.

46 *Ibid* at para. 57.

47 *Ibid* at para. 57-60.

48 Sopinka at 102, citing *National Trust Co. v. 1117387 Ontario Inc. et al.*, 2010 ONCA 340.

3. Fresh Evidence that Allows Fairness to be Achieved Is More Likely to be Admitted

As noted above, *Golder* appears to stand for the principle that even if the *Palmer* test is not met, a court retains discretion to admit evidence if doing so is in the interests of justice. As such, the issues highlighted in *Golder*, and subsequent Court of Appeal decisions which have followed it, demonstrate a specific type of evidence for which a fresh evidence motion may have a greater chance of success – evidence required for fairness to be done.

For instance, in *Petrelli*, as described above, the evidence of a separate proceeding should have been before the trial judge whose decision was appealed. In the end, the record from the Bahry case was uncontroversial as to its content and definitively resolved the issue between the parties such that the Court of Appeal did not have to put the parties to the needless expense of rearguing the case in the lower court.

In contrast, in *Re Friedland*, the Court of Appeal rejected a fresh evidence motion that would have further delayed resolution of a case in which individual victims of a Ponzi scheme had already waited over two years to receive some recovery for their losses.[49]

4. Fresh Evidence Motions in Public Law Cases Have a Greater Chance at Success

In recent years, it has become clear that in cases involving an important public law or *Charter* issue, the parties and interveners may seek permission to file new materials to provide the social, economic or cultural context of the legislation in question, and in such instances, the *Palmer* test may not apply.[50]

5. Fresh Evidence Motions with Respect to Legislative Facts Have a Greater Chance at Success

Similarly, the application of the *Palmer* test has been found to have limited application in the context of legislative facts (including Hansard and Cabinet statements), as opposed to adjudicative facts.[51]

6. Fresh Evidence in Conflict with an Agreed Statement of Facts is Unlikely to be Admitted

If a fresh evidence motion concerns evidence that would undermine or contradict an agreed statement of facts adopted by both parties at the trial level, such a motion is unlikely to succeed absent evidence of fraud or misrepresentation, even if it meets the *Palmer* test.[52]

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49 *Re Friedland*, 2013 BCCA 119 at paras. 35-36.

50 Brown at 145, citing *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44; and *Carter v. Canada (Attorney General)* (May 16, 2014), Doc. 35591 (S.C.C.).

51 Sopinka at 102, citing *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685.

52 Sopinka at 108-109, citing *Weldwood of Canada Sales Ltd. v. Lindquist* (1989), 67 Alta. L.R. (2d) 247 (C.A.); and *Pollon v. American Home Assurance Co.* (1991), 3 O.R. (3d) 59 (C.A.).

7. Fresh Evidence Undermining Assessment of Damages

Motions to adduce fresh evidence can arise in circumstances where subsequent events inform a contingency which factored into the assessment of damages at trial. The approach taken by the Court of Appeal for British Columbia traces to the decision of the House of Lords in *Mulholland v. Mitchell*.[53] In *Mulholland* new evidence was admitted on the basis that the new evidence was necessary to a proper adjudication of an appeal on damages.

> In this case, I think that it can be fairly argued that the basis on which the case was decided at the trial was suddenly and materially falsified by a dramatic change of circumstances. An appeal on the whole question of damages is pending and it would be unsatisfactory for the court to deal with that appeal without taking into account the falsification, if such there be, of the basis of the trial judge's award. In the absence of the fresh evidence, the Court of Appeal would be restrained from dealing with the reality of the case before it.

The Court of Appeal adopted and applied *Mulholland* in *Knudson v. Farr*[54] and further discussed the issue in *Cory v. March*:

> At the commencement of argument counsel for Mr. Marsh applied for leave to introduce as fresh evidence the fact of Mrs. Cory's death. The supporting affidavit confirmed that counsel intended to rely upon that evidence in support of a submission that the court should reduce the future costs and future earnings awards to Mrs. Cory. It is clear from the authorities to which counsel referred us that the court has a discretion to receive the fresh evidence and that the discretion is to be exercised by balancing the competing considerations of the public interest in the finality of litigation on the one hand, on the other hand, the affront to common sense involved in the court shutting its eyes to a fact which falsifies the assessment: [55]

In *Miller v. Leenstra,* the Court of Appeal drew a distinction between a "fact" established at trial, later proven to be incorrect, and a changed appreciation surrounding the certainty of an event. The Court of Appeal suggested that fresh evidence is more likely to be received in the former situation.

> In making the balancing between the interests of the public in finality on the one hand and any affront to common sense or a sense of justice if the evidence is not admitted on the other hand, the cases indicate different treatment of the new evidence if it shows that something that was taken to have been certain at the trial is, in fact, incorrect than the treatment if something that was taken as uncertain at trial is demonstrated to have become certain. In the former case there is a greater likelihood that the discretion will be exercised in favour of the admission of the fresh evidence than is so in the latter case.[56]

IV. Rehearing of Issues

Although not directly related to deficiencies in the proceeding below, on occasion counsel may be faced with a situation in which an appellate court releases its decision and counsel is of the opinion that the decision was wrongly decided due to manifest error. In rare circumstances, counsel may seek a rehearing of the issue before the Court of Appeal itself prior to formal entry of the order.

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53 *Mulholland v. Mitchell,* (1971) All E.R. 307 (H.L.)

54 *Knudson v. Farr*, (1984) 55 B.C.L.R. 145 (C.A.)

55 *Cory v. March*, (1993) 77 B.C.L.R. (2d) 248 (C.A.) at p.259

56 *Miller v. Leenstra*, (1993) 87 B.C.L.R. (2d) 285 (C.A.), at para. 21 255

Section 9 of the *Court of Appeal Act* has been interpreted to provide the court with the statutory authority to rehear an appeal after judgment has been delivered, but before the order of the court has been entered.[57] The court also has access to this remedy based on its inherent jurisdiction to prevent an injustice.[58]

The test for whether to allow a rehearing is stated in *Menzies v. Harlos*. In *Menzies* the appellant had been unsuccessful in the main appeal but sought a rehearing, alleging that the Court had failed to focus on the central issues in the appeal, and that its decision contained inaccurate references to evidence and failed to make reference to important pieces of evidence.[59]

The Court noted that as of 1975 there was no longer an appeal as of right to the Supreme Court of Canada and, therefore, that there was some need to take a more liberal approach to rehearing issues at the appellate court level as mistakes might not be rectified otherwise.[60] The Court of Appeal framed the test for whether to allow a rehearing in stringent terms:

> The application is almost unprecedented in that it seeks a reconsideration of a decision on the ground that it is wrong. It is not unusual for an application to vary to be made and granted where the basis of the application is a demonstrable oversight or error in a particular aspect. An example in the area of fact is an error in calculation in relation to damages. An example in the area of law is reliance on a statute which has been repealed. It is a fundamentally different matter to allow a full reargument of issues which have been argued and decided — to, as it were, allow a second kick at the cat. That approach seems to be widely used by many American appellate courts but has not generally been part of the tradition of courts in this country or elsewhere in the Commonwealth.
>
> …
>
> I am prepared to accept that the scope for reargument should be wider than in the past. Without attempting to state a definitive rule, I approach the matter on the basis that if it appears that the court overlooked or misapprehended the evidence in a significant respect, and that a risk of miscarriage of justice ensued, there should be a rehearing.[61]

The test in *Menzies* has been adopted and applied by B.C. courts[62] and referred to by courts in other jurisdictions[63] (although its rationale recently was disagreed with by the Nova Scotia Court of Appeal in *Canada v. MacQueen*[64]).

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57 *McGarry v. Co-operators Life Insurance Co*., 2011 BCCA 272 at para. 4 [*McGarry*], citing *Johnson v. Laing*, 2004 BCCA 642 at para. 9.

58 *McGarry* at para. 4, citing *R. v. Hummel*, 2003 YKCA 4 at para 14; and *Chutter v. Chutter*, 2009 BCCA 177 at para. 9.

59 *Menzies v. Harlos* (1989), 37 B.C.L.R. (2d) 249 at paras. 7-11.

60 *Ibid* at paras. 18 and 24.

61 *Ibid* at paras. 17 and 25.

62 See, for example, *P.G. Restaurant Ltd. v. Northern Interior Regional Health Board*, 2005 BCCA 288; *E. (D.) (Guardian ad litem of) v. British Columbia*, 2005 BCCA 289 [*E. (D.)*]; *Kemp v. Metzner*, 2000 BCCA 694 [*Kemp*]; and *Fraser-Cheam (Regional District) v. Zaandam Management Ltd*. (1994), 48 B.C.A.C. 306 (C.A.) [*Fraser-Cheam*].

63 See, for example, *Willman v. Ducks Unlimited (Canada)*, 2005 MBCA 13; *AUPE v. Alberta*, 2014 ABCA 345; and *Arrowhead Auto & Truck Parts Ltd. v. Calgary (City)*, 1997 ABCA 77.

64 *Canada (Attorney General) v. MacQueen*, 2014 NSCA 73 at para. 40.

A rehearing is granted only on rare occasions. *Bains v. Bhandar* is an example of such circumstances. In that case, it was common ground that the Court of Appeal had misapprehended evidence concerning the date on which the appellant had actual knowledge of an agreement and that misapprehension played a pivotal role in the Court's decision.[65] In the rehearing, the Court also admitted fresh evidence that had not been presented and, on the basis of that evidence, set aside its previous decision.[66]

While the error by the Court in *Bains* fit specifically into the test laid out in *Menzies*, the Court of Appeal has been clear that a court should only consider rehearing an issue if the error specifically relates to evidence being overlooked or misapprehended.[67] Accordingly, applications for rehearing have been rejected on the following bases:

- the application concerns an attempt to rehash an earlier argument;[68]
- the appellant has already had the opportunity to address the issue raised;[69] and
- the application concerns a point of law not raised or argued in the original proceeding.[70]

Even where a rehearing occurs, to affect the outcome of the proceeding the misapprehension must be such as to create a risk of a miscarriage of justice. In *McGarry v. Co-operators Life Insurance Co*, [71] there was a clear error made as to the date of a relevant document in the majority's decision; however, the Court found no injustice resulted because the judgment did not rest on the date of the document but instead its contents.[72] Similarly, in *Fraser-Cheam v. Zaandam Management*, the Court of Appeal recognized that its decision contained several errors, but rejected the notion that the errors were consequential to the decision of the Court.[73]

In conclusion, it is rare that a court will exercise is discretion to rehear a case, and even more rare that the court will overturn its original decision if it does rehear the case. However, in cases where the court has clearly misapprehended or overlooked a critical piece of evidence, it may be open to seek a rehearing to overturn such a decision.

V. Strategic Considerations for Counsel

Having reviewed the applicable legal tests, the paper concludes by identifying strategic considerations that arise for counsel when presented with the potential for new matters to emerge on appeal.

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65 *Bains v. Bhandar*, 2000 BCCA 466 at para. 3.

66 *Ibid* at paras. 4 and 61.

67 *Kemp* at para. 21; and *R. v. Joubert* (1992), 13 B.C.A.C. 116 (C.A.).

68 *E. (D.)* at para. 12; and *R. v. Chow*, 2003 BCCA 248 at paras. 17-18.

69 *Henry v. North Shore Taxi (1966) Ltd*. (1992), 67 B.C.L.R. (2d) 381 at para 18 (S.C.); *Kemp* at paras. 14-15; and *Nanaimo (Regional District) v. Spruston Enterprises Ltd*., 1999 BCCA 25.

70 *Mayer v. Mayer Estate* (1993), 83 B.C.L.R. (2d) 87 at para. 22 (C.A.).

71 *McGarry* at para. 6.

72 *Ibid* at para. 10.

73 *Fraser-Cheam*.

1. The starting point for any appeal is the grounds of appeal. For the prospective appellant's counsel, the first task is to examine closely the reasons for judgment of the lower court. Before thinking about new arguments or new evidence, counsel should determine if there are viable grounds for appeal based on the existing record. If there are, counsel should ask whether it is necessary to try to raise new matters.

2. Building on the last point, appellant's counsel should recognize that there is risk to seeking to introduce new matters on appeal. It may be taken as at least an implied concession that the appeal cannot succeed without the new argument or evidence. That was the case in *On Call*[74], where the Court of Appeal observed that the party had "by its fresh evidence motion, implicitly acknowledged that all of the facts necessary to decide the issues were not in the record."

3. A decision to raise a new matter on appeal should involve a careful analysis of how the new matter fits into the overall appeal. Is it fundamental to the viability of the appeal in that the success of the appeal depends on the admission of the new evidence or the acceptance of the new argument? Or does it relate to a secondary or alternative point, such as remedy, that arises if the primary ground of appeal fails? Either way counsel likely would be well advised to acknowledge the situation up front as part of the presentation of the appeal.

4. Counsel also should consider whether there are alternatives to seeking to introduce the fresh points on appeal. In *Miller* v. *Leenstra*, for example, plaintiff's counsel first had sought leave of the trial judge to re-open in order to consider the fresh evidence. Although refused in that instance, if it is not too late to do so it may be preferable first to go back to the first instance court if new evidence or arguments come to light. *Bains* v. *Bhandar* is an example where that strategy worked. After the initial adverse decision allowing the appeal, the respondent sought leave to appeal to the Supreme Court of Canada but also sought the re-hearing in the court appealed from, which resulted in a reversal of the Court of Appeal's original judgment and thereby rendered further appeal moot from the successful respondent's perspective.

5. An attempt by the appellant to introduce a new matter on appeal requires a careful assessment by respondent's counsel. Fighting the appellant's attempt may not always be the wise strategy. Although not the ordinary case, if, for example, new evidence would allow the case to be determined on the proper factual basis, correcting the record in the court below, then objecting to the admission of the new evidence may not only be futile but it also may cause the court to question the respondent's candour (as occurred in *Harper* v. *Harper*[75]). It will be a difficult tactical call for counsel, but there may be occasions where counsel's time and attention will be directed better to answering the new argument or evidence on its merits, rather than resisting its introduction. That said, and subject to the presumably rare situation where the absence of the fresh evidence would result in the case proceeding on a false factual premise, it is fair for respondent's counsel to consider the test the appellant must meet, as discussed in this paper, and resist the introduction of new matters on appeal where their admission would be contrary to the interests of justice

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74 *On Call*, at para. 67

75 *Harper* v. *Harper* [1980] 1 S.C.R. 2, 16