

## PRACTICE

Appellant in underlying actions appealing from Federal Court (F.C.) decision (2017 FC 6) dismissing its action for patent infringement, from F.C. order (2018 FC 355) dismissing its motion to vary confidentiality order — Motions before Court herein by appellant seeking leave to introduce new ground (i.e. ineffective assistance of trial counsel) into its appeal from dismissal of its action for patent infringement; by appellant's former counsel seeking leave to intervene to oppose appellant's motion; by respondent seeking order for payment of security posted by appellant respecting costs awarded against it by F.C. — "Ineffective assistance of counsel" ground of appeal often asserted in appeals from criminal convictions — Notice of appeal may be amended under *Federal Courts Rules*, SOR/98-106, r. 75 — Whether ground of ineffective assistance of counsel could succeed based on material placed before Court on this motion, considerations of fairness, avoidance of delay, cost-effectiveness — Considerations surrounding ground of ineffective assistance of counsel in criminal cases applying equally to ground in civil cases — Civil cases involving additional special considerations — Ground seldom succeeding in civil cases — In order to meet "rarest of cases" threshold in civil context, appellant having to demonstrate exceedingly special interest or truly extraordinary situation, e.g. where wronged clients are vulnerable persons, or where conduct tantamount to fraud — Case law in criminal context suggesting that conflict of interest can be relied upon in support of ground of ineffective assistance of counsel — Supreme Court of Canada in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 adopting test to be followed in post-judgment assessment when ineffective assistance of counsel alleged for first time on appeal — Appellant having to show more than possibility of conflict of interest; having to demonstrate conflict of interest, that conflict adversely affecting lawyer's performance on behalf of appellant — "Substantial risk" of adverse effect not enough — If appellant can prove actual conflict of interest, that conflict adversely affecting its counsel's performance on its behalf, does not matter whether conflict affecting outcome of trial — Conflict in and of itself supplying element of "miscarriage of justice" necessary for ground to be sustained — Based on record herein, speculation required to conclude appellant's counsel in actual conflict of interest, that conflict adversely affecting counsel's performance on its behalf — Evidence insufficient to establish that ground of ineffective assistance of counsel can possibly succeed — No basis to suggest that counsel having incentive to soft-peddle appellant's case — No substantial risk that counsel's representation of appellant was materially and adversely affected — Counsel enjoying "strong presumption" that their conduct falling within "wide range" of "reasonable professional assistance" — Proposed ground of appeal not arguable — Leave to amend notice of appeal denied — Appellant's motion dismissed; former counsel' motion dismissed on account of mootness; respondent's motion allowed in part.

MEDIATUBE CORP. V. BELL CANADA (A-112-18, A-35-17, 2018 FCA 127, Stratas J.A, order dated June 28, 2018, 28 pp.)