

## Appeals: Can parties 'consent' to them?

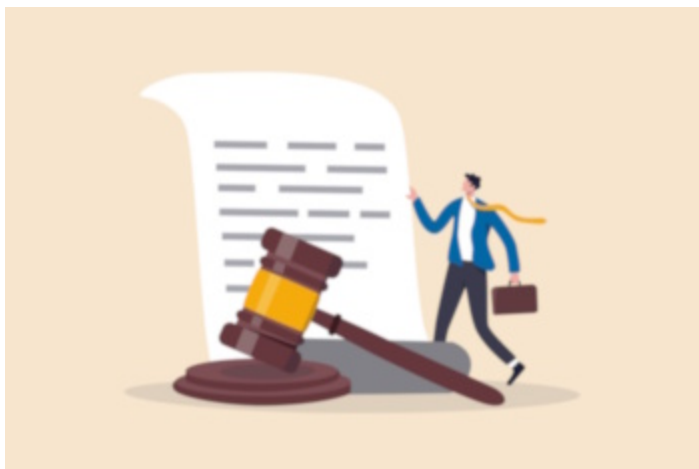
By **Marco P. Falco**

Law360 Canada (October 16, 2025, 1:08 PM EDT) -- When it comes to reviewing the orders of lower courts in Canada, appellate courts have broad jurisdiction. Far from a rubber-stamping process, all appeals involve the assessment of the lower court's reasoning through the application of standards of review.

For this reason, appeal judges are wary of relinquishing their adjudicative function to anyone else, let alone the parties themselves.



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A recent decision of the Ontario Court of Appeal, *Martin v. 11037315 Canada Inc.*, 2025 ONCA 648, illustrates that even where parties seek to resolve an appeal on consent, the court still reserves the right to assess the lower court's order on its merits.

### **A bona fide purchaser without notice**

*Martin* arose from a dispute over a residential property.

The Respondent, Kelly Martin, was the original owner of the home in question. 2148468 Ontario Ltd. (214) had a second mortgage on the property. In 2019, Martin defaulted on her mortgage payments following a fraud on her bank account.

In the interim, 214 assigned its mortgage to 11037315 Canada Inc. (110). Then, 110 started foreclosure proceedings and ultimately obtained a default judgment against Martin. 110 then sold the property to the Appellant, 2670082 Ontario Corp. (267).

When Martin learned of the default judgment and sale of her property, she brought a motion in the Ontario Superior Court to set both orders aside. The matter proceeded to the Court of Appeal where a trial of an issue was ordered on whether 267 was a bona fide purchase of the property for value without notice under Ontario's *Land Titles Act*.

The trial of an issue then took place in the Superior Court, which found that 267 was not a bona fide purchaser for value without notice. 267 appealed this order to the Court of Appeal. After that, 267

brought a motion to the Court of Appeal to allow the appeal on consent.

On its motion, 267 stated that the parties had reached a settlement under which Martin was to receive payment of some moneys held in trust following the sale of her home; the parties also agreed that, in view of the impact of the decision on 267's reputation, both parties would consent to an order setting aside the Superior Court's order that 267 was not a bona fide purchaser for value without notice.

The Court of Appeal denied the consent motion.

In a unanimous decision, the court held that it would not be "appropriate to allow the appeal on consent" or to set aside the lower court order as requested by the parties.

### **The effect on the administration of justice**

One of the primary concerns expressed by the court in not allowing an appeal on consent is the effect on the rule of law. That is, the court cannot delegate its adjudicative function to the parties.

The rule of law depends on an assessment of the facts and the application of legal doctrine by the judiciary. That principle is undermined where the court engages in a perfunctory endorsement of the parties' agreement, rather than an analysis of the case.

As the Court of Appeal observed, this principle has wide support in Canadian jurisprudence: see *Uhrik v. Terrigno*, 2024 ABCA 383; *C.S. v. D.S.*, 2022 NBCA 51; *Garshowitz v. Canada (Attorney General)*, 2017 FCA 251.

Even in cases where Canadian courts have blessed the parties' agreement on an appeal, they have refused to do so where such consent would "bring the administration of justice into disrepute": *Kubota v. Kubota*, 2022 BCCA 41; *Malick v. McClough*, 2023 BCCA 190.

As the court held, simply endorsing the parties' agreement to allow or dismiss an appeal undermines the court's adjudicative role:

This Court cannot allow an appeal or set aside a judgment or order made below based on the parties' consent alone. To ensure its powers do not serve an improper purpose, this court must consider, in every case, whether the relief requested is appropriate in light of the law and the facts of the case.

### **Court has no jurisdiction to ignore lower court's findings**

Yet another concern expressed by the court is the impact the parties' agreement would have on the lower court's decision.

The facts of *Martin* illustrate the point.

The lower court judge made a finding that 267 is not a bona fide purchaser without actual notice. In the Court of Appeal's eyes, accepting the parties' consent to set aside the lower court's decision would amount to "asking the court to whitewash this finding of misconduct without any basis for doing so."

The parties' proposed consent order at the Court of Appeal would simply restore 267's reputation in the absence of any analysis of whether the lower court was right or wrong in reaching this conclusion. In the "absence of any legal or evidentiary error, there is no authority for this court to set aside [the lower court's] judgment, even on consent." In other words, the jurisdiction of appellate courts derives from overturning errors or affirming a lower court's findings.

Where the court is asked not to undertake such an analysis and not to apply a standard of review to a lower court's decision, the court is not only abdicating its appellate function, but also acting outside its jurisdiction. In these circumstances, setting aside a lower court's finding on consent would bring the administration of justice into disrepute.

**Consent cannot undermine the appellate court's decision-making role**

Martin illustrates an obvious, but important, point about the nature of appellate adjudication — it is always a search for error or affirmation. Any agreement by the parties that undermines this critical role in our legal system threatens to undermine the rule of law and may cause the appeal court to act without jurisdiction.

Courts always encourage parties and their lawyers to settle where possible. However, such settlement cannot override the appeal court's primary purpose to assess the lower court's ruling through the lenses of its standards of review.

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