

GUIDELINES FOR THE CIVIL APPEAL PROCESS

Should I start an appeal?

If you think the trial court has made the wrong decision in your case, you may want to appeal. However, before starting an appeal it is important to consider the pros and cons of doing so. An appeal is not a re-hearing of the trial. Rather, an appeal is based on the record of what occurred at trial. The Court will not hear evidence except in very limited circumstances (Rule 37).

While the Court of Appeal may overturn the decision of the lower court and substitute its own decision or order a new trial, the Court will intervene only if the lower court made a mistake about the law or the application of the law to the facts or in its assessment of the evidence in a manner that had a material effect on the result.

Some things to consider:

- Can you show how the judge in the lower court made a mistake that affected the result? It is not enough that you are dissatisfied with the decision.
- Appeals take time. While the Court aims to have all appeals proceed as expeditiously as possible, it takes time to obtain and prepare the documents that are required for an appeal. Keep in mind it will likely be several months from when you file your notice of appeal until you get a decision.
- Appeals cost money. Appeals are complex and most require assistance from a lawyer to present effectively. Even if you are not paying significant legal fees, consider that you will have to pay for the materials such as transcripts and copying. Moreover, if you are not successful on appeal, you may be ordered to pay the other party's costs.

The Appeal Process

The Appellant

If you decide to appeal, follow the process in the *Court of Appeal Rules*. It is helpful to review, and become familiar with, the *Rules* before you begin. The Guidelines help to explain various Rules and Forms.

Step 1: The Notice of Appeal

In order to start an appeal you must fill out a Notice of Appeal (Form 1) or Notice of Application for Leave to Appeal in the few cases where leave (i.e. permission to appeal) is required (see below). See Rule 8 regarding the Notice of Appeal.

Make sure you are within the appropriate timelines for filing the Notice of Appeal (Rule 8). You have 30 days to file if the matter in the court below has been completed, and 10 days if it is not completed, that is, the trial has not yet ended (Rule 7(n)).

Once you have filled out the Notice of Appeal you need to file 4 copies with the Court registry at 287 Duckworth St., St. John's. You will also need to deliver, without delay, a copy of the Notice of Appeal to all the other parties. Be sure to make a copy for yourself. (See Rule 28)

Note: Leave to Appeal

A few specific orders require leave (permission of the Court) to appeal. You will find the requirement for leave in a statute or a rule. The circumstances where leave will be required are:

- i) Where a statute requires leave, for example: the *Public Utilities Act*, RSNL 1990, c. P-47 s. 99(1); the *Class Actions Act*, SNL 2001, c. C-18.1 s. 36(2); and (3) the *Family Law Act*, RSNL 1990, c. F-2, s. 59(2), if you are appealing an order that was made by a provincial court judge and has already been appealed to the Supreme Court of Newfoundland and Labrador.
- ii) Where the order you are appealing is an order the parties consented to (Rule 34); or
- iii) Where you are appealing a decision of the Supreme Court granting or refusing to stay enforcement of the order (Rule 42(4)).

In a case where leave to appeal is required, you must

- (1) File an Application in Form 2 (no affidavit is required but, in the Form, you should refer to the legislation or rule requiring leave);
- (2) Together with the application in Form 2, file a proposed Notice of Appeal (Rule 8 and Form 1); and
- (3) Then, follow the procedure set out in Rule 33 when leave is required by statute and Rule 30 when leave is required under the *Rules*.

Step 2: Service

As soon as possible after filing the Notice of Appeal or Notice of Application for Leave to appeal, you must serve (i.e. bring to the attention of) the Respondent with a copy. Rule 28 sets out how: (1) to serve a document; and (2) to establish that you have served the document.

Do not file the proof of service document (i.e. affidavit or other document listed in Rule 28 explaining how service was brought about) with the Court. However, you should keep a copy available in case service becomes an issue during the appeal process.

Step 3: Preparing the Transcript, Factum and Appeal Book

Obtaining and Preparing the Transcript

The transcript is a printed version of the proceedings at trial, and is obtained by transcribing the audio recording that was made by the court (Rule 46).

Not every appeal requires a transcript. Often, all that is needed is the reasons for decision of the judge who made the order you are appealing.

However, you may decide that you need the transcript to help you in preparing your factum (your written argument as to how the judge in the court below made an error). You may also need all or part of it to explain to the Court how the judge made an error, especially with respect to his or her assessment of the evidence.

It is important to remember that, even if you obtain the whole transcript, you should file with the Court only those parts that are necessary to explain your position on the appeal. As a result, you may decide to obtain the whole transcript, but you may find that none or only a portion of it should be filed with the Court.

1. The first thing to do is to obtain a copy of the audio recording from the court that made the decision you are appealing. This will be provided to you on a disc. You must deliver a copy of the disc to the other parties. You must do this without delay after filing your Notice of Appeal (Rule 46(2)). This rule applies even if you do not intend to obtain a written transcript.

2. You will then need to decide if you need the whole, a part, or none of the audio recording to be transcribed in writing. You should obtain the portion of the

transcript, if any, that is necessary to prepare your factum or to enable the Court to determine the issues under appeal (Rule 46(3)(a)). Without delay, you must provide the other parties with the details regarding how you intend to proceed (Rule 46(3)(b)).

A copy of any transcript that you requested must be delivered to every party, whether or not you intend to file it with the Court. This must be done without delay as soon as you receive the transcript (Rule 46(6)).

Note: The practice is to have the transcript prepared by a specialized transcription company because the transcriber must complete a certificate of authenticity.

3. You will not file the transcript with the Court until after you have prepared and are ready to file your factum. By preparing your factum before filing the transcript, you will be able to decide what part, if any, of the transcript is needed to explain your position on the appeal.

Factum

4. The next step is to prepare the factum. The factum is the most important part of your appeal. It is your written submission about why your appeal should be allowed.

You must follow Rule 53 which sets out the instructions regarding the contents of a factum. In addition to the information in the rule, the following comments may assist you:

(1) Part II - the Concise Statement of Facts:

(a) The appellant should summarize the key facts from the lower court ruling. This will provide the foundation or context for the appeal. It is helpful to refer to the facts set out in the reasons for decision by the trial judge;

(b) The respondent should: (i) indicate the paragraphs of the appellant's statement of facts that you agree with, (ii) identify any you disagree with, and (iii) add any further facts you feel are necessary for the appeal.

(2) Part III – List of the Issues:

List the issues raised by the appeal. What errors or mistakes did the lower court make?

(3) Part IV – Argument:

Set out why or how the lower court made an error. List any legal authorities and how and why they support your argument. While there is a limit of 40 pages for the argument, this is a maximum. Try to be concise. Use only the number of pages you need to make your points.

If you are referring to the transcript or legal authorities in your argument, state clearly what volume, page or paragraph you are referring to. Put the reference in the text of your argument under the paragraph that refers to it.

Do not use footnotes unless you are elaborating on or explaining something that is not conveniently placed in the body of your submission (Rule 53(2) and (3)).

(4) Relief Sought - write what you want the Court of Appeal to do (e.g. vary the decision or order a new trial). If you want the Court to order costs against the other side, include this in your request (Rule 58).

You must follow Rule 55, which sets out details such as type settings and numbering of paragraphs and pages, etc.

5. The next step is preparation of the cases and legislation that you are relying on in your factum. Rule 54 provides the instructions.

In choosing your authorities, it is helpful to remember that the Court of Appeal is bound by the legislation set out in statutes, and will follow principles set out in cases decided by the Supreme Court of Canada as well as its own cases. Cases from lower courts and other provinces may be considered, but the Court does not have to follow them.

Most authorities are now available online.

- Provincial statutes are available at <http://www.assembly.nl.ca/legislation/>
- Federal statutes are available at <http://laws.justice.gc.ca/eng/>
- Most cases are available at <https://www.canlii.org/en/>

The Library of the Law Society of Newfoundland and Labrador, 196-198 Water Street, St. John's, is also open to the public.

Note:

- While the factum must be printed on only one side of the paper, copies of authorities may be printed on both sides.
- Print the authorities in a legible font. Take care with this. Some electronic versions will print out in very small type. The registry of the Court may refuse to accept your documents if the print is not sufficiently large.

6. To prepare your factum and authorities for filing and serving, you must follow Rule 55, which sets out details about how to proceed. Try to assist the Court by making the materials "user-friendly" and by following the Rules.

Note: A sample form of a factum which can be used as a model in creating your own factum can be found in "Factums: A Guide for Self-Represented Litigants" on the Court of Appeal website.

Appeal Book

7. You must also prepare an Appeal Book (containing the basic documents relating to the case in the court below) to be filed with the factum and the transcript. Follow Rule 52 which sets out the details of what is to be included and how it is to be presented.

Note: An example of how to prepare an Appeal Book and how it is formatted can be found in "Appeal Books: A Guide for Self-Represented Litigants" on the Court of Appeal website.

Organizing Transcript for Filing

8. Once your factum has been completed, you will be in a position to determine what portions of the transcript are necessary to enable the Court to decide your appeal. Rule 47 sets out the details about filing the transcript with the Court.

Note: When you file the transcript you are also required to complete, sign and file Form 5. This is a Certificate, signed, and stating that you have reviewed the materials and are filing only the transcript that is necessary to enable the Court to resolve the issues on the appeal.

Step 4: Filing and Serving the Factum, Appeal Book and Transcript

Rule 56 requires the Appellant to file the factum, appeal book and transcript with the Court all at the same time. The Rule specifies the time periods within which parties are to file their documents.

Once a party (whether appellant or respondent) files a document with the Court, the document must be served on the other parties without delay in accordance with Rule 28.

Note: You need to prepare sufficient copies of your materials: Four copies for the Court, one being the original; one extra copy for you, and one extra copy to be served on the Respondent. If there are more parties, a copy must be served on each party. Each party is responsible for the costs of preparing, filing and serving its materials.

Please note that the Court also requires an electronic copy (in a searchable format) of the factum and appeal book provided by CD or flash drive.

Note: A party unable to afford the expenses of an appeal may ask the Court for an order under Rule 44.

Step 5: Set the Date

Once all of the Appellant's and Respondent's materials have been filed, you need to set a date for the oral hearing of the appeal. Rule 19 provides the relevant details about how to obtain a hearing date.

The Court will be unable to deal with your appeal until the hearing has been held. It is important to seek a date for the hearing as soon as possible after the materials have all been filed.

To set the date, contact the other parties. A calendar, setting out dates for the hearing of appeals, may be found on the Court's website. If all parties agree on a date or provide dates on which they are not available, the Appellant should deliver a written request to the registrar in Form 6. The registrar will advise the parties when a date has been confirmed.

If a date cannot be set by agreement, it will be necessary for the Appellant to make an application in Form 7 to have the Court set the date.

Step 6: Attend the hearing

Attend the hearing on the set date and time. Usually the hearing will be before a panel of three judges of the Court of Appeal. The judges are addressed as "Justice".

The Appellant presents its case first. You should highlight the important points you wish to make. The Justices may ask you questions.

Then the Respondent makes its presentation. You should respond to the points made by the Appellant and highlight any other points you wish to make. Again, the Justices may ask questions.

The Appellant is permitted to give a brief reply, but only on new points raised by the Respondent. The Appellant is not permitted to restate the points already made in its presentation.

The Court may have a short recess and then give its decision at the end of the hearing. When that happens, the Court will later file reasons for its decision or a short explanation in a memorandum of disposition. However, in most cases, the Court will "reserve" its decision and will file the decision with written reasons later.

Note: The Court may proceed without you if you fail to attend without good reason. If there is some reason you will be late or are unable to attend, you should call the registry, giving as much advance notice as possible (709-729-0066).

If you decide you no longer wish to carry on with the appeal you may discontinue the appeal by filing a notice in Form 13 (Rule 18).

Note: If you discontinue your appeal, the Respondent will be entitled to an order for costs, unless costs are waived in writing on the notice of discontinuance.

The Respondent

If you have been served with a Notice of Appeal, you need to file responding materials after being served with the Appellant's materials. You should file the same type of materials as the Appellant, but you only need to file a transcript and an appeal book if you think the Appellant's materials do not contain something that is necessary for your case. (See Part Seven of the Rules – Appeal Documents.)

Note: Filing excess materials may subject you to an order of costs.

You may also bring your own appeal by cross-appealing (Rule 11, Form 15). If you have filed a Notice of Cross-Appeal in Form 15 and the Appellant discontinues or abandons the appeal, you may choose to carry on with your cross-appeal by filing Form 16 (Rule 11(6) and (7)).

If a Respondent files a cross-appeal, the appellant may file a reply factum, that is, a response to the cross-appeal (Rule 11(5)).

Both parties

If at any time you require directions, you may make an application under Rule 32.

In complex cases, the Court may order a pre-hearing conference or case management (Rule 20).

Applications (Part Six)

Applications are usually heard by one Justice in Court. Dates are set each month for the hearing of applications. If there is urgency, the Court may agree to set an application on another date. The calendar, setting out dates for hearing applications, may be found on the Court's website.

The materials required for most applications are set out in Rule 30. They are similar to the materials required on appeal, but less information will be required. Unless already in the documents before the Court on appeal, any facts you are relying on to support your application should be set out in an affidavit. You may also make a written submission and file authorities. Assist the Court by tabbing and binding your materials, having an index and numbering the pages.

You must file 2 copies of your materials, one being the original, with the Court, make an extra copy for yourself and serve another extra copy on any other party (Rule 28(3) and (4)). The relevant filing times are set out in Rule 30(2).

A decision on an application may be given at the hearing or the Court may reserve and give a written decision, as occurs with an appeal.