

**COURT OF APPEAL RULES
PRACTICE NOTE – CIVIL PROCEEDINGS**

CAPN No. 2018-11

TRANSCRIPT AND AGREED STATEMENT OF FACTS

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RULES AFFECTED: Rules 46 to 51

EFFECTIVE DATE: Upon publication

The following Practice Note was filed with the registrar of the Court of Appeal and is published under rule 4 of the *Court of Appeal Rules*.

Background

The filing of unnecessary portions of the transcript increases costs, is a waste of resources and unduly delays the time necessary for the appeal process. In the past, in preparation for an appeal, appellant’s counsel frequently requested the preparation of, and filed with the Court, the entire transcript of the evidence taken at trial, and in some cases included the submissions of trial counsel and discussions between the trial judge and counsel.

Panels hearing appeals have found that the full transcript is, in most cases, unnecessary for purposes of determining the issues under appeal. Often, even a portion of the transcript is unnecessary. Under rule 47(2) the portion of transcript to be filed is limited to the portion “that is necessary to enable the issues on appeal to be determined”. Where the factum does not refer to the transcript, one must question whether any portion of the transcript should be filed.

Rule 46 provides for counsel to obtain the portion of the transcript “necessary to prepare the factum and to enable the issues on appeal to be determined”. In order to prepare the factum, counsel may wish to obtain all or a portion of the transcript. However, it does not follow that all or a portion of the transcript should be filed. Once the factum is written, it should be clear whether the whole, a part, or none of the transcript should be filed. It is for this reason that the transcript is to be filed at the same time as the factum.

To ensure that counsel has reviewed the issues discussed in the factum in order to ascertain what portion, if any, of the transcript is required for purposes of determining the appeal, rule 47(2)(b) requires counsel to file a certificate in Form 5.

To avoid the need for a transcript, the option of proceeding by way of an agreed statement of facts drafted for purposes of the appeal is available.

Practice Note

1. Counsel are expected to review and familiarize themselves with the rules respecting the use of transcripts on appeals and to promote their underlying purpose.
2. The appellant is required to obtain a copy of the audio recording from the court appealed from without delay, and to deliver a copy to each party (rule 46(2)).
3. The next step is for the appellant, without delay, to ascertain whether all or a portion of the transcript is necessary in order to prepare the factum and to determine the issues on appeal. Rule 46 sets out the procedure. It should be noted that rule 46(3) requires the appellant to proceed without delay and to provide the other parties with information regarding preparation of a transcript.
4. Under rule 47, the appellant is required to file only the portions of the transcript “necessary to enable the issues on appeal to be determined”. Should the respondent, or another appellant where there is more than one appellant, determine that additional portions of the transcript are required, those portions may be filed with that party’s factum. A certificate comparable to that required to be filed by the appellant applies with the necessary changes.
5. The appellant is also required to file one electronic version of the transcript where a transcript of the entire evidence has been prepared; or, where only part of the transcript has been prepared, one electronic version of the transcript together with one copy of the audio recording (rule 48). “Electronic version” is defined as a version in a format acceptable to the Court. “Transcript” is defined as a printed transcript of the evidence, which does not include submissions by counsel unless they are necessary for determination of the issues under appeal.

6. Counsel are encouraged to make use of an agreed statement of facts, prepared for purposes of the appeal, where appropriate, such as where the appeal engages issues of law without any dispute as to the facts. Where the matter proceeded on an agreed statement of facts in the court appealed from, that document must in any event be filed in the Appeal Book (rule 52(1)(a)(vi)).

7. A party may apply for an order and directions permitting the use of the electronic rather than a paper version of the transcript, or, in appropriate circumstances, the audio recording (rule 49). The Court may, of its own motion, dispense with the preparation and filing of a transcript and order that the appeal proceed using an audio recording of the proceedings in the court or tribunal appealed from.

8. Where at any time it appears to the Court that delays in the preparation of a transcript or delays for any other reason are unexplained, the registrar, on the instructions of the Chief Justice, may set the matter down for a status hearing or a prehearing conference.

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