

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

CAPN No. 2018-02

LEAVE TO APPEAL

DATE ISSUED: January 5, 2018
RULES AFFECTED: Rules 8, 33 to 35, and 42
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 Rules have been amended to remove the requirement for leave to appeal with respect to: (1) interlocutory orders (now called “uncompleted matters”); and (2) orders as to costs only. The most substantial change is the manner of dealing with appeals in uncompleted matters. Under the former Rules, it was often uncertain whether an appeal was, in fact, interlocutory or final. In addition, in the vast majority of situations, it was most convenient and expeditious to hear the application for leave at the same time as the appeal, thereby negating the usefulness of the leave requirement. Also in the vast majority of cases, leave was granted.

Accordingly, the rules committee determined that it would be more practical to allow a party to appeal an order in an uncompleted matter without having to obtain leave. There is a presumption that the appellant has good reason for proceeding before the matter is completed in the court appealed from. Consequently, the notice of appeal must include reference to the uncompleted status of the matter and the reason for proceeding at the time (Form 1(4)(b)).

In addition, the rules committee recognized that there may be some circumstances in which an appeal in an uncompleted matter should not proceed until the trial has been completed. Accordingly, rule 35 authorizes an opposing party to apply to

have the notice of appeal in an uncompleted matter struck on the basis of prejudice, inconvenience, inefficient use of judicial resources, or for other good reason. The effect would be to delay the appeal until the trial has been completed, without prejudice to the appellant to raise the same issue on a subsequent appeal.

Leave is still required under the new rules where

- (1) required by statute, such as the *Class Actions Act* (rule 33),
- (2) the order under appeal is a consent order (rule 34), and
- (3) an order regarding staying the enforcement of an order under appeal has been made by the Supreme Court of Newfoundland and Labrador (rule 42(4)).

Practice Note

1. Leave to appeal an interlocutory order was rarely denied under the former Rules. This indicates that counsel carefully considered whether it was appropriate to appeal before the trial was completed. It is expected that the same care will be taken under the new Rules. That is, in deciding to bring an appeal in an uncompleted matter or in challenging such an appeal under rule 35, it is expected that counsel will carefully consider the merits of taking action either to commence an appeal or to launch a challenge to that procedure. Fairness and the orderly and expeditious administration of justice must be the focus.
2. Rule 8 requires that a notice of appeal in an uncompleted matter must be filed within ten days after the order or decision appealed from has been filed. Where the court appealed from does not provide for filing an order, the ten day limitation period begins to run seven days after the decision is made.
3. Where leave to appeal is required by statute, rule 33 sets out the procedure. The leave application will be heard separately from the appeal unless the Court, on application or of its own motion, orders that leave and the appeal be heard together. In the latter case, submissions on leave must be included in the appeal factum. Where leave is heard before the appeal, the procedure set out in rule 33(3) applies. Counsel should note the time frames set out in the rule.

4. Under rule 34, where the order under appeal is a consent order, leave to appeal is required. The procedure to follow is set out in rule 30 which deals with applications generally.

5. Leave that may be necessary where a party seeks a stay of enforcement of an order under appeal is discussed in Practice Note CAPN No. 2018-07 dealing with stays.

B. Gale Welsh
Acting Chief Justice of Newfoundland and Labrador
Court of Appeal of Newfoundland and Labrador

Kathy Blake
Registrar
Court of Appeal of Newfoundland and Labrador