# Whether to Appeal or Resist an Appeal

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## INTRODUCTION

I have been asked to address the topic of whether to appeal or resist an appeal. Deciding whether to launch an appeal is the first step in the conduct of an appeal, yet surprisingly, there is very little written on this important subject.

A few considerations apply to all appeals, regardless of whether they involve civil, administrative or criminal matters, while some apply only to specific cases or specific clients. The aim of this paper is to set out relevant factors to consider when deciding whether to launch or resist an appeal in a ***criminal*** matter. The scope of this paper is specifically limited to criminal matters for two reasons. First, I am a Crown prosecutor and my background is in criminal law. Second, the Honourable J.E. Côté, Chair of this seminar, has provided a very thorough and useful overview paper for this seminar[1] that provides practical guidance and advice on a number of topics, including whether to appeal or resist an appeal, for ***all*** types of appeal. I cannot make the points he makes any better than he has in his paper, so this paper is meant only to supplement that paper on the issue of criminal appeals. I would encourage everyone to read the Overview paper before reading this paper.

While the aim of this paper is to set out relevant factors to consider when deciding whether to appeal or resist an appeal, it is not meant to give substantive advice on the issue. Rather, it simply provides some guidance on factors to consider.

## BUILDING A RECORD

As the Honourable J.E. Côté points out in his Overview paper: "Better than winning an appeal is not needing one. And better than a doubtful appeal is a very solid appeal."[2]

When considering whether to initiate or resist an appeal, one must always remember that an appeal is ***on the record***. It is not a hearing *de novo*, and it is not a second chance to make arguments or call evidence you chose not to make or call in the court below.[3] Applications to adduce fresh (new) evidence on appeal are governed by very strict rules.[4]

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[1] The Honourable J.E. Côté, Overview, prepared for LESA Appellate Practice Seminar, October 8 & 14, 2015.
[2] *Ibid*, at page 5.
[3] There are some limited exceptions in criminal matters where in the interests of justice new arguments will be allowed on appeal, for example, where the record contains the relevant facts and the law has substantially changed since the trial took place (new SCC or ABCA decision).
[4] *R* v *Palmer*, [1980] 1 SCR 759, 1979 CarswellBC 533; *R* v *Levesque*, 2000 SCC 47, 2000 CarswellQue 1994; *R* v *Meer*, 2015 ABCA 141, 2015 CarswellAlta 652; *R* v *Archer* (2005), 202 CCC (3d) 60, 2005 CarswellOnt 4964.

For civil or administrative appeals, adherence to the Alberta Rules of Court assists in ensuring your record is complete. For example, Rule 6.6(1), (2)(a), and (3), and Rule 6.11(1)(f) are designed to bar the usual fight about whether some previous affidavit was before the chambers judge now appealed. See also Rule 6.3(2)(c) and 6.3(3)(b) to the same effect. While these rules would also apply to applications in some criminal matters, they seldom come into play given that affidavit evidence is not often tendered except by agreement, and almost never cross-examined on.

A criminal appeal will be much more difficult if counsel in the court below did not build a proper record. There is nothing more frustrating than knowing that evidence exists to support your position on appeal, but you cannot refer to it because it was not adduced below, or at the very least, referred to on the record by agreement or admission. A failure to call relevant evidence, put full admissions on the record, or mark exhibits, can result in a matter being sent back for retrial. This just wastes more court time. Worse still, you may lose a *Charter* or constitutional argument because you failed to call the proper evidence or enough evidence on a particular point. Bad facts make bad law. In criminal matters, such mistakes can also have a large impact on other parts of the criminal justice system – such as on police powers and procedures. More thought at the beginning can save a great deal of heartache at the end. Proper research, complete *Charter* notices, and considered arguments, can all help determine or focus what evidence is necessary.

If you are running a jury trial, remember to ensure that draft jury instructions, discussed in the pre-charge conference, are filed as lettered exhibits. The usual practice seems to be to file them as "J" exhibits, to ensure they are kept away from the jury but still available on appeal. Likewise, if you have any sort of email exchange with the trial judge (jury or not), you should ensure that the exchange is marked as an exhibit when you return to court. Experienced judges will always do this, but if not, insist upon it. At the very least, keep a copy on your file for future use in an affidavit, if necessary.

Change of counsel is very common in criminal cases. New defence counsel often take over on appeal, and with the exception of summary conviction appeals, the Crown is almost always different when the matter makes its way to the Court of Appeal. A fulsome record is a benefit to everyone.

When referring to cases, always read the citation of the case into the record (except perhaps if you have filed written submissions or made the cases exhibits). It is incredibly helpful not to have to search for information when it could have been readily available in the record. It is particularly helpful in sentence appeals to know which cases the trial judge had before her when setting the appropriate sentencing range. It is surprising how many accused have the same last name (especially now that almost all judgments are reported).