

Criminal Appeals in the Court of Appeal

Prepared For: Legal Education Society of Alberta

Court of Appeal Practice

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CRIMINAL APPEALS IN THE COURT OF APPEAL

COMMENCING AN APPEAL

Whether to Appeal

There is no cost to file a criminal appeal to the Alberta Court of Appeal. However before doing so as counsel, give careful consideration to the likelihood of success. Once you file an appeal you are on record until granted leave to withdraw. Getting on record commits you to prosecuting the appeal with reasonable dispatch or the client risks it being dismissed for want of prosecution. The appeal record can be a significant cost. You should have the money in trust before you order it as you will be responsible personally for the debt.¹ Counsel have an ethical duty not to bring frivolous actions.²

Assess the possible merits of the appeal from a discussion with trial counsel, their opinion letter or a review of the judge's reasons. If you are not satisfied of the merits and need to obtain the lower court's reasons or if the client needs time to consider whether they can afford to appeal, one option is to assist the client in completing and filing the appeal in person. You can get on the record later with a letter to the Registrar's office.

If you are retained after the appeal has been filed, you are required to notify both the Registrar's office and the respondent.³ Problems can arise where the Registrar is not aware that a serving prisoner is represented for example.

How and When to Appeal

The appeal must be filed and served within 30 days of sentence being imposed or from the date of acquittal or from the finding of not criminally responsible or unfit to stand trial.⁴ The notice of appeal forms are on the Alberta Courts website. There are separate forms for self-represented appellants and for appeals with counsel. The Registrar's office requires 3 copies. A filed copy is to be served

¹ Law Society of Alberta, *Code of Conduct*, Chapter 6, Rule 6.01(2) "A lawyer must promptly meet financial obligations in relation to his or her practice..." and related commentary: "In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients..."

² For example, the *Code of Conduct*, Chapter 4, Rule 4.01(2)(b) prohibits the advocate from taking any step in the representation of the client that is clearly without merit.

³ *Rules of the Court of Appeal of Alberta as to Criminal Appeals*, Part 61 of the *Alberta Rules of Court*, SI/77-174 (hereafter "CAR") Rule 845(3) and *Consolidated Practice Direction* (hereafter "CPD") F.3.

⁴ Rule 843 CAR; *Court of Queen's Bench for Alberta Summary Conviction Rules* SI/ 2012-39, Rule 3(1).

on the respondent. Appeals may be from conviction, acquittal, sentence or both conviction and sentence.⁵

An extension of time within which to file/ serve the notice of appeal may be sought.⁶ The application is to a single judge and requires that the applicant:

- show an intention to appeal within the time period,
- account for the delay and demonstrate no prejudice to the other side,
- not have taken the benefits of the judgment appealed from and
- show a reasonable prospect of success on the appeal.⁷

A Crown applicant in particular must adequately account for delay or the extension will be refused.⁸

The notice of appeal asks whether the appellant, if successful, would like a new trial to be before a jury. If the appellant does not seek a jury re-trial it will not later be available.⁹ You may not be able to fully articulate all the grounds of appeal at this early stage. Consider a general ground to this effect: “such further grounds as may be apparent upon review of the trial transcript”. The relief sought flows from the grounds raised. Some may lead to an acquittal and others to a new trial. Both the grounds and the relief may change before the factum is filed. If you are applying for bail pending appeal (see below) the court will look at the grounds you’ve listed in the notice of appeal in assessing whether they are arguable.

The Court of Appeal has very broad powers, including error correcting powers that may render an appeal moot. For example, the court can amend an indictment where they determine there has been no prejudice.¹⁰ These powers should be considered as you craft your prayer for relief. They might also affect whether the appeal should be pursued.

Appeals from indictable matters go to the Court of Appeal. Matters tried north of Red Deer are filed in Edmonton. Others are filed in Calgary. Appeals from summary conviction matters go to the Court

⁵ ss. 675 – 676.1 *Criminal Code* (hereafter “C.C.”) speak to the right of appeal by convicted persons, the Attorney General and appeals of costs orders. Appeals by the Attorney General from acquittal or NCR verdicts are limited to questions of law alone: s. 676(1)(a) C.C. “Sentence” is defined broadly in s. 673 C.C. Appeals may also be from parole ineligibility orders: s. 675(2) – (2.3) and 676(4) - (6) C.C.

⁶ S. 678(2) C.C. and Rule 14.37(2)(c).

⁷ *Cairns v. Cairns* [1931] 3 WWR 335 (Alta S.C.A.D.)

⁸ *R. v. Finley*, 1995 ABCA 347; Note however that s. 678.1 C.C. allows an application for substitutional service where the respondent cannot be found after reasonable efforts.

⁹ S. 686(5) C.C. but note (5.1) which allows re-election thereafter with consent.

¹⁰ S. 683 C.C. and in particular (1)(g). Note also s. 686(1)(b) C.C. which allows the court to dismiss an appeal where there is no miscarriage of justice despite error or no prejudice from procedural irregularity. Powers on sentence appeal are discussed in s. 687 C.C.