Chambers and Practice Applications before the Court of Appeal

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Court of Appeal Practice

Presented by:

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> **[A]fter an appeal is filed, all manner of procedural, timing and other issues may materialize, giving rise to a variety of interlocutory, and occasionally final, appeal motions. Some of these motions … are heard by three Court of Appeal judges. But the vast majority of appeal motions are heard by one Court of Appeal judge in chambers.**
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> *Vysek v Nova Gas International Ltd*., 2002 ABCA 112 at para 3, 303 AR 209

BEFORE YOU START

1. STRATEGY

Before commencing an appeal, weigh the likelihood of success against the cost and delay associated with an appeal.

Likelihood of Success

The single most important thing to understand about appellate advocacy is that this Court will apply a sliding scale of deference to the decision[1] of the court or the administrative tribunal. An appeal is not a 're-do' of the trial. This Court uses only the written "record" from the proceeding that resulted in the decision.

Findings of fact and inferences of fact made by the court or the tribunal do not warrant appellate intervention unless "palpably" wrong. The facts as applied to the law will not warrant appellate intervention unless they are palpably wrong or the judge made an error in apprehending the law. Errors of law are scrutinized more closely, and are not accorded appellate court deference. (The topic of standard of review is enough for an entire seminar; for more information see The Honorable Roger P Kerans & Kim M. Willey*, Standards of Review Employed by Appellate Courts*, 2ed (Edmonton: Juriliber, 2006).

Delay

Not all appeals are 'as of right'. This creates delay in having an appeal heard. For example, most appeals from administrative tribunals require permission to appeal. Why? Legislators want the people they have appointed to govern an industry (e.g., energy), profession (e.g.,

[1] Decision in this paper includes an order or a judgment from the Court of Queen's Bench or a decision of a statutory tribunal. An appeal is not from a judge's "reasons for judgment": see generally *First City Trust v Dobler* (1989), 94 AR 106 at paras 93-95 (CA); *3464920 Canada Inc v Strother*, 2010 BCCA 328 at para 27.

lawyers), field (e.g., labour law) or other body (e.g., subdivision and development appeal board) to adjudicate disputes that arise in those contexts.

Similarly, appeals from some lower court proceedings also require permission to appeal. Commonly-encountered examples are pre-trial decisions directing an adjournment, time period or time limits; and any ruling made during a trial, when the appeal is brought before the trial is concluded.

The delay associated with the applications for permission to appeal is measured in months, not weeks. One recent example will illustrate this. On February 1, 2013 the Alberta Utilities Commission issued Decision 2013-025. Several utilities sought permission to appeal the decision. Another party sought permission to be added as an intervenor or respondent, which application was denied in October 2013. Permission to appeal was granted in November 2013. Two more applications to add respondents were heard in August and September 2014. The appeal was heard in January 2015, reasons were filed in June 2015. The appellants were unsuccessful, primarily because the Commission was accorded substantial deference by this Court. More than two years had elapsed since the Commission issued its decision.

2. PROCEDURE

Chambers practice at the Court of Appeal is governed by the *Alberta Rules of Court*, Alta Reg 124/2010, Division 4, titled "Applications". This division consists of rules 14.36 through 14.54. A copy of these rules is attached at **Appendix 1**.

Become familiar with these rules before completing your application; r 14.53(c) requires that the application "refer **precisely** to any applicable provision of an enactment or rule".

The party bringing the motion is the applicant, the opponent, the respondent. The applicant may have been (or be) a plaintiff, petitioner, defendant, or a joined party but not an intervener[2] in the tribunal of first instance. The applicant may be either the appellant or respondent in the appeal proper.

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2 [40] The general rule is that a person or body who is not a full party in the Court of Queen's Bench cannot appeal its decision to the Court of Appeal. See *dicta* in *Soc. des acadiens du N.-B. v. Association of Parents for Fairness etc.* [1986] 1 S.C.R. 549, 66 N.R. 173, 27 D.L.R. (4th) 406. One could multiply authority for that obvious proposition.
(footnote continued)

GETTING STARTED

1. RESOURCES

The Court's Case Management Officers ("CMO") has the authority to assist the Court with respect to any applications before the Court: r 14.36. A request for administrative directions from a CMO may be made informally: r 14.39.

Online resources are available on the Court's website: https://albertacourts.ca/court-of-appeal/publications-forms.

2. TIMING

As a general rule, unless an enactment specifies otherwise, appeals that **do not require permission** to appeal are started by filing a Notice of Appeal within **one month** after the date of the decision: r 14.8. Any applications made in the context of such an appeal must be filed 10 days before the application is scheduled to be heard: r 14.40(2). If the application must be made before a panel (three judges), the application must be filed 20 days before it is scheduled to be heard.

If permission is required to appeal, an application for permission to appeal starts the appeal. No Notice of Appeal may be filed until permission is granted: r 14.7(b). Such applications must comply with r 14.44, and are discussed in more detail below.

3. FORMAT AND ACCOMPANYING MATERIAL

Applications to a single appeal judge or a panel of the Court of Appeal must be in Form AP-3 (**Appendix 2**) and must state briefly the grounds for filing the application; identify the material or evidence intended to be relied on; refer precisely to any applicable provision of an enactment or rule; and state the remedy sought: r 14.53.

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[41] There is a narrow exception. A non-party can appeal if four conditions are satisfied: (a) it gets leave to do so from the Court of Appeal; (b) the case is equitable (such as a suit for an injunction or declaration); (c) it proves that it has a personal stake or right which will be adversely affected by the Queen's Bench judgment complained of; (d) and no one else is willing to appeal.

Brewer v Fraser Milner Casgrain LLP, 2008 ABCA 160, 432 AR 188