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Appellate Practice Points: Applications Before a Panel, Costs, and Judicial Dispute Resolution

Appellate Advocacy

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APPELLATE PRACTICE POINTS: APPLICATIONS BEFORE A PANEL, COSTS, AND JUDICIAL DISPUTE RESOLUTION

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PowerPoint – Appellate Seminar 2018

This paper deals with three issues:

1. Applications that are heard by three judge panels of the Court.
2. Costs of Appeals. This topic is not strictly about "applications", but it is not dealt with elsewhere in the Seminar.
3. Judicial Dispute Resolution on Appeal. This is another topic not otherwise dealt with.

APPLICATIONS HEARD BY THREE JUDGE PANELS

Single judges of the Court can deal with any matter "incidental to an appeal": R. 14.37(1). The modern trend is to refer virtually all applications to single judges or case management officers. Rule 14.38 specifies only a very limited number of applications must be heard by a full three judge panel:

(a) disposing of an appeal on the merits;

(b) introduction of fresh evidence;

(c) reopening or rearguing an appeal;

(d) giving effect to a previous decision of the Court;

(e) reconsidering prior precedential decisions.

The merits. The scope of what is "incidental to an appeal" is not clearly specified, but it is clear that dealing with an appeal "on the merits" is not included. Therefore, any application to allow or dismiss an appeal on the merits must be heard by a three judge panel.

Applications to dispose of appeals on the merits are rarely dealt with at a preliminary stage. There is not any "summary judgment" procedure at the appeal level, because it is generally just as easy to set the appeal down for oral argument. Rule 14.74 does contemplate summary dismissal of appeals in the absence of jurisdiction, if the appeal is moot, or if the appeal is an abuse of process. Sometimes the Court will hear applications to dismiss criminal appeals because they appear to have been abandoned. Apart from that, such applications are rare.

Note that applications to strike an appeal for failure to comply with a mandatory rule or order can be heard by a single judge: R. 14.37(2)(b).

Fresh evidence. Applications to introduce fresh evidence on appeal must be heard by a three judge panel, but these applications are invariably referred over to the panel that hears the appeal. They are not heard in advance in chambers.

The approach is set out in ***McDonald v Brookfield Asset Management Inc.***, 2016 ABCA 419 at paras. 6-7 and R. 14.45:

(a) copies of the proposed fresh evidence must be filed: R. 14.45(2);

(b) the application and the appeal are heard together;

(c) Counsel may refer to the fresh evidence during the oral argument, as if it was on the record;

(d) the Court will decide the fresh evidence application and the appeal together.

Re-opening an appeal. Permission to reopen an appeal is rarely granted, and is only possible prior to the entry of the formal judgment. This is not an opportunity to simply reargue the appeal and see if the panel might change its mind. The applicant must show some obvious flaw or error in the judgment, or an issue that was unexpectedly dealt with by the panel: ***Toliver v Koepke***, 2013 ABCA 390 at paras. 2-3, 566 AR 24.

These applications are always heard by the same panel that heard the appeal, and always without oral argument: ***Toliver v Koepke***, 2013 ABCA 398 at para. 2, 566 AR 27. Applications to reargue are discouraged, and they generally result in costs on a generous scale: ***Eagle Resources Ltd. v MacDonald***, 2002 ABCA 12, 96 Alta LR (3d) 12.

Reconsidering precedents. A party may not argue that a prior binding decision of the Court of Appeal should be overturned, unless permission has been granted in advance to reargue the point: R. 14.46, 14.72. This does not preclude distinguishing a precedent, or arguing that it has been overruled by the Supreme Court of Canada: Information note after R. 14.72.

The criteria for reopening a binding precedent, and the procedure, are summarized in ***R. v Arcand***, 2010 ABCA 363 at paras. 196-200, 40 Alta LR (5th) 199, 499 AR 1.

COSTS ON APPEAL

Costs should be dealt with in the Notice of Appeal. If the appeal is not only from the trial judgment, but also from the related disposition on costs, both should be mentioned. Because appeal periods now run from pronouncement, it will be increasingly common for an appeal to be filed from the trial judgment before a ruling on costs has been received. If a ruling on costs is received later, counsel for the appellant should consider amending the Notice of Appeal. If the appellant is seeking reversal of the trial judgment, it will often be sufficient to appeal from the trial judgment and "any subsequent ruling of costs prior to the hearing of this appeal".