

## Prince Edward Island Supreme Court - Appeal Division

### How to process a Civil Appeal

This guide is intended to help you prepare for your civil appeal. Courthouse staff cannot provide legal advice or complete your appeal on your behalf. For more information about civil appeals and procedures, please refer to the “**Rules of Civil Procedure**” and the “**Supreme Court Act**” both of which are available through this website.

A party wishing to appeal or participate in an appeal must prepare, obtain, serve, and file certain documents. These requirements are set forth in detail in Civil Procedure Rule 61.

### **DEFINITIONS**

The following is a brief explanation of some terms used in this guide:

- ! Appellant - the person appealing
- ! Respondent - the appellant’s opponent
- ! Motion - a request to the court for some order relating to an ongoing or proposed appeal
- ! Leave - Permission from the court
- ! Serving or service - refers to providing documents to an opponent
- ! Affidavit - is a sworn or affirmed written document containing evidence
- ! Appeal Book - is a booklet containing background documents
- ! Transcript - is the typed version of what various witnesses said in court
- ! Factum - is a booklet containing the outline of the arguments relating to the various grounds of appeal
- ! Registrar - refers to the registrar of the appeal division who is a court employee designated to receive and handle and issue documents on behalf of the Appeal Division
- ! Perfecting appeal - what an appellant has to do to get an appeal set for hearing.

### **WHO MAY APPEAL**

A party to a proceeding in a civil matter may appeal to the Appeal Division from a Trial Division judge’s order. Once an appeal is begun, the respondent may cross-appeal.

In all but a few cases the losing party in the Trial Division has an automatic right to appeal the trial judge’s order. However, if the order was made with the consent of the parties or where the proposed appeal only relates to costs that were in the discretion of the judge to order, there is no right of appeal until and unless permission has been obtained from the Appeal Division. Although there is a right of appeal, the Appeal Division, in order to prevent multiple appeals arising out of the same proceeding, may decline to hear the appeal until after the Trial Division judge has finally disposed of all claims for relief in the matter before him or her.

## **CASE UNDER STATUTE**

Most civil appeals to the Appeal Division are authorized under the ***Supreme Court Act*** but a few, such as a divorce appeal and workers compensation appeal, have special statutory requirements. If your case involves consideration of a particular statute, always check to see if there are special rules or procedures pertaining to your appeal.

## **LAWYER REQUIRED OR NOT**

You do not have to have a lawyer represent you at the court of appeal but you should seek legal advice where possible.

## **PRACTICAL CONSIDERATIONS**

Just because you can appeal does not mean you should. Appeals are labor intensive, costly, time consuming, and not easily won. If you lose, you will likely have to pay costs to the other side. These costs can be substantial.

Generally an appeal will not succeed unless the trial judge made either an error of law or based his decision on a finding of fact that is clearly unreasonable. The Appeal Division will not readily interfere with a trial judge's findings of fact or credibility.

Generally, appeals take about one year to process from the time of filing to the time a decision is filed.

A party contemplating an appeal should also bear in mind that the respondent may cross-appeal.

## **NEW EVIDENCE AT APPEAL LEVEL**

An appeal is generally based on the record in the Trial Division. The Appeal Division will not receive new evidence at the Appeal Division level unless the party wishing to introduce it is successful in obtaining an order from the Appeal Division allowing for the introduction of fresh evidence. The tests for obtaining such an order are quite stringent. A party wishing to introduce further evidence on appeal must make a motion to the panel [3 judges] hearing the appeal. Such a motion would have to comply with Civil Procedure Rule 37 and Rule 61.13.

## **LEAVE [PERMISSION] TO APPEAL**

If you require permission [leave] to appeal [consent orders or only costs], a notice of motion for leave to appeal must be served within 15 days of the order being appealed and filed within in the office of the registrar of the Appeal Division within five (5) days of service. If leave to appeal is granted, a notice of appeal must be filed within seven (7) days. A motion for leave to appeal must be made to a full panel of the Appeal Division [3 judges].

## **STARTING AN APPEAL**

Generally, an appeal is initiated by serving and filing one copy of a notice of appeal (Civil Procedure Form 61A) and one copy of an appellant's certificate respecting evidence (Civil Procedure Form 61C). Proof that copies of both the notice of appeal and the certificate respecting evidence have been served on the respondent(s) must be filed with the Appeal Division. Proof of service should be in the form of an affidavit of service (Civil Procedure Form 16B) as to when, where and how the documents were served or by an admission of the party to be served as to the service of the document to be filed.

The notice of appeal (Civil Procedure Form 61A) must state:

1. the relief sought; and
2. the grounds of appeal.

A party served with a notice of appeal may cross-appeal.

A notice of appeal or cross-appeal may be amended without permission before the appeal is perfected by serving a supplementary notice of appeal or cross-appeal (Civil Procedure Form 61F) on each of the parties on whom the notice was originally served.

No grounds other than those stated in the notice of appeal or cross-appeal or supplementary notice of appeal or cross-appeal may be relied on at the hearing of the appeal except with permission of the court.

## **FILING FEES**

There is no fee for filing a notice of appeal or any other document in the Appeal Division. However, obtaining the necessary transcripts of evidence taken in the Trial Division may be very expensive. The unsuccessful party at the appeal will also likely have to pay costs to the successful party.

## **SERVICE OF NOTICE OF APPEAL**

Usually a notice of appeal must be served on the respondent(s) within 30 days after the date of the **filing of the order** being appealed. However, in the case of an order made under the **Divorce Act**, the 30 days run from the date the order was **made** rather than the date it was filed.

The appellant then has 10 days from the day the respondent was served to file the notice of appeal in the office of the Appeal Division registrar.

If the time to file an appeal has expired, an appellant has two options:

- (a) to attempt to get consent from the respondent(s) for late service and/or filing of the notice of appeal (Civil Procedure Rule 3.02(4)); or

- (b) to bring a motion in the Appeal Division for an order extending the time for service and/or filing the notice of appeal.

A notice of motion (Civil Procedure Form 37A) must be prepared and a copy served on the respondent(s), and then filed in the Appeal Division with proof of service.

### **TRANSCRIPT REQUIREMENTS AND TIME LINES**

If a transcript of evidence heard in the Trial Division is necessary for the appeal, the appellant is required to file within 30 days after filing the notice of appeal proof that a transcript has been requested. However, it is important for the parties to carefully consider whether and how much transcription is necessary for the appeal because the court may impose costs sanctions where evidence is unnecessarily transcribed.

When the transcript is prepared, it is the duty of the transcriber to forthwith give written notice to the Appeal Division registrar and the parties.

Transcripts must be bound in red covers, and if there is more than one volume they must be clearly numbered.

### **PERFECTING THE APPEAL**

The appellant must perfect the appeal within 60 days of the filing of the notice of appeal in a case where no transcript is necessary or, in the case where a transcript is necessary, within 60 days of receiving notice that the evidence has been transcribed. Perfecting the appeal involves serving and filing the documents as set out in the next paragraph.

The appellant must file four (4) copies of the following documents with the Appeal Division registrar:

1. Appeal Book
2. Transcript
3. Factum.

All of these must be served on the respondent(s) before they are filed and proof of service must be filed with the Appeal Division registrar when the documents are presented for filing. Once the three documents have been filed, the appellant must file a Certificate of Perfection which states that the record, exhibits, appeal book, transcript, and appellant's factum have been filed. The Certificate of Perfection also has to set out the name, address and telephone number of the lawyer for every party to the appeal and for any person entitled to be heard on the appeal by statute or an order under Civil Procedure Rule 13.03. If a party does not have a lawyer, the Certificate of Perfection should set out the name, address for service and the telephone number of that party. When all of this is done, the appeal is said to be "perfected."

When an appeal has been "perfected" in accordance with the foregoing, the registrar can set it down for hearing.

The Appeal Book contains copies of all pertinent documents from or that were before the Trial Division judge from which the appeal has been taken.

### **APPEAL BOOK CONTENTS**

The Appeal Book must be bound front and back in buff colored covers:

- ! have consecutively numbered pages throughout;
- ! have a table of contents describing each document included;
- ! contain the following:
  - (a) notice of appeal and any notice of cross-appeal or supplementary notice of appeal or cross-appeal;
  - (b) the order appealed from;
  - (c) the reasons of the judge or tribunal appealed from;
  - (d) the pleadings or notice of application or any other document that initiated the proceedings or defines the issues in it;
  - (e) any affidavit evidence including exhibits attached thereto that the parties have not agreed to omit;
  - (f) all documentary exhibits the parties have not agreed to omit;
  - (h) the certificates of agreement respecting evidence;
  - (l) any order made respecting the conduct of the appeal;
  - (j) any other document relevant to the hearing of the appeal;
  - (k) a certificate of completeness (Civil Procedure Form 61H).

The registrar may refuse to accept an appeal book that does not comply with the Civil Procedure Rules or is not legible.

### **APPELLANT'S FACTUM**

The Appellant's Factum must be signed by the appellant or counsel or agent for the appellant and in paragraphs numbered consecutively throughout contain the following:

1. Part I, a statement identifying the appellant, the court appealed from, and the result in that court;
2. Part II, a concise summary of the relevant facts with such reference to the transcript of evidence by page and line as is necessary;
3. Part III, a statement of each issue raised, immediately followed by a concise argument with reference to the law and authorities relating to that issue.
4. Part IV, a statement of the order sought including any order for costs;
5. Schedule A, a list of the authorities referred to; and
6. Schedule B, containing the text of all relevant statutes, regulation and bylaw.

### **EXTENSION OF TIME**

If an appellant is not able to perfect the appeal on time they have two (2) options:

1. obtain consent of the other parties to extend the time; or
2. file a motion to be heard in the Appeal Division asking for an extension of

time to perfect the appeal.

### **RESPONDENT'S FACTUM**

The respondent must also file a factum. It must be served and filed within 30 days after service of the appeal book, transcript, and appellant's factum.

The respondent(s) must file with the Appeal Division registrar four (4) copies of their factum and proof of service on the other parties.

The respondent(s) factum must be bound front and back with a green cover and be signed by the respondent(s), their counsel or agent and shall consist of the following set out in consecutively numbered paragraphs:

1. Part I, a statement of the facts in the appellant's summary of relevant facts that the respondent accepts as correct and those with which the respondent disagrees and a concise statement of any additional facts relied on with such reference to the transcript by page and line as is necessary;
2. Part II, the position of the respondent with respect to each issue raised by the appellant followed by a concise statement of the related law and authorities;
3. Part III, a statement of any additional issues raised by the respondent followed by concise statement of the related law and authorities;
4. Part IV, a statement of the order sought by the respondent including any order as to costs;
5. Schedule A, a list of authorities;
6. Schedule B, texts of all relevant provisions of statutes, regulation, and bylaws not included in schedule B of the appellant's factum.

### **CROSS-APPEAL**

A respondent may cross-appeal by serving the appellant and any other interested parties with a notice of cross-appeal (Form 61E) which states the relief sought and the grounds for the cross-appeal. The notice of cross-appeal with proof of service must be filed with the Appeal Division registrar within ten (10) days after service.

A respondent who cross-appeals must prepare a factum as "appellant by cross-appeal" and either serve and file it with proof of service with, or incorporate it in, the respondent's factum.

The appellant must serve and file with proof of service as "respondent to the cross-appeal" within ten (10) days after service of the respondent's factum.

### **DISCONTINUANCE/ABANDONMENT OF APPEAL/CROSS-APPEAL**

A party may discontinue or abandon their appeal or cross appeal by serving and filing a notice of abandonment (Civil Procedure Form 61K).

A party is deemed to have abandoned their appeal or cross-appeal if they:

- ! do not file the notice of appeal; or
- ! do not request a transcript; or
- ! do not perfect the appeal; or
- ! file a factum within the times required by Civil Procedure Rule 61; or
- ! if they fail to provide security for costs when ordered to do so by the Appeal Division or by a Judge of the Appeal Division under Civil Procedure Rule 61.14.

When an appeal or cross-appeal is deemed abandoned, the registrar shall send a notice to the appellant and the respondent.

When an appeal or cross-appeal is abandoned or deemed abandoned, the appeal is at an end and the other side is entitled to costs unless a judge of the Appeal Division orders otherwise.

Where an appellant abandons or is deemed to have abandoned an appeal, the respondent shall serve notice of that on the respondent. The respondent may within 15 days thereafter serve on the appellant and file with proof of service a notice of election to proceed with the cross-appeal (Civil Procedure Form 61L). If the respondent does not do so, the cross-appeal shall be deemed abandoned without costs unless a judge of the Appeal Division orders otherwise.

### **SINGLE APPEAL COURT JUDGE OR PANEL OF THREE**

Most motions (e.g., extensions of time, relief from compliance with rules governing appeal books, or transcripts) in the Appeal Division, except motions for leave to appeal or to receive new evidence, should be heard by a single judge. Civil Procedure Rule 37 applies to motions to a single judge in the Appeal Division. However, the judge hearing the motion may refer the motion to the full panel. Furthermore, where the motion is decided by a single judge, the losing party may apply to the full panel [3 judges] to have the decision set aside or varied.