

A Checklist for Preparing the Appeal

A Clerk's Reference

You have received instructions from your lawyer to prepare an Appeal to a recent decision on one of your files. The first question you must ask yourself is; what are we appealing? There are several types of Appeals that are permitted, although a Plaintiff does not have an automatic right to an Appeal.

Section 6 of the *Courts of Justice Act* permits the following Appeals to the Ontario Court of Appeal:

- A final order of a judge of the Superior Court of Justice, except an Order for a single payment of not more than \$25,000.00 exclusive of costs and except for an order for periodic payments that amounts to no more than \$25,000.00 exclusive of costs;
- An Order of the Divisional Court, on a question that is not a question of fact alone, but only with leave from the Court of Appeal;
- A certificate of assessment of costs issued in the Court of Appeal, in respect of which an objection was served under the rules of the Court.

Firstly, you must determine if you will require Leave to Appeal. If your matter was in the Divisional Court, it requires leave to appeal. **For the purposes of this Paper, we are going to assume that leave to appeal is not required and that your instructions are to appeal the decision of a Judge of the *Ontario* Superior Court of Justice.**

Rule 61 of the *Rules of Civil Procedure* regulates the procedures on appeals to an appellate court. The Rules of Civil Procedure also set out a handy chart under “Charts” that will help walk you through the time lines.

You will be Appealing the decision of a Judge of the Superior Court of Justice following the five week Jury Trial that was completed this summer. **The very first step you must do is to make note of and to DIARIZE the following dates:**

TASK	EVENT
Make Note of	Date of Order or Judgment you will be Appealing
Diarize	30 days from the date of the Order or Judgment (remember to count weekends and holidays as it is over 5 days)
Make Note of	Date you ordered the Transcripts
Make Note of	Date Notice of Appeal & Certificate Respecting Evidence is filed with the Court
Diarize	10 days after date Notice of Appeal and Certificate are served which is the date that the documents must be filed with proof of service.
Diarize	30 days after filing of Appeal, to file proof that you have ordered the transcripts of the Oral Evidence.
Diarize	If no transcript of oral evidence is required, 30 days after filing Notice of Appeal to perfect Appeal
Make Note of	Date that notice received that the transcript of oral evidence has been transcribed
Diarize	60 days from date that notice is received advising you that the transcript of oral evidence has been transcribed
Diarize	Date that the Appeal must be PERFECTED by (30 or 60 days) depending on your transcript circumstances.

The second step that is imperative is to **order the transcript of the oral evidence that you intend to file and rely upon at the hearing of the Appeal, immediately.**

Overview of Steps to the Appeal

A **Notice of Appeal** (Form 61A) and an **Appellant's Certificate Respecting Evidence** (form 61C) must be **served** upon the Respondent, (and any other party whose interest may be affected by the appeal) within **thirty (30) days** of the Order of the Superior Court of Justice, Rule 61.04(1). There is no requirement to serve the Notice of Appeal and Certificate upon a Defendant who was noted in default or upon a Respondent that has not delivered a Notice of Appearance, unless the Respondent was heard at the Hearing with leave.

The Notice of Appeal must contain, in consecutively numbered paragraphs the reason for Order or Judgment being appealed, and the reasons for the Appeal.

One copy of the Notice of Appeal and Certificate of Evidence must be filed with an Affidavit of Service within **10 days of service**. The fee for filing the Notice of Appeal is \$259.00.

Once the Notice of Appeal & Certificate of Evidence has been filed, the appeal must be **perfected**. In order to perfect the Appeal, you must file the following documents, with the Registrar of the Ontario Court of Appeal, along with proof of service:

- If a transcript of oral evidence is necessary for the Appeal, you must file, within **thirty (30) days** of filing the Notice of Appeal, etc., proof that you have ordered the transcript of all oral evidence;

- If no transcript of oral evidence is required, then you must perfect the Appeal within **(30) thirty days** after filing the Notice of Appeal;
- If a transcript of oral evidence is required, then the Appeal must be perfected within **sixty (60) days** after receiving notice that the transcript of evidence has been transcribed.

Rule 61.09 explains that an appeal is **perfected** when the following documents are filed with the Registrar:-

- a) Three copies of the Appeal Book and three copies of the Compendium;
- b) One copy of an Exhibit Book;
- c) Three copies of the Factum; together with an electronic copy which is emailed.
- d) One typed or printed copy of the transcript of evidence (if there is one), together with an electronic version of the transcript if available.

All of these documents must be served on all parties to the action before they are filed with proof of service. Once the Appeal Book and Compendium, the Exhibit Book, the transcript of evidence (if there is one) and your Factum have been filed, you must then file a **Certificate of Perfection** which is the final step in perfecting the Appeal. The fee for perfection of the appeal is \$201.00.

Appeal Book and Compendium

Rule 61.10 governs the **Appeal Book and Compendium**. These documents must be bound front and back in buff covers. The pages of the Appeal Book and Compendium must be consecutively numbered, with numbered tabs arranged in the following order:

1. An Table of Contents describing each document by its nature and date;
2. A copy of the Notice of Appeal (or Notice of Cross-Appeal depending on the circumstances)
3. A copy of the Order or decision that you are appealing, as issued and entered;
4. A copy of the Reasons For Judgment;
5. Any other Orders and Reasons for Judgment that affect the matter;
6. A copy of the pleadings that initiated the action, whether that be a Statement of Claim or a Notice of Application;
7. A copy of any excerpts from the transcript of evidence that are referred to in your factum that you will be relying upon;
8. A copy of any of the exhibits that are referred to in your Factum;
9. A copy of any other documents that are referred to in your Factum;
10. A copy of the certificates or agreements respecting evidence to be presented;
11. A copy of any order made in respect of the conduct of the appeal;
12. And A **Certificate of Completeness of Appeal Book and Compendium** (Form 61H) signed by the lawyer or on the lawyer's behalf, stating that the contents of the Appeal Book and Compendium are complete and legible.

Exhibit Book

Rule 61.10.1 of the *Rules* discusses the **Exhibit Book**. The Exhibit Book is also bound in buff card stock, as it accompanies the Compendium (Rule 4.07) The pages of the Exhibit Book must be consecutively numbered, with numbered tabs arranged in the following order:

1. A table of contents describing each exhibit by its nature, date and exhibit number or letter;
2. Any affidavit evidence, which would include exhibits, that the parties have not agreed to omit; and
3. The transcripts of evidence used on a Motion or Application that the parties have agreed to include;
4. A copy of each exhibit filed at a Hearing or marked at an Examination for Discovery that counsel have agreed to include, all of which are to be arranged in order by date (or, if there are documents with common characteristics, grouped accordingly in order by date) and not by exhibit number.

Appellant's Factum

The **Factum** (Rule 61.11) must be bound front and back in white covers (Rule 4.07 (5)). It must be signed by the lawyer or someone he or she has specifically authorized. The text can be printed, typewritten, written or reproduced legibly, with double spaces between the lines and a margin of approximately 40 millimeters on the left hand side. The type should be in 12 point Times New Roman. A Factum cannot be filed if it exceeds 30 pages unless a Judge has given permission to file a longer Factum. It must also consist of the following:

1. **Part I**, should contain a statement identifying who your client is as the Appellant and the Court you are appealing from and a statement of the outcome of the Order;

2. **Part II** should contain a concise general statement describing the nature of your case and the issues;
3. **Part III**, should contain a concise summary of the facts relevant to the issues on the Appeal, with references to the transcripts of evidence and the exhibits as you deem necessary;
4. **Part IV**, should contain a brief statement of each issue that is to be raised, and a concise argument with reference to the law and authorities relating to that issue;
5. **Part V**, should contain a statement of the Order that the Court will be asked to make, including any order for costs;
6. A Certificate stating that an Order under subrule 61.09(2) (filing of an original record and exhibits) has been obtained or is not required, a estimate of how much time, (in hours or parts of an hour) is required for the oral argument not including reply, and
 - **Schedule A**, containing a list of the authorities referred to; and
 - **Schedule B**, containing the text of all relevant portions of statutes, regulations and by-laws.

Once all of the above documents are served and filed the Appeal is ready to be perfected – **within 30 days after filing the Notice of Appeal** and if a transcript of oral evidence is required, then the appeal must be perfected within **sixty (60) days** after receiving notice that the transcript of evidence has been transcribed.

Certificate of Perfection

The Appeal is perfected by filing a **Certificate of Perfection**. The Certificate of Perfection must state the following:

1. That the Appeal Book and Compendium, Exhibit Book, Transcripts (if any) and Factum have been served and filed with the Court, and
2. List the name, address, telephone number of the parties lawyers, for every party to the appeal and any person entitled by statute or by an order under rule 13.03 (intervention in appeal) to be heard on the Appeal.

Appellant's Book of Authorities

It is of great assistance to the Court (and to your lawyer) for you to prepare and file a casebook or a Book of Authorities which contains photocopies of the legal or other authorities to which you intend to rely and refer to at the hearing of the appeal, although it is not mandatory.

The Appellant's Book of Authorities must be bound front and back in white covers. It should include a tab for each case, with an index. The particular passages in the cases to which counsel wish to refer should be highlighted, usually using a yellow highlighter. The book of authorities should include only the cases to which counsel have referred in the Factum filed on the appeal.

The Book of Authorities should be filed, if possible, with the Factum, but if not possible, then not later than Monday of the week preceding the hearing of the appeal. (You can also file a joint casebook if all parties agree to do so.)

Consequences of not Perfecting the Appeal

If you do not file proof that you have ordered the transcript necessary for your appeal within thirty (30) days after filing your Notice of Appeal (if there is a transcript) or , If

you do not perfect the appeal within sixty (60) days after receiving notice that the transcripts are completed, the Respondent may bring a Motion before for dismissal of your Appeal for delay. If the Respondent's Motion is granted the Appeal is dismissed with costs fixed at \$750.00!

If the Appeal is one for which no transcript of oral evidence is required and you do not perfect the appeal within thirty 30 days, either the Respondent can bring a Motion to dismiss for delay or the Registrar also has the power to dismiss the Appeal for delay in accordance with Rule 61.13.

Once you have completed all of the above, and have perfected your Appeal, you can breathe a sigh of a relief for a job well done. There is a lot of information that must be compiled, organized and prepared in a short period of time. After you have filed your Notice of Appeal and Certificate Respecting Evidence, you should start to put all of the other information together rather than waiting for the transcripts to be available. If all of the other information is almost ready to go, once the transcripts are available, the finishing touches can be put on the Factum, etc.

Once the Appeal is perfected, it is placed on a List of Appeals that are ready for hearing. Certain Appeals are automatically expedited, for instance, an appeal from a Summary Judgment.

Helpful Information

The Appeals Scheduling Unit can be reached via fax at 416-327-6256. You should advise the Appeals Scheduling Unit if you have a matter that requires expediting (ie Summary Judgment appeal).

The Court of Appeal encourages the parties to file the Factums or Transcripts via e-mail. The documents must still be submitted within the time prescribed by the Rules, but can be submitted, via attachment to an email to COA.E-file@jus.gov.on.ca. Be sure that you **clearly identify** the court file number in the email re-line.

All Court Forms referred to in this paper can be found at www.ontariocourtforms.on.ca.

All documents are to be filed at the Ontario Court of Appeal office. The address for the Ontario Court of Appeal is

Court of Appeal for Ontario
Osgoode Hall
130 Queen Street West
Toronto, Ontario
M5H 2N5

Telephone number: (416) 327-5020

Facsimile number: (416) 327-5032

Everything set out in this paper is a guideline only, and the writer strongly suggests that you refer to the *Rules of Civil Procedure* for clarification and for review of applicable practice directions, which supplement the *Rules of Civil Procedure* and provide guidance and direction.

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