The CONTINUING LEGAL EDUCATION
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Practice and Advocacy in The Supreme Court of Canada

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P R A C T I C E A N D A D V O C A C Y I N T H E S U P R E M E C O U R T O F C A N A D A

THE NEW RULES

These materials were prepared by Brian A. Crane, Q.C. and Bernard C. Hofley, Q.C. both of Ottawa, Ont. for Continuing Legal Education, September, 1983.

C O N T E N T S

CONTENTS, continued

P R A C T I C E A N D A D V O C A C Y I N T H E S U P R E M E C O U R T O F C A N A D A

APPEALS TO SUPREME COURT OF CANADA: AN OVERVIEW

These materials were prepared by Brian A. Crane, Q.C. of Ottawa, Ont. for Continuing Legal Education, September, 1983.

APPEALS TO SUPREME COURT OF CANADA: AN OVERVIEW

At the outset it may be useful to outline the jurisdiction of the Supreme Court of Canada and the steps that are involved in taking an appeal. The Supreme Court is a statutory court and its jurisdiction must be found in the Supreme Court Act and in the Rules. The Act was last amended by Statutes of Canada 1976-77 and a revised edition of the Rules was issued at the beginning of 1983.

1. JURISDICTION

The civil jurisdiction of the Supreme Court of Canada is simple. With minor exceptions the court has jurisdiction to hear appeals from any judgment, final or interlocutory, of the court of last resort in a province. The Supreme Court Act gives the court its general jurisdiction to hear civil appeals but jurisdiction is also conferred under particular federal statutes such as the Federal Court Act, the Divorce Act and the Bankruptcy Act. Leave to appeal is necessary in almost every case and may be granted by the Supreme Court under section 41 or by a provincial court of appeal under section 38. There is a narrow class of appeals under section 39 (the so called per saltum appeals), which may be taken directly from a provincial superior court if the parties consent and if leave is granted. This provision is used in cases where it is deemed expeditious by both parties to go directly to the Supreme Court of Canada. In practice, the per saltum appeal has fallen into disuse.

Criminal appeals are governed by the Criminal Code and the Supreme Court Act. There is a right of appeal de plano (i.e., without leave) in cases where a conviction has been affirmed and a judge of the court of appeal has dissented on a question of law (Code, s. 618). The Crown has a similar right to appeal if there is a dissent in law (Code, s. 618, s. 620). There is also a right of appeal de plano on any question of law where an accused has been acquitted of an indictable offence and the acquittal has been set aside by the court of appeal. Also, a person found not guilty by reason of insanity and whose acquittal on that ground is affirmed by the court of appeal or against whom a verdict of guilty has been entered by the court of appeal may appeal to the Supreme Court (section 620). Finally, section 719(3) gives a right of appeal where the issuance of a writ of habeas corpus has been refused.

On all other matters involving acquittals or convictions of indictable offences it is necessary to obtain leave to appeal from the Supreme Court of Canada on a question of law pursuant to sections 618, 620 and 621 of the Criminal Code. Leave to appeal with respect to questions of law in summary conviction matters or matters involving prerogative writs in criminal matters may be obtained pursuant to section 41(3) of the Supreme Court Act.

At one time it was held that the Supreme Court did not have jurisdiction to grant leave to appeal in matters relating to sentence. It has now been held that the court has jurisdiction to hear appeals in sentence cases, although as a matter of practice leave will not be granted except in cases which raise an important question of law or jurisdiction. See Hill v. R., [1977] 1 S.C.R. 827 and The Queen v. Gardiner (1982), 43 N.R. 361.

It is important to note that not all judgments arise out of judicial proceedings. Section 41 only applies to judgments of the highest court of final resort in a province. Thus, there is no right of appeal from administrative tribunals that are not courts. Along the same line, decisions which do not arise from contested proceedings may not be appealed. There is no right

of appeal where a court of appeal has rendered an advisory opinion to an arbitrator, where a court would not have jurisdiction had it not been for the consent of the parties, and where a court could be considered curia designata in the particular case.

> J.R. Theberge, Ltée. v. Les Syndicat National des Employées de Aluminum d'Arvida Inc., [1966] S.C.R. 378. (administrative tribunal)
>
> London v. Holeproof Hosery Co. of Canada Ltd., [1933] S.C.R. 349 (advisory opinion)
>
> R. v. Norththumberland Ferries, [1945] S.C.R. 548 (curia designata)

If you believe that the Supreme Court of Canada has no jurisdiction to hear an appeal, then a motion should be made before the court (5 judges) to "quash" the appeal. Such motions are to be made promptly. Rule 28 states that a respondent should apply to quash within 60 days of the filing of the notice of appeal. At the present time, motions to quash are often made in criminal cases on the ground that the appeal does not raise a question of law as required by the Code. Even if a motion to quash is not made, the court on the hearing of an appeal may, on its own motion, raise a question of jurisdiction; R. v. Warner, [1976] S.C.R. 144.

II. TIME LIMITS

From a practical point of view the most important question in Supreme Court practice relates to the time limits for launching an appeal and the consequences of a failure to come within such limits. The following rules apply:

1. Applications for leave to appeal under the Supreme Court Act must be brought on for hearing before the Court (not just filed in court) within 90 days of the judgment of the court of appeal. This is provided by sections 41(2) and 64 of the Supreme Court Act. Under jurisprudence which has been consistently applied both in Ottawa and in the provincial courts of appeal, time runs not from the taking out of a formal order (where this is necessary) but from the issuance or pronouncement of the judgment of the court of appeal, whichever occurs first. This point is frequently misunderstood in practice because of the ambiguous wording of section 64 which refers to "the signing or entry or pronouncement of the judgment appealed from". However, the jurisprudence is clear and time runs from the date counsel received the judgment, either orally or by release of the judgment by the court of appeal, and not from the signing or entry if that occurs later (which it almost invariably does). In computing time, the months of July and August are excluded by virtue of section 64.

> Blundon v. Storm (1970), 10 D.L.R. (3d) 576
> O'Sullivan v. Harty (1885), 13 S.C.R. 431
> Attorney General v. Dunlop (1900), 7 B.C.R. 312

2. There are a very few special provisions under which leave to appeal must be obtained within a shorter time limit. For example,

(a) Under the Divorce Act it is necessary to bring on an application for leave to appeal within 30 days of the judgment appealed from. Time may be extended, but only if an application is made for extension of time within the said 30 days. Needless to say, this guillotine provision is extremely important. See section 18 of the Divorce Act R.S.C. 1970, c. D-8 and Massicotte v. Boutin, [1969] S.C.R. 818.

(b) Under the Bankruptcy Act it is necessary to bring on an application for leave to appeal within 60 days of the judgment appealed from, unless the time is extended. An application to extend time, if required, must be made on 14 days' notice. See Bankruptcy Rules, CRC c.368, rules 52 and 53.

3. If it is necessary for the parties to return to the court of appeal, either by direction of the court of appeal or to deal with a point that is necessary for clarification of the judgment, then it cannot be said that the court of appeal has fully pronounced on the case and it has been held that time would run from the time of the subsequent judgment of the court of appeal dealing with the supplementary point, provided that the supplementary point is a matter of substance which would affect an appeal to the Supreme Court of Canada. Each case must be looked at on its merits to see whether this special exception applies. See Elgin v. Roberts (1905), 36 S.C.R. 27; Martley v. Carson (1886), 13 S.C.R. 439; O'Sullivan v. Harty (1885), 13 S.C.R. 431.

4. Criminal appeals under the Criminal Code have stricter time limits. Leave to appeal must be obtained within 21 days of the judgment of the court of appeal. Because of the inevitable delays in bringing on an application for leave to appeal it is impossible to comply with these time limits. It is therefore necessary to obtain an extension of time from a judge in chambers or from the court hearing the application in almost every criminal case.

5. Rule 26 provides that the notice of appeal must be served and filed within 30 days of leave being granted. In addition, security for costs must be deposited within this time in order to perfect a civil appeal. Under section 622 of the Criminal Code, the notice of appeal must be served within 15 days of the judgment of the court of appeal in cases where leave is not required or within 15 days of leave being granted. It should be noted that it is the practice to set out in the notice of appeal the question of law on which a judge of the court of appeal has dissented in appeals under section 618.

6. A criminal appeal may be deemed abandoned for delay. The Criminal Code provides under section 623 that an appeal that is not brought on for hearing at the session following the session of the court that was in progress at the time of the judgment of the court of appeal shall be deemed to be abandoned unless otherwise ordered by the court or a judge. This rule has been interpreted to mean that the appeal must be inscribed for hearing before the Supreme Court of Canada within the relevant session. An order deeming the appeal not abandoned may be obtained on motion with an explanatory affidavit. (See Practice Direction, October 1980).

7. There is no automatic abandonment with respect to civil appeals under the Supreme Court Act. However, under Rule 36 a respondent may expedite the hearing by moving to dismiss an appeal if the case on appeal is not filed in time, and similarly a motion to dismiss under Rule 42 may be made if the factum is not filed in time. More importantly, under amended Rule 45 a respondent may move to dismiss an appeal if it is not inscribed for hearing within one year after the filing of the notice of appeal. The Registrar may, on his own motion, advise the parties that the appeal may be dismissed on the application of the Registrar to a Judge as an abandoned appeal if it is not so inscribed within 60 days after such notice. The general jurisdiction to dismiss for delay is also found in section 76 of the Supreme Court Act which provides that a respondent may move to dismiss an appeal in cases where an appellant

> unduly delays to prosecute his appeal or fails to bring on the appeal to be heard at the first session of the Supreme Court after the appeal is ripe for hearing.

It would appear that an appeal is ripe for hearing after the case has been printed and filed and the appellant's factum has been filed.

III. STEPS IN AN APPEAL

After the appeal has been perfected by the filing of a notice of appeal and, in a civil case, by depositing security, the appellant must arrange for the printing of the evidence and the documents (the appeal case), draft and file the appellant's factum and inscribe the appeal for hearing. Once an appeal is inscribed it is placed on a list and set down for hearing by the court. At the beginning of the term, a reasonable prediction may be made as to the week in which an appeal is likely to come on for hearing. In addition, important appeals are often given special dates by the Chief Justice. It is always possible to obtain a special date for an early hearing for reasons of urgency.

A party may appear personally or by counsel, but in either case should have an address for service in the National Capital Region. Rule 15(3) requires each party to appoint a local agent unless dispensed with by the Registrar. Local agents attend to service, filing, generally advise on practice and procedure, and usually attend on interlocutory motions, taxation of costs and pronouncement of judgment.

The following are the main steps to be followed in an appeal:

1. Appeal Case. The rules require that the pleadings, the evidence, the exhibits, the judgments appealed from and the agreement as to the contents of the appeal case be printed in Supreme Court of Canada form and filed in court eight weeks before the session at which the appeal is to be heard. Rule 33 provides a detailed explanation of the preparation of the case on appeal. Counsel for both parties must agree on the contents of the appeal case. If a question arises as to whether or not a document should be in the appeal case, the dispute is to be settled by a judge of the court of appeal pursuant to section 67 of the Supreme Court Act. The Registrar has jurisdiction to make special orders providing for the dispensing of the printing of exhibits or evidence and the parties may agree to omit parts of the evidence or exhibits from the case if they wish. The usual procedure is to dispense with printing rather than to omit documents from the case altogether.

2. Factum. After the appellant has served and filed his appeal case, the brief of argument or factum must be filed on or before six weeks preceeding the session at which the appeal is to be heard. The respondent's factum is to be filed two weeks before the opening of the session, although this rule is frequently not observed. Rules 37-41 govern the preparation of factums. Books of authorities are useful and should be filed in complex cases (Rule 37(2)) and are a taxable disbursement. Factums longer than 40 pages (excluding appendices) risk rejection by the court - see Practice Direction, April 1983.

3. Inscription. An appellant may inscribe an appeal for hearing after the appellant's appeal case and factum have been filed. Generally speaking, appeals are inscribed for hearing on "inscription day" which is the last day available for inscribing appeals before the session of the court on which an appeal is to be heard (two weeks before the opening of the session).

Although the rules provide that the appeal case and factums must be filed within eight and six weeks prior to the opening of a session respectively, the practice has grown up for the Registrar to permit inscription of appeals provided the appeal case and the appellant's factum

have been filed by inscription day. It is customary to obtain an order from the Registrar permitting inscriptions notwithstanding late filings. If an appeal is not inscribed as noted above, then it still may be inscribed by special leave of the Chief Justice although such motions are rarely granted after inscription day, unless there is great urgency.

4. Hearing. After inscription, the appellant is required to serve a notice of hearing. The Registrar's office advises the local agent of the likely date for the hearing, and advises as changes are made to the court's calendar. Generally, counsel may expect several weeks advance notice of the date for the hearing of the appeal.

IV. INTERVENTIONS

The court has always had the power to grant status to a third party to appear as an intervenor in an appeal. If a party has been an intervenor or mis en cause in the court below, no application is necessary: Rule 18(2) of the Supreme Court Rules. However, if such a party does not wish to be considered to be an intervenor, he must so indicate within 30 days of the filing of the notice of appeal.

The Attorney General of Canada or of a province may appear in a constitutional case as an intervenor as of right and does so merely by the filing of a notice. Any other interested party or organization must make application before a judge in chambers for leave to intervene. Applications to intervene are rarely granted in criminal cases but are frequently allowed in civil cases of public importance.

Generally speaking, the court does not favour interventions by a large number of interested organizations in a particular case since many interventions add to the length of argument. In a recent Indian case, leave to intervene was granted to the National Indian Brotherhood but was refused to a number of regional or provincial Indian organizations (Guerin v. The Queen). Leave to intervene has also been refused where an intervenor's interest in an appeal was that he had a similar case. Although there is little jurisprudence, the principle of the cases appears to be that an intervention is welcomed if the intervener will provide the court with fresh information or a fresh perspective on an important constitutional or public issue.

Norcan Limited v. Lebrock, [1969] S.C.R. 665 (Bondsman granted leave to intervene where respondent unrepresented)

Law Society of Upper Canada v. Skapinker (unreported, 1983) (Federation of Law Societies of Canada granted leave to intervene; private litigant with similar case pending granted leave to intervene).

Stella Bliss v. A.G. Canada (February 20, 1978) (Application by Canadian Civil Liberties Association refused in sexual equality case).

Ontario Human Rights Commission v. Simpsons Sears (January 5, 1983) (leave granted to Saskatchewan, Alberta, Manitoba and Canadian Human Rights Commissions where statutes at issue similar).

Gay Alliance v. The Vancouver Sun (May 26, 1978) (Application by British Columbia Civil Liberties Association refused).

Paulette v. The Queen (September 20, 1976) (Application by A.G. Alberta with similar case pending refused).

McNeil v. Nova Scotia Board of Censors (March 25, 1975) (Canadian Civil Liberties Association granted leave to intervene in case involving standing of a citizen).

V. NEW EVIDENCE

Under section 67 of the Supreme Court Act, the court may allow a party to adduce new evidence in the Supreme Court of Canada. The general principle is that leave to adduce new evidence will not be granted if the evidence was available at trial and the party, by reasonable diligence, could have discovered such evidence. However, newly discovered evidence or evidence which has arisen since the trial may be admitted in the Supreme Court of Canada. The jurisdiction is used most sparingly.

The following are examples:

Brown v. Dean, [1910] A.C. 373 (H.L.) (Affidavit evidence of the cause of illness admitted)

Varette v. Sainsbury, [1928] S.C.R. 72 (The court refused to admit evidence of the date of sale)

Gootson v. The King, [1948] 4 D.L.R. 33 (S.C.C.) (further evidence to show the defendant was subject to epileptic fits refused)

Dormuth et al. v. Untereiner et al., [1964] S.C.R. 123 (the court refused to admit evidence of the plaintiff's remarriage)

McMartin v. The Queen, [1964] S.C.R. 484 (principles to be appealed in a criminal case)

Chartrand v. The Queen (unreported, June 26, 1975) (tape recording of charge to jury admitted)

Aetna Financial Services Ltd. v. Feigelman (unreported, May 17, 1983) (recent evidence of company's financial position admitted in Mareva injunction case).

VI. STAY OF EXECUTION AND STAY OF PROCEEDINGS

The general rule is that under section 70 of the Supreme Court Act, execution is stayed in the original cause when the appeal has been perfected. There are a number of exceptions. In fact, the exceptions are more important than the general rule. Thus, where a judgment directs the delivery of personal property, execution is not stayed until the property is brought into court. Where the judgment directs the execution of a conveyance, execution is not stayed until the instrument has been executed and deposited in the Supreme Court. Where the judgment directs the sale or delivery of property, execution is not stayed until security has been given to the satisfaction of the court appealed from or a judge thereof. Most importantly, where the judgment appealed from directs the payment of money, either as a debt or for damages or costs, execution is not stayed until the appellant has given security to the satisfaction of the court appealed from or a judge thereof. Thus, in the usual case where there is a money judgment, execution may be levied by the successful respondent unless a motion is made to the court of appeal or to a judge thereof for an appropriate stay of proceedings. After the Supreme Court of Canada has pronounced judgment, you should take execution on a judgment in the court below.

Although there is no specific provision of the Supreme Court Act providing for stays of proceedings, and earlier authorities doubted that the court had jurisdiction, the court has issued stays or has continued injunctions in several recent cases. Rule 27 now provides:

> Any party against whom judgment has been given, or an order made by the court or any other court, may apply to the court for a stay of execution or other relief against such judgment or order, and the court may give such relief upon such terms as may be just.

The following are instances in which stays of proceedings have been granted: Racine v. Woods (May 16, 1983) (stay of court of appeal order allowing access in adoption matter); A.G. Canada v. Silk (November 2, 1981) (stay of order denying U.I.C. benefits to fishermen); Labatt Breweries of Canada v. A.G. Canada, [1980] 1 S.C.R. 594 (stay of order regarding seizure and removal from market of light beer).

VII. JUDGMENTS AND REHEARINGS

The court may grant any relief that is within the power of the court of appeal to grant. It sometimes appears that a respondent is not satisfied with the judgment given by the court of appeal. Thus, if there is an appeal by an appellant as to the quantum of damages, the respondent may wish the damages to be increased and the question arises whether leave to appeal is necessary. The matter is covered by Rule 29 which provides that if a respondent intends to ask the court to vary the judgment of the court of appeal, he shall give notice of cross-appeal within 30 days of the service of the notice of appeal and leave is therefore not necessary. The Rule also provides that the omission to give such a notice will not limit the jurisdiction of the court to treat the whole case as open but may, in a proper case, be grounds for an adjournment.

Rule 29(2) provides that if a respondent intends to appeal a part of a judgment which has not been made the subject of an appeal by the appellant, then in such a case the respondent must obtain leave. Thus, if an appellant has leave to appeal the quantum of damage but not the issue of liability and the respondent wishes to re-open liability, then the respondent must seek leave on this part of the case.

It should be noted, however, that these rules apply only to a situation where the judgment of the court of appeal may be varied. They have no application to the arguments that may be raised by a respondent. The court has consistently held in both civil and criminal matters that it is open to a respondent to advance any argument in support of his position and not merely those arguments which are related to the appellants points of law. The only restriction on this rule is the principle that a party cannot raise an entirely new argument which has not been raised below and in relation to which it might have been necessary to adduce evidence at trial. See Brown v. Dean, [1910] A.C. 373; Dormuth et al. v. Untereiner et al., [1964] S.C.R. 122; The S.S. Tordenskjold (1909), 41 S.C.R. 154; Dairy Foods, Inc. v. Co-op Agricole de Granby, [1976] 2 S.C.R. 651.

The Supreme Court of Canada has a unique power to rehear an appeal before or after judgment has been pronounced. The power to reopen an appeal and to call back counsel for reargument has been exercised by the court on its own motion in a few cases. See Boucher v. The King, [1951] S.C.R. 265; Sykes v. Fraser, [1974] S.C.R. 526; Manitoba v. Air Canada, [1980] 2 S.C.R. 303. It usually occurs as a result of a question being raised among the judges which was not canvassed by counsel on the appeal. The matter is covered by Rule 51 which gives the court jurisdiction to order a rehearing either on application or on its motion. A motion for a rehearing is made in writing supported by a memorandum of argument and must be made prior to the expiry of 30 clear days from the pronouncement of the judgment. If the application is not

made within the time limit, of course, the court still has jurisdiction on its own motion to order a rehearing. Apart from clerical errors, any change in a judgment, even with respect to costs, must be made by means of an application for a rehearing. If granted, the matter is set down for reargument and supplementary factums are filed. Finally, there can be no rehearing of motions for leave to appeal: Mymryk v. The Queen, [1980] 1 S.C.R. 348; Rule 51(12).