

Responding to an Appeal – Civil Cases

This guidebook has been prepared for people who are respondents to appeals in civil cases in the British Columbia Court of Appeal. It is a companion document to the guidebook, *How to Conduct an Appeal - Civil Cases*.

This guidebook does not explain the law. The Court of Appeal Registry staff (and this guidebook) cannot provide legal advice or complete the documents to be filed by you.

For more detailed information about responding to a civil appeal, please see the British Columbia *Court of Appeal Act* (the *Act*), the *Court of Appeal Civil Rules 2002* (the *Rules*) and the *Civil Practice Directives*. All of these are available for free on the British Columbia Court of Appeal's website: www.courts.gov.bc.ca.

For more information about criminal appeals, please see the Legal Services Society's booklets, *How to appeal your conviction* and *How to appeal your sentence*. These are available on the Legal Services Society website: www.lss.bc.ca.

This is one of two guidebooks prepared for people who are going to the Court of Appeal. Please see the companion booklet, *How to Conduct an Appeal - Civil Cases*.

These guidebooks and more information about dealing with the court system are available on the Self-Help section of the Law Courts Education Society website: www.lawcourtsed.ca/self_help/index.cfm.

Also see the Supreme Court Self-Help Information Centre series of self-help resources about going to Supreme Court. www.supremecourtselfhelp.bc.ca.

Note: this guidebook is written for people who are not trained in the law. The information in this guidebook does not have any legal force or effect. In case anything said in this guidebook differs from what is said in the *Act*, the *Rules*, or the *Practice Directives*, the *Act*, *Rules* and *Practice Directives* govern.

Please Note:

There is a ***Glossary of Terms*** contained in this package for your reference.

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Responding to an Appeal - Civil Cases

Introduction

1. What is the Court of Appeal for British Columbia?

The Court of Appeal is the province's highest court. Only a few British Columbia cases are heard each year by the Supreme Court of Canada, so for all practical purposes the Court of Appeal is the court of last resort for British Columbia. Its decisions are binding on all lower courts in British Columbia. Through its judgments, the Court of Appeal clarifies the law and develops consistent legal policy.

2. Does the Court of Appeal rehear cases?

An appeal differs significantly from a trial and is **not** a rehearing of a case. There are no witnesses or juries. In an appeal, the person whose case was not successful in the lower court argues that the trial judge made a mistake; for example, the judge may have applied the wrong law to the facts of the case. The appellant to the Court of Appeal must identify the mistake he or she believes the judge made.

The appeal court does not change the trial judge's decision just because the Court of Appeal judges disagree with it. The lower court is entitled to hear the evidence and come to its own decision. The appeal court may only change that decision if the lower court made a mistake as to the law or significantly misunderstood the evidence. It is important to note that not all errors in law will affect or change the outcome of a case on appeal.

3. What types of cases does the Court of Appeal deal with?

The Court of Appeal hears appeals from orders made by the B.C. Provincial and Supreme Courts and by B.C. administrative tribunals (for example, the B.C. Human Rights Tribunal).

4. Are there other types of cases heard by the Court of Appeal?

The Court of Appeal also hears appeals in accordance with provincial and federal statutes (Acts) and their rules (for example, appeals under the federal *Bankruptcy and Insolvency Act* or the provincial *Labour Relations Code*). Please see those statutes for the procedure to appeal to the Court of Appeal. The appeal period for certain types of decisions or orders (such as those of provincial boards and commissions) may be shorter than 30 days so it is very important to check the appropriate statute as it applies to your case.

5. May anyone commence an appeal?

Only people who were parties in the case in the lower court may appeal.

6. What is leave to appeal?

In some circumstances, a judge must give permission to bring an appeal. Leave to appeal is permission to appeal.

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7. What do I do if I have been served with an application for leave to appeal?

The appellant must serve you with an application for leave to appeal and a motion book. If you intend to participate in the appeal, you must serve the reply book (Form 5 of the *Rules*) at least one business day before the date the leave application will be heard in court.

8. May I present an argument against the granting of leave to appeal?

Yes. The application for leave to appeal will be heard by a chambers judge (a Court of Appeal judge in a courtroom). The appellant will present reasons why leave should be granted and then, as respondent, you will be able to present reasons why leave should not be granted. The appellant will then have an opportunity to reply.

9. What happens if leave is granted?

The appeal process will continue.

10. What happens if leave is refused?

The appellant may apply for a panel of three judges to review the decision of the chambers judge. The panel may grant leave (which means that the appeal will continue) or dismiss the application, which means the appeal is over.

11. Can I apply for review of a decision granting leave?

No, a respondent cannot apply for a review of a decision granting leave (see s. 9(6) of the *Act*).

12. What do I do if I have been served with a notice of appeal?

If you intend to participate in the appeal, within 10 days of receiving the notice of appeal, you must file a **Notice of Appearance** (Form 2 of the *Rules*) at the Court of Appeal Registry. You must also serve a copy of the filed notice of appearance on the appellant within 10 days of receiving the notice of appeal.

13. What happens if I don't file a notice of appearance?

If you do not file a notice of appearance, you are presumed to take no position on the appeal (you don't care about what happens) and the parties do not have to serve any further documents on you (see Rule 14).

14. What if the time to file the notice of appearance has expired?

You may apply for an order extending the time for filing your notice of appearance. Your application is heard by a judge of the Court of Appeal in chambers. You must file a notice of appearance at the Court of Appeal Registry and serve a copy of the filed notice upon the appellant. There is a fee, payable at the time of filing (see the attached Schedule of Fees). Note that the Court of Appeal Registry is open Monday through Friday. It is closed on holidays.

15. May I amend a notice of appeal?

You may amend a notice of appeal at any time if you and the appellant agree, or if a judge gives leave (permission) to amend. A notice of appeal may also be amended without leave at any time up to 14 days before an appeal is set to be heard, if the factums are not yet filed.

16. I have been served with an appellant's factum. Now what?

Within 30 days of receiving the appellant's factum, you must file the respondent's factum and transcript extracts (see Rules 21(2) and 27 (2)). There is a 30-page limit for the factum. You must file four copies of your factum. Three copies are for use by the court and one copy is for the appellant. (You need to file more than four copies if there is more than one appellant.) You must serve one filed copy of each document on each party to the appeal.

17. What goes into the respondent's factum?

The respondent's factum must be bound with green covers and cannot exceed 30 pages, unless a chambers judge makes an order. It must comply with Form 10 of the *Rules* and, aside from the index, all pages must be printed only on the left hand side of the page. The factum contains the following:

1. Index;
2. Chronology of the relevant dates in the litigation;
3. Opening statement (a concise statement supporting the decision of the court or tribunal appealed from);
4. Part 1 - Statement of Facts (a concise statement of the history of the proceedings and the facts of the case);

5. Part 2 - Issues on Appeal (a concise statement that sets out clearly and particularly in what respect the judgment or order appealed from is correct);
6. Part 3 - Argument (concise outline setting out the points of law or facts to be discussed, with reference to the volume and page numbers of the appeal record or the appeal book or to the volume and page and line numbers of the transcript, and the authorities in support of each point. If a statute is referred to, it may be briefly reproduced in this part, but it must be reproduced as an appendix to the factum or as a separate volume with the covers the same colour as the factum and filed at the same time as the factum);
7. Part 4 - Nature of Order Sought (concise statement of the nature of the order that is sought (i.e. that the appeal be dismissed with costs); and
8. List of Authorities - (following any appendices, authorities referred to in the factum must be listed in alphabetical order and, after each authority, the page or paragraph in the factum at which the authority is referred to must be cited).

18. What are transcript extracts?

Extracts are portions of the evidence at trial referred to in the factum. Each volume of extracts must be bound in a red cover, contain an index and comply with Form 13 of the *Rules*. The appellant must provide you with a hard copy of the transcript and if you make a request, a disk. You can excerpt the portions of the transcript you think are relevant from the disk.

19. What goes into the appeal book?

Each volume of an appeal book must be bound with a blue cover and should contain only the evidence - including exhibits, affidavits and other documents - necessary to support your position that the appeal should be dismissed (Form 12). As the respondent, your appeal book should not contain any documents that are included in the appellant's appeal book.

You may decide that the appellant has included all relevant evidence in the appellant's appeal book and therefore you do not have to file one yourself.

20. What happens if all parties agree on the contents of the appeal book?

A joint appeal book may be filed if all parties agree (Rule 26(3)).

21. What do I do if I also want to appeal the same order as the appellant?

If you want to appeal from the same order as the appellant, within 15 days of receiving a notice of appeal or the order granting leave to appeal, you must file a notice of cross-appeal (Form 8) and serve a copy of the filed notice of cross-appeal on the appellant and any other respondents.

22. What documents are required for a cross-appeal?

In addition to the notice of cross-appeal, you must file a factum, which is divided into two parts. The first part is the factum as respondent on the appeal and the second part is the factum on cross-

appeal. There is a 40-page limit for this factum. You must file the factum and serve it on the appellant within 30 days of receiving the filed copy of the appellant's factum. The appellant will file an answering factum, a copy of which will be served on you.

23. Is there a fee for filing a cross-appeal?

No, there is no charge for filing a cross-appeal.

24. What if the cross-appeal includes parties other than those in the notice of appeal?

You must include them in the "service" of your notice and these parties must file a notice of appearance if they intend to respond to the cross-appeal.

25. What if the time to file the cross-appeal has expired?

You may bring an application before a judge of the Court of Appeal in chambers for an order extending the time for filing the cross-appeal. You must file a notice of motion and pay a filing fee at the court registry (see the Schedule of Fees). You must serve a filed copy of the notice of motion on the appellant.

26. May I amend the notice of cross-appeal?

You may amend the notice of cross-appeal before your factum is filed or after, with permission of the court.

27. What happens if my filing deadline falls on the week-end?

You must file your document on the next business day.

28. Do I have to have a lawyer?

An appeal to the Court of Appeal takes a considerable amount of time, effort and money. Paperwork must be done correctly, documents must be prepared and “served” on the relevant parties, and appearances made before the Court of Appeal. Your interests are best served by hiring a lawyer; however, you can represent yourself in almost all circumstances. A corporation must be represented by a lawyer unless the court orders otherwise.

If you are entitled to represent yourself in the Court of Appeal, remember that court staff are not permitted or trained to provide legal advice. A list of lawyers who may assist people with their appeals on a “pro bono” (free) basis is available through Pro Bono Law B.C. and we recommend that you contact the program to find out if you can receive assistance with your appeal or aspects of it: 604-893-8932 or www.probononet.bc.ca

29. Is it expensive to conduct an appeal?

In addition to legal fees, there are filing fees, the cost of transcripts and hearing room costs (payable by the appellant). See the attached schedule of fees.

30. Are there fees I must pay? What if I cannot afford to pay the fees?

You pay fees when you file the respondent's book of authorities unless

you and the appellant file a joint book of authorities. You pay fees when you file a notice of motion.

If you cannot afford to pay for the fees, you can apply for “indigent status.” (“Indigent” means poor or needy). If a judge of the Court of Appeal declares that you are indigent, you will be exempt from paying the filing fees at the Court of Appeal Registry.

You apply for indigent status by filing a notice of motion (Form 6 of the *Rules*) and an affidavit. The Court of Appeal Registry staff will give you these documents to complete.

In the affidavit, you must provide information about your current household income and expenses, your education level and your workplace skills. If the judge allows the application and grants you indigent status, you will not have to pay the filing fees. If the judge denies your application for indigent status, you will have to pay the filing fees when you file your documents.

31. What are the methods of payment for fees?

You can pay by cash, cheque or money order.

32. Are there forms that I can use as a guide when preparing my documents?

Yes, they are available on the website at www.courts.gov.bc.ca. Click on the Court of Appeal tab and then the link to *Court of Appeal, Act, Rules & Practice Directives*. The forms are under Appendix A and set out the specific requirements for each document. The forms are updated as requirements change.

33. As the respondent, may I introduce new evidence?

If you want to rely on additional or new evidence, you must file an application to admit new evidence, and an affidavit setting out the new evidence and why it should be considered on the appeal. The appellant may object and will be given an opportunity to explain why. The panel hearing the appeal will decide if they will consider the new evidence.

34. What happens to the order of the lower court when an appeal is started?

The order remains in effect, unless a judge grants a “stay” (postponement) of its effect. Only judges of the B.C. Supreme Court may grant a stay of an order made in that court under the **Family Relations Act**. For other orders, you may apply to a judge of the Court of Appeal in chambers who may order that all or part of the proceedings from the lower court be “stayed” until the appeal is decided.

Hearing the Appeal

35. When is the appeal ready for hearing?

The appellant usually files a **Certificate of Readiness** (Form 14) immediately after filing his or her factum, which means that the appeal is ready. There is a fee for filing the certificate of readiness.

However, if the appellant does not file a certificate of readiness, you may file the certificate of readiness after filing your factum. In that case, you will have to pay the fee to file the certificate of readiness.

36. When will the appeal be heard?

Once a certificate of readiness is filed, the party filing the certificate (the “filing party” - either the appellant or respondent) must contact the Court of Appeal Registry to obtain a hearing date. Once the hearing date is fixed, the filing party must file with the Court of Appeal Registry a confirmation letter setting out the date. The filing party must serve the confirmation letter on all other parties.

37. What happens during the appeal hearing?

A panel of three judges hears the appeal. An appeal hearing is not a new trial; there are no witnesses or juries in the Court of Appeal. The Court of Appeal will consider new evidence only in rare cases.

Before the hearing, the appeal judges review the reasons for the decision of the judge or tribunal appealed from, some or all of the evidence presented in the lower court, and the written arguments set out in the factums.

At the hearing, the judges hear oral arguments from the parties. These arguments are about the law and how it is to be applied to the evidence in the case (as outlined in the factums). The appellant goes first; then it's your turn. The appellant has the right to reply, but not to repeat anything already said. The appellant may only address issues you raised that he or she did not address during the appellant's initial submissions. The judges will usually ask questions as the appeal is presented.

38. What should I call a Court of Appeal judge?

Their title is “Justice” (the Honourable Madam Justice Smith or the Honourable

Mr. Justice Smith). In court, they are addressed as “My Lord” or “My Lady.”

39. What should I wear when I go to court?

The justices, lawyers and court clerks wear black gowns for appeals. Other people should wear a suit or proper business attire. In chambers hearings, business attire is appropriate for everyone.

40. May I observe other appeal hearings to help me prepare?

Court proceedings are open to the public. In some very exceptional cases, matters are heard “in camera” and no member of the public is allowed to attend and the courtroom doors are locked.

Following the Appeal

41. What happens after the appeal hearing?

Sometimes, judges will give the decision without hearing from the respondent at all. Other times, the judges will give the decision orally after both sides have argued. Quite often the judges will “reserve” their decision. This means that they will take time to think about the arguments and provide written reasons later, in the form of a judgment.

The Registry will contact you before the judgment is released so that you will know where and when you can pick it up.

Once the judgment is given, the parties must prepare an order. This order is filed

with the Court of Appeal Registry. Sometimes the judges will give directions about who should prepare the order.

42. What happens after the appeal if I win/lose?

The Court of Appeal may dismiss the appeal (which means that it confirms the decision of the lower court); allow the appeal and order a new trial; or allow the appeal and change the order of the lower court. The decision is final unless the Supreme Court of Canada agrees to hear the case.

43. What are remedies?

The appellant's notice of appeal sets out the remedy (relief) the appellant is seeking from the court. You must respond to the appellant's statement of the remedy sought, explaining the remedy you want, such as dismissing the appeal and upholding the decision of the lower court.

44. What are costs?

It is common for the successful party to recover a portion of the expenses incurred. If the appeal is dismissed, the appellant will usually have to pay your costs. Whether to award costs is in the discretion of the judges. If the appeal is allowed, you will usually have to pay the appellant's costs. Usually, although not always, the scale of costs will be as set out in the *Court of Appeal Tariff*, which is part of the *Rules*.

45. When are costs payable?

Generally, costs become payable following the judgment. The guidebook, *Costs in the Supreme Court*, has useful information about paying costs. It is online at www.supremecourtselphelp.bc.ca/

46. How is a judgment enforced?

Once a final judgment is obtained, different steps can be taken, including investigation, seizure and sale of the debtor's real and personal property, and garnishment of wages.

47. How do I protect my claim if there are lots of judgment creditors?

A judgment creditor has no priority status. If the person who owes you money has few or no assets, you may find it impossible to collect the money owing under the judgment.

If the Appeal Doesn't Proceed

48. May I appeal a Court of Appeal decision?

In some cases an appeal may be taken to the Supreme Court of Canada in Ottawa. The rules for appealing to the Supreme Court of Canada may be found through the Internet. The Supreme Court of Canada website is www.scc-csc.gc.ca.

49. What if the appellant decides not to continue the appeal?

An appellant who abandons the appeal must file a **Notice of Abandonment** (Form 22 of the *Rules*) in the Court of Appeal Registry. Where an appeal is abandoned, the appeal is at an end. However, as the respondent you are entitled to the costs of the abandoned appeal, unless a judge of the Court of Appeal orders otherwise.

50. What happens if the parties reach a settlement before the appeal is heard but after documents have been filed?

A **Notice of Settlement** (Form 22) must be signed by all parties and filed with the Registry.

51. What does it mean if the appeal is inactive?

If a certificate of readiness is not filed within one year of filing the appeal, the appeal will become inactive.

The appellant and respondent may sign a consent order removing the appeal from the inactive list (Form 27). If a consent order is not filed, an application may be brought before a judge in chambers for an order removing the appeal from the inactive list.

The appeal will be dismissed for want of prosecution if 180 days pass after it becomes inactive.

For more information contact the British Columbia Court of Appeal

The Law Courts
800 Smithe Street
Vancouver, British Columbia
V6Z 2E1

Telephone number: (604) 660-2468
Facsimile number: (604) 660-1951

Hours Open to the Public:

Monday to Friday
Open at 9:00 a.m.
Closed at 4:00 p.m.

Glossary of Some Commonly Used Terms

Affidavit:

A statement written down and sworn or affirmed to be true. An affidavit must be signed before a notary public or commissioner of oaths.

Appeal:

Examination by a higher court of the decision of a lower court or tribunal. The higher court may affirm, vary or reverse the original decision.

Appellant:

The person or party bringing the appeal to court.

Appeal Book:

Filed copies of the lower court exhibits and affidavits, bound in a volume.

Appeal Record:

Filed copies of the pleadings, order and reasons for judgment of the lower court, and the notice of appeal, bound in a volume.

Appeal allowed:

The Court has decided in favour of the appellant (the party bringing the appeal).

Appeal dismissed:

The Court has decided in favour of the respondent (the party against whom the appeal is brought) and against the appellant.

Application:

See Motion (or vice versa – we generally used “application”).

Application (Motion) for Leave to Appeal:

The procedure for requesting the Court’s permission to hear an appeal.

Book of Authorities:

A list and photocopies of past legal cases that are relevant to the issues and are referred to in the factum.

Chambers:

A matter heard in a courtroom before a single judge of the Court of Appeal.

Civil Suit:

A “civil” suit (case) is a court proceeding which involves legal issues between individuals, corporations or governments. (These are non-criminal issues.) A civil case is started when there is disagreement on a legal matter.

Civil Rules:

Rules governing practices or procedures before the court that involve individuals, organizations or governments. Generally the Rules do not refer to criminal cases.

Constitutional Questions Act:

If an appeal relates to the constitutional validity of any statute, this Act provides that the party contesting the validity of the statute must notify the Attorney General of Canada or the province of the appeal hearing so that the Attorney General (or a representative) may present argument to the Court of Appeal about the case.

Costs:

Money spent to carry out or defend an appeal which a party is allowed to recover. The unsuccessful party is usually ordered to pay part of the expenses associated with the successful party's litigation.

Cross-Appeal:

An appeal filed by a respondent where the respondent wants to appeal something from the judgment of the lower court and the appellant has already commenced an appeal.

Entering an Order:

Once an order has been pronounced, a document (order) is prepared that sets out the decision of the court or judge. This order must be filed with the Registry and distributed in accordance with the Rules.

Exhibits:

Evidence that was relied upon by the lower court or tribunal.

Factum:

A bound volume filed with the Court that is made up of the following parts: index, chronology, opening statement, statement of facts, issues on appeal, argument, and nature of the order sought.

Indigent Status:

Status granted by a judge in chambers to individuals who cannot afford to pay the fees required to file court documents, where the judge determines the appeal has some merit. Individuals who cannot afford to pay court fees may apply to the court for this status.

Judgment:

Final decision by the Court in a legal proceeding. The terms "judgment" and "decision" are interchangeable. A judgment may be written or given orally in court.

Leave:

Permission of a judge in chambers or a panel of judges to take a step, in certain types of cases, to proceed with the appeal (for example, "leave of the court" must be obtained to commence an appeal).

Motion:

An application (request) to the Court for an order or judgment which occurs during the course of a court proceeding. Motions are very common occurrences and can be made for many purposes, including asking for extensions of time to file an appeal and seeking permission to argue an appeal. A motion must be brought by notice and include an affidavit giving details of the motion.

Motion (Application) for Leave to Appeal:

The procedure for requesting the Court's permission to hear an appeal.

Notice of Appeal:

The form completed by the appellant to start the appeal process.

Notice of Motion:

The form completed by the appellant or respondent to begin a process in chambers.

Order:

A decision of a Court or other decision-making body. It may or may not be the final outcome of the matter.

Panel:

The panel of three or five judges of the Court who will hear the appeal.

Party or Parties:

The party who brings the proceeding to the Court of Appeal is called the appellant. The appellant appeals the decision of a lower court or tribunal. The party against whom an appeal is brought and who must respond to the appellant's case is called the respondent.

Pronouncement of an Order:

When the Court gives a judgment (decision), it is referred to as being pronounced and becomes binding at that time. An appeal must be launched within 30 days of the date of pronouncement, whether an order has been filed with the Registry or not.

Quorum:

The panel of appeal judges before whom a case is/was heard.

Record of Proceedings:

The recording by the court staff of all appearances and/or proceedings and their outcomes before the Court.

Remedy:

Remedies can be monetary, declaratory or injunctions. Monetary remedies (damages) are most common. The Court of Appeal "remedies" include affirming or reversing the original decision, varying in total or in part the judgment of the lower court, and in some cases, ordering a new trial.

Reserved Judgment:

When a judge or judges do not immediately give their decision, but issue a written decision at a later date.

Respondent:

The person who is in response to, or in opposition to the proceeding, following specific rules set out in the Rules (or any other applicable statute).

Serve or Service:

The delivery of a document, which has been filed with the court, to another party to the proceeding. The Rules set out procedures that must be followed when serving documents, for example, the manner of the service (e.g. priority mail, personal by hand) and the time frame within which service should occur.

Statute:

A law or Act enacted or passed into law by Parliament or a legislature.

Stay:

To postpone the judgment or order pending a decision.

Transcript:

A typed record of the oral proceedings before the court or tribunal under appeal, including the evidence given by the witnesses who testified at the trial.

Tribunal:

The name given to a decision-making body that has been established by statute which is not a court; for example the Labour Relations Board or the Workers' Compensation Board.

Schedule of Fees

It costs money to conduct an appeal and the fees change periodically. For example, as of July 2006 the following fees were in place as set out in items 1-6 of *Appendix C, Schedule 1* of the *Supreme Court Rules*, B.C. Reg. 10/96 as amended.

You should check Appendix C to determine the current fees.

- 1 For filing a notice of appeal or a notice of an application for leave to appeal
\$291
- 2 For filing an application to be heard by a Justice of the Court of Appeal excluding an application for leave to appeal
\$104
- 3 For filing an application to be heard by 3 or more justices if the application is not returnable to the hearing of the appeal
\$208
- 4 For filing a certificate of readiness
\$291
- 5 For filing a book of authorities, other than a book of authorities filed jointly by 2 or more counsel of record
\$52
- 6 For each half day spent in whole or in part on the hearing of an appeal, unless the hearing is for judgment only, payable by the party who files the certificate of readiness, unless the court orders payment by another party
\$156

In addition, fees are payable for taking or swearing an affidavit for use in court, for searching a record, for photocopying and faxes or obtaining certification of documents and for a Registrar's hearing (see items 18, 19, and 25-30 of *Appendix C, Schedule 1*).

This guidebook is part of a series, Guidebooks for Representing Yourself in the Court of Appeal, produced by:



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