

## PRINCE EDWARD ISLAND COURT OF APPEAL



### How to Commence and Respond to a Civil Appeal

#### INTRODUCTION

This information is intended to explain the procedure in a civil appeal in the Prince Edward Island Court of Appeal. The first section of this guide contains questions and answers about the appeal process. This is followed by more specific information about procedures, information about certain specialized appeals, and a glossary of terms used in appeals.

For more information about appeals and procedures, please refer to Rule 61 of the **“Rules of Civil Procedure.”**

This information is not intended to give legal advice. Courthouse staff cannot provide legal advice, conduct or respond to an appeal on your behalf.

Incorporated companies require representation by legal counsel. A person may choose to have legal representation. In any event, it is advisable to seek legal advice.

#### **What is the Prince Edward Island Court of Appeal?**

The Prince Edward Island Court of Appeal is Prince Edward Island’s highest court. It sits in Charlottetown at the Sir Louis Henry Davies Law Courts at 42 Water Street.

The Court of Appeal hears appeals from decisions of the Supreme Court of Prince Edward Island, certain decisions of the Provincial Court, and administrative tribunal decisions.

The Court of Appeal has the power to intervene only if the judge in the lower court (Supreme Court or Provincial Court) or the administrative tribunal has made what is called an error of law or has misunderstood a critical fact which affected the outcome of the case.

An appeal is not an opportunity to re-try a case. Rather, the Court of Appeal reviews the reasons for judgment and the record of the proceedings (which means the pleadings and the evidence before the trial judge or administrative tribunal). The Court of Appeal cannot consider or determine issues other than those raised by the Notice of Appeal or by the submissions made in the court or administrative tribunal being appealed from.

The Court of Appeal can dismiss an appeal (confirming the decision of the lower court); allow the appeal and order a new trial; or allow the appeal and vary the order of the lower court.

### **Who may appeal?**

Generally, only parties to a proceeding in a civil matter may appeal to the Prince Edward Island Court of Appeal from an order of the Supreme Court of Prince Edward Island. Once an appeal has been commenced, the respondent may cross-appeal.

### **What costs are involved in an appeal?**

In addition to legal fees, there is the cost of producing the trial transcript. This may be an expensive cost. An unsuccessful party at the appeal will likely have to pay, in addition to their own costs, a contribution toward the costs of the successful party. There are also filing fees for certain documents. Please refer to the [Court Fees Act](#) for a list of fees and the specific documents involved. Also refer to the [Fees Regulations](#) and [Waiver Regulations](#).

### **How to start an appeal?**

Generally, an appeal is initiated by serving and filing one copy of a Notice of Appeal ([Form 61A](#)), and one copy of an Appellant's Certificate Respecting Evidence ([Form 61C](#)). Proof that copies of both the Notice of Appeal and the Certificate Respecting Evidence have been served on the respondent must be filed with the Court of Appeal. Proof of service should be in the form of an affidavit of service ([Form 61B](#)) as to when, where, and how the documents were served.

The Notice of Appeal must state:

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

A respondent 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 ([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.

### **When is Leave to Appeal required?**

In most civil cases leave to appeal is not required with the exception being orders respecting awards of costs or orders issued by the Court on the consent of parties.

### **What is the time period for starting an 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. The appellant then has 10 days from the day the respondent was served to file the notice of appeal in the office of the Court of Appeal registrar.

However, in the case of an order made under the ***Divorce Act***, the 30 days run after the day on which the order was made rather than the date it was filed.

### **What are the options if the time to appeal has expired?**

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 Court of Appeal for an order extending the time for service and/or filing the notice of appeal.

There are some exceptions to these provisions, most notably the ***Workers Compensation Act*** which does not permit the court to extend the time.

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

### **What are the transcript requirements and time lines?**

An appeal is based on the transcript of the evidence and therefore a transcript is usually required. If a transcript of evidence heard before the tribunal, in the Provincial Court or Supreme Court of Prince Edward Island 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, transcript is necessary for the appeal because the court may impose costs sanctions where evidence is unnecessarily transcribed.

Transcripts of evidence are prepared by certified court transcribers.

When the transcript is prepared, it is the duty of the court transcriber to forthwith give written notice to the Court of Appeal Registrar and the parties.

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

### **How to perfect an appeal**

The appellant must perfect the appeal within 30 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 Court of Appeal 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 Court of Appeal 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 anyone granted leave to intervene by 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 this is all completed and filed, the appeal is said to be "perfected."

When an appeal has been "perfected" in this manner, the Registrar can set it down for hearing.

### **What is contained in an Appeal Book?**

The Appeal Book contains copies of all pertinent documents that were before the tribunal, Provincial Court or the Supreme Court judge from which the appeal has been taken.

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;
  - (i) 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.

### **What information is required to be contained in the Appellant's Factum?**

The Appellant's Factum must be signed by the appellant or counsel or agent for the appellant. In paragraphs numbered consecutively throughout, the factum must 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; it is usual practice to file and exchange a copy of the authorities with the references relied upon highlighted. A list of authorities which are commonly cited and not required by the court to be copied and provided can be obtained from the Court's website or from the Registrar of the Court of Appeal.
6. Schedule B, containing the text of all relevant statutes, regulation and bylaw.

### **Can an extension of time be obtained if an appellant is unable to perfect the appeal on 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 Court of Appeal asking for an extension of time to perfect the appeal.

## **RESPONDING TO A NOTICE OF APPEAL**

### **What information is required to be contained in the 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.

A respondent must file with the Court of Appeal 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; it is usual practice to file and exchange a copy of the authorities with the references relied upon highlighted. A list of authorities which are commonly cited and not required by the court to be copied and provided can be obtained from the Court's website or from the Registrar of the Court of Appeal.
6. Schedule B, texts of all relevant provisions of statutes, regulation, and bylaws not included in schedule B of the appellant's factum.

### **How to 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 Court of Appeal 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.

### **How an appeal or cross-appeal may be discontinued or become abandoned?**

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
- do not file a factum within the times required by Civil Procedure [Rule 61](#); or
- fail to provide security for costs when ordered to do so by the Court of Appeal or by a judge of the Court of Appeal 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 Court of Appeal orders otherwise.

Where an appellant abandons or is deemed to have abandoned an appeal, the appellant shall serve notice of that on the respondent. If the appeal is deemed abandoned by the Registrar, the Registrar shall send a Notice of Abandonment or Deemed Abandonment to all parties. 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 Court of Appeal orders otherwise.

### **Motions in the Court of Appeal**

Most motions (e.g., extension of time, relief from compliance with rules governing appeal books, or transcripts) in the Court of Appeal are heard by a single judge. Motions for leave to appeal or to receive new evidence are heard by the panel which will hear the appeal. Civil Procedure [Rule 37](#) applies to motions to a single judge in the Court of Appeal.

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 unsuccessful party may apply to a full panel [three judges] to have the decision set aside or varied.

### **Can new evidence be introduced at the appeal hearing?**

The Court of Appeal will not receive new evidence unless the party seeking to introduce it is successful in obtaining an order from the Court of Appeal allowing for the introduction of fresh evidence. A party wishing to introduce further evidence on appeal must make a motion to the panel (three judges) hearing the appeal. The tests for obtaining an order are quite stringent. A motion to introduce new evidence must be in compliance with Civil Procedure [Rule 37](#) and [Rule 61.13](#). The panel will decide if new evidence will be considered.

### **What happens to the order of the lower court when an appeal is commenced?**

The order remains in effect, unless a judge grants a “stay” (or postponement) of its effect. 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 or held in abeyance until the appeal is decided. [Rule 63](#) of the Rules of Civil Procedure provide for a Stay Pending Appeal.

### **What happens in a Court of Appeal hearing?**

A panel of three judges hears all appeals. An appeal hearing is very different from a trial. It is not a new trial; there are no witnesses called in an appeal hearing; and there is no jury.

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

At the hearing, the parties have an opportunity to make oral argument to the Court. These arguments are based on the arguments outlined in the factums.

To commence the hearing, the Court clerk calls the Court of Appeal to order and calls the case. The appellant first addresses the Court setting out his or her argument which is based on the factum. The respondent then does the same. The appellant then has a limited right to reply. The purpose of reply is to address issues raised by the respondent that were not addressed during the appellant’s initial submissions.

The judges usually ask questions as the oral argument is presented.

### **What should I call a Court of Appeal judge?**

Their title is “Chief Justice” or “Justice” (the Honourable Madam Justice Smith or the Honourable Mr. Justice Smith).

In court, they are addressed as “Chief Justice”, “Justice” or “My Lord” or “My Lady.” Collectively, they are referred to as the “Judges of the Court of Appeal.”

### **What should I wear when I go to court?**

The justices, lawyers, and court clerk wear black gowns for appeals and chambers matters.

Members of the public participating in appeal proceedings should be appropriately dressed. They should wear a suit or proper business attire.

### **May I observe other appeal hearings in preparation of my appeal?**

Court proceedings are generally open to the public, except in rare cases where matters are heard “in camera.” In those cases, no member of the public is allowed to attend. In some cases a publication ban is in effect. In cases where a publication ban is ordered, the name of the accused or victim may not be published. In family law cases, the names are not usually published.

## **FOLLOWING THE APPEAL:**

### **What happens after an appeal?**

The Court of Appeal may give its decision orally the day the appeal is heard. Most often the Court will “reserve” the decision. This means that they will take time to deliberate about the arguments and provide written reasons later in the form of a judgment.

When the judgment is ready to be released, the Deputy Registrar of Court of Appeal will contact counsel for the parties or a self-represented litigant directly by telephone and explain the judgment release process. The parties are contacted 48 hours in advance of the filing and release of a judgment. At nine a.m. on the morning of filing the judgment, the parties may pick up their copy of the decision or have it sent to them by mail or email. The decision is then placed on the Court’s judgment website.

Once the judgment is given, the parties must prepare an order. Usually the successful party prepares a draft order and obtains the consent of the other party regarding the form of the Order. Where one party has counsel and the other party is self-represented, the Court usually requests counsel to prepare a draft order. This order is signed by the Court of Appeal judges and filed with the Court of Appeal Registry.

### **What happens after the appeal?**

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.

**What are costs? When are they ordered? When are they payable?**

It is common for the Court of Appeal to order the unsuccessful party to pay costs to a successful party. This enables the successful party to recover a portion of the expenses incurred. The decision to award costs and the amount of the costs awarded are in the discretion of the judges. Costs are usually payable thirty days following the judgment.

**May I appeal a Court of Appeal decision?**

In most cases, a party may seek leave to appeal to the Supreme Court of Canada in Ottawa. First, a party has to apply to the Supreme Court of Canada for leave or permission to file a Notice of Appeal. Information on appealing a decision to the Supreme Court of Canada is available on the Supreme Court of Canada website at [scc-csc.gc.ca](http://scc-csc.gc.ca).

For more information contact the:  
Prince Edward Island Court of Appeal  
42 Water Street,  
Charlottetown, PE  
C1N 7N8

Telephone number: 902-368-6024  
Facsimile number: 902-368-6774

## **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 had 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*

*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. The Court of Appeal publishes a list of frequently cited cases, which parties may refer to without copying and filing the case report.

*Chambers:*

A matter relating to an appeal during the course of an appeal proceeding heard in a courtroom usually before a single judge of the Court of Appeal.

*Civil Action:*

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 Procedure Rules:*

Rules governing practices or procedures before the court that involve individuals, organizations or governments. They are rules of practice which have been enacted pursuant to the *Judicature Act*. Generally the Rules do not refer to criminal cases.

*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.

*Judgment:*

Final decision of 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 a common occurrence and can be made for

many purposes, including asking for extensions of time to file 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 bring 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 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.

*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.

*Transcriber:*

A transcriber is a person who types and prepares a record of the proceedings. A court transcriber is certified by the court to do so.

*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 Workers' Compensation Appeal Tribunal, the Human Rights Commission, or the Island Regulatory and Appeals Commission.