**Appeals – Factum Writing & Civil Appellate Routes**

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**Framing the Appeal**

Ted Cruz, the Republican Senator from Texas, is not just a devilishly handsome fellow, born and raised for a few years in Calgary during the 1970’s oil boom, he was actually one of the best appellate lawyers in the United States. He attended Princeton for undergraduate studies and then Harvard Law School, before clerking for Chief Justice Rehnquist of the Supreme Court. He subsequently became the Solicitor General of Texas and argued 9 cases before the Supreme Court in just 6 years.

Jeffrey Toobin, in the New Yorker article, *The Absolutist*, (June 30, 2014), describes Ted Cruz’s appellate strategy as follows:

…The cases he won had more drama and importance. The most notable, from 2008, began, as Cruz recounted to me, when “two teen-age girls who were walking home one night stumbled into a gang initiation and were horribly gang-raped and murdered. One of the most brutal crimes that shocked the conscience of the city of Houston. Ernesto Medellín was one of the leaders of the gang, and he was apprehended several days later, and he confessed to it right away. His confession was one of the most chilling documents I’ve ever read, handwritten, where he describes bragging about raping these little girls. He describes showing off his bloodstained clothes. He describes keeping, as a trophy of the night, one of the little girls’ Mickey Mouse watches. This was an unrepentant murderer. He was convicted, he was sentenced to death, and then the case took a strange turn.”

The World Court, which is the judicial arm of the United Nations, issued a directive to the United States to reopen the cases of Medellín, who was Mexican, and fifty other Mexican nationals who were on death row. After their arrests, none of the defendants had been offered the consular services of the Mexican government, a right that the United States was treaty-bound to honor. In a crucial twist, the Administration of George W. Bush agreed with the World Court judgment. The Justice Department asserted that the cases, including Medellín’s, should be reopened, because the defendants had not been granted their rights under the treaty. As both a legal and a political matter, Texas’s position looked weak. How could Abbott (and Cruz) take on a President of the United States who also happened to be a fellow-Republican and fellow-Texan? And how, in any event, could the state of Texas overrule a judgment of both the United States government and the World Court?

“In both law and politics, I think the essential battle is the meta-battle of framing the narrative,” Cruz told me. “As Sun Tzu said, Every battle is won before it’s fought. It’s won by choosing the terrain on which it will be fought. So in litigation I tried to ask, What’s this case about? When the judge goes home and speaks to his or her grandchild, who’s in kindergarten, and the child says, ‘Paw-Paw, what did you do today?’ And if you own those two sentences that come out of the judge’s mouth, you win the case.

“So let’s take Medellín as an example of that,” Cruz went on. “The other side’s narrative in Medellín was very simple and easy to understand. ‘Can the state of Texas flout U.S. treaty obligations, international law, the President of the United States, and the world? And, by the way, you know how those Texans are about the death penalty anyway!’ That’s their narrative. That’s what the case is about. When Justice Kennedy comes home and he tells his grandson, ‘This case is about whether a state can ignore U.S. treaty obligations,’ we lose.

“So I spent a lot of time thinking about, What’s a different narrative to explain this case? Because, as you know, just about every observer in the media and in the academy thought we didn’t have a prayer. This is a hopeless case.”

Cruz decided to change the narrative into one about the separation of powers. He refashioned the case from a fight between Texas and the United States to one between the executive branch and the legislative branch of the federal government, with Texas advocating for Congress. He argued that the President could not order Texas to reopen the cases without the specific authorization of Congress. Cruz duelled with Stephen Breyer and other skeptical Justices for well over the allotted thirty minutes. Breyer ribbed Cruz: “As I read the Constitution, it says all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every state—I guess it means including Texas”—the audience laughed—“shall be bound thereby.”

“Certainly, Justice Breyer,” Cruz answered. “Texas, of course, does not dispute that the Constitution, laws, and treaties are the supreme law of the land.” But, he went on, the President’s order, in this case, was none of these. The questioning of Cruz became so raucous that, at one point, Justice John Paul Stevens felt compelled to interject, “You said there are six reasons. . . . I really would like to hear what those reasons are without interruption from all of my colleagues.” Cruz won the case, six-to-three, with Stevens joining the Court’s conservatives.

I bear those words in mind whenever I write an appeal factum: the battle on an appeal is the meta-framing, not the technical details. You have to own the two sentences that describe the case, not the minute technical arguments.

On an appeal it is easy to get lost in the weeds of minutiae, especially if you are doing the appeal of your own case. You have spent hundreds of hours thinking about every little detail, you know the case inside and out, and you want to show the judge you know everything and have an answer for every question. In my limited experience, I don’t believe appeals are won like that.

Appeals are won in the framing. You need to take fairness on your side; even if your claim or position seems patently unfair, you have to explain why it is actually fair for you side to win. I primarily practice insurance law, at the individual level it is easy for a judge to think it is unfair for an insurance company to deny money to an injured victim, so we constantly have to reframe the issue away from examining the specific injuries of the plaintiff to looking at the issues on a macro scale to show why fairness is on our side. In most disputes that get to the appeal stage, a valid legal argument can be made in support of both sides, crafting a strong legal argument is obviously important, but I believe that judges will accept even flimsy legal reasoning so long as they can do what is right and fair in the situation. You just have to give them a path and they will follow it to achieve justice (and no, I won’t give you examples of what I think is flimsy legal reasoning by judges of the Court of Appeal to demonstrate my point).

**Writing the Appeal**

In terms of the nitty gritty of factum writing, I model my factums on Eugene Meehan’s online article *Ten Do’s and Don’ts for Written Argument at the Supreme Court of Canada*. He suggests;

1. Keep it simple enough that a layperson could understand it. Ideas can be big, but words must be clear, concise, focused, and simple.
2. Copy previous factums that have succeeded.
3. Try to think like a judge who is probably swamped with more work than you. They want to understand what is fair in the case immediately without hours of pondering your meaning.
4. Explain your case upfront and always start on your strongest point.
5. Your two sentence theme of the case must guide all your submissions.
6. Facts matter, make sure you include the necessary facts to support your legal arguments, but not more. Including extraneous facts only detracts from your point.
7. Have someone review your work who is not afraid to provide constructive criticism.
8. Appearances of the factum matter, make sure the format helps their understanding.
9. I prefer to write like Earnest Hemingway; simple and easy words that convey the point. But also, make sure you comply with the rules in all respects.
10. Don’t use legalese, it doesn’t make you look smart. You want the judge to directly understand your argument in the 30 minutes they can put aside to read your factum.

**Administration of Justice Appeals**

In general, there are three broad categories of appeal; 1) substantive, 2) procedural, and 3) administrative of justice.

We all have a good understanding of substantive appeals, it is when we argue that the lower court made a legal error on either the facts or the law applicable to the case. The standard of review for legal errors is whether the decision is correct, and the standard of review for factual errors is whether the decision was made with a palpable and overriding error (*Housen v. Nikolaisen,* 2002 SCC 33).

We all know what procedural law is and appeals of this nature are often based on the correctness standard. For instance, if the judge improperly qualified an expert and this effected the outcome of the trial the Court of Appeal may overturn the whole trial based on this procedural error. Whether the Court of Appeal overturns a decision on a procedural matter is very heavily influenced by framing the issues and fairness. Often both possible decisions on a procedural matter can be legally justified, the result will be based largely on whether the Court wants to agree with your overall position or not.

The least known appeal consideration, and one that is often overlooked by young lawyers, is whether the trial judge made an error in exercising the administration of justice in the courtroom. The Court of Appeal is tasked with monitoring the behavior of trial judges and will, very occasionally, issue a rebuke to trial judges if they lose control of maintaining an impartial judicial process.

This type of appeal is very hard to identify, let alone win, especially for a young lawyer, but is important to keep in mind. I work at Zuber & Company, David Zuber is a strong appellate lawyer who’s been kind enough to let me work on numerous appeals with him. Zuber’s father was well regarded Court of Appeal judge for many years and so he has a very intricate knowledge of the thought processes of the Court of Appeal. As a young lawyer with no judges in my family, I am very deferential to trial judges, but the Court of Appeal does not have the same obligation of obsequious deference to a trial judge. In fact, the Court of Appeal is tasked with correcting the behavior of trial judges in certain circumstances. David Zuber and other leading lawyers have no fear asking the Court of Appeal to correct a trial judge’s behavior where warranted.

This is a very difficult skill to implement appropriately, and as a young lawyer I certainly would not attempt it by myself, but more experienced counsel might find it appropriate to do so. An additional benefit of asking for this type of relief is that it often fits in with the overarching theme of fairness to your client.

In terms of some examples of when we have requested this type of administration of justice relief, I’ll give you three:

1. we have asked the Court of Appeal to consider the appropriateness of a judge reconsidering and changing his written trial judgement numerous times at the request of a party without a full motion on the issue;
2. we have asked the appellate court to consider whether a trial judge should provide his jury charge and opposing party’s expert reports to the jury for deliberations; and,
3. we have asked the Court of Appeal to consider whether the trial judge was biased in favour of the opposing party.

(If you email me privately, I am willing to send you a few example factums where this has been successfully done; but again, I won’t cite them in this paper).

The key to this type of appeal is that it must be handled with assiduous fairness and extreme politeness. It is often not based on knowledge of substantive or procedural law, but rather knowledge of trial practice which only comes through experience. If done improperly, it will almost certainly alienate the appellate judges.

**Conclusion on Persuasive Factums**

Remember, the motto of the Law Society of Upper Canada is “Let Right Be Done”, not “Let Law Be Done”, focus on what is right and only use the law to give the judges a legal path to what is right. All three types of appeals, substantive, procedural, and administration of justice, should always be framed in achieving what is fair and right. Don’t lose the forest for the trees.

**CIVIL APPELLATE ROUTES**

And now on to the interesting stuff; appeal routes in civil cases. This topic is complicated, I will summarize the highlights in this paper; but for more detailed information I would suggest you consult the following texts:

1. Paul M. Perell & John W. Modern, *The Law of Civil Procedure in Ontario*, (LexisNexis). (Much of the following discussion is taken from pages 750 – 795 of this text)
2. Linda S. Abrams & Kevin P. McGuinness, *Canadian Civil Procedure Law*, (LexisNexis)
3. Todd Archibald, Gordon Killeen, James C. Morton, *Ontario Superior Court Practice*, (LexisNexis)
4. John Sopinka & Mark A. Gelowitz, *The Conduct of an Appeal*, (Butterworths)
5. D.J.M. Brown, *Civil Appeals*, looseleaf (Toronto: Canvasback Publishing, 2010).

**Structure**

The general right to appeal and the structure of an appeal route can usually be determined using the following rules and statutes[[1]](#footnote-1):

1. *Courts of Justice Act*
2. Rule 61 – which covers the steps required in an appeal
3. Rule 62 – which deals with interlocutory orders (which do not dispose of the matter)
4. Rule 63 – Stay pending appeal
5. Practice Directions Concerning Civil Appeals in the Court of Appeal
6. *Supreme Court Act*
7. Specific Tribunal Statute applicable

**Issues**

The following issues generally determine where the appeal lies:

1. Who made the order? (Deputy Judge of the Small Claims Court, Master, Costs Assessment Officer, Judge of the Ontario Court of Justice (OCJ), Judge of the Superior Court (SCJ)).
2. Is it a final or interlocutory order?
3. How much is the final order worth? (Two important thresholds are $2,500 and $50,000)
4. Is it an appeal from a question of fact or law, or both?
5. Is it an appeal of costs only?

**GENERAL APPEAL RIGHTS**

**No Right of Appeal**

In general, there is no right of appeal unless it is conferred by a statutory provision. Some decisions of judges and judicial officers are not subject to appeal (Perell, p. 753; *Guardian Realty Co. v. Toronto*; [1934] O.J. No. 234 (ONCA)). The vast majority of business contracts we enter into every day are not subject to appeal based on their monetary value alone.

Even if there is a right to appeal, most appeals fail. According Justice John Morden, about two thirds of appeals are unsuccessful (Perell, 753).

The court always has inherent jurisdiction to dismiss appeals that are vexatious in nature or where the appellant is in willful breach of the order under appeal [*CJA* 140(5)].

**Small Claims Court**

An appeal from a final order of the Small Claims Court for an amount of more than the “prescribed amount” (currently $2,500) goes to a single judge of the Divisional Court [*CJA*31, and *O. Reg. 244/10*] (i.e. a single judge of the SCJ sitting in the Divisional Court].

A ‘motion for a new trial’ can be brought to a judge of the Small Claims Court, after a final order is made. [*Rule* 17.04] Either to correct an arithmetic error [*Rules* 17.04(5)1] or to adduce new evidence that was not reasonably available at the time of trial [*Rule* 17.04(5)2].

There is no appeal from a Small Claims judgment of less than $2,500, excluding costs, or an interlocutory order [O. Reg 244/10 and O. Reg 317/11 s. 31] (except to the Supreme Court). However, an appeal is possible if the value of the property is more than $2,500.

If you think about it, the vast majority of business contracts you entered this week are transactions that you couldn’t appeal from, if you decided to sue. Probably 95% of all business transactions we do are matters that would go before the small claims court without a right to appeal (such as purchasing your McCafe this morning or your Costco TV).

**Ontario Court of Justice**

An appeal from a judge of the OCJ lies to the SCJ, unless otherwise stipulated [*CJA* 40].

The OCJ has jurisdiction for many criminal law matters as well as many family law matters. 1996 Amendments to the *Courts of Justice Act* indicate that appeals for certain Family Court decisions under section 21.8 and 21.12 go to the Divisional Court of the SCJ [See the section on special appeal routes *infra*].

**Costs Assessment Officer**

An appeal from an assessment officer lies to the SCJ or one judge of the ONCA [Perell, 754]:

* An appeal goes to the SCJ from a certificate of assessment of costs in a proceeding of the SCJ on an issue in respect of which an objection was served [*CJA* 17(b)].
* An appeal goes to the SCJ from a certificate of assessment of costs in the COA in respect of which an objection was served under the rules of court to the Court of Appeal to be heard by one judge [*CJA* 6(1)(c) and 7(2)].
* An appeal goes to the SCJ from a certificate of assessment of costs for a proceeding in a tribunal in an objection was served [*CJA* 90(4)(b)].
* An appeal goes to a single judge of the ONCA from a certificate of assessment of costs for a proceeding in the ONCA, if an objection was served [*CJA* 6(1)(c)].

**Master (Superior Court)**

An appeal from an Order of a Master lies to either the SCJ or the Divisional Court:

* An appeal from an interlocutory Order of a master goes a single judge of the SCJ [*CJA* 16 and 17(a)].
* An appeal from a final Order of a master goes a single judge of the Divisional Court [*CJA* 19(1)(c) and 21(1)].

**Superior Court**

An appeal from an order of a judge of the SCJ lies to the Div. Court or ONCA:

* An appeal from an interlocutory Order of the SCJ lies to the Divisional Court, with leave required [*CJA* 19(1)(b)].
* An appeal from a final Order of the SCJ for less than $50,000, including prejudgment interest, goes to the Div. Crt [*CJA* 6(1)(b) and 19(1)(a): *Canady v. Tucci*, 2009 ONCA 554].
* An appeal from a final Order of the SCJ for more than $50,000, including PJI, goes to the ONCA (unless a specific statute states it should go to the Div. Crt. These statutes are often tribunals, such as the *Landlord and Tenant Act*) [*CJA* 19(1)(a), (1.1.), (1.2)].
* There is no appeal from an interlocutory order of a Superior Court judge that dismisses an appeal from an interlocutory order of an Ontario Court Judge [*CJA* 19(4)].
* The appeal from a final order of Superior Court Judge lies to the Court of Appeal, unless it falls within section 19(1)(a) of the *Courts of Justice Act* [*CJA* 6(1)(b)].

During a trial, there is a long-stranding principle that appeals cannot be taken from mid-trial decisions. An appeal from a mid-trial decision is theoretically possible if it can be called an order, but the normal course of action is to delay any appeal until after the trial is concluded [Perell, 778].

If the plaintiff obtains an order for return of specific property, the appeal lies to the Court of Appeal, even if the property is worth less than $50,000 (Perell, 784) [*CJA* 19(1)].

If the plaintiff sues for $100,000 and the claim is entirely dismissed, the appeal lies to the Court of Appeal. But if the claim is entirely dismissed and the judge indicates that value awarded would have been $20,000 had it not been dismissed then it lies to Div. Court. [Perell, 785]. The same is true if the damages are reduced solely by an assessment of contributory negligence.

**Divisional Court**

An appeal from an Order of a single judge of the Div. Court lies to a panel of the Div. Court, not the Court of Appeal [*CJA* 21(5) and *Coote v. Ontario (Human Rights Commission)*, 2010 ONCA 580)] (technically, this is a motion to vary or set aside, not an appeal).

An appeal from a panel of the Div. Court lies to the COA on a question of law or mixed fact and law, with leave required [*CJA* 6(1)(a)]. But no appeal is possible from the Divisional Court to the Court of Appeal on a question of fact alone [Sopinka, 28].

No distinction is made between final and interlocutory orders for appeals from the Divisional Court to the Court of Appeal (*Canada Metal Co. v. Heap*, [1975] O.J. No. 2201 (ONCA)).

**Court of Appeal**

The Court of Appeal has jurisdiction to hear appeals from final orders of a Superior Court Judge, unless the Divisional Court takes jurisdiction (either because it is less than $50,000, or because a tribunal statute stipulates it).

An appeal from an interlocutory motion before the Court of Appeal lies to a panel of the Court of Appeal [*CJA* 7(5)] (technically, this is a motion to vary or set aside, not an appeal).

If one action produces two orders that are appealable to different appellate courts, the Court of Appeal has jurisdiction to hear both [*CJA* 6(2)].

A previous decision (not appeal) of a three member panel of the Court of Appeal can be directly overruled by a five member panel of the Court of Appeal [Perell, 790]. Requests for five-judge courts should be made to the Chief Justice of Ontario through the registrar.

1. **Interlocutory Motions During the ONCA Appeal Itself**

Motions in the Court of Appeal are generally heard by one judge [*CJA* 7(2)]. Single judges can adjourn the motion to a panel [*CJA* 7(4)].

Motions for leave to appeal and to quash an appeal are heard by a panel [*CJA* 7(3)]. Other specific motions, such as to receive fresh evidence or to finally determine an appeal, should be heard by a panel [*Rules* 61.16(2)].

A panel hearing a motion or the full appeal may also decide a motion that should be before a single judge [*Rules* 61.16(2.1): *Schmidt v. Toronto-Dominion Bank* (1995), 24 O.R. (3d) 1 (CA)].

**Supreme Court**

An appeal from a panel of the Court of Appeal lies to the Supreme Court, with leave [*Supreme Court of Canada Act* s. 40]. Section 40(1) of the Act explains the test for leave to appeal to the Supreme Court[[2]](#footnote-2):

**40(1)** where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.

In 1904, the Supreme Court laid out the following test for granting leave to appeal in *Lake Erie & Detroit River Railway Co v Marsh*, (1904), 35 SCR 197. The Court stated that leave to appeal would be granted where:

1. The matter was of public interest;
2. There was an important question of law;
3. The matter involved the construction of federal statutes;
4. There was a conflict between Federal and provincial statutes; or
5. Where the provincial legislation may be of general interest across the country.

In general the Supreme Court looks for a “matter of public importance; an issue which goes beyond the interests of the immediate litigants, of interest to Canadians generally.” In 1997 Justice Sopinka suggested the following factors were important:

1. Is the question germane to the disposition of the case?
2. Is the law unsettled or are the courts below misinterpreting or misapplying a decision of the Court?
3. Is there a constitutional or aboriginal issue?
4. Is there a novel point of law?

Most appeals fail the at the leave stage, of the approximately 600 leave applications brought to the Supreme Court every year only between 50 and 100 cases are issued in a given year [Abrams, 1512].

Interestingly, you can appeal directly to the Supreme Court of Canada, with leave, from a final judge in any Court of Ontario, if leave is granted by the Supreme Court [*Supreme Court of Canada Act* s. 38]. Skipping the intermediate steps in the appeal is called *per saltum*.

**38** Subject to [sections 39](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-s-26/latest/rsc-1985-c-s-26.html#sec39_smooth) and [42](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-s-26/latest/rsc-1985-c-s-26.html#sec42_smooth), an appeal to the Supreme Court lies on a question of law alone with leave of that Court, from a final judgment of the Federal Court or of a court of a province other than the highest court of final resort therein, the judges of which are appointed by the Governor General, pronounced in a judicial proceeding where an appeal lies to the Federal Court of Appeal or to that highest court of final resort, if the consent in writing of the parties or their solicitors, verified by affidavit, is filed with the Registrar of the Supreme Court and with the registrar, clerk or prothonotary of the court from which the appeal is to be taken.

Technically, ONCA can grant leave to appeal to the SCC under *SCCA* 37, but this is not done.

**SPECIAL RIGHTS OF APPEAL**

There are some Acts which specifically enumerate the rights of appeal applicable within. For instance, appeals lie from the OCJ to the SCJ under the:

1. *Family Law Act*  s. 48;
2. *Children’s Law Reform Act*, s. 73;
3. *Child and Family Services Act*, s. 69 and 156; and,
4. *Interjurisdictional Support Order Act, 2002*, s. 40.

There are also over 100 status that confer a specific right to appeal to the Divisional Court. Typically these statutes are form administrative tribunals, stating that appeals go to the Divisional Court.

There are only a few specific statutes that confer a right of appeal directly to the Court of Appeal. These are:

1. *Courts of Justice Act*;
2. *Judicial Review Produced Act;* and,
3. *Arbitration Act, 1991.*

The Government of Canada has also passed about 18 federal statutes that specifically confer a right of appeal to the local provincial Court of Appeal. Such as;

1. *Divorce Act;*
2. *Bankruptcy and Insolvency Act;* and,
3. *Companies’ Creditors Arrangement Act.*

Problems can arise where federal statute confers jurisdiction on the Superior Court to decide a matter, but is silent on the appeal route. But this issue is too complicated for this paper (see Perell p. 757, 788).

**DISCUSSION OR SPECIFIC ISSUES**

**Monetary Jurisdiction**

As stated above, there is no right to appeal from an award of less than $2,500 in Small Claims Court.

Further, appeals from the Superior Court for less than $50,000 in damages including PJI (or costs alone) go to the Divisional Court, while appeals from orders of more than $50,000 including PJI go to the Court of Appeal.

The Divisional Court has held that the $50,000 jurisdiction under *CJA* 19(1) is not dependent on the amount at issue in the proceedings, but rather on the amount of the payment ordered [Sopinka, 24].

**Final or Interlocutory Order**

*Final Orders* – are judgements or orders that “finally dispose of a substantive right in the litigation” (Sopinka, *The Conduct of An Appeal*, page 5).

*Interlocutory Orders ­*– are every other type of judgment or order. *Black’s Law Dictionary* defines interlocutory order as “deciding not the cause but only settles some intervening matter to it”.

The main practical difference is that final orders of a Superior Court Judge are appealed to the Court of Appeal with no leave required, while interlocutory orders of a Superior Court Judge require leave to be appealed to the Divisional Court. Because leave is difficult to obtain from the Divisional Court, classifying the appeal as interlocutory is an easy way to defeat it [Perell, 763].

The difference is often resolved on the ‘proportionality principle’. Unimportant matters are more likely to be deemed interlocutory with the leave requirement greatly restricting the right to appeal.

If you’d like to get into the case law, everyone starts with *Hendrickson v. Kallio,* [1932] O.R. 675 (ONCA). The matter gets very complicated and cannot be fully canvassed here.

**Leave to Appeal**

Leave requirements are implemented;

1. By the Divisional Court for interlocutory orders of the Superior Court and from tribunal decisions,
2. By the Court of Appeal for decisions from the Divisional Court,
3. By the Court of Appeal for many specific federal statutes, and
4. From costs orders [*CJA* 133(b)].

*Rule* 62.02 of the *Rules of Civil Procedure* sets out the test for the Divisional Court to grant leave to appeal an interlocutory Order from the SCJ. It is not an easy matter to pass the test.

**62.02(4)** Leave to appeal shall not be granted unless,

1. (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
2. (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

The test for leave to appeal to the Court of Appeal is not the same and is not succinctly stated anywhere, however, in *Sault Dock Co. v. Sault Ste. Marie (City)* [1972] O.J. No. 2069 (ONCA) the Court enumerated a few relevant factors of the same gist as rule 62.02 [Perell & Sopinka].

Where leave to appeal is required by statute, there is no automatic right to appeal unless it is granted by the Court. In *R. v. Paul*, [1960] S.C. J. No. 22, the Supreme Court explained that a refusal to grant leave to appeal is not the same thing as a dismissal of an appeal, but rather ‘it simply meant the right of appeal which does not exists as a right, but only by leave, never came into being’ [Perell, p. 760].

The general rule is that there is no right of appeal from an order granting or refusing leave to appeal [Perell, 775]. However, the Supreme Court always has the right to review any exercise of discretion, including a refusal to grant leave by the Court of Appeal, although this would almost never happen [Abrams 1513, *R. v. Chaisson*, [1995] S.C.J. No. 49].

**Costs Orders**

A cost order on a final order is final. A costs order on an interlocutory order is interlocutory.

Appeals on costs orders only proceed according to the general rules above on this basis. i.e. where the costs order is less than $50,000 it goes to Divisional Court and more than $50,000 goes to Court of Appeal [*CJA* s. 6(1)(b) and 19(1)(a)].

Costs will always piggyback on the substantive appeal and be heard together, unless the main appeal fails before the costs appeal is heard. The main appeal cannot piggyback on the jurisdiction of costs. i.e. where damages are $10,000, but costs are $100,000 it goes to the Divisional Court.

No appeal on costs orders only is permissible without leave of the appellate court that will hear the appeal [*CJA* s. 133(b)].

**Wrong Court**

If you have filed the appeal in the wrong court, the appeal may be transferred or adjourned to the proper court if the proceeding in both the sending and receiving court are identical in nature and will continue as if it had been commenced in that court [*CJA* 110].

In the case of interlocutory orders, if an appeal from an interlocutory order is commenced erroneously in the Court of Appeal it cannot be transferred to the Divisional Court. This is because appeals from interlocutory orders require leave to appeal. The first step required is to bring a motion for leave to appeal in the Divisional Court (*Dunnington v. 656956* Ontario Ltd. (1992), 9 O.R. (3d) 124 (Div. Ct.)).

A respondent may move to quash an appeal filed in the wrong court [*CJA* 134(3)].

Courts have dismissed appeals filed in the wrong court before, but this raises the question of if the court cannot hear the appeal, how could they dismiss it? [Perell, 794].

Very occasionally, a panel of the Court of Appeal has been retroactively designated as a panel of the Divisional Court to save a decision they have already made. But this raises the specter of another panel of the Court of Appeal overturning the decision [Perell, 795, *CJA* 13].

Both the Divisional Court and the Court of Appeal have jurisdiction to entertain appeals that lie in lower courts, provided that another appeal lies and has been taken in the higher court [*CJA* 6(2), 19(2),(3), and Sopinka 30].

**Filing Fresh Evidence on Appeal**

The Court of Appeal may receive fresh evidence on an appeal [*Rule* 61.16(2)]. The test to admit is discretionary; the party seeking to admit must show that the evidence could not have been obtained by reasonable diligence prior to trial and that it is relevant, credible, and will affect the result (*Davis v. Crawford*, 2011 ONCA 294; *R. v. Palmer* [1980] 1 S.C.R. 759).

**Timeline to File Appeal**

Rules are made to be broken. The timelines in this section are stipulated *Rules* so they must be adhered to, but remember *Rule* 3.02(1) specifically states that all timelines, including appeals to the Court of Appeal, can be abridged or extended. Consent to extend should usually be granted by the opposing party unless there are compelling reasons not to. As *pro bono amicus curiae* to self-represented litigations, I frequently argue procedural motions to extend the time to file. Judges are typically fairly lenient in granting these motions so long as:

1. The party seeking the extension formed the intention to appeal within the period for commencing the appeal;
2. There is a reasonable explanation for failing to do so;
3. There is no prejudice,
4. The appeal has some merit; and
5. It is fair in the circumstances and the “justice of the case” requires it.

*Kefeli v. Centenniel College* (2002) 23 C.P.C. (5th) 35 (ONCA)

1. **Appellant[[3]](#footnote-3)**

|  |  |  |
| --- | --- | --- |
| **Step Required** | **Rule** | **Deadline** |
| Serve Notice of Appeal & Certificate Respecting Evidence | 61.04(1)61.05(1)Form 61A and 61C | 30 days from judgment, not order despite the wording of the rule! *Byers v. Pentex*, [2003] O.J. No. 6 (ONCA) |
| File Notice of Appeal | 61.04(4) | Within 10 days of service |
| File Proof of Transcripts Being Ordered (if required) | 61.05(5) | Within 30 days of filing Notice of Appeal |
| Order the Trial Record and Exhibits (only those that are necessary, not everything) | 61.09(1)61.09(2) | Within 30 days of Notice of Appeal if transcripts not required. Or within 60 days of receiving transcripts. |
| Serve and File Appeal Book and Compendium, Exhibit Book, Transcripts, and Factum | 61.09(3)(a)61.09(3)(b) | Within 30 days of Notice of Appeal if transcripts not required. Or within 60 days of receiving transcripts. |

1. **Respondent**

|  |  |  |
| --- | --- | --- |
| Serve the Respondents Certificate Respecting Evidence | 61.05(2)61.05(4) if on consentForm 61D | Within 15 days of receiving Appellant’s Notice of Appeal and Certificate Respecting Evidence |
| Serve Notice of Cross Appeal (if required) | 61.07(1)Form 61E | Within 15 days of receiving Appellant’s Notice of Appeal |
| File Notice of Cross Appeal with Registrar (if required) | 61.07(2) | Within 10 days of Service |
| Serve and File Respondent’s Factum | 61.12(1) | Within 60 days of receiving Appellant’s Factum, Appeal Book and Compendium, Exhibit Book, and Transcripts |
| Serve and File Factum in Cross-Appeal | 61.12(4)(a) | At same time as Appellant’s Factum. They should typically be combined.  |

1. **Appellant / Respondent to Cross-Appeal**

|  |  |  |
| --- | --- | --- |
| Serve and File Reply Factum and Compendium | 61.12.(6)(b) | Within 10 days of receiving Respondents Factum |



**Registrar’s Office of the Court of Appeal**

The court staff at the Court of Appeal (and Supreme Court) are very friendly and extremely knowledgeable on appellate routes. If you get stuck just give them a call and they will set you straight.

However, you should be aware that filing appeal materials is an extraordinarily technical task. The court staff are very well trained and will inspect your documents thoroughly. It is not unheard of to have materials rejected 3 times for technical breaches before you finally get it right. This can cause for some embarrassment if you have to keep reserving your opponent with slightly revised materials. It may be prudent to bring your stack of materials to the court staff first, for their review, before you serve the opponent with materials that will be rejected and need to be reserved.

**Zuber & Company**

If none of the above works, please feel free to contact me for some friendly suggestions. I’m more than happy to help. We also take appellate referrals.

1. Anthony L. Giannotti, Appeals Manouvering the road Without Crashing, LSUC CLE: 6th Annual Civil Litigation for Law Clerks. See also; “Motions in the Court of Appeal” a manual created by *Pro Bono Law Ontario* for the Amicus Curiae that assist unrepresented litigants. [↑](#footnote-ref-1)
2. |  |
| --- |
|  Hossein Moghtaderi and Anna Du Vent, Application for Leave to Appeal to the Supreme Court of Canada: A Practical Guide, July 2013 (online) |

 [↑](#footnote-ref-2)
3. *Ibid.* The table on page 16 is from Watson and McGowan, Ontario Civil Practice, 2018 [↑](#footnote-ref-3)