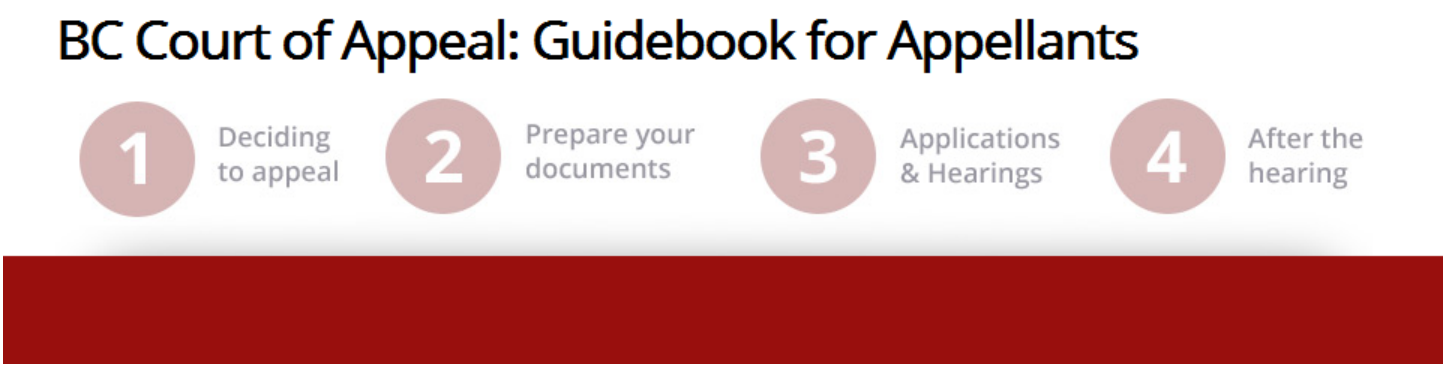

BC Court of Appeal: Guidebook for Appellants -Contents-

Step 1: Deciding to appeal

1.1 What is an appeal?

What is an appeal?

At the conclusion of a proceeding in a lower court, such as the BC Supreme Court, the party who lost may want to have that decision reviewed by a higher court in the hope that it might be reversed or changed. In such cases, an "appeal" is made to the Court of Appeal, which is the highest court in BC.

You must understand that an appeal is not a new trial or a rehearing of your case.

What an appeal *is not*

An appeal is **not**:

- a new trial;
- a hearing with witnesses or a jury;
- a chance to present new evidence or new witnesses to a new judge, except in exceptional circumstances; or
- a way to avoid complying with the trial court's order.

The Court of Appeal will not hear an appeal of every case. In some cases, you must ask the permission of the Court to appeal through a process called "leave to appeal". Even if the Court of Appeal hears your appeal, it will not:

- re-hear your case from start to finish;
- change the decision because it seems unfair; or
- change the decision just because the Court of Appeal disagrees with it. (The decision must be incorrect due to a factual or legal error.)

In summary, for an appeal to be successful, you must show that the decision-maker made a factual or legal error that affected the outcome of your case. An appeal is not a new trial or re-hearing of your case.

1.2 Do you have a right to appeal your case?

Most trial decisions from the BC Supreme Court can be automatically appealed to the BC Court of Appeal. (See ss. 6 – 8 of the *Court of Appeal Act*.)

The Court of Appeal may hear an appeal from all BC Supreme Court decisions automatically except for those orders listed in s. 2.1 of the *Court of Appeal Rules,* which are known as limited appeal orders.

Limited appeal orders include:

- orders arising from case planning conferences or trial management conferences;
- orders that grant or refuse extensions of time;
- interim orders under the *Family Law Act*;
- an order as to costs only; or
- a foreclosure order.

You cannot appeal a decision from the family or small claims court directly to the Court of Appeal without filing an appeal to the Supreme Court first.

You may only appeal some decisions by BC administrative tribunals or others made by provincial or federal bodies. Usually those decisions must first be reviewed by the BC Supreme Court, unless the statute that created the tribunal says otherwise. You must read the applicable statutes to understand how to appeal a decision and the procedural timelines that you must follow. (See Rule 16-1 of the Supreme Court Civil Rules).

If the appellant does not have an automatic right to appeal, he or she must make an application to the court to obtain leave (permission) to appeal. Section 2.1 on how to start an appeal discusses how you obtain leave (permission) to appeal.

1.3 What happens to the order you are appealing?

Bringing an appeal will not automatically stay (stop) enforcement of the order made by the decision-maker below until your appeal has been decided. This means that you have to obey the order you are appealing, unless you apply for and are granted a stay.

To stay an order made under the *Family Law Act*, you must get an order from a Supreme Court judge. To stay all other orders, you must bring an application in chambers to a judge of the Court of Appeal. You do this by filing a notice of motion (Form 6) and a motion book (Form 4).

For more information on obtaining a stay, see Section 3.2 Common applications.

1.4 Deciding to appeal

Appeals are expensive

Before making the decision to appeal your case, talk to a lawyer. He or she will explain your chances of winning or losing the appeal. There are many ways to get pro bono (free) advice or help with your case.

Appeals are costly and time consuming. Before deciding to appeal your case, think about the money you have already spent on your case, and the additional money you will need to spend on an appeal. You will have to pay registry fees for filing your documents and, if appealing a trial that involved live witnesses, fees for getting a transcript prepared. (You do not need to file a transcript for appeals from a "chambers" judgment; "chambers" includes applications and summary hearings where the evidence is given in writing (by affidavit), not by live witness testimony.) Transcript costs can add up to many thousands of dollars, even if you have been granted an order that no filing fees are payable. If you lose the appeal, you may have to pay the costs of the other party, and that can also add up to be thousands of dollars. In addition to the monetary cost, you will have to spend a great deal of time learning about the appeal process and preparing your appeal documents. You may find it stressful to be involved in another legal case.

Step 1: Deciding to appeal

An appeal is not a new trial

Appeals are very different from trials or applications. They are a complex mix of research, writing and oral advocacy skills. An appeal is not a new trial. For an appeal to be successful, you must show that the decision-maker (e.g., a judge or tribunal) made a factual or legal error that affected the outcome of your case. You will have to do an in-depth study of the law to be able to demonstrate the errors that were made by that decision-maker. You will need to do your own legal research and fully understand how the law was interpreted and what mistakes were made. You must follow the procedures of the Court of Appeal and meet strict deadlines or risk having your appeal dismissed.

Think about settling your case

Consider settling your case. Settlement allows you to reach an agreement with the other party instead of having the court impose its decision on you. The Court of Appeal has a program to facilitate settlements. The purpose of a Judicial Settlement Conference is to assist parties resolve appeals at an early stage, to save the expense to the parties, and to conclude the matter in a timely way. Details of a Judicial Settlement Conference are set out in the court's practice directive.

Consider what the court will review at the hearing

When reviewing a case, the Court of Appeal looks at whether the decision-maker made a mistake in understanding the facts of the case or interpreting the law. The mistake must be obvious and fail to consider relevant evidence. Furthermore, that mistake must have had such a *significant effect* on the outcome of the case that it led to the incorrect decision being made. Because the appeal court does not hear evidence from witnesses, it is very difficult for the appellant to convince the appeal judges that the previous decision-maker reached the wrong conclusion about the facts of the case.

1.5 An appeal is expensive. What kind of help is there?

What if you cannot afford a Lawyer?

BC Court of Appeal: Guidebook for Appellants

Step 1: Deciding to appeal

The Court of Appeal will not appoint a lawyer to represent you in a civil or family case. However, there are services that can assist you as a self-represented litigant to give you legal information or free or low-cost representation in the Court of Appeal.

What if you cannot afford to pay filing fees?

If you cannot afford to pay the fees for filing an appeal, you can apply to the court for an order that no fees are payable under Schedule 1 of Appendix C of the *Court of Appeal Rules*. You would normally make this application at the same time that you file your notice of appeal or your notice of application for leave to appeal if leave is required.

To be granted an order that no fees are payable, the judge who hears the application must find that you cannot afford to pay the court filing fees without suffering undue hardship and that your appeal has some chance of success. These fees are listed in Schedule 1 of Appendix C of the *Court of Appeal Rules*

If you are granted an order that no fees are payable, you are exempt only from paying court filing fees. You must still pay for the cost of preparing the transcript from the trial, if you are appealing from a trial that involved live witnesses. (You do not need to file a transcript for appeals from a "chambers" judgment; "chambers" includes applications and summary hearings where the evidence is given in writing (by affidavit), not by live witness testimony.) You may also be responsible for paying the other party's costs if your appeal is not successful. These costs can amount to thousands of dollars.

Rule 38 and Rule 56 give you more details about this application.

How to apply for an order that no fees are payable

Follow these steps to apply for an order that no fees are payable:

1. You must file a notice of motion (Form 6), which is the document used to make an application to court and to tell the other parties that you are making that application.

2. An application for an order that no fees are payable is usually made at the same time as you file your notice of appeal or application for leave to appeal. The time limit for filing a notice of appeal or application for leave to appeal is 30 days, commencing on the day after the order you are appealing was pronounced (i.e. the 30 day time limit starts the day after the decision-maker stated who won the

case). If that date falls on a weekend, you must file your document on the next business day.

3. Prepare an affidavit (Form 19) that includes information about your expenses, your household income, your dependants, your education and workplace skills. Note that you must attach, as an exhibit, a copy of the reasons of judgment from the previous hearing. Talk to the Court of Appeal registry staff, as they may be able to order a copy of the reasons for judgment for you.

4. File at least 4 copies of the notice of motion and affidavit – 2 for use by the court, one for your own use, plus as many other copies that you need to serve on the respondent(s).

5. Serve a copy of the notice of motion and affidavit on the other parties (respondents) within the same 30-day period, and at least 5 business days before the date of the hearing of the application for an order that no fees are payable.

6. Within 10 days from service on the other parties, file an affidavit of service in the Court of Appeal registry as proof that you served the application on every respondent. Alternatively, you can file an acknowledgement of receipt of the document by the other party.

1.6 What if you've missed a deadline and are too late to appeal?

If you've missed the deadline for filing your notice of appeal

You may apply for an extension of time if you have missed the 30-day deadline for filing your notice of appeal. Take the following steps:

1. File a notice of motion in the registry (Form 6) with an affidavit that supports your motion (explaining why you missed the deadline). You must also file a notice of appeal (Form 7).

Step 1: Deciding to appeal

2. File at least 4 copies of the notice of motion and affidavit – 2 for use by the court, one copy for your own use, plus one copy for each respondent.

3. Pay your court filing fee when you file your notice of motion.

4. Serve a copy of the filed notice of motion and other materials on each respondent at least 5 business days before the date set for hearing the application.

5. Within 10 days from service on the other parties, file an affidavit of service in the Court of Appeal registry as proof that you served the application appeal on every respondent. Alternatively, you can file an acknowledgement of receipt of the document by the other party.

Your application will be heard by a single judge in chambers. The respondent may appear at the hearing and argue that you should not be given an extension of time.

The judge will normally consider these factors when deciding whether to grant your application for an extension of time:

1. Was there a bona fide (genuine) intention to appeal?
2. When were the respondents informed of your intention to appeal?
3. Would the respondents be overly prejudiced by an extension of time?
4. Does your appeal have merit?
5. Is it in the interest of justice that an extension be granted?

If you've missed the deadline for filing your application for leave to appeal

You may apply for an extension of time if you have missed the 30-day deadline for filing your application for leave to appeal. Take the following steps:

1. File a notice of motion in the registry (Form 6) with an affidavit that supports your motion (explaining why you missed the deadline). You must also file an application for leave to appeal (Form 1).

2. File at least 4 copies of the notice of motion and affidavit – 2 for use by the court, one copy for your own use, plus one copy for each respondent.

Step 1: Deciding to appeal

3. Pay your court filing fee when you file your notice of motion.

4. Serve a copy of the filed notice of motion and other materials on each respondent at least 5 business days before the date set for hearing the application.

5. Within 10 days from service on the other parties, file an affidavit of service in the Court of Appeal registry as proof that you served the application appeal on every respondent. Alternatively, you can file an acknowledgement of receipt of the document by the other party.

Your application will be heard by a single judge in chambers. The respondent may appear at the hearing and argue that you should not be given an extension of time.

The judge will normally consider these factors when deciding whether to grant your application for an extension of time:

1. Was there a bona fide (genuine) intention to appeal?
2. When were the respondents informed of your intention to appeal?
3. Would the respondents be overly prejudiced by an extension of time?
4. Does your appeal have merit?
5. Is it in the interests of justice for an extension to be granted?

The respondent has 10 days to file and serve you with a notice of appearance if he or she intends to argue against the appeal you are making. If the respondent does not file a notice of appearance, he or she is presumed to take no position on the appeal, and you do not have to serve any further appeal documents on the respondent. (See Rules 13 and 14.)

Step 2: Prepare your documents

2.1 How do you start an appeal if appeal to leave is required?

In British Columbia, you are not always guaranteed a right of appeal from every case - three things can happen:

1. either your case is of a type where you have no right of appeal at all,
2. your case is one where you have to ask the court for permission to appeal the case (called “leave to appeal”); or
3. your case is one where you have an automatic right of appeal.

You need to think about these questions first to know which documents to prepare. Leave to appeal and automatic rights of appeal are discussed in Section 1.2

How do you prepare if you need leave to appeal?

Do you need leave to appeal?

If you do not have an automatic right to appeal, you must make an application to the court to obtain leave (permission) to appeal your case. A discussion on whether you need leave to appeal or not can be found in Section 1.2.

How to apply for leave to appeal

You can find details about making an application for leave to appeal in Part 2 of the Court of Appeal Rules. Follow these steps:

1. Prepare a notice of application for leave to appeal (Form 1).
2. The time limit for filing and serving a notice of application for leave to appeal is 30 days, commencing on the day after the order appealed from is pronounced (i.e., from the date that the decision-maker stated who won the case). If that date falls on a weekend, you must file your document on the next business day.

Step 2: Prepare your documents

3. File at least 3 copies of the notice of application for leave to appeal –one for use by the court, one for your own use, plus as many other copies that you need to serve on the respondent(s).

4. Pay your court filing fee when you file your notice of application for leave to appeal.

5. Serve a copy of the notice of application on each respondent within the same 30-day period.

6. Within 10 days from service on the respondent, file an affidavit of service in the Court of Appeal registry as proof that you served the application for leave to appeal on every respondent. Alternatively, you can file an acknowledgement of receipt of the document by the other party.

If the respondent intends to argue against your application, he or she must file and serve a notice of appearance on you within 10 days after being served. If the respondent does not file an appearance, he or she is presumed to take no position on the application, and you do not have to serve any further documents related to the application on the respondent. (See Rules 5 and 6.)

The respondent has 10 days after service to file a notice of appearance

7. File and serve a notice of motion (Form 3) and motion book (Form 4) within 30 days from serving your notice of application for leave to appeal. It must be served on each respondent at least 10 business days before the date of the application.

   At least 5 business days before the hearing, the respondent must prepare, file and serve you with a reply book (Rule 8).

8. Your application will be set down for a hearing in chambers and is usually heard by one judge, sitting alone. You will have to state your reasons why you believe you should be given permission to appeal your case.

The factors considered by the Chambers judge are outlined in Form 4. They are:

1. The importance of the proposed appeal generally and to the parties;
2. The utility of the proposed appeal in the circumstances of the parties;
3. The prospects of success of the appeal; and
4. If applicable, any statutory provision granting a right to appeal with leave.

You may be given permission to appeal your case when you are appealing a significant point of law and your appeal has merit. You will not be given permission to appeal if your appeal is frivolous or is brought to delay enforcement of the trial decision.

You may amend your notice of application for leave to appeal **before** filing your motion book (or later if you have leave (permission) from a court of appeal judge).

2.2 How to start an appeal if leave to appeal is not required?

Notice of appeal

A notice of appeal is a document that you prepare to advise the court and the other party that you intend to appeal your case. You can find details about notices of appeal in Part 3 of the Court of Appeal Rules.

Follow these steps:

1. File a notice of appeal (Form 7).

2. The time limit for filing a notice of appeal is 30 days, commencing on the day after the order appealed from is pronounced (i.e., from the date that the decision-maker stated who won the case, not the date that the order was filed or "entered"). If that date falls on a weekend, you must file your document on the next business day. (There are a few exceptions to the 30-day time limitation.)

3. File at least 4 copies of the notice of appeal – 2 for use by the court, one copy for your own use, plus one copy for each respondent.

4. Pay your court filing fee when you file your notice to appeal.

5. Serve a copy of the notice of appeal on every respondent within the same 30-day period.

6. Within 10 days from service on the other parties, file an affidavit of service in the Court of Appeal registry as proof that you served the notice of appeal on every

respondent. Alternatively, you can file an acknowledgement of receipt of the document by the other party.

You may amend your notice of appeal before filing your factum (or later if you have leave (permission) from a court of appeal judge).

2.3 After obtaining or being refused leave to appeal

If you are granted leave to appeal

If your application for leave to appeal is successful, your notice of application for leave to appeal has the same effect as a notice of appeal and your appeal will continue in the same manner as an appeal where leave is not required. In other words, you do not have to file a notice of appeal.

If your application for leave to appeal is granted, you must serve a copy of the order on any respondent who did not file a notice of appearance to your application for leave.

Skip to step 2.4 and prepare the appeal record.

Within 10 days after being served with the order granting leave, the respondent must file and serve you with a notice of appearance. If the respondent does not file a notice of appearance, he or she is presumed to take no position on the appeal, and you do not have to serve any further documents related to the appeal on the respondent. (See Rule 10.)

Use Form 25 to prepare the order.

If you are not granted leave to appeal

If your application for leave to appeal is denied, you may bring an application to vary that decision within 7 days after the order was made in front of a division of the court (i.e., three Court of Appeal justices). This is called “a review”. Use Form 15 for the

notice of application to vary and an affidavit outlining the facts that you are relying on in your appeal.

File at least 6 copies of the notice of application (and affidavit) to vary the order – 4 for use by the court, one copy for your own use, and one copy for each respondent. Serve one copy on each respondent.

Within 14 days after filing a notice of application to vary the order denying you leave to appeal, prepare a motion book using Form 16. File at least 6 copies – 4 for use by the court, one copy for your own use, and one copy for each respondent. Serve one copy on each respondent.

Ask the court registrar to set a date for hearing your application and advise the respondent(s) of the scheduled date.

Read Rule 34 for more details about these applications.

2.4 Preparing an appeal record

After you have filed your notice of appeal or you have been granted leave to appeal by a justice in chambers, you need to file an appeal record. An "appeal record" is a bound book containing filed copies of the initiating documents, order and reasons for judgment of the lower court or tribunal, as well as the notice of appeal. The deadline for filing and serving an appeal record is **60 days** from (a) the date of filing the Notice of Appeal; or (b) if you had to apply for leave, the date the judge granted leave to appeal, either in a written or oral judgment.

An appeal record contains key documents about your previous hearing. Rule 19 provides details of appeal records.

1. Use Form 9 to prepare your appeal record. **It must be bound with a blue cover**.
2. The appeal must contain these documents:
    a. your documents that initiated the proceeding under appeal and the responding documents from the court below:
    b. a copy of the reasons for judgment;

c. the order from the court below;

d. the notice of appeal (or the notice of application for leave to appeal, plus the order granting the leave to appeal);

e. If applicable, a notice under the *Constitutional Questions Act* (for example, if you are challenging the constitutional validity or applicability of any law or seeking a constitutional remedy).

3. File at least 6 copies of the appeal record in the registry – 4 copies for use by the court, one copy for your own use, plus one copy for each respondent, within **60 days** of bringing the appeal (i.e., from filing your notice of appeal). There is no filing fee for this document.

4. Within that same time period, you must serve one copy of the appeal record on each respondent.

There are professional service providers who will prepare your appeal record and appeal book for a fee. You can find these providers by looking at the brochures available at the Court of Appeal Registry or doing an Internet search (e.g., search for "appeal book preparation B.C.").

2.5 Obtain and file a transcript, if necessary

A transcript is a written record of a court or tribunal hearing. Rule 20 provides details about transcripts of evidence. Your transcript must be filed and served on the respondent(s) at the same time as your Appeal Record, **60 days** from the date you filed your notice of appeal or a judge in chambers granted you leave to appeal.

If witnesses testified in the previous proceedings, you must obtain a transcript from those proceedings. Keep in mind that a transcript is only necessary if witnesses were present, so for most appeals from Supreme Court chambers, including petitions, a transcript will not be necessary.

To order transcripts, you will have to contact a court transcription service, which are listed in the Yellow Pages of the telephone book or on the Internet. You may also get information from the "in court technologies office" at your local courthouse registry. For

Vancouver, the Court Technologies Office may be contacted at (604)660-3500 and in Victoria the phone number is (250)356-5500.

Note: you are responsible for the cost of having the transcript prepared, even if you have been granted an order that no fees are payable. Preparation of a transcript can cost thousands of dollars.

Once you have obtained the transcripts, do the following:

1. File at least 3 paper copies of the transcript at the registry – one for use by the court, one for your own use, plus one for each respondent.

2. File one electronic copy at the registry.

3. Serve one filed paper copy on each respondent (and one copy of the electronic transcript if they request it).

You must do all these steps within **60 days** of filing your notice of appeal or from when a judge granted you leave to appeal.

2.6 Put together your appeal book

Within 30 days of filing the appeal record, you must file and serve both your factum and your appeal book. Like the appeal record, the appeal book contains material from the previous proceedings. However, the appeal book contains evidence submitted at the previous proceeding, such as affidavits and documents. The appeal book must contain only so much of the evidence as is necessary to resolve the issues raised on the appeal, so unless you think it absolutely critical, there is no need to put everything that was before the previous proceedings in an appeal book

Most importantly, you cannot include new evidence that was not before the decision-maker below, except in rare circumstances.

Rule 26 gives you information about appeal books.

Use Form 12 when preparing your appeal book. The Court of Appeal site includes a checklist you can use to make sure your Appeal Book meets the requirements.

If there is more than one volume, they must be numbered on the front cover and the spine.

The completion instructions on the back of Form 12 tell you exactly how your appeal book must appear. Be sure to follow those instructions carefully. For example, the appeal book must be bound in a **blue cover**, must be limited to a certain number of pages, and so on.

The appeal book may contain these documents:

1. exhibits;
2. affidavits; and
3. other documents that relate to evidence. (These documents must have been put into evidence in the previous hearing; for example, a contract between you and the respondent.)

Within **30 days** of filing the appeal record, you must:

- file 6 copies of the appeal book in the registry – 4 for use by the court, one copy for your own use, plus enough copies to serve on each respondent; and
- serve a filed copy of the appeal book on each respondent.

You can agree with the respondents to edit and limit the contents of the appeal book in order to keep the costs down.

There are professional service providers who will prepare your appeal record and appeal book for a fee. You can find these providers by looking at the brochures available at the Court of Appeal Registry or doing an Internet search (e.g., search for "appeal book preparation B.C.").

If the respondent considers that your appeal book is incomplete, he or she has 30 days after service to prepare, file, and serve you with an appeal book (Rule 26(2)).

2.7 Write your argument (factum)

Use your factum (discussed below) and your reply, if necessary (discussed at 2.8 of this Guidebook), when preparing your argument.

BC Court of Appeal: Guidebook for Appellants

1 Deciding to appeal | 2 Prepare your documents | 3 Applications & Hearings | 4 After the hearing

Step 2: Prepare your documents

What is a factum?

A factum (Form 10) is the argument that you will use in the presentation of your appeal. It explains what your appeal is all about. See Rules 21 – 24. Your factum is due within **30 days** from filing your appeal record, along with your transcripts and appeal book.

Your factum **must be bound in a buff (light beige) cover**. It cannot be more than 30 pages long, unless a Court of Appeal judge has made an order allowing it to be longer.

The completion instructions on the back of Form 10 tell you exactly how your factum must appear. Be sure to follow those instructions carefully. For example, the pages in the factum (except the index), must be printed on the left, the pages numbered on the upper left corner of the page, in 12 point Arial type, and so on.

What does a factum contain?

Your factum must contain:

1. An index.

2. A chronology of the relevant dates in the litigation.

3. An opening statement, which is a concise (one page) statement identifying yourself as the appellant, the court or tribunal appealed from, and the result of your case in the previous proceedings. Your opening statement must set out the essential point of your appeal; that is, the main reason why your appeal should succeed.

4. **Part 1**: A statement of facts (a concise statement of the history of the proceedings and the facts of the case). The source relied on for a statement of fact (e.g., testimony; an exhibit; reasons for judgment) must be identified by referring to the volume and page number where it is found in the appeal record, appeal book, or transcript.

5. **Part 2:** Errors in judgment (a concise statement of why you claim the previous judgment or order is incorrect).

6. **Part 3:** Your legal argument (a concise outline of the facts, along with the legislation and case law to be discussed). Indicate the volume and page number of the appeal record, the appeal book, or the transcript that you are referring to. You must provide legal authorities in support of each point (e.g., legislation, or a previous case similar to yours). If you are including a part of the statute that you are referencing, it must be included as an appendix to the factum (or in a separate volume with the same cover as your factum).

7. **Part 4:** Nature of the order sought (a concise statement of the order that you wish to obtain on appeal, including any special order respecting costs).

8. A list of authorities. (This section follows the appendix. List your legal authorities [case law or legislation] in alphabetical order, referencing the page or paragraph in the factum to which it applies.)

Your factum must **not**:

- contain irrelevant material;
- reproduce material contained in your appeal record or transcript; or
- exceed 30 pages (unless a judge has ordered otherwise).

Within 30 days of filing the appeal record, you must:

- file 6 copies of the factum in the registry – 4 for use by the court, one copy for your own use, plus enough copies to serve on every respondent; and
- serve one filed copy of the factum on each respondent.

Your factum is normally filed together with your transcript extract book.

Within 30 days after being served with your factum, the respondent must prepare, file, and serve a factum on you (Rule 21(2)).

2.8 Replies

In rare situations, the respondent may have raised issues in his or her factum that you did not address in your factum. In these situations, you have an opportunity to prepare a reply. You must do this within 7 days after being served with the respondent's factum.

Use Form 11, entitled "Appellant's Reply". File 6 copies of the reply in the registry – 4 for use by the court, one copy for your own use, plus enough copies to serve on every respondent. Serve a filed copy of the factum on each respondent.

Your reply must be bound in a buff (light beige) cover. It cannot be more than 5 pages long.

The completion instructions on the back of Form 11 tell you exactly how your reply must appear. Be sure to follow those instructions carefully. For example, the pages in the factum (except the index), must be printed on the left, the pages numbered on the upper left corner of the page, and so on.

2.9 Preparing the transcript extract book

You must prepare a transcript extract book (Form 13) if your factum contains a reference to oral testimony heard in the court appealed from. Transcript extracts help the judges follow your presentation. They will not have the full transcript in front of them at the hearing, and unless you provide a transcript extract, they will not be able to follow along when you are referring to testimony that was given at the previous hearing. For this reason, you must include all parts of the transcript that are important to your case.

Rule 27 provides details about transcript extracts.

Use Form 13 to prepare the book; it contains portions of the transcript necessary to explain the references in your factum. Transcript references must be bound in chronological order, with or without tabs.

The completion instructions on the back of Form 13 tell you exactly how your transcript extract book must appear. Be sure to follow those instructions carefully. For example, it must be **bound in a red cover**, the pages in the book (except the index), must be printed on both sides of the page, the volumes numbered, and so on.

Within **30 days** of filing the appeal record, you must:

- file at least 6 copies of the transcript extract book in the registry – 4 for use of the court, one copy for your own use, plus extra copies to serve on every respondent; and
- serve one filed copy of the transcript extract book on each respondent.

If the respondent's factum refers to oral testimony from the court or tribunal appealed from, he or she has 30 days after being served with your factum to prepare, file and serve you with a transcript extract book (Rule 27(2)).

2.10 Prepare a book of authorities

If you intend to refer to two or more authorities at the hearing of the appeal or application, you must prepare a book of authorities. Use Form 21 to prepare your book.

At least 30 days before the court hearing, you must:

- file at least 5 copies of the book of authorities in the registry – 3 for use of the court, one copy for your own use, plus extra copies to serve on every respondent; and
- serve one filed copy of the book of authorities on each respondent.

You can find more information about books of authorities, including how to file a joint book with the appellant, at Rule 40.

2.11 Prepare & File a Certificate of Readiness

A certificate of readiness tells the court registry that you are ready to schedule the appeal hearing. After you have filed the appeal record, your factum, and the appeal book, your final step is to file a certificate of readiness. Rule 28 gives you more information about this document. Use Form 14 to prepare your document.

If you and the respondent have agreed on the amount of time that you will need for the appeal hearing, and where it will take place, state that information on the form. If you cannot agree with the respondent about how much time is needed for the appeal

hearing, you must state how much time each party believes is needed for the appeal hearing.

You must pay a filing fee to file your certificate of readiness.

If you do not file a certificate of readiness immediately after the appeal is ready for hearing, the respondent may do so after filing its factum.

If a certificate of readiness is not filed within one year of filing the appeal (or notice of application for leave to appeal), or a notice of hearing has not been filed within 2 months of filing the certificate of readiness, the appeal will become **inactive**. This indicates that neither you nor the respondent intends to carry on with the appeal. If you do not reinstate the appeal, the appeal will be dismissed for want of prosecution 180 days after it becomes inactive.

To remove the appeal from the inactive list so that you can proceed, you and the respondent may sign a consent order removing it from the inactive list. File Form 27 if you both agree to take this step. If you cannot agree, you may bring an application before a judge in chambers, asking for an order to remove the appeal from the inactive list.

On an application to remove the appeal from the inactive list, the court will consider:

1. whether it is in the interests of justice to reactivate the appeal;
2. the extent of the delay;
3. the explanation for the delay;
4. the existence of any prejudice arising from the delay; and
5. the likelihood of success on appeal.

See Part 3 of this guide for more information on bringing applications.

2.12 Schedule the appeal for hearing

If you filed the certificate of readiness, you must contact the registry to schedule a hearing date by filing a Notice of Hearing (Form 34). You should consult with the respondent (or respondent's counsel) to find a date that is suitable for everyone. Rule 28(7) tells you about scheduling the appeal.

2.13 Prepare and File a Notice of Hearing

If a notice of hearing has not been filed within 2 months of filing the certificate of readiness, the appeal will become **inactive**. This indicates that neither you nor the respondent intends to carry on with the appeal. See Section 2.11 of this Guidebook for a discussion of how to remove the appeal from the inactive list to carry on with the appeal.

When the hearing date is scheduled, you must complete and file a notice of hearing, Form 34, which sets out the date and the estimated length of the hearing. You must serve this filed form on every respondent.

Step 3: Applications and Hearings

3.1 Making chambers applications

You may need to make certain applications to court before your appeal comes up for hearing. Common types of applications are dealt with in s. 3.2 of this guidebook.

These applications are made in chambers, usually before a single judge. In all chambers applications, evidence is given in the form of affidavits. Applications can be scheduled for any day on which the court sits in chambers, usually from Monday to Friday, excluding holidays.

How to make a chambers application

Part 6 of the Rules tells you how to bring an application to court, in chambers. You must:

1. Prepare a notice of motion in Form 6.
2. If you intend to rely on facts at the hearing of the application, obtain an affidavit to set out those facts.
3. File at least 4 copies of the notice of motion and affidavit – 2 for use by the court, one for yourself, plus one for each of the other parties.
4. Serve one filed copy on each of the other parties at least 5 business days before the date set for hearing of the application.

It is a good idea to check with the other party before choosing a hearing date to ensure they are available at that time.

The hearing of your application must be completed within 30 minutes. That means that each party will have approximately 15 minutes to make their applications.

How to reply to a chambers application

You have the opportunity to respond to another party's application. Rule 33(1.1)sets out the procedure to follow. You must prepare an affidavit that sets out your position. Then, within 2 business days of the hearing, you must:

- file one copy of the affidavit for use by the court, plus enough copies for each of the other parties; and
- serve one filed copy of the affidavit on each of the other parties.

What orders can a chambers judge make?

If you bring an application before a single justice in chambers, make sure that the judge has the ability to do what you are asking. In the Court of Appeal, some things require a division (three judges) to decide and some things can be decided by a single justice. Section 10(2) of the Court of Appeal Act tells you what the chambers judge can do:

1. Make an order incidental to the appeal that does not involve a decision of the appeal on the merits.
2. Make an interim order to prevent prejudice to a person.
3. Make any order, if all parties consent.
4. Extend or shorten the time limitations set out in the Act or Rules.
5. Dismiss an appeal as abandoned if the appellant has failed to comply with a provision of the Act or Rules.
6. When making an order, impose terms and conditions and give directions.

3.2 Common applications

Application for leave to appeal

Applications for leave to appeal are discussed in section 2.1.

Application for an extension of time

Applications for an extension of time are discussed in section 1.6.

Application for an order that no fees are payable

Applications for indigent status are discussed in section 1.5.

Step 3: Applications and Hearings

Application for a stay of proceedings

The commencement of an appeal does not stop proceedings declared by the court or tribunal below. In general, the successful party is entitled to move forward according to the earlier judgment, even if the appeal has commenced. For example, if the plaintiff in a Supreme Court trial got a judgment that he was entitled to sell the family home and use the sale proceeds to pay off a debt, the defendant may want to apply to the Court of Appeal and ask that the previous order be "stayed" (stopped) until the judgment is reviewed by the Court of Appeal. Until a stay application is granted, the order selling the house may be enforced according to the usual process.

A judge in chambers has the discretion to grant a stay of proceedings when it is necessary to preserve the subject matter of the litigation (e.g., the family home) until the Court of Appeal has made its final decision in the case (*Court of Appeal Act*, s. 18).

To bring a successful application for a stay of proceedings, you must show:

1. that there is some merit to the appeal (i.e., that there is a serious question to be decided); and
2. that the applicant would suffer irreparable harm if the stay were not granted.

Application for security for costs

The respondent may want to make an application for security for costs of the appeal, forcing the appellant to deposit money into Court to cover the respondent's costs if the appeal is not successful.

To bring a successful application for security for costs, the respondent must show:

1. the appeal does not have merit (i.e., is not likely to be successful);
2. the appellant does not have adequate financial resources;
3. the respondent would have difficulty collecting costs of the appeal; and
4. the timeliness of the application (i.e., the appeal proceedings are not too far advanced).

Step 3: Applications and Hearings

In general, the court will consider granting an order for security of costs to prevent the appellant from pursuing a frivolous appeal at the respondent's expense. If the respondent is granted an order for security for costs, the judge will determine the amount of money to be deposited. The appeal will usually be stayed until the security is posted.

Review Applications

If your application is dismissed and the judge does not grant you the order you wanted, you can apply to have the judge's decision reviewed by a division of three judges. To do this, you have to bring an application within 7 days of when your application was dismissed. Prepare an Application to Vary (Form 15) and an affidavit.

File at least 6 copies of the application and affidavit – 4 for use by the court, one copy for your own use, and one copy for each respondent. Serve a filed copy on each respondent.

Within 14 days of filing your application to vary the order, prepare a motion book (Form 16). File at least 6 copies – 4 for use by the court, one copy for your own use, and one copy for each respondent. Serve a filed copy on each respondent.

It is a good idea to ask the other party when they are available for the hearing. Then, ask the registrar to set a date for the hearing of your application and advise the respondent of the scheduled date.

Within 7 days of receiving your motion book, the other party must prepare a reply book. They must file at least 4 copies and serve a filed copy on each of the other parties.

For more information, see Rule 34.

For information on how to respond to an application, please see the previous page.

3.3 How to prepare for the hearing

Get organized

With very rare exceptions, Court of Appeal hearings are open to the public. It is a good idea to watch an appeal hearing before your own; it will give you a better understanding of court procedure, and how you should best conduct your appeal. Weekly hearing lists for appeals and chambers applications are published on the Court of Appeal website.

The most important thing to remember about getting ready for a court hearing is that you need to be organized. It is a good idea to make notes about how you want to present the details about your case including, for example, the facts that you believe the decision-maker misunderstood, the law that you are relying on, the transcript paragraphs you will be referring to, and so on.

You may also want to talk with a lawyer about how to present and argue your appeal at the hearing. There are many ways to get pro bono (free) advice or help with your case.

3.4 What happens at the hearing

At the hearing

Before the hearing, the division hearing your appeal will review the decision of the trial court (or tribunal), some of the evidence, and the factums.

The appeal is not a new trial of the issues. There are no witnesses or juries. You cannot introduce new evidence, except in rare cases.

- As the appellant, you will make your presentation to the judges first. You should present a summary of how you believe the previous decision-maker made a mistake in either the interpretation of the law or the facts presented below. You should not attempt to re-argue the case that you made in the court or tribunal below. You will have already outlined these points in your factum.
- Your presentation follows what you have set out in your factum. In other words, your factum is your “presentation guide” and it is helpful to follow important points that you have highlighted throughout your factum. Doing so will keep you on track during your presentation and remind you of the points that you plan to cover. The justices will often want to know where they can find the points you are discussing, so you should be prepared to direct them to the most important parts

of the filed materials. You should expect the justices to stop you from time to time to ask questions.

- The respondent makes his or her presentation. The respondent's presentation will focus on proving that the previous decision-maker made the correct decision and that the grounds of appeal advanced by the appellant are without merit.
- You have an opportunity to reply to address issues raised by the respondent that were not addressed during your initial presentation. **If you reply, you cannot repeat anything that you have already said.** This is not a time to reiterate or emphasize your position on the appeal; it is a chance to address new issues raised by the respondent.

Courtroom etiquette

You must conduct yourself in a way that is respectful of the dignity of the parties who are conducting their appeal. The courtroom is a formal setting and your conduct should be polite and respectful to the judges, the other parties, their counsel, and court staff. You must not disrupt or interfere with an appeal that is being heard.

Note also:

- Dress in business clothing.
- Address the judges as "my Lord", "my Lady", or collectively "the court".
- You cannot take photographs or videos.
- You cannot record the proceedings in the courtroom.
- Do not talk on the telephone.
- You may use an electronic device in the courtroom to transmit or receive text in a discreet manner that does not interfere with the proceedings.

An electronic device means any device capable of transmitting and/or recording data or audio, including smartphones, cellular phones, computers, laptops, tablets, notebooks, personal digital assistants, or other similar devices.

3.5 Introducing New Evidence

In general, you cannot introduce new or additional evidence at your appeal. You must rely on the evidence that you submitted in the previous proceedings. However, you may introduce new evidence with leave (permission) from the division hearing the appeal

Step 3: Applications and Hearings

(usually three judges). Rule 31 provides details about how to bring an application to court to decide this issue. The application is normally heard by the division at the start of your appeal hearing.

At the beginning of the hearing, you should tell the court that you want to make a request to submit new evidence. The court will hear your reasons why this evidence should be considered on appeal. If the respondent objects to your request, he or she will have an opportunity to explain why the evidence should not be introduced.

These are the general principles the division will consider on your application to admit new evidence:

1. The evidence will generally not be admitted if you could have introduced it at trial;

2. The evidence must be *relevant* in the sense that it relates to a decisive or potentially decisive issue in the case;

3. The evidence must be credible in the sense that it is reasonably capable of belief; and

4. If believed, the evidence could reasonably, when taken with the other evidence introduced, be expected to have affected the result.

Step 4: After the hearing

4.1 Getting judgment

The judgment

The Court of Appeal may:

- dismiss the appeal (i.e., confirm the decision of the previous decision-maker);
- allow the appeal and order a new trial or hearing; or
- allow the appeal and change the previous order.

The judges will sometimes give their decision immediately after hearing the appeal, or a day or two after the appeal. (This is called an oral decision.) Other times, the judges will "reserve" their decision, which means that they will provide a written judgment at a later date.

The Court of Appeal registry will contact you when the written judgment is ready, and you can pick it up from the registry. Or, you may request that the judgment be emailed to you when it is released. (Send an email request to ca-re@courts.gov.bc.ca.) Copies of oral judgments may be obtained by sending an email to ca-orals@courts.gov.bc.ca.

Further appeals

The Court of Appeal's decision is final unless the Supreme Court of Canada in Ottawa agrees to hear your case. Further information can be found on its website.

4.2 Costs

The appeal court judges have the discretion to award costs of the appeal, and each case is decided individually. If the court does not mention costs in their judgment, the successful party is automatically entitled to have the direction for costs included in the final court order (*Court of Appeal Act*, s. 23). This means that the successful party is entitled to their costs of the appeal, including the costs of all applications. These costs cover a portion of the expenses incurred in the appeal. As a result, if you are not

successful in your appeal, you usually have to pay the respondent's costs, and this can amount to thousands of dollars. Even if you have been granted an order that no filing fees are payable, you will still have to pay the respondent's costs.

If you want to argue that costs should not go to the successful party, you may ask the court for permission to file further written submissions on the matter. Further submissions on costs are arranged through the Registrar's office and you may contact the court registry for information on how to proceed.

The scale of costs is set out in the Tariff of the Court of Appeal Rules.

4.3 Court orders

Drafting the order

An order (Form 23) needs to be prepared when the Court of Appeal has given its decision in chambers or after the appeal hearing. The parties, not the court, are responsible for preparing the order. Any party can prepare the order, but usually the successful party does so.

The signatures of all parties must be collected on the order before submitting it to the registry for entry. If someone refuses to sign an order, you may go before the registrar to settle the order. (See Rule 49.)

You can find more information about drafting court orders in the guidebook, Drafting Orders, prepared for litigants in the BC Supreme Court.

Enforcing your court order

There are different ways to enforce a court order, depending on what the judge ordered, and whether the other party is able or willing to comply. You might need to return to court to take enforcement proceedings. All enforcement proceedings take place in the court where the matter originally commenced. You must file a certified copy of the Court of Appeal order in the originating court before you can enforce it through the court (*Court of Appeal Act*, s. 22).

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Step 4: After the hearing

Enforcement options are available for creditors under the *Court Order Enforcement Act* and the *Creditor Assistance Act*. Information for debtors is available in the *Debtor Assistance Act*. An overview of your options is available in the BC Supreme Court guidebook, Enforcing Court Orders. A lawyer can advise you which options are best.