BC Court of Appeal: Guidebook for Respondents -Contents-

Step 1: How to respond to an 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.

An appeal is not a new trial or a rehearing of the 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, the appellant must ask the permission of the Court to appeal through a process called "leave to appeal". Even if the Court of Appeal hears the appeal, it will not:

- re-hear the 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, the appellant must show that the decision-maker made a factual or legal error that affected the outcome of the case.

1.2 Does the appellant have a right to appeal?

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. See Section 2.1 on how to start an appeal discusses how the appellant may obtain leave (permission) to appeal.

1.3 What happens to the order being appealed?

Bringing an appeal will not automatically stay (stop) enforcement of the order made by the decision-maker below until the appeal has been decided. This means that the appellant has to obey the order under appeal, unless he or she applies for and is granted a stay.

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

If the appellant applies to stay the order, you can file materials in response and present arguments about why a stay should not be granted.

For more information on applications for stays of proceedings, see Section 3.2 of the Guidebook for Appellants.

1.4 How do I respond to an appeal?

Two types of appeals

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

1. the appellant has no right of appeal at all;
2. the appellant must ask the court for permission to appeal the case (called "leave to appeal"); or
3. the appellant has an automatic right of appeal.

If the appeal is one where leave to appeal is required, the appellant will serve you with a notice of application for leave to appeal, which involves an initial application before the Court for permission to appeal the case.

If the appeal is one where leave to appeal is not required (i.e. there is an automatic right of appeal), then no such application is required. The question of what right the appellant has to appeal is discussed in Section 1.3 of the Guidebook for Appellants.

You must respond to an appeal

After the appellant has served you with the notice of appeal (or application for leave to appeal), you must file a notice of appearance within 10 days if you intend to participate in the appeal or application. If you do not file a notice of appearance, you are presumed to take no position on the appeal. In other words, the court will assume you don't care what happens in the appeal and the appellant does not have to serve you with any further documents or notify you of any further court hearings. Judgment may be taken against you without you having had an opportunity to present your case to the court. (Rule 14.)

The appearance contains your address of service, which the appellant will use in the future to deliver documents to you. It may be a house address, a fax number, or email address. (See Rule 39.)

Notice of appearance

Follow these steps if you intend to dispute the appellant's appeal or application for leave to appeal:

1. Prepare and file a notice of appearance (Form 2).
2. You must file your notice of appearance at the Court of Appeal registry within 10 days of receiving the notice of appeal or application for leave to appeal. If that date falls on a weekend, you must file your document on the next business day.
3. Serve a filed copy of the notice of appearance on the appellant(s) within the same 10-day period.

The appellant must serve you with two documents within 60 days of filing the notice of appeal or being granted the right to appeal (if the appellant had to apply for leave to appeal):

1. The appeal record, which contains documents from your previous hearing (see Rule 19).
2. The transcript from the previous proceeding.

Refer to the checklist attached to this guidebook. It sets out steps and timelines.

If the appellant missed the deadline for filing a notice of appeal or notice of application for leave to appeal

The appellant may apply for an extension of time if he or she missed the 30-day deadline for filing a notice of appeal. The appellant will file and serve you with the application documents at least 5 business days before a hearing by a single judge in chambers. If you intend to oppose the appellant's application, you must respond by filing your own motion book at least 2 business days before the application.

You will have an opportunity to appear at the hearing and argue that the appellant should not be given an extension of time.

In deciding whether to give the appellant more time, the court will consider certain factors:

1. Was there a bona fide (genuine) intention to appeal?
2. When were the respondents informed of the appellant's intention to appeal?
3. Would the respondents be overly prejudiced by an extension of time?
4. Does the appeal have merit?

5. Is it in the interests of justice that an extension be granted?

You can use these factors to organize the facts for your affidavit and your argument about why the court should not give the appellant more time.

1.5 If the appellant applies for leave to appeal

Follow these steps if the appellant applies for leave to appeal

If the appellant is applying for leave to appeal, he or she must serve you with notice of the application for leave to appeal (Form 1). Service of the application must be within 30 days from 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, the deadline is the next business day.

Follow these steps if you intend to oppose the appellant's application for leave to appeal:

1. Within 10 days of being served, file a notice of appearance (Form 2) and serve a copy of the filed notice on the appellant. If you do not file a notice of appearance, you are presumed to take no position on the appellant's application. In other words, the court will assume you don't care what happens at the appellant's application for leave to appeal and the appellant does not have to serve you with any further documents relating to the application. (See Rule 6.)

2. If you intend to participate at the hearing of the leave to appeal application and have filed a notice of appearance, the appellant will serve you with a copy of his or her filed notice of motion for leave to appeal (Form 3) and a motion book (Form 4). You must be served at least 10 business days before the application is to be heard.

3. At least 5 business days before the application for leave to appeal is heard, you must file and serve a filed copy of your reply book (Form 5) on the appellant. (See Rule 8.)

4. The completion instructions on the back of Form 5 tell you exactly how your reply book must appear. Be sure to follow those instructions carefully. It must be bound with a green cover and:

    - contain evidence, exhibits, affidavits, reasons for judgment, and enactments relevant to the application (that are not already in the appellant's motion book);
    - contain a memorandum of argument no longer than 5 pages; and
    - be arranged in the same manner as the appellant's motion book.

5. The leave application will be heard by a Court of Appeal judge in chambers. The appellant will present reasons why leave should be granted. As the respondent, you will be able to present reasons why leave to appeal should not be granted. After your presentation, the appellant may have an opportunity to reply to your presentation.

   The appellant may be given permission to appeal when the appeal concerns a significant point of law and the appeal has merit. The appellant will not be given permission to appeal if the appeal is frivolous or is brought only to delay enforcement of the trial decision. The factors considered by the chambers judge are:

   1. the importance of the appeal generally and to the parties;
   2. the utility of the appeal in the circumstances of the parties;
   3. the likelihood that the appeal will succeed; and
   4. whether any statutory provision grants a right to appeal with leave.

You can use these factors to organize your argument that the appellant should not be granted permission to appeal.

If the court grants the appellant leave to appeal, the appeal process continues. You cannot appeal from a decision that grants leave to appeal (s. 9(6) of the Act).

If the appellant is granted leave to appeal (and you did not file a notice of appearance), you must file one now if you intend to participate in the upcoming appeal. He or she must serve you with the court order granting leave to appeal. Within 10 days after being served with that order, you must:

- file a notice of appearance (Form 2); and
- serve one filed copy of the notice on the appellant.

6. If the appellant does not get leave to appeal, he or she may apply to a division of three judges to review the decision of the chambers judge. You will be given notice of that application. At this new hearing, the judges may grant leave to appeal (which means that the appeal can continue) or refuse to grant leave (which means that the appeal cannot continue).

   If the appellant applies to vary the judge's order refusing leave to appeal, they must apply within 7 days. They will serve you with an application, an affidavit, and a motion book.

   Within 7 days of receiving the appellant's motion book, you must prepare a Reply Book (Form 17). File at least 4 copies of the Reply Book, and serve one filed copy on each of the other parties.

If the appellant missed the deadline for filing the application for leave to appeal

The appellant may apply for an extension of time if he or she missed the 30-day deadline for filing an application for leave to appeal. This application is usually made at the same time that the appellant is applying for leave to appeal. The appellant will file and serve you with the application documents at least 5 business days before a hearing by a single judge in chambers. If you intend to oppose the appellant's application, you must respond by filing your own motion book at least 2 business days before the application.

You will have an opportunity to appear at the hearing and argue that the appellant should not be given an extension of time.

In deciding whether to give the appellant more time, the court will consider certain factors:

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

You can use these factors to organize the facts for your affidavit, and your argument about why the court should not give the appellant more time.

1.6 The respondent serves an appeal record

Within 60 days of the appellant filing a notice of appeal or having been granted leave to appeal by a justice in chambers, the Appellant must file and serve an appeal record. The appeal record contains key documents about the proceeding under appeal. Rule 19 provides details of appeal records, but it generally contains:

a. 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 Question Act* (for example, if you are challenging the constitutional validity or applicability of any law or seeking a constitutional remedy).

1.7 The appellant may serve a transcript

A transcript is a written record of a court or tribunal hearing. Rule 20 provides details about transcripts of evidence. If witnesses testified in the previous proceedings, the appellant should obtain a transcript from those proceedings and file and serve it with the Court. 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.

The transcript must be filed at the same time as the Appeal Record, **60 days** from the date the appellant filed his or her notice of appeal or a judge in chambers granted him or her leave to appeal.

1.8 The appellant serves an appeal book

The appellant will serve you with the appeal book. The appeal book contains evidence submitted at the previous proceeding, such as affidavits and documentary evidence. The appeal book must contain only so much of the evidence as is necessary to resolve the issues raised on the appeal.

At the same time as you are preparing your written argument (factum), you may want to consider whether you need any more evidence before the Court than what was in the appellant's appeal book. If so, you may prepare a respondent's appeal book.

If you think the appellant's appeal book is incomplete, you may prepare your own appeal book within 30 days after being served with the appellant's appeal book. Use Form 12 when preparing your appeal book. 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.)

See the Checklist prepared by the Court of Appeal for further information.

You must then:

- file at least 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 appellant; and

- serve a filed copy of the appeal book on each appellant.

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.").

1.9 Write your argument (factum)

What is a factum?

A factum is the argument that you will use in the presentation of your response to the appeal. It explains what your position is all about. See Rules 21 – 24. The respondent's factum is due **30 days** after being served with the appellant's factum.

Use Form 10 to prepare your factum.

Your factum **must be bound in a green 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 respondent, the court or tribunal appealed from, and the result of your case in the previous proceedings. Your opening statement must set out the essential points of your response to the appeal; that is, the main reasons why the appeal should not succeed.

4. **Part 1**: A statement of facts. Set out your position with respect to the appellant's statement of facts in his or her factum, together with a concise statement of any other facts that were before the court below that you consider relevant. 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. It is not useful to replicate the statement of facts found in the appellant's factum and indicate whether you agree with each paragraph. Instead, you may wish to state that you agree with the statement of facts in the appellant's factum, except for a list of paragraphs, explaining how you disagree with each.

6. **Part 2:** Issues on Appeal. This part outlines your position on the issues raised by the appellant's factum and other points that you want to put in issue.

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

8. **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.)

9. 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 being served with the appellant's factum, you must:

- file at least 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 appellant and respondent; and
- serve a filed copy of the factum on each appellant (and other respondents).

Your factum is normally filed together with your transcript extract book. This is discussed on the next page.

You can see an example of a factum here.

1.10 The appellant may serve a transcript extract book

Within 30 days of filing the appeal record, the appellant must serve you with a transcript extract book if his or her factum contains a reference to oral testimony heard in the court appealed from. Rule 27 provides details about transcript extracts.

If you need to explain oral testimony references in your own factum, you will also have to prepare your own transcript extract book. The judges 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. Use Form 13.

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 the left, the volumes numbered, and so on.

Within **30 days** of receiving the appellant's factum, you must:

- file four copies of the transcript extract book in the registry for use by the court, plus extra copies to serve on every appellant (and respondent); and

- serve one filed copy of the transcript extract book on each appellant (and respondent).

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

1.11 Put together 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.

1.12 If the appellant does not, prepare a certificate of readiness

The appellant's final step in the appeal procedure is to file a certificate of readiness. A certificate of readiness tells the Court registry that the parties are ready to schedule the appeal hearing. Rule 28 gives you more information about this document.

If the appellant does not file a certificate of readiness immediately after the appeal is ready for hearing, you may file this document (along with a filing fee) **if** you want the appeal to proceed. Use Form 14 to prepare your certificate of readiness.

If you and the appellant have agreed on the amount of time that you will need for the appeal hearing, and where it will take place, you will state that information on the form. If you cannot agree how much time is needed for the appeal hearing, you must state how much time each party believes is needed for the appeal hearing.

If a certificate of readiness is not filed within one year of filing the appeal, the appeal will become **inactive**. This indicates that the appellant does not intend to carry on with the appeal. If nothing has happened, the appeal will be dismissed for want of prosecution 180 days after it becomes inactive.

If the appellant wishes to remove the appeal from the inactive list so that he or she can proceed, the appellant will ask you to sign a consent order removing it from the inactive list. The appellant will file Form 27 if you agree to take this step. If you do not agree, the appellant 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.

Step 2: Applications and Hearings

2.1 Making chambers applications

You may need to make certain applications to court before your appeal comes up for hearing. These applications are made in chambers, usually before a single judge. In all chambers applications, evidence is given in the form of affidavits and applications can be scheduled for any day on which the court sits in chambers, usually from Monday to Friday, excluding holidays. Common types of applications are dealt with in section 2.2 of this guidebook.

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 that sets 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. Also 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 respond 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.

2.2 Common applications

Application for leave to appeal

Applications for leave to appeal are discussed here.

Application for an extension of time

Applications for an extension of time are discussed here.

Application for an order that no fees are payable

Applications for an order that no fees are payable are discussed here.

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 been 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 is granted, the order selling the house may be enforced according to the usual process. The plaintiff/appellant may therefore apply for a stay of proceedings.

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) if the appellant can show:

1. that there is some merit to the appeal (i.e., that there is a serious question to be decided); and

2. that he or she would suffer irreparable harm if the stay were not granted.

Application for security for costs

You may want to make an application for security for costs of the appeal, forcing the appellant to deposit money into Court to cover the judgment appealed from or your costs if the appeal is not successful.

To bring a successful application for security for costs, you 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. you 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).

In general, the court will consider granting an order for security of the judgment or costs to prevent the appellant from pursuing a frivolous appeal at your expense. If you are 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 other party. Serve a filed copy on each other party.

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 other party. Serve a filed copy on each other party.

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 other party 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.

2.3 Schedule the appeal for hearing (if the appellant does not)

Rule 28 tells you about scheduling the appeal for hearing.

Normally the appellant will file the Certificate of Readiness. However, if the appellant does not, you can file the Certificate in Form 14 after filing your factum. If you file the Certificate of Readiness, you must contact the registry to obtain a date for the hearing of the appeal. You should talk to the appellant (or their lawyer) to find a date suitable for everyone.

2.4 Notice of hearing

Normally the appellant will file the Notice of Hearing. However, if he or she does not, and you have filed the Certificate of Readiness and fixed a date for the hearing, you may file a Notice of Hearing in Form 34 setting out:

- the date for the hearing; and
- the estimated length of the hearing as set out in the Certificate of Readiness.

Serve a filed copy of the Notice of Hearing on all other parties.

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 appellant intend to carry on with the appeal. However, the appellant can still apply to remove the appeal from the inactive list. To learn more about applications to remove an appeal from the inactive list, see Section 1.12.

2.5 How to prepare for the hearing

Get organized

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 clearer understanding of court procedure, and how you should best conduct your response to the appeal. You can see the Weekly Hearing Lists by visiting the Court of Appeal website.

The most important thing to remember about getting ready for an appeal 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 important facts of your case, 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.

2.6 What happens at the hearing

At the hearing

Before the hearing, the judges hearing the 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.

- The appellant makes his or her presentation to the judges first. The appellant will present a summary of how he or she believes the decision-maker in the previous hearing misunderstood the facts of the case or made a mistake in interpreting the law.
- You make your presentation next. Your argument should be directed to showing the earlier decision-maker made no mistakes in its judgment. You will have already outlined these points in your factum.
- The appellant has an opportunity to reply to new issues you raised in your presentation.

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.

2.7 Introducing new evidence

In general, you cannot introduce new or additional evidence at the 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. 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 your argument, 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 appellant objects to your request, he or she will have an opportunity to explain why the evidence should not be introduced. The new evidence should be included in your affidavit so that the judges will have the opportunity to review it should they decide to admit the new evidence.

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 3: After the hearing

3.1 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, by reading it in court 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.

3.2 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, you usually have to pay the appellant'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 appellant'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.

3.3 The court order

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).

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.