Appeals and Judicial Reviews Pitfalls Checklist

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This checklist sets out common errors made by litigators in the commencement or perfection of an appeal or an application for ***judicial review***. The idea of embarking on a civil appeal or application for ***judicial review*** can be daunting for the unversed lawyer. Appeals and ***judicial review*** applications involve a level of knowledge and skill ordinarily outside the experience of the average litigator. Lawyers should be cautious about taking on appeals or ***judicial reviews*** where they do not do so regularly.

For guidance on ***judicial review*** applications, see the practice notes: ***Judicial Review*** (ON) and ***Judicial Review***: Standard of ***Review***. For general guidance on appeals, see the practice note: Appeals (ON), Appeals (BC) and Appeals (AB).

1 **Failing to Have the Underlying Order Issued and Entered**

In order to perfect a civil appeal from a lower court proceeding to an appellate court, an issued and entered order of the lower court is required. This rule does not usually apply to decisions of tribunals, since tribunals typically do not execute orders, but only decisions.

An appellant will not be able to perfect the appeal without the underlying court order(s). During the pandemic, the lower court may require additional time to have the order issued and entered; this consideration must be factored into the perfection timeline. For guidance on issuing and entering orders, see: Preparing and Entering an Order Checklist (ON).

2 **Appealing to the Wrong Court**

There are a myriad of avenues through which an appeal or application for ***judicial review*** is ultimately heard by the Ontario Divisional Court or the Ontario Court of Appeal. The proper venue for an appeal is largely determined by statute. It can depend on a range of factors, including whether the lower court order or tribunal decision was interlocutory or final and whether a statute, apart from the *Courts of Justice Act*, R.S.O. 1990, c. C.43, governs the appeal.

In certain cases, the underlying statute will expressly identify the period by which an appeal must be brought and to what court. A failure to appeal to the right court and on time can be fatal; the appeal could be dismissed or struck by the appellate court on a motion by the opposing party, and any subsequent appeal commenced in the proper venue may be out of time. For additional guidance on appeal routes, see: Appeal Route Checklist (ON), Appeals Checklist (ON SCJ), Appeals Checklist (ON Div Ct), Appeals Checklist (ON CA) and Identifying the Appeal Route Checklist (AB).

3 **Failing to Obtain Leave to Appeal**

Certain civil appeals to the Divisional Court or the Court of Appeal require leave of the court before the appeal may be pursued. This typically occurs where the appellate court is being asked to hear an appeal of an order or decision that has already been appealed before. Leave may also be required where there are good policy reasons for discouraging parties from appealing the order itself. If leave to appeal is required and not pursued, the appeal will not be considered and may be struck by the appellate court. For additional information on leave to appeal, see the practice notes: Divisional Court: Obtaining Leave to Appeal (ON) and Court of Appeal: Obtaining Leave to Appeal (ON).

4 **Failing to Meet Commencement and Perfection Deadlines**

The deadlines for pursuing and perfecting an appeal or application for ***judicial review*** as set out in the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 are usually not negotiable, particularly without the consent of opposing counsel. A failure by an appellant or applicant to start or perfect an appeal on time can have dire consequences. Absent a very legitimate reason for the delay or the consent of opposing counsel,

the appeal could be rejected from the outset or dismissed entirely. For guidance on perfecting an appeal, see: Perfecting an Appeal Checklist (ON).

5 **Failing to Conduct Further Legal Research and Recrafting the Lower Court Argument**

The business of appellate courts is law, so it is incumbent on the appellate lawyer to ensure that the law presented to the court is up-to-date and noted up. Moreover, a factum submitted in support of an appeal or an application for ***judicial review*** should never amount to a regurgitation of lower court or tribunal arguments. For information on drafting factums, see: Factum Checklist (ON).

As a piece of rhetoric and oral advocacy, a factum must be clear, persuasive and cogent. Since the factum is the most important document submitted to the Divisional Court or Court of Appeal, it must be drafted with care and expertise. Novices should tread carefully in the art of written appellate advocacy, which takes years of experience to refine and develop.

Appellate courts do not rehear cases — they look for legal error. Accordingly, an appeal or application for ***judicial review*** should very much constitute a "fresh start", where the issues presented to the appellate court are narrow, few and the product of considerable legal research and reconsideration.

6 **Seek Out Help**

For lawyers embarking on an appeal or application for ***judicial review*** for the first time, and even for those with some experience in the field, it may very well be necessary to understand one's limits as a litigator and retain expert appellate counsel to assist in the commencement and perfection of the appeal.

This may involve retaining an appellate lawyer to assist with drafting the Notice of Appeal/Notice of Application for ***Judicial Review***, conducting legal research, perfecting the appeal, drafting the factum and even making oral argument. Such efforts may amount to a sound investment, particularly where appellate litigation is fraught with the potential for error.

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