

The Nova Scotia Court of Appeal

A How-To Manual for Criminal Appeals

The purpose of this manual is to help you make an informed decision about appealing a criminal conviction or sentence.

Starting an appeal means you are prepared to dedicate the time, energy, focus and possibly the money to see the appeal through to its conclusion. You should not start an appeal unless you are committed to this process.

This manual lays out the mechanics of a criminal appeal. We encourage you to reference it as the appeal process unfolds.

1. Frequently Used Terms

- Appeal Book** The collection of the trial transcripts and copies of exhibits that make up the record. A transcript is a certified record of every word that was said by the judge, lawyers, and witnesses at a trial, prepared and certified to be accurate by a professional court reporter. The Crown lawyer will prepare the Appeal Book if you are incarcerated.
- Appellant** The person who is requesting an appeal court overturn a decision of a trial court.
- Certificate Of Readiness** A signed document which certifies the Appellant has started the process of gathering the materials necessary for the appeal book. It must provide an estimate of when the trial transcript will be prepared and when the appeal book can be filed with the court.
- Chambers** A sitting of the court dealing with brief but important matters such as setting dates. It is held in open court with the recording equipment turned on. In Halifax Supreme Court, Chambers is referred to as Crownside. If you live outside of Halifax, you may arrange to have your appeal set down via telephone chambers, referred to as telechambers.
- Factum** The written arguments filed by the Appellant and Respondent.
- Ground of Appeal** A one sentence summary of the mistake or mistakes the Appellant believes the trial judge made. There may be one ground of appeal or several.

Indictable Offences	The most serious crimes, such as homicide, robbery, aggravated assault, or trafficking in drugs. The most common indictable offences are in the Criminal Code or the Controlled Drugs and Substances Act. The Nova Scotia Court of Appeal hears appeals of indictable offences.
Indictment	The document from Supreme Court which sets out your charge or charges.
Information	The document from Provincial Court which sets out your charge or charges.
Nova Scotia Court of Appeal	The highest court in the province. It is where an appeal for indictable offences or an appeal from a Summary Conviction Appeal Court is heard.
Provincial Court	The Court at which all criminal charges begin and most criminal charges conclude. The Provincial Court hears the trials for all summary offences. It has the authority to hear all criminal offences except the most serious. If you are charged with an indictable offence other than murder you may choose to have your trial in Provincial Court.
The Record	The general term for all of the information that was before the trial court. This includes the certified transcript of the audio recording, all exhibits and written arguments provided to the trial judge. The Crown lawyer will obtain the audio recording and transcript if you are incarcerated.
Respondent	The person who is responding to an appeal who usually does not want the lower court decision overturned. In your criminal appeal the Respondent will be the Federal Crown, Provincial Crown, or Municipal Crown.
Summary Conviction Appeal Court	A judge of the Nova Scotia Supreme Court who is reviewing a decision regarding a summary offence.
Summary Offences	Less serious offences, most of which are in the Criminal Code, the Controlled Drugs and Substances Act, or are Provincial Offences. A judge of the Supreme Court hears appeals of summary conviction verdicts. The Nova Scotia Court of Appeal hears appeals of Supreme Court judge's decisions on summary conviction appeals.
Telechambers	A hearing of the court dealing with brief matters such as setting dates. It is held by telephone with the recording equipment turned on.

2. Starting an appeal and the importance of following it through

An appeal is not a new trial. An appeal is a review of the record to determine if the trial judge misapplied the law, misunderstood the evidence, or both.

By filing a Notice of Appeal you take the first step to having a higher court review the trial court's decision, but there are many more steps you must take. You must follow an appeal through to its conclusion before the higher court can change the lower court's ruling.

It is the Appellant's responsibility to move the appeal along by filing the required documents on time and in the proper format. If you do not do this your appeal can be dismissed.

What is the difference between the Notice of Appeal and a ground of appeal?

The Notice of Appeal is the document that starts the appeal process. Its main purpose is to tell the other participants and the appeal court what you say the judge did wrong, and to tell them what you want the appeal court to do to fix that wrong. Much of the Notice of Appeal sets out particulars of the trial such as dates, the name of the trial judge, and the names of the parties involved in the trial. It also lays out the ground or grounds of appeal. Your personal contact information must also be included.

A ground of appeal is set out in the Notice of Appeal document. It is a one sentence summary of why you believe your conviction or sentence should be overturned by an appeal court.

There can be more than one ground of appeal. If you believe the trial judge made one error, you have one ground of appeal. If you believe the trial judge made three errors, you have three grounds of appeal, and so on.

A ground of appeal could be an error of law, a misapprehension (or misunderstanding) of the facts, or both an error of law and misapprehension of facts. These errors can take place at any point in the proceedings, including pre-trial motions, mid-trial motions, the decision on whether you are found guilty or not guilty, or sentencing.

If you are appealing a sentence, you must apply for leave to appeal sentence. "Applying for leave" is another way of saying asking for permission to appeal. Practically speaking, the court will hear the application for leave and the sentence appeal at the same time.

Appealing a Jury Decision

In jury trials, the trial judge's instructions to the jury on the law may be reviewed by the Court of Appeal. The jury made their decisions in secret about what facts were proven, so there are no grounds to appeal the process by which a jury decided the facts. However, the Criminal Code does allow the Court of Appeal to determine if a verdict is unreasonable or not supported by the evidence.

What is NOT a ground of appeal?

The nature of our criminal justice system usually means that one of the parties at trial did not get what he or she wanted. People appeal convictions and sentences because they are unhappy with what happened at their trial or sentencing. Being unhappy with an outcome, however, is not a ground of appeal.

Perhaps the trial judge found you guilty even though you said you were innocent. The trial judge may have believed a witness you did not believe. If you testified, the trial judge may not have believed you.

A trial judge's job is to hear the witnesses, apply the law, and if possible make findings of fact. Trial judges have the benefit of seeing and hearing witnesses in the flesh which gives them a much better opportunity to assess whether what a witness says is reliable and trustworthy. Appeal judges read the transcript of what the witnesses said.

An appeal judge must respect a trial judge's finding of fact, even if the appeal judge might have concluded the facts were different.

Simply put, saying "I can't believe the trial judge believed that liar" is a not a ground of appeal.

Can witnesses testify at an appeal?

Most appeals will not have witnesses testify.

Witness testimony is the cornerstone of a criminal trial. However, an appeal is very different from a trial. Unlike a trial, an appeal is a review of information that the trial judge heard and the decisions the judge made based on that information.

However, the Criminal Code recognizes that there are times when witnesses must testify at an appeal. Generally, witnesses that could have testified at trial will not be heard on appeal. A potential witness must be relevant and bear upon a potentially decisive appeal issue. The witness must also be reasonably capable of belief and, if believed, could be capable of affecting the result of the trial when taken with other evidence at trial.

I think my lawyer is to blame for my conviction. Is that a ground of appeal?

Probably not. Lawyers are highly trained and are regulated by the Nova Scotia Barristers' Society. There is a strong presumption that your trial lawyer was competent, exercised sound professional judgment, and your trial was fair.

Even so, appeal courts recognize that there are times when a lawyer's performance at trial can be inadequate to the point there was a miscarriage of justice. As the Appellant you must show that your lawyer's performance at trial fell below the standard of a reasonably competent lawyer and as a result of the lawyer's performance, a miscarriage of justice occurred.

Lawyers are officers of the court and have a professional obligation not to advance frivolous arguments or call witnesses to give testimony which is irrelevant or not admissible.

If you wish to advance this ground of appeal, you must prove your trial lawyer's actions or inaction contributed to your conviction. Put another way, you must prove that if your lawyer had done or not done specific actions you would have either been found not guilty or have had a lighter sentence.

3. When should I file my appeal?

Once you have been sentenced, you may appeal:

1. Conviction alone;
2. Sentence alone;
3. Both conviction and sentence

The Notice of Appeal must be filed 25 days after sentence is passed . This does not include the day of sentencing, a Saturday, Sunday or holiday on which the Prothonotary's office is closed. It is important that you file your Notice on time – do not miss the deadline.

As a general rule, there is no benefit to filing your appeal before you are sentenced. The appeal court will not hear your appeal until you have been sentenced. Also, if you decide to appeal your sentence you will have to apply to amend your Notice of Appeal once you have been sentenced.

Although there is no benefit to filing your Notice of Appeal before you are sentenced, it would help to begin the process of gathering materials (such as a transcript) you will need to advance your appeal.

4. Appeal to the Supreme Court or the Court of Appeal?

If you wish to appeal a conviction or sentence for an indictable offence, you must appeal to the Nova Scotia Court of Appeal. It hears appeals of indictable offences and appeals from Summary Conviction Appeal Courts. The Nova Scotia Court of Appeal sits in Halifax. This means that the administration office, the judges' offices, and the courtroom in which appeals are heard are in Halifax.

An appeal is started in the Nova Scotia Court of Appeal by filing a Notice of Appeal with the Registrar of the Court of Appeal at 1815 Upper Water Street in Halifax.

If you are appealing a summary conviction, you must file your Notice of Appeal in the appropriate Supreme Court which is located in the same district of the court which heard your trial. If your trial or sentencing took place in Provincial Court within a County that does not have a Supreme Court, your appeal will have to take place in a different county. Please note that in some centres the administration office is in a separate building than the actual courtroom where your appeal will be held.

If your trial was in:	Your appeal will be in Supreme Court at:
Amherst	Administration: 16 Church Street, Amherst; Courtroom: 54 Victoria Street E, Amherst
Annapolis Royal	119 Queen Street, Digby
Antigonish	11 James Street, Antigonish
Arichat	15 Kennedy Street, Port Hawkesbury
Bridgewater	141 High Street, Bridgewater
Dartmouth	1815 Upper Water Street, Halifax
Digby	119 Queen Street, Digby
Eskasoni	136 Charlotte Street, Sydney
Halifax	1815 Upper Water Street, Halifax
Ingonish	136 Charlotte Street, Sydney
Kentville	87 Cornwallis Street, Kentville
New Glasgow	69 Water Street, Pictou
Pictou	69 Water Street, Pictou
Port Hawkesbury	15 Kennedy Street, Port Hawkesbury
Shelburne	164 Main Street, Yarmouth
Shubenacadie	1 Church Street, Truro
Sydney	136 Charlotte Street, Sydney
Truro	1 Church Street, Truro
Windsor	Administration: 87 Cornwallis Street, Kentville; Courtroom: 240 King Street, Windsor
Yarmouth	164 Main Street, Yarmouth

5. What do I do once I have filed a notice of appeal?

As the Appellant, it is your responsibility to move your appeal forward. This means you must:

1. Have the appeal placed on either the telechambers or chambers docket to set dates for the hearing and filing deadlines.
2. File your appeal book on time and in the correct format.
3. File your factum on time and in the correct format.
4. Arrange for the service of documents whenever this is required, and be prepared to prove that service of documents was done.
5. Appear for your hearing on time and prepared.

Legal Representation

After your Notice of Appeal has been filed, if you are an unrepresented prisoner, you will be contacted by court staff and asked to participate in a phone call with a judge of the court (“telechambers” or a “chambers teleconference”). You will then be asked whether or not you wish to have a lawyer and, if you do, about what steps you have taken with Legal Aid and otherwise to obtain a lawyer. If you wish to have a lawyer but Legal Aid will not represent you in the appeal, court staff will provide you with an information package, explaining how you may apply to the court to have a lawyer appointed.

Preparing, formatting and filing the appeal book

The appeal book is not just what you want the Court of Appeal to read. It contains everything that the trial judge you are appealing from considered, whether you think it helps or hurts your case. An appellant and respondent may AGREE to limit what goes in the appeal book, but one of them does not decide alone. If you are incarcerated, the Crown will prepare the appeal book.

The appeal book, therefore, must contain all of the following documents, in two separate booklets;

Appeal Book Part 1 - Documents

1. A table of contents referring to each document and the page number at which it begins;
2. A copy of the Notice of Appeal;

3. A copy of the Information if the trial was held in Provincial Court or the Information and the Indictment if the trial was in held in Supreme Court;
4. A copy of the decision under appeal signed by the judge who issued it;
5. A reference sheet containing the heading of the proceeding under appeal, the court or registry number, the name of the judge who made the judgment, the date or dates of the trial, and date of judgment

Appeal Book Part 2 – Evidence and Related Materials

An index of witnesses which includes the name of the witnesses, the party who called the witness, and page references to where in the appeal book direct examination, cross examination, and re-direct examination begins (this is usually prepared by the transcriptionist);

1. A list of all Exhibits;
2. A copy of the transcript of everything said in the course of the trial;
3. A copy of each documentary exhibit;
4. If a jury conviction is under appeal, a copy of the charge (instructions) to the jury certified by the trial judge to be accurate;

If you are appealing sentence, you do not need to include the trial transcript or exhibits entered at trial, but you do need to include the transcript of the sentencing and any exhibits entered at sentencing. You must also include:

1. The presentence report that was before the sentencing judge;
2. A copy of your criminal record, if you have one, that was before the sentencing judge;
3. A copy of each order related to the sentence. This could be a fine order, probation order, conditional sentence order, order for the taking of bodily substance (DNA), firearms prohibition order, or the warrant of committal if you were sentenced to jail

Getting a transcript

The most significant task for preparing an appeal book is obtaining a transcript of the trial in the lower court. The transcript must be signed and certified by a certified court reporter.

In order to get a transcript you must get the audio recordings and court log from the trial court and provide them to a professional court reporter for transcription.

Court reporters are private businesses. You must pay for the preparation of the transcript. You may be charged \$3.25-\$4.25 per page of transcription. There are probably between 50-60 pages of transcription for each hour spent in court. If you wish to appeal a “one day” hearing, the transcript may cost you \$1,000. The longer the hearing, the higher the cost.

Getting documents from the trial court files

When you file your notice of appeal, court staff will arrange for the court file to be moved from the trial court to the appeal court. This means you will need to contact the appeal court to arrange a time to make photocopies of the documents needed for the appeal book.

Be sure to include both sides of double sided documents.

Getting a date for your appeal hearing

After you file your Notice of Appeal, the Registrar will send you a letter advising you of the deadline for setting the appeal down and contact information for arranging a chambers or telechambers date.

Once you have contacted the court for an available chambers or telechambers date you must file with the court and serve on the opposing party:

1. Notice of Motion for Date and Directions; and
2. Certificate Respecting Filing the Appeal Book or the completed appeal book

I have a filing deadline for my factum and a date for the hearing. What is the acceptable format for filing my factum?

Filing your documents in the proper format is very important. Although some of formatting requirements may seem picky, they are designed to enable the judges who hear your appeal to navigate the volumes of paper easily.

A factum must be:

1. No more than 40 pages long, not including the index;
2. Bound with a cerlox spine;
3. Double spaced;
4. In no less than 12 point font;
5. Be organized into the following six parts:
 - i. Concise Overview of the Appeal

- ii. Concise Statement of Facts;
- iii. List of Issues;
- iv. Standard of Review;
- v. Argument;
- vi. Order or Relief Sought;

Appendix A –List of Citations referred to in Part V (Argument)

Appendix B –Statutes and Regulations including the text of relevant statutory provisions.

- 6. Printed on single sided paper;
- 7. Parts I to VI must be to the left of the “spine” or binding coil (sometimes called by a brand-name, such as “cerlox”) to allow the right side of the spine to be used for notes;
- 8. If you are the Appellant the cover page and back page of the factum must be yellow or buff coloured. If you are the Respondent the cover page and back page of the factum must be blue or green.

Why do I have to make seven copies of all of the documents?

Five copies are for the court, one copy is for you, one copy is for the Respondent.

If there is more than one appellant or respondent, you will need to provide enough copies for all parties. In the unusual event five judges sit on the panel, you will need to provide an extra two copies for the extra two judges.

6. What will happen at my appeal hearing?

The appeal hearing is when you and the Respondent will make your oral arguments to three judges of the Court of Appeal or a single judge of the Supreme Court. It will also provide the judges an opportunity to ask questions about the positions of the Appellant and Respondent.

Virtually all appeals in the Nova Scotia Court of Appeal will be heard by a panel of three judges; however in rare circumstances, five judges will hear an appeal.

In most cases, you will have to wait a few days or a few weeks before you receive the decision of the Court of Appeal.

7. What will happen to my sentence while my appeal is pending?

Once you have been found guilty of a crime, the judge who found you guilty must pass sentence before the appeal court will consider overturning the conviction. You must apply to the appeal court if you wish to put your obligations under your sentence on hold pending your appeal. If you do not take steps to do this, you could be in breach of your sentence and subject to further criminal sanction.

Filing a Notice of Appeal does not automatically suspend a sentence. You must apply to the appeal court and prove that it is in the interest of justice to suspend the sentence until the appeal has been determined. Different types of sentences require different approaches to suspend them pending appeal.

Fines, forfeited property, restitution orders, victim fine surcharges, probation orders and conditional sentence orders, and driving prohibitions.

Section 683(5) of the Criminal Code gives the Court of Appeal the authority to suspend an obligation to pay a fine, forfeiture or disposition of forfeited property, a restitution order, victim fine surcharge, probation order, or conditional sentence order.

Jail Sentence

A jail sentence can be suspended by the Court of Appeal granting bail pending appeal.

If you are in jail you must satisfy the appeal court that your appeal is not frivolous and your detention is not necessary in the public interest. You will however have to surrender yourself into custody the day before the appeal is released.

8. Can I withdraw an appeal?

Yes. If you decide you do not wish to pursue an appeal any longer you can file a one page form abandoning the appeal. Please note you can only withdraw an appeal you started. If the Crown or a co-accused appealed, only the Crown or the co-accused can withdraw their appeals.