The Nova Scotia Court of Appeal
A How-To Manual for Civil Appeals

The purpose of the information in this manual is to inform you about the process of appealing a judgment in a civil law proceeding.
"Civil" law proceedings are those cases that are not criminal cases.

1. Frequently Used Terms

Appeal Book The collection of the transcripts, documents and exhibits that make up "the Record". A transcript is a certified record of everything said by the judge, lawyers, or witnesses at a trial or hearing, prepared and certified to be accurate by a professional court reporter.

Appellant The person who is asking that the appeal court overturn a decision of a trial court or tribunal.

Appellant's Certificate Of Readiness A signed document which certifies (says & promises) that the Appellant has started the process of gathering the materials necessary for the appeal book, and stating the dates by which important parts of that process will be completed, allowing the Court to set dates for the hearing.

Chambers A sitting of the Court in which brief but important matters, such as setting dates or hearing procedural "motions", are dealt with. It is held in open court before one judge with the recording equipment on.

Court of Appeal The Nova Scotia Court of Appeal is the highest court in the province. This Court hears appeals from decisions of the Supreme Court of Nova Scotia and from other courts and tribunals.

Decision The conclusion of the trial judge or tribunal on some contested issue in the case, which may happen before a trial or hearing, during a trial or hearing, or in the verbal or written decision at the end.

Factum The written legal arguments filed by the appellant and respondent. What is written in the Factum is not evidence. The Factum discusses the facts and the law to persuade the appeal court.

Fee Waiver The filing fee for an appeal is now (June 2015) $218.05, plus the cost of a "law stamp" (which is currently an additional $25

+ HST). The filing fee is subject to change each year, usually on April 1st. The Registrar of the Court of Appeal may grant a fee waiver if you file a Waiver of Fees Application Form and the required documentation proving your financial circumstances.

Fresh Evidence The Court of Appeal MAY consider fresh evidence, evidence not considered by the original trial judge or tribunal, but only in limited circumstances, after you follow a particular procedure.

Ground of Appeal A one sentence summary of the mistake the appellant believes the judge or tribunal made. There may be more than one ground. Judges can make different types of errors, as we'll see.

Leave You only have a right of appeal if a written law passed by Parliament or the Legislature says you have a right of appeal. Some written rights of appeal only go half-way, saying the Court of Appeal must first grant "leave" or permission for you to appeal, even before it rules on the appeal itself. An example is an appeal from a decision of the Workers' Compensation Appeals Tribunal to the Court of Appeal.

Motion A document that you file to take a procedural step in an appeal, followed by a court appearance at which that procedural step is considered and ruled on by a judge of the Court of Appeal.

Order The written order made by the judge that you wish to see changed by your appeal.

The Record A general term for all of the information that was before the judge or tribunal appealed from, whether the judge or tribunal received it in written form or heard it said in the courtroom or at the hearing. This includes a certified transcript of the audio recording of the trial or hearing, and copies of all exhibits and written documents.

Respondent The person who is responding to an appeal, and who usually does not want the earlier decision overturned. Sometimes a respondent can raise his or her own issues in an appeal.

Security for Costs An order by a judge of the Court of Appeal requiring an appellant to give or otherwise set aside money to pay the respondent's legal costs should the appellant lose the appeal.

Stay The stopping by a judge of the Court of Appeal of some or all of what was ordered by the original judge, only temporarily and for as long as is needed to allow the appeal to be heard.

Tribunal A decision-maker that is not a court or a judge, but has been given decision-making authority and that can be appealed on some grounds (for example, the Workers' Compensation Appeals Tribunal).

More generally, when the words "court", "judge", and "trial" are used in this manual, read them to also mean "tribunal" or "hearing", if the appeal is one taken from a tribunal decision to the Court of Appeal.

2. Things to think about before starting an appeal

How does an appeal compare with a trial or hearing?

An appeal is not a new trial or fresh hearing. It is a process by which three or more judges of a different court read in advance the documents and transcript previously considered by one judge or a tribunal, and hear legal argument in a courtroom about the type of errors the first judge is said to have made.

Appeals review a judgment for legal error. They do not re-judge the whole case from scratch.

An appeal is normally limited to consideration of the "appeal record", factums and oral argument, to decide whether or not the original judge misapplied the law, misunderstood the evidence, or both.

By filing a Notice of Appeal you take the first step to have a higher court review the trial court's decision, but there are many more steps you must take.

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 may be dismissed and costs ordered.

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

The Notice of Appeal is the actual document that starts the appeal process.

Its main purpose is to tell the other participants and the Court of Appeal what you say the judge or tribunal did wrong, and to tell them what you want the Court of Appeal to do to fix what was wrong.

Much of the Notice of Appeal sets out basic information about the case, such as the dates of the order and decision, the name of the judge or tribunal, and the names of the parties involved in the case.

A ground of appeal is a statement written out as part of the Notice of Appeal. It is a one sentence summary saying exactly why you believe the judge or tribunal should be overturned by an appeal court.

A ground of appeal could be an error of law or legal principle, a serious misunderstanding of the evidence, or both. Some orders can also be overturned to correct a plain and obvious error.

These errors can take place at any point in the case, including during procedural hearings, in the middle of a trial, or in the final Decision that you are appealing. You should be able to point to something the judge decided verbally in court or his or her written decision, or both.

In civil jury trials, the trial judge's instructions to the jury on the law, or procedural decisions to give or keep evidence from the jury that one side wanted to present, may be reviewed by the Court of Appeal.

For example, a ground might be: "The trial judge erred in law when he concluded that assets held in a family trust were not 'matrimonial property' that can be divided under the Matrimonial Property Act."

Alternatively, a ground might be: "The Tribunal erred when interpreting the phrase, 'regular salary or wages, in s. 42 of the Workers' Compensation Act, s. 20 of the General Regulations, and Policy 3.1.1R2."

If you believe the judge or tribunal made only one error, then you write out that one ground of appeal. If you believe the judge or tribunal made three errors, you write out all three grounds of appeal, etc.

It is important that you put all of the grounds of appeal in the Notice of Appeal. You may not rely on any ground of appeal that is not included in your Notice of Appeal, unless the Court of Appeal or a judge of the Court of Appeal permits.

What is NOT a ground of appeal?

The adversarial nature of our justice system means that at least one of the parties at trial did not get what he or she wanted. People usually want to appeal decisions because they are unhappy with what happened in the end. Being unhappy with an outcome alone, however, is not a ground of appeal.

For example, it is not a ground of appeal to say, "I told the truth but my husband lied, yet the judge believed him." Trial judges assess the evidence and make such findings; courts of appeal do not.

It is also not a ground of appeal to say, “There was a lot of evidence that I could have presented but I didn’t put it before the judge because I thought what I was told by my friends and family was hearsay.” If the evidence was not presented to be ruled on by the judge, it was not the judge who made the error.

A judge’s job is to hear the witnesses, apply the law, and make findings of fact. Judges and tribunals have the benefit of seeing and hearing witnesses in person, which gives them a much better opportunity to assess whether what the witnesses say is reliable and trustworthy.

Appeal judges read the transcript; they do not meet the witness(es). They assume any trial judge is better placed to decide whom to believe. They might think you are more credible but still dismiss your appeal.

This is because the law requires the appeal judges to respect a trial judge’s finding of fact, even if one or more of the appeal judges would have concluded the facts differently. On appeal, a high standard of “deference” or respect must be given by any appeal court to findings of fact made by any trial judge.

Only a judge’s findings of fact that were not supported by any evidence, or clear or obvious (“palpable”) errors of fact, errors that decided the outcome of the case (“material” or “overriding”), can be appealed.

Do I have to follow the trial judge’s order while an appeal is underway?

Filing an appeal does not stop the order made by the trial judge. You generally must obey and carry out the terms of that order, unless you obtain a full or partial “stay” (stopping) of the order under appeal.

You may seek a stay if following the order under appeal will cause you some harm that cannot practically be reversed or fixed by the appeal court if you win the appeal.

Usually this requires harm that cannot be compensated with money (e.g., harm caused by following an order to disclose confidential documents), or harm for which monetary compensation will not be an effective remedy (e.g., harm caused by following an order to pay money to someone who cannot later be forced to pay it back if you win the appeal). A stay usually requires proof of such “irreparable harm”.

You must apply to a judge of the Court of Appeal by Motion if you wish your obligations under the order to be put on hold while your appeal is ongoing. If you do not take steps to do this, you could be in breach of the trial order and punished for contempt by the trial court for failing to follow the order.

Can witnesses testify at an appeal?

Most appeals will not see witnesses testify. Appeals are usually conducted only on the written record.

This is because, unlike a trial, an appeal is all about REVIEWING for error the information the trial judge had and the decisions the judge made, and not about the creation of new evidence or a different record.

There will be times when witnesses must testify at an appeal hearing. However, witnesses that COULD HAVE testified at trial will not be heard on appeal. If the evidence existed at the time of the trial, and you knew about the evidence or COULD HAVE known about the evidence by searching ("with due diligence"), you cannot call the evidence on appeal. It's too late; you had a chance to call them at trial.

If you could not reasonably have known about the evidence, a potential witness must have the kind of evidence that is relevant, bears on a potentially decisive trial issue, is reasonably capable of belief and if believed could be capable of affecting the result of trial when taken with other evidence at trial.

A Motion to admit evidence on appeal must first be filed and considered by a judge of the court. The evidence is then sent on to the appeal panel of three or more judges, to decide whether to consider it.

I think my lawyer is to blame for my loss; can I appeal?

Lawyers are thoroughly trained and are regulated by the Nova Scotia Barrister's Society. If you believe your lawyer is incompetent or acted without instructions, you can complain to that Society.

When appealing, however, there is a presumption that your lawyer was competent, exercised sound professional judgment and your trial was fair. You must have solid evidence before you blame your lawyer for your loss before the court or tribunal appealed from.

Furthermore, unlike in criminal trials, "ineffective counsel" is not an acceptable ground of appeal in all civil cases. The case must be one of "the rarest of cases", such as those involving an overriding public interest, or one engaging the interests of vulnerable persons like children or persons under mental disability, or one in which the other side actively interfered to make your representation ineffective.

For example, in civil appeals of child protection decisions, an appellant can succeed by showing with fresh evidence that his or her lawyer's performance at trial fell below the standard of a reasonably competent lawyer and the lawyer's performance caused a miscarriage of justice.

If you wish to advance this ground of appeal, you must prove that your type of case falls into the categories of the “rarest of cases”, and your trial lawyer’s actions or lack of action were ineffective, and this caused a “miscarriage of justice”. You will usually have to testify yourself to prove these facts.

If you make this allegation in an appeal, your former lawyer will receive notice and will likely testify at the appeal hearing on behalf of the opposing party, to respond to this very serious allegation.

I think the judge was biased; can I appeal?

Judges and tribunals have a duty to conduct hearings and trials in such a manner that every party has a fair hearing.

If a judge made an order without any notice to you (although, sometimes judges are permitted to make orders without notice), did not allow you to present your case, interfered with the presentation of your case in an unacceptable manner, or participated in the hearing as if she or he was on “one side” rather than neither “side”, you MAY have a ground of appeal alleging “reasonable apprehension of bias”.

However, it is not what you, personally believe or how you felt that is the legal test on appeal.

You must show from the appeal record or the tribunal or judge’s actions inside or outside the court room that a reasonable, independent, fully-informed observer would conclude bias may have been present, usually based upon the words or actions of the judge, usually captured by the transcript.

What is the Court of Appeal looking for when they hear an appeal?

After appeal judges read the appeal books and factums and hear argument, they do not then ask themselves, “what would I have done if I had been the judge”? That is not their job. They do not offer a “second opinion”.

To stop themselves from “second-guessing” decisions best made by judges or tribunals, appeal courts apply what they call a “standard of review” to your grounds of appeal. They read the order, decision, transcript and documents with a “standard of review” always in mind.

3. What is a “standard of review”?

(a) Errors of Law

For errors of law, the appeal court will usually ask itself about the law that applies to an issue and ask itself, did the judge get the law right?

This is the “correctness” standard of appellate review. It applies to all alleged “errors of law”.

For example, if a trial judge says in a decision, “I grant the father access to his daughter because this is in his best interests”, this MAY be an error of law: the law says decisions about access to a child normally require a judge to ask, what is in the child’s best interests? However, appeals do not focus on just one sentence of a decision, but rather review the whole context of the decision.

In some appeals, such as an appeal to the Court of Appeal from the Workers’ Compensation Appeals Tribunal, the court looks for only particular types of errors of law. In some tribunal appeals, the court only asks itself if the Tribunal got the law right if it is an issue of law important to the whole legal system, and not just to the workers’ compensation system. An example would be a constitutional law issue.

In other tribunal appeals, if the alleged error of law concerns a legal issue over which the Tribunal is considered to be the expert, such as when the Workers’ Compensation Appeals Tribunal applies sections of the Workers’ Compensation Act or Workers’ Compensation Board Policies, the Court of Appeal will apply a “reasonableness” standard of review to the Tribunal’s decision.

What this means is that the Court of Appeal asks itself whether the decision falls within a range of possible, acceptable outcomes when looking at the facts and the law. The Tribunal does not have to get it “right”; their decision only has to be a reasonable outcome.

For most appeals, however, from the decisions of judges or courts, the “correctness” standard applies.

(b) Discretionary Orders

Judges have a lot of “discretion” or “room for maneuver” to decide what the right outcome is in a given case. If the decision under appeal is a procedural ruling, the court of appeal will not overturn the decision unless the judge “erred in principle” or the ruling caused an obvious (“patent”) injustice.

For example, if a judge ordered you to produce documents that are CLEARLY irrelevant, she or he MAY have “erred in principle”: only relevant evidence must be disclosed in advance of trial. However, a document may be ordered disclosed if it appears to be relevant and will likely be admissible at trial. Judges are given a great deal of leeway in deciding such procedural issues. As stated above, appeals focus on the whole context of the ruling, not a single sentence in the decision.

Discretionary orders are far more difficult to appeal, as the judge does not have to be correct except with regard to legal principles and by avoiding an injustice. Any other reasonable outcome stands.

(c) Factual Findings

Judges and tribunals make decisions on the basis of evidence, whether sworn in written form (e.g., an affidavit) or heard under oath or affirmation from a witness testifying at a trial or hearing. A judge's discussion of the facts or rulings on the evidence MAY give rise to a ground of appeal.

However, as noted above, alleged errors of fact must be "clear" (obvious to the appeal judges) and "overriding" (changed the very outcome of the case) in order to be successfully appealed. This is the "palpable and overriding" or "clear and material" standard for reviewing a judge's findings of fact.

If a judge or Tribunal reached a factual conclusion with NO EVIDENCE on that issue, you MAY have a ground of appeal. Factual findings must be made in light of evidence considered at the hearing.

(d) Mixed Law & Fact

Many or most decisions that judges make are a mix of findings of fact and legal principles, or the application of legal principles to particular facts: a recipe applied to ingredients to produce a cake. When presented with the finished product in a written decision, it may be difficult to separate law from fact.

When looking at a mix of principle and fact, the appeal court looks to see whether or not a legal principle can be separated out for analysis for error; if not, the "clear & material" test will be applied to the alleged error regarding the application of principles to evidence.

This is the "mixed fact & law" standard of review. An example would arise in an appeal respecting a decision a judge said was made "in the best interests of the child". The legal principle of the "best interests of the child" is difficult to separate from the facts about a child's needs, interests and wishes.

For example, if a judge says, "infants should always live with their mother", or "brothers and sisters should never be separated", this MAY be an appealable error (an "extricable error of law"): the legal test is the "best interests of the child", and such "always"/"never" statements may be an error in principle.

However, if a judge only says, "I find that it is in the best interests of this young child to live with his mother while the child is breastfeeding", or "I find that the sibling relationship here is a critical consideration when deciding whether or not the children should all live in one residence", this MAY NOT be an error at all, if there was evidence before the trial judge capable of supporting these conclusions.

Alleged errors of "mixed law and fact" require you to identify a legal principle in the judge's decision; otherwise the Court of Appeal will not reverse a judge for applying the law to the facts, unless a "palpable and overriding" or "clear and

material" error was made regarding any finding of fact. As has been said before, appeals focus on the entire context of the decision, not just on a single sentence.

(e) Are the Available Grounds of Appeal Limited by Statute?

Finally, you only have a right of appeal if a statute (written law or act of the Legislature or Parliament) says you have a right of appeal. The statute says to what court you may appeal from and to, which may for example be to the Supreme Court of Nova Scotia (e.g., from Small Claims Court rulings) or to the Nova Scotia Court of Appeal (e.g., from the Supreme Court of Nova Scotia).

The statute may also say what types of errors can and cannot be appealed. For example, the Workers' Compensation Act says, "Any participant in a final order, ruling or decision of the Appeals Tribunal may appeal to the Nova Scotia Court of Appeal on any question as to the jurisdiction of the Appeals Tribunal or on any question of law but on no question of fact."

Be sure you have the right court before you go any further with your appeal! Procedures are different in each court. Not every decision of a tribunal or court can be appealed, or appealed on just any ground. Some appeals go first to the Supreme Court of Nova Scotia, and then only later to the Court of Appeal.

4. By when should I file my notice of appeal?

There are deadlines by which you must file any appeal, which depend on the type of order appealed. As a rule, the clock starts ticking once the order is "issued" (officially signed, stamped and released by the court appealed from). If there is no order, the clock starts on the day of the judge or tribunal's decision.

An order is almost always "issued" (written up, initialed by the judge, and stamped/signed by court staff) to make the result contained in the words of the decision into an "order", stating the result of the decision rather than the reasons for that result. If the party who was successful in the case does not file an order expressing the results of the decision, you should file an order, as it is needed for an appeal. If the court or tribunal does not issue orders, but only offers decisions, then it is the decision that you require.

If the order is made under legislation passed by the Nova Scotia House of Assembly and that legislation (act or statute) states a number of days within which an appeal must be filed, then that number of days is calculated as clear business days, That means you do not count the day the order was made or the day you file the appeal or weekends or holidays during which the court offices are closed.

For example, for an order under Children and Family Services Act, you must file within thirty court business days, not counting the day the order was made or the day you file the appeal and also not counting weekends or holidays during which the

court offices are closed. The thirty days are calculated that same way under the Workers' Compensation Act, except the clock starts when you receive written communication of the decision. The deadline is pretty close to six calendar weeks, but count carefully.

If the order is made under legislation passed by the federal Parliament (in Ottawa) and that legislation (act or statute) states a number of days within which an appeal must be filed, that number is calculated by calendar days. That means you must count weekends or holidays during which the court offices are closed except if the deadline falls on a holiday, you may file the appeal on the next day. In other words, there are different rules under different laws.

For example, any order under the Divorce Act, you must file your appeal within thirty days after the day on which the order was made, meaning within thirty calendar days, not counting the day the order is made but counting the day you file the appeal. If the 30th day falls on a holiday, you may file on the next day. The appeal deadline is about one month, but you should count the days carefully and file on time.

For all other FINALl orders of a judge, court or tribunal, the appeal must be filed within twenty-five clear court business days, not counting the day the order (or decision if no order) was made or the day you file the appeal, and also not counting weekends or holidays during which the court offices are closed. The deadline is pretty close to five calendar weeks, but you should count carefully to know the deadline.

Finally, there are certain orders made in a case that are short-term or procedural in nature ("interlocutory orders"), that are very difficult to appeal and have a much shorter deadline to file an appeal. For example, orders to produce documents, answer questions on discovery, join or separate proceedings, adjourn cases, or dismiss a whole claim without holding a trial or hearing.

For such orders, "leave" (permission) of the Court of Appeal is required, and only ten clear court business days are allowed to file the appeal, not counting the day the order was made or the day you file the appeal, and also not counting weekends or holidays during which the court offices are closed.

If an order or decision is made in the middle of a trial – such as to admit evidence, adjourn the hearing or rule on something like a constitutional question – the ground of appeal is PROBABLY sufficiently wrapped up in the final outcome that you can wait and appeal that ruling once you know the final order.

There is a procedure for the court to grant an extension of time to file an appeal. However, you cannot bank on the Court granting such an order, and your request may be opposed by the other parties.

Figure out your deadline, note it down and file the Notice of Appeal well before that date, if you can.

5. What to do once you have filed a notice of appeal

As we have said, if after reading the above you decide you have grounds for appeal, the first thing you must do is PREPARE, FILE, AND SERVE A NOTICE OF APPEAL. The form of Notice is contained in the Nova Scotia Civil Procedure Rules, and there are different forms for different types of appeals.

A copy of the decision and order under appeal must be filed with the Notice of Appeal, if the decision or order is in writing. If the order is not yet issued or there is no order, you must tell the court staff. If the decision was given verbally in court, you must arrange with court staff to have the court recording transcribed and then signed by the judge.

Everyone that was named as a party in the case before the tribunal or court must be named as a party in you appeal and served with a notice of the appeal (be given a copy with proof that they got it), so that they will have a fair chance to respond (making them the “respondents” and you the “appellant”).

You must also send a copy of the Notice of Appeal to the judge or courthouse where the trial decision was made. Some appeals, like workers’ compensation appeals, require that the Notice of Application for Leave to Appeal (and later, the Notice of Appeal) be sent to the Attorney General of Nova Scotia.

Once the Notice of Appeal is filed, the next step in the appeal process is to participate in a Motion for Date & Directions. This is a court appearance or telephone conference with a judge at which procedural decisions are made by the judge.

There are DEADLINES for you to request and then for the Court to hold such a hearing. For example, the longest an appeal case can go without such a court appearance or telephone conference is eighty clear court business days. However, many types of appeals require that this be done much sooner, such as within twenty-five clear court business days for appeals from tribunals, fifteen clear court business days for appeals of procedural (“interlocutory”) orders, and only ten clear court business days for child protection order appeals.

Some notices of appeal require that you insert the date for the Motion for Date and Directions in the Notice of Appeal before filing. Either way, the Motion for Date and Directions must be heard on time.

You will also have to file a “Certificate of Readiness”, which is simply a signed form telling the Court of Appeal that you have set the appeal in motion by seeking the order, requesting a written decision, and requisitioning the court audio disks and a transcript, and/or stating dates by which all of these steps will be taken.

There are fees associated with filing an appeal. You must pay the fees up front or obtain permission from the Registrar of the Court of Appeal to proceed on the basis of a “fee waiver”. The filing fee for an appeal is now (June 2015) $218.05, plus the cost of a “law stamp” (which is currently an additional $25 + HST). The filing fee is subject to change each year, usually on April 1st. The Registrar may grant a “fee

waiver" if you file a Waiver of Fees Application Form and the required documentation proving your financial circumstances.

Motion for Date and Directions

A motion for date and directions is a court appearance before a judge of the Court of Appeal, at which the judge will review the procedural steps that you have taken and the documents you have filed, "direct" (tell) you to take other steps, set a date for the appeal hearing, set deadlines for all of the steps that need to be taken or documents filed, and rule on any other Motion filed by any party.

Motions for date and directions are normally heard on Thursdays at the Law Courts on Upper Water Street in Halifax. Such a motion may be heard by teleconference among the parties and the judge on a Wednesday, at a time set by the court staff. You may ask to have this "appearance" done by telephone.

Two documents or booklets that you will be "directed" to prepare and file are the "Appeal Book" (all the documents from the trial or hearing) and your "Factum" (your legal argument for the appeal hearing).

Remember that in some cases (e.g., an appeal from a decision of the Workers' Compensation Appeals Tribunal) the appeal is a two-step process: you first have to file an Application for Leave to Appeal to the Court of Appeal. Essentially this means that you are looking for the Court's permission to appeal.

At a leave hearing you must convince the Court of Appeal that there is a legal issue that is worthy of the court's consideration. You don't have to prove that you will win the appeal, but you must show that you have an "arguable issue". Your ground(s) of appeal have to be of a type the Court of Appeal may consider, and you must have at least some argument on that or all grounds. If the Court dismisses your Application for Leave to Appeal, you can go no further.

The motion for date and directions is usually the only motion heard "in chambers" in an appeal, but there may be several such appearances, if the correct procedural steps have not be taken in the case. You will usually speak for yourself at the motion for date and directions if you do not have a lawyer. You may bring someone with you to court to support or assist you. With the permission of the judge hearing the matter, and after you sign an authorization form that the court can provide, another person who is not a lawyer may speak on your behalf.

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 or tribunal that you are appealing from also 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 you don't decide alone.

The Court requires that you file five copies of the Appeal Book.

The Appeal Book, therefore, must contain all of the following documents, in two separate booklets:

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 Order under appeal

4. A copy of the decision under appeal, signed by the judge or tribunal who issued it

5. A reference sheet, containing the heading of the proceeding under appeal, the court or tribunal file or registry number, the name of the judge or tribunal who made the judgment, the date or dates of the trial or hearing, and date of judgment; usually, an easy way to prepare the "reference sheet" is to photocopy of the cover sheet of the written decision under appeal.

Part 2 – Evidence and Related Materials

1. An index of witnesses, including their name, which party had them testify, and page references to where their evidence is found in the Transcript; usually, an easy way to prepare the index of witnesses is to photocopy the index of witnesses found at the front of the official Transcript.

2. A list of all Exhibits; usually, an easy way to provide this is to photocopy the Exhibit List kept by the court reporter in the trial court or a photocopy of the Exhibit List found in the Transcript.

3. A copy of the Transcript, containing everything said in the course of the trial or proceeding

4. A copy of each documentary Exhibit, written submission, or other document that was filed in the court or tribunal below, all of which must be read to understand your grounds of appeal.

Getting a Transcript to include in the Appeal Book

The most significant task for preparing an appeal book is obtaining a transcript of the trial or hearing (if any). The transcript must be prepared by Certified Court Reporters. Transcripts can be expensive.

In order to get a transcript you must first get the audio recordings (on disk) and court reporter's "log" from the trial court, and provide them to a professional court reporter for transcription. There is a standard form that all courts require that you submit in order to send you the court disks with the audio record.

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 in Supreme Court (Family Division), for example, the transcript may cost you $1,000. The longer the hearing, the higher the cost.

Getting documents from the trial court files to include in the Appeal Book

After you file your Notice of Appeal, you should contact the trial court to make arrangements to view the trial file and make photocopies of the documents you need for the Appeal Book. After the Appeal Book is filed, the Court of Appeal will arrange for the trial court file to be sent to the appeal court while the appeal is ongoing. If you need to view or copy any documents from the file after you have filed the Appeal Book, you may need to contact the appeal court to arrange a time to do this.

Submit double-sided pages in Appeal Books, and be sure to include both sides of double-sided originals. Do not use documents that you have marked up or written on to make copies, as these are not the same as the versions read by the judge or tribunal members. Make sure the photocopies can still be read easily when copied, are complete and relate to your proceeding.

What goes in a Factum?

After or at the same time as you file the Appeal Book, you will be required to file a "Factum". This is the written legal argument filed by both the appellant and respondent, to persuade the appeal court.

The Court requires that you file five copies of the Factum.

A factum must be:

1. No more than 40 pages long, not including the index

2. Bound with a cerlox (plastic coil) spine

3. Double spaced

4. In 12 point font

5. With page numbers must be at the top left of the page

6. 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

7. Printed on single sided paper

8. Parts **i** to **vi** must be to the LEFT of the spine when the Factum is open, with the right side blank.

The Factum is NOT the place for you to add new grounds of appeal (not already included your Notice), or to state new facts (not found anywhere in the Appeal Book), or to reference documents not before the trial judge (like newspaper articles or letters between the parties never seen by the trial judge).

The Factum is the place to make your legal argument, after outlining accurately the important facts and explaining just how the judge made a mistake that should be overturned on appeal. This is your chance to give the appeal court a written document that persuades them to agree with your side in the appeal.

A "to do" checklist

1. File your Notice of Appeal with the Court. Notify the Respondents by providing them with a copy of your Notice of Appeal. Also send a copy to the judge or courthouse where the decision that you are appealing was made.

2. If you don't already have it, take steps to have the Order and Written Decision of the judge/tribunal you are appealing issued.

3. Order the audio CD of the proceedings you are appealing (except if you are appealing a WCAT decision that proceeding in writing only.

4. Once you get the audio CD, bring it to a certified transcription service to have a written transcript produced. Get an estimated date from the service regarding when the transcript will be ready.

5. Start gathering the documents that make up the "record" that was before the court/tribunal you are appealing. This, plus the information about when

the transcript will be ready, will give you an idea of how much time you will need to put the Appeal Book together.

6. File your motion for date and directions and your certificate of readiness (except if you filed an interlocutory/costs only or a child protection appeal - if so, the motion for date and directions is contained in the Notice of Appeal).

7. Attend Court of Appeal chambers on the date selected for your motion for date and directions.

6. What will happen at my appeal hearing?

The Appeal Hearing is when you and the Respondent will make your verbal arguments to a minimum of three judges of the Court of Appeal. It will also provide the judges with an opportunity to ask you and the respondent questions that clarify your positions, or to challenge assertions made in the Factums.

The appellant speaks first, followed by the respondent. After the respondent, the appellant is given a brief chance to reply, but only regarding things said by the respondent that you did not or could not cover when you first spoke. In other words, reply is not a chance to repeat what you have already said or raise new issues or new arguments unrelated to the respondent's oral submissions.

The Court of Appeal may decide the outcome of your case right then and there. In most cases, you will have to wait a few days or a few weeks before you receive the written decision of the Court of Appeal. Court of Appeal staff will then release, preferably by email, the decision and order deciding the appeal.

7. Can I withdraw an appeal?

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 that you have started. You may have to pay the other parties some money as "costs" to off-set the legal expenses they have incurred to respond.

This manual was prepared and published by the Nova Scotia Court of Appeal Liaison Committee, with contributions from the Bar by Paula Arab, Q.C. and Peter McVey, Q.C..