

PRINCE EDWARD ISLAND COURT OF APPEAL



How to Commence and Respond to a Criminal Appeal

August 21, 2019

INTRODUCTION

This information is intended to explain the procedure in a criminal appeal in the Prince Edward Island Court of Appeal. The first section of this guide contains general information about the criminal appeal process. Information is provided on how to appeal from a conviction and sentence. This is followed by more specific information about certain processes that may be involved in a criminal appeal, and finally a glossary of terms used in criminal appeals.

This information is not intended to give legal advice. Court staff cannot provide legal advice, or conduct or respond to a criminal appeal on your behalf.

Can I represent myself or must I hire a lawyer to appear before the Court of Appeal?

You may represent yourself at the Court of Appeal, but it is not recommended. The process of conducting an appeal can be complicated. The issues on an appeal are usually questions of law. The preferred course is to be represented by a lawyer.

If you represent yourself, before you proceed with an appeal it is a good idea to speak to a lawyer. You can contact the following organizations for assistance:

- 1) **P.E.I. Lawyer Referral Service** (<https://legalinfopei.ca>)
Community Legal Information Association

P.O. Box 1207, Charlottetown, PE C1A 7M8.
40 Enman Crescent, Royalty Centre, Room 111,
Charlottetown, PE.
Toll free: 1-800-240-9798; 902-892-0853

- 2) **P.E.I. Legal Aid** (www.gov.pe.ca)
Customs House, 40 Great George Street
Charlottetown, PE 902-368-6043.

Any matter of practice or procedure not provided for in the **Criminal Code** or Criminal Appeal Rule 82 is governed by the **Rules of Civil Procedure**.

For more information about criminal appeals and procedures, please refer to:

- 1) **Criminal Code of Canada** (Indictable offences ss.673-689) (sentencing, ss.718-746.1) (laws-lois.justice.gc.ca)
- 2) **Rules of Civil Procedure** - Rule 82 Criminal Appeal Rule
<http://courts.pe.ca/court-of-appeal>
- 3) **Forms**
<http://courts.pe.ca/court-of-appeal>
- 4) **Rules of Civil Procedure**, especially Rule 61 - Appeals to the Court of Appeal
- for any matter of practice or procedure not covered by the **Criminal Code** or Criminal Appeal Rule 82. <http://courts.pe.ca/court-of-appeal>
- 5) **Court of Appeal Practice Directions**
<http://courts.pe.ca/court-of-appeal>

What is the Prince Edward Island Court of Appeal?

The Prince Edward Island Court of Appeal is the highest court for the Province of Prince Edward Island. It sits in Charlottetown at the Sir Louis Henry Davies Law Courts, 42 Water Street.

The Court of Appeal sits as a panel of three judges, and hears appeals from decisions of the Supreme Court of Prince Edward Island and decisions of the Provincial Court of Prince Edward Island on indictable offences.

Appeals relating to summary conviction matters are heard by the Prince Edward Island Supreme Court and are governed by Rule 81 of the Rules of Civil Procedure being the Summary Conviction Appeal Rule.

The Court of Appeal does not re-hear the evidence or re-try a case. It reviews the decision of the trial judge and the record of proceedings for errors of law and unreasonable verdict.

What are the reasons for appealing a conviction?

Where an appeal against a conviction is filed, a conviction can only be set aside for one of the following three reasons:

- 1) The verdict is unreasonable or cannot be supported by the evidence. This kind of challenge involves focusing only on the evidence. It is necessary to persuade the Court that the evidence was too weak to make a finding of guilt beyond a reasonable doubt.
- 2) An error of law was made. Examples of error of law would be the trial judge misdirecting or giving wrong instructions to a jury on a question of law, wrongful admission of evidence, or an incorrect interpretation of a **Charter** right. However, the Court of Appeal would not allow an appeal for error of law where it is of the view that even without the error the verdict would still have been the same.
- 3) Errors of both fact and law which the Court of Appeal considers to be a miscarriage of justice, a conviction will be set aside. Examples of a miscarriage of justice would include a jury member being biased, or misapprehension of the evidence.

What are the reasons for appealing the sentence ordered by the trial judge?

Where an appeal against sentence is filed, the sentence imposed by the trial judge can be varied only for one or more of the following reasons:

- 1) The sentence is excessive, given the background of the offender and circumstances of the offence. To assist in this regard, it is advisable to provide the Court with reported judgments or decisions of the Court or other courts to show that the sentence imposed by the trial judge is excessive or long compared to the length of sentences generally given for similar offences by similar offenders. The judgments or decisions most useful to your appeal would be those in which the circumstances of the offence and/or the background of the accused is similar.

You can find court decisions (“judgments”) on sentencing at the Sir Louis Henry Davies Law Courts Library, on the website (www.gov.pe.ca/courts) (click on “Search Reasons for Judgment”) which contains judgments or decisions of both the Supreme Court of Prince Edward Island and the Court of Appeal. As well, judgments or decisions of the Court and other courts can be found on www.CanLII.ca, the website of the Canadian Legal Information Institute.

- 2) The sentence is illegal. The ***Criminal Code of Canada*** sets out the penalties that can be imposed for every criminal offence. A sentence which is not authorized by the ***Criminal Code*** is illegal.

The Court of Appeal will compare the sentence you received with the applicable section of the ***Criminal Code*** and consider how your sentence does not comply with the law.

- 3) An error in application of the principles of sentencing that resulted in an unfit sentence.

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions that have one or more of the following objectives:

- to denounce unlawful conduct;
- to deter the offender and other persons from committing offences;
- to separate offenders from society, where necessary;
- to assist in rehabilitating offenders;
- to provide reparations for harm done to victims or to the community;
- and
- to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

If the Court of Appeal determines that a judge has ignored or put either too little or too much emphasis on one or more of these principles, the Court will consider varying the sentence. However, the fact that a trial judge has given one or more of those factors different weight than the Court of Appeal would have done, or made an error in applying one of the principles of sentencing, does not guarantee that the Court will change the sentence. The Court of Appeal must be convinced that the sentence is unfit.

Examples of errors made by trial judges when applying the principles of sentencing can be found in **Martin's Annual Criminal Code** in the annotations following sections 687, 718, 718.1, and 718.2.

A useful textbook is **Sentencing** by Clayton C. Ruby et al. (6th ed. 2004) available in the Courthouse Library. You can also find information on sentencing at www.CanLII.org.

The decisions of the Supreme Court of Canada can be found at www.scc-csc.gc.ca, and they are helpful in understanding the principles of sentencing.

How do I start an appeal?

An appeal is commenced by filing a Notice of Appeal that sets out the grounds of appeal and the relief sought. Where the appellant is not represented, the Notice of Appeal shall be in Form 82B contained in the Rules of Civil Procedure. In all other appeals, the Notice of Appeal shall be in Form 82A.

What are the time limits for filing a Notice of Appeal?

A Notice of Appeal shall be filed not later than 30 days after the date of the sentence.

How and where do I file a Notice of Appeal?

In the case of a prisoner appeal, the filing of the Notice of Appeal is effected by delivering the Notice of Appeal to the senior official of the penal institution in which the appellant is imprisoned. The senior official shall endorse the date of receipt on the document and shall forward the original to the Deputy Registrar of the Court of Appeal.

In all other cases, the appellant shall file the Notice of Appeal with the Deputy Registrar as set out in Rule 82.05(2) to (6).

When is leave to appeal required?

Leave or permission to appeal is required where the appellant is appealing from sentence only. The argument respecting leave shall be presented at the hearing of the appeal.

In the case of an application for Release Pending Determination of Appeal (bail) pursuant to s.679 of the ***Criminal Code***, leave to appeal is required if the appellant is appealing the length of sentence imposed by the trial judge.

What happens if the time to appeal has expired?

You may file a Notice of Application pursuant to Rule 82.23 requesting to extend or abridge the time for filing a Notice of Appeal.

An application to extend or abridge the time for filing shall include an affidavit setting out the merits of the appeal, an explanation for failing to apply within the time prescribed by the Rules, or any special circumstances that might cause an injustice to the applicant. The Court will consider these factors in determining whether to grant the application.

Can I present my appeal in writing?

Yes, Rule 82.08 provides that an appeal can be presented in writing. Rule 82.14 which requires that a factum be filed still applies.

What is a transcript and is it required?

A transcript is a typed record of the trial or sentencing hearing which includes all of the evidence presented at trial. It is prepared by a certified court transcriber.

Rule 82.09 provides that the parties to an appeal shall file with the Court only those portions of the transcript that are necessary for a determination of the issue(s) on an appeal.

An appellant is required to file with the Notice of Appeal a copy of the Request for Transcript and Certificate in Form 82C requesting the preparation of the transcript. This requirement does not apply in the following cases:

- a) a prisoner appeal; for which the Crown will order the transcript;
- b) an appeal from a summary conviction appeal court; or
- c) a judge otherwise orders.

What is an Appeal Book?

An appeal book contains filed copies of all material relating to the case.

Rule 82.11 requires an appellant to prepare an Appeal Book which shall contain, where applicable, in the following order:

- a) an index;
- b) a copy of the Notice of Appeal and Notice of Cross-appeal;
- c) a copy of any order respecting the conduct of the appeal;
- d) a copy of the information or indictment;
- e) a copy of any decision and order of the trial court;
- f) a copy of any agreed Statement of Facts;
- g) any agreement to limit the contents of the transcript;
- h) a list of all exhibits;
- i) a copy of each documentary exhibit or electronic information entered into evidence including affidavits and written admissions;
- j) any other item that was before the trial court which the appellant deems necessary for the appeal.

In the case of an appeal against sentence, the appellant shall also file the following:

- a) a copy of any pre-sentence report and victim impact statement;
- b) a copy of any restitution, probation or conditional sentence order;
- c) a copy of the offender's criminal record;

- d) any medical or psychiatric reports filed at the time of the sentence; and
- e) any exhibits entered at the sentencing and not at trial.

In a prisoner appeal, the Crown shall prepare the Appeal Book.

What is a factum and is it required?

An appellant is required to file a factum unless the appellant is self-represented and desires to only present oral argument or the court otherwise orders.

The appellant's factum shall consist of the following (see: Rule 82.12(2)):

- a) Part 1, containing a concise summary of the facts relevant to the issues in the appeal, including identification of the trial court and the result in the trial court, with reference to the evidence by page and line of the transcription;
- b) Part II, containing a concise statement setting out clearly and particularly the points in issue in the appeal;
- c) Part III, containing a concise statement of the argument, law and authorities relied on;
- d) Part IV, containing a statement of the Order that the Court will be asked to make; and
- e) Schedule A, containing a list of the authorities or cases relied on; and
- f) Schedule B, containing
 - (i) an index,
 - (ii) the headnote and the relevant portions of the text, or the complete text if most of the text is relevant to the issues in the appeal, of the authorities relied on, and
 - (iii) all relevant provisions of statutes, regulations and bylaws, with each authority.

The respondent's factum shall consist of the following (see: Rule 82.13(2)):

- a) Part I, containing a statement of the facts in the appellant's summary of relevant facts that the respondent accepts as correct and those facts with which the respondent disagrees and a concise summary of any

additional facts relied on, with such reference to the evidence by page and line of the transcript as is necessary;

- b) Part II, containing the position of the respondent with respect to each issue raised by the appellant, immediately followed by a concise statement of the law and the authorities relating to that issue;
- c) Part III, containing a statement of any additional issues raised by the respondent, the statement of each issue to be immediately followed by a concise statement of the law and the authorities relating to that issue;
- d) Part IV, containing a statement of the order that the court will be asked to make;
- e) Schedule A, containing a list of the authorities or cases relied on; and
- f) Schedule B, containing
 - (i) an index,
 - (ii) the headnote and the relevant portions of the text, or the complete text if most of the text is relevant to the issues in the appeal, of the authorities relied on, and
 - (iii) all relevant provisions of statutes, regulations and bylaws.

How is an appeal perfected?

An appeal is perfected when all the documents as required are filed.

The Deputy Registrar, under the direction of the Chief Justice of the Court of Appeal, sets the appeal for hearing when all the filing requirements (including times and number of copies) are in compliance with the Rules.

In the case of a prisoner appeal, within 30 days after being notified that the evidence is transcribed or if no evidence is being transcribed, within 30 days of the issue of the Notice of Appeal, the Crown shall file four copies of the appeal book, and the appellant shall file five copies of the appellant's factum.

What happens in a Court of Appeal hearing?

A panel of three judges hears all appeals. Most appeals last only a few hours. An appeal is very different from a trial. There is no jury and there are no witnesses. New evidence is rarely considered by the Court of Appeal and only upon motion and with leave of the Court.

The judges will be familiar with the appeal before they enter the courtroom. They will have read the transcript of evidence, the appeal book, and both facta.

At the hearing, both parties have an opportunity to make oral argument to the Court. Oral argument is based on the argument outlined in the appellant's factum and to rebut or to bring to the attention of the Court matters in the factum of the Crown with which the appellant disagrees.

To commence the hearing, the Court clerk calls the Court of Appeal to order and calls the case. The appellant first addresses the Court setting out his or her argument which is based on the factum. The respondent then does the same. The appellant then has a limited right to reply. The purpose of reply is to address issues raised by the respondent that were not addressed during the appellant's initial submissions.

The judges usually ask questions as the oral argument is presented. It is advisable to try to respond to the judge's questions.

What should I call a Court of Appeal judge?

Their title is "Chief Justice" or "Justice" (the Honourable Chief Justice Smith or the Honourable Justice Smith).

In court, judges are addressed as "Chief Justice" or "Justice." Collectively, they are referred to as the "Judges of the Court of Appeal."

What should I wear when I go to court?

The judges, lawyers, and court clerk wear black gowns for appeals and chambers matters.

Members of the public participating in appeal proceedings should be appropriately dressed. They should wear a suit or proper business attire.

What happens after an appeal?

The Court of Appeal may give its judgment or decision orally on the day the appeal is heard. Most often the Court will "reserve" the decision. This means that they will take time to deliberate about the arguments and provide reasons later in the form of a written decision or judgment. Usually the judges agree and produce one unanimous judgment. Occasionally they cannot agree and then the judgment of the majority is the judgment of the Court. The minority judgment is called a dissenting judgment.

When the judgment is ready to be released, the Deputy Registrar of the Court of Appeal will contact counsel for the parties or a self-represented litigant directly by telephone and explain the judgment release process. She will contact the parties 48 hours in advance of the filing and release of a judgment. At nine o'clock on the morning of filing the judgment, the parties may pick up their copy of the decision or have it sent to them by mail or email.

Once the judgment is given, the parties must prepare an order. Usually the successful party prepares a draft order and obtains the consent of the other party regarding the form of the order. Where one party is self-represented, the Crown usually prepares the order in any event. The order is signed by the Court of Appeal judges and filed with the Court of Appeal registry.

What are the possible results of an appeal?

In most cases, the Court of Appeal can make one of five decisions. They are:

1. **Dismiss the appeal from conviction or sentence**

If the Court of Appeal finds that the trial was properly conducted, the evidence supports the conviction, and there was no error of law, it would dismiss the appeal. If the Court finds that an error was made, but was not significant, it may dismiss the appeal even though there was an error. The Court may also dismiss an appeal against a sentence if a court is satisfied that the sentence fits the crime.

2. **Order a new trial**

If the Court of Appeal finds that the trial was not fairly or properly conducted, the Court could allow the appeal, set aside the conviction and order a new trial. The Court may also set aside an acquittal and order a new trial where there has been a significant error of law.

3. **Enter a verdict of acquittal**

The Court of Appeal may acquit the offender (find the offender not guilty of the charge) if the Court finds that the evidence does not support the conviction.

4. **Vary the sentence**

The Court of Appeal may change the sentence and either increase or decrease the sentence or remove or add penalties (such as a fine or probation).

5. **Substitute a verdict of guilty**

The Court of Appeal may overturn an acquittal, find the offender guilty of an offence, and then sentence the offender. The power to substitute a verdict of guilt is only available when the offender has been tried by a judge sitting without a jury. Where a jury has acquitted the accused, the powers of the Court of Appeal are limited to ordering a new trial.

May I appeal a Court of Appeal decision to the Supreme Court of Canada?

Yes, a party may seek leave and sometimes obtain permission to appeal from the Supreme Court of Canada in Ottawa.

In some serious criminal cases, where there is a dissenting opinion rendered by a judge of the court of appeal or where a court of appeal has found someone guilty who had been acquitted(found not guilty) at the original trial, a party may have an automatic right to appeal.

Information on appealing a decision to the Supreme Court of Canada is available on the Supreme Court of Canada website at: scc-csc.gc.ca.

Can I abandon my appeal?

Yes. Rule 82.16 allows an appellant to abandon an appeal before its hearing. Form 82(G) can be completed and filed to abandon an appeal.

An appeal can also be deemed abandoned by the Deputy Registrar if there has been non-compliance with the Rules as prescribed in Rule 82.24.

Specialized Applications

1. Application to adduce fresh evidence on appeal

An appeal is generally based on the record in the trial. The Court of Appeal will not receive new evidence unless the party wishing to introduce it is successful in obtaining an order from the Court of Appeal allowing for the introduction of fresh evidence. The procedure is set out in Rule 82.17. Additional practice directions are provided in the Court of Appeal Practice Directions (section 6(d), page 14). Generally, the motion is made at the same time as the hearing of the appeal on its merits.

In order to be successful on an application, the applicant must be able to persuade the Court of Appeal that:

- (i) the evidence could not have been called at trial;

- (ii) the evidence is relevant because it relates to an issue that was a deciding factor;
- (iii) the evidence is reliable; and
- (iv) the evidence could reasonably be expected to have affected the outcome (when taken with the other evidence presented at the trial).

It is difficult to satisfy all of these conditions. Therefore, applications to introduce new evidence are rarely successful.

2. **Application for assignment of counsel (Court appointed lawyer)**

In some cases, you can apply for a court-appointed lawyer under section 684 of the ***Criminal Code***.

You can apply to the Court of Appeal if you satisfy these conditions:

- you have filed a Notice of Appeal with the Court of Appeal involving a criminal matter;
- you have no money to hire a lawyer for your appeal;
- you have applied for and been refused legal aid through P.E.I. Legal Aid;
- you have exhausted all your appeal remedies within P.E.I. Legal Aid and the services of a legal aid lawyer are still refused.

You need to file an affidavit in support of your application for legal counsel. Your affidavit needs to contain the following information:

- (i) your financial circumstances, including your income, expenses, debts and the value of the items that you own;
- (ii) your education and knowledge of the Court process;
- (iii) the complexity of your case and why it requires a lawyer to advance the appeal on your behalf;
- (iv) your grounds of appeal and why you believe your appeal should succeed;
- (v) that you have exhausted all your rights to obtaining legal counsel through P.E.I. Legal Aid. You should attach a letter from P.E.I. Legal Aid confirming that you have been denied legal aid.

You can apply for assignment of counsel pursuant to Rule 82.18 by filing Form 82H together with an affidavit as set out in Form 82I.

You must contact the Deputy Registrar of the Court of Appeal to obtain a date for the hearing of your application.

3. Release from custody pending appeal

An offender may make an application under the provisions of section 679 of the **Criminal Code** for release pending appeal. It shall be made by Notice of Motion following the filing of a Notice of Appeal. Rule 82.19 sets out the information which you need to provide to the Court. In particular, you need to file an affidavit containing the following information:

- a) the particulars respecting the conviction and sentence;
- b) any grounds of appeal not specified in the notice of appeal;
- c) the applicant's
 - (i) age, marital status, and dependents if any,
 - (ii) places of residence in the three years preceding conviction,
 - (iii) proposed place of residence if released,
 - (iv) employment prior to conviction and expected employment and address of employment if released, and
 - (v) criminal record, if any; and
- d) where the appeal is from sentence only, any unnecessary hardship that would be caused if you continue to be detained in custody.

Additionally, you should inform the Court if there are any special individual circumstances relating to your physical and/or mental health or harm to your family if you are not released pending your appeal.

In the case of a conviction appeal, you need to convince the court:

- 1) the appeal is not frivolous (i.e., it is arguable);
- 2) you will surrender into custody when required;
- 3) detention is not necessary in the public interest.

In the case of a sentence appeal, you need to convince the court:

- 1) the appeal has sufficient merit that hardship would result if bail was not granted (e.g. the sentence would be served before the appeal could be heard);
- 2) you will surrender into custody when required;
- 3) detention is not necessary in the public interest.

More information

For more information, contact:

Prince Edward Island Court of Appeal

42 Water Street, P.O. Box 2000
Charlottetown, PE C1N 7N8

Telephone number: 902-368-6000
Facsimile number: 902-368-6774

Glossary of some commonly used terms

Affidavit:

A statement of factual information in support of a motion or application written down and sworn or affirmed to be true. An affidavit must be signed before a notary public or commissioner of oaths.

Appeal:

Examination by a higher court of the decision of a lower court. The higher court may affirm, vary or reverse the original decision.

Appellant:

The person or party bringing the appeal to the Court of Appeal.

Appeal Book:

Rule 82.11 of the Rules of Civil Procedure lists the documents which form the appeal book. The Appeal Book should contain a Notice of Appeal or Cross Appeal, decision and order of the trial judge, indictment or information, agreed statement of facts, exhibits. If the appeal is against sentence—a pre-sentence report, victim impact statement, criminal record, or any restitution, probation, or conditional order.

Appeal allowed:

The Court of Appeal decided in favour of the appellant (the party bringing the appeal).

Appeal dismissed:

The Court of Appeal decided in favour of the respondent (the party against whom the appeal is brought) and against the appellant.

Application for Leave to Appeal:

The procedure for requesting permission of the Court of Appeal to hear an appeal.

Book of Authorities:

A list and photocopies of court decisions or past judgments that are relevant to the issues and are referred to in the factum. The Court of Appeal publishes a List of Commonly Cited Authorities, which parties may refer to without copying and filing the case decision. (See: Court of Appeal Practice Directions at Section 5(c).)

Charter: The Charter of Rights and Freedoms

The **Charter** is that part of the Constitution which guarantees the rights and freedoms set out in it subject to reasonable limits which are prescribed by law.

Cross-Appeal:

An appeal filed by a respondent where the appellant has already commenced an appeal and the respondent wants to appeal something from the judgment of the trial court.

Entering an Order:

Once a judgment has been pronounced, a document (order) is prepared that succinctly sets out the decision of the court or judge. This order must be filed with the Deputy Registrar and distributed in accordance with the Rules.

Exhibit:

Documentary or physical evidence that was relied upon by the lower court.

Factum:

A bound volume filed with the Court that puts forward the case of the party (appellant or respondent). A factum is made up of the following parts: index, chronology, opening statement, statement of facts, issues on appeal, argument, and nature of the order sought.

Judgment:

Final decision of a court in a legal proceeding. The terms “judgment” and “decision” are interchangeable. A judgment may be written or given orally in court.

Leave:

Permission of a judge in chambers or a panel of judges to take a step, in certain types of cases, to proceed with the appeal. For example, “leave of the court” must be obtained to commence an appeal from sentence.

Motion:

An application (request) to a court for an order or judgment which occurs during the course of a court proceeding. Motions can be made for many purposes, including asking for extensions of time to file an appeal, for leave to appeal, or for appointment of legal counsel. A motion must be brought by notice and include an affidavit giving details of the request.

Motion (Application) for leave to appeal:

The procedure for requesting permission from the Court of Appeal to hear an appeal.

Notice of Appeal:

The form completed and filed by the appellant that starts the appeal process.

Notice of Motion:

The form completed and filed by the appellant or respondent that begins a process in the Court of Appeal chambers.

Order:

A decision of a Court. It may or may not be the final outcome of the matter.

Panel:

The panel of three judges of the Court of Appeal who will hear the appeal.

Party or Parties:

The party who brings the proceeding to the Court of Appeal is called the appellant. The appellant appeals the decision of a lower court. The party against whom an appeal is brought and who must respond to the appellant's case is called the respondent.

Reserved judgment:

When a judge or judges do not immediately give their decision, but the decision is postponed pending deliberation and then followed by a written decision at a later date.

Respondent:

The person who responds to or opposes an appeal.

Service:

The delivery of a document to another party to the proceeding. Rule 82.05 of the Rules of Civil Procedure sets out procedures that must be followed when serving documents.

Statute:

A law or Act enacted or passed into law by The Parliament of Canada or the Legislature of Prince Edward Island.

Stay:

To postpone the operation of a judgment or order pending an appeal.

Transcriber:

A person who prepares a record of the proceedings. A court transcriber is certified by the Court to do so.

Transcript:

A typed record of the oral proceedings before the court or tribunal under appeal, including the evidence given by the witnesses who testified at the trial.