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Continuing Professional Development

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Practice and Procedure

In the Court of Appeal for Saskatchewan



Leave to Appeal

Justice Caldwell



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Leave to Appeal

- ▶ Topics Covered:
 - ▶ The right to appeal
 - ▶ Appeals from interlocutory decisions of the Court of Queen's Bench
 - ▶ Appeals from the Court of Queen's Bench under an enactment
 - ▶ Appeals from other courts and tribunals
 - ▶ *Rothmans, Benson & Hedges Inc. v Saskatchewan*
 - ▶ Finality of applications for leave
 - ▶ *Civil Practice Directive No. 8: Leave Procedure in Appeals filed pursuant to s. 839 of the Criminal Code*



The Right to Appeal

- ▶ There is no right of appeal from a decision of any court or tribunal except as provided by statute:
 - ▶ *R v Meltzer*, [1989] 1 SCR 1764
 - ▶ *Kourtesis v M.N.R.*, [1993] 2 SCR 53
 - ▶ *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835
- ▶ Subsection 7(2) of *The Court of Appeal Act, 2000*:
 - ▶ an appeal lies to the Court of Appeal from:
 - ▶ a decision of the Court of Queen's Bench or a judge of that court.
 - ▶ a decision of any other court or tribunal where a right of appeal is conferred by an enactment.



Appeals from Interlocutory Decisions of the Court of Queen's Bench

- ▶ Subsection 8(1) of *The Court of Appeal Act, 2000*:
 - ▶ Subject to subsection 8(2), no appeal lies to the court from an *interlocutory decision* of the Court of Queen's Bench *unless leave to appeal is granted* by a judge or the court.
 - ▶ "Interlocutory" stands in contradistinction to "final".
 - ▶ "Decision" is defined in s. 2 as including "any judgment, order, decree, verdict or finding".
 - ▶ "Interlocutory decision" connotes a ruling made between the commencement and conclusion of proceedings related to an *intermediate* matter at issue in the proceedings but not to the ultimate matter in issue.



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Appeals from Interlocutory Decisions of the Court of Queen's Bench

- ▶ Subsection 8(2) of *The Court of Appeal Act, 2000*:
 - ▶ Leave to appeal an interlocutory decision is not required in:
 - ▶ cases involving:
 - ▶ the liberty of an individual
 - ▶ the custody of a minor
 - ▶ the granting or refusal of an injunction
 - ▶ the appointment of a receiver
 - ▶ other cases prescribed in the rules of court that are in the nature of final decisions.
 - ▶ The Court has not adopted any rule under s. 8(2)(b), so its exception is inoperative.



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Appeals from Interlocutory Decisions of the Court of Queen's Bench

- ▶ Section 8 is confined to appeals from decisions of the Court of Queen's Bench or a judge of that Court.
 - ▶ Section 8 does not apply to decisions of any other court or tribunal.
- ▶ Section 8 modifies s. 7(2)(a) of *The Court of Appeal Act, 2000*, such that the right of appeal under s. 7 is subject to leave being granted.
- ▶ That is, if interlocutory, a decision cannot be appealed without leave.
- ▶ It is the character of the decision — not the nature of the application from which it resulted — that attracts the label “interlocutory decision” and, therefore, attracts the application of s. 8(1).



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Interlocutory Decisions pursuant to an enactment

- ▶ If the source of the right of appeal lies in an enactment conferring a specific right of appeal from an interlocutory decision made by the Court of Queen's Bench pursuant to that enactment, then the right of appeal may not be subject to a leave requirement, e.g.:
 - ▶ the *Divorce Act*, RSC 1985, c 3 (2nd Supp)
 - ▶ *Kotelmach v Mattison* (1987), 61 Sask R 207 (CA)
 - ▶ *Farden v Farden* (1996), 141 Sask R 178 (CA)
 - ▶ *The Family Property Act*, SS 1997, c F-6.3
 - ▶ *Rimmer v Adshead*, 2003 SKCA 19, 224 DLR (4th) 372
 - ▶ *Fehr v Turta*, 2014 SKCA 91, 446 Sask R 1
 - ▶ *Felker v Easthill*, 2018 SKCA 13
- ▶ Or it may be subject to a leave requirement, e.g.:
 - ▶ *The Small Claims Act*, 1997, SS 1997, c S-50.11
 - ▶ *The Environmental Management and Protection Act*, 2002, SS 2002, c E-10.21



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Appeals from decisions of other courts or tribunals

- ▶ Whether leave to appeal is required in relation to a decision of any other court or tribunal depends entirely upon the enactment pursuant to which the decision is made, e.g.:
 - ▶ *The Municipal Board Act*, SS 1988-89, c M-23.2—leave required.
 - ▶ *The Surface Rights Acquisition and Compensation Act*, RSS 1978, c S-65—leave required.
 - ▶ *The Saskatchewan Employment Act*, SS 2013, c S-15.1—leave required.

Rothmans, Benson & Hedges Inc. v Saskatchewan

- ▶ *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119
- ▶ A judge's power to grant leave is discretionary.
- ▶ The power is exercisable upon a set of criteria which, on balance, must be shown by to weigh decisively in favour of leave being granted.
 - ▶ *Steier v University Hospital*, [1988] 4 WWR 303 (Sask CA), per Tallis J.A.
- ▶ There are two governing criteria:
 - ▶ Merit
 - ▶ Importance

Rothmans, Benson & Hedges Inc.

- ▶ Merit asks whether the proposed appeal of sufficient merit to warrant the attention of the Court of Appeal.
 - ▶ Is it prima facie frivolous or vexatious?
 - ▶ Is it prima facie destined to fail in any event?
 - ▶ The Chambers judge will look to the nature of the issue and the scope of the right of appeal as well as the nature of the adjudicative framework.
 - ▶ Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?

Rothmans, Benson & Hedges Inc.

- ▶ Importance asks whether the proposed appeal of sufficient importance to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally to warrant determination by the Court of Appeal.
 - ▶ Does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
 - ▶ Does it raise a new or controversial or unusual issue of practice?
 - ▶ Does it raise a new or uncertain or unsettled point of law?
 - ▶ Does it transcend the particular in its implications?

The power to grant leave

- ▶ A judge is empowered to grant leave on a selective basis, i.e., in relation to one issue or ground of appeal but not another:
 - ▶ *Austman v Royal Bank of Canada*, [1991] SJ No 564 (QL) (CA)
 - ▶ *Bourgault Industries Ltd. v Canada (Attorney General)*, 2011 SKCA 29
 - ▶ *GMRI Canada Inc. v Saskatoon (City)*, 2007 SKCA 39
- ▶ A judge is empowered to grant leave to appeal on conditions, including those related to appeal perfection and the payment of costs:
 - ▶ *Austman v Royal Bank of Canada*, [1991] SJ No 564 (QL) (CA)
 - ▶ *Boyko v Broomfield* (1993), 113 Sask R 291 (CA)

The power to grant leave

- ▶ A judge or the court may grant leave *nunc pro tunc*.
- ▶ You must obtain leave before serving and filing a notice of appeal.
- ▶ You may obtain leave serving and filing a notice of appeal only in special circumstances that do not defeat the object of s. 8(1):
 - ▶ *Rimmer v Adshead*, 2002 SKCA 12 at paras 53–54
 - ▶ *Grant v Saskatchewan Government Insurance*, 2003 SKCA 17
 - ▶ *Holmes v Jastek Master Builder 2004 Inc.*, 2008 SKCA 159
 - ▶ *Stevenson Estate v Bank of Montreal*, 2011 SKCA 51
 - ▶ *KKS Holdings Ltd. v Foam Lake Savings and Credit Union Limited*, 2017 SKCA 105

Applications for leave are final

- ▶ Most importantly, once made, applications for leave to appeal are final.
 - ▶ An application for leave to appeal constitutes an irrevocable election by the applicant to treat the decision below as interlocutory.
 - ▶ An applicant who applies for leave to appeal and is refused leave cannot later resile from that election and contend that the decision was final:
 - ▶ *Iron v Saskatchewan (Minister of the Environment and Public Safety)* (1993), 109 Sask R 49 (CA)
 - ▶ In *Iron*, the majority said an application for leave embodies four fundamental assertions by the applicant:
 - ▶ I have here an interlocutory order that I seek to appeal
 - ▶ The interlocutory nature of the order vests you, the judge, with jurisdiction to grant or refuse leave to appeal
 - ▶ I ask you to assume that jurisdiction and I submit to it
 - ▶ In exercising your jurisdiction, I ask you to grant me leave



Final vs. Interlocutory

- ▶ Because applications for leave are final, a party dissatisfied with a decision must carefully consider the character of the decision and determine whether it is interlocutory or final.
- ▶ The Court cannot help with the determination:
 - ▶ *Mann Family Trust (Trustee of) v Hawkins*, 2011 SKCA 7
 - ▶ *deBalinhard v deBalinhard*, 2014 SKCA 95
- ▶ An order of a judge granting or refusing leave to appeal is final and may not be appealed (s. 20(3)).
- ▶ *Civil Appeals in Saskatchewan: The Court of Appeal Act & Rules Annotated*, First Edition:
 - ▶ Pages 42–48, examples of interlocutory decisions
 - ▶ Pages 48–49, examples of final decisions
 - ▶ Pages 49–50, treatment of decisions in class actions

Criminal Practice Directive No. 8

- ▶ Criminal Practice Directive No. 8: *Leave Procedure for Appeals filed pursuant to Section 839 of the Criminal Code.*
- ▶ On the filing of a notice of appeal relating to any of the following proceedings, the Registrar shall refer the issue of leave to appeal to a judge of the Court in chambers for a determination as to whether leave to appeal is granted or denied:
 - ▶ summary offence ticket proceedings taken under *The Traffic Safety Act*, SS 2004, c T-18.1.
 - ▶ bylaw proceedings such as those taken pursuant to a bylaw of a municipality or an authority as defined in *The Summary Offences Procedure Act*, 1990, SS 1990-91, c S-63.1.
- ▶ For all other appeals, the appellant and the respondent must “succinctly address the issue of leave to appeal in Part II of their facta and proceed on the basis that the Court will consider the issue of leave to appeal at the outset of the hearing of the appeal.”

Section 839 of the *Criminal Code*

- ▶ 839(1) ..., an appeal to the court of appeal... may, *with leave of that court or a judge thereof*, be taken on any ground that involves a question of law alone, against [the decision of the Court of Queen's Bench in a summary conviction appeal (s. 822 or s. 834)].
- ▶ *R v Bray*, 2017 SKCA 17
 - ▶ The right to appeal against the result of a summary conviction appeal is limited to questions of law alone.
 - ▶ The right to appeal is exercisable only with leave of the Court or a judge of the Court.
 - ▶ Leave to appeal is granted sparingly.
 - ▶ In broad terms, an applicant must establish the proposed appeal raises a question of law that is either:
 - ▶ significant to the administration of justice generally —i.e., beyond the four corners of the case.
 - ▶ compellingly meritorious in the particulars of the case in question.
 - ▶ The Court will consider whether the offence is serious, whether the applicant is facing a significant deprivation of liberty and whether denial of leave would result in an injustice going unaddressed.



Court of Appeal Registry Office Tips for Counsel

Melanie Baldwin QC, Registrar



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Court of Appeal Registry Office Tips for Counsel – Perfecting and Scheduling Appeals

- ▶ Know when your appeal is “perfected” for the purpose of scheduling;
- ▶ Know the Court’s upcoming schedule;
- ▶ Communicate with counsel for the other party and with the registry office; and
- ▶ Get the hearing date that you want!

11 April 2019

Court of Appeal Registry Office Tips for Counsel – Perfecting and Scheduling Appeals

Know when your appeal is “perfected” for the purpose of scheduling

- ▶ A criminal sentence appeal is ready to be scheduled when the transcript is filed with the Court.
- ▶ All other criminal appeals are ready to be scheduled when the appellant factum is filed with the Court.
- ▶ Civil appeals are ready to be scheduled when all factums have been filed with the Court.



Court of Appeal Registry Office Tips for Counsel – Perfecting and Scheduling Appeals

Know the Court's upcoming schedule

- ▶ The Court's Annual Sitting Schedule is posted on the Court's website.
<https://sasklawcourts.ca/index.php/home/court-of-appeal/court-schedule/annual-sitting-schedule>
- ▶ The Annual Sitting Schedule identifies when the Court is hearing civil and criminal appeals, including specific dates set aside for sentence appeals.
- ▶ For civil appeals, the Annual Sitting Schedule identifies the six weeks per year that the Court sits in Saskatoon.



Court of Appeal Registry Office Tips for Counsel – Perfecting and Scheduling Appeals

Communicate with counsel for the other party and with the registry office

- ▶ If you know that your appeal is perfected or will soon be perfected, talk with counsel for the other party about preferred hearing dates and dates that will not work in the Court's upcoming sitting schedule.
- ▶ Contact the registry office to let us know about upcoming hearing dates that work and do not work for the parties.



Court of Appeal Registry Office Tips for Counsel – Perfecting and Scheduling Appeals

Get the hearing date that you want!

- ▶ If you follow these steps, you will end up with a hearing date that works for you and you can avoid the need to request an adjournment.
- ▶ Unnecessary adjournments waste scarce judicial and courtroom resources and negatively impact on access to justice for other litigants in the Court.



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Court of Appeal Registry Office Tips for Counsel – Communication is Key

- ▶ The registry office is staffed by the registrar and three deputy registrars.
- ▶ We operate with a focus on customer service and you are our customers.
- ▶ We welcome your inquiries. In many cases, particularly when dealing with e-filing, a quick call to the registry office before or during the process obviates the need for clean-up, by us and you, after the fact.

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Court of Appeal Registry Office Tips for Counsel – Communication is Key

- ▶ The best way to make an inquiry by telephone is to call our general reception number (306) 787-5382. Your call will be answered by one of the deputy registrars who will either provide you with the information that you require or forward your call to the registrar.
- ▶ The best way to make an inquiry by email is to use our general inbox caregistrar@sasklawcourts.ca All deputy registrars and the registrar have access to this email inbox.
- ▶ Depending on the nature of your inquiry, it might make sense to have your assistant contact the registry office to speak with a deputy registrar.
- ▶ If you believe that your inquiry can only be answered by the registrar, you should generally not delegate the task of making the inquiry to your assistant. Call the registrar at (306) 787-5258 or email using mbaldwin@sasklawcourts.ca



Advocacy in the Court of Appeal

Chief Justice Richards



General Points

- ▶ The two roles of the Court
 - ▶ error correction
 - ▶ law making
- ▶ Rights of appeal
- ▶ Standards of review



Factums

- ▶ Importance
- ▶ Arguments/grounds of appeal
- ▶ Make it accessible
 - ▶ table of contents
 - ▶ cite to the record
 - ▶ headings and subheadings



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Oral Argument

- ▶ Preparation
 - ▶ know the file
 - ▶ “hard questions”
- ▶ Use a road map
- ▶ Handling questions
- ▶ Slow down and speak up