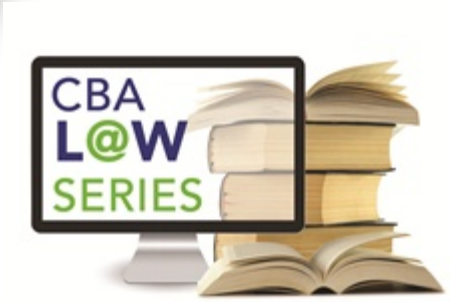
CBA L.@.W. SERIES



"Leaves to Appeal" and Interventions at the Supreme Court of Canada

A View from the Bench of Final Appeal

Speaker:
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Moderator:
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THE CANADIAN BAR ASSOCIATION
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Overview

- Leave to Appeal:
  - Statutory scheme
  - What sorts of cases get leave?
  - The leave process
  - Interlocutory remedies
  - Practical considerations
- Interventions
  - Overview of the rules and process
  - Applying to intervene
  - Applying for time for oral argument
  - Practical considerations

I. Statutory Scheme

- SCC is a statutory court
- Must find jurisdiction in a statute

Statutory Scheme (2)

- Cases that come "as of right":
  - References: *Supreme Court Act* ("*SCA*") s. 35.1 (from FCA re intergovernmental disputes); s. 36 (appeals from provincial references)s. 54 (federal private bills and petitions); s. 53 (federal references)
  - *Criminal Code* s. 691, 692 and 693;
  - A few other statutes, e.g. *Competition Act* s. 34(3.1); *Elections Act* s. 523(1)
- In all other cases, leave of the Court is required

Statutory Scheme (3)

- Most applications for leave to appeal are brought under either s. 40(1) of the *Supreme Court Act* or ss. 691-693 of the *Criminal Code*
- Leave to appeal is provided for under several other statutes:
  - e.g. *BIA*; *CCAA*; *Winding Up and Restructuring Act*

Statutory Scheme – S. 40 of the *Supreme Court Act*

- **40.** (1) … an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case … where … the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Statutory Scheme – Some Things to Note About S. 40

- Final or other judgment … of the highest court of final resort in a province … in which judgment can be had in the particular case…"
  - Not always from the Court of Appeal
  - "third party" appeals – e.g. *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835
  - "constitutional" appeals – e.g. *R. v. Laba*, [1994] 3 S.C.R. 965
  - Leave to appeal from a denial of leave: *MacDonald v. Montreal (City)*, [1986] 1 S.C.R. 460; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374
  - Leave to appeal from extension of time: *R. v. Shea*, [2010] 2 S.C.R. 17

Statutory Scheme – Some Things to Note About S. 40 -- (2)

- Generally appeals in indictable criminal matters excluded: s. 40(3):

(3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

- Appeals in indictable matters addressed by the *Criminal Code* … BUT … some aspects such as sentence appeals fall under s. 40(1)

Statutory Scheme: *Criminal Code*, ss. 691-693, 784

- Convictions/acquittals on questions of law
- NCR/unfitness to stand trial
- *Habeas corpus*
- See also *National Defence Act* and *Youth Criminal Justice Act*

Statutory Scheme: Leave Granted by Courts of Appeal

- Ss. 37 and 38 of SCA final courts of appeal to grant leave to SCC
- The virtually universal practice is for those courts not to use this power but to require parties to apply to SCC for leave: see, e.g., *Canadian Pacific Ltd v. Lowe* (1999), 180 N.S.R. (2d) 330 (C.A.)

II. What Sorts of Cases Get Leave?

- Under s. 40, the statutory test is "public importance":
  - Distinction from "national importance"
  - Not a court of error
  - Denial of leave is not approval of result or reasoning of the court appealed from
  - Questions of general or wide interest
  - Interpretation of the Constitution
  - Conflicting decisions of appellate courts
  - Reconsideration of a precedent

What Sorts of Cases Get Leave? (2)

- No statutory test under the *Criminal Code*
  - Similar considerations
  - Risk of substantial injustice

III. The Leave Process

- Material and timing:
  - SCA s. 58 – all materials within 60 days
  - Rules 25-28
  - Leave to cross-appeal – Rule 29 – not necessary if respondent seeks to uphold the judgment appealed from on a ground not relied on in the reasons for judgment
  - The memorandum of argument is limited to 20 pages
  - The notice of application and memorandum of argument must be filed electronically

The Leave Process (2)

- Use of affidavits on leave applications:
  - Generally, whether a matter is of public importance is for the Court to decide and evidence is not helpful or appropriate
  - Generally, opinions on questions of law or argument should not be offered
  - There may be exceptional cases – e.g. not clear why a ruling is unworkable in practice, to explain the context, to show likely impact, etc.
  - Generally dealt with the leave panel, but may be dealt with by a judge
  - See, for example, *Aecon Buildings v. Stephenson* (June 23, 2011) *per* Binnie J.

The Leave Process (3)

- Once all materials are filed, the application is submitted to the Court: s. 43 *SCA* and Rule 32
- Court sits in 3 panels for leave applications and the constitution of the panels changes on a regular basis
- Each judge considers the application individually and gives his/her proposed disposition in writing

The Leave Process (4)

- If the panel is unanimous:
  - An "unless" memo with a copy of a detailed summary of the case is circulated to all the judges
  - Within 2 weeks, any judge can require the case to be discussed by the full Court before the order granting or dismissing is issued
- If the panel is not unanimous, the case is automatically placed on the agenda for discussion by the full Court
- The final decision remains that of the panel

The Leave Process (5)

- Roughly 500 applications are received each year – in 2014, 561 filed and 502 submitted to the Court
- There is no "quota", but generally around 60-70 applications are granted each year; by my unofficial count, this year 54 were granted and 4 cases were remanded to the Court of Appeal
- The average time from completion of filings to disposition for 2014 was 14.06 weeks

Interlocutory Remedies

- Stay pending application for leave: s 65.1 *SCA*
  - Stay of "proceedings … with respect to the judgment …"
  - May be granted by a judge of the Court appealed from either before or after the leave application has been filed: s. 65.1(2) – note that the Court appealed from may grant a stay before the leave application is filed if satisfied that the party seeking the stay intends to apply for leave and that delay would result in a miscarriage of justice
  - Generally should apply to Court appealed from

Interlocutory Remedies (2)

- Stay pending appeal: S. 65
  - Stay of execution
  - Security for performance of the obligation is generally required before the stay will operate
- Stay imposed by s. 65 may be modified or vacated by a judge of the SCC or of the Court appealed from

Interlocutory Remedies (3)

- Bail pending appeal in criminal cases:
  - S. 679 of the *Code*
  - Applies to both appeals and applications for leave to appeal
  - The application is to a judge of the Court of Appeal

V. Practical Considerations

- The leave application is not re-argument of the appeal in the Court of Appeal
- Three key questions for both applicant and respondent:
  - Is this the right issue?
  - Is this the right record?
  - Is now an appropriate time?
- Substantial injustice BUT use sparingly – this is NOT simply that the Court of Appeal was arguably wrong

Practical Considerations (2)

- You should be able to state in summary why the case is/isn't an appropriate case for leave in a paragraph

Practical Considerations: (3)

- The applicant's approach:

"This application raises the issue of whether using a cellular telephone in a restaurant may constitute the offence of mischief. Courts in Prince Edward Island and Saskatchewan have held that it can while Courts in Nunavut and New Brunswick have held the opposite. The intervention of this Court is required to clarify the criminal law and ensure that it is being applied uniformly across Canada."

Practical Considerations (4)

- The respondent's approach: "This Court's consideration of whether using a cellular telephone may constitute mischief is not warranted and is not timely. There are only four cases dealing with this issue and none of them, except for this one, proceeded beyond the Provincial Court. Moreover, while three of the four cases involved loud talking on the telephone, this one involved the applicant throwing his telephone through the kitchen window. Conduct of this nature has consistently been held to constitute mischief, quite apart from any aspect relating to telephone use."

Questions?

Intervention

- Overview of the rules and process
- Applying to intervene
- Applying for time for oral argument
- Practical considerations

Source: Microsoft ClipArt

Overview - Purpose and Role

- Interventions serve two main purposes:
  - Assisting the Court by providing additional perspectives
  - Providing an opportunity for non-parties who may be affected by or have an interest in the ultimate decision to participate in the process
  - Interventions at the leave stage rarely granted
- Interveners generally should
  - Stay out of the facts
  - Not take a position on the disposition of the appeal as regards how the law applies to the fact
  - Not become an “adversary” but more a “friend of the Court”

Overview of the Rules and Process

- Certain parties may intervene as of right
- Here we will focus on intervention by leave of the Court
- The basic process is outlined in Rules 55-59
- Motion in writing to a judge, generally requesting both the opportunity to file a factum and to present oral argument
- NB Timing: 4 weeks after appellant's factum (R. 56)
- The practice is to deal with the request to file a factum first, and if that is granted, to defer the request to present oral argument until after the factum has been filed

Applying to Intervene

- Applicants must
  - Identify their interest in the proceeding
  - Identify the position they intend to take on the questions
  - Set out the submissions to be advanced, their relevance and why they will be useful to the Court and different from those of other parties
  - In general, there must be "an interest" and submissions that will be "useful and different from those of the other parties": *Reference Re Workers' Compensation Act, 1983*, [1989] 2 S.C.R. 335

Applying to Intervene (2)

- Order
  - Initially deal only with factum – defer decision on oral argument
  - 10 pages is the norm
  - Provide for payment of additional disbursements of appellant or respondent occasioned by the intervention
  - No new issues or additions to the record
  - No discussion of the merits

Applying for Time for Oral Argument

- Generally no separate application – the file and the factum are returned to the judge who granted the intervention and that judge will also (generally) deal with the time for oral argument
- In cases with many interveners, there is more "case management" in order to ensure that interventions are not duplicative and do not overwhelm the main parties to the appeal
- It is not an insult to be denied time for oral argument or to receive a shorter period of time

Practical Considerations

- Practice in relation to interventions is generous
- Keep in mind the purposes of having interveners and direct material to those purposes
- Stay out of the “fray” as much as possible
- Don’t deal with new issues or material not in the record
- You will have the advantage of seeing the argument unfold – use it to answer key questions that have arisen in the course of argument
- Coordinate with other interveners to avoid duplication and overlap

Questions?

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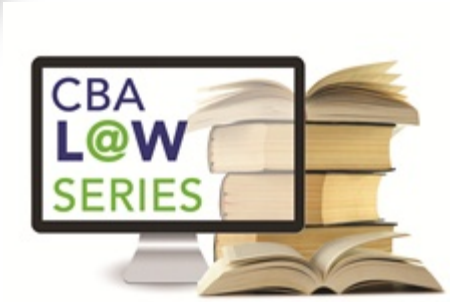

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