

PERFECTING AN APPEAL

Moses Moyal, Steinberg Morton Frymer LLP

INTRODUCTION

As the title might suggest, this paper deals with the topic of “perfecting an appeal”. Perfecting an appeal is the process provided for by the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended (“Rules”) by which an appellant completes what is procedurally required to ready an appeal for hearing by the appellate Court. Amongst other things, the process involves the gathering of affidavits, transcripts, documentary and other evidence, as may have been created or utilized in the proceeding below, and their organization in a manner prescribed by the Rules. This organization is meant to facilitate the hearing of the appeal and to make it more efficient and expeditious. An appeal is “perfected” once all of the required steps are taken, at which time the appellant is considered to be ready to argue the appeal.

The procedure for commencing and perfecting appeals is set out in Rules 61 and 62. Perfecting an appeal is only part of the appeal process. The procedure for perfecting an appeal is discussed below, however, before doing so, some general background as to the nature of orders and the manner in which appeals are commenced is of some importance.

THE TYPE OF ORDER APPEALED FROM

At the outset, a determination must be made as to whether the order to be appealed is interlocutory or final in nature. This is not always clear, but it will determine the manner in which an appeal is to be commenced and, also, to some extent, whether

an appeal is commenced under Rule 61 or 62.

A final order is one that finally disposes of a party's substantive (as opposed to procedural) rights. A clear example of a final order is a judgment rendered after a trial or application, or following a motion for summary judgment. Such an order disposes of the subject-matter of a proceeding and provides for a final disposition of the matters in issue. Final orders may also be made before an action or application is finally disposed of, if such an order, perhaps made following a motion, disposes of a party's substantive rights insofar as the subject-matter of the motion is concerned.

By contrast, an interlocutory order is one that does not finally dispose of a party's substantive rights. Orders that deal with procedural matters, such as, for instance, the amendment of a pleading, are, generally speaking, interlocutory in nature. Such orders do not, as a general rule, finally dispose of a party's entitlement to continue with the litigation, although the terms of an interlocutory order, whatever they may be, must be adhered to.

THE RIGHT AND ROUTE TO APPEAL

The right to appeal is conferred by statute, namely the *Courts of Justice Act*, R.S.O. 1990, Chap. C.43, as amended ("Act"). Section 6 of the Act deals with appeals that lie to the Court of Appeal for Ontario. Section 19 of the Act deals with appeals that must be brought before the Divisional Court (being a branch of the Ontario Superior Court of Justice). These sections provide whether or not a party has an automatic right to appeal, or whether that party must seek leave (that is, permission) of the Court to appeal. They also outline the types of orders that may be appealed to each of the two Courts

mentioned above.

While one should look to the sections mentioned above for a complete picture, section 6 of the Act provides that a final order of a judge of the Superior Court of Justice may be brought as of right in the Court of Appeal. An exception to that rule, however, is set out in section 19(1)(a) of the Act, which states that if a final order of a judge provides (in effect) that a sum of \$25,000.00 or less is or would have been payable, the appeal (also as of right) lies to the Divisional Court.

Section 19(1)(b) of the Act provides that an interlocutory order of a judge of the Superior Court is to be brought in the Divisional Court. That Court also has jurisdiction over appeals brought, as of right, from final orders of a master or case management master (see section 19(c) of the Act). An interlocutory order of a master or case management master lies to the Superior Court (also as of right) pursuant to section 17(a) of the Act.

You will all be familiar with the appeal charts included in any annotated set of the Rules. These charts provide a quick and useful guide to determining what route is applicable, the provisions in the Act that apply, and the Rules to be followed.

We return to the Rules. While, strictly speaking, a slight oversimplification, it may be said that, if the order to be appealed is final in nature, Rule 61 applies. If the order is interlocutory in nature, Rule 62 applies. Rule 62 deals with appeals from interlocutory orders that may be appealed as of right to a judge of the Superior Court, in which case the procedure to be followed on the appeal is set out in Rule 62.01 (this procedure is discussed under a different heading, and, other than for that section, the balance of the paper deals with the procedure for perfection to be followed under Rule

61). Rule 62 also deals with motions for leave to appeal to the Divisional Court from interlocutory orders of a judge of the Superior Court (see Rule 62.02). If leave to appeal is granted, then Rule 61 applies to the preparation and conduct of the appeal itself.

This paper does not deal with motions for leave to appeal. You should, however, note that, if a motion for leave to appeal is brought and an order for leave is granted, a notice of appeal must be delivered within seven days following the date on which leave is granted (see Rule 61.03(6) in the case of an appeal to the Divisional Court, Rule 61.03.1(16) in the case of an appeal to the Court of Appeal and Rule 62.02(8) in the case of an appeal to the Divisional Court from an interlocutory order of a judge of the Superior Court). Also, keep in mind that the notice of motion for leave to appeal must be served within 15 days of the date of the order sought to be appealed, in the case of Rules 61.03 and 61.03.1 (the latter motion to be brought in writing), and seven days of the date of the order sought to be appealed, in the case of Rule 62.02.

This paper also does not deal with the commencement of appeals, however, I would note the time limits imposed by the Rules for doing so: from the date of the order to be appealed: 30 days in the case of a final order and seven days in the case of an interlocutory order.

THE NOTICE OF APPEAL

Appeals are commenced by Notice of Appeal, served and filed in the appropriate Court. The Notice sets out the essential elements of the appeal, such as the order appealed from, the grounds for appeal and the relief sought. The Notice is to be served together with a Certificate or Agreement Respecting Evidence.

PRELIMINARY ITEMS

The Certificate or Agreement Respecting Evidence

When discussing the perfecting of an appeal, of greater importance than the Notice of Appeal is the Certificate or Agreement Respecting Evidence (see Rule 61.05).

That Rule provides as follows:

61.05(1) In order to minimize the number of documents and the length of the transcript required for an appeal, the appellant shall serve with the notice of appeal an appellant's certificate respecting evidence (Form 61C) setting out only the portions of the evidence that, in the appellant's opinion, are required for the appeal.

Rule 61.05(2) imposes a corresponding obligation on the respondent to an appeal to confirm the appellant's certificate or advise as to any additions or deletions to it.

It is expected that, prior to perfecting an appeal, the parties to the appeal will give some thought to whether it is actually necessary to place before the appellate Court all of the evidence and material that was before the lower Court. This is significant in that, if the focus of the appeal is limited, it may not be necessary to place before the appellate Court the complete record created below. That may cut down significantly on the material that needs to be processed and filed with the Court in anticipation of the appeal. Often, however, the temptation is to list in the Certificate that all of the evidence is required for the appeal, since often the precise scope of the appeal will not be clearly determined at the time that the appeal is commenced. One may also be inclined to include everything "just in case" it proves necessary to have some document or other material before the Court. As you will note below, particularly when it comes to the preparation of the Appeal Book and Compendium, it is expected that only the pleadings, documents and excerpts of evidence that are relevant to the matters on appeal will be put

before the Court.

Issued and Entered Order

There is another preliminary point that is worth mentioning. Often (I would venture to say usually), at the time that an appeal is commenced by way of a Notice of Appeal, the Order being appealed will not have been issued and entered with the Court. In order to perfect an appeal, in the normal course the issued and entered Order is required. You may find yourself with little time left to perfect an appeal and also realize that the Order has yet to be issued and entered. The Order should be finalized, approved, issued and entered as early as possible.

Transcripts

Lastly, if the appeal is from a trial decision or other proceeding in respect of which oral evidence was taken, transcripts will need to be ordered. These take time and, although the Rules provide for the attendant delay in receiving the transcripts, on the assumption that the appellant wishes to have the appeal heard as early as possible, the transcripts should be ordered as soon as possible.

PERFECTING AN APPEAL

Perfecting an appeal is, to a large extent, a “mechanical” process, requiring the compilation and organization of documents. The Rules that apply in perfecting an appeal are 61.09, 61.10, 61.10.1 and 61.11. Rule 61.12 sets out the respondent’s obligations, following perfection of the appeal.

At the outset, one must keep in mind the deadlines imposed for perfecting an appeal. These are set out in Rule 61.09(1): where no transcript of evidence is required

for the appeal, within 30 days after filing the notice of appeal, or, where a transcript of evidence is required for the appeal, within 60 days after receiving notice that the transcript is available.

There are a number of things that need to be prepared and filed in order to perfect an appeal (see specifically Rules 61.09(3):

1. an Appeal Book and Compendium;
2. an Exhibit Book;
3. the Transcript of Evidence (if there is one);
4. an electronic version of the Transcript of Evidence (if there is a transcript and if an electronic version is available);
5. the Appellant's Factum;
6. an electronic version of the Appellant's Factum;
7. the Certificate of Perfection.

The chart appended as Schedule "A" to this paper provides a checklist of the above-listed materials and sets out what documents are to be included in each of the items that need to be filed.

Insofar as the electronic versions referred to above are concerned, reference should be made to the *Notice to the Profession - Filing Electronic Versions of factums and Transcripts in Appeals and Motions Before the Court of Appeal for Ontario*, dated April 5, 2000. That practice direction provides guidelines for the filing with the Court of Appeal of electronic versions of documents. These may be filed by way of computer diskette, CD-ROM or, preferably, by way of e-mail. Amongst other things, these electronic documents must be named in a specific way, depending on the nature of the

document and the party that is filing it. If an electronic document is not properly named, it will be rejected by the Court. The practice direction should always be referred to in addition to the relevant Rules.

The Certificate of Perfection is sometimes forgotten, since it is a document that is not incorporated into any of the volumes of documents that need to be filed. The Court of Appeal, however, will not consider an appeal perfected until the Certificate of Perfection has been filed.

Particular attention should be paid to the preparation of the Appeal Book and Compendium and the Appellant's Factum. These are the two items that the justices hearing the appeal will most likely read before the hearing. Accordingly, the contents of these documents will form the "all-important" first impression that the Court will have of the case. The Appeal Book and Compendium is meant to and should contain the essential documents and excerpts of transcript evidence that are material to the appeal. The Factum, of course, should set out the argument to be made before the Court, in a concise, organized and clear manner.

While not strictly speaking part of the perfecting process, once an appeal is perfected is obliged to serve and file a Respondent's Factum and Compendium within 60 days after service of the appellant's materials (see Rule 61.12).

RULE 62 APPEALS

As mentioned above, Rule 62 deals with appeals from interlocutory orders that may be appealed as of right to a judge of the Superior Court, in which case the procedure to be followed on the appeal is set out in Rule 62.01. This rule does not speak in terms of

“perfecting” an appeal, but it provides the procedure for preparing the appeal materials and placing them before the Court for hearing. The appellant has to prepare and file two things: an appeal record and a factum, to be served and filed at least four days before the hearing of the appeal (see Rule 62.01(7)). The chart appended as Schedule “B” to this paper provides an outline of what materials need to be included in the appeal record and other, related, information.

CONCLUSION

The process for perfecting an appeal entails significant preparation and organization of documents. It is best to look at it as an exercise in gathering and organizing these materials in the manner prescribed by the Rules. If these Rules are followed strictly, the likelihood of the Court rejecting materials will be significantly diminished. This is of particular importance in circumstances where, simply by virtue of the amount of work to be done, we find ourselves racing against the clock to meet filing deadlines.

(October 17, 2005)

SCHEDULE "A"

MATERIAL TO BE SERVED AND FILED TO PERFECT AN APPEAL (RULE 61)

A. APPEAL BOOK AND COMPENDIUM
(Rules 61.09(3)(a)(I) and 61.09(3)(b)(I)
-THREE COPIES TO BE FILED/BUFF COVERS
-ONE COPY TO BE SERVED

ITEM	DOCUMENT	APPLIES	RULE	✓
1.	TABLE OF CONTENTS		61.10(1)(a)	
2.	NOTICE OF APPEAL		61.10(1)(b)	
3.	NOTICE OF CROSS-APPEAL		61.10(1)(b)	
4.	SUPPLEMENTARY NOTICE OF APPEAL		61.10(1)(b)	
5.	SUPPLEMENTARY NOTICE OF CROSS-APPEAL		61.01(1)(b)	
6.	ORDER OR DECISION APPEALED FROM (SIGNED AND ENTERED)		61.10(1)(c)	
7.	REASONS OF THE COURT OR TRIBUNAL APPEALED FROM		61.10(d)	
8.	TYPED COPY OF THE REASONS OF THE COURT OR TRIBUNAL APPEALED FROM (IF ORIGINAL REASONS HANDWRITTEN)		61.10(d)	
9.	PRIOR ORDER(S) OR DECISION(S) OF THE COURT OR TRIBUNAL APPEALED FROM (SIGNED AND ENTERED)		61.10(e)	
10.	REASONS OF THE COURT OR TRIBUNAL THAT ISSUED THE PRIOR ORDER(S) OR DECISION(S)		61.10(e)	
11.	TYPED COPY OF THE REASONS OF THE COURT OR TRIBUNAL APPEALED FROM FOR PRIOR ORDER(S) (IF ORIGINAL REASONS HANDWRITTEN)		61.10(e)	

ITEM	DOCUMENT	APPLIES	RULE	✓
12.	PLEADINGS OR OTHER DOCUMENT THAT INITIATED PROCEEDING OR DEFINES ISSUES IN IT (e.g. STATEMENT OF CLAIM, NOTICE OF APPLICATION OR NOTICE OF MOTION) FOLLOWED BY OTHER PLEADINGS (e.g. STATEMENT OF DEFENCE, NOTICE OF CROSS-MOTION OR NOTICE CROSS-APPLICATION)		61.10(f)	
13.	EXCERPTS OF TRANSCRIPT OF EVIDENCE REFERRED TO IN APPELLANT'S FACTUM		61.10(g)	
14.	EXHIBITS REFERRED TO IN APPELLANT'S FACTUM		61.10(h)	
15.	ANY OTHER DOCUMENTS REFERRED TO IN APPELLANT'S FACTUM		61.10(l)	
16.	CERTIFICATES OR AGREEMENT RESPECTING EVIDENCE		61.05 and 61.10(j)	
17.	ORDER(S) MADE CONCERNING THE CONDUCT OF THE APPEAL		61.10(k)	
18.	APPELLANT'S CERTIFICATE STATING THAT CONTENTS OF APPEAL BOOK ARE COMPLETE AND LEGIBLE (FORM 61H)		61.10(l)	

B. EXHIBIT BOOK
 (Rules 61.09(3)(a)(ii) and 61.09(3)(b)(ii))
 - ONE COPY TO BE FILED/ANY COLOUR COVERS
 - ONE COPY TO BE SERVED

ITEM	DOCUMENT	APPLIES	RULE	✓
1.	TABLE OF CONTENTS		61.01.1(a)	
2.	AFFIDAVITS (INCLUDING EXHIBITS) UNLESS PARTIES HAVE AGREED TO OMIT		61.10.1(b)	
3.	TRANSCRIPTS OF EVIDENCE USED ON A MOTION OR APPLICATION UNLESS PARTIES HAVE AGREED TO OMIT (e.g. TRANSCRIPTS OF CROSS-EXAMINATIONS)		61.10.1©)	
4.	EXHIBITS FILED AT HEARING OR MARKED ON EXAMINATION FOR DISCOVERY UNLESS PARTIES HAVE AGREED TO OMIT (ARRANGED IN CHRONOLOGICAL ORDER OR BY SUBJECT MATTER, BUT NOT BY EXHIBIT NUMBER)		61.10.1(d)	

C. TRANSCRIPT OF EVIDENCE
 (Rules 61.09(3)(a)(iii) and 61.09(3)(b)(iii))
 - ONE COPY TO BE FILED/RED COVERS
 - ONE COPY TO BE SERVED

D. ELECTRONIC VERSION OF TRANSCRIPT OF EVIDENCE
 (Rules 61.09(3)(a)(iv) and 61.09(3)(b)(iv))
 - ONE COPY TO BE FILED ELECTRONICALLY

E. APPELLANT'S FACTUM
 (Rule 61.09(3)(a)(v) and 61.09(3)(b)(v))
 - THREE COPIES TO BE FILED/WHITE COVERS
 - ONE COPY TO BE SERVED

F. ELECTRONIC VERSION OF APPELLANT'S FACTUM
(Rule 61.09(3)(b)(vi))
- ONE COPY TO BE FILED ELECTRONICALLY

G. CERTIFICATE OF PERFECTION
(Rule 61.09(3)(c))

SCHEDULE "B"

MATERIAL TO BE SERVED AND FILED ON AN APPEAL (RULE 62)

**A. APPEAL RECORD
(Rule 62.01(7))**

ITEM	DOCUMENT	RULE	✓
1.	TABLE OF CONTENTS	62.01(7)(a)	
2.	NOTICE OF APPEAL	62.01(7)(b)	
3.	ORDER OR CERTIFICATE APPEALED FROM (SIGNED AND ENTERED)	62.01(7)(c)	
4.	REASONS FOR DECISION APPEALED FROM	62.01(7)(c)	
5.	TYPED COPY OF THE REASONS FOR DECISION APPEALED FROM (IF ORIGINAL REASONS HANDWRITTEN)	62.01(7)(c)	
6.	SUCH OTHER MATERIAL THAT WAS BEFORE THE JUDGE OR OFFICER APPEALED FROM AS IS NECESSARY FOR THE HEARING OF THE APPEAL (e.g. AFFIDAVITS, EXHIBITS, EXCERPTS FROM TRANSCRIPTS)	62.01(7)(d)	

**2. APPELLANT'S FACTUM
(Rule 62.01(7))**

ALL PAGES MUST BE NUMBERED CONSECUTIVELY