

Draft Court of Appeal Rules – March 8, 2016

Part One – Interpretation

1. Citation
2. Purpose
3. Proportionality
4. Practice Notes
5. Calculation of Time
6. Gap in the Rules
7. Definitions

Part Two - Appeals to the Court

8. Notice of Appeal
9. Appeal Involving a Child
10. Appeal Involving a Tribunal
11. Cross-appeals
12. Challenge to a Previous Decision of the Court
13. More than One Notice of Appeal in a Proceeding

Part Three - Effect of the Rules

14. Extending or Abridging Time
15. Failure to Comply with a Rule
16. Failure to Proceed with an Appeal
17. Deemed Abandonment of an Appeal
18. Notice an Appeal is Being Discontinued

Part Four - Procedure

19. Setting a Hearing Date
20. Prehearing Conferences and Case Management
21. Appearing by Teleconference or Videoconference
22. Representation for a Party
23. Withdrawal or Change of Solicitor
24. Limited Purpose Retainer of Solicitor
25. Recording Court Proceedings

Part Five - Forms and Documents

26. Forms and Materials
27. Copies Provided by the Court
28. Filing and Serving Documents
29. Notice to the Attorney General

Part Six - Applications

30. Applications - Procedure
31. Applications Heard by a Single Judge
32. Application for Directions or an Order
33. Leave to Appeal
34. Leave to Appeal Required by Statute
35. Challenging an Appeal in an Uncompleted Matter
36. Striking Out a Notice of Appeal or Dismissing an Appeal
37. Additional Evidence on Appeal
38. Application to Intervene

- 39. Appointment as a Friend of the Court
- 40. Consent Judgment
- 41. Staying Enforcement of an Order under Appeal
- 42. Security for Costs
- 43. Exemption from the Payment of Fees and Charges
- 44. Contempt of Court

Part Seven - Appeal Documents

- 45. Transcript - Obtaining and Delivering to Parties
- 46. Transcript - Filing
- 47. Transcript - Filing Electronic Version
- 48. Transcript - Alternatives
- 49. Transcript - Form
- 50. Agreed Statement of Facts
- 51. Appeal Book
- 52. Factum - Contents
- 53. Factum - Legal and Case Authorities
- 54. Factum - Form
- 55. Filing Transcript, Appeal Book and Factum

Part Eight - Orders

- 56. Formal Order
- 57. Costs
- 58. Correction of Clerical Mistakes

Part Nine - Transitional, repeal, coming into force

Part One – Interpretation

Citation

1. These rules apply to civil proceedings in the Court of Appeal and may be cited as the *Court of Appeal Rules*.

Purpose

2. The purpose of these rules is to provide for the orderly and expeditious administration of justice in the Court.

Proportionality

3. In applying these rules, the Court shall make orders and give directions that are proportionate to what is at stake in the proceeding and the importance and complexity of the issues.

Practice Notes

4. The Court may issue practice notes on any matter respecting appeals. A practice note shall be published once in the Gazette but does not constitute a regulation under the *Statutes and Subordinate Legislation Act*.

Calculation of Time

5. Time for doing anything for purposes of proceedings in this Court shall be calculated in accordance with the *Interpretation Act*.

Gap in the Rules

6. Where a procedural issue arises that is not covered by these rules, the Court may adopt and give directions regarding an appropriate procedure.

Definitions

7. In these rules

- (a) “appeal” means an appeal to the Court of Appeal and includes a reference made to the Court pursuant to a statute;
- (b) “appellant” means a person who files a notice of appeal and includes a tribunal that states a case or brings a reference;
- (c) “Chief Justice” means the Chief Justice of Newfoundland and Labrador;

- (d) “Court” means the Court of Appeal, a panel of judges or a judge of that Court;
- (e) “court appealed from” means a court, judge, or tribunal from which an appeal lies to the Court;
- (f) “electronic version” means an electronic version in a format acceptable to the Court;
- (g) “file” means to file and serve a document in accordance with rule 28;
- (h) “judgment” means the disposition of a matter by the Court, including a decision of a judge not to recuse himself or herself, and in the case of a panel of judges, the disposition by a majority of those judges;
- (i) “order appealed from” or “order under appeal” means
- (i) the formal order settled by the judge or court appealed from and filed after the decision has been given;
 - (ii) an order or decision of a tribunal;
 - (iii) an order or decision made in an uncompleted matter; and
 - (iv) any document accepted by a court or tribunal as having the same effect as a formal order;
- (j) “party” means an appellant or respondent to an appeal or an application and includes an intervenor where the context requires and a person who is authorized by the Court or by law to be a party to an appeal;
- (k) “registrar” means the clerk, officer or employee of the Court responsible for the operation of the registry of the Court who is designated, in consultation with the Chief Justice, by the Chief Executive Officer appointed under section 59.1 of the *Judicature Act*;
- (l) “request” means a request in writing delivered to the Court;
- (m) “respondent” means a person served with a notice of appeal or named as a respondent in an appeal or an application;
- (n) “uncompleted matter” means a matter where the issues between the parties have not been determined by a final decision or order in the court appealed from.

Part Two – Appeals to the Court

Notice of Appeal

8. (1) An appeal shall be commenced by filing a notice of appeal in form
- (2) A notice of appeal shall be marked as filed in the Court within
- (a) 30 days after the order appealed from has been filed in the court appealed from, or
 - (b) in an uncompleted matter, 10 days after the order appealed from has been filed in the court appealed from.
- (3) Where the court appealed from does not provide for the filing of an order or similar document under rule 7(i), the time set out in subsection (2) shall commence from the date when the order appealed from is made.
- (4) A notice of appeal shall
- (a) specify the order and court appealed from, the date the order was filed, the file number on the order, and the neutral citation, if any, where there is a written decision,
 - (b) describe the portion of the order under appeal if only a portion is being appealed,
 - (c) state the relief, disposition or order requested,
 - (d) give the names, addresses (including email addresses) and phone numbers of the appellant and the persons being served with the notice of appeal, and their solicitors, if any,
 - (e) indicate if there is a publication ban in effect,
 - (f) state the reason if the appellant is requesting that the appeal be expedited, and
 - (g) if applicable, state that the appeal involves the custody of, access to, protection of, responsibility for or support of a child.

Appeal Involving a Child

9. (1) Every notice of appeal, application or response to either, that involves a question of custody of, access to, protection of, responsibility for or support of a child shall have noted in the top left corner, between the name of the Court and the style of cause, the words “THIS MATTER INVOLVES A CHILD”.

(2) An appeal under subsection (1) shall be monitored by the registrar to ensure that the appeal proceeds as expeditiously as possible.

(3) On instruction from the Chief Justice, the registrar may, by notice in writing, orally or electronically to each party, specify a time by which any further step in the proceeding is required to be taken.

(4) Upon application or of its own motion, the Court may convene a hearing to give directions or make orders.

(5) At least four days before the hearing of an application or an appeal involving a child, a party may file and serve a notice in form ... for the purpose of providing the Court and other parties with current information regarding any other court proceedings involving the child.

(6) Upon application or of its own motion, where an appeal involves a child, the panel hearing the appeal may permit or require a party, by affidavit, to provide current information regarding the child.

Appeal Involving a Tribunal

10. (1) Subject to statutory requirements, these rules shall apply with the necessary changes to an order appealed from a tribunal.

(2) A copy of the notice of appeal in an order appealed from a tribunal shall be served on the tribunal and on every party in the proceeding before the tribunal.

(3) The tribunal appealed from may participate in the appeal as a party, but the Court may, of its own motion or upon application, give directions regarding the extent of the tribunal’s participation.

(4) A party in a proceeding before a tribunal who is not named as a party in the appeal may apply to the Court to be added as a party, and the Court may give such directions and orders as are appropriate.

Cross-appeals

11. (1) A respondent to an appeal may make submissions by cross-appeal where the respondent

(a) seeks to appeal an order or portion of an order appealed from that is not appealed by the appellant,

(b) contends that the order appealed from should be varied or affirmed on grounds other than those given by the court appealed from, or

(c) contends that the respondent is entitled to other or different relief or disposition than given by the court appealed from.

(2) Where a respondent intends to make submissions under paragraph (1)(a) or (c), a notice of cross-appeal shall be filed within 30 days after the respondent receives a copy of the notice of appeal. The requirements of rule 8(1) and (4) shall apply with the necessary changes.

(3) Failure to file a notice of cross-appeal under subsection (2) shall not preclude a respondent from making submissions on the issues, but the omission may be grounds for an order as to costs.

(4) Submissions on a cross-appeal shall be included in the respondent's factum, placed after the submissions in response to the appeal, or if necessary, in a separate volume.

(5) Where a respondent files submissions on a cross-appeal, an appellant may file a reply factum within 30 days after receipt of the respondent's factum.

(6) Where an appeal is discontinued or deemed abandoned, a respondent may

(a) file a notice of election to proceed with a cross-appeal, and

(b) apply to the Court for directions.

(7) Where the respondent does not file a notice of election to proceed with a cross-appeal within 15 days after receiving notice that the appeal has been discontinued or deemed abandoned, the issues on the cross-appeal shall be deemed to be abandoned without costs, unless the Court otherwise orders.

Challenge to a Previous Decision of the Court

12. (1) Where a party intends to challenge a previous decision or legal principle stated by the Court, that party, when filing its factum, shall advise the Court and other parties in writing of that intention, and the Court may, of its own motion or upon application, give directions.

(2) Where an issue is raised under subsection (1), the Chief Justice may direct that the appeal will be heard by a panel of 5 judges, and in that case, each party to the appeal shall file 6 copies of every document.

More than One Notice of Appeal in a Proceeding

13. Where more than one party in a proceeding in the court appealed from files a notice of appeal, the registrar, on the instruction of a judge, may direct that the appeals be consolidated or heard together or that one appeal shall be treated as a cross-appeal.

Part Three – Effect of the Rules

Extending or Abridging Time

14. The Court may extend or abridge any time prescribed by these rules before or after the expiration of that time.

Failure to Comply with a Rule

15. (1) The Court may waive compliance or relieve against non-compliance with these rules and may direct the procedure to be followed.

(2) A party who fails to comply with these rules may be subject to an order for costs.

Failure to Proceed with an Appeal

16. (1) An appellant shall diligently carry forward its appeal in accordance with the principle of proportionality and shall perfect the appeal within the time periods prescribed by these rules.

(2) Where an appellant fails to carry forward the appeal in accordance with subsection (1), a respondent may apply to the Court for directions and the Court may make such order as may be appropriate, including an order striking out the notice of appeal.

(3) Where a respondent does not make an application under subsection (2) and 6 months have passed since the notice of appeal was filed, the Court may, of its own motion, give the parties 10 days notice that the Court will hold a status hearing for the purpose of giving directions or making orders.

(4) At the status hearing, the Court may

- (a) order the appeal to be perfected by a specified date,
- (b) adjourn the status hearing to a fixed date,
- (c) strike out the notice of appeal, or
- (d) make such other order as may be just.

Deemed Abandonment of an Appeal

17. (1) Where an application or request to set a hearing date for an appeal has not been made within one year after the notice of appeal was filed, the registrar shall give the parties notice that subsections (2) and (3) shall apply.

(2) Upon receiving notice under subsection (1), the appellant may deliver a written explanation and proposed plan in form ... to the Court and to the other parties, and the appeal shall not be deemed abandoned. Upon application or of its own motion, the Court may make an order or give directions regarding a proposed plan.

(3) If the appellant does not deliver an explanation and proposed plan under subsection (2) within 60 days after the notice was sent, the appeal shall be deemed abandoned, and the respondent shall be entitled to costs.

(4) When an appeal has been deemed abandoned, the registrar shall deliver notice to the parties, but inability to locate a party in order to deliver the notice shall not affect the deemed abandonment of the appeal.

(5) When an appeal has been deemed abandoned, upon application, the appeal may be reinstated upon such terms as the Court considers just. The terms may include payment to a respondent of costs to date on a solicitor-and-client basis, which the Court may order to be paid personally by a named solicitor if the Court is satisfied that the solicitor is responsible for the failure of the appeal to proceed on a timely basis.

Notice an Appeal is Being Discontinued

18. An appellant may discontinue an appeal by filing a notice in form ... stating that the appellant has discontinued the appeal, whereupon the appeal shall be at an end. The respondent shall be entitled to costs unless the respondent waives the costs, in writing, on the notice.

Part Four – Procedure

Setting a Hearing Date

19. (1) The registrar may, upon the request of a party and in consultation with the parties and the Chief Justice, set a time for the hearing of an appeal or an application for leave to appeal.

(2) Upon application or of its own motion, the Court may set a time for the hearing of an appeal or leave to appeal.

(3) After an appellant's factum has been filed and another party has failed to file a factum within the time prescribed by these rules, any party that has filed a factum may apply to set a time for hearing of the appeal. The Court may set a hearing time, give directions and order costs as it considers appropriate.

Prehearing Conference and Case Management

20. (1) The Court may at any time, of its own motion or upon application, direct a prehearing conference for the purpose of

- (a) simplifying or isolating issues on the appeal,
- (b) canvassing the possibility of a settlement or mediation hearing, or
- (c) addressing any other matter that may expedite the appeal.

(2) The Court may at any time, of its own motion or upon application, direct the case management of an appeal for the purpose of

- (a) achieving the efficient use of court resources and promoting access to the Court in a timely and cost effective manner,
- (b) providing information and resolving questions of procedure, including directions regarding steps to be taken to perfect the appeal,
- (c) giving directions regarding documents to be filed, and
- (d) setting dates for the filing of documents and hearing of the appeal.

(3) A judge conducting a prehearing conference or case management may make an order consented to by the parties and may set the time or modify the time set for the hearing of the appeal.

(4) Discussions at a prehearing conference or during case management are without prejudice and shall not be referred to at the hearing of the appeal.

(5) The judge conducting a prehearing conference or case management shall not for that reason be disqualified from hearing the appeal unless the judge was involved in settlement or mediation discussions related to the appeal.

(6) Except by consent of the parties, a judge who was involved in settlement or mediation discussions related to the appeal shall not hear the appeal or disclose to any member of the appeal panel positions taken or admissions or concessions made by the parties or their counsel at those discussions.

Appearing by Teleconference or Videoconference

21. (1) A party wishing to be heard by videoconference or teleconference on an appeal, on an application, at a prehearing conference or for case management may make a request to the registrar, and the Court may grant the request and give directions as required. Subsections (2) to (6) apply where a request has been granted.

(2) For the hearing of an appeal, a party appearing by videoconference or teleconference shall

(a) where possible, attend for the videoconference at a courthouse,

(b) if a courthouse is not practically available, the party may attend for videoconferencing in a place other than a courthouse, and

(c) if videoconferencing is not practically available, the party may be heard by teleconference.

(3) For the hearing of an application, subsection (2) shall apply, except that the Court may direct, based on the nature of the application, that the application will be heard by teleconference despite the availability of a videoconference.

(4) A prehearing conference or case management shall be held by teleconference unless a videoconference is directed by the Court.

(5) A party being heard by videoconference or teleconference shall ensure that the place where the videoconferencing or teleconferencing is held is free from distractions and noise.

(6) Unless otherwise ordered by the Court, costs associated with appearing by videoconference or teleconference shall be the responsibility of the party requesting it, and the costs may be recoverable as costs of the appeal or application.

Representation for a Party

22. (1) A party may be represented by a solicitor or by

- (a) him or herself where the party is a natural person,
- (b) a natural person acting as a trustee or in a representative capacity for the party, or
- (c) a natural person acting as agent or in another representative capacity where authorized by statute.

The Court of Appeal Rules Committee considered that it would be appropriate to provide two options for subsection (2). A third alternative is to omit rule 22. Alternatives offered by those reviewing the draft would also be considered.

Option A: (2) A party that is a corporate body must be represented by a solicitor unless leave of the Court is obtained.

Option B (includes (2) and (2.1)): (2) A party that is a corporate body having a sole shareholder who is the sole director may, with leave of the Court, be represented by that person.

(2.1) Subject to subsection (2), a party that is a corporate body must be represented by a solicitor.

Option C: Omit rule 22.

(3) An application for leave under subsection (2) shall be in form ... supported by an affidavit which shall include

- (a) the residency of the proposed representative,

- (b) the corporate capacity and experience of the proposed representative,
- (c) authorization by the corporation for the proposed person to act as its representative,
- (d) whether the proposed representative is a director or officer of the corporation,
- (e) whether the proposed representative has given evidence in the court appealed from or is likely to give additional evidence for purposes of the appeal,
- (f) the ability of the corporation to retain a solicitor, and
- (g) the structure of the corporation.

(4) In determining an application for leave under subsection (2), the Court may consider

- (a) the complexity of the issues,
- (b) whether the matter will proceed expeditiously if leave is granted,
- (c) whether the interests of shareholders, officers, directors, employees, creditors and other potential stakeholders are adequately protected if leave is granted, and
- (d) any other relevant matter.

(5) In granting leave under subsection (2), the Court may impose such conditions with respect to the nature and scope of the representation as it deems appropriate.

(6) Upon application of a party, for the purpose of facilitating access to justice, the Court may, in exceptional circumstances and subject to such conditions as may be appropriate, permit a person who is not a solicitor

- (a) to make submissions on behalf of a party who, by reason of physical or mental disability or other disabling circumstance, is not able adequately to make submissions on his or her own behalf,
- (b) to sit with a party in the Court for the purpose of providing assistance, advice and support during the proceeding.

(7) A person granted privileges under subsection (6) shall undertake, in writing,

- (a) not to receive directly or indirectly any remuneration for the assistance provided, unless the Court otherwise permits,
- (b) that his or her interests are not in conflict with the interests of the party, and
- (c) to observe and be bound by all the obligations that apply to an officer of the Court, including obligations of confidentiality.

Withdrawal or Change of Solicitor

23. (1) A party may change his or her solicitor in proceedings in this Court by filing a notice of change of solicitor in form ...

(2) A solicitor who has taken any step on behalf of a party in proceedings in this Court shall be and remain the solicitor of record unless a notice of change of solicitor has been filed under subsection (1) or, upon application, the Court grants the solicitor leave to cease acting for the party in the proceedings.

(3) Where leave is granted under subsection (2), the party shall without delay notify the Court and the other parties, in writing,

(a) of a new address for service, and

(b) whether the party has or intends to engage a new solicitor or intends to act on his or her own behalf.

(4) At any time during the proceedings, if a party who was acting on his or her own behalf engages a solicitor, that solicitor shall without delay notify the Court and the other parties, in writing, of the address for service.

Limited Purpose Retainer of Solicitor

24. A party may retain a solicitor for a limited purpose and the solicitor shall file and serve a notice in form ... identifying the nature and scope of the retainer.

Recording Court Proceedings

25. Except as otherwise provided by law, no person shall record proceedings in the Court by any visual or audio recording device, without leave of the Court.

Part Five – Forms and Documents

Forms and Materials

26. (1) Where applicable the forms attached to these rules shall be used with such changes as the circumstances require.
- (2) All written material relied on in a proceeding shall be legible and printed on good quality paper.
- (3) The registrar may refuse to receive for filing any material that does not substantially comply with these rules and the practice notes.
- (4) Material that does not comply with these rules may result in an order for costs.

Copies Provided by the Court

27. Copies of documents provided by the Court may be provided by electronic means.

Filing and Serving Documents

28. (1) Unless otherwise prescribed in these rules or directed or ordered by the Court, a party shall file 4 copies of every document and without delay shall serve one copy of the document on each party.
- (2) An address for service used in the court appealed from shall be used for purposes of serving a document under subsection (1) unless a party notifies the Court and other parties of a change in the address for service.
- (3) A party shall serve a document on another party by delivering a copy to the address for service.
- (4) Proof that a document has been served may be established by
- (a) the signature of the recipient, with the date, acknowledging acceptance of service on the document or a copy,
 - (b) an affidavit in form ... by the person who delivered the document,
 - (c) an “acknowledgment of receipt” in form ... where the document has been delivered by mail or courier, or

(d) a confirmation of delivery obtained from the carrier where the document was delivered by registered mail or by courier.

(5) Where a party files or serves a document by fax or email in order to meet a limitation period, the party shall, without delay, file and serve the document by means of a printed copy.

Notice to the Attorney General

29. With or without an application by a party, the registrar, on the instructions of the Chief Justice, may direct a party to give notice of an appeal or an application to the Attorney General of the Province, and the Attorney General shall have the right to be heard and to participate in the matter.

Part Six - Applications

Applications - Procedure

30. (1) An application shall be in form ... and shall include

- (a) a concise statement of the relevant facts and the issues to be determined in the application,
- (b) the directions or order the applicant is requesting from the Court,
- (c) any affidavit necessary to support or provide the foundation for the application,
- (d) any document relevant to hearing of the application, and
- (e) written submissions and authorities where the nature of the application warrants.

(2) Where warranted, the materials under subsection (2) shall be indexed, tabbed and bound.

(3) Subject to direction of the Court, an application shall be filed at least 4 days prior to the time set for hearing the application.

(4) A party opposing an application shall file any affidavit, document or written submissions and case authorities on which that party relies at least 2 days before the time set for hearing the application. Where warranted, the materials shall be tabbed and bound.

(5) Where authorized by the Court or a statute or a rule, an application may be made without notice to other parties.

(6) A party, in writing, may waive notice or may give consent to the order sought by the applicant.

(7) The Court shall set dates for the hearing of applications in each month.

(8) Upon the request of a party, the Court may decide an application on the basis of the documents that have been filed and the written submissions provided that other parties indicate in writing that they agree with the request.

Applications Heard by a Single Judge

31. (1) An application that is incidental to, but does not result in the final determination of, an appeal may be heard and disposed of by a single judge.

(2) Where an application is heard by a single judge, the matter may, with leave of the Chief Justice, be reheard by a panel of the Court.

(3) A request for a rehearing under subsection (2) shall be made within 15 days after the party receives the judgment under subsection (1).

Application for Directions or an Order

32. A party may make an application to the Court for the purpose of obtaining directions or an order.

Leave to Appeal

Is 33(a) necessary?

33. An application for leave to appeal is required

(a) where the order appealed from is

(i) an order as to costs only, or

(ii) an order made with the consent of the parties, and

(b) where prescribed by statute.

Leave to Appeal Required by Statute

34. (1) Where a statute requires leave to appeal, the appellant shall file with the notice of appeal, an application for leave to appeal in form

(2) An application for leave to appeal under subsection (1) shall be heard separately from the appeal unless, upon application or of its own motion, the Court orders that leave to appeal be heard at the same time as the appeal.

(3) If the application for leave to appeal is to be heard separately from the appeal,

(a) the applicant shall, within 10 days after filing the application, file an application record containing

(i) an index,

(ii) a copy of the application,

(iii) a copy of the order sought to be appealed and the written reasons, if any, and

(iv) any other document relevant to the application for leave; and

within 30 days after filing the application for leave to appeal, file written submissions and case authorities in support of the application, indexed, tabbed and bound; and

(b) within 30 days after receiving the applicant's written submissions under paragraph (a), a respondent shall file written submissions and case authorities indexed, tabbed and bound, in response to the application.

(4) If the application for leave to appeal and the appeal are to be heard at the same time, subsection (3) shall not apply, and the applicant and a respondent shall

(a) comply with the rules regarding an appeal book and factum and, where relevant, a transcript, and

(b) include written submissions on the leave to appeal application in the appeal factum.

Challenging an Appeal in an Uncompleted Matter

35. (1) Where an appeal is commenced in an uncompleted matter, a party may apply to have the notice of appeal struck on the basis that the appeal should not proceed until the matter has been completed because

(a) prejudice to a party may result if the appeal is heard before the matter is completed in the court appealed from,

(b) hearing the appeal before the matter is completed in the court appealed from would result in delay, inconvenience or an inefficient use of judicial resources, or

(c) there is good reason for delaying an appeal until the matter has been completed.

(2) Leave of the Court is required if the order or decision under appeal in an uncompleted matter is made after the commencement of the trial.

(3) Striking a notice of appeal under this rule does not prejudice the right of the appellant to include the same issues in an appeal when the matter has been completed in the court appealed from.

Striking Out a Notice of Appeal or Dismissing an Appeal

36. (1) A party to an appeal may apply at any time before or at the hearing of the appeal for an order

(a) striking out the notice of appeal; or

(b) dismissing the appeal

on the grounds that

(c) no appeal lies to the Court,

(d) the appeal is frivolous, vexatious or without merit,

(e) the appellant has unduly delayed the preparation and perfection of the appeal, or

(f) the appellant has failed to apply to have the appeal set down for hearing.

(2) The application may be supported by an affidavit stating the reasons for the application and setting out any relevant facts not set out in the decision or order appealed from.

(3) An application to dismiss an appeal shall be heard and determined by a panel of not fewer than 3 judges sitting together.

(4) A notice of appeal may be struck out by a single judge, and where a notice of appeal has been struck out, the appellant may apply within 6 months to have the notice reinstated for good reason.

Additional Evidence on Appeal

37. (1) Upon application, the panel hearing the appeal may permit additional evidence for purposes of the appeal.

(2) The application shall be accompanied by an affidavit setting out

(a) the general nature of the additional evidence sought to be introduced,

(b) the way in which the additional evidence satisfies the criteria set out in subsection (3), and

(c) why the additional evidence was not introduced in the court appealed from.

(3) In determining the application, the Court shall consider

(a) whether, by due diligence, the evidence could have been brought in the court appealed from,

(b) the relevance of the evidence in the sense that it bears upon a decisive or potentially decisive issue in the appeal,

(c) the credibility of the evidence,

(d) whether the evidence, if believed, could reasonably have affected the result, and

(e) any other relevant factor.

(4) The evidence shall be taken, subject to cross-examination as may be appropriate, by oral examination before the Court or by affidavit or deposition or in such manner as the Court directs.

(5) The Court may, in the presence of the parties or their counsel, inspect or view any place, property or thing where the inspection or view may facilitate the understanding of the evidence.

Application to Intervene

38. (1) A person who did not participate in the court appealed from may apply to be added as an intervenor for purposes of the appeal.

(2) The application shall state the intervenor's interest in the appeal, explain the failure to apply to intervene in the court appealed from, and indicate the position the intervenor intends to take on the appeal.

(3) The Court may consider whether intervention would delay or prejudice adjudication of the rights of the parties and whether the record of the court appealed from is sufficient for purposes of the intervention.

Appointment as a Friend of the Court

39. (1) Upon application or of its own motion, the Court may appoint a solicitor to make submissions on an appeal as a friend of the court where the Court considers that such an appointment is necessary or appropriate in the circumstances.

(2) After hearing submissions the Court may make an order under subsection (1) on any terms it considers appropriate.

(3) Notice of a proceeding under subsection (1) shall be given to the Attorney General of the Province not less than 15 days before the proceeding is to be heard, and the Attorney General shall have the right to be heard and to participate in the proceeding.

Consent Judgment

40. Where the parties agree in writing that the judgment or order of the court appealed from should be reversed or varied and they agree on the order that should be made, the appellant may apply to have that order confirmed by the Court.

Staying Enforcement of an Order under Appeal

41. (1) Filing a notice of appeal shall not operate to stay enforcement of the order under appeal.

(2) Where an application to stay an order pending appeal has not been made in the Supreme Court, Trial Division, on application of a party, the Court may stay an order pending disposition of the appeal. That decision may be reviewed upon further application by a party based on a change in circumstances.

(3) The stay of an order for the payment of money shall not prevent interest from accruing.

(4) An order made by a judge of the Supreme Court, Trial Division staying the enforcement of an order that has been appealed to the Court may be appealed only with leave of the Court.

Security for Costs

42. (1) Security for costs shall not be required in an appeal unless, upon application, by reason of special circumstances, security is ordered by the Court.

(2) Unless the Court otherwise orders, an appellant who fails to give security for costs as ordered shall be deemed to have abandoned the appeal and the respondent is entitled to costs.

Exemption from the Payment of Fees and Charges

43. (1) In this section, “fees” and “charges” mean fees and charges under the *Supreme Court Fees Regulations*.

(2) A person whose ability to commence or proceed with an appeal, or a party whose ability to participate in the appeal, is impaired for financial reasons may apply for an exemption from or suspension of the payment of all or a portion of the fees and charges which may be payable by that person or party.

(3) The application shall be in form ... and shall include an affidavit and supporting information and documents setting out the basis for the application.

(4) Unless the court otherwise orders, documents filed for purposes of this rule shall be restricted to that use.

(5) No court fees shall be payable to make an application under subsection (2), and the application may be made without notice to other parties to the appeal.

(6) Factors the Court may consider in assessing the application include

(a) undue hardship that would result from the payment of fees and charges or a portion thereof,

(b) whether the applicant is in receipt of social assistance,

(c) steps taken by the applicant to arrange his or her finances, making reasonable sacrifices, to enable payment of all or a portion of the fees and charges payable for the appeal,

(d) whether the applicant applied for and was refused legal aid under a provincial plan providing legal aid or similar services,

(e) whether the appeal is frivolous or vexatious in the sense that there is no arguable basis or sufficient merit for the appeal, and

(f) whether the appeal is brought for a public purpose and the applicant has standing to pursue the appeal.

(7) The Court may make an order exempting or suspending the payment of fees and charges based on the written documentation without a hearing.

(8) Where the circumstances warrant, the Court may order that court services be used to provide the portion of the transcript required by the rules and copies of materials, and the Court may exempt the applicant from or suspend the payment of all or a portion of the associated fees and charges.

(9) A person who is not a party to an appeal may apply for an exemption from the payment of all or a portion of the fees and charges to obtain a copy of a court document where the payment would prevent the applicant from pursuing studies or conducting research.

Contempt of Court

44. Upon application or of its own motion, the Court may, by order, exercise its power to punish for contempt of Court.

Part Seven – Appeal Documents

Transcript – Obtaining and Delivering to Parties

45. (1) “Transcript” means a printed transcript of the audio recording of the proceedings in the court appealed from but does not include

(a) a party’s submissions to the court appealed from unless those submissions are necessary to enable an issue raised on appeal or cross-appeal to be determined; and

(b) a decision of the court appealed from where a printed copy of that decision has been issued.

(2) An appellant shall not file the transcript in its entirety unless the whole of the transcript is necessary to enable the issues on appeal to be determined.

(3) Upon filing a notice of appeal, without delay, the appellant, or the first appellant where there is more than one appellant, shall obtain a copy of the audio recording from the court appealed from and shall deliver a copy to each party.

(4) The appellant, or the first appellant where there is more than one appellant, shall, without delay

(a) arrange for preparation of a transcript of the portion of the audio recording necessary to prepare the factum and to enable the issues on appeal to be determined, and

(b) advise each party what arrangement under paragraph (a) has been made, indicate what portion of the audio recording is being requested and specify the date when the transcript is expected to be completed.

(5) If the appellant, or the first appellant where there is more than one appellant, fails to comply with subsection (3) or (4), another party may make an application to the Court for directions, and the Court may give such directions and make such order as to costs as may be appropriate.

(6) If an appellant indicates under subsection (4) that a transcript of only a portion of the audio recording is being requested and another party is satisfied that the transcript of an additional portion of the audio recording is necessary, that party shall proceed in accordance with subsection (4) with the necessary changes.

(7) A party, upon receipt of a transcript that was requested by that party, shall without delay deliver one printed copy and one electronic version of the transcript to the other parties to the appeal.

(8) A party disputing the accuracy of a transcript may make an application to the Court for directions.

Transcript – Filing

46. (1) In accordance with rule 55, the appellant, or the first appellant where there is more than one appellant, shall file with the factum and the appeal book

(a) 4 copies of the portion of the transcript that is necessary to enable the issues on appeal to be determined; and

(b) a certificate in form ...

(i) stating that the appellant is satisfied that the portions of the transcript being filed are necessary to enable the issues on appeal to be determined, or

(ii) if the appellant is satisfied, upon careful review, that the whole of the transcript is necessary to enable the issues on appeal to be determined, stating, with particulars, the reasons for drawing that conclusion.

(2) Where there is more than one appellant, and an appellant other than the first appellant is satisfied that a portion of the transcript has not been filed that is necessary to enable the issues on appeal to be determined, that appellant may file

additional portions of the transcript, and the requirements of subsection (1) shall apply with the necessary changes.

(3) Where a respondent is satisfied that an appellant has not filed a portion of the transcript that is necessary to enable the issues on appeal or cross-appeal to be determined, the respondent may file additional portions of the transcript, and the requirements of subsection (1) shall apply with the necessary changes.

(4) Not less than 5 days before the hearing of the appeal, additional portions of the transcript may be filed where a party determines it to be necessary to enable the issues on appeal or cross-appeal to be determined, and the requirements of subsection (1) shall apply with the necessary changes.

(5) The Court may at any time, upon application or of its own motion, order the filing of all or a portion of the transcript.

(6) Failure to comply with this rule may subject the party in default to an order for costs.

Transcript – Filing Electronic Version

47. (1) In addition to the portion of the transcript required to be filed under rule 46, the appellant, or the first appellant where there is more than one appellant, shall file

- (a) where a transcript of the entire proceedings has been prepared, 4 electronic versions of the transcript; or
- (b) where a transcript of the entire proceedings has not been prepared,
 - (i) 4 electronic versions of the transcript that has been prepared, and
 - (ii) 4 copies of the audio recording of the proceedings in the court appealed from.

Transcript – Alternatives

48. (1) A party may apply to the Court for an order and directions to permit the use of an electronic rather than a paper version of the transcript.

(2) Upon application, or of its own motion, the Court may at any time dispense with the preparation and filing of a transcript and order that the appeal proceed

using an audio recording of the proceedings in the court appealed from, and the Court may give such directions as may be appropriate.

Transcript - Form

49. (1) A transcript shall be prepared in accordance with the *Recording of Evidence Act* and the Transcript Standards Manual of the Court Reporters' Office of the Supreme Court, Trial Division.

(2) Where possible a key word index shall be included at the end of the transcript.

(3) The cover used to bind the transcript shall be grey.

(4) The transcript may be printed on double-sided pages with 4 pages of the written transcript on a single page.

(5) Where the portion of the transcript considered to be necessary to enable the issues on appeal or cross-appeal to be determined is voluminous, a party may provide, or the Court may require, a book of excerpts where that would be convenient for presentation of submissions.

Agreed Statement of Facts

50. Instead of a transcript, an agreed statement of facts may be filed with the appellant's factum along with a certificate signed on behalf of all parties indicating their agreement.

Appeal Book

51. (1) An appeal book shall be bound and shall consist of the following, in this order:

(a) Part I - Documents

(i) index of the documents in the appeal book,

(ii) the notice of appeal,

(iii) the written judgment appealed from, if any, or the transcript of an oral judgment,

(iv) the order appealed from,

(iv) any agreed statement of facts prepared for purposes of the appeal, and

(v) the documents, including any agreed statement of facts filed in the court appealed from, that are necessary to enable the issues on appeal to be determined, but not the documents in Part II, and

(b) Part II - Evidence

(i) index of witnesses,

(ii) list of the exhibits,

(iii) copies of exhibits that may be conveniently copied and are necessary to enable the issues on appeal to be determined, and

(iv) copies of affidavits and written admissions and any other documents necessary to enable the issues on appeal to be determined.

(2) The items contained in Parts I and II shall be separated by tabs to permit convenient reference to each document or portion thereof.

(3) The pages of the appeal book shall be numbered consecutively in the upper left corner of each page.

(4) If Part II is not lengthy it may be bound in the same volume with Part I.

(5) The cover of the appeal book shall be grey, and shall state the names of the parties, the number of the appeal, and the volume number of the appeal book where there is more than one volume.

(6) Where there is more than one volume, each volume shall repeat the index and, in addition to the information specified in subsection (5), shall show on its cover the page numbers contained in it.

Factum – Contents

52. (1) A factum shall be bound and shall consist of the following, in this order:

(a) Index, including the page on which the submissions on each issue begin;

(b) Part I – Introduction

A brief summary of the appeal and the positions being taken in the factum;

(c) Part II – Concise Statement of Facts

For a respondent, a statement of its position regarding the appellant's statement of facts and including any additional facts it considers relevant;

(d) Part III - List of the Issues;

(e) Part IV - Argument

A statement of the argument, not to exceed 40 pages unless otherwise authorized by the Chief Justice or a judge, setting out the points of law or fact to be argued and the basis on which the arguments are made, with specific references to the appeal book and the authorities relied upon in support of each point;

(f) Part V - Order or Relief Sought, including any order as to costs;

(g) Index of Appendix A (case authorities listed in alphabetical order) and Appendix B (statutory authorities) including citations as required under subsection (2);

(h) Appendix A - Copies of cases in accordance with rule 53, with appropriate tabbing; and

(i) Appendix B – Copies of relevant portions of statutes, regulations and rules with appropriate tabbing.

(2) In Part IV, the Argument, the citation of an authority shall

(a) be placed in the body of the argument,

(b) include the tab reference each time the authority is cited, and

(c) include reference to specific paragraphs, pages or provisions each time the authority is cited.

(3) Except where rule 11 applies, an appellant shall not file a reply factum without the prior approval of the Chief Justice.

Factum – Legal and Case Authorities

53. (1) Where possible, the index of cases shall include the neutral citation together with the citation from an official report, and in particular, reference to decisions of

the Supreme Court of Canada or a court of this Province must include the citation from the Supreme Court Reports or the Nfld. & P.E.I.R., if any.

(2) Copies of authorities in Appendix A or B from electronic sources may be filed provided there is compliance with subsection (1) regarding citation in the Index of Appendices A and B.

(3) Copies of a case authority shall not be included in Appendix A where the Court has included that case in a list of “Frequently Cited Cases”.

(4) When a copy of an authority is contained in documents already filed by another party, an additional copy shall not be filed, but the citation of the authority shall be included in the Index of Appendices A and B with reference to where the copy of the case is to be found.

(5) A copy of the whole of a lengthy case need not be included in Appendix A if providing a portion would be sufficient for purposes of the appeal.

(6) Copies of authorities may be highlighted or otherwise marked to identify the portion to which the Court’s attention is to be drawn.

(7) The Index of Appendices A and B shall be included after Part V in the factum and, if the copies of authorities are bound in a separate volume, the index shall be included at the front of each volume of authorities.

Factum – Form

54. A factum shall be bound and

(a) shall be legible and printed in font size 12 with line spacing of one and one-half,

(b) shall be printed on one side of the paper only, with the printed pages to the left,

(c) paragraphs shall be numbered consecutively,

(d) pages shall be numbered consecutively, and

(e) the colours of the covers shall be

(i) buff or yellow for an appellant, including an appellant’s reply where a reply is permitted,

(ii) blue for a respondent's factum, including a factum as a cross-appellant, and

(iii) green for an intervenor's factum,

but where there are multiple parties, a party may choose to use a different colour where that would assist in identifying that party's materials.

Filing Transcript, Appeal Book and Factum

55. (1) Within 60 days after the date of completion marked on the transcript or agreed statement of facts, the appellant, or the first appellant where there is more than one appellant, shall file together the appeal book, factum and transcript.

(2) Where there is more than one appellant, each appellant other than the first appellant shall file its factum and additional portions of the transcript, if any, within 20 days after receipt of the documents served under subsection (1). An appellant other than the first appellant that does not intend to file a factum shall without delay notify the other parties to the appeal.

(3) A respondent or intervenor shall file its factum and additional portions of the transcript, if any, within 30 days after receipt of the documents served under subsection (1) or, if subsection (2) applies, after receipt of those documents or notification that an appellant does not intend to file a factum.

Part Eight - Orders

Formal Order

The Court of Appeal Rules Committee considered that it would be appropriate to provide two options – the first provides for the Court to issue a draft order when the judgment is released, and the second is the current model in which counsel is responsible for drafting the order. (Options are set out in (2).) Alternatives offered by those reviewing the draft would also be considered.

56. (1) A formal order of the Court shall be in form ... and shall state the judgment of the Court. Where a judge files dissenting reasons, the order shall indicate the nature of the dissent.

Option 1:

(2) *After issuing a judgment, the Court shall provide the parties with a draft formal order.*

(3) *A party contending that there is an error, omission or inaccuracy in the draft formal order shall provide the particulars to the Court and the other parties, in writing, within 15 days after receiving the draft formal order.*

(4) *After approving and filing the formal order, the Court shall provide a copy to each party.*

(5) *At the request of a party, with the written consent of the other parties, under the direction of the chair of the panel that made the order, the registrar may delay the filing of the formal order.*

(6) *The formal order may be filed in the court appealed from and thereby becomes a judgment of that court for purposes of enforcement.*

Option 2:

(2) *Within 15 days after the Court's judgment is issued, the successful party, or where there is mixed success, the appellant shall prepare a draft formal order and shall provide a copy to the Court and to the other parties to the appeal.*

(3) *A party receiving a copy of a draft formal order shall, without delay, indicate consent to the draft or provide comments in writing to the drafter of the order, with a copy to the Court.*

(4) *Where the successful party fails to provide a draft formal order in accordance with subsection (2), the appellant shall prepare the draft order and subsections (2) and (3) shall apply with the necessary changes.*

(5) *The Court shall approve and file the formal order, and shall provide a copy of the formal order to each party.*

(6) *The formal order may be filed in the court appealed from and thereby becomes a judgment of that court for purposes of enforcement.*

Costs

57. (1) The Court may make such order as to costs as it considers fit. The order may include costs in the court appealed from.

(2) If no order is made under subsection (1),

(a) the costs of any proceeding in this Court shall be included with the costs of the appeal, and

(b) the successful party on the appeal shall have its costs of the appeal in accordance with column 3 of the scale of costs attached to this rule.

(3) The Court may award costs in accordance with any column or combination of columns under the scale of costs, and in exercising its discretion for this purpose, the Court may consider:

(a) the amounts claimed and the amounts recovered,

(b) the importance of the issues,

(c) the complexity, difficulty or novelty of the issues,

(d) the manner in which the proceeding was conducted, including any conduct that tended to shorten or unnecessarily lengthen the duration of the matter,

(e) the failure by a party to admit anything that should have been admitted,

(f) seniority of counsel at the bar,

(h) fair payment for the work of a person acting on his or her own behalf, and

(i) any other relevant matter.

(4) Where an item of costs in an appeal to the Court is not listed in the scale of costs attached to this rule, costs of that item shall be determined by a taxing officer.

(5) The rules of the Supreme Court, Trial Division governing the manner of payment and taxation of costs shall apply to costs in this Court.

Correction of Clerical Mistakes

58. At any time the Court may

- (a) correct an error in a judgment or order that arose from a clerical mistake or from an accidental slip or omission, or
- (b) amend a judgment or order to provide for any matter that should have been but was not adjudicated.

Part Nine – Transitional, repeal, coming into force