
Appeals

Alberta Crown Prosecution Service - Practice Protocol

EFFECTIVE: January 29, 2024

This Practice Protocol provides prosecutors with guidance and direction in relation to the conduct and launching of appeals in criminal and quasi-criminal proceedings.

Background

The governing principle in the decision to appeal on behalf of the prosecution will be one of restraint. The appeal process is onerous, for both the prosecution and the accused. Furthermore, the Court and the public should be confident that the Alberta Crown Prosecution Service (ACPS) is launching an appeal only where the appeal is meritorious. The following Practice Protocol sets out the minimum requirements that must be met before an appeal to the Supreme Court of Canada (Supreme Court), Court of Appeal of Alberta (Court of Appeal), or Court of Queen's Bench of Alberta (Court of Queen's Bench) will be initiated.

Protocol

The basis and responsibility for appeals varies depending on the appeal court and the nature of the appeal, as set out below.

1. Appeals to the Court of Queen's Bench ~ Summary Conviction Appeals (SCA)

Summary conviction appeals to the Court of Queen's Bench may be handled by any Crown prosecutor with the approval of their Chief Prosecutor.

A. Sentence Appeals

The prosecution can appeal a sentence on a summary conviction matter pursuant to section 813(b)(ii) of the *Criminal Code*. Having regard to the governing principles and established case law, an appeal against sentence should not be launched unless:

1. It relates to a serious offence, or it relates to an offender who constitutes a serious threat to the community, or it is otherwise in the public interest; and
2. One of the following conditions exist:
 - a. The sentence is illegal;
 - b. The sentence is clearly unreasonable; or
 - c. The proper administration of justice in the particular locale requires that the sentence be appealed.

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B. Acquittal Appeals

The prosecution can appeal against an order that dismisses an information (acquittal) or judicially stays proceedings. The prosecution may appeal as of right on any ground, including errors of fact and, unlike appeals in matters that proceeded by indictment, is not restricted to errors of law (see ss. 813(b)(i) and 822(1) of the *Criminal Code*). Having regard to the governing principles and established case law, an appeal against an acquittal or a judicial stay of proceedings on a summary conviction matter will not be launched unless:

1. It involves a question of law, a question of jurisdiction, or the decision is unreasonable and unsupported by the evidence;
2. A reasonable argument can be made that the verdict would not necessarily have been the same if the error had not been made; and
3. Mindful of the factors set out in the Code of Conduct for Crown Prosecutors Guideline and the Decision to Prosecute Guideline, the public interest requires an appeal.

2. Appeals to the Court of Appeal

An appeal or application for permission to appeal on behalf of the prosecution to the Court of Appeal in a criminal or quasi-criminal proceeding requires the authorization of the Attorney General or counsel instructed by the Attorney General. The Deputy Chief Prosecutor of the Appeals Unit is counsel instructed by the Attorney General for an appeal or application by the prosecution to the Court of Appeal.

The Appeals Unit is responsible for carriage of all forms of appeals and applications in the Court of Appeal. With the consent of the Deputy Chief Prosecutor of the Appeals Unit, Crown prosecutors who are not members of the Appeals Unit may have carriage of any appeal or application in the Court of Appeal, but when doing so, are accountable to, and under the direction of, the Deputy Chief Prosecutor of the Appeals Unit. Bail review in the Court of Appeal prior to trial (s. 522(4)/680 *Criminal Code*) will be handled jointly by the trial prosecutor and an assigned appellate counsel.

A. Appeal of Decisions of Summary Conviction Appeal Courts Criteria

The Court of Queen's Bench, sitting as a summary conviction appeal court, hears appeals respecting summary conviction offences. In the case of *Criminal Code* offences, decisions of the summary conviction appeal court can be appealed to the Court of Appeal with leave of the Court of Appeal (or a judge thereof) pursuant to s. 839(1)(a) of the *Criminal Code*.

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In the case of provincial statute offences, a certificate of sufficient importance pursuant to s. 19(1) of the *Provincial Offences Procedure Act* must be obtained before a decision of the summary conviction appeal court can be appealed.

Having regard to the governing principles and established case law, an application for leave to appeal pursuant to s. 839(1)(a) of the *Criminal Code* or for a certificate of sufficient importance will not be made unless:

1. The summary conviction appeal court has erred on a question of law alone;
2. There is a reasonable likelihood that a further appeal will be allowed on the ground(s) raised;
3. The record from the court below is such that the issue can be fully and fairly determined; and
4. If a new trial was ordered in the court below, it would be inappropriate to re-litigate the issue by way of a new trial (with attendant appeals) as opposed to an immediate appeal to the Court of Appeal.

In addition, the issue sought to be litigated on further appeal must be:

1. The subject of competing or contradictory rulings in the summary conviction appeal court;
2. One of importance to the administration of justice in Alberta; or
3. One which, if not addressed, will result in a miscarriage of justice.

B. Sentence Appeal Criteria

The prosecution can appeal sentence in an indictable matter with leave of the Court of Appeal (or a judge thereof) pursuant to s. 676(1)(d) of the *Criminal Code*. Having regard to the governing principles and established case law, an appeal against sentence will not be launched unless:

1. It relates to a serious offence, or it relates to an offender who constitutes a serious threat to the community, or it is otherwise in the public interest; and
2. One of the following conditions exist:
 - a. The sentence is illegal;
 - b. The sentence is clearly unreasonable; or
 - c. There are exceptional circumstances that require the guidance or direction of the Court of Appeal.

The approval of the Deputy Chief Prosecutor of the Appeals Unit, and compliance with rule 16.10 of the *Court of Appeal of Alberta - Criminal Appeal Rules*, are required for appellate counsel to argue on a defence sentence appeal that the sentence should be increased.

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C. Acquittal Appeal Criteria

The prosecution can only appeal against a verdict of acquittal on an indictable matter on a question of law alone pursuant to s. 676(1)(a) of the *Criminal Code*. Having regard to the governing principles and established case law, an appeal against a verdict of acquittal will not be launched unless:

1. It involves a question of law alone; and
2. The verdict would not necessarily have been the same if the error had not been made, and one of the following circumstances exist:
 - a. The questioned decision establishes a legal principle adverse to the public interest;
 - b. The error of law is determinative of a case that is so important that it is in the public interest that it be appealed; or
 - c. There are exceptional circumstances which justify an appeal.

The notice of appeal must be filed and served within one month of the date of the ruling being appealed. For acquittals, the time starts when the acquittal ruling is made, not when sentencing on other charges is completed. The decision to appeal should be based on the best information available. The trial prosecutor and appellate counsel should work together to compile that information. The trial prosecutor must obtain the approval of their Deputy Chief Prosecutor prior to submitting an appeal recommendation to the Deputy Chief Prosecutor of Appeals.

Practice

To initiate an appeal or application to the Court of Appeal:

1. Trial prosecutor should immediately order Reasons for Judgment (or Reasons for Sentence or SCA Decision, etc.).
2. Obtain approval of the responsible Deputy Chief Prosecutor to submit an appeal recommendation.
3. Complete an Appeal Recommendation form. Appeal recommendation forms include:
 - a. Appeal Recommendation Form - Sentence;
 - b. Appeal Recommendation Form - Stay or Acquittal;
 - c. Appeal Recommendation Form - Summary Conviction;
 - d. Appeal Recommendations Form - Other.
4. Send the completed appeal recommendation to the Deputy Chief Prosecutor of the Appeals Unit using the address on the form.
5. Appeal recommendations in respect of proceedings that took place in a judicial district north of the Judicial District of Red Deer should be sent to the Appeals Unit in Edmonton.

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Appeal recommendations in respect of proceedings that took place in the Judicial District of Red Deer or a judicial district south of the Judicial District of Red Deer should be sent to the Appeals Unit in Calgary.

6. Do not delay sending appeal recommendation while waiting for items such as Reasons for Judgment. The appeal recommendation should be submitted no later than one week after the decision proposed for an appeal is made.
7. Upon receipt of the appeal recommendation the Deputy Chief Prosecutor of the Appeals Unit will (in most cases) assign an appellate counsel to review the recommendation and work with the trial prosecutor to ensure that the information required to properly determine whether to initiate the appeal or application is available.
8. Appellate counsel will make a recommendation to the Deputy Chief Prosecutor of the Appeals Unit as to whether an appeal or application should be initiated, consulting with other members of the Unit when it is considered desirable. The trial prosecutor who made the recommendation, their Deputy Chief Prosecutor and Chief Prosecutor, as well as the Chief Prosecutor of Appeals & Specialized Prosecutions, will be notified of the decision of the Deputy Chief Prosecutor of the Appeals Unit on whether an appeal or application will be initiated.
9. If an appeal or application for permission to appeal is deemed appropriate, the Deputy Chief Prosecutor of the Appeals Unit will ensure that the statutory authority to initiate the appeal or application is issued in writing.

3. Appeals to the Supreme Court

An appeal, application for leave to appeal, application for leave to intervene, or intervention on a constitutional question in the Supreme Court on behalf of the prosecution in a criminal or quasi-criminal proceeding requires the authorization of the Attorney General. In Alberta, the Assistant Deputy Minister of ACPS, who is the Assistant Deputy Attorney General, provides this authorization. A recommendation from appellate counsel must be submitted to the Deputy Chief Prosecutor of the Appeals Unit for approval. If the Deputy Chief Prosecutor agrees with the recommendation, a memorandum is submitted to the Chief Prosecutor for consideration. If the Chief Prosecutor agrees with the recommendation, they will seek the approval of the Assistant Deputy Minister/Assistant Deputy Attorney General.

The Appeals Unit is responsible for carriage of all forms of appeals, applications or motions to or before the Supreme Court. With the consent of the Deputy Chief Prosecutor of the Appeals Unit, Crown prosecutors who are not members of the Appeals Unit may have carriage of any appeal, application, or motion before the Supreme Court, but when doing so, are accountable to, and under the direction of, the Deputy Chief Prosecutor of the Appeals Unit.

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Supreme Court of Canada Appeal Criteria

Pursuant to section 693 of the *Criminal Code*, where the Court of Appeal acquits, affirms an acquittal, or sets aside a conviction in relation to an indictable offence, the Attorney General may appeal to the Supreme Court on a question of law, (1) as of right, where a judge of the Court of Appeal dissented on that question of law, or (2) with leave of the Supreme Court. To obtain leave, there must be a question of law of national or public importance.

Pursuant to section 40 of the *Supreme Court Act*, the Attorney General may also apply for leave to appeal to the Supreme Court any final or other judgment of the highest court of final resort in the particular case, if it involves an issue of national or public importance.

4. Conceding Appeals

Consent of the Deputy Chief Prosecutor of the Appeals Unit is required for the concession or abandonment of any conviction or acquittal appeal, sentence appeal or application for permission to appeal in the Court of Appeal.

Consent of the Deputy Chief Prosecutor of the Appeals Unit is required for the concession of any conviction appeal, sentence appeal or application for leave to appeal in the Supreme Court.

Consent of the Deputy Chief Prosecutor of the Appeals Unit is required for the abandonment of any acquittal appeal, sentence appeal, application for leave to appeal, or intervention in the Supreme Court.