1 The Nature of an Appeal and Statutory Jurisdiction

I. The Nature of a Criminal Appeal

A. Rights of Appeal Must Be Provided by Statute

The general principle in Canadian law—both criminal and civil—is that rights of appeal must be specifically created *by statute*. As La Forest J explained in his concurring reasons in *Kourtessis v MNR*:[1]

> Appeals are solely creatures of statute; see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773. There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.[2]

A further restriction in criminal cases is that only the federal Parliament has constitutional authority to create rights of appeal in matters with an "exclusively criminal" character.[3] In *Knox Contracting Ltd v Canada*,[4] Sopinka J (dissenting, but not on this point) explained:

> Provincial law of procedure is inapplicable only in respect of proceedings that are exclusively criminal in nature. By virtue of section 91(27) of the *Constitution Act, 1867*, Parliament is given exclusive legislative power over criminal law and procedure. Matters arising out of a statute enacted exclusively under the criminal law power must be dealt with under federal laws, including laws of procedure.[5]

Accordingly, in a "true criminal matter"—for example, a prosecution for a *Criminal Code*[6] offence—all rights of appeal must be found in *federal* legislation, which in practical terms means the *Criminal Code* and the *Supreme Court Act*.[7]

The situation is potentially more complicated and unsettled in cases involving federal offences that are not "*exclusively* criminal" because they are created by legislation that also falls under *both* the federal power to enact criminal law and some other head of federal constitutional authority, such as the *Constitution Act, 1867*,

1 [1993] 2 SCR 53, 1993 CanLII 137.

2 *Ibid* at 69-70, La Forest J.

3 That is, matters that fall within federal legislative jurisdiction *solely* as a result of s 91(27) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, which gives the Parliament of Canada legislative authority over "the Criminal Law … including the Procedure in Criminal Matters."

4 [1990] 2 SCR 338, 1990 CanLII 71.

5 *Ibid* at 362. See also *In re Storgoff*, [1945] SCR 526, 1945 CanLII 17; *Poje v Attorney General for British Columbia*, [1953] 1 SCR 516, 1953 CanLII 34; *R v Meltzer*, [1989] 1 SCR 1764, 1989 CanLII 68.

6 RSC 1985, c C-46.

7 RSC 1985, c S-26.

section 91(3) power over taxation. The Supreme Court of Canada has repeatedly divided over the question of exactly when, if ever, the existence of a second head of constitutional legislative authority will permit an appeal to be based under provincial rather than federal legislation. Although no clear majority position has emerged, the case law establishes the following principles:

1. In matters with an "exclusively criminal" character, no right of appeal can lie under provincial legislation (*Storgoff*,[8] *Knox Contracting Ltd*,[9] and *Dagenais v Canadian Broadcasting Corp*[10]).
2. Since provincial court judges in most provinces "can only exercise criminal jurisdiction," orders by provincial court judges, in particular, "cannot be characterized as civil matters" and "*must* be characterized as criminal." Accordingly, such orders cannot be appealed via provincial legislation.[11]
3. Decisions under federal statutes that are not "exclusively criminal" can, at least in theory, sometimes be appealable under provincially created rights of appeal, although it remains uncertain exactly when, if ever, this will be possible (*Knox Contracting Ltd*[12] and *Kourtessis*[13]).
4. Under either of the competing approaches in *Kourtessis*[14] (where the Court split 3–3 on this issue, with the seventh member of the panel taking no part in the judgment), the fact that Parliament has adopted a "specific and integrated" procedural scheme will weigh against the applicability of provincially created procedures.
5. As a matter of policy, courts should seek to avoid the "unpredictable mishmash" that would be caused by an "admixture of provincial civil procedure with criminal procedure" (*Kourtessis*, per La Forest J[15] and *Dagenais*[16]).

Despite these remaining grey areas, in the vast majority of situations involving federal penal offences, both "true criminal" and quasi-criminal, the only rights of appeal will be under federal law. The most important appeal provisions are those in the *Criminal Code*, which are extensive and usually (but not always) exhaustive.

A corollary to the principle that rights of appeal must be provided by statute is that the various statutorily created appellate courts—for example, the provincial and territorial courts of appeal, the Court Martial Appeal Court of Canada, the Federal Court of

8 *Storgoff*, *supra* note 5.

9 *Supra* note 4.

10 [1994] 3 SCR 835, 1994 CanLII 39.

11 *Ibid*.

12 *Supra* note 4.

13 *Supra* note 1.

14 *Ibid*.

15 *Ibid*.

16 *Supra* note 10.

Appeal, and the Supreme Court of Canada—have no inherent jurisdiction and can only hear and decide cases when they are empowered to do so by the relevant legislature. In contrast, the provincial superior courts can trace their existence at least in part to section 96 of the *Constitution Act, 1867*. Although the judges appointed under section 96 sit in courts created by legislation, these superior courts also have "a core or inherent jurisdiction" that "cannot be removed … by either level of government, without amending the Constitution."[17] Among other things, they have inherent supervisory authority over the "inferior courts"—including the provincial courts that conduct the vast majority of criminal trials—pursuant to the traditional prerogative writs of *certiorari*, *mandamus*, prohibition, and *habeus corpus*. Prerogative review by a superior court of an inferior tribunal's decision is conceptually distinct from an "appeal" from that decision, although in practical terms it has many similar features. The use of extraordinary remedies in criminal cases for appeal-like purposes is addressed in Chapter 10, Summary Conviction Appeals and Extraordinary Remedies.

B. The Policy Against Interlocutory Appeals in Criminal Cases

While the appeal provisions that govern civil cases sometimes permit civil litigants to bring appeals against interlocutory orders, the general rule in criminal cases is that *the parties* to a criminal prosecution—for example, the prosecutor and the defendant—have no interlocutory rights of appeal and must wait for a final decision to be rendered in the case before they can pursue an appeal. As McIntyre J explained in *Mills v The Queen*:[18]

> It has long been a settled principle that all criminal appeals are statutory and that there should be no interlocutory appeals in criminal matters. This principle has been reinforced in our *Criminal Code* (s. 602 [now section 674]) prohibiting procedures on appeal beyond those authorized in the *Code*. It will be observed that interlocutory appeals are not authorized in the *Code*.[19]

This omission reflects the policy view that interlocutory appeals are "all too frequently … the instrument of delay" and "are far more likely to delay the disposition of cases."[20] Since the party who loses an interlocutory ruling will often still go on to win the case at trial, forcing the parties to postpone their appeals to the end of the case will sometimes make an appeal of the interlocutory ruling unnecessary. The trade-off is that in other cases where the party who loses an erroneous pre-trial or mid-trial ruling goes on to lose the trial, the lack of an interlocutory right of appeal can result in weeks or months of wasted court time spent on a trial that must be done over because of the earlier error.

17 *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at para 15, 1995 CanLII 57.

18 [1986] 1 SCR 863, 1986 CanLII 17.

19 *Ibid* at para 959.

20 *Ibid* at para 964.

As with most general rules, the rule against interlocutory appeals in criminal cases is subject to a number of exceptions. For example:

- The parties to criminal proceedings in a provincial court can sometimes bring an interlocutory application for judicial review in the superior court via the prerogative writs of *certiorari*, *mandamus*, prohibition, and/or *habeas corpus*. This is most common when the proceedings in the provincial court are a preliminary inquiry, but can sometimes be done during a trial. While such an application is not an "appeal" in a formal sense, the losing party in the superior court review proceedings has a statutory right under the *Criminal Code* to appeal the reviewing court's decision to the court of appeal.
- Third parties whose interests are directly affected by an order made during the course of a criminal trial—such as witnesses or media organizations subject to publication bans—can sometimes bring an interlocutory appeal directly to the Supreme Court of Canada, with leave of the Court.
- The *Canada Evidence Act*[21] expressly provides for interlocutory appeals in certain circumstances where claims of national security privilege or "specified public interest" privilege are being litigated.

C. Appeals Are Against Orders, Not Reasons

The general rule both in criminal and civil matters is that appeals lie "against orders, not reasons."[22] In other words, a party who obtains a favourable order at trial generally cannot appeal the order even if they are unhappy with the trial court's underlying reasons or are dissatisfied with the legal basis on which the order was made. Likewise, the party in an appeal to a court of appeal who succeeds in the result usually cannot appeal further to the Supreme Court of Canada in order to challenge the court of appeal's legal reasoning, although like most general rules this rule is subject to exceptions.

Criminal appeals are subject to the further restriction that the parties to a criminal prosecution—the Crown and the defendant—ordinarily may only appeal against the final orders that are made at the conclusion of the trial. For instance, section 675 of the *Criminal Code* permits a defendant who has been tried for an indictable offence to appeal against their conviction,[23] against the sentence imposed,[24] or against an order declaring them to be not criminally responsible on account of mental disorder (NCR-MD).

21 RSC 1985, c C-5.

22 *R v Laba*, [1994] 3 SCR 965 at 978, 1994 CanLII 41.

23 When the defendant is found guilty but is granted an absolute or conditional discharge, the finding of guilt is deemed to be a "conviction" for appeal purposes even though it is not a conviction for most other purposes: see s 730(3)(a). However, the discharge is simultaneously deemed to be an *acquittal* for the purposes of the Crown's right of appeal.

24 A defendant may also appeal against certain ancillary orders made as part of the sentencing process, such as an order delaying parole eligibility or an order declaring the defendant to be a dangerous offender.

Likewise, section 676 permits the Crown to appeal only against orders acquitting the accused or finding them to be NCR-MD, against orders quashing the indictment or staying the prosecution, or against the sentence. Neither party has any direct right of appeal from orders or rulings made during the course of the trial, except insofar as they can be linked to one of the listed final orders. Accordingly, the party who ultimately wins the trial ordinarily cannot appeal any decisions that went against them along the way. For instance, a defendant who is acquitted at the end of a trial cannot appeal against the trial court's finding that their Charter[25] rights were not infringed or against an order admitting evidence. Likewise, if the prosecution ultimately secures a conviction for the offence charged, the Crown generally cannot pursue an appeal against unfavourable pre-trial rulings that it may believe set bad precedents. For example, the Crown cannot appeal from a ruling that the accused's section 8 Charter rights were infringed if the trial court proceeds to admit the seized evidence anyway under section 24(2), or even if it excludes this evidence but the accused is convicted anyway based on the strength of the rest of the Crown's case.

However, the Supreme Court has carved out several exceptions to this latter rule by interpreting its jurisdiction under section 40(1) of the *Supreme Court Act* expansively to allow appeals sometimes to be brought in criminal cases by a party who was *successful* in the end result either at trial or in the court of appeal, and who thus has no statutory right of appeal under the *Criminal Code* (see Section II, "Statutory Rights of Appeal," below).

These general rules also have implications for the rights of *respondents* in criminal appeals. Since appeals are against orders, not reasons, "[a]s a general rule, a respondent is entitled to raise any argument which supports the order of the court below,"[26] including arguments that were rejected at trial or on an initial appeal. This general rule is subject only to the limit that an appeal court may refuse to consider entirely new issues that were not raised in the proceedings below. Thus, for example, when a defendant at trial successfully argues that their Charter rights were infringed, but the trial court admits the seized evidence anyway under section 24(2) and the defendant is convicted, the accused may appeal the conviction under the *Criminal Code* appeal provisions. Although the *Criminal Code* does not provide any right for the Crown to cross-appeal the finding that there was a Charter breach, the Crown is free to argue as the respondent in the accused's appeal that the trial court erred by finding such a breach. Equally, an accused who was acquitted at trial and is now defending against a Crown appeal from the acquittal may advance any arguments raised below that would support the acquittal, including arguments that failed at trial.

25 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

26 *R v Keegstra*, [1995] 2 SCR 381 at para 21, 1995 CanLII 91.

On a further appeal to the Supreme Court of Canada, the respondent may rely on any argument raised below that would support the order being appealed, and does not require leave of the Court or a formal cross-appeal.

II. Statutory Rights of Appeal

Appellate courts' jurisdictions are derived from their enabling statutes. In the case of criminal appeals, the *Criminal Code* establishes the appellate jurisdiction of the superior court in summary conviction appeals and the provincial appellate courts in both indictable and summary conviction matters. The jurisdiction of the Supreme Court of Canada in criminal matters is established by both the *Criminal Code* and the *Supreme Court Act*.

It is important to note that it is the *nature of the proceeding*—whether summary or indictable—that determines the route of an appeal, *not* the level of court where the trial was held. Many *Criminal Code* offences are "hybrid" offences where the Crown can choose whether to proceed summarily or by indictment. If the Crown proceeds summarily, the trial *must* take place in the provincial court. If the Crown elects to proceed by indictment or if the offence is "straight indictable" rather than hybrid, *the accused* is usually allowed to elect whether to have their trial in the provincial court or the superior court.[27] So, for example, if the accused is charged with a hybrid offence and the Crown elects to proceed summarily, the trial will take place in the provincial court and any ensuing appeals will at least at first instance be heard in the superior court, which is the "summary conviction appeal court." However, if the Crown elects to proceed *by indictment* and the defendant elects a provincial court trial, any ensuing appeal will be to the court of appeal of that province or territory under the *Criminal Code*'s indictable appeal provisions.

A. Indictable Appeals

Appeals in indictable matters are dealt with in part XXI of the *Criminal Code*. Sections 2 and 673 provide that the forum for an indictable appeal is the "court of appeal" in the province or territory where the trial was held. These courts of appeal generally hear cases sitting in three-judge panels, although on occasion a panel of five judges will be convened—for instance, in cases where the court is being asked to overturn one of its own precedents[28] or where there is a significant constitutional issue before the court.[29]

27 The exceptions are (1) defendants charged with one of the less serious indictable offences listed in s 553 of the *Criminal Code* have no right to elect a trial in the superior court, whereas (2) defendants charged with one of the extremely serious offences listed in s 469 cannot be tried in the provincial court and *must* be tried in the superior court.

28 See e.g. *R v Ijam*, 2007 ONCA 597.

29 See e.g. *R v Nur*, 2013 ONCA 677; *R v Smickle*, 2013 ONCA 678; *R v Charles*, 2013 ONCA 681.

1. Appeals by Criminal Defendants

Section 675(1)(a) of the *Criminal Code* gives broad rights of appeal to a defendant who has been tried for an indictable offence and has either been convicted or found NCR-MD, or who has been found unfit to stand trial. They may appeal *as of right* on questions of law alone (s 675(1)(a)(i)), and *with leave of the court* may also appeal on questions of fact or questions of mixed law and fact (s 675(1)(a)(ii)) or, even more generally, on any other ground "that appears to the court of appeal to be a sufficient ground of appeal" (s 675(1)(a)(iii)). Even though sections 675(1)(a)(ii) and (iii) formally require the defendant to seek and obtain leave of the court, this requirement is almost entirely ignored by the courts of appeal, which typically hear and decide all of a defendant's grounds of appeal on the merits without even mentioning the statutory need to obtain leave.

Defendants may also appeal against their sentence pursuant to section 675(1)(b), which also requires leave of the court. Most courts of appeal treat the leave requirement in sentence appeals largely as a formality. These courts will hear the appellant's arguments on the sentence appeal *before* addressing the issue of leave and will usually proceed to decide the appeal on the merits with the requirement for leave being mentioned only as an afterthought, if at all. It would be extremely unusual—to the point of being almost unthinkable—for a court of appeal to state that it would have allowed the accused's sentence appeal but is denying them leave to appeal. However, the issue of leave will sometimes be decided in advance by a single judge if the appellant brings a preliminary motion such as an application for bail pending appeal or to stay a driving prohibition. In these situations, the motions judge will often decide the question of leave in advance, often on an incomplete record. For this reason, appellate counsel should consider the tactical implications of bringing a preliminary motion in situations where there is a possibility of the motions judge short-circuiting the appeal by denying leave.[30]

The powers of the court of appeal on a defendant's appeal from a conviction or NCR-MD finding are set out in section 686. Under section 686(1), the court of appeal may allow an appeal on three alternative bases: (1) if the verdict is unreasonable or cannot be supported by the evidence, (2) if the trial court is found to have committed an "error in law," or (3) if "on any ground there was a miscarriage of justice."

The test for whether a verdict is unreasonable under section 686(1)(a)(i) is "whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered."[31] This test applies both to verdicts rendered by a jury and

30 The same strategic concerns apply to summary conviction appeal matters pursuant to s 839 where leave is required. A single judge can dispose of an application for leave and thus dismiss the appeal: see *R v Metin*, 2013 ONCA 21.

31 *R v Yebes*, [1987] 2 SCR 168 at 185-86, 1987 CanLII 17.

to judgments by a judge sitting alone, although since in the latter situation the trial judge must provide reasons, the analysis will proceed somewhat differently.[32] While an appellate court is not permitted to substitute its view for that of the trial judge, the reviewing court may re-examine the evidence and reweigh it to determine whether the totality of the evidence is capable of supporting a verdict. If a trial verdict is found to be "unreasonable," the court of appeal will set aside the conviction and will usually enter an acquittal, although in some circumstances it may instead order a new trial.[33]

Conviction appeals are more commonly allowed either on the basis that the trial judge made a "wrong decision on a question of law" (s 686(1)(a)(ii)) or on the basis that there was a "miscarriage of justice" (s 686(1)(a)(iii)). While it would be impossible to exhaustively list every potential "question of law" that might result in an appeal being allowed, some common legal errors include misapplying or misinterpreting legislation, erroneously admitting evidence that should have been excluded, incorrectly failing to find a Charter violation on the established facts, or misdirecting the jury about the law. Certain errors, such as misapprehensions of the evidence by the trial judge, can be classed alternatively as errors of law or as errors resulting in a miscarriage of justice, depending on the circumstances.[34] Other grounds that can lead to a finding that there has been a miscarriage of justice include apprehensions of judicial bias, Crown misconduct (such as improper cross-examination or inflammatory closing addresses to the jury), jury selection improprieties, and situations where it is shown that the appellant was ineffectively represented by their trial counsel. Again, this is not by any means an exhaustive list.

Section 686(2) provides that when an appeal is allowed under section 686(1)(a), the court of appeal may either enter an acquittal or order a new trial. The court will generally enter an acquittal only if it has concluded that the defendant's conviction was unreasonable on the evidential record at trial or when the effect of the court's ruling on a point of law would undermine the Crown's case to such a degree that a retrial would be pointless. For example, when the Crown's case depends entirely on evidence seized following a Charter breach and the court of appeal concludes that the seized evidence should be excluded under section 24(2), the usual remedy will be to enter an acquittal. In some cases, the court of appeal will quash a conviction and enter a stay of proceedings (e.g., if it concludes that the defendant's section 11(b) Charter right to a speedy trial was infringed).

Section 686(1)(b) sets out the circumstances in which a conviction appeal may be *dismissed*. Most obviously, an appeal may be dismissed under section 686(1)(b)(ii) if the court of appeal finds no errors in the trial proceedings. If the court of appeal finds that the accused was improperly convicted on some counts in an indictment but

32 *R v Biniaris*, 2000 SCC 15.

33 *R v Beaudry*, 2007 SCC 5.

34 *R v Morrissey*, 1995 CanLII 3498 (ONCA).

properly convicted on "another count or part of the indictment," section 686(1)(b)(i) authorizes the court to quash the improperly entered convictions but dismiss the appeal on the remaining counts, or quash the accused's conviction for the offence charged and substitute a conviction for a lesser included offence. When the court exercises this power, it must also reassess the fitness of the accused's sentence under section 686(3) and may either uphold or vary the sentence imposed at trial or remit the case to the trial court for resentencing. If the court of appeal finds that the trial court committed errors of law but is satisfied that these errors did not result in a "substantial wrong or miscarriage of justice," it may dismiss the appeal under section 686(1)(b)(iii), commonly referred to as the "curative proviso." The court may apply the proviso if it is satisfied that the error was harmless or concludes that the case against the defendant was otherwise so overwhelming that the result would inevitably have been the same.[35] Finally, the court of appeal may dismiss an appeal in the face of "procedural irregularities" at trial—including irregularities traditionally viewed as causing the trial court to lose jurisdiction, such as improperly excluding the defendant from their own trial—if the trial court had "jurisdiction over the class of offence of which the appellant was convicted" and the court is satisfied that they suffered no prejudice (s 686(1)(b)(iv)).

2. Crown Appeals

The Attorney General's rights of appeal in indictable matters are set out in section 676 of the *Criminal Code*. The Attorney General can appeal as of right against an acquittal, a finding of NCR-MD, or a finding that the accused is unfit to stand trial (ss 676(1)(a) and (3)). However, these orders may only be appealed on a ground "that *involves a question of law alone*." The Crown can also appeal as of right against orders of a trial court or the superior court that quash an indictment or stay proceedings.

The requirement that a Crown appeal against an acquittal, NCR-MD verdict, or finding of unfitness be based on a "question of law alone"[36] means that the Crown's right of appeal is substantially narrower than the right of a defendant to appeal a conviction or NCR-MD verdict. While the defence can also appeal on the basis of questions of fact or questions of "mixed fact and law," the Crown cannot. Among other things, this means that Crown cannot appeal an *acquittal* merely by arguing that it was "unreasonable" on the evidence. As Arbour J noted in *R v Biniaris*,[37] "the Crown is barred from appealing an acquittal on the sole basis that it is unreasonable, without asserting any other error of law leading to it."

35 *R v Khan*, 2001 SCC 86.

36 The Supreme Court of Canada has interpreted the phrase "question of law alone" as meaning "nothing different than a 'question of law'": *Biniaris*, *supra* note 32 at para 31.

37 *Ibid* at para 32.

While it would be impossible to exhaustively list all of the various errors that can be characterized as "errors of law alone" for the purpose of section 676(1)(a), common examples include misdirections on points of law in a jury charge, erroneous rulings excluding prosecution evidence, and erroneous conclusions that the accused's Charter rights were infringed. However, in these latter situations the Crown must show that the trial judge's errors flow from a misunderstanding or misapplication of *the law* rather than from their factual findings, which the Crown cannot appeal.

The powers of the courts of appeal when deciding Crown appeals are set out in section 686(4). The court may either dismiss the appeal (s 686(4)(a)) or allow the appeal, set aside the acquittal or NCR-MD verdict (s 686(4)(b)), and either order a new trial (s 686(4)(b)(i)) or enter a verdict of guilty (s 686(4)(b)(ii)). However, the power to substitute a finding of guilt is unavailable if the verdict at trial was rendered by a jury. If the court of appeal sets aside an acquittal and substitutes a conviction, it may either impose sentence itself or remit the case to the trial court for sentencing.

Even when the court of appeal finds an error of law, it will dismiss the Crown's appeal rather than overturn an acquittal unless the Crown can demonstrate that the errors were ones of real consequence in the context of the particular case. As Fish J explained for a majority of the Supreme Court of Canada in *R v Graveline*:[38]

> It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal.[39]

Although the concept underlying this rule is similar to that which motivates the section 686(1)(b)(iii) curative proviso in defence appeals, there is an important distinction concerning the burden of persuasion. In a conviction appeal, the Crown must demonstrate that there was no "reasonable possibility that the verdict would have been different had the error at issue not been made."[40] When the Crown appeals an acquittal, the burden *remains on the Crown* to show that the error might reasonably be thought to have affected the result.

The Crown can also appeal against the sentence imposed at trial (s 676(1)(d)). As with sentence appeals brought by the defendant, Crown sentence appeals require leave of the court.

B. Summary Conviction Appeals

Part XXVII of the *Criminal Code*, which deals with summary conviction matters, contains two separate appeal provisions, sections 813 and 830, which both give the

38 2006 SCC 16.

39 *Ibid* at para 14.

40 *R v Bevan*, [1993] 2 SCR 599 at 617, 1993 CanLII 101.

superior court jurisdiction to hear appeals in summary matters (see s 812). The provincial and territorial courts of appeal ordinarily have no jurisdiction to hear appeals in a summary conviction matter unless there has first been an appeal to the superior court. However, in unusual circumstances[41] where a "summary conviction offence was tried with an indictable offence" and the indictable offence is under appeal, sections 675(1.1) and 676(1.1) permit the appellant (the defendant or the Crown) to avoid multiple appellate proceedings in different courts by giving the court of appeal jurisdiction to hear and decide the summary conviction appeal along with the indictable appeal (with leave of the court or a judge thereof).

Appeals to the summary conviction appeal court under sections 813 and 830 are both as of right, with leave of the court not required. Under section 813, the accused may appeal from a conviction or finding of NCR-MD or against sentence, while the Crown may appeal from an order staying or dismissing an information (including an acquittal), from an order finding the accused NCR-MD, or against the sentence. The grounds of appeal that can be raised under section 813 by either a defendant *or the Crown* are not limited to questions of law, so the losing party at trial, either the accused or the attorney general, may appeal based on errors of "fact, mixed fact and law, or law alone."[42] Accordingly, the Crown's right of appeal in summary conviction matters is considerably broader than its right of appeal in indictable matters. The remedial powers of the summary conviction appeal court in an appeal brought under section 813 are the same as the powers of the provincial or territorial appellate courts in indictable appeals, as set out in part XXI of the *Criminal Code*.[43]

The scope of section 830 is narrower than section 813. It grants the superior court jurisdiction to hear appeals that raise a question of law and/or allege that the lower court has erred in the exercise of its jurisdiction or refused to exercise jurisdiction. Under section 830 the Crown or an offender may appeal against "a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court." The main distinction between these two routes for summary conviction appeals is remedy. Under section 830, a summary conviction appeal court may remit the matter back to the trial court along with the opinion of the appeal court for reconsideration, though this is rarely done in practice.[44] As discussed further in Chapter 10, Summary Conviction Appeals and Extraordinary Remedies, the existence of these two parallel forms of summary conviction appeal is largely a historical artifact, and there is now rarely any compelling

41 See e.g. *R v Patriquin*, 2003 NSCA 89; *R v Dixon*, 2013 BCCA 41.

42 *R v Labadie*, 2011 ONCA 227 at para 50.

43 See *Criminal Code*, s 822(1).

44 See *Criminal Code*, s 834(1)(b). No similar jurisdiction exists under s 813 appeals.

reason for either the defence or the Crown to frame a summary conviction appeal as an appeal under section 830 rather than as an appeal under the more broadly worded section 813.

The losing party in the summary conviction appeal court may pursue a further appeal to the provincial or territorial court of appeal under section 839 of the *Criminal Code*. However, these further appeals by either the defendant or the Crown are restricted to "questions of law alone" and require leave to be granted by a judge or panel of the court of appeal. For many years, this leave requirement was largely ignored in Ontario.[45] As Doherty JA of the Ontario Court of Appeal explained in *R v RR*:[46]

> Despite the very different statutory provisions governing indictable and summary proceedings, the vast majority of summary proceeding matters brought to this court proceed as if they were appeals as of right in indictable proceeding matters. By that I mean, the court does not address the question of leave to appeal as a discrete preliminary issue; rather, it simply lists summary conviction matters for oral argument before a panel of the court. The application for leave to appeal and the appeal itself are addressed in the same proceeding. In oral argument, leave to appeal is sometimes not even mentioned (much less argued). Instead, counsel and the court generally proceed directly to the merits of the grounds advanced on behalf of the applicant/appellant. Often the argument focuses on alleged errors at trial and makes only passing reference to the reasons of the summary conviction appeal court. This court's disposition is almost always based on the merits of the appeal and seldom alludes to the leave requirement.[47]

In *RR*, the Ontario Court of Appeal announced a change of policy, declaring that it would require appellants in summary conviction matters to bring an express application for leave and that leave would be granted sparingly, only in cases that raised legal issues of "significance … to the [general] administration of criminal justice" or where the merits of the appeal "appear very strong."[48]

The rules of court or practice directions for each province or territory now provide guidance for whether leave to appeal should be dealt with as a preliminary matter or in conjunction with the appeal. The practice varies by jurisdiction. It appears that leave and appeal are merged in PEI, Nova Scotia, New Brunswick, Quebec, and Saskatchewan, whereas a preliminary stage application is required in Alberta, Manitoba, British Columbia, the Northwest Territories, Nunavut, and Yukon.

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45 Other provinces traditionally followed the practice of dealing with leave as a preliminary motion, such as *R v Chaluk*, 1998 ABCA 253, referenced by Doherty JA in *R v RR*.

46 2008 ONCA 497.

47 *Ibid* at para 2.

48 *Ibid* at para 37.

C. Supreme Court of Canada Appeals

1. The Supreme Court of Canada's Appellate Jurisdiction in Criminal Cases

The Supreme Court of Canada serves as the final court of appeal in criminal cases. The Supreme Court usually hears appeals from decisions rendered by the provincial or territorial courts of appeal, although in some limited circumstances the Court can hear appeals directly from certain trial-level decisions (see below).

Most criminal appeals that make their way to the Supreme Court do so pursuant to the appeal provisions of the *Criminal Code*. Section 691 gives rights of appeal to defendants whose convictions have been affirmed by the court of appeal, or whose acquittals have been overturned on appeal, while section 692 gives similar rights of appeal to people found NCR-MD at trial or found to be unfit to stand trial. Appeals under these sections must be based on "questions of law" and usually require leave to appeal to first be granted by the Supreme Court. The only exceptions are that a defendant may appeal as of right on questions of law "on which a judge of the court of appeal dissents," (s 692(3)(a)) *or* if their acquittal has been set aside on a Crown appeal and the court of appeal has substituted a conviction.

Section 693 of the *Criminal Code* gives corresponding rights of appeal to the Crown, either when its own appeal to the court of appeal from, for example, an acquittal or stay of proceedings has been dismissed, or when a defendant's appeal to the court of appeal from a conviction has succeeded. Crown appeals under section 693 require leave of the Supreme Court unless they are based on a question of law on which a judge of the court of appeal has dissented.

The *Criminal Code* appeal provisions do not give either defendants or the Crown any right to appeal a *sentence* to the Supreme Court of Canada, with or without leave, nor do they give any direct rights of appeal from orders made by trial courts. Moreover, section 674 of the *Criminal Code* states:

> No proceedings other than those authorized by this Part and Part XXVI [which deals with extraordinary remedies and ensuing appeals] shall be taken by way of appeal in proceedings in respect of indictable offences.

However, the Supreme Court has interpreted this provision as *not* restricting its jurisdiction to hear appeals in criminal cases under section 40(1) of the *Supreme Court Act*, which provides for appeals to the Supreme Court, with leave

> 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 sought to be appealed to the Supreme Court*. [Emphasis added.]

In *Dagenais*, Lamer CJ stated:

> While on a literal reading, s. 674 of the *Criminal Code* could be taken as excluding any resort to s. 40 of the *Supreme Court Act* "in respect of indictable offences," such literal

interpretation cannot be adopted, given the legislative history and purpose of these provisions.[49]

The Court has concluded that it has jurisdiction under section 40 to hear appeals from decisions by the court of appeal in various situations where the *Criminal Code* provides no right of appeal,[50] such as in sentence appeals and appeals in summary conviction matters. Moreover, the Court has relied on its expansive reading of section 40 to grant leave to appeal from various orders made by judges of the superior courts in criminal cases that were "final" in the sense that the persons whom they directly affected had no other right of appeal. For instance, in *R v St-Cloud*,[51] the Court granted leave to the Crown to appeal from a decision on a bail review setting aside a detention order.[52] As discussed further below, the Court has also granted leave under section 40 to third parties—witnesses and the media—whose rights or interests were affected by orders made during criminal trials, and who had no other right of appeal.

The Court has also used section 40 of the *Supreme Court Act* to create exceptions to the ordinary rule that the *successful* party in the court of appeal has no further right of appeal. For instance, in *R v Laba*,[53] the Court carved out an exception when the Crown seeks to appeal from a declaration of constitutional invalidity and cannot piggyback the issue on an ordinary criminal appeal. The trial court in *Laba* found the *Criminal Code* provision under which the accused were charged to be unconstitutional because it reversed the onus of proof, and stayed the proceedings.[54] The Crown had successfully appealed the stay to the Ontario Court of Appeal, which agreed with the trial judge that the impugned provision violated the Charter but disagreed over the appropriate remedy. The trial judge struck down the entire provision—both the offence and the reverse onus—and stayed the proceedings. The Court of Appeal held that only the reverse onus provision should be struck down, and accordingly lifted the

49 *Dagenais*, *supra* note 10 at 858.

50 Conversely, the Court has interpreted s 40(3) of the *Supreme Court Act* as precluding resort to s 40(1) only in relation to "judgments in respect of which an appeal lies by virtue of the *Criminal Code* provisions": *R v Adams*, [1995] 4 SCR 707 at 715, 1995 CanLII 56.

51 2015 SCC 27.

52 See also *Adams*, *supra* note 50, where the Court held that it had jurisdiction under s 40 to hear a Crown appeal from an order by a superior court trial judge purporting to lift the mandatory statutory publication ban over the complainant's name in a sexual assault case on the basis of his conclusion in the course of acquitting the accused that she was "a liar and a prostitute." The Court concluded that since this latter order "had no bearing whatsoever on the acquittal," which the Crown was not seeking to overturn, the Crown could appeal it directly under s 40(1).

53 *Supra* note 22.

54 The provision, s 394(1)(b) of the *Criminal Code*, as it then existed, created a reverse onus that put the burden on people who bought or sold certain ore-bearing rocks or minerals to prove lawful ownership. This reverse onus was found to violate s 11(d) of the Charter.

stay and ordered a new trial. Although the Crown had "won" in the Court of Appeal—it had successfully appealed the stay order—and thus had no right of further appeal under the *Criminal Code*, a majority of the Supreme Court held that the Crown could appeal further under section 40(1) of the *Supreme Court Act* against the declaration of constitutional invalidity.[55] Lamer CJ held that

> [t]his Court has jurisdiction under s. 40(1) to grant leave to appeal against a ruling on the constitutionality of a law that cannot be piggybacked onto [appeal] proceedings set out in the *Criminal Code*.[56]

He noted that on this approach the Crown would also have been able to appeal directly to the Supreme Court of Canada from the finding of constitutional invalidity even if the matter had proceeded to trial and the accused had been convicted anyway, thereby precluding *any* Crown appeal to the court of appeal.[57] In *R v Keegstra*,[58] Lamer CJ noted that the Court also has jurisdiction under section 40 to hear appeals by *defendants* who have brought unsuccessful constitutional challenges to legislation in the courts below. He explained:

> [U]nder the dual proceedings approach, this Court has the jurisdiction to hear applications for leave to appeal under s. 40 of the *Supreme Court Act* on any ground questioning the constitutionality of a *Criminal Code* provision. As rulings on constitutionality are distinct from rulings on culpability, either party may seek leave to appeal rulings on constitutionality, regardless of whether they are the appellant or respondent in proceedings regarding culpability, and regardless of whether the ruling on culpability is appealed.[59]

Likewise, in *R v Hinse*,[60] the Court held that it had jurisdiction to entertain an appeal by a defendant from a decision by the Quebec Court of Appeal setting aside his conviction and enter a stay of proceedings. Since Hinse had *won* in the Court of Appeal—the Court had allowed his appeal, quashed his robbery conviction, and granted him a remedy that was for all practical legal purposes "tantamount to an acquittal"[61]—he had no further right of appeal under the *Criminal Code*. However,

55 In the result, the SCC upheld the finding of unconstitutionality, although the majority varied the constitutional remedy by reading words into the section rather than simply striking words out.

56 *Laba*, *supra* note 22 at 982.

57 In the result, the Court agreed that s 394(1)(b) violated s 11(d) of the Charter and was not saved by s 1, but varied the remedy further by reading in an evidential burden in place of the unconstitutional legal burden.

58 *Supra* note 26.

59 *Ibid* at para 20.

60 [1995] 4 SCR 597, 1995 CanLII 54.

61 *R v Jewitt*, [1985] 2 SCR 128 at para 51, 1985 CanLII 47.

the Supreme Court held that he could appeal the stay order under section 40(1), and ultimately allowed his appeal and granted him the remedy he sought (an acquittal).

2. Leave Applications in the Supreme Court of Canada

Section 40(1) of the *Supreme Court Act* expressly states that the Court may grant leave to appeal under the section

> where, with respect to the particular case sought to be appealed, 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.

The *Criminal Code* provisions that govern appeals to the Supreme Court do not set out any criteria for when leave should be granted, but it is generally assumed that the Court applies the "public importance" test to appeals under the *Criminal Code*. Relevant factors include the public and national importance of the issues and the existence of conflicting jurisprudence in different provincial and territorial courts of appeal. Since the Court considers itself a "court of policy" rather than a "court of error," appeals that depend on their own particular facts are less likely to be granted leave than appeals that involve difficult or unsettled general legal principles that have broader implications for future cases. However, the Court may also be more inclined to view the correct resolution of a case as a matter of "public importance" if the matter has attracted widespread public attention, even if the issues it raises are fact-specific and unlikely to arise frequently in the future.[62]

Leave is sometimes granted only on particular grounds of appeal specified by the Court, but in other cases leave is granted at large without any restriction on the grounds that can be raised. An appellant who appeals as of right based on a dissent in the court of appeal is restricted to arguing the points raised in the dissenting judgment and must seek leave to raise additional grounds. However, the respondent is not subject to this restriction and may raise any argument that was raised in the courts below that would support the order being appealed, without the need to cross-appeal or seek leave.

III. Third-Party Appeal Rights

In some limited circumstances, third parties can appeal or otherwise challenge rulings made in the course of criminal proceedings on an interlocutory basis. Examples include appeals by witnesses or record holders involving claims of privacy or privilege, appeals by government agencies involving privilege claims, and appeals by the media challenging publication bans.

62 See e.g. *Bowden Institution v Khadr*, 2015 SCC 26.

When the proceedings are in the provincial court—either because a preliminary inquiry is still under way or because the matter is being tried in the court—a third-party challenge can often commence by way of an application by the third party to a judge of the superior court for an extraordinary remedy. This is discussed in more detail in Chapter 10, Summary Conviction Appeals and Extraordinary Remedies. However, since extraordinary remedies cannot be invoked against orders by superior court judges, a third party may only challenge a decision made by a superior court judge in a criminal case if there is some specific statutory right of appeal available to the third party, or by applying directly to the Supreme Court of Canada under section 40 of the *Supreme Court Act*. Although the Supreme Court ordinarily only hears criminal appeals once there has been a first-level appeal decided by a provincial or territorial court of appeal, it has jurisdiction under section 40 to hear an appeal by a third party against trial-level orders that are "final" from the third party's perspective and will sometimes exercise this jurisdiction and grant leave to appeal to a third-party applicant.

A. Direct Appeals to the Supreme Court of Canada

1. By a Witness or Records Holder

In *LLA v Beharriell*,[63] the trial judge (a superior court judge) ordered that a sexual assault complainant's counselling records be produced to the defendant. The Ontario Court of Appeal held that it had no jurisdiction to hear an appeal brought by the complainant and the institutions who had custody of the records. The Supreme Court of Canada agreed with the Court of Appeal but held that the Supreme Court had jurisdiction under section 40 of the *Supreme Court Act* to hear an appeal directly from the trial judge's decision.[64] In the result, the Court set aside the trial judge's production order and directed him to reconsider the matter under the principles the Court had laid out in a companion decision, *R v O'Connor*.[65]

The same reasoning applied in a different case, where one of the complainants in a historical sexual assault case brought a civil suit against the defendant.[66] Before the defendant's superior court trial began, he brought a third-party records application to access the file of the complainant's civil litigation lawyer, and the trial judge ordered that the lawyer's file be produced to the defence. The complainant sought and was granted leave under section 40(1) of the *Supreme Court Act*, which was available to him because he had no other right of appeal, so that from his perspective the production order was a "final order." The production order was stayed pending the Supreme

63 21 OR (3d) 621, 1995 CanLII 542 (CA).

64 *A (LL) v B (A)*, [1995] 4 SCR 536, 1995 CanLII 52.

65 [1995] 4 SCR 411, 1995 CanLII 51.

66 *R v McClure*, 2001 SCC 14.

Court of Canada appeal and the defendant's trial was adjourned. The Supreme Court ultimately allowed the appeal and set aside the order.

Similarly, in *R v Brown*,[67] the accused sought the lawyer's file of a third-party suspect on the basis of evidence that this suspect had confessed to his lawyers. The Ontario Superior Court granted the motion in part and ordered production of some of the suspect's lawyer's documents. The Supreme Court of Canada granted leave to the third-party suspect under section 40 of the *Supreme Court Act* and set aside the production order.

In *World Bank Group v Wallace*,[68] a record holder who had refused to attend or participate in the procedings in the Ontario Superior Court then applied to appeal the resulting decsion to the Supreme Court of Canada. While the respondents opposed leave, in part on that basis, leave was granted, and no comment was made with respect to the decision of the appellant not to have participated in the first-level litigation.

2. By the Media

In *Dagenais*, the Supreme Court of Canada considered an appeal brought by media organizations from a publication ban ordered by a superior court judge. Since the media had no other rights of appeal from the order, the Court held that it had jurisdiction under section 40 of the *Supreme Court Act* to hear the appeal.[69]

B. Statutory Privilege Appeals Under the Canada Evidence Act

Most third parties have no statutory right to appeal against decisions made in criminal trials other than the right to appeal directly to the Supreme Court of Canada under section 40 of the *Supreme Court Act*. However, the *Canada Evidence Act* gives the Crown and certain government agencies special interlocutory appeal rights in cases where they are asserting certain specified forms of privilege—namely, public interest immunity or national security privilege.

When a claim of "specified public interest" is asserted in a superior court criminal trial by the Crown or another government official, it is the trial judge who must decide whether or not the information over which the immunity has been claimed should be disclosed. However, when the claim is asserted in a provincial court trial, the claim must be resolved by way of an application to the superior court. In either instance, the losing party is granted a right of appeal to the court of appeal under section 37.1 of the *Canada Evidence Act*.

67 2002 SCC 32.

68 2016 SCC 15.

69 *Dagenais*, *supra* note 10 at 860.

In contrast, sections 38ff of the *Canada Evidence Act* give exclusive jurisdiction to resolve national security privilege claims to the Federal Court. Since the Federal Court has no criminal law jurisdiction, an assertion of national security privilege in a criminal trial necessarily triggers a collateral proceeding in the Federal Court, and the Federal Court's ruling can be appealed further to the Federal Court of Appeal under section 38.09.

C. Third-Party Appeal Rights Initiated by Applications for Extraordinary Remedies

Third parties who are affected by orders made during a provincial court trial can seek interlocutory review in the superior court by bringing an application for an "extraordinary remedy" (e.g., *certiorari*, *mandamus*, or prohibition). The review decision can then be appealed to the court of appeal under section 784 of the *Criminal Code*.

1. Appeals by Media Organizations Against Publication Bans: Dagenais v CBC

In *Dagenais*, the media was appealing from a publication order made during a superior court trial, and thus had to appeal directly to the Supreme Court of Canada under section 40(1) of the *Supreme Court Act*. However, in its decision, the Court noted that if the publication ban had instead been issued by a provincial court judge, the appropriate route of review for the media would have been to bring an application for *certiorari* in the superior court, followed if necessary by an appeal to the court of appeal under section 784 of the *Criminal Code*.[70]

2. Appeals by Trial Counsel: R v Cunningham

In *R v Cunningham*,[71] defence counsel brought an application to be removed from the record after Yukon Legal Services Society concluded that the accused was no longer financially eligible. The preliminary inquiry judge denied the application, and defence counsel brought a *certiorari* application to review the ruling. When the lawyer's application was denied, she appealed to the territorial court of appeal, which allowed her appeal; the Crown then pursued a further (successful) appeal to the Supreme Court of Canada.

3. Appeals Arising from Orders Regarding the Attire of a Witness: R v NS

In *R v NS*, the complainant in a sexual assault case was called to testify at the preliminary inquiry, and the preliminary inquiry judge ordered her to remove her niqab,

70 *Ibid* at 865.

71 2010 SCC 10.

which covered her face. She brought a *certiorari* application, which was followed by further appeals to the Ontario Court of Appeal[72] and, ultimately, to the Supreme Court of Canada,[73] which remitted the case to the preliminary inquiry judge to reconsider the issue on the basis of the new legal test the Court had established.[74]

The Supreme Court of Canada held that the standard of review for a third-party *certiorari* application is broader than the standard applied to an application brought by the Crown or the defence (discussed in more detail in Chapter 10, Summary Conviction Appeals and Extraordinary Remedies). A third party can seek review on the basis of either jurisdictional error or error of law on the face of the record.

Had the issues in *Cunningham* or *NS* arisen at a superior court trial rather than a preliminary inquiry, the only available route of appeal would have been pursuant to section 40(1) of the *Supreme Court Act*. The Supreme Court has expressed its dissatisfaction about the lack of alternative statutory appeal rights that would allow appeals to be brought to the provincial and territorial courts of appeal rather than directly to the Supreme Court of Canada:

> This appeal, like *McClure* before it, comes directly to the Supreme Court of Canada without the benefit of its being considered by the Ontario Court of Appeal.
>
> . . .
>
> Sections 674 and 675 of the *Criminal Code* provide the procedures for appeals to the intermediate courts of appeal of the provinces, but are limited so as to exclude the ability of those courts to consider appeals from interlocutory orders.
>
> . . .
>
> The administration of justice would greatly benefit if the jurisdiction of the provincial appellate courts were broadened to permit parties the easier access to those courts. The Supreme Court of Canada would also have the fuller record, and valuable input, of the provincial courts of appeal if further appeals to this Court were taken.
>
> This anomaly in the *Criminal Code* is an unnecessary encumbrance and its serious defects have been repeatedly noted by this Court with the accompanying request for legislative amendment by Parliament. That request is made here once again, in the strongest possible terms.[75]

Parliament has not responded to the Court's request and has not enacted any interlocutory appeal rights for third parties who are affected by orders made in criminal cases.

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72 *R v NS*, 2010 ONCA 670.

73 *R v NS*, 2012 SCC 72.

74 The preliminary inquiry judge again ordered that the complainant remove her niqab, and the superior court dismissed her second application for *certiorari* review (*NS v HMQ*, 2013 ONSC 7019). The Crown subsequently withdrew the charges and the complainant never actually testified without her niqab.

75 *Brown*, *supra* note 67 at paras 105, 107, 109-10.

2 Procedural Steps in an Indictable Appeal

I. Introduction

The specific procedural steps that must be taken to initiate and pursue a criminal appeal vary considerably depending both on the jurisdiction where the appeal is being brought and on the nature of the appeal—for example, whether it is indictable or summary, and whether it is against conviction or sentence or both, or against some other order or disposition. This chapter addresses the procedural requirements for ordinary first-level indictable appeals to the court of appeal—that is, appeals where the defendant is appealing against a conviction or a conviction and sentence, or where the Crown is appealing against an acquittal or a stay of proceedings. The special rules governing appeals by either party against sentence alone are addressed separately in Chapter 8, Sentence Appeals. Appeals to the Supreme Court of Canada are addressed in Chapter 11.

Appeals by a defendant or by the Crown against a finding of "not criminally responsible on account of mental disorder" (NCR-MD) are governed by the same procedures that apply to ordinary indictable appeals. However, part XX.1 of the *Criminal Code*[1] contains special provisions that govern appeals from dispositions made following NCR-MD verdicts, and some provincial courts of appeal have created special procedural rules for these appeals. This highly specialized form of criminal appellate litigation is not addressed in this book.

Some provinces and territories have also established special rules for appeals by defendants who are not represented by counsel, which in some jurisdictions only apply when the appellant is in custody. Inmate appeals are addressed separately in Chapter 9, Inmate Appeals.

Procedures in summary conviction appeals are broadly similar to those in indictable appeals, but there are some significant differences. Summary conviction appeals are dealt with in Chapter 10, Summary Conviction Appeals and Extraordinary Remedies.

The *Criminal Code* delegates rule-making powers to the provincial and territorial courts,[2] and the courts of appeal in every province and territory have established their own criminal appeal rules. These rules contain many broad similarities, but there are also important variations. Some of the most significant differences will be addressed below, but it is beyond the scope of this book to exhaustively itemize them all.

Despite these local variations, indictable appeals in all jurisdictions follow broadly similar paths. An appeal is commenced by filing with the court an initiating document, styled as the "notice of appeal" or "notice of application for leave to appeal," within a time limit established by the local rules. Once an appeal has been launched by giving this notice, the local rules require certain steps to be taken—mainly by the appellant's counsel, but sometimes by counsel for the respondent or by court officials—to obtain

1 RSC 1985, c C-46.

2 Specifically, *Criminal Code*, s 482.

and assemble the record from the proceedings under appeal. Once this record becomes available, counsel for the appellant must prepare and file a factum summarizing the facts of the case and the arguments that are being advanced. Once the appellant's factum and the record have been filed with the appeal court, the appeal is sometimes said to be "perfected," although not all jurisdictions use this term.

II. The Notice of Appeal

Section 678(1) of the *Criminal Code* states:

> An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal *shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court*. [Emphasis added.]

The local criminal appeal rules address three main issues:

1. the form of notice that must be given;
2. whether this notice must be served on the opposing party and, if so, how this can be done; and
3. the time limits for launching an appeal.

A. Form of Notice

The criminal appeal rules in all of the provinces and territories require notice of appeal to be given in writing, and specify the format of the notice. These forms are all broadly similar, requiring the appellant to provide:

1. details about the case being appealed, including such matters as the charges, the level and geographic location of the trial court, the dates of the proceedings, the identity of the trial judge, the mode of trial (judge alone or jury), and the sentence imposed;
2. whether the appellant is appealing or seeking leave to appeal against conviction or sentence or both; and
3. the proposed grounds of appeal.

The notice must be signed by the appellant or by their counsel. Many jurisdictions provide a special simplified form for unrepresented defendants.[3]

Since the deadline for filing a notice of appeal is quite short (see below), appellate counsel will rarely be certain that all potential grounds of appeal have been identified at the time the notice of appeal is drafted. For this reason, it may be advisable to include a basket clause in the notice reserving the right to raise further and other

3 British Columbia, Alberta, New Brunswick, Nova Scotia, Newfoundland and Labrador, and the three territories have special forms for use by all unrepresented appellants, whereas Ontario and Prince Edward Island have special forms that may be used only by appellants who are both unrepresented and in custody.

grounds after receiving and reviewing the trial record. The rules in some jurisdictions also permit replacement or supplemental notices to be filed later if additional grounds have been identified, and some jurisdictions insist that this be done rather than allowing the appellant to rely on a basket clause in the original notice of appeal. For instance, the Court of Appeal of Manitoba will refuse to accept a factum with grounds that are not expressly set out in the notice of appeal, even if the notice contains a "such further and other grounds" basket clause. If the appellant wants to advance additional or amended grounds that were not identified when the original notice of appeal was filed, an amended notice must be filed.

An important technical point that is sometimes overlooked is that when a defendant who was convicted of an indictable offence following a trial by judge alone under part XIX of the *Criminal Code* appeals their conviction and obtains an order for a new trial, section 576(5)(a) of the *Criminal Code* entitles the defendant to have the case retried with a jury, but only if the defendant requested this in their notice of appeal. Some jurisdictions, including Alberta and Ontario, have a specific section of the notice of appeal that deals directly with the requirement to specify the mode of retrial (see, for example, Form 12 of the *Ontario Court of Appeal Criminal Appeal Rules*).[4]

B. Service

The criminal appeal rules in most jurisdictions[5] do not require a defendant's notice of appeal to be served on the respondent Crown before it is filed. Rather, the defendant is permitted to file their notice with the court, which forwards a copy to the Crown. Many jurisdictions expressly permit filing by registered mail and/or courier, and many also have special rules for unrepresented inmates that allow them to file their notice of appeal by giving it to correctional staff, who must send it to the court of appeal. Some jurisdictions have recently made the move to electronic filing.

However, many jurisdictions require notices of *Crown* appeals to be personally served on the defendant (the respondent in the appeal),[6] with most jurisdictions also requiring that this happen *before* the notice of appeal is filed with the court (and thus

4 *Court of Appeal for Ontario Criminal Appeal Rules*, online: <https://www.ontariocourts.ca/coa/criminal-appeal-rules> [Ontario *Criminal Appeal Rules*].

5 In Nova Scotia, an appellant is only exempted from having to serve their notice of appeal on the Crown if they are unrepresented and in custody. In Quebec, all unrepresented appellants are exempted, whether or not they are in custody (*Rules of the Court of Appeal of Quebec in Criminal Matters*, s 25 (in force 11 March 2024), online: <https://courdappelduquebec.ca/en/procedure-notices-and-forms/rules-in-criminal-matters-coming-into-force-march-11-2024/rules-in-criminal-matters> [Quebec *Rules in Criminal Matters*]).

6 Some jurisdictions (e.g., Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, and Newfoundland and Labrador) permit the Crown to serve represented defendant/respondents through their counsel. However, in Manitoba this is only permitted if counsel is "authorized to accept service," so the Crown ordinarily serves the respondent personally as well as serving their counsel.

within the time limit for commencing the appeal).[7] Section 678.1 of the *Criminal Code* permits the Crown to seek an order for substitutional service if the respondent "cannot be found after reasonable efforts have been made to serve" them with the notice of appeal.

C. Filing Deadlines

In most jurisdictions, an indictable appeal must be commenced *within 30 days* of the date of the defendant's *sentencing* (or, in the case of a Crown appeal from an acquittal, the date of the acquittal). However, some jurisdictions have different time requirements.[8] It is important to note that for defence appeals, in most jurisdictions the appeal clock only begins to run *on the date the defendant is sentenced*, even if the defendant is only appealing against their conviction. However, in Quebec the appeal clock starts running *on the date of the judgment* rather than the sentencing date.[9]

Regard must also be had to the rules for computing time in the applicable jurisdiction. In most jurisdictions, the appeal period is computed by counting forward 30 days (or 60 days, in the Northwest Territories and Nunavut), starting on the day *after* the date of sentencing or the defendant's acquittal, and *including* weekends and holidays. For example, in most provinces with 30-day appeal periods, a defendant who is sentenced on March 15 would have to file their notice of appeal by the end of the day on April 14, or on the next business day if this date falls on a weekend or holiday. However, the Nova Scotia criminal appeal rules calculate time differently, using a method that excludes both the date of filing and all the intervening weekends and holidays. Accordingly, even though the Nova Scotia rules require notice of appeal to be filed within 25 days of the date of an acquittal or the date of sentence, the exclusion of weekends and holidays from the 25-day calculation means that the appellant actually has *more* time to file their notice than in provinces with a 30-day limit that includes weekends and holidays.

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7 The rules in some jurisdictions (e.g., Quebec, New Brunswick, Prince Edward Island, and Newfoundland and Labrador) permit the Crown to file its notice of appeal first and only serve the defendant afterwards, within a specified time limit. In British Columbia, the Crown can serve the respondent with the notice or appeal either before or after it is filed with the court of appeal, so long as both the filing and the service occur within 30 days of the pronouncement of the order under appeal (*BC Court of Appeal Criminal Appeal Rules*, BC Reg 145/86, r 4(1) [BC *Criminal Appeal Rules*]). In Alberta, r 16.8(2) expressly requires the Crown to serve its notice of appeal on the defendant only after it has been filed (*Court of Appeal of Alberta Criminal Appeal Rules*, SI/2018-34).

8 Nova Scotia requires appeals to be commenced within 25 days of the date of sentence or acquittal, but also uses an idiosyncratic method of time calculation that counts only "clear business days" and thus excludes weekends and holidays. In the Northwest Territories and Nunavut, appellants are given 60 days from the date of sentence (or, in the case of Crown appeals from an acquittal, the date of the acquittal).

9 Quebec *Rules in Criminal Matters*, s 25.

In situations where *both* the defence and the Crown have a potential right of appeal,[10] the rules in most jurisdictions require *both* parties to exercise their right of appeal within same time period (usually 30 days). However, the rules in a few jurisdictions[11] give the Crown and defence additional time to file their own appeal if they are the respondent in an appeal commenced by the opposing party.

In all jurisdictions, section 678(2) of the *Criminal Code* authorizes the court of appeal or a judge of the court to grant an extension of time for filing a notice of appeal, either before or after the appeal period has expired. The case law recognizes that when deciding whether to grant an extension of time, courts should consider a number of factors, including whether the appellant formed a bona fide intention to appeal within the required time, whether the respondent would be prejudiced, whether the proposed appeal is arguable, and "overall, whether the extension of time is in the interests of justice."[12] When an extension of time is sought by the Crown because it failed to properly serve its notice of appeal on the respondent before the deadline, courts will also consider "whether reasonable diligence was exercised in attempting to locate the [respondent] for service"[13] or whether there is a "reasonable excuse for the delay."[14]

III. Perfecting an Appeal

Most indictable appeals are heard and decided on the basis of the record in the court below, which ordinarily consists of: (1) a transcription of the court proceedings below, prepared and certified as accurate by a court reporter; and (2) copies of all significant court documents and exhibits that are capable of being reproduced. There is considerable variation between jurisdictions when it comes to which documents must be filed and the exact form of the filing. For instance:

- In Ontario, the exhibits and other court documents are filed together in a volume that is called the "appeal book," but the transcripts are filed separately. British Columbia takes this same approach.[15]
- In Nova Scotia, the transcripts must also be included in the appeal book.
- In Alberta, the exhibits are not included in the appeal record, but the parties must file a separate volume called Extracts of Key Evidence that includes copies of only those exhibits they consider necessary for the appeal.

10 For example, if a defendant is acquitted on some counts and convicted on other counts, they are entitled to appeal the convictions while the Crown is entitled to appeal the acquittals.

11 New Brunswick, Prince Edward Island, and Nova Scotia.

12 *R v Watkins*, 1999 CanLII 1374 (ONCA).

13 *Ibid*.

14 *R v REM*, 2011 NSCA 8 (Chambers) at para 39; *R v Derbyshire*, 2015 NSCA 23 (Chambers) at para 11.

15 See BC *Criminal Appeal Rules*, r 8.

- In New Brunswick, the trial exhibits are not included in the appeal book; rather, the registrar normally asks the trial court to forward them to the court of appeal.

There are significant variations between jurisdictions when it comes to assigning responsibility for obtaining and preparing these materials. The examples given below should be seen as merely illustrative rather than exhaustive.

An appeal is often said to be "perfected" once most or all of the materials necessary for it to be heard have been served and filed, but different jurisdictions define "perfection" differently (and some do not use the term at all). For example, the Ontario rules specify that an appeal will be considered perfected once the transcripts, the appeal book, and the appellant's factum—the main documents the appellant must obtain or prepare—have all been served and filed.[16] Once these materials have been filed, a hearing date can be set, with the respondent's factum filing deadline calculated by counting backward from the scheduled hearing date.[17] However, the Newfoundland and Labrador rules specify that the respondent's factum is due 30 days after receipt of the appellant's factum, and the appeal is not said to be perfected until both parties' facta have been filed and one or the other side has filed an application to set a hearing date. The PEI rules define perfection similarly.

Other jurisdictions do not use the concept of perfection or make it a precondition for setting a hearing date. For example, in Nova Scotia the appellant (or the Crown, if the appellant is a self-represented prisoner) is required to bring a chambers motion for date and directions, to be heard within 80 days after the notice of appeal was filed. In Quebec, the clerk will issue a "declaration of readiness" and submit it to the parties once the file is complete and ready for hearing. The hearing date is then scheduled by the clerk, who unilaterally informs the parties without consulting them as to their availability. However, they are informed of the hearing date several months in advance.

British Columbia does not use the term "perfection." The hearing date for an appeal is set through the registry after the appellant's factum has been filed. The British Columbia *Criminal Appeal Rules* state that the respondent's factum is due within 30 days of receiving the appellant's factum "unless otherwise directed by the registrar." In practice, however, the deadline for the respondent's factum is usually set by the registry after the hearing date is set, and it is calculated by counting backward

16 Ontario *Criminal Appeal Rules*. The Saskatchewan rules do not use the term "perfection," but authorize a hearing date to be set after the filing of the appellant's factum—which in Saskatchewan includes the transcripts and appeal book materials as appendices.

17 Under r 46(6) of the Ontario *Criminal Appeal Rules*, the respondent's factum (or any other party to the appeal, such as an intervener) must be filed "no later than five weeks before the appeal hearing date," unless directed otherwise by a judge of the court. New Brunswick takes a similar approach, except that the "Respondent's Submission" is due on the 20th day of the month preceding the month of the scheduled hearing.

from the hearing date. There is a Practice Directive that provides that the respondent's factum is due 18 weeks after the appellant's factum is filed, which should be six weeks before the appeal is heard.[18]

In Yukon and the Northwest Territories, appeal hearing dates are constrained by the appellate courts' limited sitting schedule. The Yukon Court of Appeal is composed of judges of the British Columbia Court of Appeal and judges from Northwest Territories or Nunavut. A panel will typically consist of two British Columbia Court of Appeal judges and one trial judge from one of the other territories. Similarly, the Northwest Territories Court of Appeal consists of judges appointed from the appellate courts of Alberta and Saskatchewan, from the Supreme Courts of the Northwest Territories and Yukon, and from the Nunavut Court of Justice, although the current roster does not include any judges from Saskatchewan. The Yukon Court of Appeal sits in Whitehorse for two weeks each year if there are appeals scheduled. If an appellant wants an appeal heard more quickly, it may be heard by the Yukon Court of Appeal sitting in Vancouver. Many chambers applications are heard in Whitehorse by video with a justice of the British Columbia Court of Appeal, or by a justice of the Supreme Court of Yukon. The Northwest Territories Court of Appeal sits in Yellowknife four times a year.

A. Transcripts

The *Criminal Code* contemplates that most indictable appeals will be conducted on the basis of a transcript of trial proceedings (see s 682(2)). The various criminal appeal rules likewise assume that the trial transcript will ordinarily be obtained and filed before the appeal is argued, although some jurisdictions create exceptions (such as for appeals by unrepresented inmates). The rules in most jurisdictions make the appellant's counsel responsible for ordering and paying for the transcripts, although some jurisdictions assign this task to the registrar of the court of appeal.[19]

Many provincial and territorial criminal appeal rules specify the portions of the trial proceedings that must ordinarily be transcribed, although they allow the parties to agree between themselves to omit certain portions as unnecessary. For instance, rule 38(3) of the Ontario *Criminal Appeal Rules* provides that in a conviction appeal:

> (3) Unless relevant to a ground of appeal, the following trial proceedings may be omitted from the transcript:
>
> a. Any proceedings in respect of the selection of the jury;
>
> b. The opening addresses of counsel;
>
> c. Any evidence given on a motion or application brought before, during or after the trial;
>
> d. In the case of a trial by judge and jury, any evidence given in the absence of the jury; and
>
> e. Any submissions of counsel pertaining to paragraphs 38(3)(a)-(d).

18 Criminal Conviction/Acquittal Appeals Timeline (Criminal Practice Directive, 13 January 2014).

19 For example, in Saskatchewan.

Rule 38(9) then allows the parties to avoid complying with these requirements if they "make an agreement respecting the transcript required for the appeal," which must be put in writing and signed and included in the appeal book.

However, some jurisdictions take a different approach and simply leave it up to the parties to decide which portions of the proceedings should be transcribed. For example, the Newfoundland and Labrador *Court of Appeal Criminal Appeal Rules*[20] require the appellant to order and file transcripts only of "those portions of the record in the proceedings that he or she believes are necessary to enable the issues on appeal to be determined." If another party to the proceedings believes additional transcripts are necessary, that party must order them or seek the direction of the court. In Saskatchewan, the rules leave it up to the court of appeal registrar to decide if "based on the nature of the proceedings, a transcript is necessary," and if so to decide which portions of the proceedings should be transcribed. In Manitoba, the onus is on the appellant to order the transcripts, but the rules do not specify exactly which parts of the trial must be transcribed, which can lead to disagreements between counsel as to whether certain transcripts are necessary in a particular case (e.g., sentencing decision transcripts in a conviction appeal, or trial transcripts in a sentence appeal).

The rules in some jurisdictions[21] permit the parties to agree between them to dispense with the transcript entirely and have the appeal proceed on the basis of an agreed-upon statement of facts.

B. The Appeal Book

In some but not all jurisdictions, the rules require copies of the key court documents and trial exhibits to be bound together into an "appeal book."[22] As noted above, some jurisdictions also require the trial transcripts to be included in the appeal book, while in other jurisdictions they must be filed separately. Most jurisdictions assign responsibility for preparing the appeal book to counsel for the appellant. In Manitoba, however, the rules require the Crown to prepare the appeal book even when it is the respondent, and give the Crown access to the file for this purpose.[23]

Since in some jurisdictions the party preparing the appeal book must include copies of the trial exhibits, the appeal rules in these jurisdictions all provide mechanisms for arranging to have the court file from the trial court sent to the court of appeal. In Ontario, for example, counsel for the appellant must file a requisition with the lower court within 14 days of filing the notice of appeal (r 12). However, in some other

20 SI/2002-96.

21 For example, British Columbia, New Brunswick, Newfoundland and Labrador, Quebec, and Yukon.

22 In Saskatchewan, the rules require these documents to be filed as appendices to the appellant's factum rather than in a separate appeal book. In New Brunswick, the exhibits do not form part of the appeal book but are normally forwarded to the court of appeal at the request of the registrar.

23 *Manitoba Criminal Appeal Rules*, SI/92-106, r 18.

jurisdictions the process is initiated by the court of appeal registrar's office after a notice of appeal has been received. In Alberta, where the parties are only required to file copies of the exhibits they consider important for the appeal, the trial file remains in the trial court and the parties must obtain copies from that court's registry office.

In British Columbia, the appellant in a conviction appeal or an appeal from an acquittal is responsible for preparing an appeal book with trial exhibits, but the *Criminal Appeal Rules* do not have any express mechanism for arranging to have the trial court exhibits sent to the Court of Appeal. As a practical matter, the company the appellant uses to produce and prepare the transcript will also usually prepare and produce the appeal book and take responsibility for getting the trial court exhibits.

The BC *Criminal Appeal Rules* are also silent on who should prepare the appeal book in a sentence appeal. In practice, the Court of Appeal usually prepares the appeal book and obtains the trial exhibits in order to be able to do this.

C. The Factum and Book of Authorities

The appellant and respondent in an indictable appeal are ordinarily both expected to file facta, although this requirement is often waived in appeals involving an unrepresented defendant.[24] The criminal appeal rules in each jurisdiction contain detailed rules governing the appearance, length, and contents of facta, the specific details of which vary considerably from one jurisdiction to the next (see Chapter 4, Drafting the Factum).

Most of the criminal appeal rules also contain provisions that require the appellant's factum be filed within a short time of the trial transcript being received. For instance, rule 44(3) of the Ontario *Criminal Appeal Rules* purports to require appeals to be perfected—that is, for the proper number of copies of the transcript, appeal book, and appellant's factum as required by the rules all to be served and filed—within 90 days of receipt of the transcript, unless the registrar or a judge orders otherwise. However, this deadline is generally ignored as unrealistic in most cases. Once a transcript has been ordered, it is usually impossible to predict exactly how long it will take to prepare, and appeal counsel cannot hold themselves in a state of perpetual readiness waiting for it to arrive. Accordingly, in Ontario the 90-day deadline is roundly disregarded by the defence bar, the Crown offices, and the court itself, even though it remains part of the rules.

However, in Manitoba the rules give the appellant only 45 days to file a factum after transcripts are received by the court, and then gives the respondent 30 days to file its responding factum after the appellant has filed its factum. There is a provision

24 See e.g. *Manitoba Criminal Appeal Rules*, r 24, which provides that "[a] person who is unrepresented by legal counsel may file a written argument with the registrar at any time before the day fixed for the hearing but is entitled to a hearing without filing a written argument or a case book."

to allow for consent extension requests to the Registrar (see r 21(a)), but the timelines in the rules are strictly enforced by the Registrar, such that absent a consent extension, a motion needs to be brought to extend the filing deadlines in the rules.

Other jurisdictions take a different approach. For instance, in Nova Scotia filing dates are set at a chambers motion.

IV. Procedural Steps by the Respondent

As noted above, in some jurisdictions the respondent's factum is due a specified number of days after the appellant's factum has been filed.[25] In Ontario and New Brunswick, the filing deadline for the respondent's factum is determined by counting backward from the scheduled hearing date, which in those jurisdictions is only set after the appellant's materials have been filed. Other jurisdictions (e.g., the Northwest Territories and Nunavut) provide that the respondent's factum is due by a specified number of days "before the date of commencement of the sittings at which the appeal is to be heard," with that date being determined before the appellant has filed its materials.

25 Thirty days in British Columbia, Saskatchewan, Manitoba, Prince Edward Island, Newfoundland and Labrador, and Yukon. Nova Scotia gives the respondent only ten days but excludes weekends from this calculation. Alberta and Quebec give the respondent 60 days from the date of service of the appellant's factum.