U.S. Perspectives from Canada's Law Firm

Bet the company appeals north of the border

Understanding the appeal process in Canada

Litigation is unpredictable and even a strong case can result in a disappointing judgment. Fortunately, this is not always the end of the road. Appealing to a higher court for reconsideration is a valuable opportunity to overturn problematic findings, correct damaging errors and find vindication. However, the Canadian appeal process can be difficult to navigate, from overcoming procedural hurdles to putting together a persuasive legal argument. Keeping these considerations front of mind is essential to a successful appeal strategy in Canada.

Canadian appeals process – Key points

- Most commercial matters are heard by the provincial Superior Courts, which are trial courts of inherent jurisdiction. Appeals from the Superior Courts are brought in the provincial Courts of Appeal. In contrast to the United States, Canadian federal courts have much narrower jurisdiction encompassing only certain federal matters that are specifically assigned to it by statute.
- Legislation and court rules govern whether an appeal will be available "as of right" or "with leave". Leave requirements vary across Canadian jurisdictions.
- The time period to bring an appeal will be set out in the governing statute or court rules, but is typically 30 days from the date of the judgment.
- The standards of review are very similar to appeals in the United States.

Jurisdiction and the Canadian court system

The first step to launching a successful appeal in Canada is to ensure that you are in the right place. Although this may seem obvious, appeal courts tend to focus on whether or not they have jurisdiction and even the most meritorious appeal will fail if brought before the wrong court.

In Canada, the vast majority of cases fall within the jurisdiction of the provincial court system. Each province has a Superior Court, which is a trial court of inherent jurisdiction. Appeals from the Superior Court are brought in the provincial Court of Appeal. In Ontario, there is also a branch of the Superior Court called the Divisional Court which has limited appellate jurisdiction to hear appeals arising from interlocutory orders. Differentiating between final and interlocutory orders is not always clear, so it may be prudent to launch simultaneous appeals in both courts to preserve appeal rights in case a jurisdictional issue arises.

In Canada, like the United States, there is a separate federal court system. However, the Canadian federal courts have much narrower jurisdiction encompassing only certain federal matters that are specifically assigned to it by statute. This includes cases involving the Government of Canada, interprovincial or intergovernmental disputes, and private claims between parties in specific federally-regulated areas, as well as tax, immigration, intellectual property, citizenship and certain competition matters. Most commercial matters are heard by the provincial Superior Courts, even those involving federal statutes such as the Bankruptcy Act or *Canadian Business Corporations Act*. In contrast to the United States' district and circuit court system, the Canadian federal court system has one Federal Court and one Tax Court that hears cases in all the provinces. Appeals from these courts lie to the Federal Court of Appeal.

At the apex of both the federal and provincial court systems is the Supreme Court of Canada, which is the final appeal court in Canada. It is comparable to the Supreme Court of the United States, although the Supreme Court of Canada has broader jurisdiction that encompasses all areas of Canadian law and is not limited to federal matters. Unlike in the United States, there are no areas of law for which the provincial appeal courts are the official courts of last resort. In practice, however, the provincial appellate courts are the end of the road in most cases due to the Supreme Court of Canada's stringent leave requirement, which is outlined in greater detail below.

Leave to appeal: the gatekeeper requirement

Legislation and court rules govern whether an appeal will be available "as of right" or "with leave". "As of right" means there is an automatic right to appeal that is not subject to the court's discretion. If there is a leave requirement, however, the appellate court's permission needs to be sought and obtained before an appeal can be brought.

Leave requirements vary across Canadian jurisdictions. Some have very broad rights of appeal that apply to most trial court decisions, including interlocutory orders made throughout the course of a proceeding, such as British Columbia, Alberta, and the Federal Court of Appeal. This is in contrast to the United States federal courts, where appeals from interlocutory orders are relatively rare. Other jurisdictions, including Ontario and Québec, require leave to appeal interlocutory orders. Interlocutory appeals can be useful, but they can also have a significant impact on the timing and efficiency of the proceeding.

On an application for leave to appeal, the party must meet a certain threshold of merit or importance to show that the appeal should be heard. The applicable threshold is geared towards the type of order being appealed. For example, in the Ontario Divisional Court, leave to appeal from an interlocutory order that does not finally determine the matter will only be granted if there is a conflicting decision on the matter that should be resolved, or there is a good reason to doubt the correctness of the order and it involves a matter of importance.

As mentioned above, the Supreme Court of Canada has a very stringent leave requirement that applies to all civil cases, which is commensurate with the Court's important role as the highest court in Canada. A party seeking leave to appeal must raise a question of national and public importance that warrants a decision from the Court. The Court does not provide reasons on leave applications, so it is never entirely clear why leave is granted or denied. However, we know that the Court grants leave in very few cases. In 2019, the Court granted 36 out of 517 applications for leave in both civil and criminal matters, or just 7 per cent and that percentage is declining. Most successful leave applications to the Supreme Court of Canada involve constitutional issues, including cases under the *Canadian Charter of Rights and Freedoms*. It can be difficult to obtain leave in purely commercial or procedural matters unless there is a significant controversy in lower courts or the importance of the question transcends the interests of the parties. The Supreme Court of Canada's leave requirement is functionally equivalent to the petition for certiorari process by which the Supreme Court of the United States decides which cases to hear.

Difficulty levels on appeal: law, fact, and mixed fact and law

Broadly speaking, there are three types of issues that can be raised on appeal: (i) questions of law, (ii) questions of fact, and (iii) questions of mixed fact and law. Identifying the nature of the error is key to understanding the likelihood of success on appeal because of the varying degrees of scrutiny, or standards of review, that the appellate court will apply to the issue. Very similar standards apply to appeals in the United States.

On a question of law, the appellate court will review the decision for correctness, and is free to replace the trial court's opinion with its own if it disagrees. All it takes is to convince the appellate court that the trial judge was incorrect. If the trial judge made an error on a legal issue, such as the legal test to be applied or the interpretation of a contract or statute, an appeal is likely to be worthwhile.

On the other hand, factual findings are much more difficult to overturn on appeal. An appellate court will not disturb a finding of fact unless the trial judge made a "palpable and overriding error". This heightened standard is meant to reflect the trial judge's relative advantage in assessing the evidence, and to discourage unnecessary appeals. Questions of mixed fact and law, which involve applying a legal standard to a set of facts (such as a finding of negligence), are also reviewed for palpable and overriding error. For these types of issues, an appellant must point to an error that is both "palpable", or plainly seen, and "overriding", or sufficiently material to the factual determination. Because of the deferential standard of review, arguments over the facts are best made in trial courts and appeals of questions of fact should be carefully considered.

How much time to decide?

As soon as the decision is issued, it is time to start considering a potential appeal. The time period to bring an appeal will be set out in the governing statute or court rules, but is typically 30 days from the date of the judgment. By the end of the 30 days, counsel will have to prepare and file a notice of appeal detailing the errors of the judgment, so it is best not to leave a decision on whether to appeal to the last minute.

The importance of oral advocacy

Another unique aspect of appeals in Canada as compared to the United States is the relative emphasis on oral advocacy. In both the United States and Canada, written submissions are of utmost importance in making your case to the appellate court. However, in Canada, while the written argument still does much of the heavy lifting, counsel are given a greater opportunity to make oral arguments at the hearing. It is not uncommon for a party to receive a half day in court to make oral submissions on appeal and litigants before the Supreme Court of Canada are usually granted one hour per side. In contrast, parties before the Supreme Court of the United States are limited to just 30 minutes, and argument at other appellate courts is typically even briefer.

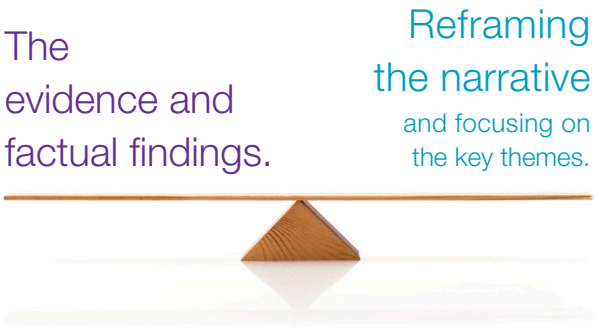
In the meantime… enforcement and stays of execution

As a starting assumption, a successful party is entitled to the benefit of a court judgment in their favour, and may enforce the order according to its terms. However, there are a variety of reasons that a party seeking to appeal an adverse order may wish to avoid enforcement while the appeal process plays out.

Depending on the applicable legislation or court rules, there may be an automatic stay (or suspension) of the order when an appellant brings an appeal or files an application for leave to appeal. If not, the appellant has the option to bring a motion for a stay of execution to persuade the court to suspend the order pending appeal. On a motion to stay, the court will consider whether the appeal raises a serious issue to be determined, whether there would be irreparable harm to the appellant if the order were enforced and whether the balance of convenience favours the stay. A stay is a discretionary remedy that courts will only issue if the circumstances require it. Even a highly meritorious appeal will not warrant a stay unless there would be some harm to the appellant that cannot be adequately compensated by damages.

Conclusion

When faced with the prospect of appealing a material judgment in Canada, there are numerous procedural and strategic matters that need to be considered to minimize the fallout of an already damaging judgment and potentially win big on appeal. While the evidence and factual findings made at trial are an important determinant of success, an appeal offers an opportunity to reframe the narrative and focus in on the key themes and arguments supporting the case. An experienced appellate team will bring their specialized knowledge and fresh insight to help navigate the appellate process and put forward the strongest possible case.



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