APPEALS IN THE PERSONAL INJURY CONTEXT

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OVERVIEW

The practice of personal injury law, although part of civil litigation in general, has become a very specialized area of practice. Defendants are represented almost exclusively by lawyers whose practices are restricted to the defence of personal injury lawsuits. Increasingly, plaintiff lawyers dedicate their practices exclusively to plaintiff personal injury litigation. The specialization of the bar and the practice of personal injury law extends equally to appeals which might flow from a personal injury case. While the appeal process is generic in a sense, applying to all forms of civil litigation, there are specific issues more common to appeals that arise in the personal injury context. To that end, this paper intends to:

1. Review appeals in tort actions, both with and without juries;

2. Review appeals that arise within the context of claims for statutory accident benefits;

3. Briefly address the issue of appeals from costs awards, as costs are sometimes the tail that wags the dog; and

4. In passing, mention appeal issues unique to the personal injury landscape.

THE STARTING POINT – *COURTS OF JUSTICE ACT*

Part VII of the *Courts of Justice Act*[1] ("*CJA*") deals with court proceedings. Sections 132, 133, and 134 specifically address appeals.

Section 132 is not controversial; it provides that a judge shall not sit as a member of a court hearing an appeal from his or her own decision.

Section 134 broadly describes the various powers that may be exercised on appeal:

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1 *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended

- the ability to make any Order or decision that ought to or could have been made by the court or tribunal appealed from;
- ordering a new trial;
- the quashing of the appeal;
- draw inferences of fact from the evidence;
- receive further evidence on appeal;
- direct a reference or the trial of an issue.

It is also important to remember that the jurisdiction of appeal courts is established in the *CJA*. With respect to the jurisdiction of the Court of Appeal, Section 6 provides, in part, as follows:

> **6.**(1) An appeal lies to the Court of Appeal from,
>
> (a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;
>
> (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;
>
> (c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17).

Part I of the *CJA* deals with the Court of Appeal in general and should be consulted, as may be necessary.

Part II of the *CJA* deals with the Court of Ontario, including Divisional Court. Section 19(1) maps out the jurisdiction of the Divisional Court, providing that an appeal lies to the Divisional Court from,

> (a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);
>
> (b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;
>
> (c) a final order of a master or case management master. 2006, c. 21, Sched. A, s. 3.

For appeals filed on or after October 1, 2007, the jurisdiction of the Divisional Court referred to in Section 19(1)(a) of the *CJA* relates to a final Order of not more than $50,000.00, exclusive of costs.

We all know that the Court of Appeal is located in Toronto, and that any case to be argued at the Court of Appeal will be argued in Toronto.[2]

Section 20 of the *CJA* provides that, for appeals to the Divisional Court, such an appeal shall be heard in the region where the decision appealed from took place (unless the parties agree otherwise or the Chief Justice of the Superior Court orders otherwise).

RULES OF CIVIL PROCEDURE

Appeals involve a tango between the *CJA* and the *Rules of Civil Procedure* where each takes a turn in leading during the appeal dance. The *CJA* tells you where you should appeal - the *Rules*

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2 Although I am mindful that, with the advent of technology, the Court of Appeal has grown more sophisticated and such things as leave to appeal motions can be arranged to be argued at a local courthouse, heard by a single judge of the Court of Appeal in Toronto, with parties hooked in via a video link.

gives procedural direction. Rule 61 deals with the procedure on appeals to the Court of Appeal or the Divisional Court, and is based on an appeal from a final Order.

Rule 62 deals with appeals from an interlocutory Order. Certainly, in personal injury actions, interlocutory Orders arise and do get appealed. It is imperative to understand the separate appeal routes that apply to final Orders versus interlocutory Orders.

It is beyond the scope of this paper to deal with the issue of interlocutory versus final Orders, as that topic merits an entire paper on its own, other than to say that it is important that you get that analysis right.

Interlocutory appeals, commonly seen in the personal injury context, would include:

- decisions on motion relating to amendment of pleadings;
- decisions on motion relating to production of documents;
- disputes relating to the scope of Discovery;
- medical examinations;
- inspection and/or preservation of property;
- undertakings and refusals; and
- production from third parties, particularly the Crown and police entities.

In our jurisdiction, where we no longer have a sitting Master, those motions are all heard at first instance by a judge of the Superior Court of Justice. As stated earlier, when appealing an interlocutory Order of a judge of the Superior Court of Justice, leave is required as provided by the *Rules of Civil Procedure*.

The appeal route is difficult and confusing enough that most civil practice compendiums include a flowchart. I have reproduced the procedural appeal summary from my own 2013 Carswell Ontario Civil Practice.

SUMMARY OF PROCEDURE ON AN APPEAL TO AN APPELLATE COURT

(Appeals to the Court of Appeal for Ontario or to the Divisional Court)

Who Does It	What To Do	When
Appellant	**Stay pending appeal.** The general rule is that there is an automatic stay of any order for the payment of money, except a support order, upon delivery of the notice of appeal: rule 63.01. There is no automatic stay for orders granting non-monetary relief. Moreover, where leave to appeal is required there will be no immediate automatic stay because a notice of appeal cannot be delivered until leave to appeal is granted. Therefore, if desired, and no automatic stay is available, move for a stay under rule 63.02.	Can be as early as the time of the making of the order to be appealed: see rule 63.02.
Appellant	**Seek leave to appeal, if required** (a) by motion to a judge: rule 62.02. (b) by motion to the appellate court: rule 61.03. Motions for leave to appeal to the Court of Appeal shall be made in writing: rule 61.03.1.	Serve notice of motion within 7 days after date of the order sought to be appealed: rule 62.02, and see also rules 37.07(6) and 37.08(1). Serve notice of motion within 15 days after the making of the order or decision sought to be appealed, unless a statute provides otherwise, and file with proof of service within 5 days after service.

Appellant	**Serve notice of appeal** (Form 61A) and appellant's certificate of evidence (Form 61C): rule 61.04.	Within 30 days after the making of the order appealed from unless a statute or the Rules provide otherwise (rule 61.04(1)) or within 7 days of the granting of leave to appeal where leave required: rules 61.03(6) and 62.02(8). In a divorce action a notice of appeal must be filed within 30 days of the date of judgment: *Divorce Act* (Canada), s. 21.
Appellant	**File notice of appeal** with proof of service: rule 61.04(4).	Within 10 days after it is served: rule 61.04(4)
Respondent	**Serve respondent's certificate of evidence (Form 61D):** rule 61.05(2) or Make an agreement as to documents and evidence: rule 61.05(4).	Within 15 days after service of appellant's certificate. Within 30 days after service of notice of appeal.
Respondent	**Serve notice of cross-appeal** (Form 61E), if cross-appealing, and then file notice of cross-appeal with proof of service: rule 61.07.	Serve within 15 days after service of notice of appeal and file within 10 days after service.
Respondent	**Move for security for costs of appeal** if appropriate: rule 61.06.	On at least 7 days' notice to the appellant: rules 61.16(1) and 37.07(6).
Appellant	**File proof of ordering transcript of evidence:** rule 61.05(5).	Within 30 days after filing notice of appeal.
Court reporter	**Give written notice to parties and registrar when evidence transcribed**: rule 61.05(7)	Forthwith.

Appellant	**Perfect the appeal** by (a) if so ordered causing the record and original exhibits to be forwarded to the registrar, (b) serving and filing with proof of service the appeal book, compendium, the exhibit book, the written, and if available, electronic copy of the transcript of evidence and the appellant's factum (an electronic copy of the factum must be filed but not served), (c) filing with the registrar a certificate of perfection: rule 61.09.	If no transcript is required, within 30 days of filing notice of appeal; if a transcript is required, within 60 days after receiving notice that the evidence has been transcribed: rule 61.09(1).
Registrar	**Notice of listing for hearing** (Form 61G) is to be mailed after the appeal has been placed on the list of cases to be heard: rule 61.09(5)	When appeal perfected.
Respondent	**Move to dismiss for delay** if the appellant does not file proof that the necessary transcripts have been ordered or fails to perfect the appeal: rule 61.13(1).	On 10 days' notice to the appellant.
Respondent	**Respondent's factum** is to be served and filed with proof of service and is to include a factum as appellant by cross-appeal if there is a cross-appeal: rule 61.12.	Within 60 days after service of the appeal book, transcript of evidence and appellant's factum.
Appellant	**Deliver factum as respondent to the cross-appeal, if there is a cross-appeal:** rule 61.12(4)(b).	Within 10 days after service of the respondent's factum: rule 61.12(4)(b).

SUMMARY OF PROCEDURE ON AN APPEAL FROM AN INTERLOCUTORY ORDER

(The following is the procedure on an appeal to a judge of the Superior Court of Justice provided in rule 62.01. As to what appeals are covered by that rule, see rule 62.01(1).)

Who Does It	What To Do	When
Appellant	**Serve notice of appeal** (Form 62A): rule 62.01(2).	Within 7 days after the making of the order or certificate appealed from: rule 62.01(2).
Appellant	**File notice of appeal** in court office at the place where the appeal is to be heard: rule 62.01(5). Re place of hearing, see rule 62.01(6).	Not later than 7 days before the hearing date: rule 62.01(5).
Appellant	**Serve appeal record and factum** and file it, with proof of service, in the court office at the place where the appeal is to be heard: rule 62.01(7).	Not later than 7 days before the hearing date: rule 62.01(7).
Respondent	**Serve any further material and factum** and file, with proof of service, in the court office at the place where the appeal is to be heard: rule 62.01(8).	Serve and file the factum and any further materials at least 4 days before the hearing: Rule 62.01(8) and (8.1).

A BRIEF WORD ABOUT COSTS

Where the only issue on the appeal relates to the costs that were awarded that were in the discretion of the court, be mindful that s.133 of the *CJA* mandates that leave to appeal is required. There is no appeal, as a right, when the only issue is costs.

Section 133 provides that leave to appeal is required from any Order that was made with the consent of the parties, or where the only issue on the appeal relates to costs that were in the discretion of the court.

The case law dealing with s.133(b) of the *CJA* confirms that leave to appeal a costs Order is granted sparingly and only where there are strong grounds that the lower court erred with its award of costs.[3]

TORT ACTION – NON-JURY

Section 108 of the *Courts of Justice Act* singles out 12 specific types of cases which must be tried without a jury. Several of the non-jury cases apply directly to personal injury litigation, being:

- relief against a municipality;
- declaratory relief (such as may arise in an LTD or accident benefit context); and/or
- other equitable relief (which again might arise in a first-party benefit dispute).

A trial determined by a judge sitting without a jury yields a written decision which can then be the subject matter of an appeal. The determination of facts and the assessment of the law can be transparently reviewed by an appeal court. This does have an impact on the capacity and willingness of an appeal court to grant an appeal.

In contrast, jury trials yield answers to the questions that were put to the jury, but no transparent written decision outlining how those questions came to be answered. There are clear implications resulting in a distinction between how cases are viewed by an appeal court, when it comes to the appeals from a jury verdict, as opposed to a judicial decision.

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3 *McNaughton Automotive Ltd. v. Co-Operators General Insurance Company* 2008 ONCA 597; *Axelrod v. Beth Jacob of Kitchener*, [1943] OWN 80

ACCIDENT BENEFIT APPEALS

Accident benefits are claimed and received in the law of contract, albeit a contract created by statute and regulation governing the mandatory auto insurance system that applies to all Ontario motorists.

As a first step, a claimant must file an application for mediation with the Financial Services Commission of Ontario ("FSCO"). If the mediation fails to result in a resolution of the dispute, at the claimant's sole option, the dispute may be advanced by way of arbitration at FSCO, or by way of litigation in the Superior Court of Justice. Disputes which proceed through FSCO create different implications on appeal.

Appeals in the Arbitration Context

FSCO has its own *Dispute Resolution Practice Code ("DRPC")*, somewhat like its own version of a combined *Courts of Justice Act* and *Rules of Civil Procedure*. Section 50 of the *DRPC* provides for any party to an arbitration to appeal the Order of an arbitrator to the Director of Arbitrations (or as often the case to the Director's Delegate). Appeals to the Director must be in the prescribed form as outlined in the *DRPC*. Like civil appeals, the Notice of Appeal must be filed within 30 days of the date of the arbitration Order.[4] Attached at **Tab B** is the Form I - Notice of Appeal that applies to appeals from a FSCO arbitration, along with the Guide published by FSCO that accompanies the Notice of Appeal form.

Following the Order of the Director or Director's Delegate, the appropriate next stage in the appeal process is not actually an appeal, but rather an Application for Judicial Review of the

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4 See Section 52 of the *Dispute Resolution Practice Code*.

decision of the Director or Director's Delegate made to the Divisional Court. From the Divisional Court, the matter would then proceed to the Ontario Court of Appeal.[5]

STANDARD OF REVIEW

There are competing standards of review applied to appeals, depending on the nature of the issue in the appeal and the nature of the decision from which the appeal is made. This has long remained one of the thornier aspects of doing appellate work.

Judge Alone Trial

In a judge alone case, the seminal Supreme Court of Canada decision in *Housen v. Nikolaisen*[6] continues to apply. On questions of law alone, the standard is correctness, ie. was the judge below right or was the judge below wrong with the legal interpretation?

On findings of fact by a trial judge, but also including inferences drawn from those facts, and even questions of mixed fact and law, the standard of review is more onerous, requiring the appellant to demonstrate a palpable and overriding error. Simply put, the judge is entitled to deference, indeed a high degree of deference, as the appeal court is not in as good a position as the initial trier of fact to assess and determine those factual matters.

The kinds of errors that constitute palpable and overriding errors include the following:

- Failure to consider relevant evidence.
- The misapprehension of relevant evidence.
- The consideration of evidence that is irrelevant.

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5 See the seminal decision in *G.P. v. Pilot Insurance Company,* 2008 CanLII, 2602, as an example of this appeal route, stemming from an appeal of a FSCO arbitral decision

6 *Housen v. Nikolaisen,* supra

- A finding that has no basis on the evidence.

- A finding based on an inference that is really more speculative than legitimate inference.[7]

Jury Trial

Appeals in the jury context often tend to focus on the judge's charge to the jury, which is available in a transcript form reduced to writing. Of course, a judge's charge does not exist in a non-jury case; rather, one is left with the sufficiency of the judge's own reasons.

A jury verdict will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it.[8]

Accordingly, the test of reasonableness in the civil context asks whether the jury's verdict is so unwarranted by the evidence as to justify the conclusion of the appeal court that the jury did not appreciate the evidence and acted in violation of its duty. In cases where there is some evidence to support the jury's verdict, high deference will be accorded to the jury's verdict, such that it will not be set aside, even if the contrary conclusion was also available on the evidence.

On the issue of non-pecuniary general damages, the Court of Appeal has given some guidance in terms of a general rule of thumb, if the non-pecuniary general damage award is too high or too low by 50% or more, the court may well conclude that the damages are inordinately high or low and then vary those damages.[9]

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7 *Peart v. Peel Regional Police Services Board* (2006), 217 OAC 269 (CA) 158

8 *McCannell v. McLean*, 1937 CanLII 1 SCC [1937] SCR 341 (which has been affirmed over and over again by multiple courts ever after)

9 *Howes v. Crosby* (1984), 45 O.R. (2nd) 449; also see *Fidler v. Chiavetti* (2010), 317 D.L.R. (4th) 385 (ONCA)

Judicial Review of a FSCO Decision

The standard of review changes completely when dealing with a judicial review of a decision from the Director or the Director's Delegate. The 2008 Supreme Court of Canada case *Dunsmuir v. New Brunswick*[10] clarified this area of law by establishing:

(a) On questions of law, the standard of review is correctness;

(b) On questions of mixed law and fact, the standard of review is reasonableness. Note that "reasonableness" is a deferential standard which acknowledges that FSCO, like other administrative tribunals from which judicial review may be sought, is a specialized body, possessing specialized knowledge and experience.

A judicial review application is not the same thing as an appeal, because the role of the court is simply to look at the decision of the tribunal, not to conduct a trial or inquiry into the truth of the facts that were presented in the original arbitral decision.

STANDARD OF REVIEW CHART

Issue	Standard of review
Question of law	Correctness
Question of fact	Palpable and overriding error
Mixed fact and law	Correctness ↔ palpable and overriding, depending on extent to which chief error is factual or legal
Judicial review from FSCO	Legal analysis - correctness
	Mixed fact and law - reasonableness

10 *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190

PRACTICE POINTS – JURY TRIAL APPEALS

1. While the failure of counsel to object to a judge's charge to the jury is not always fatal in a civil jury charge, "an appellate court is entitled to give it considerable weight".[11] In the absence of an objection at trial, in most instances, an alleged misdirection or non-direction will not result in a new trial in a civil case, unless the appellant can show that a substantial wrong or miscarriage of justice has occurred.[12] The absence of objection suggests that an issue was not seen as central to the jury's deliberations.

2. In addition to complaints about the charge to the jury, appeals in jury cases can also sometimes relate to the jury questions themselves. Typically, before closing submissions are made, the parties meet with the trial judge to formulate the questions to be put to the jury. (Preferably, in my view, the issue of jury questions is dealt with at the outset of the trial rather than as an afterthought, but that is an issue for another paper.)

3. In order to appeal a jury's award of damages, in the absence of some error in the charge to the jury, "the jury's assessment must be so inordinately high or low as to constitute a wholly erroneous assessment". Jury awards attract significant deference. It is very common to see the appeal court indicate that, while an award of general damages was either too high or too low, and outside of the generally expected range, it was not so plainly unreasonable or unjust so as to satisfy the court that no jury reviewing the evidence as a whole, and acting judicially, could have reached that decision. Unless the jury award is truly exceptional, being clearly too low or clearly too high, be cautious advancing an appeal from a jury award that simply complains about the quantum of the damages awarded. Only where the jury award is exceptional, will it warrant appellant intervention.

4. Other appeals that may occur in the jury context include:

   (a) whether or not the jury should have been instructed about the cap on non-pecuniary general damages;

   (b) whether the jury was inflamed by prejudicial evidence that was tendered; and

   (c) should the jury have been struck by the trial judge?[13]

5. Note that a factual finding grounded on credibility is a particularly difficult issue to disturb on appeal.[14]

RECENT PERSONAL INJURY APPEAL DECISIONS – ILLUSTRATING THE POINTS

Martin v. Fleming[15]

On October 29, 2010, the Ontario Court of Appeal heard and released orally its decision in *Martin v. Fleming*, which finally answered, after 16 years of debate, the question of whether a plaintiff is subject to one deductible when involved in multiple accidents, or individual deductibles for each accident.

This was a purely legal question and indeed came to the Court of Appeal following a Rule 21 motion for the determination of a point of law. The motion judge's decision was upheld, and the appeal was dismissed with costs fixed in the total amount of $15,000.00, allocated equally as between three responding parties.

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11 *Marshall v. Watson Wyatt & Company*, 2002 CanLII, 13354 ONCA

12 *Vokes Estate v. Palmer*, 2012 ONCA 510, at para. 7 and *Rizzi v. Mavros*, [2008] OJ No. 935, at para. 38

13 See *Gutbir v. University Health Network*, 2012 ONCA 66 and *McCannell v. McLean*, 1937 CanLII 1 (SCC)

14 See *Housen v. Nikolaisen*, 2002 SCC 33 and *Waxman* v. Waxman, (2004) 186 OAC 2001

15 *Martin v. Fleming* (2012) ONCA 750

Zurek v. Ferris[16]

Heard and released on October 3, 2012 was the decision in *Zurek v. Ferris*, which was the appeal of a jury's assessment of damages, the defendant having admitted liability at trial for the injuries.

The appellant sought to set aside the jury's verdict and sought an order for a new trial. The issue on appeal was whether the trial judge's charge to the jury deprived Ms. Zurek of a fair trial. This argument needed to fit within the language of s. 134(6) of the *Courts of Justice Act*.

While acknowledging that the charge to the jury was "unorthodox", and that some of the trial judges' comments were unnecessary and not germane to the issues before the jury, the Court of Appeal was still satisfied that the charge, when read as a whole, was fair.

The Court of Appeal specifically noted the fact that few objections to the charge were raised at trial, which it said "supports our conclusion that the charge as a whole was fair".

The appeal was dismissed with costs in the amount of $15,000.00.

Parris v. Laidley[17]

The case was heard and the decision also released on October 31, 2012. The court was asked to consider whether the motions judge below appropriately granted summary judgment on the issue of implied consent in a medical negligence case. Essential to the motion judge's decision was that the defendant had not rebutted the presumption of consent. He drew an adverse inference because he failed to make any real effort to make his son's evidence available.

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16 *Zurek v. Ferris* (2012) ONCA 742

17 *Parris v. Laidley* (2012) ONCA 755, CanLII

The Court of Appeal indicated that drawing adverse inferences from failure to produce evidence is discretionary. The inference should not be drawn unless it is warranted in all the circumstances. A case-specific inquiry is required. The motion's judge failed to take into account all relevant evidence in determining that the conditions precedent to drawing the adverse inference had been met. Specifically, he made no findings concerning the credibility of the defendant's evidence that supported his position that his son had no consent, express or implied, to drive the automobile.

The appellant was successful, with costs fixed in the amount of $6,500.00.

Edwardson v. Hamilton (St. Joseph's Hospital)[18]

This appeal was argued September 28, 2012 and the decision released October 26, 2012. The defendant doctor in a medical negligence case appealed an award of damages in excess of $400,000.00. The plaintiff had suffered a stroke following a cervical rhizotomy performed by an anaesthetist.

The appeal proceeded on four grounds - two relating to liability and two relating to damages. The liability arguments dealt with informed consent and the conclusion by the trial judge that the plaintiff would not have consented to the rhizotomy if she had been properly informed of the potential benefits and risks. The liability arguments were rejected by the Court of Appeal.

The damage appeal arguments contended that the assessment of general damages was too high and that the assessment of future economic losses was speculative. Those submissions were also rejected. The appeal was dismissed with costs fixed in the amount of $20,000.00.

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18 *Edwardson v. Hamilton (St. Joseph's Hospital)* (2012) ONCA 719

Duchesne v. St. Denis[19]

This appeal was argued September 4, 2012 and the decision was released October 17, 2012. The issue on appeal was the *Limitations Act*, 2002, which came into force on January 1, 2004. The overall question was whether the minor appellant's claim was discovered or discoverable by a reasonable person, within his abilities and in his circumstances, prior to January 1, 2004.

As an aside, this is a helpful review of the *Limitations Act* and the principles to be considered when looking at discoverability. The appellant was successful on this particular appeal, being granted leave to serve and file a fresh Statement of Claim adding the Third Party as a defendant. Costs to the plaintiff were awarded throughout in the amount of $15,000.00, relative to the motions below, and in excess of $56,000.00 with respect to the Divisional Court and Court of Appeal appeals.

Pastore v. Aviva Canada Inc.[20]

This case is an important one to the entire personal injury and insurance law bar, and to every Ontarian; it applies to anyone injured in an automobile accident, whether as a pedestrian, passenger, or driver. The case was argued January 19, 2012 and the unanimous written decision was released September 27, 2012.

Ontario motorists carry automobile insurance under a mandatory private auto insurance regime, in which certain no-fault benefits are provided under a standard government pre-approved auto policy. Automobile accident victims are entitled to certain no-fault benefits, also known as "statutory accident benefits," regardless of fault. Individuals with the most serious of injuries are eligible to receive an enhanced level of accident benefits. The term used in the *Statutory Accident Benefits Schedule* ("SABS") to distinguish those who are eligible for the enhanced

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19 *Duchesne v. St. Denis* (2012) ONCA 699

benefits, from other accident victims, is "catastrophic impairment". In *Pastore*, Feldman J.A. clarified one of the several tests that define who suffers a "catastrophic impairment".

While there are several different ways that one can be found to suffer from a catastrophic impairment, *Pastore* deals with the test applicable for "mental or behavioural disorders". Ms. Pastore was a pedestrian who was hit by a car while crossing the street. An assessment of her accident-related mental or behavioural disorders was carried out by reference to the American Medical Association's *Guides to the Evaluation of Permanent Impairment, 4th Edition*, as mandated by the SABS. The *Guides* direct the assessment of functioning in four categories of functional limitation:

1. Activities of daily living;

2. Social functioning;

3. Concentration, persistence, and pace; and

4. Deterioration or decompensation in work or work-like settings.

Ms. Pastore's initial application for a catastrophic impairment designation was denied by Aviva Canada. The dispute was heard before an arbitrator of the Financial Services Commission of Ontario. Her application was accepted by the arbitrator.

One of the issues raised by Aviva Canada at arbitration was whether the test required an overall assessment of "marked impairment" or "extreme impairment" in all four of the categories described above, or whether a marked/extreme impairment in a single category alone was sufficient. The arbitrator was satisfied that one marked impairment alone was enough to comply with the *Guides'* approach to catastrophic impairment.

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20 *Pastore v. Aviva Canada Inc.* (2012) ONCA 642

On appeal, the Court of Appeal addressed the appropriate standard of review. Following the decision of the Supreme Court in *Dunsmuir v. New Brunswick*, the court noted that the Financial Services Commission of Ontario, as a specialised tribunal, must be accorded deference. As such, the correct standard of review was the reasonableness standard. The Court of Appeal determined that it was a reasonable initial decision to find that a single category of impairment that was either marked or extreme was sufficient to meet the test for catastrophic impairment. Ms. Pastore was, consequently, found to be catastrophically impaired.

The Court of Appeal has affirmed the specialized knowledge of arbitrators at the Financial Services Commission of Ontario, the need for a broad, liberal, and inclusive approach when determining access to the SABS, and clarified the previous test for assessing those suffering from mental and behavioural disorders. This decision lends clarity to a long-debated area of personal injury law.

Hamman v. Usher[21]

The central basis of the appellant's appeal in this medical negligence case was that the trial judge had made palpable and overriding errors in her findings of fact by misapprehending cogent evidence and failing to consider or reconcile other material evidence. The appellant contended that these failings of the trial judge undermined her key finding that the cause of the bleeding was the IUD and not a laceration or perforation resulting from the respondent's negligence on July 19, 2001.

The Court of Appeal did not agree with the appellant's position. Accepting that some of the evidence may have supported the appellant's theory of the case, there was ample other evidence to support the trial judge's findings. She gave thorough and thoughtful reasons for

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21 *Hamman v. Usher* (2012) ONCA 818

rejecting the appellant's theory and accepting the respondent's theory. The trial judge did not commit any reviewable error.

The appeal was heard and dismissed with costs in the amount of $25,000.00 on November 20, 2012.

Hurst v. Aviva Insurance Company[22]

The release of this decision on November 29, 2012 by the Court of Appeal held up the completion of this paper, so my apologies to the MLA team hosting this conference, but it was important enough I wanted to add reference to this case to my paper.

This appeal arose from a fundamental question of law that goes to the core of the functioning of the province's no-fault system. Indeed, given its importance, the Insurance Bureau of Canada and the Ontario Trial Lawyers Association were both granted intervener status.

The legal question to be answered dealt with the interaction of the mandatory FSCO mediation system and the accident victim's ability to arbitrate/litigate accident benefit disputes. There were four cases heard together, in which all four plaintiffs had first sought a FSCO mediation to dispute a denial of accident benefits. Although it was intended that the mandatory FSCO mediation would be completed within 60 days, FSCO developed a huge backlog and was unable to provide timely mediations. Rather than wait for months and months for the mediation to be conducted, actions were commenced in all four cases, even though no mediation had occurred. The insurers all brought motions to dismiss/stay the actions, arguing that the actions were premature, as the mandatory mediation had not taken place.

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22 *Hurst v. Aviva Insurance Company* (2012) ONCA 837

At the motion stage, the motions judge found in favour of the plaintiffs, holding that they were allowed to proceed with their actions.

The Court of Appeal upheld the decision of the motions judge and, in so doing, offered language and an analysis that is helpful to claimants (my plaintiff basis perhaps showing with this statement). Simply put, 60 days means 60 days and claimants seeking accident benefits cannot be made to wait and wait simply because the system is unable to accommodate their claims.

Key pronouncements include:

- Reading the provisions in their entire context makes it clear that the purpose of the legislation is to make mandatory a mediation process *that is timely and effective.*

- The purpose of the legislative scheme of dispute resolution is to mandate a speedy mediation process, conducted and completed on a strict timetable, in order to settle disputes quickly and economically. The speedy mediation process enables insured persons to receive the benefits to which they are entitled without delay.

- I do not accept that the 60-day clock does not begin to run until FSCO has assessed an application as complete. Such an interpretation, which would allow FSCO to accumulate a backlog of any length, would ignore the legislative purpose of providing a speedy mediation process.

- I have placed no weight on FSCO's interpretation of the *Act* as the appellants have submitted. Any deference that is due is not owed to FSCO, but to an arbitrator appointed under the *Act*, or to a Director's Delegate on an appeal of an arbitrator's decision.

- I find it sufficient to observe that the failure of a statutory act to perform a statutory duty does not eliminate a person's rights granted by the statute.

Costs were ordered against the appellant insurers in the sum of $10,000.00 and as against the intervener, IBC, in the amount of $6,584.00

BIBLIOGRAPHY

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Judicial Review of Tribunal Decisions, Carolyn Brandow, published in the December 2009 edition of The Litigator, Journal of the Ontario Trial Lawyers Association

Defending Your Damage Award on Appeal, Kirk Stevens, paper presented the Ontario Trial Lawyers Association 2009 Spring Conference

SCHEDULE "A"

Appeals

Judge not to hear appeal from own decision

132. A judge shall not sit as a member of a court hearing an appeal from his or her own decision. R.S.O. 1990, c. C.43, s. 132.

Leave to appeal required

133. No appeal lies without leave of the court to which the appeal is to be taken,

(a) from an order made with the consent of the parties; or

(b) where the appeal is only as to costs that are in the discretion of the court that made the order for costs. R.S.O. 1990, c. C.43, s. 133.

Powers on appeal

134.(1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

Interim orders

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

Power to quash

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

(c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

Scope of decisions

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal. R.S.O. 1990, c. C.43, s. 134 (3-5).

New trial

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred. R.S.O. 1990, c. C.43, s. 134 (6); 1994, c. 12, s. 46 (1).

Idem

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties. R.S.O. 1990, c. C.43, s. 134 (7); 1994, c. 12, s. 46 (2).

Court of Appeal jurisdiction

6.(1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17).

Combining of appeals from other courts

(2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal. R.S.O. 1990, c. C.43, s. 6 (2); 1996, c. 25, s. 9 (17).

Idem

(3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2). R.S.O. 1990, c. C.43, s. 6 (3); 1996, c. 25, s. 9 (17).

Divisional Court jurisdiction

19. (1) An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);

(b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;

(c) a final order of a master or case management master. 2006, c. 21, Sched. A, s. 3.

Same

(1.1) If the notice of appeal is filed before October 1, 2007, clause (1) (a) applies in respect of a final order,

(a) for a single payment of not more than $25,000, exclusive of costs;

(b) for periodic payments that amount to not more than $25,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b). 2006, c. 21, Sched. A, s. 3; 2009, c. 33, Sched. 2, s. 20 (2).

Same

(1.2) If the notice of appeal is filed on or after October 1, 2007, clause (1) (a) applies in respect of a final order,

(a) for a single payment of not more than $50,000, exclusive of costs;

(b) for periodic payments that amount to not more than $50,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b). 2006, c. 21, Sched. A, s. 3; 2009, c. 33, Sched. 2, s. 20 (3).

Place for hearing

Appeals

20.(1) An appeal to the Divisional Court shall be heard in the region where the hearing or other process that led to the decision appealed from took place, unless the parties agree otherwise or the Chief Justice of the Superior Court of Justice orders otherwise because it is necessary to do so in the interests of justice. 1994, c. 12, s. 7; 1996, c. 25, s. 9 (14).

Other proceedings

(2) Any other proceeding in the Divisional Court may be brought in any region. R.S.O. 1990, c. C.43, s. 20 (2).

APPLICATION OF THE RULE

61.01 Rules 61.02 to 61.16 apply to all appeals to an appellate court except as provided in clause 62.01 (1) (b) or rule 62.02 and, with necessary modifications, to proceedings in an appellate court by way of,

(a) stated case under a statute;

(b) special case under rule 22.03, subject to any directions given under subrule 22.03 (2); and

(c) reference under section 8 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 61.01; O. Reg. 536/96, s. 7; O. Reg. 14/04, s. 28.

DEFINITION

61.02 In rules 61.03 to 61.16,

"Registrar" means,

(a) in the Court of Appeal, the Registrar of the Court of Appeal, or

(b) in the Divisional Court, the registrar in the regional centre of the region where the appeal is to be heard in accordance with subsection 20(1) of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 61.02.

MOTION FOR LEAVE TO APPEAL TO DIVISIONAL COURT

Notice of Motion for Leave

61.03 (1)Where an appeal to the Divisional Court requires the leave of that court, the notice of motion for leave shall,

(a) state that the motion will be heard on a date to be fixed by the Registrar;

(b) be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(c) be filed with proof of service in the office of the Registrar, within five days after service. R.R.O. 1990, Reg. 194, r. 61.03 (1); O. Reg. 61/96, s. 5 (2); O. Reg. 14/04, s. 29 (1).

Motion Record, Factum and Transcripts

(2) On a motion for leave to appeal to the Divisional Court, the moving party shall serve,

(a) a motion record containing, in consecutively numbered pages arranged in the following order,

(i) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter,

(ii) a copy of the notice of motion,

(iii) a copy of the order or decision from which leave to appeal is sought, as signed and entered,

(iv) a copy of the reasons of the court or tribunal from which leave to appeal is sought with a further typed or printed copy if the reasons are handwritten,

(iv.1) a copy of any order or decision that was the subject of the hearing before the court or tribunal from which leave to appeal is sought,

(iv.2) a copy of any reasons for the order or decision referred to in subclause (iv.1), with a further typed or printed copy if the reasons are handwritten,

(v) a copy of all affidavits and other material used before the court or tribunal from which leave to appeal is sought,

(vi) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves, and

(vii) a copy of any other material in the court file that is necessary for the hearing of the motion;

(b) a factum consisting of a concise argument stating the facts and law relied on by the moving party; and

(c) relevant transcripts of evidence, if they are not included in the motion record,

and shall file three copies of the motion record, factum and transcripts, if any, with proof of service, within thirty days after the filing of the notice of motion for leave to appeal. R.R.O. 1990, Reg. 194, r. 61.03 (2); O. Reg. 61/96, s. 5 (3); O. Reg. 206/02, s. 13 (1).

(3) On a motion for leave to appeal to the Divisional Court, the responding party may, where he or she is of the opinion that the moving party's motion record is incomplete, serve a motion record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the responding party on the motion and not included in the motion record,

and may serve a factum consisting of a concise argument stating the facts and law relied on by the responding party, and shall file three copies of the responding party's motion record and factum, if any, with proof of service, within fifteen days after service of the moving party's motion record, factum and transcripts, if any. R.R.O. 1990, Reg. 194, r. 61.03 (3); O. Reg. 61/96, s. 5 (4); O. Reg. 206/02, s. 13 (2).

Notice and Factum to State Questions on Appeal

(4) The moving party's notice of motion and factum shall, where practicable, set out the specific questions that it is proposed the Divisional Court should answer if leave to appeal is granted. R.R.O. 1990, Reg. 194, r. 61.03 (4); O. Reg. 61/96, s. 5 (5).

Date for Hearing

(5) The Registrar shall fix a date for the hearing of the motion which shall not, except with the responding party's consent, be earlier than fifteen days after the filing of the moving party's motion record, factum and transcripts, if any. R.R.O. 1990, Reg. 194, r. 61.03 (5).

Time for Delivering Notice of Appeal

(6) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave. R.R.O. 1990, Reg. 194, r. 61.03 (6).

Costs Appeal Joined with Appeal as of Right

(7) Where a party seeks to join an appeal under clause 133 (b) of the *Courts of Justice Act* with an appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or in a supplementary notice of appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Divisional Court hearing the appeal as of right; and

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 534/95, s. 3; O. Reg. 175/96, s. 1 (1); O. Reg. 14/04, s. 29 (2).

Costs Cross-Appeal Joined with Appeal or Cross-Appeal as of Right

(8) Where a party seeks to join a cross-appeal under a statute that requires leave for an appeal with an appeal or cross-appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Divisional Court hearing the appeal or cross-appeal as of right; and

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 534/95, s. 3; O. Reg. 175/96, s. 1 (2); O. Reg. 206/02, s. 13 (3); O. Reg. 14/04, s. 29 (3); O. Reg. 394/09, s. 24.

Application of Rules

(9) Subrules (1) to (6) do not apply where subrules (7) and (8) apply. O. Reg. 175/96, s. 1 (3).

MOTION FOR LEAVE TO APPEAL TO COURT OF APPEAL

Motion in Writing

61.03.1 (1) Where an appeal to the Court of Appeal requires the leave of that court, the motion for leave shall be heard in writing, without the attendance of parties or lawyers. O. Reg. 333/96, s. 2 (1); O. Reg. 575/07, s. 4.

Notice of Motion

(2) The notice of motion for leave to appeal shall state that the court will hear the motion in writing, 36 days after service of the moving party's motion record, factum and transcripts, if any, or on the filing of the moving party's reply factum, if any, whichever is earlier. O. Reg. 333/96, s. 2 (1).

(3) The notice of motion,

(a) shall be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(b) shall be filed with proof of service in the office of the Registrar within five days after service. O. Reg. 61/96, s. 6; O. Reg. 14/04, s. 30 (1).

Moving Party's Motion Record, Factum and Transcripts

(4) The moving party shall serve a motion record and transcripts of evidence, if any, as provided in subrule 61.03 (2), and a factum consisting of the following elements:

1. Part I, containing a statement identifying the moving party and the court from which it is proposed to appeal, and stating the result in that court.

2. Part II, containing a concise summary of the facts relevant to the issues on the proposed appeal, with such reference to the evidence by page and line as is necessary.

3. Part III, containing the specific questions that it is proposed the court should answer if leave to appeal is granted.

4. Part IV, containing a statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue.

5. Schedule A, containing a list of the authorities referred to.

6. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws. O. Reg. 61/96, s. 6; O. Reg. 333/96, s. 2 (2).

(5) Parts I to IV shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 61/96, s. 6.

(6) The moving party shall file three copies of the motion record, factum and transcripts, if any, and may file three copies of a book of authorities, if any, with proof of service, within 30 days after the filing of the notice of motion for leave to appeal. O. Reg. 61/96, s. 6.

Responding Party's Motion Record and Factum

(7) The responding party may, if of the opinion that the moving party's motion record is incomplete, serve a motion record as provided in subrule 61.03 (3). O. Reg. 61/96, s. 6; O. Reg. 333/96, s. 2 (3).

(8) The responding party shall serve a factum consisting of the following elements:

1. Part I, containing a statement of the facts in the moving party's summary of relevant facts that the responding party accepts as correct and those facts with which the responding party disagrees and a concise summary of any additional facts relied on, with such reference to the evidence by page and line as is necessary.

2. Part II, containing the responding party's position with respect to each issue raised by the moving party, immediately followed by a concise statement of the law and authorities relating to it.

3. Part III, containing a statement of any additional issues raised by the responding party, the statement of each issue to be followed by a concise statement of the law and authorities relating to it.

4. Schedule A, containing a list of the authorities referred to.

5. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws. O. Reg. 61/96, s. 6.

(9) Parts I to III shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 61/96, s. 6.

(10) The responding party shall file three copies of the factum, and of the motion record, if any, and may file three copies of a book of authorities, if any, with proof of service, within 25 days after service of the moving party's motion record and other documents. O. Reg. 61/96, s. 6.

Moving Party's Reply Factum

(11) If the responding party's factum raises an issue on which the moving party has not taken a position in the moving party's factum, that party may serve a reply factum. O. Reg. 61/96, s. 6.

(12) The reply factum shall contain consecutively numbered paragraphs setting out the moving party's position on the issue, followed by a concise statement of the law and authorities relating to it. O. Reg. 61/96, s. 6.

(13) The moving party shall file three copies of the reply factum with proof of service within 10 days after service of the responding party's factum. O. Reg. 61/96, s. 6.

Determination of Motion

(14) Thirty-six days after service of the moving party's motion record and factum, and transcripts, if any, or on the filing of the moving party's reply factum, if any, whichever is earlier, the motion shall be submitted to the court for consideration, and,

(a) if it appears from the written material that no oral hearing is warranted, the court shall determine the motion;

(b) otherwise, the court shall order an oral hearing to determine the motion. O. Reg. 61/96, s. 6.

Date for Oral Hearing

(15) If the court orders an oral hearing, the Registrar shall fix a date for it. O. Reg. 61/96, s. 6.

Time for Delivering Notice of Appeal

(16) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave. O. Reg. 61/96, s. 6.

Costs Appeal Joined with Appeal as of Right

(17) Where a party seeks to join an appeal under clause 133 (b) of the *Courts of Justice Act* with an appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or in a supplementary notice of appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal as of right;

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 175/96, s. 2; O. Reg. 14/04, s. 30 (2).

Costs Cross-Appeal Joined with Appeal or Cross-Appeal as of Right

(18) Where a party seeks to join a cross-appeal under a statute that requires leave for an appeal with an appeal or cross-appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal or cross-appeal as of right;

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 175/96, s. 2; O. Reg. 206/02, s. 14; O. Reg. 14/04, s. 30 (3); O. Reg. 394/09, s. 25.

Application of Rules

(19) Subrules (1) to (16) do not apply where subrules (17) and (18) apply. O. Reg. 175/96, s. 2.

COMMENCEMENT OF APPEALS

Time for Appeal and Service of Notice

61.04 (1) An appeal to an appellate court shall be commenced by serving a notice of appeal (Form 61A) together with the certificate required by subrule 61.05 (1), within 30 days after the making of the order appealed from, unless a statute or these rules provide otherwise,

(a) on every party whose interest may be affected by the appeal, subject to subrule (1.1); and

(b) on any person entitled by statute to be heard on the appeal. O. Reg. 14/04, s. 31.

(1.1) The notice of appeal and certificate need not be served on,

(a) a defendant who was noted in default; or

(b) a respondent who has not delivered a notice of appearance, unless the respondent was heard at the hearing with leave. O. Reg. 14/04, s. 31.

Title of Proceeding

(2) The title of the proceeding in an appeal shall be in accordance with Form 61B. R.R.O. 1990, Reg. 194, r. 61.04 (2).

Notice of Appeal

(3) The notice of appeal (Form 61A) shall state,

(a) the relief sought;

(b) the grounds of appeal; and

(c) the basis for the appellate court's jurisdiction, including references to,

(i) any provision of a statute or regulation establishing jurisdiction,

(ii) whether the order appealed from is final or interlocutory,

(iii) whether leave to appeal is necessary and if so whether it has been granted, and

(iv) any other facts relevant to establishing jurisdiction. O. Reg. 19/03, s. 11.

(4) The notice of appeal, with proof of service, shall be filed in accordance with subrule 4.05 (4) (leaving in or mailing to court office) in the Registrar's office within ten days after service. R.R.O. 1990, Reg. 194, r. 61.04 (4).

CERTIFICATE OR AGREEMENT RESPECTING EVIDENCE

Appellant's Certificate Respecting Evidence

61.05 (1) In order to minimize the number of documents and the length of the transcript required for an appeal, the appellant shall serve with the notice of appeal an appellant's certificate respecting evidence (Form 61C) setting out only the portions of the evidence that, in the appellant's opinion, are required for the appeal. O. Reg. 570/98, s. 5.

Respondent's Certificate Respecting Evidence

(2) Within fifteen days after service of the appellant's certificate, the respondent shall serve on the appellant a respondent's certificate respecting evidence (Form 61D), confirming the appellant's certificate or setting out any additions to or deletions from it. R.R.O. 1990, Reg. 194, r. 61.05 (2).

(3) A respondent who fails to serve a respondent's certificate within the prescribed time shall be deemed to have confirmed the appellant's certificate. R.R.O. 1990, Reg. 194, r. 61.05 (3).

Agreement Respecting Evidence

(4) Instead of complying with subrules (1) to (3), the parties may, within thirty days after service of the notice of appeal, make an agreement respecting the documents to be included in the appeal book and compendium and the transcript required for the appeal. R.R.O. 1990, Reg. 194, r. 61.05 (4); O. Reg. 19/03, s. 12.

Ordering Transcripts

(5) The appellant shall within thirty days after filing the notice of appeal file proof that the appellant has ordered a transcript of all oral evidence that the parties have not agreed to omit, subject to any direction under subrule 61.09 (4) (relief from compliance). R.R.O. 1990, Reg. 194, r. 61.05 (5).

(6) A party who has previously ordered a transcript of oral evidence shall forthwith modify the order in writing to comply with the certificates or agreement. R.R.O. 1990, Reg. 194, r. 61.05 (6).

(7) When the evidence has been transcribed, the court reporter shall forthwith give written notice to all parties and the Registrar. R.R.O. 1990, Reg. 194, r. 61.05 (7).

Costs Sanctions for Unnecessary Evidence

(8) The court may impose costs sanctions where evidence is transcribed or exhibits are reproduced unnecessarily. R.R.O. 1990, Reg. 194, r. 61.05 (8).

SECURITY FOR COSTS OF APPEAL

61.06 (1) In an appeal where it appears that,

(a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;

(b) an order for security for costs could be made against the appellant under rule 56.01; or

(c) for other good reason, security for costs should be ordered,

a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just. R.R.O. 1990, Reg. 194, r. 61.06 (1); O. Reg. 465/93, s. 6.

(1.1) If an order is made under subrule (1), rules 56.04, 56.05, 56.07 and 56.08 apply, with necessary modifications. O. Reg. 288/99, s. 21.

(2) If an appellant fails to comply with an order under subrule (1), a judge of the appellate court on motion may dismiss the appeal. R.R.O. 1990, Reg. 194, r. 61.06 (2).

CROSS-APPEALS

61.07 (1) A respondent who,

(a) seeks to set aside or vary the order appealed from; or

(b) will seek, if the appeal is allowed in whole or in part, other relief or a different disposition than the order appealed from,

shall, within fifteen days after service of the notice of appeal, serve a notice of cross-appeal (Form 61E) on all parties whose interests may be affected by the cross-appeal and on any person entitled by statute to be heard on the appeal, stating the relief sought and the grounds of the cross-appeal. R.R.O. 1990, Reg. 194, r. 61.07 (1).

(1.1) A respondent may, subject to subrule (1.2), serve a notice of cross-appeal without obtaining leave to appeal for the cross-appeal if,

(a) there is an appeal as of right; or

(b) leave to appeal has been granted. O. Reg. 206/02, s. 15.

(1.2) The respondent shall obtain leave to appeal in the manner provided by subrule 61.03 (8) or 61.03.1 (18), as the case may be, if the cross-appeal is taken under a statute that requires leave for an appeal. O. Reg. 394/09, s. 26.

(2) The notice of cross-appeal, with proof of service, shall be filed in the office of the Registrar within ten days after service. R.R.O. 1990, Reg. 194, r. 61.07 (2).

(3) Where a respondent has not delivered a notice of cross-appeal, no cross-appeal may be heard except with leave of the court hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.07 (3).

AMENDMENT OF NOTICE OF APPEAL OR CROSS-APPEAL

Supplementary Notice to be Served and Filed

61.08 (1) The notice of appeal or cross-appeal may be amended without leave, before the appeal is perfected, by serving on each of the parties on whom the notice was served a supplementary notice of appeal or cross-appeal (Form 61F) and filing it with proof of service. R.R.O. 1990, Reg. 194, r. 61.08 (1).

Argument Limited to Grounds Stated

(2) No grounds other than those stated in the notice of appeal or cross-appeal or supplementary notice may be relied on at the hearing, except with leave of the court hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.08 (2).

Relief Limited

(3) No relief other than that sought in the notice of appeal or cross-appeal or supplementary notice may be sought at the hearing, except with the leave of the court hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.08 (3).

PERFECTING APPEALS

Time for Perfecting

61.09 (1) The appellant shall perfect the appeal by complying with subrules (2) and (3),

(a) where no transcript of evidence is required for the appeal, within thirty days after filing the notice of appeal; or

(b) where a transcript of evidence is required for the appeal, within 60 days after receiving notice that the evidence has been transcribed. R.R.O. 1990, Reg. 194, r. 61.09 (1); O. Reg. 570/98, s. 6 (1).

Record and Exhibits Only If Required

(2) If the appellant or the respondent believes that a part of the record or the original exhibits from the court or tribunal from which the appeal is taken is required for the proper hearing of the appeal, the appellant or respondent may move before a judge of the appellate court for an order that they be sent to the Registrar. O. Reg. 24/00, s. 8; O. Reg. 653/00, s. 5.

Material to be Served and Filed

(3) The appellant shall,

(a) serve on every other party to the appeal and any other person entitled by statute or an order under rule 13.03 (intervention in appeal) to be heard on the appeal,

(i) the appeal book and compendium referred to in rule 61.10,

(ii) the exhibit book referred to in rule 61.10.1,

(iii) a typed or printed copy of the transcript of evidence,

(iv) an electronic version of the transcript of evidence, unless the court reporter did not prepare an electronic version, and

(v) a typed or printed copy of the appellant's factum referred to in rule 61.11;

(b) file with the Registrar, with proof of service,

(i) three copies of the appeal book and compendium, and where the appeal is to be heard by five judges, two additional copies,

(ii) one copy of the exhibit book,

(iii) a typed or printed copy of the transcript of evidence,

(iv) an electronic version of the transcript of evidence, unless the court reporter did not prepare an electronic version,

(v) three typed or printed copies of the appellant's factum, and where the appeal is to be heard by five judges, two additional copies, and

(vi) an electronic version of the appellant's factum; and

(c) file with the Registrar a certificate of perfection,

(i) stating that the appeal book and compendium, exhibit book, transcripts, if any, and appellant's factum have been filed, and

(ii) setting out, with respect to every party to the appeal and any other person entitled by statute or by an order under rule 13.03 (intervention in appeal) to be heard on the appeal,

(A) the name, address and telephone number of the party's or other person's lawyer, or

(B) the name, address for service and telephone number of the party or other person, if acting in person. O. Reg. 570/98, s. 6 (2); O. Reg. 19/03, s. 13 (1-3); O. Reg. 260/05, s. 14.

Relief from Compliance

(4) If it is necessary to do so in the interest of justice, a judge of the appellate court may give special directions and vary the rules governing the appeal book and compendium, the exhibit book, the transcript of evidence and the appellant's factum. O. Reg. 19/03, s. 13 (4).

Notice of Listing for Hearing

(5) When an appeal is perfected, the Registrar shall place it on the list of cases to be heard at the appropriate place of hearing and shall mail a notice of listing for hearing (Form 61G) to every person listed in the certificate of perfection. R.R.O. 1990, Reg. 194, r. 61.09 (5).

APPEAL BOOK AND COMPENDIUM

61.10 (1) The appeal book and compendium shall contain, in consecutively numbered pages with numbered tabs arranged in the following order,

(a) a table of contents describing each document by its nature and date;

(b) a copy of the notice of appeal and of any notice of cross-appeal or supplementary notice of appeal or cross-appeal;

(c) a copy of the order or decision appealed from as signed and entered;

(d) a copy of the reasons of the court or tribunal appealed from, with a further typed or printed copy if the reasons are handwritten;

(e) if an earlier order or decision was the subject of the hearing before the court or tribunal appealed from, a copy of the order or decision, as signed and entered, and a copy of any reasons for it, with a further typed or printed copy if the reasons are handwritten;

(f) a copy of the pleadings or notice of application or of any other document that initiated the proceeding or defines the issues in it;

(g) a copy of any excerpts from a transcript of evidence that are referred to in the appellant's factum;

(h) a copy of any exhibits that are referred to in the appellant's factum;

(i) a copy of any other documents relevant to the hearing of the appeal that are referred to in the appellant's factum;

(j) a copy of the certificates or agreement respecting evidence referred to in rule 61.05;

(k) a copy of any order made in respect of the conduct of the appeal; and

(l) a certificate (Form 61H) signed by the appellant's lawyer, or on the lawyer's behalf by someone he or she has specifically authorized, stating that the contents of the appeal book and compendium are complete and legible. O. Reg. 19/03, s. 14.

(2) The Registrar may refuse to accept an appeal book and compendium if it does not comply with these rules or is not legible. O. Reg. 19/03, s. 14.

EXHIBIT BOOK

61.10.1 The exhibit book shall contain, in consecutively numbered pages with numbered tabs arranged in the following order,

(a) a table of contents describing each exhibit by its nature, date and exhibit number or letter;

(b) any affidavit evidence, including exhibits, that the parties have not agreed to omit;

(c) transcripts of evidence used on a motion or application that the parties have not agreed to omit; and

(d) a copy of each exhibit filed at a hearing or marked on an examination that the parties have not agreed to omit, arranged in order by date (or, if there are documents with common characteristics, grouped accordingly in order by date) and not by exhibit number. O. Reg. 19/03, s. 15.

APPELLANT'S FACTUM

61.11 (1) The appellant's factum shall be signed by the appellant's lawyer, or on the lawyer's behalf by someone he or she has specifically authorized, and shall consist of,

(a) Part I, containing a statement identifying the appellant and the court or tribunal appealed from and stating the result in that court or tribunal;

(b) Part II, containing a concise overview statement describing the nature of the case and of the issues;

(c) Part III, containing a concise summary of the facts relevant to the issues on the appeal, with such reference to the transcript of evidence and the exhibits as is necessary;

(d) Part IV, containing a statement of each issue raised, immediately followed by a concise argument with reference to the law and authorities relating to that issue;

(d.1) Part V, containing a statement of the order that the appellate court will be asked to make, including any order for costs;

(e) a certificate stating,

(i) that an order under subrule 61.09 (2) (original record and exhibits) has been obtained or is not required, and

(ii) how much time (expressed in hours or fractions of an hour) the lawyer estimates will be required for his or her oral argument, not including reply;

(f) Schedule A, containing a list of the authorities referred to; and

(g) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws. O. Reg. 534/95, s. 4; O. Reg. 570/98, s. 9 (1); O. Reg. 24/00, s. 9; O. Reg. 19/03, s. 16 (1); O. Reg. 575/07, ss. 4, 27.

(1.1) References to the transcript of evidence shall be by tab, page number and line in the appeal book and compendium, and references to exhibits shall be by page number in the exhibit book and by tab and page number in the appeal book and compendium. O. Reg. 19/03, s. 16 (2).

(2) Parts I to V shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 534/95, s. 4; O. Reg. 570/98, s. 9 (2).

RESPONDENT'S FACTUM AND COMPENDIUM

Filing and Service

61.12 (1) Every respondent shall,

(a) serve on every other party to the appeal,

(i) a typed or printed copy of the respondent's factum, and

(ii) the respondent's compendium;

(b) file with the Registrar, with proof of service,

(i) three typed or printed copies of the respondent's factum, and where the appeal is to be heard by five judges, two additional copies, and

(ii) three copies of the respondent's compendium, and where the appeal is to be heard by five judges, two additional copies; and

(c) file with the Registrar an electronic version of the respondent's factum. O. Reg. 19/03, s. 17.

Time for Delivery

(2) The respondent's factum and compendium shall be delivered within 60 days after service of the appeal book and compendium, exhibit book, transcript of evidence, if any, and appellant's factum. O. Reg. 19/03, s. 17.

Contents of Respondent's Factum

(3) The respondent's factum shall be signed by the respondent's lawyer, or on the lawyer's behalf by someone he or she has specifically authorized, and shall consist of,

(a) Part I, containing a concise overview statement describing the nature of the case and of the issues;

(b) Part II, containing a statement of the facts in the appellant's summary of relevant facts that the respondent accepts as correct and those facts with which the respondent disagrees, and a concise summary of any additional facts relied on, with such reference to the transcript of evidence and the exhibits as is necessary;

(c) Part III, containing the position of the respondent with respect to each issue raised by the appellant, immediately followed by a concise argument with reference to the law and authorities relating to that issue;

(d) Part IV, containing a statement of any additional issues raised by the respondent, the statement of each issue to be followed by a concise argument with reference to the law and authorities relating to that issue;

(e) Part V, containing a statement of the order that the appellate court will be asked to make, including any order for costs;

(f) a certificate stating,

(i) that an order under subrule 61.09 (2) (original record and exhibits) has been obtained or is not required, and

(ii) how much time (expressed in hours or fractions of an hour) the lawyer estimates will be required for his or her oral argument, not including reply;

(g) Schedule A, containing a list of the authorities referred to; and

(h) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws that are not included in Schedule B to the appellant's factum. O. Reg. 19/03, s. 17; O. Reg. 575/07, ss. 4, 28.

(4) References to the transcript of evidence shall be by tab, page number and line in the respondent's compendium, and references to exhibits shall be by page number in the exhibit book and by tab and page number in the respondent's compendium. O. Reg. 19/03, s. 17.

(5) Parts I to V shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 19/03, s. 17.

Cross-Appeal

(6) Where a respondent has served a notice of cross-appeal under rule 61.07,

(a) the respondent shall prepare a factum as an appellant by cross-appeal and deliver it with or incorporate it in the respondent's factum; and

(b) the appellant shall deliver a factum as a respondent to the cross-appeal within 10 days after service of the respondent's factum. O. Reg. 19/03, s. 17.

Contents of Respondent's Compendium

(7) The respondent's compendium shall contain, in consecutively numbered pages with numbered tabs arranged in the following order,

(a) a table of contents describing each document by its nature and date;

(b) a copy of any excerpts from a transcript of evidence that are referred to in the respondent's factum;

(c) a copy of any exhibits that are referred to in the respondent's factum; and

(d) a copy of any other documents relevant to the hearing of the appeal that are referred to in the respondent's factum. O. Reg. 19/03, s. 17.

Relief from Compliance

(8) If it is necessary to do so in the interest of justice, a judge of the appellate court may give special directions and vary the rules governing the respondent's factum and the respondent's compendium. O. Reg. 19/03, s. 17.

61.12.1 Revoked: O. Reg. 19/03, s. 18.

DISMISSAL FOR DELAY

Motion by Respondent

61.13 (1) Where an appellant has not,

(a) filed proof that a transcript of evidence that the parties have not agreed to omit was ordered within the time prescribed by subrule 61.05 (5); or

(b) perfected the appeal within the time prescribed by subrule 61.09 (1) or by an order of the appellate court or a judge of that court,

the respondent may make a motion to the Registrar, on ten days notice to the appellant, to have the appeal dismissed for delay. R.R.O. 1990, Reg. 194, r. 61.13 (1); O. Reg. 351/94, s. 5.

Notice by Registrar

(2) Where the appellant has not,

(a) filed a transcript of evidence within 60 days after the Registrar received notice that the evidence has been transcribed; or

(b) perfected the appeal within one year after filing the notice of appeal,

the Registrar may serve notice on the appellant that the appeal will be dismissed for delay unless it is perfected within ten days after service of the notice. R.R.O. 1990, Reg. 194, r. 61.13 (2); O. Reg. 570/98, s. 12 (1).

(2.1) Where no transcript of evidence is required for the appeal and the appellant has not perfected it within the time prescribed by subrule 61.09 (1) or by an order of the appellate court or a judge of that court, the Registrar may serve notice on the appellant that the appeal will be dismissed for delay unless it is perfected within 10 days after service of the notice. O. Reg. 554/96, s. 1.

Registrar to Dismiss where Default not Cured

(3) Where the appellant does not cure the default,

(a) in the case of a motion under subrule (1), before the hearing of the motion; or

(b) in the case of a notice under subrule (2) or (2.1), within ten days after service of the notice,

or within such longer period as a judge of the appellate court allows, the Registrar shall make an order in (Form 61I) dismissing the appeal for delay, with costs fixed at $750, despite rule 58.13 and shall serve the order on the respondent. R.R.O. 1990, Reg. 194, r. 61.13 (3); O. Reg. 534/95, s. 6 (2); O. Reg. 168/05, s. 3.

Cross-Appeals

(4) Where a respondent who has served a notice of cross-appeal has not delivered a factum in the cross-appeal within 60 days after service of the appeal book and compendium, transcript of evidence and appellant's factum, the appellant may make a motion to the Registrar, on five days notice to the respondent, to have the cross-appeal dismissed for delay. R.R.O. 1990, Reg. 194, r. 61.13 (4); O. Reg. 570/98, s. 12 (2); O. Reg. 19/03, s. 19; O. Reg. 55/12, s. 8.

(5) Where the respondent does not deliver a factum in the cross-appeal before the hearing of the motion under subrule (4) or within such longer period as a judge of the appellate court allows, the Registrar shall make an order in (Form 61I) dismissing the cross-appeal for delay, with costs fixed at $750, despite rule 58.13. R.R.O. 1990, Reg. 194, r. 61.13 (5); O. Reg. 394/09, s. 27 (1).

Motions for Leave

(6) On a motion for leave to appeal, where the moving party has not served and filed the motion record and other documents in accordance with subrule 61.03 (2) or subrules 61.03.1 (4) to (6), the responding party may make a motion to the Registrar, on 10 days notice to the moving party, to have the motion for leave to appeal dismissed for delay. O. Reg. 61/96, s. 8.

(7) On a motion for leave to appeal, where the moving party has not served and filed the motion record and other documents within 60 days after the filing of the notice of motion for leave to appeal, the Registrar may serve notice on the moving party that the motion will be dismissed for delay unless the documents are served and filed within 10 days after service of the notice. O. Reg. 61/96, s. 8.

(8) On a motion for leave to appeal, where the moving party,

(a) in the case of a motion under subrule (6), does not serve and file the documents before the hearing of that motion, or within such longer period as a judge of the appellate court allows;

(b) in the case of a notice under subrule (7), does not serve and file the documents within ten days after service of the notice or within such longer period as a judge of the appellate court allows,

the Registrar shall make an order in (Form 61J) dismissing the motion for delay, with costs fixed at $750, despite rule 58.13. R.R.O. 1990, Reg. 194, r. 61.13 (8); O. Reg. 394/09, s. 27 (2).

FAILURE TO OBTAIN ORDER TO CONTINUE APPEAL

61.13.1 (1) If a transfer or transmission of an appellant's interest or liability takes place while an appeal is pending and no order to continue is obtained within a reasonable time, a respondent may make a motion to the Registrar, on 10 days notice to the appellant, to have the appeal dismissed for delay. O. Reg. 570/98, s. 13.

(2) If the appellant does not obtain an order to continue before the hearing of the motion or within the longer period allowed by a judge of the appellate court, the Registrar shall make an order dismissing the appeal for delay, with costs fixed at $750, despite rule 58.13. O. Reg. 570/98, s. 13; O. Reg. 394/09, s. 28.

ABANDONED APPEALS

Delivery of Notice of Abandonment

61.14 (1) A party may abandon an appeal or cross-appeal by delivering a notice of abandonment (Form 61K). R.R.O. 1990, Reg. 194, r. 61.14 (1).

Deemed Abandonment

(2) A party who serves a notice of appeal or cross-appeal and does not file it within ten days after service shall be deemed to have abandoned the appeal or cross-appeal, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 61.14 (2).

Effect of Abandonment

(3) Where an appeal or cross-appeal is abandoned or is deemed to have been abandoned, the appeal or cross-appeal is at an end, and the respondent or appellant is entitled to the costs of the appeal or cross-appeal, unless a judge of the appellate court orders otherwise. R.R.O. 1990, Reg. 194, r. 61.14 (3).

CROSS-APPEAL WHERE APPEAL DISMISSED FOR DELAY OR ABANDONED

61.15 (1) Where an appeal is dismissed for delay or is abandoned, a respondent who has cross-appealed may,

(a) within fifteen days thereafter, deliver a notice of election to proceed (Form 61L); and

(b) make a motion to a judge of the appellate court for directions in respect of the cross-appeal. R.R.O. 1990, Reg. 194, r. 61.15 (1).

(2) Where the respondent does not deliver a notice of election to proceed within fifteen days, the cross-appeal shall be deemed to be abandoned without costs unless a judge of the appellate court orders otherwise. R.R.O. 1990, Reg. 194, r. 61.15 (2).

MOTIONS IN APPELLATE COURT

Rule 37 Applies Generally

61.16 (1) Rule 37, except rules 37.02 to 37.04 (jurisdiction to hear motions, place of hearing, to whom to be made) and rule 37.17 (motion before commencement of proceeding), applies to motions in an appellate court, with necessary modifications. O. Reg. 263/03, s. 6 (1).

Motion to Receive Further Evidence

(2) A motion under clause 134 (4) (b) of the *Courts of Justice Act* (motion to receive further evidence) shall be made to the panel hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.16 (2).

Motions Required to be Heard by One Judge

(2.1) A motion required by subsection 7 (2) or 21 (3) of the *Courts of Justice Act* to be heard and determined by one judge may be heard and determined by a panel hearing an appeal or another motion in the proceeding properly made to the panel. O. Reg. 770/92, s. 15.

Motions Required to be Heard by Panel

(2.2) A motion in the Court of Appeal for an order that finally determines an appeal, other than an order dismissing the appeal on consent, shall be heard and determined by a panel consisting of not fewer than three judges sitting together, and always of an uneven number of judges. O. Reg. 570/98, s. 14.

Motion to be Heard by More Than One Judge

(3) Where a motion in an appellate court is to be heard by more than one judge, the notice of motion shall state that the motion will be heard on a date to be fixed by the Registrar. R.R.O. 1990, Reg. 194, r. 61.16 (3).

(3.1) Revoked: O. Reg. 263/03, s. 6 (2).

Certificate of Estimated Time for Argument

(3.2) The notice of motion shall contain a certificate stating how much time (expressed in hours or fractions of an hour) the lawyer estimates will be required for his or her oral argument, not including reply. O. Reg. 333/96, s. 3 (2); O. Reg. 575/07, s. 4.

Motion Record and Factum

(4) On a motion referred to in subrule (3),

(a) the moving party,

(i) shall serve a motion record that contains the documents referred to in subrule 37.10 (2) and a factum consisting of a concise argument stating the facts and law relied on by the moving party, and

(ii) shall file three copies of the moving party's motion record and factum, with proof of service, within 30 days after filing the notice of motion;

(b) the responding party,

(i) may, if of the opinion that the moving party's motion record is incomplete, serve a motion record that contains the documents referred to in subrule 37.10 (3),

(ii) shall serve a factum consisting of a concise argument stating the facts and law relied on by the responding party, and

(iii) shall file three copies of the responding party's motion record and factum, with proof of service, within 25 days after service of the moving party's motion record and factum; and

(c) a party who intends to refer to a transcript of evidence at the hearing shall ensure that it is included in the motion record. O. Reg. 263/03, s. 6 (3).

Review of Registrar's Order

(5) A person affected by an order or decision of the Registrar may make a motion to a judge of the appellate court to set it aside or vary it by a notice of motion that is served forthwith after the order or decision comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 61.16 (5).

Review of Single Judge's Order

(6) A person who moves to set aside or vary the order of a judge of an appellate court under subsection 7 (5) or 21 (5) of the *Courts of Justice Act* shall do so by a notice of motion that is served within four days after the order is made and states that the motion will be heard on a date to be fixed by the Registrar. R.R.O. 1990, Reg. 194, r. 61.16 (6).

Registrar to Dismiss for Delay

(7) If the moving party has not served and filed the motion record and other documents in accordance with subrule (4),

(a) the responding party may make a motion to the Registrar, on 10 days notice to the moving party, to have the motion dismissed for delay;

(b) the Registrar may serve notice on the moving party that the motion will be dismissed for delay unless the motion record and other documents are served and filed within 10 days after service of the notice. O. Reg. 263/03, s. 6 (4).

(8) The Registrar shall make an order in Form 61J.1 dismissing the motion for delay, with costs fixed at $750, despite rule 58.13, if the moving party,

(a) in the case of a motion under clause (7) (a), does not serve and file the motion record and other documents before the hearing of that motion, or within such longer period as a judge of the appellate court allows;

(b) in the case of a notice under clause (7) (b), does not serve and file the motion record and other documents within 10 days after the notice is served, or within such longer period as a judge of the appellate court allows. O. Reg. 263/03, s. 6 (4); O. Reg. 394/09, s. 29.

PROCEDURE ON APPEAL

Application of Rule

62.01 (1) Subrules (2) to (10) apply to an appeal that is made to a judge,

(a) from an interlocutory order of a master or case management master, under clause 17 (a) of the *Courts of Justice Act*;

(b) from a certificate of assessment of costs, under clause 6 (1) (c) or 17 (b) or subsection 90 (4) of that Act; or

(c) under any other statute, unless the statute or a rule provides for another procedure. R.R.O. 1990, Reg. 194, r. 62.01 (1); O. Reg. 438/08, s. 49 (1).

Time For Appeal

(2) An appeal shall be commenced by serving a notice of appeal (Form 62A) on all parties whose interests may be affected by the appeal, within seven days after the making of the order or certificate appealed from. R.R.O. 1990, Reg. 194, r. 62.01 (2); O. Reg. 14/04, s. 33 (1).

Hearing Date

(3) The notice of appeal shall name the first available hearing date that is not less than seven days after the date of service of the notice of appeal, and rule 37.05 (hearing date for motions) applies, with necessary modifications. R.R.O. 1990, Reg. 194, r. 62.01 (3).

Notice of Appeal

(4) The notice of appeal (Form 62A) shall state the relief sought and the grounds of appeal, and no grounds other than those stated in the notice may be relied on at the hearing, except with leave of the judge hearing the appeal. R.R.O. 1990, Reg. 194, r. 62.01 (4).

(5) The notice of appeal shall be filed in the court office where the appeal is to be heard, with proof of service, not later than seven days before the hearing date. R.R.O. 1990, Reg. 194, r. 62.01 (5); O. Reg. 171/98, s. 22 (1); O. Reg. 438/08, s. 49 (2).

Place of Hearing

(6) The appeal shall be heard at a place determined in accordance with rule 37.03 (place of hearing of motions). R.R.O. 1990, Reg. 194, r. 62.01 (6).

Appeal Record

(7) The appellant shall, not later than seven days before the hearing, serve on every other party and file, with proof of service, in the court office where the appeal is to be heard, an appeal record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of appeal;

(c) a copy of the order or certificate appealed from, as signed and entered, and the reasons, if any, as well as a further typed or printed copy of the reasons if they are handwritten; and

(d) such other material that was before the judge or officer appealed from as is necessary for the hearing of the appeal,

and a factum consisting of a concise argument stating the facts and law relied on by the appellant. R.R.O. 1990, Reg. 194, r. 62.01 (7); O. Reg. 171/98, s. 22 (2); O. Reg. 206/02, s. 17 (1); O. Reg. 438/08, s. 49 (3).

(8) The respondent shall serve on every other party, at least four days before the hearing,

(a) a factum consisting of a concise argument stating the facts and law relied on by the respondent; and

(b) any further material that was before the judge or officer appealed from and is necessary for the hearing of the appeal. O. Reg. 14/04, s. 33 (2); O. Reg. 438/08, s. 49 (4).

(8.1) The respondent's factum, and any further material, shall be filed with proof of service in the court office where the appeal is to be heard, at least four days before the hearing. O. Reg. 171/98, s. 22 (3); O. Reg. 438/08, s. 49 (5).

(9) A judge may dispense with compliance with subrules (7) and (8), in whole or in part, before or at the hearing of the appeal. R.R.O. 1990, Reg. 194, r. 62.01 (9).

Abandoned Appeals

(10) Rule 61.14 applies, with necessary modifications, to the abandonment of an appeal under this rule. R.R.O. 1990, Reg. 194, r. 62.01 (10).

MOTION FOR LEAVE TO APPEAL

Leave to Appeal from Interlocutory Order of a Judge

62.02 (1) Leave to appeal to the Divisional Court under clause 19 (1) (b) of the Act shall be obtained from a judge other than the judge who made the interlocutory order. O. Reg. 171/98, s. 23 (1).

(1.1) If the motion for leave to appeal is properly made in Toronto, the judge shall be a judge of the Divisional Court sitting as a Superior Court of Justice judge. O. Reg. 171/98, s. 23 (1); O. Reg. 292/99, s. 2 (2).

Time for Service of Motion

(2) The notice of motion for leave shall be served within seven days after the making of the order from which leave to appeal is sought or such further time as is allowed by the judge hearing the motion. R.R.O. 1990, Reg. 194, r. 62.02 (2); O. Reg. 14/04, s. 34 (1).

Hearing Date

(3) The notice of motion for leave shall name the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 62.02 (3).

Grounds on Which Leave May Be Granted

(4) Leave to appeal shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted. R.R.O. 1990, Reg. 194, r. 62.02 (4).

Motion Record

(5) On a motion for leave, the requirement of rule 37.10 respecting a motion record may be satisfied by,

(a) requisitioning that the motion record used on the motion that gave rise to the order from which leave to appeal is sought be placed before the judge hearing the motion for leave; and

(b) serving and filing a supplementary motion record containing the notice of motion for leave to appeal, a copy of the order from which leave to appeal is sought and a copy of any reasons given for the making of the order as well as a further typed or printed copy of the reasons if they are handwritten. R.R.O. 1990, Reg. 194, r. 62.02 (5).

Factums Required

(6) On a motion for leave, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 34 (2).

(6.1) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 30 (1).

(6.2) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 30 (2).

(6.3) Revoked: O. Reg. 394/09, s. 30 (3).

Reasons for Granting Leave

(7) The judge granting leave shall give brief reasons in writing. R.R.O. 1990, Reg. 194, r. 62.02 (7).

Subsequent Procedure Where Leave Granted

(8) Where leave is granted, the notice of appeal required by rule 61.04, together with the appellant's certificate respecting evidence required by subrule 61.05 (1), shall be delivered within seven days after the granting of leave, and thereafter Rule 61 applies to the appeal. R.R.O. 1990, Reg. 194, r. 62.02 (8).

Jury trials

108. (1) In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided. R.S.O. 1990, c. C.43, s. 108 (1); 1996, c. 25, s. 9 (17).

Trials without jury

(2) The issues of fact and the assessment of damages in an action shall be tried without a jury in respect of a claim for any of the following kinds of relief:

1. Injunction or mandatory order.

2. Partition or sale of real property.

3. Relief in proceedings referred to in the Schedule to section 21.8.

4. Dissolution of a partnership or taking of partnership or other accounts.

5. Foreclosure or redemption of a mortgage.

6. Sale and distribution of the proceeds of property subject to any lien or charge.

7. Execution of a trust.

8. Rectification, setting aside or cancellation of a deed or other written instrument.

9. Specific performance of a contract.

10. Declaratory relief.

11. Other equitable relief.

12. Relief against a municipality. R.S.O. 1990, c. C.43, s. 108 (2); 1994, c. 12, s. 41; 2006, c. 21, Sched. A, s. 16.

Idem

(3) On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury. R.S.O. 1990, c. C.43, s. 108 (3).

Composition of jury

(4) Where a proceeding is tried with a jury, the jury shall be composed of six persons selected in accordance with the *Juries Act*. R.S.O. 1990, c. C.43, s. 108 (4).

Verdicts or questions

(5) Where a proceeding is tried with a jury,

(a) the judge may require the jury to give a general verdict or to answer specific questions, subject to section 15 of the *Libel and Slander Act*; and

(b) judgment may be entered in accordance with the verdict or the answers to the questions. R.S.O. 1990, c. C.43, s. 108 (5).

Idem

(6) It is sufficient if five of the jurors agree on the verdict or the answer to a question, and where more than one question is submitted, it is not necessary that the same five jurors agree to every answer. R.S.O. 1990, c. C.43, s. 108 (6).

Discharge of juror at trial

(7) The judge presiding at a trial may discharge a juror on the ground of illness, hardship, partiality or other sufficient cause. R.S.O. 1990, c. C.43, s. 108 (7).

Continuation with five jurors

(8) Where a juror dies or is discharged, the judge may direct that the trial proceed with five jurors, in which case the verdict or answers to questions must be unanimous. R.S.O. 1990, c. C.43, s. 108 (8).

Specifying negligent acts

(9) Where a proceeding to which subsection 193 (1) of the *Highway Traffic Act* applies is tried with a jury, the judge may direct the jury to specify negligent acts or omissions that caused the damages or injuries in respect of which the proceeding is brought. R.S.O. 1990, c. C.43, s. 108 (9).

Malicious prosecution

(10) In an action for malicious prosecution, the trier of fact shall determine whether or not there was reasonable and probable cause for instituting the prosecution. R.S.O. 1990, c. C.43, s. 108 (10).

PART 4 - APPEAL OF ARBITRATION ORDER

50. APPEAL

50.1 A party to an arbitration may appeal an order of an arbitrator to the Director only on a question of law.

50.2 A party may not appeal a preliminary or interim order of an arbitrator until all of the issues in dispute in the arbitration have been finally decided, unless the Director orders otherwise.

50.3 An appeal does not stop an arbitration order from taking effect, unless the Director orders otherwise.

TIME FOR APPEAL

52.1 Subject to **Rule 52.2,** the appellant must file the ***Notice of Appeal*** within **30 days** of the date of the arbitration order.

52.2 The Director may extend the time for requesting an appeal on such terms as he or she considers appropriate, either before or after the **30-day** time limit, if he or she is satisfied there are reasonable grounds for granting the extension.

Ontario

Financial Services Commission of Ontario
5160 Yonge Street
Box 85
Toronto ON M2N 6L9

Dispute Resolution Services

Notice of Appeal
Form I

Commission file number
P-

Complete ALL sections.
Attach extra sheets if necessary.

ARBITRATION DECISION DETAILS

Applicant	Insurer(s)	
Date of Arbitration decision (yyyy/mm/dd)	Arbitrator	Arbitration file number A

APPELLANT

☐ Mr. ☐ Mrs. ☐ Ms.	Company name **OR** Last name	First name	Middle name
Street address			Apt./Unit
City	Province/State	Postal Code/Zip	Country
Home phone number	Work phone number Ext.	Fax number	Email address
	( )	( )	

APPELLANT'S REPRESENTATIVE

☐ Mr. ☐ Mrs. ☐ Ms.	Last name	First name	File reference number
Title		Firm name	
Street address			Apt./Unit
City	Province/State	Postal Code/Zip	Country
Phone number	Ext. Fax number		Email address (required)
( )	( )		

The representative is:

☐ Lawyer — Law Society licence number _____

☐ Licensed paralegal — Law Society licence number _____

☐ Not required to be licensed

Specify the type of exemption from the list of exemptions recognized in the Law Society 's by-laws _____

REASONS FOR THE APPEAL

Briefly explain the reasons for your appeal (questions of law only).

☐ Extra sheets attached

ACTIONS SOUGHT FROM THE APPEAL

Briefly explain what outcome or result you are looking for in the Appeal.

☐ Extra sheets attached

TRANSCRIPTS

Was the Arbitration recorded?
☐ No
☐ Yes

Are you ordering a transcript of the hearing?
☐ No
☐ Yes

If **Yes**, you must inform the other party and arrange for a transcript copy to be provided to him/her and the Director's Delegate. State when you expect to receive the transcript. ▼

If **No**, briefly explain why a transcript is not needed for the Appeal. ▼

☐ Extra sheets attached

STAY OF THE ARBITRATION ORDER

Are you asking for a Stay of the Arbitration Order?
☐ No
☐ Yes

If **Yes**, briefly explain why you are asking for a Stay. Your reasons should be as complete as possible. ▼

☐ Extra sheets attached

APPEAL FROM A PRELIMINARY OR INTERIM ORDER

Are you asking for an Appeal of a Preliminary or Interim Order?
☐ No
☐ Yes

If **Yes**, briefly explain why you should be permitted to appeal a preliminary or interim order. Your reasons should be as complete as possible. ▼

☐ Extra sheets attached

EVIDENCE

List any evidence that you intend to rely on that was not part of the Arbitration hearing. Explain why this evidence is necessary. Your explanation should be as complete as possible.

☐ Extra sheets attached

SIGNATURE AND CERTIFICATION

I certify that all information in this Notice of Appeal and attachments is true and complete. I realize that copies of all information filed with this Notice of Appeal will be given to the other party in this dispute.

☐ Appellant
☐ Representative

Name (please print)

Title

Signature	Date (yyyy/mm/dd)	☐ Cheque or money order enclosed	Total number of extra sheets attached ▼

Ontario

Financial Services Commission of Ontario
5160 Yonge Street
Box 85
Toronto ON M2N 6L9

Dispute Resolution Services

Notice of Appeal
Form I

Guide For Completing Dispute Resolution Services (DRS) Forms

Use this form to appeal an Arbitration decision. **Appeals are only allowed on questions of law.**

You must file your completed *Notice of Appeal* with the Financial Services Commission of Ontario (the "Commission") at the address below, **within 30 days** of the date of the arbitration order you wish to appeal. The Director of Arbitrations may extend the time based on the reasons for the delay and the apparent strength of the appeal. The steps you must take are set out in this form.

Personal information requested on this form is collected under the authority of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended. This information, including documents submitted with this application, will be used in the dispute resolution process for accident benefits. This information will be available to all parties to the proceeding. Any questions about this collection of information may be directed to the Director of Arbitrations, Dispute Resolution Services, at the address below.

If you have any questions or want more information, contact:

Appeals Unit
Dispute Resolution Services
Financial Services Commission of Ontario
5160 Yonge Street, 15th Floor, Box 85
Toronto ON M2N 6L9

In Toronto: (416) 590-7222

Toll Free: 1-800-517-2332, extension 7222

Fax: (416) 590-7077

Commission website: www.fsco.gov.on.ca

Appealing an Arbitration Decision

For a complete set of the rules for appeals, see the *Dispute Resolution Practice Code.*

Step 1

Complete this *Notice of Appeal* form within **30 days** of the date of the Arbitration order. If the *Notice of Appeal* is incomplete, it may be rejected. After completing the form, you must serve a copy on the respondent (the other party). If the respondent was represented at the arbitration hearing by a lawyer, you should serve the *Notice of Appeal* on the lawyer. If not, serve the respondent.

Service may be done by personal delivery, courier, fax, regular mail, registered mail or any other method allowed by the *Dispute Resolution Practice Code*.

Then file the following with the Commission:

- Completed *Notice of Appeal*
- Original *Statement of Service* form stating when and how you served the respondent with the *Notice of Appeal*
- The fee

Step 2

Upon receiving a properly completed *Notice of Appeal*, *Statement of Service* and the application fee, the Commission will promptly acknowledge the appeal.

Step 3

To oppose your appeal, the respondent must file a *Response to Appeal* within **20 days** of receiving acknowledgement of the appeal from the Commission. You will get a copy of the *Response to Appeal* from the respondent.

Step 4

Unless the Director of Arbitrations or an adjudicator delegated by the Director (known as Director's Delegate) advises you differently, your written submissions must be served on the respondent and filed with the Commission within **30 days** of the date the *Response to Appeal* was due. If a transcript is ordered, this time limit is extended to **30 days** from receipt of the transcript.

Step 5

The Director or Director's Delegate may decide the appeal with or without a hearing.

How to Complete the Notice of Appeal

PLEASE PRINT

Arbitration Decision Details

This information can be found in the arbitration decision.

Applicant's Name and Address

Fill in completely. Provide any alternative addresses, phone numbers, fax numbers or electronic mail addresses that will make it easier for us to contact you.

Appellant's Representative

You may choose to have someone represent you. Although many people are represented by a lawyer in an appeal, a lawyer is not required. If you have a representative, fill in the name, address and phone number of your representative. If it is a firm, please give the name of the firm in the box provided. **A minor (a person under the age of 18) or a person who has been declared mentally incapable, must have a representative.**

Reasons for the Appeal

Appeals are only available on questions of law. If your appeal does not involve a question of law, it may be rejected.

Briefly state what part(s) of the Arbitration order you are appealing and the error(s) of law you claim the arbitrator made. Attach extra sheets if necessary. Your *Notice of Appeal* must be sufficiently detailed to allow the other party to respond. It is not necessary, however, for you to file your complete written submissions until later.

Action Sought

Briefly state the remedy or outcome you are seeking in your appeal.

Transcript

Indicate if the Arbitration hearing was recorded by a reporting service. If it was recorded, indicate if you have ordered a transcript of the hearing. If you do not intend to order a transcript, you must state why a transcript is not needed for the appeal.

Stay

The usual rule is that an appeal does not stop the Arbitration order from taking effect. If you are asking that the Arbitration order not go into effect, you must explain why the usual rule should not apply.

It is likely that the stay will be decided without further submissions, so your reasons should be as complete as possible.

Appeal from a Preliminary or Interim Order

The usual rule is that a party may not appeal a preliminary or interim order of an arbitrator until all of the issues in the arbitration dispute have been finally decided. If you are seeking to appeal a preliminary or interim order, you must explain why the usual rule should not apply.

It is likely that this issue will be decided without further submissions so your reasons should be as complete as possible.

Evidence

Appeals are usually decided based on the evidence presented at the arbitration hearing. The Director's Delegate will have access to the arbitration exhibits and, therefore, it is not necessary to refile them.

If you want to rely on any additional or new evidence – documents or witnesses – you must explain what the evidence is and why it should be allowed in the appeal.

This issue may be decided without further submissions so your explanation should be as detailed as possible.

Signature

Sign the form and return it to the Appeals Unit at the Commission.

Fee

If you are an insured person, be sure to enclose the filing fee of $250 by cheque or money order made out to the **MINISTER OF FINANCE. The application will be rejected if the filing fee is not enclosed.**

If you are an insurer, the Commission will invoice your company for the filing fee (**$250**) and the insurer assessment (**$500**).

Note: You may settle your dispute with the respondent directly at any time during the appeal process.