Of appeals

This page covers the myriad ways in which appeals may be conducted in Ontario. It takes specific aim at peculiarities in the appeals process that could undermine a party's right to appeal. This page also provides practice tips to counsel.

General information regarding the appeals process in Ontario is derived from three pieces of legislation that should be very familiar to any litigation counsel. These are:

1. the *Courts of Justice Act*;
2. the *Rules of Civil Procedure*; and
3. the *Supreme Court Act*.

Before delving into more complex questions of appellate procedure, these acts should be reviewed and thoroughly understood.

Other legislation, like the *Construction Act* or the *Arbitration Act*, provide for different timelines and rights of appeal. Be careful to know whether special legislation applies to the decision under appeal. Many statutes that create administrative tribunals will specify when and how an appeal may be taken.

The time for an appeal

Appeal timelines are deceptively straightforward. For most appeals from Ontario Superior Court decisions, the time to appeal is either thirty (30) days if the appeal is to an appellate court, or seven (7) days if the appeal is from an interlocutory decision (rules 61 and 62).

An appeal is always taken from the order made, not from the reasons for decision. An order must be signed and entered for an appeal to be heard by the appellate court. **Counsel must therefore work to obtain an order from the court and have it signed and entered without delay.** A failure in this regard can lead to increased costs for the appeal.

Starting the appeal clock

As a general rule, the time in which to begin an appeal begins when the order is pronounced. The pronunciation of an order can occur in court at the end of a hearing; a jury may pronounce an order at the end of trial; a judge may issue an endorsement. These acts (and more besides) create the order because the parties to a dispute will understand precisely what the court requires of them. Drafting, signing, and entering the formal order in the book is an act separate from the actual making of an order (see rules 59.01 and 59.04).

In *Byers v. Pentex Print Master* (

[2003] 167 OAC 159

), the Ontario Court of Appeal explained the logic behind this distinction. A jury had pronounced judgment in a civil proceeding, with costs reserved to the presiding judge. Two orders therefore issued: a jury's order on the merits of the dispute and a judge's order with respect to costs. The

appellant sought to appeal by arguing that the date of the costs order's pronouncement in court was the date on which the time to appeal was calculated. The Court disagreed. It said that:

> litigants are best served by a rule which accords with the traditional understanding that a decision on the merits is final for the purpose of appeal when it is rendered, notwithstanding the pendency of the determination of the costs attributable to the case. (para. 17) …
>
> Given that no formal judgment has been signed or entered in this case in respect to either the merits judgment or the costs judgment, reference should be made to two early Ontario decisions, Hickey v. Stover (1885), 11 P.R. 88 (Ont. Div. Ct.) and Fawkes v. Swayzie (1899), 31 O.R. 256 (Div. Ct.). These cases stand for the proposition that the time for appealing runs from the date that a judgment is pronounced and not from the date that it is signed and entered. This proposition is based on the settled principle that the binding effect of a judgment or order commences on the date of its pronouncement. This principle has been given effect by rule 59.01 which provides that an order (which includes a judgment) is effective from the date on which it is made, unless it provides otherwise, and by rule 59.03(3)(b) which requires that every formal order shall contain the date on which it was made. The formal judgment must be signed and entered, however, before the appellant's appeal can be perfected. (para. 31) …
>
> the court possesses the power to alter, modify or amend its judgment, or to rectify its own mistake, following the release of its decision and before it has been signed as the formal judgment of court and entered. In other words, the court may reconsider matters properly encompassed in its decision on the merits before it is entered. When the court does so, and alters or modifies its merits judgment, the time for service of the notice of appeal from that judgment commences when that judgment has been altered or modified and entered. (para. 41).

These passages provide a complete summary of the rules for calculating the time to appeal.

Practice directions

1. Your day isn't over when the Court rises. If a decision of any kind was made by a judicial officer during the sitting that affects your client, you must determine whether your client wishes to appeal.
2. When in doubt, advise your client once a decision has been made of her or his right to appeal.
3. Always determine whether the appeal is from an interlocutory decision or a final decision.

Raising new issues on appeal

Although new issues can be raised on appeal, appellate courts restrict parties' ability to raise such issues, especially when issues require additional evidence that was not adduced at the trial level.

An appellant can only raise new issues on appeal with leave of the appellate court (*Bodnar v. Boban*

Estate, 2021 ONCA 746, para. 13).

Granting leave to raise new issues on appeal is at the appellate court's discretion (*Bodnar v. Boban Estate*, 2021 ONCA 746, para. 13), and exercise of that discretion is typically reserved to the panel hearing the appeal.

The Court's exercise of discretion is based on the rule set out in *Ross v. Ross*, 1999 NSCA 162, para. 34:

> The general principle concerning arguments raised for the first time on appeal is that they should only be entertained if the Court of Appeal is persuaded that all the facts necessary to address the point are before the Court as fully as if the issue had been raised at trial. The rationale of the principle is that it is unfair to permit a new argument on appeal in relation to which evidence might have been led at trial had it been known the issue would be raised: see e.g., The Tasmania, (1890) 15 App. Cas. 223 (H.L.) at 225; S-Marque Inc. v. Homburg (1999), 1999 NSCA 59 (CanLII), 176 N.S.R. (2d) 218 (C.A.); O'Bryan v. O'Bryan (1997), 1997 CanLII 4045 (BC CA), 97 B.C.A.C. 62 (C.A.).

This rule has been adopted by the Ontario Court of Appeal (see 2021 ONCA 746, *supra*; *Ontario Energy Savings L.P. v. 767269 Ontario Ltd.*, 2008 ONCA 350).

The Ontario Court of Appeal summarized the law on this issue in *Kaiman v. Graham*, 2009 ONCA 77, para. 18:

> The general rule is that appellate courts will not entertain entirely new issues on appeal. The rationale for the rule is that it is unfair to spring a new argument upon a party at the hearing of an appeal in circumstances in which evidence might have been led at trial if it had been known that the matter would be an issue on appeal: Ontario Energy Savings L.P. v. 767269 Ontario Ltd., 2008 ONCA 350, at para. 3. The burden is on the appellant to persuade the appellate court that "all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial": Ross. v. Ross (1999), 1999 NSCA 162 (CanLII), 181 N.S.R. (2d) 22 (C.A.), at para. 34, per Cromwell J.A.; Ontario Energy Savings at para. 3. This burden may be more easily discharged where the issue sought to be raised involves a question of pure law: see e.g. R. v. Vidulich (1989), 1989 CanLII 231 (BC CA), 37 B.C.L.R. (2d) 391 (C.A.); R. v. Brown, 1993 CanLII 114 (SCC), [1993] 2 S.C.R. 918, per L'Heureux-Dubé J., dissenting. In the end, however, the decision of whether to grant leave to allow a new argument is a discretionary decision to be guided by the balancing of the interests of justice as they affect all parties: R. v. Warsing, 1998 CanLII 775 (SCC), [1998] 3 S.C.R. 579, per L'Heureux-Dubé J., dissenting; R. v. Sweeney (2000), 2000 CanLII 16878 (ON CA), 50 O.R. (3d) 321 (C.A.); Vidulich at pp. 398-99.

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