

Policy:

Appeals by Crown to the Court of Appeal and Supreme Court of Canada

Policy Code:

APP 1

Effective Date:

March 1, 2018

Cross-references:

[ENV1](#) [MED 1](#)

This policy outlines the minimum requirements that must be met before an appeal or application for leave to appeal to the B.C. Court of Appeal (BCCA) or Supreme Court of Canada (SCC) will be approved. The fact that the criteria are met does not necessarily mean that an appeal will be initiated.

Not every unfavourable result can or should be appealed and the appeal process is onerous for both the Crown and the accused/respondent. Finality is an important goal of the criminal justice system. To that end, a second litigation of issues which a trial court has already decided should be avoided if reasonably possible.

Subject to *Environmental Prosecutions* ([ENV 1](#)), all Crown appeals or applications for leave to appeal to the BCCA and SCC are to be considered on their own merits and approved by the Director of Criminal Appeals and Special Prosecutions, or designated Criminal Appeals Crown Counsel.

Appeal against Acquittal to the Court of Appeal

No appeal or application for leave to appeal against acquittal or judicial stay of proceedings will be approved unless the following conditions are met:

- it involves a question of law alone (section 676(1)(a))
- a reasonable argument can be made that the verdict would not necessarily have been the same if the error in law had not been made (*Vézeau v The Queen*, [1977] 2 SCR 277) or that the error below had, in the concrete reality of the case, a material bearing on the acquittal (*R v Graveline*, 2006 SCC 16)
- the public interest requires an appeal

In deciding whether the public interest requires an appeal, some of the factors that may be considered include:

- whether public safety concerns, taking into account the seriousness of the offence and the circumstances of the offender, warrant a reconsideration of the case
- whether the issue raised by the case is one of general importance and no similar case is under appeal
- whether there are conflicting judgments on the question of law to be appealed
- whether it is likely that an appeal, if taken, would be successful
- whether there exists a proper record upon which to litigate the question of law

The application of and weight to be given to relevant factors will depend on the circumstances of each case.

Appeal against Sentence to the Court of Appeal

An appeal or application for leave to appeal against sentence will be not approved unless the sentence imposed in the trial court is either illegal or unfit, and the one of the following conditions apply:

- the proposed appeal involves a serious offence or relates to an offender who constitutes a serious threat to the community
- the proposed appeal raises an important question of general application concerning the principles of sentencing
- the public interest in the proper administration of justice requires that the sentence be appealed

Generally, a sentence will only be considered unfit if it is clearly below the acceptable range of sentence and not merely at the low end of the acceptable range (*R v Shropshire*, [1995] 4 SCR 227; *R v M* (CA), [1996] 1 SCR 500). Also, a judge can order a sentence outside the normal range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit (*R v Nasogaluak*, 2010 SCC 6 at para 44). Accordingly, to merit an appeal, a successful appeal should lead to a significant increase in the length of the sentence or a significant alteration to the manner in which the sentence is to be served.

Procedure to Request an Appeal

All requests for appeal or application for leave to appeal from acquittal or sentence should be in the required form. It is imperative that all information identified on the Fact Sheet

(Appendix A or B) be provided with the appeal request, including whether any victim(s) requests notification, and if so, their name(s), address(es), and other contact information.

Trial Crown Counsel should advise Administrative Crown Counsel of all requests for a Crown appeal or application for leave to appeal. All such requests must be approved by a Regional Crown Counsel, Director, or their respective deputy before being forwarded to the Director of Criminal Appeals and Special Prosecutions.

Time is of the essence. The Crown appeal request must be submitted to the Director of Criminal Appeals and Special Prosecutions well in advance of the expiration of the 30-day time limit for filing the Notice of Appeal and serving the accused/respondent.

The 30-day time limit for sentence appeals runs from the date of sentence.

The 30-day time limit for appeals from acquittal runs from the date of the acquittal and not from the date of sentence (e.g., where a verdict of acquittal is directed by the trial judge at the close of the Crown's case on the charged offence, but the trial continues on a lesser and included offence, the 30-day appeal period runs from the date of the directed verdict of acquittal.)

Criminal Appeals staff may have relatively little information about the file and therefore may require assistance. When Criminal Appeals staff seeks information from a local Crown Counsel office with respect to a case, it is incumbent upon the local office to obtain the required information rather than direct the Criminal Appeals staff elsewhere.

The requesting office should order all necessary transcripts on an expedited basis, including transcripts of reasons for judgment, reasons for sentence, significant rulings during the trial, and portions of the judge's charge relevant to the grounds of appeal. The appeal request form should be forwarded immediately and transcripts as soon as possible.

Where a Regional Crown Counsel and the Director of Criminal Appeals and Special Prosecutions disagree about whether an appeal or application for leave to appeal should be taken to either the BCCA or the SCC, the matter must be referred for resolution to the Assistant Deputy Attorney General (ADAG) at the earliest opportunity prior to the expiration of the appeal period.

Subject to *Environmental Prosecutions* (ENV 1) and in the absence of a specific arrangement under the following paragraph, the Criminal Appeals office will have conduct of all appeals or applications for leave to appeal to the BCAA and SCC.

The Director of Criminal Appeals and Special Prosecutions may request a Regional Crown Counsel or Director to provide counsel to conduct an appeal or application for leave to

appeal. Crown Counsel attached to a Region or Directorate may request to be given conduct of an appeal or application for leave to appeal after consultation with a Regional Crown Counsel or Director of Criminal Appeals and Special Prosecutions respectively. The request is to be made to the Director of Criminal Appeals and Special Prosecutions.

Additional Considerations in Relation to Crown and Defence Appeals

- If there is a media enquiry concerning an acquittal or sentence, Crown Counsel should indicate that decisions concerning whether to appeal are made following a complete review of the case. Crown Counsel should not outline their recommendation regarding appeal or make any public pronouncement regarding the likelihood of a Crown appeal being taken from an acquittal or sentence, see *Media – Guidelines for Crown Counsel* ([MED 1](#)).
- Crown Counsel should refrain from making any representations about positions the Crown will take in response to a defence appeal or any interlocutory application connected to an appeal, including an application for bail pending appeal.
- Crown Counsel must not enter into any arrangement which purports to fetter the discretion of the Attorney General to commence an appeal unless the written approval of the ADAG to such an arrangement is obtained in advance.

Interventions in the Court of Appeal and the Supreme Court of Canada

Recommendations to the ADAG about whether or not the Attorney General of British Columbia should intervene in appeals or applications for leave to appeal to be heard in the BCAA or SCC will be made by the Director of Criminal Appeals and Special Prosecutions, or their designate.

Appendix A

Crown Appeal against Acquittal or Judicial Stay of Proceedings

1. Name of accused.
2. Lower Court registry number.
3. Lower Court registry location.
4. Place of acquittal or stay of proceedings.
5. Name of judge.
6. Offence of which accused acquitted or on which stay of proceedings entered and section of *Criminal Code* of offence. A copy of the endorsed Information or Indictment to be attached.
7. Plea at trial.
8. Whether a jury trial.
9. Length of trial (give dates).
10. Place and date of acquittal or stay of proceedings. Transcript of Reasons for Acquittal or Stay of Proceedings to be forwarded to Criminal Appeals office as soon as possible.
11. If trial by judge without a jury, attach a statement of the facts as found by the trial judge upon which acquittal or stay of proceedings based.
12. If accused in custody, place of incarceration.
13. Where can the accused be served with the Notice of Appeal? Provide most recent known address and place of employment and known previous addresses.
14. Where the accused is not in custody give the name, detachment and telephone number of the officer who will arrange service of the Notice of Appeal on the accused.
15. What error(s) of law alone would form the basis for this appeal?
16. Explain why the verdict in this case would have been different if the error(s) in law had not occurred.

17. What position did the Crown take at trial on the issues forming the basis for the appeal?
18. What cases were cited by the Crown and defence on the issues?
19. Provide any additional information which would assist in determining if this is a case requiring a Crown appeal.
20. Names of all Crown Counsel involved.
21. Names and telephone numbers of all Court Reporters (or Court Recording Service) involved in the trial.
22. Name, address, and phone numbers of defence counsel at trial.
23. Names, addresses, and telephone numbers of any victims who require notification.
24. Are there any relevant publication bans?

Appendix B

Crown Appeal against Sentence

1. Name of accused.
2. Lower Court registry number and location.
3. Place of sentencing.
4. Name of judge.
5. Of what was accused convicted and what sentence was imposed.
A copy of the endorsed Information or Indictment to be attached.
6. Plea at trial.
7. Whether a jury trial.
8. Length of trial, give dates.
9. Place and date of reasons for conviction.
10. Place and date of reasons for sentence. Transcript of Reasons for Sentence must be forwarded to Criminal Appeals office as soon as possible.
11. Attach a statement of the facts as found by the trial judge for the purpose of sentence.
 - (a) If accused convicted after trial, where are the facts as stated by the court?
(e.g.) Judge's reasons for conviction; Judge's reasons for sentence.
 - (b) If accused convicted upon guilty plea, give the date the facts were read in.
Did accused deny any of the facts read in by Crown? What facts denied?
Did Crown then prove those facts?
12. If accused in custody, place of incarceration.
13. Where can the accused be served with the Notice of Appeal? Provide most recent known address and place of employment and known previous addresses.
14. Where the accused is not in custody give the name, detachment and telephone number of the officer who will arrange service of the Notice of Appeal on the accused.
15. Outline basis of appeal against sentence.
16. What was the Crown's position on sentence?

17. What cases were cited by the Crown and defence on sentence.
18. Were any witnesses called on sentence? Give names, by whom called, purpose.
19. List documents placed before judge on sentence (copies to be attached)
 - (a) criminal record (YES/NO)
 - (b) pre-sentence reports (YES/NO)
 - (c) character letter (YES/NO)
 - (d) psychiatric/psychologist reports (YES/NO)
 - (e) Victim Impact Statements (YES/NO)
 - (e) other (YES/NO)
20. Was any portion of the facts contained in the documents on sentencing denied by the accused? What was denied?
21. Did the accused admit additional convictions to those on the record sheet or in the pre-sentence report? If so, what were those admissions?
22. Were there co-accused - whether tried with the accused or separately?
Indicate any circumstances which would justify any disparity between the co-accused's sentence and this sentence.
23. How much time did accused spend in custody prior to sentence?
Did any portion of this time result from other sentences?
24. Names of all Crown Counsel involved.
25. Names and telephone numbers of all Court Reporters (Court Recording Service) involved in the trial and sentencing.
26. Names, addresses and telephone numbers of any victims who require notification.
27. Are there any relevant publication bans?