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Application for Leave to Appeal to the Supreme Court of Canada: A Practical Guide

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I. Application for Leave to Appeal to the Supreme Court of Canada

According to section 40 of the *Supreme Court of Canada Act* [the Act], the Court has authority to grant leave from any judgment of a court of final resort. Leave is required for an appeal, unless it is available as a right in a limited number of cases, for example under a *Criminal Code* provision. According to section 58(2) of the Act, an application for leave to appeal must be served and filed within 60 days of the date that a judgment is pronounced. If leave is granted, the Court may, under section 40(4), extend the time within which the appeal may be allowed. Approximately 500 cases are appealed to the Supreme Court of Canada (SCC) annually; however, only 10-20 percent of the applications are granted leave. Only cases that most clearly meet the test are granted leave. This is a condensed guide for preparing an application for leave to appeal. For more detailed and exhaustive publications please see Eugene Meehan's¹ and Henry Brown's² works, as well as the Court's own website.

Under rule 16(1) of the Act, an Ottawa agent is required at appeal stage, but it is optional at the leave stage. Engaging an agent with extensive experience dealing with the Court – and with a good relationship with Court staff – is invaluable in the preparation and review of materials that meet all of the detailed requirements set out in the Act and the Rules.

II. The National Importance or Public Interest Test

The statutory test for leave to appeal to the SCC is set out in section 40(1) of the Act. The Act sets out the following circumstances:

where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.

The Court no longer provides written reasons for the disposition of leave applications, and the only resource is some earlier decisions of the Court. In a 1904 decision, Justice Nesbitt set out the following non-exhaustive list of circumstances in which leave will be granted:³

- A matter of **Public interest**;
- An **important question of law**;
- The construction of **federal statutes**;
- A **conflict** between Federal and provincial statutes; and
- Where provincial legislation may be of **general interest across the country**.

¹ Eugene Meehan, *Supreme Court of Canada Manual (looseleaf)*, (Toronto: Thomson, 2012).

² Henry S Brown, *Supreme Court of Canada Practice*, (Toronto: Carswell, 2012).

³ *Lake Erie & Detroit River Railway Co v Marsh*, (1904), 35 SCR 197 at 200.

Chief Justice Dickson, further stated that when reviewing applications for leave to appeal the SCC looks for a “matter of public importance; an issue which goes beyond the interests of the immediate litigants, of interest to Canadians generally.”⁴ Finally, in a 1997 address, Justice Sopinka provided an overview of the grounds for granting leave and proposed the following considerations:

- Is the question **germane to the disposition of the case?**
- Is the **law unsettled** or are the courts below **misinterpreting or misapplying a decision** of the Court?
- Is there a **constitutional or aboriginal** issue? and
- Is there a **novel point of law?**

III. Drafting the Memorandum⁵

Rule 25(1)(f) of the Act sets out the construction of the memorandum and the statutory requirements that must be strictly followed. The memorandum is a concise statement of facts and arguments and organized in seven numbered parts:⁶

- Part 1:** Concise overview of position with respect to issues of public importance and Statement of Facts
- Part 2:** Statement of Issues
- Part 3:** Statement of Argument
- Part 4:** Submissions with respect to Costs (maximum one page)
- Part 5:** Order Sought
- Part 6:** Table of Authorities (arranged alphabetically and setting out the paragraph numbers where the authorities are cited)
- Part 7:** Statutory Provisions (the text of provisions of any statute, regulation, rule, ordinance or by-law relied on in both languages)

Rule 25(2) states that the applicant’s memorandum (parts 1-5) cannot exceed 20 pages in length. Given this strict page limit, concise advocacy and effective organization is essential. Subdividing each of the prescribed parts of the memorandum will assist in telling the story and provides an effective framework to present your argument. It is highly recommended to use the headings for advocacy rather just merely stating the issues. The heading should state the desired conclusion in a way that reinforces the thread of the argument.

⁴ Address to the Canadian Bar Association, 1983.

⁵ There are useful tips and guidelines in the materials attached.

⁶ See Appendix B.

a) Use of Evidence

Pursuant to Rule 25(1)(g), applicants may include affidavit evidence in support of leave. While, as a general rule, affidavits of legal experts should not be used to establish national or public importance, the Court has allowed such affidavits to be filed in the past. An alternative approach would be to reference legal commentary, particularly where a well-respected judge or advocate has opined on the issue.

b) Printing Requirements

For all documents:

- Page size: 21.5 cm by 28 cm (letter size)
- Paper type: Good-quality white paper
- Printed on one side only and, in the case of a bound document, with the printed pages facing up on the left. However, books of authorities and condensed books must be printed on both sides of each page.

For documents created using word processing software:

- Font: Times New Roman or a comparable font
- Font style: Regular
- Font size: 12-point size is recommended
- Number of words per page: Not more than 500
- Line spacing: At least one and one half lines apart, except for quotations from authorities, which must be indented and single-spaced
- Margins: Not less than 2.5 cm

c) Binding

Certain documents, such as factums, records, books of authorities, motions made to the Court and applications for leave to appeal, must be bound. See the [Specific Requirements for Documents](#) table for further information.

d) Covers, Headings and Contact Information

Covers are required for all documents. Good-quality white paper must be used for the covers of documents which are not required to be bound; however, good-quality cover stock, in the colour specified in the [Specific Requirements for Documents](#) table, is required for all bound documents. For sample cover and contact information see Appendix A and the sample attached.

e) Table of Contents

Each document that must be bound, and each volume of each such document, must have a table of contents. The table of contents must appear at the beginning of the document or volume and must include the following:

1. A detailed list, in the order in which they appear, of the contents of each section of the document and of every volume of the document, including appendices, and in a separate column, the page numbers at which they commence;
2. In the case of a judgment given without recorded reasons, the phrase "no recorded reasons" in the column for page numbers; and
3. In the case of a book of authorities, the tabs and references for each authority.

Lower-case Roman numerals should be used in numbering the pages of a table of contents in accordance with the Guide for Numbering Pages of Print and Electronic Documents.

f) Page Numbers and Volumes

In every document, except for books of authority, the pages must be numbered consecutively, and page numbers, in Arabic numerals, must appear at the top centre of each page, including any blank pages, with the exception of:

1. the cover and any inside cover pages; and
2. the table of contents (which must be numbered independently using lower-case Roman numerals).

See the Guide for Numbering Pages of Print and Electronic Documents.

If a printed document contains tabs or dividers, the numbering must remain consecutive, irrespective of the tabs or dividers. Do not include page numbers on the tab or divider pages.

If a document exceeds 300 pages (or 600 pages if printed on both sides), it must be bound in volumes of not more than 200 pages (or 400 pages if printed on both sides). Each volume must be numbered in upper-case Roman numerals. The volume number should be placed within the horizontal lines, below the title of the document and the other information required included there. The volume number in Roman numerals must also appear on the bottom cutting edge of each volume. Each volume of a document must include a cover (see Form 1), which must be immediately followed by a table of contents. Page numbering must be started over again in each additional volume of a document.

IV. Electronic Document

a) Technical Requirements

- In PDF format on a CD-ROM.
- When paper documents are scanned, the resolution must be set to 300 dpi.

b) Bookmarks and Hyperlinking

- Bookmarks are essential. They must mirror the items in the table of contents of a document and of each volume of a document. In a book of authorities, the name of each authority must be preceded by the tab number.
- Linking within a document is optional.
- Links to external Websites and between documents are not permitted, because such links will not function once the document is uploaded into the Court's electronic document management system.

c) Page Numbers and Volumes

- The page numbering of the electronic version must be identical to the page numbering of the printed version. To ensure this, the following rules must be complied with:
 - If you are using Adobe Professional, set your numbering "style" to "None" for the cover page and to "i, ii, iii ..." for the table of contents pages. For further information, see the E-Filing FAQ page.
 - Number any blank pages in the document to ensure that the numbering in the printed and electronic versions is consistent.
 - Do not scan tabs or divider sheets into the electronic version.
- If the printed version of a document has more than one volume, the electronic version must be saved in separate files that correspond to the printed volumes.

V. Extension of Time at the SCC

Under section 58(1)(a) of the Supreme Court of Canada Act, an applicant must file an application for leave to appeal within 60 days of the Court of Appeal decision being rendered. However, Section 59(1) of the Act and Rule 6 of the SCC rules state that a judge can, under special circumstances, grant an extension (a discretionary power).

If you apply for leave outside of these timelines, you must also file a motion for an extension of time. Given that judges usually review the extension of time application in light of the issue at bar, it is highly recommended that both applications be filed concurrently. A reviewing panel of judges may grant an extension and in doing so will consider several factors. In *R v Roberge*, 2005 SCC 48, [2005] 2 SCR 469, the Supreme Court of Canada provided the following non-exhaustive list of considerations when reviewing an application for extension of time. These include:

1. Whether the applicant formed a bona fide intention to seek leave to appeal and communicated that intention to the opposing party within the prescribed time;
2. Whether counsel moved diligently;
3. Whether a proper explanation for the delay has been offered;
4. The extent of the delay;

5. Whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and
6. The merits of the application for leave to appeal.⁷

Courts have traditionally adopted a generous approach towards granting extensions of time. However, “the ultimate question is always whether, in all the circumstances and considering the factors... the justice of the case requires that an extension of time be granted,” [emphasis added].⁸ The judge must consider balancing any potential prejudice that would result from a decision to grant or refuse the extension of time. He or she must also consider whether there is a serious issue to be appealed. The case must be arguable before the court.

Many court decisions have the potential to be successfully appealed and, in the ideal situation, all applications for leave would be submitted on time. The courts, however, recognize that some delays are warranted. That said, success when applying for leave to appeal will, arguably, be more difficult when the application is accompanied with an extension for time.

⁷ *R v Roberge*, 2005 SCC 48, [2005] 2 SCR 469, para 6.

⁸ *Ibid.*

APPENDIX A

SCC No:

IN THE SUPREME COURT OF CANADA

(On Appeal from)

BETWEEN:

(APPELLANT)

**Applicant
(Respondent?)**

-and-

(RESPONDENT)

**Respondent
(Appellant?)**

APPLICATION FOR LEAVE TO APPEAL

(Applicant)

(Pursuant to Section 40 of the Supreme Court Act, R.S.C. 1985, c. S-26, as amended)

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APPENDIX B

Table of Contents

TAB		PAGE
	1. Notice of Application for Leave to Appeal	
	2. Affidavits in Support	
	3. Certificate of Applicant	
	4. Reasons and Formal Judgements Below	
	a. Trial	
	b. Court of Appeal	
	5. Applicant's Memorandum of Argument	
	Part I – Statement of Facts	
	Part II – Statement of Issues	
	<u>Issue 1:</u> Issue 1	
	<u>Issue 2:</u> Issue 2	
	Part III – Statement of Argument	
	<u>Issue 1:</u> Issue 1	
	<u>Issue 2:</u> Issue 2	
	Part IV – Submissions with respect to Costs	
	Part V – Order Sought	
	Part VI – Table of Authorities (arranged alphabetically and setting out the paragraph numbers where the authorities are cited)	
	Part VII – Statutory Provisions (the text of provisions of any statute, regulation, rule, ordinance or by-law relied on in both languages)	
	6. Documents Relied Upon	
	7. Authorities	

Selected Bibliography

I. Articles

How To Develop An Appealing Personality: Getting Leave to the Supreme Court of Canada (or, Making Sure the C.A. Isn't the End of the Road), online at: <http://www.supremeadvocacy.ca/en/how-to-develop-appealing-personality-getting-leave-the-supreme-court-of-canada>.

This is a brief non-academic and no-nonsense primer on some practical points of (written) advocacy at the leave to appeal stage to the Supreme Court of Canada. It includes great tips on writing.

Supreme Court of Canada: Process and Advocacy, A Practical Guide for Practitioners, online at: <http://www.supremeadvocacy.ca/en/supreme-court-of-canada-process-and-advocacy-a-practical-guide-for-practitioners>.

A practical guide for appellate advocacy at the Supreme Court of Canada (the overview of the SCC near the beginning of the article has been fully revised in the online version to bring it up-to-date with the new Rules of the SCC as they were brought in on June 28, 2002).

Ten Do's and Don'ts for Written Argument at the Supreme Court of Canada, online at: <http://www.supremeadvocacy.ca/userfiles/files/CBA%20Papers%20-%20E%20Meehan%20SCC%20Do's%20-%20Don'ts%20Written%20Argument.pdf>.

Application for Leave to Appeal to the Supreme Court of Canada: An Overview and Practical Tips, online at: <http://www.supremeadvocacy.ca/en/supreme-court-of-canada-process-and-advocacy-a-practical-guide-for-practitioners>.

Selected Bibliography on SCC Appellate Advocacy by Eugene Meehan, online at: <http://www.supremeadvocacy.ca/userfiles/files/E%20Meehan%20-Selected%20Bibliography%20on%20SCC%20Appellate%20Advocacy.pdf>.

II. Templates and Samples

1. Leave Application Template provided by the Court Registry
2. Leave Application Template, *Tercon Contractors LTD v R*, 2010 SCC 4.
3. SCC Response Template