Civil Appeals to the Court of Appeal

Practice and Procedure

by the Honourable Justice
Stuart J. Cameron

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Introduction

This paper deals exclusively with appeals arising out of civil proceedings. Despite its length, it is intended as an introduction to the subjects it covers, not as a complete treatment of them.

Basically, civil appeals are of two kinds: those taken against decisions of the Court of Queen's Bench or a judge thereof and those taken against decisions of other courts or tribunals. Both have an underlay of *substantive* as well as *procedural* requirement. The substantive underlay is found in *The Court of Appeal Act, 2000*;[1] in such other enactments as confer rights of appeal; and in case authority. The procedural underlay is provided by the *Court of Appeal Rules*, as well as case authority.

Given the underlay of both substantive and procedural requirement, I have divided the paper into two parts. Part One deals with three matters of substantive law: the right of appeal; the jurisdiction of the Court; and the powers of the Court, including the bases upon which it exercises its power. Part Two covers several matters of practice and procedure, including obtaining leave to appeal when required; initiating the appeal; applying in chambers for relief pending the hearing of the appeal, and so on. In addition, the paper contains some practice tips, in the form of notes interspersed throughout, that you may find useful.

I should add, perhaps, that so far as decisions of tribunals are concerned, the paper deals only with appeal from such decisions as provided for by statute. It does not deal with judicial review thereof as provided for by common law. The two are different, and nothing is said of the latter, it being a matter of practice in the Court of Queen's Bench.

Editor's Note: *The Court of Appeal Act, 2000* and the *Court of Appeal Rules* are available from the Queen's Printer at **www.qp.gov.sk.ca**.

1 SS 2000, c C-42.1.

Legislation and Readings

Legislation

The Court of Appeal Act, 2000, SS 2000, c C-42.1

Saskatchewan Court of Appeal Rules

Suggested Readings

Kerans, Roger P. & Kim M. Willey, *Standards of Review Employed by Appellate Courts*, 2d ed (Edmonton: Juriliber Limited, 2006).

Sopinka, John & Mark A. Gelowitz, *The Conduct of an Appeal*, 3d ed (Toronto: LexisNexis Canada, 2012).

White, Robert B. & Joseph J. Stratton, *The Appeal Book* (Aurora: Canada Law Book, 1999).

Part One

Matters of Substantive Law

The Right of Appeal

Basically, an appeal is an application to a court empowered to reconsider the decision of another court or tribunal and, if thought fit, to alter that decision. The purpose of appeal has both a private and a public aspect. The private aspect is to ensure that no one is left to bear the burden of a wrong or unfair decision. The public aspect is to maintain public confidence in the administration of justice and, in appropriate circumstances, to clarify and develop the law. The ability of a person to apply to a court empowered to reconsider and alter the decision of another court or tribunal is what we refer to as "the right of appeal". The right may vary, depending on the terms in which it is conferred. Hence, a decision may be open to appeal, and to reconsideration and alteration, on a more or less ample basis.

Let us consider all of this more fully, having regard for the following:

1. the fundamental nature of the right;
2. the source of the right;
3. the scope of the right; and
4. the exercise of the right.

The Fundamental Nature of the Right

While the private aspect of the purpose of appeal rather suggests otherwise, rights of appeal are regarded as *exceptional*, at least to the extent they are taken to depend on statute for their existence. Mr. Justice LaForest took note of this in *Kourtessis v M.N.R.*, [1993] 2 SCR 53 at 69–70:

> Appeals are solely creatures of statute: see *R. v. Meltzer*, [1989] 1 S.C.R. 1764 at p. 1773. There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal a decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.[2]

The Source of the Right

The primary source of the right of appeal in Saskatchewan is section 7 of *The Court of Appeal Act, 2000*. Its definitions aside, section 7 reads thus:

> 7(2) Subject to subsection (3) and section 8, an appeal lies to the court from a decision:
>
> (a) of the Court of Queen's Bench or a judge of that court; and

2 Historically speaking this is not entirely accurate. The functional equivalent of appeal existed at common law in several forms: by way of application for (i) a writ of error; (ii) judicial review; (iii) a new trial following a jury verdict; and so on. The last-mentioned form of appeal and its common law origin is often lost sight of. But the notion that appeal is a creature alone of statute is now so ingrained as to have consigned the bulk of this to history.

> (b) of any other court or tribunal where a right of appeal to the court is conferred by an enactment
>
> (3) If an enactment provides there is no right of appeal from a decision mentioned in subsection (2) or confers only a limited right of appeal, that enactment prevails.

Let us put aside the reference to section 8 for the time being. (It requires leave to appeal an interlocutory decision of the Court of Queen's Bench).

As for the remainder of section 7, it may be noted that subsection 7(2)(a) operates, in effect, to *confer* a general right of appeal upon a party dissatisfied with a decision of the Court of Queen's Bench or a judge of that Court. Subsection 7(2)(b) does not operate in the same way. Rather than confer a right of appeal upon a party dissatisfied with a decision of any other court or tribunal, it *recognizes* such right of appeal as may be conferred by some other enactment.

But whether the right of appeal be that conferred by subsection 7(2)(a), or that recognized by subsection 7(2)(b), it is subject to subsection 7(3). Subsection 7(3) may operate to preclude appeal, in whole or in part, or to limit the extent of the right, because other enactments sometimes do so. *The Trade Union Act*,[3] for example, states in section 21 that "[t]here is no appeal from an order or decision of the board under this *Act*…". Other enactments partially preclude appeal, as does *The Water Appeal Board Act*.[4] Section 26 of that *Act* provides for appeal to a judge of the Court of Queen's Bench, then goes on to state "[t]here is no appeal from the decision of a judge pursuant to this section", thus precluding appeal to the Court of Appeal.

Still other enactments allow for appeal to the Court of Appeal but limit the extent of the right. Such limited rights of appeal are commonly found in the constituent statute of the court or tribunal. The most common form of limit is to restrict the right of appeal to "a question of law". *The Small Claims Act, 1997*, *The Saskatchewan Human Rights Code*, *The Automobile Accident Insurance Act*, and *The Municipal Board Act* afford good examples of this.[5] The first provides for appeal to the Court of Queen's Bench and then to the Court of Appeal (with leave) but only "on a question of law". The second and third make similar provision, allowing for appeal (without leave) but once again limited to "a question of law". The fourth allows for appeal directly to the Court of Appeal (with leave) but only on "a question of law or on a question concerning the jurisdiction of the board".

Thus, the scope of the right of appeal may vary. And it may vary not only in this way but in others as well.

The Scope of the Right and its Limits

Generally

The right of appeal conferred by subsection 7(2)(a) applies to "a decision of the Court of Queen's Bench or a judge of that court". As such, it encompasses a decision of a judge *without a jury*, whether at trial or in chambers, and a decision of *a judge and jury*. It encompasses the latter because a jury verdict is ultimately reduced by judgment to "a decision of the Court of Queen's Bench".

Unless otherwise limited by subsection 7(3) of the *Act*, the scope of the right of appeal conferred by subsection 7(2)(a), so far as the right encompasses a decision of a judge without a jury, is as broad as it comes. It extends to the judge's findings of fact, identification of the law, and application of the law to the facts. We remarked upon this in *Farm Credit Corp. v Valley Beef Producers Co-operative Ltd.* [*Valley Beef*], 2002 SKCA 100, 218 DLR (4th) 86. Speaking of this right of appeal in *Valley Beef*, when subject to no limit, I said this on behalf of the Court at p. 605:

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3 RSS 1978, c T-17. Note: This *Act* was replaced by *The Saskatchewan Employment Act*, SS 2013, c S-15.1, effective August 15 2014, subsequent to the writing of this paper.

4 SS 1983-84, c W-4.01.

5 SS 1997, c S-50.11 (s 45); SS 1979, c S-24.1 (s 32); RSS 1978, c A-35 (s 194(1)); SS 1988-89, c M-23.2 (s 33.1).

> This is a substantive right of the person, the scope of which extends to every component of the decision subject to the right. In considering the scope of the right, as well as its object, it might be well to remind ourselves that Queen's Bench judges, when called upon to decide a dispute, are basically called upon to perform three tasks:
>
> > (i) to find the facts material to each of the elements of the cause of action, having regard for the evidence and the weight of the evidence bearing upon each of those elements, for the nature of the burden of proof, and for the location of the onus of proof;
> >
> > (ii) to identify the governing law, including the selection, the construction and, if required, the interpretation of the law; and
> >
> > (iii) to apply the governing law to the facts as found and to exercise, when appropriate, judicial discretion.

These are the fundamental components of all judicial decision-making. And, unless otherwise limited, the right of appeal conferred by subsection 7(2)(a) from a decision of a judge without a jury extends to each of them.

Now, the scope of the right of appeal conferred by subsection 7(2)(a), so far as the right encompasses *a decision of a judge and jury*, is narrower. It is narrower by reason of the right to trial by jury and by the peculiarities associated with that mode of trial. Traditionally, a party dissatisfied with a jury verdict could apply to the Court of Appeal, as provided for by the common law, for a new trial on grounds of: (i) misdirection; (ii) improper reception or rejection of evidence; (iii) unfairness in the proceedings; and (iv) insufficient evidence to support the verdict. This is still so. And, while the right of appeal extends to the *sufficiency of the evidence*, the right is not as comprehensive as it is in relation to the fact-finding component of a decision of a judge without a jury. Were it otherwise, the right of appeal would begin to conflict with the right to trial by jury, a unique right to a unique mode of trial. The extent to which this right of appeal is narrower when it comes to a jury verdict will emerge more fully as we go along.

With that, let us turn to the scope of the right of appeal recognized by subsection 7(2)(b), namely such right of appeal from *a decision of any other court or tribunal* as may be conferred by some other enactment. On the face of it, and unless otherwise limited by the operation of subsection 7(3), this right also extends to each of the fundamental components of all judicial-decision making—to the decision-maker's findings of fact, identification of the law, and application of the law to the facts.

But the scope of these rights of appeal, including that of subsection 7(2)(a), is always subject to limit by the operation of subsection 7(3). In other words, they are subject to such limits as may be imposed by another enactment, one that confers only a limited right of appeal. As we have seen, it is not uncommon for other enactments to limit the right of appeal to "a question of law". This is especially so of rights of appeal relating to decisions of tribunals, though on occasion this is also true of those relating to a decision of a judge of the Court of Queen's Bench.

When Limited to "A Question of Law"

What makes for "a question of law" for the purposes of appeal can be a difficult matter. This is not as it should be—not after the Court of Appeal has been in existence for over 90 years. But there it is. And lest anyone should think otherwise, this is just as nettlesome for the judges of the Court as it is for counsel who appear before the Court. The difficulty stems from case authority classifying questions for the purpose of appeal. They are customarily classified as "a question of law", "a question of fact", and "a question of mixed fact and law". As was said in *Canada (Director of Investigation and Research, Competition Act) v Southam Inc.*, [1997] 1 SCR 748 at para 35:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

This seems clear enough, but classifying a question about whether the facts satisfy the legal test as "a question of mixed fact and law" makes for difficulty. Does a right of appeal limited to a "question of law", for example, extend to a "question of mixed fact and law"? If not, a right of appeal so limited does not extend to the decisive component of the decision: the decision-maker's application of the governing law to the facts as found. It is here where the decision comes to rest. And it is here where one may encounter a misapplication of the law to the facts, or an unwarranted expansion or contraction of the law in either fitting the facts to the law or not doing so.

My purpose for the moment is merely to flag the difficulty. We shall tackle it shortly. In the meantime, I want to make the point that to better understand what constitutes "a question of law" for the purposes of appeal, let us recall the fundamental components of all judicial decision-making and work our way through them one at a time, eliminating the source of all but true questions of law.

The Finding of Facts

The first task of the decision-maker is to find the facts material to the cause of action or the matter in dispute. Generally, a finding of fact gives rise to "a question of fact" not "a question of law".

Who did what and where and when and why are issues of perception and fact which, when in dispute, must be determined by the decision-maker in light of the evidence and the weight of the evidence. This extends to issues of fact determined by *inference* (which is to say such facts as may appropriately be inferred from other facts proved or admitted) as well as issues of credibility. Thus, a right of appeal limited to "a question of law" does not extend to the determination of such issues. It does not extend to them unless—and this is an important qualification—the *process* by which a fact in controversy is found is attended by error of principle.

Let us have a closer look at this qualification. Speaking for the majority of the Court in *Hitchings v P.S.S. Professional Salon Services Inc.*, 2007 SKCA 149, [2008] 5 WWR 440, I made the point that a finding of fact is capable of giving rise to a question of law for the purpose of a right of appeal so limited, saying:

> [65] …It is instructive in this regard to recall that the facts as found are one thing, the *process* by which they are found is another, and it is here where a decision is most apt to be seen as giving rise to a question of law. Why? Because the fact-finding *process*, or method by which facts in dispute are determined in judicial and quasi-judicial settings, is underpinned by principle, as supplied by both statutory implication [where the statute calls for a hearing] and common law.

In elaborating upon this I drew attention to the broad principle that triers of fact are called upon to determine a fact in controversy *on the basis of the relevant evidence before them*, (leaving aside matters of fact of which they may take judicial notice):

> [67] …Hence, they are required in principle to consider and weigh the relevant evidence as the faculty of judgment commends when exercised *impartially, fairly, in good faith, and in accordance with reason*, bearing in mind the governing standard of proof and the location of the onus of proof.
>
> [68] It follows, that a tribunal cannot reasonably make a valid finding of fact on the basis of *no evidence* or *irrelevant evidence*. Nor can it reasonably make a valid finding of fact in *disregard* of relevant evidence or upon a *mischaracterization* of relevant evidence. To do so is to err in principle or, in other words, to commit an error of law. [Citations omitted] Nor can a tribunal reasonably make a valid finding of fact based on an *unfounded* or *irrational inference of fact*. [Footnotes omitted]
>
> [69] The all-important point is that to make a finding of fact on any of these bases is to err in principle by offending the implicit requirements of the statute, as well as the common law duty of procedural fairness perhaps. To suppose otherwise is to suppose the legislature

> intended, in conferring power upon a…tribunal to determine facts in controversy much as judges do, to empower the tribunal to engage in unfounded, unreasonable, or arbitrary fact-finding. The fact-finding process, or method by which facts in controversy are to be determined in this quasi-judicial setting, does not permit of this, either in its statutory or common law conception.[6]

As the reference in these passages to the standard and burden of proof suggest, a finding of fact can also give rise to a question of law on these bases, for the *fact-finding process* rests on the idea of someone having the burden to prove a fact in controversy to a given standard. The fact finder must, of course, employ the right standard and locate the burden of proof in the right place. These are matters of law within the scope of a right of appeal limited to a question of law.[7]

There is one other point that might be borne in mind regarding the *fact-finding process* and how it can lead to a question of law: a finding of fact that comes to rest on *inadmissible evidence* is a finding of fact attended by error of law. As such, it falls within the scope of a right of appeal limited to a question of law.

So, the *fact-finding process*, in contradistinction to the facts as found, may give rise to a question of law for the purpose of a right of appeal so limited.

That said, a question of law for this purpose is usually associated with the decision-maker's *identification of the relevant law* and its *application to the facts as found*. Let us consider this in some detail.

The Identification of the Law

The second task of the decision-maker is to identify the governing law. This includes the selection of the appropriate law and, if necessary, its clarification and interpretation. For the purposes of a right of appeal limited to "a question of law", the performance of this task almost invariably gives rise to a question of this nature, and no more need be said of the matter in the present context.[8]

The Application of the Law to the Facts

This is the ultimate task of the decision-maker. Having found the facts and identified the law, the decision-maker must apply the law to the facts and thus come to a conclusion on the merit of the cause of action or matter in dispute. This is often described as the decision-maker having to *evaluate the material facts against the relevant legal standard*. Do the facts make for "fraudulent misrepresentation", for example, or for "breach of condition or warranty" or "latent defect"?

It is here where the subject under discussion encounters difficulty, for, as we have seen, a question arising out of the decision-maker's application of the governing law to the facts as found is often classified as a "question of mixed fact and law". The difficulty, of course, lies in knowing if the decision-maker's performance of this task gives rise to "a question of law" for the purpose of a right of appeal so limited. In other words—and this is the critical point—does a decision-maker's application of law to fact give rise to "a question of law", so as to fall *within* the scope of the right of appeal, or to "a question of mixed fact and law", so as to fall *beyond* the scope of the right?

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6 Note: Leave to Appeal dismissed, [2008] 2 SCR xi. Note, too, this treatment of the subject was referred to with approval in *Murphy v Saskatchewan Government Insurance*, 2008 SKCA 57, 310 Sask R 149 (per Klebuc C.J.S. for the Court).

7 See, for example, *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, per Rothstein J. at para 54.

8 I hedge this a bit because in some instances, as strange as this may seem, an issue of statutory interpretation may give rise to a question of fact not of law: see, for example, *Peters v University Hospital Board* (1983), 147 DLR (3d) 385, 23 Sask R 123 (CA) (discussion by Bayda C.J.S. of when an issue of statutory interpretation may amount to a question of fact). Likewise, an apparent issue of fact may give rise to a question of law: see, *Canada (Director of Investigation and Research, Competition Act) v Southam Inc.*, [1997] 1 SCR 748 (discussion of this by Iacobucci J.).

This can be a vexing matter. We have attempted to simplify things in a number of recent cases, beginning with *Farm Credit Corp. v Valley Beef Producers Co-operative Ltd.*, 2002 SKCA 100, 218 DLR (4th) 86. This case featured an unlimited right of appeal from a decision of a judge of the Court of Queen's Bench. Hence, what we had to say of the matter was not said in the context of a right of appeal limited to a question of law. Nevertheless, the reasoning should find broader application. We there abandoned the class of question known as "a question of mixed fact and law". We did so by holding that a judge's application of law to fact is to be taken as giving rise on appeal to "a question of law". We could see no statutory or pragmatic justification for maintaining the notion, or at least the nomenclature, of "a question of mixed fact and law". This notion not only gives rise to difficulty and confusion, it is theoretically unsound. In holding it theoretically unsound we adopted the thesis of Professor Etienne Mureinik on what constitutes "a question of law"—a thesis denying the rational existence of "a question of mixed fact and law": *The Application of Rules: Law or Fact*, Etienne Mureinik, (1982) 98 LQR 587.[9]

The point finds further support in *Gallop v Mulatz*, 2008 SKCA 29, 311 Sask R 123. Again, this was not a case featuring a right of appeal limited to a question of law, but once again the reasoning should find favour in this context. Speaking for the Court, I said this of the application of law to fact:

> [34] …this entails evaluating the facts against a legal standard, a matter that calls for a normative judgment and the drawing of conclusions in law based on the facts as found: *St-Jean v. Mercier*, [2002] 1 S.C.R. 491; *ABB Inc. v. Domtar Inc.*, [2007] 3 S.C.R. 462; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221; *Farm Credit Corp. v. Valley Beef Producers Co-operative Ltd*.[10]

Having regard for the foregoing I think it may safely be said that *for the purpose of a right of appeal limited to a question of law*, both the decision-maker's *identification of the law* and the decision-maker's *application of the law to the facts* give rise on appeal to "a question of law". Indeed, this is what was made of the matter in *Sherwood (Rural Municipality No. 159) v Regina (City)*, 2000 SKCA 4. Speaking for the Court in this case, Gerwing JA observed at para 2:

> Our jurisdiction in this matter is restricted to questions of law alone. That is, here we can analyze only whether the Municipal Board erred in law in interpreting the statute or if, after findings of fact, it erred in law in applying those facts, as found, to the law.

That said, we may move on to consider how the right of appeal may be limited not only in scope but in its *exercise*.

The Exercise of the Right and its Limits

Ordinarily the exercise of a right of appeal is limited only by time. But when the right applies to an "interlocutory" decision of the Court of Queen's Bench, it is limited in another way—this by reason of section 8 of the *Act* to which the right of appeal conferred by subsection 7(2)(a) is subject. As mentioned earlier, section 8 requires that *leave to appeal* be obtained in relation to an "interlocutory" decision.

The right may be limited in yet another way—this by reason of section 9 of the *Act*. Section 9 serves to postpone the exercise of the right in relation to an "incidental" decision.

Let us consider these in turn.

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9 I recommend the reading and re-reading of this article. I also recommend the reading of "Appeals on Questions of Fact", (1955) 71 LQR 402. Reference might also be had to: Wade, *Administrative Law*, 4th ed (Oxford: Clarendon Press, 1977), at p. 775; and "Error of Law in Administrative Law", C.T. Emery and B. Smythe, (1984) 100 LQR 613.

10 This passage was quoted with approval in *Murphy v Saskatchewan Government Insurance*, 2008 SKCA 57, 310 Sask R 149 at para 4.

"Interlocutory" Decisions

Section 8 of the *Act* provides as follows:

> 8(1) Subject to subsection (2), no appeal lies to the court from an interlocutory decision of the Court of Queen's Bench unless leave to appeal is granted by a judge or the court.
>
> (2) Leave to appeal an interlocutory decision is not required in the following cases:
>
> (a) cases involving:
>
> (i) the liberty of the subject;
>
> (ii) the custody of a minor;
>
> (iii) the granting or refusal of an injunction;
>
> (iv) the appointment of a receiver.
>
> (b) other cases, as prescribed in the rules of court, that are not in the nature of final decisions.

What is "an *interlocutory decision* of the Court of Queen's Bench"? *Wharton's Law Lexicon*, 14th ed, at p. 529, says this of the matter:

> An interlocutory order or judgment is one made or given during the progress of an action, but which does not finally dispose of the rights of the parties—e.g., an order appointing a receiver or granting an injunction, and a motion for such an order is termed an interlocutory motion.

But *Bouvier's Law Dictionary* (1897), Vol. 1, at p. 1096, says the following:

> Something which is done between the commencement and the end of a suit or action which decides some point or matter, which, however, is not a final decision of the matter in issue…

And *Black's Law Dictionary*, 10th ed, at p. 938, states the following:

> **interlocutory**, *adj*. (Of an order, judgment, appeal, etc.) interim or temporary, not constituting a final resolution of the whole controversy.

This is generally instructive but not definitive, and it points to some difficulty. Indeed, distinguishing between an "interlocutory" and "final" decision is occasionally a difficult matter, as remarked upon by Martin J.A. (later Martin C.J.S.) in *Beaver Lumber Co. Ltd. v Cain*, [1924] 3 WWR 332 (Sask CA). Picking up on this, I too remarked upon the difficulty in *Silcorp Ltd. v KJK Holdings Inc.* (1992), 90 DLR (4th) 488, 100 Sask R 143 (CA), referring to two lines of English authority pointing up the nature of the difficulty.

In *Salaman v Warner*, [1891] 1 QB 734 (CA), Lord Esher M.R. said that if the decision below:

> …whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if [the] decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go, then I think it is not final, but interlocutory. (p. 735)

Lord Fry went on to add the following:

> I think that the true definition is this. I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. (p. 736)

But in *Bozson v Altrincham Urban District Council*, [1903] 1 KB 547 (CA), Lord Alverstone C.J. said this:

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I

> think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order. (pp. 548–49)

In *Salter Rex & Co. v Ghosh*, [1971] 2 All ER 865 (CA) at 866, the English Court of Appeal decided to follow *Salaman v Warner*.[11] Lord Denning M.R. noted that "Lord Alverstone CJ [in *Bozson*] was right in logic but Lord Esher MR [in *Salaman*] was right in experience". In his characteristic way, Lord Denning M.R. then went on to say this:

> This question of 'final' or 'interlocutory' is so uncertain, that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way.

In uncertain cases the Saskatchewan Court of Appeal tends toward the pragmatic approach articulated by Lord Denning M.R. So when faced with uncertainty about the nature of the decision it is well to "look up the practice books and see what has been decided on the point". For a list of orders that have been found to be either interlocutory or final (by courts of varying authority) reference may be had to: *The Law of Civil Procedure*, Williston and Rolls, Vol. 2, pp. 1033–37; and *The Western Practice Digest* (3d), pp. 736–37.[12]

> **Note**: I have compiled a list of orders that have been treated by the Court of Appeal for Saskatchewan, or a judge of the Court, as either "interlocutory" or "final". The list appears in *Part Two—Matters of Practice and Procedure*.

"Incidental" Decisions

Fortunately, this subject is much easier. It is rooted in subsections 9(4) and (5) of the *Act*, which refer to "incidental" decisions. By this is meant decisions in the nature of rulings made in the course of a trial or a chamber application—a decision allowing or disallowing evidence, for example, or amendment of the pleadings. Such decisions are subject to appeal, but the exercise of the right is postponed by these subsections until the completion of the trial or application.

For instance, Bayda C.J.S., in delivering the judgment of the Court in *Prince Albert Credit Union Ltd. v Diehl*, [1986] 3 WWR 543, 47 Sask R 284 (CA), said this at p. 544:

> In our respectful view, the appeal is improper. A ruling by a trial judge on an evidentiary matter, a procedural matter, or upon an application for leave to amend pleadings is but part of the trial. **Such rulings are ordinarily subsumed in the judge's final judgment and are appealable as part of that judgment…. They are not appealable in their capacity as separate decisions.** There are exceptions to this rule but the present case does not fall within the ambit of those exceptions. [emphasis added]

Further appreciation of what is meant by the term "incidental" decision may be had by reference to *Ceapro Inc. v Saskatchewan*, 2008 SKCA 64, 314 Sask R 1 (Chambers). This case featured a ruling by a trial judge allowing a non-suit against some but not all of the defendants. The ruling was followed by a judgment dismissing the action as against the former. Smith J.A. held that this was a final disposition; that the disposition would not be subsumed in the judgment to be delivered in relation to the other defendants; and that the disposition did not therefore constitute an "incidental" decision within the meaning of subsections 9(4) and (5).

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11 See, too, *White v Brunton*, [1984] 2 All ER 606 (CA), rejecting the approach of *Bozson v Altrincham Urban District Council*.

12 Useful reference may also be had to *Stroud's Judicial Dictionary* (4th ed, pp. 1409–10) and to English Practice. For the former English Practice under section 1(1) of the *Supreme Court of Judicature (Procedure) Act, 1894*, see: (i) *Halsbury's Laws of England*: 1912, Vol. 23, pp. 193–94; Vol. 18, pp. 178–81; (ii) *The Annual Practice* predating 1925; and (iii) *The Annual Practice*, 1929, Order 58; pp. 1187, 1199, 1222–25. For recent English practice see: (i) *The Annual Practice*, 1985 (O.59 r. 1, pp. 808–09); and (ii) 87 LQR 459.

Time Limits

Subsection 9(2) of the *Act* requires that the right of appeal from a decision of a judge of the Court of Queen's Bench, conferred by subsection 7(2)(a), be exercised *within 30 days* after the date of the decision being appealed from. This limit may be enlarged pursuant to subsection 9(6). But not in the face of a contrary provision in an enactment specifically governing the appeal. For example, section 11 of *The Securities Act, 1988*[13] confers a right of appeal to the Court of Appeal, but limits its exercise to 30 days, with no power of enlargement. In such cases, the right of appeal expires if the appeal is not brought within the time limit. This is what was made of the matter in *Jordan v Saskatchewan Securities Commission* (1968), 64 WWR 121 (Sask CA), drawing on *MacDonald, Re* (1928), [1929] 2 DLR 265, [1929] 1 WWR 193 (Sask CA), per Haultain C.J.S. at p. 195:

> As the right of appeal is given by statute and there is no statutory or other authority for extending the time fixed by the statute there is no right of appeal if the appeal is not brought within that time, and this Court has no power to extend that time as we have been asked to do: *B.C. Permanent Loan Co. v. C.N.R. (No. 2),* 15 Sask. L.R. 433, [1922] 2 W.W.R. 579.[14]

So much for the nature, source, and exercise of the right of appeal conferred by subsection 7(2)(a) or recognized by subsection 7(2)(b).

There is another section of the *Act*, namely section 13, that bears upon the scope of the subsection 7(2)(a) right of appeal from a decision of a judge *without a jury*. It serves to augment this right of appeal.

Section 13 of the Act

Section 13 states the following:

> 13. Where issues of fact have been tried, or damages have been assessed, by a trial judge without a jury, any party is entitled to move against the decision of the trial judge, by motion for a new trial or otherwise:
>
> (a) within the same time that is allowed in cases of trial or assessment of damages by a jury; and
>
> (b) on the same grounds, including objections against the sufficiency of the evidence, or the view of the evidence taken by the trial judge, that are allowed in cases of trial or assessment of damages by a jury.

This section serves to enlarge the scope of the subsection 7(2)(a) right of appeal in relation to a decision of a judge of the Court of Queen's Bench sitting without a jury. A brief explanation will drive home the point.

Traditionally, you recall, a party dissatisfied with *a decision of a jury* could apply to the Court of Appeal for relief on the following grounds:

1. misdirection
2. improper reception or rejection of evidence
3. unfairness in the proceedings
4. insufficient evidence to support the verdict.

Consider the fourth. Given the *right* to trial by jury, it was difficult to have a verdict overturned on the ground of insufficient evidence. Indeed, it still is, for if the issue comes down to this, the question is not whether the Court agrees with the view of the evidence taken by the jury. That would derogate from the right to trial by jury. Rather, *the question is whether a jury, properly instructed and acting judicially, could reasonably have*

13 SS 1988-89, c S-42.2.

14 See, too, *Re Fair & Toronto*, [1930] 3 DLR 76 (Ont SC (AD)) and *Re Milstein and Ontario College of Pharmacy (No. 1)* (1976), 13 OR (2d) 699 (Ont HCJ Div Ct).

arrived at the verdict. This is a demanding test. On occasion it is expressed in the negative, which tends to make it even more demanding. The Court is not to interfere with a jury verdict on the basis of insufficiency of evidence unless convinced the verdict 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. (See, for example: *Taylor v University of Saskatchewan* (1955), 15 WWR 459 (Sask CA) and *McCannell v McLean*, [1937] SCR 341.) This serves, of course, to narrow the scope of the right of appeal from a jury verdict.

Now, according to section 13(b), a party dissatisfied with a decision of *a judge without a jury* is entitled as of right to appeal on the same grounds as allowed in cases of trial by a jury, including "the sufficiency of the evidence". In addition—and this is the point—a party dissatisfied with the decision is entitled by section 13(b) to appeal on the ground "of the view of the evidence taken by the trial judge". This implies a broader-based appeal than is available in relation to a jury verdict, implying that both the right of appeal and the power of the Court to act on that right are broader. Indeed it suggests that the Court of Appeal may be invited to take its own view of what the evidence proves, something far beyond the pale in relation to a jury verdict.

But one has to be wary of this. While the section says the right of appeal from a decision of a judge of the Court of Queen's Bench in a trial without a jury extends to "the view of the evidence taken by the trial judge", this does not mean that a finding of fact made by the judge is wide open to appeal; nor does it imply a wide open power in the Court of Appeal to take its own view of what the evidence proves. I will have more to say of this in a moment, as I take up the subject of the powers of the Court. For now, I want only to make the point that section 13 is not as broad as it appears to be on the face of it.

With that, we may sum up the section 7 rights of appeal as follows:

Section 7 Appeals

The Court of Queen's Bench

> Subsection 7(2)(a) of *The Court of Appeal Act, 2000* confers a general right of appeal from a decision of the Court of Queen's Bench or a judge thereof. Subject to subsection 7(3), this is an unlimited right of appeal from a decision of a judge alone and therefore extends to each of the components of the impugned decision: to the judge's findings of fact, the judge's identification of the law and the judge's application of the law to the facts.
>
> If subsection 7(3) applies, which is to say if some other enactment confers a right of appeal but limits it to "a question of law", the right of appeal does not extend to the fact finding component of the decision unless this component features a question of law arising from the fact-finding *process*, as it will when a finding: (i) is founded on no evidence, inadmissible evidence, or irrelevant evidence; (ii) is made in disregard of relevant evidence or on a mischaracterization of relevant evidence; or (iii) rests on an incorrect view of the standard of proof or the location of the onus of proof. That said, a right of appeal limited to a "question of law" extends to the other components of a decision, namely the decision-maker's *identification of the law* and *application of the law to the facts*.
>
> If section 8 applies, which is to say if the decision be an "interlocutory" decision, the right of appeal may only be exercised with leave of the Court of Appeal or a judge of the Court. If section 9 applies, as it does to "incidental decisions", the exercise of the right of appeal is postponed until the completion of the trial or other proceedings.
>
> To the extent an appeal lies to the Court of Appeal from a decision of a judge of the Court of Queen's Bench *following proceedings without a jury*, the right of appeal conferred by subsection 7(2)(a) is augmented by section 13(b), but only to a limited extent. Section 13 entitles a party dissatisfied with the decision to appeal on the grounds, among others, of "the view of the evidence taken by the trial judge", but this does not imply a wide open right of appeal, or a wide open power in the Court to act on that right.

> To the extent an appeal lies to the Court of Appeal from a decision of the Court of Queen's Bench following *a trial by jury*, the right of appeal conferred by section 7(2)(a) is not augmented by section 13 and is limited to issues of misdirection, reception or rejection of evidence, procedural fairness, and the sufficiency of the evidence relative to the verdict. The last of these is further limited by reason of the right to trial by jury, being limited to the ground the verdict is one which no jury, properly instructed and acting judicially, could reasonably have arrived at in light of the evidence.

Any Other Court or Tribunal

> Section 7(2)(b) of *The Court of Appeal Act, 2000* recognizes such rights of appeal as are conferred by particular enactments—usually the enactments constituting and empowering the court or tribunal. In these instances, then, it is necessary to look elsewhere for the right of appeal and its scope.
>
> The scope of these rights of appeal is often limited to "a question of law". When so limited, the right of appeal does not extend to the decision-maker's *findings of fact*, but it does extend to the process by which the facts are found (as above), as well as to the decision-maker's *identification of the law* and to the decision maker's *application of the law to the facts*.

So much for the right of appeal. What remains is to consider the capacity of the Court to act on it, which brings us to the next subjects: the jurisdiction and powers of the Court.

The Jurisdiction of the Court

Since "[a]ppeals are solely creatures of statute and…there is no inherent jurisdiction in any appeal court" (*Kourtessis v M.N.R.*), we must look to statute for the Court's jurisdiction.

With the odd exception, too arcane for present purposes, the jurisdiction of the Court is provided for in section 10 of *The Court of Appeal Act, 2000*. Comparatively speaking, there is not much to be said of this—much more is to be said of the next subject, namely the powers of the Court—though an important point or two should be made of the Court's jurisdiction before turning to its powers.

If you look at section 10 of the *Act,* you will see that it confers *appellate jurisdiction* on the Court of Appeal. It is this that enables the Court to entertain and act upon an appeal brought in exercise of a right of appeal. More precisely, it is this that enables the Court to hear and determine such appeal in accordance with the Court's powers.

In addition, section 10 confers some original jurisdiction, namely "any original jurisdiction that is necessary or incidental to the hearing and determination of an appeal". Original jurisdiction is of the kind possessed by the Court of Queen's Bench. Ordinarily, the Court of Appeal relies only on its appellate jurisdiction, but on occasion it may resort to this incidental original jurisdiction, as it may do to fill some gap, let us say, or to avoid having to remit a matter for determination elsewhere. But this is extraordinary and need not detain us.

Section 11 goes on to confer a particular form of original jurisdiction: the jurisdiction to engage in judicial review—to grant prerogative relief by way of *certiorari*, *mandamus* and so on. Only in special cases, however, will the Court exercise this jurisdiction: *Geller v Saskatchewan* (1985), 48 Sask R 239 (CA). If for some reason the Court of Queen's Bench is precluded from acting, for example, or might find it embarrassing to act, application may be made to the Court of Appeal.[15]

15 For concrete examples of this see: *Maurice v Priel* (1987), 46 DLR (4th) 416, 60 Sask R 241 (CA) (Queen's Bench Judge a party to the application, making this a special case for the Court of Appeal to exercise its original supervisory jurisdiction); *Royal Canadian Mounted Police v Saskatchewan (Commission of Inquiry)*, [1992] 6 WWR 62, 100 Sask R 313 (CA) (Queen's Bench represented at inquiry, making it unseemly for application to be heard in that Court); *Baynton v Mills*, 2008 SKQB 108, 313 Sask R 266 (Queen's Bench judge a party to an application for an interlocutory injunction).

The Powers of the Court

Once again, since "appeals are solely creatures of statute [and] there is no inherent jurisdiction in any appeal court" (*Kourtessis v M.N.R.*), we must look to statute for the powers of the Court.

We need not look beyond *The Court of Appeal Act, 2000* for the powers themselves, though on occasion some other enactment granting a right of appeal may confer further power upon the Court. It is well to be alert to this, but it need not sidetrack us. In the main, the powers of the Court are found in subsection 12(1), which provides as follows:

> 12(1) On an appeal, the court may:
>
> (a) allow the appeal in whole or in part;
>
> (b) dismiss the appeal;
>
> (c) order a new trial;
>
> (d) make any decision that could have been made by the court or tribunal appealed from;
>
> (e) impose reasonable terms and conditions in a decision; and
>
> (f) make any additional decision that it considers just.

These are sweeping powers, and they apply across the board to all appeals within the contemplation of the *Act*.

You will appreciate the nature of the relationship between a right of appeal and the power of the Court. The relationship is akin to that of right and remedy. In that sense, these powers exist to the end of giving effect, when appropriate, to: (i) the right of appeal, conferred by subsection 7(2)(a), from a decision of the Court of Queen's Bench or a judge thereof; and (ii) the right of appeal, conferred by some other enactment and recognized by subsection 7(2)(b), from a decision of any other court or tribunal. By nature, then, these powers are largely *remedial*, which is to say they are meant to be resorted to, with the exception of that mentioned in subsection 12(1)(b), when the Court is convinced the decision of first instance merits alteration. In this sense, they exist to the end of empowering the Court to set matters right.

In addition to the powers conferred on the Court by subsection 12(1), section 14 vests the following powers in the Court:

> 14. On appeal from, or on a motion against, the decision of a trial judge or on any re-hearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

These, too, are sweeping powers, but they do not apply across the board. They are confined to an appeal from a decision of a trial judge without a jury.

Now, power is one thing, the *basis for its exercise* is another. Hence, in considering the powers of the Court it is necessary to have regard not only for their content but for the framework of principle governing their exercise.

This framework is made up of several *standards of appellate review*. By "standard of review" is generally meant this: the test to which an allegation of error will be subjected on appeal. These several standards are the product of case law, rather than statute, and serve to govern *the exercise* of the powers of the court.[16]

16 For a better understanding of the fundamental character of the subject matter and the discussion that follows see: Daniel Jurtas, *The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?* (2007), 32 Man LJ 61-77.

Some are limiting, as we shall see, and some are not. Those that are limiting serve to limit both the right of appeal and the power of the court to act on that right.

We have already encountered an example of this in relation to an appeal in a case decided by a jury. Recall how it is not open to the court to overturn the findings of a jury on the basis the court takes a different view of the evidence, for that would derogate from the right to a jury trial. It is only open to the court to do so if satisfied that *no jury, properly instructed and acting judicially, could reasonably have arrived at the verdict under appeal*. This amounts to "the standard of appellate review" applicable to the verdict of a jury and serves to limit both the right of appeal and the power of the court to act on that right. The limit derives by necessary implication from the right to a jury trial.

Now, there are several such "standards of appellate review" governing the exercise by the court of its powers. They vary depending on the nature of the decision under appeal and the issues to which the appeal gives rise. They vary because of the peculiar characteristics of certain decision-making and certain issues. Let us consider these standards of review as they pertain to each of the following:

1. a decision of a judge without a jury;
2. a decision founded on the exercise of discretion;
3. a decision respecting the quantum of damages; and
4. a decision of a tribunal.

The Standards of Appellate Review Pertaining to a Decision of a Judge of the Court of Queen's Bench Sitting Without a Jury

Once again it is useful to observe that the task of the judge is basically three-fold: (i) to find the facts in dispute; (ii) to identify the law that governs the controversy; and (iii) to apply that law to the facts as found and thus arrive at a decision, exercising such discretion as may be vested in the judge. It is possible, of course, for the judge to go wrong at one or more of these turns. So a party may appeal on the ground the judge erred in the findings of fact, or in the identification of the law, or in the application of the law to the facts. **The Court will entertain such grounds of appeal on the standard of appellate review reserved for each.** Let us consider these standards in turn, beginning with the standard that applies to findings of fact.

Findings of Fact

Here is where the powers conferred upon the Court by section 14 come into play. For ease of reference I repeat the section:

> 14. On appeal from, or on a motion against, the decision of a trial judge or on any re-hearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

This section ties in with section 13, which you recall applies "where issues of fact have been tried…by a trial judge without a jury" and allows for appeal on the ground, among others, of "the view of the evidence taken by the trial judge".

Section 14 picks up on this, opening with the *declaratory* statement "the court is not obliged…to adopt the view of the evidence taken by the trial judge". It then states, in *imperative* terms, that the court "shall act on its own view of what the evidence, in its judgment, proves". The section then goes on to state, in *permissive* terms,

that "the court may draw inferences of fact". These three statements are oriented to the fact-finding component of the judge's decision or, if you like, are geared toward appeal on the facts of the case as found by the trial judge. They extend to both the primary and secondary facts. "Secondary facts" are those determined by inference drawn from a base of other facts admitted or proven.[17]

These three statements seem to suggest that the Court of Appeal, when acting on a ground of appeal taking issue with a trial judge's findings of fact, is to consider the evidence adduced at trial and make up its own mind about what the evidence proves, not disregarding the trial judge's findings but not being bound to defer to them. However, the matter is more complex than that, as we shall see in a moment.

Beyond these three statements lies another, also couched in *permissive* terms, namely that the Court may "pronounce the decision that, in its judgment, the trial judge ought to have pronounced". This statement is concerned not with the proper ascertainment of the facts of the case but with the rendering of judgment. In other words it is directed at empowering the Court, once the facts are ascertained, to apply the law to the facts as it sees fit, and thus arrive at what appears to the Court to be the right decision. You will appreciate that there is some overlap here with some of the provisions of subsection 12(1), but this is an historical vestige and is neither here nor there.

The important point is that section 14, read in conjunction with section 13, is not to be taken as providing for appeal by way of *re-hearing* as distinct from appeal by way of *review for error*. Let me briefly explain the distinction.

So far as issues of fact are concerned, *re-hearing* posits a broader form of appeal than does that of *review for error*. The former calls upon the Court to take its own view of what the evidence in its judgment proves, not disregarding the findings of fact made by the trial judge but not being bound to defer to them except to the extent they rest upon findings of credibility. The latter calls on the Court to review the trial judge's findings of fact for error, and to do so on the basis of a standard of review that carries with it a considerable measure of deference to the findings of fact made by the judge. In a sense, then, re-hearing is oriented to the decision on the merits of the case, and review for error is oriented to the process by which the decision was made.

The significance of all of this is that section 14, read in conjunction with section 13, is not to be taken as allowing for appeal by way of *re-hearing*. It is to be taken as allowing only for appeal by way of *review for error*. The Saskatchewan Court of Appeal held otherwise, as in *Farm Credit Corp. v Valley Beef Producers Co-operative Ltd.*, 2002 SKCA 100, 218 DLR (4th) 86, and *Canada (Attorney General) v H.L.*, [2003] 5 WWR 421 (Sask CA). But the Supreme Court of Canada reversed the Court of Appeal in Longman's case: *H.L. v Canada (Attorney General)*, 2005 SCC 25, [2005] 1 SCR 401. The majority (the Supreme Court split 6–3 on this issue) held that section 14, so far as it applies to the findings of fact at trial, is to be read as providing for appeal by way of *review for error*.[18]

Now, appellate review for error in relation to the findings of fact made by a trial judge presupposes the existence of a standard of appellate review reserved for this purpose. That standard, in its encapsulated form, is this: **the Court of Appeal is to review the trial judge's findings of fact for "palpable and overriding error".** Only if such error is found is the Court to interfere with the findings. In other words, the Court is not to resort to its section 14 powers respecting fact-finding unless it detects a "palpable and overriding error" in relation to the findings of fact. You will appreciate that this amounts to a *precondition* to invoking these powers, as well as the powers conferred on the Court by subsection 12(1).

17 By inference of fact, I mean no more than a purely factual inference, not one that entails the evaluation of the facts against a legal standard. The difference—an important one—lies, for example, in determining what happened and then in determining if what happened amounts to a particular wrong recognized by the law.

18 The subject is steeped in history and historical controversy, as the reasons for judgement in this Court and the Supreme Court illustrate. I suggest that those who foresee appellate advocacy in their future read the reasons for judgment in the two courts for their historical treatment of the subject. Why? Because to fully appreciate what section 14 means it is necessary to first appreciate what it does not mean.

Beneath the proposition that the Court is not to interfere with or reverse findings of fact in the absence of "palpable and overriding error" lies the notion a court of appeal is bound to accord a considerable measure of *deference* to the judge's findings of fact—deference borne of essentially three *policy considerations*, according to the majority reasons for judgment in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235: *first*, the scope of review on appeal is to be seen as limited, given the scarcity of judicial resources, the desirability of avoiding duplication of proceedings, and the goal of providing an efficient and effective remedy for the parties; *second*, trial judges are presumed to be competent to decide the cases that come before them, a presumption that should not be undermined by frequent and unlimited appeals, especially since an appeal is the exception rather than the rule; and *third*, trial judges are better situated to make factual findings, given their extensive exposure to the evidence, their advantage in hearing the testimony, their familiarity with the case as a whole, and their expertise and insight in relation to fact finding.

The *deference* encompassed by this standard of "palpable and overriding error" extends to the judge's findings of primary and secondary fact alike (i.e., facts established directly or by inference) and to the judge's findings of credibility.

All of this finds confirmation (and further elaboration) in the majority judgment of the Supreme Court in *H.L. v Canada (Attorney General)*. The majority judgment was authored by Fish J. and is now the authoritative treatment of the subject. I shall quote some extracts from it, but I recommend a full reading of his reasons for judgment (as well as the reasons of the minority, authored by Bastarache J., to gain a more complete understanding of the subject).

To begin with, Fish J. observed that his analysis of the standard of review under consideration was confined to the facts and nothing but the facts: "with facts proved directly and with facts inferred, but not with questions of law or mixed fact and law".

With that in mind, he said this:

> 53 The standard of review for error has been variously described. In recent years, the phrase "**palpable and overriding error**" resonates throughout the cases. Its application to all findings of fact — findings as to "what happened" — has been universally recognized; its applicability has not been made to depend on whether the trial judge's disputed determination relates to credibility, to "primary" facts, to "inferred" facts, or to global assessment of the evidence. [emphasis added]
>
> …
>
> 55 "Palpable and overriding error" is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial. But it should not be thought to displace alternative formulations of the governing standard. In *Housen*, for example, the majority (at para. 22) and the minority (at para. 103) agreed that inferences of fact at trial may be set aside on appeal if they are "clearly wrong". Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result.
>
> 56 In my respectful view, **the test is met as well where the trial judge's findings of fact can properly be characterized as "unreasonable" or "unsupported by the evidence".** In *R. v. W. (R.)*, [1992] 2 S.C.R. 122, McLachlin J. (as she then was) explained why courts of appeal must show particular deference to trial courts on issues of credibility. At the same time, however, she noted (at pp. 131-32) that
>
> > it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

> The statutory framework in criminal matters is, of course, different in certain respects. But as a matter of principle, it seems to me that unreasonable findings of fact — relating to credibility, to primary or inferred "evidential" facts, or to facts in issue — are reviewable on appeal because they are "palpably" or "clearly" wrong. The same is true of findings that are unsupported by the evidence. I need hardly repeat, however, that appellate intervention will only be warranted where the court can explain why or in what respect the impugned finding is unreasonable or unsupported by the evidence. And the reviewing court must of course be persuaded that the impugned factual finding is likely to have affected the result.

As for *factual inferences* made by the trial judge—and the power of the Court of Appeal in relation to them—Fish J. went on to say this:

> 74 …Not infrequently, different inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot reweigh the evidence by substituting, for the reasonable inference preferred by the trial judge, an equally — or even more — persuasive inference of its own. This fundamental rule is, once again, entirely consistent with both the majority and the minority reasons in *Housen*.
>
> 75 In short, appellate courts not only may — but must — set aside all palpable and overriding errors of fact shown to have been made at trial. This applies no less to inferences than to findings of "primary" facts, or facts proved by direct evidence.

In sum, then, the Court of Appeal may exercise the powers conferred upon it by section 14 in relation to findings of fact but only if satisfied that a finding of fact made by the trial judge is attended by "palpable and overriding error" or is "unreasonable or unsupported by the evidence".

To better appreciate what this standard connotes in practice, consider the remarks of McLachlin J. (now Chief Justice McLachlin) in *Toneguzzo-Norvell (Guardian ad litem of) v Burnaby Hospital*, [1994] 1 SCR 114 at p. 121:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene **if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it**: …A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal. [emphasis added]

As this suggests, a judge who overlooked or ignored *conclusive or relevant evidence* in making a material finding of fact will have committed a "palpable and overriding error". This is also true of a judge who makes a material finding based on *no evidence*, or *inadmissible* evidence or *irrelevant* evidence, or on a *mischaracterization* of relevant evidence. This harks back to what I earlier said of the process by which findings of fact are made, as distinct from the findings themselves.

It has occasionally been said that so long as there is some evidence to support an impugned finding of fact a court of appeal is not to intervene. (See, for example, *Housen v Nikolaisen* at para 1.) In this same vein, it has also been suggested that a court of appeal is not to "reweigh" the evidence with a view to determining whether a fact in dispute was proved on a balance of probabilities.

These ideas present some difficulties. Why? Because there may be some evidence in support of a finding of fact, but that evidence may be substantially overborne by other evidence to the contrary, other evidence that the trial judge did not overlook or disregard, but rather failed to weigh appropriately. What then?

The majority judgment in *H.L. v Canada (Attorney General)*, 2005 SCC 25, [2005] 1 SCR 401, may supply the answer. It says that "palpable and overriding error" is essentially indistinguishable in principle from "unreasonable or unsupported by the evidence". That being so, it may be within the power of the Court to reconsider the evidence and its effect, and to some extent reweigh it, in considering whether a finding of fact is unreasonable or unsupported by the evidence in light of the civil standard of proof. I say that because this is what is expected of a court of appeal in determining whether a verdict in a criminal case is "unreasonable or unsupported by the evidence", having regard for the criminal standard of proof: *R v Yebes*, [1987] 2 SCR 168.

Whether this will enable the Court to intervene where there is *some* evidence to support a finding of fact but where that evidence is overborne by other evidence to the contrary remains to be seen. I merely alert you to the possibilities here.

I want to alert you to something else as well. Findings of fact based on affidavit evidence, as is often the case on proceedings in Chambers, are currently reviewed on the standard of "reasonableness" rather than "palpable and overriding error": *Farm Credit Corp. v Valley Beef Producers Co-operative Ltd*. As noted by Klebuc C.J.S. in *Great Sandhills Terminal Marketing Centre Ltd. v J-Sons Inc.*, 2008 SKCA 16, 307 Sask R 295:

> [27] It is well-established that findings of fact made by a trial judge are reviewable on appeal on the standard of palpable and overriding error. However, such standard does not apply where a Chamber judge made his findings of fact solely on affidavit evidence. In such event, the applicable standard is one of reasonableness, since a Chamber judge is in no better position than judges of the Court of Appeal to make primary and secondary findings of fact solely on the basis of affidavit evidence. [citations omitted]

With that, we may move on to the standard or standards of review applicable to a ground of appeal alleging the trial judge erred in relation to the other components of the decision: the identification of the law and the application of the law to the facts.

The Identification of the Law

This is much simpler. The Court of Appeal is to review the impugned decision for error of law on a standard of *correctness*. In other words, the Court asks itself if the trial judge's selection and appreciation of the law was correct. Commenting on this in *Housen v Nikolaisen*, the majority states at para 8:

> On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own…

This means, of course, that no *deference* is accorded the decision of the trial judge in relation to this component of the decision under appeal. The primary *policy reason* for this, according to *Housen v Nikolaisen*, is that "the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations" [para 9].

The Application of Law to Fact

This is more difficult. As mentioned earlier, a judicial decision is ultimately the product of a judge's application of the law to the facts or, in other words, the judge's evaluation of the material facts against the relevant legal standard. As we saw earlier, this has been taken in general to give rise on appeal to "a question of mixed fact and law", as in *Canada (Director of Investigation and Research, Competition Act) v Southam Inc*.

However, as pointed out in the majority reasons in *Housen v Nikolaisen*, a question of "mixed fact and law" can sometimes be reduced to a question of "law alone". For instance, where the question reduces to whether the judge applied the correct legal standard, the question is really one of law. So, too, if the judge failed to consider a required element of a legal test. Such questions, it was said, are not truly questions of "mixed fact and law"

but of "law alone", and to that extent they are to be reviewed on the standard of *correctness*, just as any other question of law.

This suggests that only to the extent a question of law alone cannot be extracted from the judge's evaluation of the facts against the relevant legal standard does a true question of "mixed fact and law" arise. And when it does, the standard of review may vary, according to the majority reasons in *Housen v Nikolaisen* [the Court split 5–4 on the issue], though identifying the governing standard can be difficult. Why? Because the majority reasons in this case state that decisions fall along "a spectrum of particularity" depending on their "precedential value". As they range from the general to the particular their precedential value decreases and the standard becomes more stringent, requiring review not on the standard of *correctness* but on the stringent standard of *palpable and overriding error*. When a question of "mixed fact and law" centres on a finding of negligence, for example, and the question involves the judge's interpretation of the evidence as a whole, the Court of Appeal must employ this standard of review, and it cannot interfere with the judge's conclusion in the absence of palpable and overriding error in his or her evaluation of the facts against the relevant legal standard.

I should point out that some of this is not easy to reconcile with what was said of the matter in *St-Jean v Mercier*, 2002 SCC 15, [2002] 1 SCR 491. That case raised a question of whether on the facts of the case a medical doctor was at "fault", within the contemplation of statute, in caring for a patient. This, of course, is a question having to do with the application of law to fact. It entails evaluating the facts against the legal standard in play. The Supreme Court held that such a question, once the facts have been established without palpable and overriding error, is to be reviewed on the standard of correctness, "since the standard of care is normative and is a question of law within the normal purview of both trial and appellant courts. Such is the standard for medical negligence". (See: Gonthier J. at para 49.) A similar observation was made by the Supreme Court in *ABB Inc. v Domtar Inc.*, 2007 SCC 50, [2007] 3 SCR 461 at para 34:

> In *Desgagné v. Fabrique de St-Philippe d'Arvida*, [1984] 1 S.C.R. 19, this Court distinguished the simple assessment of facts from the legal characterization of those facts. Thus, an appellate court has the power, in exercising its jurisdiction, to reach its own legal characterization of the facts even though it accepts the trial judge's assessment of them.[19]

Judging from the foregoing, it would seem that in *general* the trial judge's application of the law to the facts—the evaluation of the facts as found against the legal standard in play—gives rise to a question of law and therefore attracts appellate review on the standard of *correctness*. I say in *general* because of the position taken by the majority in *Housen v Nikolaisen*, a case founded on the proposition a municipality was liable in damages for personal injury on the basis it breached its statutory duty of repair in relation to a roadway. *Housen* would seem to be an exception to the general rule.

In leaving this subject, I draw your attention to the fact the majority judgment in *H.L. v Canada (Attorney General)* explicitly confined its analysis to the standard of review pertaining to the facts, and only the facts, to the express exclusion of the application of law to fact. The point is that the Court did not purport to reconcile the tensions between the majority judgment in *Housen v Nikolaisen* on the one hand, and the unanimous judgment in *St-Jean v Mercier*, on the other. Thus, an element of uncertainty persists about the extent to which the standard of *correctness* applies to a ground of appeal alleging that the trial judge erred in applying the law to the facts.

As mentioned earlier, the Saskatchewan Court of Appeal takes the position that an appeal based on the ground the judge erred in applying the law to the facts raises "a question of law" rather than "a question of mixed fact and law". This suggests that the Court will in general apply the standard of *correctness* when dealing with such questions. However, in a case of negligence, at least, allowance must be made for the position taken by the majority in *Housen v Nikolaisen*. How all of this will ultimately play out, only time can tell.

19 See, too, *Prud'homme v Prud'homme*, 2002 SCC 85, [2002] 4 SCR 663; *Ellis-Don Ltd. v Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 SCR 221 at para 42: "the legal consequences to be derived from the facts…is a pure question of law".

Eventually the Supreme Court may be expected to reconcile what was said of the nature of application of law to fact in *Housen v Nikolaisen*, on the one hand, and *St-Jean v Mercier* and *ABB Inc. v Domtar Inc.* on the other.

In the meantime the Court of Appeal takes the position in general that a question that "entails evaluating the facts against a legal standard" constitutes a question of law and generally attracts the standard of correctness: *Great Sandhills Terminal Marketing Centre Ltd. v J-Sons Inc.*; *Gallop v Mulatz*.

With that we sum up:

The Standards of Review Pertaining to a Decision of a Judge of the Court of Queen's Bench Without a Jury

1. An appeal from a decision of a judge of the Queen's Bench sitting without a jury amounts to an appeal by way of *review for error*, a review conducted on one of two standards: **palpable and overriding error** or **correctness** depending on the question: *H.L. v Canada (Attorney General)*.

2. If the alleged error is such as to give rise to a "question of fact" the review is conducted on the standard of **palpable and overriding error** and its equivalent of whether the finding in question is **unreasonable or unsupported by the evidence**. This standard applies to *primary* and *secondary* findings alike, as well as to findings of *credibility*. And it posits a considerable measure of deference to the findings made by the trial judge. However, a finding of fact made on the basis of affidavit evidence, as in chambers for example, attracts review of the standard of *reasonableness*.

3. If the alleged error is such as to give rise to a "question of law", whether arising out of the judge's identification of the law or the judge's application of the law to the facts, the review is conducted on the standard of **correctness**, except to the extent *Housen v Nikolaisen* applies. This standard posits no deference or little deference to the view of the trial judge.

4. To the extent *Housen v Nikolaisen* applies to a "question of mixed fact and law" that is incapable of reduction to "a pure question of law", the question is to be reviewed on the stringent standard of **palpable and overriding error** if on the "spectrum of particularity" the decision is of insignificant "precedential value". Decisions concerning negligence ordinarily fall on the *particular* side of the spectrum and are therefore subject to review on this standard, meaning the Court is not to interfere with the judge's conclusion in the absence of palpable and overriding error. If, on the "spectrum of particularity", the decision falls on the *general* side of the spectrum and is of significant precedential value, it falls to be reviewed on the standard of *correctness*.

With that, we may consider the remainder of the framework of principle governing the exercise of the Court's section 12 powers—a much easier undertaking I may say—beginning with their exercise in relation to discretionary decisions.

The Standard of Review Pertaining to Decisions Based on Discretion

The Nature of the Matter

By discretion is basically meant this: the faculty of deciding in accordance with circumstances and what seems appropriate, reasonable, just, fair, or equitable in those circumstances. The law frequently vests judges with the power to exercise discretion—sometimes in unbounded terms, sometimes if the judge finds certain requisites satisfied, and sometimes within stated limits only. For instance, a provision that states a

judge *may* do this or that as he or she thinks fit—or thinks fit, having regard for certain criteria—confers discretionary power.

Let me illustrate the point and its implications in this way. Suppose your firm empowers you to select an articling student, saying, "use your best judgment" or "do as you think fit". You have been entrusted with largely unbounded discretionary authority. And your exercise of that discretion is not open to justified interference by the firm unless there be something extraordinary, even egregious, associated with your selection, something, let us say, that is contrary to an implicit reservation or term and cuts to the core of the matter.

Now suppose the firm says it wants an articling student who:

- has a degree in arts, including studies in English and Political Science;
- is fluent in English and French;
- excelled in jurisprudence;
- passed courses in trusts and property, both real and personal;
- served on at least one student body; and
- participated in at least two meaningful extracurricular activities during his or her studies.

You have now been entrusted with a highly bounded discretionary authority, one bounded by numerous criteria. And your exercise of that discretion is open to justified interference by the firm if you fail to abide these criteria in making your selection.

There is more to the matter than this, but this will serve to capture its basic profile.

The Standard of Review

Given the nature of discretion, there may be seen to be an implied limit on the right of appeal, and the power of the Court to act on that right. Hence, the standard of review posits a comparatively narrow basis for intervention on appeal.

The standard of review is founded on the general idea that on appeals from a decision of this kind, the function of the Court of Appeal, at the outset, is essentially one of review to determine if the judge *abused* his or her discretion. Put another way, the function of the Court, initially, is to review the decision for vitiating error, one that serves to vitiate the exercise by the judge of the discretionary power vested in him or her. Only if some such abuse or error be found to exist is the Court in a position to intervene. Such error, if found, is usually found in that which bounds the exercise of the discretion, or shapes its form and extent, which is to say in such requisites or stated limits or criteria, if any, as surround the discretionary power.

Hence, in *Rimmer v Adshead*, 2002 SKCA 12, [2002] 4 WWR 119, I said this of the matter on behalf of the Court:

> [58] In turning to this issue, it is necessary to bear in mind that the powers in issue are discretionary and therefore fall to be exercised as the judge vested with them thinks fit, having regard for such criteria as bear upon their proper exercise. The discretion is that of the judge of first instance, not ours. Hence, our function, at least at the outset, is one of review only: review to determine if, in light of such criteria, the judge abused his or her discretion. **Did the judge err in principle, disregard a material matter of fact, or fail to act judicially? Only if some such failing is present are we free to override the decision of the judge and do as we think fit. Either that, or the result must be so plainly wrong as to amount to an injustice and invite intervention on that basis.** [emphasis added]

Incidentally, by "failing to act judicially" is generally meant acting arbitrarily or capriciously.

This body of principle or standard of review is routinely applied by the Court of Appeal for Saskatchewan in all manner of contexts involving the exercise of discretion.[20]

> **Note**: The standard of review governing the exercise of the powers of the Court as it pertains to discretionary decision-making is narrowly founded and exacting. Many appeals founder on this score as a result of underestimating the nature and rigour of the standard.

The Standard of Review Pertaining to Decisions Regarding Damages

Damages may be awarded by a judge or by a jury. In either case the court is empowered by subsection 12(1) to set aside the award. There was a time, not long ago, when the court, having set aside an award of damages made by *a jury*, could not itself determine the damages, for that would derogate from the right to trial by jury. Hence, the court could only order a new trial limited to the assessment of damages. Subsection 12(2) of *The Court of Appeal Act, 2000* changed this. The subsection reads thus:

> 12(2) Where the court sets aside damages assessed by a jury, the court may assess any damages that the jury could have assessed.

Regardless of whether damages are assessed by a judge or by a jury, it should be understood that there is an element of discretion in quantifying non-pecuniar damages—for pain and suffering let us say—**in the sense the judge or jury is called upon to make an award that seems to them to be appropriate, reasonable and fair in the circumstances**. So, once again there exists an implied limit on the right of appeal and the powers of the Court. This is especially so in relation to the assessment of non-pecuniary damages because the amount thereof does not lend itself to objective calculation to the extent the amount of pecuniary damages does. Hence, the power of the Court to set aside an award of damages and substitute its view for that of the judge or the jury, as the case may be, is limited in their exercise. These limits find expression in the standard of review reserved for this purpose.

The prevailing standard is that stated by McIntyre J., speaking for the Supreme Court of Canada in *Woelk v Halvorson*, [1980] 2 SCR 430 at pp. 435–36:

> It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at the trial is wholly erroneous, that a Court of Appeal is entitled to intervene. The well-known passage from the judgment of Viscount Simon in *Nance v. British Columbia Electric Railway Co. Ltd.*, [1951] A.C. 601 at p. 613, — approved and applied in this Court in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, — provides ample authority for this proposition. He said:
>
> > The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would

20 See, for instance, *Royal Bank of Canada v Anderson*, 2008 SKCA 153, 314 Sask R 215 (QB order denying leave to commence action); *Fleet Street Enterprises Inc. v 3889581 Manitoba Ltd.*, 2003 SKCA 84 (QB order setting aside default judgment); *Scharnagl (Litigation Guardian of) v Tomilin*, 2005 SKCA 121, 269 Sask R 25 (QB order declining to add parties); *Pearlman v University of Saskatchewan*, 2002 SKCA 74, 219 Sask R 260 (QB order regarding judicial review remedies); *Benson v Benson* (1994), 3 RFL (4th) 291, 120 Sask R 17 (CA) (costs); *Chesko v Chesko* (1985), 37 Sask R 135, 43 RFL (2d) 341 (CA) (family law); *Saskatchewan Power Corporation v John Doe*, [1988] 6 WWR 634, 69 Sask R 158 (CA) (interlocutory injunction) (leave to appeal to SCC refused [1989] 1 SCR xiv). See, too, *McKinnon Industries Ltd. v Walker*, [1951] 3 DLR 577 (PC) at p. 579 (generally); Elsom v Elsom, [1989] 1 SCR 1367 at p. 1375 (generally); *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd.*, [1987] 1 SCR 110 (generally).

> have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, **it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage…** [emphasis added]

This principle has long been established. An earlier example of its application in this Court in somewhat different circumstances may be found in *McCannell v McLean*, [1937] SCR 341.[21]

The Standard of Review Pertaining to Decisions of Tribunals

Such rights of appeal as exist in relation to the decisions of tribunals are usually confined to questions of law or jurisdiction. So, in determining appeals of this kind the Court customarily employs the standard reserved for questions of law, namely that of correctness. As noted by Sherstobitoff J.A., speaking for the Court, in *Cadillac Fairview Corp. v Saskatoon (City)*, [2000] 11 WWR 89, 199 Sask R 72 (CA):[22]

> **III. Standard of Review**
>
> 26 The [tribunal] argued that the standard of review should be something less than correctness, on the basis of the judgment of the Supreme Court of *Canada in Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 (S.C.C.). In the present case, where there is a right of appeal only with leave of the court, and only in respect of questions of law or jurisdiction, we are satisfied that the standard of review is one of correctness, which is to say the [tribunal's] construction of the provisions of the legislation and the manual must be looked at with a view to determining whether the Committee was correct.

There are exceptions, of course, for some enactments do not limit the scope of the right of appeal in this way. *The Legal Profession Act, 1990*[23] is one. Decisions made under such enactments attract broader bases for reconsideration, special ones even, as may be seen, for example, in *Lamontagne v Law Society of Saskatchewan* (1991), 81 DLR (4th) 64, 89 Sask R 219 (CA), and *Merchant v Law Society of Saskatchewan*, 2009 SKCA 33, 324 Sask R 108. But these tend to be out of the ordinary, and are mentioned only for the purpose of alerting you to their existence.

This, then, completes our consideration of the content of the powers of the Court and the bases upon which those powers fall to be exercised. It also serves to bring to a conclusion Part One of the paper, concerning matters of substantive law. So we can move on to matters of practice and procedure.

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21 For application of this body of principle in the Court of Appeal for Saskatchewan, you may want to refer to *Rieger v Burgess*, [1988] 4 WWR 577, 66 Sask R 1 (CA), and *Grosvenor Fine Furniture (1982) Ltd. v Terrie's Plumbing and Heating Ltd.* (1993), [1994] 1 WWR 275, 113 Sask R 105 (CA) (Leave to appeal to SCC refused [1994] 1 SCR xi). Incidentally, *Rieger*'s case is noteworthy for holding, for the first time, that trial judges ought to instruct juries as to ranges of damages in appropriate cases.

22 See, too, *Amoco Canada Petroleum Co. Ltd. v Saskatchewan Assessment Management Agency,* 2000 SKCA 91, 199 Sask R 111.

23 SS 1990-91, c L-10.1 (section 56 confers an unrestricted and open-ended right of appeal). Contrast this with *The Medical Profession Act, 1981*, SS 1980-81, c M-10.1, section 66, which confers a right of appeal, with leave, but only on "a point of law".

Part Two

Matters of Practice and Procedure

Obtaining Leave to Appeal when Necessary

Section 8 of *The Court of Appeal Act, 2000*, requiring leave to appeal in relation to interlocutory decisions, provides that leave may be granted "by a judge or the court". While both enjoy the power to grant leave, it is customary to apply to a single judge sitting in chambers, who is expressly empowered by subsection 20(2) of the *Act* to hear and determine such applications.

As required by section 9 of the *Act*, more particularly subsection 9(3), an *application for leave* must be made within 15 days after the date of the decision—not 30 days as in the case of *serving a notice of appeal*. This 15-day limit is subject to extension, a matter covered later under the subject "extensions of time".

The practice and procedure on applications to obtain leave to appeal is governed by the *Court of Appeal Rules*, more particularly by the Rules found under PART XIV—APPLICATIONS, and even more particularly by Rule 49 and the Forms appearing in the APPENDIX (Forms 4a and 4b).

Beneath this lie a number of matters of considerable importance, including:

1. the implicit footings upon which an application for leave to appeal rests;
2. the criteria that govern the disposition of such applications;
3. the *nunc pro tunc*, or retroactive, grant of leave;
4. the finality of a leave application; and
5. exceptions to the requirement for leave.

Let us consider these in turn.

The Implicit Footings

These were identified by Bayda C.J.S., speaking for himself and Vancise J.A. in *Iron v Saskatchewan (Minister of the Environment and Public Safety)* (1993), 103 DLR (4th) 585, 109 Sask R 49 (CA). The Chief Justice said this:

> The essence of an application for leave embodies, necessarily, four fundamental assertions by the applicant. By the mere fact of making the application, the applicant expressly or impliedly is saying these four things to the Chambers judge: (i) I have here an interlocutory order which I desire to appeal; (ii) the interlocutory nature of the order vests you, the judge, with jurisdiction to grant or refuse leave to appeal; (iii) I ask you to assume that jurisdiction, and I submit to it; (iv) in exercising your jurisdiction I ask you to grant me leave.

The significance of this lies in the fact that an applicant for leave to appeal who elects to treat the decision in issue as "interlocutory" and therefore open to appeal only with leave, cannot later, on dismissal of the application, be heard to say that the decision was "final" and therefore subject to appeal without leave. As explained in *Iron v Saskatchewan*, an applicant for leave to appeal cannot approbate and reprobate in this way, or blow hot and cold, and cannot therefore resile from an election to treat the decision in question as interlocutory. This means

it is necessary, before making an application for leave to appeal, to carefully consider whether the decision is "interlocutory" or "final", bearing in mind that the jurisdiction to grant leave stems from the interlocutory nature of the decision; otherwise there is no jurisdiction to act: *Iron v Saskatchewan*.

This can be a tricky business. In doubtful situations counsel may opt to treat the decision in question as "interlocutory", rather than "final", and be held to that position, as in *Iron v Saskatchewan*. On the other hand, counsel may opt to treat the decision as "final", rather than "interlocutory" only to be met with an application to strike out the notice of appeal on the ground the decision is interlocutory, not final, and therefore open to appeal only with leave.

This is what happened in *Qually v Qually* (1986), 53 Sask R 161 (CA). There, an appeal was taken (without leave) from an order of the Queen's Bench pertaining to discovery of documents. The Court quashed the appeal on the basis the order was "interlocutory" and could only be appealed with leave. See, too, *Pisiak v Wadena Credit Union Ltd.* (1992), 97 Sask R 241 (CA).

A similar thing happened in *Rolls-Royce Canada Ltd. v La Ronge Aviation Service Ltd.* (1996), 144 Sask R 226 (CA Chambers). That case concerned an order setting aside a pre-judgment garnishee summons. Counsel opted to treat the order as "final" and launched an appeal without obtaining leave. The other side then applied to a judge of the court in chambers to have the notice of appeal struck out on the footing the order was "interlocutory". The application was allowed and the notice of appeal was struck out on the basis the order was interlocutory, not final, and could not be appealed without leave.

Query: Since the jurisdiction of a judge in chambers is limited by s. 20(1) of the *Act* to matters "incidental" to an appeal, is it open to a judge of the court, as distinct from the court, to strike out a notice of appeal on the ground leave to appeal was required but not obtained? This question and others arose in *Clarkson Gordon Inc. v Taran Furs (MTL) Inc.* (1989), 35 CPC (2d) 160 (Sask CA Chambers) and were referred to the Court for disposition, rather than dealt with in chambers.

Having regard for all of the foregoing, you will appreciate the need to carefully identify the nature of the decision in question when considering whether to apply for leave to appeal. This harks back to what I earlier said of the substance of the matter (at pp. 12–14) and the need, when in doubt about whether the decision is "interlocutory" or "final", to "look up the practice books and see what has been decided on the point" as Lord Denning put it in *Salter Rex & Co. v Ghosh*, [1971] 2 All ER 865 (CA).

The Governing Criteria

The power to grant leave is a discretionary power exercised upon a set of criteria which, on balance, must be shown by the applicant to weigh in favour of granting leave: *Qually v Qually* (1986), 53 Sask R 161 (CA); *Steier v University Hospital Board*, [1988] 4 WWR 303, 67 Sask R 81 (CA per Tallis J.A. in chambers). In *Qually v Qually*, Tallis J.A. noted on behalf of the Court:

> When considering applications for leave, leave will not necessarily be granted simply because an arguable point is raised. If there is an arguable point, the question presented must be of sufficient importance to the particular litigants or of such general importance that the court should hear the issue presented for determination. We must also keep in mind that the interjection of an appeal will inevitably create delays in the litigation.[24]

Picking up on what was said of the matter in *Qually v Qually* and in *Steier v University Hospital Board* (and upon consultation with other members of the Court), I elaborated upon the governing criteria in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121:

> The governing criteria may be reduced to two — each of which features a subset of considerations — provided it be understood that they constitute conventional considerations

24 See, too, *Super Bingo Inc. v Courtyard Inns Ltd.*, [1988] 4 WWR 575 (Sask CA) (per Tallis J.A. in chambers); and *Silcorp Ltd. v KJK Holdings Inc.* (1992), 90 DLR (4th) 488, 100 Sask R 143 (CA).

rather than fixed rules, that they are case sensitive, and that their point by point reduction is not exhaustive. Generally, leave is granted or withheld on considerations of *merit* and *importance*, as follows:

> **First**: Is the proposed appeal of *sufficient merit* to warrant the attention of the Court of Appeal?
>
> - Is it *prima facie* frivolous or vexatious?
> - Is it *prima facie* destined to fail in any event, having regard for the nature of the issue and the scope of the right of appeal, or, for instance, the nature of the review framework, such as that pertaining to the exercise of discretionary power?
> - Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?
> - Is it apt to add unduly or disproportionately to the cost of the proceedings?
>
> **Second**: Is the proposed appeal of *sufficient importance* either to the proceedings before the court or to the field of practice, or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?
>
> - Does the decision bear heavily and potentially prejudicially upon the course or outcome of the proceedings?
> - Does it raise a new or controversial or unusual issue of practice?
> - Does it raise a new or uncertain or unsettled point of law?

This, then, is the framework of principle that is generally applied on applications for leave to appeal.[25]

I might add that leave may be granted in relation to one issue but not another: *Austman v Royal Bank of Canada* (Sask CA Chambers, November 27, 1991) and on appeal (1992), 97 Sask R 258 (CA).

The Granting of Leave *nunc pro tunc*

Leave may be granted *nunc pro tunc* (now for then, or retroactively): *Budd v Pioneer Co-Operative Association Ltd.* (1986), 49 Sask R 306 (CA per Wakeling and Gerwing JJ.A.). But this power is exercised sparingly and should not be seen as a substitute for timely application. As I noted on behalf of the Court in *Grant v Saskatchewan Government Insurance*, 2003 SKCA 17, 227 Sask R 316:

> [5] Nor are we prepared to grant leave *nunc pro tunc*. This is an extraordinary power that is used sparingly so as not to defeat the object of section 8 of *The Court of Appeal Act, 2000*. That object lies in allowing for appeals of interlocutory decisions to be culled in advance for the purpose of avoiding needless expense and delay. They are culled along the lines identified in *Rothmans, Benson & Hedges Inc. v. Government of Saskatchewan* 2002 SKCA 119. Ordinarily, the purpose of the section can only be realized by timely application for leave to appeal.[26] [citations omitted]

25 For the application of this criteria in various settings see, for example, *Schock v Boyd*, 2005 SKCA 48, 269 Sask R 146 (Lane J.A. in Chambers); *Gilewich v Strand*, 2007 SKCA 34, 293 Sask R 48 (Hunter J.A. in Chambers); *627360 Saskatchewan Ltd. v Bellrose*, 2007 SKCA 23, 293 Sask R 164 (Richards J.A. in Chambers); *Prince Albert (City) v 101027381 Saskatchewan Ltd.*, 2008 SKCA 1, 307 Sask R 162 (Klebuc C.J.S. in Chambers); *Mercer Human Resource Consulting Ltd. v Farm Credit Canada*, 2008 SKCA 98, 311 Sask R 209 (Jackson J.A. in Chambers); *Stomp Pork Farm Ltd. v Lombard General Insurance Co. of Canada*, 2008 SKCA 146, 314 Sask R 175 (Hunter J.A. in Chambers).

26 See, too, *Holmes v Jastek Master Builder 2004 Inc.*, 2008 SKCA 159, 314 Sask R 267 (Chambers, per Lane J.A.).

The Finality of Leave Applications

There is no appeal to the court from a decision of a judge of the court either granting or denying leave to appeal. This is so by reason of subsection 20(3) of *The Court of Appeal Act, 2000*. It used to be so by reason of case authority: *Morgan v Saskatchewan* (1991), 82 DLR (4th) 443, 93 Sask R 188 (CA) and *Iron v Saskatchewan (Minister of the Environment and Public Safety)* (1993), 103 DLR (4th) 585, 109 Sask R 49 (CA).

Exceptions to the Requirement for Leave

Section 8 contains a number of exceptions, including decisions regarding the custody of a child, the grant or refusal of an injunction, and the appointment of a receiver.

In addition, some enactments contain a right of appeal, the exercise of which is not subject to obtaining leave to appeal. The *Divorce Act* is one such enactment. The right of appeal conferred by this *Act* expressly extends to "any judgment or order, whether final or interim…". In the light of this, and on the premise this provision "prevails over any provision in our *Court of Appeal Act*", it has been held that leave to appeal is not required in relation to an interim or interlocutory decision made pursuant to the *Divorce Act*, RSC 1985, c 3 (2nd Supp): *Kotelmach v Mattison* (1987), 61 Sask R 207, 11 RFL (3rd) 56 (CA Chambers). See, too, *Belmore v Belmore* (1996), 144 Sask R 164 (CA Chambers).

Other enactments also contain their own right of appeal. *The Personal Property Security Act, 1993*, SS 1993, c P-6.2, for example, states in s. 66(2) that an appeal lies to the Court of Appeal from "an order, judgment or direction of a court made pursuant to this *Act*". Having regard for the fact this right of appeal is conferred without reference to the need to apply for leave, it has been held that leave to appeal an interlocutory order made pursuant to this *Act* (an adjournment sine die in this case) is not required: *Rocky Meadows Transport Ltd v. Double D Construction Ltd.*, [1999] SJ No 200 (Sask CA Chambers). See, too, *Dureault's Allied Sales Ltd. v Courtyard Inns Ltd.* (1988), 70 Sask R 77 (CA).

The Family Property Act, SS 1997, c F-6.2, also provides its own right of appeal. Section 55 states that a right of appeal lies to the Court of Appeal "from any order or judgment made or given on or pursuant to an application pursuant to this *Act*". This right of appeal is also conferred without reference to the need for leave. Still, leave to appeal interlocutory orders made in the context of proceedings under this *Act* are treated as requiring leave to appeal: *Noble Holdings Ltd. v Basler Holdings Ltd.*, 2005 SKCA 4 (order directing the trial of an issue); *Mannix v McKay*, 2007 SKCA 93, 307 Sask R 154 (interim distribution of property).

You might think a conflict in principle has emerged here, though I should point out that *Rocky Mountain Meadows Transport* and *Dureault's Allied Sales* were decided before *The Court of Appeal Act, 2000* was enacted, including section 8, whereas *Noble Holdings* and *Mannix* were decided afterwards. It would be inappropriate for me to comment on whether a conflict exists, so I simply draw the matter to your attention.

There is a related matter I should also like to draw to your attention. An interlocutory order may be made in the context of proceedings based on the *Divorce Act* or *The Family Property Act* but may not be made under or pursuant to those *Acts*. In that case, leave to appeal is required. I have in mind an interlocutory order made in the context of such proceedings but on the authority of the *Queen's Bench Rules*. As noted in *Rimmer v Adshead*, 2002 SKCA 12, [2002] 4 WWR 119, the rights of appeal found in the *Divorce Act* and *The Family Law Act* are confined to judgments or orders made in the exercise of a power specifically conferred by those enactments. As such, these rights of appeal do not extend to an interlocutory order made on the authority of the *Queen's Bench Rules*. See, too, *Gilewich v Strand*, 2007 SKCA 34, 293 Sask R 48.

> **Note**: Given the difficulties associated with distinguishing between "interlocutory" and "final" decisions, coupled with the potential pitfalls of applying for leave, I have gathered together a list of decisions which have been treated in the Court of Appeal as either "interlocutory" or "final". This list is not exhaustive—time constraints foreclosed further search—but it should prove helpful.

The following orders of the Court of Queen's Bench have been taken by the Court of Appeal, or a judge of the Court, to be "interlocutory":

- Order **declining jurisdiction** under *The Court Jurisdiction and Proceedings Transfer Act*: *Mubili v Chona*, 2009 SKCA 34, 324 Sask R 152.
- Order declining **to dismiss** an action as misconceived: *Cameco Corp. v Insurance Co. of the State of Pennsylvania*, 2009 SKCA 15, 324 Sask R 46.
- Order setting aside **noting for default** and granting leave to file a statement of defence: *Grant v Saskatchewan Government Insurance*, 2003 SKCA 17, 227 Sask R 316.
- Order setting aside **pre-judgment garnishee summons** engaging none but the interests of the parties to the litigation: *Silcorp Ltd. v KJK Holdings Inc.* (1992), 90 DLR (4th) 488, 100 Sask R 143 (CA).
- Order declining to set aside **pre-judgment garnishee summons**: *Montreal Lake Cree Nation v Mamczasz Electrical Ltd.*, 2009 SKCA 30.
- Orders re **amending pleadings**: *Cameco Corp. v Insurance Co. of the State of Pennsylvania*, 2007 SKCA 76; *Kidd v Flad*, 2007 SKCA 130; *Kieling v Saskatchewan Wheat Pool*, [1989] SJ No 525 (QL) (CA). (Note: leave to appeal granted in the extraordinary circumstances of the Chief Justice of the Queen's Bench advising a disgruntled litigant about what an order by another judge of the court meant or did not mean, with a third judge disagreeing on the meaning attributed to the order by the Chief Justice: *Kieling*).
- Orders **striking out**: *Zuidema Farms Inc. v Gritzfeld*, 2008 SKCA 12 (for want of prosecution); *Rollheiser v Lockwood*, 2006 SKCA 57, 279 Sask R 113 (as beyond jurisdiction of QB); *Bartok v Shokeir* (1998), 168 Sask R 280 (CA) (as pleading a novel cause of action).
- Orders pertaining to the **discovery of documents**: *Qually v Qually* (1986), 53 Sask R 161 (CA); *Aitken and Aitken v Regina (City)* (1987), 60 Sask R 57 (CA); *Anderson v Canada (Attorney General)*, 2004 SKCA 115, 254 Sask R 242; *Schroeder v Korf* (1996), 144 Sask R 229 (CA).
- Orders regarding **oral discovery**, including proper officer and direction to answer questions: *International Minerals & Chemical Corp. (Canada) Ltd. v Commonwealth Insurance Co.* (1988), 71 Sask R 306 (CA); *Potash Corp. of Saskatchewan Inc. v Allendale Mutual Insurance Co.* (1993), 109 Sask R 144 (CA); *G.L. v Canada (Attorney General)*, 2004 SKCA 137, 254 Sask R 286; *Mann Motor Products Ltd. v Hlewka*, 2004 SKCA 163.
- Order of case management judge re **scope of discovery**: *Saskatchewan Trust Co. (Liquidator of) v Coopers & Lybrand Inc.*, 2003 SKCA 75, 238 Sask R 191.
- Orders regarding **proper officer to be examined**: *Mercer Human Resource Consulting Ltd. v Farm Credit Canada*, 2008 SKCA 98, 311 Sask R 209; *Jorgenson v ASL Paving Ltd.*, 2007 SKCA 25, 289 Sask R 281; *K and P Holdings Ltd. v Saskatchewan Government Insurance* (1989), 81 Sask R 314 (CA).
- Orders directing the **trial of an issue**: *Lund v Board of Police Commissioners of Estevan (City)*, [1996] 9 WWR 440, 144 Sask R 308 (CA) (judicial review); *Chubak v Blais*, 2004 SKCA 4 (application to vary child support); *Noble Holdings Ltd. v Basler Holdings Ltd.*, 2005 SKCA 4 (claim under *The Personal Property Security Act).*
- Order **staying proceedings** pending the trial of an issue: *Pisiak v Wadena Credit Union Ltd.* (1992), 97 Sask R 241 (CA).
- Order allowing **supplementary affidavit** to be filed on application for **summary judgment**: *Rask v Hus*, 2006 SKCA 29.
- Order allowing for **hearing** under ss. 23 and 33 of *The Limitation of Civil Rights Act*: *Bank of Montreal v Hildebrand*, [1988] 4 WWR 363 (Sask CA).
- Order regarding **interim disposition of family property**: *Mannix v McKay*, 2007 SKCA 93, 307 Sask R 154.

- Order **adding party to an action**: *Stomp Pork Farm Ltd. v Lombard General Insurance Co. of Canada*, 2008 SKCA 146, 314 Sask R 175; **declining to add party**: *Lowery v Anchorage Counselling & Rehabilitation Services Inc.*, 2007 SKCA 19.
- ***Ex parte* order adding party**: *Brail v Fayerman Bros. Ltd.*, [1987] 1 WWR 518, 53 Sask R 204 (CA) (option to return to Queen's Bench to rectify order).
- Order to **proceed** under Part 40 of Queen's Bench **Simplified Procedure**: *White v White* (1999), 189 Sask R 152 (CA) (collateral appeal unavailable after dismissal: *Diamond v Western Realty Co.*, [1924] SCR 308).
- Order by Queen's Bench judge granting **leave to appeal to Queen's Bench** from a decision of an arbitrator under *The Arbitration Act, 1992*: *Bank of Nova Scotia v Span West Farms Ltd.*, 2003 SKCA 35, 232 Sask R 279.
- Orders **severing and declining to sever** cross-claims from main actions, or issues of liability from issues of damages: *S.T. v Canada (Attorney General)*, 2001 SKCA 88; *Lamirande v Metis Society of Saskatoon, Local 11* (1987), 63 Sask R 239 (CA); *Cosgrove v South Saskatchewan Hospital Centre* (1991), 91 Sask R 159 (CA).
- Order **staying suspension of medical doctor** pending appeal: *Bahinipaty v College of Physicians and Surgeons of Saskatchewan* (1985), 44 Sask R 110 (CA).
- Order under Queen's Bench Rule 438(1) **taking accounts and determining indebtedness of defendant**: *Canadian Imperial Bank of Commerce v Shinkaruk*, [1986] SJ No 114 (QL) (CA).
- Order **directing case to be tried by jury** (without the usual deposit): *Scrimshaw v Holy Family Hospital*, [1987] SJ No 42 (QL) (CA).
- Order declining **summary judgment** in relation to part of an action: *First City Trust Co. v Woodlawn Properties Ltd.*, [1987] SJ No 494 (QL) (CA).
- Interim order for **maintenance of child** under *The Infants Act*: *Singh v Singh*, [1987] SJ No 487 (QL) (CA).
- Order that s. 2 of ***The Limitation of Civil Rights Act*** applies to a particular mortgage: *National Trust Co. v Larsen and Remai Financial Corp.* (1988), 68 Sask R 207 (CA).
- Order **determining points of law** under Queen's Bench Rule 188: *Shields (Resort Village) v Toronto-Dominion Bank* (1988), 67 Sask R 79 (CA).
- Order granting **leave to commence action** for damages for tort committed outside the province: *Newgrade Energy Inc. v Kubota America Corp.* (1991), 97 Sask R 32 (CA).
- Order declining to direct **return of seized equipment** but without prejudice to reapply: *Sunnyvale Farming Enterprises Ltd. v Lloyds Bank Canada* (1991), 90 Sask R 33 (CA) (application for leave to appeal made by successful party—an obvious anomaly—because of an adverse finding in the fiat).
- Order granting creditor **leave to sue bankrupt creditor** in Queen's Bench under s. 69(1) of the *Bankruptcy Act*: *Avco Financial Services Canada v Little (Bankrupts)* (1990), 85 Sask R 1 (CA).
- Order refusing **stay of civil action** pending disposition of criminal charges: *Bank of Montreal v McCammon*, 1994 CanLII 4548 (Sask CA); *Bank of Nova Scotia v Diamond-T Cattle Co.* (1994), 123 Sask R 125 (CA).
- Order setting a date for **pre-trial conference** and compliance with a **disclosure order**: *Arlo Investments Ltd. v Prince Albert (City)*, 2007 SKCA 26.
- Order declining to **extend period of redemption** in *order nisi* for foreclosure: *Altec Management Ltd. v Great-West Life Assurance Co.* (1996), 141 Sask R 167 (CA).
- Order for **payment into court** by federal government: *Peepeetch v Canada (Attorney General)*, 2006 SKCA 40 (jurisdiction to make order).

The following orders of the Court of Queen's Bench have been taken to be by the Court of Appeal, or a judge of the Court, to be "final":

- Order **striking out a pleading** of a cause of action: *D.B. v M.C.*, 2001 SKCA 129, 213 Sask R 272.
- Order relating to the **removal of counsel** from acting in relation to an action: *Mitchell v Mitchell* (1996), 144 Sask R 223 (CA).
- Order **allowing non-suit** against some but not all defendants: *Ceapro Inc. v Saskatchewan*, 2008 SKCA 64, 314 Sask R 1.
- Order requiring **disclosure of documents** as against a non-party to the litigation: *Popowich v Saskatchewan* (1999), 174 DLR (4th) 336, 177 Sask R 226 (CA).
- Order **staying motion for contempt**, with leave to return the matter to chambers list in certain events: *Collis v Saskatchewan Government Insurance*, 2002 SKCA 64, 219 Sask R 211.
- Order refusing to **suspend the registration of a foreign judgment** "may well be final": *Bank of Nova Scotia v R & R Wood Preservers Ltd.*, [1985] SJ No 583 (QL) (CA).

Initiating an Appeal

All appeals are initiated by Notice of Appeal or Notice of Cross-Appeal, as provided for by PART III and PART VI of the *Court of Appeal Rules*. The content of these documents is covered, in turn, by Rules 8 and 9, and their forms (Forms 1a and 1b) which appear in the APPENDIX to the Rules. The Notice of Appeal or Cross-Appeal, as the case may be, is to be served and filed in accordance with the applicable Rules. An appeal is generally taken to come into existence upon service of the Notice of Appeal.[27]

The Rules in PARTS III and VI, together with the Forms in the APPENDIX, were revised recently and were drawn with a view to handing the practitioner an easy to read, straight forward set of instructions for these purposes. Please pay careful attention to them. This is especially so of clauses (a) to (d) of Rule 8, which read thus:

> 8. A notice of appeal, in addition to identifying the judgment or order from which the appeal is taken, shall, in separate numbered paragraphs:
>
> (a) specify whether all or part of the judgment is being appealed and, if a part, which part;
>
> (b) identify the source of the right of appeal and the basis for the jurisdiction of the court to determine the appeal;
>
> (c) set forth the grounds of the appeal;
>
> (d) state precisely the relief sought.

Note: Drawing a Notice of Appeal carefully, with these requirements in mind, can go a long way toward disciplining one's consideration of the issues to which the impugned decision gives rise. It is well to think this through completely at the outset, with the source and scope of the right of appeal, together with the applicable standards of review, clearly in mind, remembering all the while that an appeal lies against the *decision* rather than the *reasons* for the decision. (It is possible, of course, to make the right call but for the wrong reasons.)

In addition, it is well to present carefully drawn grounds of appeal that are limited to the essentials, tightly stated, and free of embellishment. It does your case no good if it gets off on a lengthy, ill-focussed, rambling, and argumentative set of grounds of appeal. Moreover, it is well to identify exactly what it is you would like the Court to do in the exercise of its powers. This also applies to Cross-Appeals. By Cross-Appeal I mean this. A respondent on appeal, while desirous of having favourable rulings of the judge upheld, may desire to challenge an unfavourable ruling, one that went against the respondent at trial. If so, the respondent is entitled to cross-appeal.

27 See, section 9(1) of *The Court of Appeal Act, 2000* and, for a general example of the point, *Pachal's Beverages Ltd., Re* (1972), 31 DLR (3d) 620, [1973] 1 WWR 217 (Sask QB).

Between the time an appeal is initiated and heard, questions may arise about this or that, and lead to procedural dispute. These disputes are routinely resolved by a single judge sitting in chambers, or by the Registrar as we shall see, which brings us to the subject of chamber practice in the Court of Appeal.

Chamber Practice

The Foundation and General Practice

The foundation is contained in section 20 of *The Court of Appeal Act, 2000*:

> 20(1) A single judge sitting in chambers may hear and dispose of an application or motion that is incidental to an appeal or matter pending in the court and that does not involve the decision of the appeal on the merits.
>
> (2) A single judge sitting in chambers may hear and dispose of an application for leave to appeal.
>
> (3) An order made by a judge in chambers, other than an order granting or denying leave to appeal, may be discharged or varied by the court.

Two features of this section should be noted. First, a single judge in chambers has only limited authority, since the power extends only to matters "incidental" to the appeal. Second, decisions made in the exercise of this power are subject to appeal to the Court of Appeal, with the exception, noted earlier, of decisions granting or withholding leave to appeal.

A judge of the Court, assigned by the Chief Justice, holds chambers in Regina in the Court of Appeal Chamber Room on the second and fourth Wednesdays of each month. When the Court is sitting in Saskatoon (which it does several times a year) a judge designated by the Chief Justice holds chambers in Court Room #4, where the Court of Appeal sits, on the first day of the sittings.

Applications attended by urgency are heard by the designated chamber judge on any day of the week—or if necessary on the weekend—as may be arranged by the Registrar.

Applications of comparative simplicity may be made by telephone, again as arranged by the Registrar.

The Commonest Types of Application

Most often, applications are brought to obtain one of the following types of relief:

1. lifting or imposing stays of execution of the judgment or order under appeal (Rule 15);
2. dismissing an appeal for want of prosecution (Rule 46(1));
3. settling matters concerning the content and filing of the Appeal Book and *Factum* (Rules 18 to 38); and
4. extensions of the time for bringing an appeal or for making application for leave to appeal (Rule 71).

Applications for relief of this nature are to be made by Notice of Motion in prescribed form, accompanied by such supporting material, including affidavits, as may be necessary to the effective hearing and determination of the matter. (See: Form 5 (stays of execution); Forms 6 and 7 (dismissing for want of prosecution); and Form 3 (enlarging time).)

Lifting and Imposing Stays: Rule 15

Rule 15—which is of considerable importance to appellate practice—serves to automatically stay the execution of the judgment or order under appeal, as well as any further proceedings in the action, pending the hearing

of the appeal. This is subject to exception, mentioned in the Rule, but in the main the execution of judgments or orders is automatically stayed on serving and filing a notice of appeal.

On occasion, the *automatic stay* may work an injustice, or be taken advantage of by an appellant. Some unsuccessful litigants launch appeals and then sit back in order to gain the advantage, let us say, of taking off another crop before having to give up farm land or of re-arranging their finances or of forestalling the operation of a custody order to strengthen their case. Similarly, the *lack of a stay* may be used to unfair advantage.

If the automatic stay imposed by Rule 15 (or the lack of a stay) is apt to work an injustice to either party pending the hearing and determination of the appeal, a judge of the Court will, on application, grant such order as will best ensure that a party does not suffer any injustice or disadvantage in the meantime.

A judge of the Court may make orders for lifting or imposing a stay in whole or in part, and with or without conditions, to the ends of achieving these goals. In appropriate cases, for example, an order will go for the payment of monies into Court pending the disposition of the appeal. Or an order may be made prohibiting the disposition of property, or securing it, and so on.[28]

Dismissing for Want of Prosecution: Rule 46

If an appellant unreasonably delays the pursuit of his or her appeal, the respondent may apply for relief. This is covered by PART XII of the Rules, which enables a judge in chambers to make an order requiring the appellant to "perfect" the appeal or risk its dismissal. By "perfecting" the appeal is generally meant getting it ready for hearing in step with PART VIII and PART IX of the Rules. Unreasonable delays usually occur as a result of appellants dragging their heels in obtaining a transcript when required, or in preparing the appeal book, or filing the *factum*.

Since a single judge sitting in chambers has only "incidental" power, it is not within the authority of a judge alone to dismiss an appeal in a case of unreasonable delay. Only the Court may do so. But a single judge in chambers may make an order under Rule 46(1) requiring perfection of the appeal, thus paving the way for later dismissal by the Court. If the appeal is not perfected within the time prescribed by the judge, the respondent may then apply to the Court, on a date to be obtained from the Registrar, for dismissal of the appeal.

An appellant whose appeal is not set down within one year of being launched may be required to show cause why the appeal should not be dismissed as *abandoned*: Rule 46(2). The Registrar currently allows a short period of grace before invoking Rule 46(2). But once she invokes it, a notice goes out requiring the appellant to appear before the Court to answer for the delay or face dismissal of the appeal. Barring adequate explanation—and the longer the delay the harder it is to explain away—the Court actually dismisses the appeal as abandoned.

28 See the following cases: (i) *Tekarra Properties Ltd. v Saskatoon Drug and Stationery Co.* (1985), 17 DLR (4th) 155, 37 Sask R 286 (CA) (definitional: powers regarding stay re-defined); (ii) *International Minerals & Chemical Corp. (Canada) Ltd. v Commonwealth Insurance Co.* [Sask CA Chambers, January 15, 1993]; *Onslow v Commissioner of Inland Revenue* (1890), 25 QBD 465 at 466 (definitional: distinguishes "orders" and "judgments"); (iii) *Mayrand v Mayrand* (1982), 20 Sask R 263 (order re transfer of proceedings; definitional; meaning of old Rule 15(1)); (iv) *Bank of Nova Scotia v Omni Construction Ltd.* (1981), 14 Sask R 81 (CA)(judgment recovering money, stay lifted on terms); (v) *Benson v Benson* [Sask CA Chambers, May 14,1982] (judgment under *The Matrimonial Property Act*: possession and use of land settled pending appeal); (vi) *MacKay Construction Ltd. v Potts Construction Co.* (1983), 25 Sask R 81 (CA) (order for payment into Court); (vii) *Ross v Ross* (1984), 37 Sask R 290 (CA) (judgment under *The Matrimonial Property Act*: possession and use of land during appeal); (viii) *Canadian Pioneer Petroleums Inc. v Federal Deposit Insurance Corp.*, [1984] 3 WWR 765, 34 Sask R 51 (CA) (injunction: the limits of Rule 15(1)); (ix) *Taylor v Eisner* (1989), 80 Sask R 84 (CA) (status quo dealt with); (x) *Saskatoon Sound City (Bankrupt), Re* (1989), 80 Sask R 226 (CA) (scope of Rule 15 stay regarding receiving order); (xi) *Saskatchewan Union of Nurses v Sherbrooke Community Centre* (1996), 141 Sask R 161 (deals with matter where there is no "execution" to be stayed; definitional); (xii) *Cook v Saskatchewan* (1990), 83 Sask R 63 (CA) (maintaining caveat), (xiii) *Hayden v Dahl*, 2008 SKCA 30, 307 Sask R 274 (custody of children); (xiv) *Hannah v Warner*, 2008 SKCA 39, 307 Sask R 316 (child support and outstanding judgment, need for supporting affidavit).

Rule 46(2) is treated as a method of further disciplining proceedings in the Court of Appeal. And in the several years the Rule had been in effect numerous stale appeals have been removed from the records of the Court as abandoned. Quite a number have been permitted to continue after a show cause hearing, with a smaller number having been dismissed.

Settling Matters Concerning the Appeal Book, *Factum*, Etc.

Sometimes counsel cannot agree on the contents of the appeal book, or take issue with the scope of the *factum*, or fail to act promptly in accordance with the time limits prescribed by the Rules. This is covered by PART XVII of the Rules. Matters of this nature may be settled by a judge in chambers. In addition—and this is a significant point of practice—they may also be settled by the Registrar pursuant to Rule 60(1).

> **Note**: The Court encourages counsel to take advantage of Rule 60(1). The Registrar is intimately familiar with the matters upon which she is empowered by this Rule to act, and turning to her, rather than a judge in chambers, is likely to reduce cost and delay. More generally, it should also be noted that the Registrar is an invaluable source of information and help in many other respects. It is well for counsel to maintain a respectful and good working relationship with the Registrar and staff.

Extensions of Time: Rule 71

This, too, is covered by PART XVII of the Rules. In addition, it is covered substantively by subsection 9(6) of *The Court of Appeal Act, 2000*. Subject to specific statutory limitation, the Court, as well as a single judge in chambers, enjoys discretionary power—"unfettered" except to the extent it must be exercised "judicially"—to extend or not to extend the time during which an appeal may be taken. Generally speaking, to succeed, an applicant will have to satisfy the judge hearing the application of the following:

- the delay is not inordinate and may be explained;
- no prejudice will befall another if the time is extended;
- there was a *bona fide* intention to appeal while the right to do so existed; and
- the order or judgment from which it is sought to appeal is arguably wrong.[29]

Applications to extend the time for applying for leave to appeal are governed substantively by subsection 9(3) of the *Act*. These applications are expected to be made with particular dispatch. Such appeals may hold up proceedings below and are dealt with on an expedited basis. So the more time that elapses between the time the application should have been made and its actual making, the less likely it is that the sought-after extension will be granted. By their very nature these matters must be dealt with promptly—*time is very much of the essence here*.

Recasting a Case on Appeal

From time to time it will appear that the case was drawn or presented too narrowly in the first instance, or additional evidence will come to hand, not adduced in the first instance. When this happens you may want

29 For concrete illustration of this in varying circumstances see: *Bird Construction Co. v Maier*, [1949] 1 WWR 920 (Sask CA); *Joynt v Topp* (1962), 36 DLR (2d) 591, 40 WWR 248 (Sask CA); *Royal Bank of Canada v G.M. Homes Inc.* (1982), 25 Sask R 6 (CA); *Bank of Nova Scotia v Saskatoon Salvage Company (1954) Ltd.* (1983), 29 Sask R 285 (CA); *Treeland Motor Inn Ltd. v Western Assurance Co.* (1983), 4 DLR (4th) 370, 30 Sask R 154 (CA); *627360 Saskatchewan Ltd. v Bellrose*, 2007 SKCA 23, 293 Sask R 164; *Mannix v McKay*, 2007 SKCA 93, 307 Sask R 154; *Hippsley v Saskatchewan Government Insurance*, 2008 SKCA 14, 307 Sask R 160; *Prestige Commercial Interiors (1992) Ltd. v Graham Construction & Engineering Inc.*, 2008 SKCA 27, 307 Sask R 134.

to recast the case on appeal, either by amending the pleadings, or by raising a new ground, or by adducing additional evidence. The Court is empowered to permit this, but it will only do so in limited circumstances in order to prevent injustice and promote finality.

Amending Pleadings

The Court's approach to an application to amend the pleadings is set forth in *Thomas v Thomas* (1961), 29 SLR (2d) 576, 36 WWR 23 (Sask CA) at pp. 26–27, wherein Hall C.J.S. said this of the matter:

> In *Beemer v. Brownridge*, [1934] l W.W.R. 545, at 550, Turgeon, J.A. (later C.J.S.) said:
>
> > Generally speaking, an amendment should be allowed however negligent or careless may have been the first omission and however late the proposed amendment, **if it can be done without injustice to the other side**; and there can be no injustice to the other side if it can be compensated by costs. [emphasis added]
> >
> > The foregoing principle was followed by this Court in *Whiteshore Salt and Chemical Co. Ltd. and Midwest Chemicals Ltd. v. Atty.-Gen. of Sask.* (1953) 6 W.W.R. (NS) 1, reversed [1955] S.C.R. 43; and in *Frobisher v. Canadian Pipelines and Petroleum Ltd.* (1957-58), 23 W.W.R. 241, affirmed [1960] S.C.R. 126. In the present case there was no dispute as to the facts; no injustice could possibly have been suffered by the defendant in granting the amendment, and the amendment was necessary to fully determine the issue between the parties. The amendment, therefore, will be allowed and the appeal disposed of on that basis.[30]

Raising New Grounds

This Court's approach to this type of recasting—raising a new ground of liability or defence based on the pleadings at trial, for example, but not advanced at trial—was established in *Howell v Stagg*, [1937] 2 WWR 331 (Sask CA). There the appellant sought to re-characterize the nature of a document, contending for the first time on appeal that the document did not amount to a "release", as it had commonly been taken to constitute at trial, but to an "offer under seal" that had expired in the circumstances. The Court declined to act on the contention, adopting the approach taken in *The Owners of the Ship "Tasmania" and The Owners of the Freight v Smith and Others, The Owners of the Ship "City of Corinth"* (1890), 15 App Cas 223 (HL) at p. 225:

> My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
>
> It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.[31]

30 For the application of principles such as these in varying circumstances, see: *John G. Stein v O'Hanlon*, [1965] 1 All ER 547, [1965] AC 890; *Waghorn v George Wimpey & Co. Ltd.*, [1970] 1 All ER 474; *Upper Canada College v Smith* (1920), 61 SCR 413; *Marleau v Peoples' Gas Supply Co. Ltd.*, [1940] SCR 708.

31 See, also, *Toneguzzo-Norvell (Guardian ad litem of) v Burnaby Hospital*, [1994] 1 SCR 114 (SCC refused to entertain argument, raised for the first time on appeal, that certain earning tables should be replaced by other alternatives); and *Gray v Cotic*, [1983] 2 SCR 2.

All of this is to be distinguished from raising new arguments of law alone. As Dickson J. (later Chief Justice Dickson) said in *R v Perka,* [1984] 2 SCR 232 at p. 240:

> In both civil and criminal matters it is open to a respondent to advance any argument to sustain the judgment below, and he is not limited to appellants' points of law. A party cannot, however, raise an entirely new argument which has not been raised below and in relation to which it might have been necessary to adduce evidence at trial.

Incidentally, counsel may not present arguments, raise points of law, or cite authorities not mentioned in the *factum* without leave of the Court: Rule 38.

Adducing Fresh Evidence

This is covered by PART XVI of the *Rules*, and more specifically by Rule 59. This Rule was drawn with a view to preserving the jurisprudence in effect before the Rule was adopted in 1997. In the main, the jurisprudence is to be found in two decisions: *Maitland v Drozda*, [1983] 3 WWR 193, 22 Sask R 1 (CA) (adducing fresh evidence on appeal following a trial) and *Turbo Resources Ltd. v Gibson* (1987), 60 Sask R 221 (CA) (introducing fresh evidence on appeal following a chamber application). Briefly stated, the tests for admission of fresh evidence may be summed up thus:

- it will not be admitted if, by due diligence, it could have been adduced at trial;
- the evidence must be relevant, in the sense it bears upon a decisive or potentially decisive issue;
- the evidence must be credible, in the sense it is reasonably capable of belief;
- the evidence must be practically conclusive of a decisive or potentially decisive issue.

Note: Applications to adduce fresh evidence on appeal must be made to the Court, *not* a judge in chambers, since such a matter is not "incidental" to the appeal: *Turbo Resources Ltd. v Gibson* (1987), 60 Sask R 221 (CA) at p. 226.

Should you find yourself in the position of having to amend the pleadings on appeal or to adduce fresh evidence, you should serve a notice of motion to that effect, returnable on the date set for the hearing of the appeal. You should then address that issue as a preliminary matter in your *factum*. In this way the opposite party and the Court will not be taken by surprise. Furthermore, in the case of an application to adduce fresh evidence, you should not include this in the appeal book, but rather as part of the application.

Appeal Becoming Moot

On occasion, the substratum of the appeal, or some part of it, may become moot between the time the appeal is taken and heard. Generally speaking, the Court will not entertain issues of this nature, being merely of academic interest. And if there no longer exists a live controversy, because the tangible or concrete aspects of the dispute between the parties has disappeared in the meantime, the Court will dismiss the appeal: *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 (affirming [1987] 4 WWR 385 (Sask CA)).[32]

32 See, too, *International Brotherhood of Electrical Workers, Local Union 2085 v Winnipeg Builders' Exchange*, [1967] SCR 628 at 636 (nothing left to be enjoined by injunction); *Daniels v Daniels* (1989), 79 Sask R 62 (CA) (hearing case on a moot constitutional issue would amount to turning private cause of action into a constitutional reference at the instance of the individual, and no reason to suppose issue would not come before the court in a case that was not moot). For other concrete examples, see: *R v Law Society of Saskatchewan* (1983), 25 Sask R 135 (CA); *R v Law Society of Saskatchewan*, [1985] 2 WWR 765 (Sask CA); and *O.K. Economy Stores v Retail, Wholesale and Department Store Union, Local 454* (1994), 118 DLR (4th) 345, 123 Sask R 245 (CA).

That is the general practice. There are exceptions. If, for example, the appeal should feature an issue of recurring but fleeting duration, so that such issues usually disappear between the taking and hearing of an appeal, the Court may exercise a discretion to determine the issue. It may do so, as well, if the issue is of such significant general importance as to merit resolution, notwithstanding its moot quality. But this is exceptional, and ordinarily the Court will not entertain such issues or will dismiss the appeal where there is nothing left to litigate.

Applying for Re-hearing an Appeal

On occasion, rare as it might be, it may be necessary to apply to the Court to re-hear an appeal. This is covered by Rule 47. This Rule was also cast with a view to preserving the jurisprudence that preceded it. The power in the Court to re-hear is exercised only in special circumstances, and the standard is a demanding one.[33]

If, for example, a judge should retire or die before judgment is given, reducing the panel that heard the appeal to an even number, the Court will rehear the appeal. Indeed, this is now mandatory by reason of section 16 of *The Court of Appeal Act, 2000*. If, on the other hand, the Court, sitting with a panel of three let us say, should give judgment and counsel should want the case reheard by a five or seven judge panel, the Court will not re-hear the appeal on that basis alone.

Additional Matters

There are three matters—tips for practice if you like—that you should be alert to. One has to do with avoiding unnecessary appeals, one with vexatious proceedings in the Court of Appeal, and the other with appellants who are in contempt.

Unnecessary Appeals

From time to time judges of the Court of Queen's Bench will make a slip in disposing of a matter by miscalculating figures, for example, or overlooking or misstating something. Similarly, the reasons may not be free of doubt; or the proposed judgment or order, based on the reasons, may not reflect the intention of the judge. Such slips and failings may be corrected. Indeed, until the judge is *functus officio*—generally by issue of the order or judgment as distinct from issue of the reasons or fiat—he or she may go beyond the mere correction of slips and reconsider matters.[34]

If you should encounter something of this nature, it is well to first raise the matter with the judge, through the Local Registrar, before turning to the Court of Appeal. We encounter this on occasion and are at pains to point out the authority of judges to correct such slips, and even to reconsider before becoming functus. Taking advantage of this can sometimes obviate the need to appeal and save the associated expense and delay.

Vexatious Proceedings

Once in a while you may encounter a self-represented litigant who persists in pursuing frivolous or vexatious proceedings in the Court of Appeal and in other courts. While the Court of Appeal has no

33 See *Storey v Zazelenchuk* (1985), 40 Sask R 241 (CA), and *Armco Canada Ltd. v P.C.L. Construction Ltd.* (1986), 33 DLR (4th) 621, 52 Sask R 100 (CA). See, too, *Borrowman v Wickens* (1986), 50 Sask R 124 (CA).

34 See, by way of example, *Rygus v Zawitkowski*, [1928] 1 WWR 753 (Sask CA) (Martin J.A. observes that formal judgment had not been entered and "so long as an order had not been perfected the Judge has power to reconsider..."); *Friesen v Saskatchewan Mortgage & Trust Corp.*, [1926] 4 DLR 496 (Sask CA) (Court observes that until a judgment or order is entered, there is "inherent power in every court to vary its order so as to carry out what was intended and to render the language used free of doubt").

statutory authority for controlling its own process, it has assumed inherent jurisdiction to put a stop to this form of abuse. In exercise of that jurisdiction, the Court has prohibited persons from filing any further notices of appeal or taking any other steps to get before the Court of Appeal or any other court in relation to a matter, without first obtaining leave of a judge. And the registrars have been instructed to refuse any such notices.[35] You may want to bear this in mind, for some of these litigants are bent on using the courts for improper purposes or abusing other persons.

Recently, the Court adopted Rules covering this subject. Rule 46.1 allows the Court (but not a judge of the Court) to quash an appeal on the ground:

1. it discloses no right of appeal;
2. it is frivolous or vexatious;
3. it is manifestly without merit; or
4. it is otherwise an abuse of the process of the court.

Rule 46.2 allows the Court (as well as a judge of the Court) to prohibit the commencement of proceedings without leave of the Court or a judge if satisfied that a person has "habitually, persistently, and without reasonable cause" commenced frivolous or vexatious proceedings in the Court.

Appellants in Contempt

This seems to be encountered most often in the context of matrimonial property disputes. In general, the Court will not hear an appellant who is in contempt. If an appellant has refused to purge his or her contempt of a Queen's Bench order restraining disposition of assets, let us say, or has failed to comply with, or disobeyed, court orders to do or refrain from doing this or that, the Court is pre-disposed not to come to the appellant's aid. Indeed, the Court has on occasion quashed an appeal on grounds such as these.[36] Some litigants are so mulish or bullish, and so utterly contemptuous of court orders, as to be a menace, yet expect the courts to come to their assistance. It is this the Court resists, and does so rather strongly.

35 The leading authority, which unfortunately has not been reported, is *Hrabinsky v Mabel Allen* [Sask CA, September 13, 1983, unreported].

36 See: *Burge v Burge* (1995), 134 Sask R 72 (CA) (court quashes appeal after appellant failed to purge his contempt); *E.F. v J.S.S.* (1995), 14 RFL (4th) 286, 169 AR 47 (CA) (Court affirms general rule re not entertaining application by person who disobeys order); see, too, *Podgorenko v Podgorenko*, 1999 BCCA 52, 120 BCAC 81.

Conclusion

As noted at the outset, my treatment of several of these subjects, however laboured it may appear at a turn or two, remains essentially introductory in many respects. But I do hope it gives you a practical and useful introduction to appellate practice. For those of you who may go on to become appellate counsel I recommend three books covering some of the subjects:

- Kerans, Roger P. & Kim M. Willey, *Standards of Review Employed by Appellate Courts*, 2d ed (Edmonton: Juriliber Limited, 2006).
- Sopinka, John & Mark A. Gelowitz, *The Conduct of an Appeal*, 3d ed (Toronto: LexisNexis Canada, 2012).
- White, Robert B. & Joseph J. Stratton, *The Appeal Book* (Aurora: Canada Law Book, 1999).

In closing, I should add that the views I have expressed are my own, not those of the Court, except for those of my views as are embodied in judgments out of the Court. I should add, as well, that it would be inappropriate to quote from the paper in submissions to the Court.

Bon Voyage!

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