

CRIMINAL PRACTICE DIRECTIVE NO. 9

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Effective June 1, 2020

The right to effective assistance of counsel extends to all accused persons. In criminal appeals, the appellant may raise grounds of appeal suggesting that trial counsel was ineffective, incompetent or otherwise contributed to a miscarriage of justice. For an appeal alleging ineffective assistance of trial counsel to succeed, it must be established that:

- (a) trial counsel's acts or omissions constituted incompetence; and
- (b) a miscarriage of justice resulted.

Incompetence is determined by a reasonableness standard. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish that the alleged acts or omissions of trial counsel were not the result of reasonable professional judgment: *R v GDB*, 2000 SCC 22.

Application of practice directive

1 This practice directive applies to those criminal appeals before the Court of Appeal for Saskatchewan in which the appellant advances as a basis of the appeal that trial counsel provided ineffective assistance at trial resulting in a miscarriage of justice.

Review of notices of appeal by Registrar and Crown

2(1) The registrar of the Court will review all notices of appeal filed in criminal appeals to determine if the appellant is advancing ineffective assistance of trial counsel as a basis for the appeal and will categorize each such notice of appeal using the categories described below.

(2) Crown counsel who becomes aware that an appellant is raising such issues must notify the registrar.

Appeal categories and initial process for each

Category A: Appeals by represented appellants

3(1) If appeal counsel alleges ineffective assistance of trial counsel as a ground of appeal, appeal counsel should:

- (a) be satisfied, by personal investigation or other appropriate inquiries, that some factual foundation exists for this allegation to be made, apart from the instructions of the appellant;
- (b) provide trial counsel with informal notice of the general nature of the potential allegation of ineffective assistance;

(c) provide trial counsel with a waiver, if necessary, and a reasonable opportunity to respond to appeal counsel regarding the allegations; and

(d) consider trial counsel's response, if any, before proceeding with this ground of appeal.

(2) If a notice of appeal or amended notice of appeal prepared and filed by appeal counsel contains an allegation of ineffective assistance of trial counsel, the registrar will take the following steps:

(a) schedule the appeal for appeal management;

(b) notify trial counsel of the allegation; and

(c) provide trial counsel with a copy of this practice directive.

Category B: Appeals by self-represented appellants

4(1) If a notice of appeal prepared and filed by a self-represented appellant contains an allegation of ineffective assistance of trial counsel, the registrar may:

(a) schedule the appeal in the ordinary course; or

(b) at the registrar's discretion, direct the appeal to appeal management.

(2) If the registrar schedules the appeal, the panel of the Court hearing the appeal may consider and decide the appeal or may direct the appeal to appeal management.

(3) If the appeal is directed to appeal management, the registrar will:

(a) set a date for appeal management;

(b) notify trial counsel of the allegation; and

(c) provide both the appellant and trial counsel with a copy of this practice directive.

Initial considerations for trial counsel

5(1) If trial counsel receives notification of an allegation of ineffective assistance of trial counsel, either from appeal counsel or from the registrar, trial counsel should locate and maintain trial counsel's file relating to the criminal prosecution. Trial counsel is encouraged to contact the Saskatchewan Lawyers' Insurance Association (SLIA) with regard to file management and transfer.

(2) If the allegation proceeds to an appeal hearing, trial counsel should be aware that the Court may order the disclosure of trial counsel's file to some or all parties to the appeal and that the file may be made available to the Court.

Appeal management process

Appeal management judge

6(1) Appeal management proceedings are scheduled before a judge of the Court in chambers pursuant to Rule 32 of *The Court of Appeal Criminal Appeal Rules (Saskatchewan)*.

(2) Once a judge of the Court has commenced appeal management on an appeal, that judge may continue with appeal management for as long as the judge considers it necessary and advisable to do so.

Waiver of solicitor/client privilege

7(1) In some cases, the trial record may suffice as an evidential basis for an allegation of ineffective assistance of trial counsel leading to a miscarriage of justice. In other cases, the allegations may pertain to matters that occurred between the appellant and trial counsel that are not reflected in the record. In these latter cases, fresh evidence on appeal may be necessary to enable proper consideration of the issue.

(2) If the contents of trial counsel's file are considered relevant to the appeal, a waiver of solicitor-client privilege will need to be provided by the appellant. The appeal management judge will canvass the issue of waiver and may set a timeline for dealing with this issue.

Transfer of trial counsel's file

8(1) If a waiver of solicitor-client privilege has been provided, trial counsel should, in the normal course, release trial counsel's original file to appeal counsel, or to the appellant if the appellant is self-represented. Trial counsel may, at trial counsel's own expense, retain a copy of the entire file or portions of the file if trial counsel wishes or is professionally obligated to do so.

(2) If trial counsel has any objection to the transfer of trial counsel's file, or parts of it, trial counsel should bring those objections to the attention of the appeal management judge forthwith. The appeal management judge may refer the issue to a panel of the Court for a determination.

(3) The appeal management judge may set a timeline for the provision of trial counsel's file. If this timeline is not met, the appellant may make an application to the Court for production of the file.

(4) The appeal management judge may give any further directions that the judge considers appropriate, including setting the appeal for hearing by the Court.

Application for fresh evidence

9(1) If the appellant is relying on more than the record as the evidentiary basis for an allegation of ineffective assistance of trial counsel, the appellant must file an application to adduce fresh evidence, supported by an affidavit.

(2) The application for fresh evidence will be heard by the Court at the same time as the appeal is heard unless the Court directs otherwise.

(3) The appeal management judge will set a timeline for the service and filing of the application and affidavit.

(4) If the timeline set pursuant to subsection (3) is not met, the appeal management judge may make any further order that the judge considers appropriate, or may refer the appeal to the Court to make any order that the Court considers just.

Affidavit from trial counsel

10(1) If trial counsel considers it appropriate to do so, trial counsel may file an affidavit in response to the fresh evidence application.

(2) If trial counsel intends to file an affidavit, the appeal management judge will set a timeline for the service and filing of the affidavit.

(3) If the timeline set pursuant to subsection (2) is not met, the appeal management judge may set a further timeline or make any further order that the judge considers appropriate, or may set the appeal for hearing by the Court.

Cross-examination on affidavit

11(1) Any party desiring to cross-examine an affiant must notify the appeal management judge, with notice to all other appeal management participants and trial counsel.

(2) The panel of the Court hearing the appeal shall determine whether cross-examination will be permitted.

NOTE: This Practice Directive is issued by the Court under the authority of *The Court of Appeal Act, 2000*.

Melanie A. Baldwin, Q.C., Registrar
Court of Appeal for Saskatchewan