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Note

Practice Note: Civil Appeals to the Supreme Court of Canada

By B. A. CRANE*

In an effort to reduce the workload of the Supreme Court and to increase its role as a law making body, the *Supreme Court Act*¹ has been amended so as to alter the appellate jurisdiction of the Court. As a result of these amendments, all civil appeals to the Supreme Court are brought by leave either from the court appealed from pursuant to section 38 or from the Supreme Court itself pursuant to section 41. Accordingly, the former jurisprudence, developed when it was necessary to establish that the amount or value of the matter in controversy was at least \$10,000.00, and that a judgment was final, may now be disregarded.

It is still possible, however, to appeal *per saltum* on a question of law, with leave of the Supreme Court of Canada, directly from a judgment of a lower court of a province provided the parties consent thereto.² Also, the Supreme Court of Canada has a special jurisdiction to hear references by the Governor-in-Council or by the Senate or House of Commons, pursuant to sections 55 and 56 of the Act.

Furthermore, the right to appeal to the Supreme Court of Canada cannot be taken away by a provincial legislature by legislating that there shall be no further right of appeal from the judgment of a provincial superior or appellate court.³

Appeals with Leave of the Court of Appeal

Section 38 provides:

Subject to sections 40 and 44, an appeal to the Supreme Court lies with leave of the highest court of final resort in a province from a final judgment of that court where, in the opinion of that court, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision.

The restrictive approach adopted by courts of appeal is exemplified by

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¹ S.C. 1974-75-76, c. 18.

² *Id.* s. 39.

³ *Crown Grain Co. v. Day*, [1908] A.C. 504.

the judgment of the Federal Court of Appeal in *MNR v. Creative Shoes Ltd.*⁴ where it was stated that a lower court should not grant leave to appeal to the Supreme Court of Canada unless it was positively satisfied that the question was one that ought to be decided by that court.

Certain questions of law are obviously questions that should be decided by the Supreme Court of Canada. One example is a question as to the validity of the law enacted under Section 91 or Section 92 of the *British North America Act*. Another is a question as to whether the *Bill of Rights* has operated to make an Act of Parliament inoperative. A third example that comes to mind is a question as to the effect of previous decisions of the Supreme Court of Canada or the Privy Council or an apparent conflict between decisions of different Courts of Appeal in Canada.⁵

The jurisdiction of a provincial court of appeal to grant leave pursuant to section 38 is limited. Thus, a provincial court of appeal does not have the authority to give leave in the case of an interlocutory judgment or in the case of a discretionary order. In fact, if leave is erroneously granted by a provincial court, the Supreme Court of Canada will not be bound by the grant when the appeal comes on to be heard.⁶ Even if leave is refused by a provincial court, it is still possible to apply for leave to the Supreme Court of Canada. The fact that leave has been refused by a court of appeal is not a significant factor in the determination of whether leave should be granted by the Supreme Court. It is only in quite unusual cases that leave is granted by a provincial court. However, if the case is of great local interest, or has involved a serious division of opinion in the court of appeal, an application for leave should be made first to the court of appeal.

Leave to Appeal by the Supreme Court of Canada

The jurisdiction of the Supreme Court of Canada to grant leave to appeal in a civil case is set out in section 41(1) of the *Supreme Court Act*.

Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from such judgment is accordingly granted by the Supreme Court.

It will be seen that there are statutory criteria directing the Court to consider questions of law of public importance but that the Court is free to grant leave to appeal in any particular case as it sees fit.

Leave to appeal has traditionally been granted in cases raising questions of constitutional importance, the application of the *Bill of Rights*, a signifi-

⁴ [1972] F.C. 1425.

⁵ *Id.* at 1428.

⁶ See *Vanderlaan v. Edinburgh Developments Ltd.*, January 11, 1975; *The Nova Scotia Board of Censors v. Gerard McNeill*, [1976] 2 S.C.R. 265.

cant conflict between provincial courts, the interpretation of some federal statutes and the interpretation of major provincial statutes. Similarly, leave has been granted in cases which raise important social or political issues such as freedom of speech and Indian status or hunting rights. Although the legal issues may be narrow, the Court has also granted leave in cases which involve title to large areas of land or affect a large number of citizens.⁷ However, the fact that a case involves a substantial sum of money, by itself, is not usually a significant factor.

Evidence as to the general significance and public importance of a case can be provided by affidavit accompanying the application for leave, in spite of the fact that such information may not be in the record of the courts below. This is a useful way of showing that a case is in the nature of a test case or that the issue, such as the interpretation of a standard form contract, affects a number of commercial transactions. If the matter involves a provincial statute, the fact that the statute has its counterpart in several provinces, is relevant to the question of public importance and this can be shown by providing references or extracts from the various statutes in an appendix to the memorandum of argument.

It is difficult to identify cases which do not obviously fall into the category of important public questions but which nonetheless merit an application for leave to appeal. The Court has jurisdiction to grant leave in any case and one's predictions continue to be confounded. The Court, for many years, has not given reasons for granting leave in any particular case. There are a number of older decisions in which criteria for granting leave have been identified, but at present these cases are rarely referred to in argument before the Court.

As a general observation, leave to appeal is rarely granted in a case which mainly involves complex issues of fact. The general principle is that there must be a clear and important issue of law which merits consideration by the Supreme Court of Canada. Thus, leave has been refused in cases involving motor vehicle accidents, notwithstanding that there may be a marked difference in approach in the courts below, and in expropriation cases which involve the assessment of complex facts. Recently, however, leave to appeal was granted in a number of damage cases in which large awards had been revised by several provincial courts of appeal. The cases were all heard together during the June 1977 term so that the Court would be able to review the general principles of damage assessments by provincial courts of appeal.⁸

In some areas of the law, there may be a greater disposition to grant leave. For example, in real property, tort and contract cases, the law tends to be formed by courts rather than by legislatures and, therefore, the Supreme

⁷ *The Attorney General of Newfoundland v. Bell*, leave granted, May 16, 1977 (lands in Newfoundland); *Metropolitan Toronto v. Stephanie Atkinson*, unreported judgment, June 24, 1977 (tenants leases on Toronto Islands); *Pacific Logging Company Ltd. v. Assessor for British Columbia*, unreported judgment, May 4, 1977 (assessment of lands on Vancouver Island).

⁸ *Thornton v. Board of School Trustees (B.C.)*; *Andrews v. Grand & Toy Alberta Ltd.* (Alta.); *Teno v. Arnold* (Ont.).

Court of Canada may be more disposed to grant leave than in areas subject to frequent scrutiny by the legislature. On the other hand, if a case is of interest only to the parties and involves the interpretation of a specific lease, a specific contract or a particular act of negligence, leave to appeal is unlikely to be granted even though some questions of law or interpretation may arise from the facts.

It is extremely difficult to obtain leave to appeal in matrimonial disputes and it may be said with some confidence that leave to appeal will not be granted unless an extremely important question of law is involved.

It must also be recalled that the Supreme Court can exercise a general supervisory jurisdiction over the functioning of courts of appeal. Thus, leave to appeal has been granted in a few cases apparently because a court of appeal acted without justification and gave no adequate reasons in reversing the findings of fact of a trial judge or in revising a jury's damage award.

Matters of Practice and Procedure

For many years the Court has taken the position that only in rare cases will leave be granted if the question in issue concerns a question of practice and procedure. Similarly, if an order is of an interlocutory nature, leave to appeal will rarely be granted.⁹ Cartwright C.J.C. in *International Woodworkers of America v. Flanders Installation Ltd.* expressed the general principle with respect to appeals from interlocutory orders:

It is only under exceptional circumstances that we grant leave to appeal to this Court from an interlocutory order. It is said that a point of law of general importance is raised but is it seldom found satisfactory to attempt to deal with such a point until the facts have been ascertained at a trial.¹⁰

Nonetheless, leave has been granted in a number of cases in which substantial questions of procedure have been in issue.¹¹

Discretionary Orders

Pursuant to section 44 leave to appeal may be granted from an order made in the exercise of a judicial discretion. In practice this only takes place where there is a clear legal error. Where a court, acting in the exercise of its discretion or acting as *persona designata*, has reached a decision on the merits, it is virtually impossible to challenge that decision in the Supreme Court of Canada. Examples of such cases are rulings made in the course of trial, the determination of certain matrimonial questions and applications under statutes providing for maintenance of a testator's dependants.¹²

⁹ *Coast Construction Co. Ltd. v. The King*, [1951] S.C.R. 759; *Low-Beer v. Imperial Investment Corporation*, Oct. 14, 1964.

¹⁰ [1968] S.C.R. 203 at 204.

¹¹ *Ladoceur v. Howarth*, [1974] S.C.R. 1111; 41 D.L.R. (3d) 416 (misnomer); *Basarsky v. Quinlan*, [1972] S.C.R. 380; 24 D.L.R. (3d) 720 (amendment expiry of limitations); *Frank v. Alpert*, [1971] S.C.R. 637; 17 D.L.R. (3d) 491 (case dismissed for delay); *Clarke v. Miller*, [1970] S.C.R. 584; 12 D.L.R. (3d) 771 (costs; jurisdiction of court of appeal to hear appeal).

¹² *Carnochan v. Carnochan*, [1955] S.C.R. 669; 4 D.L.R. 81; *Mizinsky v. Robillard*, [1957] S.C.R. 351; 8 D.L.R. 81.

While the Court may grant leave to appeal from final or interlocutory judgments and from discretionary orders, not all determinations are judicial proceedings. Although it may be self-evident, there is no right of appeal from bodies that are not courts. Thus, one cannot seek leave to appeal from the decision of an administrative tribunal in spite of the fact that the provincial legislature may have provided no further right of appeal from the decision of that tribunal. In this sense, the jurisdiction of the Supreme Court of Canada is similar to the jurisdiction of the Privy Council which enjoyed the right of appeal from a decision of "any court, judge or judicial officer."¹³

Along the same lines, decisions which do not arise from contested proceedings between the parties may not be appealed. Thus, it has been held that there is no right of appeal if a court of appeal has rendered an advisory opinion to be an arbitrator, nor from a decision of a court which would have been without jurisdiction but for the consent of the parties, nor from a court which can be considered as *curia designata* in the particular case.¹⁴

Also in this category are cases in which leave to appeal to a provincial court of appeal has been refused by that court. Such cases not being in the nature of a determination on the merits and in the nature of discretionary orders cannot be appealed to the Supreme Court of Canada unless a question of jurisdiction is raised by the argument.¹⁵

Where Appellant Has No Interest in the Appeal

The Court has consistently refused to decide abstract questions of law which are not based on a real dispute between the parties.¹⁶ Similarly, the Court has declined to decide cases in which the result of an appeal would be purely academic because of a statutory amendment depriving the plaintiff of his claim and the judgment of the Court of any direct or practical effect.¹⁷ In this context, it is well to remember the case of *Scott v. Scott*, in which Earl Loreburn noted that the function of a court was simply to do justice between the parties:

It would require a treatise to expound the law upon all these subjects, and it would be a treatise without authority, liable to the risk of error or misconception which inevitably attends judicial efforts to declare the law at large and in general terms outside of the points really raised by the facts of the case, instead of following the method by which the common law of this Country has been gradually built up into a coherent though irregular structure.¹⁸

¹³ *J. R. Théberge Limitée v. Le Syndicat National des Employes de l'Aluminium d'Arvida Inc. and Aluminum Company of Canada Inc.*, [1966] S.C.R. 378; 58 D.L.R. (2d) 764.

¹⁴ *London v. Hole-proof Hosiery Company of Canada Ltd.*, [1933] S.C.R. 349, 3 D.L.R. 657 (advisory opinion); *R. v. Northumberland Ferries*, [1945] S.C.R. 458, 3 D.L.R. 145 (*curia designata*).

¹⁵ *Hospital for Sick Children v. O'Brien*, [1962] S.C.R. 765; *Canadian Utilities Ltd. v. MNR*, [1941] 4 D.L.R. 429.

¹⁶ *Coca-Cola Company of Canada Limited v. Matthews*, [1944] S.C.R. 385; [1945] 1 D.L.R. 1; *Carmichael v. Dolmage*, [1947] 1 D.L.R. 781.

¹⁷ *The King ex rel. Tolfree v. Clark*, [1944] S.C.R. 69; D.L.R. 495; *Bishop v. Ontario Securities Commission* (motion to quash; unreported 1964); *Oatway v. Canadian Wheat Board*, [1945] 2 D.L.R. 145.

¹⁸ [1913] A.C. 417 at 445. See also *Cox v. Hakes* (1890), 15 A.C. 506.

Procedure in Launching an Appeal

Under section 41 of the *Supreme Court Act*, applications for leave to appeal must be brought on for hearing before the Court within 90 days of the judgment appealed from. Section 41(2) provides for the 60 days referred to in section 64 plus an additional 30 days which theoretically gives enough time for an application first to be made to a provincial court of appeal.¹⁹ Time runs from the earlier of the pronouncement or entry of the judgment appealed. Thus, in the normal case, the time should be calculated from the date of the pronouncement of the judgment of the court of appeal. If something remains unsettled by the judgment of the court of appeal requiring a further appearance before that court, time will probably run from the date of the final disposition of the matter by the court of appeal. It is important to emphasize that the application must be *heard* by the panel (three judges) of the Supreme Court of Canada within the 90 day period or an extension of time obtained. The Court as a rule sits on the first and third Mondays of each month for the purpose of hearing applications for leave to appeal when the Court is in session. The months of July and August, which are considered as long vacation, do not count in the computation of time.

If an application is made beyond the 90 day time limit, an application for extension may be made either at the hearing of the application or by special motion to a judge in chambers. The attitude of individual judges varies with respect to applications for extension of time and in some cases it may be desirable to bring on such an application for extension before the Court hearing the application for leave to appeal. The safest course is to apply for extension of time within the 90 day period, especially if there is no prospect of the respondent consenting to such application.

The application is made by filing a motion book consisting of a motion, a supporting affidavit if necessary, the pleadings, the formal judgments and the reasons for judgments of the courts below, and a memorandum of argument. The motion book should be served ten clear days and filed six clear days before the hearing. In addition, in most cases, counsel file copies of the evidence which has been used before the court of appeal. It is now common for a respondent to file a reply but this is not required by the rules.

Applications for leave to appeal, as a rule, are examined by law clerks to the judges prior to the hearing. In addition, it is customary for each judge to study the memorandum of argument, so that he is familiar with the general nature of the application. Therefore, it is not unusual for the judges to have formed some view of the case before the matter has come on for argument. Because of the workload of the Court, and the fact that arguments are made

¹⁹ Section 64 reads:

(1) Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from, but the months of July and August shall be excluded in the computation of the said sixty days.

(2) The appellant may appeal from the whole or any part of any judgment or order, and if he intends to limit the appeal, the notice of appeal shall so specify.

in writing, oral argument is limited to 15 minutes for each side, although in practice argument frequently goes beyond the time limit.

If leave is granted, which may be immediately or after judgment has been reserved, the successful party is required to serve and file a notice of appeal and, unless the appeal is from the Federal Court, to deposit security for costs in the amount of \$500.00. The notice of appeal need not set out the grounds for appeal. The notice must be served and the security deposited within 30 days after leave to appeal has been granted. There is no provision in the rules specifically providing for an extension of this time after the expiry of the 30 days.²⁰ Thereafter, the appeal case is prepared and facta filed and the appeal set down for hearing in the same way as with criminal appeals.

Certain statutes provide for special time limits for making applications for leave to appeal. For example, section 31 of the *Federal Court Act* provides for the Notice of Appeal to be filed within 60 days after the pronouncement of the judgment.²¹ This section is somewhat out of harmony with the provisions of section 41 of the *Supreme Court Act* since no provision is made for the time within which an application for leave to appeal may be made to the Supreme Court of Canada. The practice at the present is for an application for leave to be made to the Supreme Court of Canada within the time limited by the *Supreme Court Act* (90 days); thereafter, the successful applicant may apply in writing pursuant to Rule 324 of the Federal Court Rules to the Federal Court of Appeal for an extension of time to file the notice of appeal. Such applications are invariably granted once the Supreme Court of Canada has granted leave to appeal.

Special time limits also apply in the case of an application for leave to appeal under the *Bankruptcy Act*²² and under the *Divorce Act*.²³ These proceedings should be examined with care. In particular, under the *Divorce Act*,²⁴ an application for leave to appeal can only be granted within 30 days of the judgment appealed from. An extension of time may be permitted but only if granted *prior* to the expiry of the 30-day period. Under the *Bankruptcy Act*,²⁵ notice must be given to the trustee of the application for leave to appeal, and if this notice is not given, the application cannot be heard.

Leave may be granted on terms that the successful applicant pay the costs of the respondent, even on a solicitor and client basis. Thus, if the appellant represents large interests and is seeking to settle a question which will affect a number of cases, the Court may feel that leave should only be

²⁰ Rule 56(6) reads:

When leave to appeal is granted by the Court, the appeal shall be brought within thirty days from the pronouncement of the judgment granting leave or within such time as may be allowed within the time by the Court. If the appeal is not so brought, it shall be deemed abandoned. (G.O. April 1, 1976).

²¹ R.S.C. 1970, c. 10 (2nd Supp.)

²² R.S.C. 1970, c. B-3.

²³ R.S.C. 1970, c. D-8.

²⁴ *Id.* s. 18.

²⁵ *Supra*, note 22, s. 151. Bankruptcy Rule 53. See also *Kent Steel Products Ltd. v. Arlington Management Consultants Ltd.*, [1967] S.C.R. 497; 62 D.L.R. (2d) 638.

granted on such terms. This has been done in Crown appeals involving summary conviction offences,²⁶ and cases under the *Income Tax Act*.²⁷ Similarly, a condition might be imposed for the payment of arrears of alimony in a matrimonial dispute. It should be noted, however, that where security for the judgment is in issue, an application may be made by the appellant to the court of appeal to stay execution on giving security pursuant to section 70 of the Act.

A respondent should recognize that the opponent, when granted leave, will usually only be permitted to argue those issues on which he has been granted leave to appeal. Furthermore, even if he is granted leave at large, the Court may not permit him to argue issues to which he has not referred in his application for leave to appeal. A respondent, on the other hand, may argue any point in order to defeat the appeal including matters not mentioned in the application of leave. Furthermore, a respondent may cross-appeal under the rules, apparently without seeking any special leave of the Court. Thus Rule 90 provides:

It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends upon the hearing of an appeal to contend that the decision of the court below should be varied, he shall, within fifteen days after the service of the notice of appeal, or such further time as may be prescribed by the Court or a Judge in Chambers, give notice of such intention to all parties who may be affected thereby. The omission to give such notice shall not in any way interfere with the power of the Court on the hearing of an appeal to treat the whole case as open, but may, in the discretion of the Court, be ground for an adjournment of the appeal or for special order as to costs.

²⁶ See *J. A. Madill v. Kuo Chu*, Nov. 16, 1976; *Minister of Manpower & Immigration v. Hardayl*, (1977) 75 D.L.R. (3d) 966.

²⁷ R.S.C. 1952, c. 148.