

RULE 82
CRIMINAL APPEAL RULE

This rule is made pursuant to the provisions of section 482 of the *Criminal Code*, R.S.C. 1985, c. C-46 and amendments, by the Judges of the Supreme Court of Prince Edward Island.

APPLICATION OF RULE

82.01 (1) This rule shall apply to appeals under Part XXI, Part XXVI and section 839 of the *Criminal Code*, R.S.C. 1985, c. C-46.

Interpretation and Definitions

82.02 (1) Unless the context requires otherwise, the interpretation and definition sections of the *Criminal Code* apply to this rule.

- (2) In this rule, unless the context requires otherwise,
- (a) "Appeal" includes an application for leave to appeal and a cross-appeal;
 - (b) "Attorney General" means the Attorney General as defined in section 2 of the Code and includes counsel instructed by him for the purpose of appeal, and Her Majesty the Queen represented in an appeal by the Attorney General;
 - (c) "Chief Justice" means the Chief Justice of Prince Edward Island;
 - (d) "Code" means the *Criminal Code*, R.S.C. 1985, c. C-27 and amendments;
 - (e) "Court" means the Appeal Division of the Supreme Court;
 - (f) "judge" means a judge of the Appeal Division of the Supreme Court;
 - (g) "Notice of Appeal" includes notice of application for leave to appeal and notice of cross-appeal;
 - (h) "Prisoner Appeal" means an appeal by a person who, when the notice of appeal is given, is in custody and is not represented by counsel;
 - (i) "Registrar" means the registrar of the Supreme Court; and
 - (j) "Trial Judge" means the judge who presided at the trial in the trial court.

Leave to Appeal

- 82.03** (1) Where leave to appeal is required, the notice of appeal shall contain an application for leave to appeal.

Commencement of Appeal

- 82.04** (1) An appeal shall be commenced by issuing a notice of appeal and
- (a) if the appeal is under Part XXI of the *Criminal Code*
 - (i) notice of appeal by the Attorney General or counsel instructed by him shall be in Form 82A;
 - (ii) notice of appeal by a convicted person represented by counsel shall be in Form 82B;
 - (iii) notice of appeal by a convicted person not represented by counsel shall be in Form 82C; and
 - (b) in all other cases a notice of appeal shall be in Form 82D.

Notice of Appeal

- 82.05** The notice of appeal shall state the relief sought and the grounds of appeal including particulars of
- (a) any evidence the appellant contends was wrongfully admitted or excluded, and
 - (b) any misdirection or nondirection by the trial judge.

Time for Notice of Appeal

- 82.06** (1) A party who proposes to appeal from a conviction or an acquittal shall issue a notice of appeal within 30 days from the day of the conviction or acquittal.
- (2) A party who proposes to appeal from sentence or from conviction and sentence shall issue a notice of appeal within 30 days from the day of sentence.

Issue and Service of Notice of Appeal

- 82.07** (1) Subject to subrule (2) a notice of appeal is issued when the original and three copies are filed in the office of the registrar.
- (2) Where the appellant is a prisoner in a penal institution and is not represented by counsel, a notice of appeal is issued when the original and one copy is served on the senior officer of the institution in which the appellant is imprisoned.
- (3) Where the senior officer of a penal institution is served with a notice of appeal under subrule (2) he shall

- (a) endorse the date of service on all copies of the notice of appeal,
 - (b) return a copy so endorsed to the appellant,
 - (c) forward the original to the registrar, and
 - (d) forward a copy to the Attorney General or his agent.
- (4) Upon receiving a notice of appeal the registrar shall
- (a) assign to the notice of appeal an Appeal Division number,
 - (b) retain and file the original,
 - (c) forward a copy to
 - (i) the clerk of the court, if the trial was held in the Trial Division of the Supreme Court, or
 - (ii) the trial judge, if the trial was held in the Provincial Court or the Youth Court,
 - (d) if the appellant is an accused or a defendant,
 - (i) forward a copy to the Attorney General, and
 - (ii) return a copy to the appellant.
- (5) Where the appellant is an accused or a defendant the forwarding of a copy of the notice of appeal by the registrar to the Attorney General is deemed to be service on the respondent.
- (6) An appellant who is not an accused or defendant shall, within 15 days after the notice of appeal is issued or such extended time as the court or a judge allows, serve the notice of appeal by personal service, or in such manner as a judge directs, on the respondent or such other person as a judge directs and a copy of the notice of appeal, together with proof of service thereof, shall be filed in the office of the registrar not later than ten days after the service of the notice of appeal.
- (7) Where a convicted person, not represented by counsel, commences an appeal and subsequently retains counsel, the counsel shall immediately give written notice to the respondent and to the registrar of his retention and his address for service.

Cross-Appeals

- 82.08** (1) A respondent may, within 15 days after a notice of appeal has been served upon him, issue and serve a notice of cross-appeal upon the appellant in the same manner as a notice of appeal is served under Rule 82.07. The form of a cross-appeal shall be

similar to the form for a notice of appeal with the necessary modifications.

Transcript of Evidence

- 82.09** (1) Except in a prisoner appeal, an appellant shall, unless a judge otherwise orders, file with the notice of appeal a certificate in Form 82E signed by a court reporter stating the number of copies of the transcript required by subsection 682(2) of the *Criminal Code* to be furnished to the court.
- (2) Subject to subrule (3) in a prisoner appeal the Attorney General shall, forthwith after receiving the notice of appeal, forward to the registrar a request for preparation of the transcript.
- (3) Unless the court or a judge orders otherwise, where an appeal is against sentence only the transcript shall be limited to
- (a) the evidence given and submissions made on the issue of sentence, and
 - (b) the reasons for sentence given by the trial judge.
- (4) The parties to an appeal may agree in writing or a judge may, on motion, order that part of the transcript be omitted.
- (5) The parties to an appeal may agree to a statement of facts in place of a transcript of evidence and the exhibits.
- (6) Where an agreement or order is made under subrule (3), (4) or (5) the appellant or Attorney General shall modify or withdraw his request for preparation of a transcript.
- (7) When the evidence has been transcribed the court reporter shall forthwith forward the original transcript and the number of copies requested together with the original file to the registrar.
- (8) The registrar shall, upon receipt of the original transcript and copies, notify the appellant that the transcript has been prepared and the appellant shall cause a copy to be delivered to the respondent at the address for service on file with the court or in such other manner as a judge shall direct. The Attorney General shall, in the case of a prisoner appeal, be responsible for service of the transcript on the parties to the appeal.
- (9) The charges payable by a party to an appeal for a copy or transcript of any material prepared under subsections 682(2) and 682(3) of the *Criminal Code* shall be the fees as from time to time are fixed by the Civil Procedure Rules.

Exhibits

- 82.10** (1) Except where otherwise provided by the Code, all documents, exhibits and other things received in connection with a trial or proceeding that is appealable under this Rule 82 shall be retained by the trial judge, the clerk of the court or of the Crown, or the registrar as the case may be, for a period of ten days after the expiration of the time limited for giving notice of appeal and of any extension thereof. If an appeal is not sooner commenced and unless a judge or the trial judge otherwise orders, all such documents, exhibits or other things shall be returned to and received by the party who produced them at the trial or proceeding or who had custody and control of them at the trial or proceeding or to his counsel.
- (2) Where a party refuses to take delivery of any documents, exhibits or other things as herein provided, the custodian thereof may, on ten days notice to such party, apply to a judge for an order for disposal of such exhibits, documents or other things by destruction thereof or otherwise.
- (3) Upon receipt or filing of a notice of appeal the Attorney General shall forthwith,
- (a) cause to be sent to the registrar a list of all exhibits that were before the trial court;
- (b) advise the person who has custody of such exhibits of the appeal.
- Thereafter the exhibits shall be retained in the custody of such person until the appeal is finally disposed of. Upon such final disposition of the appeal and subject to any order that may be made by a judge the custodian of such exhibits shall dispose of them in the manner provided in Rule 82.10(1).
- (4) Notwithstanding the provisions of Rule 82.10 a judge, or the registrar, may at any time prior to the final disposition of the appeal request the custodian of the exhibits to forward all or any of them to the court and the custodian shall immediately comply with such request.
- (5) Nothing in Rule 82.10 shall affect the provisions of the *Narcotic Control Act*, and the *Food and Drugs Act* or of any other federal or provincial enactment insofar as they relate to exhibits or things seized and to forfeiture thereof.

Report of Trial Judge

- 82.11** (1) Where an appeal is against sentence and in any other appeal when so directed by the court or a judge the registrar shall, on

behalf of the court and pursuant to subsection 682(1) of the *Criminal Code*, request the trial judge to forward to him for the use of the court a report on the case in general and, in particular, on the matters raised in the notice of appeal.

- (2) Upon receiving a report of a trial judge pursuant to this subrule or pursuant to any request of the Court of Appeal or a judge, the registrar shall mail copies thereof to the parties to the appeal or their counsel.

Appeal Book

- 82.12** (1) Subject to subrule (2), the appellant shall prepare an appeal book which shall contain in the following order, and where applicable
- (a) an index,
 - (b) a copy of the notice of appeal and notice of cross-appeal,
 - (c) a copy of any order respecting conduct of the appeal,
 - (d) a copy of the information or indictment,
 - (e) a copy of any decision of the trial court that is not included in the transcript,
 - (f) a copy of any statement of facts agreed to under Rule 82.09(5),
 - (g) if the appeal is other than one against sentence only,
 - (i) copy of the transcript of the proceedings
 - (ii) a list of all exhibits, and
 - (h) if the appeal is against sentence,
 - (i) transcript of the evidence (if any) given on the issue of sentence, and submissions made on the issue of sentence,
 - (ii) the reasons (if any) for sentence given by the trial judge,
 - (iii) a copy of any presentence report,
 - (iv) a copy of the criminal record, (if any) of the accused or the defendant.
- (2) Where the appellant is a convicted person not represented by counsel the Attorney General shall prepare the appeal book required under subrule (1) and shall forward a copy of the appeal book to the appellant free of charge.

- (3) The registrar may refuse to accept an appeal book that does not comply with this subrule or that is not legible.
- (4) The parties to an appeal, or their counsel, may by written agreement filed with the registrar, agree that any material mentioned in subrule (1) be omitted from the appeal book and they may agree to the inclusion in the appeal book of an agreed statement of facts in lieu of a transcript.
- (5) If either party wishes to abridge either the transcript or the appeal book, or both, and has not obtained the agreement of the opposite party or parties, he may apply to a judge who may give directions as to the form and contents of the transcript or appeal book, or both.
- (6) Exhibits will ordinarily be retained in the trial court as provided by Rule 82.10 and need not be reproduced in the appeal book. Counsel may, however, find it convenient to prepare copies of key documents or extracts therefrom for the use of the court unless such key documents are adequately quoted in the evidence or the decision appealed from.

Appeal in Writing

- 82.13** (1) Where an appellant desires to present his argument in writing without appearing in person or by counsel he shall state his intention to do so in his notice of appeal and may
- (a) include his points of argument in his notice of appeal, or
 - (b) file and serve an appellant's factum within the time prescribed by Rule 82.15.
- (2) Where a respondent desires to present his argument in writing instead of appearing in person or by counsel he shall, within the time prescribed by Rule 82.18, file and serve a respondent's factum and a written notice that he does not intend to appear in person or by counsel.

Appellant's Factum

- 82.14** (1) An appellant shall prepare an appellant's factum unless
- (a) he is not represented by counsel and has stated in his notice of appeal that he desires to present oral argument only,
 - (b) he has included his points of argument in his notice of appeal, or

- (c) it is ordered otherwise.
- (2) If the appellant does not file a factum, the respondent may, with leave of the court, make an oral presentation.
- (3) The appellant's factum shall be signed by the appellant, the appellant's counsel, or on counsel's behalf by someone he or she has specifically authorized, and shall consist of:
 - (a) Part I, containing a statement identifying the appellant, the court appealed from and the result in the court appealed from;
 - (b) Part II, containing a concise summary of the facts relevant to the issues on the appeal, with such reference to the evidence by page and line as is necessary;
 - (c) Part III, containing a concise statement setting out clearly and particularly in what respect the trial decision is alleged to be wrong;
 - (d) Part IV, containing a concise statement of the argument, law and authorities relied upon;
 - (e) Part V, containing a concise statement of the order sought from the Court of Appeal;
 - (f) Schedule A, containing a list of the authorities referred to; and
 - (g) Schedule B, containing the text of all authorities referred to in Schedule A and of all relevant provisions of statutes, regulations and by-laws,in paragraphs numbered consecutively throughout the factum.

Perfecting Appeals

- 82.15** (1) Subject to subrule (2), within 30 days after being notified that the evidence has been transcribed, or if no evidence is to be transcribed, within 30 days of the issue of the notice of appeal, an appellant shall serve on each party
- (a) a copy of the appeal book, and
 - (b) a copy of the appellant's factum, if one is required, and file with the registrar
 - (i) if the notice of appeal was served under Rule 82.07(c), the original notice of appeal with proof of service,
 - (ii) four copies of the appeal book,

- (iii) four copies of the appellant's factum, if one is required, and
 - (iv) a certificate that service has been made under clauses (a) and (b) where applicable.
- (2) Where the appellant is a convicted person not represented by counsel, within the time prescribed by paragraph (1)
 - (a) the Attorney General shall file with the registrar four copies of the appeal book,
 - (b) the appellant shall file with the registrar five copies of the appellant's factum, if one is required, and
 - (c) the registrar shall forward to the respondent a copy of the appellant's factum, if any.
- (3) When subrule (1) or (2) is complied with, the appeal is perfected and the registrar, under the direction of the Chief Justice, may, as appeals are perfected, set times for the hearing thereof and in so doing shall have regard as much as possible to advice from the parties or their counsel as to the probable length of the hearing and convenient dates thereof.
- (4) A perfected cross-appeal may, with leave of a judge, be set down for hearing even though the main appeal has not been perfected.

Respondent's Factum

- 82.16** (1) Subject to subrule (3), each respondent shall prepare a respondent's factum.
- (2) The respondent's factum shall be signed by the respondent, the respondent's counsel, or on counsel's behalf by someone he or she has specifically authorized, and shall consist of,
 - (a) Part I, containing a statement of the facts in the appellant's summary of relevant facts that the respondent accepts as correct and those facts with which the respondent disagrees and a concise summary of any additional facts relied on, with such reference to the evidence by page and line as is necessary;
 - (b) Part II, containing the position of the respondent with respect to each issue raised by the appellant, immediately followed by a concise statement of the law and the authorities relating to that issue,
 - (c) Part III, containing a statement of any additional issues raised by the respondent, the statement of each issue to be

immediately followed by a concise statement of the law and the authorities relating to that issue,

- (d) Part IV, containing a statement of the order that the court will be asked to make,
- (e) Schedule A, containing a list of the authorities referred to; and
- (f) Schedule B, containing the text of all authorities referred to in Schedule A and of all relevant provisions of statutes, regulations and by-laws that are not included in Schedule B to the appellant's factum,

in paragraphs numbered consecutively throughout the factum.

- (3) A respondent who is not represented by counsel need not comply with this rule.

Cross-Appeal Factum

82.17 (1) Where a respondent has served a notice of cross-appeal under Rule 82.08,

- (a) the respondent shall incorporate his submission respecting the cross-appeal in the respondent's factum, and
- (b) the appellant shall file, with proof of service, a factum as a respondent to the cross-appeal within 10 days after service of the respondent's factum.

- (2) A respondent who is not represented by counsel need not comply with this rule.

Filing and Service of Respondent's Factum

82.18 A respondent shall, within 30 days after service of the appeal book, transcript of evidence and appellant's factum, file with the registrar four copies of the respondent's factum with proof of service on all other parties to the appeal.

Hearing of Appeals

82.19 (1) The registrar shall give each party notice of the time set for the hearing of an appeal under Rule 82.15(3).

- (2) The registrar shall file a certificate that each of the parties has been notified as required by subrule (1) and such certificate shall be prima facie evidence that such notice has been received by the parties.

- (3) On the hearing of an appeal the appellant and the respondent shall be restricted in their argument to the grounds set out in

their respective notices of appeal and factums unless leave of the court is obtained to argue matters not set out in their grounds of appeal or factums.

- (4) On or after hearing an application for leave to appeal the court, if it decides to grant leave to appeal, and if the merits of the appeal have been fully argued, may decide the appeal without further argument.

Early Hearing of Appeals

82.20 On application by any party to an appeal, the court or a judge thereof, may, in special circumstances, order an early hearing of an appeal and may give any necessary directions.

Abandonment of Appeal

- 82.21** (1) An appellant who wishes to abandon an appeal may, before the hearing of the appeal
- (a) serve on the respondent a notice of abandonment, Form 82F, and
 - (b) file with the registrar the notice with proof of service.
- (2) A notice of abandonment may be signed by the appellant or his counsel, but if it is signed by the appellant his signature shall be verified by affidavit or witnessed by a solicitor or by an officer of the penal institution in which the appellant is confined.
- (3) An abandoned appeal shall be deemed to be dismissed without any formal order being necessary, but the respondent may apply to the registrar for a formal order dismissing the appeal.
- (4) Notwithstanding subrule (3), a judge may at anytime, on notice of motion, grant leave to withdraw a notice of abandonment if it is in the interest of justice to do so.
- (5) This rule applies to a cross-appeal.

Failure to Comply with Rule

- 82.22** (1) Where a party to an appeal or his counsel is at fault in failing to comply with this rule, the court on motion of any other party to the appeal or on the application of the registrar, may
- (a) if the party failing to comply is the appellant
 - (i) dismiss the appeal, or
 - (ii) direct the appellant to perfect the appeal within a specified time,
 - (b) fix a date for hearing of the appeal, or

- (c) make such other order as may be just.
- (2) If an appeal is not perfected within four months of the date of the trial decision, the registrar may give to the parties a notice of motion returnable before the court or a judge for an order dismissing the appeal for non-compliance with the rules.

Failure to Appear at Hearing of Appeal

- 82.23** (1) If an appellant who has not stated in his notice of appeal his intention not to appear personally or by counsel fails to appear at the hearing of the appeal, the court may adjourn the hearing, dismiss the appeal or may hear it in the appellant's absence.
- (2) Where a respondent fails to appear at the hearing of the appeal, the court may adjourn the hearing or hear the appeal in the respondent's absence.

Release From Custody Pending Appeal

- 82.24** (1) Where an appellant seeks to appeal against sentence only and also seeks his release from custody pending the hearing of the appeal, a judge shall first hear and determine the application for leave to appeal the sentence.
- (2) Upon an application to a judge for release from custody pending appeal pursuant to section 679 of the *Criminal Code* the appellant shall file an affidavit setting forth
- (a) the offence of which he was convicted,
 - (b) any grounds of appeal not specified in his notice of appeal,
 - (c) his age and marital status,
 - (d) his places of residence in the 3 years preceding his conviction, and where he proposes to reside if released,
 - (e) his employment prior to conviction, and whether he expects to be employed if released, and where,
 - (f) his criminal record, if any,
 - (g) where the appeal is as to sentence only, what unnecessary hardship would be caused if he were detained in custody, and
 - (h) the particulars of any undertaking or recognizance proposed by him.
- (3) Where the prosecutor contends that the detention of the appellant is necessary in the public interest, he shall file an affidavit setting out the facts upon which he relies.

- (4) The appellant and the prosecutor may cross-examine upon affidavits filed by each other.
- (5) A judge may dispense with the filing of the affidavits referred to in paragraphs (2) and (3) and act upon an agreed statement of facts.

Extension or Abridgment of Time

- 82.25** (1) The Court of Appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.
- (2) Subject to subrule (4), an application to a judge for an order to extend or abridge a time prescribed by this rule shall be made by notice of motion.
 - (3) Two clear days notice of an application to extend or abridge time shall be given to the opposite party unless such application is made on consent or unless otherwise directed by a judge.
 - (4) A convicted person not represented by counsel may apply for an extension of time in his notice of appeal.
 - (5) Where an application for an extension of time is made under subrule (4), a judge may, on such notice to the Attorney General as the judge directs, determine the application and either grant or refuse the extension.
 - (6) A judge on an application to extend or abridge time, shall examine the court file, including the explanation for the delay or the reasons in support of abridgment and the apparent merits of the proposed appeal as indicated by the grounds of appeal set forth in the notice of appeal and the report of the trial judge upon the matter and shall determine whether an extension or abridgment of time should be granted.
 - (7) Where a judge dismisses an application to extend or abridge time the applicant may, by filing a notice in writing with the court within seven days after such dismissal, have the application to extend or abridge time determined by the court.

Penal Institutions

- 82.26** The registrar shall supply copies of this Rule 82 to the Director or person in charge of the Penitentiary at Dorchester, New Brunswick, and to the Director or person in charge of every penal institution in Prince Edward Island and on request to any other person he considers entitled thereto.

Effect of Non-compliance with Rules

82.27 Non-compliance with this Rule 82 shall not render any proceeding void, but the same may be amended or may be set aside as irregular or otherwise dealt with as may be just.

Matters Not Provided For

82.28 Any matter of procedure or practice not provided for by the *Criminal Code* or this rule shall be governed by the Rules of Court in force from time to time.

General

82.29 A person, who enters a plea of guilty or on whose behalf a plea of guilty has been entered, shall have no right to appeal from a conviction entered upon such a plea without leave of the court.

Operative Date

82.30 This rule was made pursuant to section 482 of the Criminal Code by the Judges of the Appeal Division of the Supreme Court of Prince Edward Island at a meeting held on February 28, 1996, to become effective on the 1st day of September, 1996.

R. v. Shaw (D.C.) (1997), 151 Nfld. & P.E.I. 85 (P.E.I.S.C.-A.D.)

An accused filed a notice of appeal from conviction and sentence and applied for release pending the appeal pursuant to s.679 of the *Criminal Code*. Rule 82.24 provides that if the Crown intends to argue that the accused's detention was necessary in the public interest, the Crown must file an affidavit setting out the facts to be relied on. The Crown in this case failed to file an affidavit. The Appeal Division stated that Rule 82.24 could not supersede the onus placed on the accused under s.679(3) of *Criminal Code* to establish that his detention was not necessary in the public interest. If accused does not meet this onus, he cannot be released regardless of whether the Crown has filed the affidavit required by Rule 82.24.

R. v. Viscount (B.R.) (1996), 146 Nfld. & P.E.I.R. 57 (P.E.I.S.C.-A.D.)

Accused applied for extension of time for filing and serving a notice of appeal.

Combined effect of s.678(1) of the *Criminal Code* and Rule 82.06(1) means a notice of appeal should be issued within 30 days from the date of conviction. Time period may be extended by application of provisions of s.678(2) of the *Criminal Code*. Courts have developed certain criteria for guidance on a motion for extension which may be stated as follows:

- (1) Was there a *bona fide* intention to appeal?
- (2) Is there a reasonable excuse for the delay in not filing within the prescribed time?
- (3) Does the appeal have merit? and
- (4) Are there exceptional or special circumstances justifying the extension of time?

Extension will not be granted automatically. Applicant has burden to show why it should be granted and provide court with adequate information to enable the court to exercise its discretion.