

CRIMINAL PROCEDURE

APPEALS

SUMMARY CONVICTION OFFENCES

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Chapter 9

Appeals

Summary Conviction Offences

[§9.01] Introduction¹

A single judge of the Supreme Court hears appeals of offences that are prosecuted summarily, and of offences prosecuted under provincial statutes and municipal by-laws. The relevant law and procedure for summary conviction appeals is found in sections 812 to 838 of the *Criminal Code* and in the Criminal Rules of the Supreme Court of British Columbia (Rule 6 Summary Conviction Appeals), December 1, 1997 (the “Rules”). Sections 683 to 689 (excepting ss. 683(3) and 686(5)), the Court of Appeal sections of the *Criminal Code*, are applicable to summary conviction appeals (s. 822).

Sections 101–114 of the *Offence Act* govern summary matters under provincial statutes. By and large, those provisions are similar if not identical, but see s. 115 and following sections in that Act dealing with appeals by stated case.

[§9.02] Procedure

1. Jurisdiction

The decision to file in the Supreme Court or the Court of Appeal is straightforward. However, when an accused has pleaded guilty to a combination of summary and indictable offences, it can be confusing. If the Crown proceeded indictably at trial on a hybrid offence then the appeal is not summary and it is made to the Court of Appeal.

¹ Revised in June 2006 by **Gillian Parsons**, Crown Counsel, Vancouver. Revised in July 2005 by Anita Ghatak, Crown Counsel, Vancouver. Reviewed and revised in July 2004 by Gail C. Banning, Crown Counsel, Vancouver. Reviewed and revised in June 2002 by Adrienne Lee, Crown Counsel – Criminal Justice Branch. Reviewed annually from February 1998 to February 2001 by K. Angela White, Regional Crown Counsel Office, Vancouver. Reviewed and revised in January 1995 by Suzanne Williams, Crown Counsel – Regional Crown Counsel Office; reviewed and revised in January 1996 and January 1997 by Sandra Dworkin, Crown Counsel – Regional Crown Counsel Office, Vancouver.

Appeals and reviews for young persons convicted of offences are dealt with in Chapter 7 at §7.10.

2. Documents

Appeals are commenced by filing six copies of the Notice of Appeal (Form 3 Defence, Form 4 Crown). If the defence appeals, the appeal must be filed within 30 days after the order under appeal has been pronounced, or within 30 days after the sentence has been imposed. The Registry Clerk forwards a copy of the Notice of Appeal to the Crown. If the Crown appeals, the appeal must be filed within 30 days after the order under appeal has been pronounced.

“Registry” means an office of the appeal court in the judicial district to the place where the trial was held (Rule 6(1) and s. 814(3) of the *Criminal Code*). On defence appeals, the registry will forward the notice of appeal to the Crown. If the Crown appeals, the Crown must serve the defendant personally or, if necessary, apply under Rule 6(4)(c) for directions from the court for alternative service or obtain an order for substituted service if the accused is evading service (Rule 6(4)(d)).

The date for hearing the appeal is fixed when the documents are filed. Counsel must provide available dates to the registrar at that time. A date will not be set beyond six months from the date the appeal is filed. Within that six-month period, the date may be changed with agreement of counsel, which is confirmed by filing a praecipe. Dates beyond the six-month period can only be set with leave of the court (Rule 6(11)).

Most appeals are argued on the transcript. Consequently, within 14 days of serving the notice of appeal, the appellant must furnish proof (satisfactory to the registrar) that transcripts have been ordered. For a conviction appeal, the evidence and reasons for judgment are required. A sentence appeal must include counsel’s submissions as well. The original and one copy of the transcript and reasons for judgment must be filed and served within 30 days (sentence appeals) or 45 days (all other appeals) of service (Rule 6(5) and (7)).

Not later than 30 days before the hearing, the appellant must file a statement of argument and serve one copy on the respondent. The appellant’s statement must be concise and include the circumstances, relevant facts, and points of law and fact to be argued (Rule 6(15)).

The respondent must then file a response not later than 14 days before the hearing. The respondent's statement must indicate which portions of the appellant's circumstances and facts are accepted, state the respondent's version of the circumstances and facts where there is disagreement with the appellant's, and also include any additional circumstances or facts to be relied upon. In addition, the respondent must state a position about the points of law contained in the appellant's argument and state any additional points to be argued (Rule 6(16)).

All statements of argument must refer to the transcript and list the authorities relied upon. References to authorities should include the full citation. The statement of argument must be on 8 1/2 x 11 inch paper, be double-spaced, have consecutively numbered paragraphs, and not exceed 20 pages in length.

A statement of argument is not required if the appellant is unrepresented or if the appeal is from sentence only.

The Rules provide that the respondent or the registrar may apply for dismissal of the appeal if the appellant fails to pursue the appeal diligently or to comply with the Rules.

An appeal may be abandoned by filing a notice in Form 5, or by speaking to the matter in court. Often the Crown is willing to speak to these matters on behalf of defence counsel and to prepare the order.

[§9.03] Other Forms of Appeal

1. Trial de Novo

An appeal may be determined by holding a trial de novo (new trial) in the Supreme Court (s 822(4)). An application to the court must be made under Rule 6(8). An appeal may be allowed "because of the condition of the record", or for any other reason where the interests of justice so require. In practice this section is rarely invoked.

2. Summary Appeals on the Transcript or on an Agreed Statement of Facts

Sections 829 to 838 deal with the forms of appeal, which in practice are filed rarely. The appeal is based either on the transcript or an agreed statement of facts, filed within 15 days of filing the notice of appeal.

3. Section 830 Appeals

Section 830 provides that any party may appeal against a conviction, judgment, verdict of not criminally responsible on account of mental

disorder or of unfit to stand trial, or other final order or determination. This section gives the Crown an opportunity to appeal "a judgment or other final order or determination", which is more expansive than under s. 813(b). The grounds for appeal are that:

- (a) it is erroneous in point of law;
- (b) it is in excess of jurisdiction; or
- (c) it constitutes a refusal or failure to exercise jurisdiction.

The appellate court has different authority under s. 834 than under the more usual forms of appeal. The court can affirm, reverse or modify the conviction, judgment, verdict, or other final order, or determination; or it can remit the matter to the summary conviction court accompanied by the opinion of the appeal court.

An appeal filed under s. 830 precludes the filing of an appeal under s. 813 (see s. 836). Most summary conviction appeals are launched under s. 813.

[§9.04] Release and other Orders Pending Appeal

1. Stay of Driving Prohibitions

Following a conviction for a driving offence, a driving prohibition may be imposed by the court pursuant to s. 259 of the *Criminal Code*, by the court pursuant to s. 98 of the *Motor Vehicle Act*, or automatically by operation of s. 99 of the *Motor Vehicle Act*. On the appellant's application, the Supreme Court may stay these court-ordered or automatic prohibitions pending appeal. However, the Supreme Court is without jurisdiction to stay driving prohibitions imposed by the Superintendent of Motor Vehicles pending appeal.

Applications to stay the prohibitions pending appeal against conviction may be made under s. 261 of the *Criminal Code* and s. 101 of the *Motor Vehicle Act* by filing a Notice of Application in Form 7 with a supporting affidavit. The application must be set down within 3 days from filing and can generally be heard within a day or two. The appellant must show that the appeal is not frivolous, that the continuation of the driving prohibition pending appeal is not necessary in the public interest, and that to grant the stay would not detrimentally affect the confidence of the public in the effective enforcement and administration of criminal law *R. v. Gardner* (1993), 32 B.C.A.C. 310 (B.C.C.A.); *R. v. Braut*, 2004 BCCA 362. There is a distinction between hardship and mere inconvenience to the appellant driver (*R. v. Baker* (4 October 1994), Vancouver Registry, CA019336 (B.C.C.A.)).

A court may be reluctant to grant a stay if there is a driving record which includes 24-hour prohibitions under the *Motor Vehicle Act* (*R. v. Gill* (1992), 20 B.C.A.C. 239; *R. v. Maddin* (unreported, February 28, 2006 (B.C.S.C.)).

As s. 261 of the *Criminal Code* and s. 101(2) of the *Motor Vehicle Act* address only conviction appeals, if the appeal is against sentence only there is no jurisdiction in the court to stay the driving prohibition pending appeal: *R. v. Mordo* (30 December 1996), Vancouver Registry, CA022640 (B.C.C.A.)).

Although s. 101 of the *Motor Vehicle Act* does not explicitly provide for conditions to be imposed on the stay, such conditions are routinely imposed. Section 261 of the *Criminal Code* does provide that restrictions may be imposed on the stay, but states that any restrictions will not count toward fulfillment of the court-ordered prohibition. Counsel may want to consider whether a stay with restrictions pursuant to s. 261 is advisable, since if the appeal fails, the restrictions on the client's driving privileges will exceed the original prohibition.

If the application is successful, counsel must immediately file the order with the court registry, which will forward it to the motor vehicle branch in Victoria.

2. Bail

An appellant may apply for bail pending appeal under s. 816. Unlike s. 679 releases (by the Court of Appeal), s. 816 does not set out what the court must consider when determining if the applicant should be released. However, the considerations for the court will be the same: the appeal must not be frivolous, the appellant must establish that he or she will surrender in accordance with the terms of the order, and the detention must not be necessary in the public interest. If bail pending appeal is refused the Appellant there is a strong practical purpose in bringing the appeal on quickly.

Section 822 bail provisions do not apply to appeals launched under s. 830 (see s. 831).

3. Fines and Probation Orders

Under s. 683(5), and on application under Rules 6(26) and (29), the payment of fines, restitution, and victim fine surcharges, and the compliance with forfeiture orders and with conditions of probation orders, may be stayed pending appeal.

4. Extension of Time of Appeal

A notice of appeal must be filed within 30 days of the order appealed from or within 30 days of the sentence imposed. An appellant may apply (in special circumstances) for an extension of time to appeal (Form 6). The factors taken into account are whether:

- (1) the applicant had a *bona fide* intention to appeal within the appeal period;
- (2) the applicant informed the respondent of this intention;
- (3) there is a lack of prejudice to the other side;
- (4) there is merit in the sense that there is a reasonably arguable ground; and
- (5) it is in the interests of justice that an extension be granted (*R. v. Smith* (8 November 1990), Vancouver Registry, CA012956 (B.C.C.A.)).

Rule 6(34) allows either party to apply for directions for any matter not provided for in Rule 6.

[§9.05] Grounds of Appeal

The bases on which an appeal will be allowed or dismissed are found in s. 686 of the *Criminal Code*. Pursuant to s. 822, ss. 683 to 689 apply to appeals taken under s. 813. Both the Crown and defence may appeal on issues of law or fact and no leave is required (*R. v. Baig* (1992), 78 C.C.C. (3d) 260 (B.C.C.A.)). This is unlike appeals in the Court of Appeal, where leave may be required and the Crown is limited on its appeal to issues of law alone.

The notice of appeal sets out the grounds of appeal. The notice may be amended with appropriate notice to the respondent before the hearing.

1. Section 686 of the Criminal Code

The following summarizes the three broad grounds of appeal set out in s. 686 of the *Criminal Code*.

(a) Verdict Unreasonable or Not Supported on the Evidence—s. 686(1)(a)(i)

A reviewing court (such as the summary conviction appeal court) may not interfere with a verdict as unreasonable or unsupported on the evidence simply because it takes a different view of the evidence from the trial judge, or because it has a lingering doubt based upon its own review of the evidence. The reviewing court may not “re-try” the case. The proper test is whether the verdict is one that a properly instructed trier of fact, acting

judicially, could reasonably have rendered. The reviewing court must thoroughly re-examine the evidence and bring to bear the weight of its judicial experience to decide whether, on all the evidence, the verdict was reasonable (*R. v Biniaris* (2000) 143 CCC (3d) 1 (SCC). See also *R. v G(A)* 143 CCC (3d) 46 (SCC); *R. v Burns* (1994), 89 C.C.C. (3d) 193 (SCC); *R. v Yebes* (1987), 59 C.R. (3d) 108 (S.C.C.)).

The general rule of appellate deference to the trial judge's findings of fact applies with particular force to findings of credibility, as the trial judge has had the advantage of seeing and hearing the witnesses (*R v RW* (1992) 74 CCC (3d) 134 (SCC); *R. v. Clark*, [2005] 1 SCR 6; *R. v. Chiasson*, [2006] SCC 11; *R. v. Reischer*, [2002] B.C.J. 144; *R v. AAM*, [1996] BCJ 441 (BCCA); *R v Francois* (1994) 91 C.C.C. (3d) 289 (SCC)).

When the defendant's appeal from conviction is allowed on the grounds that the verdict is unreasonable or unsupported on the evidence, in most cases the remedy is acquittal. Because of its limited success rate standing alone, this ground of appeal is usually accompanied by a ground alleging an error of law (discussed in (b)).

(b) Error of Law—s. 686(1)(a)(ii)

An appeal may be allowed when the trial judge erred on a point of law (s. 686(1)(a)(ii)). In determining whether the trial judge has erred, the judgment will be read as a whole and in context. The summary conviction appeal court will keep in mind that imprecise language in oral judgments does not necessarily reflect legal error. When a phrase in a trial judge's reasons is open to two interpretations, the one which is consistent with the trial judge's presumed knowledge of the applicable law must be preferred over one which suggests an erroneous application of the law. "A trial judge sitting without a jury is under no obligation to exemplify his legal qualifications respecting the rules of evidence and procedure, but rather is presumed to know the law unless misdirection is made manifest in his reasons" (*R. v. Waters* (1992), 14 B.C.A.C. 216 (B.C.C.A.); *R. v. Smith* (1989), 95 A.R. 304 (Alta C.A.), affirmed, [1990] 1 S.C.R. 991 (S.C.C.)).

In *R. v Sheppard* (2002), 162 CCC (3d) 298, however, the Supreme Court of Canada

recognized that a trial judge may err in law when he or she gives only generic, "boilerplate" reasons not susceptible of meaningful appellate review. Counsel should keep in mind that the Supreme Court in *Sheppard* cited its earlier decision in *Burns*, *supra*: "Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case." See also *R. v Braich*, [2002] S.C.J. No 29.

When the summary conviction appeal court finds an error of law, the court may nonetheless dismiss the appeal if it is of the opinion that no substantial wrong or miscarriage of justice has occurred (s. 686(1)(b)(iii)). In making this determination, the reviewing court must ask whether there is any reasonable possibility that the verdict would have been different without the error (*R. v Charlebois*, [2000] 148 C.C.C. (3d) 449 (S.C.C.)).

(c) Miscarriage of Justice—s. 686(1)(a)(iii)

A variety of circumstances can convince a summary conviction appeal court that a miscarriage of justice has occurred at trial, entitling the appellant to a remedy. The most frequently alleged circumstance is that the trial judge misapprehended the evidence, or, in other words, made a mistake about the substance of the evidence heard at trial. The leading case on misapprehension of evidence is *R. v Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.). Other examples of circumstances that may amount to a miscarriage of justice are that the accused did not receive effective assistance from his counsel at trial, or that the trial judge was biased.

2. Charter Issues

The test on an appeal of a *Charter* issue is like that on other issues: did the trial judge err in law or make a decision that was unreasonable? The appellate court is not to substitute its opinion for the trial judge's (*R. v. Mellenthin* (1992), 76 C.C.C. (3d) 481 (S.C.C.)); *R. v. Chiasson*, 2006 SCC 11.

3. New Issues on Appeal

Counsel occasionally want to make arguments that were not raised at trial, frequently involving *Charter* issues. Generally, new issues cannot be raised for the first time on appeal. (*R. v. Brown* (1993), 83 C.C.C. (3d) 129 (S.C.C.); *R. v. Ubhi* [1996] B.C.J. No. 934 (B.C.C.A.); *R. v. Vidulich*, [1989] B.C.J. No. 1124 (BCCA)).

4. Appeals from Sentence

On appeals from sentence, the issue is the fitness of the imposed sentence. In *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.), the Supreme Court of Canada emphasized that an appellate court ought to give great deference to the trial judge when asked to vary a sentence. A variation in the sentence should only be made if the Court of Appeal is convinced that the sentence imposed by the trial judge is clearly unreasonable, falling outside the “acceptable range”. (See Chapter 8 for further discussion of this decision and see *R. v. M (CA)* (1996), 105 C.C.C. (3d) 327 (S.C.C.)).

[§9.06] Orders

On defence appeals, the summary conviction appeal court may dismiss the appeal, allow the appeal and order a new trial, or allow the appeal and enter an acquittal. If the appeal is allowed for a legal error under s. 686(1)(a)(iii), the usual order is for a retrial when there is sufficient evidence on which a properly instructed jury acting reasonably could convict. See subsequent paragraphs dealing with the powers of the Court of Appeal and s. 686 (*R. v. Eccles* [2004] B.C.J. No. 2056 (B.C.S.C.); *R. v. S.(P.L.)*, [1991] 1 S.C.R. 909).

On Crown appeals, the court may dismiss the appeal; allow the appeal and order a new trial; or allow the appeal, set aside the acquittal and enter a conviction. The latter order will only be made if the Crown can satisfy the court that all the findings necessary for a conviction were made in the trial court (*R. v. Cassidy* (1989), 50 C.C.C. (3d) 193 (S.C.C.)).

[§9.07] Further Appeals for Summary Convictions

An appeal from the judgment of the summary conviction appeal court may be taken to the Court of Appeal on a question of law alone, with leave of a judge of the Court of Appeal (s. 839).

Indictable Offences²

[§9.08] Governing Provisions

All indictable offences are appealed directly to the Court of Appeal. The relevant law and procedure is found in Part XXI of the *Criminal Code* (Appeals–Indictable Offences) and the Criminal Appeal Rules, 1986.

The Court of Appeal has no inherent jurisdiction to hear appeals or grant remedies. Its jurisdiction and powers are restricted to those specifically conferred by statute.

Appeals on indictable matters arise from the conviction, sentence, acquittal, or a verdict tantamount to an acquittal (for example, a stay of proceedings) by a trial court judge in offences that have been proceeded with by indictment. If the proceedings were by indictment, but the conviction in question was for an included offence punishable on summary conviction (see s. 662 of the *Criminal Code*), the appeal is one arising out of a “proceeding by indictment” within the meaning of s. 675 of the *Criminal Code* and Part XXI of the *Criminal Code* applies. The *Criminal Code* does not provide for appeals from interlocutory rulings, though of course these ruling may give rise to an appeal at the conclusion of trial.

To avoid the unnecessary bifurcation of appeals, when summary conviction offences are tried with indictable offences, and the Crown or defence wants to launch appeals on both, Part XXI applies if the conditions set out in ss. 675 (1.1) and 676 (1.1) of the *Criminal Code* are satisfied. In that event, the appeals relating to both the summary conviction and indictable offences are “consolidated” and heard in the Court of Appeal. Absent these provisions, a party wanting to appeal from a conviction/acquittal or sentence imposed with respect to a summary conviction offence, and a conviction/acquittal or sentence imposed for an indictable offence, if those offences were tried at the same time, is obliged to pursue appeals in both the Supreme Court and Court of Appeal. If indictable and summary conviction matters are consolidated for appeal purposes, leave with respect to the summary conviction offences, required by s.839(1) of the *Criminal Code*, is still necessary (*R. v. F.M.* [1999] B.C.J. No. 1664 (C.A. In Ch.)).

Pay special attention to hybrid or Crown electable

² Mike Brundrett, Crown Counsel, Criminal Appeals and Special Prosecutions, Vancouver kindly revised the indictable offence section of this chapter in December 2008. Revised annually from 1997 to 2008 by Gregory J. Fitch, QC, A/Director, Criminal Appeals and Special Prosecutions, Criminal Justice Branch, Ministry of Attorney General. Revised in August 2006, with the kind assistance of Kenneth Madsen, Ministry of the Attorney General, Victoria. Reviewed and revised in December 1994 and in January 1996 by Alexander Budlovsky, Crown Counsel – Criminal Appeals and Special Prosecutions, Vancouver.

offences. If the Crown fails to indicate on the record whether it is proceeding summarily or by way of indictment and the trial proceeds in Provincial Court, the Crown is, as a general rule, deemed to have proceeded summarily (*R. v. Dosangh* (1977), 35 C.C.C. (2d) 309 (B.C.C.A.)). However, the presumption is rebuttable and the proceedings will be treated as indictable for purposes of appeal, even in the face of the Crown's failure to make a formal election, if it is clear from the circumstances that everyone understood the proceedings to be by indictment (*R. v. Tommy* [1989] B.C.J. No. 2207 (C.A.), *R. v. R.M. and I.S.* [1997] B.C.J. No. 1308 (C.A.) and *R. v. Coupland* (1978), 45 C.C.C. (2d) 437 (Alta. C.A.)).

Appellate procedure for young offenders is governed, in part, by s. 37 of the *Youth Criminal Justice Act*. Where the offence is indictable or hybrid and the Crown elects to proceed by way of indictment, the appeal is to the Court of Appeal in accordance with Part XXI of the *Criminal Code*. Where the offence is punishable on summary conviction or hybrid and the Crown elects to proceed summarily, the appeal is to the Supreme Court in accordance with Part XXVII of the *Criminal Code*. As with adult proceedings, where the Crown fails to elect a mode of procedure on a hybrid offence, it will be deemed to have elected to proceed summarily (s. 37(7)). Again, however, the presumption may be rebutted by circumstances that clarify the Crown's intention to proceed by indictment; for example, when it is apparent on the face of the information that it was sworn outside the six-month limitation period for summary conviction offences (*R. v. I.B.* (1994), 93 C.C.C. (3d) 121 (Ont. C.A.)).

When preparing appeal documents, pay close attention to the requirements of the Criminal Appeal Rules, 1986, so as to avoid the delay and expense of documents being rejected by the Court of Appeal Registry. A "Checklist to Assist in the Filing of Appeal Books and Transcripts", which details common shortcomings ranging from illegible photocopies to wrongly coloured covers on transcripts and appeal books, is available at the registry. The civil rules requiring approval of the transcripts and appeal books before they are filed do not apply to criminal matters. Counsel are responsible, however, for filing complete materials to support the grounds of appeal.

[§9.09] Notice of Appeal

Depending on the nature of the appeal, the notice of appeal, or notice of application for leave to appeal, should be filed in Form 1 (notice of appeal against conviction and/or sentence where the appellant is represented by counsel); Form 1A (summary conviction appeal where the appellant is represented by counsel); Form 2 (notice of appeal against conviction and/or sentence where the appellant is not represented by

counsel); or Form 3 (Crown appeal against acquittal or sentence) as provided in the Criminal Appeal Rules. Five copies should be filed with the registry. The notice of appeal, whether it be from conviction, sentence, or both conviction and sentence, must be filed 30 days from the pronouncement of sentence. If the Crown appeals, the notice of appeal must be filed within 30 days after the pronouncement of the order under appeal (Rules 3,4 and 5). If a notice of appeal is not filed within 30 days, an application to extend time to appeal must be filed—see § 9.12, *infra*.

The Court of Appeal Registry serves the notice of appeal on Crown counsel. Counsel for the appellant must arrange service on the Crown of all other documents, including applications for bail and any other interlocutory matters. Documents for appeals being handled by the Provincial Attorney General, except for those filed in the Victoria Court of Appeal Registry, may be served on the office of Criminal Appeals and Special Prosecutions at Suite 600, 865 Hornby Street, Vancouver, British Columbia, V6Z 2G3. Documents for appeals in the Victoria Court of Appeal Registry may be served on the Provincial Crown (Criminal Appeals and Special Prosecutions) at 3rd Floor-940 Blanshard St., Victoria, B.C., V8W 3E6. The mailing address of the Victoria Appeals office is P.O. Box 9245 Stn. Prov. Govt., Victoria, B.C. V8W 3E6. Appeals that the Attorney General for Canada will be handling should be served on the Public Prosecution Service of Canada at Suite 900, 840 Howe Street, Vancouver, British Columbia, V6Z 2S9.

[§9.10] Grounds of Appeal

1. From Conviction

The accused may appeal a conviction on any ground of appeal that involves a question of law alone without leave (s. 675(1)(a)(i)), or on any ground of appeal that involves a question of mixed law and fact, with leave (s. 675(1)(a)(ii)), or with leave under s. 675(1)(a)(iii) on any other sufficient ground. If there is any doubt about whether or not the ground of appeal in question is one of law alone or of mixed fact and law, the appellant should tick off both boxes on the notice of appeal or the application for leave to appeal, setting out the grounds of appeal as either a question of law alone or a question of mixed law and fact.

2. From Acquittal

The Crown is limited to an appeal on a ground of law alone (s. 676(1)(a)). It is sometimes difficult to ascertain what is a question of law alone and what is a question of mixed law and fact. Counsel for an accused/respondent should always scrutinize the grounds of appeal on a Crown appeal with a view to arguing that the appeal does not raise a question of law alone. There are many cases that distinguish

between questions of law alone and other kinds of questions: see for example, *R. v. Wild*, [1970] 4 C.C.C. 40 (S.C.C.); *R. v. Sunbeam Corporation (Canada) Ltd.*, [1969] 2 C.C.C. 189 (S.C.C.); *R. v. Schuldt* (1985), 23 C.C.C. (3d) 225 (S.C.C.); *R. v. Collins* (1987), 56 C.R. (3d) 193 (S.C.C.); *R. v. Dixon* (1988), 42 C.C.C. (3d) 318 (B.C.C.A.); *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 181 (S.C.C.); *R. v. Morin* (1992), 76 C.C.C. (3d) 193 (S.C.C.); and *R. v. Biniaris* (2000), 143 C.C.C. (3d) 1 (S.C.C.).

3. From Sentence

The accused or the Crown may apply for leave to appeal sentence to the Court of Appeal against the fitness of a sentence imposed by the trial court (s. 687). “Sentence” is defined in s. 673. Once the sentence is put in issue by an accused, the court has jurisdiction to increase the sentence, even if the Crown has not filed a cross appeal on sentence asking for the sentence to be increased (*R. v. Hill* (1975), 23 C.C.C. (2d) 321 (S.C.C.)). The policy of the Court of Appeal, however, is that it will not consider increasing the sentence unless the Crown has given notice to the appellant that an increase in the sentence will be sought. This is a power that is rarely exercised by the Court of Appeal.

An appeal from sentence may be filed by completing Form 1 of the Criminal Appeal Rules. Only one form is necessary to appeal both conviction and sentence.

There are additional appellate provisions regarding dangerous and long-term offender proceedings (s. 759) and extraordinary remedies (s.784), which are not discussed in this chapter.

[§9.11] Bail Pending Appeal

The law governing applications for bail pending appeal is set out in s. 679 of the *Criminal Code*.

The Court of Appeal or a justice of that Court has authority to suspend certain financial penalties, as well as the conditions set out in a probation order or conditional sentence order, where an appeal or application for leave to appeal has been granted (s. 683(5)). In addition, the Court may order the offender to enter into an undertaking or recognizance before suspending a probation or conditional sentence order (s. 683(5) and (5.1)).

When bail pending appeal is granted, the Court of Appeal Registry will prepare both the bail order and the recognizance to enable the appellant to be released. If the appellant has been released with sureties, it is wise to make an appointment with the Registry in order to perfect the bail to ensure that a justice of the peace is available, the sureties are present, and the appellant is brought in from the place of incarceration.

1. Bail Pending Appeal from Conviction

The *Criminal Code* states that an appellant may be released if the notice of appeal or notice of application for leave to appeal has been filed and the appellant satisfies the court that:

- (a) the appeal or application for leave to appeal is not frivolous (s. 679(3)(a));
- (b) the appellant will surrender himself or herself into custody in accordance with the terms of the order (s. 679(3)(b)); and
- (c) the appellant's detention is not necessary in the public interest (s. 679(3)(c)).

The applicant for bail should file a notice of application for release pending the determination of the appeal (Form 8) as well as, at minimum, the material outlined in Rule 19 of the Criminal Appeal Rules. The Rules require two clear days' notice to the prosecutor. It is often the case that counsel will contact the Crown in advance and arrange a convenient date for the hearing of the application and then file the notice in the registry and serve the Crown. The appellant's material should include an affidavit setting out the requirements in Rule 19, as well as any other facts that will assist the court in determining if the conditions for release have been met. These include names of the proposed sureties, years at specific addresses, and the general good background of the applicant. In addition, transcript excerpts (a contentious ruling or a portion of the charge to the jury or Reasons for Judgment) should be filed to the end of demonstrating that the appeal is not frivolous.

Section 679(5) sets forth the various kinds of orders that can be made. One of the terms that will be included is an “end date”. This means the bail does not continue indefinitely. The appellant must surrender into custody on the date of the hearing of the appeal or on the end date (which is often about six months from the date of the application), whichever occurs first. The end date is designed to ensure that if bail is granted, the appeal is prosecuted expeditiously. When the appellant fails to comply with this condition the appellant's appeal may be dismissed under Rule 13 or a request to extend the period of bail pending appeal may be refused.

It is important to remember that the presumption of innocence ends with the verdict of guilty. The burden is on the appellant to satisfy the court that all the conditions in the *Criminal Code* governing release pending appeal have been met.

The Court of Appeal can release an accused on bail on an appeal from conviction, even though the trial court has not yet sentenced the accused (*R. v. Bencardino and De Carlo* (1973), 11 C.C.C. (2d) 549 (Ont. C.A.) and *R. v. Smale* (1979), 51 C.C.C. (2d) 126 (Ont. C.A.)). This jurisdiction is only exercised, however, in exceptional circumstances (*R. v. Turkington* [1985] B.C.J. No. 1988 (C.A.)). Moreover, an order for release can only apply to the custody to which an accused is then subject such that if the court grants release on bail pending appeal before the sentence has been imposed, that order expires when sentence is imposed. A further order admitting the appellant to bail pending appeal must then be sought (*Re Morris and The Queen* (1985), 21 C.C.C. (3d) 242 (Ont. C.A.)).

2. Bail Pending Appeal from Sentence

The *Criminal Code* states that the applicant may be released if:

- (a) leave to appeal has been granted (s. 679(1)(b));
- (b) the appeal has sufficient merit that in the circumstances it would cause unnecessary hardship if the appellant were detained in custody (s. 679(4)(a));
- (c) the appellant will surrender himself or herself into custody in accordance with the terms of the order (s. 679(4)(b)); and
- (d) the appellant's detention is not necessary in the public interest (s. 679(4)(c)).

The court will sometimes set down an early hearing date on an appeal from sentence rather than release the person on bail pending appeal.

3. Review of Initial Decision

The decision made by a judge under s. 679 may, on the direction of the Chief Justice of the Court of Appeal, be reviewed by that court (s. 680 and Rule 20). On the consent of the parties, a single judge of the court may exercise the powers of the Court of Appeal. The court (or single judge) hearing the review may, if it does not confirm the decision, either vary the decision or substitute such other decision as, in its opinion, should have been made.

4. Bail Pending New Trial

When either the Court of Appeal or the Supreme Court of Canada orders a new trial, the pre-trial bail provisions of the *Criminal Code* apply (s. 515 or 522) except that those powers are exercised by a judge of the Court of Appeal (s. 679(7.1)). *R. v. Barbeau* (1998), 40 W.C.B. (2d) 484 (Que.C.A.); *R. v. Ranger*, [2003] O.J. No. 5126 (Ont. C.A.) suggests that once the accused has appeared in the court in which the new trial is to be conducted, the trial court has concurrent jurisdiction to deal with

the issue of bail pending the new trial.

[§9.12] Extension of Time to File

Extension of time has already been referred to briefly in §9.09.

Rule 3 of the Criminal Appeal Rules, 1986 provides that a person who wishes to appeal against conviction, sentence, or conviction and sentence shall, within 30 days after the imposition of the sentence, commence the appeal by filing an original and four copies of the Notice of Appeal. If the prosecutor wants to appeal, the Notice of Appeal must be filed within 30 days after the pronouncement of the order under appeal (Rule 4). The Crown must also file Five copies of the Notice of Appeal (in Form 3).

Once 30 days have expired, the appellant must file a notice of application to extend time to file the notice of appeal, along with the notice of appeal. Granting an extension of time is a matter within the court's discretion. The appellant must establish "special circumstances" for the court to grant an extension. The appellant must file an affidavit establishing a *bona fide* intention to appeal within the appeal period, that the appeal has some merit, and generally should also explain the reasons for the delay: *R. v. Roberge*, 2005 SCC 48; *R. v. Scheller (No. 2)* (1976), 32 C.C.C. (2d) 286 (Ont. C.A.); *R. v. Smith*, [1990] B.C.J. No. 2933 (C.A.). When the delay in filing the notice of appeal is systemic and flows from necessary steps taken by the Legal Services Society to determine whether to fund the appeal, an affidavit in support of the extension application may be obtained from the Society's Appeals Coordinator. Prepare a notice of application to extend time in Form 7.

An application for extension of time may be made on two clear days' notice (s. 678(2) of the *Criminal Code* and Rules 16 and 17). The application for extension may be, and usually is, addressed when the appeal is heard. The extension application may be heard in advance of the appeal where it will be opposed and of a time-consuming nature or where there are matters (for example, bail) that will be dealt with before the hearing date of the appeal.

The court cannot admit an appellant to bail pending appeal without first granting an extension of time to enable the filing of a notice of appeal.

Crown counsel may decide not to oppose applications to extend time, particularly if the delay is short and explained by the need to obtain approval for legal aid funding or some other sufficient cause.

[§9.13] Transcripts and Appeal Books

An appellant is required by Rule 7 to file four copies of the transcript and appeal book and deliver one copy of each to the respondent within 60 days after filing the Notice of Appeal. The form and content of transcripts and appeal books is addressed in Rule 8 and Forms 4 and 5. Counsel are directed by Rule 9 to attempt to reduce the size of the transcript and appeal book by excluding exhibits and/or evidence that is unnecessary for a proper hearing of the appeal.

The time required to prepare and reproduce transcripts and appeal books sometimes makes it impossible to comply with the 60 day period set out in Rule 7. While some delay will be forgiven in the filing of this material, an appellant who fails to file transcripts and appeal books within a reasonable time risks facing an application by the respondent to dismiss the appeal for want of prosecution (Rule 13(1)), or a registrar's reference (Rule 13(3)) which obliges counsel to appear before the court or a judge thereof to explain their failure to diligently pursue the appeal or comply with the filing requirements set out in the Criminal Appeal Rules, 1986.

[§9.14] Factums

Under Rule 10, an appellant must file four copies of their factum and deliver one copy of it to the respondent within 30 days of filing the appeal book and transcript. The respondent must do the same within 30 days of receiving the appellant's factum. It is open to an appellant to file a reply factum within 7 days of receiving the respondent's factum. Factums must be prepared in Form 6. The factum of an appellant should be bound in a buff coloured cover. The respondent's factum should be bound in a green coloured cover. The Registry will not accept a factum longer than 30 pages unless the approval of the registrar or a judge of the court is obtained. Absent exceptional circumstances, factums should not exceed 30 pages. See Court of Appeal Civil Practice Directive #4 for information about how to cite authorities.

Failure to file factums within the time period set out in the Rules may, as with delay in filing transcripts and appeal books, trigger application of Rule 13.

See Court of Appeal Criminal Practice Directive #4 for the correct form, content and filing rules for abbreviated written argument on appeals from sentence.

[§9.15] Abandonment

An appellant may abandon an appeal by informing the court in person, or through counsel, that they wish to abandon the appeal or by signing and filing a notice of abandonment in Form 11. When the appellant (as opposed to his or her counsel) personally signs the notice of abandonment, his or her signature must be

witnessed (Rule 14).

[§9.16] Setting Down the Hearing

Hearing dates for conviction appeals are fixed after the respondent's factum has been filed. Appeals from sentence are generally set down once the Registry has received the sentencing transcript. If a very short sentence is being appealed, it can usually be set down for hearing without significant delay.

[§9.17] Raising an Issue for the First Time on Appeal

During the trial, counsel should keep in mind that the failure to raise a point or make an objection before the trial judge may be a factor weighed later by the Court of Appeal in dismissing an appeal (*R. v. Sherman* (1979), 47 C.C.C. (2d) 521 (B.C.C.A)). Counsel should be particularly careful about issues of law, especially under the *Charter*. Generally, new issues cannot be raised for the first time on appeal. This includes both applications to exclude evidence, as well as constitutional challenges to the validity of the legislation. See, *R. v. Speerbrecker* (1986), 47 M.V.R. 271 (B.C.C.A.); *R. v. Blair* (1988), 29 B.C.L.R. (2d) 78 (C.A.), leave to S.C.C. refused; *R. v. Perka* (1984), 14 C.C.C. (3d) 385 (S.C.C.); *R. v. Walker* (1992), 79 C.C.C. (3d) 97 (B.C.C.A.); *R. v. Luksicek* (1993), 23 B.C.A.C. 265; and, *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 (C.A.).

[§9.18] The Hearing of the Appeal

1. Appeals from Conviction

Section 686 states that counsel for the appellant should be prepared to demonstrate that the trial court erred in that:

- (a) the verdict is unreasonable or cannot be supported by the evidence;

The proper test is "whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered (*R. v. Yeves* (1987), 36 C.C.C. (3d) 417 (S.C.C.) and *R. v. Biniaris, supra*). When applying the test, an appellate court must engage in a thorough re-examination of the evidence and bring to bear the weight of its judicial experience to decide whether, on all the evidence, the verdict is a reasonable one. It is not sufficient for the reviewing court to simply take a different view of the evidence than the trier of fact. Nor is it sufficient for the Court of Appeal to refer to a vague unease or a lingering or lurking doubt based on its own review of the evidence. While a lurking doubt may signal the need for thorough appellate scrutiny of the evidence, it is not, without further articulation of the basis for such doubt, a proper basis upon which to

interfere with the findings of the trier of fact. An appeal court, if it is to overturn the verdict, must articulate the basis upon which it concludes that the verdict is inconsistent with the requirements of a judicial appreciation of the evidence.

- (b) the trial judge erred on a point of law;

Questions of law include interpretation of a statute (*R. v. Audet*, [1996] 2 S.C.R. 171); application of a legal rule or principle (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748); instructions to a jury; or failure to provide sufficient reasons for judgment (*R. v. Sheppard*, [2002] 1 S.C.R. 869; *R. v. Gagnon*, 2006 SCC 17); or

- (c) there was a miscarriage of justice.

Categories of what constitutes a miscarriage of justice are still open. A miscarriage of justice may include a misapprehension of evidence (*R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.)), or errors in the trial process effecting fairness of the trial.

The court has an unfettered right on appeal from conviction to order a new trial or direct that a verdict of acquittal be entered (s. 686(2)). Generally, where the verdict is found to be unreasonable or unsupported by the evidence, the remedy is an acquittal.

The court has the power to dismiss an appeal where there is an error on a point of law, if no substantial wrong or miscarriage of justice has occurred (s. 686(1)(b)(iii)). In such a case, the Crown must satisfy the court that there is no reasonable possibility that the verdict would have been different had the error not been made (*R. v. Bevan* (1993), 82 C.C.C. (3d) 310 (S.C.C.)).

The court also can dismiss an appeal if there is a procedural error, including one which may go to jurisdiction (see s. 686 (1)(b)(iv) and *R. v. Cloutier* (1988), 43 C.C.C. (3d) 35 (Ont. C.A.)).

The Court of Appeal also can dismiss the appeal and substitute a conviction for an included offence if an appeal would otherwise be allowed (s. 686(1)(b)(i) and s. 686(3)).

In circumstances where a trial court has convicted on one count and entered a conditional stay on another count by reason of the application of the rule against multiple convictions in *R. v. Kienapple* (1974), 15 C.C.C. (2d) 524 (S.C.C.), an appeal court can remit the stayed count back to the trial court so the trial court can enter a conviction on the “*Kienapple*” charge. This will allow the appellant to then appeal that conviction if desired. A court of

appeal has jurisdiction to make such an order even where the Crown has not appealed the conditionally stayed count (*R. v. P. (D.W.)* (1989), 49 C.C.C. (3d) 417 (S.C.C.) and ss. 686(2) and (8)).

When the Court of Appeal orders a new trial, the new trial shall be held before a Court composed of a judge and jury if the accused requested this in his or her notice of appeal. If the accused does not make the request in the notice of appeal, the new trial will be held before a judge without a jury or before a provincial court judge. If the Court of Appeal ordered the new trial to be held before a Court composed of a judge and jury, the accused may, with the prosecutor’s consent, elect to have the trial heard before a judge without a jury or before a provincial court judge (s. 686(5) and (5.1)).

2. Appeals from Acquittal

Appellate courts have “read in” the equivalent of s. 686(1)(b)(iii) to appeals by the Crown from acquittals, even though the *Criminal Code* is silent on this point (*R. v. Vezeau* (1976), 28 C.C.C. (2d) 81 (S.C.C.)). The Crown must demonstrate that, but for the error of law, the verdict would not necessarily have been the same. This also applies to summary conviction appeals (*R. v. Danielisz* (1988), 5 M.V.R. (2d) 244 (B.C.C.A.)).

The court has the power to enter a guilty verdict rather than order a new trial when, in its opinion, the accused should have been found guilty but for the error in law, but cannot do so if the appeal is from an acquittal by a jury (s. 686(4)(b)(ii)). The court will not enter a guilty verdict on a Crown appeal from an acquittal unless it is satisfied that all of the factual findings necessary to support a verdict of guilty have been made. See *R. v. Cassidy* (1989), 50 C.C.C. (3d) 193 (S.C.C.). When a guilty verdict is entered on appeal, the Court of Appeal can either pass sentence or remit the case to the trial court with directions that sentence be imposed by the trial court.

3. Appeals from Sentence

Section 687 sets forth the jurisdiction of the court with respect to appeals from sentence. The Supreme Court of Canada has affirmed a deferential standard of review on appeals from sentence. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, an appellate court can only intervene to vary a sentence imposed by a sentencing judge, if the sentence is “clearly unreasonable” or “demonstrably unfit” (*R. v. Shropshire* (1995), 102 C.C.C. (3rd) 193 (S.C.C.); *R. v. M. (C.A.)* (1996), 105 C.C.C. (3rd) 327 (S.C.C.)).

The Court of Appeal does not have jurisdiction to hear appeals on a summary conviction matter unless it involves a question of law alone. Quantum of sentence is not a question of law alone.

Under Rule 12, the court may order that a post sentence report be prepared relating to a person in respect of whom an appeal against sentence is outstanding.

If a probation or conditional sentence order has been suspended pending appeal, the Court of Appeal must take into account any conditions of an undertaking or recognizance and the period during which they were imposed in determining whether to vary a sentence (s. 683(7)).

[§9.19] Miscellaneous Appeal Provisions

Part XXI of the *Criminal Code* covers a number of matters that have not been referred to in this material. For example, s. 682 outlines the court's power to require a report from the trial court judge (*R. v. E.(A.W.)* (1993), 83 C.C.C.(3d) 462 (S.C.C.)). The section also outlines what ought to be included in the appeal books (see also Rules 7–10 regarding preparing and filing appeal books and factums). Section 683 outlines the Court of Appeal's other powers including the power to admit fresh evidence (*R. v. Palmer and Palmer* (1979), 50 C.C.C. (2d) 193 (S.C.C.) and *R. v. Stolar* (1988), 40 C.C.C. (3d) 1 (S.C.C.)). Section 688 addresses the right of an appellant to attend the hearing of an appeal, as well as the way in which the appellant will appear (i.e. personally or by video link). Sections 685(1) and (2) provide that the court may dismiss an appeal summarily where a notice of appeal does not show a substantial ground of appeal or where the appeal should have been filed in another court.

Under s. 684, the Court of Appeal or a judge of the Court may assign counsel to act on behalf of an unrepresented party to an appeal if it appears desirable in the interests of justice that the accused have legal assistance and if the accused doesn't have sufficient means to obtain that assistance (*R. v. Baig* (1990), 58 C.C.C. (3d) 156 (B.C.C.A.)). See Court of Appeal Criminal Practice Directive #1 for the procedure to be followed under s. 684. The Supreme Court of Canada or a judge of that court has jurisdiction to make the same order on appeals to that court (s. 694.1(1)).

Finally, note that an appellate court judge has jurisdiction to stay a driving prohibition order made under either the *Criminal Code* (see s. 261) or the *Motor Vehicle Act* (see s. 93) pending determination of an appeal.

[§9.20] Appeals to the Supreme Court of Canada

Appeals to the Supreme Court of Canada are governed by ss. 691 to 695 of the *Criminal Code*, the *Supreme Court Act*, R.S.C. 1985, c. S–26, and the Supreme Court of Canada Rules.

Under the *Criminal Code*, the Supreme Court of Canada will hear only appeals on questions of law alone. However, under s. 40(1) of the *Supreme Court Act*, issues of mixed law and fact may be reviewed with leave.

An accused/appellant has an appeal as of right to the Supreme Court of Canada in the following circumstances:

- (i) where the conviction has been affirmed by the Court of Appeal but a judge of the court has dissented on any question of law;
- (ii) where an acquittal is set aside by the Court of Appeal but a judge of the court has dissented on any question of law;
- (iii) on any question of law where the Court of Appeal has unanimously set aside an acquittal and entered a verdict of guilty; and
- (iv) where a verdict of not criminally responsible on account of mental disorder (NCRMD) or a verdict of unfit to stand trial is affirmed by the Court of Appeal or a verdict of guilty is entered by the Court of Appeal under s. 686(4)(b)(ii) on any question of law on which a judge of the Court of Appeal dissents (ss. 691–692).

Otherwise, all appeals are dealt with by application for leave to appeal.

The Attorney General may appeal as of right to the Supreme Court of Canada where a conviction is set aside by the Court of Appeal, where a Crown appeal from an acquittal or order defined in s. 676(1)(b) or (c) or a verdict of NCRMD or unfit to stand trial is dismissed *and*, in all of these scenarios, a judge of the Court of Appeal has dissented on any question of law. Otherwise, leave to appeal is required (s. 693).

The Supreme Court will not hear appeals concerned solely with the quantum of sentence. In rare instances, the court will hear appeals from sentence based on constitutional grounds, the jurisdiction to impose a sentence, or the interpretation or application of the fundamental principles that guide sentencing proceedings (*R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 (S.C.C.)).

Applications for leave to appeal are prepared in written form. They must be filed within 60 days from the pronouncement of the Court of Appeal judgment. The Supreme Court of Canada may order an oral hearing on the application for leave to appeal, but this is rare. Once leave to appeal is granted, the appellant must file a Notice of Appeal within 30 days. In cases of appeals as of right, the appellant must file a Notice of Appeal within 30 days after the judgment appealed from (s. 43 and ss. 58–60 of the *Supreme Court Act* and Rules 25–28, 32 and 33–45 of the Rules of the Supreme Court of Canada).

An applicant who is appealing conviction to the Supreme Court of Canada may apply for bail pending appeal and s. 679 of the *Criminal Code* applies.

Anyone commencing an appeal in the Supreme Court of Canada should carefully read the Supreme Court Rules. As a general rule, these Rules, especially those pertaining to time limits, are strictly enforced.

[§9.21] Prerogative Writs

Part XXVI of the *Criminal Code* governs extraordinary remedies such as certiorari, prohibition and mandamus in superior courts. Such writs can be used to remedy errors in jurisdiction made in the provincial court, but the grant of these remedies is discretionary. It is unlikely that extraordinary relief will issue if an appeal is available as an alternative (s. 776 of the *Criminal Code* and *Cheyenne Realty Ltd. v. Thompson* (1974), 15 C.C.C. (2d) 49 (S.C.C.)).

The replacement of the stated case provisions by the present provisions for summary appeal on transcript or agreed statement of facts no doubt has narrowed the scope for prerogative writs to review provincial court decisions on summary matters. Under s. 830, one can now appeal a summary conviction on the basis of a “refusal or failure to exercise jurisdiction”.

The tendency of the courts is to reduce the scope and exercise of jurisdiction on prerogative writs in trial situations, leaving errors in the lower courts to be dealt with as grounds of appeal. Applications for prerogative relief can delay and fragment the holding of trials and may prove academic and unnecessary if the end result of the trial is favourable to the side aggrieved by the error.

Prerogative writs do not lie to review decisions of superior courts. Decisions of the British Columbia Supreme Court, therefore, cannot be reviewed by prerogative writ.

Review by prerogative writ of rulings on preliminary inquiries is also very limited as few such rulings will amount to a denial of natural justice or a loss of jurisdiction.

An order for relief in the nature of certiorari is available to quash a committal for trial in the absence of *any* evidence upon which the committing justice could have determined that the evidence was sufficient to put the accused on trial (*R. v. Skogman*, [1984] 2 S.C.R. 93).

Applications for relief in the nature of mandamus, prohibition, certiorari, and habeas corpus are further governed by the Criminal Rules of the Supreme Court of British Columbia. The “writs” have been abolished and replaced by “orders” in the nature of certiorari, and the like. Proceedings are commenced by serving and filing a notice of application in Form 1. Note the limitation period of six months for certiorari in Rule 4(2).