ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

Criminal Practice Primer: How to Get Bail Pending Appeal

January 17, 2017 | Melanie Webb

Unsave

Your client has been convicted and intends to appeal the conviction and/or sentence, and also wishes to bring an application for bail pending appeal. This article focuses on the procedure at the Ontario Court of Appeal for indictable matters, but can be similarly adapted to bail pending appeal for summary conviction matters.

The procedure for bail pending appeal differs from a bail hearing at first instance. The applicant/appellant is not brought to court, but remains in custody at the courthouse where sentenced that day, or whatever institution to which they have been transported, and the sureties are not typically cross-examined. Rather, an application record is filed, and the hearing usually proceeds by way of brief submissions. Counsel appears in front of a single judge of the Court of Appeal in motions court, and counsel need not be gowned.

PUTTING TOGETHER THE APPLICATION RECORD

The application record must be filed three clear days in advance of the hearing.[1] The application should include the following:

- Notice of Application
- A copy of the Notice of Appeal[2]
- The Information/Indictment
- Affidavits of any proposed sureties, which set out their personal information and the plan of release
- Copies of the Reasons for Judgment and any important rulings made during the course of the pretrial motions or the trial proper

In the case of a jury trial, the charge to the jury should also be included if possible, especially if the instructions will form part of the grounds of appeal, as is frequently the case.

The application should also include an affidavit from the applicant, but this is not absolutely essential if not practical to obtain it.[3] In instances where no sureties are being put forth and it is being proposed that the applicant be released on his or her own recognizance, an affidavit from the applicant should be included. Where there is no affidavit from the applicant, one should include an affidavit in the name of a student or associate setting out the information required in s. 32(1) of the *Criminal Appeal Rules*. Even where the applicant's affidavit is included, it nonetheless helpful to include such a supporting affidavit from a student/associate, outlining the procedural history of the case from arrest and release to the end of trial. This does not mean plodding through an extensive summary of each witness' evidence at trial. It is appropriate, however, to highlight some of the pertinent issues which may lay the foundation for grounds of appeal to provide a broad overview of the case.

In some instances, appellate counsel may wish to file a letter or affidavit from trial counsel outlining possible issues on appeal. This is subject to counsel's discretion, and in the alternative to an actual letter, it is acceptable to simply describe in the student/associate's affidavit the issues highlighted by trial counsel. Of course, it is appellate counsel's responsibility to review and assess viable grounds of appeal apart from and beyond trial counsel's opinion.

The application should also acknowledge the applicant's criminal record, if any, and the status of any other outstanding charge, including whether the allegations of any outstanding charges pre-date or post-date the events underlying the matter on which the accused was convicted. Counsel on the application should be sufficiently familiar with the record and outstanding charges to be prepared to address any queries regarding these issues on the hearing.

Other basic points to bring out:

- The applicant's compliance with all bail conditions while awaiting trial
- Attendance at any counselling, rehabilitation program, etc.
- Any significant health issues
- Employment status
- Hardship that may inure to not only the applicant but dependents of the applicant
- Whether there is a possibility that the applicant may serve his sentence before the hearing of the appeal

In drafting the sureties' affidavits, it is generally preferable to attach as exhibits copies of documents showing proof of assets, but counsel should not panic should they not be conveniently on hand. An affidavit attesting in sufficient verifiable detail to the value and nature of the assets should suffice.

Other materials that counsel may consider including:

- Copies of counsel's written submissions, if any were filed – even if ultimately one decides against filing it, it is helpful to have on hand and important to understand the arguments made. This is also

helpful in the event that a transcript of the oral submissions is not yet available, which is often the case by the time of the hearing of the application.

- Copies of materials filed on sentencing, including letters and other defence materials, and the presentence report

OTHER MATERIALS

Generally, it is not necessary to file cases or a written argument. It can be helpful, however, to file a brief merits memorandum in more complex matters, to outline some of the general issues on appeal. Practically speaking, this also assists appellate counsel in preparing the appeal itself.

It is not required, nor is it expected, to have complete trial transcripts prepared for the hearing of the application itself. Counsel should, however, be prepared to answer to the query as to the anticipated time for completion, or at the least, any efforts made to ascertain this information from the court reporter. Indeed, if counsel has information that it is expected to take many months before the transcripts will be ready, counsel should be sure to include that point in the application record and advise the Court of that fact. What counsel should have, at a minimum, are the Reasons for Judgment. If counsel is able to file certain short excerpts from the trial that may assist in pointing to a clear misapprehension of the evidence, for example, or that otherwise support one or more grounds of appeal, this can certainly be of assistance in making the case for release.

One basic requirement that is often forgotten: number the pages of the application record, else prepare to be turned away or required to number every copy as you stand at the Registrar's desk before filing.

Counsel may also file supplementary materials before the hearing date: any supplementary application record must also be page-numbered.

If there are any ancillary orders, such as a fine order or probation, an application should be filed requesting a stay of those orders pending appeal.

PROCEDURAL ISSUES

It is perfectly possible, and indeed routine, to bring the bail application on the same day as sentencing. Appellate counsel should coordinate with trial counsel on mutually available dates, so that if sentence is expected to be passed in the morning, appellate counsel will be on hand to argue the application in the afternoon. To be on the safe side, it is best practice to file the application returnable for the day of sentencing submissions, in case sentence is passed the same day. If the matter is adjourned, then appellate counsel may coordinate with Crown counsel and the motions clerk to arrange a new date, which can often be simply done by email or telephone without necessitating a personal appearance. In some circumstances, of course, sentence is passed late in the day, meaning that the bail application may not be heard until the next weekday morning.

It is helpful to contact Crown counsel who will be dealing with the application, a day or so beforehand, to canvas their position. When on consent, Crown counsel and counsel for the applicant will work out terms in advance and have an Order to go prepared for the Court the morning of. One of the

standard terms will be a "sunset clause", or bail expiry date. This is typically 6-12 months hence, and requires the applicant to surrender him/herself into custody by that date or on the evening before the hearing of the appeal, whichever is earlier. Should the appeal not yet be perfected or listed by that point, counsel should bring an application to extend the appellant's bail, which should be filed about two weeks in advance of the bail expiry date to allow sufficient time for the application to be considered by the Crown and paperwork to be filed.

THE ARGUMENT

In a contested application, the argument is generally brief on the scheduled date. This is not the time to launch into a full-blown argument of each of the grounds of appeal. One should keep in mind that that, just as in the lower courts, there will usually be other matters on the list, some on consent and some contested, and the Court will need to hear all of them that day. Counsel should be attentive to whatever is conceded by Crown counsel and focus their arguments on whatever concerns are raised. Counsel must properly understand the test to meet.[4]

On an application for bail pending appeal, the accused no longer enjoys the presumption of innocence. Under s. 679(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, the Court of Appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that:

1. the appeal or application for leave to appeal is not frivolous;
2. he will surrender into custody in accordance with the terms of the release order; and
3. his detention is not necessary in the public interest.

An appeal is not frivolous if the proposed grounds raise arguable issues. The applicant does not have to satisfy the Court that such grounds have a likelihood of success on appeal; rather, the applicant is only required to satisfy the court that there is a viable ground of appeal that would warrant appellate intervention if established.[5] In considering whether or not detention is necessary in the public interest, there are two components: (1) public safety; and (2) public confidence in the administration of justice.[6] The Court of Appeal has noted that the public interest ground "takes on particular importance in cases where an applicant has been convicted of a very serious offence and faces the prospect of a lengthy period of incarceration".[7] Where the grounds of appeal are strong and where there is serious concern about the accuracy of the verdict, the public interest may shift in favour of release even for serious crimes.[8]

As in any argument, counsel should also be prepared to answer questions posed from the bench mid-submission. Counsel for the applicant and for the Crown will usually have a draft Order prepared with agreed-upon terms as well, should the Court see fit to grant the application judicial interim release.

Again, as with any motion, the Court may either render its decision immediately after argument, or in more difficult cases or where counsel has handed up a substantial amount of material the morning of, the Court may reserve judgment. The decision may not come the same day. This does not mean,

however, that release will not be granted, and the applicant should not take this as a signal of failure. Counsel should prepare their client, however, that this is a possibility in some cases, and that they may need to sit in custody for a day or more awaiting the decision.

Sureties should be on stand-by during the relevant time to attend at the Justice of the Peace office in whatever courthouse is agreed upon, to sign the recognizance of bail. Counsel should also remember to make arrangements for an interpreter when appropriate. The recognizance of bail can be signed at Old City Hall, which is quite common being the closest courthouse to the Court of Appeal, or alternatively, when more convenient to the sureties, counsel should ask the motions desk to email a copy directly to the Justice of the Peace office in another jurisdiction. It is counsel's responsibility to ascertain the contact information of that office in advance, to provide to the motions desk. Be aware, however, that some jurisdictions require the actual original signed Order, meaning that counsel may need to arrange that the Order be picked up and driven to the courthouse. The signed recognizance of bail with attached Order will then be faxed to the jail where the accused has been brought, or may be delivered to the courthouse where the accused was sentenced earlier that day if the accused has not yet been moved.

In the case of a sentence appeal only, or an application for leave to appeal from the summary conviction appeal court

Where the accused does not appeal from conviction of an indictable offence, but from sentence only, counsel must first argue leave on the bail application itself.[9] In such cases, it is highly recommended to file a merits memorandum.

Similarly, in cases where the applicant applies for bail pending the application for leave to appeal from the summary conviction appeal court decision, the Court may also consider the leave application at that time.[10]

SUMMING UP

On an application for bail pending appeal, the majority of the time and effort will go into preparing the written materials themselves. A carefully prepared application record will go a long way towards persuading the Court, and perhaps even the Crown, of why the applicant should be released.

As for the day of the hearing itself, given the logistics involved, counsel should prepare their client and sureties for the reality that this will be an all-day process, even when the application is on consent and heard first thing in the morning.

ABOUT THE AUTHOR

Melanie Webb practices primarily criminal law at the trial and appellate levels. She also represents clients on regulatory and disciplinary issues, as well as extradition matters.

---

[1] *Criminal Appeal Rules*, SI/93-169, s. 37

[2] The Notice of Appeal must be filed separately, of course, as the originating process. A copy of the Notice of Appeal should be included in the application record itself.

[3] *Ibid*., s. 32

[4] In October 2016, the Supreme Court of Canada heard argument in *R. v. Oland* on the issue of the proper test determining release pending appeal under s. 679(3) of the *Criminal Code*. The decision is still on reserve. This article briefly outlines the present state of the law in Ontario.

[5] *R. v. Manasseri*, 2013 ONCA 647, at para. 38

[6] *R. v. Farinacci* (1993) 86 C.C.C. (3d) 32 (Ont. C.A.); *R. v. Forcillo*, 2016 ONCA 606, at para. 9

[7] *R. v. Baltovich* (2000), 47 O.R. (3d) 761 (C.A.), at para. 19

[8] *Ibid*., at para. 20.

[9] *Ibid*., s. 31

[10] *R. v. Lukaniuk*, 2013 ONCA 533

[0] Comments