Ontario Justice Education Network
Charter Challenge Resource:
Presenting your case at the Court of Appeal

> *In order to argue effectively in the face of a time limit, the argument must be prepared having regard to this factor. Unfortunately, some counsel do not plan at all, and find that they have frittered away the time available on preliminaries or non- essentials. Others decide to argue the appeal as if time is unrestricted; they just argue it twice as fast. The result, usually, is that the benefits of oral argument are seriously compromised.*

The Conduct of an Appeal by Sopinka and Gelowitz, (Toronto: Butterworths, 1993) at 216.

What is an appeal?

The appeal process allows a judgment, trial procedure, criminal verdict or sentence to be considered by a higher level of court. If one of the parties to the original hearing or decision alleges there was an error during the hearing, or with the judge's decision, or if it believes the outcome is unfair, an appeal may be launched. Appeals can be made in criminal or civil cases.

Appeals are applications to set aside or alter a judgment, decision, order, verdict or sentence. Appeals must be based on a question of law, not a question of fact. This means that the appeal court does not rehear the evidence (there are usually no witnesses). Instead, the transcript of the original hearing is reviewed, and the legal arguments are made by both the parties. In some cases, if an appeal is successful, the trial court's decision is quashed (overturned) and a new trial is ordered. In other cases, the appeal court simply enters a new judgment or alters an aspect of the decision.

Depending on the type of claim and which court is hearing the appeal, there may be one judge or a panel of judges presiding. If there is a panel of judges, the decision of the majority of the panel members determines the outcome. Dissenting judgments are judgments from panel members who disagreed with the majority. For the **Charter Challenge**, a panel of three will preside: one Court of Appeal judge, one Court of Appeal counsel, and one Court of Appeal law clerk.

Appeals can be allowed in full or in part, or be dismissed in full or in part. The unsuccessful party to an appeal may have to pay the costs of the successful party. The Supreme Court of Canada is Canada's highest appeal court.

What happens during an appeal?

First, the appellant files an appeal, specifying the grounds of appeal. This must usually be done within a set time limit after the trial. Sometimes, depending on the case and on the court, the appellant must first ask the higher or appeal court for leave to appeal. This means that the higher court first considers whether or not it should hear the appeal at all. The appeal is then scheduled for hearing.

Before the appeal hearing, each party files documents that set out their positions. Depending on which court is hearing the appeal, these documents may include a **factum** (legal arguments), a book of authorities (copies of all of the legal cases being relied on), and a compendium (including the transcript from the original hearing).

During the appeal, the parties present legal arguments in support of their positions. The appellant starts, setting out the grounds on which they allege the earlier hearing or decision was wrong or unfair. The respondent then replies, explaining why there was no error or unfairness. Both parties rely on legal precedents (earlier cases) that support the interpretation of the law they advocate for.

The judge or judges then deliver their decision. Sometimes this happens on the same day as the hearing. Other times the decision is reserved, meaning it is delivered at a later time. This delay allows the judges to consider the submissions and legal precedents further before making their decisions. For the **Charter Challenge**, the decision will be given after oral arguments have been presented by both parties.

Who has the burden of proof in an appeal?

Under the appeal system, the **appellant** (the one who has filed the appeal) bears the burden of proving their allegations against the respondent. Either party to the original decision can file the appeal.

The Charter Challenge Mock Appeal will follow the following format:

1. Clerk calls court to order and calls case	1 min
Appellant's Case	
2. Appellant's submissions • Introduction of Counsel & Opening • First counsel for the appellant – Issue #1 • Second counsel for the appellant – Issue #2 • Third counsel for the appellant – Issue #3 • Fourth counsel for the appellant – Issue #4 *NOTE: the panel may question counsel during their submissions – so keep an eye on the clock – each counsel only has 3 minutes to present their issue!*	 2 min 3 min 3 min 3 min 3 min

Respondent's Case	
3. Respondent's submissions • Introduction of Counsel & Opening • First counsel for the respondent – Issue #1 • Second counsel for the respondent – Issue #2 • Third counsel for the respondent – Issue #3 • Fourth counsel for the respondent – Issue #4 *NOTE: the panel may question counsel during their submissions – so keep an eye on the clock – each counsel only has 3 minutes to present their issue!*	2 min 3 min 3 min 3 min 3 min
THERE WILL BE NO REPLY FROM THE APPELLANT IN THIS MOCK APPEAL	
Panel's Decision	
4. Judges deliberates and give their decision	6 min
5. Judges give feedback to counsel and discuss appeal process, etc.	10 min

Total time: 45 minutes

Courtroom Etiquette and Protocol

The courtroom is a formal setting, and there are some specific etiquette rules to follow that may not be familiar to you. Here are some pointers:

- When facing the judge, counsel for the appellant usually sit at the table to the left and counsel for the respondent sit at the table to the right.

- When the judge enters, all counsel (and everyone else in the courtroom) must stand-up. Counsel then bow to the judge. Sit down when the clerk instructs everyone to do so.

- When you are getting ready to address the judge, either stand at your table, or by the podium (if there is one). Wait until the judge seems ready to proceed. The judge may nod or may state that you can proceed. If you are not sure, ask the judge if you may proceed.

- The first counsel to address the court should introduce other counsel. For example, you might say "I am [name] appearing for the appellant/respondent; my colleagues are [name], [name] and [name]".

- Every other counsel should introduce themselves again before starting to address the court.

- If it is not your turn to address the judge, pay attention to what is happening. Take notes that you can use during your submissions. Try not to distract the judge. If you need to talk

with your co-counsel, write a note.

- Stand every time you are addressing or *being addressed* by the judge.

- Refer to your co-counsel as "my colleague" or "my co-counsel". Opposing counsel should be referred to as "my friend" or "counsel for [the appellant/respondent]".

- Address the judge formally. Refer to each judge as "Justice [name]" or simply as "Justice". If there is more than one judge presiding, to address all of the judges at once, say "Justices".

REMEMBER TO:

- **Speak clearly**
- **Use an appropriate volume**
- **Try not to say "um", "ah" or "okay"**
- **Do not go too fast! Speak slowly.**

- Try not to say "I think" or "in my opinion". Instead, say "it is submitted", or "I/we submit".

- Do not interrupt the judge, and if a judge interrupts you ***stop immediately***, and wait until they are finished before replying. Never interrupt or object while an opposing counsel is addressing the judge. Wait until you are specifically asked by the judge to respond to a point argued by opposing counsel.

- If the judge asks you a question, **take your time to think about it before replying**. If you do not hear the question, or are confused by it, ask the judge to repeat or restate the question. If you do not know the answer, say so. Once a question has been answered, pick up from where you were before the question.

Oral Advocacy Tips

- **Don't simply read from your factum**. The panel has already received and read the trial judge's decision, your factum and opposing counsel's factum. Use your factum as a guide when preparing your presentation notes, but do not read directly from it!

- **Read opposing counsel's factum as you prepare for the mock appeal**. Anticipate their arguments and think about how you would counter them. There is always a chance that the panel will ask you a question that comes from opposing counsel's factum; if you have thought about their arguments in advance, you will sound more persuasive when you answer questions during oral submissions.

- **Nominate one person from your team to introduce all counsel and give the opening**. The opening can be a modified version of the introduction from your factum, and should always outline the four issues raised on appeal. Pro Bono Law Ontario (PBLO) has produced a *Court of Appeal Handbook* which recommends the following when preparing the opening:

> Start with one sentence explaining the context of the appeal, such as "This is an appeal from a divorce judgment." Explain in one sentence the decisions of the lower courts. Then give the judges a map or summary of your arguments. This makes it easier for the judges to focus on what is important. A good road map is: "In my argument I will show the trial judge erred in two/ three/ four ways." Then list the errors. Finish your opening by stating what remedy or order you are asking for.
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> Court of Appeal Handbook: A guide to representing yourself at the Court of Appeal of Ontario (2004)

Your road map may say something like: "My co-counsel and I will be focusing on four main issues today…". Make sure that you end with whether you want the trial judge's decision to be overturned or upheld!

- **Do not recite the facts.** If you are the appellant – after you have introduced counsel and before you begin the opening statement – ask the panel if they are familiar with the facts of the case. In most cases, they will say "yes" and ask you to proceed directly to the issues.

- **Practice your submissions to make sure you will stay within the 3 minute time limit**. The judges may stop you to ask you questions, so leave room for a little time to answer these questions. Do not be discouraged if the judge interrupts you; listen to the question, take a moment to think of the answer, and answer briefly. Keep an eye on the clock: if you run out of time, say that you will rely on the arguments in your factum for any points that you do not have time to address.

- **Have a good attitude.** In a lecture presented to the Criminal Lawyers' Association in Toronto on November 27, 1998, Mr. Justice Binnie of the Supreme Court of Canada explained:

> Attitude is everything in advocacy. No matter how disastrously you think the hearing is unfolding, be steadfast and defiant. Don't crumple. Don't take up the posture of a whipped cur, signaling by your body language that you wish you were somewhere else. You don't know who your friends are on the bench or how many they are in number. If you let yourself down you let them down as well, and above all you let down your client. If at the conclusion of an apparently disastrous hearing you can walk out of there with flags flying and your chins up, then in my book you can say that you are an advocate worthy of the John Sopinka tradition.
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> For a complete copy of the speech, please visit the following link: http://www.scai-ipcs.ca/pdf/Binnie-SurvivorsGuidetoAdvocacy.pdf

- For a few additional tips, check out "Oral Advocacy", by D.H. Jack of Lerners LLP. The document is based on an address given by Mr. Jack to the Compulsory Moot Programme of the University of Toronto Law School on January 8th 2009. In particular, check out the list of seven "tips" highlighted on the 2nd page: http://www.lerners.ca/content/Oral%20Advocacy.pdf