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Part 14 - Appeal and Judicial Review (*Criminal Code*)

Rule 63 - Summary Conviction Appeal

Educational Notes

This Rule addresses appeals relating to summary offences under the *Criminal Code* and the provincial *Summary Proceedings Act*, R.S.N.S. 1989, c.450. It replaces the previous Practice Memorandum 21. Previous case law is likely to remain relevant.

Rule 63.03 applies the rest of the Rules (particularly R.91) to summary conviction appeals, except where they are inconsistent with the provisions of the *Criminal Code* or R.63. This suggests that, among other things, criminal lawyers will need to be conversant with the court's preferences on briefs and books of authorities, as set out in Rule 40 – Brief.

The deadline for filing an appeal is clarified as 25 days from the date of sentence, in some situations or 25 days after the decision is made, for other matters (R.63.05). Defence counsel do not have to launch an appeal of conviction before their client is sentenced, but matters where the defendant was convicted on some counts and acquitted on others may result in different deadlines for the Crown or defence to file appeals in the same matter.

An appeal by either Crown or defence is commenced by filing a Notice of Summary Conviction Appeal in form 63.05 (previously there were different forms.) The appeal must provide a date for a motion for directions no more than 25 days after filing the appeal.

Notice to individuals is given in accordance with Rule 31 – Notice, and to the Crown, by delivering the notice to the office of the person who represented the Crown in the proceeding under appeal. This could prove complicated in cases where the Crown was represented by a local agent or *per diem* Crown Attorney. Respondents who wish to participate must file a designated address for delivery.

63.01 - Definition

In this Rule, “decision” means any of the following determinations:

- (a) a conviction or a finding of guilt;
- (b) a dismissal of, or order staying a proceeding on, an information;
- (c) a sentence;
- (d) a verdict of unfit to stand trial or not criminally responsible on account of mental disorder;
- (e) any other order or determination that is made on summary conviction and for which an appeal is available to the Supreme Court of Nova Scotia.

63.02 - Scope of Rule 63

- (1) This Rule applies to a summary conviction appeal under Part XXVII of the *Criminal Code*, which includes an appeal of a decision in both a federal summary conviction proceeding and, by operation of the Summary Proceedings Act (Nova Scotia), a provincial summary conviction proceeding.
- (2) This Rule is made under subsections 482(1) and (3) of the *Criminal Code*.
- (3) This Rule includes directions, as referred to in subsection 815(1) of the *Criminal Code*, on the manner and time in which notice of an appeal is given.
- (4) A person who appeals a decision in a summary conviction proceeding may bring the appeal in accordance with this Rule.

63.03 - Other Rules apply

- (1) All Rules outside this Rule apply to the extent that they provide procedures that are suitable to a summary conviction appeal, and are not inconsistent with the provisions of the *Criminal Code* or this Rule.
- (2) In particular, Rule 91 - Criminal Appeal, made by the judges of the Nova Scotia Court of Appeal applies, including the Rules providing for a prisoner appeal, cross- appeal, transcript, and appeal book, subject to each of the following modifications or exceptions:
 - (a) Rule 91 must be read as if a reference to the registrar were a reference to the prothonotary;
 - (b) no provision about leave to appeal in Rule 91 applies;
 - (c) no provision in Rule 91 that is inconsistent with this Rule 63 applies.

63.04 - Heading

- (1) A document filed under this Rule 63 must contain a standard heading in Form 63.04.
- (2) The year to be stated in the heading must be the year in which the appeal is started, the court number must be left blank for assignment by the prothonotary, and the charge number and person number must be obtained from the Provincial Court of Nova Scotia.

Forms

Heading for Appeal(63.04).

63.05 - How and when appeal started

- (1) A person may start an appeal of a decision in a summary conviction proceeding by filing a notice of appeal in one of the following periods:
 - (a) not more than twenty-five days after the day the appellant is sentenced, if the appeal is from a conviction, finding of guilt, sentence, or both a conviction or finding of guilt and a sentence;
 - (b) not more than twenty-five days after the day the decision is made, if the appeal is from a decision that is not a conviction, finding of guilt, or sentence.

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- (2) Subsection 815(2) of the *Criminal Code* provides for extension of the period within which notice of an appeal is given.
- (3) The notice of appeal must be filed at the office of the prothonotary responsible for scheduling sittings of the Supreme Court in the municipality where the proceeding under appeal was heard, unless the prothonotary or a judge permits otherwise.
- (4) The notice must contain a standard heading written in accordance with Rule 63.04, be entitled "Notice of Summary Conviction Appeal", be dated and signed, and include all of the following:
 - (a) a notice the appellant appeals from a decision, including the names of the court appealed from and judge who made the decision, the date and place of the decision;
 - (b) a notice of the time, date, and place when and where the appellant will make a motion for directions and setting the time, date and place for the hearing of the appeal;
 - (c) a statement of the charge and the decision;
 - (d) a concise statement of the grounds of appeal;
 - (e) a description of the result the appellant seeks on the appeal;
 - (f) whether the appellant will make a motion for an interim order and if so, what interim relief the motion will seek and when it will be made;
 - (g) an acknowledgement of the appellant's obligation to provide a transcript under subsection 821(3) of the *Criminal Code*, and information about when the appellant is to deliver a transcript to the court and the respondent;
 - (h) a designation of an address for delivery of documents to each appellant.
- (5) The appellant must provide to the prothonotary further information by which the appellant may be contacted, such as a telephone number, e-mail address, or fax number.
- (6) The notice of summary conviction appeal may be in Form 63.05.

Forms

Notice of Summary Conviction Appeal(63.05).

63.06 - Date, place, and notice of motion

- (1) The date for the motion in the notice of summary conviction appeal may not be more than twenty-five days after the day the notice is filed.
- (2) The motion must be heard at the courthouse in which the notice is filed, unless the prothonotary or a judge permits the appellant to make the motion at another place or in another way provided for in Part 6 - Motions.
- (3) Notice must be given to a respondent who is not the Crown in accordance with the provisions for giving notice of a proceeding to a party in Rule 31 - Notice.
- (4) Notice must be given to the Crown by delivering a copy of the notice of summary conviction appeal to the office of the person who represented the Crown in the proceeding under appeal.

63.07 - Respondent's information

A respondent who wishes to participate in an appeal must file a designation of address for delivery under Rule 31 - Notice, and provide to the prothonotary further information by which the respondent may be contacted, such as a telephone number, e-mail address, or fax number.

63.08 - Date and directions for appeal

A judge hearing a motion for directions and to set a time, date, and place for hearing an appeal may do any of the following:

- (a) set the time, date, and place;
- (b) designate the respondent's address for delivery, if the respondent has failed to do so;
- (c) set dates for filing the appeal book, the appellant's brief, the respondent's brief, and any appellant's reply brief;
- (d) give other directions.

63.09 - Dismissal for failure to file or deliver

A judge may dismiss the appeal of an appellant who fails to file within a directed time, or to immediately deliver to the respondent, an appeal book, brief, or other directed document.

63.10 - Conduct of appeal

The appeal is conducted in accordance with section 822 of the *Criminal Code*.

Rule 64 - Prerogative Writ

Educational Notes

This Rule provides for prerogative writs in criminal proceedings or imprisonment by filing a notice for judicial review within 25 days after the decision under review. This is a dramatic change from the previous 6 month deadline in the previous R.58. Unlike that deadline, the 25 day deadline is explicitly extendable under R.64.03(2). Notice to individuals is effected in accordance with Rule 31 – Notice, and to the Crown by delivering the notice to the office of the person who represents the Crown in the proceeding under review. The same concerns about this point for R.63 apply here.

There are some changes from the previous R.58. Rule 64 makes no reference to *ex parte* applications by the Crown to quash a conviction, order, warrant or inquiry as provided for in the previous R.58.09. Incorporation of R.7.09(3) suggests the possibility of costs against the decision-making authority for failing to produce the record.

64.01 - Scope of Rule 64

- (1) This Rule is made under subsections 482 (1) and (3) of the *Criminal Code*.
- (2) A person may apply for a prerogative writ in relation to a criminal proceeding, or imprisonment, in accordance with this Rule.

64.02 - Writ is granted by order

A judge may grant an order having the effect of mandamus, certiorari, prohibition, or *habeas corpus* in relation to a criminal proceeding, or imprisonment.

64.03 - Mandamus, certiorari, and prohibition

- (1) A person who wishes to obtain an order having the effect of mandamus, certiorari, or prohibition may start the proceeding by filing a notice for judicial review in the form prescribed by Rule 7 - Judicial Review and Appeal.
- (2) The notice must be filed no more than twenty-five days after the day of the decision under review, another action under review, or an alleged failure to act, unless a longer period is allowed by a judge under Rule 2.03(1)(c) of Rule 2 - General.
- (3) Rules 7.05, 7.06, and 7.08 to 7.10, of Rule 7 - Judicial Review and Appeal, apply to a judicial review for mandamus, certiorari, or prohibition to the extent they are consistent with the *Criminal Code* and this Rule.
- (4) Notice must be given to the Crown as a respondent by delivering a copy of the notice for judicial review to the office of the person who represents the Crown in the proceeding under review.
- (5) Notice must be given to a respondent who is not the Crown in accordance with the provisions for giving notice of a proceeding to a party in Rule 31 - Notice.

64.04 - Habeas corpus

- (1) A person under imprisonment, or other criminal detention, may obtain a review of the legality of the detention by filing a notice for *habeas corpus* in the form prescribed by Rule 7 - Judicial Review and Appeal.
- (2) Rules 7.12 to 7.17, of Rule 7 - Judicial Review and Appeal, apply to *habeas corpus* brought in relation to a criminal proceeding or imprisonment, to the extent they are consistent with the *Criminal Code*.

64.05 - Other Rules apply

All Rules outside this Rule apply to the extent that they provide procedures suitable to mandamus, certiorari, prohibition, or *habeas corpus* in connection with a criminal proceeding or imprisonment and are not inconsistent with the provisions of the *Criminal Code* or this Rule.

Rule 65 - Application to Reduce Parole Ineligibility

Educational Notes

This Rule will work in conjunction with s.745.6 etc. of the *Criminal Code*. All applications must be made at Halifax for initial screening by the Chief Justice. If a jury is empanelled, the matter returns to the place where the conviction was entered.

65.01 - Scope of Rule 65

- (1) This Rule is made under subsection 745.64(1) of the *Criminal Code*.
- (2) A prisoner who is entitled under the *Criminal Code* to apply for a reduction in years of imprisonment without eligibility for parole, may make the application in accordance with this Rule.

65.02 - Other Rules apply

All Rules outside this Rule apply to the extent that they provide procedures suitable to an application for reduction of parole ineligibility and are not inconsistent with the *Criminal Code* or this Rule.

65.03 - Heading

- (1) A document filed under this Rule must contain a standard heading in Form 65.03.
- (2) The year to be stated in the heading must be the year in which the application for a reduction is filed, and the registry number must be left blank for assignment by the prothonotary.

Forms

Heading for Application(65.03).

65.04 - Starting application

- (1) A person may start an application under section 745.6 of the *Criminal Code* by filing an application with the prothonotary at Halifax for reduction of parole ineligibility.
- (2) The application must name the Attorney General of Nova Scotia as the respondent, contain a standard heading written in accordance with Rule 65.03, be entitled "Application for Reduction of Parole Ineligibility", be dated and signed, and include all of the following:
 - (a) the applicant's full name and date of birth;
 - (b) a notice to the Chief Justice that the applicant applies for a reduction of parole ineligibility;
 - (c) a description of the offence and the sentence that are the subjects of the application, including the place of the trial or guilty plea, the date of conviction, and the date of sentencing, and the period of parole ineligibility;

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- (d) the name and place of each institution in which the person has been detained since the time the applicant was charged with the offence that is the subject of the application and the date of the applicant's entry into each of those institutions;
 - (e) information about any sentence, in addition to the sentence that is the subject of the application, that the applicant is serving including the date and place of the imposition of the sentence and details of the offence for which the sentence was imposed;
 - (f) the reduction the applicant seeks;
 - (g) a concise statement of the grounds relied on in support of the application;
 - (h) an address for delivery.
- (3) The application for reduction of parole ineligibility may be in Form 65.04.

Forms

Application for Reduction of Parole Ineligibility(65.04).

65.05 - Affidavit

- (1) The applicant must file with the prothonotary at Halifax an affidavit entitled "Affidavit Supporting Application", in which the applicant swears or affirms that the facts stated in the application are true to the best of the applicant's personal knowledge, or information and belief.
- (2) The affidavit may be in Form 65.05.

Forms

Affidavit Supporting Application(65.05).

65.06 - Notice

- (1) The person who files an application for a reduction in parole ineligibility must immediately notify the following persons of the application:
 - (a) the respondent, the Attorney General of Nova Scotia;
 - (b) the Solicitor General of Canada;
 - (c) the person in charge of the penitentiary or other institution in which the person making the application is held.
- (2) The notice must be given by one of the following methods:
 - (a) delivery of a certified copy of the application for reduction of parole ineligibility, and a copy of the affidavit, to the respondent and the Solicitor General by registered mail to the offices of each in Halifax and to the person in charge of the penitentiary or other institution by registered mail to the address of the penitentiary or other institution;
 - (b) making delivery, or otherwise providing notice, in accordance with the provisions of Rule 31 - Notice, for giving notice of a proceeding to a party.
- (3) The applicant must file an affidavit proving notice not more than five days after the day the application is filed.

65.07 - Review for compliance with s.745.6 of Code

- (1) The Chief Justice, after receipt of the application and before it is determined whether there is a reasonable prospect that the application will succeed, may conduct a preliminary review of the application.
- (2) The Chief Justice, after completing a preliminary review, may dismiss the application in either of the following circumstances:
 - (a) the applicant is not permitted under subsection 745.6(2) of the *Criminal Code* to make the application, because the applicant has been convicted of more than one murder;
 - (b) the applicant does not meet all of the conditions for entitlement to make the application in subsection 745.6(1) of the *Criminal Code*.

65.08 - Review for reasonable prospect of success

The Chief Justice, or a judge designated by the Chief Justice under subsection 745.61(1), who determines whether there is a reasonable prospect of success in accordance with section 745.61 must notify the parties of the determination.

65.09 - Order after review

- (1) An application that does not comply with section 745.6 or does not have a reasonable prospect of success may be dismissed by order, and the order may include terms for a new application in accordance with subsection 745.61(3).
- (2) An application that is not dismissed under sections 745.6 or 745.61 may be continued by order of the Chief Justice designating a presiding judge in accordance with subsection 745.61(5).

65.10 - Place of hearing, motion, and proceeding

- (1) A jury must be empanelled at the place where the conviction was entered, unless the presiding judge directs otherwise.
- (2) The presiding judge may give directions about the place at which motions may be made.
- (3) The court record must be maintained at the office of the prothonotary in charge at the place where the jury is to be empanelled and, if that is not Halifax, the prothonotary at Halifax must deliver the records to the prothonotary in charge.

65.11 - Notice and attendance of applicant

- (1) Notice of the time, date, and place for selection of a jury and hearing of the application must be given by the prothonotary in writing.
- (2) The written notice may be delivered to the following parties, at the following addresses:
 - (a) the Attorney General, at the Halifax office of the Public Prosecution Service or an address designated in writing by the Director of Public Prosecutions;

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- (b) the Solicitor General, at the Halifax office or an address designated in writing by counsel for the Solicitor General;
 - (c) the applicant, at the address of the officer in charge of the institution where the applicant is detained, an address designated by counsel for the applicant in a notice or other document referred to in Rule 33.02(1), of Rule 33 - Counsel, or, if counsel requires, both addresses.
- (3) The presiding judge may make an order under Rule 50.06, of Rule 50 - Subpoena, to secure the attendance of the applicant at a pre-hearing conference, the hearing of a motion on the application, or the selection of a jury and hearing of the application.

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65.12 - Parole eligibility report

- (1) The presiding judge may order the Solicitor General to provide a new parole eligibility report for use on the hearing of the application before a jury.
- (2) The order may provide that the report is to be prepared by a person who the Solicitor General is satisfied has the necessary knowledge and skill.
- (3) The report must contain summaries of all of the following kinds of information about the applicant:
 - (a) social and family background;
 - (b) classification and discipline evaluations;
 - (c) regular reports on conduct;
 - (d) psychological or psychiatric assessments;
 - (e) other relevant information about character, conduct, and parole eligibility.
- (4) The report must be delivered to the prothonotary, and the prothonotary must deliver copies to the parties.
- (5) The presiding judge must set a time, date, and place to hear objections to the admissibility of parts of the report.
- (6) The person who prepares the report must be available for cross-examination when the objection is heard, unless the presiding judge orders otherwise.
- (7) The presiding judge must decide whether an objected part is to be excluded from the hearing before the jury.
- (8) The judge may order that a person who is a source of information stated in a parole eligibility report be present for cross-examination at the hearing before the jury.

65.13 - Pre-hearing conference

- (1) The presiding judge must set a time, date, and place for a conference to prepare for the hearing of the application.
- (2) The judge may delay setting a time, date, and place until after a parole eligibility report is delivered and an objection to the report is determined.
- (3) The judge may give directions on any of the following subjects:
 - (a) obtaining compliance with these Rules;
 - (b) means of presenting evidence;

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- (c) disclosure by each party;
- (d) the time, date, and place when and where the jury is to be empanelled and the hearing is to start.

65.14 - Empanelling jury

A jury may be empanelled as a jury is empanelled for an indictment under Part XX of the *Criminal Code* and the *Juries Act* (Nova Scotia), with the applicant and the Attorney General having the number of peremptory challenges they would have on a trial of an indictment for the offence for which the applicant was sentenced.

65.15 - Documents without sponsor

Each of the following documents may be admitted on proof, or admission, that the document is authentic:

- (a) the parts of a parole eligibility report not excluded;
- (b) a transcript of parts, or all, of the trial of the indictment or sentencing hearing that led to the sentence about which the application is made;
- (c) a victim's statement entered at the sentencing hearing or submitted for the application in accordance with section 745.63.

65.16 - Order of presentation

- (1) The order of presentations at the hearing must be as follows, unless the presiding judge directs otherwise:
 - (a) the applicant opens the applicant's case with a brief speech;
 - (b) the applicant calls witnesses and closes the applicant's case without a speech;
 - (c) the Attorney General opens the case for the Attorney General with a brief speech, if the Attorney General chooses to present evidence;
 - (d) the Attorney General calls witnesses and closes the Attorney General's case;
 - (e) the parties tender the exhibits proved by each;
 - (f) the Attorney General speaks to the jury first, unless the Attorney General does not call a witness;
 - (g) the applicant speaks second, or first if the Attorney General does not call a witness.
- (2) The presiding judge may give directions for the conduct of the hearing, and the directions prevail over directions given under Rule 65.13(3).