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What Every Lawyer Should Know about Raising New Issues on Appeal

By Marco P. Falco

After a lengthy Court proceeding, lawyers may be tempted to devise new arguments on appeal in the hope of having an unfavourable decision overturned. However, the legal test for advancing novel arguments at an appellate Court remains onerous.

Two decisions of the Ontario Court of Appeal, *Kaiman v. Graham,* 2009 ONCA 77, and *Whitby (Town) v. G & G 878996 LM Ltd.,* 2020 ONCA 654, show that the Courts' reluctance to allow new issues on appeal stems from a concern for fairness to the parties and the proper role of appellate scrutiny by judges.

The High Threshold in Seeking to Raise Novel Questions

A party seeking to raise new issues on appeal has a high onus. In order for the new issues to be considered, the appellate must show the Court that "all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial": *Ross v. Ross* (1999) 181 N.S.R. (3d) 22 (C.A.).

In other words, if a complete record is not before the appeal Court, the Court is in no position to assess its merits. Where, of course, the novel issue raised is one of pure law, this burden necessarily eases, as the existence of a complete factual record is not as important: *R. v. Brown,* [1993] 2 S.C.R. 918.

One of principles guiding the reticence to admit new issues is a concern for fairness to the parties. As a 2008 decision of the Ontario Court of Appeal, *Ontario Energy Savings LP v. 767269 Ontario Ltd.,* makes clear, "it is unfair to permit a new argument on appeal in relation to which evidence might have been led at trial had it been known the issue would be raised".

That being said, the decision to consider a new question is entirely within the appeal Court's discretion. Although the threshold is high, there is no doubt that if it is in the interests of justice that the new issue be considered, it will be. This is particularly so where a party may not have had effective counsel at first instance or where there is a good explanation for the omission in the lower Court.

Two decisions of the Court of Appeal show the factors that go into the Ontario Court of Appeal's assessment of novel issues.

Five Good Reasons New Questions May not be Allowed on Appeal

Kaiman v. Graham, 2009 ONCA 77, involved a dispute over a family cottage. The appellants alleged that since the death of one of the cottage's owners, they were shut out of the use and enjoyment of the cottage.

The appellants brought an action in the Ontario Superior Court alleging, amongst other things, that they had an equitable interest in the cottage property and a valid unsigned lease over the property.

After losing at trial, the appellants advanced a new argument at the Court of Appeal that the *Residential Tenancies Act* ("*RTA*") applied to their case, such that the matter ought to have been adjudicated by the Landlord and Tenant Board, not the Superior Court. Notably, the appellants did not raise this argument at trial.

The Court of Appeal declined to entertain the issue of the applicability of the *RTA*. It offered five reasons for its decision:

1. The underlying pleadings illustrated that the majority of the relief requested at trial had "nothing to do with the *RTA*". To allow the appellants to raise this issue for the first time on appeal would run "contrary to the basic purpose of an appeal which is to correct trial error";
2. The issue of the application of the *RTA* to the cottage property was a question of mixed fact and law. The underlying factual record in the lower Court was "sparse". If the respondents had known about the *RTA* issue at trial, they may have submitted a more complete trial record;
3. The appellants failed to give an explanation as to why they did not advance the *RTA* argument at trial. Trial counsel did not file an affidavit to explain why the *RTA* question was not pleaded or raised;
4. When raising the *RTA* issue, the appellants failed to undertake to indemnify the respondents from their costs at trial on a full indemnity basis, nor did they offer to pay the costs of the appeal. This weighed against allowing the appellants to raise this new issue; and
5. The likelihood of success on the *RTA* question was "by no means clear" and outweighed by the principle of finality in adjudication. In the words of the Court, it would be unfair to the respondents "to have them undergo the expense of yet another hearing at first instance simply because a fresh lawyer on the case thought of a new argument that may or may not succeed".

Having balanced these factors, the Court concluded that it would not hear the *RTA* issue.

Why Novel Equitable Claims Should Not Be Raised for the First Time on Appeal

Similar considerations went into the Court of Appeal's more recent decision, *Whitby (Town) v. G & G 878996 LM Ltd.,* 2020 ONCA 654.

However, the context of *Whitby* is what matters most: in this appeal, the appellant was seeking to raise an equitable claim for the first time.

G & G involved an order of an application judge of the Superior Court under Ontario's *Building Code Act* in which the Court ordered that the Town of Whitby could recover its full costs in repairing G & G's exposed wall following a fire at the premises.

On appeal, and for the very first time, G & G sought to raise the defence of equitable set-off, alleging that G & G had a claim against the Town of Whitby itself, such that any amounts owing by Whitby to G & G had to be "set off" against any liability G & G had to indemnity Whitby.

After considering the pleading and the counsel's submissions at trial, the Court of Appeal held that the defence of equitable set-off could not be raised at first instance on appeal.

Key to the Court's analysis was that G & G was advancing an equitable defence, meaning the facts of the case and the underlying equities were essential to determining the defence's validity.

If G & G wanted such equities to be considered, it should have raised the issue in the main application, where a complete factual record could have been considered by the lower Court. The Court of Appeal held:

This concern [i.e. of raising novel issues on appeal] is heightened in the present case where G & G is seeking an equitable remedy, and we have a wholly inadequate evidentiary record to assess the equities of the case. Further, G & G has not explained why equitable set-off was not raised on the application. It would be contrary to the interests of justice to allow G & G to introduce this new argument on appeal…

Beware the Clever Appellate Lawyer

Both *Kaiman* and *G & G* teach important lessons on when it is appropriate to raise new issues on appeal.

The more the new issue raises pure questions of law, the more likely a factual record is not as relevant and the issue can be entertained by the appellate Court – this approach respects the proper role of appellate scrutiny in Canadian democracy, which is to identify legal error by the lower Courts.

On the other hand, where an issue, such as equitable relief, depends on a complete factual record, the appeal Court will be loathe to entertain it for the first time. Appellate Courts are generally not in the business of weighing evidence. This principle applies particularly where the party seeking to advance the issue has offered no explanation for why it was not brought forward in the lower Court.

In the end, the decision by the appeal Court to entertain the new issue depends entirely on context. The Court's duty to do what it is in the "interests of justice" gives it broad discretion to balance the importance of legal issue at stake against the prejudice to the opposing party in raising the issue at first instance on appeal.

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