

Protocol for Appeal Proceedings Involving Allegations of Ineffective Trial Counsel

Preamble

In criminal appeals from conviction, the appellant may raise grounds of appeal suggesting that their trial counsel was ineffective or otherwise contributed to a miscarriage of justice. In such cases, the appellant will often want to provide the court with information concerning instructions to and conduct of trial counsel. This information will typically come before the court by way of a motion for leave to file fresh evidence. Any response to such evidence will usually come from trial counsel. The response could consist of affidavit to be considered by the Court on the fresh evidence motion.

If the Appellant is represented by counsel it is expected that they will understand an assessment of the merits of the allegations against trial counsel prior to raising these issues in the Notice of Appeal. In most cases such assessment will include giving trial counsel notice of the allegations, providing a reasonable opportunity to respond and if feasible, advising trial counsel prior to a Notice of Appeal being filed with the Court.

A useful discussion of the issues raised in appeals involving allegations of ineffective trial counsel can be found in the court's decisions in **R. v. West (2009 NSCA 63; 2009 NSCA 94)**, **R. v. Hobbs (2009 NSCA 90)** and **R. v. Fraser (2011 NSCA 70)**.

Protocol

1. All Notices of Appeal are reviewed by the Registrar. As part of this review, the Registrar will attempt to discern whether the grounds of appeal include allegations with respect to the conduct of trial counsel. If Crown counsel becomes aware that an Appellant is raising such issues they will notify the Registrar.
2. If the Registrar determines that the grounds of appeal include allegations with respect to the conduct of trial counsel, a letter enclosing a copy of the Notice of Appeal will be sent to that counsel for their information. This letter will be copied to the parties to the appeal. In addition the Registrar shall report the matter to the Chief Justice who may consider appointment of an appeal management Judge under Rule 90.45.
3. Trial counsel should be provided with copies of correspondence or documents filed with the court with respect to the motion for date and directions.
4. Trial counsel must advise the court at the time of the motion for date and directions with respect to their intended participation in the proceeding. In particular, they should advise the court with respect to whether they intend to make any motions or file affidavit evidence.

5. Should the response by trial counsel involve disclosure of information that is potentially subject to solicitor-client privilege the Court may be asked to provide direction as to whether the appellant's allegations are sufficient to constitute a waiver of privilege.
6. In some circumstances, the nature of the allegations against trial counsel will result in that counsel making a motion to become an intervenor on the appeal.