APPLICATIONS FOR LEAVE TO APPEAL: THE PARAMOUNT IMPORTANCE OF PUBLIC IMPORTANCE

*Geoff R. Hall**

Introduction

A crucially important yet often underestimated part of the appellate process is the application for leave to appeal. From the perspective of a litigant seeking to overturn an adverse decision, there is no practical difference between losing an application for leave to appeal and losing the appeal itself; either result forces the litigant to live with the unfavourable decision. Yet counsel often do not do a particularly good job in undertaking this crucial aspect of the appellate process, as the point of the application is either not well understood or is too easily forgotten. The aim of this article is to present some pointers for good advocacy in applications for leave to appeal, with a view to assisting counsel in both seeking and resisting leave to appeal.

Applications for leave to appeal[1] arise in many different contexts in civil cases.[2] The most notable are appeals from provincial appellate courts and the Federal Court of Appeal to the Supreme Court of Canada,[3] appeals from the Ontario Divisional Court to the Court of Appeal for Ontario,[4] appeals from interlocutory orders of trial

---

* Of McCarthy Tétrault.

1. In some contexts, the proper nomenclature is a "motion" for leave to appeal, not an "application" for leave to appeal (for example, where leave is sought pursuant to Rule 62 of the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 to appeal an interlocutory order of a judge), but to keep terminology simple the generic term "application for leave to appeal" is used throughout this article.
2. This article primarily considers applications for leave to appeal in civil cases. In criminal cases different considerations may apply.
3. *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40.
4. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1)(*a*)

judges,[5] and appeals of orders as to costs.[6] While slightly different issues arise and slightly different tests are applied in different contexts, there is a common underlying theme that must be borne in mind no matter what the context. Appellate courts seek to use the leave to appeal process to reserve their dockets for cases that will advance some aspect of the law. This requirement is more strictly applied the higher a case rises in the judicial hierarchy but it is present and crucially important at all levels.

Thus the focus in seeking leave to appeal must be to convince the court that granting leave will allow the appellate court to make a decision that will entail an important legal statement and that the case therefore deserves a precious spot on the appellate court's docket. Conversely, the focus in seeking to resist an application for leave to appeal must be to convince the court that leave can safely be denied without passing up an opportunity to clarify or improve the law. This is a highly specialized focus, not present in any other step in the litigation process, and it leads to unique challenges in advocacy.

The Problem: The Grounds for Granting or Denying Leave are Obscure and Counterintuitive

The .task of preparing an application for leave to appeal or a response to such an application is made difficult by the fact that the grounds on which appellate courts grant or deny leave are somewhat obscure and often run counter to counsel's instincts. Little is written on the point, either by courts or by commentators. In the Supreme Court of Canada, where leave is most difficult to get (and thus where leave applications are most crucial for litigants seeking to overturn adverse decisions), the problem is particularly acute because the practice is never to give reasons for either granting or denying leave to appeal. The stated rationale for this approach is that the Supreme Court has deliberately so refrained in order to maintain an "unfettered discretion" as to when leave should be granted.[7] The problem may also be somewhat exacerbated by the

---

5. See, for example, the *Courts of Justice Act*, s. 19(1)(*b*). Analogous provisions exist in other jurisdictions.
6. *Courts of Justice Act*, s. 133(*b*). Analogous provisions exist in other jurisdictions.
7. John Sopinka, "The Supreme Court of Canada" in Brian A. Crane and Henry S. Brown, *Supreme Court of Canada Practice 1998* (Toronto: Carswell, 1998), pp. 306-316, specifically at p. 308. One is cynically tempted to wonder whether the Supreme Court of Canada would tolerate a lower court reserving unto itself an

fact that applications for leave to appeal are often argued in writing without an oral hearing at which judges can give counsel feedback on what submissions are helpful and important to them in determining whether leave to appeal ought to be granted or denied. Moreover, the factors a court looks at when considering whether or not to grant leave to appeal are often counterintuitive because the merits of the case (which is the *only* issue in virtually all other steps in the litigation process) carry little weight.

Counsel facing an application for leave to appeal appear to face an almost irresistible temptation. It is easiest simply to rehash the same arguments made in the court below and argue that leave to appeal ought to be granted in order to correct the error made by that court. This approach is wrong. The focus on an application for leave to appeal is entirely different from the focus in the court below and, indeed, on the appeal itself if leave is granted. The focus is not on the merits of the proposed appeal — whether the court below erred — but rather simply whether the proposed appeal ought to be heard by the appellate court.

The way that these principles work out in practice can best be demonstrated by reviewing the grounds used for determining applications for leave to appeal at different levels of the judicial hierarchy starting at the Supreme Court of Canada and then working downwards.

Leave to Appeal to the Supreme Court of Canada

The official record is virtually silent on the test employed on applications for leave to appeal to the Supreme Court of Canada. Aside from the fact that reasons for judgment are never issued to explain how the test is actually applied in particular cases, the *Supreme Court Act* appears to provide for virtually unfettered discretion. Leave to appeal a judgment may be granted where:[8]

> . . . the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it . . .

---

unfettered discretion by refusing to give reasons for judgment. The practice of not *ever* giving reasons is unfortunate in that, as set out below, in most cases the leave decision is quite mechanical. Thus the practice of never giving reasons tends to render the process more mysterious than it actually is.

8. *Supreme Court Act*, s. 40(1).

However, certain extra-judicial writings, particularly by the late Mr Justice Sopinka, are instructive in providing guidance to counsel as to the factors actually considered by the Supreme Court of Canada when deciding whether to grant or deny leave to appeal. These writings establish that, mirroring the wording of the governing statutory provision, the public importance of the proposed appeal to the development of the law is the paramount consideration in the leave decision, and the actual merits of the case are almost irrelevant.

In a book published in 1993, Mr Justice Sopinka and Mark Gelowitz (a former law clerk to Sopinka J.) strongly made the point that what the Supreme Court looks for in a leave application is significantly different from what it looks for in the argument of an appeal. They also noted that counsel often fail to grasp this distinction:[9]

> . . . counsel should focus their submissions to the Court on the true issue in an application for leave (i.e., the national or public importance of the issue raised in the case sought to be appealed) . . . A common defect in applications for leave to appeal to the Supreme Court is an overriding emphasis on the merits and *minutiae* of the case, at the expense of, or to the exclusion of, any consideration of the jurisprudential context of the case. On a fundamental level, whether or not the Court of Appeal was "wrong" had little if anything to do with whether the case is one of public importance. Indeed, the Court may be inclined in particular cases to grant leave precisely for the purpose of affirming the judgment of the Court of Appeal, thus giving direction on the point in issue to all of the courts of Canada.

Sopinka and Gelowitz then provided a list of factors militating in favour of the granting of leave: a novel constitutional issue, the interpretation or application of a significant federal statute of general application, the interpretation or application of a provincial statute with corresponding similar legislation in other provinces, an issue for which there are conflicting decisions in the provincial appellate courts, or an issue that requires revisitation by the Supreme Court on an important question of law. Conversely, "The Court is considerably less likely to grant leave to appeal in cases which are primarily factual in nature, or in which the result generated will be of interest primarily to the parties themselves and not of general application."[10]

An article published by Mr Justice Sopinka a few months before

9. John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (Toronto: Butterworths, 1993), pp. 166-67.

10. *Ibid.*, at p. 167.

his untimely death elaborated on these criteria.[11] He again began by emphasizing that the focus on leave applications is not the correctness of the decision sought to be appealed. "We are not a court of error and the fact that a court of appeal reached the wrong result is in itself insufficient." This is so even if the error consists of misapplication of a decision of the Supreme Court of Canada, unless such misapplication has become an epidemic, in which case the Supreme Court may grant leave to appeal in order to correct the epidemic and provide guidance to the lower courts. Moreover, the question of public importance must be germane to the disposition of the case, not merely incidental, and the issue must be supported by an adequate factual record created in the courts below. If the matter has recently been dealt with by the Supreme Court and subsidiary issues have arisen, the court tends to be in no rush to decide them but instead tends to wait to see how the lower courts are applying the court's decision before proceeding to decide the subsidiary issues they have generated. If the issue raised has been or is about to be dealt with by legislation, leave is usually not granted because the legislation deprives the issue of public importance. In criminal cases, Mr Justice Sopinka noted that the test is somewhat relaxed, and leave may be granted where there is concern that there may have been an unfair trial or a wrongful conviction. In common law civil cases it is normally necessary to show that the matter has importance in several provinces. For civil cases from Quebec this requirement usually cannot be met and public importance in Quebec is usually sufficient to grant leave.[12]

Mr Justice Sopinka then set out various factors militating in favour of and against leave to appeal being granted. The list echoed the one he and Gelowitz published in 1993 with a few new additions. Factors favouring leave include a constitutional challenge to a statute, common law rule or government practice; a conflict between provincial courts of appeal on matters which should be dealt with uniformly between provinces; a novel point of law, such as reversing the burden of proof of causation, extending liability for economic loss, or reconsidering the test for informed consent in medical cases; interpreting an important federal statute or provincial statute existing in several provinces, and defining aboriginal rights. Mr Justice Sopinka then set out factors weighing against leave to

11. Sopinka, *supra*, footnote 7.
12. *Ibid.* at pp. 308-310.

appeal. They include the lack of a solid factual foundation, cases in which the main question has been settled but subsidiary questions remain in relation to working out the judgment, cases in which the point is moot (in such cases, leave to appeal will only be granted if the matter is evasive of review in the sense that it is not likely ever to arise as a live issue), and cases in which the Court of Appeal is plainly right (although it is also possible that the court may wish to grant leave in order to achieve a decision binding on the whole country).[13]

The foregoing suggests that there are several key steps that counsel should undertake when seeking leave to appeal to the Supreme Court of Canada.

The first key step in any application for leave to appeal is to conduct a thorough search for conflicting decisions from other appellate courts. A split between appellate courts can often render what is otherwise a mundane issue into a matter of public importance warranting leave to appeal.

A striking example of this phenomenon is *R. v. Tapaquon.*[14] The issue was, to use the Supreme Court's own description, "a narrow and technical point of criminal procedure law"[15] which could hardly be imagined to be a matter of public importance (or indeed a matter of much practical or even academic interest).[16] Shortly before *Tapaquon* reached the Supreme Court of Canada, leave to appeal had been denied in another case (from the Manitoba Court of Appeal) which squarely raised precisely the same issue,[17] an outcome which undoubtedly reflected the obscure nature of the issue.

---

13. *Ibid.*, at p. 310.
14. [1993] 4 S.C.R. 535, 109 D.L.R. (4th) 637, 87 C.C.C. (3d) 1.
15. *Ibid.*, at p. 554 (*per* L'Heureux-Dubé J., dissenting).
16. Pursuant to the *Criminal Code*, R.S.C. 1985, c. C-46, s. 574, if an accused is committed to trial after a preliminary inquiry a prosecutor has the power to prefer an indictment on any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, not just the charge in the original information. The issue in *Tapaquon* was whether this provision allows a prosecutor to prefer an indictment on the charge in the original information after the preliminary inquiry judge has refused to commit the accused to trial on that charge but rather has committed him or her only on a lesser included offence. This issue could be of academic interest only to the keenest of criminal procedure buffs. Furthermore, its practical implications are difficult to imagine. If the Crown's evidence is sufficiently weak that a committal to trial on the original charge cannot be obtained, it is hard to believe that the Crown could ever secure a conviction at a trial.
17. *R. v. Hampton* (1990), 69 Man. R. (2d) 293, 60 C.C.C. (3d) 308 (C.A.), leave to appeal refused [1991] S.C.R. viii *sub nom. D.K.H. v. The Queen.*

What suddenly rendered the narrow and technical procedural point into a matter warranting consideration by the Supreme Court of Canada was a split between provincial appellate courts: first the Newfoundland Court of Appeal[18] and then the Saskatchewan Court of Appeal[19] considered the issue and disagreed with the decision of the Manitoba Court of Appeal.

A more recent example of the same phenomenon is *United States of America v. Kwok.*[20] In *United States of America v. Cazzetta,*[21] the Quebec Court of Appeal held that the *Extradition Act*[22] confers extensive jurisdiction under the *Canadian Charter of Rights and Freedoms* on extradition judges. Leave to appeal to the Supreme Court of Canada was refused.[23] A little over a year later, the Court of Appeal for Ontario faced the same issue in *Kwok* but expressly declined to follow *Cazzetta,* holding that it had been wrongly decided. Leave to appeal to the Supreme Court of Canada was quickly granted.[24] While the issue of the Charter jurisdiction of extradition judges would seem to be sufficiently important that it might warrant consideration by the Supreme Court of Canada in any event, it is likely that leave to appeal was granted simply because of the irreconcilable conflict between *Cazzetta* and *Kwok* and that the emergence of this conflict had transformed an issue otherwise not warranting leave to appeal into one that did.

If the case involves a provincial statute, a second key step in preparing an application for leave to appeal to the Supreme Court of Canada is to look for comparable statutes in other provinces in order to make the point that a decision in the proposed appeal will have significance in several jurisdictions. If the case involves a federal

18. *R. v. Myers* (1991), 65 C.C.C. (3d) 135, 91 Nfld. & P.E.I.R. 37 (Nfld. C.A.).
19. *R. v. Tapaquon* (1992), 97 Sask. R. 245, 71 C.C.C. (3d) 50, 12 W.A.C. 245 (C.A.), revd by the Supreme Court of Canada (*supra*, footnote 14).
20. (1998), 41 O.R. (3d) 131, 163 D.L.R. (4th) 128, 127 C.C.C. (3d) 353 (C.A.).
21. (1996), 138 D.L.R. (4th) 41, 108 C.C.C. (3d) 536, [1996] R.J.Q. 1547 (C.A.).
22. R.S.C. 1985, c. E-23, s. 9(3).
23. *United States of America v. Cazzetta* (1997), 140 D.L.R. (4th) vii, 110 C.C.C. (3d) vi, 206 N.R. 316n (S.C.C.).
24. *United States of America v. Kwok* (1999), 41 O.R. (3d) xv (S.C.C.). The speed with which leave to appeal was granted is probably an indication of how clear it was to the Supreme Court that leave to appeal had to be granted to settle the split between the Ontario and Quebec courts on the issue raised in the case. The application for leave to appeal was submitted to the court for consideration on January 25, 1999 (see *ibid.* at p. xvi). Leave was granted only 24 days later, on February 18, 1999. This is an unusually speedy determination of a leave application, particularly where leave to appeal is granted.

statute this step is obviously not necessary but counsel should emphasize the point that a decision by the Supreme Court will have implications throughout Canada.

Counsel may also find some assistance in understanding the process by reviewing the significant body of literature that provides statistical analysis of the disposition of applications for leave to appeal in the Supreme Court of Canada.[25] Such analysis provides useful as a guide to the types of cases that are of interest to the court at any particular time.

Throughout the process, it is important for counsel to keep in mind that the Supreme Court of Canada's approach to applications for leave to appeal is driven by its understanding of its role in the judicial hierarchy. Bora Laskin made this mindset clear in an article published in 1975, shortly after the *Supreme Court Act* was amended to require leave to appeal in most cases. Chief Justice Laskin expressly tied the court's role in the judicial hierarchy to the grounds on which applications for leave to appeal are decided. The court is a "supervisory tribunal" instead of an appellate tribunal. Its main role is to oversee the development of the law and give guidance to lower courts on issues of national concern and common concern to several provinces. As such, it is expected to resist interfering in purely local or private issues and, indeed, is enjoined from doing so by the statutory requirements for leave. It is only within this context that the court can be expected to be sensitive to the correctness of decisions. Furthermore, this approach means that it is the issue that is in contention, not the character of the parties, that is decisive in leave applications. Thus, the mere fact that a government or a government agency is a party does not weigh in favour of granting leave.[26]

For those familiar with the factors that are determinative of leave applications at the Supreme Court of Canada the process is almost mechanical. Public importance is the only real criterion. It is most easily demonstrated by showing that provincial appellate courts have split on the issue raised by the proposed appeal or by showing

25. Aside from periodic academic articles, statistical analysis of leave applications is provided each year in the Supreme Court Law Review. See, for example, Henry S. Brown, Brian A. Crane and Caroline Jill Date, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada 1996-97" (1998), 9 S.C.L.R. (2d) 431.

26. Bora Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada" (1975), 53 Can. Bar Rev. 469 at pp. 474-75.

that the proposed appeal requires the interpretation of a statute that will be of interest across Canada (either a federal statute or a provincial statute with counterparts in other provinces). Unless one is seeking to appeal a wrongful conviction for first degree murder, the actual merits of the proposed appeal carry almost no weight and are essentially irrelevant to the determination. This approach is sometimes difficult to grasp because it is counterintuitive — why would an appellate court refuse to hear a case if the decision in the court below is unjust? The approach is, however, entirely consistent with the supervisory role of the Supreme Court of Canada and essential for counsel to keep in mind when dealing with an application for leave to appeal.

Leave to Appeal from the Ontario Divisional Court to the Court of Appeal for Ontario[27]

The test for obtaining leave to appeal from the Ontario Divisional Court to the Court of Appeal for Ontario is not significantly different from the test for obtaining leave to appeal to the Supreme Court of Canada, although it is slightly relaxed as there is more scope for the Court of Appeal to act as a court of error and agree to hear a case simply to correct an error made in the court below. As at the Supreme Court, the primary focus is the public importance of the proposed appeal, not the underlying merits of the case. This was made clear in one of the first applications for leave to appeal considered after the creation of the Divisional Court about a quarter century ago.

Sault Dock Co. and Sault Ste. Marie (City) (Re)[28] held that as a general rule decisions of the Ontario Divisional Court in its appellate capacity are intended to be final and that a further appeal is the exception to the rule. *Sault Dock* then set down a series of guidelines for leave applications. The magnitude of the amount involved is not of significance, nor is the importance of the decision to the individual a paramount consideration:[29]

---

27. This example is considered separately because it is the only instance in Canada in which a provincial court of appeal has jurisdiction to hear appeals from a multi-member court which itself has appellate jurisdiction. Since the example is unique and has spawned some unique case law with respect to applications for leave to appeal, it is considered separately.
28. [1973] 2 O.R. 479, 34 D.L.R. (3d) 327 (C.A.).
29. *Ibid.*, at p. 481.

> It is rather the impact which the decision on the question will have on the development of the jurisprudence of Ontario. If the resolution of the question would largely have significance only to the parties and would not settle for the future a question of general interest to the public or a broad segment of the public, the requirements to obtain leave will not have been met.

The parallel between this approach and the approach outlined by Justice Sopinka and Chief Justice Laskin at the Supreme Court of Canada is apparent.

Sault Dock then set out four specific classes of cases in which it is appropriate for leave to appeal to be granted. They are cases involving arguable questions of (i) the interpretation of a federal or provincial statute or regulation, including its constitutionality; (ii) the interpretation, clarification or propounding of some general rule or principle of law; (iii) the interpretation of a municipal bylaw where the point in issue is of public importance, and (iv) the interpretation of an agreement where the point in issue is of public importance.[30] In other words when it is acting as a second level of appeal the primary role of the Court of Appeal for Ontario, like the Supreme Court of Canada, is to determine issues of law having public importance, not to correct errors in the courts below. The leave to appeal process serves a gatekeeping function in order to ensure that the Court of Appeal serves this role.

At the same time, *Sault Dock* left open the possibility that the Court of Appeal for Ontario can sometimes serve simply as a court of error even when acting as a second appellate tribunal. It held that leave may be granted in special circumstances, such as the introduction of new evidence, obvious misapprehension by the Divisional Court of the relevant facts, a clear departure from established principles of law resulting in a miscarriage of justice, or clear error by the Divisional Court (although more than the mere possibility of error must be present for leave to appeal to be granted on this basis).[31] Furthermore, in a subsequent case, the Court of Appeal held that the guidelines in *Sault Dock* are somewhat relaxed where the decision sought to be appealed was rendered by the Divisional Court in the exercise of its original jurisdiction as opposed to its appellate jurisdiction,[32] leaving yet more room for argument on the merits of a case when seeking leave to appeal.

---

30. *Ibid.*
31. *Ibid.*
32. *United Glass Workers and Dominion Glass Co. (Re)*, [1973] 2 O.R. 763 (C.A.).

Nevertheless, counsel's mindset in approaching an application for leave to appeal to the Court of Appeal for Ontario should not differ much from that when approaching an application for leave to appeal to the Supreme Court of Canada. Leave is obtained by convincing the court that making room for the case on its docket will advance the law of the province and be of significance generally. There is slightly more scope to argue that leave ought to be granted simply because the court below was wrong but making this argument without consideration of the public importance of the proposed appeal is a recipe for failure.

Leave to Appeal Interlocutory Orders of Trial Judges

Leave is generally required to appeal an interlocutory order made by a judge. Once again, the public importance of the issue raised by the proposed appeal is a paramount consideration, even though it is often extremely difficult to establish. The merits of the proposed appeal have greater weight than they do in applications for leave to appeal final judgments at the higher levels of the judicial hierarchy, but are still usually not enough in and of themselves to secure leave to appeal.

The British Columbia Court of Appeal has a well-established body of jurisprudence on applications for leave to appeal an interlocutory order of a judge. In general, it applies a four-part test which considers both the merits of the proposed appeal and the public importance of the case: (i) whether the point in issue is of significance to the action; (ii) whether the point in issue is of significant to the practice generally; (iii) whether there is merit to the appeal; and (iv) whether the appeal would delay the trial of the action.[33] The first two factors are emphasized in some cases.[34] It is clear that the public importance of a proposed appeal to the development of the law carries significant weight in the leave decision: in at least one case, leave to appeal was granted where there was some uncertainty in the

33. See, for example, *Lenec v. Mallison* (1994), 53 B.C.A.C. 186, 87 W.A.C. 186 (C.A.) and *British Columbia (Milk Marketing Board) v. De Jong* (1995), 44 C.P.C. (3d) 144, 117 W.A.C. 1 (B.C.C.A.).
34. See, for example, *Johnson v. Brown* (1987), 24 C.C.L.I. 161 (B.C.C.A.), *Shulman (Guardian ad litem of) v. McCallum* (1991), 61 B.C.L.R. (2d) 66, [1992] 2 W.W.R. 569 (C.A.), affd 105 D.L.R. (4th) 327, [1993] 7 W.W.R. 567, 47 W.A.C. 292 (C.A.), leave to appeal to S.C.C. refused 111 D.L.R. (4th) vii, 88 W.A.C. 79*n* and *G.W.L. Properties Ltd.* v. *W.R. Grace & Co. of Canada* (1993), 29 B.C.A.C. 140, 48 W.A.C. 140 (C.A.).

law and the question was of sufficient general importance to justify leave.[35]

In Ontario, rule 62.02(4) of the Rules of Civil Procedure codifies the grounds for leave to appeal an interlocutory order of a judge. It provides that leave to appeal shall not be granted unless one of two conditions is met: (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or (b) there appears to the judge hearing the application for leave to appeal to be good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the judge's opinion, leave to appeal should be granted. The case law that has evolved around this provision makes it clear that both conditions require the proposed appeal to involve matters of public or general importance transcending the interests of the parties.[36]

The requirement of public importance in applications for leave to appeal interlocutory orders poses a significant challenge in advocacy. It is extremely rare that a single interlocutory order of a single trial judge, which is likely not binding on any other court and often involves only procedural matters, will raise much of an issue of interest beyond the parties to the case. This is in sharp contrast to leave applications at the Supreme Court of Canada where virtually every decision sought to be appealed is binding throughout an entire province and will be afforded significant weight in all other provinces.[37] (In the case of a decision of the Federal Court of

35. *Tsolum Farms Ltd. v. United Grain Growers Ltd.* (1986), 18 C.C.L.I. 289 (B.C.C.A.).

36. See, for example, *Rankin v. McLeod, Young, Weir Ltd.* (1986), 57 O.R. (2d) 569, 13 C.P.C. (2d) 192 (H.C.J.) and *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110, 30 O.A.C. 53, 28 C.P.C. (2d) 294 (Div. Ct.).

37. Not all cases sought to be appealed to the Supreme Court of Canada are of this character, because it is possible in some circumstances for a decision from a court below a provincial court of appeal to be appealed directly to the Supreme Court. The *Supreme Court Act*, s. 40(1), provides that an appeal lies with leave from "any final or other judgment . . . of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed". In other words, once appeal rights in a province are exhausted, even if that occurs below the level of the provincial Court of Appeal, a further appeal lies to the Supreme Court of Canada with leave. However, such appeals are rare. Furthermore, the test for leave to appeal in such cases does not appear to differ in any way from that employed when leave is sought with respect to a final judgment of the highest court of a province.

Appeal, it is binding throughout the country in cases in the Federal Court and will be afforded significant weight in all provincial courts.) Yet the task of counsel seeking leave to appeal an interlocutory order is to transform what at first glance usually appears to be a matter of interest only to the parties into a matter of broad and general interest.

Seeking leave to appeal an interlocutory order is often a most challenging if not impossible task and this helps to explain why leave is so rarely granted. One argument that has been successful in meeting this challenge has been to point out that a relatively new remedy has been the subject of conflicting trial-level decisions but has not yet been considered by any appellate courts.[38] Another successful argument has been to emphasize that the issue is a matter of first impression. It is helpful here to bolster the position by adducing evidence from the affected industry as to the likely impact of the impugned decision.[39] These examples show that counsel must be creative and innovative in constructing this part of their argument because the public importance of a proposed appeal is often not immediately apparent. It is at this stage that many applications for leave to appeal an interlocutory order will falter.

Leave to Appeal an Order as to Costs

One exception to the paramount emphasis on the public importance of a proposed appeal over its merits occurs in applications for leave to appeal an order as to costs. There are few authorities on the test applied for such applications (presumably because such applications are rare), and as such the grounds for leave in such cases are somewhat sketchy. However, those authorities that do exist suggest that the merits have more weight than in any other type of leave application. Although it is nowhere expressed in any of the cases, the most obvious explanation for this departure from the courts' normal approach to applications for leave to appeal is that there is rarely much, if any, precedential value to a discretionary award of costs, and as such there is little public importance to any appeal of such an order. At the same time, the broader jurisprudential signifi-

38. See *Van Brugge v. Arthur Frommer International Ltd.* (1982), 35 O.R. (2d) 333, 16 B.L.R. 143 (H.C.J.), in which leave to appeal was granted to allow the Ontario Divisional Court to pronounce on the proper scope of the then-new *Mareva* injunction.

39. *Ash v. Lloyd's Corp.* (1992), 8 O.R. (3d) 282 (Gen. Div.).

cance of the case is sometimes a consideration in some leave applications with respect to orders as to costs, and may be a matter that counsel should address.

Authorities from both Ontario[40] and Alberta[41] essentially hold that where there is any doubt that a court has properly exercised its discretion in respect of costs, leave to appeal ought to be granted. This approach gives little weight to the consideration of public importance, and therefore stands in stark contrast to applications for leave to appeal in every other civil context. The British Columbia courts tend to apply a slightly different test, which is only slightly modified from the test used there on applications for leave to appeal interlocutory orders of trial judges.[42] This approach gives somewhat more weight to public importance than the test enunciated in Ontario and Alberta but still gives significant consideration to the merits of the proposed appeal.

However, even where the courts state that the test for leave to appeal an order as to costs differs from the test for leave to appeal generally, they often turn their minds to the public importance of a proposed appeal when determining whether leave to appeal ought to be granted.[43] Thus, while counsel have greater scope on applications for leave to appeal orders as to costs to argue the merits of the proposed appeal, the public importance of the proposed appeal ought also to be the subject of some consideration and counsel who ignore this factor do so at their peril.

Conclusion

Applications for leave to appeal are crucially important. A litigant losing such an application faces the same practical outcome as an unsuccessful appellant after full argument of the appeal. While

---

40. *Bondy v. Bondy* (1978), 6 C.P.C. 117, 4 R.F.L. 285 (Ont. H.C.J.).
41. *Prodon v. Vickrey* (1988), 31 C.P.C. (3d) 264, 93 A.R. 244, 62 Alta. L.R. (2d) 76 (Q.B.).
42. See *supra*, notes 33 to 35 and accompanying text. The specific test on an application for leave to appeal an order as to costs was set out in *Pierce, Van Loon v. Davro Investments Ltd.* (1994), 5 B.C.L.R. (3d) 112, 76 W.A.C. 309, 36 C.P.C. (3d) 71 (S.C.): (i) the applicant must identify a good arguable case having enough merit to warrant scrutiny by the court; (ii) the issues must be important, both to the parties and in general; (iii) the appeal must have practical utility; and (iv) the court should consider the effect of the delay in proceedings caused by the appeal.
43. See, for example, *British Columbia (Assessor, Area No. 09) v. Bramalea Ltd.* (1996), 50 C.P.C. (3d) 178 at p. 179, 121 W.A.C. 178 (B.C.C.A.), vard 144 W.A.C. 305 (B.C.C.A.).

authorities setting out the grounds on which leave applications are determined are not abundant, those that do exist establish that a paramount consideration on any leave application is the public or general importance of the proposed appeal and that the actual merits of the proposed appeal are a very secondary consideration, particularly in the highest appellate tribunals. Yet counsel, fresh from having argued the merits in the court below and perhaps only rarely facing the task of having to deal with applications for leave to appeal, often miss the point and vigorously argue the merits of their case to the detriment of their argument on the issues that will actually determine the application.

Counsel better serve their function of assisting the court and better serve their clients to achieve the outcomes they want when the highly unique and specific focus of leave applications is borne in mind. Argument must be directed towards the question of whether the proposed appeal can advance the law instead of being directed towards the correctness of the impugned decision. Counterintuitively, standing on the side of justice does not help much, if at all. Counsel must abandon the natural inclination to argue the merits of their case and instead must focus on the issues with which a court determining an application for leave to appeal actually grapples.