

Court Martial Appeal Court
of Canada



Cour d'appel de la cour martiale
du Canada

NOTICE TO THE PARTIES AND THE PROFESSION

To: Members of the Legal Profession and all Parties to proceedings in the Court Martial Appeal Court of Canada

From: The Honourable Mary J.L. Gleason, Chief Justice

Date: June 30, 2025

Re: **Practice Direction – Ineffective Assistance or Incompetence of Trial Counsel**

A. Introduction

1. This Practice Direction applies to appeals, applications for leave to appeal, and motions for an extension of time to appeal in which a party (termed “the Appellant” in this Practice Direction) makes allegations of ineffective assistance or incompetence of trial counsel.
2. If an unrepresented Appellant makes allegations of ineffective assistance or incompetence of trial counsel, the matter will be immediately referred to the Chief Justice or a judge of the Court for a case management hearing and directions.

B. Counsel’s Duties Before Advancing Allegations of Ineffective Assistance or Incompetence of Trial Counsel

3. Before advancing an appeal, an application for leave to appeal, or a motion for an extension of time to appeal involving grounds of appeal which allege ineffective assistance or incompetence of trial counsel, counsel for the Appellant must:
 - (a) Take the steps necessary to be satisfied that there is some foundation for any allegation that trial counsel was ineffective or incompetent; and
 - (b) Notify trial counsel informally of the nature of the allegations bearing on the professional conduct of trial counsel and give trial counsel a reasonable opportunity to respond informally to the allegations to counsel for the Appellant.

C. Advancing an Appeal Alleging Ineffective Assistance or Incompetence of Trial Counsel

4. Where a notice of appeal, amended notice of appeal, or application for leave to appeal (collectively termed simply “Notice of Appeal” in this Practice Direction) includes grounds of appeal alleging the ineffective assistance or incompetence of trial counsel:
 - (a) The Chief Justice or a designated judge of the Court will act as the case management judge to make directions with respect to the matter.
 - (b) A case management hearing will be held within four weeks of the filing of the Notice of Appeal or otherwise as directed by the case management judge.
 - (c) Where the Notice of Appeal includes grounds of appeal or is amended to include grounds of appeal that trial counsel was ineffective or incompetent,

counsel for the Appellant shall formally serve a copy of that Notice of Appeal on trial counsel.

- (d) The Appellant shall prepare and provide to trial counsel the Appellant's affidavit setting out the factual basis for the allegations bearing on trial counsel's professional conduct and a signed waiver in which the Appellant expressly waives solicitor client privilege to the extent necessary to allow trial counsel to respond to the allegations of ineffective or incompetent trial counsel. The Appellant shall also deliver a copy of the affidavit and signed waiver to the Crown/Respondent.
- (e) Upon written request by counsel for the Appellant, trial counsel shall forward trial counsel's entire trial file to counsel for the Appellant, in accordance with the professional obligations of counsel.
- (f) If trial counsel wants to keep a copy of all, or any portion, of the trial file before transferring the file to counsel for the Appellant, trial counsel (at trial counsel's own expense) may make copies of whatever documents trial counsel wishes from the file. In addition, if trial counsel wants access to the file in connection with the Appellant's case after the file has been transferred to counsel for the Appellant, counsel for the Appellant must facilitate this access to the entirety of that file in a timely way and must permit trial counsel to make copies (at trial counsel's own expense) of whatever documents trial counsel wishes from the file.
- (g) Upon receipt of a copy of a Notice of Appeal, the Crown/Respondent will forward a letter to trial counsel (in the format found in the Appendix to this

Practice Direction), requesting an affidavit in response to the allegations set out in the Appellant's material. The process for distributing trial counsel's affidavit is set out below.

- (h) Upon receipt of the material referred to above, namely (a) a copy of a Notice of Appeal, (b) a signed waiver of privilege, (c) any affidavits or other material setting out the factual basis for the allegations bearing on trial counsel's professional conduct, and (d) the request from Crown/Respondent, trial counsel shall prepare an affidavit in response to the allegations. Trial counsel's affidavit shall not divulge any confidential information learned or obtained by trial counsel during the course of the file or instructions given by the Appellant, except to the extent necessary to respond fully to the allegations of ineffective assistance or incompetence. Trial counsel's original affidavit and a copy of it shall be provided to counsel for the Appellant.
- (i) Upon receipt of trial counsel's affidavit, counsel for the Appellant shall review it and, where Appellant's counsel is of the opinion that it divulges confidential information or instructions of the Appellant exceeding what is necessary for trial counsel to respond to the allegations, edit the copy of the affidavit and redact any portions of the affidavit over which privilege is asserted. The redacted copy of the affidavit shall be sent to the Crown/Respondent (with redactions showing as blackened lines) and trial counsel, unless otherwise directed by the case management judge.

- (j) Counsel for the Appellant shall file with the Court, (a) the original unredacted copy of trial counsel's affidavit and (b) any edited or redacted version of the affidavit, both of which shall be sealed by the Registry pending directions from the case management judge.
- (k) If Appellant's counsel does not see a need for redactions, Appellant's counsel will file the original affidavit with the Court unsealed and forward a copy to the Crown/Respondent.
- (l) The Crown/Respondent will provide trial counsel with all relevant filings in relation to the ineffective assistance or incompetence of counsel ground of appeal.

D. Directions before Hearing of Appeal Alleging Ineffective Assistance or Incompetence of Trial Counsel

- 5. The case management judge, prior to the hearing of an appeal alleging ineffective assistance or incompetence of trial counsel, may make any directions necessary to ensure a timely and fair hearing of the appeal and shall specifically consider whether, after receiving submissions from counsel for the Appellant and the Crown/Respondent, it is necessary to make directions concerning each of the following matters:
 - (a) Confirmation that trial counsel has been formally served with a copy of the Notice of Appeal.
 - (b) The time periods for the preparation of any affidavits relied upon by the Appellant in support of allegations concerning trial counsel's professional conduct, to the extent that these materials have not already been prepared.

- (c) The time periods for the preparation of trial counsel's affidavit and its service to counsel for the Appellant, to the extent it has not already been prepared and served.
- (d) The time periods for any editing or redacting of trial counsel's affidavit by counsel for the Appellant to the extent that this has not already occurred.
- (e) The time period for providing the Crown/Respondent with a copy of trial counsel's affidavit , in either (i) unedited form, where counsel for the Appellant determines that no editing is required or, (ii) edited form, where counsel for the Appellant takes the position that editing is necessary because the affidavit divulges privileged information which is not necessary to respond to the allegations made against trial counsel, to the extent that this has not already occurred.
- (f) If trial counsel's affidavit has been redacted by counsel for the Appellant, the case management judge will, if required, review the original affidavit, the redacted affidavit and the Appellant's affidavit, and after hearing from the parties, decide whether solicitor client privilege has been waived by the Appellant with respect to some or all of the redacted portions. If so, the case management judge will release these redacted portions to the Crown/Respondent.
- (g) The time period for the filing of the Appellant's application to adduce fresh evidence, including but not limited to any affidavits referred to above.
- (h) If either party applies to cross-examine the affiants pursuant to the *Criminal Code*, s. 683(1) (b) or (d) on the affidavits filed, the panel hearing

the appeal will decide whether to allow cross-examination and will also hear the cross-examination. It is anticipated that cross-examination would occur before the panel hearing the appeal unless otherwise ordered by the panel.

- (i) Counsel will advise the case management judge if counsel wishes to cross-examine on any filed affidavit. The case management judge will direct that trial counsel and/or the Appellant attend the hearing of the appeal and the application to adduce fresh evidence and be available for cross-examination should the panel so order. If counsel require a subpoena for a witness, counsel will submit their application to the Chief Justice or a judge of the Court.
- (j) The time period for filing of the parties' memoranda of fact and law after the filing of the affidavits.
- (k) The case management judge may provide a memorandum setting out any orders or directions, with copies to the parties and trial counsel.

E. Hearing of Appeal Alleging Ineffective Assistance or Incompetence of Trial Counsel

- 6. Subject to the directions of the case management judge, a date for the hearing of an appeal alleging ineffective assistance or incompetence of trial counsel shall not be set until:
 - (a) The appeal books and transcripts have been filed in accordance with the *Court Martial Appeal Court Rules*.

- (b) The Appellant has filed an application to adduce fresh evidence,
identifying any and all affidavits relied upon.
- (c) All the matters listed in paragraph 5(a) – (k) above have been considered or
addressed by the case management judge.

“Mary J.L. Gleason”

Chief Justice
Court Martial Appeal Court of Canada

Appendix - Form letter to impugned trial counsel

Dear Sir / Madam:

Re: R. v. (name of appellant) File NO. _____

As you are aware, the above-captioned individual is appealing his/her conviction from (identify offence(s)) returned on (date) in (level of court). You were counsel at trial for (name of appellant). I represent the Crown/Respondent in this matter.

The appellant has alleged in a(n) (amended) notice of appeal filed on (date) that your representation of him/her was ineffective or incompetent and resulted in a miscarriage of justice. When such an allegation is made, the Court Martial Appeal Court of Canada's Practice Direction on Ineffective Assistance or Incompetence of Trial Counsel applies. A copy of this Practice Direction is available on the website of the Court Martial Appeal Court of Canada.

The details of this alleged ineffective representation are contained in the appellant's affidavit sworn (date) and (identify any other supporting material). It is my understanding that (name of appellant's counsel) has served this material upon you.

The Court Martial Appeal Court of Canada will require a response to these allegations from you in order to properly dispose of this ground of appeal. Your response should be in affidavit form. Please prepare and swear an affidavit responsive to the particulars of the allegations raised against you. To facilitate your doing so, it is my further understanding that (name of appellant's counsel) has delivered to you an express waiver of solicitor-client privilege to the extent necessary for you to respond, signed by the appellant.

It is not my intention to engage in a discussion with you concerning the content of your affidavit other than to point out that a complete response to each and every allegation is desirable. To this end, I ask you to have particular regard to the following portions of the appellant's material:

(enumerate applicable or pertinent paragraphs, etc.)

Once your affidavit is sworn, please deliver the original and a copy to (name of counsel for the appellant). (Name of counsel for the appellant) will then vet your affidavit for its adherence to the scope of the waiver of privilege. **Do not send a copy to me at this point in time.** Should there be any disputes about whether your affidavit exceeds the scope of the waiver, they will be addressed through the case management process currently underway in connection with this appeal under the supervision of (name of case management justice).