

PRACTICE DIRECTION

MANITOBA COURT OF APPEAL

RE: ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

Preamble

This practice direction replaces the January 15, 2016 practice direction. It applies to any appeal where the appellant raises as a ground of appeal that their counsel was ineffective or otherwise contributed to a miscarriage of justice in first instance.

In such cases, the appellant will often want to provide the Court with information concerning instructions to and conduct of 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 counsel in first instance or cross-examination of affidavit evidence by the responding party. The Court may also need to consider opposing affidavits from the respondent which the appellant may wish to cross-examine on.

A useful discussion of the issues raised in appeals involving allegations of ineffective trial counsel can be found in the Supreme Court of Canada decision in *R v GDB*, 2000 SCC 22, and this Court's decisions in *R v Le (TD)*, 2011 MBCA 83, and *R v Ramos*, 2020 MBCA 111.

Directive

1. An allegation of ineffective assistance of counsel is an exceptional submission that should not be made absent a proper factual record reasonably supporting such a claim. The appellant has the obligation to marshal the necessary record for the Court.
2. If the appellant is represented by counsel it is expected they will undertake a comprehensive assessment of the merits of an allegation of ineffective assistance of counsel in first instance before advancing it as a ground of appeal in the Notice of Appeal or in an Amended Notice of Appeal. That assessment shall include:
 - (a) appellate counsel being satisfied, by thorough personal investigation or other inquiries, that a reasonable factual foundation exists for the allegation of ineffective assistance, apart from the instructions of the appellant; and

(b) providing reasonable notice to counsel in first instance of the nature of potential allegation of ineffective assistance and a reasonable opportunity to respond to the allegations before the allegation is made public.

3. All Notices of Appeal will be reviewed by the Registrar or Deputy Registrar. As part of this review, an attempt will be made to discern whether the grounds of appeal include allegations with respect to the conduct of counsel in first instance. If the responding counsel becomes aware that an appellant is raising such issues he or she will promptly notify the Registry.
4. If the Registrar or Deputy Registrar determines the grounds of appeal include allegations with respect to the conduct of counsel in first instance, a letter enclosing a copy of the Notice of Appeal will be sent to that counsel. If it is not clear from the Notice of Appeal who counsel at first instance was, appellate counsel shall advise the registry. This letter will be copied to the parties to the appeal. In addition, the Registrar or Deputy Registrar shall report the matter to the Chief Justice and shall provide the Law Society of Manitoba insurer with a copy of the Notice of Appeal.
5. Where an allegation of ineffective assistance of counsel is made, a meeting for directions, prior to the setting down of the appeal for hearing is mandatory and shall be set by the Registrar at such time as directed by the Chief Justice.
6. Prior to the first meeting for directions with the Chief Justice, or a judge appointed by them, all parties shall reasonably attempt to agree to a timetable, with the assistance of the Registrar or Deputy Registrar, for the orderly conduct of any matters related to the allegation of ineffective assistance of counsel.
7. Counsel in first instance shall be provided with copies of correspondence or documents filed with the Court relating to the allegation of ineffective assistance.
8. Counsel in first instance must advise the Court at the meeting for directions whether they intend to participate in the proceeding. In particular, counsel will advise the Court whether they intend to make any motion or file affidavit evidence.
9. The status of the counsel in first instance in the appeal, and their rights of participation, shall be discussed at the meeting for directions. If there is a disagreement as to the status of counsel in first instance in the appeal, and their rights of participation, a motion to settle the dispute will be required.
10. Should the response by counsel in first instance involve disclosure of potentially privileged information, a motion regarding waiver of privilege would be expected if the parties cannot resolve the matter between themselves.

11. In some circumstances, the nature of the allegations against counsel in first instance may result in an application for intervener status on the appeal.
12. The fact there is an allegation of ineffective counsel does not relieve the parties of the obligation to perfect the appeal in accordance with the Rules, in particular any motion for further evidence.

ISSUED BY:

“Original signed by Justice Cameron”

**The Honourable Diana Cameron
Senior Judge of the Court of Appeal**

DATE: December 14, 2022