

## **Applications for New Evidence Frequently Asked Questions**

### **1. What is new evidence?**

Only the evidence given (oral or written) and exhibits entered in the court or body appealed from can form part of the record on appeal (rules 14.70 and 14.28(1)). Any evidence, facts or other information that was not considered by the lower court or body (including any information that was created or discovered after the date of the decision that is being appealed) is “new” evidence. New evidence may only be introduced in the appeal with the court’s permission (rule 14.70). If you wish to rely on new evidence, you must bring an application to admit new evidence (rule 14.45).

### **2. Is there a deadline to file an application to admit new evidence?**

Applications to admit new evidence must be filed and served before the filing of the applicant’s factum (rule 14.45(1)). It is common for applications to admit new evidence to be filed at the same time as one’s factum. Most importantly, applications to admit new evidence cannot be filed after your factum is filed without permission of the Court.

### **3. What if I missed the deadline to file an application to admit new evidence?**

If you want to file an application to admit new evidence after filing your factum, you must obtain permission to do so. You should first determine whether the other party or parties to the appeal objects to a late application for new evidence, and then contact the case management officer for directions.

### **4. What documents are required to file an application to admit new evidence?**

An application to admit new evidence requires:

- (a) an application in [Form AP-3](#) (civil) or [Form CRA-F](#) (criminal),
- (b) a memorandum of argument (maximum 5 pages),
- (c) copies of the proposed new evidence, and
- (d) envelopes large enough to contain the new evidence marked “New Evidence” and labelled with the appeal number and style of cause.

An affidavit in support of the application and authorities are optional.

The Court will keep 5 copies of all documents. This does not include the copies that you will require for yourself and for service.

**5. Is there a cost to file an application to admit new evidence?**

For all civil appeals, the cost to file an application to admit new evidence is \$50.

For all criminal appeals, there is no cost to file an application to admit new evidence.

**6. What is the purpose of the envelope? Does that mean that the judges hearing the appeal will not look at what's inside?**

New evidence does not become part of the court record until it is admitted. The envelope is a visual cue that what is inside has not yet been admitted. The judges hearing the appeal will open the envelope and read the new evidence before the appeal is heard. If the new evidence is admitted, it will be removed from the envelope and placed on the court file.

**7. When is the application to admit new evidence heard?**

The application to admit new evidence is heard at the same time that the appeal is heard and by the same panel of judges, so the appeal and the application to admit new evidence are heard concurrently. Typically, each party makes oral submissions on the new evidence application at the beginning of the appeal. The panel will reserve their decision on the application and ask the parties to proceed with their oral submissions on the appeal.

Counsel are permitted to refer to the new evidence in oral argument, but should attempt to advise the Court when new evidence is being relied on. The panel will give a decision on the application to admit new evidence and on the appeal at the same time, after all the oral argument is heard: [McDonald v Brookfield Asset Management Inc.](#) 2016 ABCA 419 at paras. 6-8.

**8. What is the test to admit new evidence?**

The test to admit new evidence is commonly referred to as the “Palmer test” ([R. v. Palmer](#) [1980] 1 SCR 759). The four factors that the Court will consider are:

- (a) whether the evidence, by due diligence, could have been introduced at trial,
- (b) whether the evidence is relevant in the sense that it related to a decisive or potentially decisive issue in the case,
- (c) whether the evidence is credible in the sense that it is reasonably capable of belief, and
- (d) whether the evidence, if believed, could reasonably, when taken with other evidence introduced, be expected to have affected the result.

The memorandums of argument filed by the parties should address this test.

**9. What is the deadline for a response to an application to admit new evidence?**

A memorandum of argument in response to an application to admit new evidence (or a letter indicating that no response will be filed) must be filed and served at least 10 days before the scheduled hearing of the application (rule 14.43).

**10. How do I write the factum if I don't know whether the new evidence will be admitted? Can the factum include references to the new evidence or contain argument that relies on the new evidence?**

The factum can summarize the new evidence in "Part 1 – Facts", but the factum should clearly identify which evidence was entered at trial and which evidence is "new". The new evidence can also be referred to in "Part 4 – Argument", but again the factum should highlight when the new evidence is being relied on as part of the argument.

**11. Is the new evidence accessible to the public?**

Before a ruling is made on the application to admit new evidence (or if the application is denied), the new evidence does not form part of the file and is therefore not accessible to the public without the court's permission. In that case, the case management officer should be consulted for directions.

If the application to admit new evidence is granted, the new evidence is placed on the file and is accessible to the public in the usual course (i.e, upon payment of the requisite search and photocopy fees and subject to any access restriction or publication ban).