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Appellate jurisdiction over interrelated final and interlocutory orders

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The Court of Appeal for Ontario recently commented on a particularly complex area of appellate jurisdiction: interrelated final and interlocutory orders. The issue arose in *Martin v. 11037315 Canada Inc.* 2021 ONCA 246, where the Superior Court judge made both final and interlocutory orders arising from the same application. Generally speaking, appeals from interlocutory orders lie only to the Divisional Court with leave, whereas appeals from final orders lie in the Court of Appeal. The result may be separate appeals in different courts arising from the same proceeding. But what about a case like *Martin*, where the interlocutory and final orders are arguably intertwined?

Split jurisdiction between interlocutory and final orders is among the more vexing issues in appellate advocacy. Identifying the correct appeal route from different aspects of an order is notoriously complex, and the consequences of error can be significant. Appellate jurisdiction is statutory, and no appeal lies to a court without jurisdiction. There are various mechanisms in the *Courts of Justice Act* to relieve parties from the consequences of error (such as transferring the appeal to the proper court), but the application of these provisions depends on the circumstances.

Martin is potentially significant as another recent case addressing interrelated final and interlocutory orders. There is a line of authority holding that the Court of Appeal may have appellate jurisdiction over combined final and interlocutory orders — provided they are sufficiently interrelated — without requiring the appellant to seek leave to appeal in the Divisional Court. *Martin* is at least the fourth case relying on this line of authority since March 2020 (*Abbasbayli v. Fiera Foods Company* 2021 ONCA 95*; 2099082 Ontario Limited v. Varcon Construction Corporation* 2020 ONCA 202; and *Cooper v. The Laundry Lounge, Inc.* 2020 ONCA 166).

Background of Martin

Martin involved a property dispute. The Superior Court exercised its equitable jurisdiction essentially to restore a homeowner to the equity she had in her home, which she had lost when the appellants (numbered corporations) obtained a foreclosure order by default judgment. For purposes of the jurisdictional issues, there were three categories of orders subject to the appeal:

• an order setting aside the default judgment foreclosing on the home (interlocutory);

• orders for the sale of the home and for the payment of the proceeds so that the homeowner recovers her equity, net of the mortgage and other obligations (final); and

• an order dismissing a motion to vary the orders based on a "new fact" (interlocutory).

The appellants commenced an appeal in the Court of Appeal from these orders, without seeking leave from the Divisional Court to appeal from the interlocutory orders. This created a potential jurisdictional problem, which Justice Sarah Pepall raised with counsel. Even though the parties were content to proceed in the Court of Appeal, their consent cannot confer appellate jurisdiction.

Section 6(2) of the *Courts of Justice Act*

The situation in Martin is potentially addressed by the transfer provisions in the Courts of Justice Act, but there are limits to these powers. Section 6(2) grants the Court of Appeal jurisdiction over an appeal that lies in the Divisional Court, provided there is a concurrent appeal in the Court of Appeal in the same proceeding. Where the Court of Appeal has jurisdiction under this provision, the power to exercise that jurisdiction is discretionary.

However, s. 6(2) does not empower the Court of Appeal to grant leave to appeal where the Courts of Justice Act requires the appellant to seek leave to appeal from the Divisional Court as a prerequisite for the appeal. In these circumstances, the Court of Appeal cannot assume jurisdiction over the appeal unless and until the Divisional Court itself grants leave to appeal. (See, for example, *Mader v. South Easthope Mutual Insurance Company* 2014 ONCA 714, para. 55.)

This limit is particularly significant where interlocutory orders are involved, such as in *Martin*. An appeal from an interlocutory order of a superior court judge lies to the Divisional Court only with leave of that court (s. 19(1)(b) of the *Courts of Justice Act*). To ground appellate jurisdiction, the appellant must first seek and obtain leave from the Divisional Court. Only then can the interlocutory appeal can be combined with an appeal already in the Court of Appeal.

Intertwined final and interlocutory orders

Notwithstanding the limits of s. 6(2), there is a line of authority applying this provision to intertwined final and interlocutory orders to ground jurisdiction in the Court of Appeal without leave. The court in *Martin,* referencing *Lax v. Lax [2004] O.J. No. 1700,* held "that leave to appeal from an order of a judge of the Superior Court is not required where the issues in an appeal from an order having final and interlocutory aspects are so interrelated that leave would inevitably have been granted."

Martin picks up this line of authority from Lax, which has been followed in several cases since. Including *Martin*, the Court of Appeal has relied on this line of authority at least four times since March 2020. Prior to that, the Lax principle was cited occasionally, but less frequently.

At first glance, Lax may seem inconsistent with the notion that the Divisional Court must grant leave to appeal before the Court of Appeal has jurisdiction to take up the appeal under s. 6(2) of the *Courts of Justice Act*. However, the Lax principle makes good sense and is a practical way of addressing the multiplicity of appeals that may otherwise arise from split appellate jurisdiction. Requiring the appellant to seek leave in the Divisional Court would add unnecessary time and expense. This is best avoided, particularly given the pandemic's strain on the judicial system.

Application in Martin

In *Martin*, Justice Pepall was satisfied that it was at least arguable that the Court of Appeal has jurisdiction. The question remains open for final resolution, however, as the immediate issue before Justice Pepall was whether to allow the appellants to proceed with their motion to restore the appeal (which the Registrar appears to have dismissed for delay). Justice Pepall allowed the motion to proceed on April 28, 2021. As of writing, a decision has not been reported.

Additional COVID practice point

Martin raises an important practice point during the COVID-19 pandemic. Formal orders had not been taken out in the Superior Court, as the application judge dispensed with formal typed orders given the pandemic. Instead, he determined that his endorsements were deemed to be orders.

The problem this raises in an appellate court is that the appeal is from the order, not the reasons. The formal order is the basis for the appeal, not a formality, and must be before the appellate court. Justice Pepall noted the statement on the Court of Appeal's website that an "issued and entered order is required for the purpose of an appeal to the Court of Appeal for Ontario in civil proceedings." She recommended that registry staff advise the appellants that they should obtain an issued and entered order before the hearing of the motion. This is good advice for us all.

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