motion should be made for substitution of the personal representative or another interested party for the deceased. Once the appeal is properly constituted with a live appellant, the court must then consider whether to abate the appeal or to exercise its jurisdiction to hear the appeal despite it being rendered moot by the death of the original appellant. The general test is whether there exist special circumstances that make it "in the interests of justice" to proceed (*Smith* at paras. 9, 10, 20, 50, and 51; *Simon Fraser University v. Noble*, 2011 BCCA 334 at paras. 16 to 18, citing *Smith*).

E. INTERVENERS ON APPEAL [§4.23]

1. INTERVENER STATUS GENERALLY [§4.24]

Under the new Court of Appeal Rules, the Court of Appeal has adopted the spelling "intervener", consistent with the spelling used by the Supreme Court of Canada (under the former Rules, the spelling was "intervenor").

A party who intervened in the court below is not automatically entitled to intervener status in the Court of Appeal; the proper procedure is for the proposed intervener to make an application for intervener status to a justice of the Court of Appeal pursuant to Rule 61.

There are generally two routes to intervener status. Intervention may be permitted: (1) where the applicant has a direct interest in the litigation; or (2) if the appeal raises public law issues that legitimately engage the applicant's interests, and the applicant brings a different and useful perspective to those issues that will be of assistance to the court (*British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2018 BCCA 282 (Chambers) at para. 14). These two separate routes to intervener status are discussed in the following topics.

A witness or counsel who feels aggrieved by comments made by the trial judge in reasons for judgment has no right to intervene on the appeal (*Shea v. Manitoba Public Insurance Corp.*, 1993 CanLII 1309 (BC CA)).

2. HOW TO SEEK LEAVE TO INTERVENE [§4.25]

Rule 61 provides that "[a] person, other than a party, interested in an appeal" may apply for leave to intervene. Likewise, s. 30(f) of the Act provides that the general powers of a justice of the Court of Appeal include the power to "grant leave to appeal".

Having regard to cases decided under the previous rule governing intervener status (Rule 36 of the old Rules), the same substantive considerations are relevant to intervener applications under the current *Court of Appeal Act* and Rules (*Thomas v. Rio Tinto Alcan Inc.*, 2022 BCCA 415 at para. 28).

Under Rule 61(2), a party seeking leave to intervene must do three things within 14 days after the appellant files the appellant's factum: (1) obtain a hearing date for the application to intervene; (2) file and serve a notice of application in Form 4; and (3) file and serve a memorandum of argument prepared in accordance with the court's completion instructions. As a matter of practice, the registry will not accept an intervention application before the appellant's factum has been filed.

The completion instructions for a proposed intervener's written argument requires the applicant to describe itself and its interest in the appeal, identify the position to be taken on the appeal, briefly summarize the submissions to be advanced and their relevance to the appeal, and set out why the submissions will be useful to the court and different from those of other parties.

Affidavits in support of interventions should describe the nature of the applicant and why it is directly or indirectly interested in the points being appealed. Affidavits should not offer opinions about the correctness of the decision under appeal. Cross-examination may be ordered on affidavits to determine whether the evidence is useful or admissible (Rule 44(1)); see also *Re Down*, 2000 BCCA 218 (Chambers)).

The justice hearing an application for leave to intervene may grant leave to intervene on any terms and conditions that the justice may determine (Rule 61(3)). The justice is to specify the date by which the factum of the intervener must be filed, and may make provisions as to additional costs incurred by the other parties as a result of the intervention (Rule 61(3)).

Rule 41 permits a justice to extend (or abridge) any time limit provided for in the Rules, but an application to intervene brought late in the proceedings may be denied if it makes it impossible for the parties to address the matters sought to be raised by the intervener (*John Carten Personal Law Corp. v. British Columbia (Attorney General)*, 1997 CanLII 4039 (BC CA) (Chambers); *Apsassin v. British Columbia (Oil and Gas Commission)*, 2004 BCCA 240 (Chambers) at para. 8).

Where an application to intervene is brought shortly before the date fixed for the hearing of an appeal, an extension of time to apply for

intervener status may be denied. However, late applications may be allowed if the delay in question was inadvertent and the proposed intervener had always expressed an intention to intervene (*Leonard v. The Manufacturers Life Insurance Co.*, 2019 BCCA 375 at para. 42, application to vary dismissed 2020 BCCA 5).

3. SCOPE OF AN INTERVENER'S PARTICIPATION ON APPEAL [§4.26]

Unless a justice otherwise orders, an intervener must not file a factum longer than 10 pages, must include in the factum only those submissions that pertain to the facts and issues included in the factums of the parties, and is not to present oral argument (Rule 61(4) and (5)). An intervener's factum must also be prepared in accordance with the court's completion instructions (Rule 61(4)(a)).

Interveners may adduce evidence on their leave application, but require the court's permission to adduce evidence on the appeal itself. An intervener is not entitled to adduce evidence of adjudicative facts that alter the record below or go to the merits of an appeal (*PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 at paras. 186 and 188, affirmed on other grounds 2011 SCC 44; *British Columbia v. Philip Morris International Inc.*, 2016 BCCA 363 at para. 27).

The usual practice of referring fresh evidence applications to the division hearing an appeal arises from the *Palmer* test for the admissibility of fresh evidence tendered by a party and the criterion of whether the evidence could reasonably be expected to have affected the result of the case (see also Rule 59). This rationale does not apply in the case of fresh evidence tendered by an intervener (*Philip Morris International Inc.* at para. 27. referring to *Palmer v. The Queen*, 1979 CanLII 8 (SCC)). (See "Fresh or New Evidence on Appeal" in chapter 6 for detailed discussion on bringing additional evidence in an appeal.)

4. GROUNDS FOR GRANTING INTERVENER STATUS: DIRECT INTEREST VERSUS PUBLIC INTEREST [§4.27]

The applicable principles governing intervener applications are summarized in *J.P. v. British Columbia (Child, Family and Community Services)*, 2016 BCCA 124 (Chambers) at paras. 3 to 6. The court usually considers the following criteria:

(1) the nature of the individual or group seeking intervener status;

(2) the directness of the applicant's interest in the matter; and

(3) the suitability of the issue with respect to which leave to intervene is sought.[11]