WELL-RUN APPEALS

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The Canadian Judicial Council 2006
This excellent report is the culmination of an initiative of the Canadian Judicial Council that started in the spring of 2004. At that time, the Council’s Appeal Courts Committee recommended that the Honourable Jean Côté be asked to prepare a report on the procedures of appellate courts in Canada, with the objective of identifying best practices. The Council accepted the Committee’s recommendation and from July through December 2004, Justice Côté carried out an exhaustive review of the procedures used by the appeal courts throughout the country.

In his report, Justice Côté, with the assistance of Chief Justices, puisne judges and administrators of Canada’s appeal courts, evaluates procedures now in use and makes insightful recommendations on how present processes can be adjusted to conform with best practices, taking into account the circumstances of each jurisdiction. The best practices identified in the report will help to improve the efficiency of appellate processes throughout Canada and ultimately will facilitate better access to justice for Canadians who use our appeal courts.

On behalf of the Canadian Judicial Council, I thank Justice Côté and those who assisted him for their hard work and their contribution to the administration of justice in Canada.

The Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada
Chairperson, Canadian Judicial Council
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CHAPTER 1
INTRODUCTION

“Habit with him was all the test of truth,
‘It must be right: I’ve done it from my youth.’”

– Crabbe, The Borough, letter 3 l. 138 (1810)

A. REQUEST BY COUNCIL

In the spring of 2004, the Canadian Judicial Council requested me to study and report on best practices for appellate courts in Canada. In 2000, I had studied the speed aspect and published a book.¹ I worked on the Council’s request from July to December 2004, thanks to my colleagues’ kindly assuming my share of Court of Appeal work.

This document is the Report requested.

B. BASIC CONCLUSION

1. The Big Problem

This Report will produce very modest benefits unless we all change a number of our attitudes to appeals. Tinkering with Rules alone will do little good.

Since 1851, England alone has conducted some 60 official studies of civil procedure. Most led to reforms of the Rules or statutes. Those since the 1870s have had little effect. Most were killed by the indifference or opposition of the legal profession, or the misunderstanding or indifference of the judges. The culture changed little after 1875.² Ontario has conducted official similar studies in 1973, 1976, 1987, 1991, 1992, 1995-6, and partly in 1981. The reforms attempted before 1995 failed.³

This present Report suggests many changes in appellate Rules and procedures. Appendix A is an outline of a full set of recommended Rules and legislation for a Court of Appeal. But if we sit back and rely upon litigants to invoke the new Rules, and upon individual judges to interpret the new Rules and implement them, significant improvement is very unlikely.

2. The Solution

Our only hope of real improvement is to shake off four shackles:

(a) our assumption that appeals need little policing, for which task we may rely on respondents, so abdicating courts’ own duties;⁴ 
(b) our assumption that only the named parties have an interest in an appeal or its procedures;⁵ 
(c) our assumption that all that matters is “substantive” result, i.e. correctness of final decision;⁶ and 
(d) our assumption that justice always demands flexibility and ad hoc treatment free of any truly binding procedure, and that predictability, certainty and finality are unimportant.⁷

Each individual judge in each court needs to see and remember the bigger picture, and to stiffen his or her resolve. Many Chief Justices, Registrars, and Court of Appeal staff lawyers have been voices crying in the wilderness.

I hope that this national Report will also help to show three things:

(a) how common are the complaints and problems of most appeal courts;⁸ 
(b) how many solutions are at hand, oft-studied and recommended, workable, reliable, and already tested; and 
(c) how ridiculously skimpy are many facilities and resources in most Courts of Appeal, and how even a few staff could make a big difference.

C. METHODS USED AND PEOPLE CONSULTED

See Appendix B at the end of this Report.

I drafted this Report largely in longhand, trying to make it concise. It was then keyboarded and went through half a dozen drafts and revisions. The process from initial draft to penultimate version took 6 or 7 weeks.

My assistant Marge Smith did all the keyboarding and format revisions, and made good suggestions about format. She performed prodigious unremitting labor, with no respite and looming deadlines.

In addition, Ms. Smith made all the travel arrangements, created a filing system, and cross-filed all the answers to the questionnaire and all correspondence.

We all owe her a great debt for making this possible.

Debra MacGregor, one of the Alberta Court of Appeal’s staff lawyers, is a trained professional editor. She helped track down many references, and (along with Christina Pereira) supplied the tables and graphs. She went over each chapter at least twice, corrected errors, and helped with the flow and intelligibility of the contents. I am very grateful to her also.

⁴ See Chapters 4 and 6. 
⁵ See Chapter 5. 
⁶ See Chapter 5. 
⁷ See Chapter 5. 
⁸ See Chapter 7.
CHAPTER 2
SCOPE OF REPORT

“On the question you ask depends the answer you get.”
– Frankfurter J. in Bay Ridge Operating Co. v. Aaron (1948) 334 U.S. 446, 484

A. THE ASSIGNMENT

The Canadian Judicial Council asked me to recommend the best practices for Canadian appellate courts to follow. The aims of speed, economy and access are to be the focus. I take access and economy to refer to all parties or potential parties to an appeal, and also to the public.

The interaction of the three goals often raises problems or requires choices, both of which are introduced in Chapter 3.

B. QUESTIONS OF PROCEDURE AND INTERNAL OPERATION

I have interpreted my mandate widely. Subject to the five months available, I have tried to look at the whole range of a number of topics:

1. Traditional practice and procedure topics, including judges’ and lawyers’ attitudes and philosophy about them.
2. The effects on the public and litigants of practice and procedure.
3. Motives of litigants and counsel bearing on practice and procedure.
4. Administrative aspects of handling appeals.
5. The internal operating procedures of appellate courts.

Some aspects of these topics seemed to require too much information for any country-wide value of my study, and for my resources. I have omitted them entirely. An example would be many personnel topics, including whether assistants (secretaries) and Registry staff should be an integral part of the regular public service.
C. EXCLUDED TOPICS

I have also tried to stay away from substantive topics, such as the right to appeal, the grounds for allowing or dismissing appeals, standards of review, dissenting, precedent and overruling it, “judicial activism,” or the dynamics of decision-making in a panel. Nor do I discuss style, form, or format of judgments, or their publication or reporting by courts or publishers. I also omit selection, training, discipline, and collegiality of judges.

Premises and their security are large topics which affect several aspects of my study. I have touched on them only briefly.

Nor did I try to hand out report cards with marks for individual appeal courts. I must state, however, that every appellate court in Canada taught me a good deal. Every single one is a model to other courts in one or more areas, and virtually every one has solved some problem which puzzles most or all of the others. I hope that the analytical and less anecdotal style of this Report will not obscure too many of those good examples.

I owe a great debt to all the people who helped me and are listed either at the end of Chapter 1 or in Appendix B to this Report. I believe that anyone who reads this Report will owe them a similar debt. I thank them sincerely for their care, their help, their generosity, their hospitality, and for being themselves.

It became very evident that Canada’s appellate courts are being administered by fascinating people, judges and staff, able and dedicated to a degree which few people could even imagine.

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10 I visited all of them except the three on which I sit, and I got questionnaires from every appellate court.
“To proportion the eagerness of contest to its importance seems too hard for human wisdom. The pride of wit has kept ages busy in the discussion of useless questions, and the pride of power has destroyed armies to gain or keep unprofitable possessions.”

— Samuel Johnson, *Thoughts on the Late Transactions Respecting Falkland’s Islands* (1771)

“There can be no economy where there is no efficiency.”

— Benjamin Disraeli, *Address 1 October 1868* (Times 3 October 1868)

### A. LISTING OF OBJECTIVES

The Canadian Judicial Council properly lists three aims for this study: speed, economy and access.

1. **Speed**

   Lord Woolf and Lord Bowman endorsed this aim in England.¹¹ Its importance is discussed in Chapter 5, Parts A, B, and E.

2. **Economy**

   Lord Woolf defines economy as devoting to a given suit resources proportional to the need of that individual case, and no more.¹²

3. **Access**

   See Chapter 19.

4. **Correctness**

   Of course any Court of Appeal’s aim is also correctness, i.e. applying and developing the right law (including standards of review) to this case, and making clear law for the future. That requires a clear, final answer and binding precedent. A province needs some appeals, to make, clarify, and make uniform the law. Correctness is very important in the Supreme Court of Canada, relatively less at lower levels of court.¹³

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¹² Cf. Chapter 5 on excessive expense and delay. See also Lord Bowman, *op. cit. supra*, at 23 and 26.

¹³ Chapter 5 discusses this at length.
B. CONFLICTS AMONG OBJECTIVES

The Council’s three objectives conflict more than they agree.

One could cure most problems of access with many more resources, e.g.:

(a) Double the number of judges, give each judge a staff lawyer and two law clerks, and fly them all over the province.

(b) And give a free lawyer to any unrepresented litigant.

So therefore, access and economy tend to conflict heavily.

Economy to litigants and economy to the taxpayer tend to conflict, as the examples above show. Another example of that: requiring counsel to organize the record for the judges saves judges’ time and so saves taxpayers’ money, but it costs lawyers and litigants money.

Economy and speed sometimes cooperate. For example, delay means more pending cases, litigants’ interest and capital lost, and more handling and storage and supervision costs for counsel, the court, and taxpayers.14

But sometimes economy and speed conflict, e.g. expedited transcripts cost more. A lawyer is entitled to charge his client more for working to a truly tight deadline. That may involve using several lawyers, with some overlap of effort. Help from lawyers without charge to lay litigants (in drafting documents, or free transcripts), speeds up appeals. But it usually costs the taxpayer more (to pay the lawyer). Even advice from Registry staff to self-represented litigants often speeds things up, but costs the taxpayers, because it takes up a significant fraction of the staff’s time. Conversely, requiring counsel to try to agree on what exhibits to omit from an appeal book may save a few dollars, but can easily consume six months.

Speed and access sometimes cooperate (coincide), but often conflict. For example, postponing a hearing until the Court of Appeal sits in a small town where the parties live gains accessibility, but loses speed. Translating Rules and procedures or individual documents into another language (or into simpler phrasing) improves access, but costs money for translation (or rewriting). Dismissing an appeal for non-prosecution (or threatening to) buys speed, but at the cost of the appellant’s access.

C. STRONG PUBLIC INTEREST IN THREE OBJECTIVES

Three of the objectives (correctness, speed and economy) do not refer only to parties’ interests, still less those of lawyers. The public has a large interest both in criminal appeals, where that should be obvious, and in civil appeals too. That is developed further in Chapter 5.

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14 See Chapter 5, Part E.
D. ACCESS INCLUDES RESPONDENTS TOO

Access to justice for the respondent involves speed of the appeal! If the appellant can appeal from a judgment and then neglect to do anything with the appeal for some years, then for those years the respondent has no certainty. His judgment at trial is locked in escrow. And execution is stayed too, in many provinces.

E. DANGEROUS SIDE OF APPEALS

1. General

The whole point of litigation is certainty and finality between the parties. An appeal erases all that, so long as it lasts. To a lay person, an appeal gives the impression that litigation is seamless and eternal, and that its promises of a final answer are hollow.

Appeals constantly throw precedent into the melting pot (especially coupled with the power of Courts of Appeal to reconsider past precedent), and so harm the public by heavily eroding certainty of the law.

An appeal can be expensive, especially if there are interlocutory motions during it.

Appeals consume a scarce resource: bright, learned, experienced judges.

2. Stalling

(a) Appeals offer lots of chance for careless or unethical parties or lawyers to delay, stall, or play games. See Chapter 4.

(b) That is especially true because traditional methods put all control over the first three-quarters of the appeal process solely into the appellant’s hands. See further Chapter 6.

All of subpart 1 is exacerbated by slow-moving appeals.15

All the other evils of delay are also drawbacks of appeals, because any appeal delays final judgment by at least six months, often several years.16

F. TOO MUCH ACCESS TO APPEALS IS A BAD THING

If everyone could appeal everything and had long times to do so, but paid little or no fee, and got free lawyers, everyone would appeal almost everything. So we would need about as many Appeal judges as Queen’s Bench judges and Provincial Court judges. Judging by their present numbers, that would require 20 times as many appellate judges as we have now! If Canada could afford all that, it would be unworkable. It would cause appalling delay too. Nothing would ever be finally decided.

So we should beware of too close an analogy to trial courts.

15 See Chapter 5.

16 Ibid.
G. NEED TO LOOK BEYOND LABELS

1. See What Actually Happens

We must see what we are really doing, e.g. in appeals from one judge, or in leave motions.\(^{17}\)

Legally-trained people see legal fictions or constructs. They are like an airline with two boarding lounges. Sitting in them or moving between them is not progress. It is inaction.

Lay people just see inaction, talk, and reploughing same ground. They do not see those mental constructs.

2. Be More Analytical

Lord Bowman’s Report\(^ {18}\) is not very analytical, and it does not follow through with all of Lord Woolf’s objectives.

\(^{17}\) See Chapters 6 and 9 respectively.

\(^{18}\) Review of the Court of Appeal (1997).
CHAPTER 4
MOTIVATION, INCENTIVES AND PENALTIES

“No written laws can be so plain, so pure,
But wit may gloss and malice may obscure.”
– Dryden, The Hind and the Panther, II (1687)

“Judges are apt to be naïve, simple-minded men.”
– Oliver Wendell Holmes J. (N.Y.C. Speech 15 Feb. 1913)

A. INTRODUCTION

The present *laissez-faire* system of litigation (including appeals) leads to a culture where the litigation is seen as a battlefield where no rules apply.19 Process is often master, not servant.20 Tools originally designed for proper efficient conduct of litigation are now subverted from their proper purpose.21 Rules are flouted on a vast scale, timetables are ignored, and there is no effective enforcement mechanism.22 Costs are totally ineffective to control bad behavior.23 The October 2004 Alberta Law Reform Institute’s study of Rules24 notes that all comments on dismissal of suits for want of prosecution supported absolute non-discretionary dismissal after certain delay, but wanted the existing period shortened!

B. MIXED MOTIVES OF PARTIES AND COUNSEL

1. Evidence of Mixed Motives

When we speak of motives, we must recognize that many people do not set out to perform poorly. But hell is paved with good intentions. People usually follow the course of least resistance. They are often lax.

The motives and priorities of litigants and lawyers are often mixed.25

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20 Ibid.
21 Ibid.
22 Ibid.
23 Ibid. And see Chapter 5 below.
There are now some litigators who are sophisticated and aggressive. They have poor motives. That is recognized in Quebec, but less understood elsewhere. Many appellate judges think that does not happen, or rarely does; but Registry staff and lawyers know better. Lord Woolf speaks of this both generally, and with respect to delaying tactics of some defendants’ insurance companies. Criminals are often neither honorable nor prompt.

Mixed or oblique motives in a number of appeals are not mere speculation. In almost every Court of Appeal, half of civil appeals and a third of criminal ones never get to a hearing by a panel. They are abandoned, dismissed for want of prosecution, struck off, etc. See the Appendix to this chapter. British Columbia’s Registrar notes the large number of appeals in British Columbia which are dismissed for want of prosecution. Some appeals in British Columbia or the Federal Court of Appeal have everything filed and a certificate of readiness, but do not proceed, and are finally deemed abandoned. The Quebec Court of Appeal and some others note that many appeals are struck off or deemed abandoned, with no protest, and no attempt to cure or restore them. Ontario found the percentage was very high when their lists were backlogged a few years ago.

Newspapers are full of stories about refugees and illegal immigrants who use appeal after appeal to various administrative tribunals (and judicial review) to stay here illegally over 15 years. The Alberta Court of Appeal presses maintenance appeals for progress, and then about 90% of those appellants abandon their appeal. Once the Federal Court of Appeal began to fast-track interlocutory appeals and limited them to one hour oral argument, they stopped being filed. They had been stalls.

Total gridlock used to be created in Ontario when counsel combined an appeal and its automatic stay, with bankruptcy. That was cured by case law. Many summary conviction appeals are just a device to keep a driver’s license.

2. Judges’ Assumptions

None of this is news to lawyers or to Registry staff. Yet outside Quebec, one assumption underlies a great many discussions of appellate practice, most reported cases on delay and waiving the Rules, most actual decisions for time extension (reported or not), and many discussions with appellate judges. They assume that virtually all appeals are sincere, founded on an honest difference of opinion, and launched (by the appellant) and opposed (by the respondent) by people in a hurry to get a judgment on the merits.

I seriously question those assumptions.

Recall that most appellate judges left practice upwards of 20 years ago, and had been hand-trained by people with the old professional traditions. Not so of young lawyers now. The common lack of civility may often be a symptom of something bigger and deeper. Over 20 years ago, there was no serious oversupply of lawyers, and often not enough lawyers. The practice of law was far less competitive then. Then, most lawyers knew each other and trusted each other, with a few exceptions. There were professional courtesies. Now most lawyers do not know or trust each other. A request to an opponent for some concession often sounds like a trap.

28 Court officials told an Ontario study that they are frustrated by the number of court files which are opened and then never looked at again: Civil Justice Review (Blair J. and Lang, co-chairs), *First Report* (March 1995 Toronto) p. 92 (sec. 6.4).
The 1995 Ontario study showed that bench, bar, and court administration each had serious criticisms of the other two groups, though none about their own group.29

Many Canadian cities are no longer the smallish stuffy respectable places which they were in our youth. Even if most lawyers are decent, the same is not true of most litigants. We have seen Canadian Schedule 1 chartered banks, trust companies, big insurance companies, and big publicly-traded companies, fail under a welter of tricky practices and misleading accounts. Why assume that that only occurs in the newspapers and never in appeal courts’ work? Any persistent crook will end up in a Court of Appeal sooner or later.

I do not suggest that most appellants or counsel are insincere, though some of each are.

But not every litigant or lawyer is keen to work efficiently every day, especially if the motivation structure is backwards. One of my former law partners used to say that lawyers respond to sanctions, not to rules.

3. Examples30

I offer these examples of tarnished motives.

(a) Many lawyers are over-busy, and oil only the squeakiest wheels. They intend no harm, but only get around to dealing promptly with the matters where a significant sanction looms. It is fairly uncommon that all four participants (two parties and two lawyers) simultaneously consider the appeal a high priority in terms of both importance and urgency. Note that the same lawyer who says that he or she cannot write a factum in 8 weeks, can often do a motion for bail or restoration of license in 24 hours, with memo and affidavits.

Many a lawyer or a lay litigant is not very familiar with the Court of Appeal’s Rules and practices, and has not diarized their deadlines. He or she just goes by what the Court of Appeal says. His or her documents are assumed to be good enough unless the Registry counter bounces them when tendered for filing. He or she does little unless the Court of Appeal is chasing and threatening him or her.31

(b) Sometimes both parties to an appeal are sincere, but one or both have some temporary tactical oblique motive, e.g. to grind the other side down, to gain some temporary advantage (e.g. bail or a stay or an anticipated favorable precedent from another court). Lord Woolf speaks of wars of attrition by use of interlocutory litigation, and delaying litigation where the defendant has more financial resources than the plaintiff.32 A war of attrition is almost irresistible if someone else is funding the munitions. Indeed, excessive delay and expense often does bar access.


31 The Ontario study was told by court administrators that they spend a lot of time checking documents for lawyers and telling lawyers or their staff how to do things: Civil Justice Review, op. cit. supra, at 92 (sec. 6.4).

Some appeals are wars of attrition on both sides, e.g. because large amounts of money are at stake. This is common in matrimonial litigation. Sometimes one or both lawyers are churning the file to generate fees.\(^\text{33}\) One author likens litigation to a 1930s all-night dance marathon.\(^\text{34}\)

(c) A considerable number of appeals are filed merely to buy breathing room, e.g. to make a decision or to negotiate a settlement. Many appellants do not want an adjudicator; they want a refrigerator. Yet it is probably unethical to file an appeal without intent to pursue it. Certainly is in England and Wales: the Bar Council says so.

(d) Some appeals are stalled for want of funding or other resources. That is common, especially in criminal cases, but usually the parties or counsel will not reveal that. It is not ethical for the lawyer to refuse to work then, but many do. Some appeals were begun sincerely, but have since dropped in priority because of cooling ardor, mounting expenses, or changes in events (e.g. became semi-moot).\(^\text{35}\)

(e) Sometimes both parties to an appeal are sincere, but one (or both) lawyers are mentally blocked, or cannot make a decision. Some lawyers just cannot write. Or one or both clients may be mentally blocked or unable to make a decision. Sometimes the lawyer who lost cannot bring himself to tell his client that what he told the client was to be a good suit or defence has failed for good reason. Or the lawyer cannot yet persuade the client of that. One American appellate specialist says that most factums are written by trial counsel to convince the client that counsel had a good case and ran the trial ably.\(^\text{36}\)

(f) Some appeals are vindictive, or a mere stall. The appellant has no confidence at all in, even any hope of, a successful outcome. The same is true of some respondents. One prominent Ontario lawyer wrote to me that delay inevitably favors one side and is “sometimes artificially created (often unobtrusively as possible) by one side to favor that particular side.”\(^\text{37}\) Some parties hate each other. They think that their motive is the merits, but their hatred constantly diverts them onto tangents or revenge.

(g) Some appeals are funded by others (e.g. Legal Aid or a creditor or a government). To the appellant that appeal is a long shot, a free lottery ticket. He or she does not fear any sanctions, nor worry much about losing. The lawyer may be short of work and need this retainer. An Ontario study of the courts heard bench, bar and court administrators all say that Legal Aid encourages unnecessary litigation, gives few incentives to settle, and fewer to be efficient.\(^\text{38}\)

(h) The appellant’s lawyer may not yet have been able to find a plausible argument to support his appeal. Occasionally the respondent cannot find one to resist it. Counsel may be unused to the Court of Appeal and lack confidence in his or her efforts, or may not even know what to do. Or the lawyer may have done work which he or she fears is not good enough to file. Writing is never completed, only abandoned. Similarly, preparation never ends; it is only stopped by the most rigid time deadlines.

\(^{33}\) The Civil Justice Review, op. cit. supra, at p. 126 (Chapter 11) criticizes the billable hour, and payment irrespective of quality of work.


\(^{35}\) See Côté, Slow Appeals, pp. 74-6 (2000).


\(^{37}\) A very impressive letter from a Vancouver lawyer said that the respondent often opposes any expedition of the appeal, because the respondent hopes (and sometimes expects) that the appeal will be dropped if it cannot be heard quickly.

\(^{38}\) Civil Justice Review, op. cit. supra, at p. 130.
(i) Some counsel get sloppy with their calendars, double-booking and taking on too much work. They want flexibility for themselves and for no one else, because it gives them control and there are no sanctions.

4. Conclusion

If backlogs grow, the incentives and temptations for oblique motives grow. Maybe that is why backlogs snowball, but short lists shrink. This also ties in with Chapter 5, Part B.2 (second fallacy).

Therefore very few appeals will run promptly, and still fewer both promptly and without contention over procedure, unless the Court of Appeal effectively imposes suitable incentives (rewards and punishments). In particular, the Court of Appeal must be careful to avoid rewarding delay or punishing promptness.\(^{39}\)

**Recommendation 1:** Appellate judges should become more aware of the motivations at play in some appeals.

C. BACKWARDS REWARD STRUCTURE

Yet many present rules or practices do punish the good and reward the wicked. That may not be the intent, but it is the effect.

1. Examples of How Courts Reward Delay and Breach of Rules

   (a) Inadequate post-judgment interest rates, and situations where the time value of money is not compensated at all, e.g. where property is tied up or some action is forbidden, or the person delayed is the defendant, not the plaintiff.

   (b) Excessive difficulty in getting pre-judgment remedies, such as garnishment before judgment, or freezing (Mareva) orders, coupled with excessive difficulty in upsetting fraudulent preferences or conveyances.

   (c) Lack of any penalties for dilatory respondents.

   (d) Unpredictable results of appeals, sympathy or result-driven decisions, and excessive orders for new trials (despite lack of ultimate merits in the substance of the case), especially in criminal cases.

   (e) Stays of execution, or bail, pending appeal, especially without adequate security or without adequate machinery to force prompt prosecution of the appeal. In many Courts of Appeal, there are automatic stays of execution, direct or virtual (such as the need for a certificate of no appeal to enforce the judgment). Getting out, and staying out, of jail is huge reward.\(^{40}\)

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Inadequate costs penalties for meritless or abusive interlocutory appellate motions, or other delaying appellate steps.

That is always so in criminal cases, which very rarely permit costs.

Costs of $1000 are not even noticeable in most civil suits. All legal bills are far higher today. In Saskatchewan, taxable costs used to be one-half actual legal bills, but have steadily declined, and tariffs have not been updated. Inflation steadily eats away any fixed tariff. Any over 12 years old is ineffective.41

There is no penalty for mere slowness.

Costs almost always arrive long after the event.42

Many persistent litigants claim to be judgment-proof and pay no costs.43

Non-existent or inadequate security, especially where the litigant is judgment-proof. The Supreme Court of Canada has never raised its $500 figure, and asks appellants not to bother filing it.

Interlocutory orders (or Rules) which look only at the problems and interests of the party in default, not those of his or her opponent, still less of the public. See Chapter 5, Part B.

Allowing late amendments and new issues and evidence by the opponent, after the innocent party has done its work in reliance upon the old state of pleas, especially when the harm is irreparable because of intervening loss of evidence.

Reluctance to fine for, or even find, contempt. The strictissimi juris doctrine and other cobwebbed fetters are examples.

Very low filing fees for appeals in many Courts of Appeal. Manitoba is about to raise theirs significantly. Alberta now charges $600. There are no filing fees in criminal matters. British Columbia and the Federal Court of Appeal waive fees for those who are apparently poor.44

Very slow court procedures to punish or deter breaches of the Rules.45

Examples of How We Now Punish Obedience and Promptness

Legal work is rarely free. The innocent party must bear extra legal fees for extra effort or early performance, for doing work which is beyond the ordinary or which should have been done by the opponent. He or she gets few or no costs from that opponent.

Little or no costs for motions by the innocent party to enforce the Rules. See (a).

41 A lawyer in one big city wrote me to say that present costs tariffs have fallen behind current legal bills both in topics and in size of fees, and simply serve to urge and dissuade parties to act in ways unconnected with the rational merits of the case.


44 See Bhamjee v. Forsdick, supra.

(c) Costs are often awarded in the cause. That is especially bad if the slow or disobedient party is a plaintiff who is likely to get damages at the end of the suit.

(d) Procedures are both complex and perfectionist.46

3. Motivation of Non-Parties

We must note the motivation of outsider non-parties, such as Legal Aid, governments who fund, creditors who fund, interveners, subrogated insurers, maintenance enforcement authorities, and owners of shell companies. In public issue cases, the appellant is sometimes not very interested in the case, especially in its later stages. The so-called interveners are the real proponents. Yet they run no risk of paying costs in Canada (unlike England).

D. THE SOLUTIONS

How can we cure the attitudes, conduct and problems outlined above?

We should more or less reverse all the items in Part C, both by Rules, and by actual practice. Enforce the Rules. If the Court of Appeal occasionally penalizes one litigant’s misconduct, word gets around, and the others pull up their socks or do not attempt to stall or postpone decision.

Recommendation 2: Courts should not rely upon respondents to keep appeals moving; the Court should do it.47 Give the Registrar some weapons.48

Recommendation 3: Locate every possible stage or source for delay or inaction, and give a remedy and a “police constable” for it.

That is Ontario’s philosophy, and it works.

Never let the Court of Appeal be a quiet anchorage in which to sit out the waves of litigation. Make the litigants go out to sea and work, or give up their ship and come ashore. At no stage should a litigant sit idle, especially an appellant.

Recommendation 4: Publicize inexcusable delay and shame any lawyers responsible.

Especially prevent lawyers’ telling the court that there is no hurry, but telling their client that delay is the court’s fault.

Extract significant (not nominal) security for costs from any dilatory appellant; see Part E.

The Saskatchewan Court of Appeal often directs that a slow party has to pay costs before he can take the next step. Such an “unless” order should be the usual form of a time extension or a modification of the Rules or cure of a slip.

Tighten up granting stays of execution and bail: see Part F.


47 See Chapter 6, Part C.2.

48 See Chapter 6, Part C.5.
Recommendation 5: Enact a final drop-dead period with no exception or discretion (like Alberta’s R. 244.1). Any appeal which has seen nothing effective done for two years should be deemed abandoned. So should an appeal which has gone a year with no record filed.

Litigants who proclaim loudly their poverty and never pay costs very often manage to find filing fees and fees for transcripts. One cannot usually run for public office without putting up a refundable deposit. Filing fees for appeals are often so low that a litigant can file an appeal just to hold his options open, and not have to make a decision until he has to pay for transcripts and appeal books. If they are slim, not even then.

Recommendation 6: Increase filing fees to the level where they deter an insincere or trivial appeal, or one filed with no decision to go forward with it. Be wary of dispensing with them for alleged poverty.49

Recommendation 7: Keep tariffs or standards for party-party costs up-to-date and ahead of inflation.

Recommendation 8: Punish procedural misconduct with costs payable at once in any event.

E. SECURITY FOR COSTS

1. Introduction

An appellant who may be, or become, a man of straw has enormous opportunity to thwart justice with impunity, and gamble with others’ money.

2. Discretion

Plaintiffs often argue that they should not be ordered to give security if they might not be able to afford it. Such an argument rings especially hollow in the mouth of an appellant, for the following reasons:

(a) He or she usually has already retained a lawyer whose fees will greatly exceed the likely amount of security.

(b) He or she will have to pay for a transcript and appeal book whose cost may exceed the amount of security.

(c) Often the appellant has shareholders or supporters who could give some kind of security, if only their own personal undertaking to pay.

(d) One cannot do justice by looking only at the appellant’s interests, and imposing only remedies which everyone will bear lightly. See Chapter 5, especially Parts B and H.

(e) There is no reason to presume that the first court was wrong; the merits of the suit are no longer a blank slate or mystery, as they were in the first court. Often the appeal has no reasonable prospect of total success, on all aspects of the suit.

49 As in the Federal Court of Appeal and British Columbia Court of Appeal.
(f) Procedure is not mere form, and involves public interest in expedition. See Chapter 5.

(g) The appellant who is to give security is often not the plaintiff (unlike the trial court) but the defendant, or is otherwise in possession of the funds or property in question.

Judges should all lose the old reluctance to order security. We must recall the larger context of motivation.

3. Special Circumstances Test

Oddly, many Appeal Rules require “special circumstances” to order security for costs of an appeal. That is a tougher test for security than in the trial court. Yet the appellant has already been held wrong! The respondent won in the first court. All the grounds for security available in the first court should be available to both parties on an appeal, especially against the appellant. There is no reason to treat the appellant more laxly because he has lost.

Recommenda­tion 9: The court should not require “exceptional circumstances” for security for costs. Increase and clarify other grounds for security.

4. Evidence

Recommenda­tion 10: The respondent seeking security should rarely (if ever) have to give evidence that he has an arguable case.

5. Terms

Recommenda­tion 11: The Rules should clearly show that security for costs can be a term of other procedural orders, without having to meet the grounds for a free-standing security order.

6. Amount

Interlocutory matters can swell costs unexpectedly. Judges tend to be 20 years out of date with expenses, especially legal fees. Do not compromise with tokens. Even $4000 or $5000 is nothing to many litigants.

Recommenda­tion 12: The amount of security should not be nominal.

7. Enforcement

Recommenda­tion 13: Enforcement of terms of the order for security on default, such as dismissal, should be automatic. There should be no need for a second motion, still less later action by three Justices of Appeal.

8. Respondents

Nova Scotia has a Rule allowing security from a respondent, and Alberta’s very general Rule may allow that too. That is salutary in the right case, e.g. a non-resident respondent.

Recommenda­tion 14: Allow an order for security for costs from a respondent.
F. STAYS OF EXECUTION AND BAIL

1. Introduction

One Registrar told me that a motion for stay of execution pending appeal is always a bad sign. Many Courts of Appeal complained of prisoners who get out on bail and then delay their appeal unconscionably.

2. Terms

Terms are necessary to do four things:

(a) Remove incentives to delay, and penalize delay.

(b) Define obligations very clearly and precisely, including exact deadlines for further steps in the appeal. British Columbia, Manitoba and Saskatchewan bail orders give a timetable for the appeal. New Brunswick orders have a sunset date.

(c) Enforce all this, with conditions precedent, or security. Manitoba nearly always imposes terms on a stay: financial terms, and must expedite the appeal. If bail is given, set a timetable. Bail is revocable in Manitoba. Federal Court of Appeal stays are only given on terms.

(d) Give an enforceable sunset date, i.e. a date when bail ends and the appellant must report, whether or not the appeal is over. British Columbia does that. So a postponement requires a bail extension; it is not automatic.

Recommendation 15: A judge should never give bail or a stay of execution pending appeal without adequate terms, conditions, final deadline (expiry), and security.

3. Cooperation to Date

Nor should a judge ever give bail or stay of execution unless the appellant has already done all that any appellant could do to this point, e.g. order the transcript and secure its payment.

Recommendation 16: Amend the Rules to require a firm order for the transcript and completion of all steps required to that date, before an order for bail pending appeal.

4. Automatic Stays

Some federal and some provincial legislation or Rules create an automatic stay of execution of some types of order, by the mere filing of a notice of appeal. (No province has that for all types of order under appeal.) But I have concluded that that is always a bad idea. It should not be done even indirectly, e.g. by legislation requiring a certificate of no appeal. Why?

(a) Such legislation creates the impression that the trial judgment is of little importance, and that an appeal is a routine step expected in any civil suit. That ignores the modern Canadian rigorous standards of review on appeal.

(b) That is too easy. It is a powerful incentive to appeal for someone who has just lost a trial and wants to buy more time cheaply, without any belief that there are even arguable grounds of appeal, still less an intent to pursue them, let alone proof of any of that.
(c) It has no terms or conditions.

(d) It puts the onus and expense of enforcement on the respondent. The onus is on the person held at trial to be right, to go to court and lift it. That is backwards.

(e) Similarly, the discussion of terms and conditions tends to put terms on the party moving to lift the stay, the respondent held right at trial, not on the appellant held to be wrong!

(f) It generates work too. Saskatchewan has it and gets lots of motions to lift the automatic stay (albeit fewer than when the Rule was the reverse). But Manitoba and Alberta are happy with no automatic stay, and get few motions for a stay. Nova Scotia gets few stay motions, except in custody and access cases. Those usually go nowhere and such appeals are filed for the stay.

(g) Such a Rule does not require the appellant to prove irreparable harm. If no irreparable harm is likely, why should the loser get possession? It is like giving all plaintiffs an interlocutory injunction or replevin automatically, with no evidence of anything and no security. The Supreme Court of Canada says that the tests for a stay of execution are very similar to the familiar three-part test for an interlocutory injunction. An automatic stay makes the respondent prove negatives (disproving the three tests for injunctions).

(h) Automatic statutory stays are usually coupled with a provision that they can be lifted only by an appellate judge. Yet the judge appealed from is much more familiar with the facts, and with any likely prejudice to each side from granting or withholding execution. A motion before him or her would usually be much more prompt and cheap.

**Recommendation 17:** Rules and statutes should allow a stay of execution (or anything analogous) pending appeal only after a motion by the appellant with evidence of merits, hardship, balance of convenience, and judicial consideration of possible security. Repeal requirements for a certificate of no appeal.

**Recommendation 18:** The initial application for a stay of execution should be in the court appealed from, and to an appellate judge only if an application in the first court is impractical or denied.\(^5\)

\(^5\) As in Alberta’s Rule 508(3).
### APPENDIX TO CHAPTER 4: 
APPEALS WHICH END WITHOUT HEARING

**Appeals Disposed of in 2003 But Not by Judgment**
After Full Hearing by Panel
*e.g. abandoned, dismissed for want of prosecution, leave denied, struck out by one judge*

<table>
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<th>Court</th>
<th>Civil No Hearing</th>
<th>Civil Total Appeals</th>
<th>Civil % No Hearing</th>
<th>Criminal No Hearing</th>
<th>Criminal Total Appeals</th>
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<td>175</td>
<td>42.9%</td>
<td>41+</td>
<td>134</td>
<td>30.6%+</td>
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<td>88</td>
<td>25%</td>
</tr>
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<tr>
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<td>45</td>
<td>35.6%</td>
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<td>5</td>
<td>12</td>
<td>41.7%</td>
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</tbody>
</table>

#### Civil Appeals (2003)

- **Full Hearing:** 51.17%
- **No Hearing:** 48.83%

#### Criminal Appeals (2003)

- **Full Hearing:** 63.24%
- **No Hearing:** 36.76%
CHAPTER 5
PHILOSOPHY OF HANDLING PROCEDURAL DEFAULTS

“...a significant reform requires a new approach, a change of culture. All parties must accept that certain habits must change. If one waits for a reform which disturbs no one, one may expect a reform more cosmetic than real.”


“Reason to rule, but mercy to forgive:
The first is law, the last prerogative.”

– Dryden, The Hind and the Panther, pt. 1, l. 261 (1687)

“We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror.”

– Measure for Measure, act 2, sc. 1, l. 1 (1604)

A. INTRODUCTION

1. A Recurring Question

As Chapter 1 suggests, an issue recurs throughout all procedural matters: Enforcing Rules vs. Mercy or Individual ‘Justice’. These questions of philosophy affect most of the issues in this study. Lord Woolf’s three principles (correctness, speed, and economy) are hard to implement if this philosophy of enforcement vs. mercy is distorted or neglected.51

2. The Problems

Litigation is too slow and expensive\textsuperscript{52} for all, especially those of limited resources.\textsuperscript{53} Why? There is another problem. Justices spend a lot of time on work not really necessary to write good judgments. Why?

Judges do not see that they are part of the problem, indeed more often problem than solution when it comes to procedure.\textsuperscript{54}

Existing Rules are not used, or are used for the wrong purposes and perverted by litigants in daily use. See Chapter 4. There is little point to a Rule which is almost always waived. Enforce it, or repeal it.

Yet the Rules critical to the pace, economy and basic nature of litigation are continually subverted by judges. Some Rules get no more than lip service.

In few places are all the judges willing to discipline the parties and encourage prompt economical litigation.

3. How We Got These Attitudes\textsuperscript{55}

Present lopsided attitudes in Canada stem from a historical accident. It will be much easier to understand them, see them in perspective, and move on to a wider view, if we understand how we got them.

(a) Pre-Judicature Acts

Before 1873, most procedural rules were very messy, cumbersome, antiquated, random, and not rationally planned, but historical accidents. One exception was pleading. The old pleading Rules embodied an intellectual theory designed to govern everything. In practice, it did not work and was too rigid.

(b) 1873 and 1875 English Judicature Acts and their Rules

The 1870s procedures were designed to substitute simplicity, lack of formality, and power to relieve against slips. In theory, and on paper, they were a much better system. Common-law Canada promptly copied them.

\textsuperscript{52} On the excessive expense of modern litigation (just before England’s recent reforms), see Andrews, \textit{Principles of Civil Procedure}, 573 (1994). In Ontario (before the Court of Appeal and Superior Court cleared up their backlogs), see Civil Justice Review (co-chairs Blair J. and Lang), \textit{First Report}, pp. 87-8, 126, 128 (Toronto March 1995). Note especially that p. 128 details previous studies from Manitoba.


\textsuperscript{54} Civil Justice Review, \textit{First Report, supra}, at pp. 103, 109: “We have met the enemy and they is us.”

\textsuperscript{55} See Zuckerman, \textit{op. cit. supra}, at 26-33.
(c) Application of these 1875 and 1883 Rules

Brett M.R. suggested that any amendment should be allowed, however late or negligent. Worse was a mere paper by Lord Bowen in which he suggested that no one should lose his suit because of a procedural flaw unless there was irreparable harm. Lord Bowen’s judgments did not go so far, but after a generation or two, the line from his paper crept into many judgments.

These ideas were adopted increasingly as law in the 20th Century, especially in Canada. Judges now lack courage ever to find irreparable harm, and the first half of the dictum is blown out of all proportion. Respondents are very poor at proving prejudice. The courts are now fanatic in picking holes in such proof. This was exacerbated by the 20th Century nullity vs. curable irregularity debate, which was sterile.

The assumption underlying all these ideas is that perfect evidence and a perfect answer are the only goals and trump all else. We assume that access to justice means only perfection of answer, never economy or speed!

So in Canadian courts, missing deadlines rarely led to any result. No one has courage to dismiss for want of prosecution. Counsel and litigants learned to ignore Rules, especially as Rules grew more complex and counsel less and less feared judges.

The result is lots of uncertainty. There is a huge conflict between the Rules and what judges actually do. Both the uncertainty and that conflict produce a plethora of procedural motions, e.g. to dismiss without prejudice.

A thorough study in Ontario confirmed the pervasiveness of these mistaken and timid attitudes of judges. Those consulted in that study commonly complained that judges would not enforce the rules or impose sanctions, even costs. That included criticism of appeals.

These are ideas of civil procedure. Criminal trial procedure is not so timid, and routinely trumps merits. Indeed it may be an 800-lb. gorilla. But criminal appellate procedure attitudes are still mired in the same old-fashioned slough as civil appellate procedures are.

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56 “It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty’s Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.” This was in a chapter of 1 Ward (ed.), The Reign of Queen Victoria; a Survey of Fifty Years of Progress, 281-329 (Smith Elder, London 1887), reprinted as Chapter 16 in 1 Select Essays in Anglo-American Legal History, 516-557 (1907) (repr.Wildy & Sons 1968). The quotation is found on p. 541 of the latter.

57 Andrews, op. cit. supra, at 577.

58 Id. at 579.

59 Civil Justice Review, op. cit. supra, at pp. 87, 88, 100, 149, 151.

60 Id. at 87-88 (before the Ontario Court of Appeal got rid of its big backlog).
4. More Modern Views Elsewhere

The U.S.A. outgrew such views before 1960.

More recently, English and European countries have similarly made a big change in course and attitude. Continental courts with slow lists are now pulling up their socks. For example, there has been a recent big Belgian study of how the Quebec Court of Appeal cleared up its former huge backlog.

Here is the new English philosophy in a nutshell:

(a) Delay is bad in itself and forbidden. Without finality, everything is delay. A non-final decision is no decision.

(b) Court and litigant resources used must be limited to what is proportionate to the need of that individual case. Litigation is not society's only need for resources. (Consider health, education and poverty.)

(c) Each court has a duty to be proactive and manage this. Devoting more resources to cases deserving them than to those demanding them, is more likely to give correct answers.

B. FALLACIES IN THE INDULGENT APPROACH

We must examine more carefully the implicit assumptions underlying judges' present inclination to waive every Rule or deadline. I will confine this to Courts of Appeal.

1. Ignoring Other Interests

The first fallacy assumes that inside an appeal, the only relevant interests are those of the individual appellant and respondent. The Crown or Attorney-General is treated as another private litigant unconnected with the public or its interests. Never does the Court of Appeal itself claim any legitimate interest: it is invisible.

But in fact there are seven other important interests now being ignored:

(a) The public's interest in

   (i) seeing justice done and the law enforced, and

   (ii) having confidence in the legal system and its being prompt, effective, and affordable. Justice delayed is justice denied.


62 See Zuckerman, op. cit supra, 783-4.


64 The Ontario study concluded that bench, bar and court administration each focussed upon its own constituency and needs, ignoring the public interest: id. at p. 103 (Chapter 9).
(b) The public and other litigants’ interest in having clear predictable law without inconsistencies, uncertainty, or delay in getting it. People will not settle out of court, or even obey the law, if results of litigation are uncertain or long delayed. Society desperately needs obedience and settlement. It lacks resources to try every case, or even to investigate everyone now tempted to commit a crime.

(c) The public’s interest in seeing criminal, professional, safety, health, environmental, taxation, and regulatory laws enforced, to save the public from dangerous, incompetent, or noxious people and things, and keep the government solvent. That a criminal is at large or on bail or unpunished negates this aspect of criminal law.

(d) Other litigants’ interest in having the queue ahead of them not be too long, and not be clogged unnecessarily by insincere appeals (bluffs), no-shows, and late adjournments.

(e) The public’s interest in not incurring extra expense of having judges out of town away from their other work with no appeal to hear.

(f) The public’s interest in having public resources for health, education, etc., and not letting an individual litigant expropriate more than his or her due share of public resources. Someone always pays for expensive litigation: as taxpayer (who funds the Crown, Legal Aid, and the courts), or as customer (when a business passes on its costs through higher prices for its product, especially higher premiums for its insurance).

(g) The interests of those crucially affected by litigation who are not parties, such as minors, beneficiaries, neighbors, or victims of crime.

2. Ignoring Rules’ Influence on Conduct

The second fallacy is that the situation (e.g. the missed deadline) is a sad, given, uncontrollable, past event, like an earthquake. No thought is given to framing and enforcing rules designed to prevent or deter such events in the future, rather than reward and encourage them. We ignore the lazy, oblique, or mischievous motives of some parties and counsel. Chapter 4 above describes them at length.

We now have a culture in which time limits and certain other Rules are largely ignored.

3. Ignoring Cumulative Effect

The third fallacy is forgiving or ignoring all small delays and breaches of procedure. It produces the death of a thousand cuts. Clogged lists, delayed hearings, and delayed judgments (justice) arise a month at a time, in hundreds of cases. That is the same way that a family’s budget gets unbalanced $5 or $10 at a time, and a student’s essay falls late by a hundred little delays, procrastinations or interruptions.

We excuse every delay and piece of misconduct on the ground that it is a small mouse. Yet the mice devour half the larder and spread disease.

65 See n.12, supra.


Judges become enured to that, but the public do not, and they have lost confidence, patience, tolerance, and respect, because of the judges’ neglect and unwillingness to act.68

4. **Seeking Perfection**

The fourth fallacy assumes that we now get perfection in litigation. It ignores the fact that the present system gives perfection (if at all) to the few, and nothing to the many.69 This fallacy also assumes that the parties want perfection at any cost, and however slowly. That view is particularly wrongheaded in a suit over money (or property). An uneconomic suit over money or property is worse than useless. Some suits pay the lawyers more than the party who wins the suit (or appeal).70

5. **Random Rules**

The fifth fallacy is to hope that if we have no firm rules, and let each individual judge decide each case in isolation, all those judges at all their keyboards will eventually strike the right balance between enforcing a general principle and relieving against its harshness in exceptional circumstances. Sometimes an individual judge seems to achieve that. But the more procedural is a Rule, or the more that it is designed to protect the public and not the opposing litigant, the poorer the balance.

6. **Exceptions Devour Rules**

There are many Rules of Court which individual judges have virtually repealed. They create a host of exceptions, and almost every reported case declines to apply the Rule. Any competent barrister quickly learns that that Rule is a broken reed upon which he or she cannot put any weight. Indeed, almost every court can name Rules which it never enforces and more or less ignores. There are many more which it thinks that it enforces, but in fact does not enforce. The judges thus train the bar to ignore that Rule completely, and mistrust all the rest of the Rules of Court.

Perfect Rules are of no use if they are not enforced, indeed are waived. The 18th Century had many laws, most ignored. Chaos, delay and cynicism abounded. An unenforced Rule may exhort an occasional naïve or exceptionally moral person, but will mislead or trick many more. The net result devalues all courts and laws.

The Alberta Law Reform Institute wrote in August 2004 that “one of the most common complaints of respondents to the Rules Project is that the courts will not enforce their orders.” They append a long string of quotations from correspondence to that effect.71

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C. PEOPLE MUST POLICE RULES

1. Rules Do Nothing Alone

   Alone, Rules are but ink squiggles on pieces of paper.

   Rules and procedures do not enforce themselves.\(^{72}\) Enforcing the Rules which we have is often better than passing stronger or more sophisticated Rules. For example, the Supreme Court of Canada, and the Courts of Appeal of British Columbia, and Quebec all have justifiable legislation saying that one party who breaches certain Rules has no right to present argument. Who has the courage to enforce that?

   Ontario’s study\(^{73}\) showed that the key problem with litigation is that no one is in control. The ship has no one at the helm and often drifts into the Sargasso Sea.

2. Philosophical Intimidation

   The fallacies and antiquated views of procedure outlined in Parts A and B above do more than encourage delinquent litigants, and discourage diligent litigants. They neutralize all the judges.

   We have managed to put the white mantle of “justice” around the shoulders of every litigant who is late or in breach of orders and Rules. If the judge god-like waives the breach, the judge renders justice, we assume. If the judge enforces the Rules, he or she feels a crabbed, vindictive martinet.

   We thus leach away all the moral authority underlying our judges and Rules, even underlying orders of judges.

   That is pernicious. One could justify stronger words.

   It is no wonder that the public sometimes think that judges are just favoring lawyers, or inhabit some pink theoretical cloud thousands of feet above the earth.

   **Recommendation 19:** Courts of Appeal should foster the practice and belief that duly-enacted rules and procedures are legitimate, moral, and beneficial.

3. Enforcement vs. Waiver

   All Registrars, Masters and judges should have the will and encouragement to enforce them.

   Instead, we let judges override almost every Rule, Direction, order, timetable, deadline, penalty, or other direction. See further Part H below, and Chapter 6.

\(^{72}\) See Chapter 1.

\(^{73}\) See Civil Justice Review, First Report, supra, at pp. 88, 99, and 110.
4. Temporary Management

Worse, Courts of Appeal rotate this (enforcement vs. waiver) duty through all Justices of Appeal on the court (except maybe the one with an overall view and responsibility, the Chief Justice). Those who administer the lists and try for efficiency are at best ordinary puisne judges subject to effectively being thus later overruled by time extensions, fiats, etc. by other judges. The biggest courts note that some judges are much laxer than others. Worse still, those told to administer are often Registry officials with little power to make orders. A dam is as strong as its weakest piece of mortar.

See further Chapter 6, Part C.

D. WHY APPEALS NEED MORE ENFORCEMENT

Many people assume that civil procedure matters for trial courts only. Or Courts of Appeal seem somehow more important or loftier, and so people think mere procedure does not reach such Olympian heights. Or they believe that “merits” vastly outweigh mere procedure (which is fallacies B.1 and B.4 again).

Nothing could be more misguided.

1. Where there is an appeal, the courts have already given judgment. The appeal attacks that and undoes precedent and res judicata, and produces uncertainty anew.74 That runs contrary to modern Canadian standards of review on appeal.75 Despite these standards, appellate procedure may still be rooted in the old idea that an appeal is a full rehearing. And such full-rehearing procedure is contrary to the principle of proportionality of resources.76

2. Courts of Appeal and their judges and staff do more preliminary work before oral argument of an appeal than most Canadian trial judges do before a trial, so wasted preliminary effort or time to forget preliminary preparation is more serious in a Court of Appeal.

3. Before argument, the parties give the Court of Appeal a record and facta, but that work is much more for the benefit of the Court of Appeal than for themselves. It is not like discovery or interlocutory applications in the trial court, which are usually for the benefit of one or more parties, not for the trial judge.

4. Therefore, Courts of Appeal should not assume that trial courts’ procedure is suitable for them.

5. This is especially true in Canada, where trial courts’ procedure is still bogged in 1880s thinking.77

6. The Supreme Court of Canada will not let a leave motion linger, even if both parties request it because they are still negotiating. It has an extensive bring-forward system and polices all filings. Other appellate courts should note the appropriate philosophy which that reflects, and take heed.

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74 Cf. Zuckerman, op. cit. supra, at 783-4.
75 Zuckerman 721.
76 Zuckerman 720.
77 See Part A.3(c) above.
E. EVILS OF DELAY\textsuperscript{78}

The English recently took steps to speed up litigation. Yet the “delay” which formerly prevailed in England and Wales\textsuperscript{79} was far shorter than typical Canadian litigation’s duration.

Delay in litigation has nine pernicious effects.

1. **Lost Evidence**
   
   Delay takes away the courts’ ability to find facts. Evidence deteriorates or disappears. A successful appeal usually leads to a new trial or hearing years later. It may be two years after the first trial, and 10 years after the events in question. This is very common. Yet witnesses forget, die, move, or lose their willingness to testify. Exhibits deteriorate.\textsuperscript{80} It is the biggest evil of delayed criminal appeals. That prejudice is almost always irreparable. It harms the public, not just one litigant.

2. **Stale Remedy**
   
   Even what would have been the legal remedy may come too late to be much good, or to be worth the expense of the appeal (or of fighting the appeal). Note the time value of money, for instance. (See the Appendix to this Chapter.) And note the impact of delay of child custody or access for a year or two. Can one give back to an injured person the lost years? Or to someone wrongly jailed?\textsuperscript{81}

3. **Upset Expectations**
   
   Delay leads people to rely on the \textit{status quo}, especially when it is coupled with a stay.

4. **Wasted Work**
   
   Delay increases work and expense to all — e.g. repeatedly having to get up to speed again.\textsuperscript{82} Or needing motions to govern the period while appeal is pending. Or disputes over queue-jumping and expediting.\textsuperscript{83} That is unnecessary if the appeal can be heard soon.

Specifically, delay leads to more interlocutory fights.

5. **Frozen Lives**
   
   Uncertainty poisons the ability to make business decisions. Uncertainty greatly strains a litigant’s health. Waiting to learn the fate of one’s livelihood can be nearly as bad as awaiting the results of a test for cancer. But the wait is far longer in a court than in a clinic. A disputed asset is often sterilized and impossible to use productively. A business being sued may not be able to borrow or mortgage its assets, and probably cannot mortgage the rights withheld from it. Sterilized assets


\textsuperscript{79} See Andrews, op. cit. supra, at 577.

\textsuperscript{80} Id. at 578.

\textsuperscript{81} Lord Woolf, Interim Report, supra, Chapter 3, p. 4.

\textsuperscript{82} Lord Woolf, Interim Report, supra, Chapter 3, pp. 3, 5.

\textsuperscript{83} Andrew, op. cit. supra, at 578.
prejudice the whole community. Dickens pictured those evils in the opening of *Bleak House*, and that process of cause and effect is still true. Otis J.A. wrote in 1999 that parties to litigation usually tell the conciliator of profound psychological and physical harm from prolonged litigation.84

6. **Insincere Exploitation**

Delay leads to stalls and game playing: see Part F and Chapter 4. This produces a powerful temptation to our less admirable counsel and fellow citizens.

7. **Snowballing**

Delays exacerbate each other. Sometimes one produces another.85 The pending list of cases waiting to be heard becomes too big even to know or understand.86 One needs more resources to police the queue, than to administer the hearings awaited.

8. **Cloaked Inaction**

Delays often obscure the fact that one counsel is doing very little work on the one suit, quite possibly because he or she has taken on too many cases. That encourages both counsel to forgive each other’s delay.87

9. **Oppression**

Delay typically oppresses the weaker party to a dispute.88

**F. MISSTaken ASSumptions ABOUT Motives**

See Chapter 4, Part B.2.

**G. SOLutions**

Attitude may be the problem, but not all cures are vague. All Courts of Appeal and their judges and staff can take very concrete steps to fix the problem. They involve vigilance and a little imagination, but most require no more court facilities, and little or no extra judicial work.

1. **Have a Deadline**

Sometimes the spectre of dismissing a meritorious appeal (or response) on purely procedural grounds with little moral fault cannot be ignored, and one should give the litigant another chance. Even then, it is very wrong in principle simply to refuse to dismiss the appeal. One must set new

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84 “The Conciliation Service Program of the Court of Appeal of Quebec” (2000) 11 World Arbitration and Mediation Report, 80, 81. See also Andrew, *op. cit. supra*, at 578.


88 Andrew, *op. cit. supra*, at 578.
deadlines. Deadlines are no additional restriction, penalty, or tool; they are but a feeble substitute for the old restrictions which the Rules or earlier orders had placed upon the slow litigant and which the judge is now removing.

Recommendation 20: Each appeal should have a deadline at each stage.

2. Do Not Excuse Irreparable Harm

If there is significant irreparable harm to the opposing party, to that extent the default in principle cannot be excused. The appeal must to that extent be dismissed (or allowed). Sometimes only a single issue is so affected. Then if such an appeal succeeds and leads to a new trial, the issues on that new trial must be restricted. A new trial 8 or 10 years after the event is very difficult, especially in a criminal case. Such prejudice must be carefully looked into before times and Rules are extended.

Recommendation 21: Do not forgive non-trivial irreparable harm to the opponent, the court, or the public.

3. Repair Reparable Harm

The defaulting party seeking an indulgence must be made fully to repair all reparable harm by terms and conditions, and the Rules should expressly require that.

That includes harm to the public and litigants in other cases, e.g. when a case runs over and delays later cases.

“Fully” means solicitor-client costs for steps wasted or for extra future steps necessitated. And compensation for other non-lawyer expenses, e.g. interest at higher rates, or time and wages lost from work by parties or witnesses.

A late respondent’s factum is a problem. Should it be received? It should make a big difference whether enough time to circulate and read remains or not. What terms should be imposed then? British Columbia allows dismissal, or refusal to hear a party, as the penalty for a breach of the Act or Rules. The Supreme Court of Canada and the Federal Court of Appeal allow that as penalty for a late factum. A fortiori in other courts with no leave system or other screening.

Conditions attached to leave or indulgences should not be limited to procedural matters. They may have to cover substance. If delay in an appeal leads to loss of important evidence about one topic, the delaying party should lose that part of the suit (appeal) or permanently lose the right to adduce his contrary evidence. Once again, prejudice not fully repaired is injustice.

A promise or order to make such reparation is rarely enough, unless the defaulter is clearly solvent and liable to execution, or is certain to owe a larger sum to all others at the end. Payment in advance, or good security for it, must be a condition precedent to relief. A promise from a promise-breaker is worth little. The Saskatchewan Court of Appeal often directs that costs be paid before the next step is taken.

Rules should leave the court no “discretion” to depart from the need for terms.  

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89 Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 28.
90 Cf. Alberta Rule 244(2).
In Manitoba, the Crown polices breaches of bail conditions, and may move to revoke bail if the appeal moves slowly.

**Recommendation 22: Ensure that all reparable harm is repaired before forgiving defaults.**

Repairing all prejudice also has a very salutary effect on the attitudes of all concerned. The 1880s thinking criticized above relies a lot on a supposed huge gulf between forgiving a default and not forgiving it. But if defaults are forgiven only on terms of repair, then the more serious the default, the bigger the repair bill. There is no gulf, but a continuum. At some point the repair bill gets steep enough that the defaulter does not want his or her default excused. That motivates him or her both at the present motion, and also the next time that he or she is tempted to break a Rule.

4. **Require Evidence of Merits**

Courts of Appeal should not extend an appellant’s times, revive an appeal, or forgive an appellant’s significant breach of Rules, without some evidence of merits of the appeal. (That is ordinarily not necessary for a respondent, because he or she won in the first court.)

This first test (*sine qua non*) of arguable merits should not be utter, mathematically-provable hopelessness, i.e. not even a thin hope. It should be a reasonable prospect of success. Quebec and England and Wales have reformed that test.

**Recommendation 23: Require evidence of truly arguable merit to the party’s substantive case before forgiving defaults.**

5. **Do Not Abdicate Control**

Ontario’s 1995-96 study pinpointed this remedy. Those consulted wanted some kind of case management by the courts and had positive experiences where it had been used.92

Courts should not put the onus on the innocent party to move or to prove when orders or Rules are disobeyed.93 That punishes him or her, especially as taxable costs never cover all legal bills. A respondent who will not move will often happily support a Registrar’s motion, or oppose the appellant’s motion. The wrongdoer should have to move for court permission, and either find terms to remove all prejudice to **everyone**, or fail.

Better still, the Court of Appeal should proactively supervise and manage the flow of appeals.94 Alberta’s Rules properly deny costs for late facta save in truly exceptional circumstances. The same is true in Quebec of late books of authorities.

**Recommendation 24: Use enforcement mechanisms under which the court or the defaulting party must move, not the innocent party.**

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91 Part A.3.
93 See Chapter 6, Part C.2.
94 See Chapters 6 and 10.
6. **Use Judges Who Believe in Procedural Goals**

Ontario named as its two list judges the two thought to be toughest on procedure, deadlines, and enforcing them. That was a very good idea. See further Chapter 6, Part C.7.

7. **Do Not Bow to a *Fait Accompli***

Litigants must seek time extensions beforehand. Courts should not bless default retroactively, barring very special circumstances like automobile accidents. That is the American practice. The Supreme Court of Canada and Ontario Court of Appeal try to encourage that.

**Recommendation 25:** Be slow to excuse defaults after they occur.

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**H. HOW FIRM SHOULD APPELLATE RULES OF COURT BE?**

1. **Introduction**

Judges may be pardoned for some of the attitudes criticized in Parts A and B. Few Rules of Court mention the right philosophy or forbid the wrong one. Some Rules seem to authorize some very bad practices.

Every Court of Appeal should either enforce or repeal every Rule. Ignore none. Eat up none with exceptions. Make sure that the published Rules explain what the Court of Appeal really expects and usually gets.

2. **Possible Power of Individual Judges over Existing Rules of Court**

In particular, some judges seem confused or vague about whether the Rules of Court bind them. The answer is yes. They do. They are legislation, and legislation binds all courts if constitutional. Rules are not motivational posters or maxims. They are law.

If a Rule lets the court or a judge waive or vary it, of course he, she or the court may. But not unless the Rule says so. And such waiver or modification must be for good reason, and limited to that reason.

In these respects, judges should set a good example for trial court judges.

3. **Evaluation**

   (a) **General Principle**

   A Rule which gives a judge power to extend some times for good reason and on terms, and to waive minor breaches of form, or cure small harmless slips, is proper and necessary.

   (b) **Criteria for Waiver**

   Exceptional circumstances may justify a departure from the usual Rule, e.g. where no factum is filed. Examples of exceptional circumstances are an illness or similar emergency, or something which comes in form only within a Rule.
Other extensions and waivers of Rules are occasionally proper, but only under proper weighing of the factors advocated by Lord Woolf and Zuckerman, not under the present Canadian passivity and compliance described in Parts A and B. It should then be only in the framework of some overall court supervision and control.

(c) No Power to Waive Other Rules

A Rule which gives power to any Justice of Appeal to waive any Rule or any court order which he or she wishes, seems to me indefensible. If any Rule can be waived by one judge, there are really no appeal Rules. At most, there is a Practice Direction describing the usual mode this month. The Alberta Law Reform Institute recommends that there be no such Rule. Yet many Canadian appellate Rules say that.

One may think that such a Rule speaks only to power, not to criteria for its exercise. But that subtle point is likely to be misunderstood by many judges and counsel. At best that Rule would be another Rule which does not mean what it says.

Indeed, there are some other Rules which should never be waived entirely. That is why they are enacted.

**Recommendation 26:** Have no legislation which allows one judge to waive any Rule.

4. Size of Court

In a small, very collegial court with very self-disciplined judges, discretion may be controlled by tradition. But in a court of 20 judges or more, many new because of high turnover, absence of express Rules is a recipe for great inconsistency, unpredictability, and incessant motions.

**Recommendation 27:** Keep all Rules and Practice Directions up-to-date, and repeal or amend any whose enforcement is undesirable. Enforce the rest.


Appendix to chapter 5: 
Time Value of Money

The first table below shows the effect of annually compounding an investment at 6% p.a. That rate might well be the cost of a bank loan, or even the yield on some bonds. This table ignores inflation entirely, which may be right where the winner gets pre-trial interest, but often he or she does not. Then both tables understated the time value (depreciation) of money. Pre-trial interest is about equal to annual inflation.

<table>
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<th>Years</th>
<th>Value of Investment</th>
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<tbody>
<tr>
<td>0</td>
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</tr>
<tr>
<td>1</td>
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</tr>
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</tr>
<tr>
<td>16</td>
<td>2.5403508</td>
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</table>

The second table below shows how the present value of $1 diminishes if it is payable some years later. It is computed by dividing $1 by the above factors.

<table>
<thead>
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<th>Years</th>
<th>Reduced Worth of Dollar</th>
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</thead>
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<td>16 years</td>
<td>elapsed reduces the present worth of every eventual $1 to 39.4¢</td>
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<tr>
<td>14 years</td>
<td>elapsed reduces the present worth of every eventual $1 to 44.2¢</td>
</tr>
<tr>
<td>12 years</td>
<td>elapsed reduces the present worth of every eventual $1 to 49.7¢</td>
</tr>
<tr>
<td>10 years</td>
<td>elapsed reduces the present worth of every eventual $1 to 55.8¢</td>
</tr>
<tr>
<td>8 years</td>
<td>elapsed reduces the present worth of every eventual $1 to 65.2¢</td>
</tr>
<tr>
<td>6 years</td>
<td>elapsed reduces the present worth of every eventual $1 to 70.5¢</td>
</tr>
<tr>
<td>4 years</td>
<td>elapsed reduces the present worth of every eventual $1 to 79.2¢</td>
</tr>
</tbody>
</table>

Time Value of Money
CHAPTER 6
WHO POLICES PROGRESS

“Quis custodiet ipsos Custodes?”
– Juvenal, Satires #6, l. 347

“Laws can never be enforced unless fear supports them.”
– Sophocles, Ajax (ca. 450 B.C.)

A. INTRODUCTION

Since tradition or habit and Rules often diverge, this is an important chapter.

B. TOO OFTEN, POLICING PROGRESS IS NOBODY’S BABY

Rules do not police themselves. Often Rules need enforcement more than improvement (amendment). 97

Appellate judges too often waive Rules, so counsel come to see both judges and Rules as paper tigers. Especially when there is a different judge in chambers each week. 98

If no one polices them, Rules exist only for the naïve or the very conscientious and efficient. Then by and large appellants totally control the pace. That is very bad. Proactivity is the only viable alternative to rule by appellants, as shown below.

C. PROS AND CONS OF ALTERNATIVES FOR WHO POLICES

This is not a question of speculation. Hard experience in the United States, Quebec, and Ontario shows that only court case management works. 99

Who are all the different people who might police and maintain progress in an appeal?

1. The Appellant’s Counsel

If policing is needed, ex hypothesi the appellant’s counsel is not moving. That is often so. He or she will not punish himself or herself.


98 See Chapter 5, especially Parts B and H.

99 Lord Bowman, Review of the Court of Appeal (Civil Division) 5 (1997) says the same.
Saskatchewan limits when he or she can get off the record. Criminal counsel need leave to withdraw from the record in Alberta.

2. The Respondent

In theory he or she is the usual regulator, but that does not work. Ontario and Alberta find that the respondent rarely moves to complain of delay in criminal matters, especially if the appellant has counsel. (In Ontario, it is often because Court of Appeal takes effective steps before the respondent can.) Why is the respondent usually passive or condoning?

(a) The respondent may not care about delay or breaches of Rules. Chapter 4, Part C explains why.

(b) Even if the respondent cares, a motion to complain of delay is very often a poor investment of his or her resources. It takes more work than judges usually realize, far more than they recompense in costs.

(c) Even if the respondent cares, his or her lawyer may well not want to annoy opposing counsel, nor to set a high standard for speed: a knock-for-knock pact. This can be quite noticeable with Crown prosecutors. The criminal bar often get on well and like to accommodate each other. Crown appellate counsel may be less concerned about the difficulty in running a second trial later, than are front-line prosecutors.

(d) A respondent is ill-equipped to police or fight delay by some others, such as court reporters. Consent alone to extend time or waive Rules is pernicious. Court must examine such a request on its merits. The public interest dictates that the court intervene and not wait for the respondent’s interest to move the respondent. Chapter 5, Part B elaborates on that.

Recommendation 28: Appeals should be kept moving, and important Rules enforced, by the court or its officers, and this duty should not be abdicated to either or both counsel.

3. Panels of Judges

(a) Three-Judge Panels

There is little rational reason to use three judges to decide procedure. The only reason is the mechanistic view that this may be “dismissal”, and the assumption that only three judges can do that. One can combat such thinking with “deemed abandonment” Rules.

The more fundamental answer is that that mechanistic view is wrong in logic and law.

It is the topic and type of decision which dictates who should make the decision, not the form of the final order. We have hundreds of procedural statutes and Rules which bar or end appeals. Many of them are automatic, and others are implemented by the Registrar. If someone tries to appeal to the wrong court, or after the time for appeal, or when he or she is not a party to the suit, we do not wait for three judges to tell him or her that there is no appeal. Similarly an appeal ends if the security ordered by one judge is not posted, or the leave to appeal needed is refused by one judge. Many Rules deem an appeal abandoned because of certain inaction. Sometimes the Registrar issues a certificate, sometimes merely makes a pen notation, but no judge is involved, let alone three.

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A very strong panel of the Privy Council has held that procedural orders are not final orders for appeal purposes, and a would-be appellant cannot make them final or get a right of appeal, by disobeying such procedural orders and being removed from the suit, or having his or her claim dismissed summarily.102

Besides, if a three-judge panel decides not to end the appeal, three judges hear the appeal twice (six in all), which is extremely slow and inefficient.

Lord Bowman says that judges of appellate “quality are a scarce and valuable resource and it is important that they are used effectively and only on work which is appropriate to them.”103

(b) Two-Judge Panels

One could use these if one does not trust one judge, or thinks that two would have more courage or consistency? That is dubious. One judge should suffice.

4. Alternating Single Judges Selected Randomly

Some judges are much softer than others, as big Courts of Appeal recognize. One randomly-selected judge sitting once every few weeks quite likely does not see the big picture or the results of waiving rules. Administrators see the big picture, and do not fret over a 1-in-1000 theoretical exception. Appellate judges have been trained since they left high school to look for small errors, exceptions, and logical gaps. That is bad training for administering anything.

Using all the judges individually in rotation for procedural motions is a bad system, and worse if counsel can in effect judge-pick by getting adjournments. New Brunswick mitigates that a little by its tradition that one judge adjourns motions only to the same judge, not to another. Nova Scotia mitigates it by keeping one duty judge for a term, not just a week.

But if a motion must be heard by one judge, e.g. to give leave to appeal, then that judge should give directions and timetables to keep the appeal moving (if it goes ahead at all).104

Ontario has largely excluded ordinary single judges sitting in rotation from hearing most interlocutory topics, except stays of execution.

That random-judge system is still more pointless if the slow litigant can then appeal from the one duty judge to a panel (as in most Courts of Appeal, but not the Federal or Alberta Courts of Appeal). Then the real appeal sits on ice waiting for its parasite appeal. (Or else the subsidiary appeal becomes moot.) The tail then wags the dog. For that reason, often three judges hear a procedural motion in Prince Edward Island in the first instance, even though one could have heard it. Mercifully, such wasteful appeals from one judge are not common in Ontario. Alberta now requires that such an appeal get leave of the judge appealed from (on the analogy of costs appeals).

One judge can scarcely bring a motion, but can refer a matter to a panel, as British Columbia does. Especially if the Rules allow the court to act on its own motion, as in Alberta.

See also Part E below on adjournments, and Chapter 10, Part C.6, on overuse of appellate judges.

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104 Lord Bowman, Review 75.
5. Registrar

(a) As Judicial Officer (Quasi-judge)

The Registrar may be a suitable person to decide procedural questions, because he or she sees the big picture and does not view each case as an isolated happening devoid of consequences, or as purely a search for the right answer.

Why not give him or her such powers if he or she is a lawyer? Some are Q.C.s (e.g. in Saskatchewan), and all are trusted and able. The Supreme Court of Canada’s Registrar extends times, extends factum length, allows new evidence, and taxes costs. Ontario’s Registrar sets and enforces statutory deadlines, hears motions to dismiss for delay, and settles formal orders. Many Registrars tax costs. New Brunswick’s Registrar relieves against fees or some other Rules. Some settle the wording of formal orders and relax rules respecting transcripts and the trial record. See further Part 6 below.

(b) As Person Moving

The Supreme Court of Canada’s Registrar moves, especially in unperfected leave motions. She also moves for vexatious litigant orders. The Ontario Registrar moves to dismiss in certain default situations. The Federal Court of Appeal Registrar puts slow cases down for status review. Twice a year, the Saskatchewan Registrar moves to dismiss for want of prosecution all appeals inactive for two years. The Rules allow that where nothing was done for one year. (That is heard first by one judge, who sets deadlines.) There are also motions by Nova Scotia’s, New Brunswick’s, and Alberta’s Court of Appeal Registrar.

Or the Registrar can just refer matters to a judge without a formal motion, as in British Columbia (which judge can refer it on to a panel). Saskatchewan’s Registrar is proactive. In recent years, British Columbia purged its civil list of inactive appeals. British Columbia let the Registrar refer any slow appeal to the court or a judge. Such a judge sets a timetable but adjourns the motion. Then she or he refers it to a panel for dismissal. Ontario has similar procedures. New Brunswick has run a similar purge.

This option (b) is better than nothing, but then the Registrar’s role is largely clerical, and we are back to nos. 1-4.

(c) As Clerk

The Supreme Court of Canada’s Registrar refuses to accept for filing motions which are plainly impossible. That may be about one-quarter of the leave motions tendered. Presumably all the other Registrars do that at times. Within a week or so of when a factum is due, if it is not in, the Supreme Court of Canada’s Registrar chases counsel for it, thanks to her computer. The Quebec Court of Appeal and the Supreme Court of Prince Edward Island, Appeal Division, act similarly.

If the Registrar is not a lawyer, some counsel will try to bully the Registrar. As the boss of the counter clerks, he or she should not let a Rule fall into disuse, or pretend to waive it if the Registrar has no such power. He or she should know and apply the Rules.
Breach of a timetable or deadline in the Saskatchewan Court of Appeal leads to an automatic dismissal motion before a panel of three judges. Defaults in the Federal Court of Appeal lead to an automatic status review (in writing) by three judges.

On the Registrar’s role in deeming an appeal abandoned, see Part D below.

(d) Right of Appeal from Registrar

This is relevant only to (a) above. There is some danger of in effect eliminating the Registrar, unless the standard of review on appeal is tough. The individual judges would need a lot of restraint and self-discipline. And an appeal from the Registrar would slow things a lot.

6. A Master of the Court of Appeal

(a) Advantages

Alberta’s Court of Appeal theoretically has this office,106 but no funding to fill it. It wants two. Nova Scotia wants one Master.

Lord Bowman says that not all judicial functions need a judge, and recommends this office.107 Ontario and the U.S. 9th Circuit do something similar.108

This office frees the Registrar of the need to be lawyer, and frees him or her and the court of any apparent conflict of interest from motions by the Registrar.

Quebec and Ontario and some other provinces have some functions (such as time extensions) done by a staff lawyer who is not the Registrar. Such people need the status to exert moral suasion and induce obedience. They should not have to have the Chief Justice sign letters for them in all cases.

(b) Right of Appeal

Quebec sees few appeals to a Justice of Appeal from the Registrar.

See subpart 5(d) above.

7. A Constant Judge (List Manager)

Having one fixed judge decide matters of timing and flow of appeals has many advantages.

Too many appeals from such a judge could be a problem, though.

England adopted that system in the mid 1990s.109 Quebec, Ontario, and Alberta use this system for a number of types of motion. It is used for comparatively narrow topics, especially in Ontario. The status court judge in Ontario does not rotate and is constant. He or she can borrow the Chief Justice’s inherent power over lists.

In Alberta, the Court of Appeal has power to dismiss appeals for want of prosecution of its own motion. The list management judge has tried referring some delinquent appeals to one of the regular panels hearing motions.

107 See his Review, pp. 5, 73, 75.
108 Ibid.
109 Lord Bowman, Review, 76.
See further Chapter 5.

**Recommendation 29:** A larger Court of Appeal should have a staff lawyer with statutory judicial powers. Since the term “Registrar” is ambiguous, the office should be called “Master” or something similar. He or she should have jurisdiction to hear all questions of timing or format, and many other interlocutory motions, and to tax costs. There should be an appeal to one judge, but no further, and with a restrictive standard of review on appeal.

**Recommendation 30:** One judge should have statutory power to dismiss or restore an appeal on procedural grounds, and to impose terms and conditions, without proof that the appeal is hopeless on the merits. Three judges should be needed only to dismiss or allow an appeal on grounds of its merits (or lack thereof).

**Recommendation 31:** Control and supervision of the lists and their progress should be in the hands of the Master or one constant judge, not all the judges in random temporary order.

**D. DEEMED ABANDONMENT**

1. **Basic Method**

   The Registrar gives the delinquent counsel notice that a certain appeal will be deemed abandoned if it is not perfected within x days. Manitoba and Ontario do this. Alberta’s criminal appeals are subject to similar provisions.

   Manitoba’s Registrar gives counsel 30 days to perfect a lagging appeal or motion. If they do not, it is deemed abandoned. A judge will not restore it without the missing document. Quebec’s and British Columbia’s practice is similar. British Columbia’s Registrar (with notice) puts on the inactive list any appeal not ready to argue after a year. After six months, they are dismissed automatically. Then they become very hard to restore. Ontario’s practice is similar, using a computer to detect and print the necessary warnings and deemings.

   Quebec and Alberta criminal Rules deem an appeal abandoned if the appellant’s factum is not filed by a certain point.

2. **No Discretion**

   If counsel do not cure the flaw within that time, the Registrar must issue a certificate deeming the appeal abandoned. He or she has no choice, and so no hearing is held.

3. **Criteria (triggers)**

   The Rules should reserve the penalty for serious breaches of serious requirements. Examples might be trial record or transcript, or a factum, overdue by two or more months.
4. Reinstatement

This is the system’s Achilles heel. If any one judge can reinstate an appeal struck off, especially by consent, then the exercise may be almost pointless. There should be criteria and conditions for restoration, such as first tendering the next step.

5. Conclusion

This process seems to work well, and avoids waiting for the innocent party to spend his or her time and money on a motion to dismiss for want of prosecution.

Recommendation 32: The Rules should require the Registrar to deem appeals abandoned after specified important defaults or delays by the appellant. There should be a prior warning.

E. ADJOURNMENTS AMONG INDIVIDUAL JUSTICES OF APPEAL

1. Shirking Work

A judge who dodges motions work by undue adjournments can be a problem. This can be unconscious. But the New Brunswick practice that adjournments have to be to the same judge would help, and would force and encourage the first judge to prepare properly.

2. Judge-shopping

Even a system which supposedly prevents judge-shopping is bypassed, if counsel can keep adjourning a motion until a sympathetic judge turns up one week. A rule that adjournments have to be to same judge would help, though would be awkward if one judge is unavailable for some weeks.

3. Adjournments Sine Die

The Federal Court of Appeal never does this. Any adjournment is always to a fixed date, so every appeal is always under supervision and pressure. The Alberta Court of Queen’s Bench controls summary conviction appeals to it the same way. The judge to whom they are adjourned has power to dismiss them.

Recommendation 33: Do not adjourn motions or appeals for an indefinite length of time.
CHAPTER 7
ONE SOLUTION FOR ALL COURTS?

“Houses are built to live in and not to look on; therefore let use be preferred before uniformity, except where both may be had.”
– Bacon, *Essays*, ‘Of Building’ (1625)

“The laws of a country ought to bear reference to its physical character, to the climate, whether warm, cold, or temperate; to the quality of the soil, to its situation, to its size, to the kind of life led by the people, whether farmers, hunters, or laborers.”
– de Montesquieu, *L’Esprit des lois*, I (1748)

A. INTRODUCTION

It is very doubtful that every detail of procedures and methods should be the same in all Courts of Appeal, large or small, irrespective of geography or jurisdiction. But people reluctant to embrace reform are often quick to brush off the most compelling arguments with the suggestion that the reforms would be fine for others, but not for the reluctant person’s unique circumstances. So we have to go further and find some criteria to evaluate what reforms should be universal, and which should be limited.

B. ARE THE AIMS THE SAME ACROSS CANADA?

Yes.

C. ARE THE PROBLEMS THE SAME?

1. Not All Are

   (a) Some provinces have a high volume of appeals and potential backlogs (and had bad backlogs in recent years). Some do not.

   (b) Some provinces have many judges, even some split between cities, and need special methods of communication and collegiality. Most do not.

   (c) A few provinces have trouble getting judgments out on time. Few are as speedy as could be.
(d) Resources, and of what type, vary from adequate through inadequate to almost non-existent.\textsuperscript{110}

(e) The Supreme Court of Canada controls its own access, unlike the others. It has under 70 actual appeals with leave in the pipeline at a time.

(f) The Federal Court of Appeal also hears judicial review motions, and is not just a Court of Appeal.

(g) The Federal Court of Appeal has Registries and sitting points in more than 19 places. It sits in Toronto every second week. A few other Courts of Appeal sit a lot in more than one place. Most do not.

(h) Only the New Brunswick Court of Appeal, Supreme Court of Canada, and Federal Court of Canada have two official languages for all judgments. (Almost all others hear some cases and write some judgments in a second language.) The other courts issue judgments in one language only.\textsuperscript{111}

(i) Only Prince Edward Island has a court as small as its quorum; the Northwest Territories and Nunavut have some resemblances.

(j) Only the Supreme Court of Prince Edward Island, Appeal Division, judges do much trial court work, though again Northwest Territories and Nunavut have some resemblances. And some other Atlantic Court of Appeal Registrars are burdened with a lot of trial court work.

(k) Only the Supreme Court of Canada and Supreme Court of Prince Edward Island, Appeal Division, usually sit with the same (full) court. The rest use fluctuating panels.

2. There Are Lots of Common Problems

But the differences above do not affect all or even most of the topics in this Report. I particularly emphasize the following.

(a) Slow Appeals

This is a much broader question than backlogs or volume. One litigant who is unreasonably stalled rightly does not care who caused it, or whether his plight is unusual, or common. A slow unmotivated party is much the same in Cornerbrook or Cranbrook.

(b) Expense

A transcript and an experienced lawyer are expensive and for much the same reason, in all cities of any size.\textsuperscript{112}

(c) Other Access Issues\textsuperscript{113}

Only Prince Edward Island is geographically small, though a number of provinces have thin population once one gets very far from the Court of Appeal’s city.

\textsuperscript{110} See Chapter 18.

\textsuperscript{111} See Chapter 20.

\textsuperscript{112} Chapters 3 and 11.

\textsuperscript{113} See Chapter 19.
(d) Efficiency and Simplicity

Some courts have a lighter volume of appeals. But leisure would be no reason to work inefficiently, still less to waste counsel’s time and money. All Courts of Appeal’s appeals are becoming more complex.

(e) The bigger courts have more pressures, but have more resources too. Conversely, they have resources but more demands. The question is the balance between resources and calls on them.

(f) The Federal government is the same bad obstacle to enacting criminal Rules everywhere, as almost all provinces report.

(g) Nowhere is the main problem systemic backlogs anymore, so we must all concentrate on the next goals. Those tend to be very similar, as the other chapters show. For example, getting out judgments faster.114

(h) Most (though not all) governments begrudge their own Court of Appeal any money or resources, and careful examination suggests that saving money is not the primary motive in many cases.115

(i) Reluctance to enforce the Rules is widespread.116

(j) Tarnished motives of litigants and parties are universal.117

(k) Suboptimal allocation of priorities in case management and internal procedures is not confined to one province.118

(l) Insufficient control over oral argument is universal.119

(m) Wasteful books of authorities are required and filed everywhere.120

(n) Time-consuming self-represented parties are a burden everywhere.121

(o) Experienced appellate counsel are lacking everywhere.122

114 See Chapter 16.

115 Chapter 18.

116 Chapter 5.

117 Chapter 4.

118 Chapter 10.

119 Chapter 13.

120 Chapter 14.

121 Chapter 15.

122 Chapter 21, Part G.
D. DO SOLUTIONS WORK THE SAME IN ALL COURTS?

1. Many do. Size of court or volume of work is rarely critical, e.g. does not influence how to settle the record.¹²³

2. Some procedures can be done less formally in smaller courts, but the essence is the same everywhere.

3. Case management and its tracks will differ in detail court to court; a lot is trial and error.

4. Chapter 11 recommends that how Courts of Appeal access trial court documents not argued by either party may depend upon how organized and efficient the individual offices of the trial court are.¹²⁴

E. INTERCONNECTED REMEDIES

1. There are alternative ways to handle some problems, but the solution adopted in any one place must be consistent with the other parts. Where there are alternatives, one cannot use neither, and it would be a waste to use both. And one cannot adopt a method requiring lots of staff, if one cannot get such staff.

2. Some procedures are more or less alternative to each other.

3. Some remedies are sequential and need several interconnected procedures, e.g. to block all escape routes for evaders.

F. SHOULD A SMALLER PROVINCE COPY A BIGGER ONE’S RULES OF COURT?

1. Advantages

(a) It is cheap, quick, and easy to do. One does not need a lot of research. Nor even much discussion or consultation.

(b) This guarantees one size or color for all, across boundaries, and so uniformity and ease of learning by lawyers who cross provincial boundaries.

2. Disadvantages

(a) Most sets of Rules are not really designed or engineered from the ground up or after full study and thought. Most grew like Topsy in local conditions, albeit with periodical study and pruning.

(b) Most individual Rules reflect isolated events and local conditions. They often reverse specific past practices.

Often those have no application in the new province, and never did.

¹²³ Chapter 11.
¹²⁴ See Chapter 11, Part E.2(c),(g).
(c) Culture can differ a lot.\textsuperscript{125}

(d) It is hard to know how Rules actually run in practice in their home province. Even the identical Criminal Code is administered very differently province to province.

(e) An unenforced Rule is a great evil.\textsuperscript{126} If the Rules copied are those of a big busy Court of Appeal, they are very likely to be unsuitable or unfamiliar in some respects. As noted in Chapter 6, passing a Rule alone will not change the culture.

3. A model or plan or report may be more suitable to copy, than a detailed set of exact Rules. An example is found in Appendix A to this Report.

I hesitate to make any firm recommendation on this topic F.
APPENDIX TO CHAPTER 7:
POPULATION AND GROSS DOMESTIC PRODUCT

Population (2001)

Gross Domestic Product (2001)
A. INTRODUCTION

We usually understate appellate delay. We do not calculate delay before the appeal is filed. Yet in some provinces, an appeal can be filed a year after the decision under appeal! We have to see the whole picture and prevent needless delay, especially deliberate stalling.

B. WHEN TIME RUNS FROM

There are three arguable alternative starting points: when the trial court first announces its decision; or when that is formally filed (entered); or when that is formally served on the appellant.

1. Possible Problems with Pronouncement

   (a) The formal order later entered could be unexpectedly different, and in theory an appeal is from it.

   (b) The appellant might not know of pronouncement?

   (c) The Court of Appeal might not be sure when pronunciation was?

   I did not find any of these objections very convincing, for the reasons in #2, 3 and 4 below.

2. Answers to 1(a) Unexpected Difference

   (a) That rarely happens.

   (b) If it does, a judge can extend time to appeal in that rare case, or can let the appellant amend the notice of appeal.

   (c) In Ontario, Quebec, New Brunswick, and Saskatchewan, time runs from pronouncement and it works well. Saskatchewan changed to that system from the old way of counting from entry, and are happy with the change.
3. **Answers to 1(b) Lack of Notice**

(a) This is not a problem in criminal cases, where time always runs from pronouncement.

(b) In civil cases, pronouncement is usually defined as when the appellant gets notice, but the appellant is bound by notice to his or her counsel.

(c) A party has a duty to give the court an address for service, so if judgment is reserved and then given in writing, a copy mailed to that address is highly likely to reach that address in a few days. The system should not count time from some later date to accommodate the odd neglectful litigant who does not pick up his mail or tell his lawyer how to reach him.

(d) One should frame the legislation so that time to appeal is long enough to allow for getting notice from counsel or the trial court, say a total time to appeal of 30 days (or one month?)

(e) Extending time to appeal is possible in the rare case of injustice.

4. **Answer to 1(c) Uncertainty**

Pronouncement occurs in open court, or by mailing or handing out filed written reasons. It should not be hard for the Court of Appeal to discover the date of that.

5. **Not Service**

Time to appeal should definitely not keep running until service of the entered order, for several reasons:

(a) The Court of Appeal does not know when that is, and can hardly check the date of service either.

(b) One does not want to give the appellant a motive to evade service and so extend his or her time to appeal. Or even get more time because he or she travels a lot or keeps his or her address quiet. It is remarkable how often the Crown cannot find an accused to serve him with its notice of appeal.

6. **Not Entry**

Should times to appeal only count from entry of the formal judgment in question? That has certainty, and would be easy to determine.

But it can easily delay the start of the appeal by up to a year, or longer, e.g. by discussions over the wording of the formal order. That is especially so when the trial court’s process for setting the disputed wording of a formal order is slow and cumbersome. Alberta experience repeatedly shows that.

Requiring entry also gives an appellant incentive to delay. It is hidden delay, not shown by any Court of Appeal (or Canadian Judicial Council) statistics.

But New Brunswick and Prince Edward Island do not mind this system.
7. Reasons to Follow

Occasionally the trial court will give a mere decision, with reasons to follow later.\(^{127}\) In theory that complicates an appeal time which runs from pronouncement. But the practical solution is extension of time to appeal in those rare cases.

8. Conclusion

Many Federal Acts, and Ontario, New Brunswick, Saskatchewan and Quebec legislation choose pronouncement, though sometimes the statutory language is somewhat vague. On balance, it is the best choice.

**Recommendation 34:** Make time to appeal run from pronouncement. Word that statute or Rule to define that event clearly.

**Recommendation 35:** Provide that a significant deviation between a pronounced decision and entered order is relevant on any motion to extend time to appeal.

C. WHEN TIME STOPS RUNNING

I can see four arguable dates when the time for appeal would stop running, i.e. four alternative duties on a would-be appellant.

1. Filing the notice of appeal?

Filing in the Court of Appeal Registry is a simple convenient point for the Court of Appeal. But the respondent may not know of that for some time, i.e. not know that his trial judgment is back in the melting pot.

2. Service of the notice of appeal on the respondents?

(a) but the respondent could evade service (cf. Part B.5 above),
(b) and the Registrar of the Court of Appeal will not know when it was served.

3. Filing proof of service?

Ontario, Nova Scotia, Prince Edward Island and Saskatchewan require the appellant to serve the notice of appeal before filing it, then file proof of service with the Registrar. This represents a change of Rule in Saskatchewan, which it is happy with it.

4. Some combination?

A compromise seems fair. One could make time stop on filing, but add some penalty for not serving the notice promptly. One province adopted this recently.

Service on the address for service or solicitor whom the respondent used in the trial court seems reasonable. I disagree with older cases which say that the respondent’s address for service dies with judgment. Alberta’s Rules revised that a few years ago, and there has been no problem.

**Recommendation 36:** Require that the notice of appeal be filed within the time for appealing. Require that it be served and proof of service be filed, within a further 10 days, with power to extend that.

**Recommendation 37:** Each party’s address for service in the trial court should continue for Court of Appeal purposes until formally changed.

**D. EXTENDING TIME TO APPEAL**

This has potential to be a very dangerous topic, but fortunately there are not many applications to extend time.

Courts in Canada have no general power to extend limitation periods, though some Acts allow that in narrow circumstances. Legislation always imposes short time limits on appeals: typically a few weeks, even less. At the end of litigation, certainty is important. A belated appeal can both punish the respondent for his or her reliance on the trial verdict, and also diminish trial courts in the eyes of the public. They are not mere preliminary bouts before the “real” match in the Court of Appeal. That and the philosophy outlined in Chapter 5 have led most Courts of Appeal to enunciate specific, fairly tight criteria for extending the time to appeal, e.g. intent in time to appeal.

Unfortunately, in more recent years a few courts have allowed an escape clause wherever it seems to the court that the “interests of justice” are at play. That test is either extremely broad, or hopelessly vague. Authority which says that the courts are to play by the Rules unless they dislike the result, leaves no law or Rule at all. I can see no principled justification for that. It flies in the face of all said in Chapter 5.

**Recommendation 38:** Reword Rules or statutes on time to appeal to incorporate only tests for extension of time such as intent in time to appeal, reason for the delay, no waiver or other bar, no prejudice not compensable in money, and an arguable appeal.

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128 See Zuckerman, op. cit. supra at 731-4.

CHAPTER 9
LEAVE TO APPEAL

“Hope deferred maketh the heart sick.”
– Proverbs 13:12

“The question of the power of the Queen to admit the appeal, as an act of grace, gives rise to different considerations.”
– Cushing v. Dupuy (PC(Que) 1880) 5 App Cas 409, 416

“Words are like leaves; and where they most abound, much fruit of sense beneath is rarely found.”
– Pope, An Essay on Criticism (1711)

This chapter is about ordinary Courts of Appeal, not a second level of appeal such as the Supreme Court of Canada or House of Lords. Different considerations entirely apply there.

A. A CONFUSING CATEGORY

I would prefer not to treat leave to appeal as a separate topic, for reasons given below. But Canadian readers expect to find it as a separate topic.

My biggest problem is that the whole concept of “leave to appeal” confuses thinking. It is a legal fiction cloaking a number of distinct topics. The phrase is commonly used to describe two or more items from this list:

(a) The Court of Appeal has a choice of what cases it hears, and so may decline to hear a case.
(b) A different court decides which cases the Court of Appeal hears.
(c) One judge alone may dismiss an appeal (though cannot allow one).
(d) Some appeals will get less elaborate treatment than others, in some respect, such as
   (i) type of argument, or
   (ii) how many judges decide the appeal.
(e) A different standard of review on appeal for some appeals; that seems to vary from court to court; in Canada it may have to do with public importance.

130 This chapter is largely a rewrite of Côté, Slow Appeals: Causes and Cures, Chapter 4 (2000).
If we stop parroting the words “leave to appeal” and start thinking about these five separate matters, we then see that there is no necessary connection among them. One can logically have one without the other. Each of them should be considered on its own merits.

Another result of using terminology instead of analysis is ironic: fights over nothing. American intermediate Courts of Appeal usually have absolute jurisdiction, i.e., a duty to hear every appeal on the merits, without “requiring leave.” The only narrow exceptions are for appeals in *forma pauperis*, or from interlocutory decisions (which very rarely seek or get leave). Conversely, American top appellate courts (supreme courts) usually require leave. 131

The English seem to shy away from denying oral argument of “appeals.”

Yet each country does pretty well what it professes not to do. When an English court requires leave to appeal, in effect one judge alone dismisses the appeal (often without any oral argument). When an American staff lawyer recommends to three judges that they dismiss an appeal without oral argument, and they agree, they decline to proceed to full appeal procedures. The English and the Americans do much the same thing, but call it different names. 132

Canadians get hung up on terminology, adopt all the formal reluctance of the Americans and of the English, and use it as a reason to refuse to do things that both the Americans and the English do. We have to get past labels and see what the Americans and the English actually do.

Some Canadians who would welcome the English system (leave) and fear the American one (maybe no oral argument) do not see that the American system is actually kinder to appellants. The English system of leave has one judge dismiss an appeal, often without a full trial record. Yet it duplicates work, as shown below. The Americans have three judges consider every appeal on the full record.

Therefore, fuller consideration of some of the five topics listed above will be found elsewhere in this Report. 133

B. DOES REQUIRING LEAVE HELP?

1. Objectives

Let us now turn from concepts and terminology to practicality. Should we let certain types of appeal proceed only if a single appellate judge has first heard oral argument on a motion for leave, and granted leave to appeal? The Canadian Bar Association’s 1996 Task Force on Systems of Civil Justice very briefly endorses that. 134 Is that a good rule? Sometimes yes, and sometimes no. But if yes, usually there is a better way (on which see Chapter 10, Part F).

The objectives of such a rule are probably mixed, even at times confused or conflicting. However, saving the court the work of hearing an unsuitable or hopeless appeal is always one aim. Saving the parties the work, plus the associated delay, is probably another.

133 On item (d), see Chapter 13 on oral argument, and Chapter 10 on tracking. Item (b) is discussed in Part F below.
134 C.B.A. Report, p. 49.
2. Judicial Labor

In theory, the one judge who grants leave could be a member of the panel which later hears the appeal, but practicalities of assembling panels render that well-nigh impossible, especially in a larger Court of Appeal.135

Does requiring leave save judicial labor? If leave to appeal is denied, the matter is heard by one appellate judge instead of three, a saving of two judges’ time. But if leave is granted, then the case is ultimately heard by a total of four judges, a waste of one judge’s time.136 If about two thirds of 100 cases got leave and one third did not, then 33 would be heard by one and 67 by four, a total of (33 + 268) 301 judge-cases. Without a leave requirement, 100 would be heard by three, a total of 300.

So no judge labor whatever will be saved by requiring leave, if two thirds or more of the cases get leave. If half get leave (as with Saskatchewan and British Columbia interlocutory appeals), judicial labor will only be reduced by about 16%, which is not very much. A third of the judge labor would be devoted even if none ever got leave. To cut total judge labor in half requires that no more than one case in six get leave. Yet most Quebec factual appeals from indictable convictions get leave. And those with both factual and legal questions almost all get leave. Conversely, only 30%-40% of Quebec judicial review appeals get leave.

Lord Bowman gave an extremely guarded recommendation to introduce a general requirement for leave in England, and only as an experiment.137 That is not surprising, as the English statistics which he cited showed that appeals which had got leave very often did not succeed any more than unscreened appeals.138

Furthermore, the discussion above only covers judges’ labor. A leave motion followed by an appeal may well mean almost double the work for the Registry, law clerks, and staff lawyers.

Therefore, I have serious doubts whether the new English practice of requiring leave to appeal in every civil case saves any judicial labor. Indeed, sometimes more than one judge hears a leave application in England, so the result may well be that the court spends more judicial labor because of leave,139 not less.

3. Parties’ Labor and Expense

That is not the most wasteful aspect of requiring a motion for leave. Far worse, requiring leave from one judge will likely not save the parties any time or money. It might not be too bad if the leave application were ex parte or written, and any denial of leave were not questioned further. Some Canadian courts handle leave applications in writing only. But elsewhere the leave application is often a long oral hearing on both sides, probably with written argument too. It takes almost as long to argue before one judge as before three, so a leave application costs almost as much time.

135 Lord Bowman, Review, 75-6.
137 Id. at 34.
138 See Slow Appeals, Chapter 4, p. 20.
139 Id. at 59-60, 199, 203.
and money as an appeal. (Written argument has to be prepared twice, so it might be partly recycled.) And if leave is granted, the whole thing must be done all over, thus virtually doubling the expense of time and money to the parties.

A motion for leave to appeal will consume weeks, often months. That means that if leave is granted, the whole appeal has been delayed with no offsetting benefit of any kind.

Worse still, some Alberta counsel have found a new way to pervert the system. They file a motion for leave to appeal, and then agree to adjourn it *sine die*. Yet the few statutes in Alberta which require leave to appeal contain clear indications that the Legislature considers those topics urgent. To combat that, Alberta’s Consolidated Practice Directions deem a motion for leave abandoned if not heard within six months. Counsel argue that that does not apply to a motion adjourned *sine die*.

All that is probably why the American Bar Association once condemned a need for leave as useless.\(^{140}\) The Federal Court of Appeal and a number of Canadian provinces hear most appeals as of right, without any need for leave. The same is true of American intermediate Courts of Appeal, including the Federal appeal courts.

Therefore, Lord Woolf’s idea that requiring leave to appeal saves the parties expense on a hopeless appeal\(^{141}\) has much less force than it seems at first.

### 4. Merits

Apart from efficiency, to require that *all* appeals seek and get leave seems odd on the merits. Does it presuppose that one judge can summarily and reliably find that over a third of *all* appeals of *all* types are hopeless, or are not important enough to hear? If he or she cannot find that that many are hopeless, no time is saved, as shown above.

### C. WHEN IS SUMMARY TREATMENT JUSTIFIED?

#### 1. Special Types of Case

On the other hand, if one can identify some type of case not very likely to be important or successful, then some summary disposition process can be beneficial. In Alberta, second summary conviction appeals were formerly heard on the merits by a panel of the Court of Appeal. The leave required by the *Criminal Code* s. 839 used to be treated as a formality, and given by the panel when hearing the appeal. Then the Court started having one judge hear leave applications (as Quebec, Manitoba and British Columbia do). This yielded considerable saving, because thereafter fewer such appeals were even filed.

That happy result probably flowed from three things. First, many of those appeals under the old system were probably not sincere. They were a mere excuse to stay drivers’ license suspensions. Second, the *Criminal Code* confines such appeals to a question of law alone, and one judge can readily see whether there is one. Usually there is none. Third, the judges quickly showed that they would not give leave without an arguable question of pure law, so counsel did not even try unless they thought they had a good chance.

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Therefore, a court could usefully identify some class of case with these earmarks:

(a) After the event, it can be seen that most of these appeals fail, OR that most of them were not worth a full written judgment making law.

(b) Before the event, it is easy to identify and describe this class of cases in legislation.

(c) Without a full transcript, one judge can reliably predict whether the appeal is doomed, or is highly unlikely to be worth having a judgment about.

(d) There is no serious split among the judges of the appeal court over the principles relating to that class of appeal.

If a category meets all four criteria, then some good would flow from requiring leave to appeal. But there are other better ways of handling the situation: see Chapter 10, Part F.

Confining appeals to questions of law alone sounds promising, but it is not. To evade just such legislation, many courts have defined “question of law” in the broadest possible terms. Any good lawyer can find what is technically a question of law almost anywhere. It would have to be a question of general law of general interest and importance, to be a real distinction (or worth hearing for law-making purposes).

**Recommendation 39:** Leave to appeal should be required for certain narrow rare categories of appeal. Eliminate all other requirements for leave, or convert them to special handling.

2. Alternatives to Requiring Leave

See Chapter 10, especially its Part F.

D. INTERLOCUTORY APPEALS

1. Introduction

A commonly-suggested category requiring leave is “interlocutory appeals”. But there are many problems with that.

2. Mysterious Boundaries

That word “interlocutory” breeds uncertainty. It is highly technical, and over time has been interpreted in many conflicting, even strange, ways. (Who wins a motion determines whether it can be appealed, or where.) Some people think that a final decision on one point cannot be interlocutory. Canadian law reports are full of surprising and conflicting decisions on this artificial topic.\(^{142}\) Nothing is more sterile than a whole class of litigation about whether an appeal needs leave or not, and whether it is interlocutory or not. Judges thus make useless extra work for themselves.

Ontario sees lots of such litigation. What is interlocutory and what is not is now a problem for both the bench and bar in Saskatchewan. Lawyers there must elect to seek leave or appeal without it; the Court of Appeal will not let them do both. It is a puzzle in British Columbia too, and because of it, the British Columbia Court of Appeal allows special notice of application to file. The applicant can apply both ways in British Columbia if unsure.

3. **Category Ignores Likely Merits**

Trying to see whether an appeal is interlocutory is a poor way to decide whether it is important, and no indication at all of whether it is likely to succeed.

4. **Criteria for Leave Are Confused**

Once one judge hears a motion for leave to appeal, there is no obvious criterion for leave, the way there is when the law confines an appeal to questions of law alone. Different courts or judges indeed differ sharply on the criteria for giving leave in an interlocutory matter. New Brunswick is about to amend its Rule to clarify that.

The usual rationale in Canada for hearing interlocutory appeals at all, is that doing so could save a second trial, if there was an error.

But in Canada where leave is necessary, that rationale rarely if ever seems to be reflected by any of the criteria for giving leave in the reported cases. Usually their criteria are either

(a) law making: grant leave if there is either a general question of importance, or conflicting precedents (though that lawmaking would still be open if one waited until after the first trial was over before appealing), or

(b) error-correcting simpliciter, e.g. ask whether the appeal is arguable, or the like.

(Only one province says that the Court of Appeal usually denies leave unless later correction of the error after trial would be impossible.)

So in interlocutory appeals (the biggest category), the leave requirement in the form usually met is either useless, or off on a voyage of its own. Nothing about it serves the professed rationale for hearing some of these appeals or requiring leave.

5. **Barring Interlocutory Appeals?**

The American practice can be a false guide. The New York Appellate Division hears all interlocutory appeals as of right, with no need for leave, and has no backlog despite its very high volume. Just as the Canadian Criminal Code entirely bars interlocutory appeals, most American appeal courts will ordinarily not hear any interlocutory appeal, civil or criminal. The dissatisfied litigant or accused is supposed to protest the interlocutory decision, but go to trial. If he or she wins the trial, the interlocutory point becomes academic. If he or she loses the trial, the point can be one of the grounds for appealing from the trial judgment. Some American appeal courts will only hear an interlocutory appeal if the appellant can show permanent prejudice which could not be undone by later ordering a new trial. Rarely can one show that. In the United States, expense and inconvenience of a possible second trial is not a ground to hear an interlocutory appeal. So most American Courts of Appeal rarely hear them.
Maybe Canada should do the same, especially where a Master and a judge have already heard and decided the question. How many new trials are caused by failure to appeal some procedural tiff before trial? Very few. Any possibility of an interlocutory appeal encourages delay, obstruction, and a war of attrition.

6. Conclusion

Unless Canadian courts make that big change and adopt that strict American test, requiring leave for interlocutory appeals gives Canada the worst of both worlds. Canadian courts which require leave for interlocutory appeals often give leave, e.g. on the ground that the point is arguable, and that procedural law would be clarified. (That philosophy is sometimes appropriate; procedure can be as important as some rules of substantive law.) But if that approach is right, there should be no need for leave in interlocutory appeals. The problem should be handled other ways. That would include no automatic stay of execution. Other ways are discussed below.

7. Two Appeal Courts

If requiring leave is a way of splitting interlocutory work between two appellate courts, it might be better to file all such appeals in one court. Then some could be administratively internally selected and sent to the other court. That is often the American method.

E. TIMES

It takes more time to prepare a motion for leave than to prepare a notice of appeal, so if the Rules are at all fair, they would allow more for a motion for leave to appeal than for a simple appeal. Therefore, requiring leave to appeal would slow down the appeal at the outset. Then the motion would take at least three weeks to come on, be prepared for, argued, and decided. So requiring leave can delay an appeal for months. But delay in an appeal is pernicious: see Chapter 5, Part E.

Recommendation 40: Do not require leave to appeal interlocutory matters. Bar some such appeals before trial entirely and allow them as a ground to appeal the trial decision. Allow others before trial and give them special short and fast handling in the Court of Appeal.143

F. GATEKEEPERS OUTSIDE THE APPEAL COURT

Some statutes require leave to appeal or a certificate of importance, from someone outside the Court of Appeal.

In practice, such a gatekeeper is usually the judge to be appealed from. That has the advantage that he or she is already familiar with the matter (unless counsel delay some months in seeking leave). But the losing party questions the quality of such screening, saying that the judge cannot objectively assess his or her own decision. Some may be too strict in finding arguable error or general questions of importance, some too lax, he or she argues. And a trial judge is unlikely to have seen enough appeals as a benchmark to test the importance and arguableness of the present appeal.

143 As Alberta started doing in 2004.
And, if the trial judge can deny leave, one is strongly tempted to allow a second leave application to an appellate judge. Now five judges hear the appeal instead of three! We are going backwards. And if the trial judge does grant leave, he cannot take any further part in the appeal, three separate ones take over, and so four judges in total will hear it.

Requiring leave from the trial court (and no one else) does cut down on the appeal court’s work, but it gives more work to the trial court (which may be as busy). And it duplicates the work and expense for the parties. It is a remedy, better than nothing, but there are better remedies.

Furthermore, the English experience shows that where leave is granted by the “lower” court, the appeal has a low chance of success, about half that of cases where the appeal court gave leave. 144

G. LEAVE BY WHOM?

1. Trial Judge
   See Part F above.

2. One Judge
   This is discussed above at length in Part B.

3. Panel of Court of Appeal?
   Two provinces require this outside criminal matters. But what labor does leave by a panel of the Court of Appeal save? Why not just hear the appeal? Alberta arbitration legislation called for that, but when the Alberta Court of Appeal pointed out the illogic of requiring six judges to hear an appeal, the Act was amended to substitute leave of one judge. If the panel uses a more streamlined procedure, the concept “leave to appeal” becomes meaningless. One should forget that mumbo-jumbo and hear such appeals with that simpler procedure.

   When Federal Court of Appeal leave is necessary, it is “heard” without oral argument. But why make it easier? Supreme Court of Canada motions increased a lot when they changed to a paper exercise.

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144 Review, supra note 6 at pp. 37, 196.
H. USE OF LEAVE AS A CASE MANAGEMENT TOOL?

1. Where the Criminal Code requires leave to appeal, that need usually is ignored in conviction cases. But maybe a Court of Appeal could enforce it if the appeal is limping?

2. A judge should give directions and timetables whenever giving leave to appeal, in any type of case.¹⁴⁶

I. APPEAL TO PANEL FROM ONE JUDGE’S LEAVE DECISION¹⁴⁷

Maybe the existence of a statutory right to appeal a refusal of leave in conviction appeals is why only one Canadian Court of Appeal requires a separate leave application in indictable conviction appeals.

British Columbia receives a fair number of appeals from civil one-judge leave decisions (from 1/5 the refusals), and hears these like ordinary appeals. If the panel wants to give the leave which the one judge denied (which is 1/4-1/3 the time), they probably hear and decide the merits of the appeal at the same time. So does denial of leave by one judge have real effect under such a régime?

Few if any other Courts of Appeal hear appeals from refusals of leave to appeal.

In principle, this appears to me evasion of the legislative bar on an appeal unless leave is first given. It is a prime example of lawyers’ and courts’ view that correctness trumps all: speed, economy, certainty, and obedience to legislation.¹⁴⁸

Recommendation 41: Where leave to appeal by one judge is denied, bar any appeal or rehearing of that decision, or any fresh leave motion before anyone else.


¹⁴⁷ See Zuckerman 745-6, Lord Bowman 59.

¹⁴⁸ See Chapter 5.
CHAPTER 10
CASE MANAGEMENT

“\textit{Vigilantibus, non dormientibus, subveniunt jura.}”
(\textit{The laws serve the vigilant, not the sleeping.})

– Broom’s \textit{Legal Maxims}, 599 (10th ed. 1939)

A. INTRODUCTION

1. General

Chapters 4 and 5 of the present Report show the need for proactive Courts of Appeal. Chapter 6 shows why they need some hands-on control.\textsuperscript{149} Chapters 9 and 10 show why not all appeals should be treated the same. Chapter 9 shows what is wrong with leave to appeal as a central method.

This chapter suggests a better approach: case management, and different procedure, for different types of appeal.

2. American Approach

The methods described here are roughly the American approach.

3. History

At one time, Courts of Appeal seem to have streamed cases to some degree. For example, the Alberta Appellate Division had separate District Court and Supreme Court lists, with a different size of panel hearing different lists. Maybe as some courts got bigger, those courts then went to one standard method for all appeals? It was a retrograde move, if so.

Smaller courts already do much of this, albeit not formally.

The Quebec Court of Appeal now takes charge of many types of appeal from the date of filing. British Columbia now case manages appeals involving children, and is trying to do more case management.

The methods advocated here flow from the problems and solutions in the preceding chapters, and an Ontario study recommends them (for trial courts).\textsuperscript{150}

\textsuperscript{149} See also Lord Woolf, \textit{Interim Report “Access to Justice”}, Chapter 5, p. 3 (para. 16) (1994).

B. OBJECTIVES OF CASE MANAGEMENT/STREAMING

I can see 13 aims justifying management of appeals.

1. To keep appeals moving at every stage proactively, and not wait to act until counsel have let a case molder, or someone complains, or Rules on gross delay are violated. The Court of Appeal should keep monitoring and modifying.\(^{151}\)

2. A Court of Appeal should not assume that all appeals will go to hearing. After all, one-half of the civil appeals and one-third of the criminal ones do not! See Chapter 4’s Appendix. Courts of Appeal should widen their focus and encourage settlement or abandonment. It is important to identify cases likely to take that route.\(^{152}\)

3. To detect other non-flow problems early, including
   (a) Lack of parties (e.g. constitutional issue);
   (b) Likely conflicts of interest of judges; or
   (c) Lack of jurisdiction.\(^{153}\)

4. To devote minimum resources to those appeals which are
   (a) Not fairly arguable;
   (b) Not open (no jurisdiction, or necessary leave was not got, or filed late);
   (c) Moot;
   (d) Of no practical use;
   (e) Too small;
   (f) Deemed inactive or abandoned because of expiry of deadlines. Detect and refer for disposal serious lack of prosecution or cooperation, or other serious misconduct, on a specific appeal; or
   (g) Of no general interest, etc.

5. To detect and give priority to urgent matters (whether or not the parties see the urgency), especially if non-parties are likely to be affected. See examples in Part D.1.

6. To detect and cure any unsuitableness or inadequacy of the usual procedures, e.g.:
   (a) Parties or counsel distant from Court of Appeal offices;
   (b) Unusual record, e.g. from a special tribunal;
   (c) Many parties or interveners;
   (d) Not an appeal, but a reference from the government; or
   (e) Parties or counsel cannot civilly cooperate.

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\(^{151}\) Lord Woolf, supra, at Chapter 5, p. 4 (para. 20).

\(^{152}\) See Lord Woolf, supra, at Chapter 5, p. 5 (para. 23) (1994).

7. To detect, and handle suitably, any appeals of unusual importance, e.g. issue of overruling past precedents, etc.

8. To detect and cure relevant misunderstanding or ignorance on the part of

(a) Parties;

(b) Counsel;

(c) Trial court's or tribunal's clerks in preparing or certifying the record for the Court of Appeal; or

(d) Court reporters.

9. To give judges, law clerks, and staff lawyers lots of lead/preparation time.

The court will derive many important list management advantages if it gets an early summary of each appeal by legal counsel. The benefits self-reinforce. Such summaries have many more uses than preparing the panel of judges just before oral argument. British Columbia does this now. Some other provinces in effect do that. The Alberta Court of Appeal is beginning to experiment with it.

10. To prevent gaps, thin spots, or over-crowding on hearing lists.

11. To detect and cure persistent or habitual misconduct or inaction by one party or lawyer?

12. To detect and try to group and hear together appeals closely related, e.g. appeal from the same hearing, or with the same parties.

13. To keep the Registrar's records and information up to date.

C. BASIC METHODS OF CASE MANAGEMENT

1. Contents of Notice of Appeal

(a) Basic Contents

Sometimes, a notice of appeal does not do much more than its name implies. It says who the appellant is, and what he or she is appealing from.

But a notice of appeal must also set the limits of the appeal by clearly stating which paragraphs of the formal order in the first court are being appealed. That is vital.

**Recommendation 42:** Rules should require that a notice of appeal state which parts of the formal order are appealed.

(b) Form

The traditional notice of appeal was a lawyer-drafted document. Prisoner appeals are usually accomplished by filling in a form. Experiments in a number of provinces show that counsel and lay parties appreciate a form which they can fill in. So the court should provide one, and have a copy on its website. An interactive one there, keyed to instructions on how to fill it out (as in Alberta), is user-friendly.
Recommendation 43: Replace lawyer-drafted notices of appeal with a court-drafted standard form with blanks to fill in.

(c) Grounds of Appeal

Usually a notice of appeal also gives the grounds of appeal, i.e. lists the complaints about the judgment under attack. Alberta’s civil appeal notice appears to be one of the few which do not.

Should a notice of appeal be required to give grounds? In theory, yes.¹⁵⁴ There is an ethical duty on counsel not to appeal without grounds. And it is early notice to the opponent of what the case is about. In those Courts of Appeal which require both sides to agree on how much evidence to reproduce for the Court of Appeal, this is almost the only official way that the respondent can learn what topics are likely to arise, especially as I recommend dropping that agreement.¹⁵⁵ And theoretically the notice is a pleading framing the issues.

But it is doubtful that anyone really gets much practical assistance from formal grounds of appeal in a notice. No lawyer drafting one can be accurate or complete before he or she has studied the transcript or record of proceedings in the first court. An unethical or hurried lawyer is quite capable of modifying slightly the boilerplate grounds which he or she memorized 20 years before as a student.

And the grounds do not bind the appellant; most Courts of Appeal will let him or her put other ones in his or her factum. So the grounds are of very little use in shaping the record to be filed, or planning the respondent’s research or argument. Very few Courts of Appeal told me that the grounds were used for case management.

Besides, most lists of grounds are too vague and formulaic to be really comprehensible, let alone reliable.

Anything which the appellant’s counsel names as topics or grounds may be fuzzy. But for what it is worth, the notice of appeal should be a form which includes a blank which asks about the issues in the appeal. An informational question like that is more likely to produce a handcrafted and frank answer, than is a legal request for a premature pleading. This is likely the best way to compromise between the theory of grounds of appeal and the practical reality of the information needed.

Recommendation 44: Abolish the need for formal grounds of appeal in a notice of appeal. Require instead that the appellant’s counsel state what are likely to be the important issues in the appeal.

(d) Other Information

However, a notice of appeal can usefully state more than the fact of an appeal.

The form for the notice should have blanks in which the appellant must give various types of objective information useful for case management and general administration by the Registrar. As a sample, a copy of p.3 of the new Alberta form is Appendix A to this to chapter.

¹⁵⁵ See Chapter 11.
2. Get Other Information at Once

(a) The Court of Appeal needs the following extra information:

(i) Is mediation suitable?
(ii) Is the usual procedure suitable?
(iii) Any reason to expedite the appeal?

(The above three are Quebec Court of Appeal questions.)

(b) Here is how to get that information:

(i) Separate docketing statement filed at or near beginning?
(ii) Detailed notice of appeal? See #1(c) (probably better than (i)). The Registrar should examine each notice of appeal for danger signs or possible need for special treatment, e.g. a large number of separately-represented parties.
(iii) Documents to accompany it, e.g. formal order appealed (as in Alberta).
(iv) Ask counsel if the usual procedure is suitable, as Quebec does, and Alberta is starting to do.
(v) Ask for suggestions, as Quebec does. Use letters or conference calls.
(vi) In a criminal case, ask the trial judge for certain objective information, such as whether there were voir dires, and on what issues.
(vii) Note cases where the reasons for judgment under appeal are unusually long.
(viii) Note cases where the trial record is unusually long.

3. Supplement That Information Later

There are four ongoing ways to get more information:

(a) How can the Registrar learn whether the respondent has counsel and who it is?
   The Federal Court of Appeal's formal appearance is one method.

(b) Have the objective summaries of cases prepared early enough to use for case management and motions, not just for preparation for argument.\textsuperscript{156}

(c) Detect particular categories of case early, especially those for urgent treatment.

(d) Pick up information or danger signs elsewhere, e.g.

(i) Automatic trip wires, e.g. delays, even unpublished ones or non-mandatory time standards.
(ii) Motions, especially multiple or acrimonious ones.
(iii) External character of filings, e.g. big appeal book or transcript.

\textsuperscript{156} See Part B.9.
4. **Monitor Lists Periodically**

(a) **Horizontally**

On certain dates, go through all the computer lists and follow up on what looks wrong, incomplete, late or odd. This is done in Alberta when the list management judge calls counsel to attend and report progress. That is done four times a year for all civil cases over 6 months old. That date is chosen because an appeal should be ready or almost ready to set down for oral argument by then.

(b) **Vertically**

(i) As each case reaches a certain stage, check certain things. At one or two critical points, check the paper file, not just the computer? Nova Scotia’s motion to set down for argument may be similar.

(ii) Diarize ahead specific notes, concerns, needs, or special deadlines, or reminders.

5. **Set Times and Check Progress**

No longer leave control of progress to the appellant.

List management judges and Registrars should set times and check progress in all cases. Ontario uses a number of staff lawyers too.

Usually times and steps are set by the stream, i.e. there is a typical timetable for each.

Staff must follow up daily on each default, once it is identified. The Supreme Court of Canada does, and the Ontario Court of Appeal does so for certain steps.

As a transitional stage, or pending more resources, a Court of Appeal could implement that fully for (say) two tracks (or types of appeal), and only partly for others.

6. **Do Not Overuse Judges**

Do not overuse judges’ labor; that would be counterproductive. Instead, take these five steps:

(a) Give the Registrar more powers.

(b) Appoint Masters. In provinces with no such office, establish it.

(c) Hire more staff lawyers to help the list manager.

(d) Establish formula timetables and directions (see 5).

(e) Limit appeals from a Registrar or Master?

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7. **Act Effectively**

Registry staff should try to handle promptly what they can, using some judgment.

They should refer to the list management judge or Master what they cannot handle. He or she will deal informally, or more formally give orders and enforce them.

The list management judge should refer appeals to panels in appropriate cases for possible dismissal (or to a duty judge for procedural remedies).

A Court of Appeal should have a policy against consent adjournments and time extensions. Only a judge (usually the list manager) or a panel can give them.

8. **Directions From One-Judge Motions**

In any case where leave to appeal is necessary and heard separately, all grants of leave should include a restriction of ground, and either set, or have soon set, a timetable. Have a checklist.\(^{158}\)

The same is true of an order giving stay of execution or bail.

9. **Case-Managed Appeals**

Where case management is needed for one appeal, see Part D.2.

10. **Communication With Counsel**

A Court of Appeal should keep open lines of communication with both counsel. Have staff available to phone and write them. Make staff available at the counter and on the phone or by e-mail or fax. Never hide behind voice mail. Many questions from litigants or counsel are sensible, but not run-of-the-mill. Put lists and lots of information on the public website, so people can do their own checking. The Supreme Court of Canada does.

11. **No Early Timetable**

Should the court set a timetable for the appeal at the outset? That is a doubtful idea if it is suggested for all appeals, especially if it is done too early. It is still more doubtful if one party seems unreliable. It then gives but specious certainty, and wastes effort later. It may be workable for certain streams or in special circumstances. Or at a later stage?

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\(^{158}\) See Lord Bowman, *Review*, pp. 75, 86. See also Chapter 9.
D. POSSIBLE STREAMS

See the chart in Appendix C to this chapter. Each Court of Appeal should select the different categories of appeal needing different handling in its province or territory. I offer in Part D merely some suggestions for a fairly large province.

1. Expedited/Urgent\textsuperscript{159}

The Quebec Court of Appeal accelerates more than a third of its appeals, and decides them in 2-3 months. Expediting becomes less important when most appeals move fairly promptly.

(a) Child Custody or Access

In Saskatchewan, custody appeals are fast-tracked.

Alberta is putting child custody and access, and procedural appeals, on a special semi-fast track. Nova Scotia expedites interlocutory appeals.

(b) Quebec’s common categories for the fast track are these:

(i) Where the suit was summarily dismissed in the first court
(ii) Wrongful dismissal cases
(iii) All family matters (Ontario so handles all family cases, because long family suits just generate motions.)
(iv) All extradition
(v) Guardianship of the mentally infirm (very fast)
(vi) Child abduction
(vii) Interlocutory judgments
(viii) Appeals from sentence alone (technically a different track)

Ontario has three of those categories. Alberta would add two more:

(ix) Professional discipline (striking off the rolls)
(x) Land use planning cases.

(c) Should this include cases with bail or a stay of execution, especially if the public interest is involved?

(d) Should this include cases or types of cases not likely to go to hearing, where a last-minute collapse or death by inanition is very likely? One-third of criminal cases and one-half the civil so end, though many are hard to identify beforehand.\textsuperscript{160}

In a smaller court, such expedited appeals are heard by a special ad hoc panel. In a bigger one, there should probably be a monthly urgent list.

\textsuperscript{159} A thoughtful lawyer in a large city wrote me that a publicized accessible way of getting appropriate appeals on quickly, by dropping some of the usual preparatory materials, was needed. It is done occasionally and successfully and so it is possible.

\textsuperscript{160} See Appendix to Chapter 4 on Motivation.
2. **Case Management Stream/Track**

This is the method for appeals requiring individual handling, or which are difficult, or have many issues, or are unusual, or have many parties, or interveners, or related appeals, or where case management is requested by one or both parties. Or where the Rules do not really cover the situation, and a lot of motions will be needed.

One judge hears all motions and makes all administrative decisions about the appeal. This is done in Ontario, if one party requests it. It is best if the other side consents. Quebec and Nova Scotia do this with a few big appeals. They set the panel early, and put its president or another member of it in charge. Quebec’s sentence-alone appeals have management by the duty judge who hears leave applications.

There would be fewer special or boilerplate directions in this track.

The usual panels hear most appeals in this stream, but cases to be heard by a bigger panel to settle big questions or overrule previous precedent, could go this route.

3. **Short Cases, e.g. procedural appeals**

These appeals would either be on a special list, or on the normal list with special time limits.

Alberta sees these more as urgent, and it has just adopted shorter facta for them (and put them on the fast track). The Federal Court of Appeal fast tracks these and as a result, gets far fewer now.

A panel of two judges could hear such appeals.¹⁶¹ The English Court of Appeal often now sits in two-judge panels. Disagreement is rare. They could co-opt a third judge if they do disagree.

The Court of Appeal could decide others in writing only.

4. **Summary Disposition, e.g. striking out**

   (a) **Criminal Appeals**

Many criminal appeals are not even arguable. Maybe they are filed for some of the reasons outlined in Chapter 4. Yet most Courts of Appeal treat all criminal appeals the same, require a full transcript, and send them all to a full hearing months after they are filed. The obvious public interest in speed and certainty here is ignored.

Quebec takes seriously Parliament’s requirement that a criminal appeal have leave, unless it is on a question of law alone.

Section 685 of the *Criminal Code* permits a Court of Appeal to dismiss an appeal summarily if the notice of appeal purports to be on a question of law alone and it is not “a substantial ground of appeal.” No motion or attendance by anyone is necessary. The Registrar can refer the matter to the Court. The Saskatchewan Court of Appeal has a senior lawyer as Registrar, and uses this power frequently.

It is entirely possible that a Court of Appeal’s inherent power to dismiss an unarguable or moot appeal summarily, applies to criminal cases too. See subpart (b) below.

Though s. 685 speaks only of appeals which purport to be on a ground of law alone, that is doubtless because all other criminal appeals require leave to appeal. So a Court of Appeal has full power to dismiss other (factual) criminal appeals summarily too. There the order would not technically be a dismissal. It would be a refusal of leave to appeal.

These powers should be used in proper cases. It is ironic that they are usually ignored, even though the standards of review of factual questions have been tightened so much in the last 20 years.

(b) Civil Cases

Many lawyers are very unfamiliar with appellate law and standards of review. They think that an appeal is a retrial, and so bring hopeless appeals. More seminars and books on appellate law might help. A few appellate specialist lawyers would help too.

Whether or not the Rules of Court say so, case law uniformly holds that a Court of Appeal has inherent power to dismiss summarily an appeal which is not arguable. It is odd that the power is so little used. Once again, present tough standards of review make many factual or discretionary appeals virtually hopeless. If the test for summary treatment is the English one of “no reasonable prospect of success”, then a significant number of appeals would so qualify. They should be dismissed with the least delay and work reasonably possible.

Binding precedent often dooms some legal appeals, or renders them mere way stations on the track to Ottawa.

Where one has to pore over lengthy transcripts to see whether an appeal has any real prospects, then a summary motion may achieve little economy or speed. But a surprising number of civil appeals today are not from superior court trials. Either there is no oral evidence, or it is brief, already transcribed, and of marginal relevance. An ever-increasing number of appeals are from motions or summary trials, and all the evidence is documentary.

If the key parts of the appeal are factual, it only takes 10 minutes to see whether there is some significant evidence to support the finding made, and whether the judge under appeal used the right standard of review (if he or she was not the original fact finder).

More civil appeals should be pushed on for summary determination.

See Part B.4 supra.

5. No Oral Argument

These are decided by a panel of three, but whether they are considered part of regular lists is less important. The latter is a purely pragmatic or logistical question. See further Chapter 13, Part C.

6. Ordinary Stream/Track

This would include appeals from most trials. Panels of three would hear these.
7. Judicial Conciliation

I have not listed judicial conciliation (or J.D.R.) as a track, but it obviously requires personal attention of one judge.  

E. WHO WOULD RUN SYSTEM

Tracks # 1 (Urgent) and 2 (Individual) would need close personal monitoring by someone up to the date of hearing. Others would not need that unless automatic signals were triggered.

To the extent that some types of appeal go under this management system, the Court of Appeal would need to expend more work and attention, especially in the early stages. How would that be done?

1. New Computer System

Ontario has a powerful computer which detects certain defaults every night and prints not only a report, but draft documents to enforce penalties. A computer also keeps asking a question until it gets an answer. It does not usually forget.

But the Supreme Court of Canada learned in 1989 that almost every appeal has some exception. The system has to allow for that readily. Let people adjust those.

British Columbia’s Court of Appeal are very happy with their new computer system, made for them. As are Quebec’s.

Should Courts of Appeal integrate the computer management system with e-filing? That sounds easy, but no one in Canada seems to have achieved this yet. Be careful!

2. By Hand

A pen-and-paper system, maybe with simple word processing, would also work. Quebec gets 2000 appeals a year, and manages criminal appeals this way. When Ontario eliminated its big backlog a few years ago, it began with a manual analysis of all the backlogged appeals.

(a) Diary System

The most common question in case management is whether certain steps have been taken in time. If not, there is a predetermined result, such as a reminder, an inquiry, a striking off certificate, a motion by the Registrar, or a reference to some higher person.

Therefore, the Registrar must have a list of steps or events (such as filing an appeal) which start such periods running. When one occurs on a file, the deadline is diarized. The diary can be a large bound book purchased from a stationer, with one page for each deadline day. Or it can be a filing box, with dividers for months and days of the year. Each appeal has a card bearing its name and number. Deadlines are written on the card and filed behind the appropriate divider.

163 See further Chapter 21, Part E.
Each working day, a clerk looks at the diary for the day before, sees the few appeals there noted, and checks their records to see if the deadlines for that previous day were observed. If not, the predetermined result (such as a certificate or a form letter) is issued. If it was done, the clerk double-checks to see if the next deadline was properly diarized.

In a medium or small court, it would only take 10 to 15 minutes a day (or less) to do this.

Almost all appellate courts have some sort of a computer system, and it would help this process a lot, e.g. when the clerk wished to see if the transcript had been filed as yesterday’s deadline dictated.

In practice, systems would be partly computerized and partly pen and paper.

(b) What Records

Besides a diary system, case management would require forms, manuals for clerks, tables of deadlines, rubber stamps or labels, and periodic lists of the appeals falling into certain categories. Once again, even the most basic word processing program on the simplest personal computer would be ample to generate all of those.

The Quebec Court of Appeal sends minutes of all case management conferences to all concerned.

(c) Generating Forms

Routinely the Registrar would prepare and issue standard letters, orders, certificates (and mailing labels). Even without a special computer, the Registrar would have simple word processing and could generate those at a given command (and merge with addresses already on the machine).

Quebec uses form letters; see examples in Appendix B to this chapter.

3. A More Automatic System

A case management system may not need a lot of individual hands-on management with a sophisticated computer system or a lot of clerical labor.

Alberta sentence appeals have been more or less self-policing for several years now. (The volume is significant, since sentence appeals are always heard separately from conviction appeals in Alberta, even when both are appealed together.) A bench-bar committee worked out a detailed Practice Direction. It sets automatic deadlines for all steps, and fixed criteria for when an appeal is set down for hearing. Personal attendances are almost never required, and only in rare circumstances are individual communications needed. If certain steps are not taken by deadlines, the appeal is struck off the list, and if not restored within a few more months, it is deemed abandoned.

Alberta has very very old computer systems to list each appeal and what was filed on it. Though very primitive, they are ample to supply all the information necessary easily to draw up hearing lists and see when to prepare a certificate of striking off. Without any computer at all, pen-and-paper methods would be ample.

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164 Part I of the Consolidated Practice Directions.
The system works smoothly without any complaints and almost no individual motions. The system is now being copied in Alberta for procedural and child custody appeals.165

4. When the Supreme Court of Canada first did more work (motions for leave) on paper, it found that papers got lost and delayed. It had to set up a system and appoint a dispatcher.

Recommendation 45: Each Court of Appeal should name one fixed judge and one non-judge to propose, create, and manage one or more special streams of appeals based on criteria appropriate to that Court of Appeal, approved by that court, and published. That judge and non-judge should administer and constantly monitor that scheme, and from time to time recommend to that court other streams and various improvements based on experience.

F. BETTER THAN LEAVE TO APPEAL

Sometimes requiring leave to appeal would do some good, but using some of the techniques in this chapter would be better.166

How can we avoid the delay and duplication of work which comes from a leave motion and then an appeal? They stem from two related faulty premises:

(a) that there is no appeal if leave is not granted; and
(b) that an appeal starts only some time after leave is granted.

(See further Chapter 9.)

Instead of calling for leave to appeal, one should instead legislate as described in Parts C to E above.

The advantages over the usual leave procedure are several. First, usually there is no fourth judge. Second, we eliminate duplication between the first stage before one judge and the final stage before three. Third, we tailor the amount and type of argument to the individual appeal. Fourth, we prepare the trial record and written argument at once, not waiting until after the “official commencement” of the appeal (i.e. after “leave”).167

This is very similar to the American procedure for screening appeals to deny oral argument in some.168 The traditional Canadian leave procedure gives small protection to the appellant (a decision by one judge basically on oral argument). American courts give more (full review by staff on a full trial record, and then a decision by three judges). See Chapter 13 on oral argument.

Recommendation 46: In appropriate cases, replace leave to appeal procedures with tracking machinery and restrictions on argument and standard of review or grounds of appeal.

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165 Part J of the Consolidated Practice Directions.
167 Cf. Lord Bowman, Review, supra note 4 at 75-76.
168 See Meador and Bernstein, Appellate Courts in the United States 136 (West 1994).
APPENDIX A TO CHAPTER 10:
PART OF ALBERTA NOTICE OF APPEAL FORM, P. 3

5. Has this file been under Case Management in the Court of Queen's Bench?  
   ☐ Yes  ☐ No
   If yes, case management justice: ________________________________
   Trial date: ________________________________

6. Is this case related to any case presently before or about to be filed in this Court?  
   (e.g. arises from same controversy; involves same, similar or related issues, etc.)  
   ☐ Yes  ☐ No
   If yes, name of related case(s): ________________________________
   Action or appeal number(s): ________________________________
   Nature of relationship: ________________________________

7. Is the constitutional validity of an Act or Regulation being challenged as a result of this appeal?  
   ☐ Yes  ☐ No

8. Has mediation been attempted in the trial court?  
   ☐ Yes  ☐ No

9. Are you willing to participate in Judicial Dispute Resolution with a view to settlement or 
crystallizing of issues?  
   ☐ Yes  ☐ No

10. Would case management be beneficial?  
    ☐ Yes  ☐ No

11. Could this matter be decided without oral argument? See Note  
    ☐ Yes  ☐ No

12. Should the appeal be expedited?  
    ☐ Yes  ☐ No
    If yes, provide reason: ________________________________

13. Is there a statutory ban, ban on publication or an order of the Court which affects the 
privacy status of this file?  
    ☐ Yes  ☐ No
    If yes, provide details including which party/parties the ban or order affects and the 
section the ban was granted under: ________________________________

14. Appellant's estimated time of argument (if less than 45 minutes): ________________________________

15. List respondent(s) or counsel for the respondent(s)

   Name

   Law Firm (if applicable)

   Address  Postal Code

   Telephone Number  Fax Number

Note: The address set out in section 15 will be considered the respondent's address for service until such time as the 
respondent files documentation specifying otherwise.
All parties listed in section 15 must be served with a filed copy of the Notice of Appeal within the prescribed appeal 
period. (R. 510(1))

Date

Signature of Appellant(s) or Counsel (Legibly print or stamp name (R. 5.1))

Note: Proceeding by no oral argument requires the consent of all parties. If you select yes, please append a letter to Form N or forward a 
letter forthwith confirming that all parties agree to proceeding with no oral argument. Please include an agreed upon timetable for the 
filing of the appeal books and all facts. Your timetable will be taken to the List Manager, or designate, who will approve it, modify it, deny it 
or request a meeting with the parties to canvass the request more fully.
APPENDIX B TO CHAPTER 10: SAMPLE QUEBEC COURT OF APPEAL FORM LETTERS
(To be initiated by the supervising staff lawyer in the Court of Appeal and signed by the Chief Justice of Quebec)

Each letter is addressed to the two counsel of record on the appeal, and names the appeal and its file number.

Letter #1:

Dear Counsel,

The clerk of the trial court tells us that you have not followed through with his [or her] query about what evidence you need transcribed (criminal Rule 22).

Hoping to be assured of a speedy hearing of this appeal, I ask that you rectify this situation and that you contact the Court of Appeal Registrar, ______________, Phone _____________, on receipt of this letter, to keep him informed.

With my best wishes,

Letter #2:

Dear Counsel,

The clerk of the trial court tells us that you have not paid the fees for the transcripts which you have ordered (criminal Rule 24).

Hoping to be assured of a speedy hearing of this appeal, I ask that you rectify this situation and that you contact the Court of Appeal Registrar, ______________, Phone _____________, on receipt of this letter, to keep him informed.

With my best wishes,
Letter #3:

Dear Counsel,

The clerk of the trial court tells us that the appellant has asked an outside service to prepare the appeal book (criminal Rule 22).

Hoping to be assured of an early hearing of this appeal, I ask you to contact the Court of Appeal Registrar, ________________, Phone ____________, on receipt of this letter, to tell us the name and details of that outside service and the estimated completion date of your factum.

This information will be recorded by the clerk here, to take the place of the notice under Rule 23, which the trial court clerk will not be able to issue, in these circumstances.

With my best wishes,

Letter #4:

Dear Counsel,

The Registrar tells me that the appellant [or respondent] has been in default of filing his [or her] factum since ____________________.

Hoping to be assured of an early hearing of this appeal, I ask you to contact the Court of Appeal Registrar, ________________, Phone ____________, on receipt of this letter, to inform us of the date when the appellant will be able to deliver his [or her] factum.

With my best wishes,

Letter #5:

Dear Counsel,

Pursuant to criminal Rule 36, I ask the parties to send me within 15 days of receipt of this letter the certificate of perfection duly completed.

In default of receiving that certificate, the court will fix the time allowed to counsel for oral argument, and you will be informed of the hearing date for the appeal at least 8 weeks beforehand.

With my best wishes,
### APPENDIX C TO CHAPTER 10: APPEAL TRACKS

<table>
<thead>
<tr>
<th>Name of Track</th>
<th>How to Get on It</th>
<th>Who Runs It</th>
<th>Same Judge Throughout?</th>
<th>Special Procedures?</th>
<th>Which Panel Decides Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Normal/Usual</td>
<td>Automatic</td>
<td>Usual way</td>
<td>No</td>
<td>No</td>
<td>Usual hearings panels</td>
</tr>
<tr>
<td>Expedited/ Urgent</td>
<td>Either special motion, or automatic in certain categories</td>
<td>List Manager?</td>
<td>No</td>
<td>Yes, either standing Rules or <em>ad hoc</em></td>
<td>Usual panel or motions panel?</td>
</tr>
<tr>
<td>Unusual/ Hands-on Management/ Big/Difficult</td>
<td>Either special motion, or referral by Registrar or a judge, or certain automatic categories</td>
<td>Specially selected judge</td>
<td>Yes</td>
<td>Probably</td>
<td>Three judges, either a usual panel or a special sitting</td>
</tr>
<tr>
<td>J.D.R./ Conciliation</td>
<td>Consent of both parties, and absence of some bars</td>
<td>Specially selected judge</td>
<td>Yes, until it fails; then different judge</td>
<td>Yes</td>
<td>If J.D.R. fails, usual panel; if it succeeds, no panel</td>
</tr>
<tr>
<td>Sentence Appeals?</td>
<td>Automatic</td>
<td>In Alberta, usually no one; elsewhere, usual way</td>
<td>Occasionally one judge will give leave and directions</td>
<td>Only re Appeal Books?</td>
<td>Ordinary panel</td>
</tr>
<tr>
<td>Short/simple/ procedural</td>
<td>Automatic</td>
<td>List Manager?</td>
<td>No</td>
<td>Yes standing Rules</td>
<td>Smaller panel?</td>
</tr>
<tr>
<td>Summary disposition/ lack of merits</td>
<td>Special motion or reference by Registrar</td>
<td>No one?</td>
<td>No</td>
<td>Yes</td>
<td>Motions panel</td>
</tr>
<tr>
<td>No oral argument</td>
<td>Consent of both parties</td>
<td>List Manager?</td>
<td>No</td>
<td>Only absence of oral argument</td>
<td>Three judges, no oral hearing; who assigns these panels?</td>
</tr>
</tbody>
</table>
“There is a practical limit to which inquiry into collateral
issues may be extended in pursuit of the trivial.”


“By his (stenographer’s) neglect of duty he has put you to the expense
of coming to Court for this order. Eleven months have passed since this
case was tried. He has been notified several times to file transcript and
return, and it seems to me that the plaintiff has been very indulgent in
waiting so long. The rule is granted – with costs.”

– Keays v. Doyle (1920) 48 N.B.R. 1 (A.D)

“This lawsuit is degenerating into a giant paper exercise.”

– Funduk M., in Re-Max Real Est. (Edm.) v. Alta. Social Housing Corp.
2003 ABQB 476, J.D.E. 0103-04381 (May 23) (para. 10)

A. INTRODUCTION

This chapter is about giving the judges access to the pleadings, evidence, and decision of
the court under appeal.

Present practices in this area satisfy almost no one, and few of the three main objectives of
procedure (correctness, speed, economy) are met. Yet every solution has been tried in the past.
So reform and hard thinking are important.

Lawyers are not the only problem. Some appellate judges want to have their cake and eat it
too. They cannot have a slim record containing every document which might possibly interest
someone later.

\[169\] Some parts of this chapter are re-edited versions of passages from my earlier book Slow Appeals: Causes and Cures (2000), Chapter 6.
B. OBJECTIVES

These are important, because the current thinking seems conflicted. Presently we are trying to chase at least 8 different objectives:

1. To allow prompt preparation and filing of factums (and oral argument), and avoid delaying the appeal.

2. To let the parties, especially the respondent, legally rely on all the trial evidence, and not create artificial gaps in evidence later after trial.

3. To allow judges and their legal assistants ready and portable reference to reasons of the court appealed from, and documents or evidence which the parties think relevant.

4. To allow quick and easy reference during oral argument to court documents and evidence likely to come up then.

5. To allow judges and their legal assistants reference, within a few hours, to other court documents or evidence, e.g. when drafting judgment.

6. To avoid expense, inconvenience and tree waste, caused by multiple copies of bulky documents which no one looks at. (Electronic records may be good for the Court of Appeal, but are almost as expensive for the parties.)

7. To avoid undue storage and shipping problems for the Registry.

8. To allow remote, instant, paperless filing and transmission of the record, and instantaneous multiple and remote access, by computerizing.

C. ORAL EVIDENCE AND PROCEEDINGS

1. A Separate Topic

Oral evidence differs from other parts of the trial court’s record in two respects.

(a) Often Absent

Often there is no oral evidence. Over one-half of British Columbia appeals are from chambers or summary trial with no oral evidence, so no transcript is necessary. Outside tax cases, the Federal Court of Appeal sees little oral evidence, and when it does, it is often already transcribed before the appeal is filed.

(b) Catch-22

Oral evidence presents a Catch-22. It is difficult or impossible to know accurately how much oral evidence is relevant or useful until one reads it, which requires that it be all transcribed. Especially if one or both appellate counsel did not attend the trial, or did not take full notes there. Then after transcription, one may find that big parts of it are irrelevant.
2. Should a Complete Transcript be Compulsory?

(a) Does Ordering Only Part Save Time or Money?

(i) Expense vs. Speed

Expense is an issue for poor people, or for many litigants if the trial was long. But Courts of Appeal cannot make bricks without straw. They need enough record. And our present methods do not achieve economy anyway.

Part of the problem here stems from confusion of objectives, and part from dubious assumptions about how court reporters or transcribers work.

The objectives of speed and economy often clash.\(^\text{170}\) So far as the trial court’s record is concerned, I opt for speed over economy. To the party who pays for the transcript, it will make comparatively little difference. Half or two-thirds of the cost of preparing the trial record is usually far smaller than the fee of the appellant’s counsel.

(ii) Negotiation Achieves Nothing

Every Court of Appeal has found that telling the parties to agree on a joint record is usually worse than useless. It consumes many months, yet saves few trees. In the end the parties agree to reproduce everything. Lawyers either do not recall the trial evidence, or are lazy and procrastinate, or do not understand their case and cannot plan, or cannot see the forest for the trees clearly. Even slight lack of focus means that they dare not discard any evidence entirely.

Manitoba finds that as civility declines and expert appellate counsel disappear, asking counsel to agree on anything has limited use. British Columbia dropped the need for an agreement. Criminal lawyers never agree to drop anything longer than 2 or 3 pages from the record reproduced for the Court of Appeal.

The agreement process is a big mess if one party is self-represented.

Lawyers are reluctant to spend much time on this. They are either hired by the hour and must openly bill their client for that work, or are paid on a lump-sum basis and have to do such work free. But the court reporter’s bill seems to the client a fixed item. So many lawyers have little incentive to trim down the amount of transcription? They do not pay for it.\(^\text{171}\) The lawyers’ attitude may well be sensible. At their hourly rates, it is cheaper to transcribe a few witness’ evidence unnecessarily, than for two lawyers to study and negotiate over it.

Lawyers often fear that they might omit evidence which would help repel their opponent’s arguments. Their opponent’s arguments are unknown or vague because he or she has not read the evidence, or has not read the opposing argument. This is a vicious circle.

\(^{170}\) See Chapter 3, Part B.

\(^{171}\) See Whittaker (1973) 56 Judicature 324, 325 (#8).
There is another obstacle to seeking agreement on a selective record. The lawyers running the suit on each side are often senior, busy, and unwilling to get involved in details at intermediate stages, yet poor at delegating authority. They see transcripts and appeal books as the job of junior lawyers, secretaries, or paralegals. Those people lack the authority, training, experience, confidence, and familiarity with the file, to exclude any evidence.

(iii) Delay

Delay in agreeing on the trial record contents also cloaks stalling. A notice of appeal is easy to prepare, fairly cheap to file, and in many provinces, buys an automatic stay of execution. In all provinces it buys time. What seems to be 6 or even 12 months spent agreeing on the content of the trial record may be a cloak. The appellant may really have taken that long to decide to appeal. Or he may simply have been unilaterally extending the time to perform the trial judgment.

Delay at the beginning means that every other stage will be late by at least as much. If the overall delay is long enough, the appeal becomes moot; and one side or the other in effect loses the appeal (or even the lawsuit) without intervention of any judge or Rule.172

Lawyers are usually slow to order a transcript, because it requires money up front.173

All the critical path diagrams at the end of my Slow Appeals book174 show how ordering the transcript at once and filing it separately allows the appellant to begin and complete his or her factum much earlier. Those were prepared after studying other diagrams (not reproduced in that book) using actual Alberta average times and illustrating the traditional method. That traditional method took about a year longer to perfect an appeal.

(iv) Bulk

People assume that a very bulky transcript inconveniences the Court of Appeal, but that is questionable. An electronic transcript with 10 “volumes” instead of one is no trouble at all. Where the appeal court only requires one hard copy of the transcript, bulk is little trouble. Ontario and Alberta do that, and both are happy. Quebec permits a sole electronic copy by consent.

(v) Time to Transcribe

We also assume that the more evidence to be transcribed, the longer that transcription will take. That is questionable. In Canada, today rarely does one sole court reporter take down the evidence in shorthand which is not computer compatible. Commonly the evidence is reproduced on sound tapes or discs. Even if there is a court reporter, he or she will probably use computer-assisted transcription software (C.A.T.); this produces virtually instantly a rough draft of a transcript (which needs heavy editing).

173 See Chapter 4 on motives.
174 See that book’s Charts 1, 2, and 3.
(vi) Other

One can discover whether any quotation or extract from the evidence by counsel is cut off too soon or out of context (which is a repeated complaint of judges in the U.S. federal Ninth Circuit and of one former Ontario Court of Appeal judge).

There is no danger that someone will claim there is no evidence on a point when in fact there is.

Some new issue, or apparent gap in evidence for an existing issue, may emerge later, making a full transcript vital.175

Different typists can simultaneously transcribe separate tapes or discs, or separate shorthand tapes. Indeed, different parts of one CD can be transcribed simultaneously by different transcribers. There is no reason to finish transcribing Monday morning's evidence, or Smith's evidence, before starting work on Monday afternoon's or Jones'. Four transcribers can work simultaneously on four different average-sized trials, or on four parts of one large trial.

Reproducing only part of the evidence may actually add to transcript production time. I am told that where only part of the evidence is to be transcribed, the transcribers spend significant time trying to locate those passages. In many Canadian cities, sound is recorded on old-fashioned tapes, which stretch, thus throwing off footage or time recorders and logs. Only modern computer-generated CD sound recordings avoid that problem and give accurate locations or markers.

(vii) Conclusion

The American federal appellate courts make the appellant transcribe all the oral evidence,176 and so do many American state courts. The original (or a single copy of it) must be filed in court. That way the lawyers can access it.

American appeal courts’ differences of opinion about the record relate only to whether counsel should file multiple copies of excerpts of the record, and if so, how extensive these should be.

Reproducing all the trial evidence will make no difference in Canadian criminal appeals, where counsel always reproduce all the evidence. Nor is that necessarily wrong or lavish, for the Crown will often wish to rely upon the proviso in s. 686(1)(b)(iii) of the Criminal Code because of the alleged overall strength of the evidence. Similarly, reliance upon all the evidence may also be used to counter certain Charter arguments by the defence. Besides, criminal defence counsel usually are paid by Legal Aid, and so they and their clients have little incentive to spend effort and run risks in order to reduce the size of the court reporter’s bill to Legal Aid.

Parties should not even try to agree to dispense with some (or all) of the trial evidence.

175 See Chapter 15, Part C.2 on governments or courts buying transcripts for prisoners.

176 See 107 F.R.D. 125.
Recommendation 47: Every appellant should be required to order a transcript of all the oral evidence and any oral reasons for decision. The appellant should also file a single copy of all the evidence (written evidence or transcribed oral evidence) with the Court of Appeal.

(b) When to Order

Once we decide to transcribe everything, there is no reason to wait at all to order the transcript. American Courts of Appeal do not. Manitoba requires a certificate of the proper government office that it has received an order for a transcript, before the notice of appeal can be filed! Alberta’s Queen’s Bench (for summary conviction appeals) requires the order at the time of filing the appeal. So do the Federal Court of Appeal and the New Brunswick Court of Appeal. Alberta’s Court of Appeal is now about to require it. The Court of Appeal should get a certificate that was ordered, or copy of the order, or a certificate that there was no oral evidence.

There are many advantages to promptly transcribing and filing all the evidence and trial records:

(i) if there is any trouble getting or transcribing any of the evidence or record, one learns that at once;

(ii) if the appellant cannot or will not pay for or order the transcript, one learns that at once;

(iii) the need to pay for a transcript up front discourages appeals filed only for delay, e.g. to get a stay of execution, especially an automatic one;

(iv) counsel can begin work at once on factums;

(v) court staff can at once begin tracking assessment, and case management; and

(vi) one can make early informed decisions whether to make multiple copies for the judges of any of the evidence or trial documents.

Recommendation 48: Appellants should be forced within two weeks after appealing, to order the transcripts of oral proceedings. They should file either proof (a certificate) of having done so, or proof that a search has been made and no such sound recording or shorthand exists. If that is still not done after one warning, the appeal should be automatically dismissed. Restoration of such an appeal should be exceptional, and on very stiff terms.

3. Format

Electronic transcripts are important to increase access and searchability, and reduce bulk for handling and storage.

About half the provincial Courts of Appeal require them: appellants file one paper and one electronic copy. Ontario points out that an extra electronic copy would be useless if no one used it and they lacked facilities to. Conversely with a huge case (17,000 pages), an all-electronic appeal worked fine. It is a question of culture.

As a minimum, transcript should always be supplied on a computer (word-processing) disc or CD. The format would preferably be Adobe and properly formatted for page searching, but if need be, just ASCII flat format.
Then judges who prefer computer access can have it. The Court of Appeal will probably soon learn by experiment that it only needs a few hard copies, maybe only one. That will save the litigants money and save the Court of Appeal storage space and labor.

If bulky, the one hard copy of the full transcript could be printed shrunk in size, four pages per sheet, as in Quebec. And double sided. This is the format for transcript which will likely not be referred to during argument.

If the Court of Appeal uses electronic transcripts, judges not comfortable with computers should have the transcript loaded onto a computer for them on the bench, ready to call up a page number. Alberta uses Adobe format, and to call up a page number only requires two commands. One needs to know nothing about computers to use it.

**Recommendation 49:** The appellant should file one hard copy of the complete transcript, in a format convenient to the Registrar. The appellant should also file a disc containing an electronic version, in format convenient to the Registrar.

4. **Extracts**

Do not transfer from counsel to the judges the job of printing out important passages from a disc of the full transcript.

Under the American federal system, each lawyer is free to select which portions of the transcript he or she will reproduce in multiple copies for the court. They can defer that selection until they write their factums. Several Canadian Courts of Appeal now use a similar system. Since November 1994, the Supreme Court of Canada has permitted that.177

**Recommendation 50:** Each counsel must reproduce for the judges in hard copy those extracts of oral evidence which he or she will refer to in oral argument. Transcript extracts must reproduce the whole page cited, plus the page before and the page after (to avoid too selective and unfair quotes). They will be bound with similar extracts of documentary evidence.178

5. **Alternatives?**

I do not recommend any alternative handling of oral evidence, save in exceptional circumstances.

In an unusual case, possibly a CD of digital audio recordings from trial might suffice instead. Some provinces will sell those to counsel. Any format would do. Some American jurisdictions give the Court of Appeal only a videotape of the trial as the complete record. (Only the parties’ Appendices to briefs contain hard copy transcript excerpts.)179

But an audio recording is slow to listen to (except in a short case), and some of it will later be transcribed anyway.

Some provinces have legislation allowing agreed facts instead of a transcript, but no one ever uses that. In view of what is said above in Part C.2(a), that is understandable.

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177 S.C.C. Bulletin, November 24 1994, “Notices to the Profession,” has been superseded by the 2002 Rules. See Rules 35(1)(a)(ii) and 38(2) and 39(2).

178 See Part D.6 below, which has a fuller description.

179 See Slow Appeals, p. 34.
6. **Delayed Transcripts**

American experience has led their Courts of Appeal to take charge of this subject. The American Bar Association says that there should be accountability. The court reporter or transcriber must complete them promptly. All Courts of Appeal can and should control delay in transcripts by contempt orders if necessary. The British Columbia Court of Appeal does call in some reporters or transcribers to explain their delay. So does the Ontario Court of Appeal’s “status court” whenever the transcript takes more than 90 days. The Alberta Court of Appeal has done this by informal agreements.

Resources are not the issue. The transcribers are paid per page and are usually freelance. Enough of them should be certified. Not enough have been certified in three provinces, which is odd, as presumably certification costs no one anything. Some provinces find that transcripts are very slow for no discernible reason. They have enough freelance certified transcribers, who can work simultaneously. Length of a proceeding should be no object, because different people can simultaneously transcribe different portions, especially from CDs of digital recordings. One suspects inefficiency and poor administration.

If the trial court controls transcript production and is doing a poor job (as in some provinces), the Court of Appeal should take it out of their hands. It has the legal right and duty.

Note Lord Bowman’s suggestion that contracts to prepare transcripts contain a penalty clause and deadlines.

It is customary to let the trial judge proofread and correct a draft of the transcript of what he or she said. That always slows the process down, and is of dubious value. It even has dangers.

At times, reproduction and filing of the trial record is held up waiting for one missing item, e.g., an exhibit difficult to reproduce legibly, or the fraction of the transcript by one ill court reporter.

**Recommendation 51:** The Rules should permit different parts or volumes of the evidence to be filed separately as they become ready, without waiting for other parts.

**Recommendation 52:** Appeal courts should police court reporters or transcribers. There should be time limits for preparing a transcript after it is ordered, and sanctions for breach. Limits should be enforced, and not routinely extended.
7. **Court Reporters**

Where computer-assisted transcripts (C.A.T.) are available, counsel should be encouraged to use a real court reporter at trial or at important motions or hearings in cases involving a lot of money, or where an appeal is likely. Such transcripts will be of higher quality and available sooner. If one wants to pay more, they can be available the same day.

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**D. HOW MANY WRITTEN RECORDS TO DUPLICATE**

1. **The Question**

   Once we leave behind oral evidence and its Catch-22, we turn to pleadings, orders, court records, and written evidence. They already exist, are legible, and accessible to the parties. The question is how and to what degree to make them accessible to the Court of Appeal (judges and staff).

2. **Objectives**

   The objectives listed in Part B all conflict heavily.\(^{184}\)

   Experience shows that speed, convenience and efficiency should get more weight here and now, than should economy. We have been hoping for economy, enduring 6-12 months’ consequent delay in many cases, and getting very little economy anyway.

3. **Seeking Agreement Achieves Nothing**

   There is no Catch-22 with written documents and evidence. Aside from that, all the arguments above in Part C.2 against requiring an agreement on the evidence to reproduce, apply here too.

4. **The Draft-Factum Method**

   A bulky or multi-party case may be a problem. If we let each side duplicate and file only its extracts of evidence, the Court of Appeal could have a fragmented record, requiring a lot of flipping back and forth between different books of extracts. Only in such a big case is it worth spending time and money to create a joint record; not in ordinary cases.

   One may reach agreement more easily on the contents of a joint record if first both counsel draft their factums. The agreed joint book will contain evidence which one or the other factum cites. After the agreed record (book) is prepared, the parties should then revise their factums merely to correct their precise page references to the record.

   Occasionally that system will work, but it requires cooperative lawyers, and a Registrar or judges to police it. A tricky, indecisive or procrastinating lawyer, or lay litigant, would make it unworkable. The British Columbia Rules Committee is considering this system. Ontario, Alberta and the Federal Court of Appeal have used this system occasionally. Many judges interviewed seem to distrust the idea (though were intrigued).

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\(^{184}\) See also Chapter 3.
It would probably be dangerous to make the draft-factum system the general rule, but it needs more trial, especially in big cases with good counsel.

5. Remaining Choices

So ordinarily the remaining choices in most appeals are either:

(a) To make multiple copies of all court documents and written evidence for the judges, or

(b) Let each party photocopy and file a book containing only those items which that party wants for his or her own argument.

6. Unilateral Extracts

I favor choice 5(b) for the reasons below.

(a) Policy

The modern standard of review on appeal may suggest less need for Courts of Appeal to read big chunks of evidence. They look for palpable error, which is usually localized. Even an appellant’s argument of “no evidence to support the fact finding” only requires those passages of evidence which the respondent identifies as supporting it.

**Recommendation 53**: Each party should file for each judge on the panel a copy of a book containing only such evidence and court documents as that party plans actually to refer to in argument (written or oral). Ordinarily, each party will make his or her own separate book organized in the way she or he wishes, probably in likely order of argument. Each document selected to be reproduced must be complete, unless that document exceeds 20 pages.

British Columbia, Quebec, New Brunswick, and the Supreme Court of Canada use this system now. Such a book, plus pleadings, etc., and one hard copy of exhibits, is the system in Ontario. They seem happy with it. In custody appeals, Saskatchewan lets each party select and reproduce the evidence which he or she wants. (A number of Courts of Appeal which use the old system of a very full record also encourage brief extracts from counsel.)

Unfortunately, some judges do not like this unilateral-extracts system. But we cannot meet all the objectives listed in Part B. The alternatives to this system are even worse.

(b) Other Procedural Details

Normally the two unilateral sets of extracts of written evidence filed by the two opposing parties can overlap. But if these reproduced books of evidence and documents are likely to be truly bulky, then see Part D.4 above on the alternative system of draft factums.

If there are multiple parties on the same side, the court could encourage cooperation and a joint book among them. That is common in the Supreme Court of Canada.
The appellant’s set of extracts of written evidence must also contain the reasons under appeal, and maybe the formal order and pleadings under appeal. Those are the only compulsory contents. British Columbia and Alberta require a distinctively-marked separate volume containing just the notice of appeal, pleadings, reasons, and formal judgment.

**Recommendation 54:** Each jurisdiction should list in its Rules those non-evidentiary items which should be filed with or reproduced for the appeal court in most appeals. The appellant should cause them to be reproduced and filed along with his or her unilateral written evidence extracts.\(^\text{185}\)

(c) Overview

The method recommended above will give judges two photocopied, properly formatted and indexed books containing only reasons and the order appealed, a few other formal documents, and what evidence and documents each party cites in argument. These books should be faster, far less bulky, and much more portable, than the older full-record systems. They would usually be slim and so easy to navigate.

(d) Timing

Counsel’s reproduced selections from written or oral evidence should be available for the judges as soon as the facta are distributed, and so should probably be filed when the facta are filed. Ontario gets them with the factum, which cites the party’s extracts (compendium). Waiting for the extracts until oral argument is planned is much too late, especially as then the factum cannot cite it. Each party’s extracts are supposed to include no more than his or her factum cites. Oral argument citing much additional evidence is questionable. And what is needed for judges and their assistants to prepare before oral argument is about the same as what is needed in oral argument.

**Recommendation 55:** Counsel’s reproduced selections from oral and written evidence should be due when his or her factum is due.

7. **Electronic Exhibits**

Electronics would not help much now with documentary evidence, because most written trial evidence is not yet in electronic form, and would be expensive or hard to scan well. But as electronic filing and other computerization spread in trial courts, that may well change in years to come.

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E. COURT ACCESS TO NON-REPRODUCED ITEMS

Since only a few selected pieces of written evidence or pleadings will be duplicated for the judges, what if a judge wants to look at some of the rest of the evidence and court records not reproduced? That is not a big problem with oral evidence, for a single copy of the full transcript is to be filed with the Court of Appeal. If it is electronic, access by one judge may be easy. The problem is court documents which neither counsel expects to refer to in argument and so neither reproduces.

1. Legal Concept

A Rule should say that the unreproduced trial items are part of the official record on appeal, though precise definition could be tricky. Quebec has done that. The Federal Court of Appeal sometimes so orders. It comforts counsel.

Recommendation 56: Have a Rule which makes non-reproduced trial evidence part of the record on which the Court of Appeal may rely.

2. American Loan of Trial File

American Courts of Appeal usually have the transcript of oral evidence filed with the trial court. Then the entire original trial court file is lent to the Court of Appeal. That is the only full record which the Court of Appeal ever gets. (The parties file multiple copies of the evidence which they wish to highlight in argument, much as described in Part D above.)

Borrowing the trial court’s original file (as in the U.S.A.) is tempting, but has 10 drawbacks.

(a) Most Registrars dislike that idea, probably because of undue labor and inconvenience. A number of Canadian courts amended their Rules to drop that.

(b) The trial court may need its file in the meantime, especially if the appeal is not from a full trial of whole matter. (This problem would diminish if the number of interlocutory appeals diminished, or if trial courts went to electronic filing.)

(c) Some trial courts’ files are disorganized. Some files are very bulky, and hard to navigate.

(d) Borrowing the trial court’s file would probably put labor onto clerks and Registrars and off the shoulders of counsel, a retrograde move.

(e) Non-document exhibits or exhibits in odd format (e.g. rolls of plans) can be a problem.

(f) The trial court and Court of Appeal often are in same city. Routinely moving boxes or files between offices a few hundred meters apart in the same city seems silly.

(g) Another relevant question is how cooperative and efficient the trial court’s registry is. Can it fulfil a request for a fax of a document within a few hours?

(h) The appellate Registrars who still receive trial court files say that they are never looked at, even when counsel do not reproduce the full record.

(i) Use of the raw file by more than one judge is difficult, as New Brunswick discovered.

(j) Some Courts of Appeal have very crowded premises and are very short of storage space.
3. **Modified American Plan?**

Here are some variants.

(a) The appellant could provide one photocopy of all the trial court’s file with a table of contents, in order, with little or no other formatting: tabs instead of page numbers, and no non-document exhibits. Again that gives counsel comfort and encourages them to put less in the photostatted extracts which they file in multiple copies.

(b) Occasionally the appellant could organize the trial court’s file? But ordinarily that raises security issues.

(c) The Court of Appeal could arrange to have the trial court hold its file ready and be able to copy a document and fax it on short notice? The trial court could transmit only an inventory of it? That is more promising.

(d) The appellant could arrange to scan all the paper in the trial court’s file onto a disc.

(e) Many trial courts can print from a computer an inventory of any file’s contents.

Anything which the judges are *likely* to want should come in hard copy too, lest the Court of Appeal become a print shop, doing lawyers’ work for them, as Ontario Divisional Court found.

Having the appellant go to a lot of work in copying or rearranging a bulky trial court file is undesirable if it is pointless. That would be so where the appeal was from one small motion, but the file is lengthy and bulky. That could well occur in a family law case.

4. **Conclusion**

No perfect solution is possible where the question is Court of Appeal access to documents which neither party will cite in argument. The biggest factors are that the chance of the Court of Appeal needing many is remote, the chance of their needing none is considerable, and the urgency of such access is very unlikely.

**Recommendation 57:** The default mode be that the trial court must locate and preserve its complete file at a place where the trial court can readily later access it. If the trial court can readily copy or print an inventory of the file’s contents, it should do so and send that to the Court of Appeal.

If the Court of Appeal later needs to see one or more documents from the trial court’s file, it should then ask to have them faxed.

**Recommendation 58:** If either party wishes the entire trial court file to be held by the Court of Appeal, it should have the right to requisition that in advance.

**Recommendation 59:** The Court of Appeal should have the right to modify this default mode in exceptional circumstances. In particular, if one trial court or judicial district was found to be messy, disorganized, slow, or uncooperative, the Court of Appeal should have the power to start ordering it to ship its files, or to require copies or reorganization in the Court of Appeal premises by the appellant or by some third person at the appellant’s initial expense.
F. SMALLER ISSUES

1. Terminology

Terminology should be made consistent; it is now very puzzling. There is no point reciting the present inconsistencies. I propose these new terms:

(a) Complete Transcript

(b) [Appellant’s] Record Extracts (which will include extracts from the transcript and selected written evidence)

(c) Complete Trial File

2. Quality of Sound Recordings

Transcripts made from sound recordings vary a lot in quality. The discussion below assumes that we cannot get back real court reporters.

No court should use old tape recorders, especially if the trial clerk does not really monitor the machine. Yet a number of provinces still do. The provincial governments all abandoned court reporters on the theory that modern technology is so good. Yet some retain 1950s-style tapes. They are hard to index and use, as noted in Part C.2(a) above. That is a disgrace.

Recommendation 60: All trial courts should go to multi-track, multi-microphone digital recording using CDs. They should use properly trained and paid transcribers, and certify them.

3. What Was Before the Chambers Judge?

Sometimes there is a dispute over whether an older affidavit was before the later chambers judge under appeal, and so is properly put before the Court of Appeal. Most trial courts have the Rule that a notice of motion must recite the evidence and documents relied on. Alberta’s Rules of Court now require a written notice by a respondent to a trial court motion naming any past affidavits which he will rely on. Both Rules help decide such disputes over what was before the chambers judge.

Recommendation 61: Trial courts’ Rules should require both an applicant and a respondent to give written notice of any evidence on which they will rely in the motion at hand.

The Federal Court of Appeal defers the decision of what was before the chambers judge to the panel, which seems as good a way as any, where the mystery cannot be resolved by either such Rule.

Records from trials rarely present that problem, because trials use formal procedure to file documents and enter evidence.

4. Tabs

Ontario likes tabs in record books. They are handy, but can be a good deal of work. Note the Alberta system of parallel page numbering with different letter prefixes. Each part of the record has a distinctive letter prefix before the page number.
5. **Motions Books**

Should a motion for leave to appeal have as much record as an appeal? The Quebec Court of Appeal requires that. The Alberta Court of Appeal tends to have it all. But that is slow. I hesitate to recommend that Courts of Appeal demand that.

6. **Filing Fees**

Under the proposals above, the Court of Appeal will usually have access to all the record, but part will not be in multiple copies and not be very well-organized or inventoried, and probably not in searchable form. Occasionally Courts of Appeal will have to reproduce some things. But both speed and economy to the parties will be much greater.

**Recommendation 62:** Therefore, the Court of Appeal should increase its filing fee significantly. But that should not be imposed at later stages, such as when filing the transcripts, which would discourage prosecution of the appeal. It should be imposed when the appeal is filed.

7. **Transcribing Argument**

Even oral trial court argument is sometimes usefully transcribed, especially on appeal from motions, certainly in criminal proceedings. So that should be *permitted* if the appellant so desires. I doubt that it should be *required* ordinarily. If the appellant does not reproduce it and the respondent wants it, the respondent can reproduce it.

8. **Sentence Transcripts**

Sentence appeal transcripts are usually very short. So the British Columbia Court of Appeal orders and pays for them itself, even if the appellant has counsel. The court does that to speed up the process, since sentence appeals are often urgent.

**Recommendation 63:** The government or the Court of Appeal should order and pay for all sentence appeal transcripts unless they are over 150 pages long and the appellant has counsel.

9. **Covers**

This should be uniform in each court, and not the same as any other bound books, such as factums. Grey is a traditional color for the record. The essential documents like pleadings, reasons for decision (or charge to the jury) and formal judgment should be in a separate volume with a distinctive color (maybe red). Having a different color for transcripts and exhibits (written evidence) would also be a good idea. Extract volumes should have distinctive colors of cover.

All volumes of record should have different numbers. There should not be a volume 2 of transcripts and a volume 2 of exhibits, for example. Volume numbers should be large and easy to see.

**Recommendation 64:** Adopt a scheme for all appeals which makes different volumes of the record easy to distinguish.
10. Time of Filing

One or two Courts of Appeal do not file the transcript or trial record until the appellant's factum is filed. They postpone filing to save storage space. That seems to me to be the tail wagging the dog. Besides, the transcript and record contain a wealth of information useful for case management, and so needed by the Court of Appeal as soon as possible. See Chapter 10, Part C.2, 3.
“Who wear out a good wholesome forenoon in hearing a cause between an orange-wife and a fosset-seller; and then rejoin the controversy of three-pence to a second day of audience.”

– Coriolanus, II, (c. 1607)

A. INTRODUCTION

1. Scope

This chapter is about deciding when an appeal is ready for oral argument and selecting the date for that argument.

2. Problems

Though the topic at first sounds easy, a number of Courts of Appeal devote significant labor to this task. Yet a number of appeals collapse or get adjourned late enough, that court resources are wasted.

B. POSSIBLE AIMS

We must begin the topic by considering what we seek to achieve. I can think of five aims.

1. Avoid Waiting Time by Counsel

(a) Waiting after perfection before hearing

In theory, the delay between selecting a hearing date and its arrival is wasted time.

(b) On the week of hearing

All Courts of Appeal now seem to give fixed dates to argue. At one time, cases came on for argument in sequence, and counsel might have to gown and wait days before their case was reached. That wasted time and money, especially if counsel were from out of town.
2. Let Counsel and Parties Plan Their Affairs

If there is no fixed date for argument, counsel must either leave a week or more open in their diaries, or double book and risk no-shows. If a client is from out of town, he must spend days in a hotel waiting. If she is in town, she must either spend days at the courthouse, or risk missing the first one-half hour of her appeal.

3. Avoid Having the Court Wait or Have Idle Panels

What if a Court of Appeal books a date for an appeal, but counsel are not ready to argue it that day? There are other litigants who were told that that day was already booked and are waiting for later days. They have been delayed for no reason. And if any of the judges travelled to the hearing from another city, they are inconvenienced and the taxpayers punished for nothing. That may also be true if argument ends much earlier in the day than planned.

4. Speed up Perfection

We saw in Chapter 5 that delay anywhere in the system is harmful. If a case is ready to argue, its argument date should therefore be selected at once.

5. Avoid Remanets (run overs) or Overcrowded Days or Weeks

If the Court of Appeal sends counsel home on the scheduled argument date, not having argued, the waste is obvious. A case half argued is also a problem, because memories will fade before the same panel can reassemble. If it goes ahead the next day though not scheduled, the problem is merely transferred to the following innocent litigants. If the court sits until 6:30 p.m., the quality of decision (and civility) suffer.

C. HOW MUCH READINESS TO REQUIRE BEFORE SELECTING A HEARING DATE

1. Should the court set an appeal down for argument before either factum is filed?

This has theoretical attractions: see objective B.1(a). But it is dubious in practice. Such practice led to many adjournments of supposedly fixed appeals in Manitoba, so that that Court of Appeal had to abandon it. The Supreme Court of Canada does it, but has to leave gaps on the list. It causes problems if interveners are added later, or constitutional questions are stated later. The Supreme Court of Canada Registrar has to keep policing the list. If filings are late, then that invites a motion to extend or postpone. This is easy enough with enough staff and a computer system, and only about 60 appeals a year on the list of appeals with leave (or as of right). The Nova Scotia Court of Appeal seems to do this, but it takes lots of staff time beforehand to certify estimates of time to expect appeal books and facta, and the labor of a judge to implement it.

This system could work only in a court where late factums by either party are statistically rare.
Setting down cases for a date beyond when even a late factum would arrive would not work any better, and would mean court-induced artificial delay for cases where both counsel are in fact prompt.

Trial courts long ago abandoned this method #1 in favor of certificates of readiness.

2. **Require the Appellant’s Factum Only?**

Ontario, Saskatchewan, Manitoba, New Brunswick, British Columbia and Prince Edward Island do this now. This method is better than #1, as staff lawyers can then assess each appeal and see if more research is necessary.

But data are vague on the number of respondents who do not file their factum promptly. My experience with one registry so operating was bad. British Columbia finds that sometimes the panel is trying to get ready with no respondent’s factum (though the Registrar’s review one month before usually catches it). The Supreme Court of Canada finds that late respondents can threaten distribution of books. Ontario finds that many respondents file their factum only a few weeks before oral argument, because there are no sanctions. That is the one Rule commonly ignored in Ontario. That practice makes bench memos very late in some Ontario and Alberta appeals.

Manitoba and Prince Edward Island Registrars have to chase respondents with a manual diary system, and assistance of the duty judge to call in defaulters. That takes up a fair amount of their precious time.

The Supreme Court of Canada and Quebec Court of Appeal threaten the respondent with denial of any oral argument, but always relent. That way, the respondent cannot delay the appeal as easily, but can greatly inconvenience the court, if the court does not want to delay the appeal.

3. **Require Appellant’s Factum and Due Date for Respondents?**

The Federal Court of Appeal and Quebec Court of Appeal require the appellant’s factum plus either the respondent’s factum or expiry of the time for filing it. Then the hearing date is set. A late respondent then needs leave to file his factum, and that may be given only on terms. That leave rarely comes after materials are distributed in the Federal Court of Appeal.

If a date requires the concurrence of all counsel, the last respondent likely will not agree and thereby run the risk of being denied oral argument?

4. **Require All Factums?**

In Alberta, Edmonton does this, not Calgary. The Supreme Court of Canada and British Columbia Court of Appeal dropped this. The Supreme Court of Canada did so in order to pressure counsel to write, with a deadline.

In considerable part, the arguments here are the same as those under #1.

This time to select a date is preferable to #2 because it avoids the evils there.
Recommendation 65: Do not book the date for oral argument until all factums have been filed. Relax this Rule only where urgency is demonstrated, an order fixes the deadline for the respondent, and his counsel is believed reliable.

Recommendation 66: If the respondent’s factum is more than two months overdue, and the appeal is not booked yet,
(a) set the date for argument without reference to the respondent’s calendar or wishes; and
(b) bar any oral argument by the respondent.

5. Certificate

Such a certificate is not a difficult task in Ontario. It just says that counsel think that the appeal is ready. That is probably not necessary in a computerized system. Filing a paper to save a search seems odd.

D. TIME ESTIMATES

See Chapter 13, Part B.

E. HOW TO SELECT THE DATE FOR ARGUMENT

1. Limits

Counsel who will not agree to any date in the next four months are a reason not to open up distant lists until current ones are almost full.

Saskatchewan sets argument dates monthly, and so only allows counsel choice of dates within one sitting. Nova Scotia opens up a maximum of three sittings. Alberta usually opens four to six months at a time. That is the outer limit.

Saskatchewan and British Columbia find that if available dates are too close, lawyers’ calendars are full. Besides, the court needs about five weeks to digest the material and prepare. That is the inner limit.

2. Agreement of Counsel?

It is pleasant if counsel will agree upon available dates which are not too distant.

Picking trial dates is a poor analogy, because witnesses are unique. Fixed dates for appeals were never given in the past; counsel still have no right to them. Fixed dates are largely for the benefit of counsel, not the Court of Appeal.

So if a court lets counsel pick dates, such a system needs policing. Some counsel want a veto over a date selected for argument, but wish to give the court no say in the date (except where the lists are full). Such a one-way street is unfair to the public.
3. **Impossibility or Delay in Agreeing or Setting Down**

Counsel may have trouble agreeing on any date available. This occurs where too few counsel argue appeals *and* they do lots of trials too. It occurs a fair amount in Toronto (criminal cases) and Charlottetown.

A Court of Appeal should not put up with this. A multi-month trial on which one counsel is involved is not enough reason to select a time for hearing an appeal which is too far off.

The Registrar should then select dates.

The British Columbia Court of Appeal sets such unscheduled appeals down before a judge, who dismisses them as abandoned.

4. **Selection by Registrar with Reference to What Counsel Say**

One plan is to have counsel tell the Registrar when they are not available, and then let the Registrar select a date.

This sounds good in theory, but displays serious drawbacks. Many Courts of Appeal try this, but report these problems:

(a) Delay between each counsel’s advice of open dates and the Registrar’s confirmation of the actual date allows unknown competing and intervening time commitments. Counsel refuse to earmark dates. Indeed, a date can get booked by a conflicting event within hours. The Federal Court of Appeal and New Brunswick Court of Appeal find that.

(b) Counsel do not examine their diaries closely and with enough thought, if (say) 5 months’ range is involved.

(c) There is no way to tell whether counsel later just get cold feet, or play coy.

Courts which use this method sometimes do not really solve such problems. Others devote a lot of high-powered labor and attention to it.

The Supreme Court of Canada suggests a schedule, tells counsel, and is flexible if they object. That works pretty well. But most lawyers will not say no to the Supreme Court of Canada, and do not want to. They like arguing before the highest court. The same counsel will try to stand up their local Court of Appeal in favor of an examination for discovery or a traffic court appearance.

Counsel sometimes tell the staff lawyer in the Federal Court of Appeal that they are all booked up. The Chief Justice of the Federal Court of Appeal supervises that. He may force counsel to state that they refuse early dates, in writing. The Federal Court of Appeal may insist on a hearing earlier than counsel want.
5. **Selection by the Registrar Alone?**

If there are many counsel, or difficulty is experienced, or the Court of Appeal has a large volume, or available dates are far off, or very close, the Registrar may have to select dates unilaterally, whether counsel like them or not. A paralegal in the Ontario Court of Appeal does this, except that he or she consults the few criminal appeal specialist lawyers about their calendars. Counsel can complain to the list judge, but that rarely arises. The Quebec Court of Appeal’s method is similar. It will give way only to a religious holiday, the Supreme Court of Canada, or to a long trial. Otherwise, the Quebec Court of Appeal insists on the date which it wants.

6. **By a Justice of Appeal**

Alberta used to have a judge select hearing dates when calling the list. That was largely abolished in the wake of adopting fixed dates. It should only be used if there is a real fight, which would be rare. But Nova Scotia does it that way. It sounds like a waste of two counsel’s and a judge’s time. Judicial labor is scarce, and it takes counsel an hour to go to the courthouse and come back, even if the appearance is five minutes. In theory this oral method selects a solid date, but Nova Scotia dates seem to come unstuck as often as those elsewhere. It gathers useful information for future use, but there are other ways to do that.

**Recommendation 67:** When a case is ready to set down for a fixed date, the Registrar should give the parties 48 hours to suggest good or bad dates. If two dates are both open and not too far off, the Registrar should prefer the one more convenient to counsel. Aside from that, the Registrar should pick the dates and counsel should have no veto, except for religious holidays, Supreme Court of Canada appearances, or surgery already booked.

F. **LATER REQUESTS TO CHANGE DATE**

1. **A Problem with Many Courts of Appeal**

The Quebec Court of Appeal and Federal Court of Appeal are reluctant to grant these adjournments, but the Federal Court of Appeal gets such requests. (There are few requests in Quebec.)

British Columbia gets so many requests to postpone appeals, that it verifies the hearing list one month before hearing! But it still lets counsel adjourn on consent. It needs an explanation if the request is only a few weeks before the scheduled argument date. Most counsel do not abuse that; a few do.

2. **Within a Week After Set Down**

An immediate adjournment is usually not a big problem. If it is for a very good reason, a court could allow it if another firm date is substituted at the same time.
3. After Books Distributed/Within 5 Weeks of Hearing

Such a late request to adjourn causes serious problems:

(a) The opponent has arranged his or her calendar in reliance.

(b) The Court of Appeal usually cannot get another appeal on that short notice, so the half-day will be wasted.

(c) It establishes a backwards incentive system.

(d) Some Justices of Appeal have read already; that creates a disincentive for them to read promptly. That is what led the Alberta Court of Appeal to largely ban adjournments of sentence appeals.

(e) There is more danger of judge-shopping, which was one motive for adjournments in Alberta sentence appeals.

(f) It delays the appeal significantly. (See Chapter 5, Part E on the evils of delay.)

4. British Columbia and the Federal Court of Appeal see a lot of collapses shortly before hearing. It used to be unknown in Alberta, but it is now seeing a lot more.

5. Ontario confirms motions to ensure that they will proceed.

Recommendation 68: Dates for argument, once fixed, should be adjourned only for Supreme Court of Canada appearances or medical reasons.

(Religious holidays are foreseeable before setting down.)

G. EVENING OUT WORK AND COMPLEXITY AMONG JUDGES

1. Schemes to Do So Beforehand

In Manitoba, one judge rates each upcoming case for difficulty (on a scale 1-5).

2. Pre-Division of Labor

See Chapter 16, Part D on pre-assignment.

H. TAX ON COURTROOM TIME

The New Brunswick government wants to charge litigants for the amount of courtroom time which they use. The principle has arguable merits, but that government wants to collect the fee up front, and so base it on estimates of length of argument. That will simply induce people to underestimate. When England reintroduced income tax in the mid 19th-Century, one astute observer called it a tax on honesty. See further Chapter 4.

Recommendation 69: Do not base charges on advance time estimates.
CHAPTER 13
ARGUMENT

“He draweth out the thread of his verbosity finer than the staple of his argument.”

– Love’s Labour Lost, act 5, scene 1, l. 18 (1595)

“We were referred to a great many authorities upon the nature and incidents of an easement and the argument represented a flight into the higher altitudes of that topic. The authorities are by no means easy to reconcile and often deal with matters which are by no means pertinent . . .”


A. INTRODUCTION

Some appellate judges sit in court one-half the working days. That is too hard and leaves too little time over. If split equally, it would leave one-quarter the time to prepare beforehand and one-quarter to write afterwards. And that calculation would leave nothing for chambers motions or miscellaneous other duties. But one week is just enough to prepare for two weeks of sittings, and one week is much too short to write the reserved judgments from two weeks of sitting. That latter point is the key consideration in this chapter and in Chapter 16 on speeding up judgments.

B. LIMITING ORAL ARGUMENT IN APPEALS

Average length of oral argument is steadily dropping. It is now often half a day for an appeal. It used to be much longer, but some cases still run a long time.

When we think about regulating oral argument, we must be careful to distinguish four different things. It is very easy to confuse some of them. I will discuss each together with its pros and cons.

188 For examples of excessive length of oral argument, see Andrews, Principles of Civil Procedure, 588 (1994).
1. **Standing or General Time Limit**

   (a) **Practice**

   All American appeal courts impose such limits on oral argument (where it is allowed at all). The Supreme Court of Canada also impose strict time limits, even though almost all their appeals must be important and arguable in their eyes (because they gave leave). Those are the most difficult and important appeals in Canada. And the Supreme Court of Canada cut the usual time limit down, if one counsel estimates a shorter time! Quebec has short argument limits for sentence appeals and fast-track appeals. Ontario has them for some categories. The Federal Court of Appeal has them for interlocutory appeals. Alberta has just introduced them generally.

   Several other provinces do not announce time limits, but give a single appeal only two hours in total, unless special leave is given beforehand. That is a limit on oral argument of about one hour per side, in all but name.

   (b) **Reasons to Impose Limits**

   Some parties can argue for days, especially if a lot of money (or newspaper publicity) is involved, or if one party is self-represented. It is a very rare case which needs or deserves that. Typical oral argument wastes significant time informing the Court of Appeal of the facts and the law, not telling why they support one result or the other.189

   If a party’s factum is adequate, there is a limit to what else that counsel can legitimately add orally. There is no point to repeating the factum. Time limits on oral argument emphasize that the factum is the important thing, not later oratory before the panel.

   We must apply here one of the three Woolf principles, economy and proportionality.190 Few Canadian Courts of Appeal are short of work.

2. **Court-Imposed Case-by-Case Limit**

   (a) **Labor**

   It is a lot of work to estimate beforehand a fair limit on oral argument individually in each case. It takes an experienced legally-trained person. The Ontario Court of Appeal uses an enormous amount of valuable staff lawyer labor for this. Some Courts of Appeal use their Chief Justice! The labor seems disproportionate to the result.

   In many cases, the “individual” limit will turn out not to be truly individual, but a rule of thumb, likely based on the category (subject) of the appeal.

   (b) **Confusion**

   If the basis of this limit is at all hazy, then counsel who wants to go over the time allotted need only suggest that the court’s guess in advance was wrong. The key question is evaluating whether a case is worth hours, not guessing whether counsel will take hours.

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190 See Chapter 5.
(c) Hidden Time Limits

Many experienced presidents of panels limit the length of oral argument during the hearing, by various means. This is informal and ad hoc, and only experienced counsel expect or understand it.

3. Holding Counsel to Their Own Time Estimates

This is easy to administer, and certainly is a minimum ceiling if other cases are in danger of being postponed, or the day’s argument will run past (say) 5:30 p.m. But this method essentially lets counsel pick any time they want, rewards over-estimates, and could punish more realistic estimates. So it creates backwards motivation.

4. Vetting Time Estimates by Counsel

As list manager, I tried this for a year or so on every Edmonton appeal, and found I was very poor at estimating how long argument would run. I expended much labor for very little result.

The court should never use counsel’s estimates in raw form. Do not confuse this method with #2. This is really just #3, subject to advance correction of poor time estimates by counsel.

Quebec negotiates with counsel an agreed revised time for argument. It uses colored lights on the podium, but will give five minutes more. In British Columbia, this is done by an experienced staff lawyer.

5. Conclusion

Recommendation 70: Impose publicly and in advance time limits on oral argument of all appeals. They should be uniform, not crafted case by case. Certain categories of appeal might be given a shorter time. An individual panel could extend the limit at the hearing of that particular appeal.

If that is done, the court can no longer gauge how many cases to set down for one day by length of argument. One needs either a pretty well fixed number of cases per day (as now in Alberta), or the Manitoba system of giving each appeal beforehand points for difficulty, and not exceeding a certain amount of daily total difficulty.

C. APPEALS IN WRITING ONLY

Many courts offer to decide appeals on the facta alone, but they get very few takers. One exception is Nova Scotia prisoner appeals.

1. Oral Argument Not Compulsory

No court should ever compel counsel to give oral argument if they do not want it; that would be pointless. Occasionally a panel could call in counsel to answer questions or to comment on other issues or authorities.

2. Reasons to Encourage Written Appeals

What is the point of oral argument if the facts are on point and have no significant gaps? Especially in a fairly brief matter? Courts of Appeal should not try to put on a show, or to cater to counsel's suspicions that some judges do not read. Courts of Appeal really resist denying any counsel oral argument who wants it, because counsel are suspicious and the judges are cautious. That oral argument commonly changes the panel's mind (or two of their three minds) as to who wins, is doubtful.

All-written appeals would be a great boon to out-of-town parties or counsel.

Some appeals are urgent and not that important. They aim to correct error, not to make new law, e.g. interlocutory or preliminary questions holding up a trial. Written argument only would be useful then. Such a process would be fairer to counsel than not hearing the appeal at all.

3. Miscellaneous

Lord Bowman\textsuperscript{192} recommends written appeals where there is consent. He says that the court could reduce the fee for those!

If a respondent's factum were late, he or she might get no argument (oral or written), but that has not happened yet.

I deal with motions in writing only in Part E below.

Recommendation 71: Courts of Appeal should do more to encourage appeals in writing only, especially where there is a motion to expedite a simple matter, or another type of urgent case, such as child access.

D. LIMITS ON FACTUM SIZE

1. Terminology

“Factum” is the almost universal term for written argument except in New Brunswick and in some sentence appeals.

2. Present Practice

There is a limit of 30, 35, or 40 pages in almost every appellate court. The sentence factum in British Columbia is a brief memo and that works well. Saskatchewan has a short factum limit for self-represented parties. British Columbia and Alberta have strict limits on the memorandum's length in motions.

No complaints were noted by any court. Counsel in Ontario commonly seek more, but not in other Courts of Appeal. The Supreme Court of Canada gets only 5-10 requests a year to exceed the standard 40 pages there, even though its appeals are usually important, in unsettled areas, and involving public policy. That court requires special reasons. Quebec will extend it a little.

\textsuperscript{192} Review, 3, 89 (1997).
3. **Word Count**

It might be easier to administer or certify a word count than a page limit with elaborate format rules. That is done in the U.S.A. Computer software does it easily. A 30-page judgment double spaced contains under 8000 words, so a factum should not contain much more if it is 30 pages or under. Say 8500 words, to be safe.

4. **Extensions and Evasions**

Where there is no standing limit on oral argument, I doubt that length extensions for facta should be allowed, except in very unusual cases, e.g. what is in form one appeal, but in substance is two appeals on different topics.

In the Supreme Court of Canada, some counsel started filing an illicit second factum in the guise of an index to the condensed evidence record filed for oral argument. The Supreme Court of Canada is now amending the Rules to bar that.

**Recommendation 72:** A court with standing limits on oral argument should limit factums to 40 pages or 11,300 words, less in certain simpler types of case. (Any court without limits on oral argument should limit it to 30 pages or 8500 words.) The court should be slow to allow a longer factum.

5. **Supplemental Questions**

Argument need not be divided into rigid categories: written or oral. The two can interact. For example, sometimes a Court of Appeal panel requests or permits further written submissions on some topic after oral argument, while judgment is reserved.

Occasionally a panel will write to counsel before oral argument to tell counsel what questions or topics to brief or be prepared for. But that is not common. A perceptive lawyer in a large city wrote me and suggested that panels should do that more often, and e-mail makes it easy. He points out that that might make rarer Court of Appeal judgments based on points not argued. I agree.

**Recommendation 73:** Hearing panels should more often warn counsel before oral argument what points interest the panel, so that counsel will be fully prepared to discuss them.

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**E. ORAL ARGUMENT IN INTERLOCUTORY MOTIONS**

1. **Introduction**

Some appellate courts do not even insist on a memo to accompany a motion. It is true that where memos are required, they and the affidavit often duplicate each other. But that is an argument for a shorter memo, not for no memo, especially as the affidavit is often not required by law or practicalities.

**Recommendation 74:** Every motion should be accompanied by an explanatory memorandum. A simple motion would only require a few lines.
2. Limit Oral Argument on Motions

American courts do not let judges near interlocutory motions in the Court of Appeal.193

If an interlocutory motion takes some hours before a judge, there is something wrong. A whole appeal should not take that long. Indeed, the whole appeal may well not be worth its cost, if the total of all its ancillary parts take that long. A fortiori the result of a mere interlocutory motion in the Court of Appeal may not be worth it. It might be better to forget the motion and just let the appeal proceed. That is even more true of a motion for leave to appeal, which is supposed to save resources!

Court of Appeal procedures should not routinely cause or require motions of any real length. If they do, the procedures are wrong, or the court has Rules which it will not enforce.194

An Ontario study recommended a page limit on the material for all motions.195

3. Should Most Interlocutory Motions be Written Only?196

That is the usual practice of the Federal Court of Appeal, which passes them among three judges. (If the loser is dissatisfied, he or she can apply in writing to the same three to reconsider.) The Federal Court of Appeal needs special grounds for personal appearance. The Ontario Court of Appeal hears leave motions in writing (on appeal from Divisional Court). The Supreme Court of Canada has so heard almost all leave motions for many years. Counsel finally came to accept that. New Brunswick leave motions are now written.

An important aim of procedure is proportionality of resources.197

Most interlocutory motions have known criteria, e.g. stay of execution, or bail, or a time extension. This topic interlocks with who hears motions, access, and language.200

**Recommendation 75:** Argument by one side on an interlocutory motion should be limited to 30 minutes, 45 for a motion for leave to appeal.

**Recommendation 76:** Courts of Appeal should permit and encourage all motions (interlocutory or otherwise) to be argued in writing only.

4. Reconsidering or Rearguing Appeals

Every court seems to limit to written submissions motions to rehear or reconsider a judgment of the court just given. Such motions rarely succeed. Indeed, if no exceptional circumstances are even alleged, the Supreme Court of Canada Registry refuses to file the motion. If it is accepted, it goes first to one judge for directions.

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194 See Chapter 5.
197 Lord Woolf: see Chapter 5 above.
198 Chapter 6.
199 Chapter 19.
200 Chapter 20.
It is much easier to have two or more judges decide any motion if all argument is written. That is the Federal Court of Appeal's practice. That in turn makes motions to dismiss or quash easier. Reassembling the same panel for oral argument is usually very difficult, especially if some judges are from out of town.

**Recommendation 77:** Any motion to reverse or vary a decision just given or for leave to do so, should be decided by the same judge or panel which decided, and argued in writing only, unless that judge or panel calls for oral argument.

5. **Tag Ends of Appeals**

Often costs or some small overlooked point need more argument after the panel has given its main decision. These are almost always argued in writing only, in British Columbia and Alberta.

**Recommendation 78:** Handle small, undecided or overlooked parts of an appeal, such as costs, in writing only (unless the panel calls for more oral argument).

F. **RECORDING ARGUMENT IN THE COURT OF APPEAL**

1. **How and by Whom**

The Court of Appeal should not let unqualified persons or private tape recorders record oral argument. Transcribing is much more difficult than lawyers and judges think, especially if the right array of microphones was not used. An erroneous or even fraudulent tape or transcript would be very likely to result, especially with a certain class of vindictive litigant. But Nova Scotia Court of Appeal lets a party apply to videotape with his own tape.

If the court is likely to want argument transcribed later, the initial record should be by a real court reporter, not a sound recording.

Otherwise, recording should be by court’s audio recorder, preferably a digital system. The Supreme Court of Canada uses a plain audiotape. It has the videotape as a back-up.

**Recommendation 79:** Do not let private persons record oral argument. If it is permitted or ordered, use the Court of Appeal’s devices, or an official court reporter (shorthand writer).

2. **When to Record**

Recording is an act of self-preservation for the judges, if a self-represented (or in any event vexatious) party is to speak. Disciplinary complaints against the judge and requests for reargument because of someone’s misconduct, are very common among certain repeat litigants. Recording is also useful if an appeal is likely to be complex or fast moving, or many notes will be needed.

Commonly recording may solve the judge's usual dilemma of whether to listen or to write during argument. But the cost may be disproportionately high.
The Supreme Court of Canada and the Nunavut, Nova Scotia, Newfoundland and Labrador Courts of Appeal, and the Supreme Court of Prince Edward Island, Appeal Division, usually record argument. The Supreme Court of Canada finds it useful, and it saves note taking. It is online and searchable by the Supreme Court of Canada’s law clerks (students). The Ontario Court of Appeal rarely records. Alberta and Saskatchewan often do if a self-represented party argues. Alberta and Ontario do it very rarely in a complex case. Quebec is now discussing the question.

**Recommendation 80:** Each panel or president should decide whether or when to record oral argument.

3. **Who Can Get a Copy of the Tape or Disc of Oral Argument?**

The judges on the panel always can. But it is dangerous to sell (or give) it to litigants for five reasons:

(a) knowing that that will occur inhibits all in what they say in court;

(b) it also leads to grandstanding;

(c) having a cheap sound recording floating in the public undercuts court reporters or transcribers;

(d) it is also open to crooked or incompetent transcripts, or even open to doctoring the recording; and

(e) it makes easy sound bites broadcast on radio or TV.

Only the Supreme Court of Canada, Supreme Court of Prince Edward Island, Appeal Division, and Nova Scotia Court of Appeal seem to offer a copy. They will sell the disc or tape. Alberta refuses to provide them. The Supreme Court of Canada videotapes are often shown on cable TV’s CPAC channel. The Supreme Court of Canada controls the camera.

**Recommendation 81:** Do not make tapes or discs available to anyone outside the Court of Appeal.

4. **Who Gets a Copy of the Transcript?**

Providing it to anyone outside the court is all downside and no upside for the judges. What legitimate need do parties have for it? The only circumstance I can think of is a later dispute as to whether one counsel had made a binding contract or firm undertaking in open court. That is rare. Available transcripts inhibit judges’ free discussion, and allow people to take parts out of context. Only the Supreme Court of Canada sells the transcript of argument before the court. Alberta refuses to provide it.

**Recommendation 82:** An appeal court should not release transcripts or oral argument before it, save with leave of the court on proof of need in exceptional circumstances.

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201 See above Part 1(a).
CHAPTER 14
LEGAL AUTHORITIES

“A precedent embalms a principle.”
– Baron Stowell (1788 opin.) quoted by Disraeli, Hansard 22 Feb. col. 1066 (1848)

A. INTRODUCTION

Books of authorities were unknown two generations ago. I remember when the first one was filed in the Supreme Court of Canada in 1968. It was voluntary then, and not even encouraged. I prepared one of the first ones in the Alberta Court of Appeal. They seem little used in the United States. They are still voluntary in Saskatchewan, but are expected. Most Canadian appellate courts now use them.

The Supreme Court of Canada used to require a joint book, but no longer does. Each party files its own. Many are much too big. They contain too many cases, and reproduce all of each case. Now the Supreme Court of Canada uses condensed Appeal Books, which are mostly case law, not evidence!

B. USE BEFORE AND AFTER ORAL ARGUMENT

There is very little need for a hard-copy book of authorities before or after oral argument. Judges have offices near law libraries, and most judges now readily look up cases on computer. That is especially so if the factum citing the case is electronic. Even if a judge had no computer access to law at home, counsel printing, and a judge taking home, bulky books of authorities, on the chance the judge will have to look up a case that evening, is a dubious expenditure of time and money.

And counsel often file books of authorities only after the judges have read the factums.

Some books of authorities have problems with quality which would deter a judge from relying on them when later writing a judgment. Some books of authorities contain fourth-generation photostats which are hard to read. More and more give computer printouts with no paragraph numbers or usable page numbers. The computer format is often very difficult to read.
C. USE DURING ORAL ARGUMENT

So the only use of a book of authorities occurs in court during oral argument, if counsel then go into detail about cases cited. Even that most often does not occur. Most books of authorities are never opened during oral argument. If they are, it is only to see one or two cases (precedents). If counsel has a copy of a case, he or she can read from it, if that question arises. And if the law is pivotal, court law clerks should already have checked the cases cited in the facta to see if they support the proposition.

Furthermore, over 90% of all books of authorities contain far more material than would ever be suitable for oral argument. And how can under one and one-half hours’ oral argument include hundreds of pages of illustration? That is physically impossible.

D. CONCLUSION

If there are electronic facta, hyperlinked electronic authorities might have some point. If a court plans to introduce electronic facta soon, it might retain hard-copy (photostatted) books of authorities until then.

Counsel often file books of authorities fairly shortly before argument, which is extra wasted work for the Registrar. In Quebec, they used to file them the morning of argument! In Quebec and Nova Scotia, they are now required to do so earlier, but there is no sanction, except no costs.

Registrars find that books of authorities are often as bulky as transcripts and appeal books, and so are as much trouble to store, keep track of, and distribute.

They must cost the clients a fair amount of money too. It is more than a question of photostatting, collating, and binding. Gluing on tabs is surprisingly labor-intensive. So is highlighting critical passages.

A number of Registrars and some Chief Justices question their usefulness in present form.

Whether the present hard-copy photostatted books are worth the bother and expense to everyone is very doubtful, especially in a court which prepares routine bench memos. Furthermore, most counsel reproduce too many cases, too fully.

Recommendation 83: Abolish hard-copy books of authorities or reproducing authorities, except when counsel cite authority which is neither in any of the Lexis Nexis, Quicklaw, Maritime Law Book, eCarswell, or Canadian court databases, nor reported in any of the standard Canadian or English law reports.

E.g. an unreported non-electronic case

an American, Australian or New Zealand case

a case from an obscure or hard-to-get law report, or

an article or textbook
Recommendation 84: Retain any requirement for electronic hyperlinked facta.

However, statutes and Regulations are often time-consuming to navigate and update, especially to show the Act or Regulation as it read at the date of the facts litigated, whether in book form or electronically.

Recommendation 85: Keep the brief appendix of extracts from legislation at the end of a factum.

E. CITATIONS IN FACTUMS

1. Introduction

Until about three years ago, counsel wrote factums with volumes (or photostats) of hard-copy law reports in front of them. Now many do all their research (such as it is) on computer, and give whatever citation they happen to find there. They also tend to use free websites. Therefore, often the cases cited in a factum appear to be unreported ones.

2. Problems

That in turn gives a Court of Appeal many difficulties:

(a) One cannot tell whether the case is well-known and reported everywhere, or obscure and little-known, or too recent to be reported at the time the factum was written.

(b) One cannot tell whether the case is the same as another case, even a well-known case. The name of the same case often differs in different websites or law reports. Conversely, there are often several different judgments or decisions with the same name (likely given in the same suit on different dates). Counsel rarely give the neutral cite (and some courts do not use them).

(c) The case cannot be used until one accesses the very website which counsel used.

(d) If the case has no court-inserted paragraph numbers, there is no way to cite precise passages in it in a way that every reader can use. Page 17 in one printout could be p. 21 on another, even on another printout from the same website and document.

(e) The Court of Appeal will have to go to the labor of looking up other cites if it wants to refer to the case in a judgment.

(f) If counsel has not looked for parallel cites, it is very probable that counsel has not looked for later appellate history of the same case, either. Sometimes the case cited was reversed on appeal. It is poisoned fruit.

(g) Law reports and court websites add (or at least cite) corrigenda by the issuing court; other versions may not.
3. The Solution

No Court of Appeal should put up with this. Counsel are just shifting their own duty to do reliable legal research, and to edit the factum, onto the Court of Appeal. Some counsel do not know how to use a law library, or how to check citations by computer, or have discarded their firm’s library and are too lazy to look up parallel versions by computer or to walk four blocks to the courthouse library. None of that should be the Court of Appeal’s problem. Counsel unable or unwilling to take these simple steps should not accept appellate retainers. The Court of Appeal has to make law for the province (or for Canada) and needs proper material.

Courts of Appeal should criticize counsel who give unworkable, inconvenient or inaccurate citations.

Courts of Appeal should praise counsel who do careful, accurate, usable factums and research.

Recommendation 86:

(a) No Court of Appeal should accept a citation in a factum unless it is to a published hard-copy law report (such as the D.L.R.s), or it is to a website with court-inserted paragraph numbers, or unless no such version exists and counsel so states.

(b) Counsel should also give the neutral cite202 and a parallel cite to a hard-copy law report, if one exists.

(c) Pinpoint references should be to court-inserted paragraph numbers, or to page numbers in a hard-copy law report, and never to a page number in a printout from an electronic version. If that is impossible, the pinpoint cite must be identified another way, e.g. “4th last para. of the judgment” or “second para. of Part C of the judgment.”

(d) Staff lawyers or law clerks who review factums before hearing should draw such failings to the attention of the panel.

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202 As already recommended by the Canadian Judicial Council's Judges' Technology Advisory Committee in October 2004.
CHAPTER 15
SELF-REPRESENTED LITIGANTS

“\textit{He believes, with all his heart and soul and strength, that there is such a thing as truth; he has the soul of a martyr with the intellect of an advocate.}”
– Bagehot, \textit{Biographical Studies, ‘Mr. Gladstone’} (1881)

“\textit{Laws are generally of such a texture as the little creep through, the great break through, and the middle-sized alone are entangled in.”}

A. INTRODUCTION

This chapter is about appellants (or respondents) who have no solicitor of record, and speak for themselves in court though they are not members of the bar. A few have a law degree (or say they do), but are not admitted to the local bar. This chapter also includes litigants who have a lawyer whose name does not appear, or who have got other legal help.

B. SIZE OF PROBLEM

During interviews, almost every appellate court in Canada spontaneously mentioned self-represented parties as a problem and a large drain on resources, especially the time of the Registrar’s staff. For a number of Courts of Appeal, it may be the unresolved problem which bothers the court the most.

The Alberta Court of Appeal has done two different calculations, both of which suggest that about 1/6 of its resources are devoted to self-represented parties. Far fewer than 1/6 of litigants in that court are self-represented, but all of them take up more court resources than do litigants with counsel. Some take enormously more. Some courts find that one consultation at the counter can take three hours.\textsuperscript{203} In Manitoba, some organized groups are involved in 20-25\% of appeals, and over half the parties in family cases have no lawyer of record. One-fifth of the Supreme Court of Canada’s leave motions are by self-represented persons. Even the Federal Court of Appeal hears a lot of self-represented appellants.

The Quebec Court of Appeal in Montreal gets appeals from parties who have no lawyer, almost no English, and no French!

\textsuperscript{203} See Lord Bowman’s \textit{Review of the Court of Appeal}, p. 16 (1997).
C. PRISONER APPEALS

1. Not a Problem for the Court

All criminal appeal Rules encourage prisoners with no lawyer to file appeals from their conviction or sentence. No Court of Appeal suggested that these are a problem in either number or type.

Furthermore, experience shows that these appeals usually run in a more or less proper manner. An occasional prisoner will move his appeal slowly (maybe even after he has been released from jail). But these prisoners are almost always polite and respectful, and seem to do their best to advance legally relevant points. Often they succeed. Sometimes their written presentations are well done. Rarely are they hard to understand. Even when their points are not sound in law, they are ones which a lay person would see as important.

Such appellants (or criminal respondents without counsel) very rarely make procedural difficulties, and are almost never long-winded. Their cases are well worth the modest time which they take. In Nova Scotia and Alberta, the Crown sometimes raises problems with a conviction which the prisoner appellant has overlooked.

That benign picture may change. An experienced Alberta criminal defence lawyer says that in criminal trial courts, he sees unrepresented accused trying to pervert justice with strange objections and proceedings, attacks on the court’s jurisdiction, and claims of immunity. Those litigants may graduate to the Court of Appeal.204

When prisoners are denied Legal Aid, usually the Court of Appeal has no idea why. Often it is likely a belief that the proposed appeal lacks merit. Many Legal Aid authorities seem to base such decisions on an opinion from the lawyer who was defence counsel at trial, without any transcript of the trial. Sometimes if a transcript is later obtained, it will reveal an obvious ground of appeal, which trial counsel did not recall or understand. (Conversely, some criminal appeals with counsel are completely hopeless, but are likely funded by Legal Aid.)

Such topics may be one reason that the Criminal Code s. 682(1) lets the Court of Appeal seek a report from the trial judge. Some provinces such as Ontario do that and have a Rule on the subject. Its Court of Appeal is going to seek a short report concentrating on objective facts such as whether there were voir dires, or statements were excluded. Where there is an application under s. 684 of the Criminal Code, that sounds well worth trying.

Recommendation 87: A Court of Appeal faced with an application to fund counsel for a criminal appeal should request a report from the trial judge on specified objective topics.

Maybe Courts of Appeal should encourage various Legal Aid authorities to reconsider the methods which they use when making decisions on whether to fund criminal appeals.

The British Columbia Court of Appeal has a form and sample affidavit for prisoners to use to seek free counsel under s. 684 of the Criminal Code. The court needs to see an arguable point before it will make that appointment.

2. **Buying a Transcript**

It is very common for provincial governments or Courts of Appeal to pay for the transcript of the trial or sentencing when a prisoner without counsel appeals from conviction or sentence.

The transcript of a sentence hearing is usually thin and inexpensive, and the saving in time alone well justifies the modest expenditure. A number of Courts of Appeal or governments buy those. The British Columbia Court of Appeal does so even if the appellant has counsel.

Funding the transcript is also a good idea where a prisoner with no lawyer appeals from a conviction. Without that, there must be a good deal of delay. Often there would be a motion to appoint free counsel under s. 684 of the *Criminal Code* (which would entail paying for a transcript anyway). Given the seriousness of delay in criminal appeals (see Chapter 5), the chance of saving the cost of part or all of an occasional transcript is not worth the delay which waiting for it would produce. Any delay also entails a good deal of time and effort and extra appearances by Crown counsel.

The Ontario Court of Appeal has one judge review inmate appeals to see if more should be transcribed for the Court of Appeal.

**Recommendation 88:** The practice of governments’ paying for the transcript in prisoner appeals should be universal. If the trial was especially lengthy, then some attempt could be made to identify what portions are unnecessary. The formal documents and reasons for conviction, or charge to the jury, should always be reproduced, as should the reasons for admission into evidence of any key disputed Crown evidence such as a confession.

3. **Moving Prisoners**

A prisoner appeal requires the prisoner’s presence. Sometimes that can be a great inconvenience for the prisoner, because of poor and lengthy transportation arrangements, bureaucratic timing and waiting, and loss of seniority in prison because of the move. Prisoner appeals are seldom lengthy, but often involve motions and preliminary appearances. Quebec plans to use video facilities for this. See s. 688(2.1) of the *Criminal Code* specifically authorizing this in certain circumstances. The Ontario Court of Appeal sits in Kingston to shorten the trip for prisoners.

**Recommendation 89:** If video conferencing facilities are available, the prisoner without counsel should be offered that option to hear his appeal.

4. **Notice of Appeal**

A number of Rules call for multiple copies of a prisoner’s notice, which seems unfair and unnecessary.

**Recommendation 90:** Accept a prisoner’s notice of appeal in a single original. Make the government photocopy it. Amend Rules accordingly.
D. CIVIL LITIGANTS

1. Introduction

Self-represented parties are often a problem in civil appeals, but not all are. All staff and judges consulted agree that some appear reasonable and sincere, and some emphatically do not. Everyone agrees that the unreasonable ones have a very serious impact on Courts of Appeal.

Many appellate judges (though not all) think that a majority of self-represented litigants in their court are more or less reasonable and sincere. But most Court of Appeal Registry staff would disagree, and suggest that the reasonable ones are a distinct minority. These estimates refer only to sincerity or some degree of reasonableness. The percentage of the self-represented who have a sound case is far lower. Often it takes a lot of court labor to tell whether their position is sound.

We err gravely if we think that all self-represented parties are the same. To assume that all are mentally unbalanced, and so should be largely ignored, would obviously be unfair to those who are not. Equally, we must see the converse. To assume that all lay litigants are sincere and reasonable but impecunious, and so need extra indulgence, would be grossly unfair to the opponents of those who are not.

2. Classification

I now list five different categories of self-represented civil litigants.

(a) Hidden Lawyer

A number of litigants are not really self-represented at all (despite what they say). A real lawyer advises them and even drafts or checks their written work. There may be a host of reasons (good or bad) why the lawyer does not appear on the record.

The only self-help book for self-represented litigants which I was able to borrow is by a large successful U.S. publishing and software company, and written by two American professors/lawyers. It sounds sensible and sincere, and is not at all malicious. It strongly and repeatedly advocates using a lawyer or a paralegal behind the scenes, and gives many details about how to do so. Though it tells a lot about the details of suits and trials, its section on appeals is comparatively perfunctory.

A self-represented litigant will often argue technical points which a lay person would never find on his or her own. Often a lay litigant’s oral argument shows that he or she does not understand the content of parts of his or her written material.

American studies show that a majority of self-represented litigants say that their reason not to use a lawyer is that they can do it better themselves. Those unable to afford a lawyer are a much lower percentage. And patently many repetitive Canadian lay litigants seem to have an inexhaustible supply of money to pay for transcripts, printing, photostatting, and airline travel.


206 Id. at pp. 1/6 to 1/9, 23/2 to 23/13.

207 Id. at pp. 20/7 to 20/11.
Some self-represented litigants themselves have an LL.B. and may have practised law elsewhere in Canada at one time.

(b) Hedge Lawyer

Similarities in written material from unrelated self-represented litigants, and watching who sits with them in court or consults with them, sometimes show a hidden link.

It seems likely that some ostensibly self-represented litigants buy advice and drafting help from self-appointed legal advisers who are not legally entitled to practise law locally. They may be lawyers from other countries not admitted locally, paralegals who cannot appear in superior courts, or just self-appointed “experts”.208

(c) Mischief Makers

“Iago’s soliloquy – the motive-hunting of motiveless malignity.”

– Coleridge, “Notes on the Tragedies of Shakespeare: Othello”, in The Literary Remains of Samuel Taylor Coleridge, bk. 2 (1836)

There are a number of organized groups, such as tax protestors, fathers’ rights, or farm-gate defence. Such pressure or activist groups sometimes encourage and instruct members and sympathizers to file unfounded court proceedings. Some even file fictitious mortgages in property registries. Some can be very vindictive. The maneuvers of such people are often totally insincere.

An ordinary citizen worried about his tax or divorce or credit problems might easily be lured by their siren song and panaceas. The internet and websites make such contacts easy.

I have seen signs of such activists hiring themselves out to ordinary litigants with other types of problems, thereby moving into category (b).209

Some litigants seem to enjoy tying up the courts and annoying them.210

A quick tour of the internet also shows websites which directly tell the public how to obstruct and delay litigation, and to punish and harass one’s enemies through the courts. More websites offer to sell instruction manuals or videotapes and precedents for suits or motions on the same topics. Some tell how to sue the judge and opposing counsel, or have them barred from acting further. One is by an American “with formal legal training” from two universities, who is unhappy with divorce courts. These are very beguiling hard-sell marketing. Other sites offer cheap American legal help from anonymous lawyers. Bombs are not the only thing for which the internet offers recipes and cookbooks. I am tempted to cite chapter and verse for my statements, but it is not in the public interest to publish the addresses of such websites. Some of the websites are very disturbing.

So it is easy for an ordinary sane person to see that the medium is the message, and that he can harass anyone he dislikes with litigation, whether or not it ultimately succeeds.211


Some people in category (c) simply carry vindictiveness and harassment to the point of litigation terrorism.

A lay person reading American material, or listening to the siren song of a Canadian hedge lawyer, may not realize the dangers of paying party-party costs in Canada. Those can be fairly heavy, even in an appeal court, especially in Ontario. Ignoring a reasonable offer to settle by the other side can also render one liable to heavy costs if one fails ultimately.

Therefore, if a judge orders costs of a failed motion payable immediately and in any event, that can have a very salutary educational effect.

(d) Sincere Ordinary People

I understand that trial courts now see a large number of self-represented litigants who appear to be normal and more or less reasonable. Many seem unable either to afford a lawyer or qualify for Legal Aid. Some are educated people or civil servants (or both), and are up to the litigation task they undertake.

Any appellant is a person not content to accept the result in the first court. Though I have seen some normal, sincere, reasonable lay litigants in appeals, my own experience suggests a much smaller percentage of them in appeals than the percentages reported by many trial courts.

It is critical to understand that many self-represented parties in appeals do not want to use a lawyer. Probably most do not. Some say that a previous bad experience turned them off lawyers.

(e) Mentally Disturbed or Rigidly Obsessed

All appellate judges would agree that some self-represented litigants appear to be unwell mentally, and that Courts of Appeal always have some of them on hand. (The debate would be over what proportion they are: see the beginning of Part D above.) Such litigants usually appear sincere, but they are often persistent to an unbelievable degree.\(^{212}\)

A great deal of study, and consultation with judges and mental health experts over several years, makes me respectfully suggest the following. The proportion of self-represented litigants who are mentally unsound is little observed and under reported, especially among persistent litigants. I am not sure of all the reasons for the under reporting, but offer some:

(i) Mentally unwell litigants are usually on their best behavior in the courtroom, but can act radically differently with Registry staff, librarians, and opponents. Some are sporadically abusive, even violent. Few Registry staff seem to tell the judge of such conduct.

(ii) The most common mental litigation affliction usually affects only one narrow topic, leaving the sufferer otherwise normal and able to function, especially in the first few years of the litigation.

\(^{212}\) E.g. Griffith v. R.C.M.P., 2004 BCSC 1443, [2004] B.C.J. #2295, New W. S 060623 (Nov. 4). Judges in one Court of Appeal have had to respond to lawsuits against them by a persistent self-represented litigant, and even when a motion to strike the pleadings was successful, the legal costs of defending one such suit approached $90,000. Also see Grant Lester et al, “Unusually persistent complaints” (2004) British Journal of Psychiatry 184, 352 - 356. More common but less severe personality disorders can affect behavior in trial courts, especially in family litigation. A very useful description of such personality disorders is Eddy, Bill. High Conflict People in Legal Disputes (Janis Publications, 2006).
(iii) The unwell litigants devote enormous energy (and sometimes intelligence) to gathering evidence and arguments to support unfounded assertions. For a time, they can convince anyone on earth that their case is arguable. It often takes a lot more probing to show the flaws. Such litigants often use evidence which is literally true, or half true, but extremely selective. In reality it is extremely misleading.

(iv) Sometimes such a litigant’s initial case is arguable. There is no obvious or clear evidence of mental problems until he or she keeps litigating the same point despite earlier judgments, and then sues or tries to have disciplined all those who tried to help him or her.

(v) Such litigants almost always have a good manner and make a good first impression; only a lot of probing or repetition exposes the grave flaws.

(vi) When one encounters the first such litigant, the conduct looks like amazingly individual eccentricity. Dealing over time with several such litigants, shows that many of the symptoms are not individual or random, but are repeated by almost all the sufferers.

(vii) Some disturbed self-represented litigants have good, pragmatic people skills. They can subtly beguile some judges and get them to abandon judging attitudes or disciplines for a more helping mode. It often takes later disappointment in that role for the judge to revert to a more orthodox approach.

(viii) Judges usually have no training which is of any assistance in recognizing these factors.

(ix) A number of these litigants display cyclical and periodic activity, and their attitude may not be constant.

(x) Such litigants are often semi-peripatetic, litigating in various courts or cities, or living in one but periodically visiting another to litigate.

(xi) The litigant’s written and oral presentations often differ radically.

Motivations here are mysterious, but such litigants have an exaggerated idea of the importance of their complaint. Dealing with the highest court in the province probably satisfies some desire for importance and attention.

(f) Conclusion About Types

There are many discussions today in Canada about self-represented litigants. Most ignore all categories other than category (d), and so suggest that the problem is solely one of funding. I respectfully suggest that it is extremely dangerous to use that approach in a Court of Appeal.

Recommendation 91: Do not treat unrepresented appellants as solely or primarily a funding problem.
3. Duty of the Court

I will summarize the right approach. A judge should always handle litigation as a judge, seeking to apply the law to the facts and to administer fair procedures to both parties. That sounds obvious and easy, but it is not. It is amazingly tempting for a judge to stray from that path where one party is representing himself or herself, whether the self-represented party is normal and reasonable and needs legal help, or is patently mentally disturbed, or whether the judge cannot tell. Here are some more specific examples.

(a) The judge should explain to the lay litigant the essential points of the procedure and what is relevant. The judge should answer questions from him or her so long as they are on proper topics. If the self-represented party does not follow proper procedure or gets into topics which are irrelevant at that stage, the judge should explain the failure, and warn of likely consequences. The judge must be very patient, and may have to explain and warn many times.

(b) The judge should read all the material beforehand, and demonstrate that he or she has read it. It may be wise to announce at an early stage that decision will be reserved at the end.

(c) The temptation to waive the rules is usually strong; many rationalizations tempt the judge. For example, “He is going to lose anyway, so I will give him lots of latitude, since it won’t hurt the other side.” That temptation is extremely dangerous. It can lead to the grossest injustice to the other side, e.g. when the self-represented party’s unsworn but very plausible allegations lead the judge to rule against the opposite party on some procedural point. (Of course the judge should not worry about mere form or trifles.)

(d) If the self-represented litigant persists in doing what he or she has been repeatedly told not to do, the judge must act, and enforce the rules of decorum and procedure.\(^{(213)}\)

That is more than a matter of fairness to the other side, vital as that is. A mentally-disturbed lay litigant will often resent waivers of Rules, even when they favor him or her, indeed when he or she asked for them. That sounds improbable, but is actually a common feature of this mental disorder.

The judge should refuse to accept inadmissible evidence. It is important to follow all the usual rules about notice, time limits, criteria for raising new points or amending pleadings or extending time, and so forth. The Supreme Court of Canada treats self-represented leave motions the same way as ones by lawyers.

(e) If objectionable courtroom behavior or very persistent irrelevance keeps occurring despite explanations and warnings, the judge should at least adjourn temporarily. If security officers were not in court before, they should be now. If bad behavior recurs, the oral hearing should end at once. The self-represented litigant may be given a chance to send in more written argument.

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\(^{(213)}\) Shedden v. Patrick (HL(Sc) 1869) L.R. 1 Sc. & Div. 470 represents the third suit on the same topic, each of the previous two having been dismissed by the House of Lords. This third attempt was argued by the appellants in person before the House of Lords for (23 + 2) 25 days. The House of Lords dismissed the appeal without calling on the respondents. The first appellant repeatedly interrupted the Law Lords’ oral judgment, despite repeated threats to remove her. At the end, the appellant said that another appeal on the same matter was pending below, and asked to have the papers impounded, or at least photographed, but the House of Lords did not do so.
(f) The judge must remain respectful, calm, and patient at all times. If that is difficult, the judge should call a brief recess. Thinking through the right procedure or strategy often takes a few minutes.

(g) The judge must never put on the wrong hat, or fall into psychological traps.

First, the judge must see that all due formality is observed. That is more important with self-represented litigants, not less. Any attempts to lead the judge into informality, personal approaches, familiarity, small talk, or jocularity, must be rigorously avoided. Other participants should also be forced to be formal, polite, and respectful. The litigant’s supposed ignorance or habits are no excuse for the judge. With the wrong manner or procedure comes the wrong hat.

Second, the judge must not concentrate on the lay litigant and his or her understanding, still less try to persuade or satisfy him or her. That is not the judge’s role. The judge is not a mediator or broker. The judge’s role as educator is strictly subsidiary. The judge’s duty is to weigh the interests of both sides and apply the law through a procedure fair to both. The judge must base all decisions on the same criteria (substantive and procedural) which would be applied to all other litigants.

Third, the judge must remember that he or she is no longer a lawyer. The judge must not act as a legal adviser, counsellor, scribe, mouthpiece, or even interpreter, for the self-represented litigant. In particular, the judge should follow these rules:

(i) Do not put words into the litigant’s mouth.

(ii) Do not try to bend his or her vague factual complaints into a size or shape which falls into a legal pigeonhole (which the litigant probably has never heard of).

(iii) Do not suggest to him or her alternative arguments, remedies, or venues. (For example, do not say “Your remedy is not to appeal; you should seek judicial review.”)

(iv) Do not try to act as the litigant’s parent, friend or counsellor. Judging is not one of the helping professions. A judge is woefully untrained and unprepared for such a role. It would be safer for a judge to take out the lay litigant’s appendix. At least that would not harm the lay litigant’s opponent.

The beauty of the rules in this subpart 3 is that they work fairly for all self-represented litigants, normal and sincere, or abnormal or vindictive. Diagnosis is neither possible nor necessary. Judges get into trouble and work injustice precisely because they abandon their usual judicial approach and standards.

Judges would greatly benefit from some training in how to deal with difficult people, especially those with the litigious mental disorder. The annual appellate judges’ conference in April 2005 offered one session on that subject, with a psychiatric expert contributing. Nova Scotia has a committee studying the topic.

Recommendation 92: Obtain the services of mental health professionals to train appellate judges in how to deal with self-represented litigants or difficult people.
E. VEXATIOUS LITIGANTS

1. Statutory Powers

Every litigant is entitled to his or her first bite. But legislation often lets courts bar suits by a person who habitually brings unfounded proceedings. Usually such an order forbids commencing more suits without leave of a judge.214 Quebec Court of Appeal orders require leave of the Chief Justice of Quebec. The statutes usually do not expressly mention appeals, but are often broadly enough worded that they would cover them.

Unfortunately, some statutes require consent of the Attorney General, or a motion by some other litigant. That may not be easy to get, and the court can scarcely solicit it. So many Canadian Courts of Appeals suffer in silence for years at the hands of a persistent litigant.

Recommendation 93: Legislation on vexatious litigants should not require the consent or motion of the Attorney-General.

Recommendation 94: Courts should not hesitate to use such legislation, or mention it to lawyers who complain about repeated unfounded proceedings against their clients.

2. Inherent Powers of Courts

Apart from such legislation, the courts probably have a similar inherent power. I have not seen legislation which purports to remove or negate such a power.

Though the authorities are not unanimous, the majority in England and Canada uphold such an inherent power.215 Courts and their Chief Justices clearly have inherent power to manage their lists and registries, and to strike out or otherwise deal summarily with individual vexatious proceedings (motions, suits, appeals, pleadings, or other documents). I have trouble seeing why that must be done piecemeal or repeatedly. To order an initial leave hearing before one judge is hardly more than list management. If a judge can strike out a suit which is vexatious, then the greater includes the less, and the judge can refuse to let it be commenced in the first place.

The Quebec and Saskatchewan Courts of Appeal regularly make such orders. A number of other Courts of Appeal treat the persistent and vexatious like the weather; they grumble but take no remedial steps.

Once such an order is made, the Registry rejects documents tendered in contravention (i.e. no leave and not seeking leave).

214 A persistent vexatious litigant who for over 20 years sued lawyers who never acted for him and judges who ruled against him, for huge sums, using violent language rehashing 25-year-old matters, was barred from suing without leave: Sanderson v. Basaraba (2003) 179 Man. R. (2d) 59, 2003 MBQB 246. But see Campbell v. R. (2005) 2 CTC 31, 2005 DTC 5114, 330 NR 373, 2005 FCA 49 (Feb 3), a tax appeal by a lay person which contained a lot of very irrelevant material about terrorism and money laundering, and sexually explicit material about public figures. After the appeal was dismissed, the court denied a vexatious-litigant order. One suit or appeal was not sufficient for that.

3. **Who Should Move?**

If need be, the court can act of its own motion, or the Registrar can move. But it is better if one judge induces the Attorney-General or the opposing party to move. Then another judge can hear the motion.

**Recommendation 95:** Encourage a suitable party to move for a vexatious litigant order against a persistent vexatious appellant. If need be, the court should act of its own motion, with appropriate safeguards.

4. **Security for Costs**

The balance of English and older Canadian authority holds that ordering security for costs is an inherent power of courts, and that the Rules on it are not an exclusive code. Besides, the Rules usually cover vexatious litigation and parties who re-sue without having paid previous costs, and cover special circumstances in appeals. Alberta’s new R. 593(1.1) is very broad and allows the court to order any party to provide security where it is just.

A persistent litigant clearly has some money or is able to get it. No one can sue or appeal repeatedly without money. Yet many self-represented litigants refuse to pay costs. So security for costs is a very healthy remedy in such cases, and a fair intermediate step before a vexatious litigant order.

**Recommendation 96:** Courts of Appeal should accede to security for costs motions against repetitive appellants with far-fetched arguments, and not be stingy in setting amounts. Courts of Appeal should be slow to upset trial courts’ orders for security for costs against such persons.

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**F. SECURITY ISSUES**

1. **Dangers**

Most judges find lay litigants figures of sympathy or amusement, and consider them all completely harmless. The judges have no scientific or legal basis for that view.

I do not wish to suggest that all, or most, self-represented litigants are physically dangerous. But some are, and we do not know which ones they are.

   (a) **Criminal Records Unknown**

   In a civil case, no one looks at a litigant’s criminal record. Some persistent litigants have been found guilty of criminal violence in other courts. I have known such cases. Yet other judges in the jurisdiction do not know that. Security staff may know of such things, yet think it improper to prejudice judges by telling them. If security staff offer to be present when some lay litigant is due in court, the judge should not discourage that.

   (b) **Violent Incidents**

   There have been murders in Canadian courtrooms during civil suits. I have not heard of one during criminal proceedings. A young lawyer was badly slashed with a scythe during a taxation of costs by a self-represented litigant. Counter staff have been assaulted and
threatened. One litigant recently damaged the grille at the Registry counter. One lawyer got a pie in the face. Lay litigants in England have thrown heavy objects at judges on the bench, on a number of occasions. In British Columbia, one lay litigant began stalking a staff member, and had to be barred from the courthouse.

2. Physical Security

**Recommendation 97:** The security staff should keep the names and photos of any litigants who show dangerous tendencies, and should liaise with the Registry, and should attend whenever such people are due in court.

**Recommendation 98:** Every courthouse should screen everyone entering (except judges, staff, and lawyers) for dangerous objects. A metal detector is the obvious method.

**Recommendation 99:** It should be impossible to reach internal corridors, still less judges’ offices or retiring rooms, without a key or code number. Do not use metal keys as they are easy to copy and impossible to cancel without wholesale re-keying.

**Recommendation 100:** There should be adequate security personnel.

**Recommendation 101:** If not yet enacted, enact local legislation to give the security staff legal powers to search and handle questionable people in the court precincts, modelled on the legislation now passed in many provinces.\(^\text{216}\)

3. Exclusion Orders

**Recommendation 102:** If a litigant proves abusive and threatening to Registry staff or other people at the courthouse, a judge should make an order barring him from entering the premises without written leave of a judge. The order may bar him from litigating without counsel.

G. NON-LAWYERS REPRESENTING OTHERS\(^\text{217}\)

Often a lay person will want to represent someone else, such as a private company or a relative. Judges often permit that, or silently condone it.

1. Dangers

But a host of bad consequences can flow from that. Here are some of them:

(a) First, there would have to be consent of the person to be represented. Only the Nova Scotia Court of Appeal seems to consider this. If it is a company, no directors’ resolution is ever proffered. One has only the lay person’s word. No one ever asks the other shareholders. No one asks whether the person to be represented is *sui juris*.

(b) The person to be represented has no lawyer (*ex hypothesi*), and so needs advice as to the dangers of being self-represented. No one ever tenders such advice.

\(^{216}\) See the Manitoba history and citations, in *R. v. Lindsay*, *supra*.

\(^{217}\) See also Part D.2(a), on hidden lawyers.
(c) Usually the court knows nothing of the experience, training, or ability of the person who wants to act. Is he or she competent?

By letting him or her represent another, the Court of Appeal is just opening itself up to a further appeal on the ground of incompetence of the lay agent.218

(d) The scope of the retainer is left vague. Is it just this one time, or henceforth? Does it include authority to negotiate and compromise and accept payment? There is a grave danger that after the suit is finally lost, the “client” will repudiate all that the mouthpiece did, and seek to start afresh. I have seen an affidavit in which one family member disclaimed all consent to or knowledge of what another lay family member had done in court for both of them.

(e) Sometimes the suggested advocate has a bad track record of vexatious and improper behavior, but often there is no systematic way to discover that.219 Once appointed, the spokesperson will be ungovernable. Most penalties for misconduct would fall on the “client”, not the spokesperson. The advocate may well be judgment-proof. Putting him or her in jail for contempt would probably do little to aid the wronged opponent.220

(f) To permit a lay person to represent another often violates legislation on the exclusive office of lawyers.221 At best, it encourages or covers up such violations. The judge has no way of knowing whether the advocate is charging for his services. Judges should not make orders which they know are illegal.

(g) The court’s leave may make it harder for the opposing lawyer to deal directly with the lay “client” and give him, her, or it notice.

Recommendation 103: Do not give a non-lawyer leave to represent someone else in court, save in possibly very unusual circumstances and after full evidence and inquiry.

2. Solutions

A court can always offer an unrepresented party an adjournment, and suggest where to get free or inexpensive advice.

If an unrepresented litigant wants to speak or act for himself or herself, he or she may. Often there are other represented parties on the same side as the self-represented party, and he or she need do little more than ride on their coattails. If a fellow unrepresented litigant wants to come to court, listen, and then adopt the first one’s submissions, he or she may.


Anyone has the right to bring a lay person to court to offer quiet advice. That does not need the court’s leave and involves no formality. Such a person should be allowed (on request) to sit beside the party. But the judge should not let the camel creep further into the tent. The lay adviser should not speak out loud, on any account. Any such attempt must be firmly suppressed.

A lay litigant can be offered the right to make written submissions. He or she can take time or care preparing them, and consult other people, books and precedents when doing so.

See also Part H.

H. HELP

1. Registry Staff

(a) Registry staff spend a lot of time helping self-represented litigants. Some litigants are not too much of an imposition, but a few take huge amounts of time. The total effort is prodigious, especially when there are many self-represented litigants.

**Recommendation 104:** Governments should fund enough Registry staff and give them some training in dealing with self-represented litigants.

(b) The public should be able to see staff at the Registry counter or phone them. A Court of Appeal should not use voice mail once it gets enough staff.

(c) One staff lawyer in Quebec with heavy management duties took a course on how to deal with difficult people.

**Recommendation 105:** All Registry staff and case management lawyers should be offered instruction in how to deal with difficult people.

2. Existing Duty Counsel Systems

These should be expanded to cover the Court of Appeal, and to cover advice to lay people on preparing paperwork, not merely advice at or before oral hearings. Such help would save Registry staff countless hours, and so greatly ease Courts of Appeal’s budgets.

3. New Projects

Special projects should be established with proper precautions and limits.

In Vancouver, one program for appellants has operated successfully for some years. The Canadian Bar Association provides volunteer lawyers to give advice (occasionally even to argue in court). The Salvation Army provides the vital initial screening of the applicants. A good brochure describes the program, and the Registrar’s office has copies available. This is a very successful program and great experience for counsel.
Ontario is developing a pilot project with Pro Bono Ontario to provide duty lawyers. But the Court of Appeal wants to be careful, because it is not fair that the court give one side a lawyer and not the other. They do not want to encourage new appeals, or discourage hiring lawyers. They do not want to incur transcript or other disbursements. So Ontario wisely confines its program to perfected appeals. The Court of Appeal wants lawyers to identify suitable cases. The Ontario Court of Appeal also has duty lawyers for inmate appeals. They are paid a small sum by Legal Aid, and cannot seek a Legal Aid appointment for themselves. Quebec is trying to encourage such a scheme. The Nova Scotia bar report that they do a lot of pro bono work for such litigants.

Recommendation 106: The Court of Appeal should encourage legal and non-profit non-legal groups to screen and provide advice and assistance to self-represented parties in the Court of Appeal.

4. Forms

Forms greatly help lay litigants (and even lawyers). Self-represented parties often ask for precedents to follow. The court website would be a good medium.222

Recommendation 107: The Court of Appeal should provide forms or precedents for all common documents used in an appeal.

5. Pamphlets and Websites

The topics of explanation and answers to questions which the Registry staff commonly offer to lay people can be noted over time, and then written up in simple language. Such written explanations should be available both in written form at the counter, and also on the court’s website. Anything very common should be printed in pamphlet form. A number of Courts of Appeal, including the Nova Scotia Court of Appeal, do that. It will save much time in the long run.

The Quebec Court of Appeal has prepared sheets which list all the common types of motion, say whether the Registrar, one judge, or a panel, hears them, and tell whether to gown, times for notice, documents required, number of copies and other details.

Recommendation 108: Write up and duplicate and offer the staff’s answers to questions often asked by self-represented litigants.

The courts’ websites tend to be written for lawyers.223

Recommendation 109: An expert in plain language should try to make the Court of Appeal’s website more user-friendly for lay people.

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222 See further Chapter 21, Part B.2(b).

6. More Complete Rules

Some provinces’ Rules of Court and court Practice Directions are on isolated topics only, not
mentioning some essential or customary steps in an appeal. Other jurisdictions have Rules which
describe the whole appeal process in order, from start to finish. Lay litigants find the latter style
very helpful. British Columbia has a separate Practice Direction on s. 684 applications which is
worded simply.

Recommendation 110: When Rules of Court on appeals are next rewritten, they should describe
all the steps in ordinary appeals. Where convenient, that should be in the usual order that these
occur.
A. INTRODUCTION

Current Canadian Judicial Council statistics show that delayed judgments are a bigger problem, now that most backlogs awaiting argument are gone.224 Recent volumes of the Dominion Law Reports (vv. 239, 240) contain 20 and 25 appellate decisions respectively. In them, the average wait from the last argument to delivery of reasons was 4.4 and 4.7 months, respectively.

B. WHY JUDGMENTS COME OUT LATE

We need uniform terminology for the judge who is going to write the first draft judgment. I will call him or her the “author”.

Many efforts to improve this situation do little good, because they ignore most of the real reasons for delay in issuing judgments. Here are 18 possible causes of delay after argument.

1. Occasionally, one member of the panel got too little chance to read the materials before oral argument, and so is not really up to speed during or immediately after oral argument. That is a grave fault, but fortunately rare in recent years.

2. Argument has not jelled the issues.

3. One or more judges on the panel are not sure which way they will go.

4. The author needs to read more evidence.

5. The panel cannot give oral judgment now for some reason.

6. The author is too tired at the end of the day or of argument, or it is too late in the day, for him or her to start.

224 Canadian Judicial Council, 2003 Statistics Re Caseload and Delays: Courts of Appeal, pp. 18-35, (line 3,”Hearing to Judgment” in each box). Not all Courts of Appeal are slow in this respect.
7. The next case’s argument is now at hand, so there is no time. Often the author will sit full
days for two consecutive weeks, even longer. His or her mind is then crowded with at least
20 separate appeals.

8. One judge on the panel wants to leave the premises at once after argument, so no agreement
can be reached the same day.

9. The author wants more legal research, or wants to read the cases cited. This is especially bad if
there is a shortage of law clerks.

10. Once time is later available, the author has forgotten many details, and needs to get back up
to speed.225

11. Who is the author has not been decided yet.

12. The author assumes that nothing can be done until he or she has a full free day; or the author
has other time management problems.

13. The author procrastinates, even has mental blocks.

14. The court reserves too many cases, and this one is too far back in the queue.

15. The author is in court one-half of each month,226 and needs one-quarter of each month
to prepare and to hear one-judge motions. That leaves under one-quarter of each month
to write reserves, which is too little for the number generated by sitting half the time.

16. The author does not write readily. Lawyers who seek judgeships, even trial judges who seek
transfer to the Court of Appeal, do not always grasp the importance of this ability or willingness.

17. The author does not type well, and lacks secretarial assistance.

18. So much time has now elapsed since argument, that the author fears to write a short
judgment; that would be embarrassing.

C. WHO ASSIGN JUDGES TO CASES AND HOW

Even the clerical aspects of assigning judges to sitting dates (or weeks) can be large, especially
without a good computer system. This takes up too much of the time of some Chief Justices.

Some judges like writing, most do not like it but do it, and a few cannot. Should a complex case
likely to be reserved get a judge who has expertise or energy, and will more readily write the
judgment? Should the panel hearing a technical case include at least one judge familiar with
the topic? Chief Justices do not routinely pick panels to fit cases, but some do in special situations
like that.227 It takes advance work for the Chief Justice to read cases ahead of time and allocate
judges.

225 That loss of memory does more than slow down production. As one lawyer pointed out to me, it also degrades the quality
of the resulting judgment.

226 See Canadian Judicial Council, 2003 Statistics, n. 224, supra, at p. 3. One must assume that the figure given there for the
Ontario Court of Appeal is weeks, not days, and should be multiplied by five.

227 One able lawyer in a big city wrote me to encourage temporary specialization of appellate judges. It is also interesting that
his local Court of Appeal does not circulate draft judgments, so the experts not on the panel may have no chance to make
comments or suggestions to the “general practitioner” writing the draft judgment.
D. SELECT THE AUTHOR EARLY

1. Who will write?

Saskatchewan uses the “circled judge” system, pre-selecting the author for each appeal. It is not fully random. British Columbia and Quebec do much the same. American Courts of Appeal typically pre-pick an author.

2. Advantages of Pre-Selecting the Author

(a) He or she can take notes differently.
(b) He or she can ask his or her law clerk or staff lawyer to attend argument, and otherwise prepare beforehand.
(c) He or she knows to take vital steps immediately after argument ends, e.g. getting a missing document, instructing research, or noting the panel’s conclusions.
(d) The system produces equal work division, so there is no awkwardness or need to postpone the choice.

3. Disadvantages of Pre-Selecting

(a) Fear that the other two judges will coast and not fully participate. That does not occur in Saskatchewan. The bar does not object in Saskatchewan. No complaints are evident in Quebec.
(b) Fear that someone will thereby gain some advantage?
(c) A rota (impersonal selection) is inflexible and ignores all practicalities about who is best suited to write. But (as noted), the pre-selection need not be purely random.

Recommendation 111: Pre-select the author for each case. At the very least, assign the writer immediately after oral argument, the same day.

4. The panel may vary the choice of author if the one picked previously will dissent. They may also do so if all judges on panel agree because of interest or workload (as in Quebec and Saskatchewan).

5. Who will choose or direct research by law clerks or staff lawyers? Should one judge on the panel be agreed or designated to direct that? The Quebec and Alberta Courts of Appeal do that.

E. EACH PANEL SHOULD CAUCUS BEFORE AND AFTER ORAL ARGUMENT

1. Former objections to discussion before argument

There used to be a theory that judges should go into argument with a completely open mind? But oral argument is a late stage in argument, not its beginning.

No one ever seems to express any objections to caucusing after argument. But occasional judges duck it, or speak vaguely at it.
2. **Advantages of Caucusing**
   
   (a) The judges correct error and work cooperatively, before wasted work is done, before positions harden, and while memories are fresh.

   (b) Work on the judgment can start at once. See Part B.

   Most Courts of Appeal seem to meet beforehand. Manitoba has introduced caucuses before and after argument.

3. **Chairing the Meeting**

   In Saskatchewan, the pre-selected author chairs a pre-hearing panel meeting which can reach tentative conclusions, as well as plan what to watch for or ask during argument.

   **Recommendation 112**: Each panel should meet and discuss each appeal just before and just after oral argument.

F. **NO JUDGE SHOULD SIT IN COURT TWO CONSECUTIVE FULL DAYS**

1. **Not Back to Back**

   Lord Bowman\(^\text{228}\) criticizes long sittings for a given judge. Breaking up sitting time does not increase the total, so long as the judges all live and work in the same city. Only two Courts of Appeal split residence, and few travel much.

   Consecutive week-long sittings are a remnant of the old practice of hearing appeals back to back with no fixed dates, until all ready were heard. There is no real reason now to do it week by week, especially if few appeals are scheduled to run over to a second day. Indeed, an unexpected run-over is easier to handle if the panel is not scheduled to sit the next day. In a court which sits only in one city, there is no need for consecutive days. Nova Scotia judges rightly dislike sitting back-to-back days, and usually do not. The Supreme Court of Prince Edward Island, Appeal Division, does not usually group appeals.

2. **Not Full Days**

   Eliminating consecutive full sitting days will end two vicious circles. With the (afternoon or) next day to prepare, and time to deliver more memos of judgment and oral judgments, fewer reserved judgments become necessary. And prompt, more efficient writing becomes much easier, and reserved judgments get planned and started at once. This practice will address most of the reasons why judgments now come out late, which are listed in Part B.

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\(^{228}\) Review of the Court of Appeal, pp. 3, 93 (1997).
3. **Travel**

Even travelling American Courts of Appeal do not sit in the afternoons. They start work at once on judgments in the afternoons. That is a big reason to limit oral argument. The New Brunswick Court of Appeal usually does not sit in the afternoons, except when catching up a backlog. Many Courts of Appeal will sit through the lunch hour, if that will finish the last (or only) appeal of the day. That lets the author begin work on the judgment after lunch when his or her memory is freshest.

Federal Court of Appeal judges do not sit Fridays. So even if a judge sat elsewhere on Thursday, on Friday he or she can be back in the home office with memory fresh, ready to begin drafting. And they are not usually out of town two consecutive weeks. Though the Federal Court of Appeal travels, all its judges are based in Ottawa, so they can confer with each other. (Quebec Court of Appeal judges only sit 2-1/2 hours on Fridays, and begin sitting early on Fridays.)

The Federal Court of Appeal has secure electronic links between all of its offices. So a judge out on circuit can begin or continue drafting wherever he or she is.

**Recommendation 113:** Do not sit consecutive full days if all judges reside where the hearing is. Leave blank days.

**Recommendation 114:** If some judges are from out of town, do not schedule as much as four hours’ argument per day. If necessary, limit oral argument (on which see Chapter 13).

**Recommendation 115:** If some judges are from out of town, provide electronic means to draft judgments while out of town.

G. **WAYS TO SPUR TARDY AUTHORS**

1. **Ethical Guidance**

   The Canadian Judicial Council resolved in September 1985 that “reserved judgments should be delivered within six months after hearings, except in special circumstances.”

2. **Internal Rules on One Court of Appeal**

   An example is New Brunswick’s Protocol. A draft should be circulated within three months and issued within six months, barring special circumstances. After three or four months, it is time to call a meeting of the panel. Only the Chief Justice of New Brunswick extends the time. He uses moral suasion. Ontario has had a similar protocol since May 1, 2002. Saskatchewan says that three months is normal, six is odd, over nine cause for alarm.

3. **Lists of Judgments Outstanding**

   These are circulated to all judges. The Canadian Judicial Council’s 1985 resolution also recommends this.

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229 *Ethical Principles for Judges*, Canadian Judicial Council, Chapter 4, Pr. 3, Commentary 10 (p. 21) [n.d.].

230 The able lawyer referred to in n. 227 above strongly encourages each Court of Appeal to have such internal deadlines.
The Supreme Court of Canada learned to minimize the work of preparing this list and eliminate retyping, by copying entries off the hearing lists.

4. **Court Meetings**

Outstanding judgments should be a regular item on each agenda.

5. **President of Panel Acts**

At (say) three months, if need be, the president of the panel writes the draft instead of the author, or the president gets the third member to write.

6. **Chief Justice of the Court Acts**

Failing that, at (say) five months, the Chief Justice takes steps. See the New Brunswick protocol above. The Chief Justice of Quebec acts much sooner than five months.

7. **Sanctions?**

Some trial courts have legislation on this, whose terms may be broad enough to cover Courts of Appeal too.

In some trial courts, the delinquent judge is taken off other work.

Ingenuity could suggest other sanctions. Maybe a judge who likes travelling could not attend seminars until he or she had caught up.

8. **Third Member Does Nothing**

What to do if the third member of the panel will not concur or write a separate judgment, is a very difficult question. There is only one solution which I can see, suggested by British Columbia’s Rules.

**Recommendation 116:** Enact a Rule whereunder two judges can insist (after nine months) on filing their judgments, even if the third one does not have one ready then.

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**H. LEGALLY-TRAINED HELP**

Though I frown on non-judges writing judgments (especially the dispositive parts, as distinguished from fact recitals), they should do the checking. A judge should not waste his or her time checking quotations or cites, whether for form, clerical errors, or whether the precedent supports the proposition. But such checking is important. A staff lawyer or law clerk should also read the draft and point out obscurity, contradiction, and repetition.

If a judge has serious trouble writing and will supervise the work closely, the lesser of two evils may be drafting work by a law clerk or staff lawyer.
Publication bans, privacy legislation, secrecy legislation, and desire to preserve anonymity for litigants, can cause delays or last-minute panics if the court publishes judgments on its website. It also helps if counsel are asked at an early stage if they are aware of any publication bans.

**Recommendation 117:** Any Court of Appeal which publishes judgments on its website should have a systematic way to detect privacy topics and review the style of cause and contents of draft judgments affected, well before the day of filing. Staff lawyers or specially trained non-lawyers should do this work.

### I. NON-LAWYER HELP

See also Chapter 18, Part D, on inadequate staff in some provinces and territories.

Get the best judicial assistants (secretaries) possible. A good one should be able to find most errors by the author in drafts. Leaving in such errors is another evil of a judge’s doing his or her own typing.

Get a good research librarian, who can find materials and also supply interlibrary loans and xeroxes of articles.

In bilingual courts, even non-lawyer translators catch errors of various sorts in drafts, e.g. mistaken quotes. That is because translators are careful educated people.

**Recommendation 118:** A Court of Appeal of any size should hire and use fully the best expert non-lawyers (such as librarians, assistants, and, if necessary, translators).

### J. MORE TRAINING FOR JUDGES

1. **Judgment Writing**

   (a) **Courses**

   Canada has well-advertised hands-on judgment writing courses every summer, both ordinary and advanced, in English and in French. They should be compulsory for all new appellate judges.

   (b) **Books**

   Strunk and White, *The Elements of Style* (3d ed. 1979 Collier-Macmillan)


   *Rédaction: rédiger des écrits d’ordre juridique* (cours de la formation professionnelle du Barreau du Qué. Yvon Blais)
2. Time Management and Paper Handling

(a) Principles

Sometimes an appellate judge gets backlogged in work because of poor management of time. That is a large subject, but here are a few examples of what such a judge may be doing wrong:

(i) Confusing what is urgent (fifty phone calls and e-mails a day) with what is important (writing a couple of reserved judgments).

(ii) Doing easy and pleasant tasks (a debate in the e-mail) and putting off a hard one (writing a reserved judgment) until later.

(iii) Not making and following a prioritized “to do” list.

(iv) Taking on unnecessary tasks.

(v) Not delegating.

(vi) Assuming that a big task must be postponed until there is a big unbroken chunk of time.

(b) Books


Côté, Jean, et al., *Safe and Effective Practice* (Legal Education Society of Alberta and C.L.I.A., n.d.)

(c) A number of courses on time management exist. The commercial ones are not always of consistent quality. It would be wise to see whether any local college or university or continuing legal education body offers one. Failing that, the provincial or territorial government may offer one for its staff from time to time, and they might let a judge participate.

K. ORAL JUDGMENTS

1. Advantages

An oral judgment has a number of advantages:

(a) A quick answer for the parties.

(b) Giving reasons while all the issues and arguments are freshest in the judges’ minds.

(c) It takes less total work than any other method.

(d) It saves some argument time, if one side is not called upon.

(e) The court can fine-tune the remedy at once, e.g. on costs or interest.

If appellate panels give more oral judgments, that speeds up the process two ways. First, those cases are decided at once and finished. There is no delay in them. Second, they and their papers are gone and they cannot delay or distract the judge. Only important judgments are reserved, and the judges are free to concentrate upon them.
2. **Percentage of Total Judgments in Many Courts**

   In England in the 1990s, the ratio of oral to written was between 2:1 and 3:1. The ratio is now 3:1 oral: written in the Federal Court of Appeal. In the Quebec Court of Appeal it is about 46:33. In Ontario, it is now 50:50. In British Columbia, it is 13:19.

3. **What is Hard for Some Judges**

   Many judges cannot readily give a truly *ex tempore* judgment. Such judgments are less common now, even in British Columbia. Many judges find the fact recital the hardest part to draft on the day.

4. **Advance Preparation**

   If the case may not need a reserved judgment, at least write out the facts before oral argument. That forms a good foundation for an oral judgment or memo (endorsement) of judgment. Quebec and Alberta often do that. British Columbia judges often draft their own oral judgments beforehand.

5. **How to Prepare on the Spot**

   There are three ways, and only personal preferences really matter among these three:
   
   (a) a pad of paper,
   
   (b) a computer in the retiring room, with a printer and maybe a projector screen (as in Alberta), and

   (c) modifying a draft or notes pre-prepared some days before.

6. **Recording and Publishing Oral Judgments**

   The Registrar should record them electronically as delivered. A digital sound system has many advantages.

   There is no reason that another person such as a staff lawyer cannot tidy that transcript up and ready it for approval and signing.

   **Recommendation 119:** Try to give more oral judgments.

   **Recommendation 120:** Prepare a draft of one ahead of time in likely cases.

   **Recommendation 121:** Put computers and printers in retiring rooms.

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CHAPTER 17
CIRCULATING DRAFTS OFF THE PANEL

“A man’s mind is hidden in his writings; criticism brings it to light.”
– Solomon ibn Gabirol, The Choice of Pearls (ca. 1050)

A. INTRODUCTION

I will not discuss less formal judgments. No one circulates those.

Now all but two Canadian Courts of Appeal seem regularly to circulate drafts of reserved decisions for comment, to all judges on the court. (The Supreme Court of Canada and the Supreme Court of Prince Edward Island, Appeal Division, cannot be counted either way, because normally all judges sit on such appeals.) The New Brunswick Court of Appeal circulates translations as well as drafts in their original language. The other two courts circulate draft judgments only to the panel who heard the particular appeal.

Should Courts of Appeal circulate important drafts to judges who did not sit?

B. ARGUMENTS AGAINST CIRCULATING

1. *Audi alteram partem* (or he who hears must decide) seems to me at best a theoretical objection. Off-panel judges who object would rarely if ever get the draft decision reversed, and then likely only with more argument from counsel. Judges every day consult students, staff lawyers, colleagues, recent decisions, textbooks, etc., and no one ever complains about that.

2. It would be too much work? That is considered under D below.

3. Precedential effect is a red herring: see Part F below.

C. ARGUMENTS FOR CIRCULATING

1. Circulation will detect overlooked authority.

2. Circulation will prevent two simultaneous clashing decisions by two panels about the same topic. Experience shows how hard it is to find in advance, group, and argue together such cases.
3. Circulation will expose error, e.g. poor logic, even poor grammar, or poor editing. The courts which issue judgments in two languages say that their translators often detect errors in drafting and coherence in unissued draft judgments. Indeed, even commercial publishers fairly often detect errors in issued judgments. The New Brunswick Court of Appeal found that starting to circulate drafts off the panel dramatically cut down the number of corrigenda issued later, by improving all aspects of the product.

4. Circulation will test and improve the arguments, and show which ones need more care and strength. Comments induce the author to think more. Hearing a devil’s advocate always improves an argument or conclusion.\(^{232}\)

5. Circulation increases clarity. Those who are too close to a topic often do not explain it well, and take for granted what the reader fresh to it does not know.

D. CONCLUSION

The strongest argument against circulation is the amount of work involved in a big court. But we may note that the United States’ huge Federal 9th Circuit circulates judgments and has frequent rehearing calls, including those by judges off panel (i.e. *sua sponte*). So in effect it circulates drafts. The British Columbia Court of Appeal has 15 full-time judges and presently 5 supernumeraries: total 20. Quebec and Ontario are bigger, with about 24 and 22 respectively.

The theoretical horrors of multiple comments and resulting further drafts can largely be ignored. Circulation would not require each judge to communicate with each other about each draft. Especially if the argument against circulation is that it is too much work. But the multiple-comment issue is a big argument for not circulating the comments off panel.

In the electronic age, the work of sending out drafts is small. If those off panel have no veto, then the only real extra work from circulation off panel is

(a) the author reading comments on his or her draft from off panel, and

(b) the judges off panel reading draft judgments.

Item (a) probably produces a trivial increase in work. Each comment is likely to be fairly short. Reading those from a small court would take 5 or 10 minutes. From a big one, 15-20 minutes, if that. Size of court is not important there. Many judges will comment but rarely.

So the remaining issue is the work produced by (b).

\(^{232}\) One able lawyer sent me some comments suggesting that panels for hearing make much more use of judges with expertise in the particular topic. It is likely no accident that the Court of Appeal of his province does not circulate draft judgments for comment off panel.
We may assume that most appellate judges in Canada draft about the same number of (reserved) judgments per year. Then if a court is twice as big as its neighbor, circulation off panel will mean approximately twice as much reading on that court as on its neighbor. (Actually, the ratio is \(b-2/s-2\), where \(b\) is the total number of judges on the big court, and \(s\) is the total number on the smaller court. The number 2 represents the other two panel members, who will always read drafts.)

No one judge can turn out more than 2-3 true draft reserved judgments per month, September to June. And on average, he or she will write a lot fewer. I doubt that any will write over 20 true reserves per year. And some of their circulation is to the two judges on the same panel.

Reading drafts from other panels should not be compulsory. The circulated draft should begin with a brief statement of what the issues are, and where to find them, so that judges off panel may not read drafts on topics in which they feel no confidence or interest. So I cannot see that the burden of reading such drafts should be undue. But I admit that when the size of the court reaches some point, most judges off the panel will stop reading, and then the exercise will become largely pointless.

At (say) 40 judges on other panels, the burden might be undue, which would mean a Court of Appeal with a total of (say) over 45 judges. No Canadian Court of Appeal is that big. At what size would it become too much work?

If there are 20 judges on the court, and each writes two reserved judgments in a given month, then in each case, \(3/20\) of the reading burden from circulation is not off panel. For a given judge at any time, 17 authors will be off panel for him or her. Circulation of drafts would mean \((2 \times 17) \text{ 34 more drafts per month to read. Maybe few judges would read all 34. But surely a number will read the ones which look important, or which touch on topics with which they are familiar or interested in, or which a colleague mentions to them.}

The Quebec Court of Appeal is big (24 judges) and successfully circulates.

Besides, the British Columbia Court of Appeal has to circulate to all judges (not just a panel) an early memo summarizing each pending appeal and what it is about, partly to stop two panels from contradiction. That is work too.

**Recommendation 122:** All judgments, except short memoranda or oral judgments or endorsements, should be circulated in draft form, for comment by all judges on the court, before issue.

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### E. RESULT OF COMMENTS ON DRAFTS FROM JUDGES OFF PANEL

These comments on drafts are suggestions only. However numerous or consistent, they do not bind the panel. No one off the panel has a veto.

Whatever the number or the result of the comments, no conference of all the judges on the court should be held. That process is too slow, and produces more heat than light, as Quebec notes. Manitoba and Alberta tried that, abandoned it because of gridlock, and circulation works smoothly there now.
Circulation off panel should work no suspension of filing or effect.

**Recommendation 123:** Circulation off the panel should be for advice and information only.

**F. NO PRECEDENTIAL EFFECT**

Whether a draft was circulated or not should make no difference to precedent. There is no real link. Decisions of those Courts of Appeal which now never circulate drafts, nevertheless bind. Non-circulated decisions often lay down trite law which certainly should bind. No Court of Appeal which circulates seems to give circulation any effect on precedent (with the small exception of Alberta *sentencing* memoranda).
CHAPTER 18
STAFF AND FACILITIES

“It is the justice’s clerk that makes the justice.”
– Fuller, Gnomologia (1732)

A. INTRODUCTION

This chapter is about whether Canada’s appeal courts have the people and physical resources to do their work correctly and on time. It is a huge topic, and precise recommendations for individual courts would need detailed study. But I have come to the conclusion that the other chapters would be incomplete or misleading without some mention of this topic.

The topic of video conferencing is dealt with in Chapter 19.

B. GOVERNMENT ATTITUDES

Very few of the appeal courts are free of serious resource problems. Some of the provincial and territorial governments really are poor. But some are not that poor, and several are not poor at all, and indeed are generally in a spending mode.

The federal government is very well funded, and generally speaking seems to give its own courts proper resources. I will not speak further in this chapter of the two federally-funded courts.

Many provincial and territorial governments like to portray the issue as one of simple lack of funds, or of competing demands, especially health and education. There are many indications that that is not the whole story. Many individual but similar facts begin to build up a picture which makes the observer suspect that some governments have a bad attitude to their courts.

C. PREMISES

One clue is a Court of Appeal which has to share a small overcrowded building with many other government functionaries who are unconnected with the court (or with health or education) and patently of far less priority. Another comes when a replacement court building is planned, but repeatedly deferred to the construction of other patently less important or pressing buildings (unconnected with health or education). Another comes when the Court of Appeal is in an old slum within a mile of a very expensive new building housing elected officials.
It is all a question of degree. But two provincial and two territorial courts of appeal are in substandard, unbelievably overcrowded buildings. In three of those cases, the courtroom size would be laughable were it not for the total absence of security. In those three, the bench will barely hold three judges, with no real room for their books, let alone a computer. The one adequate courtroom in those four (and one of the inadequate ones) is only borrowed, so an appeal sitting neutralizes the entire superior court. In only one of those four places is the local government doing anything about the facilities.

One Court of Appeal building is far over a century old, never designed as a public building, ludicrously crowded and inefficient, dirty, and a serious health and fire hazard. No judge should have to keep big buckets in his or her office to catch rainwater. No courthouse should grow mushrooms. Any official who put schoolchildren into such a building would be rightly hounded out of office by the press. In another crowded building, air quality is so bad that a number of judges have been made ill, and staff cannot be kept at work on summer afternoons.

I am not speaking of the Alberta Court of Appeal’s former Calgary premises; I refer to other provinces and territories.

When an appeal court cannot use sensible procedures for getting the trial record or for keeping appeals moving, because it has no space to put transcripts and appeal books, then the fleas are wagging the dog.

Other Courts of Appeal are hobbled by having the use of only one courtroom. So they cannot hear two appeals at once, or risk doing so, and cannot hear an appeal and a motion at the same time. Here again a physical inadequacy dominates all scheduling decisions.

**D. SKELETON AND STOLEN STAFF**

Another clue to some governments’ attitude is that staff are constantly being pilfered from the appeal court. The government gives some of them a host of other duties totally unrelated to that court. In some provinces, the counter staff also have to give more than half their time to the trial court. On other occasions, when one of the few staff in the Court of Appeal leaves for any reason, the government removes the position so there can be no replacement. The governments hire away vital court staff members for better pay, but will not increase the pay or classification for the Court of Appeal’s staff position. Sometimes a government has been known to hire people away from the Court of Appeal, but then refuse to allow their positions to be filled by the Court of Appeal on the ground that there is a supposed hiring freeze on!

Just as some buildings are not adequate because the appeal court shares them with other courts and even government officials, some officials are not adequate because they wear too many hats and have too many non-Court of Appeal duties.

To put it another way, some appeal courts appear on paper to have almost enough officials and staff. But that is false, because their numerous non-appellate duties mean that none of them (even the Registrar) is anything like a full-time employee. The appeal court has but a few fractions of people.
Some appeal courts are really working with the equivalent of only one or two full-time non-legal Registry staff. Those people have to attend the counter, counsel the public (including the self-represented), file documents, manage the lists, sit in court during the sittings, and do a hundred other tasks for the appeal court. I cannot believe that any Canadian province with a population over half a million is so short-handed that it cannot provide the Court of Appeal another two junior counter clerks.

But of course a few courts are so short of space that they would have nowhere to put more than one more staff member.

E. STAFF LAWYERS AND ARTICLING STUDENTS

1. Inadequate Numbers

Appeal courts do not have enough legally-trained employees. Some have almost none, and some have a significant number but a huge volume of appeals. All of them have a great deal of work which should be done by legally-trained people but is not being done.

I have not detected any duplicative or unnecessary methods or systems of the staff lawyers or law clerks of the Courts of Appeal. All or almost all Courts of Appeal need more. Some Courts of Appeal have almost none.

2. Allocation of Staff to Tasks

However, I notice that the various Courts of Appeal use their precious legally-trained staff in very different ways, on very different tasks. Those same tasks are done by others, or not done at all, in other courts. Sometimes a court which is generally short of resources devotes a significant part of a key official’s time to handling some task which most other courts skimp or omit. Occasionally that may be because individual judges can call on clerks or staff lawyers at will. I would be slow to identify any of those allocations of resources as mistaken, but I doubt that such different approaches can all be optimal.

Some Chief Justices and appellate judges now do appalling amounts of administrative work themselves. American appeal courts are much more efficient, because they use judges only for judges’ work. Part of the Canadian problem is that provincial and territorial governments want to push work off onto federally-paid judges. The federal government has no say in provision of non-judges in provincial or territorial Courts of Appeal.

Each appeal court should draw up its own list of tasks which its legally-trained people might do. I will not try to impose my own choices, but that preliminary list could include the following tasks:

(a) summarizing or analyzing incoming cases;
(b) identifying appeals which lack jurisdiction, are vexatious, or are in breach of procedural rules;
(c) identifying the need for more legal research;

(d) identifying other gaps in the material filed by counsel;
(e) drafting brief judgments (oral, endorsements, memoranda, etc.);
(f) answering queries from counsel or counter staff;
(g) supervising the lists and keeping them moving;
(h) drafting timetables and other instructions to counsel;
(i) drafting procedural orders, e.g., for limping appeals;
(j) taxing bills of costs;
(k) recommending or deciding what sanctions (including dismissal) should be imposed for various procedural breaches.

Since some provincial and territorial governments probably will not reform their attitudes soon, the next step would be to decide which of those tasks should be done by judges or by clerical staff, and which not done at all by anyone. The list of tasks should be pared until it can be done within the existing budget. Few Courts of Appeal (if any) now do all the tasks. The ones left undone should be rationally selected, not left to tradition or chance.

Then the court should decide who is to do each remaining task, allocating the tasks rationally.

**Recommendation 124:** Each appellate court should rethink its allocations of work and people within its existing budget. Each should list all the possible tasks which might be done by legally-trained people (judges, staff lawyers, or law clerks), then prioritize them, then decide which will be done or not done, and then decide which will be done by whom.

3. Law Clerks v. Staff Lawyers

As part of the inquiry recommended in #2, I suggest that appellate courts decide whether their scarce budgets are better spent on law clerks (articling students or newly-called lawyers), or on staff lawyers (who have been at the bar some years).

Many present allocations between the two seem to have grown like Topsy, and to be based either on historical accident, tradition, or unthinking imitation of American courts.

Most appellate judges love having law clerks around. They are bright, keen, eager, and fun to train. But they only stay a year or so, and leave just when they start to get up to speed. Staff lawyers want more pay, but are ordinarily far more experienced, efficient, and confident. I suspect that (say) one good staff lawyer could be of more help to a court than (say) two law clerks.

Similarly, whether to limit the stay of staff lawyers to two or three years needs re-examining. That time limit deters some brighter candidates who want a career, not a temporary job. And it throws out good employees just when they hit their peak of efficiency and experience. It is the obverse of the Peter Principle. American courts are departing from such time limits. Wisconsin has a staff lawyer of over 20 years’ standing, and Ontario one of over 13.
Another thing which needs re-examination is the traditional assumption that law clerks are closely tied to individual judges and not shared, whereas staff lawyers work centrally for the whole court. That again stems from a quirk of American history. Alberta is experimenting very successfully with the opposite thesis.

**Recommendation 125:** Courts of Appeal should hire more staff lawyers, but not increase the number of law clerks.

**F. COMPUTERS**

1. **Case Management and Statistics**

   A few appeal courts have no computer system, and report that their workload is small enough (especially once their lists are pruned of deadwood), that they do not need computer management of pending appeals. That is doubtless correct.

   Most appeal courts have a computer management system, very often two or more. If there is more than one, typically the two systems do not really cooperate, and do different things. Many of the systems work more or less adequately, but are extremely user-unfriendly. Therefore, staff can realistically only use them for routine tasks. It takes a computer expert to extract the statistics or other non-routine reports which the systems theoretically can produce.

   The Supreme Court of Canada and Ontario, Newfoundland, Saskatchewan and Manitoba seem reasonably content with their systems. British Columbia is extremely pleased with its new tailor-made system, called WebCATS.

   **Recommendation 126:** The other appeal courts should learn more about British Columbia’s computer system.

   The Ontario Court of Appeal automatically produces various types of exception reports, e.g. names of appeals whose facta have not been filed on time. It also produces the documentation which will put right the discrepancy discovered, e.g. a notice deeming an appeal abandoned.

   The right software might mitigate some of the staff shortages which hobble so many appeal courts now.

   **Recommendation 127:** An appeal court of any real size should obtain the computer capacity to follow Ontario’s lead.

2. **Electronic Appeals**

   Not many Canadian appeal courts now routinely read transcript off a computer screen during argument in the courtroom. Ontario and Alberta have found that Adobe Acrobat works well for that purpose, and have electronic transcripts filed in that format.

   Many other appeal courts do not get truly electronic transcripts of that sophistication. But many report that they get an extra copy of the transcript on a machine-readable disc, as a word-processing document. That has many uses outside the courtroom. Manitoba and Prince Edward Island have had some experience with special search software from Winnipeg which is very useful in that situation.
That is especially true because the ongoing expenses are borne by counsel and their clients, not the court. Such electronic transcript capacity would help solve storage and shipment problems. An ordinary laptop or desktop personal computer is more than adequate to run the necessary software or download some transcripts. All courtrooms should be wired so that computers can at least be plugged into power sources on the bench and at counsel tables. Preferably they should also have connections to a central computer server.

**Recommendation 128:** Every Court of Appeal should get one copy of each transcript filed in electronic form, in a computer format usable by the judges of that court.

The one problem comes where the appeal court’s courtroom has a bench too small for even a laptop computer. Here again grossly inadequate premises keep some methods in the 1930s mode.

3. **Computer-Averse Judges**

People tend to love or fear computers. I am not a computer enthusiast, but can assure those who do not like computers that using a transcript of oral evidence in a computer need only involve two simple commands to call up a page number. The clerk in the courtroom can do everything else, load the transcript, and call up the transcript for the appeal in question. The computers on the bench in the Alberta Court of Appeal bear a sticker naming the only command which a judge has to remember!

People who like or are used to computers tend to alienate those who are not computer fans. They either try to make serious use of computers compulsory, or try to make their use far too complicated. Cut and paste and simultaneous viewing features are efficient, but not essential, for example. Computer experts sometimes have a habit of trying to teach neophytes peripheral confusing matters and skipping past the one or two essentials.

**Recommendation 129:** All judges should be offered user-friendly, voluntary computer instruction geared to their individual needs and learning level.

4. **Website**

I comment in Chapters 10 Part C, 15 Part H, and 21 Part G.2 on how useful an appeal court’s website can be for many purposes.

**Recommendation 130:** A court which does not have a website should produce one and keep it up to date.

A website does more than help counsel and the public. It also saves staff and judge time by telling counsel and the public how to do things right the first time, without needing the staff to teach them manually.

5. **Inter-City Communication**

See Chapter 16, Part F.
G. WASTES OF JUDICIAL TIME

Many chapters (such as #13) deal with this topic.

Lack of resources now exacerbates the problem. Judges do administrative work which staff should be doing, and check citations and quotations which law clerks or staff lawyers should be checking. They do simple research which a law clerk, lawyer, or reference librarian could do. They do typing and formatting and proofreading which assistants (secretaries) should be doing. That most judges can type well is in some ways a bad thing.

All the above are both one direct reason, and also a family of background reasons, why judgments are not as issued so promptly as they should be.234

H. WASTES OF THE REGISTRAR’S TIME235

Even if the Registrar or a staff lawyer is given judicial duties, he or she cannot do them properly if burdened with clerical duties because there are not enough clerks in the Registry. Or if he or she is burdened with other non-appellate duties.

234 See further Chapter 16.

235 See further Chapter 6, Part C.5.
CHAPTER 19
ACCESS TO COURT OF APPEAL

“Too much have I travell’d in the realms of gold . . .”
– Keats, Sonnet, “On First Looking into Chapman’s Homer”

A. INTRODUCTION

Access to justice by a respondent is just as important as access by an appellant. We must not discriminate, or ignore one side. It is too easy to look only at the plaintiff or appellant in suits. But it is very wrong.236

Delay and undue expense are also bars to access, but have their own chapters.237 Understandability is discussed elsewhere.238 Legal Aid is briefly discussed in Chapter 15, Parts C and H.3. One aspect of physical access to a building is discussed in Chapter 15, Part F.2.

That leaves for discussion here two topics: geography,239 and accessibility of judges.240

B. EXTRATERRITORIAL COURTS OF APPEAL

1. Introduction

What the local bench and bar want is very important.

2. Yukon

The bench and bar of the Yukon Territory seem happy with their present set-up.

3. Northwest Territories and Nunavut

The judges of the Northwest Territories Court of Appeal have recommended a Panarctic Court of Appeal for that territory and Nunavut. It still seems to me a good idea. The Alberta Court of Appeal is too far away from Iqaluit, and some of its judges bring modest local expertise. Nunavut has a truly distinct language and culture. No other existing Court of Appeal is well situate to replace that. The Ontario and Quebec Courts of Appeal are very busy. Air service from Winnipeg to Iqaluit is poor.

236 See Chapters 3 and 5.
237 Chapters 4-6.
238 Chapter 15, Chapter 20 and Chapter 21.G.
239 Parts B, C, and D below.
240 Part E.
Prince Edward Island shows that a small Court of Appeal can work. Especially in Nunavut, where a unified criminal trial court produces more appeals (from summary conviction matters). The only problem with a three-judge court is that when one judge is ill or away, the other two cannot sit (unless a trial court judge is used). So holidays have to be coordinated.

C. SITTINGS LOCATIONS

1. Distances

The other Canadian Courts of Appeal are resident within their own territory. Only Prince Edward Island is too small for place of hearing to be an issue. Nova Scotia is over 520 km. long from Yarmouth to Sydney. New Brunswick is about 410 km. wide.

The four western provinces are over 1200 km. tall (north to south). They range from 530 km. to over 1400 km. wide (west to east). The province of Newfoundland and Labrador is somewhat similar in latitude, but much more extended: over 1520 km. tall and over 1200 km. wide. Yukon is over 900 km. wide and 1060 km. tall. Ontario is more: about 1570 km. tall and 1480 km. wide. Quebec is a good deal more: 1940 km. tall, and over 1520 km. wide.

For example, as the plane flies, Toronto to Thunder Bay is well over 900 km. Schefferville is about the same distance from Quebec. Churchill is about the same distance from Montreal.

2. Present Court Access

The British Columbia, Alberta, Saskatchewan, Ontario, Quebec and Federal Courts of Appeal sit in more than one place. The British Columbia Court of Appeal sits also in Victoria, Kamloops, Kelowna and Prince George (though some places not often). Manitoba is now offering sittings in Brandon. Alberta sits a 50:50 ratio between Edmonton and Calgary. Saskatchewan is about 72:28. The Quebec Court of Appeal hears more appeals in Montreal than in Quebec.

Alberta and Quebec’s judges reside in two different cities. (Alberta is split about 50:50, Quebec 13:7.)

3. Adding More Sitting Locations

(a) Federal Court of Appeal

The Federal Court of Appeal likely sits in enough locations (18 including Ottawa). It sits in Toronto every other week! It consults counsel about their convenience as to place of hearing. Balance of convenience governs in a dispute. In equal balance, the appellant chooses.

(b) Other Courts of Appeal

The question of sitting in more places is open for other Courts of Appeal, especially those which now only sit in one place. The question should be approached pragmatically.
A Court of Appeal’s offers to sit in a second city are often not accepted. Second location sittings lists outside the provinces of Quebec, Alberta and Saskatchewan are often very light, despite public announcements and efforts to fill them. That may be because the volume of litigation is light, dictating few and uncertain sittings. (The Federal Court of Appeal properly will not usually hold a distant sitting for a single case, unless in conjunction with another sitting in a nearby city.) So most (sincere) parties would pay to have their case heard sooner in another bigger city. Often the parties have counsel from the bigger city. It is not easy to say whether expense and delay in hiring counsel for an appeal who are in a big city is purely geographical. Some are specialists in appeals, especially in criminal matters, and Courts of Appeal should encourage that. Such new counsel seem much less common in civil cases.

It is also difficult for a judge to sit often five consecutive days out of town. Travel is cumbersome for out-of-town judges. They can travel out on Sunday night, but it is awkward having to return on the Saturday (there are few flights then) and then be at work the next Monday, especially if the judge has to travel again on Sunday night. Then would put him or her on the road 7 days per week.

Even travelling to meet counsel with some appellate experience is a barrier to access for litigants resident in smaller centres. Geography is even harder for a party without a lawyer. He or she then cannot go downtown and ask the Registry what to do.

(c) Agents
The Supreme Court of Canada system of Ottawa agents is a very good compromise, and should be encouraged in large provinces.

(d) Culture and Language
Geography can overlap with language or cultural issues. The other part of the province or territory sometimes has a higher percentage of people with another language or culture.

(e) Facilities
The facilities tail should not wag the access dog. Some provinces hear no criminal cases in the other city, or only criminal cases there. Any biggish place hears criminal trials, so facilities for an appeal and prisoners must exist in most such cities. Room for three chairs on the bench is surely not that rare.

(f) Conclusion
I have not seen any need clearcut enough to recommend firmly sittings in more locations.

4. Purely Written Appeals
Increased use of no-oral argument appeals would be a boon to remote parties.241

241 See Chapter 13, Parts C, E.4, E.5.
5. Interlocutory Motions and Brief Matters

Occasionally local circumstances may make one judge available for one-judge motions in a smaller centre. Aside from that happenstance, having multiple sittings points for motions is very dubious. Requiring personal attendance far off for a mere procedural motion is usually an undue expense and delay.

Telephone connection, or writing only, is enough for a simple quick motion. The Federal Court of Appeal abandoned telephone applications, and I too find them difficult if they are lengthy or complex. Good quality sound is essential. Holding one with a self-represented civil litigant is not a good idea at all. About 95-98% of Federal Court of Appeal interlocutory motions are in writing only. It takes leave of the Chief Justice to have personal appearance and oral argument.

If a Court of Appeal lacks video conferencing facilities, usually the trial court or the local telephone company or a local hospital or college has them. If such publicly-funded institutions will not share them with the Court of Appeal (as in one province), the court should make a fuss. Video hearings should not be confined to truly distant counsel. They should include those at a medium distance too. Manitoba and Saskatchewan offer telephone conferences. The Federal Court of Appeal has 10 such facilities. Lord Bowman recommends this.242 The Quebec Court of Appeal has video capacity and uses it a fair amount for Quebec City’s broad region. The bar are not reluctant there.

But most courts with such equipment get few requests to use it. Again, Ontario has the facilities, but they are rarely used. Do counsel not like it, or do they not know of it? The latter is suspected. The Court of Appeal should educate the bar.243

Recommendation 131: A Court of Appeal should provide out-of-town counsel with access to video conferencing facilities for motions, or (if writing will not suffice) for tag ends of appeals. Or for a prisoner appeal where a motion or scheduling appearance is necessary but the prison is elsewhere.

Maybe the Court of Appeal could use video conferencing to hear brief appeals where the counsel are in another city. Especially if the parties (or one) will pay the charges. That needs experiment.

But the Ontario Court of Appeal, the Supreme Court of Canada, and the Federal Court of Appeal have offered to hear appeals that way and got very few takers. Counsel either want to argue face to face, or like the travel; no one is sure which. An airplane ticket, a hotel room, and a few meals, are not very expensive compared to counsel’s overall bill in a big important appeal. If one lawyer is going in person, the opponent dares not forego that perceived face-to-face advantage.

243 See further Chapter 21, Part G.
D. FILING

1. Fax or Electronic

Fax or electronic filing also helps access to the Court of Appeal for those in other cities. Many jurisdictions allow fax filing of shorter documents (not transcripts or facta). Saskatchewan allows urgent fax filing. British Columbia lets a number of things be filed in electronic format, and in 2005 should be able to receive them electronically from remote locations. A number of courts have found that e-filing is not easy. The Supreme Court of Canada is using a pilot project for filing any document electronically. Ontario is working on it still. Alberta has a small pilot project for e-filing.

One must never let e-filing put onto the Court of Appeal the task of printing hard copies for the judges. One must be realistic as to the use to be made of the documents so filed.

**Recommendation 132**: All Courts of Appeal should allow fax filing for out-of-town parties or counsel (though not transcripts, appeal books or facta).

Electronic filing of the trial record or facta (e.g. an extra disc) is pointless if no judge wants to, or can, access them. Such filing can be done *ad hoc* for a big case with a special panel, but that will not work routinely. And it does not help access by the appellant much if the disc is to be physically delivered to the Court of Appeal.

2. Locations or Offices

The Federal Court of Appeal has 17 local offices for filing! They have a secure electronic link with the main one, and overnight courier. Note Alberta’s emergency-filing Rule 244 allowing Court of Appeal filing in smaller judicial centres. That definitely would help access.

3. Language

Should all Courts of Appeal permit filing in either French or English? See Chapter 20.

4. Remote Searching

An electronic system should allow litigants anywhere to use the internet to access the list and see when their case is pending, and what has been filed. Even without e-filing, the Supreme Court of Canada does that, and Alberta does to a degree.

5. Conclusion

In the absence of enough funding, I hesitate to make any formal recommendations about remote electronic access.

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244 Rule 514(2)-(5).
E. VACATIONS AND ABSENT JUDGES

1. Access to Judges

Counsel and Registry staff need emergency access to one judge, every day that businesses are open. The Federal Court of Appeal duty judge is available 365/7/24. A party could need a stay suddenly. If judges frequently work at home, or are away on travel or conferences, it is hard for the Registrar or parties to find a judge. Or it puts a disproportionate burden on the one or two judges usually present at the office.

Absence interferes with collegiality, too.

2. Summer

Judges need a holiday sometime, so eliminating the summer long vacation would likely not much increase the total number of sitting days per year. So there would be no general benefit to that. And counsel dislike summer sittings. The bar rejected them in Manitoba.

Occasionally an appeal cannot wait 2-3 months over the summer. There should be capacity for a special sitting in summer for such an urgent case. Alberta does that every July.

F. ACCESS TO REGISTRY STAFF

Though this is important to counsel, it is even more so to self-represented litigants, who need lots of advice.245

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245 Chapter 15, Parts A, B, and H, and Chapter 18, Parts D and H.
CHAPTER 20
LANGUAGE

“If names are not correct, language will not be in accordance with the truth of things.”
— Confucius (K’ung Fu-tzu)

There is some overlap of language with geography and other access issues. For example, the linguistic minority in a province may be grouped at some distance from where the Court of Appeal sits.

A. FILING DOCUMENTS

In principle, filing a document in the other official language should not gravely inconvenience a unilingual Registry. But it might be necessary to borrow the services of a bilingual clerk from another court to help process the document, especially if it contains information necessary for court administration. Experience and a bit of basic training in terminology would help speed the process. The Rules or legislation in many provinces would likely not permit use of French documents in a civil case.

As courts become more systematized and develop more computer forms and letters, replies or notices from the court in both languages or in the other language should become easier.

B. LANGUAGE IN COURT

The Federal Court of Appeal judges are all fully bilingual, but I am not sure how many other Courts of Appeal can make that boast.

Most Courts of Appeal can put together a panel to hear an appeal in either (or both) of Canada’s two official languages. But that requires a good deal of notice and planning if that is a language in which most members of the court are not fluent. Judicial assignments are usually made 6 or 12 months in advance. Sometimes there is only one panel suitable for such an appeal. A judge may have to be borrowed from the trial court. It could be awkward when the appeal is from one of the few trial judges who feels comfortable in the second language.
A speedy appeal hearing may therefore be almost impossible in such cases.

A self-represented litigant who does not speak very good English or French (only, say, Arabic or Mandarin), can be quite a challenge. It is quite easy to live most of one’s life in some big Canadian cities without speaking or understanding a word of English or French.

Should the court or the government pay for an interpreter in a civil case? The Charter’s s. 14 gives him or her “the right to the assistance of an interpreter.”

C. CANADIAN LANGUAGES OTHER THAN ENGLISH AND FRENCH

This is an especially important issue in Nunavut, where English or French is the first language of only a small fraction of the population. Though many people there speak pretty good English, many do not. And many do not speak it well enough to use in something as technical and vital as a court proceeding. A judge who speaks good Inuktitut is very hard to find, and even lawyers who speak it well are almost non-existent (though the University of Victoria’s temporary program has produced some).

Aboriginal languages are often a hidden issue elsewhere in Canada (though the Quebec Court of Appeal is sensitive to the issue). If a litigant seems to speak English readily and with the usual Canadian intonations, we assume that he or she understands English fully. We do not reflect that it may be a second language of limited scope, and that (say) Cree is the person’s mother tongue. Furthermore, good interpreters between English or French and an aboriginal language are often hard to find.

The Northwest Territories Court of Appeal seems to have good facilities for courtroom translation. On demand, it can offer a prisoner simultaneous translation of his or her appeal from the argument in English, into his or her mother language. Sometimes no equipment at all is necessary. The interpreter sits next to the prisoner and quietly interprets directly to him or her, disturbing no one. If the prisoner wishes to speak to counsel or the court, the interpreter translates out loud at once. On other occasions, the interpreter sits off to the side translating the English argument quietly into a microphone and the prisoner wears headphones.

**Recommendation 133:** Inquire of apparently aboriginal parties without counsel whether they feel that they need translation to and from the court’s usual language of argument. If so, provide an interpreter.

**Recommendation 134:** Have a roster of interpreters.
D. JUDGMENTS

More and more Courts of Appeal are more frequently producing judgments in a second official language. New Brunswick has followed the Supreme Court of Canada and the Federal Court of Appeal in issuing all its reserved decisions simultaneously in both official languages.

This is a good thing, and produces collateral benefits too. But it again serves to highlight the very scarce resources available to a number of Courts of Appeal. A good translator does not work quickly or cheaply, and has to understand the material completely. Sometimes a translator must look up outside material, e.g. to verify the accuracy of a quotation and see if it has already been translated.

Translation of judgments is important for another reason. It is expensive, and Toronto legal publishers are usually very reluctant to publish a judgment which is available in French only. And so such judgments may not be indexed or digested outside Quebec, even if they are appealed to the Supreme Court of Canada. As a result, knowledge of Quebec precedents outside that province is often abysmal. As judge-made law is a huge and growing part of law across the whole nation, that is a serious flaw. It produces ignorance, conflicting authorities, uncertainty, and duplication of effort.

**Recommendation 135:** The Council and Quebec Court of Appeal should encourage the translation and national dissemination of Quebec Court of Appeal judgments.

Where a statute or Regulation is bilingual (as are all federal statutes and Regulations and newer criminal appeal Rules), quotations from it should be bilingual. Judgments often neglect that. Again, Toronto publishers of annotated federal legislation seem reluctant to provide those versions. This topic goes to more than respect or form: it reminds all of us to use both versions of such legislation to interpret it.

**Recommendation 136:** Appellate judges quoting bilingual legislation should try to quote both versions, not just one.
CHAPTER 21
MISCELLANEOUS

“By length of time and continuance laws are so multiplied and grown to that excessive variety that there is a necessity of a reduction of them, or otherwise it is not manageable.”

– Hale, History of the Pleas of the Crown (1736)

A. WHO HEARS MOTIONS

See Chapter 6, Part C.3-7.

B. LEGISLATING

There is a discussion of the philosophy of the contents of the Rules in Chapter 5, Part H.

1. Who Enacts Rules

In some Courts of Appeal, the judges themselves enact the Rules of Court governing their court (Quebec, Nova Scotia and Saskatchewan). In the others, the provincial Cabinet does (Ontario, Alberta, Manitoba, British Columbia, New Brunswick, and Prince Edward Island). In the latter case, it acts upon the advice of either the judges, or of a Rules Committee in which the judges are represented.

What formal enactment by the provincial Cabinet adds is very unclear. It also raises the spectre that the government could refuse to enact what the Rules Committee or judges recommended, or would enact what they had not recommended. Two provinces have come close to the latter on isolated occasions. As the judges also have inherent power to enact Rules, it is very doubtful that a Rule which they enacted could be legally vetoed by the government.

Recommendation 137: Formal enactment of the Rules should be by the body which makes the real decision, such as the judges or the Rules Committee. For publicity, Rules should then be filed as a Regulation (or laid before the Legislature, as in Nova Scotia). But that is clerical and implies no power to refuse filing.

Who is canvassed about possible Rules changes is a different topic. The bar and government should usually be consulted as well as the judges.

Recommendation 138: Coordinate the Rules of the trial court with those of the Court of Appeal, to prevent duplication of content or numbering scheme, or contradiction between the two.
Even if the Court of Appeal itself passes the Rules, it may still legitimately issue Practice Directions. They might be about experimental topics, or be warnings, explanations, or tips. Rules bind the judges, but Practice Directions often make suggestions. A comprehensive set of forms would be more suitable for Practice Directions than for Rules. *A fortiori* should the judges issue Practice Directions where another body enacts the Rules.

If a court has issued various Practice Directions over the years, they are often hard to find and coordinate. It is not clear which are still in force. Ontario, Alberta and England have consolidated their old Practice Directions.

**Recommendation 139**: Each Court of Appeal which has issued Practice Directions and Practice Notes should consolidate them and repeal all the old ones.

2. **Publication of Rules and Practice Notes**

These should be disseminated and publicized a number of ways:

(a) the ways that ordinary Provincial Regulations are;

(b) on the Court of Appeal’s website;

(c) by notices to frequent customers of the Court of Appeal; and

(d) via publishers of practice books or services.

On forms, see Part H.2(d) below.

3. **Criminal Rules**

Most Courts of Appeal told me that the Federal government had treated them badly in one respect. Those courts tried to file criminal appeal Rules which they had duly enacted under s. 482 of the *Criminal Code*. Though drafted impeccably by language experts in both official languages, they were rarely good enough for the Federal government, which refused to file them as Regulations. In one case, the refusal lasted a year. One court found the process lasted 2-1/2 years. One waited nine years, and despite pestering the Federal government, they could not even get an acknowledgment of receipt.

The legality of such refusals is difficult to imagine, as the judges alone have the legislative power under the *Code*.

A number of Courts of Appeal have given up trying to deal with the Federal government on this issue, and so still have antique criminal appeal Rules.

**Recommendation 140**: That the Council protest strongly to the Minister of Justice of Canada. If there is any further refusal, the Registrar of the court in question should move in the Federal Court of Canada for a declaration and *mandamus*.

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4. Statutes

Some of the statutes governing Courts of Appeal in Canada contain things which are more suitable to Rules: minor questions of procedure, or things needing frequent amendment. Such an Act should be confined to establishing the court and its jurisdiction, and a few other important substantive questions.

Practice and procedure should not be in a statute, as it is too cumbersome to amend, and misleads someone who looks for practice topics in the Rules of Court.

C. Use of Trial Court Judges on Appellate Courts

1. Introduction

This discussion does not apply to the three territories, where trial judges (of all three territories) are full members of the Court of Appeal.

Most Courts of Appeal have legislation allowing them to call on trial court judges to sit as members of appellate panels and decide appeals. When should that be done?

The Supreme Court of Canada is a special case, and has not done this since the 1930s. No more need be said about it.

I dislike applying the term “ad hoc” to trial court judge sitting on other courts. And the word “deputy”. These demean the trial court judge and are not really accurate. The proper term is usually “ex officio”.

2. Temporary Assignment

There are many urgent or unusual situations where a Court of Appeal virtually has to use a trial court judge for a time. For example, the appeal court may be very busy and a backlog growing. Or the appeal court is busy and one or two of its judges may be ill but expected to recover.

Or there may be vacancies on the Court of Appeal which the Minister is not filling (which is common), especially if it is anticipated that the trial court judge in question will be moved to the Court of Appeal.

A trial court judge could also properly sit on an appeal where three appellate judges without a conflict cannot be found. Or where three appellate judges comfortable in French are not available. Those problems can be more common with a small Court of Appeal. Or maybe where the Court of Appeal has to lend a judge temporarily to the trial court for some specific purpose, thus leaving the Court of Appeal short-handed?

It is also very educational for a trial court judge to sit one or two weeks with the Court of Appeal. Alberta used to make that a practice for all new Queen's Bench judges. One would sit once for a few days with two experienced appellate judges. Some Alberta Court of Appeal panels contain one Queen's Bench judge.
3. Regular Use

Most Courts of Appeal do not regularly ask trial court judges to sit on appellate panels. Alberta is the exception. Most notable is its practice of having sentence and maintenance appeals heard by a panel of one Justice of Appeal and two Queen’s Bench Justices, a practice copied from England.

Is it desirable that trial court judges sit regularly on Court of Appeal panels?

If a certain class of appeal requires a great deal of experience, and if the members of the Court of Appeal have not had long trial court experience, that is an idea. Some Courts of Appeal are much younger than others: that tends to be cyclical and time cures it. However, the Supreme Court of Canada has greatly changed the standard of review in sentence appeals. So the question “is this too big a number for this case?” is less important and less common in sentence appeals than previously. They come more and more to deal with questions of principle. (And few maintenance appeals proceed, and guidelines are reducing the importance of custom there too.)

Any regular use of trial judges on appellate panels should probably require a number of preconditions:

(a) The trial court judge being lent should be selected and announced early enough to be able to participate fully in all pre-hearing preparation of the relevant appeals, such as reading the material and discussing it with the rest of the panel.

(b) The trial court judge selected should be given enough time off trial court duties to fully prepare for the appeals beforehand, sit full days on the appeals, and take his or her share of the writing afterwards.

(c) Each Chief Justice (Court of Appeal and trial court) should consent to the loan of the particular individual(s) involved.

(d) Those lent should have suitable abilities and inclinations, including willingness to write judgments promptly, an interest in legal theory, and a willingness to reverse their fellow judges and take any resulting flak. Lord Bowman247 points out that a Court of Appeal should only hear the types of case requiring special abilities.

Such preconditions are likely to be met when a trial judge is assigned to sit with the Court of Appeal for a year or two, as has often occurred in Quebec. But few trial courts can spare a judge that long.

Another problem arises when one of the appeals is from the trial court judge selected. Of course he or she will not sit on that particular appeal. But it looks odd when he or she sits on the cases just before and after, especially the same day. It looks odder if in the same week (say) Martin J. sits on appeal from Barry J., and Barry J. sits on appeal from Martin J.

In summary, more regular use of trial court judges can have advantages. But the proper preconditions are significant, and some of the advantages are shrinking. In practice, it may be hard to find the right situation to make such assignments regularly. Emergency loans of a judge are matters of need.

Recommendation 141: Confine use of trial judges on Court of Appeal panels to suitable people with enough time to prepare before and after oral argument, except for emergencies.

D. INTERVENERS

1. Introduction

It is unfortunate that this is a hazy topic, because it can have great practical consequences for the court and the original parties. The Supreme Court of Canada often sees a considerable number of interveners in one appeal, and Courts of Appeal may expect more of that. This can make a short appeal complex and lengthy.

If cases are booked for hearing before the question of interveners is closed off, it can be very difficult to know how much time to allow on the list for a given appeal.

2. Substantive Law

This is one procedural topic where I have great trouble finding any coherent pattern in the decided cases, let alone a sensible principled one. Substantive law is outside the topic of this Report, but the randomness of the case law in this area leads to one useful thought.

Recommendation 142: Courts of Appeal should encourage their judges to give written decisions laying down simple concrete guidance on when to allow an intervention. They should cite earlier cases and accept or reject them. Later judges should try to follow those decisions.

3. Who Decides

There does not seem to be any consistent practice on whether requests to intervene are decided by the duty judge, by a fixed judge (such as the Chief Justice or list manager), or by the panel which will hear the appeal.

In theory, there could be advantages in a decision by the panel, who would be more familiar with the appeal and know what issues they were likely to focus on. But a decision on intervention is often necessary well before the panel and the hearing date are fixed, let alone before the panel has had a chance to read the factums. And procedural motions before three judges consume a lot of resources, as Chapter 6 discussed.

Which one judge decides may not be critical if precedents are developed and followed, as described in subpart 2 above. However, if there is one judge responsible for all case management of the appeal, there is some advantage to the judge hearing the motion. Managing the appeal, and who can intervene, are topics which affect each other. And both types of decision benefit from knowing the same kinds of facts.

248 See Chapter 10, Part D.2.
4. **Conditions**

It is common for orders allowing interventions to set some procedural conditions, such as:

(a) How much argument the intervener is allowed, and of what type (oral or written);

(b) Which existing issues the intervener may address;

(c) Whether the intervener will have other rights, such as moving to adduce new evidence, raising new issues or grounds of appeal, objecting to other procedural decisions, or cross-examining on affidavits by others;

(d) Costs;

(e) Deadlines for filing and service.

**Recommendation 143:** If someone is allowed to intervene, the judge allowing that should at once precisely spell out the procedure which will apply.

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E. **CONCILIATION**

Terminology is a problem here. Various terms are thought objectionable in principle, or thought to have over-specific technical meanings. Some echo fights which I do not need to get into. I will use the term “conciliation,” which the Quebec Court of Appeal uses.

1. **Introduction**

Many American Courts of Appeal have had great success with helping parties to appeals compromise and end their suits and appeals by a settlement agreement.\(^\text{249}\) About 2000 appeals are filed a year in Quebec. Of those, about 100-150 a year are helped to a settlement in the Quebec Court of Appeal’s well-developed program. About 80-85% of the conciliations succeed. The bar in Quebec apparently love the program. Manitoba has done a few family conciliations, and Alberta a few. British Columbia introduced a formal program of assisting negotiation and settlement on November 1, 2004. Ontario has done some selectively, with success rate of 95-98%. It now conciliates about 10% of family law cases.

So conciliation is worth experimenting with.

2. **Who Handles It?**

In Quebec, three judges in Montreal and two in Quebec City have special training, and one will work with the parties to an appeal.

American appellate judges do not do it; very often volunteer senior lawyers are the conciliators there. Some American courts also have a few full-time professional conciliators on staff. The U.S. system of volunteer (unpaid or nominally paid) conciliators should also be explored. Many senior lawyers would be pleased to do a little work for the Court of Appeal.

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\(^{249}\) See Côté, Slow Appeals, Chapter 9 (2000).
Canadian lawyers sometimes like the idea of conciliation by judges. After all, there are already lots of non-judge mediators for those who want them. Whether any of the judges on the court had existing training or experience in this area would be a relevant factor. A judge can help if one of the issues in contention is really not arguable? (But conciliators differ on whether to take that approach.) Also trial judges sometimes resent conciliation of appeals from them by someone seen as having status lower than a judge’s. Quebec finds that a judge’s presence increases the success rate. Parties often need to be heard by a judge, as a goal in itself.

But I am nervous about judges spending too much time on this, especially on a court which has a heavy load of appeals. A trial court can save itself judicial labor by helping the parties to settle suits which would have needed a lengthy difficult trial and a big reserved judgment. A day’s conciliation may obviate 10 weeks’ trial. Whether conciliation will save a Court of Appeal much labor is less clear; the arithmetic depends largely on whether one judge often succeeds in brokering a settlement.\textsuperscript{250} The arithmetic may be somewhat like that discussed in Chapter 9, Part B.2.

However, conciliation probably leads to earlier settlements. Trial courts have always had a problem with the number of suits which collapse (e.g. settle) on the eve (or morning) of trial. That is becoming more common with appeals, especially in British Columbia.

The Quebec Court of Appeal and the New York Appellate Division hear interlocutory appeals, but never settle those alone. They settle the whole lawsuit, in such cases. That saves overall judicial time (though it may not be appellate time).

Of course a pre-hearing conference aimed at streamlining the appeal and its preparation, and not at settlement, would be completely different. Time can well be saved by such methods, and a judge may not be necessary. The Registrar or a Master might work well there.

**Recommendation 144:** A Court of Appeal should experiment with conciliation of selected appeals where both parties consent.

### 3. Facilities

Conciliation by a judge can be a problem if the facilities are not suitable. An ordinary courtroom would probably not have the right table. The judge should not sit on the bench. The psychological effect might not be right.

What is really needed is a big enough meeting room with a suitable table and chairs, and two smaller rooms nearby where each side can withdraw and talk among themselves.

Security is a problem, since both the judges and the parties will be present, probably without a clerk. And the parties may hang around for hours. If it is in the secure area of the courthouse, they should not be left to roam unattended.

A small dark room in a basement may not foster relaxation and perspective. Ernest Bevin was Britain’s Foreign Secretary in the late 1940s. He said that he never knew an international conference in a gloomy room to succeed, nor one in a bright cheerful room to fail. It may be a coincidence, but the very successful New York program uses two sunny rooms high up with a fine view over midtown and lower Manhattan. Perspective always aids compromise.

4. Methods

Presumably the judge or other person who is to conciliate should first meet the counsel and try to reach agreement on broad objectives, methods, and timetable for the actual mediation session. That might include the following topics:

(a) What the conciliator is to learn beforehand, and who will prepare it. For example, a statement of what facts are agreed; the judgment and reasons under appeal; and any vital document, such as the disputed lease.

(b) Confidentiality and any exceptions to it. For example, Ontario would not tell the panel hearing an appeal that it had gone to conciliation and did not settle.

(c) Procedure at the actual conciliation.

(d) A brief set of written contentions from each side. Vital would be what issues each wants conciliated (which could be different or broader than issues in the appeal.)

(e) Who may attend it and who must attend it. Quebec insists that the parties come, and not merely be available by phone. They are supposed to be finding their own solution.

(f) What the conciliator may do, e.g. may he or she meet privately with one side?

(g) What the conciliator may not do.

(h) How to record any agreement.

(i) The conciliator will have no further connection with the matter afterwards, whether it settles or not.

(j) The conciliator will not be required to testify, whether or not it settles.

(k) Waiver of intervening time limits during conciliation.

Conciliation should be held early before the parties run up big legal bills in the Court of Appeal.

Recommendation 145: A judge should not take part in a conciliation until the rules and consequences are agreed and fixed in advance.

5. What Cases?

If a judge is to participate and try to help create a compromise, the previous consent of both parties is necessary. (Consent is not necessary for a mere pre-hearing conference to try to streamline and agree on mere procedure for a pending appeal.)

But consent to conciliation is not enough. Not all cases are suitable for conciliation. The Quebec Court of Appeal never pressures parties to conciliate. Those Courts of Appeal which practise it seem to have worked out rules of thumb for categories of suitable cases. That likely explains their very high success rates. Only experience (in the same or in other courts) would reveal those categories.
Presumably these categories might also be worth trying to conciliate:

(a) Where other similar disputes between the parties in future are likely, e.g. child custody cases. Ontario’s conciliations have emphasized family cases.

(b) Where the parties are likely to have an ongoing relation, e.g. family members, neighbors, members of a small town or profession, two big businesses which are natural customers of each other, an employee still employed by other party. Boundary disputes, for example. Or fights inside family companies. Then issues outside the suit can be mediated.

(c) An early stage in an appeal likely to be expensive to litigate, e.g. the record will be bulky.

(d) Where the dispute seems to have more to do with hurt feelings than anything of objective value.

(e) Where one client will not take his or her lawyer’s advice.

Quebec even has success conciliating some criminal appeals. This overlaps with case management and streamlining of big complex appeals. At least less serious grounds of appeal can be eliminated.

Doubtless experience will also show a list of contraindications for conciliation. One in British Columbia is presence of serious crime or violence. Another would be a case where one party already knows that it is likely to lose, but has other motives for not settling, e.g. its whole appeal is a stall.

6. Publicity

The Ontario Court of Appeal got few requests until it distributed brochures on the topic.

F. CONTENTS OF NOTICE OF APPEAL

See Chapter 10, Part C.1.

G. EDUCATING THE BAR

1. Problems

A number of Courts of Appeal regret that there are very few lawyers who seem to specialize in appellate work. No one seems to have many ideas about how to encourage such specialization, though the Ontario Court of Appeal gives such counsel some consideration in fixing dates.

Indeed, most Courts of Appeal report that a significant number of lawyers appeal without knowing the standard of review. Some may not even understand the basic nature of an appeal. Some do not seem able to find authorities on point.
And of course many counsel are unfamiliar with appellate procedures. Constant experiments and improvements in appellate practices exacerbate that. Some Rules and Practice Directions are complex, and how they fit together is not always obvious. Even a good lawyer who reads them correctly is not sure that his or her interpretation is right.

Ironically, Courts of Appeal may see more of the best and worst lawyers than of the average type of lawyer.

2. Cures

(a) Accessibility to Answer Questions

**Recommendation 146:** A Court of Appeal should not hide behind voice mail. It should have enough counter staff. In a bigger Registry, it should designate one person to be the contact for any advice or explanation which will take more than a couple of minutes. See also Chapter 15, Part H.

Many lawyers and paralegals go by what bounces at the Court of Appeal counter, not by the Court of Appeal’s written materials.251

**Recommendation 147:** Courts of Appeal must ensure that all staff apply and enforce all their Rules consistently.

(b) Seminars

A fair-sized bar needs an almost continual course on appellate practice and advocacy. The Nova Scotia Court of Appeal holds lunchtime seminars on appellate procedure. Other courses are for paralegals. The Alberta Court of Appeal has found recent meetings when the procedures change significantly, well attended, well received, and mutually useful.

**Recommendation 148:** Courts should encourage the local bar admission and continuing education authorities to include appellate topics in their seminars.

**Recommendation 149:** Each Court of Appeal should host meetings to announce and explain big changes in procedures.

(c) Court Website and Written Guides

**Recommendation 150:** The Court of Appeal should use its website, standing guides, and special e-mails to announce changes in practice, and to remind the bar of underused facilities (such as video conferencing or sittings elsewhere).

**Recommendation 151:** Put lots of information on the website: formal Rules and Practice Directions, court lists and schedules, announcements, and informal guides, explanations and hints. And of course Court of Appeal decisions.

Explanations commonly sought should be put in readable form and available both on the website and over the counter.

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(d) Forms

Forms often make clear and concrete what is vague or ambiguous in Rules or Practice Directions. They save counsel and even more, lay litigants, a lot of time.\(^{252}\)

(e) Reward a Job Well Done

Courts of Appeal should use carrots as well as sticks. Let good counsel argue their case the way they want. Always praise counsel publicly when they do a good job.

**Recommendation 152:** Award counsel extra costs when they do extra work which benefits the court or their opponents.

(f) Review and Re-Edit Rules and Practice Notes Periodically

See Part B.1 above.

(g) Agents

As with the Supreme Court of Canada, maybe Courts of Appeal should encourage inexperienced counsel to use experienced firms as agents.

\(^{252}\) See Chapter 15, Part H.4.
APPENDIX C TO CHAPTER 21: ALBERTA COURT OF APPEAL FORM N

(An interactive version of this form, which is updated as required, is available on the Alberta Courts’ Website under Court of Appeal, Publications and Forms).

Appeal Number:
Q.B. Number:

IN THE COURT OF APPEAL OF ALBERTA

All applicable areas must be completed. Please type or print. Attach additional pages if necessary.

BETWEEN:

(The style of cause remains the same as in the Trial Court and must show status for both courts – Practice Direction A.2.)

APPELLANT OR RESPONDENT (circle one)
(Plaintiff, Petitioner or Applicant) Circle status at trial
- AND -

APPELLANT OR RESPONDENT (circle one)
(Defendant or Respondent) Circle status at trial

CIVIL NOTICE OF APPEAL

1. APPEAL FROM:  ❑ Judgment  ❑ Order  ❑ Decision

PORTION BEING APPEALED (R. 511):
❑ Whole, or
❑ Only specific part(s)
If specific part(s), indicate which part(s):

PROVIDE A BRIEF DESCRIPTION OF THE ISSUES:

__________________________

OF THE TWO OPTIONS BELOW, INDICATE WHERE THE ORDER ORIGINATED:

❑ COURT OF QUEEN’S BENCH
   File number:  
   Location:  
   Justice:  

On appeal from a Queen’s Bench Master or Provincial Court Judge?  ❑ Yes  ❑ No
(If you are appealing an order of a Queen’s Bench Master or Provincial Court Judge, a copy of that order is also required.)

❑ BOARD, TRIBUNAL or PROFESSIONAL DISCIPLINE BODY
   Specify:  

__________________________
2. **PARTICULARS OF JUDGMENT, ORDER OR DECISION APPEALED FROM:**

   Date pronounced: ____________________________________________________________

   Date entered: __________________________________________________________________

   Date served: __________________________________________________________________

   Attach a copy pursuant to R.506(2). If a copy is not attached, provide reason: ________________________

   (Upon the judgment or order becoming available, the Appellant shall forthwith file a copy with the Registrar.)

3. **IF THE ORDER ORIGINATED IN THE COURT OF QUEEN’S BENCH, CHECK ONE OF THE FOLLOWING, TO INDICATE THE TYPE OF ORDER THAT IS UNDER APPEAL:**

   ❑ Interim order made in chambers

   Specify nature of order: ______________________________________________________________

   ❑ Final order or refusal to grant final order before trial (eg. summary judgment, striking pleadings, etc.)

   ❑ Judgment after trial

4(a). **IS THIS APPEAL ABOUT PROCEDURE OR CUSTODY OR ACCESS ONLY UNDER PART J. OF THE CONSOLIDATED PRACTICE DIRECTIONS?**

   ❑ Yes ❑ No

   **IF YES, CHECK APPLICABLE BOXES:**

   Error correcting only ❑ Yes ❑ No

   Involves new law ❑ Yes ❑ No

   **IF YES, WAS VIVA VOCE EVIDENCE GIVEN IN THE COURT APPEALED FROM?**

   ❑ Yes ❑ No

4(b). **IS THIS A FAMILY LAW APPEAL?**

   ❑ Yes ❑ No

   **IF YES, CHECK APPLICABLE BOXES:**

   Divorce ❑ Yes ❑ No

   Error correcting only ❑ Yes ❑ No

   Involves new law ❑ Yes ❑ No

   Maintenance Only ❑ Yes ❑ No

   Child support ❑ Yes ❑ No

   Spousal support ❑ Yes ❑ No

   Spousal and child support ❑ Yes ❑ No

   Error correcting only ❑ Yes ❑ No

   Involves new law ❑ Yes ❑ No

   Maintenance arrears ❑ Yes ❑ No

   Child support ❑ Yes ❑ No

   Spousal support ❑ Yes ❑ No

   Spousal and child support ❑ Yes ❑ No

   Error correcting only ❑ Yes ❑ No

   Involves new law ❑ Yes ❑ No

   Matrimonial property ❑ Yes ❑ No

   Error correcting only ❑ Yes ❑ No

   Involves new law ❑ Yes ❑ No
Adoption
Error correcting only
Involves new law

Guardianship
Error correcting only
Involves new law

Parentage
Error correcting only
Involves new law

Protection against family violence
Error correcting only
Involves new law

Other, please specify:
Error correcting only
Involves new law

5. HAS THIS FILE BEEN UNDER CASE MANAGEMENT IN THE COURT OF QUEEN’S BENCH?

If yes, case management justice: ________________________________

Trial date: ________________________________

6. IS THIS CASE RELATED TO ANY CASE PRESENTLY BEFORE OR ABOUT TO BE FILED IN THIS COURT?
   (e.g. arises from same controversy; involves same, similar or related issues, etc.)

If yes, name of related case(s): ________________________________

Action or appeal number(s): ________________________________

Nature of relationship: ________________________________

7. IS THE CONSTITUTIONAL VALIDITY OF AN ACT OR REGULATION BEING CHALLENGED AS A RESULT OF THIS APPEAL?

8. HAS MEDIATION BEEN ATTEMPTED IN THE TRIAL COURT?

9. ARE YOU WILLING TO PARTICIPATE IN JUDICIAL DISPUTE RESOLUTION WITH A VIEW TO SETTLEMENT OR CRYSTALLIZING OF ISSUES?

10. WOULD CASE MANAGEMENT BE BENEFICIAL?

11. COULD THIS MATTER BE DECIDED WITHOUT ORAL ARGUMENT?

12. SHOULD THE APPEAL BE EXPEDITED?

If yes, provide reason: ________________________________
13. **IS THERE A STATUTORY BAN, BAN ON PUBLICATION OR AN ORDER OF THE COURT WHICH AFFECTS THE PRIVACY STATUS OF THIS FILE?** ❑ Yes ❑ No

If yes, provide details including which party/parties the ban or order affects and the section the ban was granted under: ____________________________________________

14. **APPELLANT’S ESTIMATED TIME OF ARGUMENT (if less than 45 minutes):** ______________________

15. **LIST RESPONDENT(S) OR COUNSEL FOR THE RESPONDENT(S):**

   Name ________________________________________________________________

   Law Firm (if applicable) ________________________________________________

   Address __________________________ Postal code __________________________

   Telephone number __________________________ Fax number __________________

**NOTE:** The address set out in section 15 will be considered the respondent’s address for service until such time as the respondent files documentation specifying otherwise.

All parties listed in section 15 must be served with a filed copy of the Notice of Appeal within the prescribed appeal period. (R. 510(1))

Date ________________________________________________________________

Signature of Appellant(s) or Counsel __________________________________________

(Legibly print or stamp name (R. 5.1))
Notice to the Respondent:

A respondent who fails to comply with the requirements of the Alberta Rules of Court and the Court of Appeal Consolidated Practice Directions, within the prescribed time, will not be allowed to present oral argument, nor be entitled to costs, unless otherwise ordered.

Failure to appear at the appeal hearing may also lead to an order or judgment being made against the respondent in their absence.

Notice To All Parties:

Parties are required to provide an address for service if it is different than the address set out in this document.

Parties are also required to notify the Registrar of any change of address throughout the proceedings, to ensure that they can be contacted at all times.

An address for service within 30 kilometres of the office of the Registrar must be provided (R. 5(1)(b)(i)).

Appeal Number: __________________________
Q.B. Number: __________________________

IN THE COURT OF APPEAL OF ALBERTA

BETWEEN:

APPELLANT OR RESPONDENT (circle one)
(Plaintiff, Petitioner or Applicant)
Circle status at trial

- AND -

APPELLANT OR RESPONDENT (circle one)
(Defendant or Respondent)
Circle status at trial

CIVIL NOTICE OF APPEAL

Appellant(s) or counsel for the appellant(s):

Name __________________________
Law Firm (if applicable) __________________________
Address __________________________
Postal code __________________________
Telephone number __________________________
Fax number __________________________

[October 2005]
APPENDIX A TO REPORT
OUTLINE OF SUGGESTED RULES,
PRACTICE DIRECTIONS AND STATUTES

[Each item should state by some symbol or abbreviation if should go in Practice Directions or Act. If none, presume that it goes in the Rules, or in Quebec’s case the C.C.P.?]

1. Aims or purposes (à la English C.P.R.s)

   (See Recommendation: 19)
   - correctness
   - speed
   - economy
   - general interpretation in light of principles or aims?
   - other

2. Creation or continuation of court

3. Jurisdiction of court
   - general Court of Appeal
   - including contempt powers
   - including powers of predecessors

4. Powers of the Court of Appeal
   - give any remedies first court could have
   - lack of appeal of earlier interlocutory order is no bar to relief by panel
   - interim orders pending appeal
   - re things or people not appealed
   - security searches and expulsion (See Recommendation: 101)
   - exclude vexatious people from premises (See Recommendation: 102)
5. Membership of court
   - Chief Justice and x other judges
   - including use of superior trial court judges
     - when? request? (See Recommendation: 141)
   - Masters (See Recommendation: 29)
   - quorum
     - not less than 2. As set by Rules?
   - judge not to sit on appeal from self
   - absence or disability of the Chief Justice
   - giving judgment within 6 months of retirement from court (avoid overlap with “giving judgment” below)
   - death or disability of judge after judgment reserved

6. Power of judges to make and amend Rules, forms, tariffs, and Practice Directions
   (See Recommendations: 110, and 137)
   - publication of same
   - those Rules apply to all appeals, whether under Rules or statutes, except as otherwise provided, and except as inconsistent with a statute
   - practice directions generally
   - may contradict Rules only in emergency or as temporary pilot project
   - may be mandatory or merely advisory
   - may adopt Forms
   - repeal of old ones (See Recommendation: 139)
   - conflict with Rules
   - provision for periodical review of Rules and Practice Directions (See Recommendation: 27)

7. Correlation or incorporation of general Rules (or Rules of trial court)
   Don’t duplicate them!
   (See Recommendation: 138)
8. Procedure where Rules are silent
   – proceed by analogy to other Rules

9. Right of government to refer questions to the Court of Appeal
   (and see Procedure on a Reference #34, below)

10. Right to appeal
    – who may be an appellant
    – general right to appeal from superior trial court, except as restricted or barred elsewhere
    – consent orders?
      – no, or only with leave of trial court
    – rulings during a trial or hearing?
      – no? Special test? Leave?
    – costs orders alone? (cross appeals re costs alone?)
      – only with leave of trial court, whether or not a question of principle is involved
    – other exceptions?
    – cases partly within jurisdiction of one court, partly another
    – cases partly with leave, partly not?
    – appeals filed in wrong court
      – not a nullity
      – transfer to correct court, subject to usual Rules on curing defects
    – panel hearing appeal can give remedy, despite failure to appeal an interlocutory order, including an order to sever issues

11. Leave to appeal by one judge, when needed? (See Recommendations: 40, and 46)
    – keep the list of categories needing leave small
    – orders re time or deadlines?
    – security for costs?
    – what to do when not clear whether leave is needed

(And see Part 28, below)
12. Procedure for leave to appeal?
   - question of stay pending leave
   - ordinary motions procedure (for interlocutory motions in Court of Appeal and in trial court) applies except as noted?
   - “hear” in writing only?
   - affidavit not necessary to verify papers on file in court below or to make argument
   - compulsory information and copies
   - should “memo” be as elaborate as a factum?
   - form of material filed by respondents
   - extra parties, cross appeals, etc., after leave is given
   - notice of appeal if leave is granted?
   - no appeal from leave decisions! (See Recommendation: 41)

13. Time to appeal
   - begins with pronouncement (See Recommendation: 34)
   - ends with filing notice of appeal (See Recommendation: 36)
   - extending by motion
     - limited grounds (See Recommendations: 35, and 38)
     - ultimate inflexible deadline
   - defining by motion
   - other

14. Manner of appealing
   - notice filed
     - number of copies
   - where
   - effective date
   - how (electronic etc.?)
- contents of notice
  - parties
  - identify the judgment in question, with identifying names and dates, including neutral cite of written reasons, if available
  - exactly what parts of judgment are appealed
  - other administrative information
    (specify)
  - jurisdiction for appeal (including any leave)
- format
  - including style of cause (don’t reverse it but identify appellant and respondent)
    See Alberta Form N
  - file before or after service?
    - make it optional, but require affidavit of service
  - date for service? (See Recommendation: 36)
  - penalty for non-or-late service
  - any filing in trial court? Or notice to it?

15. (Other) information to be provided
  - copy of reasons under appeal if already available in writing
  - copy of order under appeal

16. Cross appeals etc.
  - interaction with leave?

17. Filing other documents in Court of Appeal
  - how
  - where (and effective date)
  - style of cause and appeal number
  - electronic
  - fax (See Recommendation: 132)
  - Registrar may reject those hard to read, slovenly, or contravening a Rule or Practice Direction
18. Amending notice of appeal or application for leave or cross appeal or notice of intent to vary
   – within time to appeal, unilaterally
   – at any time up to filing respondent's factum, by consent
   – always possible by leave of one judge

19. Parties to an appeal
   – potentially, all affected by the appeal who were parties to the proceeding under appeal
   – need to serve all potential parties with notice of appeal
   – what they need do to become parties?
   – motions re adding others? [or leave this question to be governed by the trial court Rules?]

20. Interventions
   – need leave
   – who hears motion
   – deadline for moving
   – order must set procedure and rights (See Recommendation: 143)

21. Service
   – notice of appeal
     – (on whom: see 19 supra)
     – they then become parties (subject to order or abandonment)
   – other documents
     – on all parties to appeal
   – addresses for service continue until changed (See Recommendation: 37)
   – solicitors of record continue until changed
22. Quashing appeals summarily
   - substantive grounds
   - procedural grounds
   - procedures

23. Voluntary abandonment of appeal
   - may be done, fully or partly
   - manner
   - signature
   - filing and serving
   - formally in open court
   - costs
   - duty of all parties to notify Court of Appeal Registrar forthwith of intent to abandon, settlement, or undertaking to abandon, including oral binding agreements (avoid overlap with Part 39 below)

24. Stays of execution or proceedings pending appeal
   - in emergency, before appeal filed or served?
   - no automatic (See Recommendation: 17)
   - by whom (See Recommendation: 18)
     - apply to trial court, unless impractical
     - if denied, reapply to one judge
   - only if appellant has done all he can and should to that point (See Recommendation: 16)
   - principles (criteria) (See Recommendation: 17)
   - terms (See Recommendation: 15)
   - security (See Recommendation: 15)
   - expiry (See Recommendation: 15)
   - repeal any requirements for a certificate of no appeal, and substitute a one-month delay if there is no certificate?
25. Security for costs

- criteria (See Recommendation: 9)
  - non-natural appellant which is likely not to pay costs in full, whether or not other appellant(s) are natural or likely to pay
  - non-resident party, whether or not there is reciprocal enforcement legislation
  - by appellant if merits of appeal or net success are very doubtful (See Recommendation: 96)
  - by appellant if real likelihood that appellant’s recovery will be less than appellant’s liability for costs
  - by appellant if costs in trial court or related litigation not yet paid by appellant (See Recommendation: 96)
  - by any party on any grounds for security which would be open in the trial court
  - as a term of any stay, indulgence, waiver, curing of default, or extension of time (See Recommendation: 11)
  - by respondent on proper terms (See Recommendation: 14)

- merits of appeal (suit): only appellant need show (if moving), not respondent (See Recommendation: 10)

- who can hear
  - always Master or one judge
  - Registrar in some cases?

- procedure

- when can cover costs below

- amount to be estimate of likely party-party costs, except in special circumstances (See Recommendations: 12, and 96)

- what form may take (including another party’s undertaking to pay this party’s liability for costs)

- automatic dismissal as result of non-posting (See Recommendation: 13)
  - certificate by Registrar, no order necessary
26. Offers to settle or payment in
   - need to make afresh in Court of Appeal
   - incorporate trial court’s Rules
     (Plaintiff is still considered plaintiff and is still defendant, in Court of Appeal)
   - test of no real compromise/concession?
     - once a party has taken a significant step in the appeal, an offer by it to settle without payment to it is a valid offer

27. Conciliation or settlement conferences (See Recommendations: 144, and 145)
   - aims
   - application for
   - consent necessary and how recorded
   - time limits pending
   - judge presides and governs
   - privacy/privilege
   - judge acts as judge and has immunity from suit and subpoena
   - setting procedures (pre-hearing)
   - restrictions on judge who presided
   - recording and publishing settlements
   - consent judgments are not precedents

28. Motions in the Court of Appeal
   - what Registrar can do
   - what Master can do (See Recommendations: 29, and 31)
   - appeals from each of those?
   - what takes Chief Justice of the court to decide
   - what takes list manager of the court to decide (See Recommendation: 31)
   - what takes 2-judge panel
   - what takes 3-judge panel
- some dismissals
- all dismissals
- new evidence
- nothing else?
- one judge can do anything which it does not expressly take Chief Justice, list manager, or panel to do (See Recommendation: 30)
- appeal from one judge only with his or her leave (or forbidden?)
- notice
  - length of
  - manner
    - (including notice of motion)
- return dates and places
  - do not adjourn sine die (See Recommendation: 33)
- (including whether Registrar must be consulted)
- no appeal from refusal of leave (See Recommendation: 41)
- in other motions, no rehearing or reconsideration except if order not yet entered, or by way of appeal?
- memoranda (including chronology of events, deadlines for length and time estimates?) (See Recommendation: 74)
- record for motion
  - motion book?
    - covers and format
- respondent's memo and material
- length of argument of motion (See Recommendation: 75)
- not spoken to or abandoned
- time limit for oral argument?
- duty where motion not proceeding
- time limits for leave motions (See Recommendation: 75)
- consent applications
- all in writing (See Recommendation: 76)
29. Consent judgments in Court of Appeal
   - any limits?
     - what material: up to counsel? Panel can call for more?
   - procedure
     - application in writing, unless panel otherwise orders

30. The first court or tribunal’s record on appeal
   - principle; all is on record (See Recommendation: 56)
   - order for transcript to be in writing and not countermanded
   - order to be copied to Court of Appeal? (See Recommendation: 57)
   - deadlines/standards for office preparing transcripts? (See Recommendation: 52)
   - transcripts of oral evidence and proceedings
     - when (See Recommendation: 48)
     - all (See Recommendation: 47)
     - sole copy (See Recommendation: 47)
     - certificate of having ordered (See Recommendation: 48)
     - omitting lengthy argument
     - format: double sided or miniscript?
     - format: paging, table of contents, running heads, etc.
     - certification of transcripts and accepting as proof
     - other format and covers (See Recommendation: 64)
       - how detailed? Leave some to a manual or Registrar’s discretion?
     - electronic copy (See Recommendations: 49, and 128)
   - court records, pleadings
     - what compulsory: commencing document, formal order or judgment, reasons for decision and for ruling in question, charge to jury, notice of appeal (See Recommendation: 54)
     - what optional for either party
     - format and covers (See Recommendation: 64)
     - number of copies
- reproduced selections of written and oral evidence (for each party’s argument) (See Recommendations: 50, and 51)
  - time for (See Recommendation: 52)
  - format and covers (See Recommendation: 64)
  - number of copies
  - combined with transcript selections and mandatory documents
  - documents reproduced in full unless over 20 pp. (See Recommendation: 53)
  - should they be double sided? Must they be, if over ___ pages?
- physical evidence or views
- how Court of Appeal can access parts of record not selected
  - order by judge for transmission of file (See Recommendation: 59)
  - praecipe by a party for transmission of file? (See Recommendation: 58)
  - Practice Direction designating particular judicial centres (districts) or tribunals who can be ordered to hold record available to fax copies (See Recommendation: 57)
  - Registrar or a judge may give directions in individual appeals
  - service
  - duty of court or tribunal appealed from, and its custodian of records, to obey orders forthwith (including by Registrar of Court of Appeal)
- different volumes can be filed separately as become available (See Recommendation: 51)
- trial court Rules to say applicant and respondent to motion must file written notice of any evidence on which they will rely (See Recommendation: 61)

31. New evidence on appeal
- principles
  - diligence, credibility, likely to have decisive effect on result
- time to move
  - at or before deadline for moving party’s factum
- when and where heard (panel hearing appeal)
- evidence need not be sealed in meantime, unless a judge so orders
32. Consolidating or hearing appeals together
   - when leave needed
     - if change of venue
     - if one case already set down for argument
     - if not all parties consent
     - if would produce significant delay? (define?)
   - otherwise, by consent

33. Case Management
   (See Recommendations: 2, and 20, and 24, and 28, and 45)
   - who can request
   - criteria for?
   - by whom
   - powers
   - recording and publishing decisions re management
   - information needed
   - different streams
   - right to move for advice and direction in any appeal?
   - right to propose or move for timetable, in any appeal
   - other expedition of appeals
   - other pre-hearing conferences
     - included topics
   - can judge supervising appeal sit on panel later hearing appeal?

34. Procedure on a Reference by the Government
   - to whom Rules on appellants apply
   - other steps
   - funding
   - case management
35. Times
   - generally
   - setting timetables
   - as condition of other orders
   - who may set

36. Defaults and Delay and Time Adjustments
   (See Recommendations: 3, and 4)
   - define default and delay?
   - supervision by one or two fixed judges (list managers) appointed by Chief Justice
   - one judge can extend or shorten all times set by Rule, Practice Direction or order except
     [here specify certain unalterable time limits], subject to curing harm as provided below
   - reporting by parties
   - reporting by Registrar
   - defaulters’ parade, and status court/calling the list
   - initials etc. on public lists in privacy cases
   - nonappearance at lists, motions, hearings
   - referral by Registrar to judge (See Recommendations: 2, and 24, and 29)
   - referral by judge to panel (See Recommendations: 2, and 24, and 30)
   - motion by Registrar to judge or panel (See Recommendations: 2, and 24, and 30)
   - court acting on own motion (See Recommendations: 2, and 24, and 30)
   - advance warning
   - deemed inactive (or struck off)
     - dead if not revived within six months
     - deemed abandoned (See Recommendation: 32)
     - Registrar’s certificate of inactive or abandoned
   - cross appeals etc.
   - continued absence of factum or other step
   - court can cure default afterwards, but test is tougher than relief or extension before (See
     Recommendation: 25)
   - curing slips vs. nullities
what not to say! Do not give a judge a general power to relieve against Rules (See Recommendation: 26)
require evidence of merits before curing (See Recommendation: 23)
delay in curing
principles of curing prejudice (See Recommendations: 21, and 22)
- compulsory to cure the curable, whether procedural or substantive, if relieving against default or form, or extending or shortening time
- significant incurable prejudice is always a bar
terms and conditions
- replace one time limit with another, not *sine die* (See Recommendation: 20)
vexatious litigant order (See Recommendations: 93, and 94)
penalties
who can enforce (See Recommendation: 2)
dismissal by court (See Recommendations: 2, and 30)
(when panel required or not: see Part 28 “Motions” above)
- who can move
- principles applicable
terms and conditions
- who can refer to a judge
- who can refer to a panel
- Court of Appeal acting of own motion
restoration of appeal
- not by consent alone
- forms and conditions
- tests?
final non-extendible compulsory drop-dead date: 2 years with nothing done? And 1 year with no record? (See Recommendation: 5)
37. Written argument (factums)

- who can file
  - parties
  - interveners subject to order's terms
  - those with statutory right to argue
- general principles and nature
- format and contents
  [move much of this to a form?]
  - color of covers (appellant, respondent, intervener, appellant by cross appeal, respondent by cross appeal, reply by appellant)
  - omit duplication of what is in extracts of evidence book
- any compulsory topics or information
  - jurisdiction
  - standard of review
- content and its division and headings
- table of contents
- printed on left side?
- size of print
- binding so will fall open
- signature
- length (for various motions and appeals)
  - certifying number of words?
  - maximum (See Recommendation: 72)
- quality
  - good
  - to be typewritten, printed by a computer, or a good photocopy of foregoing
- filing
  - when
  - number of copies
- service
mode of citing case law (See Recommendation: 86)
- no (book of) authorities
  - unless textbooks, or cases not in usual law reports or website, or hyperlinked to factum) (See Recommendations: 83, and 84)
  - require appendix of statutes at end of factum (See Recommendation: 85)
- reply factum only with leave
- factum where there is cross appeal or notice of intention to vary

38. Appeals in writing only (See Recommendation: 71)
- need consent or special circumstances
- panel may order oral argument despite consent
- reply factum

39. Scheduling oral argument
- do not schedule back-to-back full days for the same panel (See Recommendation: 113)
- any time estimates still needed?
- who checks readiness? certificate?
- who ensures appeal which is ready gets set down?
- what degree of readiness necessary
  - both facta? (See Recommendations: 65, and 66)
- parties may suggest dates which they do not want (See Recommendation: 67)
- Registrar selects dates (See Recommendation: 67)
- notifying parties of dates selected
- adjourning or abandoning after set down
  - who can
  - criteria for (See Recommendation: 68)
  - terms and conditions
  - duty to advise Court of Appeal promptly (avoid overlap with Part 23 above)
  - costs
40. Place of oral argument
   – ordinary place for appeals
   – ordinary place for motions
   – requesting special place
     – decided by Chief Justice or by judge designated by Chief Justice, if not a regular place
     – decided by a judge, if a regular place
   – video conferencing (See Recommendation: 131)
     – by telephone? no?
     – deposit for video conferencing?
   – costs may reflect place or move or refusal of move

41. Oral argument itself
   – times of commencement
   – non-appearance
     – of appellant: dismissal
     – of respondent: hear and decide
   – who presides
   – who can argue
     – appellant who filed factum
     – respondent who filed factum
     – intervener, subject to order’s terms
     – Attorney General or other person allowed by statute to argue
   – limited to points in factum, except in special circumstances determined by panel (or a majority)
   – general limits on time for (See Recommendation: 70)
   – who sets exceptions and when
   – respondent’s right to reply, subject to above limitations
   – belated further submissions after judgment reserved are barred, except new authority without argument?
   – panel (or a majority of it) calling for more argument before decision (See Recommendation: 78)
42. Principles for exercise of powers of the Court of Appeal

[Note that outside scope of this Report.]
- standard of review?
- do not act on harmless error
- do what trial court should have done (subject to standard of review)
- appeal is from formal order, not reasons
- new trial or hearing may be full or partial

43. Giving judgment
- when: any time
- how: either orally in court, or in writing
- by whom
  - signed by each member of panel, with power in a member to authorize another to sign for him/her
  - dissents
  - death or incapacity
    (Avoid overlap with "Retirement" above)
- two judges can force filing after a time (See Recommendation: 116)
- notice beforehand to parties or media of impending release of reserved reasons (Practice Direction only and subject to contrary order by a judge)
- posting on website?
  - unless a judge orders otherwise (Practice Direction)
  - subject to editing for privacy

44. Rehearing appeals and amending judgments of Court of Appeal
- motion on notice
- argument in writing only, first appellant, then respondent (See Recommendation: 77)
- panel can call for oral argument
45. Entry of formal judgment
   – Registrar may sign if approved as to form by all parties on their counsel
   – settling or approving form: one member of panel, or Registrar, on notice
   – signing
   – filing or entry in Court of Appeal
   – filing in trial court
   – filing Supreme Court of Canada judgments
   – service on solicitor of record or address for service is sufficient

46. Photographs or recordings made in court or chambers
   – only with leave of the court
   – penalty

47. Costs
   – misconduct or indulgences should bring immediate costs in any event, barring exceptional circumstances (See Recommendation: 8)
   – follow the event of appeal, if nothing said to contrary
   – column or scale same as in court appealed from if nothing said to contrary
   – interest on costs?
     – runs from pronouncement, not entry of taxation
     – if Court of Appeal gives judgment which trial court did not, runs from pronouncement of judgment in court under appeal
   – Registrar or Deputy Registrar taxes, or can ask taxing officer of trial court to do so
   – revise tariffs (if fixed sums) every 5 years (See Recommendation: 7)

48. Reconsidering past Court of Appeal precedents
   – principles?
   – procedure

49. Forms (See Recommendation: 107)
   – appendix of
     [should any be Practice Directions, not Rules? All?]
   – deviations from
50. Filing Fees

   (See Recommendations: 6, and 62, and 69)

51. Criminal sentence appeals

   - contents of record
   - record separate from conviction appeal record?? up to appellant?
   - court or Crown pays for all sentence appeal books and orders, unless over 150 pages and accused is appellant and has counsel (See Recommendation: 63)
   - questionnaire at beginning of first factum filed
   - criminal appeal Rules (prisoner or with counsel, as case may be, including cross appeals etc.) apply if not inconsistent
   - where combined with conviction appeal?

52. Criminal prisoner appeals

   - information in jails
   - filing single copy of notice of appeal with jailer (See Recommendation: 90)
   - service by government
   - government should buy transcript, etc. (See Recommendation: 88)
   - written argument by prisoner optional
   - argument
   - bringing in prisoner (See Recommendation: 89)
   - Rules for criminal appeals with counsel apply if not inconsistent

53. Second appeal to Court of Appeal in summary conviction matters

   - need leave motion before one Justice of Appeal
   - notice of motion must specify the questions of law suggested
   - order giving leave must specify questions of law granted
   - no appeal from leave decision
54. Criminal appeals with counsel

- time to appeal
- bail or other stays
  - information required (including aliases, previous residence, criminal record, charges pending (See Recommendation: 17)
  - steps necessary before applying (See Recommendation: 16)
  - notice
  - terms and conditions (See Recommendation: 15)
  - formalities of entering formal order and recognizances
- dissents
  - who settles wording of formal judgment
  - need to file formal
- interface with legal aid authorities
  - reporting status
  - other?
- bringing in prisoners who have counsel
  - follow notice of appeal, unless counsel or prisoner advises otherwise by writing or in open court
- appointing counsel under s. 684
  - provide a form
  - notice to whom?
- report of trial judge (See Recommendation: 87)
  - form to request objective information
  - special reports
- summary conviction and indictable sentence appeals can be combined if from same trial
- summary disposition under s. 685
- documents in French?
- appeals alleging that trial counsel was incompetent
  - just require early notice and case management by a judge
- counsel seeking to withdraw
- Court of Appeal may order post-sentence report
- general civil Rules apply if not inconsistent, including dismissal, inactive or struck off, deemed abandoned, and reinstating
APPENDIX B TO REPORT
PEOPLE CONSULTED

A. PEOPLE INTERVIEWED OR CONSULTED

1. The Chief Justices of almost all the courts visited

2. Registrars
   (a) British Columbia: Jennifer Jordan, R.
   (b) Alberta: Lynn Varty, R.
   (c) Saskatchewan: Maurice Herauf, Q.C., R.
   (d) New Brunswick: Michael Bray, Q.C., R.
   (e) Nova Scotia: Annette Boucher, R.
   (f) Prince Edward Island: Sheila Gallant, R.
   (g) Supreme Court of Canada: Anne Roland, R. and Louise Meagher, D.R.
   (h) Federal Court of Appeal: Suzelle Bazinet, Judicial Administrator

3. A number of staff lawyers
   (a) Alberta: Debra MacGregor
   (b) Ontario: John Kromkamp
   (c) Quebec: Lysanne Legault
   (d) Federal Court of Appeal: Eloise Arbour, Counsel/Executive Officer to the Chief Justice

4. A number of other appellate judges
   (a) Alberta: Costigan and Berger JJ.A.
   (b) Saskatchewan: Cameron J.A.
   (c) Manitoba: Kroft, Twaddle, Hamilton and Freedman J.J.A.
   (d) Ontario: Charron J. (now on Supreme Court of Canada)
   (e) Quebec: Mailhot J.A.
   (f) Prince Edward Island: McQuaid J.A.
   (g) Newfoundland: Cameron and Welsh JJ.A.

5. Watson J., Court of Queen’s Bench of Alberta (who also gathered comments from a number of lawyers)

6. Agrios J., Court of Queen’s Bench of Alberta

7. Slatter J., Court of Queen’s Bench of Alberta

8. A number of lawyers in five or so provinces, especially Alain Hepner, Q.C. and R. B. Drewry, Q.C.
B. PEOPLE WHO ANSWERED QUESTIONNAIRES

– All the Chief Justices of all the appellate courts, including those of three territories (with the help of a number of Registrars and list managers)

C. TRANSLATION

Appreciation is given to all those who provided translation, including Justice Moreau, Bernard Deschênes and the Government of Canada’s Translation Bureau, for their ability and efficiency.