



# THE APPELLATE CRAFT

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by **J. E. CÔTÉ**

A Justice of the Courts of Appeal  
of Alberta, the Northwest Territories,  
and Nunavut

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# TABLE OF CONTENTS

<b>PREFACE</b> .....	<b>x</b>
<b>CHAPTER 1 – INTRODUCTION</b> .....	<b>1</b>
A. Who this Book is For .....	1
B. Art, Science, or Craft? .....	2
C. Approach or Philosophy .....	3
<b>CHAPTER 2 – MAKING LAW</b> .....	<b>4</b>
A. Two Functions of Courts of Appeal .....	4
B. Stare Decisis .....	6
C. Clarity of Precedents .....	8
D. Natural Justice .....	8
E. Overextended Law-Making? .....	9
1. Introduction .....	9
2. Judges Make Law .....	9
3. Proper Degree .....	10
4. Method Matters .....	10
F. Afterword .....	12
<b>CHAPTER 3 – JUSTICE BETWEEN PARTIES</b> .....	<b>13</b>
A. Over-Legislating .....	13
B. Written Reasoning .....	18
C. Standards of Review .....	18
1. Introduction .....	18
2. Importance and Rationale .....	19
3. Problems of Second Appeals .....	19
D. Factual Appeals .....	20
1. What is Palpable and Overriding Error .....	20
(a) Skipped Factual Issue .....	20
(b) Contradictory Findings .....	20
(c) No Evidence at All .....	21
(d) Evidence Misquoted .....	21
(e) Logical Errors .....	21
2. How to Research and Analyze the Evidence .....	22
3. Trial Judge’s Failure to Find Facts .....	23
E. New Trials .....	23
1. Unfair Surprise .....	24
2. Unequal Procedure .....	24
3. Breach of Procedural Rules .....	24
4. Misconduct by One Party .....	24
5. Mistaken Decisions about Evidence .....	25
6. Interference by the Trial Judge .....	25
7. Misdirection of the Jury .....	25
F. Sentence Appeals .....	26
G. Damage or Maintenance Appeals .....	26

H. Justice vs. Courtesy .....	27
I. Motions to Rehear .....	27
J. Unargued Issues .....	28
<b>CHAPTER 4 – APPELLATE JUDGE’S PERSONAL EFFORT .....</b>	<b>29</b>
A. Workload .....	29
B. Accessibility .....	30
C. Case Dodging .....	30
D. Avoiding Competing Tasks .....	31
E. Administrative Duties .....	31
<b>CHAPTER 5 – THE JUDGE’S OWN EFFICIENCY .....</b>	<b>33</b>
A. Reading Counsel’s Material Beforehand .....	33
1. Hot Court is Vital .....	33
2. When to Read the Materials .....	34
3. What to Read .....	34
B. Promptly Drafting Judgments .....	35
1. Techniques to Produce Judgments Faster .....	35
(a) No Unnecessary Work .....	35
(b) Pre-Hearing Preparation .....	35
(c) Start at Once .....	36
(d) Keep Up the Momentum .....	37
(e) Avoid Unnecessary Keyboarding .....	37
2. Deadlines and Rules .....	38
3. Dangers .....	38
C. Paper Handling .....	38
D. Time Management .....	39
E. Note Taking .....	39
F. Delegate to Trained People .....	40
G. Delegation to Judicial Assistant .....	41
<b>CHAPTER 6 – APPELLATE JUDGE’S PERSONAL LEARNING .....</b>	<b>44</b>
A. Reasons to Update Education .....	44
B. Qualities of a Good Appellate Judge .....	44
1. Patience .....	45
2. Cooperativeness .....	45
3. Acuity .....	45
4. Ability to Write .....	46
5. Work Habits .....	46
6. Independence .....	46
7. Knowledge and Experience .....	46
8. Diversity .....	47
C. Appellate Law and Procedure .....	47
D. Continuing Education .....	48
E. Keeping Up with the Law Generally .....	49
F. Appellate Judge’s Own Speeches, Writing and Teaching .....	50
1. Benefits .....	50
2. Drawbacks .....	50
G. Self-Assessment .....	52

<b>CHAPTER 7 – CIVILITY</b> .....	<b>53</b>
A. Why Civility Matters .....	53
B. Punctuality .....	54
C. Diligence .....	54
D. Manner in Court .....	55
E. Questions to Counsel .....	55
F. Judgments .....	57
1. Treatment of Parties .....	57
2. Treatment of Counsel .....	57
3. Treatment of the Trial Judge .....	58
4. Checking Drafts .....	58
G. Social Interaction with Trial Judges .....	59
H. Colleagues .....	59
<b>CHAPTER 8 – COLLEGIALLY</b> .....	<b>60</b>
A. Introduction .....	60
1. What is Collegiality? .....	60
2. Why is Collegiality Important? .....	60
3. Courts with Special Need for Collegiality .....	61
B. Sharing the Load .....	61
C. Making Decisions .....	61
1. General Philosophy .....	61
2. Specific Techniques .....	63
3. Causes of Disagreement .....	64
(a) Synthesist .....	65
(b) Idealist .....	65
(c) Pragmatist .....	65
(d) Analyst .....	65
(e) Realist .....	65
D. Collegiality in Writing Judgments .....	66
E. Draft Judgments by Other Judges .....	67
1. General Approach .....	67
2. Promptness .....	67
3. Impute No Motives .....	68
4. Diplomacy .....	68
F. Internal Memos .....	69
G. Discussions Outside the Court .....	70
H. Discussions in Court .....	70
I. Meetings and Court Administration .....	71
J. Sharing Resources .....	72
K. Personal .....	72
L. Systemic Threats to Collegiality .....	73
M. Limits of Collegiality .....	74
1. Stay Open Minded .....	74
2. No Cabals .....	74
3. No Groupthink .....	74
4. Concurring Reasons .....	75
N. Accessibility .....	75

<b>CHAPTER 9 – CLARITY</b> .....	<b>76</b>
A. Importance .....	76
B. Where Clarity Works .....	77
C. How to Achieve Clarity.....	77
1. Where to Get Help .....	77
2. The Basic Approach.....	78
3. Principles of Writing .....	78
(a) Brevity.....	78
(b) Simplicity .....	79
(c) Shun Quotations.....	80
(d) Write Positively .....	80
(e) Purity.....	80
(f) Discard .....	81
(g) Edit and Re-edit.....	81
4. Timing .....	82
5. Physical Aids .....	82
D. Allusions .....	82
E. Avoid Habitual Formats .....	83
F. Publishers Change Judgments .....	84
G. Poor Writing.....	84
<b>CHAPTER 10 – DISSENTING</b> .....	<b>85</b>
A. Reasons to Dissent or Not.....	85
1. Why to Dissent .....	85
2. Poor Reasons to Dissent .....	86
3. Disadvantages of Dissenting .....	87
B. Alternatives to Dissenting.....	88
C. How to Dissent .....	89
D. Continuing Dissents .....	89
E. Dissents on Sentence.....	90
<b>CHAPTER 11 – HOW TO READ APPELLATE JUDGMENTS</b> .....	<b>91</b>
A. Introduction.....	91
B. Ratio Decidendi v. Obiter Dicta.....	92
C. Counting Heads .....	92
D. Affirming or Approving Others.....	93
E. Denying Leave to Appeal .....	94
F. Reserved v. Extempore Judgments.....	94
G. Facts vs. Law .....	95
H. Law Reports.....	95
1. How Publishers Change Judgments .....	95
2. Official Reports .....	96
3. Summaries .....	97
4. Unreported Cases .....	97

<b>CHAPTER 12 – SUPERVISION AND MANAGEMENT</b> .....	<b>98</b>
A. Presiding Over a Panel .....	98
1. Rights .....	98
2. Duties .....	99
3. Unrepresented Litigants .....	100
B. The Chief Justice .....	101
1. Necessary Powers .....	101
2. Hard Job .....	102
3. How to Deal with the Chief Justice .....	102
C. Administrative Judges .....	103
<b>CHAPTER 13 – CONFIDENTIALITY</b> .....	<b>104</b>
A. Dangers .....	104
B. Precautions Before Judgment .....	106
1. Computers and Phones .....	106
2. Papers .....	106
3. Conversations .....	107
C. After Judgment .....	108
D. Staff and Premises .....	108
<b>CHAPTER 14 – ONE-JUDGE MOTIONS</b> .....	<b>109</b>
A. Law of Motions .....	109
B. Limits on One Judge’s Powers .....	110
C. Proper Approach to Motions .....	110
1. Keep the Appeal Moving .....	110
2. Do Not Unduly Fetter the Panel .....	111
3. Give the Panel the Tools it Needs .....	111
4. Fairness vs. Efficiency .....	111
D. Efficiency .....	112
E. Whether to Give Extended Reasons .....	112
F. Involve the Registrar .....	113
G. Mistakes to Avoid .....	114
1. Bail .....	114
2. Stay of Execution .....	114
3. Leave to Appeal .....	115
4. Delay .....	115
5. Extending Time to Appeal .....	115
6. Interventions .....	115
7. Appeal from Refusal of Leave .....	116
8. Wrong Court .....	116
9. Security for Costs .....	116

<b>CHAPTER 15 – APPELLATE JUDICIAL ETHICS</b> .....	<b>117</b>
A. Disqualification for Interest or Bias .....	117
1. Connection with Trial Judge .....	117
2. Who Decides and How .....	118
3. Detecting Conflicts Early .....	119
B. Delegation .....	119
C. Honesty and Accuracy .....	120
D. When to Decide .....	120
E. Relying Upon Issues or Authorities Not Argued .....	121
F. Angling to Get Cases or Topics .....	121
G. Extracurricular Activities .....	121
<b>CHAPTER 16 – SPECIOUS REASONING</b> .....	<b>122</b>
A. Uncited Contrary Argument or Authorities .....	122
B. Misrepresented or Watered-Down Arguments .....	124
C. Manufactured Rationales .....	125
D. Boundary Arguments .....	127
1. “Close Enough” .....	127
2. No Boundaries .....	127
3. No Definition is Perfect .....	128
4. All Distinctions are Impractical .....	128
E. Fuzzy Reasons .....	129
1. Papered-Over Gaps .....	129
2. Mere Assertion .....	130
3. Abstraction .....	130
4. Non Sequitur .....	130
5. Emotion .....	130
F. Ambiguity .....	131
1. Undistributed Middle Term .....	131
2. Bad Statistics .....	132
G. Expanding and Contracting Categories .....	133
1. Overlapping Categories .....	133
2. Rules vs. Philosophy .....	134
3. Meaningless Distinctions .....	134
H. Framing the Wrong Question .....	135
1. Simple Wrong Question .....	135
2. Implying Answers and Excluding Issues .....	135
3. Semantics .....	136
4. Answer Does Not Match the Question .....	136



I. Other Classical Fallacies .....	137
1. Distraction with Irrelevancies .....	137
(a) Tu quoque.....	137
(b) Ad hominem Attacks.....	137
(c) Appeals to Sympathy .....	138
(d) Waving a Big Stick .....	139
2. Causation Assumptions.....	139
3. Begging the Question .....	140
J. Unworkability .....	141
K. Bad Use of Analogies .....	142
L. Misuse of Authority .....	143
1. Covert Appeals to Authority .....	143
2. The Crowd as Authority.....	144
3. The Middle Kingdom .....	145
M. Rebutting Specious Arguments .....	146
<b>CHAPTER 17 – EVALUATION OF AN APPELLATE JUDGE’S WORK .....</b>	<b>147</b>
A. The Supreme Court of Canada .....	147
1. Procedural Role of Justices of Appeal.....	147
2. Effect of Court of Appeal Reargument.....	148
3. Writing for the Supreme Court of Canada .....	148
4. How to Think When Reversed .....	148
5. Ongoing Thinking .....	149
B. Learned Commentaries.....	150
C. Comments by the Media .....	150
D. Interest Groups .....	151
E. Popularity Generally.....	152
<b>Appendix A – The Most Important Thing is to Begin.....</b>	<b>153</b>
<b>Appendix B – Extracts from Poorly-Written Legal Material .....</b>	<b>158</b>

## PREFACE

*“Sir, I cannot find words to thank you, but you will not find me ungrateful for what you have done. Your skill has indeed exceeded all that I have heard of it.”*

– “The Adventure of the Beryl Coronet”

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A book of this sort cannot be a recital of one person’s own views and discoveries, for many reasons. One is that each person really gains such views from others, especially co-workers and predecessors.

Teachers never get nearly enough recognition from their pupils. The more a teacher reshapes our minds, the less we realize how little we knew, or how mistakenly we thought, beforehand. That is especially so when the teachers’ role is informal.

And every colleague whom a judge encounters, indeed every judge or Master before whom a lawyer appears, teaches something. Some colleagues gave specific suggestions for this book during the writing process; others taught me things years ago.

So this preface is likely to omit people who should be named, and I list particular names with great trepidation.

From early days, I owe a big debt to William Hurlburt, Q.C., Hyndman M., Cartwright C.J.C. and Martland J. Other people outside Alberta have given ideas, including Bayda C.J.S.

Every colleague has contributed something knowingly and directly, or by good example. I will just mention a few. First, Chief Justices Fraser and Laycraft. Then the following justices (and a fine Master): Carole Conrad, Adelle Fruman, Michael Funduk, Robert Graesser, William Haddad, Constance Hunt, John McClung, Elizabeth McFadyen, Mary Moreau, Clifton O’Brien, Ellen Picard, William Sinclair, Frans Slatter, William Stevenson, and Jack Watson. Registrars Lynn Varty and Danielle Umrysh also helped.

A lot of prompt research and editing suggestions came from Melanie Hayes-Richards, Debra MacGregor, Andreea Bandol, Beth Millard, and Linda Harmata. They went out of their way to help.

Maybe most important was my assistant, Marge Smith. She keyboarded and revised the manuscript many times, and detected countless errors. Indeed, as she has done with every judgment or paper which I have written for 21 years.

I am very grateful to the Canadian Judicial Council for their encouragement and assistance in publication of a book which could never pay for itself by selling copies to so small an audience.

## CHAPTER 1 – INTRODUCTION

*“He is now translating my small works into French.”*

*“Your works?”*

*“Oh, didn’t you know?” he cried, laughing. “Yes, I have been guilty of several monographs. They are all upon technical subjects. Here, for example is one ‘Upon the Distinction between the Ashes of the Various Tobaccos.’ . . . It is a point which is continually turning up in criminal trials, and which is sometimes of supreme importance as a clue. . . . Here is my monograph upon the tracing of footsteps, . . . Here, too, is a curious little work upon the influence of a trade upon the form of the hand. . . . That is a matter of great practical interest to the scientific detective – especially in cases of unclaimed bodies, or in discovering the antecedents of criminals. But I weary you with my hobby.”*

– *The Sign of Four*, Chapter 1

### A. WHO THIS BOOK IS FOR

This book aims to help someone recently appointed to an appeal court, whether coming from a trial court, or directly from practice. It is a manual for new appellate judges.

Some judges seem to work harder than others, and suffer more in the process. Yet it is doubtful that that comes from any difference in ability, or even experience. So some parts of this book may help someone who has already done appellate work for a few years.

Trial courts also have some appellate jurisdiction, e.g. hearing appeals from summary convictions. So trial judges might find this book helpful for part of their work.

Trial judges sit temporarily with the Alberta Court of Appeal, the Northwest Territories Court of Appeal, and the Nunavut Court of Appeal. They often remark that they find the experience educational, giving them new insights into their trial work. So some trial judges might like to dip into this book. And trial judges are usually interested to find precisely why some trial judgments are affirmed on appeal, but others reversed. They may find clues here.

Canadian appellate courts employ significant numbers of articling students (law clerks) and staff lawyers. When those staff come straight from a law faculty (or a law firm) to working for a court, the transition is sharp. Judges often do not think or operate in the way that law school might suggest. Maybe this book will help some law clerks or staff lawyers get up to speed.

## B. ART, SCIENCE, OR CRAFT?

Why does the title of this book use the word “craft,” and not science or art? Skills or training need not involve either a science or an art. A craft is the third possibility.

Appellate judging does not much resemble an art. For one thing, the product is not supposed to be too subjective or individualistic, nor indeed too creative. Innovation is usually the highest sign of genius in the arts, but if every appellate judge in Canada tried to be different and innovative, Canada would last no longer than did the Tower of Babel.

Besides, this book tries to be a helpful manual. If appellate judging truly were an art, then its biggest single feature would be personal, maybe even genetic. By the time that one was old enough to sit on an appeal court, either one would have the artistic ability or one would not. If so, this book could teach a few details of fingering or brushwork, but nothing else; the book would be largely useless. However, the experience of writing the book suggests more strongly than ever that an appellate judge does not pour out from the soul some innate unteachable elixir. Appellate judging is not an art.

Today we like to think that everything worthwhile is a science. Marx commanded millions of supporters by claiming to have discovered scientific laws governing history and political “science.” Outsiders also think that medicine and surgery went from quackery to the revealed immutable truth in 60 or 70 years, by adopting science. But that is neither the history nor the present state of healing. Medicine and surgery are still crafts, not science. Those professions have learned by trial and error over many years what works and what does not. Long after, science sometimes arrives and explains (or partly explains) why one method works and the others fail. But there are a host of undoubted truths in medicine and surgery which the basic sciences cannot explain, indeed which physicians and surgeons cannot explain. No one knows why certain medicines cure certain diseases. The laws of science must be the same for humans and animals, yet a good treatment for a human may be disastrous for an animal, or vice versa.

Over 35 years ago, researchers discovered a good cure for stomach ulcers: several drugs which inhibit production of stomach acid. Yet even then, science still did not know what caused stomach ulcers. Only later did a lone physician prove that they are caused by certain bacteria, and now different antibiotic drugs are often used. Once again, the craft acted successfully before science could understand what was going on.

What is a craft? It is a method of working developed by a group of people in the same field striving to improve their product and methods, who tell each other their successes and failures. Though never blind to theory or to the views of those in other lines of work, a craft depends largely on trial and error, and accumulated experience. It has some similarity to what scholars do, but even more similarity to the methods of chefs, writers of nonfiction, speechwriters, mechanics, cabinetmakers, and practical geologists.

Like physicians and surgeons, judges and other lawmakers have to venture out ahead of scientists, and try to tackle problems which no one fully understands. Sometimes no one understands the problem at all. None of these professions can sit on their hands and watch epidemics or social anarchy, praying that some academic will save them with a new basic discovery. When the danger is grave, almost any solution is likely to be better than doing nothing, and centuries of experiment by the craft reveal the best (or least harmful) methods. In history, often the flag followed trade. So the social and physical sciences often follow the work of men and women exercising their craft.

Besides, some crafts breed their own success. We know and are shaped by the society in which we grew up. Even if some set of rules is not the best possible system, over time it works, if only through habit. Any reasonable remedy for a problem is better than no remedy, and any remedy is likely to improve with use, tinkering, and experience. Some microbes may resist management and antibiotics, and try to mutate and evade them, and maybe some sociopaths do too. But the vast majority of the population try to adapt to, and work with, the system which they are used to. So the craft of law has more hope of succeeding (while waiting for science to catch up) than does medicine or any other physical engineering.

## C. APPROACH OR PHILOSOPHY

This book is written by one judge, who has just as many quirks and personal preferences as other judges. However, one's personal, social, or small-p political, philosophy does not seem to be central to most of the issues discussed in this book.

Instead, experience shows that the best appellate judges say things to their fellow judges, and issue judgments, which are not mere corollaries (let alone photocopies) of their personal, social and political views. Such judges are easy to work with, to debate with, and to compromise and agree with. That is true even of those judges with whom one would differ on a number of the partisan issues which are rehearsed in each day's newspapers. A good judge is not a political orator, nor even a political philosopher, dressed up in a gown. The legal craft brings something special to both law making and error correcting. It is very difficult for someone not trained in the law, or someone who has not practised law, to understand that.

Therefore, this book tries to avoid taking sides in some of the more common social or political debates which judges commonly hear. Nor does it get very far into discussions about the proper breadth of the judge's role in Canada today.

What the book does cover is easy enough to see quickly, as the table of contents is fairly full.

What does this book omit? Substantive and procedural law (e.g. standards of review in judicial review of administrative tribunals). General discussions of ethics and conflicts of interest applicable to all judges. Judicial independence, tenure, and discipline, and choice and appointment of judges. This book is not aimed at lawyers, so it says little about advocacy.

## CHAPTER 2 – MAKING LAW

*“As a rule, when I have heard some slight indication of the course of events, I am able to guide myself by the thousands of other similar cases which occur to my memory.”*

– “The Red-Headed League”

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### A. TWO FUNCTIONS OF COURTS OF APPEAL

American judges and legislators remember that Courts of Appeal have two distinct functions. Indeed in most American states, different people fulfill the two tasks: an intermediate Court of Appeal and the state Supreme Court. In the Commonwealth, we discuss the distinction less often. What is it?

Everyone knows that one function of a court of appeal is to correct error by the court appealed from. Courts of Appeal do that to prevent injustice to the party who lost in the first court. That is the topic of Chapter 3 below.

What is an appellate courts' second function? Making law. That is the topic of this chapter.

A historical example illustrates the difference.<sup>1</sup> Until about the 1840s, appeals lay from various English trial courts to an appellate court, the Court of Exchequer Chamber. Thence a further appeal lay to the House of Lords, the final court. Given the last word, one might assume that the House of Lords was therefore the influential law-making court. But it was not, for two reasons.

The smaller reason was that members of the House of Lords with no legal training sat and voted on appeals, until well into the 19th Century, and once even formed the majority. Though the House of Lords could summon and consult “all the judges”, they need not. Even if they consulted them, they could (and sometimes did) depart from the judges' opinion. That diminished the prestige of the Lords' decisions.

The main reason that the Lords made little law, was that for generations no real law reports published their decisions. Indeed, that House considered it contempt to report its debates and proceedings. The Lords' decisions may have been theoretically persuasive in lower courts, but they rarely could be obtained in usable form.

So for all practical purposes, the House of Lords used to correct errors only, not make law. The Court of Exchequer Chamber was the most influential law-making court. Its decisions were widely reported.

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<sup>1</sup> It comes from C.K. Allen's *Law in the Making*, 220 ff. (7th ed. 1964, repr. 1978).

When the draft *Judicature Act* was introduced<sup>2</sup>, the Bill would have entirely abolished appeals to the House of Lords. From the point of view of error correction, that made sense. Two layers of error-correction are slow and expensive. However, a different consideration prevailed. A second appeal is sometimes needed for another reason: to make and settle the law. The resulting New Act's<sup>3</sup> theory was that the Lords would hear only appeals where law needed making or settling. The old system was thus turned on its head.

For generations, no Canadian court structurally distinguished error correction from law making. Until recent times, any civil suit with \$10,000 in issue could carry on to the Supreme Court of Canada as of right; many did. In practice, standards of review were lax and often ignored in all appeal courts. The Supreme Court of Canada was not created until eight years after Confederation. From then until 1949, it was largely an **alternative** forum to the Privy Council, which usually heard appeals directly from provincial Courts of Appeal (except in constitutional cases).

History shapes institutions. All that history emphasized the error-correcting feature of Canadian appeal courts, and obscured both the law-making feature and its separateness. Canadian law grew largely in the cracks of error-correction, like daisies in a brick sidewalk; law-making was not seen as a separate flower bed.

The traditional description of two appellate functions may be too simple. Courts of Appeal have a third function which overlaps somewhat. Courts of Appeal also exist to promote uniformity of result. There may be no one right number or practice in many areas of law; a number of answers may be equally reasonable. But it is usually very desirable that the result be predictable. That means one result. Uniformity is not well promoted by modern Canadian standards of review which (unlike the Privy Council's old rules) apotheize the first judge, and the second Court of Appeal. Where Ottawa gives leave, that leaves the intermediate Court of Appeal with little legitimate error-correcting role, and so less occasion to say anything about the law. However, the Supreme Court confirms that one legitimate aim of a provincial court of appeal is to promote uniformity of criminal sentences within the province.<sup>4</sup>

The basic split between error-correction and law-making is fundamental, and should shape many aspects of the appellate work everywhere.<sup>5</sup> Here are a few of this distinction's many corollaries.

1. No appellate judge should get so caught up in one function that he or she forgets the other, nor perform the other thoughtlessly.<sup>6</sup>
2. Sometimes the desire to correct error here and now, and the desire to make law for the future, conflict. Then the court cannot fully do both in one appeal. See Chap. 3, Part A.
3. Sometimes an appeal court has a choice of which cases to hear and not hear (e.g. by giving leave to appeal). Then arguable error is not the only, nor the most important, criterion for leave. Need to make law, settle it, or make it uniform is usually more important.
4. If an appeal court's resources are overtaxed, which appeals get fuller treatment and which do not, should also be influenced by whether law needs making.

<sup>2</sup> About 1874.

<sup>3</sup> The *Appellate Jurisdiction Act*.

<sup>4</sup> See *R. v. C.A.M.* [1996] 1 S.C.R. 500, 566-67 (para. 92).

<sup>5</sup> See Posner, *Economic Analysis of Law* 600 (6th ed. 2003).

<sup>6</sup> One important aspect of this is developed further in Chap. 3, Part A., another in the present Chapter 2, Part D, below.

5. Judgments should state clearly when they are discussing error in the case at hand, and when they are making rules for the future.
6. In the Commonwealth, courts change the law only retroactively (though some Charter declarations of invalidity are prospective only). Canadian courts should consider making some changes in judge-made law prospectively, or postponing them for some time.<sup>7</sup>

## B. STARE DECISIS

Precedent is not a fashionable topic in Canada at present. But it is necessary. Where there is no *stare decisis* at all, there is no true firm law (or only statutory law). The result is different in each place, even each time, and even a statute will be interpreted in a host of ways. Canada has over 1000 federally-appointed judges, and just as many provincial and territorial court judges. Without *stare decisis*, there would be almost two thousand petty fiefdoms in the law: one in each courtroom.<sup>8</sup> The American Bar Association's former Canon 20 of Judicial Ethics made the point strongly.<sup>9</sup>

Without *stare decisis*, courts do not make true law, and even error-correction is more apparent than real. It begins to look very personal and subjective, and even arbitrary, government by whim or personalities.

Nor is merely persuasive precedent enough. After all, articles, books and foreign court decisions are persuasive too. To give equal status to a 1927 Michigan Law Review article and a 2006 decision of the Supreme Court of Canada would be absurd. That would be worse than individual fiefdoms; it would produce chaos.

The judges on a given Court of Appeal can reverse trial judges, and are likely to decide like cases alike. So even a purely realistic and pragmatic approach, eschewing all theory, must recognize that court of appeal decisions have much more weight than other decisions. Law is a prediction of what the judges will do.<sup>10</sup>

Whether or not legal commentators like it, the Supreme Court of Canada and the various Canadian Courts of Appeal uniformly hold that their decisions bind other lower Canadian courts. Appellate courts have the power and demonstrated inclination and means to enforce that view. So binding precedent is a fact which we can no more ignore than climate or gravity.

An appellate judge who disregards precedent is very short-sighted; why does he or she think that others will do as he or she says, not does? If his or her decisions do not bind, why would anyone follow them?

Some academic commentators (and Lord Denning) dodged all that, by claiming that the United Kingdom abolished binding precedent: they said that in 1966 the House of Lords resolved no longer to be bound by precedent. They pretend that is the end of the topic.

<sup>7</sup> See an American book, Witkin, *Manual on Appellate Court Opinions* 195-6 (§101) (1977).

<sup>8</sup> See *R. v. Crazybull* (1993) 141 A.R. 69, 72-73 (C.A.) (paras. 20-21); *Cassell & Co. v. Broome* [1972] A.C. 1027, 1054, 1084, 1107, [1972] 1 All E.R. 801 (H.L.(E.)); Barak, *The Judge in a Democracy* 161 (2006)..

<sup>9</sup> After repeal and replacement in 1972 and 1990, new Canon 3 Part B(2) is much briefer.

<sup>10</sup> Holmes, "Path of the Law" (1897) 10 Harv. L. Rev. 457, 458.



“A little learning is a dangerous thing; Drink deep, or taste not the Pierian spring,” said Pope. In fact, that 1966 Practice Direction is fenced in by express qualifications as to time, topic, and place. It says that departures from previous House of Lords precedent will be exceptional.<sup>11</sup>

Few writers mention what the House of Lords has actually done since 1966.<sup>12</sup> The House of Lords does not just drift away from following one of its previous decisions. It formally debates the question, after notice to all parties.<sup>13</sup>

The House of Lords has reversed its previous precedents on only a handful of occasions. It never departs from a previous precedent simply because it now prefers another view of the law.<sup>14</sup> Indeed, the Law Lords have often said that if a certain question had first arisen now, they would not have adopted the legal rule previously adopted. Yet they still followed the precedent and did not reverse it. The Lords have laid down a number of factors which militate against departing from previous precedent, such as doubt, age of the precedent, or reliance on it, especially in property matters.<sup>15</sup>

Whether to make precedent that strong is up to each Canadian appellate court. But it is important that judges ask themselves such questions, and not slip into an unthinking practice or needless contradiction of existing precedent.<sup>16</sup>

An important role of Courts of Appeal is to settle the law, so it is unfortunate when they avoid reasonable chances to do so. For a Court of Appeal to unsettle hitherto settled law is worse. It harms society; that should be done only in rare cases, and for the strongest of causes. Uncertainty is poisonous. The job of appellate judges is to kill snakes, not stir them up or breed them.

Uncertainty bars settling disputes and so breeds unnecessary litigation. But if a Court of Appeal does its job properly, litigation will produce precedents which settle the law, and so reduce future litigation.<sup>17</sup>

Courts do not advance **any** political, social, or economic philosophy when they leave society with conflicting rules of conduct.<sup>18</sup> The oppressed will not invoke unpredictable courts. Arbitrary unpredictable governance is not law. Without law there is little justice. Lack of law withers commerce. Conversely, law which is observed inside and respected outside that country encourages investment, agriculture, science and commerce, and brings prosperity. Many countries have lost law and prosperity by losing real law and independent courts, and many today seek to rebuild them.

In any educated discipline, even one so creative and individual as poetry, what has gone before is not rubbish like worn-out tires.

<sup>11</sup> See the Practice Direction [1966] 1 W.L.R. 1234, [1966] 3 All E.R. 77, [1966] 2 Ll. R. 151.

<sup>12</sup> The cases are reviewed in Stevenson & Côté, *Civil Procedure Encyclopedia*, v. 3, pp. 66-11ff., and *Cassell v. Broome*, *supra*, at 1054-55 (A.C.).

<sup>13</sup> So does the Alberta Court of Appeal, by requiring express leave of a previous panel to open up the question: see its Consolidated Practice Directions, Part A. 3.

<sup>14</sup> See *Horton v. Sadler* [2006] U.K.H.L. 27, [2007] 1 A.C. 307.

<sup>15</sup> Other criteria are cited in Stevenson & Côté, *supra*. See also Mason essay in Sheard (ed.), *A Matter of Judgment* 1, 10 (Judic. Comm. of N.S.W. 2003).

<sup>16</sup> Cf. *Davis v. Johnson* [1979] A.C. 264, 328, 336, 343-44, [1978] 1 All E.R. 841 (H.L.(E.)), and Barak (2002) 116 Harv. L. Rev. 19, 29-30.

<sup>17</sup> See Posner, *op. cit. supra*, at 554.

<sup>18</sup> See Barak, *loc. cit. supra*, at 30-31.

“Every nation, every race, has not only its creative, but its own critical turn of mind; and is even more oblivious of the shortcomings and limitations of its critical habits than of those of its creative genius.”

\* \* \*

“No poet, no artist of any art, has complete meaning alone. His significance, his appreciation is the appreciation of his relation to the dead poets and artists.”

\* \* \*

“The existing order is complete before the new work arrives; for order to persist after the supervention of novelty, the *whole* existing order must be, if ever so slightly, altered; and so the relations, propositions, values of each work of art toward the whole are readjusted; and this is conformity between the old and the new.”

\* \* \*

“The poet must be very conscious of the main current, which does not at all flow invariably through the most distinguished reputations.”

\* \* \*

“Someone said: ‘The dead writers are remote from us because we *know* so much more than they did.’ Precisely, and they are that which we know.”<sup>19</sup>

## C. CLARITY OF PRECEDENTS

On this topic, see Chap. 9, Part B.3(e).

## D. NATURAL JUSTICE

If a court commingles or forgets one of the two distinct law-making and error-correcting functions, it may break the rules of natural justice. Procedure and fairness to the parties are important even when making new law. There are two principal dangers.

The first danger is deciding an appeal on a point of law which the parties had no chance to research or argue. What if the Court of Appeal finds a new legal issue (or important uncited authority) after oral argument has finished? And if the Court feels that it cannot expressly leave that topic to one side? Then it should give counsel a chance to comment in writing. (In a rare case, oral reargument might be appropriate.) Why should the court do that? There may be

- (a) countervailing arguments or authorities which the Court of Appeal has not heard of, or forgotten;
- (b) a safer or juster way to reach the same result;
- (c) an ethical or procedural bar to raising this new point at this late stage;

<sup>19</sup> Eliot, T.S., “Tradition and the Individual Talent,” in *The Sacred Wood* (1920).

- (d) some bar to deciding this appeal on the new point, e.g. because of evidence which neither counsel previously needed to mention to the Court of Appeal because then this issue was not on the table; or
- (e) other issues not yet argued in the Court of Appeal.<sup>20</sup>

The second danger in mingling law-making with error correction is edging over from legal authorities to evidence. Usually evidence must be adduced only in open court at trial, with an oath or similar assay mark, and full chance to cross-examine or rebut. (The exceptions are very narrow.) A party who cites a journal article which contains facts bypasses all that, and smuggles untested evidence through the back door. If the Court of Appeal cites such factual articles, the court is the smuggler, and it gives no chance for either party (or both parties) to protest.<sup>21</sup>

Notice of new arguments or decisive authorities, and a chance for counsel to respond, obviate those dangers.

Many people admire Cardozo J. for having a torts judgment worked out in his mind beforehand, then just waiting until the August afternoon when the Long Island Railroad's scale toppled onto Mrs. Palsgraf. He unveiled his prefabricated creation as his judgment in that appeal. But other legal scholars are uneasy. Apart from any question of preconceived ideas, one wonders whether Mrs. Palsgraf and the railroad had a proper chance to research and argue these legal points.

## E. OVEREXTENDED LAW-MAKING?

### 1. Introduction

The topic of so-called "judicial activism" is often debated today, usually among non-lawyers. I will curtail my remarks, and try to keep my own social or economic philosophy to myself. I will also omit some of the weaker arguments commonly heard on both sides of the debate.

### 2. Judges Make Law

Canadian judges can, do, and should make new law, both in constitutional and non-constitutional topics; that seems well settled. The reasons have often been discussed in legal literature.

But that topic is a straw man, for the most common criticism of "activism" is not that new law is made. It is that too much is made too quickly, and too far removed from the old law replaced. Saying that judges should make new law does not answer that objection. Agreeing that one's wardrobe needs changes is not an argument for wearing every possible dramatic new style.<sup>22</sup>

<sup>20</sup> See the strong words of Bridge L.J., in *Goldsmith v. Sperrings* (CA) [1977] 1 W.L.R. 478, 508, [1977] 2 All E.R. 566, *leave den.* (H.L.) [1977] 1 W.L.R. 509, and the speech of Lord Diplock in *Hadmor Prod. v. Hamilton* (HL(E)) [1983] AC 191, 233, [1983] 1 All ER 104-2, 1056. Cf. *J-Sons v. N.M. Paterson & Sons* (2003) 180 Man. R. (2d) 178, 44 CPC (5<sup>th</sup>) 47 (C.A.), *leave den.* [2004] 2 S.C.R. vi. See also Megarry (1978) 16 Alta. L. Rev. 406, 413 ff.

<sup>21</sup> See the cases cited in Stevenson & Côté, *Alberta Civil Procedure Handbook 2008*, R. 530n., para. 6 (p. 577 n. 8).

<sup>22</sup> See Chap. 16, Part D on boundary disputes.

### 3. Proper Degree<sup>23</sup>

Thus restated, the pertinent question is how much judicial law-making is proper, and how much is too much. The answer is largely a function of five things:

- (a) one's own judicial philosophy,
- (b) one's view of how good or bad the present law is,
- (c) the techniques of professional law-making,
- (d) one's ideas of where public opinion is now and is moving, and
- (e) individual circumstances, such as whether it is a topic in which the Legislature is likely to intervene soon.

Every lawyer or judge can name legal topics where the law is either unfair, socially or economically counterproductive, obsolete, confused, or arbitrary. If that area is "lawyer's law", almost everyone would agree that the courts should start to reform that area, and soon. If it is not "lawyer's law", then one would not want to get too far out of step with current public opinion, and social values and practices.

Conversely, most lawyers and judges (of whatever social or economic inclinations) harbor a pet social or economic idea which they would welcome in some hypothetical millennium. But (if they have any objectivity) they doubt that they will ever see that idea become law, and suspect that most Canadians would firmly reject it. I seriously doubt that a judge should write a judgment based on such a pet idea, especially outside the area of "lawyer's law". It is probably an illegitimate use of the judicial power. More seriously, the proposal is not likely to gain acceptance, and it will probably leave behind only friction.<sup>24</sup>

In the social or philosophical debate as to precisely how far judges should go in making new law, I do not feel confident in saying more.

### 4. Method Matters

However, that is not an end of this topic. Making new law also has important technical aspects which a judge must never forget. Whether one's inclinations are to change the law mightily in some area, or to leave the existing rules in repose, does not matter here. With either policy or either philosophy, confusion, contradiction and grave uncertainty in law will do no one any good.<sup>25</sup>

That is not an argument against all reform lest it make a noise or cause someone somewhere some doubt. But every good must be rationally balanced against its costs (social or otherwise). And if possible, the cost should be the least reasonably obtainable for the given benefit. In other words, given the goal, choose the least expensive route to it.

Indeed, many a good reform has floundered through poor implementation or superficial flaws. The Torrens system is a wonderful way to hold land, and it is a thousand pities that it has not spread further. But Torrens was not a lawyer, and the first draftsman of his scheme in South Australia did not understand it, and produced a badly-written Act. Copying it has hobbled the scheme ever since.

<sup>23</sup> See Barak, *loc. cit. supra*, at 126-27; Barak, *The Judge in a Democracy*, Chap. 15 (2006).

<sup>24</sup> See Barak, *loc. cit. supra*, at 51-53, 57, 59, 73, 86-88; Barak, *The Judge in a Democracy* 102-08, 273 (2006); and a paper by Beverley McLachlin C.J.C., in Sheard (ed.), *A Matter of Judgment* 1, esp. at 14, 21-23 (Judic. Comm. of N.S.W. 2003).

<sup>25</sup> See *Michael, Abrahams, Sons & Co. v. Buckley* [1924] 1 K.B. 903, 907; Barak, *loc. cit. supra*, at 30-31.

Its geographical spread has slowed to a crawl. A short delay in the 1850s to find a better draftsman might have made a huge difference to the world.

Therefore, a judgment intended to change the law should be planned and written carefully. It should answer specific questions and lay down specific rules of law (even if these are novel and will have a big impact).

Some judges are tempted to write a general legal treatise in the judgment, or indulge in truly *obiter* comments. But that invites confusion, alarm, and deliberate misinterpretation of the judgment. Such judgments puzzle solicitors trying to advise clients.

Why do judges sometimes write judgments which are too broad, vague, or inaccurate at the borders? I am not at all sure, but here are some factors which may contribute:

1. haste or impatience
2. carelessness, lack of foresight, or imagination
3. failure to see the links between law and social or economic issues
4. fear that any compromise will devour or stall the reform
5. desire to make a big mark in history (or show off)<sup>26</sup>
6. desire to conceal some of the possible implications of the reform
7. delegation of the writing to a young law clerk
8. forgetting law making and concentrating on justice in the individual case at hand.<sup>27</sup>

Furthermore, accuracy, clarity, and foresight become more and more difficult as the statement grows broader. If two partly opposing rules of law (such as one old and one new) are carefully planned and constructed, they can be made to fit together with a recognizable boundary, especially if one rule is built in stages. If one roughly sketches both on the back of an old envelope with a thick crayon and quickly erects them in an afternoon, they will overlap and block each other (and the light). Impatient people will soon demolish one (or both). One will have achieved nothing. It takes accurate social and other data or evidence to create broad new rules.<sup>28</sup>

Pathologists only see corpses. They never examine live people. And most of the cadavers which they see are unhealthy. And officials rarely order a *post mortem* in an obvious case. Much of what pathologists see are unusual or puzzling cases.

There is some analogy with Courts of Appeal. The routine house sale or even dismissed employee will rarely if ever come to an appellate judge's notice. Appellate judges tend to forget that, and to build rules based on individual exotic cases which they hear. The remotest coincidence or most bizarre happening may be memorably litigated all the way to Ottawa. (We all learned in law school the rule when two careless hunters fire simultaneously and kill the same victim.) Judges may even create a new rule designed to prevent a recurrence of one very isolated case. Thereafter, day-to-day practice will incorporate precautions against that one bizarre past event.

<sup>26</sup> See Fowler's *Modern Eng. Usage* 498 (2d ed. 1965); Goldfarb & Raymond, *Clear Understandings* 156 (Random House N.Y. 1982, repr. Goldenray 1988).

<sup>27</sup> On which see Chap. 3, Part A.

<sup>28</sup> See Barak, *loc. cit. supra*, at 32-33.

A medical adage says, "If you hear hoofbeats, suspect horses, not zebras." Appellate judges should be careful not to write judgments which require zebra-proof stable doors.

Marx said that thesis + antithesis = synthesis. Among calm imaginative people of good will, that is often so. And sometimes war or other conflict exhausts everyone, so that ultimately stasis supervenes. However, very often, quick thesis + antithesis = retreat. One ends without the synthesis, and often without the thesis either.

Any significant change makes many people nervous, especially in modern Canada. People should be comforted and led to change by easy reassuring individual steps. And they should be made to feel that they have a say, and are not merely tied to the railroad tracks.

Psychologists tell us that what people perceive as moving "too fast" is often not particularly speedy. It simply omits some steps.

Most areas of Canadian law have changed a lot in the last 60 years. Yet most of those changes do not alarm the public at all. In a democracy, there are always two ways to reform law: a professional diplomatic way, and an amateurish way. The former will proceed more successfully than the latter, 19 times out of 20.

## F. AFTERWORD

Perhaps this chapter is about judicial leadership. If so, here are a few postulates to consider.

1. Judicial leadership is not the same as novelty.
2. Judicial leadership is not the same as one particular social or political philosophy.
3. Judicial leadership is not the same as political leadership, nor the same as academic leadership.
4. Judicial leadership is not the same as What I Write; timidity or stuffiness is not the same as What You Write.

## CHAPTER 3 – JUSTICE BETWEEN PARTIES

*“A great brain and a huge organization have been turned to the extinction of one man. It is crushing the nut with the triphammer – an absurd extravagance of energy . . .”*

– *The Valley of Fear*, Epilogue

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This chapter is about an appeal court correcting errors by the court appealed from. It discusses when a Court of Appeal should intervene or not. Above all, it discusses right and wrong ways to do that.

### A. OVER-LEGISLATING

First, we must inspect the biggest danger in modern appellate judgments. An invented example will illustrate.

A poor but honest plaintiff, a widower with three children, has tried for a number of years to bring to trial his meritorious and reasonable suit for wrongful death and distressing personal injury. The negligent defendant is a furnace installer. His lawyer and he have been slow, uncooperative, even obstructive. At last, the poor widower receives the furnace man’s long-delayed answer to various kinds of discovery. On every sensitive point, he claims privilege. The furnace man’s affidavit is vague and conclusory, and swears to improbable facts. The widower needs to get the missing evidence (discovery) to win at trial. His lawyer does not cross-examine on the furnace man’s affidavit, but moves for production of the evidence withheld. A master and a judge order its production. The slippery furnace man appeals, and then stalls off the appeal for a year or two. The three judges who hear the appeal become very sympathetic to the poor widower, and highly suspicious of the devious furnace man. They decide to dismiss the appeal and uphold production.

One of the judges agrees to write the first draft of the judgment. The furnace man raised many factual arguments, and his affidavit is uncontradicted and not cross-examined on. The factual issues are intricate, some of the evidence is bulky yet inconclusive, and some of the furnace man’s factual arguments are hard to rebut. Will the judge have to find for the slippery furnace man? Or write an intricate factual judgment which may violate the standard of factual review on appeal?

The poor widower’s factum suggests a legal shortcut. One of the court’s articling students finds even more authority to the same effect. The judge drafts a judgment following those cases, and creating a new exception to the law of privilege. He is pleased that this new law makes the slippery furnace man’s factual arguments academic. The other two judges like the judgment, sign it, and file it. The poor injured widower gets production, a trial date, and then a handsome settlement offer. The three judges believe they have done justice.

Four years later, the Court of Appeal hears another appeal. A police search has seized very confidential recent witness statements, client instructions, and investigation notes, from an accused's lawyer. His obvious claims of privilege have been brushed aside. The provincial court judge's reasons are oral and succinct. She says that the seizure may not be fair, even hints that the law is wrong. But she outlines a broad, illogical, and unconvincing, legal exception to the doctrine of privilege. She even cites a legal precedent for the exception. Though the transcript misspells the name of the case, it is readily found. This judge has accurately paraphrased its *ratio decidendi*.

The panel hearing the new appeal are about to quash this illogical and unjust legal proposition. But to their horror, they see that the case cited is *Poor Widower v. Slippery Furnace Installer*, and They Decided It.

What went wrong?

Judges are human, and want to do justice in each individual lawsuit. Judges in trial courts look at what fact findings are reasonably open on this evidence, and inventory many legal rules. They do all that so as to see whether they can combine a proper fact-finding with an established rule of law and so do justice in the case at hand. If they can, they do. If they cannot, they probably do not.

An appellate judge faces a further temptation rarely open at trial. The appellate judge can make new law which will do justice in this case, between these two litigants. If no contrary decision of the Supreme Court of Canada or the same Court of Appeal is cited, any plausible-sounding rule of law will have that effect. Then precise fact-findings often become easy or unnecessary. Moral indignation at an individual injustice also tempts appellate judges to enunciate broad propositions.<sup>29</sup> And counsel often tend to emphasize legal rather than factual issues. That is partly because of the standard of review on appeal, partly because a lawyer who lost at trial is often more interested in personal vindication than in victory for the client.<sup>30</sup>

The three appellate judges in *Poor Widower v. Slippery Furnace Installer* stopped analyzing when they found one possible way to help the poor widower. They did not try to imagine how the legal solution which they wanted to invent or bless for that case would work in future in a vast spectrum of different fact situations. They did not even ask themselves whether they could reasonably answer that question. If the new rule of law is wide enough, judges probably cannot answer that question.

This appellate vice is common. Long ago, a respected American textwriter politely showed that the American Supreme Court was addicted to it.<sup>31</sup>

A daily observer of Mathew L.J. in the 1890s gives this astute description of that much better appellate judge:

"Mathew . . . could not bear to see injustice done even under the guise of law. He was a first-class lawyer but he had the humanest of outlooks and deep sympathy for the underdog. His first aim was always to get at the merits of a case. Then and only then did he apply the law. He was too good a lawyer to run counter to the law, knowing – no one better – that hard cases make bad law. If all else failed and a legal obstacle stood in the way of a decision on the merits, he would force a settlement and he was strong enough to do it."<sup>32</sup>

<sup>29</sup> See Posner, *Cardozo: A Study in Reputation* 104 (1990).

<sup>30</sup> See Posner, *Economic Analysis of Law* 575 (6th ed. 2003).

<sup>31</sup> See 1 Davis, *Admin. Law Treatise* v (1958).

<sup>32</sup> Alexander, Gilchrist, *After Court Hours* 168 (1950). Cf. *Ex p. Long* (1854) 24 L.T. (o.s.) 73.



Sometimes it takes great delicacy, learning, research, and judgment, to right a wrong without confusing or perverting the law. And occasionally it is impossible.

A court legislates when it states a new proposition of law; a Court of Appeal's legal propositions bind itself, and all other courts in its province or territory. So any statement of law by a Court of Appeal entails some danger; its propositions of law can be very dangerous. And certainly very hard to get rid of.

Cabinet Ministers, M.P.s and M.L.A.s know that their Parliament or Legislature does little besides make laws. But Justices of Appeal sometimes forget that they legislate too, and revert to more innocent habits of thought formed when they were trial judges, or even lawyers.

Hard cases are not the only cases which make bad law. Sometimes excitement, publicity, or even subtle stage setting by eminent counsel, can create an unarticulated feeling by the judges that ordinary rules do not apply this time.

"Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."<sup>33</sup>

The three judges hearing the appeal of *Poor Widower v. Slippery Furnace Installer* had a problem in evidence or facts. They hated to tell the widower that his lawyer had neither cross-examined nor led any evidence, and that they could not disbelieve uncontradicted sworn evidence by the slippery furnace man. Annoyed by past delay, they also shunned ordering a new hearing. So they fastened on some undisputed fact which made the furnace man lose even more sympathy, and followed glib shallowly-reasoned precedents by two or three isolated past motions court judges. They thus erected a large new rule of law on one sympathetic fact.

The appellate judges did not even ask themselves whether that one fact, sympathetic in the widower's case, would be sympathetic (or even relevant) in all other cases. Still less did they consider whether it would adequately offset all the reasons that we have a doctrine of privilege, especially in a whole array of other future situations.

At best, these three judges made law too broad or vague: too broad or vague an exception to the doctrine of privilege. But it might be worse than over-broad: maybe it is unsound or unworkable, and should never have been invented in any form. The three judges have woven a net which now tangles their Court and everyone in that province. If judges in other provinces are incautious, or have sympathetic cases, the disease will spread. The law of privilege may become contradictory and unpredictable. It will be dangerous to confide in one's lawyer.

That fate threatens any judge who rationalizes his or her decision too quickly and glibly, however just the result may seem in this case.

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<sup>33</sup> Holmes J. (dissenting) in *Northern Securs. Co. v. U.S.* (1903) 193 U.S. 197, 400-01.

The case of *Poor Widower v. Slippery Furnace Installer* is fictitious, but typical. One could find a similar example in many recent volumes of every law report in Canada (though maybe not quite so many from the Supreme Court of Canada, which is more attuned to the general than the particular).<sup>34</sup>

Solving an injustice in one case by inventing a whole new wide legal doctrine is like burning down a hotel to rid it of mice: certainly expensive, likely to injure people, and totally unnecessary. A 69¢ mouse trap would work just as well.

Lord Denning wove nets and later caught himself in them, more than once. For example, in 1949 he held that there is a well-established rule of practice, enforceable by the Court of Appeal, that a newspaper or any periodical publication cannot be compelled on discovery (interrogatories) to disclose its sources, except in special circumstances.<sup>35</sup> But 14 years later, he held that journalists have no privilege to protect their sources, and that the courts' discretion not to inquire into newspaper sources is confined to libel suits, and is not a real rule. He said there were only three "common law" cases on point, and listed them, never mentioning his own *Georgius* Court of Appeal decision. He said that the authorities "are all one way" and ordered a journalist to disclose sources.<sup>36</sup> In the 1949 suit, the Oxford University Press was a very respectable publisher of a very respectable directory of the clergy, and the plaintiff there wanted the names of "sources" to sue those clergy for a technical libel. On the other hand, in 1963, Mulholland's sources and news story revealed a grave threat to national security, and were about other conduct which offended Lord Denning's moral sensibilities.

Here is another Denning example. English legislation protecting commercial tenancies forbade the court to renew the lease if "the landlord reasonably requires possession in order that the premises... may be demolished or reconstructed." First, Denning L.J. joined in a Court of Appeal judgment refusing to apply that, and imposing a new lease, because the demolition was not to be immediate, nor the primary purpose.<sup>37</sup> The judgment of Denning L.J. said (in two lines) that "demolition or reconstruction must be the immediate and primary purpose."<sup>38</sup> Then in another case, he reached the same conclusion, stressing how the landlord's proposed rebuilding was not drastic. He cited the *Smart* decision, expressly saying that its *ratio* was the need for reconstruction as the landlord's "primary purpose." He even italicized those two quoted words. He held that reconstruction was not the primary purpose in this second case. In the alternative, he held that it had to be a substantial part of the premises.<sup>39</sup>

<sup>34</sup> *Tilden Rent-a-Car Co. v. Clendenning* (1978) 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.). It is arguable that one majority judgment offers an example of subjugating long-term general law for short-term results in one case. A frequent traveller often rented cars from the same big rental company, but never bothered to read the contracts which he signed. He rented another car from them, consumed alcohol, drove the car into a post and damaged it, took a breathalyzer test, was charged with impaired driving, pled guilty, and was convicted. A box on the face of the car rental contract plainly said that if he paid a small additional fee, he would not be liable for car damage unless he violated the rental contract (or two other events). He paid it. The back of the contract said in small type that no one who consumed any alcohol was to operate the car. There was somewhat vague evidence of possible misrepresentation by employees as to what the small additional fee purchased. The majority found the renter a very sympathetic person, and believed that his guilty plea and conviction were false. They held the clause about alcohol to be so strange that no one could expect it in a car rental contract. They could have held for the renter on any of several factual grounds; after all, the trial judge had done so. But instead, the majority used one or two dissenting judgments from elsewhere 60 years before, to enunciate a new rule of law: that a signed contract does not bind one if the other party sees that one did not read it, and if a clause in it is stringent or unusual. They did not cite any of the thousands of decisions to the contrary, many of them binding. To the extent that this case is remembered, it would subvert virtually all signed contracts.

<sup>35</sup> *Georgius v. Oxford Univ. Press* [1949] 1 K.B. 729, 1 All E.R. 342 (C.A.).

<sup>36</sup> *A.-G. v. Mulholland* [1963] 2 Q.B. 477, 1 All E.R. 767, 770-72. And in 1976 he took a third tack when someone wished the court to order production of a TV network's unbroadcast news film: *Senior v. Holdsworth* [1976] Q.B. 23, 33, 34-5, [1975] 2 All E.R. 1009.

<sup>37</sup> The statute did not mention those factors.

<sup>38</sup> *J.W. Smart etc. v. Hinckley etc. Bldg. Socy.* [1952] 2 All E.R. 846, 850 (C.A.).

<sup>39</sup> *Atkinson v. Jettison* [1955] 3 All E.R. 340, 342 (C.A.).

But then along came a third case. This time, Lord Denning sympathized with the landlord, and the premises were near the end of their economic life. So he held for the landlord. He said that *Atkinson* had been decided because of that landlord's recent purchase, and coolly stated that that precedent decided no more. "I think that it is going too far to say that the work of reconstruction must be the primary purpose." He distinguished *Smart v. Hinckley*<sup>40</sup> as having been decided under earlier legislation (though the wording is similar).<sup>41</sup>

Pity an English solicitor trying to advise a client on either of those topics. Or a client who had relied on the latest Court of Appeal decision and arranged his business to fit it.

One could multiply such examples.

At one time, many appeal courts tended to the opposite extreme. They decided many cases briefly, with few reasons and almost no law. Any propositions of law which they mentioned were narrow and guarded, or well-settled. The law hardly developed, indeed ossified in many areas. The courts stated no principles about some topics, and the law reports furnished but a wilderness of single instances. Courts of Appeal gave but the dots. Textbooks had to furnish numbers and try to connect the dots with lines. That avoided the over-legislating or snare danger, but at too high a cost.

Courts of Appeal rarely do that now, and we criticize such timid older appellate decisions. Society and technology develop, we think that we learn more about human behavior, and we clearly need flexible law capable of improvement. We have many more trial judges, and so need more guidance and uniformity. Only Courts of Appeal give that. How can Courts of Appeal sail between the rock and the whirlpool? How can they let the law develop, but not weave ill-considered snares for future courts and parties? To answer that question, we must examine some of the causes of bad-law snares.

1. Trying too hard to produce a just or sympathetic result in this one appeal. Sometimes that is truly impossible, especially when the problem lies in lack of evidence, lack of resources, or procedural failings. Hard cases make bad law.
2. The tendency to look on each appeal as a legal question, not a factual one. Law students, inexperienced lawyers, and some academic writers, see legal issues everywhere. But experienced judges know that usually careful attention to the facts answers a suit, and the law then easily takes care of itself. Therefore, an appellate judge must not let counsel or the researches of court law clerks or staff lawyers dictate the issues.
3. Standards of review. These very often exclude Courts of Appeal from a meaningful role in facts or procedure, tempting appellate judges to reach results by manipulating the law.<sup>42</sup>
4. Rushing to decision too quickly, without thinking things through or calling on enough imagination and experience about what may occur in future.
5. Not enough experience of family life, commerce, professions, litigation, government, and other endeavors, to know what rules will be workable and what ones will cause hardship or waste. Not enough knowledge of the context in which people live.
6. Not enough research, and reliance upon inadequate legal precedents and discussion.<sup>43</sup>

<sup>40</sup> *Supra*.

<sup>41</sup> *Fisher v. Taylor's Furnishing Stores* [1956] 2 Q.B. 78, 2 All E.R. 78, 80 (C.A.).

<sup>42</sup> See further Parts C and D below.

<sup>43</sup> See Chap. 16 on specious reasoning, and incomplete authority.

7. Lack of sensitivity to this problem of over-legislating.
8. A grandiose desire to rise above petty factual questions and instead stand on Mt. Olympus hurling legal thunderbolts at future generations; indeed, showing off.

Merely listing the eight causes of overlegislating and snares suggests some precautions for almost all the eight causes.<sup>44</sup> I suggest another precaution.

The author should circulate any draft judgment which will likely make new law, to every judge on the whole appeal court, and seek comments. The author should also summarize briefly any general propositions of law in it, as though writing a brief headnote. Everyone who sees the draft should reflect and comment on that brief summary.

Judges who were not on the panel should try hard to ignore who is to win or lose that appeal, and whether or not they like that result. That is the panel's business. Instead, they should concentrate on three things: whether the new proposition of law is clear in the draft, whether its scope is defined, and how it will work in future very different situations. Can it cause harm? Is it too broad or inflexible? Is it likely to be counterproductive? Will it be unfair in other situations?

Appellate judges who do not circulate drafts outside each panel run a serious risk of tripping each other up.

## B. WRITTEN REASONING

No conclusion is completely reliable until one drafts something in writing. The discipline of writing out a step-by-step set of reasons to support a tentative conclusion is almost mandatory. If one has trouble writing a logical flow of detailed reasons for a desired result, then that result is suspect. One's earlier thoughts and oral discussions may have skipped a step, or contained a flaw.

Conversely, working out the reasoning on paper adds confidence. Often it stimulates the mind and suggests additional reasons to support the tentative conclusion.<sup>45</sup>

The reasoning thus written will sometimes serve as a first draft of a judgment. But often it contains too many false steps, detours, and tangents. Then it is better and faster to write a new draft inspired by some of that reasoning, but arranged differently.

## C. STANDARDS OF REVIEW

### 1. Introduction

The topic here is when an appeal court can upset the decisions of the court or tribunal being appealed. To be more specific, can the appeal court simply substitute its decision on the merits? Or must it accord some elbow room ("deference") to the first judge or tribunal?

<sup>44</sup> See also Megarry (1978) 16 Alta. L. Rev. 406, 411 ff.

<sup>45</sup> See Traynor (1957) 24 U. Chi. L. Rev. 211, 218.

## 2. Importance and Rationale

Canadians now see standard of review as very important. Americans have long recognized that. A high proportion of recent Canadian appellate decisions conclude that any error in the impugned decision was not bad enough (or of the right type) to permit the appeal court to interfere. Sometimes the appellate judges even hint that their own views are contrary.

However, appellate deference is like a reasonable doubt: though everyone pays it lip service, some people have trouble believing in it, let alone practising it.

Appellate judges must exercise enough moral restraint and intellectual honesty to respect the standard of review. Otherwise it will become a mere façade or game. Standard of review will be invoked to dismiss an appeal, but not even mentioned when the appeal court wishes to allow the appeal. One can find occasional examples (or pairs of examples) of that sort of thing in the law reports. Two things can help an appellate judge avoid such temptations.

First, one must appreciate the true rationale for appellate deference. The main reason is **not** that a trial judge who sees and hears the parties and other witnesses has some advantages over the Court of Appeal, even though that is usually true. The main reason is that rehearing and re-deciding the same question in a second court expends a great deal of precious time, money, and certainty. Therefore, the appeal is a detriment except in a clear and extreme case. Hence the rule that the reversible error must be simple and clearly demonstrable, or one of law or principle.

Second, one must keep constantly in mind the distinction between justice in the individual case, and making law. In particular, an appellate judge has an advantage only in making law or policy, or creating uniformity of awards.

No lengthy bibliography is necessary. The seminal Canadian book is by Kerans.<sup>46</sup> The book is mandatory reading for appellate judges. The leading Supreme Court of Canada decision is *Housen v. Nikolaisen*.<sup>47</sup> The Supreme Court also touches on the same subject several times each year.

## 3. Problems of Second Appeals

Logic alone will not readily or infallibly derive the rules necessary for a second appeal, e.g. from a trial court through an intermediate court of appeal to a final appellate court. Some of the rules in this area sound reasonable, even inevitable, until one reads the contrary (and often older) decisions on the topic.

For example, the Judicial Committee of the Privy Council and the House of Lords have laid down rules which seem inconsistent with those given more recently by the Supreme Court of Canada. From time to time the Privy Council has said that it owes deference to a decision of an (intermediate) court of appeal. And it often held that it owed great deference to “concurrent fact findings”; i.e. to agreement by the trial court and the intermediate court of appeal. The Supreme Court of Canada’s modern decisions on precedent suggest that the final court of appeal owes no deference whatever to the intermediate court of appeal, which adds no weight to a trial verdict by agreeing with it. Indeed, an important role of the Supreme Court of Canada is to police the standard of review used by the intermediate court, and to reverse its decision if it falls outside that standard. Such a rule is not inevitable, because an error as to standard of review by the intermediate appeal court may technically be an error of law, but it is not an error of general law. To correct that error is simple error-correction (or doing justice) between the parties, and is not law making.

<sup>46</sup> *Standards of Review Employed by Appellate Courts* (Juriliber, 1994). The second edition was published in 2006.

<sup>47</sup> [2002] 2 S.C.R. 235, 286 N.R. 1, 2002 SCC 33.

Often, these observations are only of academic or historical interest. When the chain of appeal is from a superior court through the local court of appeal to the Supreme Court of Canada, the rules for appellate review are as the Supreme Court of Canada now says, not as they or the Privy Council said 60 or 160 years ago.

However, sometimes a provincial appeal court (or other statutory appeal tribunal) is a second appellate court. For example, the first appeal lies from a summary conviction court or other provincial court to a superior court judge, and then a second appeal lies to the provincial court of appeal. Or a statute may create a tribunal, and an appellate tribunal, and then an appeal to the superior court or to the provincial court of appeal. Then it may not be so easy to say whether the standard-of-review rules are those governing the Supreme Court of Canada, or the older Privy Council decisions. For one thing, the Supreme Court of Canada is final, and it exists primarily to make law. That is not so clear when a provincial court of appeal is the second level of appeal.

## D. FACTUAL APPEALS

### 1. What is Palpable and Overriding Error

“Overriding” error of fact means that the error has a big effect on the result, and is not a mere tangent or detail.

What is “palpable error” of fact? It is not a merely debatable weighing of evidence. The following are some examples of palpable error.

#### *(a) Skipped Factual Issue*

For example, a trial judge has found arson because there was motive and opportunity. The judge does not say whether anyone else had opportunity, though there was some evidence that they did. So that issue should have been a live issue, and was not academic. Only exclusiveness transforms the conclusion Could Have Done It or May Have Done It, into Must Have Done It (because no one else could have). So to find guilt from opportunity without exclusivity is plain error of fact.

(Sometimes, of course, the trial judge fails to make a fact finding because he or she misunderstands the law and thinks the missing facts are irrelevant. That is an easy ground for relief, because it is a legal error. It is not quite the topic before us now.)

#### *(b) Contradictory Findings*

A trial judge may structure a judgment in a way which makes it easy to contradict himself or herself. The most common way is to make a string of fact findings (or apparent fact findings) without first analyzing the issues. The fact findings sound much more like a narrative than resolution of disputes.

Another method which permits self-contradiction is to find facts clumped around different topics, when one fact turns up in more than one clump. So the trial judge covers the same factual issue twice, either for two different reasons, or no special reason. By chance, two findings about the same fact are more or less opposite.

If that fact affects the result, that is palpable and overriding error.

**(c) No Evidence at All**

Occasionally a trial judge makes an express or implied fact finding, but heard no evidence which could support it. The question here is not the weight or credibility of the evidence; it is whether there is any at all. Or in any event, any beyond a slight hint.

Appellants allege this ground of appeal fairly often, but after a full trial, usually the respondent can point to some evidence in the appeal book which could support the impugned fact finding. If the respondent does not, that means a lot of work for the Court of Appeal. Someone there must read through the whole appeal book to see if there is any such evidence. Fairly often there is; the respondent just did not look hard enough.

If the appeal is from a motion with affidavits, and no live evidence, this “no evidence” argument often succeeds. Affidavits are often brief, even skimpy.

Occasionally an estoppel, a presumption, or a permissible factual inference bypasses the missing evidence. For example, if the preferred evidence to measure damages is missing, the court may use another measure then and presume that the loss would be the same.

**(d) Evidence Misquoted**

Trial judges misquote evidence more often than one would expect. Maybe that is because we give Courts of Appeal verbatim transcripts, but the trier of fact rarely demands that tool. The flaw becomes evident when the trial judge purports to recite, quote, or summarize the evidence, does so inaccurately, and makes the inaccurate statement his or her fact finding.

For example, the trial judge finds that the pump station was manned at the time of the explosion. But the evidence only says that it was manned at those hours on weekdays, and this was a weekend. Or the evidence says that the control station was manned then, but other evidence shows that the pump station and the control station are two different places. Or the only witness said that he saw the pump station manned each time that he visited, but later admitted that he did not visit on the day in question.

Of course many misquotations of evidence are not serious. They are palpable, but not overriding. American courts call that “harmless error.”

**(e) Logical Errors**

If the trial judge drew a significant inference of fact from some pieces of evidence, but the inference does not flow logically from those pieces, and there is no other evidence of that fact, that is palpable and overriding error.<sup>48</sup>

Making time run backwards, so that causes are later than effects, is another logical error. So is having some person or thing in two places at once. Errors of arithmetic, or double counting, also suffice.<sup>49</sup>

<sup>48</sup> It could also be legal error in some circumstances, but that does not detract from the Court of Appeal's ability to reverse because of it.

<sup>49</sup> See further Chap. 16, Part I.2.

## 2. How to Research and Analyze the Evidence

If counsel do not offer the Court of Appeal all the evidence-checking, arrangement, and analysis, which the issues require, the court can spend a lot of time and effort on that. The proper grounds of appeal in Part D.1 above often require the Court of Appeal to check all the evidence.

The Court of Appeal must then comb the appeal books, at least until it finds certain things. There is usually no shortcut to avoid that. But the court can at least avoid duplicating its work. The main way to avoid duplication is to postpone reading evidence until one knows all the issues and has a precise list of tasks or objectives. So reading much evidence before oral argument can be inefficient.

If the search of the record is for several topics and the evidence seems intricate, or calculation or other refinement is necessary, then more preparation is needed.

Will whoever searches the evidence later have to do more work with his or her notes, even to rearrange them? If so, he or she may later overlook or misunderstand an item in those notes. Or he or she will have to have the notes retyped or resorted, and run the risk of copying or sorting errors. Paraphrasing evidence can be very delicate work, and a paraphrase of a paraphrase often misleads. The researcher will then have to go back and look up ambiguous notes in the appeal book before resorting.

So it is risky and inefficient to do the work in two stages. It is better to plan what final product one wants, and arrange the search results that way the first time. Whoever is going to search the record should first devise a scheme for sorting and housing the selected cites to be found.

In such situations, the minimum preparation is to make headings. Each heading should be on a separate pad of paper, or in one's computer. Then each relevant piece of evidence should be very briefly summarized and cited, on the relevant pad or pads or under the right computer headings. There should be a final pad or heading to note any large chunks of important evidence which do not fit in any of the other headings. That is just insurance against another topic later emerging.

A more focussed method is to prepare a simple chart, and cite in it the pieces of appeal book evidence found. The type of chart depends on the facts and issues. Maybe a table of company officials and duties and term of office. Or a sketch map of the scene, with references to places and routes or electric lines. Or a chart of related companies and their shareholdings, and who was involved in each.

Often the most useful type of chart is a timeline (chronological list of events). The items could be events, contracts, important correspondence, and meetings. If the appeal is about time limits, delay, or priority, a timeline is critical. A timeline organizes events in the order that they occurred. One side may strongly hint at some causal connection between A and B. But if B occurred before A, A cannot have caused B. That is an eternal and universal truth.

A timeline helps in other ways too. It will give a framework to index and organize a lot of evidence, especially documents (exhibits). Unlike a topical index, it selects objective features, and so needs little background knowledge to compile. Almost every event or paper unequivocally belongs in a single spot (date). Mistaken counting becomes evident. Relations between two documents or events become noticeable.

Even an alphabetical index based on objective facts (such as names of people or places) is better than no arrangement at all.



Sometimes one ends by having to make an analysis of the evidence on some plan which was not foreseeable when one began. Even then, one's earlier superseded plan or index will usually obviate any need later to go back to the appeal books and reread them, save maybe for a page or two.

### 3. Trial Judge's Failure to Find Facts

Usually the law, the conflicts in the evidence, or the arguments of counsel made some fact findings necessary to a decision. So the trial judge had a duty to find those facts. If he or she did not, that is a ground to allow the appeal. It may well be ground for a new trial, unless there is evidence on the point, and the parties want the Court of Appeal to find the fact itself, or the evidence permits only one answer on that question.

One might wonder how any trial judge could fail to find a necessary fact. But sometimes trial argument was somewhat vague or confusing, and the right authorities were not cited. And sometimes the trial judge's reasons are ambiguous, vague, or lengthy. They may leave the impression that there is a certain fact finding; maybe the judge even intended to make it. But careful reading will show that there is not one on the precise point.

See also Part D.1(a) above.

We have already seen problems with writing trial reasons for decision in two distinct parts: facts (or narrative), and then law.<sup>50</sup> That can also lead to missing fact findings. Especially if the reasons are written with law after facts, as dictated by many fixed formats. It is often better to integrate facts and law.

If they are not integrated, their key elements should be restated and applied to each other, issue by issue. For example, the discussion of law could end with a list of factual criteria which the law makes relevant or controlling. And the trial judge should then apply the fact findings to those criteria to get the result.

Research by articling students usually recites the law well; but students are often weaker with facts, and rarely want to apply law to facts of any complexity. So a trial judge's reasons drafted by a student (or by the trial judge from a student memo) may well not find and apply enough facts.

(And of course an entirely missed issue<sup>51</sup> can produce the same effect.)

## E. NEW TRIALS

Discussions of the standard of review often subtly suggest that there are only two grounds for reversing a decision: substantive legal errors, or (palpable) substantive factual errors. But that is not true. Procedural problems can also found a successful appeal and lead to a new trial. That is subject to two restrictions: a deferential standard of review, and the need that the errors have produced substantial wrong or a miscarriage of justice.

Here are some examples of such mishaps in the trial court which can lead to a new hearing.

<sup>50</sup> Part D.1(b) above.

<sup>51</sup> Discussed above in Part 1(a).

### 1. Unfair Surprise

The first rule of natural justice is to tell each party the case against him or her, and offer a chance to rebut it. That applies to courts too, not just administrative tribunals. Therefore, if the court under appeal based its decision on a topic or evidence which the losing party either had no reasonable basis to anticipate, or was barred from rebutting, the Court of Appeal should upset the decision.

How can that happen in a court? The trial judge may have proceeded upon an unpleaded issue, or let the winner amend its pleadings to raise a new issue at the last moment. Even if the issues were pleaded early, the winner may have led surprising new evidence which the losing party could neither have anticipated nor quickly rebutted. For example, maybe the new evidence was important but contrary to information which the winner had previously given through discovery.

### 2. Unequal Procedure

Even where two alternate procedures are arguable or reasonable, the trial judge should apply them uniformly. If he or she repeatedly let the winning party do something (such as use leading questions during evidence in chief) but rigorously barred the losing party from doing so, that also can found an appeal.

### 3. Breach of Procedural Rules

There are hundreds of procedural rules for running a suit. Some are codified in legislation such as Rules of Court. But many others are not, especially those which govern a trial.<sup>52</sup> Which party can make an opening statement, and when, which can lead evidence first, who can cross-examine on what, and who can reopen its case or lead rebuttal evidence, are often regulated by judge-made principles.

Important breaches of those rules can lead to a new trial, in a civil or a criminal case.

Counsel for appellants often concede that no one flaw in the trial was bad enough to reverse it, but argue that the “cumulative effect” is. Often that is a weak argument. But if the appellant can show that the several breaches all impaired the same step, or combined to keep out important evidence or to bar the same important right, then the cumulative effect can be very real. The error is operative, and the appeal succeeds.

### 4. Misconduct by One Party

Not all litigants and counsel are fair and honest. Hunger for money, the pressure of a big client on a small lawyer, stress and distrust among parties or counsel, or psychological kinks, can lead to very dishonest and malicious behavior. No set of Rules of Court or Code of Civil Procedure can list or forbid all such behavior.

In modern times, Canadian courts have seen burglary of a court reporter’s home to steal the shorthand, many forgeries of court orders, forgery of opponents’ supposed consents on proposed orders, a vast array of oral lies to motions or trial judges, and doctored papers admitted as trial exhibits. Not to mention old-fashioned perjury in affidavits and on the witness stand. One step short of that is an affidavit whose contents are not firsthand knowledge, despite what it alleges.

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<sup>52</sup> See Ferguson, *Ontario Courtroom Procedure 2007* (2007).

Some parties more or less tell the truth at trial, but commit perjury on Examination for Discovery. Some withhold papers or other information during discovery and then spring them at trial. Others destroy or hide evidence, including physical objects.

If any such conduct affected the result of the suit or motion in question, it could well be the ground for an appeal and a new hearing, maybe under the ancient maxim that fraud dissolves all.<sup>53</sup>

Of course operative misconduct is not confined to dishonesty or crime. Careless loss of evidence or careless failure to look for evidence and disclose it through discovery, could also lead to remedies on appeal. So could very unreasonable or bullying tactics at trial. Deterring a witness from testifying for the other side, or improperly coaching a witness, could suffice.

Unduly inflammatory addresses to a jury are a recognized ground of appeal. So is revealing to the jury important or very prejudicial information which is not in evidence.

Some of these flaws will have been pointed out to the trial judge, but not sufficiently remedied by him or her. Some will be unknown to the trial judge. Then a motion for new evidence may be necessary to put the information before the Court of Appeal.

## 5. Mistaken Decisions about Evidence

A trial judge's decision whether or not to admit evidence is best dealt with here. Admitting inadmissible evidence, or refusing to admit admissible evidence, is always a ground of appeal. That includes what questions the trial judge lets counsel ask, and when the judge allows cross-examination.

Of course some error is small or harmless. If the decision on admission had little effect on the outcome or general fairness of the trial, the Court of Appeal will not order a new trial; costs could be a remedy. If inadmissible evidence was admitted but other admissible evidence proved the same facts, then the error was harmless.

Failure of the losing party to object to the flaw at trial might bar a civil appeal, but less often a criminal appeal. And such silence does not always bar a civil appeal. An important factor is whether a timely objection would have made a difference. For example, if the appellant did not object to certain questions to a witness at trial, but objects on appeal, could the respondent have got that evidence in some other way? If so, an objection at trial could have led to that, and so the trial result would have been about the same. Then ordering a new trial would be pointless. If the substitute evidence is no longer available, a new trial would be extremely unfair.

## 6. Interference by the Trial Judge

Appellants often allege that the trial judges interject too often, either hamstringing examination of witnesses, or conducting it themselves. That is a ground for a new trial if the trial judge did so to a serious degree. But it is not commonly bad enough to upset. This shades off into bias, which is a fairly common plea, but rarely made out.

## 7. Misdirection of the Jury

As is well known, this is an established ground for a new trial and fairly often made out. Jury charges sometimes deal with a topic two or more times, so it is often useful for an appellate judge to index the topics in the impugned charge, or to comb it more than once.

<sup>53</sup> *Philipson v. Egremont* (1844) 6 Q.B. 587, 605, 115 E.R. 220, 14 L.J.Q.B. 25, 29; *Rogers v. Hadley* (1863) 32 L.J. Ex. 241, 248.

## F. SENTENCE APPEALS

These are largely a Canadian phenomenon. They rarely succeed in the United States, and so are uncommon there. They have come to England only in recent times. Conversely, the standard of review in Canada is now very deferential, so the volume of Canadian sentence appeals may be expected to drop.

Sentencing a particular accused is the topic on which judges are most likely to disagree. It is also an area where sometimes a judge will feel so strongly about the particular case that he or she is willing to make, bend, or ignore legal rules to achieve it. The “overlegislating” mistake outlined in Part A above can easily occur here.

From that danger flow three corollaries. First, tact, care, thought, attention to principle, and standards of review are important. Second, the judges must remind themselves that hard cases make bad law and that Courts of Appeal make law, and a bad precedent is more harmful than an unfair decision.

Third, sentence appeals are problematic occasions for reserved decisions. They can lead to wide publicity and influence for a single result-oriented decision. And input from other judges tends to centre about this one accused and his or her crime, rather than principles.

Sentence appeals create other problems. Usually the Court of Appeal has no power to send a sentencing matter back to the original court to rehear and decide afresh. If the Court of Appeal allows the appeal on any ground, it must fix the proper sentence. If more evidence is needed, the Court of Appeal will have to hear it.<sup>54</sup>

The Supreme Court of Canada has affirmed that the usual tests for receiving new evidence on appeal apply.<sup>55</sup> Yet defence counsel are in the habit of informally tendering all manner of new material on a sentence appeal. The Court of Appeal must be very careful, especially where there is no consent from the Crown.

These are some dangers in sentence dissents.<sup>56</sup>

## G. DAMAGE OR MAINTENANCE APPEALS

There is one suggestion which does not appear on the face of most of the writing about damage or maintenance appeals. Though the standard of review on appeal is deferential, no one says how deferential. The cases use maddeningly vague phrases. How big is the permissible range (or ball park)?

It helps to look at past appellate decisions which have recognized the deferential standard, yet substituted a different number. In damages cases, that look probably suggests that a multiple is necessary. In other words, the Court of Appeal cannot increase a damage award by 60% or even 80%. Unless they should double or treble it, they should not interfere. Conversely, probably at least a 50% reduction would be necessary before a Court of Appeal should interfere.

<sup>54</sup> If that were to be very lengthy or contentious, the Court of Appeal could appoint a special commissioner to hear evidence and make fact findings.

<sup>55</sup> *R. v. Lévesque* [2000] 2 S.C.R. 487, 260 N.R. 165, 191 D.L.R. (4th) 574, 148 C.C.C. (3d) 193.

<sup>56</sup> See Chapter 10, Part E.

## H. JUSTICE VS. COURTESY

Courtesy by appellate judges is important.<sup>57</sup> Usually justice and courtesy can be reconciled, and if there is a polite way to do the right thing, the Court of Appeal should do so.

However, where the two things cannot be reconciled, justice must prevail over courtesy and diplomacy. Some trial judges cause problems by using language too polite and vague when making credibility findings. For example, instead of saying that witness A was not telling the truth, or not believed, the trial judge says that he or she is “not persuaded” by witness A. Counsel on appeal then accuse the trial judge of reversing the onus of proof, and using the wrong standard of proof (especially in a criminal case). Appellate judges can make analogous errors by tiptoeing around the worst aspects of the faulty procedure or judgment in question.

It is not proper for the Court of Appeal merely to make impugned trial rulings afresh, for example. If the standard of review says that the Court of Appeal can intervene only for certain types of error, and those kinds do exist, it must say that it finds them and what they are.

The result of stiff standards of review is that when an appeal meets those standards, there is rarely any tactful way to announce the result. Words like “palpable error” or “unreasonable” or “patently unreasonable” are not flattering. But those are the mandatory standards of appellate review, and so are mandatory topics in appellate reasons. Even synonyms cause doubt. If the Court of Appeal tried to use more diplomatic or vague language, it would invite confusion. Losing counsel would allege that the Court of Appeal had used the wrong standard of review.

Sometimes a mistake was not the trial judge’s fault. One of the counsel may have been supine, even acquiesced. Courts of Appeal are often slow, especially in criminal cases, to bar an appeal because of the appellant’s trial counsel’s error. Even civil appellants sometimes manage to escape their trial counsel’s failings. So the trial judge’s error was often one not objected to, even invited. It is then helpful to say that the trial judge was not to blame. Other errors occur through pure bad luck, or misunderstandings, with no negligence or default by anyone.

Naturally a Court of Appeal cannot dismiss a meritorious appeal to save an innocent trial judge’s feelings, in any circumstances.

## I. MOTIONS TO REHEAR

American litigants often ask an appeal court to reconsider the result in a judgment which it has just pronounced in their lawsuit. Canadian courts now see some such motions. (I am **not** speaking about departing from *stare decisis*, i.e. different cases as precedent.)

There is usually no prescribed procedure for such a motion. Presumably it should be decided by the three judges who have given the judgment in question. One must distinguish two separate questions:

- (a) Should re-argument be allowed?
- (b) Should the Court of Appeal (as a result of it) vary its judgment?

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<sup>57</sup> For reasons discussed in Chap. 7, Part A, and throughout Chap. 8.

However, the argument for the two questions commonly overlaps a great deal. If the motion looks dubious and the applicant seems judgment-proof, security for costs could be ordered.

Usually, the most efficient method is to allow written argument at once on both topics (a) and (b) by the party moving, then written reply by the opposing party. If the court decides that the matter should not go further, it can issue a written decision. If it thinks that the matter should go further (which will be rare), it can either correct its judgment at once, or call for oral argument (or more evidence).

Motions to reconsider have many disadvantages: delay, expense, clouding Supreme Court of Canada appeal times, and difficulty in reassembling the same three-judge panel (especially if they live in different cities).

Such a motion should succeed only if the Court of Appeal finds some plain error in its judgment which affects the result, and if the topic was already before the Court of Appeal. There should either be some important authority overlooked, or a demonstrable simple error, or failure to decide a point argued to the Court of Appeal. It is doubtful that a new topic should be allowed at such a late stage, save in truly exceptional circumstances, and on proper terms and conditions.

The Court of Appeal should dismiss a motion to reconsider where the losing party merely wishes the Court to re-weigh an arguable question which it has already weighed.

A motion to rehear cannot rely upon the first decision's use of an authority which was not cited by counsel, if it was readily findable before initial argument.<sup>58</sup>

Courts of Appeal should discourage motions to reconsider. Usually the motion fails, and often it was not even arguable. Sometimes it was based on considerations which would never support reconsideration. In such cases, the Court of Appeal should point that out plainly, and give the winner heavy costs.

## J. UNARGUED ISSUES

See Chapter 2, Parts D and E.

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<sup>58</sup> *J-Sons v. N.M. Paterson & Sons (#2)*, 2004 MBCA 25, [2004] Man. R. (2d) Uned. 18 (Feb. 19), *leave den.* (2004) 331 N.R. 398 (S.C.C.).

## CHAPTER 4 – APPELLATE JUDGE'S PERSONAL EFFORT

*We had the carriage to ourselves save for an immense litter of papers which Holmes had brought with him. Among them he rummaged and read, with intervals of note-taking and of meditation, until we were past Reading. Then he suddenly rolled them all into a gigantic ball and tossed them up onto the rack.*

*“Have you heard anything of the case?” he asked.*

*“Not a word. . .”*

*“I have just been looking through all the recent papers in order to master the particulars. It seems, from what I gather, to be one of those simple cases which are so extremely difficult.”*

– “The Boscombe Valley Mystery”

### A. WORKLOAD

The size of an appellate judge's task depends largely on the ratio of two things. They are size and the growth of the population and economy which his or her court serves, vis-à-vis the number of available judges.

On most Courts of Appeal, the total amount of work to be done in a year is considerable. It tends more to peaks and valleys than does practising law. At times, an appellate judge has to work more evenings and weekends than some lawyers. At other times, there may be no judicial work to do, and the judge is either looking for work (e.g. trial court work) or teaching, writing, or reading law.

Some things could be done to trim off the peaks of work and fill in the valleys, but they are often undesirable. Putting off writing a judgment until things are slower is dangerous, because the judge may forget his or her ideas. And such postponement usually produces inefficiency, because the judge forgets much of the argument and evidence, and later has to get back up to speed.<sup>59</sup> Therefore, working in peaks and valleys may be a short-term price to pay for a long-term investment in overall speed, better product, and less total work. Besides postponing work delays justice.

<sup>59</sup> See Chapter 5, Part B.1(c).

## B. ACCESSIBILITY

Unlike trial judges, appellate judges do not work autonomously, and the personal contacts needed are even greater after judgment is reserved. Appellate judges also do a great deal of preparation before any oral argument.

Therefore, frequent contact among appellate judges is important. Registry staff, articling students (law clerks) at the courts, staff lawyers, and counsel for litigants also need contact with judges. Face-to-face communication is often the most efficient. It is more likely to produce harmonious cooperation, and prevent hostility or misunderstanding. Phone calls do not do that so well, and e-mail or written memos are even poorer. If that communication becomes slow or over-formal, then delays and misunderstandings will multiply elsewhere. If an appeal court is not too big, and housed in one city, unnecessary formality can be dangerous.

It is necessary that one member of the Court of Appeal be available at all times to hear urgent motions, especially for bail or a stay of action. Most Courts of Appeal set up a rota for that. The Registry should be able to reach that judge by phone at all times, and the judge should be where he or she can come to a motion within an hour or so.<sup>60</sup>

The judges of two Canadian Courts of Appeal are split between two cities. Furthermore, most Canadian appellate courts regularly sit in more than one city, so their judges must be absent from their offices part of the time. And other business will take them away a few more days a year.

Any judge is entitled to a few weeks' uninterrupted holidays a year, and few would begrudge a few more days here or there. Brief or infrequent absences are no problem. If the judge needs freedom from interruptions in order to work, working away from the office for a few days may be a good idea.

But problems can arise if absence from the office is long or frequent. After a few days away, an appellate judge needs to attend and communicate for some consecutive hours at the office. Still more difficult is frequently working from some other location (such as a vacation home or lake cottage), especially if colleagues and the Registry do not know its phone number. Or if it has no phone. A Justice of Appeal who is often unreachable for days at a time makes it difficult for others, however hard he or she might also be working at the same time. Still less should a Justice of Appeal live outside the city designated at the time of appointment.

## C. CASE DODGING

Courts of Appeal work fairly when someone or some system assigns judges to cases randomly. That prevents judges from choosing which litigants they will judge, and follows the analogy of random selection of jurors. Trying to get oneself assigned to a particular case has dangers.

Randomness also evens out the amount and difficulty of the tasks handed to various judges. So appellate judges should be doubly careful to avoid doing anything which looks like dodging work. That includes disqualifying oneself because of slight (remote) conflicts of interest, being too quick to give adjournments, and finding shallow reasons to hold that the Court of Appeal has no jurisdiction to hear and decide the merits.

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<sup>60</sup> Many American federal circuit Courts of Appeal have judges resident and working in cities all over a very large geographic area.



## D. AVOIDING COMPETING TASKS

An appellate judge should avoid appointments, offices, memberships, social activities, or hobbies which cut seriously into regular judicial work. The first way that they can interfere is by making the judge too busy, or sending him or her out of town too often. Assigning judges to hear appeals panels can then get very complex. When a number of judges are away or tied up on a number of weekdays, such assignment becomes almost impossible.

Second, outside activities also interfere by forcing judges to avoid appeals involving the groups to which judges belong. That also makes assigning judges to courtrooms (panels) very hard, especially because conflicts are usually discovered closer to the hearing, long after the list is set. By then, other judges have relied upon the assignments and made other commitments. It would be very unfortunate to adjourn an appeal because of one judge's hobbies.

The problems for the other judges are especially acute if one of their colleagues seems to be involved in half the extracurricular activities in town, and knows everyone prominent in law, the professions, the arts, business, charity, service groups, and academe.

If one judge's connection with the same group has led to disqualifying conflicts in two or three appeals already, it may be time to consider severing the connection. The judge's day job should come first.<sup>61</sup>

## E. ADMINISTRATIVE DUTIES

Administrative duties and committee meetings bore or repel most people. But rarely has a provincial or territorial government given a court a big enough staff or budget that it will do all that administration. One Chief Justice cannot do most of it, especially if the Court of Appeal has more than one working location. So the puisne judges have to share administration. It is part of the job.

These duties differ in every court, but can include the following tasks (in no particular order):

- liaison with the government and other courts
- negotiating with the government over budgets and premises
- law reform and Rule-making
- continuing education
- the court's website and databank of its decisions
- hiring and supervising staff lawyers and articling students
- educating and training both these groups
- law libraries
- plans for physical improvements such as computers
- answering a host of miscellaneous queries by the Registry officials
- managing pre-hearing flow of appeals
- liaison with the public (including schools)
- handling media relations

<sup>61</sup> See further Chap. 6 Part F.

- security and confidentiality
- *ex officio* membership on various bodies such as Judicial Councils for other courts
- compiling statistics
- liaising with groups such as the Canadian Judicial Council, and handling all manner of new and unexpected problems.

Merely listing all that work shows that each Justice of Appeal will have to be on several committees or administer several things. On a small court of appeal, it may be worse. Everyone (locally and nationally) expects a small court of appeal to do as many kinds of tasks as a big one, despite the small number of hands available for the work.

If even one member of the court of appeal shirks such work in any way, the public and the other judges suffer accordingly.

Once again, one sees that a modern Court of Appeal is neither a retirement home nor a think tank.

## CHAPTER 5 – THE JUDGE'S OWN EFFICIENCY

*“ . . . I cannot guarantee that I carry all the facts in my mind. Intense mental concentration has a curious way of blotting out what has passed. The barrister who has his case at his fingers’ ends and is able to argue with an expert upon his own subject finds that a week or two of the courts will drive it all out of his head once more. So each of my cases displaces the last, and Mlle. Carère has blurred my recollection of Baskerville Hall. To-morrow some other little problem may be submitted to my notice which will in turn dispossess the fair French lady and the infamous Upwood.”*

– *The Hound of the Baskervilles*, Chapter 15

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Part B.1 of this chapter can make a dramatic difference to a judge’s life and work.

I discuss the efficiency and speed of a whole appeal court in two other books.<sup>62</sup> This chapter is about a different topic: how an individual judge can work efficiently and keep up.

### A. READING COUNSEL’S MATERIAL BEFOREHAND

#### 1. Hot Court is Vital

The volume of material filed for most motions is modest, even slim. And usually it arrives shortly before the motion’s return date, leaving little choice in when or how to read it. So this Part A concentrates instead upon the evidence and written argument for a full appeal.

The old style of appellate practice was largely oral, and at one time many judges did not read any of the material before oral argument. Some counsel seem to think that that is still so, but I doubt that. It no longer occurs in Alberta. Usually judges prepare themselves for each appeal before oral argument begins.

Americans refer to a panel of judges which has done its homework as a “hot court”. In Canada, such a panel wastes no time, and will hear an appeal in an hour or two instead of a day or two. If the case is suitable, the court will give an oral judgment at once. A “cold court” is extremely inefficient.

Reading beforehand gives a better product, not just a faster one. It lets the panel see all the issues and arguments, look for missing authorities, and look at key pieces of evidence. There are rarely enough time or resources to do that in the courtroom. And it gives time to reflect, and plan questions.

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<sup>62</sup> *Slow Appeals: Causes and Cures* (2000), and *Well-Run Appeals* (Canadian Judicial Council 2006).

So if the judges do not prepare before oral argument, the panel will have an unpalatable choice. They must either forego much necessary reading, or reserve judgment (after oral argument) for that purpose. Anything which the panel finds thereafter will come too late to ask questions about it, unless the panel then directs some kind of supplementary argument. That process is very slow.

## 2. When to Read the Materials

If the Registrar distributes appeal materials to the panel many weeks before oral argument, when should a judge read them? That involves a tradeoff. Waiting to read just before the hearing leaves no time to plug gaps in the material. Those gaps may be clerical errors or omissions, books not filed, volumes not distributed, evidence which is poorly reproduced, or legal authorities missing, miscited, or insufficiently researched. On the other hand, a judge reading too early forgets many details before oral argument.

So judges should compromise. They can look at the materials as soon as they arrive, to learn the parties, counsel, and what is the basic issue or topic. That should detect any conflicts of interest. It is very disruptive if a judge does not discover a conflict of interest until the evening before oral argument. (Occasionally a name which reveals a conflict is buried in the middle of the evidence, but that is rare.)

Assuming that no conflict of interest thus appears, what then? The judge should do his or her real reading at least two weeks before oral argument. That leaves enough time to do more legal research and remedy any omissions in the material.

After reading the material, the judge should also write or dictate a brief note for personal use. It will show

- (a) tentative views as to the result (or sometimes lack of any conclusion yet),
- (b) which issues seem to be decisive, and which seem to be academic or hopeless,
- (c) what is missing, or what further work is needed, and who is following up.

Whether to make the notes on a separate sheet, or in the evidence books and factums, is a matter of individual choice.

## 3. What to Read

Martland J. used to advise that one read first the reasons appealed from, then the appellant's factum, then the respondent's factum. Years of experience confirm that advice. If there are multiple parties or interveners, it is usually easier to read first all the factums which support the appeal, and then all those opposing the appeal.

A different order may help in four circumstances:

- (a) where the trial judge's reasons are very long;
- (b) the reasons consist of rulings spread through the trial at intervals;
- (c) the trial judge gave long supplementary reasons; or
- (d) where there are no reasons, only a charge to the jury.

In those four cases, it often helps to look at the list of grounds of appeal in the appellant's factum before reading the trial reasons. One can then merely skim the parts of those reasons not under appeal. Conversely, one should read a charge to the jury very carefully, watching for any mention of the topics in issue on appeal. It is dangerous to skip entirely any reasons not directly appealed. Sometimes they contain additional reasons or fact findings germane to the parts appealed. (But there are drawbacks to spontaneously reading reasons for sentencing in preparing for a conviction appeal; one may learn that the accused had a previous record.)

It is usually best to finish reading the appellant's factum before beginning the respondent's. But occasionally, where the issues are very complex yet distinct, one might read one topic carefully in both factums before reading argument on another topic.

There is very often one key document around which the appeal revolves (such as a contract or a regulation). It is often hard to find and not quoted, or only selectively quoted. Quotes often harbor typos. So it is very useful to bookmark the document's full text in the evidence (physically or electronically).

Some judges mark up transcripts with different colors to show passages which different counsel cite.

## B. PROMPTLY DRAFTING JUDGMENTS

Many appellate judges have trouble drafting judgments quickly. Yet any delay can cause expense, frustration and woe for litigants, especially those languishing in jail.

### 1. Techniques to Produce Judgments Faster

A judge can do many things to improve speed, yet not sacrifice quality.

#### (a) *No Unnecessary Work*

A Court of Appeal should not write a full reserved decision unless there is solid reason, e.g. need to settle a point of law. Only a minority of cases require them. Often a briefer Memorandum of Judgment (endorsement) will do. And a written Memorandum (endorsement) should not be written where an oral judgment will suffice.

#### (b) *Pre-Hearing Preparation*

Before oral argument, each panel should assign one Justice of Appeal to supervise pre-hearing preparation and research of each appeal.<sup>63</sup>

The panel should also agree who will write the first draft. That should be decided on the day of argument. Some courts even assign that task before argument.<sup>64</sup>

Most judges have trouble giving an oral judgment *ex tempore*, or drafting one in 10 minutes. So if it is likely before oral argument that one may later prove suitable, the court should prefabricate any elements which would take time to draft, such as a recital of facts and issues. That way, the only thing remaining to draft at the end of argument will be the actual reasoning on the decisive issues.

<sup>63</sup> See further, Chap. 8, Part M.2(b).

<sup>64</sup> See Witkin, *Manual on Appellate Court Opinions* 49-52 (1977); Coffin, *The Ways of a Judge* (1980).

Often the judgment appealed from sets out the facts and procedural history adequately, and is available to the profession (through a court website or a law report). If so, before argument the panel hearing the appeal should note the judgment's citation. If they decide to give an oral judgment, they can simply begin by giving that citation, and bypass any need to recite afresh facts or background.

**(c) *Start at Once***

The greatest delay in drafting we have to fear is delay itself. If a judge can start drafting a judgment within 24 hours of hearing argument, memory will be fresh, and virtually all the work can be started then, and continued without any long break. But if the judge waits to begin, after a few days, memory fades. In the judge's mind, issues merge, factual details disappear, and solutions to problems evaporate. Key passages become hard to find. Some good ideas fly away forever. Others take several days' rereading just to rebuild.

Besides, if drafting begins at once, enough time remains to do the job properly and revise several drafts.<sup>65</sup>

**SO WRITE SOMETHING THE SAME DAY.** One veteran American appellate judge said that that is the most important lesson he learned in his career.

Judges should always do two things to ensure a prompt start in writing a judgment.

First, immediately after oral argument, a judge should record key ideas, by dictation (or keyboard, if a fast typist). Those would include

- (a) preliminary thoughts,
- (b) basic chain of reasoning to follow in the judgment, including what is important and what is peripheral,
- (c) problems,
- (d) what information is lacking, and
- (e) a list of who is to supply what is missing. For example, a student should check the legislative history of a certain statute, the Registry should borrow the trial court's original file, and the judge should read the transcript of a key witness.

Second, courts and panels should avoid sitting hours which interfere with prompt writing. Five p.m. is too late for the court to rise. A judge who is tired, or has to get home immediately after court, has no time to put down thoughts or even confer. That judge will likely be too tired to do so even after dinner. The court should not cram a whole month's sittings into a few days. There should be gaps. That also suggests time limits for oral argument.

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<sup>65</sup> On which see Chap. 9, Part C end.

**(d) Keep Up the Momentum**

The day after oral argument, how should a judge get started on the actual draft and keep going? Here are some tips.

- (i) Reserve big blocks of time exclusively to write this judgment.
- (ii) Set quotas, e.g. 1000 words per half day.
- (iii) Begin with a part which is either easy, or interesting, or arouses emotions. The judge may write easy or simple parts when tired, stressed or pressed, and leaving a hard part unwritten or partly written, and coming back to it later.
- (iv) Begin in the way which makes one comfortable. If one tends to see or recall generalities, or see them first, make an outline. Begin with general headings and then subdivide them into finer points. If one tends to see first or recall details, then begin by writing notes about specific points. Get them down in any order. Or get on the keyboard and pour out a stream of consciousness. Then go over that screed, rearrange it, and decide whether to write a draft based on the rearrangement.
- (v) After finishing one part of the draft, one should not get up until the next part is planned or begun.
- (vi) Never put off all work waiting for a big uninterrupted block of time to come along. Use little scraps of time, e.g.
  - to edit what is already written
  - to outline something not written, or
  - to find pieces of evidence or check citations
- (vii) A fast rough incomplete draft is the best way to keep up momentum and capture thoughts before they fade. There is always time later to edit and fill in citations or blanks. Never let disappointment with the quality of something written interfere with writing a rough draft of another part. The author should quietly sing, to the tune of "As Time Goes By . . .":
 

"A draft is still a draft, a sigh is just a sigh  
The fundamental things apply."
- (viii) If uncertain how to reason at one spot, discuss it with a colleague. Then make an informal personal note of the reasoning and what ideas can be eliminated. Then outline or write the corresponding part of the draft judgment.

See further a book called *The Most Important Thing is to Begin*.<sup>66</sup> It is about how to write judgments, with emphasis on how to overcome delay and procrastination. It contains excellent tips and insights, some with value beyond judgment writing. A rearranged summary of it is Appendix A.

**(e) Avoid Unnecessary Keyboarding<sup>67</sup>**

<sup>66</sup> Canadian Judicial Council and National Judicial Institute (2003). See also Berry, *Writing Reasons: A Handbook for Judges* (2d ed. 2001, E-M Press Victoria).

<sup>67</sup> See Part G below for a discussion of the pros, cons, and limits of this important topic.

## 2. Deadlines and Rules

Some provinces or Courts of Appeal have formal time limits for issuing their decisions. In 1985, the Canadian Judicial Council recommended that ordinarily a Court of Appeal should not take more than six months to issue a reserved judgment. At least two Courts of Appeal have internal guidelines and procedures to enforce this.<sup>68</sup>

An appellate judge should know the applicable time limits. To calculate real net times available for research and drafting, one must deduct from nominal deadlines the time needed for internal processes at the end. Those include translation, proofreading and cite checking, format or privacy checking, and notifying the parties in advance of an upcoming reserved decision. Nor should one forget giving other judges enough time to comment, or even draft a dissent or separate concurrence.

The president of the panel should also watch the elapsed times, and investigate any apparent delay. If the delay is too long, the president should assign a different member of the panel to write a draft.

## 3. Dangers

Appellate judges must remain open to persuasion, or even radical shifts in opinion, until oral argument is over, and the three panel members have discussed the case afterwards. They sometimes have to keep open minds longer, e.g. if a reserved judgment is to be drafted by one of them.

Judges should avoid any form of preparation or prefabrication which prevents such shifts. Nor should they succumb to pride of authorship. Someone else's idea may be better. Clinging to a draft on which one has labored is pointless if it is not the best product available.

## C. PAPER HANDLING

The total volume of paper and messages which reach an appellate judge in a week can be staggering. The judge must pass on, consume, or discard, an equal volume each week. If not, he or she will soon be buried under yellowing stacks of paper (or a long list of half-read e-mails). And the public and colleagues will suffer.

So efficient paper-and-data handling techniques are important. They are largely driven by general time-management considerations.<sup>69</sup> But there are also six other ways that a judge can handle data effectively.

1. Obtain suitable nearby storage to house all the transcripts, evidence books, factums and authorities for appeals not yet argued.
2. Obtain similar but distinct nearby storage to house such books and papers after oral argument when judgment has been reserved (or reasons are not filed yet). Those papers can include research, draft judgments, and internal correspondence.
3. Delegate as many clerical tasks as possible. Personally typing and revising lengthy documents is inefficient. Dictation is efficient for some tasks.<sup>70</sup>

<sup>68</sup> See also *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267, 220 C.C.C. (3d) 1.

<sup>69</sup> On which see the references below in Part D.

<sup>70</sup> See Part G.



4. Promptly read, or at least glance over, every incoming message. Try very hard to do something useful at once. In extreme cases (such as a trolley full of new transcripts, evidence books and factums) that something may be storage, earmarking time to work on the material, and adding it to a prioritized list of "Things to Do." But usually one should immediately do more. For example, pass the document on to someone else to work on, file, or look up more information. Leaving the communication undigested accomplishes nothing. It lays the foundation for an Everest of untouched tasks.
5. Establish an effective filing system, and keep it up-to-date. Giving low priority to filing is a false economy. An hour spent looking for a lost document is a waste, frustrating, annoying, and embarrassing.
6. Be brave. Throw out everything which one cannot effectively file and easily retrieve. An unfindable document is a detriment. There is little point to filing indefinitely a copy of a paper, if the original is on the Registrar's file, in the library, or on the court's website.

## D. TIME MANAGEMENT

This topic might also be called personal effectiveness. It is almost as important for an appellate judge as for a practising lawyer. Many appellate judges doubt their efficiency, sensing that they work harder than their quantity or speed of judgments suggests.

Some of that is inherent in appellate work, nine-tenths of which is hidden like an iceberg. But certain time management techniques can overcome many problems and speed up the process. Most techniques are not mechanical, but psychological. Almost all problems are psychological.<sup>71</sup>

This topic is broad and far reaching. It is much too lengthy for this chapter (or this book). So I recommend two other books:

Lakein, Alan, *How to Get Control of Your Time and Your Life*<sup>72</sup>

Côté, Jean, et al., *Safe and Effective Practice*<sup>73</sup>

## E. NOTE TAKING

It is difficult to listen carefully to oral argument and take good longhand notes at the same time. It is impossible to do both those two things and also plan questions, and ask them. That poses an obvious dilemma.

Most appellate judges probably choose to listen carefully and not take many notes. Judges might try to work out some more abbreviated way of taking notes and resolve to omit more incidental details. If one cannot escape the dilemma, that may well be better than not listening fully.

<sup>71</sup> A few general hints are found in Parts B.1(c), (d) and C above.

<sup>72</sup> 1996, Signets Book, Reissue Edition.

<sup>73</sup> Legal Education Society of Alberta and Canadian Lawyers Insurance Association, n.d.

But briefer notes leave holes. Sometimes one later needs a detailed note of argument. Oral argument is rarely taped or recorded, so there is no other way to reconstruct it, especially weeks later. If a party's factum is poor, or counsel's oral argument departs from it, then the Court of Appeal may well reserve decision. Unaided memory of oral argument fades very quickly, especially when sandwiched among argument of other similar appeals. Notes can rebut a discipline complaint about a judge. Courts need some way to escape the listening vs. note-taking dilemma.

If the judge is a fast typist and the bench will accommodate a computer, or the judge can take shorthand, then making abbreviated notes of argument might leave enough time to listen carefully to argument. Touch typing leaves eyes free, e.g. to look at counsel.

If one of the court's articling students (law clerks) is going to watch the appeal, the student might be asked to take careful notes.

The Supreme Court of Canada regularly makes a plain audiotape of oral argument, with the videotape as back-up. They find it useful. Some appeal courts record argument.

## F. DELEGATE TO TRAINED PEOPLE

Many judges do not really use a librarian. Yet librarians with legal training or experience can identify, locate, and obtain, case law, statutes, books, or articles.

Many Canadian appeal courts make heavy use of employees with law degrees. Articling students with law degrees (law clerks) lack experience, but most are very bright.<sup>74</sup>

Having a staff lawyer or a law clerk conduct legal research rarely attracts criticism. However, judges must be careful what instructions the researcher gets, and should ask whether a full job of objective research was done. A few decided cases from one source (especially not a very balanced source), given without explanation, could be dangerous if a judge assumes that it comes from a full search.

Critics sometimes worry that articling students (law clerks) editing a judgment<sup>75</sup> will lobby the judge to adopt one conclusion. I have not yet met (still less worked with) an appellate judge who seemed that suggestible. Appellate judges have minds of their own, and cannot be intimidated. It is curious that counsel often see appellate judges as too inflexible, but authors of articles see them as too malleable.

However, the belief that some judges have articling students (law clerks) draft their judgments leads to other justifiable concerns.

If a student writes the first draft of a judgment, my common fear is not that the student will produce the result. Instead, I fear a three-legged race. The judge is almost certain to direct the general chain of reasoning and the result, but the student will then supply the precise authorities and the details. It is very hard for someone to draft something which he or she does not fully understand or fully believe in. If the student thinks that his or her legal researches point one way, but the judge wishes to go another way, then the draft may well contain tortured logic, miscited authorities, or little authority. A student who is too opinionated or political, and not diligent or thorough, will write a flawed draft.<sup>76</sup>

<sup>74</sup> Coffin, *op. cit. supra*, sketches their history.

<sup>75</sup> See Coffin, *op. cit. supra*, at 162-63.

<sup>76</sup> Of course such problems will not occur routinely, because usually the judge and the student's views will not diverge dramatically after the two have discussed the appeal.

Judge Richard A. Posner has aptly criticized clerk-written judgments:

“In general I think you’d find that the most interesting and accessible opinions are those that are judge-written rather than clerk-written, or if the clerk wrote a first draft, the judge rewrote it thoroughly. The reason is not that the judges are smarter than the law clerks, though obviously they are more experienced, but that law clerks write as if they were defensively, conscious of their inexperience and reluctant to produce something that looks like an individual product. Clerk-written opinions tend to a dreary uniformity and often fail to disclose the considerations that actually moved the court to its decision.”<sup>77</sup>

There is a bigger problem with drafting by students.<sup>78</sup> Though students can usually research and write law, most are weak and inexperienced in dealing with evidence and facts.

If one year’s students have a hand in hiring the next year’s, I do not know whether that could produce or entrench any biases. That topic is worthy of thought.

Staff lawyers are usually a little older and more experienced than law students, and likely much better at handling facts and evidence. Aside from that, the question of their drafting judgments is much like the question of law clerks (articling students) drafting. It may arise more rarely, because many Courts of Appeal have fewer staff lawyers and use them differently. Most staff lawyers do not work so closely with the judges, nor indeed get involved in drafting judgments of any importance.

If appellate judges are diligent in giving instructions and checking work by non-judges, the only realistic problem will be the three-legged race/Posner problem outlined above.

So using others to write first drafts is partly a question of personal preference. For example, some people will readily edit, but dislike writing. A few people like writing, but most are slow and reluctant writers. It may be counterproductive to urge judges to use a division of labor which seriously diverges from their own strengths and weaknesses.

## G. DELEGATION TO JUDICIAL ASSISTANT

The old-fashioned term “secretary” falsely implies that these invaluable helpers do only clerical work. Avoid such assumptions and their corollaries.

Judges (like lawyers) should ask for assistants as intelligent and reliable as possible. Judges who have never worked with such talent do not know what they are missing. Such an assistant can take from the judge many tasks which do not require a law degree. This frees up the judge’s time to concentrate on judicial work. Here are a few examples.

1. An assistant should be able to look up specific citations of court decisions on various websites or in the library. That way, she can check the accuracy of the citations, and of all quotations.
2. If a judge’s work calls for travel, the assistant should independently make all the arrangements.
3. Nor should a judge have to dictate ordinary correspondence word for word; the assistant should be able to draft it.

<sup>77</sup> Answer 10 to Dec. 1, 2003 20 Questions on the “How Appealing” Website ([http://legalaffairs.org/howappealing/20q/2003\\_12\\_01\\_20q\\_appellateblog\\_archive.html](http://legalaffairs.org/howappealing/20q/2003_12_01_20q_appellateblog_archive.html))

<sup>78</sup> Hinted at in Chap. 3, Part D.

Legally-trained people are often poor delegators, especially if they are careful people. A judgeship does not improve their delegation skills.

Indeed, computers solidify reluctance to delegate. Governments also realize that buying a computer for a judge is much cheaper than hiring an assistant. So almost every judge has a computer, but sometimes several share one assistant.<sup>79</sup>

It is a serious mistake for a judge to do most of his or her own keyboarding, especially at the later stages.

First, no matter how good a typist the judge is, or how fancy the printer or software, the judge's time is too valuable for that. Samuelson's famous text on economics demonstrated that long ago. Besides, the judge should concentrate on the judicial and legal aspects of the job, and leave the shared abilities (such as keyboarding, proofreading, etc.) to the assistant.

It is true that some e-mail is urgent but non-sensitive, so a judge may safely receive and send these short e-mails personally.<sup>80</sup>

It is also true that some important documents can be quickly and well drafted at a keyboard, if the author has the right typing speed, neither too quick nor too slow.

But few people have the skill to plan and visualize speech beforehand. So dictating a first draft of any important document often produces something long, rambling, and very hard to edit. Conversely, hand-writing a draft may produce text which is too short: telegraphic, even cryptic. And the process is slow. If the judge types fast and well, a judgment drafted on the keyboard may also be too lengthy and wordy.

In any event, a judge who types out a rough draft should never be seduced into doing subsequent printing, formatting, or inputting of corrections. Why?

First, this wastes enormous amounts of the judge's time. Second, modern word processing has very technical formatting. The judge may well introduce many formatting errors that either bedevil databases, or consume hours while the judge's assistant corrects them. Once the first draft is done, the assistant should do all formatting and input all changes. Third, passing a document amongst various computers may also cause many glitches, or corrupt the document. Worse still, if 20 different drafts of the same document pass between a judge, legal counsel, student, and an assistant, someone may revise the wrong version of the document.

Nor should the judge type routine correspondence or memos, nor even lengthy notes to self. If he or she must provide the exact wording, dictation is much more efficient. The demise of shorthand was followed by unpopularity of dictaphones. But recent dictation software for computers creates surprisingly accurate drafts directly from oral speech.

Sending all one's own e-mails poses another graver danger.

We all know not to mail a letter written in annoyance; instead we sleep on it, and reread it in the morning. That is one of the soundest inter-personal laws.

<sup>79</sup> There are, of course, many other reasons to give judges computers.

<sup>80</sup> Whether the judge should do that 365 days a year, 17 hours a day, is a different question to ponder.

But it is not limited to anger or annoyance, nor to snail mail. An e-mail's over-strong language or careless terminology can wound. Some such memos should be redrafted several times, to make it more and more diplomatic. Even so, sometimes the fifth draft just avoids offence.

Besides, comments are truly persuasive only if edited, succinct and clear. Even Ernest Hemingway's first draft would ramble. Longer e-mails are often hard to read and ambiguous.

Repeated confusion, dismay, friction, and anger come from sending offhand carelessly-written comments at the speed of light. There is no bigger threat to judicial collegiality and cooperation. And all from drafting and sending one's own e-mail. The problem is haste. So a judge needs an artificial delay to give time to reflect. One solution is to have an assistant type, revise and send lengthy or contentious e-mails. Another solution might be an overnight embargo.

## CHAPTER 6 – APPELLATE JUDGE’S PERSONAL LEARNING

*“Jonathan Wild wasn’t a detective, and he wasn’t in a novel. He was a master criminal, and he lived last century –1750 or thereabouts.”*

*“Then he’s no use to me. I’m a practical man.”*

*“Mr. Mac, the most practical thing that you ever did in your life would be to shut yourself up for three months and read twelve hours a day at the annals of crime. Everything comes in circles . . . The old wheel turns, and the same spoke comes up. It’s all been done before, and will be again.”*

– *The Valley of Fear*, Part I, Chapter 2

### A. REASONS TO UPDATE EDUCATION

One might assume that new appellate judges need no further training, because they are experienced. Most were once superior court judges.

But appellate judges do need retraining for many reasons. First, their job is different from trial work. The proper functions of an appellate judge differ critically.<sup>81</sup>

The second reason is to refresh and improve them at mid-career. The Crown and public entrust them with great power, and difficult decisions with serious consequences. So appellate judges have a duty to prepare fully for this.

Third, learning new things keeps anyone mentally agile, healthier, and more attuned to work. For some people, physical, social, or pragmatic achievements fill that bill; but people named to appellate courts usually like ideas, words, and mental challenges.

Finally, the joy of new discoveries and interests helps add zest. No one should coast or plod through life bored.

### B. QUALITIES OF A GOOD APPELLATE JUDGE

To decide what further learning would achieve, it helps to know what qualities an appellate judge should have.

The list would be long if it included the qualities which judges on **all types** of courts need, such as fairness, honesty, open-mindedness, a sense of humor or proportion, good judgment, caution, and steadiness.

Instead, here is a short list of eight qualities or skills which especially benefit an appellate judge.

<sup>81</sup> As described in Chapters 2 and 3, especially Chapter 3.

## 1. Patience

An appellate judge needs patience and a wide time horizon. On a Court of Appeal, the most important job is to make law and imagine how it will work years later. Besides, an appellate judge can do very little alone. Most tasks take agreement of three judges, and some have to wait for comments from everyone on the court. A convoy moves at the speed of the slowest vessel. An impatient judge neglects law,<sup>82</sup> and cannot wait calmly for others. Colleagues do not always see things the same way (especially at first), and counsel are often imperfect or slow.

One author nominated Lord Dunedin as a great judge:

“To my mind he had the true judicial temperament. It was obvious that he was out to do justice, to listen, to weigh the arguments, to keep his mind open, to reject the fallacious and give due weight to the true . . . There was . . . patient searching after truth. What a refreshing contrast to judges prone to dash off with a hastily adopted view of the case and to buttress that view throughout by advocate’s points.”<sup>83</sup>

## 2. Cooperativeness

The judge must be able to work with other people. The reasons are much the same. Some lawyers hate all the compromises required by solicitors’ work, and prefer working alone as a barrister. Later they are elevated to the Bench and like calling the shots as a trial judge. They may need to adjust on joining a Court of Appeal. A lawyer who hated partnership meetings and preferred to practise on his or her own, may also dislike work on an appeal court. So might a law teacher who hated faculty and committee meetings. Courts of Appeal have many meetings, large and small, and most decisions are by three people, not by one.

## 3. Acuity

An appellate judge needs mental discipline and perception. Whether the task is making law, looking for reversible error, or crafting a practical solution, the appellate judge needs a flexible and quick mind. People constantly throw concepts and words at the judge, who must be able to assess and deal with many of them quickly.<sup>84</sup> Standards of review constantly force appellate judges to perform one, two, or three sets of mental gymnastics. The work is sometimes counterintuitive.

So the judge should be able to identify and distinguish inside his or her own head several things: analysis, memory, uncertainty, hope, dislike, and similar mental states.

The perception needed includes creativity and imagination. Law making can be as creative as architecture, and involves more dimensions and aspects.

<sup>82</sup> See Chap. 3, Part A.

<sup>83</sup> Alexander, Gilchrist, *After Court Hours*, 152 (1950). One may contrast Lord Dunedin’s strengths with some such weaknesses in Cardozo: see Posner, *Cardozo: A Study in Reputation* 137 (1990).

<sup>84</sup> Any reader who doubts this should read Chap. 16.

#### 4. Ability to Write

An appellate judge must write quickly and well. The judge must explain promptly and clearly what he or she means.<sup>85</sup> Someone who cannot do that, or does not enjoy doing that, should not accept such a judgeship. He or she would either work cruel hours, or bog down. Canada's most prolific published authors are neither novelists, nor journalists. They are judges. A few masters or trial judges are prolific, by choice. But appellate judges have no choice: they have to be prolific authors.

One does not need beautiful style (though it helps). The work will also be faster and more effective if the judge's writing is persuasive.

Sadly, most high schools and science degrees teach little effective about writing prose. And arts degrees even foster poor writing; most undergraduate essays and academic articles are vague and very hard to read. A law degree usually exacerbates that. Legal writing has traditionally been barbarous, dense, and hard to read. Since his or her first day of law school, every judge has been marinated in legal writing, most of it bad. A few younger lawyers got a quick writing course, of uneven quality, during their Bar Admission Course. But most lawyers have not had one hour's instruction in clear effective writing.

Fortunately, the National Judicial Institute offers federally-appointed judges in Canada wonderful judgment-writing courses. They are one of the best things about a judicial appointment. The only pity is that they come 20 or more years into the "student's" career, after chronic infection with bad habits.

#### 5. Work Habits

An appellate judge must be willing and able to work hard, and efficiently. A lawyer who fled solicitor's work for family or criminal law, hoping to escape paper, would not like this job. A law teacher who had trouble marking essays or exams promptly would detest the job. Anyone who took an appellate judgeship for honorable semi-retirement, would be in for a rude shock. Even a hardworking person will meet trouble with this job without paper handling and efficiency techniques.<sup>86</sup>

#### 6. Independence

An appellate judge needs courage and independence. At times, he or she must resist the views of colleagues (on or off the panel), and not go along with the majority view. Or not go along too quickly. Still more must an appellate judge resist the temporary excesses of public opinion, educated or not.<sup>87</sup>

#### 7. Knowledge and Experience

Appellate judges need to understand people's interactions and problems in a wide context. Twenty-first century judges hear complex issues, and make law outside the traditional topics of "lawyer's law". Such issues often have many dimensions: social, economic, ethical, psychological, scientific, or historical. Yet counsel may not see all those dimensions. So an appellate judge needs some knowledge of those domains, and ability and willingness to absorb concepts and theories from non-legal disciplines.

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<sup>85</sup> Chap. 9 suggests how.

<sup>86</sup> On which see Chap. 5, especially Part C.

<sup>87</sup> See Lord Atkin's dissent in *Liversidge v. Anderson* (H.L.(E.)) [1942] A.C. 206, 225 ff.



But theory and concepts, even history, often are not enough. A judge benefits enormously from broad experience and knowledge of life: how things really work and have really worked, and what people really do, or really did in the past. No one knows all that, so an ability and willingness to learn is important.

One example of the seventh quality will help. Past inequality or discrimination has abused different groups in many different ways and degrees. The significance of the inequality has varied with the values, needs and problems of those groups at different times. Very often the inequality was invisible on paper: one needed practical knowledge, even experience, to understand and weigh its impact in real life. Inequality today often exists or is alleged in unexpected places and ways. So a judge needs empathy, mental flexibility, experience, and broad knowledge, to assess them.

## 8. Diversity

The final quality is diversity. It overlaps with the seventh. An appellate court, even an appellate panel, should contain people of different backgrounds, viewpoints, and inclinations. If two are big-picture people, the third should be meticulous with details. If two grew up in a big city, one should have a rural background. If two were barristers, one should be an ex-solicitor. If two are rigid and love enforcing rules, the third should be sympathetic and flexible. If two reason in linear mathematical fashion, the other one should think creatively or pragmatically. Often there is no single right answer to a question. When there is, it is often possible to uncover and to test it, in a number of different ways. Curiously, diversity on a Court of Appeal can actually assist collegiality.<sup>88</sup>

So all appellate judges need the first seven qualities, but should otherwise differ from each other.

## C. APPELLATE LAW AND PROCEDURE

Every appellate judge should learn the basic rules governing appeals, both criminal and civil. Those include

- (a) who has the right to appeal,
- (b) a few general principles governing appeals (such as the fact an appeal is from the formal judgment),
- (c) standards of review,
- (d) other rules for deciding appeals, and
- (e) the procedure followed by the Court of Appeal in question (including motions to one Justice of Appeal).

A new appellate judge should also read carefully the statute which establishes and governs his or her court, the applicable Rules of Court, its Practice Notes or Directions, Part XXI of the Criminal Code, and the sections of Canada's *Supreme Court Act* which give powers to provincial or territorial Justices of Appeal.

There are few Canadian books confined to the topic of appellate law, and American and English texts on those subjects are not very helpful. (American books are very helpful on practical aspects of appellate work.) Yet an appellate judge needs some general background instruction on such topics.<sup>89</sup>

<sup>88</sup> See Edwards (2003) 151 U. Pa. L. Rev. 1639, 1667-70.

<sup>89</sup> See Stevenson & Côté, 4 *Civil Procedure Encyclopedia*, Chapter 75 (2003).

## D. CONTINUING EDUCATION

If an appellate judge takes a particular interest in some area of the law, or feels weak in another, then a two- or three-day course for judges or for lawyers is a good idea. Some continuing legal education bodies waive or reduce fees for judges. Most Courts of Appeal have a budget for attending such courses. The National Judicial Institute and the Canadian Institute for the Administration of Justice put on many good courses oriented to judges. Often organizers of courses charge no attendance fee for judges (but may limit the number attending).

The National Judicial Institute holds an annual spring course for Canadian appellate judges, with enough places that every appellate judge could attend every second or third year. It offers some excellent and practical lectures and discussions. Every appellate judge should attend it several times.

What other courses should an appellate judge take? A few hints are found in Part B above. If the judge has not recently taken a judgment-writing course, that is vital.

The major factor in picking courses is what the individual judge thinks will interest and instruct him or her. Lectures which do not interest, and fat looseleaf books never read, just waste money. But here are a few other hints.

First, find out whether the course in question will apply to the work which one actually does. The general title of the course does not tell enough; one should read as detailed a program as can be got. Many talks, especially by some academics, are interesting, but somehow miss most practical aspects and the very topics frequently litigated. It helps if some of the instructors are judges or practising lawyers.

As noted, a judge should get used to other people's and groups' viewpoints on social or ethnic issues (for example). It is also very important to become aware of current issues, and what are the sensitive topics or modes of speech or behavior. But it is less helpful to hear a one-sided presentation of one viewpoint, still less helpful to hear it several times in three days. The line between awareness and partisan re-education is a fine one.

Everyone talks about court collegiality; but how many do anything about it? One positive step is a course or book on people skills, especially on how to listen and to communicate, and the psychology of relationships. Other useful topics are negotiation, conciliation, and how to solve problems in a group. Such instruction will help judges to work together, remedy the reduced human contact which judges experience, retard the onset of "judge-itis," and provide an intriguing new vista.<sup>90</sup>

But practicality is not the only important object for continuing education. Occasionally judges should pick courses or a hobby to expand their minds and learn other ways of thinking, or other disciplines. Then the aim is long-term mental growth, more than immediate application. Most people get an LL.B. knowing little useful psychology, criminology, sociology, or economics. Some learn no political science, language, history, political science, or literature. Yet some of these are fascinating, both in themselves, and for helping us see the world around us. Such learning keeps one more interested in life and mentally active.<sup>91</sup>

<sup>90</sup> See Collier (1992) 31 *Judges' Jo.* 4, 37-38.

<sup>91</sup> For example, one can peek into a whole new world if one looks at Epstein [1996] N.Z.L.J. 235, or Posner, *Economic Analysis of Law* (6th ed. 2003).

Psychology can be fascinating, especially slightly abnormal psychology. Almost all litigants are sane, but a significant fraction likely have personality disorders. One good introduction to this topic for lawyers and judges is Eddy, *High-Conflict People in Legal Disputes*.<sup>92</sup>

Another very real advantage of attending courses is harder to analyze. We are energized by meeting other people in the same line of work, hearing their comments on their work, and hearing their questions during courses and seminars. Even discovering that others have the same problems and no better solutions, reassures us. Almost any short course will offer some new solution to an old problem, help to choose solutions to an old problem, and warn us of new problems. Listening to discussions and lectures stimulates other brain synapses. Solutions to problems (even ones not discussed) suddenly pop into one's head.

When suitable courses are not available, then an appellate judge should get something tailored, or use electronic learning. For example, this may be the time to improve typing skills, or knowledge of the internet or legal research. Many judges take individual instruction in the other official language.

There are books on every conceivable topic. Often a book can add what no course seems to do, or will tell much more than a one-hour lecture can. Almost all appellate judges have access to professional librarians and researchers. They can access almost anything. Judges should make heavy use of this service. One can search online most big library catalogues, even from thousands of miles away, and it only takes a few days to get a book on interlibrary loan from across the country. For example, often a very palatable way to approach a new topic is to read biographies of eminent past figures from the field.

## E. KEEPING UP WITH THE LAW GENERALLY

Appellate judges must learn of recent legal changes, especially as not many counsel have enough leisure to keep up, and their legal research methods are very imperfect. If appellate courts in two other provinces have decided a topic within the past six months, probably a similar dispute will soon turn up locally.

However, a judge should not have eyes bigger than stomach. One common error is to have the loose parts of six different law reports routed to one, but then not read any (because the stack soon grows so tall). Why resolve to look at some website or database each day for the new decisions, then not do so (or print them and not read them)? Instead, the judge should pick a moderate goal and stick to it. For example, faithfully going through the last D.L.R.s loose part each week would be a good goal, especially because they include almost all Supreme Court of Canada decisions. And such a pamphlet can be read anywhere, not just on a computer.

Each appellate judge should experiment to see whether keeping up by electronic or print methods is easier, more convenient, and more appealing. Then he or she should proceed the way that appeals, not the way that colleagues do or advocate.

<sup>92</sup> Janis Publications, Calgary 2006.

## F. APPELLATE JUDGE'S OWN SPEECHES, WRITING AND TEACHING

### 1. Benefits

The public benefits when appellate judges teach or write for the legal profession. Judges have much legal experience and education, and some experience in communicating. Some classic English textbooks were written, edited, or updated by appellate judges. Judges were key lecturers at various Canadian law schools over many generations. On some topics, the judge may be the best qualified person in town.

The judge will benefit too. One never really understands a topic until one tries to teach it, indeed until one answers questions by students. Writing or teaching usually leads to more research, or at least reading to refresh memory. Knowing more law or practice never hurt an appellate judge.

Such activities offer a change of pace, and a temporary pass out of judicial segregation. Contact with bright law students is always stimulating. And any new mental activity keeps a judge fresh (as noted above).

### 2. Drawbacks

However, a judge needs caution, because there are some restrictions and potential drawbacks.

First, the *Judges Act* forbids a judge to take any outside employment: see s. 55 and its very narrow exceptions. So the judge will either have to waive any honorarium or royalties, or instead ensure that the university or publisher pays an equivalent sum directly to charity. So far as I know, no one has ever objected to a Canadian judge thus “moonlighting.” Nor to a judge having a law book published by a publisher (though most publishers are profit-making corporations). Some people have objected to a judge’s giving lectures (without fee) for a profit-making seminar company. If the analogy with publishing is a good one, that objection is hard to see; but maybe the analogy is not complete. What is traditional and what is novel seems to play a role here.

Of course, the topic, and the format should not lower respect for the Bench, nor create any conflicts of interest. The activity should not be one likely to lead to litigation or political or public controversy. Publishing a book on any aspect of sex education (however well done or scientifically oriented) would be a bad idea. So might be a book advocating euthanasia, or condemning or advocating new reproductive techniques. Such topics are controversial, and fodder both for yellow journalism and the prurient or excitable.

Nor should a judge publish a series of articles showing why his or her religion was the right one and the others wrong. Or condemning religion as superstition. Much the same would be true of any other socially-controversial issue.

Those cautions overlap with another. A judge should not engage in an extracurricular activity which could well embarrass him or her later in court, or lead to a significant number of disqualifications from hearing cases.

Even in that light, judges usually consider that teaching a standard course in a law faculty (such as torts or wills) is harmless. So is writing or editing some fairly dry straightforward legal textbook. Salmond wrote at least three texts (on torts, jurisprudence and contracts) while a sitting New Zealand judge, and the world would be much poorer without them. A general legal textbook will often take a stand on some controversial legal questions. People would likely not criticize the judge for writing the book. But it could give some problems when some of those controversial points are later cited to him or her, and more so if he or she is a Justice of Appeal, and such points are cited to lower courts.

The question of legal publishing is one of degree; neither unqualified encouragement nor an absolute ban is in order. It depends on the topic, the treatment, and the judge. I can light only a few small candles in this murky area. The book's ratio of straightforward exposition (or even straightforward synthesis) to debatable statements, may count for a lot. Also, one would hate to see a lawyer's manuscript of a serious textbook abandoned because the author became a judge on the eve of submitting the manuscript to a publisher. Nor should a legal textbook grow obsolete for want of a new editor, just because the author has since become a judge.

But a sitting judge should choose very carefully the topic, style and approach of any book which he or she sets out to write. A book written for judges seems harmless, one for lawyers, law students and law teachers moderate, and a book for lay people most dangerous. Finally, any mention of certain topics, words or names will attract moths who will swarm around, blind to anything but those topics, words or names.

One would think that speeches, lectures, addresses, seminars, and discussions by judges would follow much the same criteria. That may be true of lecturing in a law faculty or a bar admission course. But there is more danger in a less formal setting. People like to give talks which are interesting, and a talk whose precise contents are *ex tempore* is always easier to listen to than someone reading *verbatim* from a written script. So speakers often *ad lib*. Questions are asked, and debate ensues.

The popular press attend some banquets and Bar conventions, even when the judge speaking somehow assumes that the press are not there. In the past decade, the press have managed to stir up controversy over a number of such speeches. Many years ago, a British Columbia judge who gave a published speech was censured by the then Chief Justice of Canada, whose censure seemed to lay down a broad prohibition. Practically speaking, many journalists will attend a banquet or convention. But exceedingly few will look at a 700-page legal textbook.

An appellate judge asked to give a talk should ask questions, and impose conditions, before saying yes. Unless the topic is very technical and the absence of the media is guaranteed, the judge should read from and stick to a script carefully edited and previously vetted by a reliable and cautious third person. Unless the topic is very dull and takes no controversial legal positions, its text should be narrowly distributed. Often the organizers will be content with a list of authorities and suggested further readings, or maybe a mere list of headings or topics, or very short simple "power points" from a computer.

When there is to be a panel discussion, often the judge can merely act as moderator, and take no sides. But if the press attend, they may innocently attribute some partisan's comments to the judge, or write a story which some of the public read that way.

The above comments are not meant to delimit ethical norms. Instead, they are warnings of dangers, mere advice on how to avoid possible trouble. An appellate judge's aim should not be to win a public, vexing, and lengthy fight about one sentence supposedly once uttered at a Bar convention. It should be to avoid getting into such an ordeal in the first place.

Many of these suggestions may sound overcautious, even over-imaginative. But some of them stem from actual situations. Today Canada has some very aggressive or relentless disappointed litigants and their hedge lawyers, some unsportsmanlike and extremely zealous counsel, and some vague and broad prohibitions in pronouncements on judicial ethics. Not to mention the statutory power of some governments to force judicial councils to hold full "courts-martial" of impugned judges. Or the hunger of the media for controversy.

## G. SELF-ASSESSMENT

An appellate judge will benefit from assessing his or her activities, intellectual and emotional state, and aspirations, every two or three years. A spouse, close but objective friend, or trusted colleague can help. Careful homeowners routinely inspect and vacuum their furnace filters, and some religious people from time to time vacuum their consciences. So maybe appellate judges should regularly vacuum their intellects and look at the dust bag.

## CHAPTER 7 – CIVILITY

*On Holmes sending in his card we were instantly shown up. The statesman received us with that old-fashioned courtesy for which he is remarkable and seated us on the two luxuriant lounges on either side of the fireplace.*

– “The Naval Treaty”

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### A. WHY CIVILITY MATTERS

Why is it important to be polite and considerate in a Court of Appeal? First, because one of the major purposes of all courts is to end disputes, and prevent feuds and lingering disgruntlement. The most important person in any courtroom is the party who is going to lose, said *Megarry V.-C.*<sup>93</sup> Though the person losing may not be convinced of the verdict’s correctness, it is very desirable that party and his or her friends think that the process was fair and complete.

Failure to explain the conclusions, or rude language, may help the losing party conclude that the judge’s mind was closed, even actively biased. That applies doubly in an appeal court. By definition, at least the appellant was not persuaded by the first court’s verdict. Sometimes the first court’s reasons were brief or unrecorded. Fairly often, an appeal is going to fail, which means that the party who lost the first time is about to lose again. He or she was not persuaded the first time, and may be harder to persuade this second time.

Second, appellate judges should set a good example. Discourtesy is contagious, and discourtesy by powerful noticeable people teaches a lesson which many welcome. Many writers now state that lack of civility at the Bar has become far too common, and a great hindrance to all. Conversely, respect begets respect, and it is difficult for counsel to act inappropriately when the bench are respectful, fair and obviously anxious to understand.

Third, appeal courts should encourage the inexperienced. Almost all litigants are inexperienced. The demographics of the Bar in many cities show a shallow pyramid, so many counsel are inexperienced too. Most lawyers have seen their Court of Appeal in action but once. Most lawyers or judges recall a youthful experience before that court. It is often an unhappy memory. Many never went back. But justice cannot be done, nor law be made, unless every lawyer who has lost a case is willing to contemplate an appeal on its merits. The diligent reasonable lawyer is just the person whom Courts of Appeal want and need to hear. A rude court will gradually drive them away, and instead acquire a “clientele” of rhinoceroses or tricksters, impervious to all criticism.

Conversely, when counsel (however obscure or young) do a good job, the Court of Appeal owes them public praise.

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<sup>93</sup> *Megarry* (1978) 16 *Alta. L. Rev.* 406, 410.

Fourth, appellate judges should hoard their thunderbolts, and launch them only occasionally, when truly needed. People soon learn to ignore sheet lightning and thunderstorms which rumble across the horizon, coming no closer and producing no rain. Words have force only when novel and unusual. The parent who constantly whines empty threats rears a child who pays no heed. At times, a Court of Appeal must firmly discourage some conduct, especially future conduct. Then it usually has only words in its weapons rack.

Fifth, a civil approach is the most effective in most human situations. The relation of appellate judges to the Bar and the rest of society is no different. Rudeness is distracting, and makes its recipients defensive and uncooperative. Appellate judges always want good thoughtful argument, and so should not produce poor working conditions for counsel. Rudeness also tends to attract bystanders' sympathy to its victims. So the rude speaker loses even moral support.

As the rest of this chapter shows, civility requires more than just politeness, which can sometimes be skin-deep. Fairness is a vital ingredient too.

## B. PUNCTUALITY

Louis XVIII is supposed to have said that "punctuality is the politeness of kings."

When a powerful person keeps those in his or her power waiting for no apparent reason, the powerful person appears either arrogant, lazy, thoughtless, incompetent, or disorganized. That reduces his or her credibility, and diverts the mind of the persons waiting from the substance of the matter at hand.

Therefore, it behoves appellate judges to meet appointments (such as opening court or meetings) promptly. It also means that they should not make litigants or the public wait and wait and wait for a reserved judgment.<sup>94</sup>

## C. DILIGENCE<sup>95</sup>

Appeal courts and each judge on them gain credibility by working thoroughly and well. Younger counsel may imagine that judges spend almost all their time on golf courses or beaches and do little actual work.

A judge who comes to court ill-prepared, has lost his books or papers, or who issues perfunctory boiler-plate reasons, reinforces such beliefs. The same is true of a judge whose reasons ignore completely important arguments and authorities which counsel have clearly stated.<sup>96</sup>

If counsel have an urgent request, they are entitled to a reasonably prompt response, whether they seek a motion for a stay of execution or information about the form or timing of a factum. If no judge is available to answer, or the query is brushed aside or answered weeks later, counsel again will suspect that golf has won.

<sup>94</sup> See further Chap. 5, Part B.

<sup>95</sup> See also Chaps. 4, 5.

<sup>96</sup> See further Chap. 16, Parts A and B.



## D. MANNER IN COURT

It is curious how one person's whole manner can be transformed by another person's manner. One would think that such influence flows from the powerful to the less powerful, but that is not necessarily so. If counsel for the appellant stands up, smiles, and says something pleasant to the court, often the court responds in a pleasant manner, and the whole appeal goes more smoothly.

The judges often speak before counsel do. In any event, they have obvious power to set the tone.

Therefore, ordinarily the panel, especially the presiding judge, should strike a pleasant note. For example, opening the appeal may not be the best time for the president to mention some flaw in one party's factum. It is a good time to show the court's consideration for counsel. For example, if counsel on several cases are waiting to be heard, it is helpful to tell counsel on the second and third cases that they will not be called before such and such an hour, and are free to go and have a cup of coffee in the meantime. If one of the counsel has an articling student with him or her, or if the courtroom has separate tables for Queen's Counsel and for junior barristers, it may be helpful to suggest that the junior move up and sit at the same table as the leader. If some material has necessarily come in late (such as a very recent decision of the Supreme Court of Canada) the president should both assure the panel that the material has been received and distributed, and thank counsel for their thoughtfulness in sending it in.

If one party is there without counsel, the president should inquire whether that is the way that he or she wishes it, and whether the party is prepared to proceed (unless that party has been guilty of serious delays or stalling before).

Counsel are entitled to know at the outset how much of the material the judges have read, and to what depth they know the facts.

See also Chap. 8, Part H, on the role of the president of a panel.

## E. QUESTIONS TO COUNSEL

Most trial judges know that both law and common sense dictate that counsel be allowed to run their trial cases the way they want. So most modern trial judges do not intervene very much, especially when hearing evidence.

Many appellate judges talk more, and properly so. Appellate judges and experienced counsel know that questions and comments from the bench can be very helpful. First, is the panel listening? Second, if they do not understand or agree with something, counsel do not want to work in the dark; counsel need to know what the problem is, and to have a chance to try to fix it.<sup>97</sup> Third, if the bench has no trouble with a proposition or understands it clearly, counsel want to know that so that they can move on to the next point. Sometimes repetition or wordiness by counsel stems from lack of feedback.

However, not all counsel understand or remember those things. And many types of questions from the bench do not appear to counsel to be helpful.

<sup>97</sup> See Megarry (1978) 16 Alta. L. Rev. 406, 407.

Manner makes a difference here. A question phrased tentatively or kindly will much more readily suggest an instructive motive behind it, than will a question asked rudely or sternly. An appeal should have the tone of a seminar or panel discussion between respected colleagues. It is not a cross-examination of a witness, still less cross-examination of a partisan or dishonest witness. Counsel may well know that a certain argument is not certain to prevail, or that it will not appeal to everyone. But counsel and his client are not the same person, and counsel is permitted to put to the court any honest arguable point. Doing so does not betoken stupidity or malevolence.

Judges should keep in mind four canons of questioning.

The first canon is that counsel must get a chance to answer the question fully and in their own way, without interruption by a second question from the judge, particularly a new question on a different topic. If the question is worth asking, it is worth answering. The judge who interrupts may well mean no harm, but seems to be heckling.

The second canon is that within reason, counsel should be allowed to dictate the broad outline of his or her case. Judges do not like counsel to say, "I am going to answer the question later." But if counsel has clearly, obviously and sensibly divided argument into topics A and B, and is obviously talking about Topic A, very often there is no good reason then to ask about Topic B. All that does is to disrupt the order of argument and make it harder for all three judges to follow.

The third canon is that questions from the bench should ordinarily be confined to one of three aims:

- (a) procuring information;
- (b) letting counsel know some difficulty, disagreement or lack of information which the judges have; or
- (c) giving counsel full notice of some point which might be used against him or her.

It is pointless and improper for the judge to try to persuade counsel to agree with the judge. That often clashes with counsel's duty. Besides, it makes the counsel who receives such argument feel that the opponent has just been given an extra lawyer.

The fourth canon is: moderation in all things. No matter how sensible each question is, if there are too many of them, or they come too close together, counsel simply cannot handle all of that.<sup>98</sup> That is especially important before a court which sets any time limits on oral argument. Many appellate counsel would frame this paragraph in far stronger terms, and they may be right at times.

If one of the three judges on the bench is especially talkative, the other two judges should try to resist the temptation to join in, and should ask only questions which are important. Similarly, if a larger bench of five or seven judges is sitting, they should exercise great restraint in asking questions. An occasional question from each of seven judges leaves very little time for counsel to run his or her case.

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<sup>98</sup> Megarry, *loc. cit. supra*, at 408.

## F. JUDGMENTS

Ordinarily an appellate judge should politely word reasons for judgment, whether they are oral or written. They are the Court's most enduring product. Here are four particulars.

### 1. Treatment of Parties

Terminology can inadvertently offend parties. People can be very sensitive when they lose their appeal. When all involved have the same surname, it is tempting to refer to people by their given names. But to refer to adults involved in a serious multi-million dollar lawsuit as "George and Nancy" may seem to demean them or treat them like children.

Judges should not reveal unnecessary personal details which do not really advance the thread of the argument. A civil trial is highly unlikely to get into the newspapers, and even written civil trial reasons are not likely to either. However, the media are more likely to scrutinize written decisions of the Court of Appeal, or indeed to attend Court of Appeal hearings.

It is also important to be careful about criticizing non-parties or to repeating allegations about non-parties. A non-party has no chance to defend herself. It is always tempting for some party to portray himself (and maybe his opponent) as the victim of the non-party "rogue". That is sometimes called the empty-chair defence. It may be very unfair to the non-party so blamed.

If it is absolutely necessary for a judge to repeat such allegations, then it may be wise to leave obscure precisely who the judge is talking about. It is often easy enough to remove identifying details. Indeed, judges should get out of the habit of reciting unnecessary details, such as the name of the small town where the events occurred.

If need be, the names in the style of cause can be replaced with shorter names or initials.

### 2. Treatment of Counsel

Where a judgment discusses obvious failings of lawyers, such as missing a limitation period or failing to renew a statement of claim, the judge should check whether a different law firm was involved at that stage. Often it was. If so, the judgment should state that counsel listed for that party were not acting at that time.

If it is necessary to criticize conduct of counsel, a judge should think very carefully whether it is desirable to name counsel. It is not obligatory to put the names of counsel on a judgment. If they have been guilty of some failing which is common in the profession, and the court is simply taking the occasion to ask the profession to stop doing that, it may be unfair to single out these counsel. Their names should be left off the judgment.

Sometimes it is necessary to mention illness or other embarrassing circumstances of counsel; then it is rarely a good idea to identify them.

The court should always encourage sincere, well-meaning, hard-working lawyers, even when their work betrays lack of judgment, inexperience, or even low ability. The court again should try to avoid embarrassing such counsel publicly, either by passing tactfully over some of their tactical errors, or at least by leaving their names off judgments.

### 3. Treatment of the Trial Judge

There are many ways in which a Court of Appeal can inadvertently be undiplomatic to the trial judge. Sometimes an appellate judgment need not dwell on how an error occurred, or call something wrong. If the standard of review is correctness, it is sufficient for the Court of Appeal merely to say what is the correct law or procedure, and allow the appeal.

Conversely, if the Court of Appeal affirms a trial judge who has done a good job and given careful reasons, they should be acknowledged. The Court of Appeal should not start as though writing on a clean slate.

If the fact that the trial judge did not do the right thing is pardonable, those circumstances should be mentioned. For example, trial counsel often made no objection, or the then counsel for the appellant actually acquiesced in the course taken. Or the right law may not have been cited to the judge. The right law applied by the Court of Appeal may indeed be precedents only decided after the decision now appealed from.

If it is necessary to criticize what the judge has done, there is often no point in naming the judge. So the routine practice of naming the judge on the front page of Court of Appeal judgments might be rethought. It is always more tactful to refer to and criticize the reasons under appeal, than to refer to or criticize the trial judge. A trial judge's reasons are sometimes unreasonable, but few if any trial judges are unreasonable people.

### 4. Checking Drafts

It is always wise to let a draft cool for a week or two between writing and issuing. The longer the gap, the fresher the eye with which the author will read his or her own words, and the less he or she will cloak them with memories of meanings intended. One incidental benefit of circulating draft reasons for comment, is that enforced gap.

Even better is an independent eye. Someone else should read the draft and comment. The more people who do that, the better. That is definitely a benefit to circulating important drafts to all the judges of the court.

Courtesy and fairness will increase if at least one of the "readers" reviews the draft for politeness and diplomacy.<sup>99</sup>

One criticism of a draft is very powerful. If a reader thinks that the overall tone, or certain phrases, suggest a certain attitude, then others may well infer that too. If the author in fact lacks the attitude, or wishes to conceal it (e.g. for politeness), then the draft needs revision.

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<sup>99</sup> On review for clarity, see Chap. 9, Part C.7.

## G. SOCIAL INTERACTION WITH TRIAL JUDGES

Isolation of appellate judges from trial judges is undesirable, for many reasons. One is that judges are already forced for good reason to avoid many contacts common in the community. One does not wish an appellate bench who talk only to their chief justice (who talks only to God).

The trial bench and appellate bench have a lot to learn from the other. For example, appellate courts in Canada have so often created new rules of criminal procedure to solve an isolated problem in one case, that one wonders how any trial judge in a complex case can ever jump all the accumulated hurdles and get to the end of the course. Appellate judgments do not talk about practicalities as much as they might. Trial court judges can therefore educate appellate judges a lot, just by talking about changes in their day-to-day work. One benefit of trial court judges occasionally sitting on Court of Appeal panels, is bringing the two courts together and facilitating exchange of experiences and information.

However, informal interactions between appellate and trial judges do have some dangers. If any conversation, even one seemingly in jest, invites justification, trouble can result. A judge who senses criticism will become defensive and unhappy. And he or she may well say things neither planned nor carefully worded. The very thoughts or phrases excised from a draft judgment may be blurted out. Misunderstandings or offence may result.

If appellate judges and trial judges share a lunch room or a lounge, there is a temptation for more senior trial judges to tease an appellate judge about a very recent Court of Appeal decision. That can lead to just such dangers. The appellate judge is better advised to laugh and change the subject. Conversely, messages from the Court of Appeal to trial judges are usually best sent through judgments, not by casual social conversations between individual judges.

Occasionally there is a thin-skinned trial judge who shows undue negative feelings when reversed or criticized by the Court of Appeal. What to do in such cases is not clear. Sometimes it helps if a tactful member of the panel can speak to that trial judge immediately after the reversing judgment is made public, but (as noted) there are dangers in that.

A trial judge must be informed promptly that he or she has been reversed, and why. There are many reasons for that, both technical and psychological. Learning through newspapers or gossip is not satisfactory. Not learning could cause many errors.

Therefore, Courts of Appeal should introduce and efficiently administer specific techniques to prevent such tactlessness. When the judge appealed is reversed, Court of Appeal decisions should always give real reasons (not two lines of boilerplate). And there should be a system which gives the judge appealed from a copy of the Court of Appeal's reasons at once.

## H. COLLEAGUES

Courtesy among the judges of an appeal court is the subject of Chap. 8 on collegiality.

# CHAPTER 8 – COLLEGIALITY

*“In solving a problem of this sort, the grand thing is to be able to reason backward. That is a very useful accomplishment, and a very easy one, but people do not practise it much. In the everyday affairs of life it is more useful to reason forward, and so the other comes to be neglected. There are fifty who can reason synthetically for one who can reason analytically.”*

– *A Study in Scarlet*, Part 2, Chapter 7

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## A. INTRODUCTION

### 1. What is Collegiality?

This topic covers several interlocking virtues. First, friendliness, courtesy, and mutual respect produce easy productive cooperation. Second, pride in the group (court) and all its work yield a better product. Finally, noticing and appreciating colleagues' strengths and contributions, and deliberately reflecting on them from time to time, water the collegial garden.

### 2. Why is Collegiality Important?

Doubtless collegiality matters in almost any organization. It is especially important for a multi-judge appellate court, for at least six reasons.

First, because history shows that that is so, and courts' work has greatly profited or suffered from surges and slumps in collegiality. At times, internal schisms or even feuds have hampered certain Courts of Appeal. For 12 years, a feud between two judges prevented the U.S. Second Circuit from even assembling for a group photograph!

Second, collegiality matters because judges have tenure and judicial independence, and are expected to decide each appeal individually, with a right to dissent publicly. They have few powers over each other. Cooperation cannot be compelled.

Third, collegiality gives the public a better product, by encouraging each judge to work hard and well to improve quality, without any misunderstanding or distrust. Collegial judges have no oblique motive, and are not hobbled. Their energies are fully devoted to crafting the best law and justice they can. Every important judgment is as good as the whole court can make it.

Fourth, trust and cooperation eliminate unpleasantness or distant formality, and so make life encouraging and pleasant for the judges, who are then more likely to be pleasant and human when dealing with counsel and staff. On the bench, they need neither be wary, nor play to the gallery.

Fifth, a collegial court which speaks with one voice and works well and promptly, is very likely effective. It will influence trial judges, the Bar, and litigants, both in that and later generations.<sup>100</sup> A collegial court will produce judgments consistent with each other, free of picky distinctions and abrupt changes of course. Law in that province will be predictable, and litigation less often necessary.<sup>101</sup>

Sixth, a collegial court works efficiently, and so does not squander resources in any way, saving time for the litigants and money for the taxpayers.<sup>102</sup>

### 3. Courts with Special Need for Collegiality

If an appeal court's judges all have offices along the same corridor in the same building, propinquity will usually foster collegiality.

So collegiality may not come automatically if the court has no one home base at all, as is the case where the judges are based in many different cities,<sup>103</sup> or all live away from where they work.<sup>104</sup> It is also challenging where many of the judges live and work in one city, the rest in another.<sup>105</sup> It must also be difficult where the judges are often away from the office sitting in a host of other cities.<sup>106</sup>

## B. SHARING THE LOAD

The first step toward collegiality occurs when the judges on the court willingly share all the work, without worrying about whether one is doing "more than her share" or another is "getting out of his work". It should be a privilege to serve the public and to help each other.

Stepping in at once to volunteer (without being asked) is especially important when a colleague unexpectedly meets illness, a family emergency, or a conflict of interest. It requires and reflects sensitivity of the appellate judges to each other as human beings with needs and stresses.

## C. MAKING DECISIONS

### 1. General Philosophy

Judges should try hard to achieve a group decision, and benefit from all the strengths of all the judges, or at least all the judges who sat on the appeal in question.

It is a poor policy for the group to ignore the ideas of the minority, or presumed minority. That is so, whether the group be a committee (or the whole court) which has to make an administrative decision, or a panel of three deciding an appeal. One judge should not think, "I can count on Smith's vote, so I have a majority, so the minority cannot win, and I can ignore the minority." Even if the minority's view is wrong, their criticisms often show ways to improve the majority's product.

<sup>100</sup> Histories of judicial feuds in British Columbia in the early 1900s give an outsider a poor impression.

<sup>101</sup> On the importance of *stare decisis*, see Chap. 2 Part B.

<sup>102</sup> See generally Edwards (2003) 151 U. Pa. L. Rev. 1639.

<sup>103</sup> As in most U.S. federal Courts of Appeal.

<sup>104</sup> As in the New York Court of Appeals.

<sup>105</sup> As in Québec and Alberta.

<sup>106</sup> As in the Federal Court of Appeal.

Collegiality should also apply to the future. A judge should not think, "I am in the majority on this panel, so I should write a broad judgment now and fix the law on several topics, lest I be in a minority the next time such a case arises." That is one of many reasons why appellate judges should not decide issues not argued before them.

A judge who used to be a barrister or a tough negotiator should forget many of the skills then honed. The aim here is not win; it is to keep an open mind and find the best route to the best answer.

The biggest single threat to collegiality is distrust. Most people are reluctant to run risks. All dealings with an untrustworthy person involve risk. Precautions against an untrustworthy person can cost dearly, and progressively cripple more and more action. Therefore, anything which builds trust goes most of the way to building collegiality. When distrust arrives, or is even suspected, exceptional speed and strong effective action are needed to cure it.

How the group makes decisions is very important. The right way eliminates resentment and misunderstandings, and clearly demonstrates respect of the judges for each other as valuable advisers. This applies both to the content of decisions on appeals, and also to decisions about court procedure and administration.

Judges should avoid criticism of colleagues where possible. Lawyers are often thin-skinned, and becoming a judge often does not remedy that. Since criticism always generates heat, judges should never voice it unless a much larger benefit will result.

Often a colleague's way to administer something, or to express something, is more or less reasonable. Then another judge should not criticize it just because

- (a) he or she can think of another way which is somewhat better,
- (b) he or she was not consulted (if no real harm resulted),
- (c) the other judge seems to be courting publicity, social approval, or power, or
- (d) one could get by with less.

Conversely, if a judge is about to do something which he or she does not think needs approval, it costs little to tell others and say "I propose to do this unless someone strongly objects in the next few days." Or to ask for comments on some aspects, but not others.

Highly educated people often have trouble delegating. They want to have everything decided by them, or by the General Assembly (which includes them). And even if they give some other person power to do something, then they or the General Assembly want to second-guess and micro-manage all that the delegate then does. That is why some law firm (or medical clinic) managers do not last long. Courts of Appeal should stamp out such tendencies. They breed inaction, obsolete rules and procedures, chaos, and flight from administration of all but the masochistic.

That may be the third most important point in this book: reread the preceding paragraph. Then make a sign saying SUPPORT YOUR LOCAL DELEGATE.

The above discussion is rather general, and applies more to court administration than to deciding some specific appeal. Appeals must be decided on their merits, not to please a colleague or do him or her a favour.



## 2. Specific Techniques

Now we may turn to some more specific suggestions. Most apply both to deciding appeals, and to administrative questions.

The first topic is how early in the appeal or administrative process to consult or comment. I suggest that there should be no inflexible rule, because different people prefer different things, and circumstances vary.

It is generally unwise to try to suggest a view about an upcoming appeal to a colleague who has not had a chance to read the material, unless that person asks for a comment.

After a colleague has read the material, he or she is probably willing to discuss a tentative view (or a lack of a tentative view). It is usually more tactful to ask the other person's (tentative) view than to announce one's own. Some colleagues do not want to commit themselves, even temporarily, before the hearing or meeting. Some do not want to **seem** to do that. A judge should learn by experience and not press such colleagues before hearing. Before a hearing or meeting is often a poor time to urge one's views, though there can be exceptions. Some people disapprove of such approaches, and consider them unethical or anti-collegial.<sup>107</sup> But there is no harm in asking whether others have got all the material, or have read or noticed a certain point buried in the middle of bulky material.

Whether to mention one's own views before hearing depends on many factors, especially whether colleagues ask for them.

Most judges dislike being bullied, so a brief diffident suggestion often works where long or forceful arguments would fail. On the other hand, an occasional person likes to debate out loud to work through the matter in his or her own mind, and so may want a "sparring partner" to debate with.

Some people like a written text to read and re-read at their own speed. That may be because they are eye people not ear people; or they may fear haste, or desire calm and quiet.

In all of this, very careful listening is worth ten times any speech or reply. But a request that the speaker repeat or elaborate on something is often beneficial.

Once the panel have read the material and heard oral argument, how should they reach a decision? How should a court administrative committee decide a topic? Different courts have opposing practices. I suggest that there be no firm rules. Sometimes the most junior person should be asked for his or her views first, to avoid intimidation by more senior people. Sometimes the least decided person should speak last. Sometimes the person whose position is likely to be closest to the middle should speak first. Sometimes everyone should speak in turn. Sometimes only those who wish to, should speak. Each of those methods works well at times.

Not all Courts of Appeal hold a formal conference on a case after oral argument. Here are the advantages of such conference. It can make a quick decision, see who is for and who is against, and help select one member to do the next work (usually drafting a judgment reflecting the majority view). A conference can clear up misunderstandings, and let people know each other's views before too many positions harden.

But there are some disadvantages in an immediate conference. Some people like more time to think. Some fear misunderstandings. Some have not mastered the material fully, even after oral argument. Some reason better through reading, or by writing. Some distrust a colleague.

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<sup>107</sup> See further Part M.2.

Some like discussion to be as concrete as possible, and trust a draft more than an abstract principle. Some do not like to adopt a conclusion (e.g. by tummy feel) and then work backward to craft reasons. They like to reason forward step by step and see what result will emerge. Such people resent having to reach a conclusion, or have others harden their positions, before reasons are carefully examined. That might seem odd if competing written proposals (such as factums) had already thoroughly canvassed all possible arguments. But often they have not; rarely does a Court of Appeal judgment closely track the winner's factum. A conference may tend to push some judges into a premature conclusion, or just produce heat and disappointment, so a judge at a conference who is not sure should be quick to say so. It is notable that some bodies can adopt nothing the first time that it appears on the agenda, but become very agreeable the third or fourth time.

The alternative to an immediate formal conference is to ask one judge to write a detailed draft, and then to discuss it later. In the case of an appeal, it would be a draft of reasons for decision. In an administrative problem or dispute, it could be a detailed plan or scheme, e.g. to reassign offices, restructure the court's schedule, allocate law students, revise the Rules of Court, or introduce a budget.

### 3. Causes of Disagreement

Sometimes one person will not agree to something which others think is well-presented and convincing. The objector gives initial reasons which are hard to understand, and later other reasons which change from time to time. The successive reasons stated seem unrelated to each other. Yet the objector is generally rational, reasonable, and well-disposed. Occasionally that means that the objector needs more time, feels pressured, or is tired or unwell. But if this persists, it often means that the objector is not stating the real reason, or is stating it in code or abstractly.

There are many reasons why a person might not want to reveal clearly his or her feelings or thinking. The reticent person may fear the consequences of frankness. Those fears could include offending one of the audience (politeness or tact), disappointing someone of the opposite view (loyalty), an unpleasant debate or dissection of reasons (shyness or timidity or feeling of inferiority), or "political" discredit (fear of unpopularity or being sneered at). Sometimes the objector has trouble articulating a reason, especially a gut feeling. The situation may remind the objector of a past bad experience which he or she does not want to discuss.

Disagreements stem from a failure to communicate, or a simple misunderstanding, more often than one would suppose. Educated people are just as susceptible to this as anyone else.<sup>108</sup>

Not everyone reasons in the same way. People see and solve problems differently. The distinction here is neither personality nor mood; the question is different types of healthy rational reasoning. Large parts of the population habitually think in very different ways. There are several possible methods to analyze this. A number of factors underlie; permutations and combinations would let one classify as many as 128 varieties of thinking styles.

However, for most people it suffices to use a simpler classification of five basic thinking styles. Everyone's preferred thinking mode fits predominantly into one of these.

<sup>108</sup> On training to avoid that, see Chap. 9.

I summarize them briefly as follows:

**(a) *Synthesist***

Such people are creative, and like debate, looking at opposing ideas, and raising new perspectives. They can alarm others, and sometimes have trouble reaching a conclusion.

**(b) *Idealist***

These people like democratic participation, consensus, and long-term principles. They set very high standards.

**(c) *Pragmatist***

Such people are adaptable, willing to experiment, and to learn from it. They reason by analogy or anecdote, and can seem shallow or puzzling.

**(d) *Analyst***

These people methodically examine the evidence and seek the one answer which is logically and theoretically correct. They can seem slow or inflexible.

**(e) *Realist***

Such people quickly seize on an answer which will fix a tangible problem. The proof of the pudding is in the eating, for them. They can get impatient with extended discussion.<sup>109</sup>

Anyone who has to work cooperatively with others, or negotiate with people, will benefit immensely from reading or instruction in this area. Besides, this is one of the most fascinating and eye-opening topics which I have ever encountered: anyone interested in people should love it.

This topic helps explain why two bright colleagues may have trouble convincing each other, indeed not understand each other. Or why friends think that other friends do not argue fairly, or get badly off topic; and why some people are slow to decide. Or why some seem stubborn and rigid and others erratic. And why some words and conduct mean that a person feels too much pressure to decide now. Instruction in thinking styles will reveal what approach and arguments will work best with members of each school of reasoning and when.

When different members of a court discuss appeals or administrative questions, and try to agree on a course of action, some find that they quickly see eye to eye, and work well together. Collegiality usually flourishes naturally there. They need little gardening.

It is when one judge does not share the philosophy, decision-making process, experience, or quirks of a particular colleague, that more care and work are needed. Three things then help. Be especially attentive to such a colleague and his or her views and desires, trying to listen carefully and to understand. Second, try hard to imagine how the content and form of one's own communications may appear to him or her. Third, work hard to reduce any misunderstandings, distrust, or distance with that colleague.

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<sup>109</sup> See Harrison, Allen, and Bramson, Robert, *The Art of Thinking* (Berkeley Books 1982) (formerly titled *Styles of Thinking*.)

## D. COLLEGIALLY IN WRITING JUDGMENTS

Lawyers have trained since their early 20s to use words as scalpels, but are usually not encouraged to give others written positive encouragement. So many lawyers do not appear warm and fuzzy to anyone. Judges do so still more rarely.

It is very dangerous for a judge writing a judgment to mention any of the other judges on the panel. Nor need he or she do it. Everyone knows that each judge has read a draft of the other judgments. There is only one mention which is proper. One member of a panel may concur in, or agree with or adopt part of the reasons written by another member of the panel.

If the panel is split, each set of reasons may properly expressly disagree with various propositions of law or fact, or disagree with one of the counsel. But one judge's reasons should very rarely disagree with, or comment on, the reasons of other panel members. Proper exceptions are narrow. Even something a little less than full agreement can be read as ironic or veiled. Partial praise can be read as slighting or patronizing. Indeed, to comment at all on a colleague can seem to put him or her on a level below the author.

Not mentioning colleagues or their reasoning in judgments has largely been the Canadian appellate tradition. It is not the American one, but American teachers of collegiality admire the Canadian method.<sup>110</sup>

There is no need to mention colleagues. If a judgment rejects a legal proposition, it can say whether the proposition came from the trial judge, or from counsel for the appellant or respondent. If it came from none of them, why discuss it? A judgment is not a general literature survey. Occasionally another member of the panel first raises the topic and neither counsel has adopted the argument. Then the author may introduce the subject this way: "It might be suggested that . . ."

Nor need the author reply to every point made in a judgment reaching the opposite conclusion. Such replies can actually detract from the author's main legal and logical points.

If one of the past precedents now under discussion was written by another member of the present panel, there is no reason to mention that fact, especially if it is being used against his or her view in the present appeal, or is not being followed. And even though his or her name is not mentioned, the precedent should be treated carefully and respectfully. This is a poor time simply to disagree with it and not follow it (assuming that it is persuasive only).

Plagiarism is rude and immoral. Therefore, one judge should not make points in a draft judgment which are lifted from another's draft, with neither permission or acknowledgment. (Nor is duplication between two judgments in the same case ordinarily a good idea, for other reasons.)

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<sup>110</sup> For American examples of uncollegial language, see Roscoe Pound (1953) 39 Am. Bar Assn. Jo. 794; Fuld (1962) 62 Colum. L. Rev. 923, 924; Ginsburg (1992) 67 N.Y.U. L. Rev. 1185, 1194-5; Witkin, *Manual on Appellate Court Opinions* 233-5 (§ 122) (1977). For a rare English example of direct criticism, see Bridge L.J., in *Goldsmith v. Sperrings* (CA) [1977] 1 W.L.R. 478, 508, 509, [1977] 2 All E.R. 566.

## E. DRAFT JUDGMENTS BY OTHER JUDGES

### 1. General Approach

The author of a draft judgment who gets comments on it from colleagues should never look upon the process as trying to win an election or pass an exam, still less as running the gauntlet.

Instead, members of a family or team working on a common task are trying to help each other to improve the common product. It is like asking whether the dish which one is cooking needs more salt, or asking whether there is a better way to patch a hole in a wall or to remove a stain from a garment. Even a team's most valuable player cannot be best at everything. Some other judge on the court will have some knowledge, ability, or creativity which notices or adds something which the author of the draft did not see or think of.

No one is perfect, but a few people do not want others to realize that they are imperfect. Such rare people cannot fully benefit from collegial suggestions.

An appellate judge should listen to the views of every other colleague, even a lone wolf, or one less able, less congenial, or less hard-working than others. Nor should philosophical differences blind an appellate judge to merits. Even a judge who is a perennial hawk or bleeding heart, this time may have found true error, pertinent (even binding) authority, or important overlooked evidence. The motive or philosophy of that colleague is irrelevant; the only question is whether his or her comment may be at least partly right this time.

Indeed, comments by other judges do not even have to be correct to be valuable. The question is not whether their proposed solution or exact result is correct. The question is whether one's own draft can be corrected or improved. A half-baked criticism of one's draft often leads one to further or better reasons for one's conclusions.

Even if there is no error in a draft, others' comments often show that part is hard to understand, ambiguous, or too summary to persuade a skeptical reader. Two criticisms of a draft are almost irrefutable: "This passage is hard to understand," or "Oh, but I read that as saying something different." The proof of that pudding is in the reading.

Indeed, the more colleagues who comment on a draft, the lower the chance that the Bar, the litigants, academics or the media will later misunderstand (or be unintentionally annoyed by) the final product.

### 2. Promptness

For a judge to delay commenting on a draft judgment by another judges does great harm to the court's efficiency. If the delaying judge is on the panel, he or she can paralyze everything.

It is most unfair when a judge who prepared a draft judgment a week or two after argument has to wait over six months to issue it, because of delay by other panel members. It makes the author look lazy.

Such delay is very discourteous, and sends a message that the author and his or her work are unimportant, or disliked by the delaying judge.

And the delay tortures and prejudices the parties to the litigation.

### 3. Impute No Motives

Whatever view a judge holds about a colleague's draft or position in debate, the colleague's motives are off limits for comments. The commenting judge should stick to the merits, and not suggest that the author likes banks, favours criminals, or dislikes the *Charter*. Still less should one judge accuse another of working to some agenda, using stereotypes, trying to right an old wrong, riding a hobby horse, creating a precedent for an upcoming case or other oblique motive, or trying to uphold the trial judge because he or she is an old friend. Nor should a colleague be labelled as still thinking like a prosecutor, defence lawyer, insurance company lawyer, etc.

Such an imputation may well be wrong, and is always impossible to prove. Worse is the wound to collegiality. Such accusations will hang in the air long after the particular case is forgotten. They may never go away.

### 4. Diplomacy

Comments by one judge to another, especially those not wholly in accord, must be as diplomatically worded and delivered, as clarity will allow.

Diplomacy should select and shape mode of comment (written or oral, long or brief, formal or informal), timing, and publicity (eyes only, panel only, or copied to whole court). Sometimes court practice or need to avoid dealing behind someone's back may reduce the choice of modes or publicity.

Usually closer contact is more diplomatic. So face-to-face is best, telephone next, and a written memo or e-mail poorest. But any contact does more for collegiality than none. A general **course** of e-mails on various non-contentious topics between two people can make them feel closer to each other.

Diplomacy heavily impacts on timing of comments. A memo disagreeing or suggesting any significant changes should go through several drafts, spaced over several days. The author should carefully read each draft afresh from the point of view of tact and politeness.

Never type up a quick critical e-mail and send it on the spot to the judge whose work is in question. That is like waving about a loaded shotgun. Especially when there is no context or history of friendly e-mails between the sender and the recipient. That is a grave temptation in sending all one's own e-mail. Using other methods to communicate or having someone else send e-mail may be less efficient, but such methods do act as a safety catch to prevent firing poorly-aimed blasts.

Some judges (and lawyers) have thin skins; all take their work very seriously. An important part of an appellate judge's work is commenting on others' draft judgments, or discussing other administrative or contentious topics. An ill-considered or ill-explained comment can cause many problems. If not tactfully worded, it can cause grave harm. Phrase suggestions positively, as ways to improve, not as detection of error.

That rule applies to **any** written communication which has a significant chance of causing offence. Any comment by a judge on another's draft judgment (short of pure agreement or praise) may well do that.

It is critical that one edit and re-edit such criticisms over several days and a number of drafts. Anything quicker will be undiplomatic and likely to be misunderstood.

A judge should draft his or her own comments on colleagues' work. Having a student or staff lawyer draft them is extremely dangerous. Such helpers have no collegial relationship with the addressee judge. This can swiftly turn a Court of Appeal into nine competing law firms (sets of chambers).

If a colleague criticizes a draft, he or she should suggest an alternative wording. Indeed, that is the unwritten rule in the U.S. Third Circuit.<sup>111</sup> Suggesting a different wording or action has several advantages. It makes the criticism easier to understand, prevents misunderstandings, means less work and less to'ing and fro'ing for the original author who has to solve the problem, promotes diplomacy by letting the would-be critic recast criticism as an improvement, and prevents criticism for the sake of criticizing. The original author will be much less likely to take offence, and more likely to adopt the suggestion. And once in a while, the would-be critic will find that he or she cannot draft a better alternative; the words to be criticized turn out to be better than they looked, or at least the best of a bad lot.

Conversely, if a colleague has written a good draft, or gone to a lot of work, those who read the draft should say so.

Unless one is very friendly with the author, one should try not to comment on style. If one does, it should be a very tentative query or suggestion.

## F. INTERNAL MEMOS

Internal memos are subject to the same comments as draft judgments, including the dangers of typing and sending out one's own e-mail on the spot.

Memos which are not about judgments are often about administration. Legally-trained people rarely have training in administration, and often produce more heat than light in this area. So such memos need great restraint and diplomacy.

Internal memos should be sent to no more people than necessary. In two generations we have replaced carbon paper with mimeographing, then with photostating, and now with electronic distribution. But that labor saving is a mixed blessing. Now the easiest reflex is to click on an icon and irretrievably send something instantly to everyone on a long distribution list.

That has many sad effects. First, it breaches confidences beyond what is necessary. The author may forget that something contains or quotes a frank or unguarded sentence or two not intended for a wide audience. Second, by reaching those uninvolved, it cries Wolf and teaches people to ignore e-mail not individually addressed. Third, it wastes everyone's time (and maybe kills trees), especially if the document and its attachments are bulky.

Fourth, a widely-distributed memo often grandstands. If Smith J.A. sends an e-mail to Jones J.A., with c.c.'s to all members of the court, what does that mean? At times it is harmless, even necessary. But if the memo criticizes Jones' actions or proposal, or criticizes Jones, or is not diplomatic enough, its effect is grandstanding. Negative statements in private are addressed only to one person. Those made before a larger audience are always seen as being addressed to that wider audience, however intended. In effect, the headings on the memo are backwards. The memo says "to Jones J.A., c.c. all members of the court **Re: Parking Stalls**"; but everyone reads it as "To all other members of the court, (c.c. Jones), **Re: Jones**". Such grandstanding can be unpleasant, even humiliating. Therefore, one should be very slow to send cross-copies of anything critical to a wide audience.

<sup>111</sup> Coffin, *The Ways of a Judge* 185 (1980).

Even a non-critical memo so copied leaves the recipient in a dilemma if he or she wants or needs to say something critical in reply.

And any rule or tradition in a court which forces people to send cross-copies of something (such as comments on a draft judgment) to the whole court should be reconsidered. Its objectives may not be weighty enough to justify it.

## G. DISCUSSIONS OUTSIDE THE COURT

Twenty-five years ago, one appellate judge, if asked by trial judges about a recent decision of his court, would reply that he had not sat on that panel. That stance has dubious merit; to say that “The leak is not at my end of the canoe” only makes the leak more dangerous.

It is in the personal interests of every judge that no judge do or say anything to anyone outside the court, which diminishes its stature. If one judge does not wish (or feel able) to defend what a colleague has said or done, he or she can just remain silent. No sensitive person will press for an answer.

The wider and more public the audience, the more strongly these cautions apply. Some outsiders search for any crack in the monolith, and tales grow with telling. So even a slight hint of disagreement or criticism to outsiders is then dangerous.

Besides, the bearer of denigration usually looks the worse for it, especially as time passes. For example, lawyers who publicly criticize their former law firms usually turn out later to have been the ones in the wrong. Older lawyers (and judges) learn that.

## H. DISCUSSIONS IN COURT

During counsel’s oral argument, all three members of the panel hearing an appeal should show respect for each other and for each other’s questions. For instance, a question on a new topic is an interruption unless the topic raised by the previous judge’s question has been answered to the satisfaction of both that previous judge and of counsel.

No appellate judge should ever do anything to trip up another, such as answering his or her question to counsel, objecting to or rephrasing that question, or making suggestions to counsel contrary to the suggestions of the previous judge. If that occurs, at the next coffee break, the president and third member of the panel should point that out clearly (and privately) to the offender.

It is the duty of the president of the panel to ensure that everyone in court (including the other two panel members) behaves properly.<sup>112</sup>

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<sup>112</sup> See Chap. 12, Part A.



## I. MEETINGS AND COURT ADMINISTRATION

On relations with one's Chief Justice, see Chapter 12, Part B, below.

Few members of a law firm or law faculty like meetings or administration, but they are a necessary evil. Appellate judges often dislike them too, so each judge should make a special effort not to transform dislike of the topic to an apparent dislike of each other's actions, views or person.

Two desires clash here. The first is democracy and equality of judges. The second is the principle that power and responsibility should go together; no one should ever be saddled with responsibility without power.

Where administrative or logistical questions are involved (not deciding appeals), everyone should try to meet everyone else more than halfway. Judges do not take an oath to decide administrative topics independently, and to look only to law and conscience, for administration. Administration is not a topic for dissent, once a decision is properly made. All must then obey and cooperate.

Judges about to do something administrative should try to consult more than would be expected or required. Those who are not involved in an activity should stick in their oars much less than they wish, complain about decisions as little as possible, and try never to complain about non-consultation itself.

If appellate judges thus meet each other more than halfway, trust is engendered, misunderstandings are fewer, and any errors or problems are resented.

On administrative topics, a small diffident diplomatic suggestion by a non-administrator for improvement, which the recipient administrator is free to disregard, is permissible. But often silence is better. When one person or a committee has been charged with studying or implementing some matter of administration, criticism is a serious matter.

No other person should criticize those so charged before asking himself or herself this question: "Do I want to take on this administrative task myself?"

That thought has more value than tit for tat; it is not anticipation of a mere *argumentum ad hominem*.<sup>113</sup> It has three merits:

1. Often there is more than one way to manage something; any of them will work if applied consistently. But two things will not work: shuttling between inconsistent approaches, and illogical compromises. Even two or three very able people asked to build a horse may design a camel. Or a horse with two heads.
2. Criticism may produce resentment, resignation, or passive aggression by the person originally empowered.
3. Criticism may lead to co-option of the critic to the committee or working party.

Besides, experience shows that new administrative proposals are rarely very dangerous, no matter how it seems at the time.

<sup>113</sup> On which see Chap. 16, Part I.1.

## J. SHARING RESOURCES

Nothing is more frustrating for a lawyer or judge than having no assistant (secretary), or trying to rely on one whose other priorities prevent doing this lawyer's or judge's work. It is worse than frustrating: it is intensely demoralizing. It can also drive the assistant with several bosses to an early grave, unless she starts playing favorites or other power games.

Therefore, sharing an assistant between two appellate judges is a perennial source of danger. Sharing one among three or more, courts disaster. Who shares with whom must be very carefully thought out in advance.

If two judges share an assistant, each judge will have to work daily at meeting the other judge more than halfway, and not giving the assistant conflicting instructions.

If students (law clerks) or staff lawyers are to be shared, all the same problems will arise. Some judges manage to give students the impression that their work is more urgent and important than other judges'. There will be other problems too, for sometimes the two judges for whom a student or staff lawyer does work will have conflicting views about the same appeal. One may write the majority judgment, one a dissent. Then legal research, writing, or editing may raise questions of loyalty and confidentiality.

There are only two ways to handle any sharing. One is to carefully select beforehand two judges to share who trust each other fully, and are very cooperative considerate people, neither of whom needs more than a halftime researcher, editor, or writer. The other way is to set up a number of rigid rules in advance, enforce them, and live bureaucratically. Whether student research is confidential, and when, would then be one topic to cover with such rules.

If these problems are not faced in advance, but resources are shared, sooner or later work will not get done, and some judges will start resenting each other.

## K. PERSONAL

The more that a court does pleasant things together, the more it will have a sense of social identity. Its members will think of the court and not of individuals, and think of the court's aims and welfare, and not their own.

Friendship among colleagues does no harm, and can be a great cohesive and lubricating factor in a court. Therefore, socializing among the judges should be encouraged, so long as people are not forced into it beyond their comfort zone.

Court travel is good occasion to socialize. If a number of judges go out of town to a course, or the court has an annual retreat or conference, they should go out to dinner one evening. If a number travel to another city to sit, they should dine together and invite any of their colleagues who are resident in that city. A court meeting is often an occasion for a dinner afterwards.

An annual court picnic or sleigh ride, with staff, spouses, and children, can be a good icebreaker. So can a Christmas luncheon, or similar occasion.

Lawyers and judges are not trained in psychology, but are habituated to confidentiality and hard work. Therefore, when a judge has personal problems, family troubles, or some big change in lifestyle (such as a move, or home renovations gone seriously wrong), the victim's first reaction is to keep quiet and soldier on. By bad luck, work pressures may chance to mount just when the personal problems make that judge cranky, taciturn, forgetful, and less attentive. The danger to collegiality is obvious.

Therefore, a judge should stop and reflect if a colleague seems unusually touchy, inattentive, or depressed (which itself may produce a variety of symptoms). This is the time for attention, careful inquiry, empathy, diplomacy and tactful action.

There is no easy universal rule for such situations, but inaction (or retaliation) without thought or inquiry is definitely not one of the workable (or moral) alternatives. To become annoyed with a colleague whose spouse or parent is dying would be both inhuman and counterproductive. Often asking oneself whether the colleague has a problem is a big first step. Talking confidentially to a friend of that colleague may be a second step.

## L. SYSTEMIC THREATS TO COLLEGIALITY

We have noted that collegiality is endangered when not all the judges on a court live in the same city and work in nearby offices.

A big court can produce similar problems. A law firm with more than (say) eight partners is qualitatively different from a smaller one; the same is probably true of a Court of Appeal. It has been widely suggested that the U.S. Ninth Circuit (covering the whole western U.S.A.) has so many judges that it is at or beyond the limits of collegiality. It is doubtful that any Canadian Court of Appeal is at that point, but one may wonder whether it would be safe to increase the size of any Court of Appeal beyond (say) 25 judges.<sup>114</sup>

*Ad hoc* courts can be a problem. One thinks of the Court Martial Court of Appeal, territorial Courts of Appeal, and the Ontario Divisional Court. (The three territorial Courts of Appeal are not really *ad hoc*, because one provincial Court of Appeal provides the majority of members of each such Court of Appeal.) True collegiality is unlikely when people who scarcely know each other suddenly and temporarily have to work together, trust each other, and debate. Presumably it helps if the panels of such an *ad hoc* court do not change too often or too much. Even extensive use of trial judges or outside appellate judges poses some problems, apart from geographical ones.

<sup>114</sup> See Posner, *Economic Analysis of Law* 602 (6th ed. 2003).

## M. LIMITS OF COLLEGIALLY<sup>115</sup>

Collegiality can be bought at too high a price, and is as much a means to various ends as an end in itself. Therefore, an appellate judge must be careful not to let friendship, politeness, or a clubbish atmosphere hobble proper judgment as to the result of an appeal.

### 1. Stay Open Minded

Each judge must remain open to persuasion until the end of an appeal. Usually there is no grave danger in knowing the preliminary views of colleagues. But any argument from any source, by counsel, or from some textbook, or from a court student, may come up at any time, or be reweighed at any time. The same is true of any piece of evidence newly found in the Appeal Books. Opinions may properly shift then. The blinds and windows must always be open.

### 2. No Cabals

It is dangerous, even unethical, for two members of a panel to negotiate the result of an appeal before the third has a chance for input. (It is different once the panel is irrevocably split, and the question is how to word the majority judgment.) By analogy, it is ordinarily unwise for a panel to agree on a draft judgment before showing it to the rest of the court, if court practice is to circulate draft judgments to all judges on the court for comments. (There may be exceptions, e.g. in big or complex cases.)

However, one should not ban all communications about an appeal which are between only two members of the panel. That is doubly so when the third member is unavailable, or agrees already with one of the two, or if the three have already heard full argument and discussed the case at length, and it is plain that the third member will be dissenting from the other two.

Nor is there any harm in one member of the panel's asking a student or staff lawyer to research or draft something for an appeal, whether or not the other two panel members agree.<sup>116</sup>

### 3. No Groupthink

Each judge on a panel has to make up his or her own mind about each appeal on its own merits. His or her opinion should not be unduly swayed, still less dictated, by the views of anyone. Not by panel members, factions or schools of thought on the court, the Chief Justice, the whole court, or even the views of the legal profession or academe generally. The end of the day is no time for loyalty. Appellate judges deciding appeals must avoid Groupthink, or a desire to please friends on the court, or to please the most charming, clever, witty and congenial members of the court.

<sup>115</sup> See also Part C above.

<sup>116</sup> See Part C.2 above, about whether a panel should discuss a case before oral argument.

#### 4. Concurring Reasons

An appellate judge should write a separate concurring judgment only for weighty reasons. For one thing, it wastes the profession's time, kills trees, and can lead to puzzles about what is the *ratio decidendi*.<sup>117</sup> Concurrences also eat up hours of its author's (or his or her student's) time.

However, neither these concerns, nor collegiality, should ever drive an appellate judge to concur in reasoning (or a result) with which he or she does not really agree. (A style of writing which one dislikes is a different question entirely.) It is curious that some appellate judges are consistent in what they write, but sometimes inconsistent in what they concur in. That may be one reason why appellate courts sometimes produce inconsistent law in two appeals.

It is proper to write a separate opinion to reach the conclusion a different way, or to suggest a view of the law which would restrict or expand the scope of the decisions made (especially the law laid down). However, it is doubtful that a concurring opinion should purport to interpret the majority opinion, for any purposes.

## N. ACCESSIBILITY

This aspect of collegiality is discussed above in Chap. 4, Part B.

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<sup>117</sup> See for example *Boos v. Barry* (1988) 108 S. Ct. 1157, 485 U.S. 312; Ginsburg (1990) 65 Wash. L. Rev. 133, 148; Witkin, *Manual on Appellate Court Opinions* 186 (§ 98) (1977). Cf. Chap. 10 on dissents.

## CHAPTER 9 – CLARITY

*“We have in our police reports realism pushed to its extreme limits, and yet the result is, if must be confessed, neither fascinating nor artistic.”*

*“A certain selection and discretion must be used in producing a realistic effect,” remarked Holmes. “This is wanting in the police report, where more stress is laid, perhaps, upon the platitudes of the magistrate than upon the details, which to an observer contain the vital essence of the whole matter.”*

– “A Case of Identity”

### A. IMPORTANCE

This chapter urges judges to speak and write simply, accurately, and beyond any doubt.

Why do appeal courts need clarity? First, to bar misunderstandings, which produce waste, harm, and heat. Misunderstandings can be genuine and spontaneous, or contrived. When a Court of Appeal issues a judgment or a Practice Direction, it commands. Those commanded who resent or shirk the command often ingeniously interpret it so as to except their situation. Those persons are usually counsel, occasionally trial judges. Clarity bars that.

Second, clarity prevents and exposes muddled reasoning.<sup>118</sup> When an appeal panel discuss a possible judgment, one judge may say, “I’ll try drafting it and see if it writes.” Step-by-step explicit reasoning usually proves whether its chain of logic and evidence is sound. Difficulty in writing often flags gaps or flaws in reasoning. Indeed, many people solve a problem, or test an hypothesis, by clearly writing a possible solution.<sup>119</sup>

Third, people read clear writing. They willingly read interesting writing. But few read long hard prose (even if they claim they do). Fewer properly absorb hard prose. Murky prose obstructs, like a muddy road. Its only uses are dishonest: to deter reading, or to serve as a holy idol, to worship but not understand.<sup>120</sup>

Lest any reader still think that readers will persevere with murky writing, Appendix B will bludgeon such illusions.

Finally, clear and simple writing persuades, and strengthens precedents. A judge’s job does not end with mining uncut diamonds; readers disdain dirty pebbles. Judges must cut and polish their gems.<sup>121</sup>

<sup>118</sup> See Chap. 16, especially Parts E and F.

<sup>119</sup> See Traynor (1957) 24 U. Chi. L. Rev. 211, 218; Lasky (1961) 49 Cal. L. Rev. 831, 838, 839, 844; Coffin, *The Ways of a Judge* 57, 147 (1980).

<sup>120</sup> See the tongue-in-cheek “Translations” by Zimel (1959) 43 Jo. Amer. Judic. Soc. 63.

<sup>121</sup> See Posner, *Cardozo: A Study in Reputation* at 44, 134, 136 (1990).

## B. WHERE CLARITY WORKS

Appellate judges must be clear in all they say. Oral discussions are the most common source of misunderstanding or puzzlement. That stems from their unplanned nature, people's careless habits, excessive politeness, and selective listening. So conversations need the maximum clarity obtainable.

Internal memos in a Court of Appeal can also confuse or offend, though few are intended to do either. The faster they are dashed off on a keyboard and sent, the lower their clarity.

The need for clearly-written Rules of Court or Practice Directions is obvious.

The need to write reasons for decision clearly should also be obvious, but it is not. Every lawyer or judge has suffered from fights over unclear past precedents; yet not all present judges notice the precise source of that evil, still less learn from it.

Some judges assume that reasons for judgment should be long, imposing, and a bit ugly, like the 1864 East and West Blocks of Parliament in Ottawa. The opposite is true.

## C. HOW TO ACHIEVE CLARITY

### 1. Where to Get Help

Limited space here permits mentioning only a few ways to write clearly. The best way to learn is to take a course on simple, clear writing. There are excellent summer courses for Canadian judges on judgment writing. Many books also tell how; here are a few:

Strunk & White, *The Elements of Style*<sup>122</sup>

Goldfarb & Raymond, *Clear Understandings: A Guide to Legal Writing*<sup>123</sup>

Berry, *Writing Reasons: A Handbook for Judges*<sup>124</sup>

Williams, Joseph M., *Style: Toward Clarity and Grace*<sup>125</sup>

Mailhot, Louise, and Carnwath, James D., *Decisions, Decisions ...*<sup>126</sup>

*Rédaction: rédiger des écrits d'ordre juridique*<sup>127</sup>

<sup>122</sup> 3d ed. 1979 Collier-Macmillan

<sup>123</sup> Random House N.Y. 1982, repr. 1988 Goldenray, Tuscaloosa Ala.

<sup>124</sup> 2d ed. 2001 E-M Press, Victoria.

<sup>125</sup> U. of Chicago Press 1990, p.b. 1995.

<sup>126</sup> Yvon Blais 1998.

<sup>127</sup> cours de la formation professionnelle du Barreau du Qué. Yvon Blais.

## 2. The Basic Approach

Most people reading this chapter will be judges who write appellate judgments. So I will address my suggestions directly to you, the reader.

To write anything useful or easy to read, learn who your audience will be. Write about what interests the audience, and allow for what they know or do not know. If prose is neither interesting nor useful, no one will read it. If it is difficult to read, people will stop reading. Do not write about what you are interested in. For example, your judgment should not recount all the research and reasoning steps which you followed to reach your decision. That does no good, and leaves murky what the law is. Writing about you and your work or interests is called writer-based writing. Courts need reader-based writing instead.

An even worse type of writer-based writing is showing off. “See how erudite and hardworking I am.”

Almost as ineffective is cafeteria-writing.<sup>128</sup> Not knowing or deciding who the audience is, the author cooks everything possible, and sets it out on the steam table, for every possible audience to graze.

Do the opposite. Before writing, decide whether this judgment will be primarily for the parties (in an error-correcting case), or for future judges and lawyers (in a law-making case). The body of the judgment will depend almost entirely on that choice of audience. What degree of detail does this audience need? What aspects are important to them? Do they have to be brought up to speed first? (A bit of that never hurts.)

How to start? Begin with a very brief statement of the main issues, so that the reader will know what to watch out for. This is not a mystery novel; it is proper to announce the result or the theme at the beginning. If the judgment is more than 8 or 10 pages, explain how it will be organized and use similar headings.

Wagner often introduces early a theme which will later dominate the key parts of his opera. Other operas’ overtures do much the same.<sup>129</sup> And a good judgment somewhat restates or groups the issues. It does not merely take them off the factums, and weigh each like a public scale master.<sup>130</sup>

Carefully tune the fact portrayal to the legal discussion which will follow.

When leaving one topic for another, make the change obvious. If there is a connection or a distinction between the two topics, a transitional sentence helps. For example, “Now we turn from the old common law to the statutory amendments to it.”

## 3. Principles of Writing

The discussion above is about topic and form. Here are seven principles governing the content of good judgments.

### (a) Brevity

Make everything as brief as you can, just short of truly choppy or cryptic prose. Keep paragraphs and sentences short too. Avoid repetition, and keep only words with a definite purpose. Cut out wordy phrases.

<sup>128</sup> See Stevenson, (1975) 59 *Judicature* (#3) p. 134.

<sup>129</sup> See Posner, *Cardozo: A Study in Reputation* 55 (1990).

<sup>130</sup> Posner, *op. cit. supra*, at 144.



Do not discuss anything without a clear purpose, such as proving that the law dictates your conclusion. Do not import and re-erect what Lord Blackburn said about the ideas of Willes J., unless it is a load-bearing wall in your building. Mere recitals of law or authorities often puzzle, and usually waste paper. Recitals which you do not clearly adopt are easily misconstrued. If you restate some settled law, someone will later argue that you changed that law.<sup>131</sup>

It is dangerous to recite at length one counsel's argument, but not clearly adopt it.<sup>132</sup> Worse still is a rambling opinion which describes many cases on a number of legal topics, then abruptly announces an opinion. It merely hints that the reason is buried somewhere in one of those topics. That creates a mystery. Does it approve some of the authorities cited? Which ones? A mystery is the opposite of clarity.

Omit times, dates, and amounts not important to the issues. They bore most readers. Like burrs and thorns, they slow conscientious readers.

No method of producing a first draft is perfect.

It is virtually impossible to be simple, brief and disciplined when dictating (to a dictaphone or voice-recognition software). If you must dictate, work off a detailed outline. Even a fast typist will be too wordy when keyboarding his or her draft. Unless your typing speed is always slow, you will produce a more succinct product if you write the first draft in longhand.<sup>133</sup> On the other hand, a quick typist can break the ice and keyboard a quick rough draft. And a computer makes it far easier to shuffle the order.

### **(b) Simplicity**

When writing English, use short punchy words of Anglo-Saxon origin. Multi-syllable words are harder for every reader, even the educated. When writing French, do not postpone the operative part of a sentence with too many preliminary recitals.<sup>134</sup>

And often fancy words are too abstract and so too vague. Sustained abstraction with no concrete example weakens and often puzzles. "Oppression" is vague; bleeding a company by padding expenses is clear.

Don't use novel terminology. A modern vice is a set of invented but similar acronyms.

Use the indicative (not the subjunctive or the conditional), the active (not the passive), and real verbs (not gerunds or nouns). French prose tends to overuse the passive voice.<sup>135</sup> Do not say "making the Act violative of the Charter". Use simple sentences, with the subject and the noun close together, not separated by ancillary matters.

Use a "grammar checker" computer program to sample your writing, and see how it rates for reading difficulty (brief sentences, simple words).

If you must go into lengthy or complex facts, try to clarify them with a simple table, chart, family tree, or map.

<sup>131</sup> See Chap. 11 Part D.2; Posner, *op. cit. supra*, at 45, 135; Black & Richter (1993) 16 Dal. L.J. 377, 380-81; McCormick (1998) 9 Sup. Ct. L. Rev. (2d) 463, 470.

<sup>132</sup> See Chap. 11 Part D.3.

<sup>133</sup> Kitto, 1973 paper reprinted (1992) 66 Aust. L.J. 787, and in Sheard (ed.), *A Matter of Judgment* 69, 76 (Jud. Comm. of N.S.W. 2003).

<sup>134</sup> A colleague so advises.

<sup>135</sup> A colleague tells me that.

**(c) Shun Quotations**

Do not quote unless the quote is brief, and wonderful or amazing. Quotations within quotations are grotesque. Do not write by scissors and paste; lifting paragraphs from text already written (even by you) bloats; that style is a relic of pre-1970 technology. Only quote the vital passage from statutes; summarize the rest briefly.

**(d) Write Positively**

Beware double negatives, let alone triple or quadruple ones. This is a peculiarly legal vice. Try reading this:

One cannot deny entirely the negative influence of those legal authors lacking a style free of the temptation to avoid emphasis on what they do not intend, even unconsciously, that the reader refrain from.

If you can understand that sentence, you have been exposed to the disease. If you do not mind it, you need professional help. If you like it, you are a carrier of the disease.

I admit that I invented the indented passage above. But here is a festival of multiple negatives quoted from a real headnote in a recent Canadian law report. No judge wrote this prose:

The appeal judge erred in setting aside the trial judge's exercise of his discretion not to relieve the defendant from its non-compliance with s. 109 of the *Courts of Justice Act*. As a corporate defendant, the defendant was required to establish on appeal that its right to a fair trial was prejudiced by the delay. There was nothing on the record to indicate that the defendant's ability to make full answer and defence was prejudiced. There was no evidence that the pre-charge delay adversely affected the fairness of the trial. With respect to post-charge delay, the defendant could not rely on the presumption of prejudice resulting from the passage of time that arises respecting an individual accused. The inference of prejudice arising from the passage of time alone is linked to the liberty and security interests of an accused, not the fair trial interest. A corporate entity does not have the right to liberty and security of the person within the meaning of s. 7 of the *Charter*. In the absence of some evidence of actual prejudice, the appeal judge erred in referring the matter back for a hearing. The appeal judge also erred in stating that the s. 11(b) motion should have been argued at the end of the trial. A motion to stay proceedings for a s. 11(b) breach is ordinarily argued before trial absent unusual circumstances, which did not exist here.<sup>136</sup>

**(e) Purity**

Do not qualify or hedge unnecessarily. In university, we learned to distrust a flat unqualified statement. So, we qualify ("often," "sometimes," "many"). Then we salt our sentences with conditions ("assuming that . . ." or "subject to the foregoing . . ." or "to the extent that . . ."). Still fearing rebuttal or exposure, we make our poor sentences orphans. We write, "It may be argued that . . ." or "not unjustifiable" or "not inconsistent with" or "One might be pardoned for concluding that . . ." (That also leads to double negatives.)

<sup>136</sup> Emphasis added.

Writing which flip flops or hedges is not a cure for uncertainty. A judge's reasons for judgment, or a lawyer's written argument, is not a university exam or essay, nor an article for a learned journal.

Instead, think hard and reach a settled conclusion. Once you feel confident, state it clearly and simply.

**(f) Discard**

Discuss only what is necessary. Drop weak topics. Rarely are there six strong reasons for a conclusion in litigation. If you list six, but four are weak, the two strong ones will also seem weak, even damaged.<sup>137</sup> Especially if you sandwich the strong ones between the weak ones. Counsel's subsidiary unarguable points usually do not merit more than a sentence each; if that.

Extra points in a judgment also weaken it as a precedent. The more reasons that it gives, the easier it will be to distinguish later. If two of the reasons rely on factual or procedural quirks of that particular appeal, then later counsel and judges will argue that those two are a necessary part of the *ratio*. Since such quirks will rarely recur in future cases, the case will rarely ever apply as a precedent. Judges and lawyers commonly distinguish precedents that way.<sup>138</sup>

*Dicta* make a judgment harder to read by lengthening it and inserting detours. One can visualize the route on a direct highway, but few can visualize a route which follows even one detour.

Keep only those facts needed to understand the issue you discuss.<sup>139</sup>

Do not try to foresee every contingency or qualification. Do not include every detail. You are not drafting a taxation statute.

**(g) Edit and Re-edit**

Prune and revise repeatedly. Appellate judges may go through twenty or more drafts of a reserved judgment. No one's early drafts are clear and unambiguous. In fact, many are really bad. They leave big gaps and make careless statements. After all, the best way to keep up momentum and draft promptly is to write a quick incomplete careless draft, then revise thoroughly.

Edit to do more than correct. Clarify. Shorten and tighten.

Learn your habitual weaknesses, such as repetition, or unclear organization.<sup>140</sup> Then devote one re-editing (draft) solely to seeking and fixing such common problems.

As author you must check and revise. But as author you are a poor person to proofread, let alone assess clarity. Someone unfamiliar with the draft should also check it,<sup>141</sup> preferably someone not trained in the law. If he or she cannot understand it, usually it is not clear enough for judges or lawyers. If a legally-trained person has to read any sentence twice, it probably needs rewording.

A gap of a few days before proofreading gives you a fresher eye more like a new reader's.

<sup>137</sup> See Genesis 41:20.

<sup>138</sup> See Posner, *op. cit. supra*, at 42 (1990).

<sup>139</sup> See Posner, *op. cit. supra* 42, 135 (1990).

<sup>140</sup> Other more substantive causes of over-breadth and fuzziness are discussed in Chap. 2, Part E.4.

<sup>141</sup> On minor editing of draft judgments by law clerks, see Coffin, *The Ways of a Judge* 162-63 (1980).

#### 4. Timing

Apart from efficiency and procrastination,<sup>142</sup> timing impacts on clarity. Start while there is still time to do a careful job. Never leave important drafting until a deadline looms and you lack time.

Speaking of a sudden death requiring an immediate obituary, Mencken wrote,

The common legend is that such pressure inflames and inspires a true journalist, and maketh him to sweat masterpieces, but it is not so in fact. Like any other literary man, he functions best when he is at leisure, and can turn from his tablets now and then to run down a quotation, to eat a plate of ham and eggs, or to look out of the window.<sup>143</sup>

#### 5. Physical Aids

We saw why there are dilemmas in choosing the best way to write the first draft.<sup>144</sup> Instruction here on how to use a computer would be otiose.

What if you choose (or are forced) to draft by hand? Then use the traditional journalists' method. Write on unnumbered **half**-sheets of paper, with lots of margin and wide spacing. Start each new paragraph on a new sheet; run no sentence over between sheets. When the draft is written, reread it. When you want to move a passage, just shuffle the sheets affected. When the order seems acceptable, number the sheets and hand in for keyboarding.

### D. ALLUSIONS

People often misunderstand figures of speech, especially metaphors, which are therefore dangerous in a judgment.<sup>145</sup>

Allusions to standard literature, mythology, history, or the Bible, entail risk. Canada is full of intelligent university graduates who do not recognize such allusions, especially if they are not express. An unrecognized historical allusion got a Canadian judge into a lot of public trouble in recent years.

Even purely legal allusions can raise different problems. A judge immersed in a topic may write a conclusion like this: "The *R. v. Cain* principle overrides the rule in *R. v. Abel*, which forms no exception to it." At best, that requires the reader to read the preceding paragraphs of that judgment to see what it means. At worst, the reader must carefully analyze all that went before, and may still be in doubt. Write an issue or a conclusion in simple, free-standing terms. For example, "Contracts need consideration or a seal to be valid. A promise to a charity is no exception."

<sup>142</sup> On which see Chap. 5, Part B.

<sup>143</sup> H.L. Mencken, "Coolidge," *Baltimore Evening Sun*, Jan. 30, 1933, then *American Mercury* Apr. 1933. Reprinted in *The Vintage Mencken* (ed. Cooke) 219 (N.Y. Vintage 1955).

<sup>144</sup> Subpart 3 above.

<sup>145</sup> See the discussion in Chapter 16, Part K.

Gender-specific language is often a poor idea. Some of the most deft ways to avoid it are as follows:

Method	Don't Say	Say Instead
Use noun, not pronoun	He	The author
Use plural, not singular	He	They
Avoid possessive	Her excuse	The excuse
Use second person	The judge neglects his duty	You neglect your duty

## E. AVOID HABITUAL FORMATS

The Supreme Court of Canada is now moving away from the rigid “Dickson format” for a judgment. It looked something like this:

- A. Introduction
- B. Procedural History
  1. First Court
  2. Second Court
  3. Later Stages
- C. Facts
- D. Argument
  1. First Party
  2. Second Party
  3. Interveners
- E. Analysis
  1. Survey of Literature
  2. Law Elsewhere
  3. Competing Considerations Here
  4. Decision on Main Issue
- F. Conclusion

A number of people have criticized that format, but some courts persist in turning the crank on that machine.

Fixed formulas are straitjackets.<sup>146</sup> Cases differ; a format suited to one appeal mangles or bloats elsewhere. For one thing, the audience and the purpose vary. The fact recital in an error-correcting judgment should be very different from the recital in a judgment establishing one point of law. No two people think or write exactly the same. So one pattern for every author has many evils.

It is even worse where different people draft the different parts. Such a judgment reads like something Dr. Frankenstein manufactured. Besides, a judgment should flow, whether as a narrative, an exploration of policy, or a logical deduction. Any rigid formula tends to become a set of compartments into which the author (or authors) drop severed limbs. The judgment should be a living thing, not a series of butcher's cuts in a cooler.

Many a fixed formula leads to padding. In the sample "Dickson" outline above, one does not really reach the reasons for decision until near the end, in Part E.3.

## F. PUBLISHERS CHANGE JUDGMENTS

Chapter 11<sup>147</sup> describes how published judgments in law reports differ from the originals. Bear publishers' likely changes in mind, and omit what publishers may misunderstand or distort.

Do not refer to a case in the middle of a sentence, because law report publishers will graft and water its citation until it hides the beginning and end of the sentence. Suppose you write this sentence:

"For those reasons, the Supreme Court's recent *Smith* decision does not modify the *Jones* test for intent (knowledge plus purpose) at common law; *Smith* is only a decision on one narrow set of facts."

But in the law reports, it will look like this:

"For those reasons, the Supreme Court's recent *Smith* decision [*R. v. Smith* [1992] 1 S.C.R. 234, (sub. nom. *Smith v. R.*), 27 N.R. 212, (sub. nom. *N.S. (A.-G.) v. Smith*), 123 D.L.R. (3d) 200, 122 C.C.C. (3d) 424, (sub nom. *Smith v. R.*), 12 C.R. (7th) 100, reh. den. [1992] 2 S.C.R. xv, 28 N.R. 214n., 124 D.L.R. (4th) 107, 125 C.C.C. (3d) 160, 13 C.R. (7th) xv] does not modify the *Jones* test [*Jones v. R.* (1842) 7 Cl. & F. 212, 12 E.R. 479, 12 Cox C.C. 418, 42 L.J.Q.B. (ns) 212, [1838-42] All E.R. Rep. 701, 12 L.T. (os) 442 (Eng. H.L.)] (knowledge plus purpose) for intent at common law; *Smith* [*R. v. Smith* (*Smith v. R.*) (*N.S. (A.-G.) v. Smith*), *supra*] is only a decision on one narrow set of facts."

## G. POOR WRITING

Appendix B displays a few extracts from poorly written older judgments. Newer ones would also be easy to find, but there is no need to embarrass any current judge. A few extracts from articles and legislation are also added as a warning to other authors.<sup>148</sup>

<sup>146</sup> See Coffin, *The Ways of a Judge* 166 (1980).

<sup>147</sup> Part H.

<sup>148</sup> There are a few more amusing examples in Megarry (1978) 16 Alta. L. Rev. 406, 414 ff.

## CHAPTER 10 – DISSENTING

*“Yes, that’s it,” said Barker eagerly. “Is he on his own or is he entirely in with them?” . . .*

*“Mr. Holmes is an independent investigator,” I said. “He is his own master, and would act as his own judgment directed. At the same time, he would naturally feel loyalty towards the officials who were working on the same case, and he would not conceal from them anything which would help them in bringing a criminal to justice.”*

– *The Valley of Fear*, Part 1, Chapter 6

This chapter deals with intermediate appeal courts, such as a provincial Court of Appeal. It does not deal with dissents in the Supreme Court of Canada, whose circumstances are somewhat different.<sup>149</sup>

On the decision-making process, and discussions among the members of an appellate panel, see also Chap. 8, Part C.

### A. REASONS TO DISSENT OR NOT

#### 1. Why to Dissent

Some judges dissent to encourage the Supreme Court of Canada to reverse the majority. After an indictable conviction, a dissent on a point of law lets the accused appeal to the Supreme Court of Canada without leave. The Supreme Court of Canada does not seem very enthusiastic about some of those appeals, often hears them with a smaller panel, and often dismisses them with brief oral reasons.

Apart from that, appeal to the Supreme Court of Canada usually requires leave to appeal. Courts of Appeal rarely give it, so the losing party needs leave from the Supreme Court of Canada. If one appellate justice dissents on a legal point, that may encourage the party losing to seek leave, and encourage the Supreme Court to look harder at the legal point. In any event, the dissenting judge hopes for that.

Dissents carefully written with such considerations in mind, and based on an arguable operative question of law, are proper. But dissents are questionable where the real fight is over facts, or which party wins, and the point of law is an afterthought or makeweight.

<sup>149</sup> The United States Supreme Court has very different rates of dissent than do the United States federal Courts of Appeal: Ginsburg (1990) 65 Wash L Rev 133, 147.

The best reason to dissent is belief that applying the relevant law (including standard of review) to the evidence does not permit the result which the majority prefer. Indeed, conscience and ethics suggest that that conclusion is a necessary precondition to a dissent. That is especially true where there is no settled law, and a clash of competing norms, whether in common law or the interpretation of new legislation.<sup>150</sup>

And **writing** a dissent can have some cathartic value for its author, though the dangers of **publishing** it are obvious.

Trying to get the majority to correct something in their judgment may be a reason to **threaten** to dissent, but is not a reason actually to dissent. Still less should the third judge actually dissent if the majority make the correction which he or she suggested.

American authors often speak positively about dissents designed to encourage future “development” (change) of the law. Canadian authors quote Cardozo and sprinkle about vague but un-researched references to Holmes and Laskin. There might be some merit in that future change theory, but it needs strict limits. The first caveat is that judges are sworn to uphold the law, not to uphold what they wish were the law.

The second caveat is that all Courts of Appeal are bound by the Supreme Court of Canada.<sup>151</sup> And most Courts of Appeal are bound by their own previous decisions. Dissenting judges are bound by binding precedent (and statutes) just as much as majority judges. Being in the minority does not free the would-be dissenter from any legal restraints. A dissent is not proper unless it is founded on what would properly support a majority judgment (if one other judge concurred with it).

Furthermore, if recent Supreme Court of Canada precedent supports the majority, a dissent could encourage a future change in the law only if addressed to some other Supreme Court of Canada years from now. That sounds remote and unlikely. Besides, if the point is statutory interpretation, Parliament or the Legislature can easily clarify the statute if they do not like the majority’s interpretation of it, without lobbying by a dissent.<sup>152</sup>

Indeed, most actual examples of dissents later becoming law, are from the U.S. Supreme Court, which seems not bound by its previous decisions, even recent ones. So far as Canadian provincial Courts of Appeal are concerned, the likelihood of this year’s dissent becoming law in the next decade is very small. It may even be something of an urban myth confined to law schools. The only actual statistics which I have seen do not support the myth.<sup>153</sup>

## 2. Poor Reasons to Dissent

Some poor reasons are hinted at above, such as refusal to follow clear and binding law.

Another poor reason to dissent is personal feelings, such as mistrust between members of the panel hearing the appeal.

<sup>150</sup> See Roscoe Pound (1953) 39 A.B.A. Jo. 794.

<sup>151</sup> And pre-1949 Privy Council decisions.

<sup>152</sup> See Ginsburg (1990) 65 Wash L Rev 133, 144-5.

<sup>153</sup> See McCormick (2002) 81 Cdn. B. Rev. 369.



Even worse is a desire to encourage the losing party or the trial judge who was reversed. That is simply hobbling the Court of Appeal and its influence.

It is not sufficient for a dissent to identify a flaw in the majority judgment.<sup>154</sup>

There is little point to one judge trying to get just right a minor point of law, e.g. one which will rarely recur, or involving no general proposition. That is all form, with no practical utility now or later. An extended dissent with full reasons is inappropriate unless it raises a legal question of considerable importance. *A fortiori* if the majority's error is small and they got it almost right. Brandeis did not dissent where the point was small and unlikely to cause real harm in future cases.<sup>155</sup>

### 3. Disadvantages of Dissenting<sup>156</sup>

A Court of Appeal needs moral authority to persuade, not merely the legal power to command bailiffs. Trial judges should be encouraged to respect the Court of Appeal. They should neither be tempted to ignore its rulings, hoping that no one will appeal, nor to distinguish its decisions on thin and subtle grounds. But the influence of a Court of Appeal is diminished by a dissent, still more by frequent dissents on a variety of topics. A majority vote has little logical or moral force in itself.<sup>157</sup> A dissent suggests that it was chance that the result was 2:1, not 1:2. Unanimous words are needed.

Where there is a dissent, later courts have trouble finding what parts of that precedent to follow. A statement by the dissenting judge is sometimes inadvertently cited later. Some people do not understand that only the majority decision is law in that province. And someone will later argue that that judge was not dissenting on the point now at hand. If two judges dissent on different points, or one writes a concurring judgment on different grounds, confusion redoubles. Sometimes how to construct the *ratio* then becomes unclear.<sup>158</sup>

When Cardozo was on the United States Supreme Court, he was often in the minority at the conference after argument, but usually concurred later in the majority's published judgment.<sup>159</sup>

Writing a dissent is a powerful temptation to say something insufficiently diplomatic, even endangering collegiality.<sup>160</sup> Rude statements in American appellate judgments invariably occur where the panel is split, and are usually in the dissenting judgment.

A judge tempted to dissent should not assume that he or she has nothing to lose. A dissent which is not compelling can make the majority reasons seem stronger for having withstood attack. The effect is like ineffective cross-examination. Indeed, the bigger fuss that the dissent makes, and the more fundamental principles which it invokes, the more important and wider it makes the majority's reasons sound.<sup>161</sup> And the majority are likely to respond to a draft dissent by considerably improving their draft judgment, thus making it more persuasive.

<sup>154</sup> On that fallacy, see Chap. 16 Part M.

<sup>155</sup> Ginsburg, *loc. cit. supra*, at 143.

<sup>156</sup> See Barak, *The Judge in a Democracy*, 210-11 (2006).

<sup>157</sup> Ginsburg, *loc. cit. supra*, at 143.

<sup>158</sup> See Chap. 8, Part M.4.

<sup>159</sup> Ginsburg (1990) 65 Wash L Rev 133, 142.

<sup>160</sup> See Chap. 8, Part D.

<sup>161</sup> See Traynor (1957) 24 U. Chi. L. Rev. 211, 218; Posner, *Cardozo: A Study in Reputation* 46 (1990).

Personal risk is significant when one judge dissents fairly often. That judge's credibility erodes. An appellate judge who announces too often that the rest of the parade is out of step, raises the contrary suspicion.<sup>162</sup> It could also leave the impression that the various stated grounds for those dissents were not the sole (or real) ones.<sup>163</sup>

The American Bar Association's 1924 Canons said that:

"19 . . . It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort."<sup>164</sup>

## B. ALTERNATIVES TO DISSENTING

If the majority wish to decide the appeal orally on the spot, the dissenter may wish to call for a reserved decision. That will give more time for research, and for the judges to persuade each other.

An obvious alternative to a dissent is modifying the majority judgment enough that the third judge can concur in it, or at least concur in the result. Sometimes that takes a lot of work and discussion, but it is usually a good investment. What the third member objects to in the majority's draft may be an implication not really intended by the majority. Sometimes it is something about which they do not feel strongly. More often, the feature which the third judge dislikes is not really needed to reach the final result. The majority can delete, narrow, or weaken that feature, and so the judgment becomes palatable to the minority. Sometimes a different ground for the same conclusion can be substituted, and then all three judges can agree. Occasionally the dissenter cares about the legal question, not the result in the appeal, and all three justices can agree on putting the majority's result on a different basis.

So the dissenter should try hard to persuade the majority to rewrite their draft in a way that lets him or her concur instead.

If such surgery on the majority draft reasons is impossible, or fails to cure, then the third member of the panel could try to find a way to concur on some narrow ground. For example, maybe he or she can agree in substance with one ground used by the majority, say that it dictates the result, and so not express an opinion on the majority's other grounds. If the would-be dissenter thinks that a point not argued could be material, it suffices to mention it, and say it was not argued and is not decided in this case.

That solution achieves the narrow professed aim of most dissents: it avoids signing what conscience will not permit. That aim does not require the third judge to go further by disagreeing with the majority's other grounds; still less explaining why. If the majority cut back that far, but the dissenter persists, what he or she rationally gains by such a public split is often hard to see.

A few generations ago, some members of multi-judge courts would concur "dubitante" (with doubt). That seems to have fallen out of use, for no apparent reason. It is frank, and less harmful than a dissent.

<sup>162</sup> See Pound, *loc. cit. supra*.

<sup>163</sup> Cf. Ginsburg, *loc. cit. supra*, at 142.

<sup>164</sup> Canon 19 para. 3. After repeal and re-enactment in 1972 and 1990, that topic no longer seems to be covered in those Canons.

## C. HOW TO DISSENT

Before writing a dissent, the author should ask himself or herself why he or she is dissenting, and whether that reason can tactfully be explained. Whether or not that reason can be or should be explained, the author should publish to the world just what is needed to achieve the end sought, and no more.

The law reports are full of very brief dissents; a few generations ago, many dissents did not exceed a paragraph or two. That amply satisfies any demands of conscience and courtesy to colleagues and the public.<sup>165</sup>

A dissent longer than a few paragraphs consumes everyone's time, and wastes paper and ink. It has no legal effect. It guides no one, so why spend hours or days researching and writing it, while other (unanimous) decisions wait unwritten?

Why do most modern dissents go into so much detail? At times it may be habit, or fear of appearing lazy.

Sometimes an appellate judge writes a draft judgment hoping or assuming that it will be the majority judgment; but then the other two judges disagree, so the first author becomes the dissenter. Maybe some parts of that draft judgment should not be wasted, such as the recital of facts, procedural history, and issues.

Apart from that, the author should consider carefully whether to publish all the rest of that draft. Very often he or she should scrap it, for reasons above. The dissenting judge's time spent writing it is no reason to publish the details of that thinking. That labor is now gone forever. If one drops and breaks a bottle of antiseptic, does one cut one's fingers on the glass shards so as not to waste the antiseptic? To publish the judgment-become-dissent is at best writer-based writing, at worst an attack on the majority.

If the dissenter does publish full dissenting reasons, they should either follow their own chain of reasoning without criticizing anything, or at most criticize counsel's arguments. They should neither criticize, nor even refer to, the majority.<sup>166</sup>

## D. CONTINUING DISSENTS

If a court hands down several judgments on the same day, in appeals raising a similar question, it is common for the dissenting judge to dissent in each, even though that may not be strictly logical.

But thereafter, the time for dissenting on that question is over. All previous decisions of a Court of Appeal bind the Court, so its previous 2:1 decision binds the Court. If the same issue arises on a later appeal and the judge who dissented before sits again, he or she is bound by the court's previous decision. *Stare decisis* is law. His or her judgments must be based on the law, not on what he or she wishes were the law, or might become the law some day. One thing is absolutely clear; his or her previous dissent is not the law at present. Therefore, on a Court of Appeal below the Supreme Court of Canada, I have trouble justifying any "continuing dissent" in later cases.<sup>167</sup>

Many have said that the Bourbons learned nothing and forgot nothing. An appellate judge should do better.

<sup>165</sup> See Pound, *loc. cit. supra*, at 795.

<sup>166</sup> See further Chap. 8 Part D.

<sup>167</sup> See Traynor (1957) 24 U. Chi. L. Rev. 211, 219.

## E. DISSENTS ON SENTENCE

A brief dissent in a sentence appeal saying that the sentence should have been heavier, does no harm. Indeed, the dissent may serve the same function as a sentencing judge's words denouncing the prisoner's conduct. The accused will see that he had a narrow escape on appeal, and so even a light sentence may thus have an extra deterrent effect. To a degree, a Court of Appeal can thus have its cake and eat it too.

However, one tradition forbids a "dissent down" on sentence. One judge of a panel should not dissent because he or she thinks that the sentence should have been lighter. To the drawbacks of all dissents discussed above, such a dissent adds another. It gives the prisoner a legitimate sense of grievance. As he serves the last part of his sentence, each day he says, "one judge said that I should not be here now, and only the vote of one other judge is keeping me here." Such a "dissent down" is particularly undesirable if not based on some question of law or principle, but just on what is seen as the appropriate length of sentence for the facts at hand.<sup>168</sup>

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<sup>168</sup> See Ginsburg (1990) 65 Wash L Rev 133, 135 on the British practice.

## CHAPTER 11 – HOW TO READ APPELLATE JUDGMENTS

*“And now I made a very careful examination of the . . . paper which the inspector had submitted to us. It was at once clear to me that it formed part of a very remarkable document. Here it is. Do you not now observe something very suggestive about it?”*

*“It has a very irregular look,” said the colonel.*

*“My dear sir,” cried Holmes, “there can’t be the least doubt in the world that it has been written by two persons doing alternate words. When I draw your attention to the strong t’s of ‘at’ and ‘to,’ and ask you to compare them with the weak ones of ‘quarter’ and ‘twelve,’ you will instantly recognize the fact. A very brief analysis of these four words would enable you to say with the utmost confidence that the ‘learn’ and the ‘maybe’ are written in the stronger hand, and the ‘what’ in the weaker.”*

*“By Jove, it’s as clear as day!” cried the colonel. “Why on earth should two men write. . . in such a fashion?”*

*“Obviously the business was a bad one, and one of the men who distrusted the other was determined that, whatever was done, each should have an equal hand in it. Now, of the two men, it is clear that the one who wrote the ‘at’ and ‘to’ was the ringleader.”*

–“The Reigate Puzzle”

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### A. INTRODUCTION

I hope that the basic nature of parts of this chapter will not offend those readers already familiar with them. However, modern writers do not commonly mention some topics, which tend to be forgotten. Students also tell me that some of these topics were not taught in their law schools, so there may be some people not familiar with them.

Throughout this chapter one must recall that there are many potential audiences for a Court of Appeal’s judgment. They range from future legal scholars to the man now being sent to jail. The reader should try not to take a comment addressed to one audience out of context and read it as though addressed to another.

## B. *RATIO DECIDENDI V. OBITER DICTA*

The basic principle of precedent is that only the *ratio decidendi* of a decision by an appeal court binds. Everything else is persuasive authority which judges are free to disregard.<sup>169</sup>

Many able academic writers have discussed the finer points of the borderline between *ratio* and *dictum*, and so sometimes there is doubt whether a particular point is part of the *ratio*. And sometimes the *ratio* becomes clear only after further decisions. But those are mere details. The broad outlines are clear. What is not necessary to the decision, and especially what is clearly an offhand comment or piece of gratuitous advice, need not be followed. What binds is what is necessary to the decision.

The Supreme Court of Canada has said that its *dicta* should not be lightly disregarded.<sup>170</sup> But it is not clear that it has ever said that they truly bind other courts. Fairly often their *dicta* conflict with each other. As there are nine judges on that Court, and they write three or four large volumes a year, it would be impossible to avoid all such conflicts.<sup>171</sup>

We must also reflect that some things found physically in a judgment are not even *dicta*, because they are not the opinion of the court.<sup>172</sup>

## C. COUNTING HEADS

It is doubtful that anything in a dissenting judgment binds anyone. Even if some precise proposition in the dissent is not contrary to anything which the majority said, nevertheless by definition it is a milestone on the wrong road. Of course it is different where the majority expressly agree with the dissenting judge on that particular point.

Therefore, when one can clearly say which judgments are dissents and which are majority judgments, it is doubtful that one should go through each issue and count heads for or against each issue, or that one should say that a judge is dissenter only on issues 1, 3, 4, 7, and 9 to 12, but not on the others. Unfortunately, occasionally the results proposed by the various judges are so disparate that one cannot even readily identify dissenting and concurring opinions. Then only, one may have to resort to that kind of issue-by-issue head counting.

Of course one must distinguish between concurring in the result and concurring in the reasons. If one judge writes an opinion and four other judges simply concur in that opinion, then that is in effect the reasons of the five judges. When a judge concurs in the result but does not say that he or she agrees with or concurs in the reasons of the other judge, then the author's reasons remain the reasons of one judge only. Therefore, if each judge on a five-judge panel either gives his or her own reasons or merely says that he or she agrees with the result, then there is no such thing as majority reasons. It is even possible that there is no *ratio decidendi* from that appeal.

<sup>169</sup> Authorities are listed in 3 Stevenson & Côté, *Civil Procedure Encyclopedia*, p. 66-31 (2003).

<sup>170</sup> The cases are cited in Stevenson & Côté's *Civil Procedure Encyclopedia*, v. 3, pp. 66-22 to 66-23 (2003).

<sup>171</sup> See *Henry v. R.*, 2005 SCC 76, [2005] 3 S.C.R. 609, 342 N.R. 259.

<sup>172</sup> See part D below.

It is now rare for an even number of judges to decide an appeal, but still possible (especially if one judge proposes some entirely different result or remedy). If the court splits evenly in the result, the appeal is deemed to fail, but there is no majority judgment. The decision of those who would dismiss the appeal is not binding precedent.<sup>173</sup>

## D. AFFIRMING OR APPROVING OTHERS

Once again, it is very important to find carefully exactly what appellate judges agree with, and not read into that more than they have said.

An appeal is from the formal judgment of the trial court, not from that Court's reasons.<sup>174</sup> So if an appeal is dismissed, it does not necessarily mean that the appeal court agrees with **any** of the reasons given by the trial court. If the appeal court wishes to adopt the reasoning of the trial judge, then they must either say that they agree with it, say that they adopt it, or give reasons of their own which in effect say the same thing as the trial judge said.

Modern Canadian appellate judgments tend to quote from many previous decisions in other cases and other courts. Unfortunately, it is sometimes very difficult to tell whether the new judgment quotes them with approval and in effect adopts them. This may sound surprising. One might wonder why a judge would ever quote from another judge without intending to adopt or agree with the quotation. Apparently some judges want to write a survey of the literature, or to set out at length the arguments and authorities cited by both opposing counsel. Only after that do they start giving their own reasons for decision. Every judge writing a judgment should avoid such ambiguous citation.

Very often a judge writing reasons for decision recites some argument of counsel without adopting it or agreeing with it. If a judge intends to adopt or agree with a submission of counsel, usually he or she says so. Therefore, readers should presume that recitals of argument imply no approval. Sometimes the judge's style of writing is fuzzy and does not make it clear that a certain recital is mere preamble, not operative. Then it may help to flip back several pages and see the heading or opening words of the particular section to get the context.

Occasionally a lawyer does not understand the significance of a phrase like "assuming for the sake of argument." Such a reference never means that the court agrees with or adopts the thing assumed. Indeed it often hints that the court has considerable doubts about the proposition. Such a statement puts the proposition to one side and expressly does not decide it. What the court means is that the correctness or incorrectness of the proposition has no effect on the final result. The court simply bypasses the topic.

<sup>173</sup> See the cases collected in 3 Stevenson & Côté, *Civil Procedure Encyclopedia*, p. 66-30 (2003).

<sup>174</sup> The cases are cited in 4 Stevenson & Côté, *Civil Procedure Encyclopedia*, p. 75-91 (2003).

## E. DENYING LEAVE TO APPEAL

Publishers and lawyers quoting appellate decisions are usually very careful to indicate that the Supreme Court of Canada has denied leave to appeal it, but that probably matters little. The fact that a higher court has refused leave to appeal adds nothing to the precedential weight of the decision cited.<sup>175</sup>

That is not an arbitrary rule. The grounds for refusing leave to appeal are many. The fact that the decision in question appears to be correct is only one possible ground, and often not quite sufficient. In the case of appeals to provincial Courts of Appeal, the decided cases make that plain. Though the Supreme Court of Canada rarely now gives reasons for granting or denying leave to appeal, occasionally it has in the past. In addition, judges and counsel familiar with the process have often written or spoken on the topic. So some of its standards are known.

The Supreme Court of Canada receives far more would-be appeals than it could possibly hear. Therefore, the most common ground for denying leave to appeal is the fact that the case does not appear to raise a legal question of general importance. If an appeal raises obvious factual errors but no proposition of general law, or raises a question of law important only to a small number of people in one province, it is very unlikely that the Supreme Court would give leave. The Supreme Court sometimes refuses leave to appeal because the time is not yet ripe, or because it has already decided or is deciding a similar case. Still more pertinent is whether the case at hand raises the legal issue squarely with the right evidentiary record, so as to allow the Supreme Court to make a useful discussion of the legal point.

So refusal of leave is no indication that the Court of Appeal was right.

## F. RESERVED V. EXTEMPORE JUDGMENTS

Despite varying terminology, virtually every appellate court in North America distinguishes two classes of reasons for judgment. One is written at length some time after argument, and is often called a “reserved” judgment. It is used in more important cases. In most courts, that means that it was shown in draft form to all judges, not just those on the panel.<sup>176</sup> In contrast, there is often a shorter, less formal type of judgment which may be called an “endorsement,” a “memorandum of judgment,” or a “bench judgment” or an “oral judgment.”<sup>177</sup> In the United States (though not in Canada) the brief type is often drafted by staff lawyers.

How to identify an example of the two types of judgment differs somewhat from court to court. Often the headings will explain that, but most publishers’ law reports delete such headings. The format of the original judgment almost always shows which type is involved, but again that format disappears in many law reports. In some courts, the informal type of judgment does not identify which of the three judges wrote it; but occasionally an important reserved judgment will also have that feature. A judgment which does not reveal the name of the author is usually expressed in the plural “we.” But it is traditional for a reserved judgment to be written in the singular (“I,” not “we”) and to express conclusions in the subjunctive (“I would dismiss the appeal”). The informal type of judgment is usually much briefer and less detailed than a reserved judgment.

<sup>175</sup> *Cdn. W. Bank v. R.* 2007 SCC 22, [2007] 2 S.C.R. 3, 362 N.R. III (para. 88). The cases are cited in 3 Stevenson & Côté, *Civil Procedure Encyclopedia*, pp. 66-26 to 66-27 (2003). Curiously, publishers citing older Supreme Court of Canada decisions never tell us that the Privy Council refused leave to appeal.

<sup>176</sup> In the U.S.A. that may be by rehearing procedures.

<sup>177</sup> Though occasionally these were not really delivered orally.



There may not be any difference in the effect on lower courts of the two types as precedent. But where precedent has only persuasive authority, the weight of a reserved judgment is presumably higher. Furthermore, if it is not clear whether the judgment merely recites established law, or whether it makes new law or changes the law, one would presume that the short informal type of judgment is not intended to change the law.

Some courts even have precise rules about precedential value. For example, the Alberta Court of Appeal has declared that its memoranda of decision in sentence appeals have little value as precedent.<sup>178</sup> It has not made any declaration about precedential value of memoranda in other circumstances.

## G. FACTS VS. LAW

Only decisions on the law create precedents. A case cannot be cited as precedent for a factual proposition. That is partly because facts are supposed to come from the evidence, and the evidence may differ in every case.<sup>179</sup>

There may be one exception to that rule in constitutional cases. Often the Supreme Court of Canada has held that some statute *prima facie* infringes the *Charter*, but it is saved by evidence adduced under section 1 of the *Charter*. It would be very tedious to have to call all that evidence again in every later case on the same point. Often that is not done. Presumably that shortcut is proper, though the decided cases on the subject are not entirely consistent. Often that problem is simply passed by in silence.<sup>180</sup>

## H. LAW REPORTS

### 1. How Publishers Change Judgments

If one wishes to see precisely what a judgment said, one has to get a photocopy of the original from the court file, or (next best thing) look at the text of that judgment on that court's own website.

All commercial publishers of law reports or websites make changes in judgments.

Some of these changes are deliberate, e.g. where the editors correct errors in names or citations of cases cited, and add parallel cites. They also try to correct typographical errors. Their editors will even sometimes query a court about a seeming contradiction in a judgment, and ask if the wrong word has been used. Publishers usually watch for *corrigenda* issued by courts; one publisher may pick one of these up where another publisher's website does not. Sometimes such corrections are published only in an obscure page in a later volume of a law report.

Sometimes publishers "correct" what they think is an error, but is not actually an error.

<sup>178</sup> See its Consolidated Practice Directions Part A.4.

<sup>179</sup> The cases are cited in 3 Stevenson & Côté, *Civil Procedure Encyclopedia*, pp. 66-3 to 66-4 (2003).

<sup>180</sup> See the cases cited in 3 Stevenson & Côté, *Civil Procedure Encyclopedia*, p. 66-4 (2003).

Publishers also introduce inadvertent errors when they input the raw decisions. Though all publishers (hard copy and electronic) try hard to get decisions from courts in electronic form, in 10 to 20% of the cases they are not able to do that. When they decide to publish such a case, they then have a choice: to re-keyboard the text (maybe offshore), or to scan it in electronically. Both methods introduce typographical errors. Publishers commonly use a spell checker, but a spell checker will not detect the error if the erroneous version is also a word. Minor errors in small words (such as changing “or” to “of”) are endemic throughout commercial electronic versions of cases in the United States and Canada.

Sometimes electronic versions of cases on commercial websites have much larger and truly serious omissions, for reasons which remain obscure.

Publishers often used to rearrange the order of judgments delivered in the same appeal. Courts’ use of paragraph numbers may discourage that.

Instead of printing the one-line concurrence of one judge, publishers usually add his or her name to the beginning of the judgment concurred in (as one of the concurring judges). At times, they make errors, and fail to distinguish between a judgment expressly written by two judges (on the one hand), and a judgment written by one judge but concurred in by another (on the other hand).

Because publishers are at such pains to correct and amplify the citation of earlier precedents in judgments, sometimes they produce misleading effects. If the judgment as written cited a decision by a trial court, the editors of the law report may well update that cite by referring to the subsequent appeal of that previous case. Thus it may appear that the later court was citing the appeal court. But it was not; it was only citing the trial court. That can give a misleading impression. For example, the Alberta Court of Appeal gave one decision in ignorance of a judgment of the Supreme Court of Canada issued two days before. It knew of and cited the other case only at the Court of Appeal level. The publishers altered the Court of Appeal’s latest judgment, adding the Supreme Court of Canada reference to the Court of Appeal’s cite of the other Court of Appeal case. It then looked as though the Court of Appeal had cited the Supreme Court of Canada. After a comment about that alteration, one publisher started marking all insertions by its editors with square brackets.

As noted in Part F, publishers always take off titles, such as “Memorandum of Decision” and change formatting.

## 2. Official Reports

At one time, courts paid great attention to what were and were not “official” law reports. Why it should now matter whether some publisher makes a profit, or whether the judges have somehow blessed a set of law reports, is obscure. For over a century, publishers have received from courts the exact words of the judge; they no longer sit in court trying to summarize what the judge is saying orally.

At one time, official law reports were thought important because the judges corrected the proofs, and so the version in an official law report was considered more authentic. That is probably a reason to prefer the Appeal Cases, Queen's Bench, Chancery, and Family Reports from England, as distinguished from the Weekly Law Reports, the All England Reports, or other topical reporters. The Law Reports' versions do differ from the Weekly Law Reports' version, and the Law Reports add other features.<sup>181</sup> However, the version of judgments in Canada's Supreme Court Reports is the same one that goes to the commercial publishers. The editing and correcting is usually done before the public sees the judgment. Presumably that is the same with the Federal Court Reports.

Federal and New Brunswick courts issue judgments both in English and French versions, which are equally authentic. But most of the commercial reports publish the judgments in one language only.<sup>182</sup> That leaves out half the data in any situation where precise interpretation of the judgment is important.

### 3. Summaries

The value of a "law report" is clearly lower when it gives a mere *précis* of the decision, not the full words of the judges. One should not be content with such a summary if it is possible to obtain the actual words of the judge e.g. on some website. The summary's purpose is to tell counsel that a written judgment exists.

In some cases, it is obvious from the format of the publication that it is a mere *précis*. For example, Canada's Weekly Criminal Bulletin, the Alberta Weekly Law Digest, or the old pre-1953 Weekly Notes from England. Sometimes it is not so easy to tell whether the report is full or just a *précis*, as was the case with the old Western Law Reporter, the old Times Law Reports, or the Ontario Weekly Notes and Ontario Weekly Reporter.<sup>183</sup>

### 4. Unreported Cases

Law reports also inadvertently alter the body of case law in another way: omissions. These are often not the publishers' fault; there are still a considerable number of useful court decisions which seem not to reach the commercial publishers. Some did not even get on commercial websites. Oral judgments often do not get on the courts' own websites. There are still a number of valuable court decisions which the law reports do not report. Sometimes that is because they resemble some other decision (in the same lawsuit) already reported. Some of these unreported decisions are by single judges of the Supreme Court of Canada.

<sup>181</sup> In England, the judges also used to correct the proofs of the Law Journal Reports.

<sup>182</sup> Just as Toronto annotated Criminal Codes usually omit the French version of the Code.

<sup>183</sup> See 3 Stevenson & Côté, *Civil Procedure Encyclopedia* Chap. 66, Part P.3 (pp. 66-37 to 66-38) (2003); *Hamblin v. Field* [2000] E.W.J. #2123, [2000] Bky. and Pers. Insolv. R. 621 (C.A.) (paras. 29-32).

## CHAPTER 12 – SUPERVISION AND MANAGEMENT

*. . . Mr. Frankland, of Lafter Hall, who lives some four miles to the south of us. He is an elderly man, red-faced, white-haired, and choleric. His passion is for the British law, and he has spent a large fortune in litigation. He fights for the mere pleasure of fighting and is equally ready to take up either side of a question, so that it is no wonder that he has found it a costly amusement. Sometimes he will shut up a right of way and defy the parish to make him open it. At others he will with his own hands tear down some other man's gate and declare that a path has existed there from time immemorial, defying the owner to prosecute him for trespass. He is learned in old manorial and communal rights, and he applies his knowledge sometimes in favour of the villagers of Fernworthy and sometimes against them, so that he is periodically either carried in triumph down the village street or else burned in effigy, according to his latest exploit. He is said to have about seven lawsuits upon his hands at present, which will probably swallow up the remainder of his fortune and so draw his sting and leave him harmless for the future. Apart from the law he seems a kindly, good-natured person . . .*

– *The Hound of the Baskervilles*, Chapter 8

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### A. PRESIDING OVER A PANEL

Courts of Appeal usually sit in panels of three judges. The judge sitting in the centre (usually the Chief Justice or most senior judge) is called the president. He or she usually has a few functions which the other two do not.

#### 1. Rights

The powers of the president are probably not in any legislation, and may vary from court to court. The president may have the power to add or delete a case from the hearing list at a late date, shortly before the day scheduled for argument.

The president certainly has the power to set the precise time that the court will adjourn for lunch or a coffee break, or because of some unexpected occurrence during counsel's argument. The president may have the power to decide whether the court will begin even though one of the counsel has not arrived by the hour appointed.

How many other rights or powers the president has is less clear.

## 2. Duties

The president certainly has some duties, and they may entail some rights or powers.

If the panel has read the reasons appealed from and the facts and knows the facts and issues, the president should tell counsel that before argument begins.

The president should ensure that argument proceeds in an orderly fashion. Presumably he or she would not deviate from the usual order<sup>184</sup> without consent of the rest of the panel. The president has the duty to prevent or deal with obstacles to argument, such as interruptions from opposing counsel, heckling from bystanders, or loud noise in the corridor or an adjoining room. If something arose during argument which might be a contempt, the president should do something, though doubtless in consultation with the other two judges.

If argument by one counsel or party goes on beyond the time limits prescribed, or is unconscionably long, or becomes completely repetitive, the president should decide when to intervene, again in consultation with the other two judges.

One obstacle to proper argument is unsuitable questions from the bench. The president has limited power to deal with these, though he or she should act if they seriously impede argument. How to achieve that, especially without the panel's retiring and consulting, is a difficult question, and the practice seems to vary between Courts of Appeal.<sup>185</sup>

Counsel may assume that anything which the president says is the decision or direction of the whole court. So the president should either confine statements to things so intended, or preface others with "speaking for myself" or like words. It is desirable that the president ask a reduced number of questions.

The president should guide the other two judges a little on when and how to ask questions. For example, Saskatchewan long had an unwritten rule that the other two judges would ask no questions until the president had asked a question. It is desirable that the panel ask few (if any) questions in the first few minutes of argument, to let counsel get acclimatized and calm down, show the outline to be followed, and make his or her most important points.

If the president and another judge begin to speak at the same time, traditionally the other judge will defer to the president.

Once oral argument has finished, it is the president's duty to keep the appeal moving. That requires chairing a discussion of the three panel members.<sup>186</sup> At a minimum, that meeting will reveal whether the panel is likely to be unanimous, and should ensure that someone write the first draft judgment.<sup>187</sup>

The president should watch progress. If the judge so designated does not produce that draft within a reasonable time (or within times set by standing rules), then the president should follow up. If need be, one of the other two members of the panel should write a draft.

<sup>184</sup> Appellant, then respondent, then appellant's reply.

<sup>185</sup> See also Chap. 7 on Civility.

<sup>186</sup> How the discussions at that meeting should proceed is discussed in Chap. 9 Part C.

<sup>187</sup> Some appeal courts discuss at that meeting who will write the first draft, some let the president assign it, and some assign it beforehand by rota: see Posner, *Cardozo: A Study in Reputation* 145-6 (1990).

### 3. Unrepresented Litigants<sup>188</sup>

Almost all litigants with no lawyer of record fall into one of three groups. The first group act fairly reasonably, but either cannot afford a lawyer, or have enough education to handle a simple matter themselves. They are not much trouble to the judges or to the president of a panel.<sup>189</sup> Most unrepresented accused in criminal appeals fall into this first group. Unfortunately, these people are a small fraction of unrepresented parties in civil appeals.

The second group is invisible. These litigants are ostensibly self-represented, but have a legal adviser or ghost writer behind the scenes. Some of them try to get indulgences, or even win the appeal, on the ground that they “can’t afford a lawyer”, when that is not true at all. Their paperwork can cause problems, because it tends to be violent, unprincipled, and raise a host of issues. Sometimes it reads as though the hidden ghost writer were a very bitter or unbalanced lawyer, maybe a disbarred lawyer. Occasionally, the writer sounds like a quack with incomplete legal knowledge. Once they reach the stage of oral argument, this group tend not to be much of a problem.

The third group of unrepresented litigants appear to have some disorder of the mind or personality, though it may take some time for people without medical or psychological training to realize that. At first, some such litigants sound and look good face to face. (But their written submissions rarely do.) Repeated contact with a member of this group shows him or her to be impossible to satisfy, highly uncooperative, episodic or cyclical, and indefatigable. They appeal everything. The last characteristic may be why the third group seem so much more common in appellate courts than the other two groups, and why they are more common in Courts of Appeal than in trial courts.

An unscrupulous or unbalanced and persistent litigant can wreck the life and eat up the life savings of all those whom he or she chooses to sue. So judges must be very careful to avoid the temptation to bend the rules (and the law) in favor of any lay litigant.

The president of the panel before whom a lay litigant appears should remain calm and impartial, despite any provocation or lack of merits. That judge should explain the procedure to the lay litigant and try to help him or her understand it. Here are some key precepts for dealing with all of them:

1. Do not waive or bend the rules. To do so is unfair to the other side, and psychologically very unsound for many reasons. There are no exceptions. The fact this litigant is likely to lose, is no ground to admit inadmissible evidence or ignore legal preconditions.
2. Show that the court has read the written materials.
3. Explain and enforce courtroom decorum.
4. If there are breaches or disobedience, warn.
5. If disobedience happens more than two or three times, end the oral proceeding (maybe giving leave to file more written argument).
6. Do not slide into a non-judicial role such as scribe, adviser, coach, negotiator, parent, friend, or social worker.

These rules work for **all** types of lay litigant, from the most sincere and reasonable to the least.

<sup>188</sup> See a paper by Côté, which is part of the Commonwealth Magistrates and Judges’ Association *C.M.J.A. 2006 -7 Triennial Conference, Conference Report*.

<sup>189</sup> Though court staff may spend time helping them with their paperwork.

If a litigant who may be disturbed makes a hopeless request to a Court of Appeal, it is tempting to dismiss it orally on the spot. Often it is better not to do that. The court instead may reserve decision, promptly write out a paragraph or two of reasons, and file and issue the reasons a day or two later.

The president has the duty to ensure that argument proceed smoothly and that order be maintained. So he or she should ensure presence of police or an armed security officer whenever any unrepresented litigant is before the court. Each courtroom should also have a silent “panic button” on the bench which will summon more armed help instantly. Lay litigants who usually act sweet and helpless in front of the Court of Appeal are sometimes known to security and counter staff in the Court House as unstable extreme bullies. Some have criminal records for violence. In Canada, violence in the courts has almost always been committed in civil cases, not criminal.

## B. THE CHIEF JUSTICE<sup>190</sup>

I am not qualified to discuss how to do the job of a Chief Justice. But it is useful to consider how the “puisne” judges on an appellate court should view and work with their Chief Justice.

### 1. Necessary Powers

Cataloguing the powers and duties of a Chief Justice would be difficult and controversial. But there is no doubt that they exist and are not confined to what statutes enumerate.<sup>191</sup>

It is well settled that the Chief Justice has the power to decide how many judges will hear a specific appeal, and which judges will sit on which cases. In practice, matching appeals with judges may be done randomly, or by some system of rotation managed by staff. But the Chief Justice has the ultimate power and responsibility.

An appellate court has a number of judges, separate staff, premises and a very active business. That requires a lot of administration. Even where government employees do parts of it, someone must note whether they are doing it, and interface with the government on that and a host of issues. Some are big questions of principle and constitutional division of powers; some are much smaller, like stationery or leaking pipes. But the Chief Justice has ultimate responsibility, and must either attend to all such matters personally, or delegate individual judges or staff members to attend to them.

Detailed management by committee is usually hopeless, and always very time consuming. Meetings of the full court to decide all questions of administration are therefore rarely a viable alternative.

The Chief Justice also has some role in judicial discipline.<sup>192</sup> The Chief Justice is the first defence against a judge who is slow, slack or unwilling to work, or disobeys court rules or policies.

<sup>190</sup> See also Chap. 4, Part C.

<sup>191</sup> Some American traditions are reviewed in Murphy, *Elements of Judicial Strategy* 82 ff. (1964, repr. 1973). There is a somewhat dated work by the Canadian Institute for the Administration of Justice and the International Centre for Comparative Criminology, Université de Montréal, *Compendium of Information on the Status & Role of the Chief Justice in Canada* (October 1981).

<sup>192</sup> Cf. *Ruffo v. Conseil de la magistrature* [1995] 4 S.C.R. 267, 303 ff.; cf. *Rees v. Crane* (PC(Trin)) [1994] 2 A.C. 173.

## 2. Hard Job

The Chief Justice of a Canadian appellate court usually has these tasks:

- (a) sit and hear argument and decide appeals (as a puisne judge does);
- (b) carry out ceremonial or social tasks as Chief Justice, especially as Chief Justice of the province or territory, or as Chief Justice of Canada;
- (c) act as administrator when the Lieutenant-Governor (or Governor-General) is unavailable, including ceremonial tasks, giving Royal assent, and approving Orders in Council and warrants for expenditure;
- (d) attend meetings of the Canadian Judicial Council in a distant city, attend meetings of some of its committees, and carry out projects for those committees;
- (e) liaise and negotiate with the government on a host of issues, including appointment of judges;
- (f) answer a heavy correspondence from the Bar and the public;
- (g) (i) watch over the puisne judges for signs of maldistributed workload, illness, staleness, slowness, or inattention, and deal with them;
  - (ii) handle a host of requests and complaints from the puisne judges on every conceivable topic;
- (h) try to maintain collegiality on the court, including sponsoring and administering various social functions;
- (i) administer the court, including the buildings in which it sits and all the necessary staff; and
- (j) act as *ex officio* member of a host of committees.

This is a very difficult task, requiring very diverse (even contradictory) skills and attributes. It also seems to me to amount to several full-time jobs, calling for punishing hours and high personal efficiency. I do not know how anyone can keep it up, though all seem to manage.

The Chief Justice's job is made all the more difficult because puisne judges have tenure, so the Chief Justice has little besides tradition and moral suasion to give force to his or her directions. Even a law dean can threaten loss of merit increments to the tenured faculty; a Chief Justice cannot.

## 3. How to Deal with the Chief Justice

All the facts just recited support several reasons why an appellate judge should always be slow to complain about how his or her Chief Justice administers something. The first is the whole question of delegation and collegiality.<sup>193</sup> The Chief Justice is entitled to at least as much deference and trust as a puisne judge who administers (say) the court's articling students (law clerks).

The second reason is that the Chief Justice holds an office which the puisne judges do not, and so has powers, duties and rights which they do not. Their right to interfere is questionable, and their power to do the same job is very limited.

<sup>193</sup> Discussed at length in Chap. 8, Part I.



There is a third reason too. The Chief Justice almost always has more experience in being Chief Justice and running the court than do any of the other Justices of Appeal. And very often the Chief Justice has more experience as a judge or as Justice of Appeal than the majority of the other judges on the court.

And there is usually a fourth reason. No one can do this job perfectly, given the amount of work and diverse skills and abilities required. To ask another human being for perfection is unjust and counterproductive.

There is a fifth reason. It would be very rare that **all** the puisne judges agreed on an issue of administration and only the Chief Justice held the opposite view. Management by a divided court would almost always be worse than management by the Chief Justice.

What if a puisne judge is still determined, despite all that, to complain about how the Chief Justice does some task? Then there are good and bad ways to do it. The bad ways are either going around behind the Chief Justice's back complaining secretly, or grandstanding by complaining to all the other court members. Both are attacks on the Chief Justice and his or her ability to do the job. Such an attack usually costs more in lost collegiality and lost effectiveness, than the issue at hand is worth. So such attacks should be reserved for the most extreme situation, which presumably would not arise more than once in a generation (if then).

The better way to complain, especially in the first instance, is to speak (or write) privately and respectfully to the Chief Justice. If the matter complained of proves to be a misunderstanding, or the Chief Justice has a persuasive answer, no heat is generated, and neither the complainer nor the Chief Justice suffers any public embarrassment. Both can be frank in discussion, and can give and take, because no one else is listening.

It follows even more strongly that no Justice of Appeal (nor several) should ever carry outside the Court of Appeal any criticism of their own Chief Justice (or of their court). It is highly counterproductive to do so, and a serious breach of loyalty. So far as I can tell, it is all downside and no upside.

It is not enough to leave your Chief Justice alone and not interfere. Chiefs need help and support too. Sometimes it means volunteering to help with some task. At other times, it just means a little moral support and diplomacy. For example, a colleague worried about an administrative change may need a little explanation and reassurance.

## C. ADMINISTRATIVE JUDGES

Sometimes a Court of Appeal or legislation will give some administrative powers to a judge on the court, whether he or she be called Associate Chief Justice, supervising judge, acting Chief Justice, list manager, or have no title.

Other judges on the court should cooperate fully with such judge, and refrain from unnecessary criticism. If criticism is necessary, it should be private where possible. The reasons for that are a combination of those above,<sup>194</sup> and those in Chapter 8.<sup>195</sup>

<sup>194</sup> In Part B about Chief Justices.

<sup>195</sup> Especially its Part I.

## CHAPTER 13 – CONFIDENTIALITY

*... there are the dispatch-cases filled with documents, a perfect quarry for the student not only of crime but of the social and official scandals of the late Victorian era. Concerning these latter, I may say that the writers of agonized letters, who beg that the honour of their families or the reputation of famous forebears may not be touched, have nothing to fear. The discretion and high sense of professional honour which have always distinguished my friend are still at work in the choice of these memoirs, and no confidence will be abused. I deprecate, however, in the strongest way the attempts which have been made lately to get at and to destroy these papers.”*

– “The Adventure of the Veiled Lodger”

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### A. DANGERS

Some people who work on or with an appeal court are complacent about keeping secrets, and ignore related dangers.

So we must begin by examining some of the dangers.

The first danger is giving an unfair advantage to one party over its opponents. Parties can compromise any litigation at any stage before the final judgment of the highest court. Throughout a lawsuit, often each side knows their opponent’s demands for settlement. The two sides may be only 15 or 20% apart, especially in a big suit. A pending appeal is no bar to settlement; indeed hope of settling is often the impetus for appealing. A party may not want to settle while confident of victory, but that attitude will probably melt once the party gains any reason whatever to doubt victory, such as loss of a witness, or a change in law.

How much more devastating would be information that the party was likely to lose its appeal, even certain to? And if that party learned that, but realized that its opponent did not know, how tempting the chance to salvage by settling! All the party need do is ask the opponent, “Is your last offer still open?”

For weeks or months before a Court of Appeal decides an appeal, it generates internal paper and e-mails which hint, then suggest, then state positively, who will win the appeal. Should any of these, even a preliminary student bench memo, get into the wrong hands, enormous unfairness would likely result.

Nor would the court or the uninformed victim even guess what had happened. Even if the truth later came out, it might be hard to unscramble the omelette. At the least, it would require a new lawsuit.

This is not mere fearmongering. A few years ago, a party which had lost a big suit in Ontario later hired a private investigator to go through the home garbage of the trial judge, apparently hoping to find evidence of some conflict of interest by the judge. And big Canadian companies have recently sued each other alleging industrial espionage and theft of garbage.

Anyone who is now an appellate judge grew up in a simpler age when many types of misconduct were unheard of, indeed unthinkable. But modern litigation is not always a sport confined to principled or considerate people.

Others who are not parties could also profit from (or create) a leak.

Judges rarely remember which companies' shares are publicly traded, nor know which company is a subsidiary of a listed company. Still less do they know which suits would significantly affect the net earnings of a company. So judges do not know which appeals could affect the market value of traded shares. Yet anyone who stumbled across a court's confidential information might be tempted to make a profit, trading on the stock market by using the knowledge. Trading on slight movements of security prices is no longer confined to professional floor traders. Some of our neighbors (and maybe our trash collectors) do that every evening at their home computers.

The media are very often short of the interesting events needed to fill continuous news broadcasts and several newspapers a day. The word "secret" always spices a headline. Some years ago, someone listened to cellphone discussions of a Western Canadian Attorney-General about civil litigation by the province. The intercepted words were trumpeted all over the electronic and print media for days, even though those words were not dramatic. And the interceptor was portrayed as the hero, not the intercepted. So morality (or even law) may not govern here.

Once again, judges tend to forget that an appeal often has political or media interest which they cannot foresee. If news is scarce on the day in question, or there is any human interest or well-known name involved, a headline beginning "Top Court . . ." will spice up a news story.

That shows why Courts of Appeal are at more risk than trial courts of leaks. The stakes are usually bigger.

A few years ago, the Supreme Court of Canada accidentally put copies of a confidential student pre-hearing bench memo in packages handed out to the press. That memo was harmless, but the story was news coast to coast.

We may think all this trivial, but such leaks damage a court's stature two ways. First, they make that court look careless and disorganized. Second, a peep behind the scenes always diminishes the aura of any performance. Up close, the greasepaint shows. Or we see that the great orator is reading a script printed in big type. When Toto pulls aside the curtain revealing a little man working levers, the Wizard of Oz loses stature. When the news story is about anyone and how he or she transmits a message, not about the message, he or she is demeaned.

There is another reason why Courts of Appeal are very vulnerable to information leaks. Most of their decisions are by three or more judges, who have to communicate. Most Courts of Appeal send some draft judgments to judges who did not sit on the particular appeal. Their comments are often critical. Sometimes what caused the criticism is later removed from the draft, before the final judgment is filed. Sometimes the critic is persuaded that he or she is wrong. But sometimes not. Revelation that a judge's final judgment (or concurrence) was not his or her initial view can also make the judicial process look arbitrary. Publishing any such correspondence lowers the stature of all the judges concerned, whether it gets into a newspaper two days later, or a learned journal or a biography 20 years later. No sausage looks good while being made, however fine the ingredients.

## B. PRECAUTIONS BEFORE JUDGMENT

What is to be done?

### 1. Computers and Phones

First, think before using wireless communication. Do not discuss cases on pre-2003 cellphones, on any portable phones, nor via older wireless computers. Not even between two computers 20 feet apart. Interception, even accidentally, is far too easy with older equipment. (Newer cordless phones and wireless computers have features allowing more security.) Never make the common error of using computers or such phones still set to the factory passwords or default security settings. To give any protection, those passwords or settings have to be reset, and probably altered from time to time. And no wireless system will ever be 100% secure.

Do not use e-mail systems available commercially to the public, unless maybe with a good encryption key. Computer hackers find that many systems have no real security. Judicom may be satisfactory.

Even internal intranets run by the government could be insecure, especially where the government is one of the litigants, and political sensitivity is high. That is why judges should be involved in administering such intranets, especially in policy development, and should have a separate security officer for their communications. Judges should have sole access to a physically-separate or virtually-separate server.

All computers should be password protected.<sup>196</sup> Computers should not be left in untended rooms, nor left on overnight.

Judges should not use a printer which is also used by, or even accessible to, people who do not report to the judges.

Faxing internal correspondence risks dialling the wrong number. Users must check the number actually dialled before sending. One Canadian bank recently made the news for a week over repeated misdialled confidential faxes.

### 2. Papers

Hard copies of paperwork should be carefully guarded. The door from public areas to the offices of judges' assistants must stay locked 24 hours a day. Even if someone has just stepped down the hall a minute, and even at 8:00 p.m. while the floors are being washed. A judge's office should be locked outside office hours.

Papers should not be left out on desks at night. No one knows who has access after hours, and whether those people are regular employees, or just visiting repair services. Filing cabinets (or the file room) should be locked at night.

Note any confidential paper which might be taken into the courtroom or get mixed in with the Appeal Books or factums. It should be marked as confidential and be printed on colored paper (or have a colored cover sheet). A court should adopt a uniform paper color for confidential papers.

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<sup>196</sup> With a password hard to guess, and not in any dictionary. The best password is a combination of upper and lower-case letters, numerals, and symbols.

The court's waste paper could well blow off a truck or end up in plain view at a landfill site.

Waste paper has been a fruitful source for espionage over many centuries. Remember the investigator pawing through the Ontario judge's home garbage. Recall the 2004 and 2006 trash wars between two big airlines in Canada. In Alberta a few years ago, the courts' articling students wrote a funny song for a Christmas skit, and made six or so photocopies for themselves alone. One copy promptly turned up as an exhibit to an affidavit by a frequent lay litigant. It had likely been fished out of waste paper.

A few years ago, national media gave great coverage to private notes by tribunal members, which a lawyer took from a wastepaper basket in a hearing room after an immigration or refugee panel had left the room. The ethics of that filching seemed to trouble no one. The comments by panel members were more or less harmless, yet the media treated them as symptoms of lack of *gravitas*.

Therefore, virtually all paper discarded by judges and those who work with them should be routinely shredded each day.

### 3. Conversations

Private conversations in elevators, airplanes, or restaurants can be very dangerous. Even if one speaks briefly or cryptically, by bad luck some stranger present may be one of the people in town who will understand (or guess the allusions). A word or two may be enough to show which way the wind is blowing.

Recall that a few years ago, in quick succession, two different Cabinet Ministers got into trouble over conversations overheard on airplanes. I have known the same thing to happen to lawyers. We have been told that a Montreal judge talked about a case during a taxi ride, then hours later heard his cab driver recounting the judge's opinions to an open-line radio program.

Judges may assume that voices inside their conference room or retiring room cannot be heard outside, or that a phone in that room does not have a microphone (speaker feature) which could be on. They also assume that no one has planted a hidden microphone (bug) in the room, or altered the phone so that its microphone is always on. But has anyone actually checked any of those things?

Even the sound of laughter (or raised voices) coming from a retiring room could be embarrassing. Litigants would think that the judges were laughing at them, though the judges almost certainly would not be.

Any gossip or social conversation whatsoever with anyone could spread all over town, and grow in the telling. A trial judge in Western Canada was subjected to public appellate attack because of a brief social conversation. And an appellate decision was attacked in another case by a formal motion to rehear, based on an affidavit about some quite brief and mild remarks made by one member of the panel about the case at an educational seminar. Ultimately, no rehearing was granted, but the experience was a strain for that judge.

## C. AFTER JUDGMENT

After judgment, maybe breaches of confidence cannot lead to unfair settlements or stock market trading. But all the other dangers remain.

After a judgment is filed, it may be wise for the judges who heard the appeal to keep their notes of oral argument.<sup>197</sup> And the Registry will keep the original reasons for decision, one set of evidence and factums, and the interlocutory documents, on the official file.

Aside from that, all other paper about that appeal should be shredded. Even an extra copy of a factum will have judge's notes in it, and the judge's name stamped on the cover.

Correspondence between judges about draft judgments is confidential in both directions, and so it would not be proper for the judge to reveal it, even in memoirs written years later. So I cannot think of a reason to keep such papers. To keep something which is useless but dangerous is pointless. A judge would not keep old live artillery shells as souvenirs. Why keep old explosive papers?

## D. STAFF AND PREMISES

Those administering a Court of Appeal should give everyone working there periodic instruction in security, including protecting confidential information. New employees must get in-depth instruction about confidentiality, and sign a confidentiality oath or agreement. Administrators should also hire dedicated government staff for maintenance, cleaning, and disposal of wastepaper in sensitive areas.

Every staff member working with judges should lock up sensitive papers overnight.

Administrators should carefully check the premises to see whether someone without a proper key or pass could get into the judges' area at **any** hour or under **any** circumstances, by any route, including the back door of a courtroom. If necessary, partitions or new locks should be added. That sort of renovation is rarely expensive.

Keys and locks should be changed periodically. But metal keys are too easy to copy, and their locks cumbersome to change. Electronic locks are much better, and there should be a regular system to end her access rights the day that a staff member leaves.

Staff should never politely let anyone else through a locked door, without some investigation. Staff should display their passes at all times. New or out-of-town judges should expect to be questioned. They should be told in advance to be pleased (not insulted) when that occurs.

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<sup>197</sup> Assuming that argument was not sound recorded.

## CHAPTER 14 – ONE-JUDGE MOTIONS

*“One forms provisional theories and waits for time or fuller knowledge to explode them. A bad habit, Mr. Ferguson, but human nature is weak.”*

– “The Adventure of the Sussex Vampire”

### A. LAW OF MOTIONS

A decade ago, there was much less law governing one-judge motions in appeal courts. Probably many appellate judges heard such motions in their private offices and gave no recorded reasons. Now the law reports contain many multi-page reasons for decision in such motions. What used to be fluid or mysterious is now guided by specific persuasive authority.

On balance, that is helpful. An appellate judge no longer has to guess at criteria or rules, or manufacture them single-handed. There is no need to spend years learning them through the grapevine or trial and error. And consistency probably grows.

But now competent counsel cite more authorities, and there are always other uncited but reported cases on point. One never knows when recent reported cases will go off on a new tack.

Therefore, how to research such law is a problem. No one solution is ideal; certainly not whole-text (Boolean) computer searching. Some courts of appeal have developed local internal guides for their judges. If kept up to date, those can be very useful. Other hard-print sources include:

- an annotated edition of the local Rules of Court
- 4 Stevenson & Côté, *Civil Procedure Encyclopedia*, Chap. 76 (2003)
- Holmested & Gale, *Ontario Judicature Act* (looseleaf) notes to Rr. 504, 504a, 506
- Holmested & Watson, *Ontario Civil Procedure* (looseleaf); see its notes to the Courts of Justice Act, s. 133 n.; and to R. 61 §§ 12, 13, 16, 23, 25; R. 63 n.
- Maritime Law Book Co. “Practice” key nos. 8298-8300, 8861-6, 8870-85, 8889-90, 8901-70, 9000-9009.5, 9051-60, 9073, 9090-96, 9163-70, 9200-05, 9301-9406, 9451-9.

If one wishes to search the law online outside Quebec and the territories, the Maritime Law Book Co. “Practice” topics above are the best method. They can be searched globally, or confined to a particular law report.

## B. LIMITS ON ONE JUDGE'S POWERS

The next question is what questions one justice of appeal alone can decide. If some statute or Rule allows “a judge” to do something (such as extend time), then it only takes one. Beyond that, there is usually legislation letting one justice of appeal decide matters “incidental” to an appeal. Courts have usually been generous in defining what is “incidental” to an appeal. And sometimes the parties or the court’s panel will agree to have one justice of appeal fix some detail.

If a statute or Rule allows “the Court” or three justices of appeal summarily to dismiss an appeal on some ground, that probably implies that one justice of appeal should not act alone on that ground. Apart from that, probably one justice of appeal can sometimes dismiss an appeal.<sup>198</sup>

There are times when any one justice of appeal has power to hear a motion, but should decline to do so. For example, one judge should not vary or rescind another’s order unless the judge who made it is unavailable. Other matters of administration of the court and its lists may be confined to one designated justice of appeal; then it is undesirable that others interfere. Often consistency of approach is important. Lawyers should be discouraged from judge shopping. That is a danger when lawyers can pick the judge, or when assignments of single judges to one-judge motions become known.

## C. PROPER APPROACH TO MOTIONS

The variety of motions which one justice of appeal might hear forbids listing all of them, and partly impedes general hints. But this area should not be a wilderness of single instances. Indeed, treating each motion as a free-standing event produces great delay and inconsistency. Some general aims of appellate procedure should help guide one-judge decisions.

### 1. Keep the Appeal Moving

The public interest in prompt decisions of criminal, constitutional, child custody, or regulatory appeals is obvious. That interest is also weighty in other civil appeals, even appeals over money.<sup>199</sup> Few meritorious litigants want a later answer to their appeal or suit.

Therefore, legislatures enact time deadlines for a reason, and courts should not waive them merely on consent. Particularly when the suit is not between adults over money alone. So one appellate judge should not allow any step or hiatus which in effect would stop or slow the appeal indefinitely. Nor should the court remove the appellant’s incentive to keep the appeal moving, unless it imposes time limits. After all, there is little that a respondent can do to aid or hurry preparation of an appeal for argument.

It is striking how often a very slow appellant was convicted and then got bail, or was found liable and then got a stay of execution pending appeal. That appellant now possesses all that he or she wants. The appeal can give him or her no more, no matter how well it goes. Therefore, such bail or stays should be imposed (or allowed to continue over opposition) only on terms which set a very precise clearly-defined timetable. Nor should a judge grant such bail or stay until some solvent person or firm unconditionally orders the transcripts and reproduction of evidence (or the appellant prepays).

<sup>198</sup> Though the purely procedural nature of the order in question may give one justice of appeal jurisdiction, probably the substantive nature does not always bar one judge. See further 4 Stevenson & Côté, *Civil Procedure Encyclopedia*, Chap. 76, Part R. 4 (2003).

<sup>199</sup> See Côté, *Slow Appeals: Causes and Cures*, Chapter 1 (2000), Côté, *Well-Run Appeals* (Canadian Judicial Council. 2006).



Public interest often demands that a motions judge be proactive in keeping an appeal moving. A court which does not yet have one or more judges (or Registrars or Masters or house counsel) assigned to such duty should assign or acquire one.

Therefore, an appellate judge hearing a motion should be astute to detect any appeal filed for delay only, especially where the appeal could affect rights of persons under a disability, or non-parties. That is doubly so if the public interest is at stake. That is one reason why one test for different procedural orders is often that the appeal have arguable merit.

If an appellant is moving much too slowly, the judge should use both a carrot and a stick to speed up the appeal. The stick is deadlines and sanctions. What is the carrot? The judge should take from the idler any stay of execution or other motive to stall, so that the only carrot left to him or her is winning the appeal.

## 2. Do Not Unduly Fetter the Panel

In a trial court, motions judges try not to prejudge the trial or handcuff the trial judge. That reasoning is important on a Court of Appeal, where the quorum to hear and decide an appeal is three judges. One judge should be slow to lop a limb off the appeal without strong circumstances. That might lead to an appeal from one judge in chambers to a panel, and more delay.<sup>200</sup>

## 3. Give the Panel the Tools it Needs

The panel which hears an appeal should receive argument on all arguable points, have access to all the evidence which may be relevant on whatever legal view the panel may take, and have handy the authorities which it or either party may consider relevant.

Therefore, in case of any real doubt, a cross appeal or amendment to the main appeal should be allowed.

## 4. Fairness vs. Efficiency

A judge hearing motions wants to do justice between the parties. At times, fairness to one party clashes with procedural rules, time limits, smooth flow of work, and saving the time of the court. Most modern Canadian motions judges tend to give more weight to the possible merits of the defaulter's case, less to those of the opponent, and none to the public interest in the overall working of the court. But that balance is especially unwise in a Court of Appeal.

Before trial, the merits of a suit are rarely knowable. But a trial holds the appellant wrong and the respondent right. Often the appeal is based on procedural questions. Therefore, giving the appellant the benefit of the doubt several times over is no longer appropriate or just, after trial.

There can be real dangers in deciding anything unnecessary in a one-judge motion. For example, it could prejudice the eventual result if one motions judge were to call the appeal very compelling, where the law governing only asks whether the motion is frivolous (not arguable). Nor should the judge decide an issue which the governing law says is not one of the tests for that type of motion.<sup>201</sup>

<sup>200</sup> I am not speaking of one Justice of Appeal deciding whether to give leave to appeal.

<sup>201</sup> See Part E below.

## D. EFFICIENCY

The judge should glance over the papers filed for a motion as soon as they are available. It is urgent to detect conflicts of interest, obviously missing papers, authorities which the judge should read, motions too lengthy or complex for the time available, and motions which may require preliminary work or attendance by a student (law clerk). Prompt detection leaves time to deal with such needs. Finding such problems the morning of the motion, even the night before, means an emergency or a needless adjournment.

The judge should carefully read the motions papers later when it is most convenient.

Some appellate judges spend much more time hearing a one-judge motion than do others. That discrepancy is largest with motions for leave to appeal. What is the cause?

Some judges spend an hour or more hearing counsel orally argue irrelevant topics, or issues on which counsel are probably right. For example, the appellant often wants to prove that the trial judgment is wrong; in effect he is arguing the merits of the appeal before one judge. But sometimes that topic is irrelevant on a motion before one appellate judge. Where it is relevant, usually the appellant need merely show that the appeal is arguable. Often the respondent does not deny that it is.

Therefore, after carefully reading the motions papers, the judge should consider which counsel to call upon first, on what issues, and why. A little planning will prevent wasting time on arguing issues which are irrelevant or where counsel arguing is correct. Sometimes one clarification or concession by one counsel will make it unnecessary to hear his or her opponent on some issue.

Of course, oral argument sometimes overturns the judge's initial view, and sometimes the judge then must call on the other party to argue some issue. But even then, little or no overall time is wasted by calling on counsel and issues in a certain order.

Judges tend to assume that they have only two options at the end of argument: decide the motion with oral reasons at once, or reserve and later give written reasons. That is not so. The judge can adjourn for 10 minutes, and jot down some headings, then give oral reasons. Or he or she can announce the result and say that written reasons will follow.

## E. WHETHER TO GIVE EXTENDED REASONS

At one time, appellate judges sitting alone did not give any recorded reasons. Now they tend to do so. But reasons need not always be given. The party who won the motion will not complain of lack of reasons, and reasons may harm the other party.

If the judge hearing the motion takes some view of the merits of the appeal, he or she should try not to say much about that. The panel later hearing the merits will see more evidence, argument, and all the authorities. And likely this one judge will not be part of the panel, who may take a different view of the appeal's merits. A record of the one appellate judge's views on the merits will encumber and distract.

This is especially true of motions for leave to appeal. If the judge **denies** leave on one or more issues, proceedings are at an end (except sometimes in British Columbia). So the party denied leave on them is entitled to some reasons, unless those issues are minor. But the judge should not give reasons about any issue on which he or she **gives** leave to appeal, for the reasons in the previous paragraph. On those issues, the judge should merely say that leave to appeal is granted. If the law or custom is to define the precise question or issue on which leave is granted, the judge (after argument) should exactly define it. But he or she should give no other reasons, explanation, background or discussion.

Conversely, recorded reasons on some other topics can do much good, even if reasons are rarely given on such motions. For example, if counsel frequently make much the same mistake, or make an unnecessary motion, or fail to take certain timely precautions, or ignore legislation or the relevant Rules, appellate judges should stop suffering in silence.

The judge who hears yet another of these mistaken motions should jot down a few notes in advance, then hear the motion in a courtroom. If the motion and its argument turn out as predicted, the judge should not merely decide it. He or she should give the Bar some guidance by orally pointing out the error, or the better way of proceeding, and citing the relevant authority (which is usually short and simple). The judge should then have those reasons transcribed, edited, signed, filed, and distributed to all the usual recipients of court judgments. One short reported decision can end two generations' sloppy or mistaken practice.

## F. INVOLVE THE REGISTRAR

Counsel like to come in and see an appellate judge in his or her private office, and get decisions, leave, relaxation of Rules, or approval of flawed evidence. That is quick and seems efficient, but it breeds problems.

Often no one records who attended, what representations they made, nor what material they referred to. Nothing is marked as an exhibit. Often the judge does not use his or her notebook, and no one even records the exact decision, let alone any reasons. Later the Registrar hears rumours of the decision. Someone asks the Registrar to sign and enter a formal order which the Registrar and staff have never heard of. Or worse, the Registrar's attempt to enforce the Rules meets counsel's claim that a judge waived them on some unknown past date.

An appellate judge should never see counsel (or a litigant) without someone from the Registry present with the relevant Court of Appeal file. And the staff person who attends should get a proper chance to take notes and to comment to the judge. If the motion is not by consent, and not extremely simple, the judge should seriously consider using a courtroom, with attendant sound recording system and greater formality.

## G. MISTAKES TO AVOID

This is not the place for a treatise on motions practice, nor even the ten most common interlocutory motions in Courts of Appeal. But some specific problems tend to recur, bedevil Courts of Appeal, and encourage sloppy or tricky practice. Some practices permit one litigant to work serious injustice on opponents or the general public. So a few warnings about some recurrent problems are necessary.

### 1. Bail

Two dangers arise in the bail area. The first danger is giving unconditional bail (judicial interim release) pending appeal where the appellant has no intent to proceed with his appeal, or knows that he will lose it, and just wants to stay out of jail as long as possible. Counsel must have already ordered the trial transcript and evidence. The judge should set exact deadlines for filing the Appeal Book and factum. Otherwise the appeal will limp, and indeed may walk like a zombie until summarily struck off 18 months later.

Second one should never give bail just because the Crown does not object. The judge must look at the material, get enough information (e.g. a criminal record), and be satisfied of the three tests.<sup>202</sup> The public interest and public safety are involved. Sometimes bail is proper, but the conditions suggested by both counsel are superficial and not sufficiently worked out or worded. Then the judge should amplify the conditions.

### 2. Stay of Execution

Much the same remarks apply to a motion to give (or to retain) a stay of execution pending appeal.

In those cases, it is often unfair simply to decide that there will be no stay, or that there will be an unconditional stay. Yet that is the stark choice which both counsel usually seek to impose on the judge. Very often an order on conditions is fair: either conditions to be performed by the appellant for imposing (or continuing) a stay of execution, or conditions to be performed by the respondent for denying (or lifting) a stay. Such conditions may be designed to preserve the status quo, prevent harm to or loss of property, prevent a debtor from becoming judgment-proof, give security for the debt, or an undertaking as to damages (and security) on the analogy of an interlocutory injunction. Usually there should also be terms designed to keep the appeal moving, to counteract the temptation to delay.

When the judge suggests an order on terms, counsel often profess surprise and lack of instructions, but the judge should persist. Lack of terms may well swing the balance of convenience, and often that is a relevant test. Sometimes the two parties are too cheap, unimaginative, or lazy to buy a letter of credit or craft other terms. Then the judge should not be forced into intricate legal research to find a way to avoid all risk or injustice to both sides pending appeal. That is usually a hopeless attempt to square the circle. Terms need not be ones volunteered or agreed to. A judge can order that one party get the relief it seeks if it submits to certain terms, failing which that relief will be denied.

<sup>202</sup> Under s. 679(3) of the Criminal Code.

### 3. Leave to Appeal<sup>203</sup>

It is usually dangerous to give leave to appeal without framing specific issues and confining the appellant to those issues (if the law permits that).<sup>204</sup> Indeed a judge probably must do so, where the legislation allows an appeal on a question of law alone. All that is doubly so if the rights of the public may be affected (as in a criminal, planning, or municipal appeal). There is neither injustice nor breach of law in so confining the appellant, where the law requires both leave and a question or questions of law. Otherwise the Appeal Book will be huge, the appeal slow to perfect, and the appeal largely a factual retrial, all contrary to the manifest intent of the legislation.

### 4. Delay

Modern Courts of Appeal are “hot” courts which before oral argument read the materials and got pre-hearing help from students or staff lawyers. A big danger on a motion is making that difficult or impossible. Counsel think that deadlines to file papers (like those for university essays) are arbitrary and meaningless. But judges and students or staff lawyers usually need to get **all** the evidence and factums for an appeal at least four weeks before argument, and longer if some judges reside in another city. To let counsel reduce that time below three weeks will produce one or more horrors: a last-minute adjournment, an argument or evidence which one party has no chance to rebut or test, a cold court which does not understand the case, surprise changes of position by one or more parties, rehearing the appeal, or greatly lengthened oral argument.

Nor will a motions judge who thus removes reading time win many friends on the panel which hears the appeal.

One should not draw all one’s philosophy from bumper stickers and humorous posters. But a judge hearing such a motion to file late may recall home-made signs once common in offices: Lack of Planning on Your Part Does Not Necessarily Constitute an Emergency on My Part.

### 5. Extending Time to Appeal

Legislatures always impose much shorter limitation periods for appeals than for lawsuits. Few exceed 45 days, still fewer 60 days. Some are much shorter. A Justice of Appeal should not ignore that policy and extend time to appeal by months, merely looking at the fact the applicant may have an arguable appeal (and is poor or white-haired). How hard the applicant tried, and why it did not meet the deadline, are also relevant. Much more important is prejudice to the respondent or to the public. Neither the *Constitution Act 1867* nor Canadian geography requires that every lawsuit go at least as far as a Supreme Court of Canada leave panel.

### 6. Interventions

Excessive and laxly-controlled interventions are dangerous. Some of the modern criteria for intervention seem vague, subjective, and manipulable. One suspects that sympathy for one side’s views sometimes counts more than an actual property interest on the other side. A party who started with one opponent and a simple suit, can be financially ruined by the addition of 15 extra virtual opponents and the transformation of the case into a Judicial Inquiry into the Policy and Sociology of ss. (insert numbers) of the *Charter*. Then the logistics swamp all, and the merits cease to matter. One has a bootleg class action.

<sup>203</sup> An interesting light is thrown on interlocutory appeals in Posner, *Economic Analysis of Law* 601, 602 (6th ed. 2003).

<sup>204</sup> Trouble arose where a lower court gave leave on too narrow, or the wrong, questions, in *Pugliese v. Nat. Cap. Comm.* [1979] 2 S.C.R. 104, 25 N.R. 498, 504.

## 7. Appeal from Refusal of Leave

I am tempted to nominate as the seventh danger, permitting an appeal to a panel from refusal of leave to appeal by one Justice of Appeal (as statute directs). But one Court of Appeal does not agree with that view, so I will not press the point here.

## 8. Wrong Court

Sometimes an honest litigant conscious of the question files and serves a timely appeal in one court, but his opponent waits until time expires and then claims that it was filed in the wrong court. If there is no prejudice, and it is possible to cure that *nunc pro tunc*, an appellate judge should do so. I might have called this danger #8, but as the legislature of another province seems not to agree with that view, I will move on.

## 9. Security for Costs

The last danger is token awards of security for costs. I must phrase this delicately. People are not appointed to Courts of Appeal in their youth, and some serve on them a long time. Once one leaves private practice, one loses contact with the current expense of litigation. *A fortiori* if one never was in private legal practice. The last 20 years have seen considerable inflation. Even 4% a year compounds dramatically after a few years. After 10 years of even 4% annual inflation, prices have risen about 50% and the dollar has but 2/3 of its recent purchasing power.

And all expenses of litigation, including lawyers' fees, and official transcripts, have gone up much faster than 4% a year. One thousand dollars is now a small sum which will buy very little in a lawsuit.

Nor is the problem merely inflation (i.e. price indices). Lawyers spend more hours preparing for an appeal than most used to, because now Courts of Appeal rightly expect that (and because the clerical requirements are more extensive). And costs awards based on actual legal bills, not a musty statutory *à la carte* menu of selected legal services, are more common, especially in Ontario.

Therefore, \$3,000 or \$4,000 security for costs of an appeal can be very inadequate. As security for costs of a **suit**, it is a mere talisman: quaint as a snuff box, and just as useless.

## CHAPTER 15 – APPELLATE JUDICIAL ETHICS

*“It is of the first importance,” he cried, “not to allow your judgment to be biased by personal qualities. A client is to me a mere unit, a factor in the problem. The emotional qualities are antagonistic to clear reasoning . . . the most repellant man of my acquaintance is a philanthropist who has spent nearly a quarter of a million upon the London poor.”*

*“In this case, however – ”*

*“I never make exceptions. An exception disproves the rule.”*

*– The Sign of Four, Chapter 2*

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Most of the ethical principles and situations applying to appellate judges are the same as those which other judges meet. There is no need to discuss them again: they have already been covered.<sup>205</sup> This chapter will discuss problems confined to appellate judges.

### A. DISQUALIFICATION FOR INTEREST OR BIAS<sup>206</sup>

The Concise Oxford Dictionary says that the word “recuse” is now rare, and some English and Canadian law dictionaries omit it. However, it is becoming more common in Canadian legal usage. One can use it to refer to a judge who declines to exercise his or her functions on ethical or similar grounds, or is asked so to decline.

#### 1. Connection with Trial Judge

We have already seen that it is useful for an appellate judge to keep some informal contacts with trial judges.<sup>207</sup> Therefore any rule which barred an appellate judge from hearing an appeal from any trial judge with whom there had been social contacts would be very harmful. The trial judge is not one of the parties and has no true stake in the outcome. At most, the trial judge’s pride of authorship may be involved in the ordinary case. And often not even that.<sup>208</sup>

<sup>205</sup> See Wilson, *A Book for Judges* (1980); Fauteux, *Le livre du magistrat* (1980); Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991); *Ethical Principles for Judges* n.d. [1998], and also on “recusal”; Bryden (2003) 82 Cdn. B. Rev. 555.

<sup>206</sup> See Bryden article, *supra*.

<sup>207</sup> See Chap. 7, Part G.

<sup>208</sup> See *Hansraj v. Ao (#1)* (2004) 346 A.R. 395, 2004 ABCA 130 (one J.A.).

However, the human factor could be too strong if the trial judge and the appellate judge were closely linked; then there could be an appearance of bias. The question is one of degree. An appellate judge would not hear appeals from a judge who is his or her spouse or equivalent, a very close relative, or a very good friend. Or maybe from someone with whom the appellate judge works very closely and continually? I have not seen actual examples of the last category, but one might imagine two judges who cooperate face-to-face every few days on some charitable, fraternal, religious or professional body.

Sometimes a party will object to an appellate judge's hearing an appeal because he or she had some previous judicial contact with that party. For example, the judge may have heard and decided a motion for a stay of execution, or for security for costs. I know of only one valid objection resembling that. Modern law forbids a judge from sitting on an appeal from his or her own decision. Aside from that, no reasonable objection flows from the judge's prior interlocutory involvement with the appeal. Still less from prior contact with the party.

Even if the judge decided one of the very issues now raised in the appeal, during the earlier motion, usually the evidentiary record before the panel hearing the appeal is very different from the evidence (affidavits) before one judge on the earlier motion. Besides, rarely is it the very same issue. For example, on the motion, usually the test is whether the appeal is arguable, not whether it should or will actually succeed. Besides, judges hear *voir dire*s and arguments over admissibility of evidence every sitting day of the year. None produces a mistrial.

The judge's prior involvement is but a slight variation on an argument for disqualification which was unknown even 15 years ago. Now some convicted persons or litigants assert that any previous contact they had with a judge taints that judge. That argument never succeeds. If a judge could never decide any question of law which he or she had ever before encountered on the Bench, or ever decide a factual question which he or she had ever heard even in another case, few trials could proceed. Every experienced judge would be disqualified. Disqualification for bias from opinions has a very strict test. And having heard or ruled against the same party before is just another example of having decided the same or a similar factual question before.

There is no reason to think that appellate judges are weaker-minded or less capable of changing their minds than are trial judges. Most were trial judges a few years before.

Sometimes a judge is tempted to be cautious and not sit if there is any doubt. But on a busy appeal court that can cause problems and load unnecessary work on other judges, especially if done fairly late. It can lead to judge-shopping by lawyers using specious claims of disqualification.<sup>209</sup>

## 2. Who Decides and How

If someone suggests that a trial judge is disqualified and should withdraw, that judge decides the question. If an appellant later argues that the trial judge should not have sat, the Court of Appeal panel decides. Who decides whether a member of the Court of Appeal panel should withdraw and not sit?

Occasionally, Court of Appeal panels have given unanimous decisions finding no operative conflict, without discussing the question of who should decide. And when the impugned judge withdraws, we are rarely told who made the decision, though there is a reason to believe that the impugned judge has decided unilaterally.

<sup>209</sup> See Witkin, *Manual on Appellate Court Opinions* 56 (1977).



There is little reported express discussion of who should decide.<sup>210</sup> But almost all the recent Canadian reported cases seem to be a decision by the one judge alone. That seems sensible, though it is difficult to articulate all the reasons for it. To look on it as a preliminary interlocutory decision by one Justice of Appeal, and so open to an appeal to three Justices of Appeal, seems artificial, even inaccurate. Besides, would that lead to a decision by three judges of whom the impugned judge was one? That should be impossible. And a decision by three other judges (a second panel) would be very awkward.

Books on judicial ethics rightly frown upon a judge's passing the buck to counsel. If the judge in question has serious doubts about sitting, he or she should decide, not ask counsel to decide for him or her. Indeed, if the judge thinks that there is definitely a conflict of interest or a reasonable apprehension of bias, then the judge should withdraw at once.

However, the rules of natural justice are a separate question. If the judge is undecided, or thinks that the matter is likely too small or indirect to lead to recusal, counsel should get a chance to comment. On the one hand, counsel may emphasize a danger, or even know a fact, which the judge has forgotten, not realized, or does not know. On the other hand, often counsel and the clients are far less concerned with the niceties than is the judge. The prospect of delay (or having to reargue the appeal) is often a far greater evil in their eyes. They may ask the judge to sit. The judge should know that before deciding.

### 3. Detecting Conflicts Early

Potential conflicts cause little harm if the judge detects them at an early stage.<sup>211</sup>

## B. DELEGATION

Many non-judges are uneasy because some appellate judges use articling students (law clerks) to draft judgments. (If they knew that staff lawyers occasionally do it too, that might also cause unease.)

There are practical concerns about whether undue and indiscriminate drafting by non-judges' can sometimes lower the quality of the product.<sup>212</sup>

But on the ethical plane, there is less to discuss. If an appellate judge were so spineless and lazy as to let students decide who wins, and on what grounds, there would be ethical and other problems. But I very much doubt that that would ever occur.<sup>213</sup>

<sup>210</sup> See *Robertson v. Edm. Police Chief*, 2004 ABQB 519, 362 A.R. 44, 85-87 (paras. 118-24), app. dismissed. 2006 ABCA 302, [2006] 12 W.W.R. 589, 401 A.R. 49; Bryden, *loc. cit. supra*, at 594 ff.

<sup>211</sup> See further Chap. 5, Part A.2.

<sup>212</sup> See the discussion in Chapter 5, Part F.

<sup>213</sup> See further Chap. 5, Part F.

## C. HONESTY AND ACCURACY

A judge is a fiduciary. Fiduciaries have obligations of honesty and care. Honesty goes far beyond not receiving favours, and not rewarding friends or punishing enemies. It also encompasses not using the office to advance personal agendas or ride hobbyhorses.<sup>214</sup>

Honesty and care arise most often in an intellectual context.

During oral argument, an appellate judge can ask questions for many purposes.<sup>215</sup> Questions are proper to test one counsel's argument, or to see precisely how counsel answers his or her opponent's arguments. But the judge should always distinguish between proper questions, and advocacy for one side or for one view. The latter is wrong. One aspect of that distinction is the audience. A question to counsel designed to help his or her opponent, or to persuade (or dissuade) the other two judges on the bench, is of doubtful propriety.

A lawyer cross-examining should neither misstate to the witness evidence, nor other facts, nor the witness' previous answer. And an appellate judge should listen to answers, and frame questions carefully, to avoid similar sins.

Judgments should be scrupulously accurate. Every quotation (from authority or evidence) must be checked against the original source, maybe even rechecked one last time when the judgment is in its last draft. Every citation of argument, law, or evidence, must fairly summarize what is cited, and not mislead with a half truth or omission.<sup>216</sup> Here, electronic transcripts and careful checking by students or staff lawyers can speed the process and polish the product. There can be no possible objection to having non-judges find and check objective data like that.

Most appellate judges once were warriors (advocates). They should avoid old habits of inflated statements and slanted terminology, verbs and adjectives. No judgment needs weak, colourless, heavily-qualified prose.<sup>217</sup> But a judgment's strength must be appropriate to the topic and occasion. A judgment must explain the conclusion. Persuading others is permissible but not necessary. Denigrating those holding the opposite view is usually unnecessary, even improper.

Intellectual honesty also forbids use of specious arguments or tricks of rhetoric.<sup>218</sup>

## D. WHEN TO DECIDE

Every judge everywhere has a duty to enter **initial** argument with an open mind. But in an appeal, initial argument is the factums, not oral argument. The judge also must remain open to argument and consequent shifts of opinion, until the end of argument.

An appellate judge has an extra duty. He or she must listen to, and be open to persuasion by, the other judges hearing the same appeal. There is an overlapping duty to decide oneself without delegation. Both duties have many aspects. It is not practical to try to discuss the ethical aspect in isolation.<sup>219</sup>

<sup>214</sup> On which, see Chapter 2, Part E.

<sup>215</sup> On which, see Chapter 7, Part E.

<sup>216</sup> See Chapter 16, Parts A and B.

<sup>217</sup> See Chapter 9.

<sup>218</sup> See Chapter 16.

<sup>219</sup> The whole topic is covered in Chapter 8, Parts C and M.

## E. RELYING UPON ISSUES OR AUTHORITIES NOT ARGUED

This is another aspect of the rules of natural justice.<sup>220</sup>

## F. ANGLING TO GET CASES OR TOPICS

Most Courts of Appeal sit in panels smaller than the whole court. So which judges hear which appeals can influence who wins the appeal, or what law is there created.

It is no part of a puisne justice's duties to match up individual appeals with individual justices (unless the Chief Justice has expressly delegated that duty). Therefore, it is unethical for a Justice of Appeal to try to bypass or distort whatever mechanisms the Court uses for matching judges with cases. Those mechanisms are often random or rotational, designed to prevent favouritism or judge-shopping. One judge should not lobby to be assigned to a particular appeal or type of appeal. Some Chief Justices refuse to assign a judge to a case for which he or she tries to volunteer. Nor should a puisne judge try to gain that result indirectly, by swapping assignments with other puisne judges, or other methods. It is probably unethical to dodge work too.<sup>221</sup>

## G. EXTRACURRICULAR ACTIVITIES

Memberships and hobbies can cause an appellate judge legal, ethical and practical problems.<sup>222</sup>

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<sup>220</sup> For convenience, Chapter 2, Part D discusses it.

<sup>221</sup> See also Chapters 4, Part C and 12, Part B.

<sup>222</sup> For convenience, all are discussed together in Chapter 6, Part F.

## CHAPTER 16 – SPECIOUS REASONING

*“It is indeed a mystery,” I remarked. “What do you imagine that it means?”*

*“I have no data yet. It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts.”*

– “A Scandal in Bohemia”

This chapter describes poor reasoning. Some of it is illogical, even irrational, but much is neither. Some of these flawed methods are simply weaker than they sound. Some would have merit in limited circumstances, but are often used too broadly.

All are fairly common. A few are subtle and hard to detect. Most are plausible at first. A few unscrupulous counsel may use such methods deliberately or recklessly. Some judges do not notice the flaws and adopt counsel’s arguments.

Some people resent any mention of logic in law, so I must defend this chapter. I do not suggest that logic alone can solve typical problems in law-making, policy, or even ordinary litigation. They involve choices, principles, values, and weighing. And even at certain steps where logic may be desirable, judges are human, and human subjectivity can play some part.

But such choices and values should be open, not clad in language of inevitability. Above all, no ship should fly a false flag. Displays of reason, authority, or evidence, should be genuine. Authority and evidence should only be cited if it truly supports the proposition. Logic proffered should be sound.

If counterfeit currency is actually in use, it is idle to ignore the fact by suggesting that “everyone pays with plastic now”. Such criticisms themselves display internal flaws.

Here are 13 families of unsound arguments.

### A. UNCITED CONTRARY ARGUMENT OR AUTHORITIES

Not citing a known refutation is the most common device. Many factums do this. The most effective propaganda uses facts which are true, but highly selective. If the reader does not know the contrary argument or authority, a factum or judgment boldly ignoring it can seem very convincing.

Counsel’s omission of contrary authority is sometimes deliberate, and so unethical.<sup>223</sup>

<sup>223</sup> The cases on the duty to reveal contrary authority are cited in Stevenson & Côté’s *Civil Procedure Encyclopedia* v. 3 pp. 66-36 and 66-37 (2003).

More often omission comes from ignorance, carelessness, and poor research. The amount of law to research is vast. There are almost 800,000 decided cases in the Canadian Abridgement. Neither printed sources, nor full-text computer searching, will easily uncover more than (say) 60% of the cases on point. Canadian law has become almost unfindable.

Canadian law reports no longer summarize the arguments of counsel. Yet it is important. In 1922, Professor Kenny published an English casebook.<sup>224</sup> He explained that he reproduced the argument of **losing** counsel (or the dissenting judge). Without it, the decision would seem obvious, even trivial; the real issues would never appear.

The slippery advocate ignores entirely a contrary argument or authority, and hopes that no one will remember. If need be, he or she ignores inconvenient facts too.<sup>225</sup> Even careless judgments come close. For example, the dissent discusses little authority for several sweeping assertions contrary to traditional law, in *A.-G. Can. and Dupont v. Montreal*.<sup>226</sup> And most cases discussing professional privilege ignore leading cases, even binding cases. A suit by the wrong originating document was held incurable and it was stuck out.<sup>227</sup> But the court did not mention the Rule of Court which expressly said that suits begun the wrong way are curable, not bad.

In popular topics such as family law, people often cite United Nations and other international treaties to suggest that Canadian courts have an obligation to rule a certain way. But in a less popular topic such as drugs, Canadian judgments often do not mention the various United Nations and international conventions for the suppression of narcotics.<sup>228</sup>

Here are 7 variants on this ostrich posture.

1. If the merits or the evidence favor authors, they plunge right to them and do not mention the standard of review.<sup>229</sup> Appellants' factums often do this. But if the evidence or merits are against authors, instead they dwell on standards of review, and so get an excuse to avoid the unfavorable merits.<sup>230</sup>
2. If sympathy and the evidence favor them, authors stick entirely to them. But if sympathy or evidence contradicts the desired result, they discuss procedure and orderly methods, and discourage irregular proceedings in the future. That has been tendentiously called bureaucratic values. Some judgments suppress facts. When Cardozo J. wished to find for an injured plaintiff, he recited factual details to show the gravity of the injury and personalize the injured plaintiff.<sup>231</sup> But when Cardozo J. wished to find for a defendant, he omitted all such facts.<sup>232</sup> A stronger example in another appeal was Cardozo's failure to cite a very apposite clause in the governing contract.<sup>233</sup>

<sup>224</sup> *A Selection of Cases Illustrative of the Law of Contract*.

<sup>225</sup> See Lasky (1961) 49 Cal. L. Rev. 831, 834.

<sup>226</sup> [1978] 2 SCR 770, 776-78.

<sup>227</sup> *N.S. Michelin Tire Employees U. v. Michelin Tires* (CA 1986) 72 N.S.R. (2d) 16.

<sup>228</sup> The majority got past breach of a different international convention, in *Cap. Cities Commun. v. C.R.T.C.* [1978] 2 SCR 141, 172-75.

<sup>229</sup> For example, the dissenters relied on the standard of review, but the majority changed the assessment without even discussing it, in *Keizer v. Hanna* [1978] 2 S.C.R. 342, 19 N.R. 209, 82 D.L.R. (3d) 449.

<sup>230</sup> On standards of review, see Chap. 3, Parts C, D.

<sup>231</sup> Cf. a more modern echo, in *Arnold v. Teno* [1978] 2 SCR 287.

<sup>232</sup> See Posner, *Cardozo: A Study in Reputation* 42, 51 (U. of C. Press 1990).

<sup>233</sup> *Id.* at 106; cf. p. 137.

3. If the present law would bar the result advocated, authors talk about what the law **should** be. Indeed most journal articles assume that the law is what the author advocates or wishes, and ignore any possibility that ideal law and actual law could diverge.
4. If there are two conflicting lines of authority, authors cite only the favorable one. That is easy to do and often innocent. Usually the two conflicting lines do not mention each other. The tendency of some textbook writers to favor method #3 above reinforces that tendency.<sup>234</sup>
5. Sometimes there are two different legal rules which overlap and conflict.<sup>235</sup>
6. It is now fashionable to ignore all authority more than 20 years old, including binding appellate decisions or statutes. Even Supreme Court of Canada decisions before (say) 1965 are often thought to be stale-dated. One Alberta judge calls this “law oblivion.”<sup>236</sup>
7. Some judges rarely cite decisions from other provinces, even Supreme Court of Canada decisions on appeal from Québec. Often a decision of one Court of Appeal ignores a decision of another Court of Appeal precisely on point, two or three years before, and reported in all the usual places. So the law of different provinces is now diverging.<sup>237</sup> On practice and procedure topics, such parochialism is almost universal, even where the Rules are identical, or the law is all judge-made. Usually extraprovincial cases are cited when the author wishes to ignore local ones.

## B. MISREPRESENTED OR WATERED-DOWN ARGUMENTS

Part A talked about ignoring difficulties. This part is about misrepresenting them.

Some factums and judgments purport to recite contrary arguments and authorities, but do a poor job of it. Some even rely upon authorities portrayed as favorable, but in fact contrary. When Lord Denning cited pre-1800 cases, sometimes it was hard to see how they supported his proposition. Such poor work may come from sloppy research, misunderstanding how to read judgments,<sup>238</sup> wishful thinking, ignorance of the rules of precedent, or even closed or dishonest attitudes.

For courts, the antidote is verification. Counsel’s authorities must be carefully checked, to detect

1. Cases which do not support the proposition or are distinguishable;
2. Obvious errors, such as the wrong judgment, or a decision later reversed on appeal;
3. Incomplete selection of cases, such as a case which was later overruled, criticized, or distinguished, especially by higher courts;
4. Failure to distinguish binding from persuasive authority. Recent superior court decisions count for little if the local Court of Appeal or the Supreme Court of Canada held the contrary once. And *dicta* count for little if there is one binding *ratio decidendi* going the other way.<sup>239</sup>

<sup>234</sup> See Lasky (1965) 19 S.W. L.J. 679, 689.

<sup>235</sup> See Part G below.

<sup>236</sup> It goes hand in hand with many other tricks of citation: see Parts B and I.1 and L. below.

<sup>237</sup> Cf. Lasky, *loc. cit. supra*, at p. 835.

<sup>238</sup> On which see Chap. 11.

<sup>239</sup> See 3 Stevenson & Côté *Civil Procedure Encyclopedia*, pp. 66-5 to 66-10 (2003) and *Brook v. Calgary* [1971] 1 W.W.R. 429 (Alta C.A.).

5. Omissions from key quotations and omitted context. It is surprising how often reading the full report reveals that the sentence after the quote begins “However, . . .”. At times, the quotation is the court’s mere recital of one side’s argument, and not really the court’s decision at all.

Sometimes a factum or judgment sets up a man of straw. It presents an unconvincing contrary position, and then rebuts it. But it is not the real opposing argument or losing party. It is either invented, or once used by other people. Or it caricatures or waters down the opponent’s actual argument.

This is common in political and academic arguments. There are many ways subtly to denigrate or misrepresent an opponent’s argument. A debater may portray the opposing view as more rigid, or wider, than it really is. Or may ignore its exceptions, qualifications and nuances. Or may present the opponent’s explanation or rationale in vague or confusing terms. Or use propaganda terms.

### C. MANUFACTURED RATIONALES<sup>240</sup>

This may be a variation on Part B, or a version of the straw man. It has been popular in Canada for years.

Judges and counsel often use this device to evade well-established law (case law or even statute). Well-settled law is often old, so the author stresses its distant birth. He or she then announces the original reason that the rule of law was first invented. Or announces the “true rationale” for the rule. No one defines exactly what “rationale” means. The author then demonstrates that the proffered reason or “rationale” is inapplicable here and now.

So the author dodges the settled law.<sup>241</sup> The method sounds scientific, and is rarely criticized.<sup>242</sup>

But 9 times out of 10, the substituted rationale is bogus. The reader focusses on proof that the “true rationale” is no longer applicable; but that is looking under the wrong walnut shell. The “true rationale” has just been specially **manufactured** to be inapplicable here and now. So this game will always produce that “proof”.

I use the word “manufactured” deliberately. People who use these arguments are very rarely students of legal history; nor do they cite any respectable legal history to back up their theory of what the original rationale was. They never cite law reports or Parliamentary committees from 150 years ago. Usually they cite no authority at all for the supposed “rationale” or origin. Occasionally, the author cites a recent journal article. That article uses the same trick to attack the same rule, and cites no authority for its invented “rationale” or origin of the rule.

Most of these “rationales” sound implausible on their face. Sometimes, one even suspects what the real origin of the legal rule was. That real origin is usually still applicable. But it is never mentioned.

<sup>240</sup> See Mayrand, *Dictionnaire de maximes et locutions . . .* vo. “Cessante ratiōne legis, cessat ipsa lex” pp. 72-73 (4<sup>e</sup> éd. 2007).

<sup>241</sup> Or even announces a new rule to the opposite effect, another fallacy found in Part M below.

<sup>242</sup> There was criticism in *Ellis v. Griffith* (Ex Ch 1846) 16 M. & W. 106, 110, 153 E.R. 1118, 1120, quoted in *Mahaffy v. Bastedo* (1916) 33 D.L.R. 228, 231, 38 O.L.R. 192 (C.A.).

The settled English common-law rule was that a vendor unable to make good title would not be liable in damages for that breach.<sup>243</sup> That rule was brushed aside by asserting that it came from lack of registration of land titles in England. It was therefore called inapplicable in all parts of Canada, even those using the common-law deed registration system from England.<sup>244</sup> But the two speeches in the House of Lords in *Bain*, and the opinions of all the judges, do not clearly mention the alleged rationale. They do clearly mention other different rationales which would be equally applicable in Canada, or even more so. The Canadian decision skips many of those others.<sup>245</sup>

There is a second flaw in substituting rationales. Even if the original reason to create a legal rule has indeed gone, the rule may well have other roles and uses today. For example, all land law in common-law Canada centres on Crown grants of tenure in free and common socage, whose origins are totally embedded in the feudal system. A key part is the statute *Quia Emptores*.<sup>246</sup> But no one has yet had the brass to suggest abolishing private ownership of land because we no longer wear armor or live around castles.

We have all heard of junk science; this Part C is a rival, Junk Legal History. It is cheaper: one can play without having to get a science degree, buy an airplane ticket, publish books or articles, or even buy a white lab coat.

There are even generic brands of this nostrum. Rules of evidence are often attacked on the assertion they were devised before 1834 to thwart stupid English juries, whereas Canadian civil juries today are either

- (a) non-existent, or
- (b) very clever and sophisticated.

(The advocate must cross out the inapplicable line, and not use both in same case.)

This game is often bolstered by ridiculing whatever is old.<sup>247</sup>

A variant is confining an established rule of law to its supposed rationale, indeed making a litigant relying on the rule prove its broad social rationale in his particular case. As long as Wigmore's four "tests" for privilege were thought applicable in individual cases, that fallacy flourished. The Supreme Court of Canada abolished those four tests for "class" privilege, but preserved them for case-by-case privilege.<sup>248</sup>

<sup>243</sup> *Bain v. Fothergill* (1874) L.R. 7 H.L. 158.

<sup>244</sup> *A.V.G. Management-Science v. Barwell Developments* [1979] 2 S.C.R. 43, 24 N.R. 554, 558, 564-6.

<sup>245</sup> *A.V.G. Management v. Barwell*, *supra*.

<sup>246</sup> 18 Ed. 1 c.1 (1290).

<sup>247</sup> See Part I.1 below.

<sup>248</sup> A healthy antidote is *Kennedy v. McKenzie* (Ont 2005) 17 C.P.C. (6th) 229, 237-8 (Apr 8) (paras. 17-20). Another case and the Master here ((M) [2004] OJ #4129) had introduced a new precondition to litigation privilege, but this judge reversed the Master, saying that the new topic is only a rationale, not rule.



## D. BOUNDARY ARGUMENTS

This Part describes what at first seem to be several different devices. But analysis reveals that all share one thing: they try to move boundaries, even erase them.

### 1. “Close Enough”

This type pops up every day. This device (“so close”) is the song of the staller or the chiseler. A lawyer who tenders something late says “surely you won’t penalize me for 48 hours”. Similarly, in 1939, German propagandists sneered at England and France for “going to war over little Danzig”. The technique is to edge into someone’s space a little at a time.<sup>249</sup>

The error is that every boundary must be somewhere, and there will always be locations just beyond it or just inside it. We all have to reach the age of majority at a given minute. One minute we are a minor, the next we are *sui juris*. Every house is either in the City, or in the Rural Municipality. Near does not count. The puck is inside or outside the net. The trial judgment is bigger or smaller than the previous offer to settle. The sugar delivered either weighs as much as contracted for, or it does not.<sup>250</sup>

This device is more beguiling if the boundary is not measured in miles or dollars, but time or other intangibles are involved.

### 2. No Boundaries

The second species of this device is boundary erasing, otherwise known as the How-Many-Hairs-Make-a-Beard fallacy. It attacks any distinction which is one of degree, or hard to define exactly.<sup>251</sup> The sophist suggests that it does not even exist. Or argues that it should be abolished because it is meaningless or “arbitrary”.

Such a sophist argues that a bearded man and a clean-shaven man are the same, as follows. One hair does not make a beard. One more (2) does not either. Nor does one more (3) either. And so on. Pull one hair out of a beard and it is still a beard. Nor does pulling out another (total 2), and so forth.

If opponents persist and maintain that there is a difference between bearded and clean shaven, the advocate ridicules them. How many hairs are the minimum for a beard? 500? 1000? If the opponents cannot give an exact number, the advocate suggests that proves that the boundary does not exist. But if the opponents hit on a number (say 1500), the advocate laughs and ridicules the idea that 1499 is clean shaven, but 1500 is a beard.

Such advocacy is trickery, and argues that day is night, and black is white. It should not gull adults, but unfortunately it often persuades (or baffles) many educated people.

<sup>249</sup> But cf. Genesis 18:22-32.

<sup>250</sup> See *Purba v. Ryan*, 2006 ABCA 229, 396 A.R. 48, 60 Alta. L.R. (4th) 112, 30 C.P.C. (6th) 35.

<sup>251</sup> See reference *Re Regulation & Control of Aeronautics in Canada (P.C. (Can.))* [1932] A.C. 54, 101 L.J.P.C. 1, 7, [1931] 3 W.W.R. 625.

### 3. No Definition is Perfect

The third species suggests that a legal concept be abolished because its boundaries are uncertain, or hard work to survey. For example, the concept *ratio decidendi* has problems, so abolish the concept.

Here is a common modern example. Someone wishes to attack all journalists and judges as biased, even consciously advancing their own interests. Or alternatively, some biased journalist or self-seeking legal commentator wishes to evade criticism. To achieve any or all of these ends, the biased person suggests that objectivity or non-partisan discussion does not exist.

How do such sophists deny that a well-known entity exists? By quibbling over the borderline between it and its opposite. They suggest that perfect objectivity is impossible because we are all human, so it does not exist at all.

In our post modern, deconstructionist, society, there are those who regard impartiality as an illusion. Rejecting as fraudulent the notion that anyone is capable of being truly impartial, some people promote the idea that the only decent judge is one who sets out to be actively partial, using judicial power to address the injustices of society, redistribute assets, promote the interests of some social group seen as worthy of support, and administer justice, not according to law, but according to some overriding standard existing outside the law. People who take this approach consider that impartiality is bogus, and the pretence that it exists, or is capable of being achieved, is an impediment to true justice.<sup>252</sup>

But as the Chief Justice hints, that is the same old trick. It borders on Newspeak. Recall that in Orwell's *1984*, Big Brother's Doublethink slogans were "War is Peace," "Freedom is Slavery," and "Ignorance is Strength".

### 4. All Distinctions are Impractical

A fourth variant, the enforcement argument, has bluff plausibility. It sounds the opposite of theory, donning the overalls of practicality. This argument suggests that the distinction under attack May Be Fine in Theory, But Will Be Unworkable in Practice.

In many contexts, workability is a sound argument. Many rules are impractical in many conditions. But when applied to questions of amount or degree, often this argument is the same old sophistry. The law is full of fuzzy rules. The law properly forbids us to drive a vehicle at a rate of speed unreasonable in the circumstances. The law is not crystal clear in its application, but it is workable and understandable.

Some of these boundary arguments verge upon an argument of *reductio ad absurdum*, projecting or applying the impugned theory to the utmost. Sometimes such argument is legitimate. There is no simple rule of thumb to say when it is. But abolishing all small distinctions, even measurable ones, and abolishing all distinctions which are not accurately measurable, creates a virtual Catch-22.

<sup>252</sup> Speech by the Hon. Murray Gleeson, Chief Justice of Australia, to the National Judicial Orientation Programme Sydney, 16 August 1998 (from High Court of Australia website).

## E. FUZZY REASONS

The most basic bad reasoning is no reasoning at all. Usually this method is more or less concealed. Such dodging was more frequent in judgments a generation ago, but is still common.

Here are five different ways that judgments can be vague or avoid analysis.

### 1. Papered-Over Gaps

The purest form of the first technique is more common in decisions of some administrative tribunals, than judges' reasons. The "reasons" may be 30 pages or longer. The first part of the decision contains the procedural history. The second gives the facts. The third recites the arguments of the party applying. The fourth recites the arguments of the opposing party. The sixth is the formal order, and similar consequential matters. So any explanation cannot be in those parts; it must be in the fifth part. The fifth is short, and some of its sentences merely introduce or recite. So only one or two of its sentences really try to explain anything. They are vague and conclusory. Call them Reasonoids. In retrospect, the 30 pages are almost entirely padding.

A subtle variant on such non-reasons is a chain of reasoning lacking a link. For instance, an advocate might want to argue that suspension of driving licenses after conviction contravenes the Charter, being cruel and unusual treatment or punishment. That argument might prevail if such license suspensions kill many people (through starvation, lack of prescription medicine, lack of access to physicians, and so forth). Indeed, if one could prove that, it would be easy to connect that proposition back with the law suspending licenses. And easy to connect that proposition forward to the desired conclusion (the statute is invalid). Almost any lawyer or judge could probably write the two ends of that chain of argument.

The hard part is in the doubtful middle (showing that having no license kills). How to write that middle? Some written arguments or opinions simply offer a few tortured opaque sentences as the middle part.<sup>253</sup> If the beginning and end of the chain of reasoning are clear, sound, detailed and supported by authority, the flaw in the middle is less noticeable. Many people little note, nor long remember, the middle of anything.

Sometimes a sincere person manufactures such a chain with a cardboard link in the middle, believing that the middle exists. The beginning and end of the chain are good, which convinces the author that the whole chain must be sound, and that difficulty in writing the middle comes from lack of literary skill. But Orwell pointed out that obscure writing is often the symptom of muddled or insincere thinking.<sup>254</sup>

Occasionally the cardboard middle link is cunningly painted to look like steel, by the author's gift with words.

<sup>253</sup> See Lasky, *loc. cit. supra*, at 841.

<sup>254</sup> See the essay "Politics and the English Language" (1946), reprinted in pp. 954-67 of Orwell, George, *Essays* (ed. Carey) (Knopf 2002).) There may be an example of cloudy thinking in parts of the majority judgment in *T. Eaton Co. v. Smith* [1978] 2 SCR 749, 754-58.

## 2. Mere Assertion

Another method of avoiding reasons is to assert the conclusion, often repeatedly.<sup>255</sup> A subtler evasion is asserting and restating one or two corollaries or variants of the thesis. That looks like reasoning in steps, and makes the padding less obvious. Such assertion without proof is not rare either, even in well-respected courts and in what look to be long full-blown reserved decisions.<sup>256</sup>

Other ways will also dress up that mere assertion as proof. Epithets work well, especially if not too blatant. An author may reject an opposing argument as “speculative” or “theoretical”, and stress practical utility. Even if true, that is mere assertion.

Repetition without proof can beguile people with university degrees. Adding an *apparatus criticus* (footnotes, bibliographies, pseudo-mathematical notation, equations, etc.) ices this cardboard cake. If the partisan’s friends write articles (or books) making the same unproven assertion, that works even better.<sup>257</sup>

## 3. Abstraction

One may break a legal test down into several elements, but sometimes the key one is so vague that it is not a real test, and is purely subjective. This runs off into problems of vague boundaries.<sup>258</sup>

## 4. Non Sequitur

Another form of non-reasoning is the simple *non sequitur*.

Sometimes what is tendered is no reason at all, and does not support the conclusion. For example, someone appeals his criminal conviction on the ground that the police disliked him, were prejudiced, and beat him after arrest. None of those things is a defence to a charge of breaking and entering. Nor does the Charter make its breach by government itself a bar to prosecution or conviction. Another example: extradition for passing a N.S.F. cheque was evaded by arguing that the complainant wanted to get paid.<sup>259</sup> Another *non sequitur* would be an appeal from conviction on the ground that most truckers contravene the same statute, and the public is not really harmed by such conduct.<sup>260</sup>

## 5. Emotion

The simplest form of fuzzy argument is appeal to emotion or reflex. It works just as well with educated audiences. Mencken exuberantly assayed Woodrow Wilson’s prose this way:

... Wilson was ... superior in his own special field – ... the great task of reducing all the difficulties of the hour to a few sonorous and unintelligible phrases, often with theological overtones – that he knew ... how to arrest and enchant the boobery with words that were simply words, and nothing else. The vulgar like and respect that sort of balderdash. A discourse packed with valid ideas, accurately expressed, is quite

<sup>255</sup> See the dissent in *A.-G. Can. and Dupont v. Montreal* [1978] 2 SCR 770, 776-78.

<sup>256</sup> For example, see *Batavia Times Pub. Co. v. Davis* (1978) 88 D.L.R. (3d) 144, 153 (Ont.).

<sup>257</sup> See Fischer, *Historians’ Fallacies* 302-03 (1970).

<sup>258</sup> On which see Part G below.

<sup>259</sup> *Nebraska v. Morris* [1971] 1 W.W.R. 53, 16 D.L.R. (3d) 102 (Man.).

<sup>260</sup> See also majority judgment in *T. Eaton Co. v. Smith* [1978] 2 SCR 749, 754-58.

incomprehensible to them. What they want is the sough of vague and comforting words – words cast into phrases made familiar to them by the whooping of their customary political and ecclesiastical rabble-rousers, and by the highfalutin style of the newspapers that they read. Woodrow knew how to conjure up such words. He knew how to make them glow, and weep. He wasted no time upon the heads of his dupes, but aimed directly at their ears, diaphragms and hearts.<sup>261</sup>

## F. AMBIGUITY

Ambiguity of some sort is at the root of many flaws in argument, and some other parts of this Chapter could be so labelled. Here are a few other types.

### 1. Undistributed Middle Term

A prevalent type is the fallacy of the undistributed middle term. This fallacy would be obvious when it uses a word which has two very distinct meanings. For example, “execution” by a sheriff’s bailiff to collect a debt is not the same as “execution” by a hangman, and no legally-trained person would think that they are. A syllogism which reasoned by that flaw would sound like a 12-year old’s pun. But here is a real-life common example.

1. If prohibiting drink (or drugs) removed a cause of crime or poverty, prohibition would decrease the incidence of crime and poverty.
2. When the United States introduced prohibition in 1920, the incidence of crime and poverty did not decrease in the next few years, indeed the contrary.
3. Therefore, prohibiting drugs does not combat crime or poverty.

The fallacy present in this syllogism is that the words “prohibiting” or “prohibition” are used in a different sense in step 2 than they are in steps 1 and 3. In step 1, it means initially making drink illegal. In step 2 it refers to a specific amendment to the United States federal Constitution. The two differed, because well before 1920, most American states had introduced their own prohibition laws, so by the time of the federal constitutional measure, selling alcohol had already been illegal in most of the United States for years.

The flaw’s existence is debatable. But this is an example of an argument which seems logically conclusive, but is actually debatable.

Experts, pseudo-experts, and some prosecutors, like the semi-medical word “consistent”. So an expert on hair may testify that the hairs found at the crime scene are “consistent” with the hair sample from the accused’s head. If one takes that to mean that they are the same (subject to some margin of error), or even that they are similar, the evidence sounds impressive. Indeed it is, if that is what the expert meant.

But probably she did not. Often such people use the word “consistent” merely to indicate that the two hair samples are not clearly from different people; they may or may not be from the same person. That says very little. If the expert uses the word in that sense, but the listener thinks that “consistent” means same or similar, we have the full-blown fallacy in the implied syllogism.

<sup>261</sup> Mencken, H.L., “The Archangel Woodrow” (Smart Set Jan. 1921), reprinted in *The Vintage Mencken* 118-19 (ed. Cooke) (1955 Vintage).

One finds similar arguments: denying that one was abused is “consistent” with actual abuse, or more cold weather is “consistent” with global warming. It is true that those things (denial or cold snaps) do not disprove abuse or global warming; but they do not prove them either. One cannot logically suggest that condition A will be proved either by X or by the opposite of X.

Another example of the undistributed middle term is a famous legal article. The editor of the *Canadian Bar Review* criticized the Chief Justice of Canada for saying that journal articles are not “authority.”<sup>262</sup> The Chief Justice likely used the word “authority” in one sense: something which has independent weight in an argument. But much of the article was about the word “authority” in the different sense: writings which counsel can put before a court (for whatever it is worth).<sup>263</sup>

The fallacy is better concealed where a word or phrase has a somewhat elastic or vague breadth. Some words have both a narrow technical meaning, and a broader everyday meaning. Examples are words like “bankrupt”; or indeed “bank.”<sup>264</sup>

This fallacy becomes even more plausible where a legal term has roughly the same sense in two distinct areas of the law. What if the meaning is not the same in all respects? Then use of a precedent from one legal area in an argument in the other area may be a syllogism with a chameleon as its middle term.<sup>265</sup> For example, the legal tests for fraud by misrepresentation might not be quite the same in criminal law and in various branches of the law of contracts. In a suit to rescind a contract under the court’s equitable jurisdiction, because of misrepresentation, a quotation from a Supreme Court of Canada decision might sound impressive – until one reflected on the fact that it was written in a criminal context.

## 2. Bad Statistics

Another variant on the fuzzy middle term is very beguiling and dangerous. An expert testifies that he used a scientific test, which showed that the disputed condition existed. The test’s margin for error is “one per cent”; says the expert; “it is 99% accurate in both directions.” So the expert’s side argues that the condition existed to 99% probability. 99% is certainly enough to win a civil suit, and probably to convict too.

But this is bad statistics. Suppose that the condition which the test “found” was tuberculosis. Suppose the person in question lives in a Canadian city of 100,000 people. And suppose that the incidence of T.B. is low there; no more than 500 people have it, by anyone’s estimates or studies. The trial witness’s test has a 1% error rate in both directions. So it will miss 1% of the actual cases of T.B. tested, and it will falsely cry “T.B.” in 1% of the people tested. So if everyone in this city were tested, it would falsely label 1%, or 1000 people, as having T.B.

But there are fewer than 500 real cases of T.B. Therefore, the “positive” reading on the one person actually tested could be from among the 1000 false cases, or from 500 real ones. So the chances are over 2:1 (1000:500) that it is a false alarm.

Therefore, this evidence is less than 33% likely to be correct. We have misunderstood the statistics and used “margin of error” in two different senses.

<sup>262</sup> Nichols (1950) 28 Cdn. B. Rev. 422.

<sup>263</sup> See further Côté (2001) 39 Alta. L. Rev. 640.

<sup>264</sup> See Holmes “Path of the Law” (1897) 10 Harv. L. Rev. 457, 463-64. See also Garner (1989) 15 *Litigation* (#4 Summer) 39, 40.

<sup>265</sup> See Hancock (1959) 37 Cdn. B. Rev. 535; O’Connell (1994) 70 Ore. L. Rev. 57, 67-70; cf. pp. 70-78.

## G. EXPANDING AND CONTRACTING CATEGORIES

This topic is somewhat related to Part D on Boundaries and to Part F on Ambiguity. We saw there that if a category or a term can change its core meaning, one can use it to prove almost anything.

### 1. Overlapping Categories

Even if the core meaning remains, there is danger in changing the boundaries of the category or rule, thus expanding it or contracting it at will. A broad rule or category will tend to overlap other rules or categories; a narrow one will not. If there are two rules or categories with different boundaries, one must produce some results which the other will not. Two different rules commonly produce different results.

So, overlapping rules or categories often contradict each other in the area of overlap. In that area, an advocate can choose between the two rules or categories, and so pick the result just by picking which rule or category to use. And if either or both categories (rules) can be made to expand or contract, that is an easy way to create or remove overlaps, to choose between the two rules, and so to pick the result. In either case, the result becomes largely arbitrary. The advocate picks it without seeming to.

For example, in the law of contracts, the rule that consideration need not be adequate overlaps with rules about unconscionable transactions. Yet the two rules produce opposite results. Setting the boundaries of the rules controls the result. In criminal law, insanity (disease of the mind) overlaps with some errors of fact and so the separate doctrine of *mens rea*. In the law of contracts, fundamental breach overlaps so many other things that it may not be a separate topic. Most definitions of income and capital overlap. Similar problems can be serious, and are usually not noticed, where matrimonial property rules (capital) overlap maintenance rules (income).

If one is denied natural justice and the benefit of a union's constitution and rules, what should one do? Appeal internally? That risks being held to have waived the procedural defect and reverted to the merits.<sup>266</sup> Or should one sue in court? That risks losing for failure to exhaust internal appellate remedies.<sup>267</sup> It is also dangerous for an employer to detect an employee in medium-sized misconduct. If the company keeps its worker on, it may be held to have condoned the breach; but if it fires him, the employer will likely be held to have acted precipitately without giving warnings and a chance to reform.

Any double standard is a strong example of conflicting overlaps. These are common. Do we look at the merits of the question, or at the standard of review? Do we defer to expertise, or reweigh afresh? Do we construe legislation strictly, or generously? Is professional discipline a question of public protection, punishment, or rehabilitation? Are penalties in civil procedure intended to coerce compliance in this case, to deter others, or prevent harm to the opposing party? Must proof be strict, or a mere balance of probabilities? Are entered judgments unalterable, except where justice requires alteration?<sup>268</sup> Those competing tests overlap, so one can choose a result by selecting one of these.

<sup>266</sup> *O'Laughlin v. Halifax Longshoremen's Assn.* (NS 1970) 15 D.L.R. (3d) 316, 325.

<sup>267</sup> *White v. Kuzych* (#3) (PC (BC)) [1951] AC 585.

<sup>268</sup> See *Re Marline* [1971] 1 W.W.R. 500 (Man.).

Until the 1960s, a small militant group used a double standard to control the British electricians' union. The union had voluminous, impossibly complicated, picky clerical rules for elections. No one ever succeeded in fully complying with them. If the violation was by an outsider, he or his vote or candidate was disqualified, because the rule said so. If the violation was by an insider, the union noted how small, harmless, and unintentional was the violation, and relieved against it, as equity and fairness plainly demanded. In isolation, either ruling looked unassailable.

In a land-use bylaw, judges overcame a plainly inclusive definition of "trailer" by ransacking dictionaries to find a narrow meaning for another word in that definition, and then chopping up time periods.<sup>269</sup> In another case, judges wanted to ignore statutory restrictive time limits and bars on extending times. So they read them as applying to litigants, not to their lawyers, and then found that all failings were by the lawyers alone.<sup>270</sup> The latter game is played in many courts to circumvent procedural requirements. Another narrow non-purposive interpretation of an insurance policy was given by the majority in *Hartford Fire Ins. Co. v. Benson & Hedges (Can.)*.<sup>271</sup> One sees the flaws and the unspoken choices in *Hartford* only by reading the dissent.<sup>272</sup>

Double standards, expanding and contracting categories, and overlapping categories all sound reasonable, even compelling. Only by looking at the broader picture over time does one see how arbitrary the process can become.

## 2. Rules vs. Philosophy

A variant on overlaps and expansion or contraction, is choosing arbitrarily between a strict rule and a broader concept or analogy. For instance, sometimes we look at precise categories in the Charter. Then what is not dealt with there is not covered, and the Charter does not apply. Sometimes we expand Charter categories in vague ways and speak of "dignity". Sometimes we depart from the Charter's express categories and create other categories which are analogous.<sup>273</sup> Sometimes we apply the Charter in areas where it is admittedly inapplicable, by speaking of "Charter values". So well-known categories, set by statute, can expand and contract a lot.

The Charter arguments just enumerated can be used legitimately of course. But they involve more choice, and less objective science or binding authority, than appears at first blush.

## 3. Meaningless Distinctions

A variant on manipulable overlapping categories is meaningless differences.

The law contains a number of distinctions without any real difference, as Julius Stone liked to point out.<sup>274</sup> Giving different legal treatment to two things which are really more or less identical, allows many incongruities, errors, and games, conscious or unconscious. An advocate can get the result desired by choosing the right name. Here are some possible examples:

- (a) a definition specifying absence of quality x vs. a definition not mentioning x, but subject to an exception for x
- (b) two different legal categories, with different definitions, but identical legal results

<sup>269</sup> See *Farr v. Moore (Twp.)* [1978] 2 SCR 504.

<sup>270</sup> *Pont Viau (City) v. Gauthier Mfg.* [1978] 2 SCR 516, 526-27.

<sup>271</sup> [1978] 2 SCR 1088, 1104-05.

<sup>272</sup> *Id.* at pp. 1094-96.

<sup>273</sup> Especially under s. 15.

<sup>274</sup> See Stone, *Legal System and Lawyers' Reasonings* 241 ff. (Stevens 1964).



- (c) wishing to have one's business succeed vs. wishing to harm one's competitors (in torts law)
- (d) intention to earn income vs. intention to preserve a capital asset which earns income (in income tax law)
- (e) giving support calculated on income vs. dividing income-producing assets (in family law)
- (f) some rival standards of review (in judicial review of inferior tribunals)
- (g) privilege for certain communications, but not for the facts thus communicated
- (h) appellate deference to a discretionary decision, unless a relevant factor got the wrong weight
- (i) different names for the same thing, e.g. corroborative evidence vs. confirmatory evidence

Some of the topics which so puzzled us as law students probably were examples of meaningless distinction.

## H. FRAMING THE WRONG QUESTION<sup>275</sup>

### 1. Simple Wrong Question

Most legal argument or reasoning takes the form of answering a question, testing a hypothesis, or proving an assertion. For brevity, we can just call it answering a question.

The wrong question invites the wrong answer.<sup>276</sup> For example, one can use sophistry to destroy privilege against defamation by saying that the usual course of business does not include defaming people.<sup>277</sup> That misses the point that defamation is usually unintended. Indeed that is the whole point of qualified privilege.

If a judgment or argument discusses or answers more than one question at once, many kinds of confusion or error arise. For example, the author can answer or prove one part, then imply, even assert, that he or she has just answered or proved the other part.

### 2. Implying Answers and Excluding Issues

Some questions imply the answer to a more controversial and pertinent question. "Should the plaintiff be confined to damages alone?" That implies that the defendant is liable to the plaintiff, and that only remedy remains to discuss. Some cross-examination questions purport to recite one of the witness' previous answers, but do so incorrectly. Many debates are confined to when or how to do something, implicitly assuming that **whether** to do it is already decided or beyond debate. Whole wars have been thus started.

Other versions of two-questions-in-one try to force an either-or answer. A crude example might be the question "Public utilities regulators – savior, or oppressor of consumers?" It could well be that regulators are neither.

<sup>275</sup> I acknowledge my debt to Fischer, David, *Historians' Fallacies*, Chap. I (1970).

<sup>276</sup> Cf. Frankfurter J. in *Rogers v. Helvering* (1943) 320 U.S. 410, 413.

<sup>277</sup> See *Pullman v. Walter Hill & Co.* [1891] 1 Q.B. 524, 530 (C.A.).

One often meets subtler versions. Many discussions about Queen's Counsel imply that the institution must either be kept in its existing or traditional form, or abolished entirely. The question is framed so as not to permit any discussion of reform. Controversial rules of law are often discussed the same way. The opponent of the rule stresses all its flaws and omissions and suggests hypothetical cases with still more odd results. For example, does anyone speak of the rule against perpetuities without mentioning 84-year-old women having babies?

The opponent may foolishly accept the question as framed (i.e. warts and all), and then must argue that the flaws are not that bad. Whoever judges that debate will likely just discuss whether the existing rule with all its presumed faults is good enough to preserve.

### 3. Semantics

What to call something is unimportant. We think that we will not be sidetracked by semantic questions. But sometimes a difficult and confusing topic can conceal such questions. Law students find it hard to sort out the authority of agents. The topic is plagued by poor terminology: some names (e.g. "authority") are used to denote both rights and powers; other concepts are denoted by more than one name (such as "ostensible" and "apparent" or "undisclosed limit"); and some terms are just confused or complex or misused (e.g. "implied").

Under confusing circumstances, almost any flaw in reasoning is possible, and almost any well-worded argument sounds fairly convincing.

### 4. Answer Does Not Match the Question

Subtle errors result if a question is posed on one plane, but discussed and answered on another. What are some of the different planes? Factual, legal, moral, causational, semantic, private law, public law, substantive law, conflicts rules. For example, we saw above in Part A. example 3 that it is common to discuss what the law **should be**, and then to assume that the answer to that question is the answer to what the law now is. Another example comes when the author switches in mid-discussion between law and ethics (or Law Society Rules for lawyers).

The causational plane is difficult, partly because people cannot quite agree on what legal "causation" means. Maybe that single word encompasses different ideas, indeed different planes, e.g. factual vs. moral (normative) vs. legal. For example, a tenant who reneged on his lease contract had to pay his landlord damages, even though the landlord promptly rented out the space to a new tenant. The court briefly reasoned that the new lease did not "aris[e] out of the consequences of the breach . . ." That result may be sound, as there was a lot of vacant space in the building. But the causation ground is odd and delphic. The court did not discuss fungibility of vacant space, nor policy questions.<sup>278</sup>

<sup>278</sup> See *APECO of Can. v. Windmill Pl.* [1978] 2 S.C.R. 385, 19 N.R. 124, 82 D.L.R. (3d) 1, 4.

## I. OTHER CLASSICAL FALLACIES

This part describes some arguments which are illegitimate in principle. Detecting them does not disprove the proposition in question, but does demonstrate that the argument used adds no support to it.

### 1. Distraction with Irrelevancies

There is a host of ways to distract. I will list a few examples.

#### (a) *Tu quoque*

If the issue is the plaintiff's contributory negligence, the fact that the defendant was clearly negligent is irrelevant. But it is often trotted out.<sup>279</sup>

Suppose that I argue that sentences for assault should be reformatory, and that jail does no good. You reply that I cannot so argue, because I regularly beat my dog. This is just abuse and distraction, because my character does not detract from the proposition I advanced. My proposition would be no sounder if advanced by a gentle person, a dog lover, someone with no dog, or a dog.

You argue for reduction of traffic deaths by more enforcement of existing traffic laws. I reply that I have seen you speeding. A combination of one or two similar types of attack would disqualify most people from ever writing or speaking on most issues. Only saints could be counsel.

To identify the precise flaw in this fallacy, we may adapt Dr. Samuel Johnson's metaphor. If a small child waves about a stick, little harm can result, because the child has little strength. But if the child waves about a loaded shotgun, she is very dangerous. The force of the shotgun does not depend upon who pulls the trigger. First-hand factual recitals depend entirely upon the credibility of the narrator. But logical arguments have their own force, and gain or lose nothing by who is the messenger. If a legal argument is not a piece of first-hand evidence, an attack on the messenger is completely irrelevant.

#### (b) *Ad hominem Attacks*

That reasoning also exposes a related fallacy.

A lawyer might write an article presenting logical, authoritative, economic, historical, and statistical arguments to support the law of property. There is no value in retorting that he owns property and "He would say that, wouldn't he?" Judges can properly argue for judicial independence. If bias were a ground to bar legal argument, we would never hear paid counsel. And then no one could argue for stable government or law and order, because all 33,000,000 Canadians benefit from them.

This fallacy may sound antique, especially with its Latin name *argumentum ad hominem*. But it is alive here and now. I have hinted at some aspects of some critical legal studies writing. Marxist presentations can take that tack. So can some modern schools of thought or reform which are far from Marxist, but take on some of its terminology or debating techniques. The rhetoric of some members of the current neo-conservative movement can take some personal tacks.

<sup>279</sup> See *Arnold v. Teno* [1978] 2 S.C.R. 287, 312-13.

In one case about whether a contractor must correct defective or unsuitable work, Cardozo J. spent time describing how luxurious the house was, and how long the owner enjoyed it before paying. It is hard to find any relevance for those details other than prejudice/sympathy.<sup>280</sup>

A good proposal can be attacked on the ground that its author, or a few of its supporters, have now or may later get some unrelated bad intentions.<sup>281</sup> In the 1950s, sometimes a mild measure of reform was criticized because the Communist Party had endorsed it. Today, people sometimes criticize an institution or measure, because Franco's Spain or Mussolini's Italy had a similar institution or measure. (No one ever asks whether modern European countries still have it, or whether Republican Spain and France also had it.)

Here we slide into a cognate fallacy: guilt by association.

Must one have had appendicitis to be a surgeon? Can one be a police constable without having ever been robbed? Must an author wishing to write about the legal rights of children or seniors be under 18 or over 65?

A variant distraction is criticizing a measure as old, or praising a measure as new.<sup>282</sup> Why do we chant "Old is Bad"? In English-speaking countries, the word "Medieval" has long been considered a grave indictment.<sup>283</sup> O.W. Holmes Jr. once wrote, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."<sup>284</sup> But why attack stability in law because a U.S. Civil War veteran said so in the time of Victoria? In fact, Holmes' argument and that question are both hollow.

This type of fallacy flows in part from a wistful hope that Science will solve all problems, and that anything old is Unscientific.

### (c) Appeals to Sympathy

The converse of an *ad hominem* attack is an appeal to sympathy. This is very popular today; many yearn to champion the underdog, or at least lean toward him or her. Many modern Canadian courts recite many unnecessary facts, even at the appellate level. They often include details which create sympathy for the party who wins, or portray in a bad light the party who loses. Many modern movies open the same way too.

Sometimes sympathetic facts are relevant. If a plaintiff with no lawyer missed a filing deadline, maybe she was short of time and money and distracted by other problems, not contumacious, and did not intend to abandon her claim. All that is legally relevant. But very often in other types of case, the relevance of the sympathetic facts recited is hard to see.<sup>285</sup>

<sup>280</sup> See Posner, *Cardozo: A Study in Reputation* 107 (1990).

<sup>281</sup> Bentham gives an amusing and ever-green critique of this general type of fallacious or abusive argument, in his *Handbook of Political Fallacies*, Part the Second, Chapter I.

<sup>282</sup> See for example *Cdn. Brotherhood of Ry. etc. Workers v. B.C. Air Lines* [1971] 1 W.W.R. 39, 52-3 (B.C.).

<sup>283</sup> So what Classic Greece did is good, and we never make fun of civil law concepts from Europe or Québec, but what Henry V did is bad.

<sup>284</sup> (1897) 10 Harv. L. Rev. 457, 469.

<sup>285</sup> For example, see *Meditz v. Smith* (1967) 60 W.W.R. 310 (B.C.).

**(d) Waving a Big Stick**

There is a relative of appeals to emotion, another distraction by an irrelevancy. It has been called *argumentum ad baculum*, or threat to wield a big stick.

In a totalitarian state, one opposing Professor A's theory charges that it deviates from the party line, indeed is counterrevolutionary propaganda (or degeneracy, or free-masonry, or whatever bogeyman the régime is currently vilifying). That is an appeal to prejudice. Indeed it is a threat to have Professor A removed from his chair and reported to the NKVD, Kempei-Tai, or Gestapo, or assassinated by nationalist army officers or teenaged Red Guards. It is an invocation of a modern type of argument, which Orwell's *1984* called Crimethink.

Some propositions' mere utterance could threaten the job security of a publicly-salaried or publicly-funded person in Canada today. Indeed, entire topics could. I do not suggest how to react to such considerations in editing a law journal, or in withholding tenure for a faulty member.

But in court, counsel act honorably when they represent unpopular causes and unpopular, even nasty, clients. They are duty bound to advance arguable points, whether factual or legal. The judges who hear their arguments are sworn to weigh all those points without prejudice, fear, or favor, and apply the law as best they understand it. It is not the job of the judges to confine their words to what the editorial boards of newspapers and law journals, or Cabinet members, would approve. Judges have tenure of office for just that reason. Big Brother's Crimethink and Newspeak have no place in courts.

**2. Causation Assumptions**

The classical name for the most common mistake about causation is *post hoc, propter hoc*. Just because an event occurred after another event, even soon after, does not prove that the first caused the second. Your uncle was smoking when he locked up the shop; but that does not prove that his cigarette caused the shop to burn down one-half hour later. The cigarette could be a coincidence.

Newspaper stories often fall into this trap. Their headlines suggest that (say) coffee causes cancer. A purely statistical study shows that a number of countries (or other groups) have both high coffee consumption and cancer incidence. No one even suggests a mechanism by which coffee could cause cancer. It may well be a coincidence.

If it is not a coincidence, the reverse is possible. Cancer could increase coffee consumption. Maybe people with cancer crave coffee. More likely, cancer and high coffee consumption both result from some third factor, such as modern western lifestyle, sleep deprivation, industrialization, overwork, poor diet, competitiveness, or consumption of cigarettes or carbohydrates.

So showing proximity or correlation itself proves little (though it could be relevant). It may prove more in a controlled setting, e.g. where one-half a test population is given coffee for a set period, and the other half gets none.

As we saw in Chap. 1, law and medicine are crafts, but could benefit by study of all the physical sciences and the social sciences. Students of those sciences are trained in their methods. Sociologists know how to draft a valid questionnaire or interview, and how statistical sampling works. Psychologists know how to plan and carry out a carefully-controlled experiment. Economists know calculus, how to work with existing statistical data, and how to test proofs in that area, to a very high degree of logical rigor.

But law faculties teach none of those things, and law journal referees are often not very sensitive to them. Yet well-meaning authors of law journal articles trained only in law sometimes try to play scientist and to give empirical proof of various social propositions. The instinct is healthy, but their methods can be lamentable, even non-existent. The problem is compounded when counsel and judges then cite those articles as proof of social or other facts.

For example, one can find law review articles by writers who seem not to be experts in the topics of the articles: psychiatry,<sup>286</sup> economics of housing,<sup>287</sup> competence of physicians and efficiency of hospitals,<sup>288</sup> economics of no-fault insurance,<sup>289</sup> the causes of debt default,<sup>290</sup> and many technical aspects of legal insurance.<sup>291</sup>

### 3. Begging the Question

Assuming the answer which is to be debated is circular reasoning, which goes hand in hand with assertion without proof (Part E above). For example, the dissent in *T. Eaton Co. v. Smith*<sup>292</sup> begs the question, and starts by assuming that a clause in a lease must have the disputed effect unless a certain exception exists. It covers pages showing that exception is absent, but it never tries to show that the clause has that effect.

In unskilful hands, some basic concepts in the law of negligence verge upon begging the question. The whole concept of a duty to one's neighbor because of proximity can be almost circular. *Donoghue v. Stevenson* was criticized when it was decided, but its repetition has dulled our critical senses. I do not suggest that the modern law of negligence is illogical or illegitimate; but its boundaries and tests may be more inductive and pragmatic than we realize. A number of the policy rules<sup>293</sup> may be after-the-fact rationalization, or just vague attempts to oversimplify the very complex multi-factored actual approach which courts actually apply.

Tendentious terminology can assist in begging a question. Rules of Court let a defendant **select** a physician and have the court compel an injured plaintiff to submit to that physician's inspection. The defendant's insurer would not pick that physician at random, nor look for an unusually sympathetic physician. Yet insurers call this procedure "Independent Medical Examination." This term maligns the plaintiff's physician, who is almost never chosen by the plaintiff's lawyer, nor even chosen with litigation in mind.

<sup>286</sup> Cragg (1976) 3 Dal. L.J. 510; Schiffer (1976) 14 Osg. H. L.J. 307.

<sup>287</sup> House (1976) 14 Osg. H. L.J. 49.

<sup>288</sup> Saltsman (1976) 8 Ott. L. Rev. 382.

<sup>289</sup> Ison (1977) 27 U.T.L.J. 385.

<sup>290</sup> Puckett (1978) 28 U.T.L.J. 95.

<sup>291</sup> Wilson & Wydrzynski (1978) 28 U.T.L.J. 25.

<sup>292</sup> See [1978] 2 SCR 749, 754.

<sup>293</sup> *Anns v. Merton London B.C.* (HL(E)) [1978] A.C. 728.

For another example, counsel wants a novel and unusual order. He can find only one precedent: a recent chambers decision (from another province): *R. v. McSomebody* (unreported). So he asks for a “*McSomebody*” order, as though that were a well-known established procedure, like a *Garofoli* order.

Counsel should not acquiesce in their opponents’ choice of propaganda terms, but most counsel are not astute to detect them. So judges should not fall into the same propaganda trap. A judgment using such terms seems unfair, even odd.

## J. UNWORKABILITY

In principle, there is nothing wrong with arguing that it would be hard to implement some proposed change; such arguments are often very sound. The public may have ordered their private affairs on the basis of a contrary legal view, transitional costs may exceed the benefits of a change, too many changes of course may confuse people, or the necessary technology may be unreliable or expensive.

But some arguments wilfully magnify difficulties. Experienced British legal figures sometimes argue very plausibly about the unworkability of some proposed legal reform, without mentioning how many other countries have done it that way for a long time. Some arguments for delay brush off the proposed reform and temporize. And some are dishonest: the author opposes the measure entirely, but dares not say so.<sup>294</sup>

The basic argument for delay is very simple, but its author can deploy great ingenuity in finding excuses and using a vast variety of facts. So the same old argument sounds novel each time.<sup>295</sup> Those who have tried to get administrators to do what they do not want to do, have met many of these devices.

One trick is to oppose reform by getting several similar reforms on the table at once. The novice staller might think that would promote reform, but the opposite is true. Rarely are all the reforms compatible. The demand for reform is shared among the competing proposals, weakening the support for each. Each alternative threatens difficulties, and triggers concern or opposition. It does not matter whether those concerns about the alternative proposals are the same, different, or even cancel each other out. The number of proposals suggests that people need More Facts, even a Thorough Study. That usually leads nowhere.

The most sophisticated variant of this trick is the All Soul’s College Ploy. An opponent of some reform says nothing until it is likely to be adopted. Then, flying the flag of friendship, the opponent suggests that the proposed measure is too limited in time, space, people, or subject matter. Boundary Arguments<sup>296</sup> can be wheeled out. Indeed, the proposed reform is called Superficial; it Does Not Get at the Root Cause of the Evil. What is needed, to be effective and lasting, is a more Consistent and Thoroughgoing Solution.

Those promoting the original reform are not inclined to disagree. Indeed, they may have dreamed (but dared not utter) such thoughts. Then everyone else needs Time to Think. Clearly a committee is needed. Root causes are never clear, and usually as hard to find as the Holy Grail. What chance has a committee of succeeding? Once it is struck, any reform in this area is dead as Queen Anne.

<sup>294</sup> Bentham’s discussion of them is amusing: *Handbook of Political Fallacies*, Part the Third, Chaps. III, IV.

<sup>295</sup> One example of an argument for delay has been described by several authors, among them Bentham, in Part the Third, Chap. V, and Cornford, in his *Microcosmographia Academica*, Chap. VIII (1908).

<sup>296</sup> See Part D above.

We may leave this topic with an adage of Cornford's.<sup>297</sup> It deserves to be better known than Parkinson's various Laws.

"There is only one argument for doing something; the rest are arguments for doing nothing."

## K. BAD USE OF ANALOGIES<sup>298</sup>

Some people actively dislike and distrust analogies. Many thought Lincoln a buffoon for using them. A surprising number of people totally misunderstand analogies. Uneducated people may look only at the surface; handed one of Aesop's fables, they feel insulted that you seem to call them a frog, or a crow.

Ironically, though carefully-framed analogies may not persuade, bad ones can seduce. Bad ones often work because their authors veil them. Analogies for those who dislike analogies, one might say. A simile is an explicit analogy, but a metaphor is an implied analogy. These advocates use almost subliminal analogies.

The simplest metaphor is just a tendentious name.<sup>299</sup> It also enables the author to slip back and forth between purely semantic and real arguments. For example, someone favoring freedom of expression calls the parties their own legislators. But they are not elected, hold office for life, and do not even pretend to look beyond personal interest.

A variant on this is tendentious language. A calm debate on policy can be infiltrated by various images of struggle, even actual warfare. Marxist-influenced rhetoric tends toward that. Or instead a debater may use images of sports, games, the helm of ships, construction of houses, or curing illness. All tend implicitly to advocate a certain course of action. For example, those advocating dictatorship tell us that two people cannot steer a ship.

A good analogy can be dangerous, because rarely is any analogy perfect. Taking any too far is apt to mislead. So analogies are almost always a question of degree, and it takes thought to map their legitimate borders.

For example, one might try to import criminal procedure into the procedure used by a self-governing profession to discipline its members. In broad outline, that could be salutary. It can be more dangerous if extended to every detail.

Even a good analogy may not apply, in certain respects. For example, if one discusses duties of arbitrators, but lacks good legal authority, one properly thinks of the analogy of precedents about judges. But some of the differences between arbitrators and judges are deliberate. An arbitrator often lacks legal training, but has other expertise. He or she may not be expected to work on one case at a time. He or she may have professional and other associations, and even have been chosen because of them.

An analogy is often not a simple image like roses or lions. It may refer to a situation, institution, or historical process. One discussing a constitutional case might suggest parallels with the Reform Acts, or 18th Century local and private Acts, or the coming of Responsible Government. The safe limits of such an analogy depend upon a host of complex factual and historical inquiries.<sup>300</sup>

<sup>297</sup> *Op. cit. supra*, his Chap. VII.

<sup>298</sup> A much fuller treatment is found in Fischer, *Historians' Fallacies*, Chap. IX (1970).

<sup>299</sup> On which see Parts I.1 and I.3 above.

<sup>300</sup> Fischer, *op. cit. supra*, gives a thorough and fascinating discussion of such "historians' fallacies", especially in his Chaps. II to VIII inclusive.



## L. MISUSE OF AUTHORITY<sup>301</sup>

### 1. Covert Appeals to Authority

In university, the professors quickly taught us two things:

1. believe nothing printed on newsprint or containing colored pictures; but
2. take very seriously anything hard to read and containing footnotes.

Small guerilla bands can immobilize and defeat huge armies, even in argument. Since it is safer to criticize than to be criticized, hiding behind something when shooting appeals to some people. So some very effective appeals to authority are concealed. An author (or counsel, or a judge) may write at great length using many numbers, difficult prose, special terminology, mathematical notation, graphs, tables, diagrams, and charts.

Often we do not understand what is thus written: sometimes because we cannot, often because we do not bother. The screed just makes us feel inadequate and cross. What the author has done is dazzle us with science.

Mathematicians use equations and formulae to express mathematics. So do some other scientists, such as physicists. But often what economists and others use is **not** mathematics. They use a mathematical **style** of notation because they want to look like mathematicians.

Take, for example, this accepted principle of the interdisciplinary study of meteorology and traffic engineering:

$$(1) W_h = f(P_d + P_{d-1})$$

Do you wish that you could use science to prove things that way? Let me explain how, by interpreting this notation.

- (1) This is just a serial number. If the author uses mathematical notation again, he will call the next time (2). It means nothing. It is like a superscript without a footnote.

$W_h$  The author made this up. It happens to refer to the degree of total moisture measured on a given stretch of highway. He could instead have called it  $H_w$ , or H.M., or \*, or ‡, or anything else.

= really means “is” here. So don’t worry about what equals what. Remember, this is not math.

f literally means “function of.” All that it means, is that what comes to the right of the = sign somehow influences what lies to the left of the = sign.

( ) means that everything inside these parentheses influences, not just the first thing.

$P_d$  The author made this up too. It happens to mean the total precipitation in the 24-hour period in question. Once again, any other symbol or abbreviation could have been used.

$P_{d-1}$  means is total precipitation in the 24 hour period before the 24 hour period in question.

<sup>301</sup> Here again I must acknowledge Fischer, *op. cit. supra*, especially parts of Chap. XI.

What does this string of symbols boil down to? “How wet the road is, depends on how much rain we got today and yesterday.” Thus stated in prose, it is a suitable conversation for a three-year old. But put into mathematical notation, it is Science. When M. Jourdain learned that he was speaking only prose, he should have been chagrined.

Maybe you have trouble reading graphs, especially those which contain several wiggly lines crossing each other. Or you do not quite understand bar charts whose bars are tri-colored like a barber’s pole or a maypole. Stop feeling inadequate, or even annoyed. In a legal context, the author probably does not want you to understand them, any more than Laurence Sterne wanted you to read the marbled leaf in *Tristram Shandy*.

Even if one understands graphs, the “science” they peddle can be counterfeit. The old book by Darrell Huff<sup>302</sup> is a favorite. It is very easy to read, and educational.<sup>303</sup>

How should courts receive legal scholarship? Some respectable legal minds deliberately receive propositions in legal textbooks and articles for their internal weight of logic, and no more. The title of the author adds no more authority, they insist.<sup>304</sup> That may go too far, but caution is due here.

## 2. The Crowd as Authority

The above topic of concealed appeals to authority shades off into threats of odium for resisting fashionable or orthodox views (i.e. second-degree snobbery).<sup>305</sup>

A relative of such faddishness is another misuse of authority. Fischer<sup>306</sup> calls it “the fallacy of the prevalent proof”. What most the writers or teachers in some area believe, must be true. Still more if all do. That is the implicit suggestion.

One supposes that no bright Grade Ten student would fall for that. Yet it works. One of a collection of essays about Lord Denning contains a straightfaced statement that Lord Denning’s dissent in some case “is not controversial”.<sup>307</sup> That would have startled the two Lords Justices who constituted the majority of the Court of Appeal. In context, the academic author means that other respected academics would agree with Lord Denning’s dissent. It is curious that he attacks the binding force of authorities, for he has just invented a new binding authority: what contemporary professors think.<sup>308</sup>

One may object that this fallacy is a disease confined to historians, and does not infect lawyers or judges.<sup>309</sup> But that view is semantic only.

<sup>302</sup> *How to Lie with Statistics* (Norton, N.Y.C. 1954).

<sup>303</sup> On judges evaluating articles on science, economics, etc., see Côté (2001) 39 Alta. L. Rev. 640, 655 ff.

<sup>304</sup> See, for example, *Hunter v. Canary Wharf* [1997] A.C. 655, 694, 2 All E.R. 426 (H.L.(E.)), per Lord Goff. Remember the example of the child with a stick or shotgun, in Part I.1 above.

<sup>305</sup> That is discussed above in Part I.1(a).

<sup>306</sup> *Op. cit. supra*, his Chap. II.

<sup>307</sup> J.L. Jowell and J.P.W.B. McAuslan (eds.), *Lord Denning: The Judge and the Law*, Sweet and Maxwell 1984.

<sup>308</sup> Three federal elections ago, a Canadian party which advocated natural levitation was derided by the media. Yet that sounds just as plausible as the scholars in one field simultaneously all lifting each other by their bootstraps.

<sup>309</sup> Save maybe for one isolated awkward phrase in the McAuslan book.

At one time, facts had to be proven by sworn evidence given at a trial. Now in post-modern times, some writers see that as old-fashioned formalism. If any proposition of fact is believed in by (say) most university teachers, and at least two Toronto newspapers (not counting tabloids), those writers want judges to use the proposition, without or against sworn evidence. They call this Judicial Notice.

Here is the converse of that.

We have all heard the sensible saying, "If it ain't broke, don't fix it." But it has a less reputable cousin, which says, "No one is complaining, so why intervene?" The two suggestions are not the same. The fact that no TV station, newspaper, or even learned journal, has mounted a campaign, is no guarantee that all is well throughout the land. Still less does it mean that improvement is impossible or uneconomical. For example, the job of courts is to rule on individual injustices, or legal rules which produce them. Discrimination or other injustice is at least as bad when it afflicts isolated unorganized forgotten individuals. Popular causes seldom lack remedies. So lack of publicity or public outcry is a political argument, not a legal argument fit for a court.

### 3. The Middle Kingdom<sup>310</sup>

Now I turn to another misuse of authority. A mean-spirited person might call it a Canadian weakness. I prefer to name it Goldilocks' Law, after the famous porridge-taster.

This is a way to "prove" any proposition. Just suggest that there are rival propositions which would go further in two opposite directions. If one anticipates a university-educated audience, one unpacks the social scientist's favorite imaginary tool. It is the Continuum. One shows that the view one advocates is In the Middle, Halfway Between Two Extremes. Why this device has such a powerful appeal is irrelevant. As with a well-known cough mixture, all that matters is that it works.

When sophists gather, they must (like Lord Clive) stand astonished at their own moderation. They do not use this device every time, though they could. Almost every proposition on earth is midway between two others. British wartime marginal income tax rates reached 95%, but that is only halfway between 90% and 100%, or halfway between 80% and 110%. (The last number is not hyperbole; in 1938 combined Dominion and Alberta marginal tax rates on large incomes considerably exceeded 100%.) Why should we not move our nation's capital to Rankin Inlet (Kangiqsliiniq) in Nunavut? It is about midway between Canada's northern land boundary at the north end of Ellesmere Island, and the Minnesota border. It is pretty close to halfway between the Alaska border and Sable Island, too.

Some may dismiss such tricks with numbers or simple physical features, and suggest that no one attempts those in the subtle moral weighing of the law. So let us consider legal issues. Dare one suggest that conditional sentences can be portrayed as midway between jail and an absolute discharge?

This is not empty hyperbole or mere satire. Once one leaves behind physical attributes and enters the realm of value judgments, social science, and public policy, anyone can advocate anything. A debater can always launch two escort vessels (alternate policies) to sail beside the policy which he or she advocates, one escort on its port bow and one on the starboard. The debater's own ship will always be in the middle. Nor need the escort vessels (policies) be mere inventions. Research will usually uncover people somewhere today who advocate each of the two "escort" positions. Indeed, history will often supply tyrants or doctrinaire governments which have actually introduced one or the other of the two outlying policies. Compared to Genghis Khan or total anarchy, any policy or rule sounds prudent and statesmanlike.

<sup>310</sup> For the next few paragraphs, I am indebted to Fischer, *op. cit. supra*, at pp. 56-8, 296-7.

One example of this tactic produced important Canadian law. All Canadian courts now follow the House of Lords' decision in *Waugh v. Br. Rys. Bd.*<sup>311</sup> Where a document is prepared with two motives in mind, one privileged and one not, is the document privileged? The *Waugh* decision says no, unless the privileged motive is the "dominant" one. The operative speeches of the Law Lords relied heavily on the Goldilocks principle. They emphasized an Australian decision which held that there is no privilege unless litigation or legal advice was the sole purpose. On the other hand, some English, Canadian and New Zealand cases gave privilege if one of the purposes was privileged. The House of Lords chose the "middle" view they had created.

## M. REBUTTING SPECIOUS ARGUMENTS

People suppose that anyone who exposes an opponent's fallacious or weak argument must be on the right side of the debate. Not necessarily. It cannot be so where both sides resort to specious arguments. Nothing minus nothing is nothing. Demolishing an argument does not prove the opposite.

Certain suggestions that Bacon wrote Shakespeare's plays, lack any logic or evidence. But that only leaves the topic open; it does not prove that Shakespeare was the true author. To demolish an accused's alibi does not prove that he robbed the bank. It only shows that he did not spend the afternoon with his wife as he claimed. It does not show that he was at the bank. He could have been at a movie, or with his mistress.

Counsel often miss this point. Maybe we are too accustomed to elections, business competitions, or wars, where one side's loss must be the other's gain, and where we cannot answer "none of the above." But in litigation, especially criminal or constitutional litigation, such a verdict is often open. And in a debate about policy or lawmaking, such a verdict is usually a serious contender.

So criticism offering no alternative has limited value. It is easy enough to criticize some well-known institution, such as political parties in the electoral system, or collective bargaining by unions. Any high school debater could demonstrate serious drawbacks of each. But an enormous amount of experiment and discussion has not demonstrated any superior alternative.

Therefore, legal debate must focus on what is the issue, who has the onus of proof, and what should be the result of a draw. Well-known rules govern that in an individual suit or prosecution, but we curiously neglect the topic when debating law or policy.

The problem becomes acute where one poor argument is constantly advanced on one side of a debate. The poor argument almost hijacks the topic, so that rebutting it seems to be the task. (For example, lay people often ask how a lawyer can defend someone known to be guilty.) Gresham, an Elizabethan financier, popularized the economic law that Bad Money Drives Out Good. We may propose Gresham's Second Law, that Bad Arguments Drive Out Good.

To reach the soundest conclusions, an appellate judge must eschew the advocate's robe, and answer the true question before him or her, not attack the losing side.<sup>312</sup>

<sup>311</sup> (HL (E)) [1980] AC 521.

<sup>312</sup> Cf. Gilchrist, Alexander's description of Lord Dunedin in Chap. 6 Part B *supra*.

## CHAPTER 17 – EVALUATION OF AN APPELLATE JUDGE'S WORK

*... I have continually been faced by difficulties caused by his own aversion to publicity. To his sombre and cynical spirit all popular applause was always abhorrent, and nothing amused him more at the end of a successful case than to hand over the actual exposure to some orthodox official, and to listen with a mocking smile to the general chorus of misplaced congratulation.”*

– “The Adventure of the Devil’s Foot”

### A. THE SUPREME COURT OF CANADA

#### 1. Procedural Role of Justices of Appeal

Appellate judges in Canada should know that Canada’s legislation<sup>313</sup> gives them some powers and duties in appeals to the Supreme Court of Canada. Individual Justices of Appeal are the preferred forum for stays of execution pending appeal to the Supreme Court of Canada.<sup>314</sup> Indeed, panels of Courts of Appeal can give leave to appeal to the Supreme Court of Canada.<sup>315</sup> Though the latter power is rarely exercised, the Supreme Court of Canada has repeatedly advised Parliament to leave that power in place. The Saskatchewan Court of Appeal exercised it in 2003.

Furthermore, the Court of Appeal or one Justice of Appeal can extend some time limits for appealing to the Supreme Court of Canada or seeking leave,<sup>316</sup> or help fix the record stated to the Supreme Court of Canada.<sup>317</sup>

Every appellate judge should read those sections.

And, of course, a dissent in a Court of Appeal can compel or assist an appeal to the Supreme Court of Canada.<sup>318</sup>

<sup>313</sup> Secs. 37 and 65.1 of *Supreme Court Act*.

<sup>314</sup> Secs. 65.1 to 68.

<sup>315</sup> Sec. 37.

<sup>316</sup> *Supreme Court Act* Sec. 59

<sup>317</sup> Sec. 62.

<sup>318</sup> See the discussion in Chap. 10, Part A.1.

## 2. Effect of Court of Appeal Reargument

The Supreme Court of Canada ordinarily considers that times to appeal or seek leave in that Court run from the first decision of the Court of Appeal. Such times do not restart if the Court of Appeal issues any kind of supplementary decision, even on rehearing the appeal. But such supplemental Court of Appeal proceedings may create many practical difficulties for the parties if a Supreme Court of Canada appeal (or leave motion) is pending. Often the parties do not mention that to the Court of Appeal, and it is easy to overlook.

Another problem with later Court of Appeal proceedings is that the Supreme Court of Canada has sometimes said that it is reluctant to look at reasons for decision issued by lower courts after an appeal from them has been launched.

## 3. Writing for the Supreme Court of Canada

Appellate judges sometimes advise trial judges to get on with their job, and not worry too much about whether the Court of Appeal may reverse them. The same advice should probably go to appellate judges. They should not brood too much over possible Supreme Court of Canada reversal, nor over the fact that at times they may be but a pit stop in a race.

There are many necessary and proper audiences for a Court of Appeal judgment. So appellate judges should not complicate everyone's life by writing for another audience: the Supreme Court of Canada. It is unseemly and unfair that a judge (on any court) try to make his or her judgments appeal-proof, or even sound defensive.

However, it is permissible to explain relevant circumstances which may not be uniform across Canada, and which most Supreme Court of Canada judges might not be familiar with. That applies to business, agriculture, fishing, government, language, ethnicity, social customs, and court procedure. For example, suppose that the case involves some local procedure with a name similar to what Ontario (and likely other provinces) have, but which the author believes to be critically different. Then it may be wise to say so.

## 4. How to Think When Reversed

From time to time, an appellate judge's decision will be reversed. Occasionally this may be a decision of that judge alone, reversed by a panel of three colleagues. More often, it is a decision the judge wrote for a Court of Appeal panel which was then reversed by the Supreme Court of Canada. Some judges are bothered by being publicly overruled. Here are some hints on how an appellate judge may think constructively at such times.

Very often, the Supreme Court of Canada gives leave to appeal because broad social, constitutional, or economic issues are at play. Few appellate judges would claim to have decisive expertise in all such issues. Besides, there are probably no right or wrong answers in most such cases. Where there are, it may take generations' experience to learn which work and which do not. Voters whose political philosophy lost at the last general election do not usually take that as a personal affront, still less as a demonstration that they are mistaken. Though the analogy is incomplete, there is no reason for a reversed appellate judge to feel chagrined. Different people have different views of society, human nature, and even justice.

Occasionally an appellate judge may feel that some Supreme Court of Canada judges did not understand what he or she had written. Maybe he or she feels they even criticized him or her for a supposed view in fact not held, or for a supposed step not taken. If true, that could be a misfortune for the losing party, but scarcely for the appellate judge. It brings no shame or hardship upon that judge, except in the very rare case where one of the Supreme Court of Canada judgments personally criticizes him or her. Besides, this misunderstanding may indicate that the judge's writing could have been clearer. That is a valuable lesson.

Very often the Supreme Court of Canada will change the law, or at least decline to follow some past precedent. If it reverses the Court of Appeal for that reason, there is no shame for that Court. Appellate judges have to follow previous decisions of the Supreme Court of Canada and their own court in the meantime, and are ordinarily expected to follow a settled or substantial majority of persuasive precedents. Any Justice of Appeal who did that was not wrong. If the Supreme Court of Canada then reverses, that is just a change in the law. A new statute amending the previous law is rarely a reproach to the judges who wrote the old law; it is simply a change in the law. The Supreme Court of Canada's law making is similar.

If the Supreme Court of Canada reverses with few reasons, or with little discussion of the particular ground on which the Justice of Appeal decided, he or she may look upon that as a moral victory, and forget about the matter.

Fairly often, the Supreme Court of Canada appears to reverse a Court of Appeal on grounds which were not argued in the Court of Appeal. That may be a misfortune for the party losing, though even then it may be fair (e.g. because the point was pleaded or argued in the trial court, though not in the Court of Appeal). But it is no misfortune or reproach for the judge who wrote the Court of Appeal decision. It has simply become a different type of lawsuit.

Appellate judges are not expected to comb textbooks and Appeal Books looking for new issues which counsel have not mentioned. Indeed, very often it would be improper to do so. To a degree, any court is a prisoner of counsel and their arguments.

Finally, the Supreme Court of Canada may expose an actual or arguable error by the appellate judge whom it reverses. Then that judge should look on the experience as educational. He or she is no longer a practising lawyer, and has no unhappy client refusing to pay the bill. There is no personal loss, but there must be some lesson to draw. And it is free.

## 5. Ongoing Thinking

A string of reversals is no reason to despair. The science of statistics shows that even random events tend to clump. And it is a poor idea for an appellate judge to keep score, or to think like a lawyer who has just won or lost a case. A judge who has been affirmed has won nothing. A judge who thought that he or she was in a race or a war with colleagues on the same Court would have a very mistaken view of collegial work, and indeed of judging. Judges do not compete for market share.

Much the same is true of Supreme Court of Canada decisions. All judges in Canada are colleagues: the judge who issued the search warrant or other interlocutory order, the trial judge, three Justices of Appeal who hear the first appeal, and five, seven, or nine Supreme Court of Canada judges who hear the second appeal. The idea that every Supreme Court of Canada reversal means that its nine judges (or those in a majority) won, and three Justices of Appeal (or the majority of them) lost, is absurd. What would affirmation by the Supreme Court of Canada be then? A tie?

## B. LEARNED COMMENTARIES

Why are some judges so sensitive to criticism? Maybe it is sometimes because most people are motivated by the “usual incentives,” but judges have tenure and fixed salaries, so the “usual incentives” here are much diluted. So that may just leave criticism.<sup>319</sup>

Someone once said that the final American Court of Appeal is law reviews. That is clever, but at best a one-quarter truth. Anyone who owns a ballpoint pen and an LL.B. (or is in law school) can publish a case comment. Even the law partner of the losing lawyer. Not even a law review is necessary; one can self-publish online. Most case comments (or footnotes criticizing a case in some article) are soon forgotten. Not many are really read.

The mere fact that Professor X induced Professor Y to put into the Canadian Bar Review Professor X’s disagreement with three (or nine) appellate judges adds little to, and subtracts little from the weight of the criticism.

Comments in textbooks or law reviews have force to the extent that they **demonstrate** the correctness of their views. Maybe they disprove how a Court of Appeal has reasoned, e.g. by showing overlooked issues, authority, evidence, or logic. Then the comments have weight. If they merely assert a conclusion, or use flawed arguments, they have none. If they weigh the same social, political, economic or other policy considerations as did the Court of Appeal, their contrary conclusion means little. No one will ever get unanimity on such questions in a country of 33 million people. The author of the article or comments is but one of the 33 million. Five published comments are by only five of them (or one of them and his or her four friends).

If the article demonstrates an error, the judges who signed the decision should take heed, and learn from this. If it demonstrates none, the judges should generate nothing besides mild amusement.

See Part E below on yearning for the approval of others.

## C. COMMENTS BY THE MEDIA

Any judge who has to stand for re-election should worry about his or her press coverage. But that does not apply to any Canadian judge.

If the media accurately quote what a judge said, and then make the judge look bad because of his or her own phrasing, there may be a lesson to learn. Many words or sentiments are very controversial or cause pain in Canada today, and judges should learn what they are. There are times when it is a judge’s duty to write that way, but there is no point in doing so inadvertently or unnecessarily. A newspaper story may also remind a judge of the dangers of comments to counsel during argument of an appeal.

And a television or newspaper story may remind a judge of another segment of the audience and its viewpoint or interest.

Beyond that, a judge should pay little heed to media accounts of his or her decisions. The judge should neither play to the gallery, be tempted to, try not to, nor seem to.

<sup>319</sup> Posner, *Economic Analysis of Law* 555 (6th ed. 2003).



It is actually dangerous for a judge to read a news story about a pending appeal. Such stories are often rehashes of past news stories about the same person or case. They may well reveal facts which an appellate judge would prefer not to know. For example, in an appeal from conviction, the three judges do not want to know whether the person convicted has a previous criminal record.

Some stories or comments in the popular press (or electronic media) are so inaccurate or unfair that they can only raise the judge's blood pressure. For example, it is difficult for a trial judge to read a column excoriating him or her for letting a criminal go free, when the verdict of acquittal came from 12 jurors who happened to be in the courtroom at the same time.

## D. INTEREST GROUPS

A judge who regularly sits in a bankruptcy court would not wish to receive an award from the Canadian Bankers' Association. Nor from a group dedicated to assisting poor debtors. Both may be admirable groups, but they are (or seem) dedicated to one side in debtor-creditor disputes. For a judge to receive the seal of approval from any partisan of those who commonly litigate before him or her, suggests that he or she is also partisan, or willing to receive favors from a partisan.

That is neither flattering, nor very ethical.

An award to a sitting judge should not be something of significant monetary value. A book or a plaque would be permissible. Valuable art would be questionable, unless it came from close friends, family, or colleagues.

If an award is not for the content of a judge's decisions, and not from a body associated with frequent litigators, then it may be harmless. For example, an award from a non-litigious body for non-judicial non-partisan activities, such as coaching in an amateur youth sports league; or maybe an award from a small town for having been a successful resident of the town.

An award from a religious or ethnic group to which one belongs or is affiliated may be borderline. If a judge of Andorran descent gets an award as Andorran-Canadian Citizen of the Year, it might make nervous anyone in Canada litigating against an Andorran-Canadian in that judge's court.

It is easy for a judge to accept an award for some laudable neutral activity, and forget that the donating organization (e.g. the local university or law society) is often a litigant in that judge's court. If nothing else, it could require the judge to disqualify himself or herself from some cases then pending or soon arising.

More problematic still are memberships in, or awards from, bodies which take a position on issues which come up fairly often in civil or criminal litigation. For example, a Federal Court judge would not want an award from any immigration or refugee group, whatever the award, because the Federal Court of Canada and Federal Court of Appeal hear so many suits about immigration and refugee cases.

The appearances and possible grounds for recusal are particularly dangerous when many things all coalesce: the group, the judge's inclusion, the issues which the judge hears, and the subject of the award. For example, suppose there is a Canadian Pedestrians' League, the judge in question does not drive, and the League wants to honor the judge at its annual banquet for Services to Pedestrianism. If the judge accepts the award, how can he or she later sit on a case where a truck hit a child crossing the street?

## E. POPULARITY GENERALLY

Lawyers' publications occasionally run surveys which name the "best" or "worst" judges. Typically, they suffer from problems of small samples (low response rates). And the polls which I have seen reminded me of junior high school class elections: they were largely popularity contests. They concentrated upon the manner of the judge in question. If the judge seemed polite and friendly, smiled a lot, and did what most people expect, high marks followed.

Such media "contests" are of no importance. But the attitude of a judge who wants to be popular does matter.

An unpopular judge should try to become aware of the fact, and to learn why he or she is unpopular. If that stems from some defect (such as unavailability in emergencies, or bad temper), then the judge should try to improve. If that stems from something superficial (such as an habitual scowl), the judge should also try to do something about it. Beyond that, the judge should pay no attention to the unpopularity itself. If society wanted popular decisions, it would save judges' salaries. An applause meter in each courtroom would be far cheaper.

Conversely, if a judge thinks that he or she is popular, he or she should try to learn why. At least some of the reasons may be the wrong ones. Popular with whom? Lawyers? The media? The interests of the public often conflict with those of individual lawyers. For example, a judge who gives lawyers all the time that they want to accomplish each step in litigation (civil or criminal) does the public a disservice. The same is true of a judge who will sign any order which none of the counsel actively opposes, e.g. for judicial interim release (bail).

I close with a quotation from a speech to the Canadian Association of Provincial Court Judges by Lamer C.J.C.:

"I can tell you that as chief justice, I am nervous of a judge who is very popular; I despair of one who wants to be popular."<sup>320</sup>

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<sup>320</sup> Lawyers Weekly (1993) v. 13 #21, p. 6; cf. Barak (2002) 116 Harv. L. Rev. 19, 60.

# APPENDIX A – THE MOST IMPORTANT THING IS TO BEGIN

## Canadian Judicial Council [2003] Summary of Tips for Doing Reserved Judgments

### A. PREPARATION BEFORE ORAL HEARING

1. (a) Encourage counsel to file any legal argument before hearing (if court rules do not already require that). Or at least copies of the key statutes or cases.
- (b) Ask counsel not to give you merely peripheral information, and to highlight important passages in what they do give you.
- (c) Read what counsel provide.
2. On a multi-judge panel, assign beforehand which judge will write the draft judgment and will supervise research.
3. List any information unclear or missing, ready to clear up during the hearing.
4. Flag or note facts likely needed for a judgment, yet not prominent in the material, e.g. date of accident, or ages of children.
5. Have a law clerk or staff lawyer research certain narrow questions, if necessary.

### B. PREPARATION DURING ORAL HEARING

1. Experiment with whether to take notes by hand or keyboard, or to rely largely on transcript. Develop abbreviations.
2. Your notes should distinguish counsel's arguments or the evidence from your own comments, e.g. different side of page, or different color of ink.
3. (a) Write comments, especially if hearing live evidence. Make notes on credibility. In a short case, do so in your regular notes. In a longer hearing, dictate daily notes.
- (b) Keep a computer file or a pad of paper and there note comments, ideas, or tasks for the eventual judgment.
4. In a trial, plan ahead this work:
  - (a) what type the final argument should be (oral, brief memo, long reserve);
  - (b) what issues or research you want from counsel. And its format and arrangement: try to have opposing counsel use a parallel arrangement; and
  - (c) what other research aids, tables, or transcripts they should they produce?

5. Monitor your own upcoming schedule. Avoid unnecessary commitments which will interfere with drafting a long complex judgment. Postpone or cancel some existing ones, if need be.
6. Create and start filling in any charts or schemes necessary to understand the facts, e.g. chronology, family tree of companies, or a glossary of terms. As evidence or argument emerges, keep updating or revising these charts.
7. Do not panic at the size of the material. There are never thousands of **relevant** pages, let alone important ones.

## C. STEPS AT VERY END OF ORAL HEARING

1. Do not ask for (more) written argument unless it is really necessary.
2.
  - (a) The **same** day, type or dictate your thoughts, impressions and tentative conclusions while ideas are fresh. Include undisputed facts or legal propositions.
  - (b) Do **not** wait to do this until counsel send in something else.
  - (c) The arrangement of your dictated notes does not matter. Stream of consciousness is fine. It is private, and is **not** a draft judgment.
  - (d) List the essential elements of the offence or cause of action, the way that one would do for a jury.
3.
  - (a) Decide whether an oral judgment will do, and if so, make arrangements accordingly.
  - (b) An oral judgment can be scheduled for a day or two later.
  - (c) Plan a written reserve only if demanded by an objective articulable reason, not to buy time. A close call does not necessitate a reserve. Deciding it only needs a walk in the fresh air, or one night's sleep.

## D. GETTING STARTED AND KEEPING UP PROGRESS

1.
  - (a) **Very** soon after argument, write something.
  - (b) Such as comments, or the introductory part of a draft judgment. Or an easy issue in the draft.
  - (c) To build confidence, draft first some discrete or small or easier parts of the judgment. You can always write the hard parts later, after the ice is broken. And doing the easy parts somehow helps one decide the hard ones.
  - (d) Do **not** wait until counsel (or your law clerk) send in something else, such as more argument.

2. At a very early stage, try to draft a brief statement of the issues. Define the issues narrowly and accurately. Note which issues may not need deciding, e.g. if another issues goes one way.
3.
  - (a) Work some evenings or weekends soon after the hearing. Keep it up until a rough draft is done.
  - (b) Try to avoid taking on a second reserve before completing a rough draft of a previous reserve.
  - (c) If you have more than one, try to write the judgments in different cases in chronological (F.I.F.O.) order. Do not prefer favorites among cases.
  - (d) Keep a list of outstanding reserves, with date of argument, deadline, and any other important dates.
4.
  - (a) It is better to write roughly and quickly and revise later. Keep up the momentum. A poor draft is a lot better (psychologically) than nothing, or a mere list of questions to self.
  - (b) Do not stop writing to fill details you do not remember. Leave a note or blank and chase them up later. Go on with the draft.
5. When one section is drafted, write at least one sentence of the next section, before breaking off work.
6.
  - (a) Earmark some time slot which **has** to be used to write this judgment.
  - (b) Give writing a reserve higher priority than other tasks, especially pleasant tasks.
  - (c) Do not wait for big blocks of free time. Even 10 minutes will edit a couple of pages. Or will write a paragraph or so.
  - (d) Recognize which "interruptions" to your drafting work are excuses or not urgent.
7.
  - (a) If you develop anxiety or a mental block, think about where it centres. The writing process, or about what the conclusion should be?
  - (b) If the latter, identify the problem. Are your heart and head warring with each other? Are you unfamiliar with this area of law? Overwhelmed by complexity? Fearful of someone's criticism? Writing for too many audiences? Unwell or worried about your own life?
  - (c) To dissolve the mental block, consult someone, or delegate some task.
8. Be alert for insecurity or grandiosity. Both make one procrastinate or multiply unnecessary steps.
9. If uncertain of the proper result of the trial or appeal, try writing the key part of the judgment in one direction and see if it writes. Can you write on a narrower issue and so eliminate uncertainty?
10. If blocked, drive to a different location and write there. Or alternate between writing new sections and editing ones already written.

11. Delay in writing does **not** mean that the judgment now should be long or complex, to justify the delay.
12. If the task is very big, or other work is incessant, ask your supervising judge or Chief Justice for time off other duties, or trade other duties with another judge.

## E. METHOD OF DRAFTING

1. Begin by thinking through the basic reasoning and conclusion.
2.
  - (a) It is almost always best to begin with an outline.
  - (b) Reviewing the notes made at the end of the hearing, draft an outline of the judgment in point form.
  - (c) Start with major headings, then go back and add subsidiary ones. One thing will suggest another.
3. Decide who the audience is, e.g. these parties, or future lawyers.
4.
  - (a) Never draft a judgment by oral dictation.
  - (b) Typing the first draft yourself makes a wordy judgment unless you are a slow typist. The most succinct final product comes if you draft in pen or pencil. But if you are a good typist, you will keep up momentum and produce a draft faster on the keyboard.
5. If part of the draft turns out to have been a voyage of discovery, with a lot of tangents and dead ends, it is often better to rewrite that part afresh, rather than editing it.
6. Omit everything not truly necessary. Do not quote unless you have to, or the passage is wonderful.
7. A fixed format for all judgments is a poor idea. But a standard format for a certain type of case (civil motor vehicle accident suit, or .08 driving prosecution) may be helpful.
8. Immediately delegate to someone routine technical tasks, e.g. formatting a style of cause, checking names of counsel, prefabricating mechanical steps.
9. Use enough headings to guide the reader and to keep you on track. Having an outline greatly assists that.

## F. REVISING DRAFTS

1. Editing is critical, especially if the first draft was quick and dirty. Now make the judgment consistent, complete, accurate, and readable.
2. To gain perspective and emulate other readers, try to leave a few days between writing the complete first draft and next reading it. Watch especially courtesy and clarity.
3. Do not input your own corrections into the computer or do your own formatting; it is a waste of your time.
4. Do not try for perfection, especially if the audience is the parties.
5. Someone should use a spell checker (and maybe a so-called grammar checker to test the judgment's complexity level). But trust neither.
6. Try reading the draft out loud to yourself (or to some very obliging family member).
7. At a late stage, go over the arguments of the parties, especially the losing party, to see if anything was overlooked.

## G. OUTSIDE INPUT AND CHECKING

1. Ask at least one other judge to read the draft and comment.
2. Have a law clerk or staff lawyer read the draft, comment, and check all cites of law or evidence.
3. See if someone with no legal training can understand it.

## APPENDIX B – EXTRACTS FROM POORLY-WRITTEN LEGAL MATERIAL

### ***Alexander v. McKillop & Benjafield* (1912) 45 S.C.R. 551**

It is pointed out in argument here that the legal estate is not in question, but that does not dispose of the whole argument for it only shifts the point and does not get rid of many reasons beginning with the scope of these sections and applying others in same act which together tend to demonstrate that, considering, as in regard to interests in land we must, the equity of a purchaser filing a caveat, it must be held stronger than who does not. I need not elaborate for this case does not need it.

### ***Hanson v. Bond-Holders' Re-Organization Committee* [1951] S.C.R. 366, at 381**

The provision, in the statute, for terms which the Court “shall think fair and reasonable having regard to the interests of all parties interested in the premises”; and “for the protection of any or all persons whose interests are affected by such order”; including those of the mortgagor, particularly as contrasted with the language of the subsection as enacted in 1917 and repealed by the amendment now in force, makes it clear, whether the power is viewed as purely statutory or as an addition to that provided by the deed, that in such a transaction, the senior security holders and the Court may approve of benefits to junior interests: and I see no reason why it should not extend to the case where the mortgagor is an individual.

### ***Gagetown Lumber Co. v. R.* [1957] S.C.R. 44, at 49**

... The unexpressed element here which is concealed by the answer is the profit over the stumpage value which the purchaser would have in view, largely the determinant of the market price, the failure to face which is the serious defect in the argument presented.

Mr. Gilbert's exclusive concern with this basis results from an underlying misconception of the meaning of the form in which the principle of compensation is put, that the value of the property to the owner is the measure of compensation. Properly understood, that language is accurate but the meaning is not precisely what the appellant has in mind. It has two aspects, one that it is the present value of all the land's possibilities to the owner in contradistinction to the value to the taker, for with the latter the owner is not concerned; and the second, the value to the owner as a prudent man in a situation affected by conditions or relations from which buyers generally on the market would be free, as, for example, the special features involved in the ejection of an established business from possession of land. They represent the sum total of detriment suffered by reason of the disruption, over and above what the market price would take into account. The claim confuses the present exchange value of the land with the present value of the total return of its present growth; in substance it attributes to the land a value equal to the present value of what the owner would be able to realize from the existing growth over a growth cycle of say 64 years plus the residual or capacity value of the land . . .



**C.P.R. v. Estevan (Town) [1957] S.C.R. 365, at 368**

The question as to whether this exemption extends not only to the railway as described in the Act 37 Vict., c. 14, or whether it extends to the branch lines constructed either under the powers conferred by clause 14 of the contract or by other authority, was not rendered *res judicata* as between the parties to this litigation by the decision of this Court upon the reference [*Canadian Pacific Railway Company v. The Attorney General for Saskatchewan*, [1951] S.C.R. 190, [1951] 1 D.L.R. 721, 67 C.R.T.C. 203, [1951] C.T.C. 26], or by the judgment of the Judicial Committee [*Attorney-General for Saskatchewan v. Canadian Pacific Railway Company*, [1953] A.C. 594, [1953] 3 D.L.R. 785, [1953] C.T.C. 281, 10 W.W.R. (N.S.) 220], dismissing the appeal taken by the Attorney General for Saskatchewan by special leave upon two of the questions involved in that reference. In so far as the defendant municipalities are concerned, they were not parties to and were not heard upon the reference and, in so far as the present appellant is concerned, even though it was represented on the hearing before the Court of Appeal for Saskatchewan when the matter was considered [*Re Taxation of Canadian Pacific Railway Company*, [1949] 1 W.W.R. 353, [1949] 2 D.L.R. 240, 63 C.R.T.C. 145] and appealed to this Court from the judgment of the Court of Appeal and was represented in the proceedings before the Judicial Committee, I think it is not bound either by the opinions expressed by the Judicial Committee or by this Court. In this respect, matters referred to the Court of Appeal for Saskatchewan under *The Constitutional Questions Act* of that Province (now R.S.S. 1953, c. 78) do not differ from references to this Court under what is now s. 55 of the *Supreme Court Act* . . ., R.S.C. 1952, c. 259 . . .

**Income Tax Act, Part I, Division B**

s. 88(1)(c) - subject to paragraph 87(2)(e.3) (as modified by paragraph (e.2)), and notwithstanding paragraph 87(2)(e.1) (as modified by paragraph (e.2)), the cost to the parent of each property of the subsidiary distributed to the parent on the winding-up shall be deemed to be

- (i) in the case of a property that is an interest in a partnership, the amount that but for this paragraph would be the cost to the parent of the property, and
- (ii) in any other case, the amount, if any, by which
  - (A) the amount that would, but for subsection 69(11), be deemed by paragraph (a) to be the proceeds of disposition of the property exceeds
  - (B) any reduction of the cost amount to the subsidiary of the property made because of section 80 on the winding-up,

plus, where the property was a capital property (other than an ineligible property) of the subsidiary at the time that the parent last acquired control of the subsidiary and was owned by the subsidiary thereafter without interruption until such time as it was distributed to the parent on the winding-up, the amount determined under paragraph (d) in respect of the property and, for the purposes of this paragraph, "ineligible property" means

- (iii) depreciable property,

- (iv) property transferred to the parent on the winding-up where the transfer is part of a distribution (within the meaning assigned by subsection 55(1)) made in the course of a reorganization in which a dividend was received to which subsection 55(2) would, but for paragraph 55(3)(b), apply,
- (v) property acquired by the subsidiary from the parent or from any person or partnership that was not (otherwise than because of a right referred to in paragraph 251(5)(b)) dealing at arm's length with the parent, or any other property acquired by the subsidiary in substitution for it, where the acquisition was part of the series of transactions or events in which the parent last acquired control of the subsidiary, and
- (vi) property distributed to the parent on the winding-up where, as part of the series of transactions or events that includes the winding-up,
  - (A) the parent acquired control of the subsidiary, and
  - (B) any property distributed to the parent on the winding-up or any other property acquired by any person in substitution therefor is acquired by
    - (I) a particular person (other than a specified person) that, at any time during the course of the series and before control of the subsidiary was last acquired by the parent, was a specified shareholder of the subsidiary,
    - (II) two or more persons (other than specified persons), if a particular person would have been, at any time during the course of the series and before control of the subsidiary was last acquired by the parent, a specified shareholder of the subsidiary if all the shares that were then owned by those 2 or more persons were owned at that time by the particular person, or
    - (III) a corporation (other than a specified person or the subsidiary)
      - 1. of which a particular person referred to in subclause (I) is, at any time during the course of the series and after control of the subsidiary was last acquired by the parent, a specified shareholder, or
      - 2. of which a particular person would be, at any time during the course of the series and after control of the subsidiary was last acquired by the parent, a specified shareholder if all the shares then owned by persons (other than specified persons) referred to in subclause (II) and acquired by those persons as part of the series were owned at that time by the particular person;

s. 118.6(1) - . . . “qualifying educational program” means a program of not less than three consecutive weeks duration that provides that each student taking the program spend not less than ten hours per week on courses or work in the program and, in respect of a program at an institution described in the definition “designated educational institution” (other than an institution described in subparagraph (a)(ii) of that definition), that is a program at a post-secondary school level but, in relation to any particular student, does not include a program if the student receives, from a person with whom the student is dealing at arm’s length, any allowance, benefit, grant or reimbursement for expenses in respect of the program other than

- (a) an amount received by the student as or on account of a scholarship, fellowship or bursary, or a prize for achievement in a field of endeavour ordinarily carried on by the student,
- (b) a benefit, if any, received by the student because of a loan made to the student in accordance with the requirements of the *Canada Student Loans Act* or *An Act respecting financial assistance for education expenses*, R.S.Q., c. A-13.3, or because of financial assistance given to the student in accordance with the requirements of the *Canada Student Financial Assistance Act*, or
- (c) an amount that is received by the student in the year under a program referred to in subparagraph 56(1)(r)(ii) or (iii), a program established under the authority of the *Department of Human Resources Department Act* or a prescribed program;

### ***The Concept of Native Title (1974) 24 U.T.L.J. 1, 5***

#### ***Inter-societal property institutions***

An examination of the history of colonialism will show that the servient systems seldom had the power to resist the dominant European states when they wished to acquire sovereignty over their territory. It will further show that it was more economical for the dominant system to acquire sovereignty by negotiations and peaceful means, wherever possible, because of loss of life, the desirability of stable conditions for exploitation, and the competition between the dominant states for acquiring colonies. The agreement of the servient system to occupation could only be obtained by recognizing a property relation between the servient system and at least some of the land which it was occupying or had formally occupied, so that it could be clearly recognized that although all the territory historically occupied by the servient system would be under the sovereignty of the dominant system, at least as between the dominant and servient system, some territory would still be recognized as belonging to, or the property of, the servient system vis à vis the dominant system. When the servient system was required to transfer some of its territory to the dominant system, it generally did so by way of treaty and purchase.

***Taxation of Non-Resident Trusts, (1974) 22 Cdn. Tax Jo. 584, 585-6***

In computing its income for a year from carrying on a business in Canada, a non-resident testamentary trust may deduct therefrom any amount which is payable in the year to any beneficiary resident in Canada or which is required to be included in computing the income of a preferred beneficiary (who by definition, can only be an individual resident in Canada), but not to a non-resident beneficiary. If, however, the non-resident trust carrying on a business in Canada has been an inter vivos trust, no deduction has been permitted for any amount of the business income which is payable to a non-resident person or to a non-resident-owned investment corporation or to a Canadian resident trust (other than a testamentary trust, or a trust which has itself continuously since April 26, 1965 been a beneficiary of the non-resident inter vivos trust and the latter has been carrying on a business in Canada continuously from April 26, 1965 to the date of payment). These two exceptions noted in parenthesis [sic] are now to be withdrawn altogether commencing with the 1974 taxation year of the trust, as proposed in Resolution 79 of the November budget.

***Insurance Funding of Buy-Sell Agreements (1974) 22 Cdn. Tax Jo. 484, 489-490***

For the purposes of Manitoba and Saskatchewan succession duties, there is included in the property of the deceased "any superannuation, pension or death benefit payable or granted out of any fund or plan established for the payment of superannuation, pension or death benefits to recipients . . . on or after the death of the deceased in respect of his death". For these purposes, any amount payable in respect of the deceased under a contract of insurance which at death was owned or maintained by an employer or former employer or by a corporation associated with the employer or former employer of the deceased is deemed to be a death benefit except the part of the amount payable to the employer or a subsequent employer of the deceased or to an individual who is not connected with the deceased by blood, marriage or adoption. Therefore, where split-dollar life insurance arrangements are made between related shareholders of a company, succession duty may be applicable under the Manitoba and Saskatchewan Acts. If the deceased controlled the company, any amount payable on a policy of insurance on his life owned alone or jointly by the company is includible [sic] in property of the deceased passing on his death to the extent that the amount payable to the company exceeds the aggregate of the company's business income other than income from a financial business or dealing in land for the five preceding years minus losses. In most cases, because a relatively small proportion of the total amount payable on the death of the deceased will be payable to the company, it is unlikely that the amount paid to the company would exceed its business income earned in the preceding five years.