CRIMINAL APPEAL PROCEDURES

Queen's Bench and Court of Appeal

FINAL REPORT **101**

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on January 1, 1968 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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Hon Judge John D Bascom, Provincial Court of Alberta
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Hon Judge Donna R Valgardson, Provincial Court of Alberta

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Hon Associate Chief Justice John D Rooke
Appellate Rules Review Committee of the Court of Appeal
Philip G Lister QC
Alan Pearse
Laura K Stevens QC
Alberta Justice, Appeals, Education & Prosecution Policy Branch
Alberta Justice, Court Services Criminal Transition Team
Law Society of Alberta, Criminal Practice Advisory Committee

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This final report, which includes material researched and written by Cheryl Hunter Loewen and Geneviève Tremblay-McCaig previously published in the consultation memorandum, was written by Cheryl Hunter Loewen, with the editorial assistance of Sandra Petersson, Geneviève Tremblay-McCaig, Peter Lown and Shannon Brochu.

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Ilze Hobin provided administrative assistance throughout the criminal appeals project and coordinated Committee meetings and materials, maintained the project files and produced all documents, including this final report.

Summary

Criminal litigation consists almost exclusively of actions brought by the state against individuals. In terms of personal freedom and liberty, the stakes are high for those who are accused and convicted of criminal offences. It is therefore critical that the principle of prompt and effective access to justice be consistently reflected throughout the criminal adjudicative process, including the appeal stage.

As part of the rules of court project and in the interest of access to justice, lawyers, judges and court officers were asked to consider Alberta's criminal appeal process and identify areas in need of reform. On the positive side, there were no issues as to whether the process allowed justice to be done, achieved final results or protected the integrity of the criminal justice system. However, there were concerns about system access, delay and the complexity of the appeal process. Observations from defence and prosecution counsel, judges and court officers indicated that it is not clear and simple as to what must be done to appeal the outcome of a criminal trial in Alberta. Rather, the criminal appeal process is complicated and can be challenging for even the most experienced lawyers.

This report is the second and last concerning criminal procedures issued by ALRI under the rules project. The primary purpose of this report is to enhance access to criminal justice by providing a comprehensive description of how a criminal appeal should be conducted, from start to finish. It also contains information which may form the basis for developing criminal rules of court and other administrative and procedural protocols as appropriate to an efficient, effective criminal appeal system.

Reform Process

In December, 2010, ALRI issued *Criminal Appeal Procedures: Court of Queen's Bench and Court of Appeal of Alberta* for comment to government, academic, legal and judicial recipients, with a particular focus on distribution to individuals and groups engaged in the criminal justice system. The consultation document was prepared with the assistance of the Criminal Rules Working Committee (Committee) and outlined an appeal scheme consisting of proposed procedures drawn from the *Criminal Code*, rules of court, administrative protocols, best practices and court conventions.

ALRI received written comments from seven individuals and groups; three were from senior defence lawyers; two from groups within Alberta Justice; one from the Associate Chief Justice who commented in his

capacity as a justice of the Court of Queen's Bench; and, one from the Appellate Rules Review Committee of the Court of Appeal, which provided preliminary comments based on a canvassing of the views of the Court of Appeal Registry and Case Management officers. In addition, informal comments were provided by the Law Society of Alberta, Criminal Practice Advisory Committee.

The Committee met six times in 2011 and twice in 2012 to discuss comments, supplement the descriptive material, revise proposals and finalize the recommended procedures. The insights, information and alternative proposals put forward by the commentators were considered by the Committee, and, if not directly reflected in the recommended procedures, served to enhance the general understanding of how criminal appeals are conducted in Alberta.

This report differs from a traditional law reform format for procedural law in two respects. First, the description of the criminal appeal procedure is not limited to making recommendations as to what the appellant and respondent should do to pursue or participate in the court action. The recommended procedures also include information about what the court officers and judges do to process the criminal appeal and provide procedural assistance, as necessary, to the parties.

Second, although many of the recommended procedures would be appropriately implemented as criminal rules of court, it is not intended that all procedures be implemented in this fashion. Even as the recommended criminal appeal procedure is a blend of required, optional, administrative and judicial actions, it is anticipated that the mechanisms used to implement the optimum criminal appeal system would include a mix of criminal rules of court and administrative protocols and other materials. Further, it is beyond the scope of this report to recommend which aspects of the procedure should be implemented as criminal rules of court or to suggest specific rules.

Report Plan

In general, each chapter is arranged as follows. Headings are used to indicate the topic or issue. Material that is necessary to explain the topic, which may include legal principles, reform considerations and issues, or a brief summary of what was proposed in the consultation document, as applicable, is presented. Specific comments related to the topic, if any, that helped clarify or shape the final procedure are discussed. Finally, each topic concludes with a recommendation or recommended procedure.

Of note, for many of the topics, especially those addressed in the chapters on leave to appeal, interim relief and court assistance, the

background and discussion material is sparse. In these instances, the information consists almost entirely of the recommended procedures for making applications that may be appropriate in particular criminal appeals. Although these application processes are generally consistent and work well, they are not documented in a publicly accessible manner and are included in this report to provide a complete description of the recommended procedures for handling all matters associated with a criminal appeal.

The recommended procedures in this report use the term “must” to indicate a required action, “may,” for a discretionary act and “should,” for a best practice. In this regard, it is important to stress that the court has full authority to control the appeal process. The court exercises discretion to enhance access to justice and ensure that criminal appeals are conducted fairly. This means that the court may, in the interest of justice, modify the procedural requirements which apply to any particular appeal.

As a final note concerning the language used in this report, the actions which are done by court officers and judges to facilitate the progress and processing of a criminal appeal are simply described under the appropriate recommended procedure heading, without using the “must, “may” or “should” terms.

In terms of specific content, this report starts with foundational information. *Chapter 1 – Principles and Objectives* notes reform objectives and briefly describes the substantive law which governs criminal appeal procedures. The chapter investigates global reforms which may enhance access to justice and makes four reform recommendations. First, a common set of criminal rules of court, with appropriate adjustments for appeals to Queen’s Bench and the Court of Appeal should be developed. Second, the locations where a notice of appeal can be filed should be expanded. Third, the existing filing practices which address the specific needs of appellants who are in custody should be continued and formalized. Finally, it is recommended that criminal rules of court and other measures be implemented such that criminal appeals are conducted in accordance with the appeal procedure described in this report.

Chapter 2 – Core Process describes the steps that must be taken in order to exercise a right to appeal a criminal trial outcome or other decision and process the appeal, from start to finish. Chapter 2 includes information concerning what the appellant and respondent must, or should do to advance or participate in the appeal. It also describes the administrative actions of court officers and the role of the judge at each stage of the appeal process.

Chapter 3 – Leave to Appeal describes the two processes that are appropriate for leave applications to the Court of Appeal. Leave applications should be combined with substantive appeal hearings in cases where leave is required for a first level appeal and conducted as a separate application proceeding for second level appeals (i.e., when a party seeks to appeal the decision of an appellate court).

Chapter 4 – Interim Relief Pending Appeal discusses how an appellant may obtain sentence relief pending the outcome of the appeal process by making an application for a stay of order or judicial interim release, as appropriate. In particular, Chapter 4 recommends a specific, streamlined procedure for obtaining a stay in Queen's Bench. The recommended procedure for obtaining judicial interim release is the same for both courts.

Chapter 5 – Court Assistance describes optional procedures for getting help from the court during the course of a criminal appeal. Chapter 5 opens with a short overview and then sets out the type of assistance that can be obtained from a court officer, duty judge or the judge or panel assigned to conduct the appeal hearing. Relevant background information and issues, if any, are discussed, comments noted and recommended procedures are described.

Summary – Recommended Procedures for Criminal Appeals brings together the recommended, step by step procedure for conducting a criminal appeal in the Court of Queen's Bench or Court of Appeal of Alberta. The information is arranged using the same topic headings as in Chapters 2 through 5 and is cross-referenced to show where the discussion of each topic and associated procedure starts.

This report includes three appendices, current to April 1, 2012:

- *Appendix A - Criminal Appeal Rights and Courts* summarizes key statutory provisions which govern criminal appeals.

- *Appendix B - Criminal Rules of Canadian Provinces and Territories* lists the criminal rules applicable to appeals which are described in statutory instruments.

- *Appendix C - Sentence Appeal Questionnaire* contains a copy of the document posted on the Court of Appeal of Alberta's website.

Recommendations

CHAPTER 1

Principles and Objectives

[1] The goals of an appeal are "to do justice in particular cases by correcting wrong decisions... and to ensure public confidence in the administration of justice by making such corrections and to clarify and develop the law."[1] Consistent with these goals, a good criminal appeal process should:[2]

- do justice to both the accused and the public as represented by the Crown,
- bring finality to the criminal process while protecting the integrity of the criminal justice system,
- be readily accessible,
- be clear and simple in its structure and procedures,
- be efficient and effective in its use of resources, and
- be timely and speedy without compromising the ability of the parties to comply with required procedures and the fairness of the appeal process.

[2] A criminal appeal process that is not clear and simple may not be as accessible, efficient or effective as it could be and this might have a detrimental effect on the fair administration of justice and public confidence in the criminal justice system. Although Alberta's criminal appeals are conducted in a system that allows justice to be done, the appeal process is not clearly understood or simple. The process is complicated.

[3] There are two main reasons why the criminal appeal process is complicated. First, the substantive law of criminal appeals and court jurisdiction is complex. Second, there are many detailed requirements for bringing a criminal appeal before the appropriate court and these

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[1] The Right Honourable H.S. Woolf, *Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales* (London: H.M.S.O., 1996) at 153.

[2] The Right Honourable Lord Justice Auld, *A Review of the Criminal Courts of England and Wales*, (London: H.M.S.O., September 2001) at 611.

requirements are presently found in a number of sources of varying authority and currency.

[4] While changes to the substantive criminal law are beyond the scope of this report, the criminal appeal process is established and governed by the substantive law. Therefore, as background to the process discussion and recommendations which follow, brief descriptions of the right to appeal a criminal trial decision and the court's jurisdiction to hear an appeal are provided in the next section.

A. Criminal Appeals are Complex

1. RIGHT TO APPEAL – WHICH CRIMINAL DECISIONS MAY BE APPEALED?

[5] The first stage in any criminal appeal is that a trial participant, either the accused or Crown,[3] must determine if there is a right to appeal an unsatisfactory trial outcome. The right to appeal must have a statutory basis and whether a particular decision is appealable or not depends on legislation.[4] Criminal appeal rights and procedural principles are described primarily in the federal *Criminal Code*.[5]

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[3] In order to simplify the descriptions, the terms "accused" or "accused person" are used to indicate the person tried for a criminal offence and "Crown" to designate an Attorney General or other government prosecutor. Use of these terms represents a minor departure from criminal practice in that the general naming protocol is that a person charged with a summary conviction offence is referred to as "defendant" and someone charged with an indictable offence is identified as "accused."

[4] It should be noted that the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*] does not create a constitutional right to appeal the outcome of a criminal trial but provides grounds for challenging a decision if it can be shown that an individual's fundamental rights were violated during the course of the proceedings; see, *Canada (Minister of Employment and Immigration) v. Chiarelli,* [1992] 1 S.C.R. 711 generally and at 739; *R. v. Rodgers* indexed under *R. v. Jackpine* (2006), 207 C.C.C. (3d) 225 (S.C.C.) at paras. 18-21.

[5] Although the main body of criminal law is found in the *Criminal Code,* R.S.C. 1985, c. C-46 [*Criminal Code*], there are many other federal statutes which contain criminal prohibitions and penalties. Examples include the *Controlled Drugs and Substances Act*, S.C. 1996, c.19, *Canada Labour Code*, R.S.C 1985, c. L-2, *Canadian Environmental Protection Act,*1999, S.C. 1999, c. 33, *Fisheries Act*, R.S.C. 1985, c. F-14, *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) and *Tobacco Act*, S.C. 1997, c. 13.

The appeal rights and procedures associated with convictions of all federal offences are those described in the *Criminal Code* by operation of the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(2).

A separate line of federal criminal law recognizes that different principles apply when the offender is very young. However, a young person and the Crown also have rights to appeal and appeals are conducted as described in the *Criminal Code*. See *Youth Criminal Justice Act*, S.C. 2002, c. 1, ss. 37(1)-(8), (10), (11).

[6] Decisions regarding verdict, sentence,[6] fitness to stand trial, interim release, orders and awards, as well as extraordinary remedies (*mandamus*, *certiorari*, prohibition, or judgment on the return of a writ of *habeas corpus*) can be appealed.[7] Most interlocutory decisions made during the course of a criminal trial which do not conclude the matter can only be appealed after the end of the trial, if at all.[8]

2. COURT JURISDICTION - WHICH COURT HEARS THE APPEAL?

[7] Once a party has ascertained whether or not there is a right to appeal, he or she then determines which court has jurisdiction to hear the appeal. In Alberta, criminal appeals can be brought before the Queen's Bench or the Court of Appeal.[9]

[8] Which court hears a particular appeal depends primarily on whether the offence was tried by way of summary conviction or indictment,[10] not on the nature of the offence, trial court, decision or severity of the sentence. Although there are a number of factors which determine the details of the trial process, summary conviction offences are generally tried in the Provincial Court and indictable offences are tried in both Provincial Court and the Court of Queen's Bench.[11]

[9] In the reporting year 2009 – 2010, there were a total of 58,397 criminal cases decided in Alberta.[12] Although there is no data available as to the number of cases which were tried in Provincial Court or the Court of Queen's Bench, unofficial information from previous years indicates

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[6] *Criminal Code*, s. 673. The term sentence includes not only jail time and fines but also penalties such as forfeiture of seized property, prohibition on owning a firearm and requirements to make restitution or pay compensation.

[7] See summary in Appendix A.

[8] *R. v. DeSousa*, [1992] 2 S.C.R. 944.

[9] *Criminal Code,* ss. 812(1)(d), 673. See summary in Appendix A.

[10] Offences are classified under the *Criminal Code* as summary, indictable or hybrid. For example, *Criminal Code*, s. 266 provides that assault may be indictable or summary (a hybrid). In the case of a hybrid offence, the Crown may choose to proceed either by indictment or summary conviction, depending on the circumstances of the case.

[11] See sections including *Criminal Code,* ss. 785 [definition of summary conviction court], 468 [superior court of criminal jurisdiction], 469 [court of criminal jurisdiction], 553 [absolute jurisdiction of provincial court judge], and 536(2) [election by accused concerning certain indictable offences].

[12] Statistics Canada, "Cases in adult criminal court, by province and territory (Alberta)", online: Statistics Canada <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/legal19j-eng.htm>.

that approximately 99% would have been tried in Provincial Court, and 1% in Queen's Bench.[13] Similarly, there is no annual tabulation of the number of summary conviction and other appeals to Queen's Bench or to the Court of Appeal. However, given the number of criminal matters decided in Provincial Court, it is reasonable to assume that the majority of the criminal appeals are heard by Queen's Bench.

a. Summary conviction matters – Court of Queen's Bench

[10] Matters tried by way of summary conviction are primarily appealable to Queen's Bench.[14] Summary conviction appeals, either by the accused or Crown, are almost always as of right and not limited to particular grounds.[15]

b. Indictable offence matters – Court of Appeal

[11] Matters tried by way of indictment are appealable to the Court of Appeal.[16] In the event of mixed proceedings in which both summary and indictable offences were tried together, either party may, with leave, appeal the summary conviction matter together with the indictable offence matter to the Court of Appeal, subject to certain conditions.[17]

[12] An accused can appeal decisions made in a trial by indictment in some situations as of right to the Court of Appeal.[18] The Crown can also

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[13] Michael Marth, "Adult Criminal Court Statistics, 2006/2007" (2008) 28:5 Juristat 14 at Table 4, online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/85-002-x2008005-eng.pdf> shows a total of 51,144 criminal cases tried in Alberta. The 2006/2007 data tables submitted to Statistics Canada by Alberta Justice, Court Services [unpublished] indicated that there were approximately 50,791 criminal cases tried in Provincial Court and 353 in Queen's Bench.

[14] *Criminal Code*, ss. 812(1)(d), 813, 822(4), 829(1), 830.

[15] See summary in Appendix A. An exception to the right to appeal a summary conviction matter as of right may occur where the condition of the trial record or any other reason requires (e.g. breach of a principle of natural justice) that the appeal be conducted by way of trial *de novo.* In this case, the party seeking to appeal requires leave of the appeal court to proceed in this manner, *Criminal Code,* s. 822(4). See also Chapter 5 for how to apply for a *de novo* appeal.

[16] *Criminal Code*, ss. 675, 676. Other decisions that can be appealed to the Court of Appeal include decisions concerning a disposition or placement made by a court or a review board, *Criminal Code*, s. 672.72.

[17] *Criminal Code*, ss. 675(1.1), 676(1.1) and *Youth Criminal Justice Act*, S.C. 2002, c.1, s. 37(6). See E.G. Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2nd ed., looseleaf (Aurora, Ont.: Canada Law Book, 1987) at 23:0062 for additional explanation [Ewaschuk]. However, if the judge conducts separate trials of the related matters, the appeal cannot be combined, as confirmed in *R. v. Pelletier* (2003), 180 C.C.C. (3d) 560.

[18] See summary in Appendix A. For example, *Criminal Code,* ss. 675(1)(a)(i) and 675(3) provide that a person accused of an indictable offence may appeal a decision with respect to conviction or

(continued...)

appeal some indictable outcomes as of right to the Court of Appeal.[19] Other indictable offence matters can be appealed to the Court of Appeal with leave of the court or a single judge thereof.[20]

B. Criminal Appeal Process is Complicated

[13] Having determined the substantive issues of whether there is a right to appeal and which court has jurisdiction, the next stage in launching a criminal appeal is to determine how to bring the appeal before the appropriate court. The task of finding the requirements which apply to the criminal appeal process in Alberta is challenging as provisions are contained in a number of different federal, provincial and court sources, including statutes, rules, practice directions and court directives of varying currency and application.

[14] The federal government has the authority to enact "criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters" and the Alberta legislature has jurisdiction to make laws related to the "administration of Justice in the province, including the constitution, maintenance, and organization of provincial

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[18] (...continued)
fitness to stand trial as of right, but only on a question of law alone; *Criminal Code*, ss. 675(2), 743.6 and 672.72 allow an accused to appeal a decision with respect to parole ineligibility or a disposition order on any ground; and *Criminal Code,* s. 680 provides that decisions to grant or refuse interim release can be reviewed by the Court of Appeal on application to the Chief Justice or her designate.

[19] See summary in Appendix A. For instance, *Criminal Code,* s. 676(1)(a) provides that the Crown may appeal the acquittal of an indictable offence as of right, but only if the appeal is based on a question of law alone; and *Criminal Code*, ss. 676(1)(b)(c), 676(4) and Part XXI (extraordinary remedies) allow the Crown to appeal against a decision concerning stay of proceedings, parole eligibility or extraordinary remedy, respectively, on any ground. In connection with extraordinary remedies, it should be noted that although the Crown may appeal where judgment is issued on the return of a writ of *habeas corpus* (or where the two stages are combined), it does not have a right to appeal from the issuance of the writ.

[20] See summary in Appendix A. For example, *Criminal Code*, ss. 675(1), 676(1) and 676.1 allow appeals by the accused or Crown concerning fitness or legality of a sentence or cost award and quantum, respectively, but only with permission of the court; *Criminal Code*, ss. 675(1)(a)(ii)-(iii) requires an accused seeking to appeal a decision with respect to conviction or fitness to stand trial on a question of fact, question of mixed law and fact or sufficient grounds to ask the court for leave to appeal; and *Criminal Code*, s. 839(1) allows the accused or Crown to appeal the decision of a summary conviction appeal court on a question of law alone to the Court of Appeal, with leave of the court or a single judge thereof. In this case, the error of law must be one made by the summary conviction appeal court and not the trial judge.

Courts, both of civil and of criminal jurisdiction."[21] Thus, some of the procedural requirements for making a criminal appeal are found in the *Criminal Code,* with general court organization and administrative processes described in provincial statutes.

[15] A primary source of the procedural requirements for making a criminal appeal are the rules of court. The authority of the federal parliament for making law concerning procedure in criminal matters is partially delegated to the courts in each province.[22] The rules made by courts must be consistent with federal legislation, published in the *Canada Gazette* in both English and French and otherwise comply with requirements for statutory instruments.

[16] Alberta's rules for criminal appeals were issued as provincial regulations in 1968 in two parts. Part 61 contained rules for appeals to the Court of Appeal and Part 61.1 provided rules for summary conviction appeals.[23] It seems that there have been few changes to the published rules since that time, with one revision taking place in 1977.[24] This creates difficulty in that these rules do not always match provisions in the current *Criminal Code*. References to rules in this report mean appeal rules which govern criminal appeals.

[17] In order to supplement the rules which continue to apply and reflect current criminal appeal practices, the courts issue practice directions, directives, notes and updated court forms. These materials are publicly available in a number of formats including publication by the Queen's Printer and posting on the Alberta courts website.[25] In addition, judges and court officers may adapt criminal appeal procedures in order

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[21] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91(27), 92(14) reprinted in R.S.C. 1985, App. II, No. 5.

[22] *Criminal Code*, ss. 482, 482.1. See also *Statutory Instruments Act*, R.S.C. 1985, c. S-22 (as supplemented by *Statutory Instruments Regulations*, C.R.C., c. 1509) which contains requirements for the examination, registration and publication of rules by the Clerk of the Privy Council.

[23] *Alberta Rules of Court,* Alta. Reg. 390/68. See also Alberta Law Reform Institute, *Criminal Appeal Procedures: Court of Queen's Bench and Court of Appeal of Alberta,* Consultation Memorandum 12.22 (2010) at Appendix B - Alberta Criminal Appeal Rules and Practice Directions for a description of Alberta's criminal rules of court.

[24] *Rules of the Court of Appeal of Alberta as to Criminal Appeals*, S.I./77-174, (1977) C. Gaz. II, 4270.

[25] Online: <http://www.albertacourts.ab.ca/>. The authority of such practice directions, directives and notes has been called into question as *Criminal Code,* ss. 482(4) and 482.1(5) do not mention these mechanisms. See *R. v. J.L.A.*, [2009] A.J. No. 1037 (and *R. v. J.L.A.*, [2009] A.J. No. 1148 (CA)); *R. v. Carlson and Carlson*, [2005] B.C.J. No. 1027; *Tremco Inc. v. Gienow Building Products Ltd.*, [2000] A.J. No. 366; *Penteluk v. Penteluk Estate*, [1990] S.J. No. 60.

to meet specific administrative or regional needs. Further complicating matters is the practice of applying civil rules of court when there is no criminal rule.[26]

C. Reform Objectives

[18] Given the complicated nature of the existing criminal appeal process and consistent with the overall mandate of the project, this report contains information and recommendations which are intended to result in a criminal appeal system that is clear, simple, accessible, effective and timely.[27]

1. CLEAR AND SIMPLE

[19] There are a number of ways that the criminal appeal process might be made clearer and simpler. First, requirements that are currently found in a number of different sources could be assembled into a single, comprehensive set of procedures.[28] Second, it does not seem necessary or desirable to construct an entirely new criminal appeal system. An enhanced process could be structured by selecting effective practices from the existing, familiar statutory provisions, rules and court directions and rewriting these as procedural requirements in clear, straightforward language.

[20] Third, it seems that most criminal appeal requirements fall into one of two categories; actions that must be done in order to exercise a right of appeal or steps that may be taken during the course of an appeal to get

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[26] Rule 840(3) states "[i]n all matters not provided for by these Rules, the Rules of Court respecting civil appeals shall apply *mutatis mutandis*...." The practice of using civil rules in criminal proceedings no longer seems necessary or valid. See *R. v. Johnson* (2001), 92 Alta. L.R. (3d) 232 (C.A.) at para. 15 where the Court finds that the matter is "purely criminal... and the *Criminal Code*... provides the procedure for summary conviction appeals. The Rules of Court, and specifically r. 505(6) have no application." See also *Duhamel c. R.*, 2006 QCCA 1081, unofficial translation, [2006] Q.J. No. 9207 (QL) at paras. 12-14: the Court concluded that rules of criminal practice published by the Quebec Court of Appeal which incorporated civil procedures for summarily dismissing an appeal are not in agreement with *Criminal Code*, s. 685 and adversely affected the substantive right to appeal.

[27] The Right Honourable Lord Justice Auld, *A Review of the Criminal Courts of England and Wales*, (London: H.M.S.O., September 2001) at 611. See also Court of Appeal of Alberta Project Team, *Criminal Rules Project: Working/Discussion Paper Draft*, (2000) [unpublished] at 2-3.

[28] The idea of collecting applicable criminal appeal requirements in one place was suggested in an earlier reform initiative; see Court of Appeal of Alberta Project Team, *Criminal Rules Project: Working/Discussion Paper Draft*, (2000) [unpublished] at 2.

help from the court. It might add clarity to the appeal process if requirements were to be grouped along these lines.

2. ACCESSIBLE

[21] The complicated nature of the existing appeal process creates hurdles which, when combined with the fact that the court system is not generally well understood, may impede access to justice, particularly for those who have been convicted of a criminal offence.

[22] Access to justice might be enhanced by reforms that make it easier for everyone to understand the rules and move through the criminal appeal process to a just conclusion. In this regard, procedural requirements might be better understood if they were logically arranged, written in simple terms, flexible and available in a single format. Further, it might improve public understanding of the appeal process from start to finish if the administrative actions taken by the court were noted alongside what the parties are required to do. Finally, the justice system might be more accessible if the criminal appeal procedures were harmonized, simplified, and, as far as practical, applicable to both Queen's Bench and the Court of Appeal.

3. EFFECTIVE AND TIMELY

[23] From all accounts, the criminal appeal system is ultimately effective. Criminal appeal rights are exercised in appeal proceedings which are conducted in accordance with fundamental principles of fairness and justice. This said, parts of the criminal appeal process can be improved by removing unnecessary rules and by describing the administrative protocols and systems which facilitate the initiation, progress and timely hearing of appeals. Further, adopting process flexibility could, in appropriate situations, help ensure the timely conduct of criminal appeals.

D. Enhanced Access to Justice

1. COMMON RULES FOR APPEALS TO QUEEN'S BENCH AND THE COURT OF APPEAL

[24] The criminal appeal processes of both courts are remarkably similar in a number of ways. First, criminal appeals are grounded in the same statute and subject to the same principles of fairness and proper administration of justice. Second, both Queen's Bench and the Court of Appeal are superior courts of criminal jurisdiction. Third, both appeal processes are complicated, unclear and not accessible because the rules which govern them are drawn from a wide assortment of sources. Finally, research showed that the basic approach and main requirements for conducting a criminal appeal are essentially the same for both courts.

[25] Given that criminal appeals involve a common subject, common problems and common practices, it seems that there are no barriers to developing a common set of rules, with modifications as appropriate, for use in criminal appeals in both Queen's Bench and the Court of Appeal. Access to justice would be improved if a single set of criminal rules of court were implemented for appeals in Queen's Bench and Court of Appeal and this was proposed in *Criminal Appeal Procedures: Court of Queen's Bench and Court of Appeal* [CM12.22].[29]

[26] A key aspect of the reform recommendation is that criminal rules of court are an appropriate and efficient source for specifying the fundamental requirements which govern a criminal appeal.[30] Another feature of the recommendation is that the application of standard rules is always subject to the court's inherent jurisdiction to manage matters which are before the court. Exercises of judicial discretion may be necessary in the interest of justice in particular situations.

[27] One commentator focussed on the differences between the two courts as the basis for suggesting that a separate set of rules is needed to govern appeals to the Court of Appeal. There is no doubt that, at some

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[29] Alberta Law Reform Institute, *Criminal Appeal Procedures: Court of Queen's Bench and Court of Appeal*, Consultation Memorandum 12.22 (2010) at paras. 28-29 [CM 12.22].

[30] *Criminal Code*, ss. 482, 482.1. See also *Statutory Instruments Act*, R.S.C. 1985, c. S-22 (as supplemented by *Statutory Instruments Regulations*, C.R.C., c. 1509) which contains requirements for the examination, registration and publication of rules by the Clerk of the Privy Council and Alberta Law Reform Institute, *Criminal Trial Proceedings,* Final Report 100 (2012) at paras. 1-9.

stages of a criminal appeal, the detailed requirements of each court will be different since the types of appeals that are heard by each court are different. Process modifications are necessary and can be made to accommodate the differences at these points. This said, there are many aspects of the appeal process that are the same and significant access to justice benefits associated with adopting a common approach and process for all criminal appeals.

RECOMMENDATION 1

A common set of rules, with modifications as appropriate, should apply to criminal appeals to the Court of Queen's Bench and the Court of Appeal.

2. NOTICE OF APPEAL – FILING LOCATION

[28] The current practice is that a notice of appeal to Queen's Bench must be filed in the same judicial centre where the trial took place. A notice to the Court of Appeal in respect of a southern district trial must be filed in Calgary and notice concerning a northern trial must be filed in Edmonton.[31] However, if an appellant is in custody and does not have a lawyer, the appellant is allowed to file notice of appeal with the institution where he or she is being held.[32] A prospective appellant needs to know these details in order to correctly file a notice and start the appeal process.

[29] Applying accommodation and ease of access principles to the issue of filing location, allowing an accused appellant to file notice of appeal in any judicial centre would make it easier to start an appeal and enhance access to justice. In most cases, criminal appeal files can already be accessed by court officers throughout Alberta, regardless of where the physical file is located. Further, day to day court activities are examined on a regular basis as part of ongoing efforts to improve efficiency and implement the appropriate technological support. Functional enhancements such as centralized notice intake and appeal coordination

[31] See rr. 860.2(1)(2) and 848. Appeals are currently heard in the court where the notice is filed. It is also current practice is that an accused who is not in custody or who has a lawyer must file three copies of the notice and a Crown appellant must file two, rr. 844(1)(iii), 860.3(2).

[32] Rule 844(1)(i-ii). The current practice is that the self represented accused in custody provides 3 copies of the notice to the warden. The warden endorses all copies, returns one to the appellant, keeps one and sends one to the court.

could possibly be implemented in connection with other technology changes.

[30] The consultation document proposed that access to justice would be enhanced if an accused were allowed to file a notice of appeal in any judicial centre with a court officer then directing the appeal to the appropriate court, if necessary.[33]

[31] Three commentators expressed concern with the idea that a notice of appeal could be filed in any judicial centre. The operational and administrative issues noted in these comments are acknowledged and indeed problematic. In particular, the registries of both the Court of Queen's Bench and Court of Appeal apparently face the same practical challenges, including the lack of a fully functional electronic case management system. This means that neither court currently has a management tool to support implementation of the filing location reform.

[32] Without downplaying the seriousness of the issues raised, it seems that operational and administrative problems can be overcome and should not preclude consideration of a principled recommendation to provide more convenient locations for filing a notice of appeal. Access to justice requires broader access to the courts.

[33] According to the Right Honourable Beverly McLachlin, "[t]he most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical."[34] More recently, the Chief Justice expressed her concerns that"[w]e have a justice system that really is the envy of the world. The problem is that it is not accessible for far too many Canadians. In my view, access to justice is the greatest challenge facing the Canadian justice

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[33] This reflects the current practice of some criminal appeal administrators who review all notices, facilitate accurate characterization of appeal matters and help to ensure that matters get before the appropriate court.

Support for a distributed administrative function may be found in provisions which allow for a shift of the judicial process. See *Criminal Code*, s. 814(1) which states:

> 814 (1) In the provinces of Manitoba and Alberta, an appeal under section 813 shall be heard at the sittings of the appeal court that is held nearest to the place where the cause of the proceedings arose, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.

[34] The Right Honourable Beverly McLachlin, P.C., Remarks Presented at the Empire Club of Canada, Toronto, 8 March 2007, online: <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>.

system."[35] In this regard, it is somewhat incongruous that a person tried in Edmonton and incarcerated in a federal prison in Saskatchewan is allowed to file a notice of appeal with the warden of the institution in Saskatchewan, but would not be allowed to file the same notice of appeal in the Court of Queen's Bench in Lethbridge.

[34] One commentator provided information concerning the civil appeal urgent filing rule which is helpful in that it indicates that issues of appellant access to the Court of Appeal have been considered and resolved, in some instances, by adding filing locations, similar to the CM 12.22 proposal.[36] Although the civil urgent filing rule is not used very often, an urgent need to file a criminal appeal could be expected to arise more frequently because of the serious personal effects associated with a criminal conviction. This said, the commentator is correct in observing that implementation of the criminal appeal filing location reform requires that the appropriate technical and operational file management systems be in place.

[35] Taking the concept of centralized appeal processing even further than contemplated in CM 12.22, a defence lawyer suggested that the provincial courts should also be used as filing points for criminal notices of appeal. From the public perspective, "a court is a court" and adding more filing locations does increase access to the justice system. However, considering this suggestion in light of the issues raised by others, it seems that the challenges of adding all Queen's Bench judicial centres as places where a notice of appeal can be filed are substantial; including the provincial circuit courts would make implementing this reform recommendation much more difficult.

[36] However, the provincial courts could be added as filing locations if the filing locations were expanded in two stages. As a first stage, a criminal notice of appeal could be filed in any Queen's Bench judicial centre or either Court of Appeal location. After gaining some experience with multiple filing locations, the suggestion to add the provincial courts should be considered for implementation.

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[35] The Right Honourable Beverly McLachlin, P.C., Remarks to the Council of the Canadian Bar Association, Canadian Legal Conference, Halifax, N.S., 13 August 2011, online: <www.documentationcapitale.ca/documents/ABCaout2011.pdf>.

[36] *Alberta Rules of Court,* Alta. Reg. 390/68, r. 514(3) as kept in force by Alta. Reg, 124/2010, r. 14.1.

[37] Further, it is fair to consider the different capabilities and circumstances of the parties in a criminal appeal. The current practice of accommodating an incarcerated, unrepresented appellant's need to file at a convenient location by allowing him or her to file notice with the correctional institution supports access to justice objectives. No commentators disagreed with the proposal that the practice of institutional filing should continue. Other appellants, including accused persons who are represented and the Crown, should also be allowed to file a notice of appeal in a court that is convenient to his or her present location, as opposed to the trial location only.

[38] In making these recommendations, it is understood that a centralized appeal coordination system may be needed to fully achieve the access to justice benefits associated with multiple notice of appeal filing locations. As a later phase of reform, it is suggested that an accused may also file a notice of appeal in any provincial court location.

RECOMMENDATION 2

A criminal appellant, whether an accused person or the Crown, may file a notice of appeal in any Court of Queen's Bench judicial centre or either Court of Appeal location.

RECOMMENDATION 3

An accused who is in custody but does not have a lawyer may file a notice of appeal with the warden of the institution where he or she is held. The warden then forwards the notice to the appropriate court.

3. A COMPREHENSIVE, STANDARD CRIMINAL APPEAL PROCEDURE

[39] Understanding the criminal appeal process can be difficult, given that not only is the law complex, but the procedural requirements are scattered among various sources, practices may vary from court to court and the administrative and judicial steps are not documented. This lack of understanding may prevent an accused person from making an appeal of a criminal conviction, sentence or other decision and impede access to justice.

[40] In order to enhance public understanding of Alberta's criminal appeal procedures and facilitate process improvements, this report outlines a single, standardized appeal procedure which

- draws on existing statutory provisions and court practices,
- streamlines the process steps, as far as possible,
- describes requirements in clear, consistent and plain language,
- explains the role of the court officers in facilitating appeal coordination and communication,
- supports the optimum use of court resources,
- encourages appeal participants to manage the appeal process,
- provides procedural flexibility, subject to the requirement that such flexibility does not prejudice the rights of others or the integrity of the criminal justice system, and
- describes the role of the judges.

[41] The resulting description of the criminal appeal procedure differs from a traditional rules based approach in that the description is not limited to recommendations as to what the appellant and respondent should do to effectively pursue or participate in the court action. The description also includes information about what the court officers and judges do to facilitate the efficient processing of the appeal and provide procedural assistance, if necessary, to the parties.

[42] The main benefit of a comprehensive, standard description of the criminal appeal procedure is that Albertans may gain a better understanding of the process, from start to finish, and be able to more effectively pursue and protect their rights in the criminal justice system.

RECOMMENDATION 4

Criminal rules of court and other measures should be implemented such that criminal appeals are conducted in accordance with the procedures described in this report.

CHAPTER 2

Core Appeal Process

A. Overview of Core Appeal Process

[43] This chapter describes the core steps that must be taken to appeal the outcome of a criminal trial or other decision. The following policies and principles are reflected in the core appeal procedures:

- Required steps should, as far as possible, be the same regardless of the type of decision appealed, which court has jurisdiction to hear the appeal and whether a party is represented by counsel.
- A centralized appeal coordinating function should be adopted to make it easier to file a notice of appeal and avoid delay.
- Time periods should be clear, standardized and easy to calculate.
- Flexibility is needed to accommodate appeals which, due to practical considerations, require shorter or longer time periods or other special measures.

[44] The procedures further incorporate two concepts which are integral to the Alberta court system, one dealing with time and the other with court authority to address non-compliance. In particular, the recommended time periods for criminal appeals are intended to provide sufficient time to complete necessary tasks in the majority of appeals and calculated forward from known events.[37] Secondly, in cases where an appeal party does not comply with procedural requirements, the court may exercise discretion to set the matter aside, adjourn or make a determination despite the non-compliance, unless doing so would prejudice the rights of others or compromise the integrity of the criminal justice system.[38]

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[37] The time periods are the same as the 5, 10, 20 day and month periods set for civil time periods in *Alberta Rules of Court*, Alta. Reg. 124/2010. Further, days means calendar days, including weekends and holidays. Time periods which expire on a weekend or holiday are extended to the next following day that is not a holiday; see *Interpretation Act*, R.S.A. 2000, c. I-8, ss. 22(1)-(2).

[38] See *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 1.5.

B. Starting an Appeal

1. NOTICE OF APPEAL – TIME PERIOD to summary

[45] The existing practice is that the date for filing a notice of appeal is calculated from the date of conviction, acquittal, sentencing, judgment or other final decision that is the subject of the appeal. Criminal decisions and reasons are often given in oral form at the end of a trial or other hearing. In some, but not all, cases the oral decision from the bench is followed at a later date by a written order with reasons. In these cases, a party may not be able to formulate the appeal grounds or review the trial proceeding until after the written order with reasons is issued. Consequently, notices of appeal which are filed in compliance with a deadline calculated from the date of oral decision may not be very informative, particularly in cases where the written order follows.

[46] The idea of calculating the time period for filing notice from when the written order with reasons is available was considered but rejected. Not all decisions are issued this way and for those that are, the date when the written order will be available is largely unpredictable. The disadvantages of starting with an uncertain time to file the notice of appeal outweigh the potential benefits of starting with a more informed basis for the appeal. The consultation document proposed that the existing practice of filing a notice of appeal within one month after the date of conviction, acquittal, sentencing, judgment or other final decision that is the subject of the appeal should continue.

[47] One commentator noted that the idea that a notice of appeal should be filed within one month after the date of decision with reasons has merit and suggested that this idea be reconsidered. However, given that the trigger event and time to file a notice are both well established in criminal practice and that the only other comments received supported the proposal put forward in CM 12.22, the recommended procedure reflects the existing practice.

Recommended Procedure – Notice of Appeal Time Period

[48] A notice of appeal must be filed within one month after the date of conviction, acquittal, sentencing, judgment or other final decision that is the subject of the appeal.[39]

[49] In the event conviction and sentence decisions are not made at the same time, the notice of appeal must be filed within one month after the sentence decision.[40]

2. CONTENT OF NOTICE OF APPEAL to summary

[50] The purpose of the notice of appeal is to provide enough information to:

- identify the appellant and associated contact information,
- specify the trial or other decision appealed,
- direct the appeal to the appropriate court,
- help the appeal court identify the associated trial or other decision materials, if any, that need to be forwarded to the appeal court, and
- provide notice to the respondent.

[51] The notice content proposed in CM 12.22 was intended to standardize and streamline the information requirements consistent with the purpose of the notice and drew extensively from items which are currently required.[41]

[52] Only one group commented on the proposed mandatory and optional information items and indicated that some items currently required in a notice that are administratively useful to the Court of Appeal were not listed in the proposal. The group also observed that it is not necessary and may not be possible to file a copy of the decision with

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[39] *Criminal Code*, ss. 678(1), 815(1), 830(3). See also r. 841 and Court of Appeal of Alberta Project Team, *Criminal Rules Project: Working/Discussion Paper Draft*, (2000) [unpublished] at 25, proposal 13.(1). Chapter 3 contemplates that an application for leave to appeal would be combined with the notice of appeal in some cases and filed separately in others.

[40] This reflects the current practice as described in rr. 843 and 860.3(1).

[41] Notice components are drawn from rr. 860.2(3), 846 and from criminal notice of appeal forms which are available from the courts and available online: Alberta Courts <http://www.albertacourts.ab.ca/>.

reasons with the notice of appeal. Further, this group suggested a prescribed notice form which would clearly indicate which information items are mandatory and which are optional.

[53] There is no disagreement with these comments. In particular, if information is useful to the Court of Appeal then it should be provided when filing a notice of appeal to the Court of Appeal. Concerning the observation about the reasons for the decision appealed, this item is listed as optional at this stage of the criminal appeal process. However, a copy of the reasons for judgment or decision should be filed as soon as it is available and in any event must be filed by the appellant as part of the material supporting the appeal.

[54] On a separate notice related matter, it is important from an administration of justice perspective that the appeal court and parties be alerted to any non-disclosure order issued concerning the criminal trial, as orders validly made by a court with jurisdiction continue to apply unless specifically set aside on appeal.[42] At a minimum, the notice of appeal should note that a non disclosure order is in place concerning trial matters, even if it is not possible to provide a copy, so that the court and respondent may take appropriate measures.

[55] From an access to justice perspective, the content of a notice of appeal should not create a barrier to making the appeal. This principle must be considered when setting notice requirements. In particular, only the information necessary to satisfy substantive law requirements and specifically identify the subject of the appeal should be listed as required. However, if an appellant does not know or cannot access a required item, the notice of appeal will, in most cases, be accepted. In order to avoid delay and enhance access to justice, the court takes, and should continue to take a flexible, substantial compliance approach to accepting notices.

Recommended Procedure – Content of Notice Appeal

[56] A notice of appeal must include the following information, if known:

- the appellant's name and date of birth (for individual accused appellants only),

[42] *R. v. Litchfield*, [1993] 4 S.C.R. 333 at 348; *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599.

- the name and location of the trial court or court which issued the decision appealed,
- a record or copy of a non-disclosure order, if applicable,
- the name of the judge whose decision is appealed,
- the date(s) on which the accused was convicted/acquitted, sentenced or a matter was decided,
- the plea entered at trial,
- what charge the accused has been convicted or acquitted of (including the offence name and/or section of the *Criminal Code* or other statute and whether the offence is indictable, summary conviction or mixed),
- the sentence imposed, if applicable,
- what the appeal is about (i.e. all or part of the conviction/ acquittal; all or part of the sentence; both conviction and sentence; or an appeal of some other decision),[43]
- the grounds on which the appeal is based (question of law alone, question of fact, question of mixed law and fact or other sufficient grounds),
- the appellant's address or the name and address of the appellant's counsel as address for receiving appeal materials, if applicable,
- whether the appellant is in custody or not, and
- the signature of the appellant or the appellant's counsel.

[57] A standard form of notice of criminal appeal should be developed for appeals to the Queen's Bench and the Court of Appeal.

[58] In order to reduce the risk of having the appeal dismissed or adjourned, it is strongly recommended that the notice of appeal for a second level appeal include a copy of the order granting leave to appeal.

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[43] See Ewaschuk, note 17, at 23:0065 with reference to *R. v. W.(G.)*, [1999] 3 S.C.R. 597, and at 24:1180 for discussion of the exception to the rule that each matter under appeal must be expressly identified in the notice of appeal. If the Crown appeals a summary conviction acquittal and the court allows the appeal and convicts the respondent, the appeal court must set an appropriate sentence, even though sentence was not listed in the notice of appeal.

[59] A copy of the reasons for judgment or decision appealed should be included with the notice of appeal, if available. If not available, a copy of the reasons must be filed as soon as possible, but not later than the date on which the appellant files supporting materials.

[60] In order to facilitate and accelerate the processing of the appeal, the notice of appeal may also include the:

- address or place of incarceration of the appellant, if applicable,
- respondent's name (e.g. the accused or Her Majesty the Queen as represented by Alberta Justice, the Public Prosecution Service of Canada, or a special prosecutor),
- trial or decision court file number(s), and
- represented accused person's indication as to whether he or she intends to attend the hearing.

3. INFORMING THE OTHER PARTY – SERVICE to summary

[61] Personal service can be difficult to effect for both the accused and Crown appeal participants. Information concerning a criminal appeal can be successfully exchanged using methods less onerous than personal service. Current practice incorporates these realities to the extent that personal service of a notice of appeal seems to be required primarily for a Crown appeal.[44] Some lawyers also personally serve notices on behalf of their accused clients. In the case of an unrepresented accused in custody who files a notice of appeal with the prison warden, it seems that the Crown respondent is informed of the appeal by the court.

[62] The general proposals made in the consultation document were that personal service requirements should be replaced by less formal, yet effective communication methods and that the court continue to facilitate the timely, accurate exchange of appeal information throughout the appeal process. To this end, it was specifically proposed that the existing practice of the court informing the Crown respondent of a prison-filed notice of appeal should continue and be expanded such that the court

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[44] See for example r. 844(1)(iii); *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, S.I./2012-7, r. 40.06(1)(b)(ii); *Ontario Court of Appeal Criminal Appeal Rules*, S.I./93-169, r. 5(b); *British Columbia Court of Appeal Criminal Appeal Rules 1986*, S.I./86-137, rr. 4(1)(b), 4(2); *Rules of the Court of Appeals for the Northwest Territories as to A. Criminal Appeals B. Bail on Appeals*, S.O.R./78-68, r. 6(1)(iii); *Yukon Territory Court of Appeal Criminal Appeal Rules, 1993*, S.I./93-53, rr. 4(1)(b), 4(2).

would send one copy of any notice of appeal filed by an accused, together with administrative information concerning the appeal to the Crown respondent and clerk of the court where the trial occurred.[45] It was also proposed in CM 12.22 that the existing requirement that the respondent be personally served should continue to apply in the case of Crown filed notices of appeal.[46]

[63] One commentator had concerns with the proposal that the court would provide a copy of a filed notice of appeal to the other side and that, in so doing, court officers would be expected to act as agents for parties to the appeal. The intent of the proposal was to facilitate the communication of factual and procedural information, help streamline the appeal process and reduce the risk of delay. In addition, court officers currently forward notices filed by individuals who are in custody or self represented and in these cases the court officers are considered to be acting as administrative officers of the court, not as agents of one party or the other.[47]

[64] However, similar concerns about a registry or court officer forwarding copies of material filed by one party to the other are raised by commentators in connection with proposals made elsewhere in CM 12.22 (i.e. proposals associated with Issue Nos. 7, 17, 20 and 23). Given the consistency and number of these comments, the proposal is withdrawn and it is affirmed that the obligation to file appeal materials, including the notice, with the court and serve them on the other side remains with the appellant or respondent, as applicable. It is not the court's responsibility to forward or provide copies of appeal material.

[65] This general statement of responsibility is not intended to affect how discretion may be exercised by a court officer, judge or Case Management Officer (CMO) in terms of facilitating the exchange of appeal materials in any particular situation. Further, the current practice,

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[45] See rr. 844(1)-(4), 845 and 860.3(3). The current practice is that if the trial was conducted by a Provincial Court judge the court must also send a copy of the notice of appeal to the judge. The streamlined procedure is that the notice need only be sent to the trial court.

At a minimum, the court should continue to inform the respondent and the trial court in the event of a prison filed notice of appeal by an unrepresented appellant. For other notices of appeal, the existing practice is that an accused appellant who is not in custody or who has a lawyer must serve a copy of the notice of appeal on the respondent at the same time as the accused files the notice with the court.

[46] The proposal is based on rr. 844(1)(iii) and 860.3(2).

[47] In this report "court officer" means the registrar, deputy registrar, case management officer or clerk of the court. References to the "registrar" should be interpreted as including the registrar, his or her designate, and other court officers working under the registrar, unless otherwise provided.

whereby the court informs the Crown of any notices filed by appellants who are in custody or self represented facilitates access to justice, is not viewed as placing a huge burden on the court and should continue.

[66] The distinction between 'serving' and 'providing' notice is mentioned in only one comment, with the commentator favouring service. The principle of fair notice dictates that the respondent must be aware of an appeal and have adequate time to prepare in order to participate in an effective manner. It is therefore crucial that the respondent get the notice of appeal. Given that service is contemplated under the *Criminal Code*,[48] provides message delivery certainty and is the current practice, the proposal that notice should be 'provided' has been changed to 'served.'

[67] Some of the difficulties associated with service may be overcome by the special measures recommended for appellants who are in custody or self represented as outlined below. Others may be resolved by broader publication of information concerning how to serve a notice of appeal on the provincial or federal Crown.[49] Further, if a respondent cannot be found, a judge may direct how service is to be effected.[50] In situations where a notice has not been properly served, a judge may exercise discretion to deem service to be good and sufficient.

[68] In all appeals, a primary consideration is that the method by which appeal information, starting with the notice of appeal, is communicated to the other party must be effective. This said, to reflect the principle of fair notice and for consistency purposes, when a party files appeal materials, the party should also serve the material on the other side. The court will, however, continue to exercise discretion to facilitate the timely, accurate exchange of information throughout the appeal process.

[69] A related issue not raised in CM 12.22 concerns a notice currently given by the Crown to the accused in response to a notice of sentence appeal to the Court of Appeal if the Crown intends to argue for a more

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[48] *Criminal Code*, s. 678.1.

[49] To serve Alberta Justice, see <http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/service_of_documents.aspx>.

The addresses for serving the Public Prosecution Service of Canada in Alberta are: EPCOR Tower, 700, 10423 - 101 Street, Edmonton, T5H 0E7; or, Suite 510, 606 - 4th Street SW, Calgary, T2P 1T1.

[50] *Criminal Code*, s. 678.1.

severe or varied sentence.[51] This special notice serves an important function in the appeal process and affirms the principle that appeal participants, including the court, require fair notice of all matters which are to be addressed at the hearing so that they may prepare accordingly.

[70] Although details concerning the Crown's intent to argue for an increased or varied sentence would be included in the response factum, filed with the court and served on the accused well in advance of the hearing, a factum is not a short document designed to alert the court or the other party to all matters that are to be raised. Therefore, to ensure that this key aspect of the appeal is not missed, the Crown should continue to file and serve a separate notice of intent to seek a more severe sentence, sufficiently in advance of the hearing so that all participants can be fully prepared.

Recommended Procedure – Informing the Other Party and Service

[71] An accused appellant must serve a copy of the notice of appeal and court information about the appeal (i.e. file number and the appeal hearing date, if applicable) on the Crown respondent when the notice is filed.

[72] A Crown appellant must serve the accused with a copy of the notice of appeal and court information about the appeal (i.e file number and the appeal hearing date, if applicable) when the notice is filed.[52]

[73] The requirement that the Crown respondent give a separate notice of its intent, if any, to seek an increase or variation of sentence on appeal should continue. Any such Crown notice must be filed and served as soon as practical, but no later than when the response factum is filed.

[74] The court's current practice is to inform the Crown respondent of a notice of appeal that is filed by a person who is in prison or self represented. This practice should continue. In these cases, the court provides a copy of the notice of appeal, together with the information about the appeal (i.e. appeal file number and the hearing date, if

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[51] Rule 853(1) requires the Attorney General to give notice not less than 3 days in advance of the hearing. See also *Criminal Code*, s. 687 concerning powers of the court on appeal against sentence. Of note, provincial Crown policy dictates that an intent to argue for a more severe sentence in response to an accused person's notice of sentence appeal must go through the same internal review and approval process as when the Crown considers initiating an appeal.

[52] See rr. 844(1)(iii) and 860.3(2).

applicable) to the Crown respondent when the notice is filed.[53] The court also provides a copy of the notice of appeal to the clerk of the court where the trial occurred.[54]

4. ADMINISTRATIVE COORDINATION OF AN APPEAL to summary

[75] At present, there are a number of statutory provisions, previously published criminal rules and court practice documents which note what the court or a court officer does to support criminal appeal proceedings. It may help to clarify procedures, establish clear expectations and assist with tracking the status of a criminal appeal if the court's administrative role was also generally described at each stage of the appeal process.

[76] One of the challenges associated with describing the court's administrative activities is to ensure that the level of detail does not preclude functional or technological practice innovations that improve access to justice and efficiency. This said, the advantages of generally addressing the court's role seem to outweigh the challenges and the following description outlines what the court does when it receives a notice of appeal. Whether the various aspects of this role are described in rules of court or otherwise is a matter of court discretion.

[77] One of the main concepts incorporated in the administrative proposals in CM 12.22 is that the court begins working to facilitate processing of an appeal right from the start by communicating with the parties and organizing the appeal process. This concept is reflected in the existing court practice in both Queen's Bench and the Court of Appeal. Of note, administrative coordination would be done by the court which hears the appeal, not the court where the notice of appeal might be filed on grounds of convenience.[55]

[78] Another concept embedded in the administrative proposals in CM 12.22 is that establishing key appeal dates early helps the court anticipate future needs for judicial and administrative resources and encourages appeal parties to process trial information and produce appeal documents

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[53] See rr. 844(1)-(2), 845(1) and 860.3(3).

[54] See r. 844(4). The current practice is that if the trial was conducted by a Provincial Court judge the court must also send a copy of the notice of appeal to the judge. The streamlined procedure is that the notice need only be sent to the trial court.

[55] The details of how a receiving court would forward a notice of criminal appeal or notify the appropriate court if a central coordinative function were in place would be internal matters of court administration.

in a timely fashion. The proposals contemplated that the hearing and associated filing dates would be set by the court at the start of the appeal process and calculated by working forward in time from the date the notice of appeal is filed. This means that the notice filing date would drive the hearing date, with appeal materials filed so that the appeal is ready for hearing on the scheduled date.

[79] The consultation document proposed that the court respond to a notice of appeal by opening an appeal file; setting the appeal hearing date and calculating the appellant's supporting material filing date; informing the appellant of the administrative details associated with the appeal file including key dates and hearing rules; and contacting the trial court or decision maker whose decision is under appeal to request a copy of trial or decision materials.[56] In addition, CM 12.22 proposed that the court set the appeal for hearing on a date that is not more than 5 months after the date on which the notice of appeal is filed, unless the appeal is to be expedited or extended,[57] with sentence appeal hearings set earlier.[58]

[80] One lawyer and two groups reacted negatively to the proposal that a hearing date could be set by the court once a notice of appeal is filed. Another group suggested that the proposal may not be successful in Queen's Bench locations having a high number of appeals or for appeals involving self represented parties. One group also noted the impossibility of a hearing before the Court of Appeal taking place within 5 months after the notice is filed. This concern about the amount of time between notice

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[56] The proposals that the appeal court contacts the court below concerning the trial file and sets the hearing date are based on the *Criminal Code*, ss. 821(1), (3) which state that the Court of Queen's Bench contacts the trial court and obtains the order, record and other materials from the summary conviction trial; r. 860.2(4) which states that the clerk, upon receipt of a notice of appeal, notes the scheduled appeal date on the file; and Alberta Court of Appeal, *Consolidated Practice Directions*, online: <http://albertacourts.ab.ca/CourtofAppeal/PracticeNotes/tabid/86/Default.aspx#615> [CPD], I.3 which describes how the court responds to notices from self-represented sentence appellants.

[57] A number of provisions were reviewed to develop the suggested time limit including r. 860.4(1) which states that the clerk shall schedule a summary conviction appeal hearing not more than 120 days after the filing of the notice of appeal. The period was increased by one month to address transcript production issues. It was also proposed that some appeals be conducted on an expedited or extended basis, as needed. The proposal for expedited appeals of disposition orders and short sentences set the hearing 2 months after the notice of appeal is filed. For extended appeals, CM 12.22 suggested a hearing 7 months after the notice, with material filing dates set accordingly in both situations.

[58] Of note, the core process time line may be too generous for sentence appeals. Sentence hearings should be conducted earlier, perhaps within 3- 4 months after a notice of appeal is filed, with filing dates for sentence appeal materials adjusted accordingly.

and hearing is reiterated by others in comments on the proposals for time to file appeal materials and is addressed later in this report.

[81] The lawyer who commented on this point further observed that a unilateral setting of dates by the court might result in more applications for adjournment and suggested that a better approach would be for a court officer to consult with the appeal parties and set deadlines accordingly.

[82] Although one group generally supported the idea that hearing and filing dates should be set early in the appeal process, this group also suggested that the only way it would be possible for a hearing in the Court of Appeal to take place within the proposed 5 month time period would be to start the 5 month count at a later point, for example when the appeal books are filed. Otherwise, there needs to be a much longer time period between the date when the notice of appeal is filed and the Court of Appeal hearing date.

[83] Another group stated that key appeal dates should not be set early as such dates could not be effectively managed by the court. Further, this group and one individual highlighted the importance of transcript readiness in determining when an appeal can be expected to proceed.

[84] Taken together, these comments seem to indicate that the appeal case is not generally well developed when the notice is filed and thus the hearing and associated material filing dates cannot be set with any degree of confidence. However, dates are currently set in this fashion by Queen's Bench clerks for summary conviction appeals and are adhered to most of the time, with fewer than half of the matters requiring adjournment. In addition, there do not appear to be pressing scheduling problems which would justify dedicating Queen's Bench personnel to an appeal liaison function, as was suggested by one of the commentators.

[85] In light of the comments on these proposals and others concerning time to file appeal materials noted later in this report, it is concluded that although the basic proposals, with some modification, are likely to work for most appeals in Queen's Bench, this is one of the points where it is appropriate that the processes for Queen's Bench and the Court of Appeal be different.

[86] In addition, it is agreed that the transcript is key and once a transcript is ready, the appeal can be expected to proceed to hearing. If a

notice of appeal is the first step in the appeal process, then getting the transcript, or appeal book in the case of appeals to the Court of Appeal, prepared is the second. Although this is true for most appeals, an accused appellant may need Legal Aid assistance. The Legal Aid process, including internal administrative proceedings, if needed, can significantly delay the ordering of a transcript or appeal book.

[87] Further, there is no disagreement that appeal time lines are somewhat indeterminate when a notice of appeal is filed. However, an appellant ought to be able to show that he or she is advancing the appeal by taking the next step that is within his or her control, be that placing an order for a transcript or book, or making a Legal Aid application. The provisions below reflect these considerations and describe administrative steps taken by the court early in the appeal process to facilitate the timely preparation and submission of materials.

Recommended Procedure – Administrative Coordination

[88] For appeals to Queen's Bench, the court responds to a notice of appeal by setting the appeal hearing date and calculating the dates on which the appellant must file materials related to the appeal.[59]

[89] The Court of Queen's Bench informs the appellant of the

- appeal file number,
- appeal hearing date,
- dates when the appellant must file
  - evidence that a) the transcript has been ordered, or b) a Legal Aid application has been made,
  - a summary of complications, if any, and
  - materials to support the appeal case,
- general requirements concerning court attendance, and
- oral and "in writing" appeal processes.

[59] See also *Criminal Code*, ss. 821(1), (3) which state that the Court of Queen's Bench contacts the trial court and obtains the order, record and other materials from the summary conviction trial; r. 860.2(4) which states that the clerk, upon receipt of a notice of appeal, notes the scheduled appeal date on the file.

[90] The Court of Queen's Bench sets the appeal for hearing on a date that is not more than 5 months after the date on which the notice of appeal is filed, unless there is reason to expedite or extend the appeal process.[60] Sentence appeal hearings may generally be set earlier, within 3-4 months after the notice of appeal.

[91] For appeals to the Court of Appeal, the court responds to a notice of appeal by calculating the date on which the appellant must file evidence that a) the transcript or appeal book is ordered or b) a Legal Aid application has been made.[61]

[92] The Court of Appeal informs the appellant of the

- appeal file number,
- date on which the appellant must file evidence that a) the transcript or appeal book has been ordered, or b) a Legal Aid application has been made,
- general time lines for filing materials after the appeal book is ready,
- general requirements concerning court attendance, and
- oral and "in writing" appeal processes.

[93] For appeals to both Queen's Bench and the Court of Appeal, the court also provides a copy of the notice of appeal to the clerk of the court where the trial occurred.

C. Materials and Evidence to Support an Appeal

[94] In general, the court requires information which describes the nature and content of the appeal pursuant to the *Criminal Code* and enables it to conduct a meaningful hearing. There are three different types of information needed to describe and support a criminal appeal. First, the court requires materials generated by the trial court or other decision

[60] A number of provisions were reviewed to develop the suggested time limit including r. 860.4(1) which states that the clerk shall schedule a summary conviction appeal hearing not more than 120 days after the filing of the notice of appeal. The period was increased by one month to address transcript production issues. Some more complex appeals in Queen's Bench may be conducted on an longer time line, and some may be expedited.

[61] See also, CPD I.3 which describes how the court responds to notices from self-represented sentence appellants.

making body which describe the proceeding which produced the decision appealed. Second, the court needs a document which sets out the basis for the appeal and the relevant legal and other arguments.[62] Finally, the court requires evidence and authorities which support the legal and other arguments.

1. INFORMATION ABOUT THE TRIAL OR OTHER DECISION PROCESS

to summary

[95] The court requires accurate, detailed information about the criminal trial or other proceeding which gave rise to an appeal. The current practice is that the appellant is required to file copies of specific information from the trial or other file. It can be challenging to identify and acquire copies of specific items given the amount of information that is in a criminal trial or decision file. The consultation document put forward a list of the essential information items. It also proposed that a direct, court to court request for the trial or decision file items might facilitate the timely submission of this information and suggested protocols for effecting the court to court transfer of trial or other decision file information.[63]

[96] Two commentators stated that it is the responsibility of the appellant to provide copies of materials related to the trial or other decision making proceeding and that the court does not have the resources needed to compile this information. Another noted that although the proposal concerning court to court file transfers reflects the existing Queen's Bench administrative transfer protocol, it is the entire lower court file that must be transferred to the appeal court on request of the clerk, not just selected items.

[97] Given the clarifying comments that although the entire file of the trial or other proceeding below is sent to the Queen's Bench, no portion of the transferred file is provided to the judge or copied to the appeal file, the proposal has been modified. Both appeal courts need information about the trial or decision process and the appellant has an obligation to reproduce and file copies of some of the items from the trial or decision file to support the appeal. It is not up to the court to populate the appeal file with materials from the trial or other decision file.

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[62] In this report this document is called a "factum."

[63] See CM 12.22 at paras. 64-69 and rr. 858, 860.4(3).

[98] In terms of background information about how the court manages its files, the criminal trial or deciding court generally keeps its file active for a number of months after the date of conviction, acquittal, sentencing, judgment or other final decision that may be subject to appeal. In addition, for summary conviction appeals to the Queen's Bench, as noted above, the entire trial or decision file may be forwarded by the Provincial Court to the Court of Queen's Bench on the request of the Queen's Bench.[64]

[99] For appeals to the Court of Appeal, the entire trial or decision file is not transferred as the appeal court does not need the file and these files are often enormous. However, if the Court of Appeal determines that it is necessary to review a specific trial exhibit, the exhibit can be requested and provided to the hearing panel.

[100] A question posed by one commentator prompted reconsideration of the items listed in the consultation document to further clarify the required items by updating and removing items which are either no longer produced by the trial court or may be redundant in that if the item exists, it would be included with other materials that an appeal party files.[65] For example, the "report of the trial judge" is not something currently produced.

[101] The information the court requires should be described in the context of the appellant and respondent filings as it is up to the appeal parties to make and support their appeal cases. In order to identify all the material that an appellant should provide to fully support the appeal, the list of information items concerning the trial or other decision should be combined with the factum, transcript, evidence and authority items described below.

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[64] *Criminal Code,* s. 821(1).

[65] 'Endorsements' are added to the list. The term generally means the court clerk notes which record the steps taken each time the information or indictment concerning the accused appeared at trial or deciding court. Endorsements may also mean judge written notes concerning the disposition of a trial application. Endorsements are usually attached to the information or indictment.

Recommended Procedure – Information About the Trial or Other Decision Process

[102] In order to support an appeal, the appellant must file and serve, and the respondent may file, a copy of the:[66]

- information or indictment, including trial amendments, if any,
- endorsements,
- formal document of judgment, order or decision appealed (i.e. certificate of conviction or acquittal, sentencing order, order of disposition, probation orders, weapons prohibitions, approval or denial of leave, judicial interim release order),
- reasons for judgment, order or decision, if any, and
- list of exhibits submitted during the trial proceeding.[67]

[103] In addition, the appellant must file and serve and the respondent may file, if applicable, copies of trial procedural orders and any non disclosure orders, if not previously filed.

2. FACTUM to summary

[104] The factum content reflects the general principle that an appellant must provide some legal and record based arguments to support the appeal. Respondents are not required by law to submit anything. Crown respondents, however, are obligated as a matter of public policy to submit a written response. Further, it would be in a person's best interest to respond to and participate in a Crown appeal of acquittal, sentence or other decision. The proposal in CM 12.22 concerning the factum content for a verdict, sentence or other appeal reflects a streamlined approach in that information requirements are described in general, as opposed to detailed, terms and located in a single list.

[105] In addition, the requirement that a party inform the court in the factum of the amount of time needed to make oral argument is no longer listed since the court uses maximum time parameters to schedule hearings

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[66] See also rr. 854(3), 851(3) and CPD I.4(a)(i).

[67] The purpose of the exhibit list is to alert the court to specific trial or decision related materials such as pre or post sentence reports, a statement of facts presented to the trial judge or decision maker, or the criminal record of the convicted person, if it was disclosed to the trial judge.

and the amount of time that a party actually speaks is determined by the judge or panel conducting the appeal.

[106] Two groups noted that for appeals to the Court of Appeal the factum page length should be increased from the proposed 20 to 30 pages, consistent with existing practice. In addition, the sentence questionnaire is useful in the Court of Appeal context and should be listed as an optional item to be filed with the appellant's factum, if applicable.

[107] It may be challenging for a self represented party to prepare a formal factum. However, in order to assist the court and the other side prepare for the hearing, a self represented appellant or respondent who intends to present argument at the hearing should, as a minimum, file and serve written arguments before the date of the hearing.[68]

[108] Further, consistent with the principle of fair notice, in the event the Crown intends to argue for an increase or variation in sentence in response to a sentence appeal, the details of the Crown's sentence position, arguments and materials in support must be clearly specified in the respondent's factum. In addition, as stated earlier in this report, the appellant and court must be alerted as to the Crown's intent by a special notice filed and served when the Crown files and serves its factum.

Recommended Procedure – Factum

[109] The appellant must file and serve and the respondent may file and serve a factum which must include the following information:[69]

- a brief statement of facts,
- the grounds for appeal,
- the standard of review,

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[68] See r. 852.

[69] The requirements are based on CPD I.5(a)-(b), (d)-(f), I.6 and I.7. The statement of facts may be an agreed statement of facts co-signed and submitted by both the appellant and respondent. The grounds for appeal must include, at a minimum, those identified in the notice of appeal. See also *Criminal Code*, s. 830 which describes an appeal of a summary conviction based on the trial transcript or an agreed statement of facts where there is no question of fact in issue, including the fitness of sentence. For an explanation of standards of review, see *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235; Roger P. Kerans, Kim M. Willey, *Standards of Review Employed by Appellate Courts*, 2nd ed., (Edmonton: Juriliber, 2006); John Sopinka, Mark A. Gelowitz, *The Conduct of an Appeal*, 2nd ed., (Toronto: Butterworths, 2000).

- legal arguments in connection with each ground of appeal, with specific reference to the trial or decision file, transcript, authorities or extract of key evidence,
- concise and precise statements of the nature of relief or specific order sought, and
- the date and signature of the party or the party's counsel.

[110] The factum for appeals to Queen's Bench must be no more than 20 pages and no more than 30 pages for appeals to the Court of Appeal.

[111] The factum filed in support of a sentence appeal to Queen's Bench may include a summary of the factors which were before the court below and details of the resulting sentence.

[112] For a sentence appeal to the Court of Appeal, the appellant must submit a detailed sentence questionnaire form together with the factum.[70]

3. TRANSCRIPT, EVIDENCE AND AUTHORITIES to summary

[113] The transcript is a key source of evidence used by the appellant and respondent to make or refute an appeal case.[71] This said, a full transcript of a criminal trial can be costly and time consuming to produce and a difficult document to work with. Although the decision as to how best to support or oppose an appeal is up to the parties, the general view is, consistent with existing practice, that the appellant should file a full transcript and both parties should be prepared to address ancillary issues that may come up in oral argument.

[114] In order to facilitate prompt, effective processing of appeals by the court, parties are encouraged to reference only the evidence and authorities that are relied on to make the appeal case and to avoid filing redundant copies of material from the trial or decision file or already filed by the other side.[72] An additional benefit of filing only the amount of material necessary is that a party's costs for copying, compilation, filing and distribution may be minimized.

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[70] See CPD I.5(a), I.7. See also "Form B - Sentence Questionnaire" attached as Appendix C.

[71] In this report "transcript" means a written record of the trial court or other decision making proceeding.

[72] In this report "authorities" means legislation, cases, publications, treaties, including excerpts from each. This definition is based on *Rules of the Supreme Court of Canada*, S.O.R./2002-156 as amended by S.O.R./2006-203, r. 2. [SCC Rules].

[115] It is clear that a general procedural requirement for using abbreviated materials could be developed.[73] A number of parameters, such as duration of the trial or other decision proceeding, length of transcript, and the nature of the underlying offence, were considered as potential triggers for a requirement to file less supporting material. However, in order to avoid potential interpretation problems and applications for procedural relief, it is suggested that the decision as to the best way to support an appeal be left to the parties.

[116] One lawyer who commented pointed out the advantages of filing "e-transcripts." In this regard, the proposals did not prohibit the filing of electronic versions of transcripts or other materials and parties are encouraged by the courts to consider the use of materials in electronic format whenever possible.

[117] One group used existing Court of Appeal terms and arrangements of information to describe the materials that the court requires. There does not seem to be a substantive discrepancy, aside from one clarification provided by the group, between the information items proposed in CM 12.22 and the group's description.

[118] This group also expressed concern with the large volume of material currently being filed in some appeals and supports the efforts to focus on relevant materials, reduce the volume and thus lower the expenses incurred by the parties. In this regard, it is important to continue to stress the need to use relevant and concise materials to support an appeal and parties should use lists, excerpts and head notes, as appropriate, instead of filing full (and sometimes multiple) copies of statutes or cases. On this point, the Supreme Court of Canada requires parties to file condensed books in lieu of full cases and this practice is being generally promoted in Alberta, especially by the Court of Appeal. The Court of Queen's Bench also asks appeal parties to submit concise, relevant materials.

[119] From a practical point of view, it makes sense that procedural rules should encourage efficient practice and focussed advocacy on the part of

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[73] *Criminal Code*, ss. 482 (3), 482.1(1). See for example *British Columbia Court of Appeal Criminal Appeal Rules, 1986*, S.I./86-137, r. 9 which states that parties work together to reduce the bulk of the book and transcript; *Manitoba Criminal Appeal Rules*, S.I./92-106, r. 18(1)(2) which operate to reduce the quantity of submissions by requiring the Attorney General to prepare and file the appeal book for conviction, acquittal and sentence appeals; and *Ontario Court of Appeal Criminal Appeal Rules*, S.I./93-169, r.25(3) which consolidates submissions by stipulating that the Attorney General prepares appeal books for the court and inmate appellant.

counsel. Further, extracts of key evidence and other concise compilations are helpful to the court and the court appreciates the effort it takes to prepare and submit these compilations in advance of the hearing.

Recommended Procedure – Transcript, Evidence and Authorities

[120] The appellant must file with the court and serve on the respondent a copy of the transcript.[74]

[121] The transcript should be filed and served as soon as it is ready, but no later than the date when the appellant's factum is filed.

[122] Each party may file an extract of key evidence and serve a copy on the other party in advance of the hearing. The purpose of an extract of key evidence is to give the court the key evidence which supports the information and arguments in a party's factum.

[123] The extract of key evidence includes[75]

- parts of the transcript,
- copies or extracts from the trial file materials that are needed to support the party's arguments, and
- references to or portions of relevant authorities.

[124] The extract of key evidence should not include materials that are not directly relevant, or that are already before the court either in the party's earlier filings or materials of the other party.[76]

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[74] For a summary conviction appeal, see *Criminal Code*, s. 821(3) which requires the appellant, unless the court orders otherwise or rules of court provide, to furnish a copy of the transcript of the trial to the appeal court and respondent. For sentence only appeals, the appellant submits a partial transcript which records the sentencing arguments and decision.

[75] The content of an extract of key evidence is derived, in part, from the definition of key evidence found in CPD I.4.1(a):

> (i) extracts from the transcribed oral or written trial evidence,
>
> (ii) selected exhibits entered before the trial court,
>
> (iii) other documents on the trial record
>
> which [a] party believes will be needed for the disposition of the appeal or will support the arguments in that party's factum.

Strictly speaking, authorities are not evidence. However, in the interest of providing concise materials, authorities are often included in extracts of key evidence, which are commonly called "extracts."

[76] Redundant materials are similarly discouraged under, for example, SCC Rules, rr. 38(2), 39(2), 44(2) and *Ontario Court of Appeal Criminal Appeal Rules*, S.I./93-169, r. 22(2)(5).

4. TIME TO FILE APPEAL MATERIALS to summary

[125] The proposals in CM 12.22 for time to file materials were arranged to reflect basic, extended and expedited time frames, as generally appropriate to appeals in Queen's Bench, more complex appeals, such as those in the Court of Appeal, and appeals requiring prompt adjudication for practical and statutory reasons, respectively. The descriptions of the three appeal situations in CM 12.22 affirmed the existing practice that supporting materials are typically filed at the same time and proposed time periods for filing materials in terms that make the due dates easy to calculate. Further, the suggested filing dates were intended to provide, on average, enough time for parties to prepare concise appeal materials and for the court to review materials prior to the hearing.

[126] The recommended time to file provisions for the basic and extended time appeals are discussed in this section. The special time to file and other requirements for expedited appeals are described later in this chapter under the heading E. Expedited Appeals.

[127] For the basic situation, it was proposed that the appellant's materials should be filed with the court and provided to the respondent within 3 months after the date on which the notice of appeal is filed.[77] The respondent's materials, if any, should be filed with the court and provided to the appellant within one month after the date on which the respondent received the appellant's factum. A party should submit appeal materials in a format that is acceptable to the court, which may include electronic format.[78] Further, if a party's supporting materials are filed after the applicable filing date but before the appeal hearing, the appeal court may or may not consider the material.[79]

[128] Some appeals are complex and require more time to prepare. A number of complicating factors can affect appeals to Queen's Bench and

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[77] The proposal not only adds one month to the current notice to hearing period but also gives Queen's Bench an estimated 2 more weeks to prepare for the hearing as compared to existing practices. See r. 860.6(1)-(2) which requires the materials to be filed at least 30 and 15 days before the hearing date by the appellant and respondent, respectively.

[78] The proposal deliberately does not detail what is meant by electronic format so as to provide maximum flexibility in terms of adopting technical and administrative innovations appropriate to court information production, filing and communication.

[79] The proposal mirrors existing practice and modifies CPD I.9(c) such that the court will exercise discretion concerning any late filed factum or digest regardless of the party who made the filing. The provision in CPD I.9(a) which requires a respondent who does not intend to submit a factum to so advise the court in writing is not included in the proposal.

the Court of Appeal, including; the length of trial or other proceeding, transcript production issues, the nature of the offences, the number of decisions on appeal, multiple defendants who were tried together, whether the appeal is before the court for the first or second time, and appeal grounds which involve constitutional arguments. Although the same complicating factors may affect appeals to Queen's Bench and the Court of Appeal, the methods used to extend time periods in each court are different and may also vary depending on geographic location. The consultation document suggested that it would help clarify the appeal process if the method for setting longer time periods for complicated appeals were standardized.

[129] One of the concepts reflected in the extended time appeal situation was that either party to an appeal, or the court, could determine that an appeal is likely to be complicated and that the parties would benefit from having additional time to prepare. For these appeals, the court would set a hearing date and associated filing deadlines as noted in the proposed example or otherwise so as to provide sufficient time for the appeal participants to properly prepare.[80] Other ideas reflected in the extended time proposals are that the parties to a complicated appeal could develop, with court supervision, a timetable that is tailored to the specifics of the appeal and combine efforts to prepare a joint digest. One of the concepts considered but not put forward in CM 12.22 was that all complicated appeals should be directly managed by the court.

[130] The extended time appeal proposals contemplated that an appeal party would request that the appeal be conducted on an extended basis by filing a written summary of complications (less than or equal to 3 pages) within one month after the date on which the notice of appeal is filed. The summary of complications should clearly describe each trial or decision circumstance or other factor which makes the appeal factually, legally or logistically complicated.

[131] Some of the concepts in the extended time appeal proposals reflect the current consultation and coordination practices of the CMOs in the Court of Appeal. In particular, the proposals involve the court scheduling

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[80] The example hearing and filing date scheme for an extended time appeal involved the hearing set for a date that is not more than 7 months after the date on which the notice is filed; the appellant filing and serving materials within 4 months after the date on which the notice is filed; and the respondent filing and serving materials, if any, within 2 months after the date on which the respondent receives the appellant's factum.

a meeting with the parties for the purpose of developing a tailored filing timetable or to recommend a hearing and filing date scheme. Dates would then be set based on party feedback. Alternatively, the parties could jointly propose a filing schedule that reflects the time needed in light of the specific complexities of the appeal, again with dates set subject to court discretion . In addition, in order to facilitate timely processing, it was proposed that the parties to an extended appeal could jointly file a single digest in accordance with the timetable adopted for the appeal.[81]

[132] The vast majority of the comments received on the basic and extended time appeal proposals raised issues related to appeals in the Court of Appeal. However, one lawyer noted that the basic proposal of 3 months between notice and filing materials, which generally reflects the current practice in Queen's Bench, is arbitrary and suggested that pre-appeal conferences should always be used to set filing schedules that are appropriate to each appeal. No other commentator expressed concerns with the basic method of setting dates or the proposed time periods in the context of summary conviction appeals to Queen's Bench.

[133] Of those who commented concerning how the proposals would work in the Court of Appeal, one lawyer observed that it is unrealistic to expect an appellant to file materials within 3 months after a notice is filed. In addition, one group commented that 3 months might be possible in an ordinary case, depending on when the transcript is ready but suggested that this time period should not run until the transcript is ready. This group also stated that the only time that could run from notice would be a time period within which the appellant should order the transcript or book.

[134] The suggestion to use pre-appeal conferences is consistent with the proposals for establishing filing dates in an extended time appeal situation. However, a pre-appeal conference may not be necessary in all cases. One group seemed to suggest that appeals should be case managed but with no formal written procedures. On this point, although the details of each appeal to the Court of Appeal will be different, the general steps and process by which the appeal is monitored should be documented.

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[81] *British Columbia Court of Appeal Criminal Appeal Rules, 1986*, S.I./86-137, r. 9 provides that represented parties to a criminal appeal may work together, with guidance from the registrar, to reduce the bulk of the appeal book and transcript. However, r. 6 stipulates that parties may not work together in this fashion if either party is without legal representation.

[135] The comments on the basic and extended time appeal proposals were considered together with other timing and process points raised by commentators concerning administrative coordination of appeals. Consistent with the recommendation that appeals to both courts should be conducted according to a common set of rules and to show appropriate modifications, the time requirements for filing materials in Queen's Bench and the Court of Appeal are presented together in this report. Some of the CM 12.22 timing proposals are affirmed and some have been changed in the recommended time to file procedure below.

[136] Combining the time to file requirements not only helps clarify the similarities and differences between the two courts, but also enables a Queen's Bench appellant or respondent to easily identify and quickly access (by filing a statement of complications) a longer, more managed appeal process if necessary.

[137] In order to facilitate a timely and efficient appeal process, the parties to an appeal to the Court of Appeal often jointly propose a schedule of filings leading up to the appeal hearing and occasionally agree to prepare and file a joint extract of key evidence. If a joint extract is produced, either party may also file a supplemental extract, although this does not often occur.

[138] Appeals to the Court of Appeal require, in general, longer to prepare and more monitoring. Further, material preparation time should start to run in these cases when the transcript or book is ready for pickup. In addition, a longer time line may occasionally be needed for complicated appeals to Queen's Bench and if so, a party should file a short summary of complications to alert the court and get the appeal going on a longer, more closely monitored schedule similar to that which is recommended for Court of Appeal matters.

[139] A default time period within which the appeal hearing should be heard, calculated from the date when the notice is filed, is not appropriate for appeals to the Court of Appeal or complex Queen's Bench appeals. The hearing date for these appeals should be set by the court on a case by case basis.

[140] This said, the time period within which a party must file a summary of complications with Queen's Bench and the appellant must file proof of ordering a transcript or appeal book or making an application for Legal Aid (i.e. within two months after notice of appeal) should be

adhered to. The time periods recommended for filing appellant and respondent materials in the Court of Appeal, which are calculated from the date the transcript or appeal book is ready, should be appropriate for many longer appeals. However, these time periods are included for illustration purposes only, not as defaults. In this regard, if it becomes necessary to get an appeal moving, an application can be made to a single judge or motions panel of the Court of Appeal to set court ordered due dates.

[141] Finally, it is important to stress that the time periods noted below for filing appellant and respondent materials in Queen's Bench and the Court of Appeal reflect what would be reasonable in many situations. These periods may be shorter or longer, depending on the circumstances of a particular appeal and the tailored schedule that may be set by a court officer, judge or CMO.

Recommended Procedure – Time to File Materials

Court of Queen's Bench

[142] For appeals to Queen's Bench, the appellant must file within 1 month after the date on which the notice of appeal is filed evidence that a) the transcript is ordered or b) a Legal Aid application has been made.

[143] The transcript must be filed and served as soon as it is ready, but no later than the date on which the appellant is to file a factum.

[144] The appellant's factum, together with copies of the information or indictment, endorsements, transcript (if not filed earlier), list of trial exhibits, decision appealed (with reasons if applicable) and any other information appropriate to the appeal must be filed with the court and served on the respondent within 3 months after the date on which the notice of appeal is filed.[82]

[145] The appellant's extract of key evidence, if any, should be filed and served as far in advance of the hearing as is practical.

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[82] This timing adds one month to the current notice to hearing time period and gives Queen's Bench an estimated 2 more weeks to prepare for the hearing as compared to existing practices. See r. 860.6(1)-(2) which requires the materials to be filed at least 30 and 15 days before the hearing date by the appellant and respondent, respectively.

[146] The respondent's factum, if any, must be filed with the court and served on the appellant within one month after the date on which the respondent received the appellant's factum.

[147] The respondent's extract of key evidence if any, should be filed and served as far in advance of the hearing as is practical.

[148] In an appeal to Queen's Bench, either party may request that the appeal be conducted on a longer time line by filing and serving a written summary of complications (no more than 3 pages) within one month after the date on which the notice of appeal is filed. The summary must clearly describe each trial or decision circumstance or other factor which makes the appeal factually, legally or logistically complicated.

Court of Appeal and complex Court of Queen's Bench appeals

[149] For appeals to the Court of Appeal and complicated Queen's Bench appeals, the appellant must file within 2 months after the date on which the notice of appeal is filed evidence that a) the transcript/appeal book is ordered or b) a Legal Aid application has been made.

[150] The transcript or appeal book should be filed and served as soon as it is ready, but no later than the date on which the appellant is to file a factum.

[151] The appellant must file with the court and serve on the respondent a copy of the appellant's factum together with copies of the information or indictment, endorsements, transcript or appeal book (if not filed earlier), decision appealed (with reasons, if applicable) and any other information appropriate to the appeal within 4 months of the date on which the transcript or appeal book is ready.

[152] The appellant's extract of key evidence, if any, should be filed and served as far in advance of the hearing as is practical.

[153] The respondent may file with the court and serve on the appellant a copy of the respondent's factum and other information appropriate to the appeal, if any, within 2 months of the date on which the respondent received the appellant's materials.

[154] The respondent's extract of key evidence, if any, should be filed and served as far in advance of the hearing as is practical.

General

[155] A party must submit appeal materials in a format that is acceptable to the court which may include electronic format.[83]

[156] In order to facilitate timely processing, the appeal parties may jointly file a single extract of key evidence in advance of the appeal hearing.[84] In the event of a joint extract of key evidence, a party may also file and serve a supplementary extract of key evidence before the appeal hearing, as long as the supplement does not replicate material already filed.

[157] The appeal hearing date is set by a court officer or judge, in the case of complicated appeals to the Queen's Bench, or CMO for appeals to the Court of Appeal, based on consultation with the appeal parties, at the court's discretion.

[158] The court officer or CMO schedules the hearing date and informs and confirms the date with the parties.

D. Appeal Hearing

1. SINGLE OR SEPARATE HEARING OF RELATED MATTERS to summary

[159] A single appeal hearing makes efficient use of legal and court resources and facilitates the timely conclusion of an appeal. From a public policy perspective, the combined appeal format does not appear to prejudice the appellant in any way. The consultation document proposed that acquittal or conviction and the associated sentence would be appealed together, as would indictable and summary matters that were decided in the same trial.[85]

[160] One lawyer commented that combining the two aspects of an appeal is a very good idea because it is less wasteful than treating them

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[83] The provision deliberately does not detail what is meant by electronic format so as to provide maximum flexibility in terms of adopting technical and administrative innovations appropriate to court information production, filing and communication.

[84] See for example *British Columbia Court of Appeal Criminal Appeal Rules, 1986*, S.I./86-137, r. 9 which provides that represented parties to a criminal appeal may work together, with guidance from the registrar, to reduce the bulk of the appeal book and transcript; however, r. 6 stipulates that parties may not work together in this fashion if either party is without legal representation.

[85] The proposal reflected the existing practice in Queen's Bench and the approach taken by the Court of Appeal for summary conviction appeals.

separately. Two groups recommended maintaining the current practice for appeals to the Court of Appeal, that is, separate hearings unless specifically combined. One of these groups observed that the current system does not result in significant delay and avoids the unnecessary waste of time and effort associated with a fully prepared sentence appeal in the event the conviction appeal is successful. The other group noted differences in the nature of conviction and sentence appeals and the information relevant to each and practical issues as reasons for keeping the appeals separate.

[161] An appeal to the Queen's Bench concerning both conviction or acquittal and sentence is a somewhat rare event. Although reasons similar to those noted above for arguing related appeals separately would apply to summary conviction appeals, they may be less compelling in this context than the reasons why related matters should be combined. One of the main benefits of combining related matters is that the entire appeal can be decided more quickly if the conviction appeal is lost or acquittal overturned and the parties proceed immediately to sentence arguments with a judge who is already familiar with the case.

[162] This is another point where it is appropriate that the processes for Queen's Bench and the Court of Appeal should be different. In the interests of providing a simple process for the rare occasions when both conviction or acquittal and sentence are appealed to Queen's Bench, it is recommended that related appeals be heard together, unless there is a request for them to be heard separately.

[163] For appeals to the Court of Appeal, related matters should continue to be heard separately, unless there is an application that they be combined. This said, in order to resolve timing issues which may arise due to *Code* provisions or other reasons, it is important to stress that parties may apply to have the related matters heard together or apply to have an appeal hearing expedited. Further, the decision to expedite a hearing before the Court of Appeal can be made by a single judge; it does not require the hearing panel.

Recommended Procedure – Related Appeal Matters

[164] For appeals to Queen's Bench, acquittal or conviction and the associated sentence decisions are heard together, unless an application is made to hear the matters separately.

[165] For appeals to the Court of Appeal, acquittal or conviction and the associated sentence decisions are heard separately, unless an application is made to combine the related matters.[86]

[166] Indictable and summary matters that were decided in the same trial may also be combined, with leave of the court.[87]

2. ARGUMENT FORMAT to summary

[167] Criminal appeals generally proceed in open court on the basis of both written and oral argument. This said, there may be appeals for which it would be appropriate to have the appeal conducted solely on the basis of written submissions. The current practice is that a party who wishes to present his or her appeal case in writing only may apply to do so.[88] The consultation document proposed that the appellant or the respondent may request that an appeal proceed in writing only. If the request for a hearing in writing is granted, the court will make a decision based solely on the written arguments.

[168] There was no fundamental disagreement with this proposal. One group provided additional information as to the factors the court considers in assessing a request for a hearing in writing, in particular, that both parties should be in agreement as to the written format. The existing practice is that a request to proceed in writing only must be made by both parties. Further, those who have used the "written hearing" process following court approval, report that it is efficient and effective.

Recommended Procedure – Argument Format

[169] The appellant and the respondent may request that an appeal proceed in writing only. If the request for a hearing in writing is granted, the court will make a decision based solely on the written arguments.

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[86] See CPD I.23.

[87] *Criminal Code*, s. 675(1.1).

[88] *Criminal Code*, ss. 688(2)-(3), CPD E.4(a). It appears, however, that the actual practice of the Court of Appeal has superceded these provisions to a certain extent in that any judge sitting on a panel of three or more may require oral argument. Written argument may suffice, but court agreement will not be forthcoming if one or more judges on the panel insists on oral submissions. If a party wishes to proceed on the basis of written or oral argument only, an application in letter form directed to the registrar is usually sufficient to bring the matter to the attention of the panel.

3. OTHER MEASURES TO FACILITATE TIMELY CONDUCT OF APPEALS to summary

[170] Given the limited nature of legal and court resources and the serious personal consequences arising from an appeal of a criminal acquittal, conviction, sentence or other decision, appeals should proceed with some degree of certainty as to when the decision will be made. Once a hearing date is set, the court and parties should be able to assume that the appeal will be heard on that date and that appeal participants will take steps as needed to be ready.

[171] By way of background, if the appropriate next step in an appeal to Queen's Bench is not taken, the appellant usually seeks an adjournment or, in the case of self represented individuals, appears at the scheduled hearing and the matter is put over to a new date. The court officers monitor the situation and the court exercises discretion to try to bring matters forward on the basis of what has been filed, especially if the appeal is adjourned multiple times.

[172] The Court of Appeal relies on the CMOs to monitor and help manage appeal progress. If the appropriate next step is not taken, a CMO notifies the party that is remiss, the appeal panel and the other side. In the case of self represented individuals who don't file the appropriate materials, the court exercises discretion concerning the overall readiness of the file, including consideration of materials filed by the other side and may set a hearing date. At the start of the hearing, the court asks the self represented appellant if he or she wants to proceed or adjourn.

[173] If an appellant has not submitted a factum, transcript or other materials to support the appeal before the start of the hearing, the court may dismiss the appeal, reschedule the hearing or proceed on the basis of information in the appeal file, oral arguments of the appellant and the materials and arguments submitted by the respondent, if any.

[174] If the appellant does not appear at the appointed hearing time, the court decides whether to proceed or not based on considerations such as the appellant's right to be heard and whether the materials in the appeal file are sufficient to make the appellant's case.

[175] An appeal hearing may be conducted by the court on the basis of appeal materials submitted and arguments made by the appellant without personal participation on the part of the respondent. However, where the accused is the respondent, the court must be satisfied that proper notice

has been given such that the conduct of the appeal hearing in no way violates principles of natural justice or infringes on the accused person's *Charter* rights.

[176] One practice which facilitates the timely conduct of an appeal is that the Crown is obligated as a matter of public policy to submit a written response to every notice of appeal and participate in the hearing. Although, as a matter of law, no response to a notice of appeal is required, a person who receives notice that the Crown is appealing an acquittal, sentence or other decision should respond and participate in the hearing. A failure to participate on the part of the accused does not prevent the appeal from being heard and it is obviously in the accused person's best interest to oppose the Crown's appeal.

[177] One party commented that it is not acceptable for an appellant to miss the filing deadlines as this delays the process and has a negative impact on the smooth functioning of the court. Further, the commentator suggested that the court could take a stronger approach and automatically dismiss the appeal rather than merely considering dismissal as was proposed in CM 12.22. Although there is no doubt that missed deadlines cause delay, automatic dismissal of an appeal is not a realistic response given the serious personal consequences associated with a criminal conviction and sentence. Rather, procedural flexibility is required to enable an accused appellant to pursue his or her appeal and facilitate access to justice.

[178] The current practice is that if a party's supporting materials are filed with the leave of the court by fiat after the applicable filing date but before the appeal hearing, the appeal court may consider the material.[89]

[179] Finally, although an accused person may participate in a criminal appeal hearing by electronic means and some suggest this method should be used more frequently, participation by electronic means should remain the exception, not the rule. One of the reasons for this position is that it is a standard condition of an accused person's judicial interim release that he or she surrender into the custody of the court on the date of the appeal hearing. This cannot happen if the accused is not in the court.

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[89] This provision mirrors existing practice and modifies CPD I.9(c) such that the court will exercise discretion concerning any late filed factum or materials regardless of the party who made the filing.

Recommended Procedure – Other Hearing Measures

[180] The appellant and respondent must appear in person at the hearing of a criminal appeal at the scheduled date and time, unless otherwise ordered by the court.

[181] In exceptional circumstances, a party may apply to participate in the hearing by telephone, video conference or other electronic means as may be determined by the court.[90]

4. APPELLANT IN CUSTODY to summary

[182] Due to a statutory exclusion which applies in some situations, an appellant who is in custody may be required to get permission of the court to attend the appeal hearing if he or she has a lawyer.[91] The consultation document proposed that a broader application of the permission based attendance practice might facilitate the timely conduct of appeal hearings by reducing the logistical issues associated with prisoner location, transportation and security. One of the disadvantages of establishing a permission based attendance practice is that the court would have less opportunity to ask questions directly of the accused during the appeal hearing.

[183] CM 12.22 proposed that an appellant in custody who is represented by a lawyer would not attend the appeal hearing without the permission of the court. Further, it was proposed that a self represented appellant in custody may opt to attend in person or to participate in writing. Attendance at the hearing was defined as in person or by an electronic means acceptable to the court.

[184] The proposal that a represented appellant in custody seek court permission to attend the appeal hearing was fervently opposed by two lawyers. In addition, one group noted that it seems odd given that there is only one provision in the *Criminal Code* which limits the attendance by a represented appellant.[92]

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[90] *Criminal Code*, s. 683(2.1).

[91] *Criminal Code*, s. 688(2) and CPD E.4(a) both restrict the attendance of incarcerated, represented appellants when the appeal is grounded in law but are subject to the application of *Charter* rights and principles of natural justice.

[92] *Criminal Code*, s. 688(2) states:

> 688. (2) An appellant who is in custody and who is represented by counsel is not entitled to be

(continued...)

[185] *Criminal Code* s. 688(2)(a) was first included in the Code in 1923 and last revised in 1954.[93] If this provision were applied to prevent an accused from attending the hearing of his or her appeal, it is likely that the decision would be challenged on *Charter* grounds. Although it is beyond the scope of this report to propose reforms to federal legislation, it is recommended that this section of the *Code* be reviewed.

[186] The lawyers' point that hearing attendance should be the default position is accepted. Attendance is the norm and the accused should be present for any arguments on the merits of the appeal.[94] Of note, the acknowledgment that a represented accused who is in custody is entitled to attend the appeal hearing is not intended to mean automatic attendance at the hearing of all preliminary or ancillary applications associated with the appeal.

[187] Some accused persons do not want to attend the judicial interim release hearing. In these cases, it is the practice of some lawyers to ask the client to sign a form which states this preference and affirms that the lawyer is authorized to act on his or her behalf. This would seem to be good practice. In the event a represented accused does not want to attend the appeal hearing, his or her lawyer should consider getting the person's preference in writing.

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[92] (...continued)

> present
>
> > (a) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,
> > ...
>
> unless the rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.

[93] Gary P. Rodrigues, ed., *Crankshaw's Criminal Code of Canada*, 8th ed. (Toronto: Carswell, 1993) vol 4 at 21-306–1-308.

The only significant post *Charter* change to the section appears to be the addition of *Criminal Code,* 688 (2.1) which enables an appellant in custody who is entitled to be present at various appeal proceedings to appear by technological means acceptable to the court.

[94] The presence of a person at the hearing of his or her appeal is consistent with and may be viewed as a necessary extension of the right described in *Criminal Code,* s. 650 (1):

> 650 (1) Subject to subsections (1.1) to (2) and 650.01, an accused, other than an organization shall be present in court during the whole of his or her trial.

Recommended Procedure – Appellant Attendance at Hearing

[188] An appellant in custody who is represented by a lawyer is entitled to attend the hearing of his or her appeal without the express permission of the court.[95]

[189] An appellant who is in custody and not represented by a lawyer is entitled to attend the hearing to present oral argument or may opt to participate solely in writing.

5. SPEAKING ORDER

[190] The order in which matters and arguments are presented at a criminal appeal hearing is well established and described below, subject to the court's discretion at the time of the hearing.

Recommended Procedure – Speaking Order

[191] The appellant speaks first and respondent second, unless the court otherwise directs.

[192] The court may also allocate time to the appellant for a response or to an intervener.[96]

[193] In a combined conviction and sentence appeal, the court hears and decides the conviction appeal first and then, if appropriate, hears arguments in connection with sentence and decides the sentence appeal.[97]

[194] Each party presents oral argument on conviction, sentence or other decision appealed, including responses to questions from the court, for amounts of time as the court determines appropriate.[98]

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[95] *Criminal Code*, s. 683(2.1) states:

> 683(2.1) In proceedings under this section, the court of appeal may order that the presence of a party may be by any technological means satisfactory to the court that permits the court and the other party or parties to communicate simultaneously.

[96] See Chapter 5 for a discussion of how a person who is not a party may apply to intervene in a hearing.

[97] This reflects the practice in Queen's Bench. See also CPD A.9 which stipulates that consolidated matters in the Court of Appeal are treated as one appeal.

[98] The maximum time allotted to each side in a criminal appeal hearing before the Court of Appeal is approximately 45 minutes. The Court of Queen's Bench has no specified time limit for oral argument. However, the maximum time allowed per party in a Queen's Bench hearing seems to be approximately 20 minutes.

6. CONCLUDING ARGUMENTS

Recommended Procedure – Concluding Arguments

[195] If the court is not satisfied that oral arguments are complete at the end of the time allotted for the appeal hearing, the court may[99]

- adjourn and schedule a continuation of the hearing, or
- ask one or more of the parties to file a written summary of arguments or answers to the court's questions.

[196] A party who is asked to provide a written summary or answers must file the summary document within 5 days after the appeal hearing.

E. Expedited Appeals

[197] In addition to sentence appeals to Queen's Bench which can often be heard earlier than the recommended 5 months after the date on which the notice is filed, there are two other criminal appeal situations which require that hearings occur sooner than contemplated under the basic appeal procedure. First, if the matter appealed is a disposition order, the appeal court is required to conduct the hearing "as soon as practicable" following the notice of appeal.[100] Second, if the sentence appealed applies for a period of one year or less, CM 12.22 proposed that the appeal should proceed on an expedited basis.

[198] The consultation document also proposed that notice of a disposition order appeal be provided consistent with the *Code* requirements and that shorter time periods be established for parties to file materials and to conduct the hearing.

[199] No commentators expressed disagreement with the position that disposition order and short sentence appeals should be expedited. However, one group noted that it is the current practice in the Court of Appeal to expedite sentence appeals of six months or less (not one year or

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[99] In addition to the continuation practice described in CPD I. 13(a)-(b), the court may ask for final argument to be presented in writing.

[100] *Criminal Code*, s. 672.72(3). *Criminal Code*, s. 672.1(1) defines disposition as an order made by a court or Review Board under section 672.54 or by a court under section 672.58. These sections describe orders concerning the custody, discharge or treatment of an accused who has been declared not criminally responsible on account of mental disorder or found to be unfit to stand trial, respectively.

less) and that the CMO is involved in ensuring that disposition order appeals, which happen very rarely, are processed promptly.

[200] Only one group commented on the proposed expedited process and suggested that expedited appeals, similar to other appeals in the Court of Appeal, should be case managed. This group does not favour setting default hearing or material filing dates for expedited appeals.

[201] With the descriptions of the basic procedure for a Queen's Bench appeal and a modified procedure that is appropriate to a Court of Appeal or complicated Queen's Bench appeal done, only the expedited appeal procedure still needs to be described. Further, given the practical reasons why an appeal may need to be expedited, it is appropriate to draw attention to the timing and other specific requirements that must be met to enable an appeal to be processed quickly.

1. EXPEDITED APPEALS – GENERAL

Recommended Procedure – Time to File Materials for Expedited Appeals

[202] An appeal from a disposition order or a "short sentence" (defined as a sentence which applies for a period of one year or less) must be conducted on an expedited basis unless otherwise ordered by the court.

[203] The appellant must file and serve a notice of appeal concerning an appeal of a short sentence within one month of the date of sentencing, unless otherwise specified by the court.

[204] The court sets the appeal hearing for an expedited appeal on a date that is no more than 2 months after the date on which the notice of appeal is filed.[101]

[205] The appellant must file and serve on the respondent a copy of the appellant's factum together with copies of the information or indictment, endorsements, transcript, list of trial exhibits, decision appealed (with reasons, if applicable) and any other information appropriate to the

[101] See also *Criminal Code*, s. 819(1) which states that in a summary conviction appeal, if the appellant is in custody and more than 30 days has passed since the notice was filed and the hearing has not started, then the institution having custody of the appellant must apply for a fixed hearing date; r. 860.4(1) which states that the clerk shall schedule a summary conviction appeal hearing not less than 60 and not more than 120 days after the filing of the notice of appeal.

expedited appeal within 20 days after the date on which the notice is filed.[102]

[206] The appellant's extract of key evidence, if any, should be filed and served in advance of the hearing.

[207] The respondent's factum in an expedited appeal, if any, must be filed and served within 10 days after the date on which the respondent received the appellant's factum.

[208] The respondent's extract of key evidence, if any, should be filed and served in advance of the hearing.

2. ADDITIONAL REQUIREMENTS FOR DISPOSITION ORDER APPEALS

to summary

[209] Including the *Criminal Code* provisions for disposition order appeals in court rules would help create a convenient, comprehensive set of all the requirements for appealing a disposition order and alert parties to additional steps they may need to take in a disposition order appeal process. The difficulties associated with incorporating these provisions include how to describe statutory requirements without altering their substantive meaning and how to ensure that rules remain consistent with the *Code*.

[210] Appeals of disposition orders not only invoke a statutory requirement for expeditious processing but also involve statute described materials, parties and processes. Therefore, the consultation document proposed that the benefits outweigh the difficulties and that *Code* requirements for appealing disposition orders should be described.

[211] One group raised operational concerns with the proposal that court officers would forward disposition order appeal materials to the other side. These concerns have been addressed generally for all types of appeals by affirming that it is, and remains, up to the parties to provide copies of materials to the other side.

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[102] See r. 860.6(1)-(2) which requires materials to be filed at least 30 and 15 days before the hearing date by the appellant and respondent, respectively and r. 855 which calls for the appellant and respondent to file and serve factums 28 and 14 days, respectively before the appeal hearing. CPD I.4(k)(iii) states that the sentence appeal record, when the sentence is 6 months or less, must be filed with the court 6 weeks after the notice of appeal.

The expedited procedure involves a shorter period to keep the amount of time that the court has to prepare for an expedited hearing at approximately one month, which is the same as under the general appeal procedure and similar to existing practices.

[212] By way of background, only a few lawyers practice in the area of disposition orders as it is highly specialized. In particular, disposition order matters are governed by unique principles, appear to require more medical than legal expertise and involve less formal adjudicative processes. The disposition order appeal procedures could be clarified by restating the applicable *Code* provisions in simple form with an emphasis on the process. The following requirements represent a possible rephrasing of the applicable disposition order provisions contained in the *Code* as of April 1, 2012.

Recommended Procedure – Additional Requirements for Disposition Order Appeals

[213] The *Criminal Code* procedural provisions for appealing disposition orders should be reflected in rules.[103]

[214] The appellant must file and serve a notice of appeal concerning a disposition order within 15 days after the date of the disposition order.[104]

[215] The operation of a disposition order is automatically suspended by the filing of a notice of appeal.[105]

[216] A judge of the appeal court may make, on application, an interim disposition order pending the outcome of the disposition appeal, or order that any interim order for release or detention that was in place immediately prior to the disposition decision remain in effect until such time as the appeal is decided.[106]

[217] The disposition order appellant, unless expressly relieved of the responsibility by order or a ruling of the appeal court, is required to file with the court and provide to the respondent a certified transcript of evidence given before the trial court or Board of Review.[107]

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[103] The procedures in this report reflect the *Code* as of March, 2012. Given that the *Code* is amended on a regular basis, it becomes increasingly important as time passes that readers review the referenced sections.

[104] *Criminal Code*, ss. 672.72(2)-(3).

[105] *Criminal Code*, s. 672.75.

[106] *Criminal Code*, ss. 672.76, 672.77.

[107] *Criminal Code*, s. 672.74(4).

F. Appeal Orders to summary

[218] An order is the last step in the criminal appeal process. The content of an order is largely set by the *Criminal Code* based on the type of decision appealed and the court's reasons for allowing, dismissing or refusing the appeal or setting aside the decision.[108] The reasons for reflecting statutory order requirements in rules include that appellants may be better informed as to the type of order they can expect if successful and that the order form and content may become more streamlined and standardized. Two of the challenges to be overcome in crafting order-making requirements are how to create provisions that do not add to or subtract from the substance of the *Criminal Code* and how to keep these procedures consistent with a statute that is amended on a regular basis.

[219] On balance, the benefits of including order provisions in the rules appear to outweigh the challenges. In particular, the certainty of the last stage of the appeal process might be enhanced if a few order-making sections of the *Criminal Code* which generally describe timing, order content and "what happens after" the appeal order were to be added to the description of the core appeal process. The consultation document proposed a few general provisions concerning appeal orders.

[220] Only one individual commented on the appeal order materials and correctly pointed out concerning CM 12.22 paragraph 134, that substantive law governs what happens when a retrial is ordered, and that if there is to be a new trial, there will also be an actual notice of arraignment to appear on a specific date. The equivalent practice in the Court of Appeal is that the court is invited to set the arraignment date, and that the date be included in the appeal order, the judgment roll and the report on appeal. In this regard, the procedure described below adds clarity to the existing practice by specifying order elements which are sometimes missing, that is, when and where the accused is to present him or herself to the court in the event of a retrial.

[221] As a point of information, it seems that there are other issues which may arise concerning the content of the Court of Appeal's formal judgment in criminal appeals where one judge dissents on a question of law, thus creating an automatic right to appeal to the Supreme Court of

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[108] *Criminal Code*, ss. 686(1)-(8), 687, 822(1)-(2). In addition, r. 860.9(2) provides that nothing in the rules may operate to limit the Court of Queen's Bench's ability to exercise all of the powers under *Criminal Code*, s. 822.

Canada.[109] The formal judgment must reflect all that the court ordered. A copy of the formal judgment is provided to the judge in the court below and, in the event of a dissent, the Registrar of the Supreme Court of Canada. Access to justice may be impaired if the formal judgment referenced by the Supreme Court does not accurately reflect the dissent.[110] How should formal judgments be prepared? Should they be prepared and approved by 2 of the 3 judges? Or prepared by counsel for the appellant and respondent and signed by the panel? This appeal order issue is noted soley as a matter for possible further review.

Recommended Procedure – Orders

[222] A written order of the appeal court with reasons, except in the case of an order denying leave where no reasons are required, is generally issued within 6 months after the appeal hearing, unless otherwise determined by the court.[111]

[223] If an individual judge disagrees with the majority decision of the appeal court, the order must include the grounds and reasons of the dissenting judge.[112]

[224] If the decision on appeal is that a matter be retried, the appeal court orders both the date and trial court in which the person charged is to appear for arraignment. If the appeal court orders a new trial, a judge of the appeal court may hear an application for judicial interim release pending the new trial.[113]

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[109] The terms "Formal Judgment," "Judgment Roll," and "Court Order," are used interchangeably in Alberta to describe the document prepared by counsel and filed with the Registry.

[110] *R. v. Lee*, 2010 SCC 52 at paras. 2, 8; *R. v. Lee,* 2010 ABCA 1 at paras. 41, 67-73. See also *Her Majesty the Queen and Christopher John Lee*, Formal Judgment of the Court, Appeal No. 0803-0163-A (27 April 2010) at 2.

[111] The written format is consistent with current practice and timing reflects the guideline set by the Canadian Judicial Council, *Ethical Principles for Judges,* (Ottawa: Canadian Judicial Council, 1998) at 21.

[112] *Criminal Code*, s. 677. See also CPD E.1.

[113] *Criminal Code*, ss. 679(7.1), 822(3). Similarly, review of an existing judicial interim release order following an order for retrial may be brought before either court pursuant to *Criminal Code*, ss. 520 or 680. See also r. 860B(4).

CHAPTER 3

Leave to Appeal

A. Overview of Leave to Appeal

[225] Some criminal decisions require leave to appeal to the Court of Appeal.[114] In order to clarify what a prospective appellant must do when leave is required, this chapter describes procedures for processing leave applications either in combination with or separate from the substantive appeal hearing. The main policy position reflected in the leave procedures is that they should be tailored to suit the nature of the appeal, with first level leave to appeal considered at the same time as the substantive appeal and second level appeals (i.e. an appeal from an appeal decision) requiring a separate leave application and hearing process.

[226] In terms of how the other party is informed of a leave application, the recommended procedures are the same as those for informing the party of a notice of appeal described earlier in this report. The accused leave applicant serves a copy of the leave application on the Crown respondent when the leave application is filed. The Crown leave applicant must personally serve the accused with one copy of the leave application when the leave application is filed. Finally, in the case of a prison-filed or self represented leave application, the court provides a copy to the Crown respondent.

B. First Level Appeals – Combined Hearing to summary

[227] There are very few situations where leave is required to appeal conviction or sentence and these are limited to appeals which are made to the Court of Appeal.[115] The prevailing practice for leave associated with a first level appeal seems to be that the application is considered to be part of the notice of appeal, with leave being granted at the start or end of the

[114] *Criminal Code*, s. 839(1). See also summary in Appendix A.

[115] *Criminal Code*, ss. 675(1)(a)(ii)-(iii), 675(1)(b), 676(1)(d), 676(1.1).

appeal hearing.[116] Without a consistent procedure for processing applications for leave to appeal, it may not be clear to an appellant how leave is requested and granted.

[228] In terms of how to process a leave application, there are benefits to bundling the question of leave with the appeal on the merits. Dealing with all related matters at the same time simplifies scheduling, eliminates problems arising from having to "double serve" an accused respondent and minimizes court appearance costs. In addition, economies of effort may be realized with a combined approach in situations where leave is granted.

[229] The existing practice of considering leave to appeal applications together with the substantive appeal is an efficient use of legal and court resources. This said, it was proposed in CM 12.22 that the process for a combined leave application should be clarified to prevent the leave application from being lost in the substantive argument and to ensure that the court has sufficient information to make a decision on the question of leave. In particular, CM 12.22 suggested that the appellant's request for leave to appeal and the reasons why it ought to be granted should be clearly expressed.

[230] CM 12.22 also put forward a procedure for processing a leave application together with the substantive appeal which, in summary form, stated that if a party requires leave to appeal a criminal trial outcome or other decision at first instance, the question of leave should be addressed as a necessary first part of the appeal process.

[231] Only one group commented and observed that the existing practice of combining leave applications with the substantive appeal for first level

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[116] See r. 849(2)(3) which states:

> 849(2) An application for leave to appeal to the Court shall be made by the filing of a notice of appeal, pursuant to these rules, and no further notice is required.
>
> (3) Where the Court grants leave to appeal, it may at once determine the appeal on its merits or it may direct that the appeal be heard at a later time.

See also criminal notice of appeal forms A (Appellant not represented by Counsel) and B (filed by counsel for an Appellant or on behalf of the Attorney General) which provide less and more descriptive check boxes, respectively, to request leave. The practice of processing leave for sentence and conviction appeals at the time of hearing is also noted on the Court of Appeal of Alberta, "Criminal Notice of Appeal - Check/Return Form." These forms are available from the court and online: Alberta Courts <http://www.albertacourts.ab.ca/>.

The leave practice observed in appeal hearings as to fitness of sentence was that the substantive arguments on the merits of the appeal were presented. If the court allowed the appeal, it then verbally granted leave to appeal before issuing the decision on the merits. If the appeal was not allowed, the court dismissed the appeal and made no reference to leave.

appeals to the Court of Appeal is an efficient use of court resources. This group expressed concern that implementing the proposal would require the preparation of separate documentation, specific submissions and reasons related to leave which is not currently required. Further, these additional requirements would serve no useful purpose without the related information on the merits of the appeal. To clarify, the proposal was that a first level leave application should continue to be combined with the notice of appeal document.

[232] Only one commentator responded on the issue of first level leave and noted that the proposed requirements would add technical complexity to what is currently a simple process. In the interest of access to justice, the recommended procedure for combined leave applications reflects the existing practice as observed in court, noted in comments and partially described in an existing rule.

Recommended Procedure – Leave Process in First Level Appeals

[233] If a party requires leave to appeal a criminal trial outcome or other decision at first instance to the Court of Appeal, the appellant must file a notice of appeal within one month after the date of conviction, acquittal, sentence or other trial decision.[117] The notice of appeal may indicate that the appellant requires leave to appeal.

[234] The matter of leave for first level appeals is considered by the court as part of the appeal.[118]

C. Second Level Appeals – Separate Hearing to summary

[235] There are also benefits to processing a leave to appeal application by way of a proceeding that is distinct and precedes the substantive appeal process. In particular, a separate leave application focusses specifically on the leave related aspects of the case and can be processed in an efficient, timely manner. Another benefit is that the separate leave application process may afford the opportunity to identify and eliminate improper appeals before substantial amounts of legal or court resources have been expended.

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[117] See rr. 843, 849(2).

[118] See r. 849(3).

[236] For second level appeals, it is suggested that the application for leave to appeal should be processed by way of a separate, distinct proceeding with a hearing dedicated solely to addressing the merits of the leave application.[119] One of the reasons for this approach is that it can be challenging to establish and argue the technical grounds on which leave to appeal the decision of an appellate court may be granted. All participants benefit from the focussed nature of the separate application proceeding. In addition, it is appropriate to limit the application to consideration of only the leave grounds and arguments given that significant amounts of court and legal resources have already been used to decide the criminal matter at trial and determine the first appeal.

[237] In CM 12.22, the three format alternatives considered for the separate leave application were 'in person,' with oral arguments based on written submissions, 'in writing,' and 'as decided by the duty judge' on an application by application basis.[120] Since counsel and the court are most familiar with the 'in person' format and given the significant efficiency and transparency benefits associated with this approach, the 'in person' option was proposed in the consultation document.

[238] One commentator suggested that either a one or two step process should be used for all leave applications as this would simplify matters. However, given that the legal issues involved in granting leave for a second level appeal are significant, a separate proceeding dedicated to the leave issue is appropriate for these applications. Further, a two step approach would not be appropriate for most first level appeals.

[239] There was a slight inconsistency in CM 12.22 between the descriptions of material that should be provided with a notice of appeal and with a leave application. In both cases, copies of non-disclosure orders, if any, should be provided. The list of information items for a notice of appeal and second level leave application should be similar, as is reflected in this report.

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[119] *Criminal Code,* s. 839(1). In this report "second level appeal" means an appeal from an appeal decision.

[120] The leave procedures in SCC Rules and the criminal leave practice in England and Wales as described by the Right Honourable Lord Justice Auld, *A Review of the Criminal Courts of England and Wales,* (London: H.M.S.O., September, 2001) at 639 both provide that leave applications are determined solely on the basis of written submissions. See also CPD F.5 which states that a leave application may proceed without oral argument.

[240] One group commented on the complexity of second level appeals and suggested increasing both the time to file the leave application and memorandum page length. Further, the group noted that second level appeals are currently governed by a combination of a civil appeal rule (identified as rule 516.1) and CPD F.2(b), which both support the argument for a longer time line and more pages in which to make the leave case. These suggestions are incorporated in the recommended procedure.

Recommended Procedure – Leave Process in Second Level Appeals

[241] A party who seeks to appeal the decision of an appeal court must apply to the Court of Appeal for leave to appeal and the court may grant or deny leave at the conclusion of an application proceeding which is separate and distinct from the appeal on the merits.[121]

[242] Leave applications for second level appeals are to be decided by a single judge on the basis of written materials and oral arguments presented at a hearing before the judge.[122]

[243] The applicant and respondent in a separate leave to appeal proceeding may make a written request to present argument solely in writing, or that the leave hearing be conducted on the basis of written submissions only. The judge assigned to decide the leave application may, at the judge's sole discretion, agree to the request and if so, direct the court to inform the parties accordingly.

1. WHEN AND HOW TO FILE THE SEPARATE LEAVE APPLICATION

[244] An application for leave to appeal must be filed and served within two months after the date of the appeal court decision which the prospective appellant seeks leave to appeal.

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[121] *Criminal Code*, s. 839(1). The three part test for granting leave in a summary conviction matter is described in *R. v. Bennett* (2004), 354 A.R. 6, 2004 ABCA 116 at paras. 9, 10 and 17 [with reference to *R. v. Chaluk (K.W.),* (1998), 237 A.R. 366 (C.A.) at paragraph 7]. The test was affirmed and applied in *R. v. Lund* (2008), 440 A.R. 362 (C.A.), 2008 ABCA 373.

[122] *Criminal Code*, s. 839(1).

[245] If the accused applicant is not in custody or has a lawyer, the leave application must be filed with the registrar of the court and served on the Crown respondent.[123]

[246] An accused who is in custody and does not have a lawyer may file a leave application with the warden of the institution where he or she is held. The warden then forwards the application to the registrar of the court.[124]

[247] If the leave applicant is the Crown, the leave application must be filed with the court and a copy personally served on the accused.[125]

2. WHAT TO FILE IN A SEPARATE LEAVE APPLICATION

[248] The leave application must include, if known:[126]

- the applicant's name and date of birth (for individual accused applicants only),
- the name and location of the court which issued the decision,
- the record or copy of non disclosure order, if applicable,
- the date of the appeal court decision for which leave is sought,
- a copy of the appeal court's decision and reasons,
- the sentence imposed, if applicable,
- the applicant's address or, name and address of applicant's counsel as address for service, if applicable,
- whether the applicant is in custody or not,
- the signature of the applicant or the applicant's counsel,
- a memorandum (maximum 10 pages) which includes

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[123] See for example rr. 844(1)(ii), 845(2). The current practice is that an accused applicant who is not in custody or who has a lawyer must file three copies of the leave application.

[124] See for example r. 844(1)(i). The current practice is that the self represented accused in custody provides 3 copies of the leave application to the warden. The warden endorses the copies, returns one to the appellant, keeps one and sends one to the court.

[125] See for example r. 844(1)(iii). The current practice is that the Crown files 2 copies of the leave application.

[126] Leave application contents based on SCC Rules, r. 25; rr. 846, 849; CPD F.3, F.2(a), F.4(a)(ii), (b), F.9(b); and criminal appeal forms which are available from the Court of Appeal and online: Alberta Courts <http://www.albertacourts.ab.ca/>.

- a concise summary of facts relevant to the leave application,
- the nature of the leave sought (leave to appeal conviction/acquittal, sentence, both conviction and sentence, or other decision),
- the specific grounds (errors of law, fact or otherwise) for seeking leave and how the alleged error affected the outcome, and
- concise reasons for granting leave, with reference to statutory and common law sources, and

- a notice to the respondent about the leave proceeding.

[249] The leave application may also include:[127]

- a request, with reasons, by the parties that arguments be submitted or the hearing conducted solely in writing,
- an affidavit in support of other relief, if any, requested in connection with the leave application, and
- a chronology of trial dates, orders and decisions.

[250] A standard form should be developed for leave applications to the Court of Appeal.

3. COURT OF APPEAL RESPONSE TO A SEPARATE LEAVE APPLICATION

[251] The court responds to a leave application by opening an application file and informing the applicant of the application file number and estimated oral hearing date.

4. RESPONDENT'S ROLE IN A SEPARATE LEAVE APPLICATION

[252] The respondent may file and serve within one month after the date on which the respondent receives notice of the leave application, unless otherwise ordered, a memorandum of law (maximum 10 pages) which must include:

- a concise summary of facts relevant to the leave application,

[127] See SCC Rules, r. 25; CPD F.3(c), F.4(d)(e).

- the specific grounds on which the applicant seeks leave and the respondent's position as to whether the alleged error affected or did not affect the outcome, and
- reasons for denying leave, with reference to statutory and common law sources.

5. OUTCOME OF A LEAVE APPLICATION

[253] If the judge assigned to decide a separate leave application finds that the application or response does not comply with requirements, the judge may[128]

- decide the application based on the materials as submitted and issue an order either granting or denying leave to appeal,
- issue an order that the applicant provide specific additional written materials on a specific date, or
- set a date for oral argument on the leave application.

[254] The judge's decision to grant or deny leave to appeal a summary conviction or acquittal and associated sentence is final and may not be appealed.[129]

[255] If leave is granted, a notice of appeal must be filed and served within 10 days after the date that leave is granted.

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[128] This provision is consistent with the principle of judicial discretion in that the judge decides whether or not the leave application contains enough information to grant or deny leave to appeal. The intent is to improve access to justice by enabling leave applications which are substantially complete to proceed. This provision modifies CPD F.6(a)-(b) which states that the clerk will not accept non-compliant leave applications.

[129] *Criminal Code*, s. 675(4). See also CPD F.9(f).

CHAPTER 4

Interim Relief Pending Appeal

A. Overview of Interim Relief Pending Appeal

[256] A person convicted of an offence and sentenced or adversely affected by some other decision in a criminal matter may seek relief from the effects of the sentence or decision while the appeal is in progress by making an application to the appeal court.[130]

[257] There are two procedures for obtaining sentence relief pending the outcome of a criminal appeal. If the sentence involves penalties such as payment of a fine, restitution of property, a driving prohibition or a short term of incarceration, penalties which typically arise from a summary conviction, the appellant may apply for a stay of the order. If the sentence includes a long period of incarceration or otherwise severe penalty, outcomes which often result from the trial of indictable offences, the appellant may apply for judicial interim release (JIR).

[258] CM 12.22 described the existing practices for stay applications and for obtaining JIR and generally proposed that the practices work well and should be adopted as standard procedures in both courts. The few reform issues were addressed in the context of the relief application process in which they arise. Those who commented added a few clarifications concerning the stay and JIR processes and these points are incorporated, as appropriate, in the final procedures.

[259] The main policies and principles reflected in the recommended interim relief procedures are as follows:

- Common procedures for processing applications for interim relief might make it easier to obtain relief and should be adopted where possible.
- Existing practices and procedures which work well should be affirmed, documented and consistently adopted.

[130] An application to the criminal appeal court is currently described using a number of different terms and phrases, including "notice of motion." In order to reduce confusion, the term "application" is used in this report.

- Centralized appeal processing, if implemented, would allow an appellant to file an application for interim relief at a court close to his or her home or place of incarceration, although the hearing of the application would take place in the appeal court, in accordance with current court practice.
- In order to completely describe the interim relief procedures, coordination activities of court officers are noted.

B. Stay of Order

[260] Applications for a stay of order are common in Queen's Bench and also made by Court of Appeal appellants who seek to delay payment of a fine or a licence suspension. Each court has its own process for stay applications. The Queen's Bench stay process is based on, but is less detailed than, the procedure for JIR and the Court of Appeal's stay process is the same as the JIR procedure, but modified to reflect that the appellant is not in custody.[131]

[261] The consultation document proposed that it might help clarify the criminal appeal process if the steps for making a stay application were standardized and the same process used in Queen's Bench and the Court of Appeal. The proposed stay procedure was modelled on the existing stay application process used in Queen's Bench.[132]

[262] One group with Queen's Bench expertise agreed that the existing process for conducting stay applications is effective. Another group, with Court of Appeal expertise, opposed adopting the proposed stay process as the standard on the basis that there are very few stay applications in the Court of Appeal. In light of these comments, it is concluded that stay applications should be conducted according to the existing practices in each court, although these practices are different.

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[131] *Criminal Code*, s. 816. See also Edward Greenspan et. al., *Martin's Annual Criminal Code 2012* (Aurora: Canada Law Books, 2012) [Martin] at 1624 which states, with reference to *R. v. Simpson*, (1978), 44 C.C.C. (2d) 109 (Ont. Co. Ct.) that where no rules exist for a procedure for relief from summary conviction sentences, the rules for bail pending appeal of indictable matters apply. Further, with reference to *R. v. Anderson,* (1982), 70 C.C.C. (2d) 253 (Ont. Co. Ct.) Martin notes that a judge of the summary conviction appeal court has "inherent jurisdiction" to stay the terms of a probation order issued by the court below.

[132] The process was described by an officer of the Edmonton Court of Queen's Bench.

[263] Of note, applications for a stay or JIR are heard by a duty judge in both courts. Further, it is common for an applicant to request both a stay of certain aspects of a decision and JIR in the same application.

1. COURT OF QUEEN'S BENCH

Recommended Procedure – Stay Application in Queen's Bench

[264] For appeals to Queen's Bench, an accused may apply to stay the sentence or other decision by filing an application with or after the notice of appeal, and serving a copy on the Crown respondent.[133]

[265] If the stay application is not filed at the same time as the notice of appeal, it must include proof that the notice of appeal has been filed.

[266] In order to avoid delay in processing, the stay application should contain, if known:

- the applicant's name and date of birth,
- the appeal or leave application file number, as applicable,
- the date set for hearing the appeal or leave application, as applicable,
- the applicant's address or the name and address of the applicant's lawyer as address for service, if applicable,
- the applicant's address,
- a summary of the reasons for granting a stay of order,
- an affidavit,[134] if applicable,
- a draft stay order (which may include recognizance and undertaking),
- a memorandum (maximum 5 pages) describing the grounds for granting the stay,

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[133] See *Criminal Code*, s. 689(1)(a) which states that the period for appeal as set by the rules of court must expire without action before a trial court order for payment, restitution or forfeiture can take effect.

[134] In this report "affidavit" means a voluntary declaration of facts written down and sworn by the declarant before an officer authorized to administer oaths. The definition is based on *Black's Law Dictionary*, 7th ed., *s.v.* "affidavit" [*Black's*].

- a copy of the appealed decision with reasons, if available, and
- proof that the applicant has ordered a transcript in support of the appeal or written reasons addressing why the transcript has not been ordered.

[267] Upon receipt of a stay application, the court officer

- sets a hearing before a duty judge,[135] and
- informs the applicant and respondent of the hearing date, place and time.

[268] The respondent may file materials with the court and serve a copy on the applicant within 5 days after receiving a copy of the stay application. The respondent's materials may include:

- a statement that the respondent consents to the stay application, or
- a memorandum (maximum 5 pages) which describes the respondent's reasons for opposing the stay application in its entirety or any of the proposed terms of the applicant's stay order, and
- the respondent's proposed draft of a stay order, if any.

[269] Each party presents oral argument at the hearing of the stay application for 15 minutes, or for such other amount of time as determined by the duty judge.

[270] A stay applicant who is in custody and represented by counsel is entitled to attend the hearing of the stay application.

[271] The judge, if satisfied that the stay application meets the *Criminal Code* criteria, may issue the stay order and grant relief upon the applicant entering into the recognizance and undertaking before a judge or justice of the peace.[136]

[272] In the event the trial decision that is under appeal requires restitution of property, any stay issued must include an order which

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[135] In certain circumstances, the court may refuse to set a hearing date for the stay application until the applicant proves that a transcript to support the appeal has been ordered.

[136] *Criminal Code*, ss. 679(1)-(10), 816, 831, 832, 834.

secures the safe custody of the property pending the outcome of the appeal.[137]

2. COURT OF APPEAL

Recommended Procedure – Stay Application in the Court of Appeal

[273] For appeals to the Court of Appeal, an accused may apply for a stay of decision by following the process for obtaining judicial interim release, with modifications as necessary to reflect that the stay applicant is not in custody.

C. Judicial Interim Release

[274] The *Criminal Code* provides that a person in custody may apply to a duty judge for JIR pending the outcome of the appeal, sets criteria for making a release decision and stipulates the type of financial and personal conditions that may be ordered in connection with the release.[138]

[275] The detailed provisions in the *Criminal Code* and the fact that the *Code* is frequently amended, combined with the need to maintain operational flexibility in order to benefit from administrative and technological initiatives over time, make it challenging to describe the JIR process. The key factor which makes it less difficult to document the JIR process is that there is only one process. Most applications for JIR are made in connection with appeals to the Court of Appeal. The Court of Queen's Bench uses the Court of Appeal's procedure, with minor modifications, to process the few JIR applications that are made to Queen's Bench.[139]

[276] It was suggested in CM 12.22 that describing the key statutory provisions for obtaining JIR in the same place as the other procedural

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[137] Rule 860.

[138] *Criminal Code*, ss. 679(1)-(10), 816(1)-(2), 831, 832, 834. See also CPD E.3(b)-(c), CPD I.19 and "CPD Form A - Order for Judicial Interim Release" which is available from the Court of Appeal and online: Alberta Courts <http://www.albertacourts.ab.ca/>. It should be noted that the Crown can apply to have judicial interim release revoked.

[139] See r. 860.7(1)-(2). See also Martin, note 131, at 1624 concerning *Criminal Code*, s. 816 which states that principles for release applied to indictable matters also apply to releases pending appeal from summary convictions and refers to *R. v. Simpson* (1978), 44 C.C.C. (2d) 109 (Ont. Co. Ct.) as authority for the position that if there are no specific rules of court governing judicial interim release in summary conviction matters, then the rules for indictable matters apply by analogy.

requirements for making a criminal appeal might make it clear to appellants that, although sentence relief is available pending appeal, it is not an automatic part of the appeal process. Further, it might also help appellants understand how to apply for JIR and on what terms it may be granted.

[277] CM 12.22 proposed that the benefits of outlining JIR procedures in the rules outweigh the difficulties, and that JIR procedures could be clarified by restating the *Code* provisions in simple form with an emphasis on the process together with the other court requirements and practices which apply.

[278] One group observed that an example of process innovation noted in CM 12.22 is not related to obtaining JIR pending the outcome of a criminal appeal. The example was not intended to create confusion. Rather, it was included only to support the case for maintaining procedural flexibility in JIR applications. Flexibility is necessary given the possibility of *Code* changes and to preserve the high degree of judicial discretion that is appropriate to these applications.

[279] Another group noted that the proposals indicate that when leave is required, it must be applied for or obtained before a JIR application can be made. In practice, the application for leave and JIR are usually filed together, with the leave application processed before the JIR. The practice of processing the leave and JIR applications at the same hearing is efficient and should be used whenever practical.

1. WHEN TO FILE A JIR APPLICATION

Recommended Procedure – Time to File JIR Application

[280] An accused may file and serve on the Crown respondent an application for JIR[140]

- after the notice of appeal is filed,
- if leave is required, after or at the same time as the application for leave is filed, or
- in the case of a sentence only appeal which requires leave, after leave has been granted.

[140] *Criminal Code*, ss. 679(1)(a)-(c); r. 860A(1), (3) and (4).

2. WHAT TO FILE IN A JIR APPLICATION to summary

[281] The guiding premise is that the JIR application should contain as much information as is necessary to accurately identify the appellant and appeal file, satisfy statutory requirements, give notice to the respondent and support a decision of the court.[141] A number of factors were considered in developing the lists of information that may be required to support a JIR application, the main factors being the appropriateness of the item and the possibility that an applicant would be able to comply with the requirement.

[282] A duty judge may hear a JIR application on its merits even if some information items are missing, provided the requirements of the *Criminal Code* are satisfied.[142] An accused may therefore file a JIR application without including all of the items listed, as long as any information or documentation required under the *Code* is included. However, applicants who make incomplete filings should be aware that the court may dismiss or adjourn the JIR proceeding because information is missing. For example, the Crown may object to conducting the JIR hearing until such time as the applicant's criminal record has been disclosed.

[283] To the extent information has already been filed by the appellant as part of the appeal package, it is suggested that an extra copy is not needed to complete the JIR application. In addition, the applicant is encouraged to make specific references to authorities and to avoid filing complete copies of legislation or cases.

[284] No commentators disagreed with the proposals contained in the consultation document. One group, however, suggested that existing practice directions used with the *Criminal Code* provisions may provide the expeditious and flexible procedures needed to process JIR applications and that care should be taken to avoid implementing rules that are too restrictive.

[285] The recommendations concerning JIR applications are written to reflect the *Criminal Code* provisions in effect as of January, 2012. Given that

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[141] The JIR application content largely reflects CPD F.2(a)-(b), (e), F.3(a)-(b), and is intended to be consistent with other requirements for criminal appeal materials. A backer or specific notice/warning to the respondent is not required.

[142] *Criminal Code*, ss. 503, 515-523, 547, 597(3), 672.17, 672.18, 672.35, 672.46, 672.77, 767.1, 768, 769, 816-820.

the *Code* is amended on a regular basis, it becomes increasingly important as time passes that readers review the referenced sections.

Recommended Procedure – JIR Application Content

[286] The JIR application must include proof that a notice of appeal or application for leave to appeal has been filed.[143]

[287] The JIR application must include, if known:

- the applicant's name and date of birth,
- the applicant's FPS number or CoMIS number, if applicable,
- the appeal or leave application file number,
- the date set for hearing the appeal or leave application, if available,
- the name and address of the prosecutor and others, if any, that the applicant is required to give notice of the application to,
- the applicant's address or the name and address of the applicant's counsel as address for service, if applicable,
- the applicant's place of incarceration, and
- a summary of grounds for granting JIR.

[288] In order to avoid processing delays, it is strongly recommended that the JIR application also include the following items:

- an affidavit,
- a draft release order that states the recognizance and undertaking,[144]

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[143] Rule 860A(1).

[144] "Recognizance" means a bond or obligation made in court by which a person promises to perform some act or observe some condition such as to appear when called, to pay a debt or to keep the peace. In a criminal case when the court takes an accused's word that he or she will appear when the matter is scheduled to be decided or when told to appear, it is called a "personal recognizance". In the case of a personal recognizance the accused is relieved of the obligation of posting money or having a surety sign a bond. See *Black's*, note 134, s.v. "recognizance" and "personal recognizance". See also *Criminal Code*, s. 493:

> 493. In this Part, ...
>
> "Recognizance" when used in relation to a recognizance entered into before an officer in charge, or other peace officer, means a recognizance in Form 11, and when used in relation to a recognizance entered into before a justice or judge, means a recognizance in Form 32.

(continued...)

- a memorandum (maximum 5 pages) describing the grounds for granting the JIR application,
- a copy of the order granting leave, if applicable and not already on file,
- a copy of the appealed decision with reasons, if available, and
- proof that the applicant has ordered a transcript in support of the appeal or written reasons addressing why the transcript has not been ordered.

[289] The applicant's affidavit must include, if known:[145]

- the applicant's place of abode for the 3 years prior to conviction,
- the place where the applicant will reside if released,
- the applicant's employment prior to conviction,
- whether or not the applicant will be employed if released,
- the applicant's criminal record, including prior convictions in other jurisdictions, if any,
- criminal charges pending against the applicant, if any, and
- the date and signature of the applicant.

[290] The draft JIR order must include:[146]

- mandatory undertakings to[147]
  - keep the peace,
  - report to court in person when required by the court,
  - remain in a specified location,

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[144] (...continued)

"Undertaking" means a promise, pledge or engagement, based on *Black's*, note 134, *s.v.* "undertaking". The *Criminal Code*, s. 493 states that "'undertaking' means an undertaking in Form 11.1 or 12".

[145] Rule 860B(2)A.

[146] See CPD E.3(b)-(c). It seems that a draft order is prepared in advance of the hearing by the applicant based on direct discussions with the respondent.

[147] *Criminal Code*, ss. 816(1), 679(5), (5.1), (9), Form 12, Form 32. See also r. 860B(2)B and CPD E.3(b)-(c).

    - pursue the appeal with due diligence, and
    - abide by other conditions as set by the court, specified by statute or required under rules of court,
- a recognizance with or without deposit of cash or valuable security or sureties, if any,
- release order requirements that the accused appellant
    - personally attend the appeal hearing,
    - show picture identification at the start of the hearing, and
    - surrender themselves into custody of a peace officer, pending outcome of the appeal hearing, and
- the signature of the applicant or the applicant's lawyer.

[291] The applicant's memorandum (maximum 5 pages) must include:[148]

- a concise summary of facts relevant to the application for JIR,
- a statement of the relief sought,
- the grounds and reasons for granting JIR, with concise reference to statutory and common law sources,[149] and
- other materials or evidence necessary to the application, if any.

[292] The JIR application should also indicate whether the applicant intends to attend the JIR hearing or not.

3. ADMINISTRATIVE COORDINATION OF JIR APPLICATION to summary

[293] In order to eliminate a number of steps and enable JIR applications to be processed more quickly, CM 12.22 proposed that the court forward copies of applicant and respondent materials, together with details

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[148] The requirements are based on CPD F.1(a)-(c), F.2(a)-(c), (e), F.3(a)-(c) and 4(a)-(b), (d) as modified to conform with the other requirements for criminal appeal materials described in this report.

[149] What are the grounds for granting JIR? The *Criminal Code,* ss. 679(3)-(4) provides that for both conviction and sentence appeals, the JIR applicant must establish that detention is not necessary in the public interest and promise to surrender into custody in accordance with the terms of the release. In addition, in the case of a conviction appeal, the applicant must show that the appeal or leave application is not frivolous. In the case of a sentence appeal, the applicant must also prove the appeal has sufficient merit such that keeping the appellant in custody causes unnecessary hardship.

concerning the JIR proceeding to the parties instead of the parties informing each other. This court communication function, if not fully adopted, should at least be considered for cases where the JIR applicant is not represented by counsel.

[294] One individual expressed concern that implementing this proposal would have a significant impact on staff resources. One group repeated its comment that the Registry is not able to and should not take on additional copying and forwarding tasks. Another group observed that it would not be onerous or unreasonable for the court to inform the other party if the JIR applicant is not represented by a lawyer. However, this group also noted its concerns that the proposals impose new responsibilities on court officers, the court does not have the resources to take on these tasks and that providing copies of application and response materials to the other side is the responsibility of the applicant and respondent, respectively.

[295] Consistent with the policy noted earlier in this report, the obligation to file JIR materials and serve them on the other side remains with the applicant or respondent, as applicable. This said, the provisions concerning applicant and respondent obligations to serve JIR materials are not intended to affect how the court may exercise discretion to facilitate the efficient conduct of any particular JIR hearing.

Recommended Procedure – Court Response to JIR Application

[296] Upon receipt of a JIR application, the court officer

- sets a date for a hearing before a duty judge,[150] and
- informs the applicant and respondent of the hearing date, location and time.

[150] Of note, a court officer may refuse to set a hearing date for a JIR application which does not include a copy of the decision with reasons, proof that a transcript has been ordered or, for release applications arising from a jury trial conviction, a transcript which includes the charge to the jury. Further, CPD E.3(a) requires that materials necessary to support the appeal must be filed or ordered before JIR can be granted.

4. CROWN RESPONDENT'S ROLE IN JIR APPLICATION

Recommended Procedure – Crown Respondent's Role in JIR Application

[297] The respondent may file an affidavit and a memorandum and serve a copy on the applicant within 5 days after receiving notice of the JIR application.[151]

[298] The respondent's affidavit must include:

- the date on which the respondent received notice of the JIR application,
- a concise summary of the facts relevant to the application, and
- a statement as to whether the respondent will participate in the application hearing in person or in writing.

[299] The respondent's memorandum (maximum 5 pages) must include:

- the respondent's position and reasons for agreeing, agreeing subject to modification to release conditions, or opposing the JIR, with reference to statutory and common law sources,
- other material or evidence necessary to support the respondent's position, if any
- the date prepared, and
- the signature of the respondent or the respondent's counsel.

5. JIR HEARING AND ORDER to summary

[300] Two benefits of having the applicant at the hearing are that the court may be better able to assess the applicant's understanding of release conditions and the applicant is able to immediately agree to new or modified conditions. The main barrier to personal participation is that it may not be practical to bring the applicant to court. For this reason, applicants who are represented by counsel usually do not attend the JIR

[151] CPD F.2(c)(ii).

hearing and CM 12.22 proposed that an applicant who wishes to attend should seek court permission to do so.[152]

[301] Two groups supported the attendance proposals put forward in CM 12.22. However, two lawyers commented that the default position should be that an accused applicant attends the JIR hearing, unless he or she expressly does not want to be there. One of these lawyers also recommended participation in JIR hearings by electronic means.

[302] Similar concerns were raised by the defence lawyers concerning appeal hearing attendance and were addressed by stating that a represented accused should attend the appeal hearing. Although the substantive law considerations applicable to attendance at a JIR hearing are different than those associated with an appeal hearing, it is similarly recommended that a represented JIR applicant attend the JIR hearing.

[303] A related question not addressed in the consultation document is raised in this report for information purposes. In particular, is there, or should there be, a requirement that the criminal trial complainant be notified prior to the release of an accused who is granted JIR pending appeal? Although there is a general, principled willingness to provide information to a victim concerning matters such as the status of the offender and court procedures, the provision of information is contingent on a victim's request, subject to a number of limitations and the legislation is not specific in terms of who should provide the information.[153] It may be

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[152] A represented JIR applicant often signs a form which states that he or she does not want to attend the JIR hearing and affirms that counsel is authorized to act on his or her behalf.

[153] *Victims of Crime Act*, R.S.A. 2000, c. V-3, ss. 2(1)(g), 4(1)(2) state:

> **Principles**
>
> 2 (1) The following principles apply to the treatment of victims:
>
> (g) information should be provided to victims, in accordance with prevailing law, policies and procedures, about the status of the investigation, the scheduling, progress and final outcome of the proceedings and the status of the offender in the correctional system;
>
> **Information**
>
> 4 (1) Subject to the limits imposed by the availability of resources, enactments, including the *Youth Justice Act* and the *Youth Criminal Justice Act* (Canada), and other limits that are reasonable in the circumstances of each case, a victim, on request and at the earliest opportunity, is to be provided with information by the person or agency that has the information with respect to the case, on
>
> (a) the status of the police investigation and any prosecution that results from that investigation, if the information does not harm a law enforcement matter nor harm investigative techniques and procedures currently used, or likely to be used, in law enforcement;
>
> (b) the role of the victim and of the other persons involved in the prosecution of the offence;
>
> (c) court procedures;

(continued...)

good policy and practice to inform a complainant when an accused is released pending appeal, regardless of whether the complainant asked to be informed or not. Perhaps a more direct, court provided, public notification system should be considered.

Recommended Procedure – JIR Hearing Attendance and Order

[304] A JIR applicant who is represented is entitled to attend the hearing of the application with his or her lawyer.

[305] In exceptional circumstances, a party may apply to participate in the JIR hearing by telephone, video conference or any other electronic means as determined by the duty judge.

[306] The duty judge establishes the order of speaking and amount of time each side is allotted to present oral argument and, at the conclusion of the hearing, issues a decision to grant or deny the application for JIR.[154]

[307] The duty judge may not grant JIR until the applicant shows proof that the transcript and other material, if any, necessary to support the appeal have been ordered, or filed, as applicable.[155]

[308] If JIR is denied in connection with an appeal of an indictable matter, the duty judge may give directions to expedite the hearing of the criminal appeal or any other related proceeding.[156]

[309] The JIR application of a person convicted of a *Criminal Code* s. 649 offence or prohibited from driving may, on application of either party and subsequent order of the Chief Justice of the Court of Appeal, or her

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[153] (...continued)

> (d) any opportunity for the victim to make representations to the court on the impact of the offence on the victim.
>
> (2) For the purposes of this section, "victim" in relation to an offence means a person to whom harm has been done or who suffers physical or emotional loss as a result of the commission of the offence and, if the person is dead, ill or otherwise incapable, includes the spouse or adult interdependent partner or any relative of that person or anyone who has custody of that person in law or in fact or who is responsible for the care or support of that person.

See also *Canadian Statement of Basic Principles of Justice for Victims of Crime*, Department of Justice, online: Department of Justice Canada <http://www.justice.gc.ca/eng/pi/pcvi-cpcv/csbp-ecpf.html>.

[154] Based on observation of JIR hearings, it seems that most of the time is spent negotiating release terms and conditions with the duty judge.

[155] See CPD E.3(a). JIR for appeals which require leave to appeal will not be granted unless leave to appeal has been obtained, see CDP F.9(d) and r. 860A(2). However, an application for leave to appeal may be combined and heard with a JIR application, see r. 860A(3).

[156] *Criminal Code*, s. 679(10).

designate, be heard a second time by a single judge or panel of the Court of Appeal.[157]

[310] If JIR is denied in connection with a summary conviction appeal there is no right to appeal the JIR decision.[158]

[157] *Criminal Code*, ss. 680(1)-(3). See also Martin, note 131, at 1351. This provision includes applications for JIR pending appeal to the Supreme Court of Canada.

[158] *Criminal Code*, s. 816. See also Martin, note 131, at 1624. If the Court of Appeal is the appeal court of first instance by the operation of s. 830, it would seem that the decision to deny JIR would have the same outcome.

CHAPTER 5

Court Assistance

A. Overview of Court Assistance to summary

[311] There are a number of procedural matters that may require court assistance to ensure the just, orderly and timely conduct of the appeal. Some court assistance processes involve making a properly supported application to the court and others are less formal.

[312] This chapter identifies matters that court officers, duty judges and hearing judges or panels are often asked to help with and describes how the court processes the requests. The existing methods for obtaining court assistance seem to be effective and efficient. CM 12.22 proposed that these methods be adopted as standard procedures and suggested solutions for the few issues associated with court assistance processes. This chapter concludes by briefly discussing whether an interim decision of the court can be appealed.

[313] The main policies and principles reflected in the court assistance chapter are that:

- A common approach to getting court assistance should make it easier to get help, regardless of which court is hearing the appeal.
- Accessing court help may be more efficient if parties can easily know whom to ask for assistance (i.e. when to ask a court officer, duty judge or the hearing judge or panel).[159]
- A prompt resolution of procedural issues can help keep the main appeal on track, therefore, the time periods, if any, that are suggested for assistance proceedings are intended to be short, yet practical.
- Existing practices and procedures which work well, should be affirmed, documented and consistently adopted.

[159] As indicated in Chapter 2, "court officer" means the registrar, deputy registrar, case management officer or clerk of the court. References to the "registrar" should be interpreted as including not only the registrar and his or her designate, but also other court officers working under the registrar, unless otherwise provided.

"Duty judge" means a single judge in appearance, arraignment or motions court or in chambers.

- Central appeal coordination, if implemented, would allow an appellant to file an assistance application at a court that is closest to his or her home or place of incarceration, although the hearing of the application would be in accordance with current court practice.

B. How to Get Court Assistance

[314] The existing practices for obtaining court assistance in Alberta reflect the concept of fair notice. All applications for court guidance must be with notice to the other side so that the application can be processed in a timely and effective manner. In addition, a party to an appeal, especially in the Court of Appeal, is encouraged to discuss procedural questions with a court officer before making an application for assistance as this is often the most efficient way to determine how to proceed.

[315] There does not appear to be a clear consensus on which procedural matters are routine administration and which require an exercise of judicial discretion to resolve. What is clear is that matters are regularly resolved by court officers, duty judges and hearing judges or panels and that documenting which matters can be addressed by each would be a simple and effective way to clarify how to get court assistance, without creating new interpretation issues.

[316] CM 12.22 proposed that if it is not clear whether an issue falls within the purview of a court officer, duty judge or the hearing judge or panel, the party seeking court assistance should direct a written question to a court officer in order to find out how to obtain assistance.

[317] Most of the proposals in the court assistance chapter of CM 12.22 and the recommended procedures in this report describe or refine existing practices. A few of those who commented on CM 12.22 helped clarify the court assistance processes. In particular, one group accurately identified judges as the source of procedural guidance in unusual circumstances that are not contemplated by standard court procedures. Although the proposal in CM 12.22 encouraged an appeal participant to contact a court officer to ask about the appropriate way to proceed if he or she is uncertain, and a court officer would be able to advise as to the appropriate process in most situations, there was no proposal for what happens in unusual situations.

[318] In this regard, unusual or special circumstances require that procedural guidance come from a judge rather than a court officer. However, obtaining such guidance does not require a special appearance before a judge in chambers. A duty judge sitting the Queen's Bench criminal appearance court or in a regular day court could provide procedural direction.

[319] One individual cautioned that implementation of assistance proposals which require the use of judicial resources to resolve procedural matters, in particular to authorize practices which differ from the rules or to manage appeal proceedings, would be subject to judicial resource availability. In this regard, there is no disagreement that operational matters must be taken into account in order to implement a criminal appeal process that is accessible and functional.

[320] In addition, one group's comments concerning existing court assistance practices in the Court of Appeal indicate that these practices are generally more flexible than those described in the rules or proposed in CM 12.22. Flexibility is an important element of an accessible criminal appeal process.

Recommended Procedure – General Practice for Obtaining Court Assistance

[321] If it is not clear whether a matter falls within the purview of a court officer, duty judge or the hearing judge or panel, or if a party is unsure as to how to proceed with an appeal matter, the party may direct a written question to a court officer in order to obtain information.

[322] In the event a party's question concerns special or unusual circumstances not contemplated by standard appeal procedures, guidance as to how to proceed must be obtained from a judge.

C. Assistance from Court Officer

[323] Access to justice and the other benefits of delegating administrative authority to court officers are well known and reflected in legislation and existing practices.[160] Court officers in the Court of Queen's Bench and the

[160] See for example *Court of Appeal Act*, R.S.A. 2000, c. C-30, s. 14(2)(c) which provides that court officers may accept non-compliant appeal filings in some situations.

Court of Appeal help ensure the timely, effective processing of criminal appeals by resolving issues concerning the appeal hearing date, material filing dates and appeals which are abandoned before the hearing. The procedures for obtaining court officer assistance in each situation outlined below work well and should be continued.

1. CHANGING AN APPEAL HEARING DATE

[324] In response to CM 12.22, one group described the process for changing an appeal hearing date as a process based on consent. In particular, this group indicated that both parties must provide written consent to changing the date and to the new date, with the change then being subject to the discretion of the court. Consent of the parties is a factor that the court may consider when exercising discretion to change an appeal hearing date. However, the decision to modify dates set by the court is made solely at the court's discretion.

Recommended Procedure – Changing Appeal Hearing Date

[325] If a party to an appeal seeks to change the hearing date, the party must inform the court officer, in writing, of the situation and ask that a new appeal hearing date be set. As part of the written request to change the hearing date, the party should show that the other side consents to the request for change and the proposed new hearing date, if any. The new hearing date may be earlier or later than the original date.

[326] Changes to appeal hearing dates are made at the court's discretion.

[327] If the court officer decides to set the hearing for a different date, the court officer informs the parties, in writing, of the new date.[161] If the matter has been assigned to a specific hearing judge or panel, the officer also notifies the judge or panel.

[328] If the court officer declines to change the hearing date, the party may file and serve an application to change the hearing date, which will be heard by a duty judge.

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[161] It may be helpful to identify some of the factors that the court officer considers when making a decision to change the hearing date, such as the content of the appeal file, the court's state of readiness to hear the matter, the calendar of all available hearing dates (including dates that may be earlier than the original hearing date), and the willingness of the other party to proceed on a different date.

2. CHANGING SUPPORT MATERIAL FILING DATE to summary

[329] In response to CM 12.22, one group commented that filing dates can only be changed at the direction of a judge or duty judge. This comment is not entirely inconsistent with the CM 12.22 proposal. In particular, if a party were to ask the court officer to change filing dates, the idea is that the court officer would assess the status of the appeal file and respond in accordance with established administrative protocols. These protocols may include seeking direction from a judge or duty judge. If it is clear to the court officer that the dates cannot simply be changed, the party would then need to apply for an order or direction to set new filing and possibly hearing dates.

Recommended Procedure – Changing Support Material Filing Date

[330] If a party to an appeal is not able to meet the date set for filing materials, the party must inform the court officer, in writing, of the situation and request that a new filing date be set.[162]

[331] If the request for a new filing date is granted, the court officer notes the new filing date on the appeal file and notifies the other party. If the court officer denies the request for a new filing date, the party may file and serve an application to set new filing dates, which will be heard by a duty judge.

3. ABANDONING AN APPEAL BEFORE THE HEARING DATE

Recommended Procedure – Abandoning an Appeal

[332] An appellant may abandon an appeal at any time before the start of the hearing by filing with the court officer a notice of abandonment that is signed by the appellant or the appellant's lawyer. If the notice of abandonment is signed by the appellant, the signature must be verified by

[162] It is not suggested that the factors that a court officer considers when making the decision to change a filing date be specified. Court assistance is usually sought to extend the time to file materials. However, if a party seeks to shorten the appeal process by establishing early filing and hearing dates with the court officer, this should be done at the outset of the appeal by opting for an expedited process similar to that described in Chapter 2. If the interest in expediting the appeal develops after the appeal is underway, the court officer is likely to direct the party to make an application to a duty judge.

affidavit, witnessed by a lawyer or witnessed by an official of the institution in which the appellant is confined.[163]

[333] The court officer, if satisfied that the notice meets the procedural requirements, formally records the abandonment on the appeal file, notifies the respondent that the appeal is abandoned and cancels the appeal hearing.

[334] If the court officer finds that the notice does not meet the requirements or is otherwise unclear as to the appellant's intent, the court officer may take actions as needed to clarify and affirm the intent of the appellant and will not formalize abandonment of the matter until satisfied.

D. Assistance from Duty Judge to summary

[335] The benefits of the court maintaining oversight of criminal appeal proceedings by way of duty judge involvement include increased clarity and efficiency. The main premises underlying the procedures described below are that variations to court rules should be granted only on the basis of written requests and that directions and orders issued by the court should also generally be in writing and, if applicable, specify new dates or other requirements.[164] Court assistance with procedural issues can be obtained by submitting an application or making a request to a duty judge in a number of situations.[165] In particular, an accused or the Crown may

- request an extension of time to appeal or seek leave to appeal,
- apply for a change to a time period within an appeal proceeding in the event a court officer has refused an appeal party's request for such change,
- ask permission to submit materials that may not strictly comply with requirements,

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[163] Rule 860C(1).

[164] Of note, non compliance with rules does not render an appeal proceeding void. In order to resolve compliance issues, the court can amend, modify, set aside or otherwise deal with the rules as it sees fit; see rr. 840(4) and 860.9(1). See also Court of Appeal of Alberta Project Team, *Criminal Rules Project: Working/Discussion Paper Draft*, (2000) [unpublished] at 10, proposal 5.(1).

[165] See also Chapter 4, applications for a stay of order or judicial interim release are made to a duty judge.

- request guidance concerning a missing respondent,
- apply for procedural guidance and directions,
- seek to withdraw,
- apply for intervener status,
- apply for or request appeal management assistance, or
- apply for summary dismissal of an appeal to Queen's Bench.

1. EXTENDING TIME TO FILE NOTICE OF APPEAL OR LEAVE APPLICATION

Recommended Procedure – Extending Time to File Notice or Leave Application

[336] If an appellant seeks to file a notice of appeal or make an application for leave to appeal out of time, the appellant must get a fiat from a duty judge to do so.[166]

[337] The appellant must submit a written request to file out of time to a duty judge. The request must:

- note the date when the appeal should have been started,
- ask the court to set a new date,
- request that the court accept the notice of appeal or leave application for filing on the new date, and
- be attached to a notice of appeal or leave application, as applicable.

[338] The duty judge reviews the request to file out of time and may grant a fiat by signing the request.[167]

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[166] *Criminal Code*, ss. 815(2), 678(2). See also r. 860.8(1)(a), CPD I.24(a)-(b) and Martin, note 131, at 1343 with reference to *R. v. Stokes and Stevenson* (1966), 57 W.W.R. 62 (Man. C.A.) which notes that the *Criminal Code* does not authorize the registrar of an appeal court to extend the period for commencing a criminal appeal. The proposal reflects the principle that only a judge has the authority to issue a fiat.

Fiat (Latin for "let it be done") means a court order or decree in connection with a routine, administrative matter, definition based on *Black's*, note 134, *s.v.* "fiat".

[167] The steps are a slightly more formal codification of the existing practice in Queen's Bench whereby an appellant informs the court that a filing is late and asks for the extension of time.

2. CHANGING TIME PERIODS AFTER COURT OFFICER REFUSAL

Recommended Procedure – Changing Time Periods After Court Officer Refusal

[339] If a court officer denies a request for a new hearing or filing date, a party may apply to a duty judge for a new hearing or filing date.

[340] An application to change the date of an appeal or application hearing must be filed and served on the other side on a date that is not less than one month before the original date set for the hearing. The application should include:[168]

- reasons why the matter cannot be heard on the scheduled hearing date,
- evidence in support of the reasons,
- a proposal concerning, and commitment to, a proposed new date for the hearing, and
- copies of other orders or directions, if any, which previously modified time periods associated with the appeal.

[341] A duty judge, on application or the court's own motion, may direct or order a change to a time period in which a party is to submit materials in support of an appeal.[169]

3. FILING A NON-COMPLIANT DOCUMENT

[342] One group specifically agreed with many of the assistance proposals put forward in CM 12.22, including the description of the fiat process for filing out of time or non-compliant documents and added to the discussion on this matter. If a party cannot obtain a fiat, he or she can

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[168] *Criminal Code*, s. 824; CPD I.11, CPD F.6(c). See also CPD I.16(b) and r. 840(6.2). The procedure contemplates that hearing dates would be changed or adjourned as a result of an application proceeding, although nothing requires that the court exercise judicial discretion in this manner.

[169] See r. 860.8(1)(a)-(b) and CPD I.24(a)-(b). Ewaschuk, note 17, at 24:1110 notes that extensions of time in summary conviction appeals are discretionary and awarded in the same manner as those granted in connection with indictable offences, that is, generally not as a result of an *ex parte* application.

It is contemplated that applications for extensions of time periods would only be brought before a duty judge if a court officer determined that the extension should not be accommodated.

still make an application to the court, with notice to the other side, for an order allowing a document to be filed.

Recommended Procedure – Filing Non-compliant Document

[343] A party to an appeal who submits a non-compliant document must get a fiat from a duty judge before the document can be filed.[170] The party seeking the fiat must submit a written description of the discrepancies between the document and the requirements and a specific request that a fiat be granted, together with the proposed document to a court officer.

[344] If a fiat is granted, it must be in writing, filed with the non-compliant document and a copy of the fiat must be provided to the other party in the appeal.

4. INFORMING A MISSING RESPONDENT

Recommended procedure – Informing a Missing Respondent

[345] In the event the respondent to an appeal cannot be located, the appellant may make a written request asking the court to set an acceptable method and time frame for communicating information to the respondent.[171]

5. SEEKING ADVICE AND DIRECTION OF THE COURT

Recommended procedure – Seeking Advice and Direction of the Court

[346] A party to an appeal may apply to the court for advice or directions concerning how to proceed in specific circumstances.

6. LAWYER APPLYING TO WITHDRAW to summary

[347] The principles of fairness and proper administration of justice dictate that a lawyer who seeks to withdraw from representing a criminal

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[170] The provision reflects the existing practice in Queen's Bench. It also incorporates the approach to non-conforming sentence appeal materials as described in CPD I.4(j) and I.5(h), modified to reflect Alberta Law Reform Institute, *Civil Appeals,* Consultation Memorandum 12.21 (2007) at para. 366 which recommends that the "practice of issuing fiats based on consent should not be continued."

[171] *Criminal Code*, s. 678.1. See also r. 860.8(1)(b).

appeal client requires the permission of the court to withdraw.[172] Although applications for court approval to withdraw do not happen very often, outlining the requirements would likely improve the public's understanding of how the court helps ensure a fair appeal process. The consultation document proposed a procedure which reflects existing practice, involves an application before the hearing judge or panel, and is consistent with the decision of the Supreme Court of Canada affirming the court's oversight role when a lawyer seeks to withdraw.[173]

[348] The comments of one individual and one group helped clarify the substantive law information provided in CM 12.22. In particular, the court may authorize a lawyer to withdraw if

- the request is far enough in advance of any scheduled proceedings such that an adjournment will not be necessary,[174] or
- the request is for an ethical reason (even if granting the request would delay the proceeding).[175]

[349] The court may deny the application to withdraw if, after consideration of all relevant factors, it determines that allowing counsel to withdraw would cause serious harm to the administration of justice.[176]

[350] One lawyer and one group raised the issue of whether a withdrawal application is required in every case or only if the appeal hearing is reasonably imminent. Given that case law sets out combinations of circumstances and principles which govern a court's decision concerning any particular withdrawal, it is not necessary to detail how the process would work in all situations.

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[172] The court is also concerned about legal representation in appeals where an accused has no lawyer. The *Criminal Code,* s. 684 provides that the appeal court may appoint a lawyer to act on behalf of an accused if, in the opinion of the court, it is in the interests of justice that the accused have legal assistance and it seems that the accused does not have sufficient means to obtain assistance. See also Martin, note 131, at 1359-1361.This report does not describe a procedure for court appointed criminal appeal counsel as it is not known if this has ever been done in Alberta.

[173] *R. v. Cunningham,* 2010 SCC 10 [*Cunningham*].

[174] *Cunningham,* note 173, at para. 47. See also Court of Appeal of Alberta, "Notice of Motion - Motions Court (Panel of 3 Justices) - Check/Return Form" at K. Criminal (vi) which indicates that an application to withdraw as counsel requires 21 business days notice, online: Alberta Courts Court of Appeal <www.albertacourts.ab.ca/ca/publication/notices_of_motion_3_justices_feb09.pdf>.

[175] *Cunningham*, note 173, at paras. 48-49.

[176] *Cunningham*, note 173, at paras. 45, 50.

[351] However, it seems that the existing withdrawal process before the hearing judge or panel is unduly onerous for many withdrawal situations. In particular, if a lawyer is dismissed by his or her client or is otherwise not obliged to provide representation and seeks to withdraw well in advance of the appeal hearing, there should be a more streamlined process.

[352] If a lawyer seeks to withdraw in advance of the date when the appeal is assigned to a particular Queen's Bench judge or panel of the Court of Appeal, as applicable, a simple application to a duty judge, as opposed to the hearing judge or panel, should be sufficient. After the hearing judge or panel has been assigned and appeal materials have been distributed, the appeal will have progressed to the point where withdrawal of legal services might cause significant delay or risk of injustice. At this point, the lawyer's application to withdraw should be heard by the hearing judge, in the case of a Queen's Bench appeal, or as directed by the Court of Appeal hearing panel.

[353] To conclude, a lawyer of record who starts an appeal or files materials in response is required to make an application to the court for an order authorizing the lawyer to withdraw from representing an accused client. A lawyer who seeks to withdraw should contact a court officer to ascertain the progress of the appeal and then make the application accordingly.

Recommended Procedure – Lawyer Application to Withdraw

[354] If a lawyer seeks to withdraw from representing an accused, the lawyer must file an application, and serve a copy on the accused or his or her new counsel, as applicable. The lawyer should contact a court officer to determine the precise status of the appeal and determine the appropriate process before making the application.

[355] The accused may participate in the hearing of the application and, if the accused or his or her new counsel intends to attend, should file with the court and serve on the applicant response materials in advance of the hearing.

[356] If the accused does not oppose the application to withdraw and does not want to participate in the hearing of the matter, he or she should file and serve a signed statement indicating that the application to withdraw is not opposed.

[357] An application to withdraw which is filed before the date on which the appeal is assigned to a particular Queen's Bench judge or Court of Appeal panel, as applicable, should be heard by a duty judge.

[358] An application to withdraw which is filed after the date on which the appeal is assigned to a particular judge or appeal panel should be heard by the hearing judge or as directed by the appeal panel, as applicable.

7. APPLYING FOR INTERVENER STATUS to summary

[359] A person who is not a party to a criminal appeal is not entitled to participate in the appeal process but may apply to a duty judge to intervene in the appeal.[177] The opportunity to intervene does not apply to appeals concerning findings of mental health or fitness.[178]

Recommended Procedure – Applying for Intervener Status

[360] A person who is not a party to a criminal appeal may apply to a duty judge to intervene in the appeal.

[361] A person who is not a party to an appeal concerning findings of mental health or fitness may not apply to intervene.

8. MANAGING APPEALS to summary

[362] The existing criminal appeal management procedures work well and enhance the certainty and efficiency of the criminal appeal process.[179] Further, existing practices for getting an appeal started and for managing

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[177] Applications for intervener status in criminal appeals are relatively rare and mostly made by the federal Crown, a Crown entity that is not already a party, or an interest group when constitutional issues are involved. Moreover, the threshold to obtain intervener status is not only high but when status is granted, the role of the intervener is generally a narrow one, see for instance *R. v. Barros* (2009), 457 A.R. 94 (C.A.), 2009 ABCA 66; *R. v. J.L.A.* (2009), 464 A.R. 310 (C.A.), 2009 ABCA 324.

In the Court of Appeal, an application to intervene goes before a duty judge, unless collateral to another motion that must be heard by a panel and is subject to the duty judge's discretion to refer the application to the panel.

[178] *Criminal Code*, ss. 672.72(1) and 672.1(1) at "party" extends party status to a broader range of entities including the accused, Attorney General, person in charge of the hospital where the accused is held for assessment, prosecutor and any interested person designated by the court of Review Board.

[179] Existing appeal management practices used in Alberta include a legislated provision, criminal appearances to provide directions in connection with appeals, court officer assisted progress tracking and various types of court officer or party organized appeal information meetings.

progress are effective and should be affirmed. Criminal appeal courts require flexibility to implement management practices that are tailored to meet the needs of appellants, respondents and the court as needs may change from appeal to appeal and over time.

[363] CM 12.22 proposed that only the framework measures to manage a specific appeal need to be formally established in order to enhance the certainty of the appeal process. General appeal management procedures as may be appropriate to particular types of appeals, if any, should be established by the court.[180] In this report, the general management measures are described as part of the time to file procedure in Chapter 2. In addition, a party may initiate court assistance processes by making an application to help ensure a timely and effective hearing of the appeal.

[364] This said, it may be observed that duty judge involvement in appeal management proceedings seems to facilitate compliance with the directions, agreements or orders that come out of court assistance proceedings. Broader use of duty judges in appeal management processes should be considered in some situations.

[365] One individual asked whether the proposal for greater court involvement entails development of new appeal management procedures for the Court of Queen's Bench and expressed concern about the use of court resources. In this regard, although a more managed appeal process is generally recommended for all appeals to the Court of Appeal, it would only be used for Queen's Bench appeals which are complicated, as noted earlier in this report. Implementing the recommended core appeal management procedures should not create a significant resource issue for Queen's Bench.

[366] One group commented that the CMOs perform many of the functions ascribed to a duty judge in the proposals and that there is no need to involve a judge in appeal management activities. In general, the procedures described in Chapter 2 are intended to incorporate the appeal management role performed by CMOs and other court officers. The management procedures described in this chapter are intended to supplement the regular measures and are for managing specific, possibly problematic, appeals. Further, these supplemental measures do not seem to conflict with the views of this group.

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[180] *Criminal Code*, s. 482.1.

[367] To summarize and clarify the recommended appeal management procedures, the core procedures recommended in Chapter 2, including the consultative management measures described for appeals to the Court of Appeal and complicated Queen's Bench appeals, should be sufficient for regular appeal management situations. The procedures for obtaining court assistance recommended in this chapter are intended to help a party manage progress in the event of uncertainty or changed circumstances. The appeal management procedures recommended at this point reflect existing practices and are intended for use on a party or court initiated basis when no progress is being made in a particular appeal.

[368] Of note, appeal management procedures do not shift the responsibility for managing the progress of an appeal from the parties' lawyers to the court. Although a court officer, judge or CMO may need to intervene in some situations, it is up to the parties to engage in the process in a manner which leads to the timely resolution of the appeal.

[369] Another group made no comments on these management proposals but did describe an appeal management process currently used by the Court of Queen's Bench in Edmonton to facilitate appeals involving self represented appellants. This group did not suggest that the Edmonton process be adopted as standard procedure. However, it is included in this report as an example of a specialized management process that could be deployed to meet specific appeal needs within the overall appeal management structure.

[370] The Edmonton Queen's Bench practice for working with self represented appellants is as follows. When a self represented appellant files a notice of appeal, the clerk's office a) sets a first appearance date for the appellant to attend the regular criminal appearance court (which sits every week) and b) gives directions as to the material filing deadlines.

[371] At the appellant's first appearance date, the readiness of the appeal is assessed based on what has been filed by the appellant and possibly the Crown respondent and other information provided at the appearance. Depending on the situation, the appearance court may set the appeal hearing date, order new filing dates, give directions or make other procedural orders as the court sees fit.

[372] The first appearance court may also, if appropriate, allow the appeal, hear argument and decide the appeal, or dismiss the appeal for want of prosecution.

[373] To conclude, only the framework for appeal management needs to be formally established in order to enhance the certainty of the appeal process. Specific management practices appropriate to particular types of appeals, if any, and appeal specific management measures, if necessary, should be set by the court.[181]

Recommended Procedure – Appeal Management Assistance

[374] On application or written request of a party, or the court's own motion, the court may provide appeal management assistance.

[375] Applications or written requests for appeal management assistance may be made to a duty judge, who determines the appropriate form of assistance.

[376] If the duty judge decides to conduct an appeal management conference, the court officer sets the appeal management conference on a date that is convenient to the duty judge and informs both parties as to the time, place and method of participation.

[377] At the conclusion of an appeal management conference, the duty judge may issue a written order or direction, or take any other action which the judge determines appropriate to expedite the conduct of the appeal, avoid unnecessary expense or prevent undue delay.[182]

9. SUMMARY DISMISSAL IN QUEEN'S BENCH

Recommended Procedure – Summary Dismissal in Queen's Bench

[378] A duty judge of the Court of Queen's Bench may, on application or the court's own motion, order that an appeal be dismissed if there is evidence that the appellant has

- violated the terms of a judicial interim release order,

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[181] *Criminal Code*, s. 482.1.

[182] See *Ontario Court of Appeal Criminal Appeal Rules,* S.I./93-169, r. 19; *British Columbia Court of Appeal Criminal Appeal Rules, 1986*, S.I./86-137, r. 15; *New Brunswick Criminal Appeal Rule 63 with Respect to Criminal Appeals to the Court of Appeal*, S.I./82-13, r. 63.20; *Supreme Court of Newfoundland and Labrador - Court of Appeal Criminal Appeal Rules (2002),* S.I./2002-96, r. 22; *Yukon Territory Court of Criminal Appeal Rules, 1993*, S.I./93-53, r. 15; and *Rules of the Court of Appeal of Quebec in Criminal Matters*, S.I./2006-142, r. 65.

- not proceeded with the matter, or
- abandoned the appeal.[183]

[379] If the Court of Queen's Bench dismisses the appeal of an appellant who has been granted JIR, the court must issue a warrant for the appellant's arrest and the appellant is required to surrender into custody.[184]

E. Assistance from Hearing Judge or Panel to summary

[380] Some issues that arise during the course of an appeal require the court to decide what is fair or necessary in the circumstances in order to advance principles of justice. These types of issues must be addressed or resolved by the judge or panel assigned to hear the appeal because the decision has the potential to affect the outcome of the appeal. Court assistance to address the following matters may be obtained by making an application to the judge or panel assigned to hear the appeal:

- withdrawal of lawyer,
- change to the format of appeal hearing – summary conviction appeal *de novo*,
- change to the format of appeal hearing – oral or written format,
- new evidence on appeal,
- abandonment of appeal during hearing,
- post hearing argument, and
- summary dismissal of appeal in the Court of Appeal.

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[183] *Criminal Code*, s. 825. According to Martin, note 131, at p. 1631, *Criminal Code*, s.795 allows the summary conviction appeal court to compel the appearance of the appellant for a summary proceeding to dismiss a vexatious appeal. Martin at p. 1631 also cites *R. v. Clarke*, (1981), 31 A.R. 147 (C.A.) as authority for the court to find that a violation of the rules of court constitutes "not proceeding." It seems that the power of the Queen's Bench to dismiss is slightly broader in that the Court of Appeal does not have the ability to summarily dismiss an appeal for violation of JIR conditions. Of note, applications for summary dismissal of an appeal before the Court of Appeal must be decided by the panel assigned to hear the appeal.

[184] Based on the procedure described in CPD I.15 and on the Court of Appeal of Alberta, "Judicial Interim Release (Bail) Applications - Check/Return Form" at Note, which is available from the court and online: Alberta Courts <http://www.albertacourts.ab.ca/>.

[381] The procedures for obtaining assistance from the hearing judge or panel described below largely reflect existing practices and are expressed in common terms to apply to both criminal appeal courts. These procedures work well and should be continued. The issues of admitting new evidence during the appeal and submitting argument after the hearing are briefly discussed in this section.

[382] Most of the material in CM 12.22 concerning hearing judge or panel assistance described existing practices, not reform proposals. No commentators opposed the proposals and some provided additional information on a few points. In particular, one individual observed that an appeal in *de novo* format should only be considered in very restricted situations. There is no disagreement with this comment and a separate, pre-appeal application process is required in order to authorize an appeal to be conducted in *de novo* format.

[383] In addition, one group noted that the proposals for dismissing an appeal for want of prosecution or lack of merit in the Court of Appeal may be useful to help resolve the problems associated with appeals which are currently being filed but then not pursued any further.

1. WITHDRAWAL OF LAWYER

[384] The application procedure for a lawyer to withdraw as appeal counsel is discussed earlier in the duty judge assistance section of chapter.

Recommended Procedure – Lawyer Withdrawal

[385] A lawyer's application to withdraw which is filed after the date on which the hearing judge or panel is assigned and materials have been distributed should be heard by the hearing judge or as directed by the hearing panel.

2. CHANGING FORM OF HEARING – SUMMARY CONVICTION APPEAL *DE NOVO*

[386] A summary conviction decision is generally appealable on the record of the trial court. However, in the rare situations when the condition of the record is not suitable for appeal use or if interests of

justice would be better served, an appeal may be conducted as a trial *de novo*.[185]

Recommended Procedure – Summary Conviction Appeal *De Novo*

[387] An accused or Crown appellant may apply to the Court of Queen's Bench, based on the condition of the summary conviction trial record or other reason, for an order authorizing the appeal to be conducted as a trial *de novo.*[186]

[388] If the court finds that the interests of justice would be better served by adopting a different form of appeal, it may order that the summary conviction appeal be determined by way of a trial *de novo* conducted consistent with the trial provisions contained in the *Criminal Code* and applicable rules of court.[187]

3. CHANGING FORMAT OF HEARING – ORAL OR WRITTEN

Recommended Procedure – Changing Format of Hearing

[389] A party to an appeal may apply to the court to change the format of a hearing from oral to written, or for permission to participate in a manner other than that which is specified for the hearing.[188]

4. ADMITTING NEW EVIDENCE ON APPEAL to summary

[390] The current practice for admitting new evidence on appeal is leave based, with secondary reference to rules of the Supreme Court of Canada

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[185] *Criminal Code*, ss. 813, 822(4). Ewaschuk, note 17, at 24:0020 cites *R. v. Gagne* (2006), 69 W.C.B. (2d) 802 (D.Q.), 2006 QCCA 32 as authority for the "better served" criteria used by the appeal court to grant a *de novo* proceeding and *R. v. M. (R.N.-Z.)* (2005) 68 W.C.B. (2d) 224, (Ont.SCJ), [2005] O.T.C. 1088 (S.C.J.) for the observation that *de novo* proceedings are the exception and not the rule.

[186] *Criminal Code*, s. 822(4).

[187] Applicable provisions include *Criminal Code,* ss. 822(5)-(7). See also Ewaschuk, note 17, at 24:1177 and 24:1090.

[188] *Criminal Code*, s. 688(3) states:

> 688(3) An appellant may present his case on appeal and his argument in writing instead of orally, and the court of appeal shall consider any case of argument so presented.

See also CPD E.4(3) and argument format discussion in Chapter 2. This provision is not intended to affect the court's exercise of discretion in terms of calling for oral argument, even after the court grants an application to present argument in written format.

if leave is granted.[189] Consistent with the objectives of making criminal appeal procedures clearer, simpler and more accessible, CM 12.22 proposed that an application procedure should replace the "leave plus" approach.

[391] One group clarified the substantive law principles which are included in this report to provide context for the new evidence procedure. In particular, the grounds on which an application to introduce new evidence may be approved are that the evidence[190]

- could not have been, with due diligence, produced at trial,
- must be relevant to a decisive or possibly decisive trial issue, and
- must be of a credible nature that, when taken together with the evidence adduced at trial, could have reasonably affected the outcome.

Of note, although the decision to admit new evidence is based on the *Palmer* test, each situation also engages other principles from other cases.

[392] The same group observed that new evidence that is the subject of an application to admit should not be part of a party's appeal book or extract of key evidence. Rather, new evidence is filed separately in sealed form at the same time as the appeal materials, with the decision to admit or not being made by the hearing judge or panel as part of the appeal hearing. The practice of the court is to first work through the appeal arguments and materials without considering the need for the new evidence and then turn to the questions of the need for, and admissibility of, the new evidence.

[393] In addition, it is noted that the Court of Appeal may appoint a special commissioner for the purpose of cross-examination on affidavits concerning new evidence and for other reasons.[191] The use of special commissioners varies from province to province. Although a description of special commissioner procedures in Alberta might help clarify the

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[189] Rule 840(7). Brian A. Crane & Henry S. Brown, *Supreme Court of Canada Practice 2007* (Toronto: Thomson-Carswell, 2007) at 123 note that due to the propensity for the outcome of an application for new evidence to decide the appeal at the SCC level, these applications are usually heard by the panel assigned to the appeal, instead of a single judge.

[190] *Palmer v. R.*, [1980] 1 S.C.R. 759 at 776-777.

[191] *Criminal Code*, s. 683(1)(e).

criminal appeal process, special commissioners are not used in appeals to the Court of Queen's Bench or many appeals to the Court of Appeal. The special commissioner process is noted in this report only as a matter for possible further review.

Recommended Procedure – Admitting New Evidence

[394] An appellant or respondent may apply to the court to introduce new evidence at the appeal hearing that was not before the trial or other deciding court.

[395] The new evidence, in oral, affidavit, deposition or other format as directed by the court, must be filed with the court in a separate, sealed document or other media and may be admitted at the discretion of the court if special grounds can be shown.[192]

[396] The application to introduce new evidence must be supported by an affidavit which substantiates that new facts sought to be admitted were not before the decision maker.[193]

[397] The court may allow the party in opposition to cross-examine on the affidavit supporting an application to introduce new evidence.[194]

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[192] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 62(3) states:

> 62(3) The Court or a judge may, in the discretion of the Court or the judge, on special grounds and by special leave, receive further evidence on any question of fact, such evidence to be taken in the manner authorized by this Act, either by oral examination in Court, by affidavit or by deposition, as the Court or judge may direct.

See also r. 840(7).

[193] SCC Rules, r. 89 states:

> 89(1) An affidavit shall be filed to substantiate any fact that is not a matter of record in the Court.
>
> (2) An affidavit to be used in a proceeding shall be limited to the statement of facts within the knowledge of the deponent, but statements based on information or belief that state the source of the information or the grounds for the belief may be admitted by the Court, a judge or the Registrar.
>
> (3) When the record of the court appealed from or of the trial court is filed with the Registrar, that record is part of the record of the Court.

[194] SCC Rules, r. 90 states:

> 90(1) Any party may, by leave of a judge or the Registrar on motion, cross-examine the deponent of an affidavit filed with the Registrar by serving on the party who filed the affidavit a notice requiring the production of the deponent and documents for cross-examination before a commissioner for oaths designated by the judge or the Registrar.
>
> (2) The notice required by subrule (1) shall be served within the time that the judge or Registrar may order.
>
> (3) Any cross-examination referred to in subrule (1) shall take place before the proceeding is heard unless a judge or the Registrar otherwise orders.
>
> (4) The transcript of a cross-examination may be filed with the Registrar within 10 days after the cross-examination.
>
> (5) A judge or the Registrar may, on his or her own initiative, order the production of documents

(continued...)

5. ABANDONING THE APPEAL DURING THE HEARING

Recommended Procedure – Abandoning the Appeal at the Hearing

[398] An appellant may apply to the court to abandon an appeal at the appeal hearing and the court may[195]

- issue an order stating that the appeal is abandoned and dismissed, or
- continue the hearing and decide the matters on appeal.

6. PRESENTING ARGUMENT AFTER MISSING THE HEARING

[399] If a party or the party's lawyer is scheduled to attend an appeal hearing and fails to do so, the court may proceed on the basis of the party's filed materials and the materials filed and orally presented by the other side, if any. In the event the court goes ahead with the hearing and the party was absent through no fault on their part, principles of fairness may dictate that the party should have the opportunity to present argument. The consultation document proposed an application process on a short time line for submission of argument by a party who missed the hearing, subject to court discretion.[196]

[400] One lawyer suggested that a party who misses the hearing should have more than the 5 days proposed to submit argument, while one group highlighted practical concerns associated with physical file management in support of a very short time period. Another group observed that the situation requiring such a process arises infrequently and that any such process may raise substantive law issues as to whether or not the appeal court is reconsidering a decision.

[401] Given the extreme rarity of the circumstances which would require a process for submitting argument after missing the hearing, it is concluded that the process is not necessary. This said, additional

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[194] (...continued)

on a cross-examination.

(6) Where a deponent is not produced for cross-examination, the deponent's affidavit shall be struck out unless a judge or the Registrar otherwise orders.

[195] Rule 860C(2).

[196] The proposal differs from r. 840(6) which states that the court could dismiss the matter if the appellant fails to show up, with the dismissal possibly vacated on application if the appellant shows special reasons.

information is occasionally provided to the appeal court after the hearing if, for example, Crown or defence counsel comes across a new case that is relevant to the appeal that was not known at the time of the hearing or new issues arise during the hearing and the court asks the parties to submit additional argument. The issue of when the appeal court can accept or require additional information is determined based on whether the appeal court is *functus*.[197]

[402] In short, the *functus officio* rule is that:[198]

> [T]he court has no jurisdiction to reopen or amend a final decision, except in two cases: (1) where there has been a slip in drawing up the judgment, or (2) where there has been an error in expressing the manifest intention of the court [citations omitted].... [T]he underlying rationale for the doctrine is... that for the due and proper administration of justice, there must be finality to a proceeding to ensure procedural fairness and the integrity of the court system.

[403] Questions concerning whether a decision of the court is final or not are resolved on a case by case basis considering factors such as whether the appeal court has fully completed its duty and formally entered a decision.[199] Other factors include *Criminal Code,* s. 3.1 which states that "unless otherwise provided or ordered, anything done by a court, justice or judge is effective from the moment done, whether or not it is reduced to writing," and the relevant case law.[200]

Recommended Procedure – Presenting Argument After the Hearing

[404] No process is needed to accommodate the rare situation in which a party misses the hearing of the appeal.

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[197] *Black's*, note 134, s.v. *functus officio* means "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

[198] *Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 S.C.R. 3, 2003 SCC 62 at paras. 113-114.

[199] Ewaschuk, note 17, at 1:6087 with reference to *R. v. Adams*, [1995] 4 S.C.R. 707.

[200] See for example *Chandler v. Alberta Assn. of Architects*, [1989] 2 S.C.R. 848 and *R. v. E.F.H.* 115 C.C.C. (3d) 89 (Ont. C.A.).

7. SUMMARY DISMISSAL IN THE COURT OF APPEAL

Recommended Procedure – Summary Dismissal in the Court of Appeal

[405] The Court of Appeal may, on application or on its own motion, dismiss an appeal on the basis of failure to advance the appeal, lack of merit,[201] or abandonment.

[406] Notice of an application to dismiss must be filed and served on all parties to the appeal at least 10 days before the appeal hearing.

[407] The application to dismiss should be heard and decided as the first order of business at the appeal hearing, before commencement of oral argument on the merits of the appeal.

[408] If the court dismisses the appeal of an appellant who has been granted JIR, the court must issue a warrant for the appellant's arrest and the appellant is required to surrender into custody.[202]

F. Appeal of Interim Decisions

[409] Most interim decisions made during the course of a criminal appeal proceeding cannot be appealed. A judge's refusal to modify a time period was, at one time, something that could be appealed to a court panel by giving written notice to the registrar within 7 days of the refusal.[203] However, a recent case indicates that since this practice is not supported by the *Criminal Code*, a judge's decision not to vary a time period cannot be appealed.[204]

[410] As noted in Chapter 4, the JIR application of a person convicted of a major indictable offence or prohibited from driving may, on application of either party and subsequent order of the Chief Justice or her designate, be

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[201] *Criminal Code*, s. 685.

[202] Based on the procedure described in CPD I.15 and on the Court of Appeal of Alberta, "Judicial Interim Release (Bail) Applications - Check/Return Form" at Note, which is available from the court and online: Alberta Courts <http://www.albertacourts.ab.ca/>.

[203] Rule 840(5).

[204] *R. v. Harness* (2005), 367 A.R. 259 (C.A.) at paras. 27-31. In *R. v. Giesbrecht* (2008), 231 Man. R. (2d) 77 (C.A.) at paras. 9-12 the court affirms *Harness* and finds that a single judge's decision denying an application to extend the appeal filing deadline cannot be appealed to a panel of the court because the *Criminal Code*, s. 678(2) gives concurrent jurisdiction to make the decision to the court or a single judge of the court.

heard a second time by a single judge or panel of the Court of Appeal.[205] This is the only situation where an interim decision of the appeal court is subject to appeal.

[205] *Criminal Code*, ss. 680(1)-(3).

SUMMARY

Recommended Procedures

[411] This chapter summarizes the recommended, step by step procedure put forward in this report on criminal appeal procedures. The core process section outlines the responsibilities and roles of the appellant, respondent, court officers and judges in the processing of a criminal appeal. The next two sections summarize how an appellant seeks leave and applies for interim relief pending the outcome of the appeal, respectively. The final section notes how a party may obtain assistance from the court to resolve various procedural issues.

[412] The term "must" indicates a required action, "may" a discretionary act and "should" a best practice. In this regard, it is important to stress that the court has full authority to control proceedings on a case by case basis to enhance access to justice and ensure that appeals are conducted fairly. This means that the court may, in the interest of justice, modify the procedures for any particular appeal. The recommended procedure also describes the actions of court officers and judges that facilitate the progress and processing of a criminal appeal.

[413] It is anticipated that a mix of mechanisms would be used to implement all aspects of the recommended criminal appeal procedure. Some provisions would be reflected in criminal rules of court while others would be described in court administrative protocols or other materials.

[414] Throughout this summary we have added references to a previous paragraph. The reference see [#] appears near the end of a heading where additional information is available.

A. Starting an Appeal

1. NOTICE OF APPEAL – TIME PERIOD see [45]

[415] A notice of appeal must be filed within one month after the date of conviction, acquittal, sentencing, judgment or other final decision that is the subject of appeal.

[416] In the event conviction and sentence decisions are not made at the same time, the notice of appeal must be filed within one month after the sentence decision.

2. CONTENT OF NOTICE OF APPEAL see [50]

[417] A notice of appeal must include the following information, if known:

- the appellant's name and date of birth (for individual accused appellants only),
- the name and location of the trial court or court which issued the decision appealed,
- a record or copy of a non disclosure order, if applicable,
- the name of the judge whose decision is appealed,
- the date(s) convicted/acquitted, sentenced or when a matter was decided,
- the plea entered at trial,
- what charge the accused has been convicted or acquitted of (including, if known, offence name and/or section of the *Criminal Code* or other statute and whether the offence is indictable, summary conviction or mixed),
- the sentence imposed, if applicable,
- what the appeal is about (i.e. all or part of the conviction/acquittal; all or part of the sentence; both conviction and sentence; or an appeal of some other decision),
- the grounds on which the appeal is based (question of law alone, question of fact, question of mixed law and fact or other sufficient grounds),
- the appellant's address or the name and address of the appellant's counsel as address for receiving appeal materials, if applicable,
- whether the appellant is in custody or not, and
- the signature of the appellant or the appellant's counsel.

[418] A standard form of notice of criminal appeal should be developed for appeals to Queen's Bench and the Court of Appeal.

[419] The notice of appeal for a second level appeal must include a copy of the order granting leave to appeal to avoid delay.

[420] A copy of the reasons for the judgment or decision appealed should be included with the notice of appeal, if available. If not available, a copy of the reasons must be filed as soon as possible, but not later than the date on which the appellant files supporting materials.

[421] The notice of appeal may also include the:

- address or place of incarceration of the appellant, if applicable,
- respondent's name (e.g. the accused or Her Majesty the Queen as represented by Alberta Justice, the Public Prosecution Service of Canada, or a special prosecutor),
- trial or decision court file number(s), and
- a represented accused person's indication as to whether he or she intends to attend the hearing.

3. INFORMING THE OTHER PARTY – SERVICE see [61]

[422] An accused appellant must serve a copy of the notice of appeal and court information about the appeal (i.e. file number and the appeal hearing date, if applicable) on the Crown respondent when the notice is filed.

[423] A Crown appellant must serve the accused with a copy of the notice of appeal and court information about the appeal (i.e file number and the appeal hearing date, if applicable) when the notice is filed.

[424] If the Crown respondent intends to seek an increase or variation of sentence on appeal, the Crown must give separate notice of this intent. Any such Crown notice must be filed and served as soon as practical, but no later than when the response factum is filed.

[425] When a notice of appeal is filed by a person who is in prison or self represented, the court should inform the Crown respondent. In these cases, the court provides a copy of the notice of appeal, together with the information about the appeal (i.e. appeal file number and the hearing

date, if applicable) to the Crown respondent and clerk of the court where the trial occurred when the notice of appeal is filed.

4. ADMINISTRATIVE COORDINATION OF AN APPEAL see [75]

Court of Queen's Bench

[426] For appeals to Queen's Bench, the court responds to a notice of appeal by setting the appeal hearing date and calculating the dates on which the appellant must file materials related to the appeal.

[427] The Court of Queen's Bench informs the appellant of the

- appeal file number,
- appeal hearing date,
- dates when the appellant must file
  - evidence that a) the transcript has been ordered, or b) a Legal Aid application has been made,
  - a summary of complications, if any, and
  - materials to support the appeal case,
- general requirements concerning court attendance, and
- oral and "in writing" appeal processes.

[428] The Court of Queen's Bench sets the appeal for hearing on a date that is not more than 5 months after the date on which the notice of appeal is filed, unless there is reason to expedite or extend the appeal process. Sentence appeal hearings may generally be set within 3-4 months after the notice of appeal.

Court of Appeal

[429] For appeals to the Court of Appeal, the court responds to a notice of appeal by calculating the date on which the appellant must file evidence that a) the transcript or appeal book is ordered or b) a Legal Aid application has been made.

[430] The Court of Appeal informs the appellant of the

- appeal file number,

- date on which the appellant must file evidence that a) the transcript or appeal book has been ordered, or b) a Legal Aid application has been made,
- general time periods for filing materials after the appeal book is ready,
- general requirements concerning court attendance, and
- oral and "in writing" appeal processes.

[431] Both courts also provide a copy of the notice of appeal to the clerk of the court where the trial occurred.

B. Materials and Evidence to Support an Appeal

1. INFORMATION ABOUT THE TRIAL OR OTHER DECISION PROCESS

see [95]

[432] The appellant must file and serve, and the respondent may file, a copy of the:

- information or indictment, including trial amendments, if any,
- endorsements,
- formal document of judgment, order or decision appealed (i.e. certificate of conviction or acquittal, sentencing order, order of disposition, probation orders, weapons prohibitions, approval or denial of leave, judicial interim release order),
- reasons for judgment, order or decision, if any, and
- list of exhibits submitted during the trial proceeding.

[433] In addition, the appellant must file and serve and the respondent may file, if applicable, copies of trial procedural orders and any non disclosure orders, if not previously filed.

2. FACTUM

see [104]

[434] The appellant must file and serve and the respondent may file and serve a factum which must include:

- a brief statement of facts,

- the grounds for appeal,
- the standard of review,
- legal arguments in connection with each ground of appeal, with specific reference to the trial or decision file, transcript, authorities or extract of key evidence,
- concise and precise statements of the nature of relief or specific order sought, and
- the date and signature of the party or the party's counsel.

[435] The factum for appeals to Queen's Bench must be no more than 20 pages and no more than 30 pages for appeals to the Court of Appeal.

[436] The factum filed in support of a sentence appeal to Queen's Bench may include a summary of the factors which were before the court below and details of the resulting sentence.

[437] For a sentence appeal to the Court of Appeal, the appellant must submit a detailed sentence questionnaire form together with the factum.

3. TRANSCRIPT, EVIDENCE AND AUTHORITIES see [113]

[438] The appellant must file with the court and serve on the respondent a copy of the transcript.

[439] Each party may file an extract of key evidence and serve a copy on the other party in advance of the hearing.

[440] The extract of key evidence may include

- parts of the transcript,
- copies or extracts from the trial file materials that are needed to support the party's arguments, and
- references to or portions of relevant authorities.

[441] The extract of key evidence should not include materials that are not directly relevant, or that are already before the court either in the party's earlier filings or materials of the other party.

4. TIME TO FILE APPEAL MATERIALS see [125]

Court of Queen's Bench

Appellant

[442] For appeals to Queen's Bench, the appellant must file within 1 month after the date on which the notice of appeal is filed evidence that a) the transcript is ordered or b) a Legal Aid application has been made.

[443] The transcript must be filed and served as soon as it is ready, but no later than the date on which the appellant is to file a factum.

[444] The appellant's factum, copies of the information or indictment, endorsements, transcript (if not filed earlier), list of trial exhibits, decision appealed (with reasons if applicable) and any other information appropriate to the appeal must be filed with the court and served on the respondent within 3 months after the date on which the notice of appeal is filed.

[445] The appellant's extract of key evidence, if any, should be filed and served as far in advance of the hearing as is practical.

Respondent

[446] The respondent's factum, if any, must be filed with the court and served on the appellant within one month after the date on which the respondent received the appellant's factum.

[447] The respondent's extract of key evidence if any, should be filed and served as far in advance of the hearing as is practical.

Complicated Appeals

[448] In an appeal to Queen's Bench, a party may request that the appeal be conducted on a longer time line by filing and serving a written summary of complications within one month after the date on which the notice of appeal is filed.

[449] The summary of complications must be no more than 3 pages in length and must clearly describe the trial or decision circumstances or other factors which make the appeal factually, legally or logistically complicated.

Court of Appeal and complicated Court of Queen's Bench appeals

Appellant

[450] For appeals to the Court of Appeal and complicated Queen's Bench appeals, the appellant must file within 2 months after the date on which the notice of appeal is filed evidence that a) the transcript/appeal book is ordered or b) a Legal Aid application has been made.

[451] The transcript or appeal book must be filed and served as soon as it is ready, but no later than the date on which the appellant is to file a factum.

[452] The appellant must file with the court and serve on the respondent a copy of the appellant's factum, information or indictment, endorsements, transcript or appeal book (if not filed earlier), decision appealed (with reasons, if applicable) and any other information appropriate to the appeal within 4 months of the date on which the transcript or appeal book is ready.

[453] The appellant's extract of key evidence, if any, should be filed and served as far in advance of the hearing as is practical.

Respondent

[454] The respondent may file and serve on the appellant a copy of the respondent's factum and other information appropriate to the appeal, if any, within 2 months of the date on which the respondent received the appellant's materials.

[455] The respondent's extract of key evidence, if any, should be filed and served as far in advance of the hearing as is practical.

General

[456] A party must submit appeal materials in a format that is acceptable to the court which may include electronic format.

[457] The appeal parties may file a joint extract of key evidence in advance of the appeal hearing. In the event of a joint extract of key evidence, a party may also file and serve a supplementary extract of key evidence before the appeal hearing, as long as the supplement does not replicate material already filed.

[458] The appeal hearing date is set by a court officer or judge, in the case of complicated appeals to the Queen's Bench, or case management officer [CMO] for appeals to the Court of Appeal, based on consultation with the appeal parties, at the court's discretion.

[459] The court officer or CMO schedules the hearing date and informs and confirms the date with the parties.

C. Appeal Hearing

1. SINGLE OR SEPARATE HEARINGS see [159]

[460] For appeals to Queen's Bench, acquittal or conviction and the associated sentence decisions are heard together, unless an application is made to hear the matters separately.

[461] For appeals to the Court of Appeal, acquittal or conviction and the associated sentence decisions are heard separately, unless an application is made to combine the related matters.

[462] Indictable and summary matters that were decided in the same trial may be combined, with leave of the court.

2. ARGUMENT FORMAT see [167]

[463] The appellant and the respondent may request that an appeal proceed in writing only. If the request for a hearing in writing is granted, the court will make a decision based solely on the written arguments.

3. OTHER HEARING MEASURES see [170]

[464] The appellant and respondent must appear in person at the hearing of a criminal appeal at the scheduled date and time, unless otherwise ordered by the court.

[465] In exceptional circumstances, a party may apply to participate in the hearing by telephone, video conference or other electronic means as may be determined by the court.

4. APPELLANT IN CUSTODY see [182]

[466] An appellant in custody who is represented by a lawyer is entitled to attend the hearing of his or her appeal.

[467] An appellant who is in custody and not represented by a lawyer is entitled to attend the hearing to present oral argument or may opt to participate solely in writing.

5. SPEAKING ORDER

[468] The appellant speaks first and respondent second, unless the court otherwise requires.

[469] The court may allocate time to the appellant for a response. The court may allocate time to an intervener.

[470] In a combined conviction and sentence appeal, the court hears and decides the conviction appeal first and then, if appropriate, hears arguments in connection with sentence and decides the sentence appeal.

[471] Each party presents oral argument on conviction, sentence or other decision appealed for amounts of time as the court determines appropriate.

6. CONCLUDING ARGUMENTS

[472] If the court is not satisfied that oral arguments are complete at the end of the time allotted for the appeal hearing, the court may

- adjourn and schedule a continuation of the hearing, or
- ask one or more of the parties to file a written summary of arguments or answers to the court's questions.

[473] A party who is asked to provide a written summary of argument or answers must file the summary document within 5 days after the appeal hearing.

D. Expedited Appeals

1. EXPEDITED APPEALS – GENERAL

[474] An appeal from a disposition order or a "short sentence" (defined as a period of one year or less) must be conducted on an expedited basis unless otherwise ordered by the court.

[475] The appellant must file and serve a notice of appeal concerning an appeal of a short sentence within one month of the date of sentencing, unless otherwise specified by the court.

[476] The court sets the appeal hearing for an expedited appeal on a date that is not more than 2 months after the date on which the notice of appeal is filed.

Appellant

[477] The appellant must file and serve on the respondent a copy of the appellant's factum, information or indictment, endorsements, transcript, list of trial exhibits, decision appealed (with reasons, if applicable) and any other information appropriate to the expedited appeal within 20 days after the date on which the notice is filed.

[478] The appellant's extract of key evidence, if any, should be filed and served in advance of the hearing.

Respondent

[479] The respondent's factum in an expedited appeal, if any, must be filed and served within 10 days after the date on which the respondent received the appellant's factum.

[480] The respondent's extract of key evidence, if any, should be filed and served in advance of the hearing.

2. ADDITIONAL REQUIREMENTS FOR DISPOSITION ORDER APPEALS

see [209]

[481] The appellant must file and serve a notice of appeal concerning a disposition order within 15 days after the date of the disposition order.

[482] The operation of a disposition order is automatically suspended by the filing of a notice of appeal.

[483] A judge of the appeal court, on application, may make an interim disposition order pending the outcome of the disposition appeal, or order that any interim order for release or detention that was in place immediately prior to the disposition decision remain in effect until such time as the appeal is decided.

[484] The disposition order appellant, unless expressly relieved of the responsibility by order or a ruling of the appeal court, must file with the court and provide to the respondent a certified transcript of evidence given before the trial court or Board of Review.

E. Appeal Orders see [218]

[485] A written order of the appeal court with reasons, except in the case of an order denying leave where no reasons are required, is generally issued within 6 months after the appeal hearing, unless otherwise determined by the court.

[486] If an individual judge disagrees with the majority decision of the appeal court, the order must include the grounds and reasons of the dissenting judge.

[487] If the decision on appeal is that a matter be retried, the appeal court orders both the date and trial court in which the person charged is to appear for arraignment. If the appeal court orders a new trial, a judge of the appeal court may hear an application for judicial interim release pending the new trial.

F. Leave to Appeal – First Level Appeals see [227]

[488] If a party requires leave to appeal a criminal trial outcome or other decision at first instance to the Court of Appeal, the appellant must file a notice of appeal within one month after the date of conviction, acquittal, sentence or other trial decision. The notice of appeal may indicate that the appellant requires leave to appeal.

[489] The matter of leave for first level appeals is considered by the court as part of the appeal.

G. Leave to Appeal – Second Level Appeals see [235]

[490] A party who seeks to appeal the decision of an appeal court must apply to the Court of Appeal for leave to appeal.

[491] The Court of Appeal may grant or deny leave to appeal at the conclusion of an application proceeding which is separate and distinct from the appeal on the merits.

[492] Leave applications for second level appeals are heard by a single judge on the basis of written materials and oral arguments.

[493] The applicant and respondent in a separate leave to appeal proceeding may make a written request to present arguments solely in writing or that the leave hearing be conducted on the basis of written submissions only. The judge assigned to decide the leave application may, at the judge's sole discretion, agree to the request and if so, direct the court to inform the parties accordingly.

1. WHEN AND HOW TO FILE THE SEPARATE LEAVE APPLICATION

[494] An application for leave to appeal must be filed and served within two months after the date of the appeal court decision which the prospective appellant seeks leave to appeal.

[495] If the accused applicant is not in custody or has a lawyer, the leave application must be filed with the registrar of the court and served on the Crown respondent.

[496] An accused who is in custody and does not have a lawyer may file a leave application with the warden of the institution where he or she is held. The warden then forwards the application to the registrar of the court.

[497] If the leave applicant is the Crown, the leave application must be filed with the court and a copy personally served on the accused.

2. WHAT TO FILE IN A SEPARATE LEAVE APPLICATION

[498] The leave application must include, if known:

- the applicant's name and date of birth (for individual accused applicants only),

- the name and location of the court which issued the decision,
- the record or a copy of a non-disclosure order, if applicable,
- the date of the appeal court decision for which leave is sought,
- a copy of the appeal court's decision and reasons,
- the sentence imposed, if applicable,
- the applicant's address or the name and address of the applicant's counsel as address for service, if applicable,
- whether the applicant is in custody or not,
- the signature of the applicant or the applicant's counsel,
- a memorandum (maximum 10 pages) which includes
    - a concise summary of facts relevant to the leave application,
    - the nature of the leave sought (leave to appeal the conviction/acquittal, sentence, both conviction and sentence, or other decision)
    - the specific grounds (errors of law, fact or otherwise) for seeking leave and how the alleged error affected the outcome, and
    - concise reasons for granting leave, with reference to statutory and common law sources, and
- a notice to the respondent about the leave proceeding.

[499] The leave application may include:

- a request, with reasons, by the parties that arguments be submitted or the hearing be conducted solely in writing,
- an affidavit in support of other relief, if any, requested in connection with the leave application, and
- a chronology of trial dates, orders and decisions.

[500] A standard form should be developed for leave applications to the Court of Appeal.

3. COURT OF APPEAL RESPONSE TO A SEPARATE LEAVE APPLICATION

[501] The court responds to a leave application by opening an application file and informing the applicant of the application file number and estimated oral hearing date.

4. RESPONDENT'S ROLE IN A SEPARATE LEAVE APPLICATION

[502] The respondent may file and serve within one month after the date on which the respondent receives notice of the leave application, unless otherwise ordered, a memorandum of law (maximum 10 pages) which must include:

- a concise summary of facts relevant to the leave application,
- the specific grounds on which the applicant seeks leave and the respondent's position as to whether the alleged error affected or did not affect the outcome, and
- reasons for denying leave, with reference to statutory and common law sources.

5. OUTCOME OF A SEPARATE LEAVE APPLICATION

[503] If the judge assigned to decide a separate leave application finds that the application or response does not comply with requirements, the judge may

- decide the application based on the materials as submitted and issue an order either granting or denying leave to appeal,
- issue an order that the applicant provide specific additional written materials on a specific date, or
- set a date for oral argument on the leave application.

[504] The judge's decision to grant or deny leave to appeal a summary conviction or acquittal and associated sentence is final and may not be appealed.

[505] If leave is granted, a notice of appeal must be filed and served within 10 days after the date on which leave is granted.

H. Stay of Order

1. COURT OF QUEEN'S BENCH

[506] For appeals to Queen's Bench, an accused may apply to stay the sentence or other decision by filing and serving an application with or after the notice of appeal.

[507] If the stay application is not filed at the same time as the notice of appeal, it must include proof that the notice of appeal has been filed.

[508] In order to avoid delay, the stay application should contain, if known:

- the applicant's name and date of birth,
- the appeal or leave application file number, as applicable,
- the date set for hearing the appeal or leave application, as applicable,
- the applicant's address or the name and address of the applicant's lawyer as address for service, if applicable,
- the applicant's address,
- a summary of the reasons for granting a stay of order,
- an affidavit, if applicable,
- a draft stay order (which may include recognizance and undertaking),
- a memorandum (maximum 5 pages) describing the grounds for granting the stay,
- a copy of the appealed decision with reasons, if available, and
- proof that the applicant has ordered a transcript in support of the appeal or written reasons addressing why the transcript has not been ordered.

[509] Upon receipt of a stay application, the court officer

- sets a hearing before a duty judge, and

- informs the applicant and respondent of the hearing date, place and time.

[510] The respondent may file materials with the court and serve a copy on the applicant within 5 days after receiving a copy of the stay application. The respondent's materials may include:

- a statement that the respondent consents to the stay application, or
- a memorandum (maximum 5 pages) which describes the respondent's reasons for opposing the stay application in its entirety or any of the proposed terms of the applicant's stay order, and
- the respondent's proposed draft of a stay order, if any.

[511] Each party may present oral argument at the hearing of the stay application for 15 minutes, or for such other amount of time as determined by the duty judge.

[512] A stay applicant who is in custody and represented by counsel is entitled to attend the hearing of the stay application.

[513] The judge, if satisfied that the stay application meets the *Criminal Code* criteria, may issue the stay order and grant relief upon the applicant entering into the recognizance and undertaking before a judge or justice of the peace.

[514] In the event the trial decision that is under appeal requires restitution of property, any stay issued must include an order which secures the safe custody of the property pending the outcome of the appeal.

2. COURT OF APPEAL

[515] For appeals to the Court of Appeal, an accused may apply for a stay of decision by following the process for obtaining judicial interim release, with modifications as necessary to reflect that the stay applicant is not in custody.

I. Judicial Interim Release

1. WHEN TO FILE A JIR APPLICATION

[516] An accused may file and serve on the Crown respondent an application for JIR

- after the notice of appeal is filed,
- if leave is required, after or at the same time as the application for leave is filed, or
- in the case of a sentence only appeal which requires leave, after leave has been granted.

2. WHAT TO FILE IN A JIR APPLICATION see [281]

[517] The JIR application must include proof that a notice of appeal or application for leave to appeal has been filed.

[518] The JIR application must include, if known:

- the applicant's name and date of birth,
- the applicant's FPS number or CoMIS number, if applicable,
- the appeal or leave application file number,
- the date set for hearing the appeal or leave application, if available,
- the name and address of the prosecutor and others, if any, that the applicant is required to give notice of the application to,
- the applicant's address or the name and address of the applicant's counsel as address for service, if applicable,
- the applicant's place of incarceration, and
- a summary of grounds for granting JIR.

[519] In order to avoid delay, the JIR application should also include the following items:

- an affidavit,

- a draft release order that states the recognizance and undertaking,
- a memorandum describing the grounds for granting the JIR application,
- a copy of the order granting leave, if applicable and not already on file,
- a copy of the appealed decision with reasons, if available, and
- proof that the applicant has ordered a transcript in support of the appeal or written reasons addressing why the transcript has not been ordered.

[520] The applicant's affidavit must include, if known:

- the applicant's place of abode for the 3 years prior to conviction,
- theplace where the applicant will reside if released,
- the applicant's employment prior to conviction,
- whether or not the applicant will be employed if released,
- the applicant's criminal record, including prior convictions in other jurisdictions, if any,
- criminal charges pending against the applicant, if any, and
- the date and signature of the applicant.

[521] The draft JIR order must include:

- mandatory undertakings to
  - keep the peace,
  - report to court in person when required by the court,
  - remain in a specified location,
  - pursue the appeal with due diligence, and
  - abide by other conditions as set by the court, specified by statute or required under rules of court,

- a recognizance with or without deposit of cash or valuable security or sureties, if any,
- release order requirements that the accused appellant
  - personally attend the appeal hearing,
  - show picture identification at the start of the hearing, and
  - surrender themselves into custody of a peace officer, pending outcome of the appeal hearing, and
- the signature of the applicant or the applicant's lawyer.

[522] The applicant's memorandum (maximum 5 pages) must include:

- a concise summary of facts relevant to the application for JIR,
- a statement of the relief sought,
- the grounds and reasons for granting the JIR, with concise reference to statutory and common law sources, and
- other materials or evidence necessary to the application, if any.

[523] The JIR application should also indicate whether the applicant intends to attend the JIR hearing or not.

3. ADMINISTRATIVE COORDINATION OF JIR APPLICATION see [293]

[524] Upon receipt of a JIR application, the court officer

- sets a date for a hearing before a duty judge, and
- informs the applicant and respondent of the hearing date, location and time.

4. RESPONDENT'S ROLE IN JIR APPLICATION

[525] The respondent may file and serve the applicant with a copy of an affidavit and a memorandum within 5 days after receiving notice of the JIR application.

[526] The respondent's affidavit must include:

- the date on which the respondent received notice of the JIR application,

- a concise summary of the facts relevant to the application, and
- a statement as to whether the respondent will participate in the application hearing in person or in writing.

[527] The respondent's memorandum (maximum 5 pages) must include:

- the respondent's position and reasons for agreeing, agreeing subject to modification to release conditions, or opposing the JIR, with reference to statutory and common law sources,
- other material or evidence necessary to support the respondent's position, if any
- the date prepared, and
- the signature of the respondent or the respondent's counsel.

5. JIR HEARING AND ORDER see [300]

[528] A JIR applicant who is represented is entitled to attend the hearing of the application with his or her lawyer.

[529] In exceptional circumstances, a party may apply to participate in the JIR hearing by telephone, video conference or any other electronic means as determined by the duty judge.

[530] The duty judge establishes the order of speaking and amount of time each side is allotted to present oral argument and, at the conclusion of the hearing, issues a decision to grant or deny the application for JIR.

[531] The duty judge may not grant JIR until the applicant shows proof that the transcript and other material, if any, necessary to support the appeal have been ordered, or filed, as applicable.

[532] If JIR is denied in connection with an appeal of an indictable matter, the duty judge may give directions to expedite the hearing of the criminal appeal or any other related proceeding.

[533] The JIR application of a person convicted of a *Criminal Code* s. 649 offence or prohibited from driving may, on application of either party and subsequent order of the Chief Justice, or her designate, be heard a second time by a single judge or panel of the Court of Appeal.

[534] If JIR is denied in connection with a summary conviction appeal there is no right to appeal the JIR decision.

J. General Practice for Obtaining Court Assistance See [311]

[535] A party may direct a written question to a court officer in order to obtain information as to how to proceed with an appeal matter.

[536] In the event a party's question concerns special or unusual circumstances not contemplated by standard appeal procedures, guidance as to how to proceed must be obtained from a judge.

K. Assistance from Court Officer

1. CHANGING AN APPEAL HEARING DATE

[537] If a party to an appeal seeks to change the hearing date, the party must inform the court officer, in writing, of the situation and ask that a new appeal hearing date be set. As part of the written request to change the hearing date, the party should show that the other side consents to the request for change and the proposed new hearing date, if any. The new hearing date may be earlier or later than the original date.

[538] Changes to appeal hearing dates are made at the court's discretion.

[539] If the court officer decides to set the hearing for a different date, the court officer informs the parties, in writing, of the new date. If the matter has been assigned to a specific hearing judge or panel, the officer also notifies the judge or panel.

[540] If the court officer declines to change the hearing date, the party may file and serve an application to change the hearing date, which will be heard by a duty judge.

2. CHANGING SUPPORT MATERIAL FILING DATE see [329]

[541] If a party to an appeal is not able to meet the date set for filing materials, the party must inform the court officer, in writing, of the situation and request that a new filing date be set.

[542] If the request for a new filing date is granted, the court officer notes the new filing date on the appeal file and notifies the other party. If the court officer denies the request for a new filing date, the party may file and serve an application to set new filing dates, which will be heard by a duty judge.

3. ABANDONING AN APPEAL BEFORE THE HEARING DATE

[543] An appellant may abandon an appeal at any time before the start of the hearing by filing with the court officer a notice of abandonment that is signed by the appellant or the appellant's lawyer. If the notice of abandonment is signed by the appellant, the signature must be verified by affidavit, witnessed by a lawyer or witnessed by an official of the institution in which the appellant is confined.

[544] The court officer, if satisfied that the notice of abandonment meets the procedural requirements, formally records the abandonment on the appeal file, notifies the respondent that the appeal is abandoned and cancels the appeal hearing.

[545] If the court officer finds that the notice of abandonment does not meet the requirements or is otherwise unclear as to the appellant's intent, the court officer may take actions as needed to clarify and affirm the intent of the appellant and will not formalize abandonment of the matter until satisfied.

L. Assistance from Duty Judge see [335]

1. EXTENDING TIME TO FILE NOTICE OF APPEAL OR LEAVE APPLICATION

[546] If an appellant seeks to file a notice of appeal or make an application for leave to appeal out of time, the appellant must get a fiat from a duty judge to do so.

[547] The appellant must submit a written request to file out of time to a duty judge. The request must:

- note the date when the appeal should have been started,
- ask the court to set a new date,
- request that the court accept the notice of appeal or leave application for filing on the new date, and
- be attached to a notice of appeal or leave application, as applicable.

[548] The duty judge reviews the request to file out of time and may grant a fiat by signing the request.

2. CHANGING TIME PERIODS AFTER COURT OFFICER REFUSAL

[549] If a court officer denies a request for a new hearing or filing date, a party may apply to a duty judge for a new hearing or filing date.

[550] An application to change the date of an appeal or application hearing must be filed and served on the other side on a date that is not less than one month before the original date set for the hearing. The application must include:

- reasons why the matter cannot be heard on the scheduled hearing date,
- evidence in support of the reasons,
- a proposal concerning, and commitment to, a proposed new date for the hearing, and
- copies of other orders or directions, if any, which previously modified time periods associated with the appeal.

[551] A duty judge, on application or the court's own motion, may direct or order a change to a time period in which a party is to submit materials in support of an appeal.

3. FILING A NON-COMPLIANT DOCUMENT

[552] A party to an appeal who submits a non-compliant document must get a fiat from a duty judge before the document can be filed. The party seeking the fiat must submit a written description of the discrepancies between the document and the requirements and a specific request that a fiat be granted, together with the proposed document to a court officer.

[553] If a fiat is granted, it must be in writing, filed with the non-compliant document and a copy of the fiat must be provided to the other party in the appeal.

4. INFORMING A MISSING RESPONDENT

[554] In the event the respondent to an appeal cannot be located, the appellant may make a written request asking the court to set an acceptable method and time frame for communicating information to the respondent.

5. SEEKING ADVICE AND DIRECTION OF THE COURT

[555] A party to an appeal may apply to the court for advice or directions concerning how to proceed in specific circumstances.

6. LAWYER APPLYING TO WITHDRAW see [347]

[556] If a lawyer seeks to withdraw from representing an accused, the lawyer must file an application and serve a copy on the accused or his or her new counsel, as applicable. The lawyer should contact a court officer to determine the precise status of the appeal and determine the appropriate process before making the application.

[557] The accused may participate in the hearing of the application and, if the accused or his or her new counsel intends to attend, should file with the court and serve on the applicant response materials in advance of the hearing.

[558] If the accused does not oppose the application to withdraw and does not want to participate in the hearing of the matter, he or she should file and serve a signed statement indicating that the application to withdraw is not opposed.

[559] An application to withdraw which is filed before the date on which the appeal is assigned to a particular Queen's Bench judge or Court of Appeal panel, as applicable, should be heard by a duty judge.

[560] An application to withdraw which is filed after the date on which the appeal is assigned to a particular judge or appeal panel should be heard by the hearing judge or as directed by the appeal panel, as applicable.

7. APPLYING FOR INTERVENER STATUS see [359]

[561] A person who is not a party to a criminal appeal may apply to a duty judge to intervene in the appeal.

[562] A person who is not a party to an appeal concerning a finding of mental health or fitness may not apply to intervene in the appeal.

8. MANAGING APPEALS see [362]

[563] On application or written request of a party, or the court's own motion, the court may provide appeal management assistance.

[564] Applications or written requests for appeal management assistance must be made to a duty judge, who determines the appropriate form of assistance.

[565] If the duty judge decides to conduct an appeal management conference, the court officer sets the appeal management conference on a date that is convenient to the duty judge and informs both parties as to the time, place and method of participation.

[566] At the conclusion of an appeal management conference, the duty judge may issue a written order or direction, or take any other action which the judge determines appropriate to expedite the conduct of the appeal, avoid unnecessary expense or prevent undue delay.

9. SUMMARY DISMISSAL IN QUEEN'S BENCH

[567] A duty judge of the Court of Queen's Bench may, on application or the court's own motion, order that an appeal be dismissed if there is evidence that the appellant has

- violated the terms of a judicial interim release order,
- not proceeded with the matter, or
- abandoned the appeal.

[568] If the Court of Queen's Bench dismisses the appeal of an appellant who has been granted JIR, the court must issue a warrant for the appellant's arrest and the appellant must surrender into custody.

M. Assistance from Hearing Judge or Panel see [380]

1. WITHDRAWAL OF LAWYER

[569] A lawyer's application to withdraw which is filed after the date on which the hearing judge or panel is assigned and materials have been distributed should be heard by the hearing judge or as directed by the hearing panel.

2. CHANGING FORM OF HEARING – SUMMARY CONVICTION APPEAL *DE NOVO*

[570] An accused or Crown appellant may apply to the Court of Queen's Bench, based on the condition of the summary conviction trial record or other reason, for an order authorizing the appeal to be conducted as a trial *de novo.*

[571] If the court finds that the interests of justice would be served by adopting a different form of appeal, it may order that the summary conviction appeal be determined by way of a trial *de novo* conducted consistent with the trial provisions contained in the *Criminal Code* and applicable rules of court.

3. CHANGING FORMAT OF HEARING – ORAL OR WRITTEN

[572] A party to an appeal may apply to the court to change the format of a hearing from oral to written, or for permission to participate in a manner other than that which is specified for the hearing.

4. ADMITTING NEW EVIDENCE ON APPEAL see [390]

[573] An appellant or respondent may apply to the court to introduce new evidence at the appeal hearing that was not before the trial or other deciding court.

[574] The new evidence, in oral, affidavit, deposition or other format as directed by the court, must be filed with the court in a separate, sealed document or other media and may be admitted at the discretion of the court if special grounds can be shown.

[575] The application to introduce new evidence must be supported by an affidavit which substantiates that new facts sought to be admitted were not before the decision maker.

[576] The court may allow the party in opposition to cross-examine on the affidavit supporting an application to introduce new evidence.

5. ABANDONING THE APPEAL DURING THE HEARING

[577] An appellant may apply to the court to abandon an appeal at the appeal hearing and the court may

- issue an order stating that the appeal is abandoned and dismissed, or
- continue the hearing and decide the matters on appeal.

6. SUMMARY DISMISSAL IN THE COURT OF APPEAL

[578] The Court of Appeal may, on application or on its own motion, dismiss an appeal on the basis of failure to advance the appeal, lack of merit, or abandonment.

[579] Notice of an application to dismiss must be filed and served on all parties to the appeal at least 10 days before the appeal hearing.

[580] The application to dismiss should be heard and decided as the first order of business at the appeal hearing, before commencement of oral argument on the merits of the appeal.

[581] If the court dismisses the appeal of an appellant who has been granted JIR, the court must issue a warrant for the appellant's arrest and the appellant must surrender into custody.

JS PEACOCK QC (Chair)

ND BANKES

PL BRYDEN

AS de VILLARS QC

JT EAMON QC

HON CD GARDNER

WH HURLBURT QC

R KHULLAR

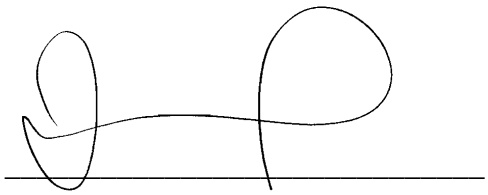
AL KIRKER QC

PJM LOWN QC (Director)

HON AD MACLEOD

ND STEED QC

DR STOLLERY QC



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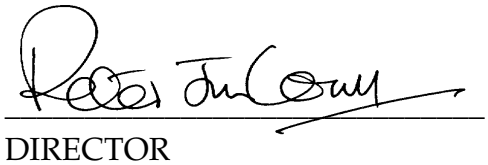

DIRECTOR

APPENDIX A

Criminal Appeal Rights and Courts

		What Decisions May Be Appealed?		To which court?		Leave Required
				QB*	CA	
By Accused	Summary Conviction [813(a)]	Conviction/Order	Not Limited to Particular Grounds**	●		
		Sentence	Not Limited to Particular Grounds	●		
		Fitness/Mental Disorder	Not Limited to Particular Grounds	●		
		Tried with Indictable?	Certain conditions		●	●
	Indictable	Conviction	Question of Law Alone 675(1)(a)(i)		●	
			Question of Fact, Mixed, or Sufficient Grounds 675(1)(a)(ii) or (iii)		●	●
		Sentence	Parole Ineligibility 675(2) and 743.6		●	
			Fitness/Legality of Sentence 675 (1)(b)		●	●
		Fitness/ Mental Disorder (NCRMD)	Question of Law Alone 675(3)		●	
			Question of Fact, Mixed		●	●
		Disposition Orders	Not Limited to Particular Grounds 672.72		●	
		Interim Release	Review by the Court of Appeal		●	
		Cost Award/ Quantum	Not Limited to Particular Grounds 676.1		●	●
		Extraordinary Remedies	General Appeal Provisions of Part XXI of CC Apply Except Where Inconsistent with Terms of 784.		●	
By Crown	Summary Conviction [813(b)]	Acquittal, Stay of Proceedings, and Dismissal of Information	Not Limited to Particular Grounds	●		
		Sentence	Not Limited to Particular Grounds	●		
		Fitness/Mental Disorder	Not Limited to Particular Grounds	●		
		Disposition Orders	Not Limited to Particular Grounds	●		
		Tried with Indictable?	Certain Conditions		●	●
	Indictable	Acquittal	Question of Law Alone 676(1)(a)		●	
		Sentence	Fitness/Legality of Sentence 676(1)(d)		●	●
			Parole Ineligibility 676(4)		●	
		Quash Orders/ Stay of Proceedings	Not Limited to Particular Grounds 676(1)(b) or (c)		●	
		Interim Release	Review by the Court of Appeal 680		●	
		Cost Award/ Quantum	Not limited to Particular Grounds 676.1		●	●
		Extraordinary Remedy	General Appeal Provisions of Part XXI of CC Apply Except where Inconsistent with Terms of s. 784 CC. (*Mandamus*, *Certiorari* and Prohibition, as well as Judgment on the Return of a Writ of *Habeas Corpus*).		●	

* In some circumstances there may be a further appeal from QB to CA.

** Although the right to appeal is not limited to particular grounds, the specific complaints and arguments to support (i.e. appeal grounds) still have to be defined/confined by the appellant's appeal documents.

APPENDIX B

Criminal Rules of Canadian Provinces and Territories

The criminal rules applicable to appeals in effect as of April 1, 2012, include:

Alberta

- *Rules of the Court of Appeal of Alberta as to Criminal Appeals*, S.I./77-174.
- *Bail Rules - Appellate Division of Alberta*, (1972) C. Gaz. I, 2898.

British Columbia

- *British Columbia Court of Appeal Criminal Appeal Rules, 1986*, S.I./86-137.
- *Criminal Rules of the Supreme Court of British Columbia*, S.I./97-140.

Manitoba

- *Manitoba Court of Queen's Bench Rules (Criminal)*, S.I./92-35.
- *Manitoba Criminal Appeal Rules*, S.I./92-106.

Newfoundland and Labrador

- *The Criminal Appeal Rules of the Supreme Court of Newfoundland, Trial Division*, S.I./87-28.
- *Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings*, S.I./2004-134.
- *Supreme Court of Newfoundland and Labrador - Court of Appeal Criminal Appeal Rules (2002)*, S.I./2002-96.

New Brunswick

- *New Brunswick Court of Queen's Bench Summary Conviction Appeal Rules*, S.I./80-117.
- *New Brunswick Criminal Appeal Rule 63 with Respect to Criminal Appeals to the Court of Appeal*, S.I./82-13.

- *New Brunswick Summary Conviction Appeal Rule 64 with Respect to Summary Conviction Appeals to the Court of Queen's Bench*, S.I./92-2.

Northwest Territories

- *Criminal Procedure Rules of the Supreme Court of the Northwest Territories*, S.I./98-78
- *Rules Respecting Criminal Appeals under Sections 678-689 of the Criminal Code and Bail Rules on Appeals to the Court of Appeal for the Northwest Territories*, S.O.R./78-68.

Nova Scotia

- *Rule 91 - Criminal Appeal [Nova Scotia Court of Appeal]*, S.I./2009-3.
- *Rule 63 - Summary Conviction Appeal [Supreme Court of Nova Scotia]*, S.I./2009-23.

Ontario

- *Ontario Court of Appeal Criminal Appeal Rules*, S.I./93-169.
- *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, S.I./2012-7.

Prince Edward Island

- *Prince Edward Island - Criminal Appeal Rules of Court*, S.I./2011-109.

Québec

- *Rules of the Court of Appeal of Quebec in Criminal Matters*, S.I./2006-142.
- *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division 2002*, S.I./2002-46.

Saskatchewan

- *Saskatchewan Court of Queen's Bench Rules Respecting Pre-Trial Conferences*, S.I./86-158.

- *The Court of Appeal Criminal Appeal Rules (Saskatchewan)*, S.I./2011-9.
- *Court of Queen's Bench for Saskatchewan Summary Conviction Appeal Rules*, S.I./2011-20.

Yukon Territory

- *Yukon Territory Court of Appeal Criminal Appeal Rules, 1993*, S.I./93-53.

APPENDIX C

Sentence Appeal Questionnaire

Consolidated Practice Directions
Form B

Sentence Appeal Questionnaire

Part 1:

The following information must be provided on the Questionnaire as the first page of the Sentence Factum:

1. Amount of time in custody before sentence.

2. (a) Date released on bail pending appeal.
   (b) Was community service performed?

3. Serving time for other offences also?

4. Date of mandatory release from last offence (if applicable). Was he/she on other pre-release programs?

5. (a) Sentences given to co-accused and their offences.
   (b) Their previous records are on p. ____ of the _____.

6. (a) Does appellant have previous criminal record?
   (b) If so, is it on p. ____ of the _____.

7. Employment history, including current job: found on p. ____ of the _____.

8. (a) Age at time of offence.
   (b) Age now.

9. Any pre-sentence report, medical or psychological report? If so, found on p. ____ of the _____. Drawn up for this case, or for earlier sentencing?

10. Any evidence of, or statement of effects of, the offence on the victim? If so, found on p. ____ of the _____.

Part II:

Parties need not repeat the following on the questionnaire if the information has been properly included in the Notice of Appeal that was filed:

1. Court and judge convicting.

2. Was there a trial, or a guilty plea?

3. Was there a jury?

4. (a) Offences of which convicted (names and section numbers).
   (b) Do any sentences include those by way of summary conviction?

5. (a) Sentences imposed.
   (b) Total sentence then imposed.
   (c) Any probation conditions? If so, found on p. ____ of the _____.

6. (a) Date of sentence.
   (b) Date of offence.