ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Civil Appeals

Consultation Memorandum No. 12.21
April 2007

Deadline for Comments: June 30, 2007

ALBERTA RULES OF COURT PROJECT

The Alberta Rules of Court Project is a multi-year project which will undertake a major review of the *Alberta Rules of Court* with a view to producing recommendations for a new set of rules. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI.

This Consultation Memorandum is issued as part of the Project. It has been prepared with the assistance of the members of the Appeals Working Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:

The Honourable Justice Carole M. Conrad, Court of Appeal of Alberta
H. Martin Kay, Q.C., Bennett Jones LLP
Ritu Khullar, Chivers Carpenter
Peter J.M. Lown, Q.C., Alberta Law Reform Institute
Havelock B. Madill, Q.C., Brownlee LLP
The Honourable Justice Sheilah L. Martin, Court of Queen's Bench of Alberta
Sandra Petersson, Alberta Law Reform Institute

The Consultation Memorandum was written by Sandra Petersson, Research Manager, Alberta Law Reform Institute. Research assistance was provided by Witek Gierulski, Counsel, Alberta Law Reform Institute and by Shannon Kleinschroth, Erin Viala, Allyson Jeffs, Kristen Lewicki, Jill Miles, and Raisa MacLeod, research assistants at the Institute.

A reader who wishes to have more information about the Alberta Rules of Court Project may consult the background material included in each of the Consultation Memoranda 12.1 to 12.9. More complete information, including reports about the Project and particulars of previous Consultation Memoranda, may also be found at, and downloaded from, the ALRI website: <http://www.law.ualberta.ca/alri>.

The Institute's office is located at:

402 Law Centre
University of Alberta
Edmonton AB T6G 2H5
Phone: (780) 492-5291
Fax: (780) 492-1790

The Institute's electronic mail address is:

reform@alri.ualberta.ca

THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolution of Disputes by Settlement	July 2003	November 14, 2003
12.7	Discovery and Evidence Issues: Commission Evidence, Admissions, Pierringer Agreements and Innovative Procedures	July 2003	November 14, 2003
12.8	Pleadings	October 2003	January 31, 2004
12.9	Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions	February 2004	April 30, 2004
12.10	Motions and Orders	July 2004	September 30, 2004
12.11	Enforcement of Judgments and Orders	August 2004	October 31, 2004
12.12	Summary Disposition of Actions	August 2004	October 31, 2004
12.13	Judicial Review	August 2004	October 31, 2004
12.14	Miscellaneous Issues	October 2004	November 30, 2004
12.15	Non-Disclosure Order Application Procedures in Criminal Cases	November 2004	January 15, 2005
12.16	Trial and Evidence Rules – Parts 25 and 26	November 2004	January 15, 2005

No.	Title	Date of Issue	Date for Comments
12.17	Costs and Sanctions	February 2005	March 25, 2005
12.18	Self-Represented Litigants	March 2005	April 22, 2005
12.19	Charter Applications in Criminal Cases	June 2006	August 25, 2006
12.20	Criminal Jury Trials: Challenge for Cause Procedures	April 2007	June 15, 2007

Available to view or download at the ALRI website: *http://www.law.ualberta.ca/alri/*

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute 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 of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of the Institute's Board are The Honourable Justice N.C. Wittmann (Chairman); A. de Villars, Q.C.; J.W. Fedorak; The Honourable Judge N.A. Flatters; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); The Honourable Justice A.D. Macleod; J.S. Peacock, Q.C. The Honourable Justice B.L. Rawlins; W.N. Renke; D.R. Stollery, Q.C. and K.D. Yamauchi.

The Institute's legal staff consists of P.J.M. Lown, Q.C. (Director); W. Gierulski; D.W. Hathaway; M. Lavelle; L. Lis; and S. Petersson. M.A. Shone, Q.C.; W.H. Hurlburt, Q.C.; and W.N. Renke are consultants to the Institute.

PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by June 30, 2007.

This consultation memorandum addresses the rules relating to civil appeals found currently in Part 39 and various other locations in the Rules. It also addresses Practice Directions relating to civil appeals.

Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Appeals Committee has identified a number of issues arising from these procedures and has made preliminary proposals. These proposals are not final recommendations, but proposals which are being put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

We encourage your comments on the issues and the proposals contained herein. You may respond to one, a few or many of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

Alberta Law Reform Institute
402 Law Centre
University of Alberta
Edmonton AB T6G 2H5
Phone: (780) 492-5291
Fax: (780) 492-1790 E-mail: *reform@alri.ualberta.ca*
Website: http://www.law.ualberta.ca./alri/

The process of law reform is essentially public. Even so, you may provide anonymous written comments, if you prefer. Or you may identify yourself, but request that your comments be treated confidentially (i.e., your name will not be publicly linked to your comments). Unless you choose anonymity, or request confidentiality by indicating this in your response, ALRI assumes that all ***written comments are not confidential***, in which case ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although usually we will discuss comments generally and without specific attributions.

Table of Contents

EXECUTIVE SUMMARY

This consultation memorandum addresses issues relating to civil appeals. Criminal appeals will be addressed separately.

Chapter 1 outlines a set of working principles that guide the policy decisions behind several proposals in this consultation memorandum.

Chapter 2 reviews the many sources of procedural provisions that govern appeals. At present appellate practice is directed by appeal rules, by practice directions, by notices to the profession, and by the trial rules. There is scope for reducing the complexity of appellate practice by consolidating these many sources where appropriate. However, a consolidation raises additional issues for publication and updating.

Chapter 3 begins by identifying factors that contribute to delay in the early stages of an appeal. The proposals for reducing this delay include:

- time to appeal should run from the date of the decision rather than the later date of entry of judgment.
- the appellant will be responsible for filing the main documents in the appeal book. The respondent will have the option to file an additional appeal book if required.
- there should be a deadline for the appellant to order the appeal book to ensure that it will be ready for filing.
- there should be a single deadline for filing the appellant's appeal book, factum and authorities rather than the series of deadlines that currently apply; there should also be a single deadline for filing the respondent's materials.

Chapter 3 then reviews the main steps of an appeal with the objectives of reducing delay, simplifying procedure, and reducing the need for court intervention to ensure the timely progress of an appeal. With respect to the latter, chapter 3 suggests a framework of penalties and consequences that would apply to late completion or non-completion of a step. Chapter 3 also considers cross appeals, calling the list, and costs.

Chapter 4 addresses the quality and content of appeal documents and recognises that the court needs appropriate materials to carry out its role. Chapter 4

also considers the penalties and consequences that should apply if faulty documents are presented for filing.

Chapter 5 reviews applications to the court including notice periods and scope for streamlining the main steps in an application. Chapter 5 also discusses the possibility of electronic hearings and whether more applications should be heard without oral argument. Chapter 5 concludes by discussing three specific applications: leave to intervene, dismissal for want of prosecution, and reconsideration of previously decided case.

Chapter 6 considers the topic of leave to appeal, including the notice period. Chapter 6 also reviews several problem areas that cannot be addressed within the scope of new rules of court but that would require significant review of the statute book. These areas are uniformity of leave requirements, levels and routes of appeal, and criteria for granting leave.

Chapter 7 looks at measures for expediting appeals including Part J appeals and various statutory measures. Chapter 7 considers how expedited appeals should be handled in light of the proposals to streamline the steps of an ordinary appeal. Chapter 7 also asks whether additional categories of appeals should be expedited or whether some expedited appeals should be treated as ordinary appeals.

Chapter 8 addresses a variety of topics under the heading of managing appeals. The topics addressed in chapter 8 include:

- variation of time periods;
- court assistance, through case management;
- judicial dispute resolution; and
- curing irregularities.

Chapter 9 reviews the powers of the court. Chapter 9 begins by reviewing the jurisdiction of the court and concludes that the court's jurisdiction should be stated in primary legislation rather than a regulation. Chapter 9 also concludes that the court's power to dispose of an appeal summarily should be stated expressly. Finally, chapter 9 considers what powers should be held by court officers in order to allow the court to function effectively and efficiently.

ABBREVIATIONS

BC Appeal Rules	*Court of Appeal Rules*, B.C. Reg. 297/2001.
Bowman Report	Sir Jeffery Bowman, *Review of the Court of Appeal (Civil Division): Report to the Lord Chancellor* (London: Lord Chancellor's Department, 1997).
Court of Appeal Act	*Court of Appeal Act*, R.S.A. 2000, c. C-30.
CPD	Court of Appeal, *Consolidated Practice Directions*, online: <http:\\ www.albertacourts.ab.ca/go.aspx?tabid=230 >.
CBA Report	Canadian Bar Association, Task Force on Systems of Civil Justice, *Report of the Task Force on System of Civil Justice* (Ottawa: Canadian Bar Association, 1996).
CJC Report	Canadian Judicial Council, *Well-run Appeals* by J.E. Côté (Ottawa: Canadian Judicial Council, 2006).
Ontario Rules	Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
Stevenson & Côté	William A. Stevenson & Jean E. Côté, *Alberta Civil Procedure Handbook, 2007* (Edmonton: Juriliber, 2007).
SCC Rules	*Rules of the Supreme Court of Canada*, S.O.R./2002-156.

NOTE REGARDING DRAFT RULES

At various points this Consultation Memorandum refers to the Draft Rules that have been prepared in the course of the Rules of Court Project and revised up to February 2007. However, the Draft Rules are not in final form and further changes are anticipated. As the purpose of this Consultation Memorandum is to encourage discussion regarding appeal rules, the Draft Rules do not encompass appellate practice at this point. However, the Draft Rules are a valuable point of reference for assessing what might be appropriate or inappropriate in the context of an appeal.

LIST OF ISSUES

CHAPTER 1. INTRODUCTION AND WORKING PRINCIPLES

> An effective system for appeals is an essential part of a well-functioning system of civil justice.
>
> – Lord Woolf, MR[1]

> There does not seem to be a great deal of authoritative written material about the purposes of an appeals system.
>
> – Sir Jeffrey Bowman[2]

[1] A system of appeals reminds us that the justice system depends on human actors. Errors are possible and do occur. If there were no mechanism for addressing such errors, public faith in the system would decline or perhaps disappear entirely. Thus, as Lord Woolf suggests, a system of appeals is essential to the proper functioning of the system.

[2] Lord Woolf adds the further condition that the system of appeals should be effective. The mere existence of an appeal process does not guarantee effectiveness. For example, while the writ of error allowed a common law court to review a decision, the writ was only available before judgment was entered. Such limited scope for review could hardly be said to provide an effective system of appeals. Nor are examples of ineffective appeal systems confined to the dusty corners of legal history. In 1973, a special committee of the Canadian Bar Association considered that an excessive case load had undermined the Supreme Court of Canada's ability to hear and decide cases in a manner appropriate for a final court of appeal.[3]

---

[1] The Right Honourable H.S. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: H.M.S.O., 1996) at para 14.1.

[2] Sir Jeffery Bowman, *Review of the Court of Appeal (Civil Division): Report to the Lord Chancellor* (London: Lord Chancellor's Department, 1997) at 25 [hereafter "Bowman Report"].

[3] Canadian Bar Association, *Report of the Special Committee of the Canadian Bar Association on the Caseload of the Supreme Court of Canada* (Ottawa: Canadian Bar Association, 1973). The special committee concluded that significant changes were required and recommended that leave to appeal be required in all civil cases.

[3] However, before we can assess whether an appeal system is effective, we must consider what the purpose of an appeal system is or should be. This is an important step but one that is often overlooked. As Sir Jeffrey Bowman concludes the fundamental concepts underlying an appeal system are not well-defined, despite the fact that there have been numerous studies that identify problems within appeal systems or specific appellate courts.[4] However, if we do not understand the purposes of an appeal system, how can we measure whether the system is *effective*? In other words, how can we assess whether those purposes are being achieved? Moreover, without such understanding it is difficult to gauge the impact of specific problems or to propose appropriate measures for reform.

[4] This Committee recognises that to best fulfill its mandate to review the provisions concerning appellate practice in Alberta an outline of working principles relevant to the role of an appellate court first had to be established. Against that background, the Committee would be better placed not only to identify problems but also to assess which measures for reform would be most effective. The Committee's work in this regard has drawn on the principles adopted in the Bowman Report on appellate reform in England and Wales with modification for the Alberta context. Those principles are set out and discussed under the next heading.

[5] The Committee identified two additional reasons for adopting a set of working principles. The first relates to changes in the Alberta court structure since the last revision of the Alberta Rules of Court in 1968. At that time, the Supreme Court of Alberta was still in place. While the Appellate Division of that court had considerable autonomy from the Trial Division, the general structure of the 1968 Rules of Court reflects a single court with a trial focus. Although consequential amendments were made to the Rules of Court and other legislation when the Court of Appeal and Court

---

[4] See for example Ian Greene *et al*., *Final Appeal: Decision-making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998) at c. 8; Canadian Bar Association, *Task Force on Systems of Civil Justice, Report of the Task Force on System of Civil Justice* (Ottawa: Canadian Bar Association, 1996) at c. 4 [hereafter "CBA Report"]; Earl Cherniak and John McManus, *Appeals: An Issue Paper Prepared for the Canadian Bar Association Systems of Civil Justice Task Force* (Ottawa: Canadian Bar Association, 1996); J.D. Taggart, *Report to the Canadian Judicial Council Appeal Courts Committee Concerning Delays in Canadian Appeal Courts* (Ottawa: Canadian Judicial Council, 1995); Canadian Bar Association, *Report of the Canadian Bar Association Committee on the Supreme Court of Canada* (Ottawa: Canadian Bar Association, 1987).

of Queen's Bench were established as separate courts in 1979, many fundamental issues flowing from that change have not been addressed.[5] In the course of its work, the Committee found many instances where practices that are appropriate at the trial level, are no longer so on appeal. The Court of Appeal has a distinct role in our justice system and that role needs to be reflected in the rules that govern appeals. The working principles provide assistance in this regard.

[6] The second reason for adopting working principles relates to the question of resources and capacity. An appellate court cannot be all things to all litigants. The capacity of an appellate court will ordinarily be significantly less than that of the trial court or courts.[6] Consequently, it is reasonable to anticipate that the demand for access to the appellate court will from time to time exceed the capacity of court resources. If demand remains high over a sustained period of time, it may be appropriate to consider whether resources need to be increased or whether choices will have to be made between which cases warrant an appeal hearing and which do not. As the Civil Justice Task Force and the authors of other reports have concluded, achieving an effective system of appeals is a question of balance rather than the construction of an ideal.[7] A set of working principles can be a useful tool when there is a choice to be made between policy options.

[7] The Rules Project Steering Committee approved four objectives for the Project as a whole. Those objectives address both the need for rewriting and, sometimes, rethinking practice. Those objectives are:

> **Objective # 1: Maximize the Rules' Clarity**
>
> Results will include:
>
> - simplifying complex language
> - revising unclear language
> - consolidating repetitive provisions

---

[5] The *Court of Appeal Act*, S.A. 1978, c. 50 and the *Court of Queen's Bench Act*, S.A. 1978, c. 51 both came into force on 30 June 1979.

[6] Indeed, an appeal court that heard as many cases as the trial court would call into question the functioning of the trial court and likely reveal an underlying defect in the justice system as a whole.

[7] For example, having noted the increasing workload and backlog faced by appellate courts, the Civil Justice Task Force recommended that all appellate courts be given greater control over their civil dockets, including the prospect of increasing leave provisions: CBA Report at 49.

- removing obsolete or spent provisions
- shortening rules where possible

Objective # 2: Maximize the Rules' Useability

Results will include:

- reorganizing the rules according to conceptual categories within a coherent whole
- restructuring the rules so that it is easier to locate relevant provisions on any given topic

Objective # 3: Maximize the Rules' Effectiveness

Results will include:

- updating the rules to reflect modern practices
- pragmatic reforms to enhance the courts' process of justice delivery
- designing the rules so they facilitate the courts' present and future responsiveness to ongoing technological change, foreseeable systems change and user needs

Objective # 4: Maximize the Rules' Advancement of Justice System Objectives

Results will include:

- pragmatic reforms to advance justice system objectives for civil procedure such as fairness, accessibility, timeliness and cost effectiveness

The Appeals Committee has adhered to these objectives in its work.

[8] However, as noted, the Appeals Committee concluded that its work should also be guided by basic principles relevant to the distinct role of an appellate court. The Appeals Committee considers that these principles facilitate objectives 3 and 4 established by the Steering Committee.

[9] While the Bowman Report sets out ten principles to guide its review of the appellate practice in England and Wales, the Appeals Committee adopts a simpler set of five principles.[8] The Committee's working principles are:

---

[8] The principles adopted in the Bowman Report at 24-27 are set out below and have been numbered here for convenience:

1. A civil appeal should be dealt with in ways which reflect the principles which Lord Woolf recommended the civil justice system should meet.
2. An appeal should not be seen as an automatic further stage in a case.
3. An individual who has grounds for dissatisfaction with the outcome of his or her case should

(continued...)

1. An individual who has grounds for dissatisfaction with the outcome of his or her case should generally be able to have the case looked at by a higher court so that it can consider whether there appears to have been an injustice.
2. There is a private and a public purpose of appeals in civil cases. The private purpose is to correct an error, unfairness or wrong exercise of discretion which has led to an unjust result. The public purpose is to ensure public confidence in the administration of justice and, in appropriate cases, to:
   – clarify and develop the law, practice and procedure; and
   – help maintain the standards of first instance courts and tribunals.
3. An appeal should not be seen as an automatic further stage in a case. The presumption should be that the trial court got it right.
4. Appeals should be dealt with in ways that are proportionate to the grounds of complaint and the subject matter of the dispute.
5. An appeal process should ensure that, so far as is practical, delay, cost, and uncertainty of process are reduced to a minimum.

---

[8] (...continued)

always be able to have the case looked at by a higher court so that it can consider whether there appears to have been an injustice and, if so, allow an appeal to proceed.

4. An appeal process should ensure that, so far as is practical, uncertainty and delay are reduced to a minimum.
5. There is a private and a public purpose of appeals in civil cases. The private purpose is to correct an error, unfairness or wrong exercise of discretion which has led to an unjust result. The public purpose is to ensure public confidence in the administration of justice and, in appropriate cases, to:
   - clarify and develop the law, practice and procedure; and
   - help maintain the standards of first instance courts and tribunals.
6. Appeals should be dealt with in ways that are proportionate to the grounds of complaint and the subject matter of the dispute.
7. More than one level of appeal cannot normally be justified except in restricted circumstances where there is an important point of principle or practice or one which for some other special reason should be considered by the CA.
8. Certain appeals which now reach the CA should normally be heard at a lower level provided that they are heard by a court or judge with superior jurisdiction to the court or judge who made the first instance decision.
9. Generally, appeals should not be heard by courts consisting only of judges from lower courts sitting as deputies in the higher court.
10. On some occasions, the court hearing an appeal will need to include judges with special expertise.

The Appeals Committee considered that principle 1 was well covered by the Rules Project Objectives and need not be restated for appeals. As to principles 7-10, the Committee considered that they could not be adopted as principles because they dictate specific changes. In the Alberta context, they are better characterised as recommendations. As such, the Committee recognised that an arguable case would have to be made out before the changes anticipated in "principles" 7-10 could be considered.

The Committee recognises that the principles will not always lead to the same conclusion. While principles 1, 2 and 3 reflect ideas relating to justice and the rule of law, principles 4 and 5 remind us that neither the justice system nor litigants have unlimited resources. The balancing of these principles is reflected in many areas of appellate practice. For example, leave to appeal allows an individual to bring a case forward for review in keeping with principles 1 and 2. The decision to grant or deny leave will consider factors relevant to principles 2 and 3, as well as those associated with principles 4 and 5.

CHAPTER 2. CONSOLIDATING APPEAL RULES

ISSUE 1
Should the appeal rules be formally consolidated?

ISSUE 2
If a consolidation were to be published, should the consolidation appear as part of the Alberta Rules of Court or as a separate set of rules?

[10] Rules relevant to appeals are located throughout the Alberta Rules of Court and also in Practice Notes issued by the Court of Appeal. Consequently, it is not always a simple task to identify which rules are relevant to a particular matter. For example, the required content of appeal documents is governed by Part 39 and, as is often overlooked, r. 5.12 of the Rules of Court and by the Practice Notes. Examples such as this and other problems fuel the conclusion that appellate practice in Alberta is overly complex.

[11] The initial phase of the Rules Project sought general comments from the profession at a number of consultation meetings. Several comments noted the complexity of appellate practice, focussing on the Practice Notes:

> The appeals Practice Notes are very frustrating. They are overly complicated and overly specified. It is just about impossible to produce a document that will be filed on the first try. [Canadian Bar Association, Creditors' Rights Sub-Section Meeting]

> On one file the notice of motion was rejected four times. There is a problem especially with the Court of Appeal. The Forms required by the Court of Appeal are nonsense. Documents filed by lawyers are bounced for very small formal errors. Yet unrepresented individuals are given a hearing if they file a scrunched-up piece of paper. We need a more practical approach. [Firm Consultation]

> The Rules have accomplished a lot. Lawyers are afraid of going to the Court of Appeal, because of the "little stuff", such as the number of characters to the inch. [Firm Consultation]

[12] In reviewing the rules that govern appeals, the Committee has concluded that complaints regarding the complexity of appellate practice are valid. However, in fairness, the Practice Notes are not the sole cause of this problem. Neither the Rules of Court nor the Practice Notes provide a complete picture of appellate practice. Both sources must be consulted. However, there is no parallel structure to facilitate reference between them. The difficulty in consulting two sources is compounded by the fact that neither source includes modern finding aids such as a detailed table of contents or index. Marginal notes and headings are also often too general or sometimes inaccurate. Language is not always plain. The Committee has concluded that the cumulative effect of these defects is that too much time is wasted in trying to determine the substance of the current rules. In this regard, appellate practice in Alberta may be accurately characterised as overly complex.

[13] However, the Committee has also concluded that the underlying substance of the current rules is far less complicated than their present form indicates. In order to establish a complete picture of appellate practice in Alberta, the Committee found it necessary to draw together rules from all of these sources. In essence, the Committee had to consolidate the relevant rules before it could properly assess the nature of current practice and where reforms might be required. That consolidation suggests that there is a clear basis for a unifying structure underneath the complexities of form. For example, there are so many similarities in the rules governing the content and format of various appeal documents that one must question whether exceptions are genuinely required for particular documents? Without a strong reason to justify an exception, a general rule applying to all documents should be sufficient.

[14] However, while the Committee believes that appellate practice would be greatly simplified if the relevant appeal rules were formally consolidated, three issues should first be considered:

- What criteria should determine which rules might be consolidated?
- Should the consolidation continue within the Rules of Court or be published separately?
- How might a consolidation be updated in future?

A. Criteria for Consolidation

[15] The first matter to consider is which rules are appropriate for consolidation and which are not. This discussion extends both to the consolidation of rules from the Rules of Court and the Practice Notes, as well as to consolidating rules scattered throughout the Rules of Court.

1. Rules and Practice Notes

[16] Turning first to the criteria that would identify relevant rules from within the Practice Notes. At present, many rules in the Practice Notes have the same substantive function as rules in the Rules of Court. Many Practice Note rules have also been in place for a considerable period of time and are firmly established as part of appellate practice. The Committee considers that such rules will generally be appropriate for consolidation. Other rules, however, may lack this level of substance and permanence. The Committee considers that it would be inappropriate to consolidate any temporary measures or pilot projects until the proposed provisions are formally adopted.[9] Consequently, in determining which matters are appropriate for consolidation and which are not, the Committee considers that the general criteria should be whether the practice is well established and working effectively. This will allow the Court of Appeal to continue any initiatives currently underway and to make ongoing adjustments to areas where practice remains in flux.

2. Part 39 and other rules

[17] While the majority of appeal rules are set out in Part 39, others are found throughout the Rules of Court. Some are specific to appeals and some are trial rules that apply to appeals as necessary. The Committee takes the general position that, wherever possible, all the rules relevant to a particular subject should be kept together. For example, the content of r. 5.12 [required content of all filed documents] should be restated within Part 39. While this will result in some duplication of rules between the trial and appellate practice, the Committee considers that ease of reference and, thus, better compliance will usually outweigh any drawbacks of duplication. However,

---

[9] From time to time, the Court of Appeal introduces new initiatives on a test basis by Notice to the Profession. For example see: Notice to the Profession – Time Limits on Motions (June 2004), online: The Court of Appeal of Alberta <http://www.albertacourts.ab.ca/ca/practicenotes/NTPjune302004-timeonmotions.pdf>, and Notice to the Profession – April 2006 Release (6 April 2006), online: The Court of Appeal of Alberta <http://www.albertacourts.ab.ca/ca/practicenotes/NTpapr2006.pdf>.

decisions on whether to repeat a rule or to rely on a trial rule are best dealt within the context of specific subjects and during the drafting process.[10] Where trial rules are retained, the Committee proposes that their application to appeals be stated more clearly and consistently.[11]

B. Publication

[18] If the appeal rules were to be consolidated, a second issue to address is how would they be published? Would the consolidation continue as part of the Alberta Rules of Court? Or would the consolidation be published as a separate set of appeal rules?

[19] The structure of the current Rules of Court reflects an older court structure. When they were issued in 1968, the trial and appeal courts were both divisions within the Supreme Court of Alberta. It might now be argued that separate courts warrant separate rules. Indeed, British Columbia, Manitoba, and Saskatchewan have separate appeal rules.[12] However, the new English Civil Procedure Rules retain the appeal rules as part of the general rules, as do Ontario and the Federal Court.[13]

---

[10] For example, as discussed in chapter 4, there is good reason to consolidate the rules relating to document content and quality of appeal documents. In contrast, as discussed in chapter 5, there is good reason why affidavits should be dealt with in the trial rules and not duplicated within the appeal rules.

[11] Currently, general or trial rules extend to appeals by several mechanisms. Some rules apply to documents or proceedings governed by "these Rules": eg. the definitions in Part 1 and the computation of time in Part 40 extend to appeals as proceedings covered by the Rules of Court. In some instances, the appeal rules refer expressly to the trial rules: eg. r. 518.1 incorporates the settlement rules of Part 12. In other instances, rules expressly applying to appeals are included alongside the trial rules: eg. several subsections of r. 318 address judgment on appeal while other subsections apply to trial judgments. Finally, should there be a gap in appellate procedure, r. 4 would be relevant and allow practice to be regulated by analogy to existing rules. In contrast, however, there are also instances where the context would exclude the application of certain trial rules to the appeal rules: for example, Part 11 on summary judgment would arguably not extend to appeals.

[12] *Court of Appeal Rules*, B.C. Reg. 297/2001 [hereafter "BC Appeal Rules"] and *British Columbia Court of Appeal Criminal Appeal Rules, 1986*, B.C. Reg. 145/1986; *Court of Appeal Rules*, Man. Reg. 555/88R; Saskatchewan *Court of Appeal Rules*, online: Courts of Saskatchewan <http://www.sasklawcourts.ca/default.asp?pg=ca_rules_courtrules>.

[13] *Civil Procedure Rules 1998* (U.K.), S.I. 1998/3132, Part 52; Ontario, *Rules of Civil Procedure*, R.P.O. 1990, Reg. 194, rr.61-63; *Federal Court Rules*, S.O.R./98-106, rr. 335-356.

[20] If published separately, the appeal rules would not likely operate as a stand-alone code of appellate procedure. To avoid considerable duplication, cross-references to the trial rules would still be necessary.[14] Rules relating to parties, service, affidavits and evidence are relevant in both trial and appellate practice, to list but a few areas of overlap. Alternatively, provisions could be duplicated between the trial and appeal rules. However, to do so would require amendments to both sets of rules to retain appropriate consistency between trial and appellate practice.

C. Updating

[21] A consolidation would be of short-term benefit without a mechanism to incorporate changes that would otherwise have to be made by new Rules of Court or Practice Notes. The Court of Appeal has established a process by which non-urgent changes to the Practice Notes will generally be made in April and October of each year.[15] While the Lieutenant Governor in Council may make changes to the Rules of Court at any time, those changes are preceded by recommendations from the Rules of Court Committee which typically meets up to four times per year. It would not appear to be an unreasonable task to coordinate the future exercise of rule-making authority to allow updates to the consolidation. Indeed, a considerable degree of coordination already exists. The Court of Appeal has a representative on the Rules Committee and the Rules Committee seemingly only makes changes to the appeal rules at the Court of Appeal's request. The Appeals Committee considers that such a coordinated approach is appropriate given the nature of rule-making authority in Alberta. The continuation of a coordinated approach would facilitate amendments and updates to any agreed consolidation.

[22] The Committee recognises, however, that from time to time, a coordinated process may not be appropriate. For example, urgent changes might be required more quickly than a coordinated process could accommodate. In such circumstances,

---

[14] For example, the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 30 provides:
30 If no special provision is contained in this Act or the Rules, the procedure and practice of the court is to be regulated by analogy to this Act and the rules or, if there is no appropriate analogy, by analogy to the *Supreme Court Act* and the Supreme Court rules.

[15] Notice to the Profession – Distribution Notice (April 2004), online: <http://www.albertacourts.ab.ca/ca/practicenotes/ntppapr2004dist.pdf>.

implementing the required change by Practice Note or Order in Council remains an option, with the expectation that changes will be incorporated as part of the consolidation as soon as possible.

POSITION OF THE COMMITTEE

[23] The Committee believes that appellate practice would be greatly simplified if the relevant appeal rules were formally consolidated. The Committee considers that such a consolidation would assist in reducing cost, delay and uncertainty of process (principle 5) and would also advance the objectives of the Rules Project. If litigants are better able to comply with the requirements, there is a benefit to the justice system overall.

[24] The Committee further considers that, on balance, such a consolidation should be published as a separate set of rules. The Committee invites your comments on the practicality of this approach and is particularly interested in whether you think provisions should be duplicated between the appeal rules and the trial rules or whether the appeal rules should be cross-referenced to the trial rules to reduce duplication.

CHAPTER 3. THE MAIN STEPS IN AN APPEAL

[25] This chapter considers the main steps that must be completed before an appeal is ready for hearing. Within this chapter the context for discussion is an "ordinary" appeal; Part J and other expedited appeals are considered in chapter 7. Applications within an appeal are discussed in chapter 5.

[26] Appellate practice in Alberta differs markedly from trial practice in the existence of a strict framework of deadlines for completing each step. This difference reflects the distinct role of each court. While parties retain significant control over the pace of litigation at the trial level,[16] once the trial is completed, time is increasingly critical. Although a party who lost should be able to have the decision reviewed (principle 1), the successful party is entitled to the benefit of the trial decision. Both the parties and the justice system are impaired if a trial decision is subject to challenge on an open-ended or drawn out basis. Moreover, by the end of trial, both parties and the justice system will have expended significant resources and time. Thus, there are strong private and public incentives to resolve an appeal in a timely manner.

[27] In the course of its review, the Committee concluded that the current provisions allow too much scope for delay in the early steps of an appeal. The Committee has considered this problem and suggested proposals to address initial delay. However, if those proposals are adopted, they will have an impact on the remaining steps in an appeal. Consequently, it is appropriate to review the problem of delay before addressing the individual steps of an appeal in sequence.

---

[16] Alberta Law Reform Institute, *Management of Litigation* (Consultation Memorandum No. 12.5) (Edmonton: Alberta Law Reform Institute, 2003) at 29-32 and 35-38. While the Draft Rules require the parties to file a litigation plan, the deadlines for completing most steps in the litigation will be determined by the parties.

A. Delay in the Early Steps of an Appeal

1. Nature of the problem

Entry of judgment

[28] At present, time for filing notice of appeal from a Queen's Bench matter does not run until judgment is entered and served.[17] However, current practice is problematic as there are no deadlines to encourage prompt entry, aside from the r. 327 requirement to obtain leave if judgment is not entered within one year. Consequently, an appeal may incur considerable delay in getting started. As noted by the General Rewrite Committee, "Any party considering whether to appeal an order may deliberately delay its entry to buy additional time to decide about the appeal or simply to postpone the day of reckoning."[18] Given that the initial decision to sue will often have to be made within 2 years of the claim arising,[19] allowing another full year to decide whether to appeal is inconsistent with both Rules Project objectives and the Committee's working principles.

Leave applications

[29] Delay is also likely to result if leave is required. While it is generally understood that a leave application must be filed within the time to appeal, this

---

[17] Rule 506 prescribes the time for filing notice of appeal:

506(1) Subject to Rule 514(3) [urgent filing permitted in QB] and Rule 577.3 [time to appeal in divorce matters], notice of appeal shall be filed in the office of the clerk of the judicial district in which the proceedings have been carried on and in the office of the Registrar of the court to which appeals from that judicial district are required to go, within 20 days

(a) in the case of a judgment, after the formal judgment or order has been signed, entered and served,
(b) in the case of an order, after the order has been signed issued and served,
(c) in the case of a direction, after the judgment or order founded thereon has been signed, entered, or issued and served,
(d) in the case of a finding or verdict, after the judgment or order founded thereon has been signed, entered or issued and served, and
(e) in the case that the defendant has not filed a defence or demand of notice, after the entry of judgment.

Time also runs from service in a range of statutory appeals, either by the application of r. 506(1) (eg. *Expropriation Act*, R.S.A. 2000, c. E-13, s. 37) or by express provision in the act (eg. *Architects Act*, R.S.A. 2000, c. A-44, s. 58).

[18] Alberta Law Reform Institute, *Motions and Orders* (Consultation Memorandum No. 12.10) (Edmonton: Alberta Law Reform Institute, 2004) at 63.

[19] *Limitations Act*, R.S.A. 2000, c. L-12, s. 3.

requirement is not stated expressly in the rules.[20] Consequently, a litigant may be confused as to when to apply for leave, i.e. before, after, or at the same time as filing notice of appeal. Moreover, as other steps run from filing the notice of appeal, time will usually be suspended until the leave application is decided.[21] This situation allows an appellant to apply for leave and then delay any further progress on the appeal for up to six months.[22] Finally, once leave has been granted there may be a further period of delay before notice of appeal is filed.[23] While leave is an effective tool for identifying which cases warrant hearing by the court and, equally important, which do not, there is scope for decreasing the delay associated with a leave application.

Appeal books

[30] Once notice of appeal has been filed, there are three further opportunities for delay in preparing the appeal book. Firstly, the rules do not provide clear guidance as to what should go into the appeal book. Rules 515(6) and 530(14) both stress that only necessary materials should be included in an appeal book.[24] However, the rules

---

[20] Part 39 provides little guidance on the procedure for bringing a leave application. The recent adoption of CPD Part J provides a clearer process for leave applications but its application is limited: Court of Appeal, *Consolidated Practice Directions* [hereafter "CPD"], online: <http:\\ www.albertacourts.ab.ca/go.aspx?tabid=230>.

[21] For example, CPD J.3(d) provides:

> J.3(d) from the date that the notice of motion is filed, the time to appeal will not run until the decision on the application for leave is filed.

[22] CPD F.8 provides:

> F.8 Where an application for leave to appeal has not been heard within 6 months from the date the notice of motion is filed, the motion will be deemed abandoned, unless otherwise ordered before the expiration of this 6-month period.

[23] CPD J.3(i) allows a further 14 days to file notice of appeal:

> J.3(i) Where leave to appeal is granted, the appellant(s) shall file a notice of appeal in Form N and serve all parties within 14 days from the date the decision on the leave application is granted. Any failure to file within this time frame will result in the appeal being struck.

[24] Rule 515(6) provides:

> 515(6) It is the duty of all counsel on an appeal so far as possible to ensure that only the material needed for the disposition of the appeal is included in the appeal book and to eliminate evidence exhibits and other material unlikely to be needed.

Rule 530(14) provides:

> 530(14) An agreement as to contents of an appeal book or order as to contents of an appeal book must exclude all matters not truly necessary to decide the appeal, but may provide that certain documents or transcripts are to be considered part of the record before the Court of Appeal without reproducing them in the Appeal Book.

detailing how to divide an appeal book into parts and volumes and the long list of documents to be included under each part, along with the detailed forms for tables of contents, send a mixed message. On the one hand, the rules provide for how to manage all possible documents on an appeal. On the other hand, the rules suggest that many of those documents will not be necessary in every appeal. The longer the appeal book, the more time it will take to prepare. Better guidance as to what materials are necessary will help to reduce preparation time.

[31] Secondly, the current mechanism for reaching agreement on the contents of the appeal book creates delay. Once the appellant has identified which documents the appellant considers necessary, the respondent must approve or object to the appellant's proposal.[25] If the respondent objects, there is no deadline for reaching agreement. Although parties have the option to apply to the court to fix the contents of the appeal book under r. 515(3), again there is no deadline for doing so. Meanwhile, time for filing the appeal book does not run until the contents are agreed or fixed by court order. Consequently, an appeal may be stalled for some time while the contents are disputed. Again, a more effective approach to determining the contents of an appeal book would help to reduce delay.

[32] Thirdly, delay will also result if the appeal book is not ordered promptly. While an appeal book must be "prepared promptly", production will not begin until the book has been ordered.[26] At present, there is no deadline for placing the order to start production. The only deadline that applies is that the completed appeal book must be

---

[25] Rule 515(1) provides:

515(1) Within 15 days after Notice of Appeal is filed, the appellant shall serve on all parties affected by the appeal a proposed agreement as to contents of the appeal book.

If there is no objection, the proposed contents are deemed to be accepted 15 days after service:

515(4) If a party does not respond to the proposed agreement as to the contents of the appeal book within 15 days after it is served on him, he shall be deemed to have accepted it and the solicitor of the party serving the document shall thereon endorse the agreement to the effect that service thereof was made and no response was received within the appointed time.

[26] Rule 530(15) provides:

530(15) Appeal books must

(a) be prepared promptly and filed and served forthwith after they are prepared, and

(b) in any event, unless otherwise ordered by a judge, be filed not later than 12 weeks from the date on which the agreement as to contents was filed or fixed,

or the appeal will be struck by the Registrar.

filed within 12 weeks of resolving the contents. However, given the time required to produce an appeal book, delay in ordering will often result in late filing.

[33] The net effect of these problems is that there is little or no incentive to ensure the timely progress of an appeal from the outset. The current provisions allow up to 18 months between the date of the decision and filing the appeal book.[27] A party intent on delay could easily increase that gap. Thus, the scope for delay in the early steps of an appeal is contrary to both the objectives of the Rules Project as a whole and to the working principles adopted by the Appeals Committee. Initial delay also makes it difficult to meet the CBA Report recommendation that appeals should be heard within 9-12 months of filing.[28]

2. Proposals for reducing delay

[34] As the potential for delay arises throughout the early steps of an appeal, the Committee proposes a number of measures to redress the problem. Each of these is considered below.

a. Date of decision

> **ISSUE 3**
> **Should time to appeal run from the date of the decision under appeal?**

[35] As noted, the absence of deadlines for entry and service of judgment is problematic for initiating a timely appeal. This problem was reviewed, in part, by the General Rewrite Committee. That committee made two recommendations to reduce delay.[29] The first recommendation requires service of a draft judgment or order within 10 days of the date of the decision. A party served with the draft then has 10 days to approve it or to apply to the court to settle any objections. If a party served does

---

[27] Twelve months for entry of judgment, 20 days for notice of appeal, 30 days for default agreement as to contents, and 4 months for filing appeal books.

[28] CBA Report recommendation 22(a)(ii).

[29] Alberta Law Reform Institute, *Motions and Orders* (Consultation Memorandum No. 12.10) (Edmonton: Alberta Law Reform Institute, 2004) at 64-66.

nothing, the draft can be entered at the end of the 10 day period. The second recommendation requires that a judgment or order must be entered within three months of the date of the decision. Beyond three months, the judgment or order can only be entered with consent of the Court of Queen's Bench.

[36] While these recommendations will reduce delay in entering judgment they retain three opportunities for delaying an appeal. Firstly, the party required to prepare the draft judgment or order may not do so within 10 days or at all. Secondly, there is no deadline for resolving objections regarding the draft. Thirdly, entry may still be delayed for up to three months without consequence. Thus, as under the current rules, several months may pass before a party has to act on an intention to appeal. This potential for delay does not reflect the Committee's working principles. In keeping with the principle that an appeal is not an automatic further stage in a case (principle 3) and that delay in the appeal process should be reduced to a minimum (principle 5), it is reasonable to expect an appellant to decide whether to bring an appeal in a shorter period of time.

[37] As an alternative, time to appeal could be calculated from the date of the decision. This approach is already in place in several areas of the law in Alberta. For example, time to appeal under the *Divorce Act* runs from the date of the decision.[30] A broad range of statutory appeals also calculate time to appeal from the date of the decision.[31] Time for appealing to the Supreme Court of Canada is calculated from the

---

[30] *Divorce Act*, R.S.C. 1985 (2d Supp.), c. 3, s. 2.1.

[31] Time runs from the date of the decision in the following: *Adult Adoption Act*, R.S.A. 2000, c. A-4, s. 11; *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, s. 27; *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, s. 26; *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 58; *City Transportation Act*, R.S.A. 2000, c. C-14, s. 18; *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 41; *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 80; *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 688; *Natural Gas Marketing Regulation*, Alta. Reg. 358/1986, s. 28(1); *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 31; *Police Act*, R.S.A. 2000, c. P-17, s. 18; *Public Utilities Board Act*, R.S.A. 2000, c. P-45, s. 70. Time runs from sending the decision in the following: *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 247; *Cooperatives Act*, S.A. 2001, c. C-28; s. 336; *Securities Act*, R.S.A. 2000, c. S-4, s. 38.

date of the decision as are appeals to many other appellate courts.[32] Calculating time from the date of decision is also consistent with the general rule that judgments take effect from pronouncement.[33]

POSITION OF THE COMMITTEE

[38] The Committee considers that time for filing notice of appeal should run from the date of the decision.

b. Applications for leave to appeal

[39] As discussed above, the current provisions relating to leave applications lack appropriate deadlines. There is also scope for greater clarity in the leave process generally. The Committee will consider issues relevant to the timing of a leave application in this chapter. Further issues regarding the leave process are discussed in chapter 6.

c. Contents of the appeal book

ISSUE 4
How should the contents of the appeal book be determined?

---

[32] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 58. In civil appeals to the Supreme Court of Canada, the applicant must file a leave application within 60 days of the decision. See also: Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 61.03 & 61.04 [hereafter "Ontario Rules"]; Nova Scotia, *Civil Procedure Rules*, r. 62.02, online: <http://www.courts.ns.ca/Rules/toc.htm>; New Brunswick, *Rules of Court*, N.B. Reg. 82-73, r. 62.05; British Columbia, *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 14 and *Court of Appeal Rules*, B.C. Reg. 297/2001, r. 11; Saskatchewan, *Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1, s. 9; England and Wales, *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 55.5.

[33] Rule 322 provides:

> 322(1) Every judgment and order is to be dated as of the day on which it is pronounced.
> (2) Every judgment and order takes effect from
> (a) the date of pronouncement, or
> (b) if the Court gives leave for the judgment or order to come into force before or after the date of pronouncement, the judgment or order takes effect from the date so ordered.
> (3) This Rules applies whether or not the judgment or order has been entered in accordance with these Rules.

The General Rewrite Committee recommended to retain pronouncement as the date that judgments and order come into force: Alberta Law Reform Institute, *Motions and Orders* (Consultation Memorandum No. 12.10) (Edmonton: Alberta Law Reform Institute, 2004) at 66.

[40] As noted, both determining what to include in the appeal book and obtaining agreement regarding the contents can contribute to initial delay. Moreover, where parties have had to resort to trial to resolve their dispute, the circumstances may not be favourable to their reaching an agreement of any kind. Thus, while there may be benefits in a joint appeal book, those benefits must be weighed against the prospect of delay. What options are available for balancing the needs of the parties and the court as regards appeal books?

Documents required by the court

[41] A primary consideration is that the appeal book must be sufficient to allow the court to consider the appeal. In this regard, the current rules do not distinguish between documents that are necessary for the court to do its job and those that reflect the interests of the appellant or the respondent. Determining which documents are necessary from the court's perspective is a critical step in identifying what should go into the appeal book. At present, this determination is made by the parties rather than the court. However, neither the appellant nor the respondent may be in the best position to identify what documents are necessary from the court's perspective. Both have a specific interest in the individual case. Moreover, the court's role extends beyond the individual case. Ultimately, the best party to determine what documents are necessary from the court's perspective is the court. While it would be impractical for the court to do so in each individual appeal, the general requirements could be stated in a rule. For example, the Draft Practice Direction on Case Management proposed that, unless otherwise ordered, an appeal book would include all relevant pleadings, evidence, essential exhibits and final documents, including the judgment or decision appealed from.[34] Such an approach would also provide better guidance to the parties as to what should go into the appeal book in contrast to the mixed message of the current provisions.

---

[34] The Court of Appeal, Draft Practice Direction on Case Management (2000) provides:
5(b) Within 14 days of filing the notice of appeal, the appellant(s) shall file and serve a list of contents of appeal book. This list may contain any documents that the appellant(s) requires, but at a minimum, must include all relevant pleadings, evidence, essential exhibits and final documents, including the judgment or decision appealed from, unless otherwise ordered.

Additional documents

[42] In addition to ensuring that the appeal book meets the court's requirements, each party must be able to present its case to the court. As the parties will typically be adverse in interest, allowing each party to identify any additional documents that party considers necessary offers a simple solution. Collectively then, the appeal book would consist of the documents required by the court and the documents selected by each party.

Responsibilities

[43] Having identified what the contents of an appeal book should be, the next step is to identify how the appeal book should be presented to the court and which party should bear the cost of production and responsibility for filing.

[44] A joint appeal book is one option. The Draft Practice Direction on Case Management offers an example of this option, requiring the appellant to initiate the appeal book but allowing the respondent to pay for any additional documents before the appeal book is ordered.[35] However, a joint appeal book would require deadlines by which the appellant and respondent would have to communicate their desired documents to each other and specific consequences of non-payment. In this regard, a joint appeal book begins to resemble the current complexity of reaching agreement on the contents.

[45] Separate appeal books are another option. Part J appeals and Supreme Court of Canada practice offer examples of this option; the appellant files the main appeal book and the respondent files a separate book of additional materials.[36] The option of

---

[35] The Court of Appeal, Draft Practice Direction on Case Management (2000) provides:
5(c) Within 7 days from service of the appellant(s) list of contents, the respondent(s) may file and serve a list of any additional materials which they wish to include in the appeal books. The respondent(s) shall be responsible for the costs associated with their additional materials and those costs shall be paid prior to the ordering of the appeal books. If not paid, the respondent(s) materials will not be included.

[36] CPD J.6 provides as follows for Part J appeals:
J.6 (b) No agreement as to contents is necessary. If respondent disagrees with inclusion of an item in the Appeal Books, he or she must say so in his or her factum. If the respondent disagrees with the omission of an item, the respondent may file and serve the omitted item in white covers and entitle it

(continued...)

separate appeal books would allow the appellant to order the appeal book sooner and without having to consult the respondent. Meanwhile, the respondent would have more time to reflect on what additional materials to include.

POSITION OF THE COMMITTEE

[46] The Committee considers that the appeal book should consist of documents required by the court and any additional documents required by the appellant or respondent. The Committee considers that the documents required by the court should be specified in the rules. The appellant's appeal book would consist of the documents required by the court plus any additional documents identified by the appellant. The respondent's appeal book would consist of additional documents required by the respondent.

[47] With respect to the documents that should be required by the rules, the Committee considers that the following documents should be included:

- all relevant pleadings, including notice of appeal and, if any, notice of cross appeal;
- in the case of a constitutional question, the notice served under the *Judicature Act* and particulars of service;
- the judgment or order under appeal;
- reasons for judgment or order under appeal, if any;
- in the case of an appeal from judgment in a jury trial, the judge's charge to the jury, together with counsel's addresses to the jury;
- the evidence other than exhibits; and
- essential exhibits only.

Alongside the rule, the court would retain discretion to order additional or fewer documents in specific cases. The Committee invites comments, particularly from the judiciary, as to whether this list of documents is appropriate.

---

[36] (...continued)
"Disputed Appeal Book". If under 15 pages, the Disputed Appeal Book may be an appendix to the respondent's factum.

Similarly, the *Rules of the Supreme Court of Canada*, S.O.R./2002-156, r. 39(2) [hereafter "SCC Rules"] allow the respondent to file "those documents not already included in the appellant's record as the respondent considers necessary to raise the question for the Court." See also BC Appeal Rules, r. 26.

d. Ordering the appeal book

ISSUE 5
Should there be a deadline for ordering the appellant's appeal book? If so, what period of time should be allowed?

[48] A further problem noted earlier is that delay in ordering the appeal book will often lead to late filing. At present there is no deadline for ordering the appeal book. The court has identified this gap as a significant factor contributing to delay. Rule 530(16) reflects this concern.[37] However, without a fixed deadline for ordering the appeal book, r. 530(16) lacks effectiveness.

[49] As discussed above, the current provisions for determining the contents of the appeal book are subject to a number of variables. In this context, it is difficult to specify a fixed deadline for ordering the appeal book. However, under the proposed changes, each side would be responsible for filing their own appeal book. This approach would permit a fixed deadline for ordering the appeal book.

POSITION OF THE COMMITTEE

[50] The Committee considers that there should be a deadline for ordering the appellant's appeal book. The logical event to trigger the running of time to order the appeal book is filing of the notice of appeal. While the task of identifying additional documents should be relatively easy and completed quickly, the Committee recognises that the appeal book is a significant expense that must be paid in advance. Consequently, the Committee considers that one month from filing notice of appeal is an appropriate period of time to order the appellant's appeal book. The appellant should file a copy of the order form with the court and serve a copy on the respondent. The Committee will consider whether there should be a deadline for ordering the respondent's appeal book later in this chapter.

---

[37] Rule 530(16) provides:
530(16) Any request to prepare, or instructions to revise or countermand, appeal books must be promptly served on Transcript Management Services of Alberta Justice, or any other preparer, in writing, and a copy filed with the appropriate Deputy Registrar.

e. Concurrent filing

ISSUE 6
Should the rules permit a party to file closely related documents at the same time?

[51] Under current practice, specific documents must be filed before others even though the documents are closely related and filed by the same party. The Committee has two comments to make regarding the filing of closely related documents.

[52] First, the Committee noted that the current structure of filing deadlines may give the impression that the preparation of closely related documents should be approached as consecutive rather than concurrent steps. For example, as filing the appeal book triggers time for filing the appellant's factum, some appellants may do little or no work on the factum until the appeal book is filed. An appellant who adopts this approach runs the risk of having too little time to complete the factum. Similar circumstances may arise in the context of a leave application and notice of appeal or with the respondent's appeal book and factum.

[53] Second, the Committee noted that each filing event increases the cost of an appeal. While this cost may be small for each party, from the perspective of court resources, separate filing deadlines can quickly add up to a significant cost. On average, there are 540 civil appeals filed each year.[38] Thus, each filing by an appellant or respondent is multiplied several hundredfold for the court. Moreover, before a document is accepted for filing, court staff must determine whether it is within time or late. Having to monitor the progress of each appeal on every document from notice of appeal, to appeal book, to factum and authorities is an administrative challenge.

---

[38] Civil appeals data 1999-2003.

[54] Concurrent filing is used in other courts. For example, the Supreme Court of Canada imposes a single deadline for filing the appellant's record, factum, and authorities; the respondent's materials are also subject to a single deadline.[39]

POSITION OF THE COMMITTEE

[55] The Committee considers that allowing closely related documents to be filed at the same time has benefits for both the court and parties. From the court's perspective, concurrent filing would both reduce the incidence of filing and make it simpler to monitor an appeal's progress. From the parties' perspective, concurrent filing allows greater scope for self-management of the appeal. Concurrent filing is also consistent with the objectives of simplifying the appellate process and reducing public cost (principles 2 and 5).

[56] In particular, the Committee considers that the following sets of documents are appropriate for concurrent filing:

- appellant's appeal book, factum, and authorities
- respondent's appeal book, factum, and authorities and, where applicable, the respondent's materials on a cross appeal.

The Committee has also concluded that the following documents should be filed separately:

- application for leave to appeal
- notice of appeal.

f. Overview of proposals

[57] The proposals discussed here and in the balance of this chapter will alter both the structure of the main steps in an appeal and the deadlines for completing each step. As an overview, the main steps and deadlines are summarised in the table below. An expanded version of this table showing the penalties and consequences triggered by late completion of the step appears later in this chapter.

---

[39] SCC Rules, r. 35(1) and 36(1). See also BC Appeal Rules, rr. 19-21 and 26-27 and Saskatchewan, *Court of Appeal Rules*, rr. 26 and 32, online: Courts of Saskatchewan <http://www.sasklawcourts.ca/default.asp?pg=ca_rules_courtrules>.

Table 1: Overview of main steps and deadlines

	Triggering event	Deadline to file & serve	Time from notice of appeal
Notice of appeal What period of time should be allowed to prepare, file and serve notice of appeal?	Date of decision	one month	–
Where leave to appeal is required, when should notice of appeal be filed?	Date of leave decision	10 days	–
Appellant's materials What period of time should be allowed to order the appeal book?	Notice of appeal filed	one month	one month
What period of time should be allowed to prepare, file and serve the appellant's appeal book, factum and authorities?	Notice of appeal filed	4 months	4 months
Respondent's materials What period of time should be allowed to prepare, file and serve the respondent's appeal book?	Appellant's materials served	3 months	7 months
What period of time should be allowed to prepare, file and serve the respondent's factum and authorities?	Appellant's materials served	3 months	
Appellant's reply What period of time should be allowed to prepare, file and serve the appellant's reply?	Respondent's materials served	10 days	ca. 7.5 months
Parties ready for hearing			ca. 7.5 months

B. Appellant's Materials

1. Notice of appeal

ISSUE 7
What period of time should be allowed to prepare, file and serve notice of appeal?

[58] As discussed earlier, the Committee proposes that time for filing notice of appeal should run from the date of the decision being appealed. As regards the time for filing notice of appeal, at present, there are two common appeal periods – 20 days

and 30 days or one month.[40] Appeals governed by the Alberta Rules of Court allow a 20 day appeal period.[41] Appeals governed by other enactments generally allow a one month or 30 day appeal period.[42] However, having two common appeal periods that are very close in length creates confusion.

POSITION OF THE COMMITTEE

[59] The Committee considers that adopting one standard appeal period would advance the Rules Project objectives. While either appeal period, if calculated from the date of decision, would reduce the scope for delay, the Committee considers that the longer period of one month would appropriate.[43] A period of one month is a good fit with the Draft Rules for settling judgment at the Court of Queen's Bench. The

---

[40] Other appeal periods are provided in a few circumstances. The *Agriculture Financial Services Act*, R.S.A. 2000, c. A-12, s. 36 allows 15 days. The *Metis Settlements Act*, R.S.A. 2000, c. M-14, s. 204 provides a 45 day appeal period. The following acts provide a 90 day appeal period from the date of decision: *Interjurisdictional Support Orders Act*, R.S.A. 2000, c. I-35, s. 36, re decision under the Act; *Livestock and Livestock Products Act*, R.S.A. 2000, c. L-18, s. 24, re decision under parts of the Act.

[41] Rule 506(1) allows 20 days for filing notice of appeal from entry and service of judgment. Rule 510(1) requires service on other parties within the time for filing notice of appeal. A 20 day appeal period applies by application of r. 506(1) in the following: *Expropriation Act*, R.S.A. 2000, c. E-13, s. 37; *Irrigation Districts Act*, R.S.A. 2000, c. I-11, ss. 87 and 159.

[42] The following acts provide a 30 day appeal period from the date of decision: *Adult Adoption Act*, R.S.A. 2000, c. A-4, s. 11; *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, s. 27; *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, s. 26; *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 58; *City Transportation Act*, R.S.A. 2000, c. C-14, s. 18; *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 41; *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 80; *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 688; *Natural Gas Marketing Act*, R.S.A. 2000, c. N-1, s. 23; *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 31; *Police Act*, R.S.A. 2000, c. P-17, s. 18; *Public Utilities Board Act*, R.S.A. 2000, c. P-45, s. 70.

[43] The time periods proposed in this Consultation Memorandum are expressed according to the principles and standard time periods approved by the General Rewrite Committee of the Rules Project following consultation. Having identified a number of problems with the current rules for calculating time, the General Rewrite Committee approved principles for calculating time in the new rules as well as a set of standard time periods: Alberta Law Reform Institute, *Miscellaneous Issues* (Consultation Memorandum No. 12.14) (Edmonton: Alberta Law Reform Institute, 2004) at 1*ff*. In summary:

- All days will be counted, including weekends and holidays.
- The standard time periods for time expressed in days will be 5, 10 and 20 days.
- Longer time periods will be expressed in months.
- Whenever possible, time periods should be counted forwards from a triggering event rather than backwards from a terminal event.

Draft Rules require service of a draft judgment or order on all parties who attended the hearing within 10 days of the decision. Thus, all parties affected by the judgment should have notice of its proposed terms and then have 10 days to approve it or apply to resolve objections.[44] An appeal period of one month allows for the possibility that it will take longer to settle the terms in some cases and, at the same time, recognises that entry of judgment is not a prerequisite to filing an appeal.

[60] In summary, the Committee considers that time for filing notice of appeal should run from the date of decision and that one month is an appropriate period of time to decide whether to appeal and to prepare, file and serve notice of appeal.

2. Application for leave to appeal

[61] Where leave to appeal is required, the leave application will often precede filing notice of appeal as the first step in the appeal. Adding this prerequisite step raises issues both in relation to the notice of appeal and, if leave is granted, the subsequent steps of the appeal.

a. Time for filing

ISSUE 8
What period of time should be allowed to prepare, file and serve an application for leave to appeal?

[62] Generally speaking, where leave is required, the leave application must be filed within the appeal period.[45] In other words, the time for filing notice of appeal and the time for filing leave to appeal are triggered by the same event and allow the same period of time for completion. However, in Alberta the time frame for seeking leave is often assumed by practice rather than stated expressly. As there are serious consequences if leave is not sought in time, the requirement to file a leave application within the time to appeal should be expressly stated in the rules.

---

[44] If a party did not have notice of the judgment, the party may apply to have the judgment set aside, varied, or discharged.

[45] However, in Saskatchewan, a leave application must be filed within a short time period. The Saskatchewan Court of Appeal Rules, r. 11 allows only 15 days to file a leave application.

POSITION OF THE COMMITTEE

[63] The Committee considers that the requirement for filing an application for leave to appeal within the appeal period is a logical approach. In keeping with the Committee's earlier proposals, the appeal period would be one month following the date of the decision being appealed.

b. Relationship to notice of appeal

ISSUE 9
Where leave to appeal is required, when should notice of appeal be filed?

[64] Currently, the relationship between a leave application and notice of appeal is not entirely clear. Should notice of appeal be filed before or only after leave is granted?

[65] A requirement that notice of appeal be filed before leave is granted is problematic for three reasons. Firstly, until leave is granted, there is no appeal. In this context, filing notice of appeal amounts to filing notice of intent to appeal. To the extent that notice of intent to appeal is required, the leave application itself should be sufficient. Secondly, where leave is not granted, the notice of appeal is without substance. This is particularly the case where leave is granted by the Court of Queen's Bench rather than the Court of Appeal.[46] Thirdly, where leave is granted, notice of appeal may need to be amended to reflect the grounds on which leave was granted. Thus, until leave is granted, there is a risk that the time and effort expended on the notice of appeal will need to be repeated or were wasted.

[66] A requirement that notice of appeal not be filed until leave is granted can also be problematic. Having involved the court and respondent in the expense of a leave application, the appellant may decide not to proceed with the appeal. Or the appellant may delay filing the notice of appeal in order to extend the timetable for completing

---

[46] For example, r. 505(3).

the remaining steps of the appeal. These problems may be reduced by a requirement that notice of appeal be filed within a short period of leave being granted.[47]

POSITION OF THE COMMITTEE

[67] The Committee considers that notice of appeal should not be filed until leave to appeal is granted. This approach reduces the risk of having to redo or "unfile" the notice of appeal and accommodates those circumstances where leave is granted by a court other than the Court of Appeal. However, to reduce the opportunity for delay in filing notice of appeal, the Committee also considers that there should be a specific deadline for completing this step. Consequently, the Committee considers that, where leave is granted, the triggering event for filing notice of appeal should be the date of the leave decision and that 10 days is an appropriate period of time to prepare, file and serve notice of appeal.

[68] Further issues relating to leave applications are discussed in chapter 6.

3. Appeal book, factum and authorities

ISSUE 10
What period of time should be allowed to prepare, file and serve the appellant's appeal book, factum and authorities?

Appeal book

[69] As noted earlier, there is no fixed deadline for filing the appeal book as parties must first agree on the contents. However, the proposal to allow each party to file its own appeal book facilitates the adoption of a fixed deadline. With respect to the appellant's appeal book, filing notice of appeal is again the obvious choice for a triggering event.[48] Filing the notice of appeal has the further advantage of being a

---

[47] Saskatchewan, *Court of Appeal Rules*, s. 11 requires that notice of appeal be filed within 10 days of leave being granted. Ontario allows 7 days: Ontario Rules, r. 61.03(6).

[48] See for example, Court of Appeal, Draft Practice Direction on Case Management (2000) which provides:

(continued...)

fixed date known to both the appellant and the court – i.e. both will know when the appeal book is due and, consequently, when it is late.

[70] As to how much time should be allowed, it must be recognised that Transcript Management Services currently requires 6-8 weeks to produce an appeal book.[49] That estimate should be increased by a sufficient margin to allow for contingencies and to accommodate concurrent filing. For example, r. 530(15) currently allows 3 months (12 weeks) from agreement as to contents.

Factum

[71] The appeal book and the factum are inter-related documents. The contents of each will influence the contents of the other.[50] Although the appellant is in a position to begin working on the factum as soon as the notice of appeal is filed, having the appeal book in hand will usually be necessary to complete the factum.

[72] At present, time for filing the appellant's factum will be governed by one of two triggering events. The appellant's factum is due no later than 60 days after the appeal books are filed or 7 months after filing notice of appeal, whichever is earlier.[51] As there is no fixed deadline for filing appeal books, the 7 month deadline will often

---

[48] (...continued)

5(e) Within 4 months of filing the notice of appeal, the appellant(s) shall file the appeal book and serve a copy on the respondent(s). The appeal book shall comply with Rule 530 of the Alberta Rules of Court, unless otherwise ordered.

[49] Transcript Management Services, Appeal Book Order Form, online: Alberta Courts <http://www.albertacourts.ca/go.aspx?tabid=540>.

[50] As noted in William A. Stevenson & Jean E. Côté, *Alberta Civil Procedure Handbook, 2007* (Edmonton: Juriliber, 2007) at 554 [hereafter "Stevenson & Côté"]: "Occasionally a judge has allowed a draft factum to be filed and served before the appeal book, to establish what should go in the appeal book."

[51] Rule 538(1) provides:

538(1) The appellant shall file 7 copies of the appellant's factum with the registrar and shall serve one of the filed copies of the factum on each respondent

(a) on the 60th day or before 60 days have elapsed from the day on which the appeal books have been prepared, or

(b) during the 7th month or before 7 months have elapsed after the filing of the notice of appeal, whichever is the earliest date.

be the earlier of the two. Thus, in many cases, time for preparing the factum will run from filing the notice of appeal.

Authorities

[73] At present, the appellant's authorities must be filed with the appellant's factum.[52]

Other jurisdictions

[74] For comparison, the Committee has considered the time periods allowed for filing the appellant's materials in other Canadian jurisdictions. The table below compares British Columbia, Nova Scotia, and the Federal Court.

Table 2: Time for filing appellant's materials

	From notice of appeal		Before hearing
	Appeal book	**Factum**	**Authorities**
BCCA[53]	90 days	90 days	30 days
NSCA[54]	60 days	88 days	2 weeks
Fed CA[55]	60 days	90 days	30 days

POSITION OF THE COMMITTEE

[75] The Committee considers that 4 months from filing notice of appeal is an appropriate period of time to prepare, file and serve the appellant's appeal book, factum, and authorities. The requirement to order the appeal book early on in the appeal should ensure that the appeal book is ready well in advance of the filing deadline, allowing the appellant sufficient time to finalise the factum.

---

[52] CPD D.8 provides:
D.8. The appellant's and respondent's books of authorities must be filed at the same time that their respective factum is filed. The only exception will be for a joint book of authorities which must be filed no more than ten days after the last respondent's factum is filed.

[53] BC Appeal Rules, rr. 19-21 & 40.

[54] Nova Scotia Civil Procedure Rules, rr. 62.14-62.15.

[55] *Federal Courts Rules*, S.O.R./98-106, rr. 345-46 & 348.

[76] Although the rules currently provide for the appellant and respondent to file a joint book of authorities, the Committee considers that joint authorities are problematic. As with a joint appeal book, the cooperative process necessary to prepare joint authorities will require additional time.[56] Moreover, the appellant is in the best position to prepare his or her authorities while preparing the factum. That effectiveness may be lost if authorities are not prepared until the respondent's materials are filed. Further, as the respondent may chose not to file anything in response to the appeal, the appellant would then be left having to prepare the authorities months later.

[77] As time for completing the respondent's steps will generally run from service of the appellant's documents, the appellant should be required to file proof of service. For convenience, this requirement should be expressly stated within the appeal rules. The Committee considers that the appellant should be required to file proof of service within 5 days of service.

C. Respondent's Materials

1. Notice of cross appeal

[78] The rules currently allow the respondent an opportunity to bring a cross appeal by filing a notice of intention to vary. The two terms "cross appeal" and "notice of intention to vary" may be misleading to some litigants and their use in the rules does not always hinge on the underlying legal distinction between them. In the interests of simplicity, the Committee recommends that a cross appeal should be brought by filing a notice of cross appeal.

[79] The respondent's decision to file a cross appeal depends on receipt of the appellant's notice of appeal. Rule 509 requires the respondent to "give notice" within 10 days of service of the notice of appeal. The Committee does not propose any change to this deadline. However, in the interests of clarity, the Committee considers that the respondent should be required to file and serve the notice of cross appeal within that time. Further issues relating to cross appeals are discussed in a separate section of this chapter.

---

[56] For example, CPD D.8 defers the filing of joint authorities until 10 days after the last respondent's factum.

2. Appeal book, factum and authorities

ISSUE 11
What period of time should be allowed to prepare, file and serve the respondent's appeal book, factum and authorities?

Appeal book

[80] In keeping with the Committee's earlier proposals, the respondent's appeal book would consist of any additional documents required by the respondent. The respondent may be in a position to identify additional documents upon receipt of notice that the appellant has ordered the appeal book. However, as the appellant may not proceed with the appeal, it would not be appropriate to require the respondent to order the respondent's appeal book until the appellant's materials have been filed.

[81] As to how much time should be allowed to prepare, file and serve the respondent's appeal book, it should ordinarily take considerably less time than the appellant's appeal book. Indeed, in many instances, the respondent may decide not to file a separate appeal book.

Factum

[82] The respondent's ability to reply depends on receipt of the appellant's factum. Thus, service of the appellant's factum is the appropriate triggering event.[57]

[83] As to how much time should be allowed, r. 538 currently allows 45 days from service of the appellant's factum. While rules allow less time to prepare the respondent's factum than the appellant's, the difference between the two was recently decreased.[58] However, there is no clear basis to support the conclusion that there is less work in drafting a respondent's factum. The principles for calculating time under the new rules would round 45 days up to 2 months.

---

[57] Filing and service are subject to the same deadlines and will often be concurrent. However, their functions are separate. Filing is notice to the court and service is notice to a party. As a result, it will sometimes be necessary to distinguish them as triggering events. The respondent's factum is an example where the distinction is key. If the appellant's materials are filed and served on different days, the respondent's time to reply should run from service.

[58] For example, until 2002, r. 538(2) allowed the respondent only 15 days: Alta. Reg. 85/2002.

Authorities

[84] At present, parties filing separate books of authorities must file them at the same time as the factum.[59]

Other jurisdictions

[85] The Committee has also considered the time periods allowed for filing the respondent's materials in other jurisdictions. The table below shows the comparative results for British Columbia, Nova Scotia and the Federal Court.

Table 3: Time for filing respondent's materials

	From service of appellant's factum	Before hearing
	Factum	Authorities
BCCA[60]	30 days	30 days
NSCA[61]	14 days	2 weeks
Fed CA[62]	30 days	30 days

POSITION OF THE COMMITTEE

[86] The Committee considers that 3 months from service of the appellant's materials is an appropriate period of time to prepare file and serve the respondent's appeal book, factum, and authorities. Proof of service should be filed within 5 days of service.

[87] The respondent is in a position to prepare his or her factum upon receipt of the appellant's materials. As with the appellant, the respondent should have the opportunity to complete the respondent's factum based on the completed appeal book. However, the Committee does not consider that there should be a fixed deadline for

---

59 CPD D.8 provides:
D.8. The appellant's and respondent's books of authorities must be filed at the same time that their respective factum is filed. The only exception will be for a joint book of authorities which must be filed no more than ten days after the last respondent's factum is filed.

60 BC Appeal Rules, rr. 21 & 40.

61 Nova Scotia, *Civil Procedure Rules*, r. 62.15.

62 *Federal Courts Rules*, S.O.R./98-106, rr. 346 & 348.

ordering the respondent's appeal book. Ensuring that the appellant's appeal book is ordered earlier is critical to getting the appeal underway. However, once the appellant's materials are filed, the appeal can be heard regardless of whether the respondent files anything at all. Thus, late filing by the respondent will generally be to the respondent's own prejudice. In this regard, the existence of sanctions for late filing should provide the appropriate incentive for the respondent to prepare the respondent's materials in a timely manner.

D. Appellant's Reply

ISSUE 12
Should the appellant be allowed to file a written reply? If so, what period of time should be allowed to prepare, file and serve the appellant's reply?

[88] At present, the rules do not provide for the appellant to file a reply to the respondent's materials. However, the proposal to allow the parties to file separate appeal books raises the possibility that the respondent's appeal book may contain material that the appellant could not reasonably anticipate and to which the appellant should be able to respond in the interests of fairness.

[89] There are two options for the appellant's response. Under the existing rules, the appellant has the ability to reply in oral argument when the appeal is heard. However, it may not be the best use of the appellant's limited time for oral argument to have to address new issues or evidence raised by the respondent's materials. Alternatively, the appellant might be allowed to file a written reply. Both Saskatchewan and British Columbia provide for a reply by the appellant.[63] However, a written reply runs the risk of amounting to a second factum if not carefully controlled.

---

[63] In British Columbia the respondent is allowed to file a separate appeal book and the appellant may file a reply within 7 days of service of the respondent's factum: BC Appeal Rules, r. 24. In Saskatchewan, although the parties file a joint appeal book, the appellant may file a reply within 15 days of the respondent's factum: Saskatchewan, *Court of Appeal Rules*, r. 33.

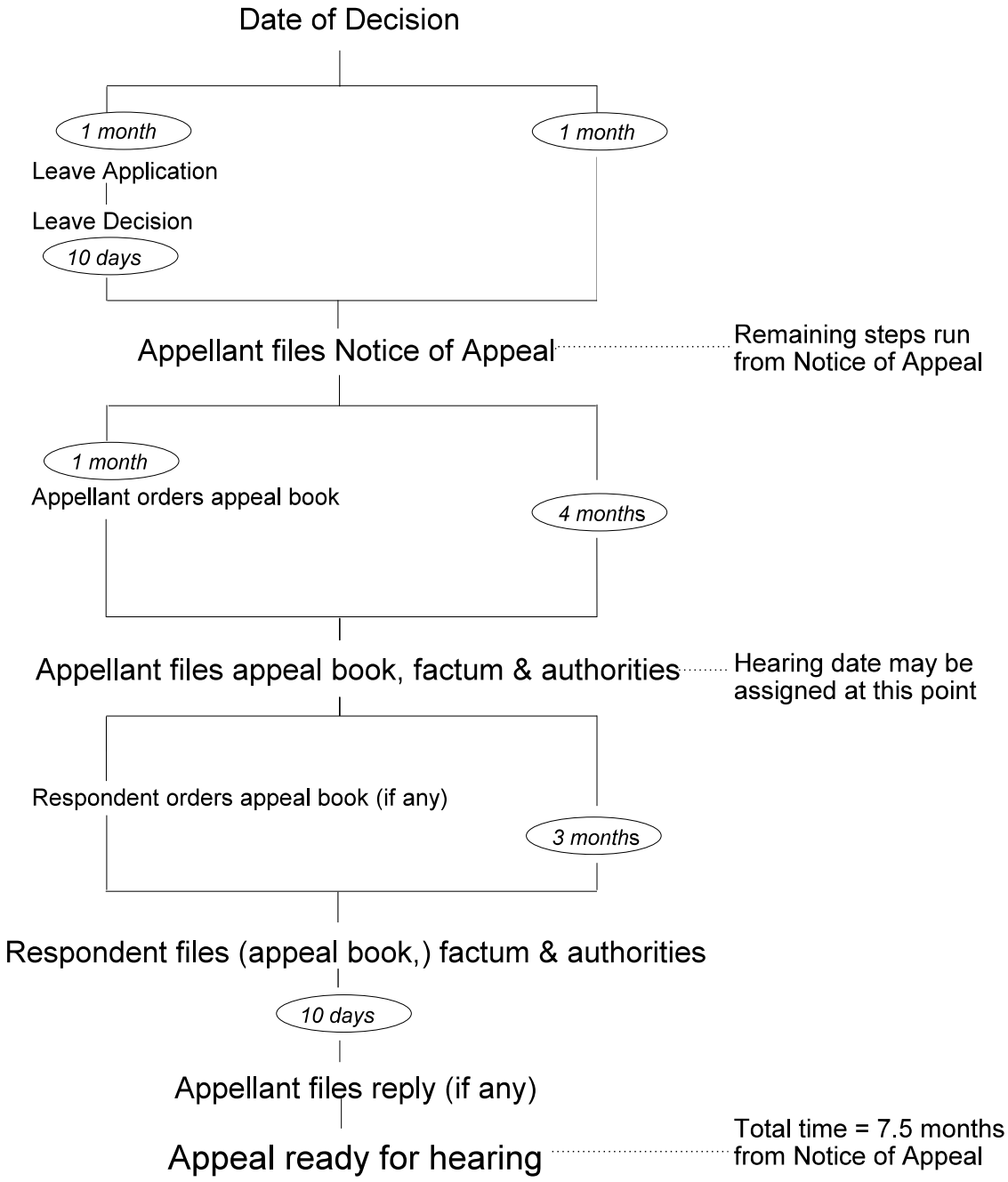
POSITION OF THE COMMITTEE

[90] The Committee considers that the appellant should be allowed to file a written reply to the respondent's materials. A written reply should allow for more effective use of both the appellant's and the court's limited time for oral argument. The Committee considers that the appellant's reply should be brief and should be completed quickly. Accordingly, the Committee considers that 10 days from service of the respondent's materials is an appropriate period of time to prepare, file and serve the appellant's reply.

❖❖❖

[91] The preceding sections of this chapter present proposals that would alter the structure of the main steps in an appeal. For convenience, the table below presents an overview of the proposed steps.

Table 4: Overview of an Appeal



E. Penalties and Consequences for Lateness or Non-completion

[92] Filing deadlines serve the important function of ensuring that an appeal advances towards hearing and, ultimately, resolution. When deadlines are missed it is a signal to the court and other parties that there may be a problem with the appeal. The problem might be a simple delay, i.e. the step will be completed late. Or the problem may be a more significant one and the step will not be completed at all. If the appellant fails to complete a step, there should be a clear mechanism for ending the appeal and affirming the resolution imposed at trial.[64]

[93] Recognising that lateness may result in non-completion, it is useful to distinguish between two types of sanction triggered by lateness. For purposes of this discussion, a ***penalty*** is a sanction imposed when a step is completed late (eg. denial of preparation costs). In comparison, a ***consequence*** is an additional measure that will facilitate bringing the appeal to an end if the step is not completed (eg. striking out).

[94] As to when penalties and consequences should apply, further comment is warranted. The current rules often fail to recognise that the main steps in an appeal require both filing and service. Generally speaking, penalties are triggered by late filing but not by late service.[65] However, service is critical to the other party's ability to complete the next step. The standard penalty of costs denied reflects this possibility. For example, lateness by the appellant may be prejudicial to the respondent and the respondent is properly relieved of the obligation to pay costs for the late step. However, for this same reason, denial of costs or other penalty should apply to late service as well as late filing. By comparison, consequences are properly trigged by late filing alone as they are directed at the appeal's or the party's status before the court.

---

[64] The consequences for inaction is another area where appellate and trial practice differ. At the trial level, if the defendant does not respond to the statement of claim, the plaintiff may apply for default judgment to bring about a resolution. At the appellate level, however, inaction by the respondent may be of no consequence. There is no default mechanism in the appellant's favour. To the contrary, inaction by the appellant is to the respondent's favour.

[65] For example, r. 538(4) provides:

> 538(4) When a factum *is not filed* within the time fixed by these Rules, the party in default shall not be entitled to costs for preparation of the factum unless the court otherwise orders. [emphasis added]

[95] This discussion also assumes that, whenever possible, penalties and consequences will apply automatically. This reflects the current practice in many instances. Automatic penalties also reduce the need to police the progress of an appeal. If a party does not meet his or her obligations under the rules neither the opposing party nor the court needs to bring an application to enforce the rules or require the party at fault to act. However, the result of an automatic sanction will be inappropriate from time to time and the court needs to retain discretion to make adjustments or cure irregularities. The court's discretion in this regard is discussed in chapter 8.

1. Application for leave to appeal, notice of appeal or notice of cross appeal

[96] If a party does not initiate an appeal within the time allowed, the court may refuse to accept the notice of appeal or leave application for filing. Even if accepted, the appeal will be vulnerable to being struck out. While the court holds discretion to extend the time to appeal (r. 548), the court must be satisfied that an extension is warranted. Thus, there is a real chance that a party will lose the opportunity to appeal if the first step is not completed in time. While working principle 1 recognises that an individual who is dissatisfied with the outcome of a case should have the opportunity to have that case reviewed by a higher court, principles 3 and 5 charge that individual with the responsibility of bringing the appeal and bringing it in a timely manner. The Committee considers that the prospect of losing the chance to appeal is an appropriate consequence where an application for leave to appeal, notice of appeal, or notice of cross appeal is filed late.

2. Appellant's appeal book, factum and authorities

ISSUE 13
What penalties or consequences should apply if the appellant's appeal book is ordered late?

ISSUE 14
What penalties or consequences should apply if the appellant's appeal book, factum or book of authorities is late?

ISSUE 15
Should the time period for reinstating an appeal be shortened?

ISSUE 16
What is the status of an appeal that has not been reinstated within the time allowed?

Appeal book

[97] At present, there is no fixed deadline for ordering the appeal book and, consequently, no sanctions against lateness.

[98] Similarly, there is no penalty for late filing or service of an appeal book. In contrast to other steps, a late appeal book does not attract an automatic costs sanction, such as denying preparation costs.

[99] Late filing triggers the consequence that the appeal will be struck out.[66] Striking out is mandatory and there is no discretion to prevent its application. Once struck, the appellant must apply to have the appeal reinstated. If the appellant does not do so within the prescribed time, the appeal is automatically deemed to be abandoned under r. 530(18).[67]

Factum

[100] Late filing of the appellant's factum will incur the penalty of denied preparation costs under r. 538(4). Late filing or late service will also allow the court to impose additional terms under r. 543(1).

---

[66] Rule 530(15) provides:

> 530(15) Appeal books must
>
> (a) be prepared promptly and filed and served forthwith after they are prepared, and
>
> (b) in any event, unless otherwise ordered by a judge, be filed not later than 12 weeks from the date on which the agreement as to contents was filed or fixed,
>
> or the appeal will be struck by the Registrar.

[67] Similarly, the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, ss. 10 and 28 allow that court to dismiss an appeal as abandoned if the appellant fails to comply with any provision of the act or rules.

[101] However, late filing does not trigger any further consequence. In other words, there is no automatic mechanism for bringing the appeal to an end if the appellant does not file a factum. Consequently, either the respondent or the court will have to move to dismiss the appeal for want of prosecution. Further, for the first 12 months of the appellant's inactivity, an application to dismiss must be heard by a panel of three judges.[68] Thus, inactivity by the appellant requires significant activity by the respondent, the court or both. Meanwhile, given the high drop out rate in civil appeals, there is a very real chance that the step may not be completed.[69]

Authorities

[102] Late filing of the book of authorities incurs a penalty of denied preparation costs.[70] However, there is no further consequence for late filing by the appellant.

Time for reinstatement

[103] Where an appeal is struck it will be deemed abandoned if not reinstated within 6 months.[71] Six months is a comparatively long time in the context of an appeal, particularly in comparison to the time allowed to complete any single step. Six months

---

[68] Rule 515.1(8) provides:

515.1(8) A civil appeal may be dismissed for want of prosecution

(a) by the court at any time before or after 6 months from the date when a notice of appeal was filed, on the application of any party or on its own motion, or

(b) by a judge, on the application of any party where the appellant has done nothing effective to advance the appeal for more than one year.

[69] Data provided by the court indicates that more than half of appeals filed will be discontinued, abandoned or settled. For example, the average drop out rate of appeals compared to appeals filed for the period 1999-2003 was 58%: Civil appeals data 1999-2003. The "true" drop out rate would be slightly higher as this calculation does not include appeals dismissed for want of prosecution.

[70] CPD D.9 provides:

D.9. When a book of authorities is not filed within the time fixed by this Practice Direction, the party in default shall not be entitled to costs for preparation of the book of authorities unless the court otherwise orders.

At present, the rules do not expressly require service of the book of authorities. This point is addressed later in this chapter.

[71] Rule 530(18) provides:

530(18) An appeal that has been struck out and has not been restored within 6 months from the date the appeal was struck is deemed to be abandoned.

also seems disproportionate in light of the CBA Report's recommendation that appeals should be heard within 9-12 months.[72]

Status of appeal not reinstated

[104] At present, if an appeal is not reinstated within the time allowed it is deemed abandoned.[73] There appears to be some question in Alberta as to whether deemed abandonment is a final resolution or whether some life remains in the appeal. For example, while the discontinuance rule states that "the appeal is at an end" (r. 525(1)) there is no equivalent statement in the deemed abandonment rules. It is also relevant to note that there are clearer costs consequences when an appeal is discontinued or dismissed. However, rr. 515.1(9) and 530(18) are silent with respect to costs on deemed abandonment. Where an appeal is discontinued or dismissed, the rules entitle the respondent to costs.[74] For further confusion, if an appeal is deemed abandoned for failure to give security for costs, r. 524(2) expressly states that the respondent is entitled to costs.

[105] The status of an appeal deemed abandoned is clearer in other jurisdictions. The Ontario Rules address both the status of the appeal and costs consequences:[75]

> 61.14(3)Where an appeal or cross-appeal is abandoned or deemed to have been abandoned, the appeal or cross-appeal is at an end, and the respondent or appellant is entitled to the costs of the appeal or cross-appeal, unless a judge of the appellate court orders otherwise.

POSITION OF THE COMMITTEE

[106] The Committee considers that there is no clear rationale for the application of different sanctions to different documents filed by the appellant. In light of the Committee's proposal for concurrent filing of the appeal book, factum and authorities a simpler set of sanctions is additionally appropriate.

---

[72] CBA Report at recommendation 22(a)(ii).

[73] Rules 515.1(9) and 530(18).

[74] Rule 525(1) awards costs upon discontinuance, and r. 527 allows taxation without an order. Rule 601 applies to costs when an appeal is dismissed.

[75] See also Prince Edward Island, *Rules of Civil Procedure*, r. 61.11(3), online: Supreme Court <http://www.gov.pe.ca/courts/supreme/index.php3?number=1003816>.

[107] The Committee considers that late filing or service of the appellant's appeal book, factum or authorities should trigger the penalty of denied preparation costs for the document in question. In addition, the Committee considers that late ordering of the appeal book should trigger the penalty of denied preparation costs for the appeal book. In all instances, the penalty should apply automatically although its effect will be delayed until costs are determined when the appeal is resolved. The Committee recognises that the penalty will have no effect at all in some appeals. The appellant will only be entitled to preparation costs if the appeal succeeds. If the appeal is dismissed, the appellant will be in no worse position with respect to costs. Despite this discrepancy, the Committee considers that it is more appropriate to deny the appellant's costs than to award costs in favour of the respondent. The respondent is not required to undertake any significant steps until the appellant's materials are filed; awarding costs to the respondent might produce a windfall, particularly if the appeal goes no further.

[108] The Committee also considers that late filing should carry the additional consequence that the appeal will be struck out. Striking out reinforces the fact than an appeal is not an automatic further stage in the litigation and that the appellant must keep the appeal moving towards hearing. In contrast to the current situation, striking out would release the respondent and the court from having to take any further steps until the appeal was reinstated. Striking out also establishes the means for bringing the appeal to an end if the appellant does not act. Given the court's jurisdiction in this matter and the severity of the consequence for the appellant, striking out should be triggered by late filing only.

[109] Finally, the Committee considers that the period of time for reinstating an appeal that has been struck out should be reduced. Six months is disproportionately long in comparison to the time allowed for each step of an appeal. Accordingly, the Committee considers that the period of time for reinstating an appeal should be 2 months. Shortening the time for reinstatement would also have an impact on appeals struck out for failure to provide security for costs (r. 524(2)) and for appeals struck off the general list (r. 515.1(9)).

[110] As to an appeal that has not been reinstated within the time allowed, the Committee considers that the appeal should be deemed abandoned with the result that the appeal is at an end and the respondent is entitled to costs.

3. Respondent's appeal book, factum, and authorities

ISSUE 17
What penalties or consequences should apply if the respondent's factum or book of authorities is late?

Factum

[111] Late filing or service of the respondent's factum will incur the penalty of denied costs.[76] Late filing or late service will also allow the court to impose additional terms under r. 543(1).

[112] Late filing or service of the respondent's factum carries the consequence that the respondent will be denied oral argument.[77] Denial of oral argument is best classified as a consequence rather than a penalty as it facilitates bringing the appeal to an end if the step is not completed. In other words, the appeal can be heard regardless of whether the respondent files a factum. Denial of oral argument applies automatically although the court retains discretion to order otherwise.

Authorities

[113] Late filing of the book of authorities incurs a penalty of denied preparation costs.[78]

---

[76] Rule 538(4) and the notice to the respondent on Form N below.

[77] The notice to the respondent on Form N [Notice of Appeal] provides:

> A respondent who fails to comply with the requirements of the Alberta Rules of Court and the Court of Appeal Consolidated Practice Directions, within the prescribed time, will not be allowed to present oral argument, nor be entitled to costs, unless otherwise ordered,

The authority for this notice likely resides in r. 539(2) [court may dispense with oral argument]. The Supreme Court of Canada practice also denies oral argument to any party filing a late factum, although this is stated expressly in the court's rules: SCC Rules, r. 71(3).

[78] CPD D.9 above.

[114] Late filing of the respondent's authorities also carries the consequence that the respondent will be denied oral argument.[79]

POSITION OF THE COMMITTEE

[115] The Committee considers that there is no clear rationale for the application of different sanctions to different documents filed by the respondent. In light of the Committee's proposal for concurrent filing of the factum and authorities a simpler set of sanctions is additionally appropriate.

[116] The Committee considers that late filing or service of the respondent's factum or authorities should trigger an automatic penalty of denied preparation costs for the document in question. At this point in the appeal, the possibility of awarding costs to the appellant is an option. However, as an appeal may be determined in favour of the respondent without a single word from the respondent, costs would benefit the appellant where the respondent had no obligation to complete the step. Consequently, costs denied better reflects the fact that the respondent may decide not file any documents in response to an appeal.

[117] If the respondent does not file a factum or book of authorities, the Committee considers that denial of oral argument is an appropriate consequence. The availability of written materials filed in advance is critical to the court's ability to prepare for the hearing, particularly where hearing time is limited. While the respondent's participation in the appeal is optional, if the respondent decides to participate it is reasonable to require the respondent to file written materials so that both the court and the appellant can best prepare for hearing.

[118] As to whether the consequence of denied oral argument should be triggered by late filing in addition to non-filing, there is a further point to consider. As a general

---

[79] The notice on Form N applies to all deadlines missed by the respondent. As noted, there is no current requirement for service of authorities on other parties.

policy, the court has indicated a willingness to dispense with oral argument where an appeal is straightforward and does not create new law.[80] Denying oral argument for late filing does not reflect these general criteria. It is inevitable that cases will arise where the nature of the case fits the court's criteria to require oral argument even though the respondent's factum or authorities was filed late. However, on balance, the Committee considers that it is simpler to deny oral argument as a consequence of late filing and for the court to exercise its discretion to permit oral argument where warranted by the nature of the case. Thus, in summary, the Committee considers that late filing of the respondent's factum or authorities should trigger the consequence that oral argument will be denied. However, denial of oral argument should not be triggered by late service as may occur at present.

4. Optional steps: respondent's appeal book and appellant's reply

ISSUE 18
What penalties or consequences should apply if an optional step is completed late?

[119] The Committee has proposed two steps that are not presently required – the respondent's appeal book and the appellant's reply. However, either step will be optional if a party decides to rely on previously filed material.

[120] As such, it can be argued that there should not be any consequences for failing to complete an optional step. The appeal can be heard without the respondent's appeal book or the appellant's reply.

---

[80] CPD C.8 provides:

C.8(a) The Court will entertain applications to hear and decide some appeals by reading the appeal book (including transcripts), factums, and books of authorities alone, without any oral argument.

b) To have the Court consider this option, all parties to the appeal or their counsel must sign letters agreeing to this procedure.

c) The panel assigned to the appeal will decide whether or not to accept the application. They may at any time call for full or partial oral argument or further written submissions.

d) The Court anticipates that purely written argument will likely be appropriate only in cases:

i) which are more straightforward, and;

ii) where no new law is to be created, and the question is one of applying established law or procedures.

[121] However, although these steps are optional, appropriate penalties are required to promote timely completion. Both steps arise late in the appeal process and the appeal will likely have been set for hearing. At some point, the court and the parties need to know that they have the complete set of materials for the appeal. For example, if the respondent were to file an appeal book 2 days before the hearing, it would likely inconvenience both the court and the appellant and perhaps even require that the hearing be postponed. The same might apply if the appellant's reply were filed at the last minute. A party intent on delaying or disrupting the appeal may well be willing to incur a penalty of denied preparation cost, particularly as preparation costs for the respondent's appeal book or appellant's reply may not be a significant amount. Thus, the penalty for late filing of the respondent's appeal book or appellant's reply should take into account the degree of prejudice to the other party and the court.

POSITION OF THE COMMITTEE

[122] The Committee considers that late filing of the respondent's appeal book or appellant's reply should attract an automatic penalty of denied preparation costs. In addition, the Committee considers that there should be a discretionary penalty of costs payable to the other party or costs payable to the court as circumstances warrant.

❖❖❖

[123] The preceding sections of this chapter present proposals that would alter the structure of the main steps in an appeal, the deadlines for completing them, and the penalties and consequences for lateness or non-completion. For convenience, these proposals are summarised in the table, below.

Table 5: Overview of deadlines, penalties & consequences

	Triggering event	Time to file & serve	Penalty for late filing or service	Consequence of late filing	Time from notice of appeal
Notice of appeal What period of time should be allowed to prepare, file and serve notice of appeal?	Date of decision	one month	none	may lose opportunity to appeal	--
Where leave to appeal is required, when should notice of appeal be filed?	Date of leave decision	10 days	none	may lose opportunity to appeal	--
Appellant's materials What period of time should be allowed to order the appeal book?	Notice of appeal filed	one month	costs denied	struck out	one month
What period of time should be allowed to prepare, file and serve the appellant's appeal book, factum and authorities?	Notice of appeal filed	4 months	costs denied	struck out	4 months
Respondent's materials What period of time should be allowed to prepare, file and serve the respondent's appeal book?	Appellant's materials served	3 months	costs denied	costs denied costs payable	7 months
What period of time should be allowed to prepare, file and serve the respondent's factum and authorities?	Appellant's materials served	3 months	costs denied	oral argument denied	
Appellant's reply What period of time should be allowed to prepare, file and serve the appellant's reply?	Respondent's materials served	10 days	costs denied	costs denied costs payable	7.5 months
Parties ready for hearing					7.5 months
CBA guideline for hearing appeals	Notice of appeal filed				9-12 months

F. Cross Appeals

1. Time for completing steps

Notice of cross appeal

[124] As noted earlier, the respondent's decision to file a cross appeal depends on receipt of the appellant's notice of appeal. The rules currently require the respondent to initiate a cross appeal within 10 days of service of the notice of appeal and the Committee considers that this is an adequate time period.

Respondent's materials on the cross appeal

[125] At present, the rules operate such that respondent's materials perform dual service for both the main appeal and the cross appeal.[81] As such, the respondent's materials on the cross appeal are subject to the same completion deadlines as the respondent's materials on the main appeal.

Appellant's reply on the cross appeal

[126] The rules currently allow the appellant 10 days from service of the respondent's factum to prepare, file and serve a reply factum on the cross appeal.[82] This would run concurrently with the time proposed for the appellant's reply on the main appeal. Is this sufficient time?

[127] The Committee's proposal to allow 10 days for the appellant's reply on the main appeal was intended to set aside a short period of time to allow the appellant to address any new issues that may have arisen as a result of material in the respondent's appeal book or factum. The same rationale does not necessarily follow for the appellant's reply on the cross appeal. In the context of the cross appeal, the appellant stands as respondent. Consequently, it could be argued that the appellant should be allowed a longer period of time to prepare a reply to the cross appeal. On this point it is relevant to note that, until recently, the time allowed for the respondent's factum

---

[81] For example, r. 540(3) provides:
540(3) Where a notice of intention to vary has been given, the respondent's factum shall consist of 2 main headings each of 4 parts, the first of which shall be entitled "factum on the appeal" and the second of which shall be entitled "factum on the cross appeal".

[82] Rule 538(3) provides:
538(3) Where a notice of intention to vary has been given, the appellant may within 10 days after service upon him of the respondent's factum file and serve a further factum in reply.

was not much greater than that allowed for the appellant's reply to the cross appeal. Although the respondent's reply time was increased from 15 to 45 days,[83] the appellant's reply time has not been increased since the Rules of Court came into effect.

Respondent's reply on the cross appeal

[128] At present, the rules do not provide for a reply by the respondent on the cross appeal.

POSITION OF THE COMMITTEE

[129] The Committee considers that it is appropriate to continue the practice of combining the respondent's materials on the main appeal and the cross appeal. This result is also consistent with the Committee's stated preference for concurrent filing. Consequently, the Committee considers that 3 months from service of the appellant's materials is an appropriate period of time for the respondent to prepare, file and serve the respondent's materials on both the main appeal and the cross appeal.

[130] With respect to the appellant's reply on the cross appeal, the Committee considers that 10 days will often be too short, particularly as the appellant now has the option to reply to the main appeal as well. Consequently, the Committee considers that 20 days from service of the respondent's materials is an appropriate period of time to prepare, file and serve the appellant's reply on the cross appeal. In order to permit concurrent filing, the Committee considers that time for the appellant's reply on the main appeal should be extended to 20 days where there is a cross appeal.

[131] In light of the Committee's proposal to allow the appellant to reply to the respondent's factum in the main appeal, the Committee considers that it would be appropriate to allow the respondent the opportunity to reply to the appellant's reply on the cross appeal. The Committee considers that 10 days is an appropriate period for the reply.

[132] Taking into account the 20 days for the appellant to reply to the cross appeal and the 10 days for the respondent to reply to the appellant, the time line for a cross

---

[83] Rules 538(2), as am. by Alta. Reg. 85/2002, s.4.

appeal would be roughly one month longer. The Committee considers that this additional time is reasonable.

2. Penalties and consequences

ISSUE 19
What penalties or consequences should apply in a cross appeal?

[133] At present, the penalties and consequences that apply in a cross appeal will generally be the same as those that apply in the main appeal. This result is not always expressly stated.

POSITION OF THE COMMITTEE

[134] The Committee considers that the penalties and consequences of lateness should be the same as between the main appeal and the cross appeal. In other words, if notice of cross appeal is late it should be treated the same as a late notice of appeal. Lateness of the respondent's factum on the cross appeal should attract the same penalty and consequences that apply to lateness of the appellant's factum. Lateness of the appellant's reply on the cross appeal should be treated as a late respondent's factum. Lateness of the respondent's reply on the cross appeal should be treated as a late appellant's reply.

G. Readiness for Hearing

1. Speaking to the list

ISSUE 20
Can "speaking to the list" be dispensed with?

[135] At present, the progress of an appeal is monitored by the General Appeal List. When an appeal is ready for hearing it is transferred to the Appeal Hearing List and

set down for a specific sitting.[84] If a party does not appear to "speak to the list", the appeal will be struck out and, if not restored within 6 months, deemed abandoned. By this process, appeals are brought to an end if no progress has been made.

[136] The proposals discussed in this consultation memorandum would attach consequences to each step in an appeal. Late completion of a step will trigger consequences that will facilitate bringing the appeal to an appropriate end if the step is not completed. For example, if the appellant files notice of appeal but does nothing else, the appeal will be struck out and, in due course, deemed dismissed. If the appellant orders the appeal book and files the appellant's materials, the appeal can still be heard regardless of whether the respondent choses to file anything.

---

[84] Rule 515.1 provides:

515.1(1) The Registrar shall enter a case on the General Appeal List whenever the first of the following events occurs:

(a) 3 months have elapsed since the notice of appeal was filed and no agreement as to the contents or order fixing contents has been filed or entered;
(b) 6 months have elapsed since the notice of appeal was filed;
(c) the appeal books have been filed;
(d) a supervising judge directs that the case be so entered.

(2) The General Appeal List shall be called by a Judge in Chambers at a time and place to be specified in advance by the Chief Justice.

(3) Counsel for each party to an appeal shall appear at the time and place specified and signify whether or not the case is ready for hearing.

(4) When the General Appeal List is called, the Chambers Judge shall transfer those cases ready for hearing to the Appeal Hearing List for a specified sittings of the Court.

...

(7) If counsel does not appear when a case is called on the General Appeal List and an adjournment has not been granted, the case shall be struck from the General Appeal List.

(9) If a case has been struck from the General Appeal List and the case is not restored to the General Appeal List within 6 months from the day that the case was struck from the General Appeal List, the appeal is deemed to have been abandoned.

(9.1) An appeal struck from the General Appeal List under subrule (7) or any other rule or under a practice direction, order or judgment may not thereafter be restored except by the order of the Court or a judge of the Court, or on consent of all parties, and on payment to the Registrar of costs referred to in subrule (10).

(10) Unless for a special reason a judge orders a lesser amount or waives the costs payable, the costs to be paid under subrule (9.1) are as follows:

(a) the first time that the appeal is restored, $200;
(b) the second time that the appeal is restored, $500;
(c) the third and subsequent times that the appeal is restored, $1000.

POSITION OF THE COMMITTEE

[137] In keeping with the Committee's proposals, inactive appeals will be disposed of by the rules. In this context, speaking to the list becomes superfluous. The Committee considers that speaking to the list can be dispensed with.[85]

2. Assigning a date for hearing

[138] As noted earlier, more than half of civil appeals are dispensed with without hearing. This high drop out rate raises the question of when appeals should be assigned for hearing. For example, assigning a hearing date when the notice of appeal is filed would lead to considerable cancellations and vacancies. However, as has been noted throughout this discussion, once the appellant's materials have been filed it will be possible to hear the appeal regardless of whether the respondent decides to participate. At the same time it is possible to gauge that the appeal should be ready for hearing 4 months after the appellant's materials are filed (i.e. 3 months for the respondent's materials plus time for reply or replies in the case of a cross appeal). Allowing a further margin for court preparation, it should be possible to assign a hearing date when appellant's materials are filed.[86]

H. Judgment & Orders

ISSUE 21
How can the process of preparing judgment be expedited?

ISSUE 22
Should the time period to enter judgment without leave be shortened?

---

[85] Speaking to the list has been already dispensed with in recent changes for procedural and sentence appeals: CPD Parts I and J. If speaking to the list is dispensed with for all appeals, it would be appropriate to amend the *Court of Appeal Act*, R.S.A. 2000, c. C-30, s. 14 [hereafter "*Court of Appeal Act*"] to remove references to calling the list.

[86] Readiness for hearing is gauged by filing the appellant's factum in both Manitoba and British Columbia: *Court of Appeal Rules*, Man. Reg. 555/88R, r. 33; BC Appeal Rules, r. 28. In the Federal Court of Appeal, the appellant must requisition a hearing date within 20 days of the respondent's memorandum: *Federal Courts Rules*, S.O.R./98-106, r. 347.

[139] The main rules relating to judgment and orders are located within the trial rules, although many of those rules refer expressly to the Court of Appeal. Issues relating to judgment and orders were put forward by the General Rewrite Committee in an earlier consultation memorandum.[87] Significant changes to the present rules have been recommended. This section considers whether the Draft Rules would be appropriate for appellate practice or whether other options should be considered.[88] Given the role of the Court of Appeal, it will usually be appropriate to speak of judgment rather than orders. For convenience, the term "judgment" is used throughout this section to mean both judgments and orders.

[140] The Draft Rules allow a 3 month period to enter judgment without leave. In the context of civil appeals, it might be appropriate to shorten this period to fall within the 60 day period for appeals to the Supreme Court of Canada.[89] Making appropriate changes to the Draft Rules, judgment rules for appeals might provide as follows:

---

[87] Alberta Law Reform Institute, *Motions and Orders* (Consultation Memorandum No. 12.10) (Edmonton: Alberta Law Reform Institute, 2004) at 61*ff*.

[88] At time of writing, the Draft Rules provide:

Preparation of judgments and orders

9.2(1) The court may direct which party is to prepare a judgment or order pronounced by the court, but if the court does not do so, the successful party must prepare it.

(2) The following rules apply, unless the court otherwise orders:

(a) within 10 days of the judgment or order being pronounced, the responsible party must prepare a draft of the judgment or order in accordance with the court's pronouncement and serve it on every party in attendance at the hearing, but if the responsible party does not prepare the draft then any other party may do so;

(b) within 10 days of the draft order or judgment being served, each party served may

(i) approve the draft, or

(ii) object to the draft and apply to the court to settle the judgment or order;

(c) if a party does not approve or object to the draft judgment or order within the 10 days described in clause (b), but all other requirements are met, and service of the draft judgment or order is proved, the judgment or order may be signed and entered.

Entry of judgments and orders

9.5(1) Subject to subrule (2), every judgment and every order is entered by filing it with the court clerk who must make a note in the court record of the entry and the date of entry.

(2) No judgment or order is to be entered more than 3 months after it is pronounced without the court's consent, which may only be obtained on application and after notice is served on every other party.

[89] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 58.

> ***Preparation of judgments and orders***
>
> The court may direct which party is to prepare a judgment or order and the procedure by which approval of the form of the order is to be sought, but if the court does not do so, the following rules apply:
>
> (a) within 10 days of the judgment or order being pronounced, the successful party must prepare a draft of the judgment or order in accordance with the court's pronouncement and serve it on every party in attendance at the hearing;
>
> (b) within 10 days of the draft order or judgment being served, each party served may
>
> (i) approve the draft, or
>
> (ii) object to the draft and apply to the court to settle the judgment or order;
>
> (c) if a party does not approve or object to the draft judgment or order within the 10 days described in clause (b), but all other requirements are met, and service of the draft judgment or order is proved, the judgment or order may be signed and entered.
>
> ***Entry of judgments and orders***
>
> (1) Subject to subrule (2), every judgment and every order is entered by filing it with the registrar who must make a note of the entry and the date of entry in the court record of the entry and the date of entry.
>
> (2) No judgment or order is to be entered more than one month after it is pronounced without the consent of the court, which may only be obtained on application and after notice is served on every other party.

[141] Another option would be to adopt a standard form for judgment. In contrast to the trial level, there are fewer options for appeal judgments. Particularly where an appeal is dismissed, a standard form judgment would likely be a relatively simple matter. For example, the BC Appeal Rules prescribe standard forms for several circumstances.[90] While there would be greater variation among appeal orders in comparison to judgments, a standard form could be developed for common orders (e.g. leave, security for costs, time extended).

POSITION OF THE COMMITTEE

[142] The Committee considers that there is scope for the use of a standard form for common judgments and orders and that a standard form should be the preferred

---

[90] BC Appeal Rules, r. 47 and forms 23 to 25.1.

option. Recognising that it will not be effective to cover all possibilities, the Committee considers that there should be a fall back rule comparable to the draft included above. In circumstances where the standard form is not appropriate, the successful party would prepare the judgment or order subject to the court ordering otherwise.

I. Recoverable Costs

[143] At present, general practice on appeal is that costs follow the event.[91] In other words, the successful party will generally be entitled to recover some of the costs of litigation from the unsuccessful party. As provided by r. 600:

> "costs" includes all of the reasonable and proper expenses which any party has paid or become liable to pay for the purpose of carrying on or appearing as a party to any proceeding, including .... the charges of barristers and solicitors, ... expenses for the preparation of plans, models, or copies of documents, [and] ... the fees payable to officers of the court ...

"Costs" does not mean the total expense of the litigation but a smaller amount. As noted by the Costs Committee of the Rules of Court Project:[92]

> Alberta presently uses a partial indemnity system for the legal costs component of party and party costs. It is premised on the assumption that a winning party is deserving of some compensation for legal costs incurred in establishing or defending its position, but recognizes that full indemnity of legal fees can significantly hamper access to justice in many cases. Accordingly, Schedule C of The Rules is intended to award approximately 30-50% of a winning party's actual legal fees, subject always to the discretion of the court to vary a costs award.

The values currently allowed under Schedule C are summarised in the table below. In addition, Schedule E [Fees and expenses] prescribes a registrar's fee of $600 for filing

---

[91] Rule 601 provides:

> 601(3) When no order is made, the costs follow the event, but the fact that a party is successful in a proceeding or a step in a proceeding does not prevent the Court from awarding costs against the successful party in a proper case.

In the specific context of an appeal, r. 518 provides:

> 518 The court may: ...
>
> (f) make such order as to costs as it seems just, but where the court is equally divided, the costs shall follow the event of the appeal.

See also CPD H. Security for costs is dealt with in chapter 8.

[92] Alberta Law Reform Institute, *Costs and Sanctions* (Consultation Memorandum No. 12.17) (Edmonton: Alberta Law Reform Institute, 2005) at para. 8.

notice of appeal or leave to appeal and court reporting services expenses of $2.00+ per page.

Table 6: Extract Schedule C

Notice of appeal	Preparation and filing $200 column 1[93] $400 column 3 $600 column 5	General	Preparation for appeal $500 column 1 $2,000 column 3 $4,000 column 5
Appeal book	Preparation (see general)	Oral hearing	First ½ day, first counsel $1,000 column 1 $2,000 column 3 $3,000 column 5
Factum	Preparation $1,000 column 1 $4,000 column 3 $8,000 column 5		Subsequent full ½ day, first counsel $500 column 1 $1100 column 3 $1600 column 5
Authorities	Preparation (see general)	Applications Contested Uncontested	 Appearance & brief $1,750 column 3 $2,500 column 5 n/a

[144] Costs awards are subject to the court's general discretion to vary an award upward or downward. In addition, costs awards are subject to specific provisions that order or deny costs. Thus, for example, a successful appellant whose factum was filed late would generally be entitled to costs except those allowed for the preparation of the factum under r. 538(4).

[145] Aside from a few specific appeal rules,[94] the detailed provisions governing the awarding and assessment of costs, as well as the procedures for resolving disputes

---

[93] Schedule C determines costs according to the value of the litigation and comprises five columns as follows: column 1, $10,000 – $50,000; column 2, $50,001 – $150,000; column 3, $150,001 – $500,000; column 4, $500,001 – $1,5000,000; column 5, > $1,500,000. Columns 1, 3 and 5 are shown here for comparison purposes.

[94] Rules expressly addressing costs on appeals include: 518, 538, and 540. Costs are also addressed in CPD D.9, H and J.7.

about costs are set out in general rules that apply to both trials and appeals. The costs rules were reviewed by the Costs Committee.[95] However, there are four areas where specific comment is required for appeals. Firstly, what is the appropriate test to require security for costs on an appeal? Secondly, should costs on appeal automatically include costs in the court below? Thirdly, developments in appellate practice and the proposals made by this Committee make it appropriate to review the tariff in Schedule C. Fourthly, there is a problem to address in terms of the timing of costs submissions. Finally, it should be noted that if the appeal rules were to be published separately from the trial rules, a significant number of costs rules would have to be repeated within the appeal rules or incorporated by reference.

1. Security for payment of a costs award

ISSUE 23
What test should govern security for costs on appeal?

[146] Security for costs is presently dealt with in r. 524.[96] The availability of security for costs on appeal was dealt with, in part, by the Costs Committee.[97] In particular, the Costs Committee considered the adequacy of the current test that requires a party to show "special circumstances" in order to obtain security for costs. The Costs Committee reached the following conclusion:[98]

> [281] The Committee is of the opinion that the case law relating to Rule 524, particularly its interplay with Rule 593(1.1), is adequate and that the case law should not be codified in the rules. In particular, the reverse

---

[95] General principles and specific issues relating to costs were discussed in Alberta Law Reform Institute, *Costs and Sanctions* (Consultation Memorandum No. 12.17) (Edmonton: Alberta Law Reform Institute, 2005).

[96] Rule 524 provides:

524(1) No security for costs shall be required in appeals unless by reason of special circumstances security is ordered by a judge.

(2) Unless the court otherwise orders an appellant who fails to give security for costs when ordered shall be deemed to have abandoned his appeal and the respondent is entitled to his costs.

[97] Alberta Law Reform Institute, *Costs and Sanctions* (Consultation Memorandum No. 12.17) (Edmonton: Alberta Law Reform Institute, 2005) at 82-84.

[98] Alberta Law Reform Institute, *Costs and Sanctions* (Consultation Memorandum No. 12.17) (Edmonton: Alberta Law Reform Institute, 2005) at 84.

> onus created by the "special circumstances" test, followed by the "just and reasonable" test, is adequate and appropriate.

[147] However, the special circumstances test has since been criticised in a report by the Canadian Judicial Council:[99]

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

This leads to the question of whether the same rule should apply on appeal as at trial. At time of writing the Draft Rules provide:

> ***Considerations for a security for costs order***
>
> 4.19 The court may order a party to provide security for payment of a costs award if the court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is made;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the court considers appropriate to consider.

POSITION OF THE COMMITTEE

[148] The Committee agrees with the Costs Committee that the special circumstances test should be retained for security for costs on appeal. Expanding the grounds on which security for costs can be ordered would operate as a barrier to bringing appeals and may increase applications to the court without good reason.

[149] Further, the Committee thinks that it is appropriate to retain the current approach expressed in r. 524(2); failure to give security for costs when ordered will

---

[99] Canadian Judicial Council, *Well-run Appeals* by J.E. Côté (Ottawa: Canadian Judicial Council, 2006) at 17 [hereafter "CJC Report"].

result in the appeal being deemed abandoned. In keeping with the Committee's earlier proposals to reduce the time for reinstatement, the appellant would have to act within 2 months of deemed abandonment.

2. Costs in the court below

ISSUE 24
Where a successful party is awarded costs for the appeal should the award generally include costs in the court below?

[150] At present, there is no clear rule as to whether a party who is successful on an appeal and who is awarded costs for the appeal should also be entitled to costs in the court below. Without a clear rule for guidance, the result is unnecessary litigation over the question.

POSITION OF THE COMMITTEE

[151] The Committee considers that, in keeping with the general rule that costs follow the event, a party who is successful on an appeal should be entitled to costs for both the appeal and the court below. There will inevitably be exceptions where this result will be inappropriate and will require modification. The court should have the ability to address those circumstances on application.

3. Costs tariff on appeals

ISSUE 25
Should the costs tariff be revised for appeals? In particular:
(a) are the items divided in an appropriate manner?
(b) should other items be included?
(c) are the amounts appropriate?

[152] Schedule C was last revised in 1998 and has had only minor updates since. As noted, developments since that time and proposals made by this Committee make it appropriate to review the tariff. Specific points are discussed below.

Notice of Appeal

[153] What amount should be allowed for preparing notice of appeal? Should the amount reflect any advice given regarding the decision to appeal? For example, British Columbia allows an amount for advice rather than preparation and filing of the notice of appeal.[100] Is the amount allowed appropriate? Notice of appeal (Form N) requires considerably more detail than it did in 1998. However, as all appellants complete the same form, should different amounts be allowed?

Appeal book

[154] What amount should be allowed for preparing an appeal book? At present, there is no separate costs amount for preparing an appeal book. However, the Committee has proposed that late filing or service of the appeal book would deny preparation costs. What amount is appropriate, both as an indemnity against the cost of preparing the appeal book and as a penalty to encourage timely completion? Should preparation costs include the Schedule E amount for court reporting expenses of preparing the appeal book?

Factum

[155] What amount should be allowed for preparing a factum? Unless the court orders otherwise, all factums are subject to the same page limit. As such, should the same amount apply to all appeals? For comparison, while Alberta allows amounts of $1,000, $4,000 and $8,000, British Columbia allows ranges of $600–$3,000, $800–$4,000 and $1,000–$5,000.

Authorities

[156] What amount should be allowed for preparing authorities? At present, there is no separate costs amount for preparing authorities. However, the Committee has proposed that late filing or service of the authorities would deny preparation costs. What amount would be appropriate both as an indemnity against the cost of preparing the authorities and as a penalty to encourage timely completion?

---

[100] BC Appeal Rules, Appendix B, Tariff of Costs.

Appellant's reply

[157] What amount should be allowed for the optional step of preparing the appellant's reply?

General preparation

[158] If preparation costs for the appeal book and authorities are added to Schedule C, is a separate amount for general preparation still required? If so, what amount should be allowed? British Columbia calculates preparation for hearing in ½ day units, each ½ day being allowed between $600 and $3,000. An increased amount for preparation costs might be more consistent with the move to hear more appeals without oral argument.

Oral hearing

[159] What amount should be allowed for oral hearing? At present, appeals filed after 1 October 2004 are subject to time limits of 45 minutes for each party that is separately represented. Thus, in many instances, if not most, the total hearing time will be 90 minutes which falls within the first ½ day hearing time. However, under the current limits, it will be rare for a hearing to take up a subsequent full ½ day. Should costs for oral hearing be calculated on units smaller than a ½ day? Should costs for the second ½ day or other unit be lower as at present? British Columbia assigns the same value to each ½ day of hearing. For comparison, where Alberta allows $1,000, $2,000, and $3,000 for a ½ day hearing, British Columbia allows $600, $800, and $1,000.

Scaling

[160] Should costs be scaled? If so, how? At present, costs are scaled to the value of the litigation and Schedule C allocates value across five columns. However, while five columns may be required to distinguish cases at the trial level, it can be argued that these divisions begin to lose precision or meaning on appeal. For example, while the dollar value of an appeal may be relatively low, the appeal may concern a significant point of law. Fewer columns might represent a more even approach for appeals.

[161] The dollar value of the litigation is not the only basis on which costs can be scaled. For example, in British Columbia, costs are scaled according to the difficulty

and importance of an appeal.[101] In Manitoba, costs are scaled based on the type of appeal.[102] Another alternative might be to scale appeal costs according to the length of the trial.

[162] Finally, it might be argued that costs should not be scaled at all. For example, all appellants complete the same notice of appeal and all factums are subject to the same page limit. Why should higher costs amounts be allowed if the underlying tasks are comparable?

Unit-based tariff

[163] At present, each tariff item in Schedule C requires separate updating. In comparison, each item in the British Columbia tariff is calculated as a number of units and allows the whole tariff to be updated by adjusting the value assigned to the base unit.[103] For example, ten units multiplied by $100 per unit equals $1,000 for the tariff item. A unit-based tariff also highlights the relative weight of each item in comparison to others.

POSITION OF THE COMMITTEE

[164] The Committee considers that:

- costs should continue to be scaled according to the value of the litigation but that there is scope to simplify the column structure reflected in Schedule C.
- the costs tariff should include separate preparation costs for the appeal book, authorities, and appellant's reply.
- hearing costs should continue to be calculated on a ½ day basis.

---

[101] The BC Appeal Rules, Appendix B allows for matter of "ordinary difficulty", "more than ordinary difficulty or importance" and "unusual difficulty or importance." In determining the appropriate scale, the court may consider the following:

- whether a difficult issue of law, fact, or construction is involved;
- whether an issue is of importance to a class or body of persons, or is of general interest;
- whether the result of the proceeding effectively determines the rights and obligations of the parties beyond the relief that was actually granted or denied.

[102] For example, interlocutory appeals have a lower tariff: *Court of Appeal Rules*, Man. Reg. 555/88R, Schedule A.1.

[103] Costs under the *Federal Courts Rules*, S.O.R./98-106, Tariff B are also calculated on a unit basis.

Aside from these points, the Committee invites your comments on matters relating to costs in appeals. The Committee is particularly interested in your views on whether a three columns or single column tariff structure would be appropriate.

[165] In order to facilitate discussion on these specific issues and on other costs issues discussed in this section, a sample tariff is set out below. However, aside from including separate items for preparing the appeal book, authorities, and appellant's reply, the Committee is not proposing the adoption of the sample tariff. The intent of the sample tariff is to encourage discussion before final recommendations are made.

Table 7: Sample tariff of costs for discussion

	Value of litigation		
	up to $200,000	$200,000 to $500,000	over $500,000
Filing notice of appeal or cross appeal	$500	$500	$500
Appeal book (excludes Schedule E fees & expenses)	$1,000	$1,500	$2,000
Factum	$4,000	$6,000	$8,000
Authorities	$500	$500	$500
Reply	$300	$300	$300
Advising appellant or respondent on appeal & general preparation	$1,000	$3,000	$6,000
Oral hearing			
first ½ day	$2,000	$2,500	$3,000
second ½ day	$1,000	$1,500	$1,700
Applications (including leave to appeal)			
preparation	$1,000	$1,500	$2,000
oral hearing	$500	$500	$500

4. Costs submissions

[166] At present, parties need not make submissions regarding costs unless they seek an exception to the general rule that costs follows the event.[104] However, even where

---

[104] CPD H provides:

1. No submissions about costs need be made by a party unless the party seeks an exception to the

(continued...)

the parties address costs in their factum, matters arising after the factums have been filed may require additional submissions on costs. It was brought to the Committee's attention that parties often overlook to raise subsequent costs issues when the appeal is heard. As a result costs submissions are often made long after the hearing has been concluded. To address this problem, the Committee considers that the rules should require the parties to address costs when the decision is made or immediately thereafter.

J. Housekeeping Points

[167] In the course of its analysis, the Committee noted areas where minor improvements would additionally enhance appellate practice. These areas are more "pedestrian" in nature and do not raise significant policy issues. Accordingly, the Committee has not identified specific issues for consultation. However, the Committee welcomes comments on any of the points discussed below.

1. Well-known authorities

[168] The rules specify that well-known authorities need not be reproduced.[105] The court is in the best position to judge which authorities it does not require. The British Columbia rules recognise this fact and that court publishes a list of recognised

---

[104] (...continued)
general practice.
2. If a party seeks an exception on the assumption of a certain outcome of the appeal, this should be stated in the factum together with a brief statement of argument.
3. Oral submissions about costs will be requested only in exceptional circumstances.

[105] CPD D.2 provides:
D.2 Counsel need not copy every authority cited. Do not reproduce minor ones, or cases for well-known propositions, or all the authorities for a point of secondary importance.
See also CPD D.4 and D.5.

authorities which parties need not reproduce.[106] This might be a useful approach to take in Alberta.

2. Service of authorities

[169] Nothing in the current rules requires service of the book of authorities on other parties. However, authorities are generally exchanged. The Committee considers that service of authorities on other parties should be provided for in the rules.

---

[106] BC Appeal Rules, r. 40(9) provides:

> 40(9) From time to time, the registrar may publish a list of authorities and parties need not include in their book of authorities any authority included in that list unless the court will be asked to depart from or distinguish the authority.

The list of frequently cited authorities is published on the British Columbia Court of Appeal website, online:<http://www.courts.gov.bc.ca/ca/notices>. The majority of references are to Supreme Court of Canada decisions such as *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311, *Moge v. Moge*, [1992] 3 S.C.R. 813, and *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. The Nova Scotia Court of Appeal has also published a list of Supreme Court of Canada cases that need not be reproduced, online: <http://www.courts.ns.ca/General/bar.htm>.

CHAPTER 4. QUALITY & CONTENT OF APPEAL DOCUMENTS

[170] The rules currently prescribe a number of requirements relevant to the content and quality of documents filed with the court. This chapter considers whether those requirements might be simplified and what penalties or consequences should attach to documents that do not meet the requirements.

A. Document Quality

ISSUE 26
Is standard formatting appropriate for appeal documents? Which documents might require exceptions?

[171] In this section, quality encompasses the idea that the court and other parties should be provided with documents that are readily legible and in a format that assists, rather than hinders, the prompt resolution of the appeal.

[172] The quality of appeal documents is governed by various rules. Appeal documents are subject to the same quality requirements as all other documents filed under the rules.[107] Specific requirements for some appeal documents are prescribed in the appeal rules. Further requirements are stated in the practice notes. Across these various sources, some requirements are duplicated. Other matters are not specified or it may be unclear whether or how the general rules apply to appeal documents. The court itself has produced checklists to assist litigants to meet the various requirements. While the checklists provide considerable assistance, they too increase the range of materials a litigant must consult to gauge whether a specific document complies with the requirements.[108] Having to produce the checklists and measure documents against them also adds to the administrative workload of the court.

---

[107] For example, rr. 5.1, 5.12, and 700.

[108] Moreover, the checklists do not claim to capture all the requirements: Alberta Courts, online: <http://www.albertacourts.ab.ca>.

[173] Despite the profusion of requirements and variations from one document to another, there is the basis for a set of standard requirements that would apply to all appeal documents.[109] The goal of ensuring that all parties and the court have uniform, legible materials to work with would likely be advanced by having a standard format that applied to all appeal documents set out in the appeal rules.[110] For example, adopting 12 point font and double spacing would accommodate the majority of appeal documents. Where exceptions are required they could be expressly identified. Both standard format and any exceptions could be reinforced by the use of prescribed forms for each type of appeal document. Prescribed forms are discussed in greater detail below.

POSITION OF THE COMMITTEE

[174] The Committee invites your comments on standard formatting for appeal documents. As general guidance, the Committee considers that 12 point font and one-and-a-half or double-spacing would be appropriate for most, if not all, appeal documents. The Committee is particularly interested to hear your views on when standard formatting would not be appropriate and why.

---

[109] In summary, the basic quality requirements for the main appeal documents appear to be as follows:
Appeal books must be legible (rr. 530(2)(f), 534, & 700), on good quality white letter-size paper (rr. 530(2)(b) & 700), printed single-sided (r. 530(2)(b)), in a font that is 10 point or larger having at least 12 characters to the inch (CPD B.2) and capital letters at least 2.9 mm high (r. 530(2)(g)). Transcripts in the evidence volume may be single-spaced if prepared by an official court reporter or fiat obtained (r. 540(7), (12) and (13).)
Factums must be legible (rr. 540(9) & 700), printed single-sided (r. 540(5)) on good quality white letter-size paper (rr. 540(5) & 700), with margins of at least one inch (CPD C.7), and be 1½– or double-spaced (CPD C.7), and in a font 12 point or larger having capital letters at least 2.9 mm high (CPD C.7). Quotations within factums may be single-spaced (CPD C.7).
Books of authorities must be legible (r. 700 & CPD D.4) and printed on good quality white letter-size paper (r. 700).
Application memorandums must be legible (r. 700), printed on good quality white letter-size paper (r. 700), and be double-spaced (CPD F.4).

[110] The quality requirements of appeal documents present a strong case for consolidation within the appeal rules. The increasing specificity of appellate practice suggests that it is no longer practical to establish requirements that apply to both trial and appeal documents.

B. Document Content

ISSUE 27
Should prescribed forms be adopted for more appeal documents?

[175] In addition to rules that ensure the quality of documents filed with the court, the rules also prescribe the content of court documents. For example, a factum is required to state the facts, grounds of appeal, points of law, and relief sought – information critical to both the court's and the opposing party's ability to resolve the appeal. Other information such as the appeal number or estimated time for oral argument is intended to assist the administration of the appeal. However, changes in practice (both appellate and trial) have increased the range of information that the court requires to administer and resolve the appeal. Moreover, as the court deals with a large number of appeals, uniform presentation of information from one appeal to the next allows for systemic efficiency.

[176] While ensuring that the court has the information it requires in an efficient form is an appropriate goal, the current rules may sometimes frustrate its achievement. For example, both r. 530 and CPD Part B, include considerable detail to outline in narrative form what should be included in an appeal book and where it should appear. This information is repeated in a court checklist and supplemented by sample documents. However, the checklist itself suggests that documents frequently fail to meet the requirements

[177] True to the adage that a picture is worth a thousand words, prescribed forms have a great advantage over narrative descriptions of document content. Form N is a good example and well illustrates how forms can be used both to obtain required information and to present that information in a standard format. While the court has provided sample documents for many years, prescribed forms on the model of Form N are a more recent addition. However, forms have been used successfully in British Columbia for some time. British Columbia's adoption of prescribed forms has also allowed a more streamlined set of rules. Whether documents are easier to prepare using standard forms has both objective and subjective components. However, the British Columbia Court of Appeal reports that the forms appear to be working well,

few documents are rejected, and the use of forms has assisted self-represented litigants.[111]

POSITION OF THE COMMITTEE

[178] The Committee considers that there is scope to increase the use of prescribed forms in appellate practice.

C. Faulty documents

ISSUE 28
What penalties or consequences should apply to faulty documents?

[179] In this chapter, a faulty document is one that does not comply with one or more of the requirements governing content or quality. The court's inherent jurisdiction to control its own process and procedure extends to documents presented to the court for filing. The basis for exercising this authority is the connection between those documents and the court's ability to administer the appeal and ultimately to resolve it. Requirements concerning content ensure that the court and other parties have the necessary information to respond to and resolve the appeal. Requirements concerning quality ensure that the information is presented in a form that assists rather than hinders the resolution of the appeal. Documents that do not meet these requirements impair the court's ability to do its job and the court is justified in rejecting them.[112]

Penalty

[180] Aside from refusing filing, faulty documents are not generally penalised. Rule 543(1) is an exception that allows the court to impose terms upon a party who files a

---

[111] Telephone discussion between Registrar, British Columbia Court of Appeal and ALRI counsel (June 2004).

[112] The court's authority to reject documents is usually exercised by the registrar or other court officer. There are a number of issues to address concerning the delegation of that authority. Those issues are dealt with in chapter 9.

faulty factum.[113] However, this leads to the question of why a penalty attaches to factums but not other documents. Should a rule like r. 543(1) apply to all documents? Or, is the prospect of the document being rejected sufficient to encourage compliance?

Consequences

[181] The consequences of submitting a faulty document for filing are that the party will either have to obtain a fiat or correct the document. Where a document has to be corrected, it may not be possible to make the corrections and return the document within the time allowed to complete the step. Thus, a further consequence is that a faulty document may trigger the penalties and consequences that apply to late filing or service. Is this an appropriate result?

[182] Under the present rules and proposals discussed here, lateness triggers significant penalties and consequences. The importance of deadlines in ensuring that an appeal progresses towards resolution has already been discussed. Is there a conflict between ensuring that each step of an appeal is completed on time and also ensuring that the document at the heart of each step meets the requirements set by the rules? If there is a conflict, should time be suspended to allow a party to correct a document by the deadline?

POSITION OF THE COMMITTEE

[183] The Committee considers that the prospect of rejection and having to correct faulty documents is an implied penalty of sufficient weight to encourage compliance. The Committee does not propose any additional penalty for faulty documents.

[184] With respect to corrected documents and lateness, the Committee does not consider that there is any conflict between the goals of ensuring that the steps of an appeal are completed on time and that they are completed to the required standard. Parties must meet all their obligations under the rules. As such, it would be

---

[113] Rule 543(1) provides:

> 543(1) Where a party fails to comply with the rules as to factums the court may impose such terms upon the party in default as it considers just.

However, r. 543(1) is rarely applied as noted in Stevenson & Côté at 562: "In practice a number of Alberta factums have flaws in form, but the Registrar does not report this to the Court, and other parties often fail to raise it on the subject of costs."

inappropriate to suspend the running of time if a party submits a faulty document with insufficient time to allow for the correction if the document is rejected. Moreover, suspending time could be subject to abuse (eg. filing incomplete documents with the object of having them rejected) and could result in prejudice to other parties.

D. On-line Filing and E-Appeals

[185] The Alberta Court of Appeal has been an innovator in moving towards the on-line filing of appeal documents. Since October 2004, all appeals from trials 10 days in length, must be filed electronically.[114] E-filing extends to the appeal book, factums, and authorities. Appeals from shorter trials may adopt e-filing with leave of the court.

[186] The Committee recognizes that advances in technology mean that both electronic documents and paper documents are currently in a state of transition. Accordingly, the Committee does not think that it is appropriate at this point to review in detail the content and quality requirements for electronic documents or to gauge whether e-filing should be expanded. Aside from the proposals to simplify the requirements for paper documents, the Committee thinks that the evolution of e-filing is best monitored by the court.

E. Housekeeping Points

[187] In the course of its analysis, the Committee noted areas where minor improvements would additionally enhance appellate practice. These areas are more "pedestrian" in nature and do not raise significant policy issues. Accordingly, the Committee has not identified specific issues for consultation. However, the Committee welcomes comments on any of the points discussed below.

1. Style of cause

[188] The General Rewrite Committee has recommended that a short style of cause be adopted for all documents other than originating documents:[115]

> [153] Rule 5.12(b) provides that, other than counterclaims, "all documents filed or issued under these Rules shall contain ... a style of

---

[114] CPD K.

[115] Alberta Law Reform Institute, *Pleadings* (Consultation Memorandum No. 12.8) (Edmonton: Alberta Law Reform Institute, 2003) at 57.

> cause setting forth the names in full of the plaintiff and of the defendant." Most Canadian rules provide for a short title or style of proceeding or cause in documents other than an originating process "showing the names of the first party on each side followed by the words 'and others'."
>
> POSITION OF THE GENERAL REWRITE COMMITTEE
>
> [154] The Committee agreed that this would be a useful and time-saving reform. The rules should provide for use of a short style of cause on subsequent documents.

The prospect of a short style of cause has additional implications at the appellate level.

[189] At the appellate level, it is important that each judge dealing with the appeal be able to quickly identify the names of the parties (and their counsel), as well as the status of each party relative to the appeal, to the trial, and to any application before the court. Consequently, a short style of cause will necessarily be longer on appeal than at trial.

2. Backers

[190] The General Rewrite Committee has also recommended that backers be discontinued:[116]

> [156] The Committee noted that notices on documents, such as the Notice to Defendant now found on the backer of a statement of claim, could appear in a document as the first paragraph after the style of cause, rather than on a backer. Backers are an anachronism and do not correspond to modern technology or modern filing methods. Certainly they will have to be dispensed with once electronic filing is a reality.

Consultation on this issue supported the recommendation to abandon backers. As electronic filing is becoming the norm for appellate practice, there is sufficient, if not greater, reason to discontinue backers on appeal documents.

---

[116] Alberta Law Reform Institute, *Pleadings* (Consultation Memorandum No. 12.8) (Edmonton: Alberta Law Reform Institute, 2003) at 58.

3. Existing or subsequent appeal books

[191] The rules currently provide for both existing and subsequent appeal books. CPD B.1 outlines how to adapt existing transcripts for filing.[117] While CPD B.1 requires permission to use existing transcripts it does not specify who grants permission. The Committee considers that it would be helpful to clarify this point. While it falls within the jurisdiction of a judge to grant such permission, it would likely be appropriate in most cases to delegate that authority to an appropriate court officer.

[192] Anticipating a subsequent appeal, r. 533 similarly allows parties to request to file an appeal book that complies with the Supreme Court of Canada rules.[118] As with existing appeal books, there is scope to clarify who can grant or deny such a request. Further, the reference to the request being made by "the solicitor for any party" calls into question the rule's application to self-represented litigants. There does not appear to be a valid reason to distinguish between parties on the basis of representation.

4. Documents bound with factum

[193] The rules currently provide that key statutes may be appended to the factum.[119] The practice notes also allow for certain rulings or exhibits to be appended and

---

[117] CPD B.1 provides:

> B.1 If existing transcripts are permitted instead of a new formal appeal book:
> (a) Label the volumes carefully and prominently.
> (b) Ensure that all are paged throughout, or insert lettered tabs to mark the beginning of any new pagination.
> (c) Provide a full table of contents, including a list of exhibits or other documents, showing the page number where each was put into evidence, and where each was reproduced. Refer to Forms C to G of the Consolidated Practice Directions of the Court of Appeal of Alberta.
> (d) Reproduce the agreement as to contents, and the notice of appeal. If there are pleadings or orders or other contents not in the transcript, reproduce them.
> (e) Mark new page numbers on the transcripts in a way that clearly demonstrates which are the new page numbers.

[118] Rule 533 provides:

> 533 If requested by the solicitor for any party, the appeal book may be printed so as to comply with the rules of the Supreme Court of Canada.

[119] Rule 540(4) provides:

> 540(4) Where a statute, regulation, rule, ordinance or by-law is relied on so much thereof as may be necessary to the decision of the case shall be printed at length as an appendix to the factum or 8 copies of the statute, regulation, rule, ordinance or by-law shall be filed for the use of the court.

See also CPD C.2 which notes that r. 540(4) is often overlooked.

authorities under 30 pages.[120] Arguably, some documents are so closely tied to a party's argument that they should be included within the factum for ease of reference. However, while statutes, rulings and exhibits are expressly provided for, an appeal may turn on a particular case or the original pleadings. As a result, it seems curious that the rules allow some key documents but not others to be included with the factum. A general rule applicable to all key documents that total less than 30 pages would be more appropriate.

---

[120] CPD provides as follows:

C.3(a) If the appellant appeals any rulings made during the trial, the appellant shall include the impugned rulings as an appendix to the factum.

(b) Include as an appendix to the factum any exhibit critical to the appeal, e.g. the very contract sued on.

D.3 Authorities should not be bound with a factum unless they are brief (under 30 pages).

CHAPTER 5. APPLICATIONS TO THE COURT

[194] This chapter deals with the general subject of applications to the court. Specific issues relevant to applications for leave to appeal are dealt with in chapter 6.

A. Jurisdiction

[195] Various rules allow applications to be heard by a single judge,[121] by a three judge panel,[122] or by the panel hearing the appeal.[123] Legislation also accommodates the possibility of two judge panels though no specific jurisdiction has yet been assigned to such panels.[124] Identifying who has jurisdiction to hear an application is a critical first step. Jurisdiction to hear an application is relevant to both filing deadlines and the number of copies that must be filed with the court. The court has taken steps to reduce the difficulty in determining jurisdiction by providing checklists on its website. However, the need to explain the rules in this manner places an additional

---

[121] Grouped by subject matter, applications that may be heard by a single judge include:

Leave and notice to appeal – leave to appeal where provided by legislation; leave to amend notice of appeal (r. 512); extending time for leave to appeal or serving the Notice of Appeal (CPD F.9).

Service – substitutional service of notice of appeal (r. 23); directions with respect to service upon a party or a person not a party (r. 510(2)).

Appeal books – fixing contents of appeal books (r. 515(3)); directions with respect to appeal books, such as the numbers of and time for filing appeal books (r. 537); fiat for non-conforming appeal books (r. 530(12)); relief from compliance with electronic appeal books (r. 530(13.1)).

Factums – filing long factum (CPD C.1); dispense with delivery of factums or vary time for delivery of factums (r. 539(1)).

General – stay pending appeal (r. 508(3)); security for costs (r. 524); transfer appeals between cities (r. 514(1)); applications incidental to an appeal (r. 516); leave to abridge time to bring certain applications (r. 516.1); dismiss for want of prosecution (r. 515.1(8)); restore an appeal that was previously struck (r. 515.1(7)).

In addition, jurisdiction is sometimes vested in a specific judge. For example, r. 505(6) requires that leave to appeal a decision of a single Court of Appeal judge be obtained from that judge.

[122] The *Court of Appeal Act*, s. 7 specifies that quorum for the court is three judges unless stated otherwise. Thus, by default, a three judge panel holds jurisdiction to hear applications where no other provision has been made.

[123] Applications that may be heard by the panel hearing the appeal include: admitting new evidence (r. 518) and dispensing with oral argument (r. 539(2), CPD C.8).

[124] *Court of Appeal Act*, s. 8(2).

administrative burden on the court. The Committee considers that both the interests of the court and litigants would be better served if jurisdiction to hear applications were clearly and logically set out in the rules. The Committee also invites comments as to whether specific motions should be heard by a panel or by a single judge.

B. Notice

[196] Rule 516.1 sets out two notice periods for applications. Which notice period applies presently depends on either jurisdiction alone or jurisdiction and type of application.[125] Briefly stated, a longer notice period of 21 business days applies to all applications within the jurisdiction of a three judge panel. A shorter notice period of 7 business days, applies to applications within the jurisdiction of a single judge. The first question to address is how these time periods should be standardised according to the General Rewrite Committee's recommendations for calculating time.[126]

1. Longer notice period: panel applications

ISSUE 29
What period of notice is required for applications heard by a panel?

[197] Scheduling requirements and allowing the opportunity to confer prior to the hearing demand additional time and justify a longer notice period for panel applications. As to the length of time, the current period of 21 business days finds a close match under the standard time periods. Currently, the applicant must give notice

---

[125] Rule 516.1 provides:

516.1(1) In this Rule, "business day" means a day other than a Saturday or a holiday.
(2) Unless leave is given, there must be 21 or more business days between the service of a notice of motion and the actual day for the hearing, when the relief sought is
(a) leave to appeal,
(b) dismissal of an appeal,
(c) admission of new evidence,
(d) restoring an appeal to the general list,
(e) extending time to appeal, or
(f) relief that one judge cannot grant.
(3) In all other motions to a judge, unless leave is given, there must be 7 or more business days between the service of a notice of motion and the actual day for the hearing.

[126] The recommendations are summarised above at note 43.

21 business days prior to the hearing; the respondent is allowed 7 business days to reply, leaving 14 business days for court administration and preparation.[127] Under the standard time periods, the applicant would file one month before hearing; the respondent would have 10 calendar days to respond, leaving approximately 20 days for court administration and preparation.[128]

Table 8: Applications under the longer notice period

	Standard	Current
Notice	one month	21 business days
Reply	10 calendar days	7 business days
Prepare	20 calendar days	14 business days

POSITION OF THE COMMITTEE

[198] The Committee considers that a longer notice period should apply to applications brought before a panel and that one month is an appropriate notice period. Within that period, the respondent would have 10 calendar days to reply, leaving 20 calendar days for court administration and preparation.

2. Shorter notice period: single judge applications

ISSUE 30
What period of notice is required for applications heard by a single judge?

[199] For the shorter notice period, the match is also close. Currently, the applicant must give 7 business days notice prior to the hearing; the respondent is allowed 2 business days to respond, leaving 5 business days for court administration and

---

[127] Rule 516.1(2) and CPD F.1.

[128] Actual time allowed for court preparation will vary slightly depending on the length of the month.

preparation.[129] Under the standard time periods, the applicant would file 10 calendar days before hearing; the respondent would have 5 calendar days to respond, leaving the court 5 calendar days for administration and preparation. Depending on circumstances, 5 calendar days will sometimes be shorter than 5 business days, though not unreasonably so.

Table 9: Applications under the shorter notice period

	Standard	Current
Notice	10 calendar days	7 business days
Reply	5 calendar days	2 business days
Prepare	5 calendar days	5 business days

POSITION OF THE COMMITTEE

[200] The Committee also considers that a shorter notice period of 10 calendar days is appropriate for applications before a single judge. Within that period, the respondent would have 5 calendar days to reply, leaving 5 calendar days for court administration and preparation.

3. Longer notice period: single judge applications

ISSUE 31
What period of notice is required for the following applications heard by a single judge:
(a) extending time to appeal
(b) dismissing an appeal
(c) restoring an appeal

[201] As noted earlier, five types of applications heard by a single judge attract the longer notice period. Leave to appeal is discussed in chapter 6 and the rest are discussed here. Is additional time required for these applications or should the shorter notice period apply?

---

[129] Rule 516.1(3) and CPD F.2.

Extending time to appeal

[202] An appeal is not an automatic stage in the litigation (principle 3) and the appeal process should ensure that delay, cost and uncertainty of process are reduced to a minimum (principle 5). In the vast majority of cases, notice of appeal must be filed within 20 or 30 days of the judgment or decision. Rule 516.1(2)(e), by requiring the longer notice period, effectively doubles the time to appeal and introduces an opportunity for delay. Is additional time required to respond to an application to extend time for appeal? Or should such applications be subject to the shorter notice period?

Dismissing an appeal

[203] An application to dismiss an appeal falls either within the jurisdiction of a single judge or a panel depending on when the application is brought.[130] Applications made before a panel will attract the longer notice period. While single judge applications to dismiss also attract the longer notice period, the question is whether they should. A single judge only has jurisdiction if the appellant has done nothing to advance the appeal for more than one year. In such circumstances, should the appellant be entitled to the longer notice period to respond? Or should an application to dismiss be subject to the shorter notice period after twelve months of inactivity?[131]

Restoring an appeal

[204] As discussed earlier, allowing the appellant six months to bring an application to restore an appeal is a disproportionately long period of time. The longer notice period could similarly be viewed as extending this period to the appellant's advantage. Does the respondent require additional time to respond to an application to restore? Or should such applications be subject to the shorter notice period?

---

[130] Rule 515.1(8) provides:

> 515.1(8) A civil appeal may be dismissed for want of prosecution
>
> (a) by the court at any time before or after 6 months from the date when a notice of appeal was filed, on the application of any party or on its own motion, or
>
> (b) by a judge, on the application of any party where the appellant has done nothing effective to advance the appeal for more than one year.

[131] It should also be noted that the Committee's proposal that an appeal should be struck out if the appellant is late, will reduce the need to dismiss appeals for want of prosecution.

Admitting new evidence

[205] Rule 516.2 was introduced in 2005 and amended in 2007 to require that an application to admit new evidence should be filed with or before the appellant's factum.[132] As applications to admit new evidence are heard by the panel hearing the appeal, r. 516.2 operates to require significantly greater notice than the 21 business days required under r. 516.1(2)(c). As r. 516.2 also allows the court to grant leave to bring an application outside of this time, the notice requirement in r. 516.1(2)(c) appears to be superceded.

POSITION OF THE COMMITTEE

[206] The Committee does not consider that there is sufficient reason to adopt the longer notice period for certain applications before a single judge. The Committee considers that the shorter notice period should apply to applications to extend time to appeal, to dismiss an appeal, and to restore an appeal.

C. Main Steps in An Application

1. Applicant's materials

ISSUE 32
Can the notice of motion and applicant's memorandum be combined as a single document?

ISSUE 33
What penalties or consequences should apply if the applicant's materials are late?

Separate or combined documents

[207] At the trial level, most applications can be brought by notice of motion alone. On appeal, however, all applications require the applicant to file both a notice of

---

[132] Rule 516.2 provides:

516.2 Except with leave of the Court or a judge, no motion by a party to introduce new evidence in the Court of Appeal may be made unless the party has filed and served a notice of motion on or before the day that party's factum is due.

motion and a memorandum.[133] As indicated in the table below, there is considerable overlap in the content of the two documents. This overlap suggests that the two documents could easily be combined, perhaps as a prescribed form. Alternatively, if the two documents are intended to serve different functions, then the content of each should reflect its specific function to reduce the overlap between them.

Table 10: Notice of Motion compared to Applicant's Memorandum

Notice of Motion	Applicant's Memorandum
• relief sought (r. 384)	• the relief sought (CPD F.4)
• grounds, material, or evidence to be relied on (r. 384)	• the grounds upon which the relief sought should be granted (CPD F.4) • a succinct statement of the facts relevant to that relief, including dates of any relevant steps in the proceedings, details of previous applications to the Court (CPD F.4)
• reference to statutory provisions or Rules of Court to be relied on (r. 384)	• precise reference to statute sections and subsections, subrule numbers, or principles under which the application is made
• any irregularities or objections (r. 384) • time estimate for oral argument (CPD F.3) • signature of counsel or applicant (CPD F.3) • notice to respondent (CPD F.3)	• any other information necessary to make the motion intelligible (CPD F.4) • whether the appeal itself has been set down for hearing, and if so when (CPD F.4)

Late materials

[208] In the context of an application, time does not run until the applicant's materials are filed successfully. Consequently, an applicant's materials cannot be filed late in the usual sense of the word.[134] "Late" filing by the applicant merely attracts the consequence that the application will be heard at a later date to ensure sufficient notice to all parties and the court. The applicant's only alternative to avoid this

---

[133] See rr. 384 and 536 and CPD Part F.

[134] Moreover, CPD F.6 requires applicants to file all their materials at the same time:

> F.6 (b) The clerks will not file a notice of motion unless the applicant provides, at the same time the notice of motion is being filed, the supporting affidavit (if applicable), memorandum (if applicable), and any other supporting materials required for the application. The only exception to this direction will be on leave applications where a preservation of time is being requested.

consequence is to seek an order allowing the application to be heard on shorter notice.[135]

POSITION OF THE COMMITTEE

[209] The Committee considers that the notice of motion and applicant's memorandum can be combined into a single document for initiating an application. The Committee also considers that, in the absence of a court order reducing the required notice period, time should run from the date of actual filing rather than attempted filing.

2. Respondent's materials

ISSUE 34
What penalties or consequences should apply if the respondent's materials are late?

[210] In response to an application, the respondent has the option to file a memorandum but must advise the court if a memorandum will not be filed.[136] Late filing will attract the penalty of denied costs for the application.[137] Late filing also carries the consequence that the respondent will be denied oral argument.

---

[135] See for example, CPD F.6.

[136] CPD F.1 provides:

> 1(c) A respondent to the motion must, at least 14 business days before the motion is heard, file and serve:
> (i) either a memorandum, or a letter indicating that they will not be filing a memorandum, and
> (ii) an affidavit (if applicable),
> all of which must be filed in quintuplicate.

See also CPD F.2(b) and (c).

[137] CPD F.7 provides:

> 7(a)When materials are not filed within the time fixed by this Practice Direction, the party in default shall not be entitled to costs of the application, unless otherwise ordered.
> (b) When a respondent fails to file materials within the time fixed by this Practice Direction, the respondent will not be allowed to present oral argument on the application, unless otherwise ordered.

POSITION OF THE COMMITTEE

[211] The Committee considers that denied costs for the application is an appropriate penalty if the respondent's memorandum is late. The Committee also considers that denial of oral argument is an appropriate consequence for non-filing and that it should be triggered by late filing. However, as with the main appeal, the Committee recognizes that the court will exercise its discretion to permit oral argument where warranted by the nature of the application.[138]

3. Affidavits

[212] Where a party intends to file an affidavit in support of an application, the affidavit must be filed and served within the time for filing the memorandum.[139] Other requirements concerning the content, quality, and validity of affidavits and exhibits are found in the trial rules.[140] The General Rewrite Committee has already reviewed issues relating to affidavits.[141] The Appeals Committee considers that the same requirements for affidavits and exhibits should apply on appeal as at trial. For example, affidavits prepared for trial should not have to be redone on appeal. Consequently, the Committee considers that the subject of affidavits and exhibits should be governed by the trial rules.[142]

4. Orders

[213] In contrast to the situation of judgment and final orders, there is a stronger Alberta practice of preparing draft orders in advance of an application being heard. As such, the Committee has not heard reports that delay in the preparation and entry of orders is a significant problem in applications before the court. However, the Committee invites comments in this area.

---

138 See previous discussion in chapter 3.

139 See CPD F.1, F.2 and F.6.

140 Rules 298 to 314.

141 Alberta Law Reform Institute, *Motions and Orders* (Consultation Memorandum No. 12.10) (Edmonton: Alberta Law Reform Institute, 2004) at 25-41.

142 As to the subsequent inclusion of affidavits and exhibits in an appeal book, however, it will be appropriate for the appeal rules to prescribe how the documents are to be identified and listed in the table of contents. For example, see r. 530(8) and CPD B.3.

5. Recoverable Costs

ISSUE 35
Should the costs tariff be revised for applications?

[214] At present, Schedule C allows recoverable costs for contested but not uncontested applications. The amounts allowed for contested applications for appearance and brief are as follows: column 1, $750; column 2, $1,250; column 3, $1,750; column 4, $2,000; and column 5, $2,500. However, since these amounts were set, the court has limited oral argument to 15 minutes on a trial basis.[143] The court will also consider applications without oral argument.[144] Both the existing costs provisions and recent changes raise issues relevant to costs on an application. For example, should costs be allowed for applications without oral argument? Should costs be awarded separately for brief and memorandum? If all applications are subject to limits for oral argument and memorandum length, should costs be scaled to the value of the litigation? On what basis is the distinction made between contested and uncontested applications?

POSITION OF THE COMMITTEE

[215] The Committee considers that costs on an application should generally follow the event.

[216] The successful party should be entitled to costs regardless of whether the application was made by personal appearance or by written argument alone, or by whether the application was contested or uncontested. The new emphasis on written materials and advance preparation means that most of the work on the application has been done well in advance of the physical hearing. The Committee further considers that a single amount for costs would be appropriate regardless of the type of application or the value of the litigation. The Committee invites comment as to what amount would be appropriate.

---

143 Above note 9.

144 CPD F.5.

[217] However, the Committee recognizes that there should be an exception to the general rule where an uncontested application is not successful. Awarding costs in favour of a respondent who has not opposed an application would be an unjust windfall for the respondent.

D. Types of Hearing

1. Without oral argument

ISSUE 36
Should specific applications normally be heard without oral argument?

[218] At present, applications are normally heard in person but can be "heard" without oral argument.[145] Some types of application may be well suited to being dealt with without oral argument. For example, applications for leave to appeal to the Supreme Court of Canada are usually determined without oral argument. Hearing applications without oral argument will likely reduce expense for the parties and may also avoid scheduling difficulties.

POSITION OF THE COMMITTEE

[219] The Committee invites your views as to whether specific applications should normally be heard without oral argument. In this regard, leave applications are one possibility to consider.

2. Electronic hearings

ISSUE 37
Should the rules provide for applications to be heard by electronic means?

[220] Hearing applications by electronic means such as telephone or video-conferencing is an option that may reduce expense. The current rules outline a

---

145 CPD F.8 and C.8.

cumbersome process for accessing this option.[146] The Draft Rules set out a streamlined process that allows the court to control when electronic hearings will be allowed. Court control addresses both the circumstances of specific cases and the availability of electronic hearing facilities at specific court locations. At time of writing, the Draft Rules provide:

> ***Electronic hearings***
>
> 6.11(1) In this rule, electronic hearing means a hearing held by electronic means in which all the participants in a hearing, and the court, can hear each other, whether or not all or some of the participants and the court can see each other or are in each other's presence.
>
> (2) An electronic hearing may be held if
>
> (a) the parties agree and the court permits the hearing, or
>
> (b) on application, the court orders an electronic hearing.
>
> (3) The court may
>
> (a) direct that an application for an electronic hearing on a matter be heard by electronic hearing;
>
> (b) direct an application be heard by electronic hearing;
>
> (c) give directions about arrangements for the electronic hearing or delegate that responsibility to another person;
>
> (d) give directions about the distribution of documents and the practice and procedure at the electronic hearing;
>
> (e) order that an electronic hearing be completed in person.
>
> (4) The court clerk must participate in an electronic hearing unless the court otherwise directs.

Would a comparable rule be appropriate for appeal applications?

POSITION OF THE COMMITTEE

[221] The Committee is interested in your views on whether the rules should provide for applications to be heard by electronic means.

E. Specific Applications

1. Leave to intervene

ISSUE 38
What provisions should govern intervenors on appeals?

---

[146] Rules 385.1 and 385.2.

[222] The topic of intervenors was discussed by the General Rewrite Committee.[147] The General Rewrite Committee recommended that there should be a written rule dealing with intervenors, but left the specific subject of intervenors on appeal to be deal with by the Appeals Committee.

[223] The draft rule resulting from the General Rewrite Committee's recommendation provides as follows:

> ***Application for intervenor status***
>
> 2.10 On application, a court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the court.

The rule is general and facilitates the use of the common law approach that is well-established in Alberta.

[224] Other appellate courts have adopted more detailed provisions. For example, both British Columbia and the Supreme Court of Canada prescribe in greater detail the documents that must be submitted by the intervenor, the process to be followed by the court, and a deadline by which intervention applications must be made.[148] In both British Columbia and the Supreme Court of Canada, the deadline for intervention runs from filing the appellant's factum. However, in Nova Scotia and Manitoba, intervention applications must be made within 20 to 30 days of the notice of appeal being filed.[149]

POSITION OF THE COMMITTEE

[225] As there is not a high incidence of intervenors in Alberta, the Committee considers that the general application of the draft rule is preferable to setting out a detailed procedure. However, the Committee has also concluded that it would be appropriate to impose a deadline on applications for leave to intervene. The Committee considers that applications for leave to intervene should be brought no

---

147 Alberta Law Reform Institute, *Parties* (Consultation Memorandum No. 12.4) (Edmonton: Alberta Law Reform Institute, 2003) at 21-24.

148 SCC Rules, rr. 55-59 and BC Appeal Rules, r. 36.

149 Nova Scotia, *Civil Procedure Rules*, r. 62.35, online: <http://www.courts.ns.ca/Rules/toc.htm>; Manitoba, *Court of Appeal Rules*, Man. Reg. 555/88R, r. 46.1.

later than 10 days after the deadline for filing the respondent's materials. Aside from this deadline, applications to intervene would be governed by the rules that apply to applications generally. However, the Committee considers that the rules should clearly alert intervenors to the potential costs consequences of an appeal.

2. Dismiss for want of prosecution

ISSUE 39
What provision should be made for dismissing an appeal for want of prosecution?

[226] At present an appeal may be dismissed for want of prosecution at any time by application to the court (three judge panel) or by the court on its own motion.[150]

[227] Where the appellant has delayed for more than a year, the application may be brought before a single judge. As stated repeatedly throughout this consultation memorandum, the appellant has an obligation to advance the appeal towards a timely hearing. The Committee's proposals would result in the appeal being struck out if the appellant missed a deadline and would reduce the time period for reinstating the appeal to two months. As such, there will be fewer instances where an appeal will need to be dismissed for want of prosecution and less obligation on the respondent or the court to respond to an appellant's delay. However, there will undoubtedly still be instances where dismissal for want of prosecution will be an appropriate course of action. For example, if an appellant shows a pattern of missed deadlines and last minute reinstatement applications, it may be appropriate to dismiss the appeal.

POSITION OF THE COMMITTEE

[228] The Committee considers that there is still scope to dismiss an appeal for want of prosecution. Accordingly, new rules should retain a provision that would allow an

---

[150] Rule 515.1(8) provides:

515.1(8) A civil appeal may be dismissed for want of prosecution.

(a) by the court at any time before or after 6 months from the date when a notice of appeal was filed, on the application of any party or on its own motion, or

(b) by a judge, on the application of any party where the appellant has done nothing effective to advance the appeal for more than one year.

application to be made at any time by a party or the court on its own motion. As a final disposition of the appeal, the motion should be heard by a three judge panel. There is no need to make separate provision for appeals where the appellant has delayed for more than a year as such appeals will be struck out.

3. Reconsider previously decided case

ISSUE 40
Should the rules provide for an application to reconsider a previously decided case?

[229] For some time, the court's policy on reconsidering previously decided cases has been as follows:[151]

> (a) From time to time the Court is asked to reconsider a case decided by it at some time in the past which is a precedent in a case now before the Court.
>
> (b) The Court has, generally, expressed the position that such a precedent may only be reconsidered in very limited circumstances. The policy of the Court will henceforth be that it will only entertain argument directed to the reconsideration of the precedent case if leave to seek reconsideration has been given by it.
>
> (c) Counsel must, then, apply by motion for leave and the Court, if granting leave, must specify the issues that may be argued. This application need not await the filing of appeal books but may be made on motion to the Court any time after the filing of the notice of appeal. The motion must be heard prior to the time fixed for the hearing of the actual appeal unless the Court or a judge otherwise directs.
>
> (d) The motion should set out precisely the grounds on which the case ought to be reconsidered and should be accompanied by a memorandum identifying the authority or authorities to be reconsidered, any authorities to be relied upon, together with suitable extracts.
>
> (e) This note does not apply to any application to re-hear or re-open any appeal.

Is it appropriate to state this policy in the new rules? Has the policy worked well in practice? What modifications might be required? On the one hand, it can be argued that making the case for reconsideration in advance of the appeal hearing duplicates

---

[151] CPD A.3, dated October 1985.

the effort required for both the parties and the court. On the other hand, if the appeal turns on the reconsideration then there may be no appeal.

Position of the Committee

[230] The Committee invites comments on whether there should be a rule prescribing the procedure to follow where a party wishes to have the court reconsider a previously decided case.

CHAPTER 6. LEAVE TO APPEAL

A. Notice

ISSUE 41
What period of notice is required for applications for leave to appeal?

[231] Generally speaking, where leave is required, the leave application must be filed within the appeal period. Filing the application triggers the running of time for reply and for preparation in advance of the hearing. How much time should be allowed?

[232] Leave applications will generally be heard by a single judge. At present, leave applications attract the longer notice period that usually applies to applications heard by a panel.[152] Is this longer notice period appropriate for a leave application or should some shorter notice period be considered? How much time should be allowed for the respondent to prepare, file and serve a reply? Once the respondent has filed a reply, how much time should be allowed for court preparation and administration?

[233] The table below summarises several options. The longer notice period (option 1), establishes a rough timetable of one month from filing the leave application to hearing; the respondent has 10 calendar days to file a reply, leaving 20 days for court administration and preparation. Under the shorter notice period (option 2), the timetable is reduced to 10 days from filing the application to hearing; time is divided between the respondent's reply and court preparation. Given the unique nature of leave applications neither the longer nor the shorter notice period may be appropriate. Options 3 and 4 suggest alternatives to consider should one month be thought too long or 10 days too short.

---

[152] See discussion in chapter 5.

Table 11: Options for notice on a leave application

	Longer (Option 1)	Shorter (Option 2)	Option 3	Option 4
Notice	one month	10 calendar days	20 calendar days	15 calendar days
Reply	10 calendar days	5 calendar days	10 calendar days	5 calendar days
Prepare	20 calendar days	5 calendar days	10 calendar days	10 calendar days

POSITION OF THE COMMITTEE

[234] The Committee considers that the unique nature of leave applications warrants a longer notice period than that usually accorded to single judge applications. The Committee considers that option 1 would be appropriate, allowing 10 days for the respondent to reply and a further 20 days for court preparation.

B. Extending Leave Requirements

1. Rights of appeal, limited rights & leave

[235] A discussion of the subject of leave to appeal must first consider the concept of a right to appeal. The default position in our legal system is that there is no such right. The availability of an appeal must be provided by legislation.[153] Alberta legislation makes such provision in a broad range of circumstances. For example, r. 505(1) creates a general right of appeal for civil orders and judgments made by the Court of Queen's Bench.[154] Federal legislation authorises appeals on indictable criminal offences.[155] And various statutes provide for an appeal from decisions of statutory authorities.[156] Nevertheless, in all instances, the availability of an appeal or the lack of

---

[153] As stated in Stevenson & Côté at 468: "There is no constitutional right to appeal, and no common-law right to appeal. A right to appeal can only be given by an express provision in a statute or the Rules of Court."

[154] Rule 505(1) provides:

> 505(1) Except as otherwise provided, an appeal lies to the court from the whole or any part of any judgment, order, direction or finding of a judge sitting in court or the verdict or finding of a jury or from the judgment, order or direction of a judge sitting in chambers.

[155] *Criminal Code*, R.S.C. 1985, c. C-46, part xxi; *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 37.

[156] Moreover, unless otherwise provided, an appeal from a statutory authority to the Court of Queen's Bench will thereby often allow a further appeal to the Court of Appeal. As stated in Stevenson & Côté at 468-69: "statutes giving a judge a power to make an order or direction are

(continued...)

an appeal and any restrictions placed on the right to appeal represent deliberate policy choices. In effect, the court's ability to hear a specific matter is pre-determined by legislation.

[236] A right of appeal may be general or limited in scope. For example, while there are few restrictions on appeals from the Court of Queen's Bench, appeals from decisions of statutory authorities are often limited to questions of law or jurisdiction. If the ground of complaint falls outside these limits, there is no right of appeal. A right of appeal may also be limited by the number of levels available. For example, civil matter arising in Provincial Court can only be appealed to the Court of Queen's Bench.[157] Beyond that level, there is no further right of appeal. Again, the decision to limit specific rights of appeal is a deliberate policy choice.

[237] A right of appeal may also be narrowed by the requirement that a party obtain leave or permission before the appeal can be filed with the court. To obtain leave, the would-be appellant has to demonstrate, on objective criteria, that a case warrants hearing by the Court of Appeal. For example, leave criteria often require that an appeal must have a reasonable prospect of success. If the appeal does not meet the criteria, there can be no appeal.[158] In contrast to the existence or lack of a right to appeal, imposing a leave requirement allows for judicial discretion in whether a case will be heard or not. The relationship between rights of appeal, leave requirements and the role of the court are summarised in the table below.

---

[156] (...continued)
presumed to give him or her that power as a judge of the court, and so to be subject to any general statutory right to appeal from his or her court."

[157] The *Provincial Court Act*, R.S.A. 2000, c. P-31, s. 53(2) provides that a decision of the Court of Queen's Bench on civil appeal from Provincial Court is final.

[158] As noted in Stevenson & Côté at 478: "If one judge refuses leave and there is no appeal without leave, no appeal from the refusal is possible in Alberta (unless maybe the judge declined jurisdiction and refused to hear the application); cases from other provinces are not good law in Alberta."

Table 12: Rights of appeal and leave

Court will hear	Appeals as of right	Legislation
	Cases granted leave	Judicial discretion
Court will not hear	Cases denied leave	Judicial discretion
	No right of appeal	Legislation

[238] As discussed in the next section, leave to appeal is commonly advanced as a solution where an appellate court faces backlog, delay, or other problems. Imposing leave requirements can be an effective means to screen out appeals without merit that would consume court resources at the expense of other cases. Leave requirements can also provide a court with more control over which cases it hears, particularly where the court itself has jurisdiction to grant or decline leave. However, it should be noted that imposing leave requirements is only one of several options for addressing caseload problems. Reducing rights of appeal, limiting rights of appeal, or limiting rights combined with a leave requirement are other options that might be more appropriate in specific circumstances.

[239] Public consultation on the Rules Project shows support for the possibility of limiting rights to appeal. Of 98 respondents, 48% said there should not be a right of appeal in every case: 43% said there should and 9% were uncertain.[159] The 48% who considered that an appeal might not be appropriate in every case indicated the following reasons:[160]

- the decision appealed was not the final ruling
- the matter concerned a monetary claim less than a certain amount
- the trial judge had followed the proper procedure

---

[159] Alberta Law Reform Institute, *Public Consultation Report* (Edmonton, 2002) at 32. Division regarding the right to appeal was also evident in the focus groups convened after the Public Consultation. The majority of Calgary participants thought there should be a right to appeal in every case, while the majority of Edmonton participants did not: Alberta Law Reform Institute, *Alberta Rules of Court Focus Group Edmonton and Calgary Venues: Final Report* (Edmonton, 2003) at 13.

[160] Alberta Law Reform Institute, *Public Consultation Report* (Edmonton, 2002) at 32-33. A further reason arising in the consultation, i.e. that an appeal has a limited chance of success, is more appropriately thought of as a reason for refusing leave, rather than a characteristic that defines a category of case where leave is required.

- the appeal has a limited prospect of success
- the appellant had previously appealed

Submissions received during ALRI's consultation with the legal profession are in a similar vein:

> I would not permit appeals for matters under $100,000 without leave.[161]

> Matters such as custody, certain types or levels of damages, custody, or interlocutory applications could readily have leave requirements. However, absolute restriction will create hardship in some instances.[162]

Thus, the prospect of limiting rights to appeal or imposing leave requirements is not without support.

2. The CBA Report

[240] The CBA Report is one of two studies reviewing appellate practice to recommend that leave to appeal should be required in a broader range of cases. Having determined that a number of appellate courts had caseload related problems (eg. backlog and delay), the CBA Report recommended that:[163]

> ...every jurisdiction consider measures to give appellate court, including the Supreme Court of Canada, greater control over their civil dockets.

The Task Force identified the use of leave requirements in defined classes of cases as an express implementation point to achieve this result.

3. The Bowman Report

[241] Caseload problems were also a factor in the context of the Bowman Report which considered leave requirements in greater detail. The Bowman Report identified 3 reasons for extending leave requirements: (1) requiring leave helps deter or filter out appeals without merit; (2) application for leave provides an early opportunity for case management; and (3) current leave requirements are inconsistent, illogical and complex.[164] The Report recognised that the statistical data was inconclusive on whether leave requirements dealt effectively with unmeritorious appeals and that case

---

161 ALRI file L-2-167.

162 ALRI file M-2-348.1.

163 CBA Report at 49-50.

164 Bowman Report at 30-34.

management could be extended by means other than requiring leave. However, the Report concluded that the complexity of leave requirements then in place in England warranted significant reform. As a result, the Report recommended that:[165]

> The requirement for leave to appeal should be extended to all cases coming to the CA except for:
>
> - appeals against committal orders or refusal to grant habeas corpus, as these involve the liberty of the subject;
> - adoption cases; and
> - child abduction cases.

The recommendation was implemented and leave is now required in the majority of cases heard by the English Court of Appeal.[166]

4. The CJC Report

[242] In contrast to both the CBA Report and the Bowman Report, the CJC Report urges caution with respect to increasing leave requirements. The CJC Report concludes that, while leave to appeal may be useful in screening out cases which do not warrant a full hearing, this objective may be better achieved by other means such as case management; moreover, where leave is granted, both the parties and the courts will have incurred additional labour and expense.[167]

---

[165] Bowman Report at 35. The following passage at 30-31 illustrates the complexity of the leave system:

> For example, while almost all orders relating to children are now subject to the leave requirement, many appeals on planning matters can take place as of right. In addition, in many appeals brought from county court the determining factor as to whether leave is required is whether the value of the appeal exceeds £5,000. This means that if A claims £6,000 from B but is only awarded £4,000, A will need leave to appeal. But if the claim is dismissed in its entirety and A certifies that the value of the claim exceeds £5,000, the appeal is as of right. Identifying the need for leave has imposed a considerable burden on the Registrar of Civil Appeals and the Civil Appeals Office.

[166] *Civil Procedure (Amendment) Rules 2000* (UK), S.I. 2000/221 sch. V, s. 52.3(1) provide as follows:

> 52.3 (1) An appellant or respondent requires permission to appeal -
>
> (a) where the appeal is from a decision of a judge in a county court or the High Court, except where the appeal is against -
>
> (i) a committal order;
>
> (ii) a refusal to grant habeas corpus; or
>
> (iii) a secure accommodation order made under section 25 of the Children Act 1989(1); or
>
> (b) as provided by the relevant practice direction.

[167] CJC Report at 55-56. On the use of "leave to appeal" as an inaccurate term see 53-54.

5. The Situation in Alberta

a. Leave to appeal

ISSUE 42
Would extending leave requirements be appropriate in the Alberta context? If so, what measures should be considered?

[243] At present, leave is not widely required in Alberta. Leave is only required if a party wishes to appeal the following:

- certain orders made before or during trial, namely (CPD J.3):
  - a case management or pre-trial order directing adjournments, time periods or time limits
  - a ruling during trial, where the appeal is brought before the trial is concluded
  - a decision on security for costs
- a judgment or order obtained by consent (r. 505(3))
- a judgment or order dealing with costs only (r. 505(3))
- a matter whose dollar value is less than $25,000 (r. 505(4))
- a judgment or order made by one justice of appeal (r. 505(6))
- a decision of another court or statutory authority where leave is required by legislation[168]

[244] There appears to be a sound policy basis for requiring leave in these categories. For example, each category could be said to reflect a balance between several of the working principles adopted by this Committee. On the one hand, appeals should be dealt with in a manner that is proportionate to the grounds of complaint and the subject of dispute (principle 4) and the appeals process should reduce delay, cost, and uncertainty as far as is practical (principle 5). On the other hand, an individual who is dissatisfied with the outcome of a case should have the opportunity to have the case reviewed for injustice (principle 1). Thus, current Alberta leave requirements are not

---

[168] For example, the *Arbitration Act*, R.S.A. 2000, c. A-43, s. 8 imposes a leave requirement on an appeal of a question of law from Queen's Bench to the Court of Appeal. See also *Arbitration Act*, ss. 15 and 48.

characterised by arbitrariness and complexity on the level that prompted reform in England.

[245] However, there are some seeming inconsistencies across the existing leave requirements in Alberta. For example, the following areas might be seen as inconsistent:

- Monetary thresholds: Rule 505(4) requires leave where the dollar value of a matter can be estimated at less than $25,000. Irrigation legislation requires leave where the dollar value is estimated at less than $10,000.[169] Builders' lien legislation provides a right of appeal (without leave) where the value of the lien is exceeds $5,000.[170] Other legislation provides a right of appeal (without leave) where the lien exceeds $200.[171] By implication, there is no right of appeal (without leave) for procedural matters where the value of the Queen's Bench action is less than $75,000.[172] However, if monetary value is a criterion for determining the availability of an appeal, should the same dollar value apply to all cases? Is $25,000 an appropriate threshold? What circumstances might justify a lower or higher value?
- Procedural matters: CPD J.3 requires leave for the following orders made before or during trial: a case management or pre-trial order directing adjournments, time periods or time limits; a ruling during trial, where the appeal is brought before the trial is concluded; and a decision on security for costs. Companies legislation provides a right of appeal (without leave) for the following: order to comply with s. 96 (report of holdings by insider) or s. 97 (insider report following takeover bid); order for security for costs for action against insider by company; order for statement of profit and loss; order

---

169 *Irrigation Districts Act*, R.S.A. 2000, c. I-11, ss. 87 and 159.

170 *Builders' Lien Act*, R.S.A. 2000, c. B-7, s. 66.

171 *Rural Electrification Loan Act*, R.S.A. 2000, c. R-19, s. 29; *Rural Electrification Long-Term Financing Act*, R.S.A. 2000, c. R-20, s. 30; *Rural Utilities Act*, R.S.A. 2000, c. R-21, s. 45.

172 Rules 659 and 671. The operation of these rules is discussed further below.

> exempting any person from requirements of s. 156 (mailing proxy form to shareholder) or s. 157 (solicitation of proxies).[173]

Would it be beneficial to rationalise leave requirements in these areas? Are there other similar categories of cases where leave might be appropriate?

[246] Extending leave requirements will undoubtedly increase the number of leave applications that must be heard by the court. However, as increased leave requirements are anticipated to lead to the hearing of fewer appeals overall, the impact on court resources may be a transitional one.[174] Nevertheless, it is relevant to consider what that impact might be. Information provided to the Rules Project, shows that the Court of Appeal heard an annual average of 50 civil leave applications for the period 1999 to 2003.[175] However, leave requirements have increased since that time and the annual number of applications has likely increased as a result.[176] Would a further increase in leave applications be appropriate at this time?

[247] Another option to consider is whether leave applications need to be heard by the Court of Appeal or whether they can be dealt with by the Court of Queen's Bench. At present, a party seeking leave to appeal a consent order or order as to costs only must obtain leave from Queen's Bench.[177] Would it be appropriate to increase the range of leave applications heard by the Court of Queen's Bench? What impact would a greater number of leave applications have on that court?

POSITION OF THE COMMITTEE

[248] The Committee recognises that in many instances extending leave requirements would require changes beyond what could be accomplished by consequential amendments flowing from the Rules Project. However, issues relating to leave to

---

[173] *Companies Act*, R.S.A. 2000, c. C-21, ss. 99, 101, 137, and 154.

[174] Bowman Report at 12.

[175] Civil appeals data 1999-2003.

[176] The monetary threshold in r. 505(4) was raised from $1,000 to $25,000 in 2003: AR 200/2003, s. 5(2). Leave requirements were imposed on various interlocutory matters in 2004: CPD Part J.

[177] Rule 505(3) provides:

> 505(3) No judgment given or order made by the consent of the parties or as to costs only shall be subject to any appeal, except by leave of the court giving the judgment or making the order.

appeal are so closely aligned with the Committee's work that the Committee considered that it is appropriate to begin the discussion. It is hoped that a future initiative will afford a more thorough review of whether leave to appeal is dealt with appropriately and consistently across the statute book. In that spirit, the Committee invites your views on whether and in what circumstances it might be appropriate to extend leave requirements.

b. Right to appeal

i. Procedural or interim matters under $75,000

ISSUE 43
Should there by a right of appeal for procedural or interim matters in actions under $75,000?

[249] At present, there is a broad right to appeal matters from the Court of Queen's Bench to the Court of Appeal.[178] The notable exception is matters falling under Part 48 of the Alberta Rules of Court [streamlined procedures]. Part 48 applies to actions under $75,000 or to matters where the parties have agreed to its application or the Court of Queen's Bench has ordered its application.[179] Under Part 48 there is no right

---

[178] Rule 505.

[179] Rule 659 provides:

659(1)Unless excluded by subrules (2) to (4), this Part applies only
- (a) to actions when money is claimed in the statement of claim and the total claimed, whether as debt, indemnity, damages or otherwise, is $75,000 or less, not including interest and costs,
- (b) when the Court, by order, considers it appropriate, or
- (c) when the parties so agree in writing and file the agreement with the clerk.

(2) This Part or any provision of it may be excluded or modified by
- (a) a written signed agreement filed with the clerk and approved by the Court, subject to any terms or modifications the Court imposes, or
- (b) the Court

(3) This Part does not apply to any action commenced before September 1, 1998, unless
- (a) ordered by the Court, or
- (b) agreed by the parties in writing and filed with the clerk.

(4) This Part does not apply to proceedings under Part 44, 49, 56 or 56.1.

of appeal for procedural or interim matters; only final orders or judgments that determine substantive rights can be appealed.[180]

[250] The Management of Litigation Committee reviewed the streamlined procedure.[181] The recommendation was later made that the benefits of the streamlined procedure could be made available to any action under the "simple track" and without the criterion of a monetary limit. However, there was no clear recommendation regarding the appeal provisions of Part 48.

[251] How should procedural or interim appeals be dealt with in actions under $75,000? At present there is no right of appeal. Consequently, if a right of appeal is allowed, it should likely be subject to some restriction.

[252] Two forms of restriction would apply under the existing rules. Firstly, matters under $25,000 would be caught by the leave requirement in r. 505(4). Secondly, procedural appeals are subject to the strict procedures of expedited appeals under Part J of the Consolidated Practice Directions.[182]

[253] Thus if procedural or interim appeals under $75,000 were not addressed separately, there would still be limits on this range of appeals. On the other hand, there may be a compelling reason to carry forward the current prohibition of such appeals.

---

[180] Rule 671(1) provides:

671(1)An appeal lies to the Court of Appeal, or from a master to a judge, only from a judgment or order finally determining all or some part of the substantive rights in issue in the action, including

(a) an order striking out a statement of claim, statement of defence or third party notice;
(b) an order refusing to open up default judgment or noting in default;
(c) an order permitting or directing default judgment;
(d) an order staying the action indefinitely;
(e) an order dismissing the action on procedural grounds;
(f) a final judgment at trial;
(g) summary judgment on the merits.

[181] Alberta Law Reform Institute, *Management of Litigation* (Consultation Memorandum No. 12.5) (Edmonton: Alberta Law Reform Institute, 2003) at 47-50.

[182] CPD J and r. 671 target the same range of matters. For example, CPD J.2(b) reproduces the list of final orders contained in r. 671 but adds specific orders nisi and declarations for clarity.

POSITION OF THE COMMITTEE

[254] The Committee does not consider that procedural or interim appeals under $75,000 warrant separate treatment. If monetary value is a criterion to consider in accessing the Court of Appeal, the same threshold should apply to all substantive and procedural appeals. The current situation requiring leave for substantive appeals up to $25,000, but allowing no right of appeal for procedural or interim matters up to $75,000, is inappropriate and introduces confusion. The Committee has already highlighted the inconsistency among various monetary thresholds for accessing the Court of Appeal. Feedback on that point may favour a higher threshold limit generally. Regardless of what limit applies, the Committee considers that once a procedural matter falls within the jurisdiction of the court, the same procedures should apply to preparing it for hearing, i.e. Part J.

ii. Master's appeals

ISSUE 44
Should there be a further right of appeal following an appeal from a master?

[255] Under current case law, an appeal from the decision of a master to a judge within the Court of Queen's Bench has been treated as a hearing *de novo*. A similar practice was formerly in place for civil appeals from Provincial Court to Queen's Bench. However, the goals of efficiency and effectiveness that underlie the delegation of judicial functions from superior court judges to other decision-makers are undermined if each matter can be tried twice. Consequently, it has been proposed that an appeal from a master's decision to a Queen's Bench judge should be an appeal on the record under the new rules.

[256] This proposed change in practice within Queen's Bench raises the issue of how master's appeals should be dealt with in the Court of Appeal. Should there be a further right of appeal beyond the Queen's Bench appeal? If there is a right of appeal, should it be restricted by narrowing the grounds to questions of law or jurisdiction, or by requiring leave to appeal?

[257] At present, roughly 30,000 applications are dealt with by masters each year.[183] Information provided to the Rules Project shows that of some 7,000 masters applications filed in Edmonton in 2003, only 138 were appealed within Queen's Bench for an average appeal rate of 5%. The appeal rate for masters applications province wide is not known nor is the rate for second appeals to the Court of Appeal. However, an appeal rate of 5% could lead to 1,500 first appeals (30,000 x 0.05) and 75 second appeals (1,500 x 0.05). On volume alone, the implications for a further appeal to the Court of Appeal might be significant.

[258] However, decision-making power and jurisdiction are delegated to masters so that Queen's Bench judges can better carry out the work of superior court judges. In this context, several of the Committee's working principles are relevant. An appeal should be dealt with in a manner that is appropriate to the subject matter of the dispute (principle 4). Accordingly, if it is appropriate to delegate first instance decision-making to someone other than a superior court judge, is it proportionate to provide for two levels of superior court review of such decisions? In particular, if the decision did not require the full authority of a superior court judge, does it warrant review by four superior court judges, i.e. one Queen's Bench judge and three judges at the Court of Appeal? Contrary to the goal of reducing cost and delay (principle 5) – a goal reflected in the delegation of authority to masters – two levels of appeal will increase cost and delay. Delegating powers downwards is inefficient if it also increases the levels of appeal upwards. Consequently, the prospect of having two levels of formal appeal is contrary to two of the Committee's working principles.

[259] As noted in chapter 1, working principles 4 and 5 highlight the fact that neither litigants nor the justice system have unlimited resources. In comparison, working principles 1, 2, and 3 reflect ideas relating to justice and the rule of law. Is a second level appeal warranted under any of these principles? Principle 3 affirms that an appeal should not be viewed as an automatic step in litigation. Principle 3, thus, speaks in favour of the master's original decision. Principle 1 recognizes that there

---

[183] See The Honourable Allan H. Wachowich, "Opening of the Court 2005-2006" (Presented at the Calgary Courthouse, 12 September 2005) at 5 and "Opening of the Court 2004-2005" (Presented at the Edmonton Law Courts, 20 September 2004) at 9, online: Court of Queen's Bench <http://www.albertacourts.ab.ca/go.aspx?tabid=300>.

should be an opportunity for review by a higher court to determine whether there has been an injustice. Principle 1 is satisfied, at least in part, by the availability of a first appeal on the record. While the appeal is reviewed within the same court, rather than by a higher court, the review is carried out by a higher authority within the court.

[260] Principle 2 highlights the private and public purposes that underlie an appeal. In the current context, the public purpose is relevant, specifically the goal to clarify and develop the law, practice and procedure.[184] Master's decisions encompass questions of procedure, law, and jurisdiction.[185] In the vast majority of cases, the Alberta Court of Appeal is the final court of appeal for the province. Consequently, most questions of law and jurisdiction remain within the court's sphere of control. Thus, it could be argued that Master's appeals on questions of law or jurisdiction justify a second appeal to the Court of Appeal. However, if a master's decision is purely procedural should it be reviewed outside of the Court of Queen's Bench? Contrary to the structure that existed when the 1968 rules came into force, Alberta now has separate trial and appeal courts. Recent developments suggest a move away from the Court of Appeal exercising a full supervisory role over the procedure of the Court of Queen's Bench.

[261] The adoption of Part J for procedural appeals introduces a means by which such appeals can be dealt with quickly to reduce disruption to the trial court process. As noted, the Court of Appeal's willingness to process such appeals quickly has discouraged some appellants from bringing an appeal, possibly because some procedural appeals were brought for the specific purpose of delay. Moreover, the Court of Appeal is prepared to decline to hear some procedural appeals. Appeals from case management or pre-trial orders directing adjournments or time limits are subject to a leave requirement.[186] Thus, while the Court of Appeal retains supervisory authority over Court of Queen's Bench procedure there is an increasing recognition that Queen's Bench authority and discretion regarding procedure should be respected.

---

184 For a list of interests served by the public purpose of appeals see the CJC Report at 24-25.

185 Master's decisions will generally not involve questions of fact: *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 9(3)(b).

186 CPD J.3(a).

In most instances, the standard of review will be unreasonableness.[187] In a similar vein, it is also appropriate to note that the Supreme Court of Canada exercises little to no supervision over the Court of Appeal's procedure.

POSITION OF THE COMMITTEE

[262] The Committee recognises that the nature of a master's decision is an important consideration in determining whether to allow a second appeal to the Court of Appeal. Although several of the working principles argue against a second appeal, allowing the Court of Appeal to fulfill its role in supervising the development of the law in Alberta is a key objective regardless of whether questions of law or jurisdiction arise first before a master, superior court judge, or statutory tribunal. As such, the Committee considers that there should continue to be a second appeal as of right where either the master's decision or the first appeal raises a question of law or jurisdiction. Given that a second appeal is appropriate for questions of law or jurisdiction, the Committee considers that all appeals from the decision of a master should be treated the same. While there is a policy basis to distinguish between questions of law or jurisdiction and matters that are purely procedural, the Committee considers that such a distinction would itself be a source of unnecessary litigation. Regardless of whether a matter originated with a master or a Queen's Bench judge, the Committee considers that appeals from Queen's Bench should be subject to the same general rules governing the right to appeal.

C. Levels and Routes of Appeal

[263] In the course of its work, the Committee noted a number of apparent inconsistencies with respect to the levels and routes of appeal that are available in specific cases. Some appeals are first directed through the Court of Queen's Bench while others proceed directly to the Court of Appeal.[188] In other circumstances, there

---

[187] See, for example, Roger P. Kerans & Kim M. Willey, *Standards of Review Employed by Appellate Courts*, 2d. ed. (Edmonton: Juriliber, 2006) at 85-93.

[188] The following acts allow for a direct appeal from the decision of a statutory authority to the Court of Appeal: *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 247; *Expropriation Act*, R.S.A. 2000, c. E-13, s. 37; *Livestock and Livestock Products Act*, R.S.A. 2000, c. L-18, s. 24; *Motor Transport Act*, R.S.A. 2000, c. M-21, s. 29; *Railway (Alberta) Act*, R.S.A. 2000, c. R-4, s. 48; *School Act*, R.S.A. 2000, c. S-3, s. 143. The following acts allow for a direct appeal but require leave:

(continued...)

may be several levels of review or appeal before a matter can be appealed to the Court of Appeal. This complexity is amplified by the distinction between a right of appeal, judicial review, and an appeal following judicial review. Viewed as a whole, these differences in procedure raise questions as to whether litigants are treated fairly and, in some cases, whether appropriate cases reach the Court of Appeal. For example, appeals against decisions by the Livestock Patrons' Claims Review Tribunal are limited to questions of law or jurisdiction but go directly to the Court of Appeal; leave is not required and the appeal period is 90 days.[189] However, a person who is denied approval to expand a feedlot must first have the decision reviewed by the Natural Resources Conservation Board and then obtain leave before an appeal can be brought to the Court of Appeal; the leave application must be filed within 30 days of the Board's decision and leave must be obtained within one month of filing.[190] Are there sound policy reasons for these and other distinctions that exist in the statute book? As with the prospect of extending leave requirements, the Committee recognises that specific changes to levels and routes of appeal lie beyond the general scope of the Rules Project. However, the Committee encourages discussion of these issues and hopes that a future initiative will afford a more thorough review of whether appeals are dealt with appropriately and consistently across the statute book.

D. Criteria for Granting Leave

[264] As leave requirements are generally imposed by legislation, individual statutes can influence the criteria for granting leave.[191] Some provisions merely require that

---

[188] (...continued)
Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 26; *Cooperatives Act*, R.S.A. 2000, c. C-28, s. 336; *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 41; *Insurance Act*, R.S.A. 2000, c. I-3, s. 659; *Irrigation Districts Act*, R.S.A. 2000, c. I-11, s. 87 and 159; *Natural Gas Marketing Act*, R.S.A. 2000, c. N-1, s. 23; *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 31; *Police Act*, R.S.A. 2000, c. P-17, s. 18; *Public Utilities Board Act*, R.S.A. 2000, c. P-45, s. 70.

[189] *Livestock and Livestock Products Act*, R.S.A. 2000, c. L-18, s. 24.

[190] *Agricultural Operations Practices Act*, R.S.A. 2000, c. A-7, s. 27.

[191] There are a few areas where leave criteria fall solely within the jurisdiction of the court:
- r. 505(4) [matters under $25,000], see *Correia v. Koska* 2005 ABCA 184 and *Webster v. Wasylyshen* 2005 ABCA 427.
- r. 505(6) [leave to appeal order by single judge] see *Vysek v. Nova Gas International Ltd.*

(continued...)

leave be obtained. Others include express criteria to consider in granting or denying leave. Others require leave but restrict the available grounds of appeal, for example, to questions of law only. And still yet others apply express leave criteria to restricted grounds of appeal. This section presents a brief overview to illustrate variations in leave criteria. As with the two previous sections, the discussion presented here raises issues that lie beyond the scope of the Rules Project. However, as leave criteria are relevant to the effective functioning of the appeals system, the Committee considers that it is appropriate to include the discussion here.

1. Leave only

[265] Section 26 of the *Surface Rights Act* requires leave without imposing additional conditions.[192] The criteria for leave under this general provision were stated in *Ranger Oil Ltd. v. Ferguson*:[193]

> In my view, leave should be granted if one or more of the grounds of appeal raised has a reasonable prospect of success and that success would have a significant impact on the parties. Leave should also be granted where the appeal raises a question of law or procedure of importance to the operation of the Act.

Ranger Oil, thus, raises two criteria on which leave may be granted: (1) that there be a reasonable prospect of success with significant impact on the parties; or (2) that there be a question of law or procedure of sufficient importance.[194]

---

[191] (...continued)
2002 ABCA 136 and *Moses v. Weninger* 2006 ABCA 52.
- CPD J.3 [procedural matters] see *Jeerh v. Yorkton Securities Inc.* 2005 ABCA 64 and *Liu v. Tangirala* 2005 ABCA 299.

[192] The *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 26 provides:
26(8) By leave of a judge of the Court of Appeal, any party may appeal from the judgment of the Court of Queen's Bench to the Court of Appeal and the rules and practice applicable to appeals to the Court of Appeal apply, except as to costs.

[193] *Ranger Oil Ltd. v. Ferguson* [1995] A.J. no. 760 (Alta. C.A.) at para 6 ["*Ranger* Oil"]. Adopted in *Canadian Crude Separators Inc. v. Mychaluk*, 1998 ABCA 62, *Imperial Oil Resources Ltd. v. Tulliby Lake Stockman's Association*, 2000 ABCA 253, and *Imperial Oil Resources Ltd. v. 826167 Alberta Inc.,* 2006 ABCA 62.

[194] The *Ranger Oil* criteria are strikingly similar to *Civil Procedure (Amendment) Rules 2000* (UK), S.I. 2000/221, sch. V, s. 52.3(6) which states:
Permission to appeal will only be given where –
(a) the court considers that the appeal would have a real prospect of success; or
(b) there is some other compelling reason why the appeal should be heard.

[266] By means of comparison, leave criteria may be stated differently in the context of other statutes. For example, like the *Surface Rights Act*, the *Companies' Creditors Arrangement Act* imposes a leave requirement without conditions.[195] However, the accepted leave criteria are set out in a different structure:[196]

> The test for granting leave, as articulated in this Court, involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties.
>
> The four factors subsumed in an assessment [of] whether the criterion is present are:
>
> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.
>
> [authorities omitted]

The *Liberty Oil* single criterion (and its four constituent elements) that there be serious and arguable grounds for appeal that are of real significance to the parties finds a strong parallel in the *Ranger Oil* requirement that there be a reasonable prospect of success with significant impact on the parties. However, without close analysis, these cases may appear to be inconsistent.

2. Leave and limited rights of appeal

[267] In contrast to legislation discussed above, several other statutes require leave where the right of appeal has been limited to questions of law or jurisdiction. In such cases, one would expect that a narrower right of appeal would affect the application of leave criteria. For example, an appeal's prospect of success or its significance to the parties should be assessed with respect to a question of law if that is the only basis for

---

[195] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13 provides:

> 13 ... any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge or the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[196] *Re Liberty Oil & Gas Ltd.* 2003 ABCA 158 at paras 15-16 ["*Liberty Oil*"]. *Liberty Oil* summarises the Court's earlier decision in *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, which in turn drew on *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C. P. C. (3d) at 396 (B.C.C.A.) and other cases. See also *Ketch Resources Ltd. v. Gauntlet Energy Corporation,* 2005 ABCA 357.

appeal. This result is evident in *Atco Electric Ltd. v. Alberta (Energy and Utilities Board),* where the right of appeal was limited to questions of law or jurisdiction. The court stated:[197]

> The test to be met when seeking leave to appeal a decision of the AEUB to this Court was recently set out by Berger J.A. in *ConCerv v. AEUB,* [2001 ABCA 217] ...:
>
> > The relevant inquiry is whether, having regard to the standard of review, the issues engaged raise serious arguable points of law: [authorities omitted]
>
> Subsumed in the general test are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C. P. C. (3d) 396 (B.C.C.A.) by McLachlin J.A. (as she then was), who set forth the elements as follows at 397:
>
> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.

In contrast to *Liberty Oil* where the stated criterion was "serious and arguable grounds that are of real and significant interest to the parties", the central requirement in *Atco* is that the case raise a "serious arguable points of law". Admittedly, elements of significance to the practice and prima facie merit would favour questions of law even within the *Liberty Oil* criterion. However, without the additional restriction to questions of law, the *Liberty Oil* criterion is a broader test and, where appropriate, will allow questions of mixed law and fact or questions of fact alone to proceed. As noted in *Atco*, leave criteria should also have regard to the standard of review to be applied on appeal. The standard of review will be high in fact-based appeals and, consequently, will limit the range of such appeals receiving leave.

3. Leave and express statutory leave criteria

[268] In comparison to the general criteria stated in *Ranger Oil* or *Liberty Oil*, express statutory criteria may be broader or narrower. For example, the *Municipal Government Act* limits the right of appeal to questions of law having "sufficient

---

[197] *Atco Electric Ltd. v. Alberta (Energy and Utilities Board),* 2002 ABCA 45 at paras 11-12 ["*Atco*"]. *Atco* was an appeal under the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, s. 26. See also *Atco Electric Ltd. v. Alberta (Energy and Utilities Board)*, 2003 ABCA 44 and *Bartlett v. Alberta (Energy and Utilities Board)*, 2005 ABCA 340.

importance" and states the criteria that the appeal have "a reasonable chance of success".[198] The *Arbitration Act* also narrows appeals to questions of law but with the further express criteria that the court must be satisfied that:[199]

> (a) the importance to the parties of the matter at stake in the arbitration justifies an appeal, and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.

Here the express criteria highlight the appeal's significance to the parties. While the grounds of appeal are narrowed to a question of law, the additional criteria appear to broaden the range of eligible cases, particularly if contrasted to the effect of narrowing grounds of appeal to questions of law under legislation such as the *Alberta Energy Utilities Board Act*.

E. Housekeeping Points

[269] In the course of its analysis, the Committee noted areas where minor improvements would additionally enhance appellate practice. These areas are more "pedestrian" in nature and do not raise significant policy issues. Accordingly, the Committee has not identified specific issues for consultation. However, the Committee welcomes comments on any of the points discussed below.

---

[198] *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 688 provides:

> 688(3) ... the judge may grant leave to appeal if the judge is of the opinion that the appeal involves a question of law of sufficient importance to merit a further appeal and has a reasonable chance of success.

Does the express requirement that the appeal have a reasonable chance of success set a lower threshold than the *Liberty Oil* requirement that the appeal have *prima facie* merit? Both reasonable chance of success and *prima facie* merit will be assessed with regard to the standard of review and these criteria may ultimately be the same.

[199] *Arbitration Act*, R.S.A. 2000, c. A-43, s. 44(2). Section 44 also allows parties to specify a broader range of appeals in the arbitration agreement; however, there is no appeal if the parties have expressly referred a question of law to the arbitral tribunal. Section 44 applies to s. 48 appeals to the Court of Appeal by implication.

1. Leave of the court

[270] As a general rule, applications for leave to appeal fall within the jurisdiction of a single judge. As noted by the court, obtaining leave from a panel of three judges is a disproportionate use of judicial resources:[200]

> Therefore, because a type of litigation (arbitration) often does not merit a second appeal, and was chosen largely for speed, it has to be heard by twice as many appellate judges as usual, on two different occasions. Judicial time is doubled, not saved, and the expense and delay to the parties is almost doubled.... If leave is to be used as the screening mechanism, it should be leave of one appellate judge, not three.

While obtaining leave from a panel may once have been common practice it is now the exception. The Committee considers that it would be appropriate to review these exceptions so that consequential amendments might be made if there is no policy argument to require leave from a panel.[201]

2. Leave to appeal judgment of single judge

[271] Rule 505(6) requires leave to appeal judgment given by a single justice of appeal. Moreover, leave must be sought from the justice whose decision is being appealed.[202] Instances where a single justice of appeal can give judgment will be

---

[200] *Nilsson v. Alberta (Minister of Public Works, Supply and Services)* (1999), 250 A.R. 85 (C.A.) at para. 17. The section in issue in *Nilsson* was subsequently amended to require leave of a single judge: *Arbitration Act*, R.S.A. 2000, c. A-43, s. 48, as am, by R.S.A. 2000, c. 16 (Supp.), s. 69.

[201] From a quick review of the statute book, leave of the court is still required under the *Arbitration Act*, R.S.A. 2000, c. A-43, ss. 8 and 15, and the *Police Act*, R.S.A. 2000, c. P-17, s. 18

[202] Rule 505(6) provides:

> 505(6) No judgment given or order made by one justice of appeal shall be subject to any appeal, except by leave of the justice giving the judgment or making the order.

As to whether r. 505(6) creates an apprehension of bias because a judge is asked to consider whether his or her decision should be appealed see *Prefontaine v. Canada (M.NR.)*, 2001 ABCA 288, *Vysek v. Nova Gas International Ltd.,* 2002 ABCA 112, *Vysek v. Nova Gas International Ltd.*, 2002 ABCA 136, and *Liu v. Tangirala*, 2005 ABCA 243. These cases were appeals from orders not judgment. On the subject of bias it should be noted that English practice generally requires that leave be obtained from the lower court at the time of hearing: see *Civil Procedure (Amendment) Rules 2000* (UK), S.I. 2000/221, sch. V, s. 52.3(2). As argued in the Bowman Report at 36:

> ... having heard the case, it [the court below] is able to consider whether or not grounds for appeal exist more quickly than the CA. In addition, the costs of an application for leave made to the court below at the end of the hearing are negligible in terms of court time, preparation time and legal costs. The court below is therefore in a good position to carry out the process of filtering out weak appeals in a way which is efficient.

rare.[203] However, an appeal from judgment lies to the Supreme Court of Canada and will be subject to a leave application before that court. The unusual result of requiring leave both from the court appealed from and from the court appealed to was probably not intended in this instance.

3. Leave applications without oral argument

[272] At present, any application may be heard without oral argument if the parties and the court agree to this procedure.[204] The Committee considers that there is greater scope for leave applications to be heard without oral argument. While the situation in Alberta does not demand that written applications should become the default,[205] the rules should specify that hearing without oral argument is an option.

4. Abandoned leave applications

[273] At present, an application for leave to appeal is deemed to be abandoned if the appeal has not been heard within 6 months of filing the application.[206] As noted in chapter 3, 6 months is disproportionately long in comparison to the time allowed for the individual steps of an appeal and for the appeal overall. The Committee has proposed that deemed abandonment should occur in a shorter period of time where the appeal has been struck out. For consistency, the same shortened period of deemed abandonment should apply to leave applications.

---

[203] The *Court of Appeal Act*, s. 8(2) provides for judgment by a single judge in specific circumstances.

[204] CPD F.5.

[205] Oral argument is not permitted on leave applications in the Supreme Court of Canada or Ontario Court of Appeal unless ordered: *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 43 and SCC Rules, r. 32(3); Ontario Rules, r. 61.03(15).

[206] CPD F.8 provides:

> F.8. Where an application for leave to appeal has not been heard within 6 months from the date the notice of motion is filed, the motion will be deemed abandoned, unless otherwise ordered before the expiration of this 6-month period.

CHAPTER 7. EXPEDITED APPEALS

[274] While parties have the option to abridge time so that an individual appeal may be brought before the court more quickly, in some circumstances there will be strong policy reasons to expedite a specific category of appeals. For example, if election results are contested, it is critical that any litigation be determined as soon as possible and the governing legislation requires would-be appellants to act quickly.[207] While few issues carry the same urgency as validating election results, several categories of appeal are commonly expedited by various procedures. This chapter considers whether or how appeals should be expedited.

A. Categories of Expedited Appeals

[275] At present there are two general groupings of expedited appeals. Firstly, governing legislation prescribes expedited procedures for a number of statutory appeals. Expedited appeals in this grouping are subject to one or more of the following procedures:[208]

- the appeal period runs from the date of decision,
- the application for leave to appeal must be made within the time to appeal,
- the record must be produced within a strict time frame,
- the appeal must be set down for hearing at the next sitting, or
- the appeal must be heard as "speedily as practicable".

Secondly, the court has adapted its own process so that specific categories of appeal may be brought to hearing more quickly. Part J appeals, which currently includes child

---

[207] The *Election Act*, R.S.A. 2000, c. E-1 allows the following appeal periods: 2 days regarding a recount of votes (s. 148); 10 days regarding a decision under the Act (s. 199(2)); and 14 days regarding filing directions for judgment (s. 199(4)).

[208] Appeals with expedited procedures include: *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, s. 27; *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, s. 26; *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 41; *Natural Gas Marketing Act*, R.S.A. 2000, c. N-1, s. 23; *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 31; *Public Utilities Board Act*, R.S.A. 2000, c. P-45, s. 70. At time of writing these acts were targeted for amendment: see below at note 214.

custody appeals and specific procedural appeals, are expedited by the following procedures:[209]

- times for preparing the appeal books, appellant's and respondent's factum are reduced,
- reduced page limits for factums, and
- some requirements relevant to document quality waived for appeal books and authorities.

B. The Main Steps in An Expedited Appeal

1. Notice of Appeal

ISSUE 45
Should expedited appeals be subject to a shorter appeal period?

Triggering event

[276] To avoid confusion, the triggering event should be the same for both regular and expedited appeals. The Committee has proposed that time should be calculated from the date of the decision in general appeals.

Time for preparation, filing and service

[277] Expedited appeals generally allow the same time for filing notice of appeal that applies to regular appeals.[210] This consistency between regular and expedited appeals reduces confusion. However, consistency also gives the appellant an advantage over other parties or even the court. While the appellant retains the "standard" appeal period, once notice of appeal is filed, the task of expediting the appeal often falls to

---

[209] CPD Part J applies to any appeal from an order or part of an order which does not finally determine all or a significant part of the substantive rights of an action. The categories of appeal that are specifically mentioned in Part J are: custody or access orders involving a minor; case management or pre-trial orders directing adjournments, time periods, or time limits; decisions regarding security for costs; trial rulings appealed before the end of trial. In addition to allowing these matters to be heard more quickly, Part J appeals are also intended to reduce cost: CPD J.1.

[210] For example, CPD J.3 provides:

> J.3(c) A notice of motion applying for leave and supporting materials shall be filed and served:
>
> (i) within the time limited in the applicable statute, Rule or regulation; or
>
> (ii) where no time limit is specified, within 20 days after the order or judgment for which leave is sought has been signed, entered and served.

The 20 day limit in J.3(c)(ii) corresponds to that set out in r. 506(1).

the other parties and the court. In other words, it can be a case of "wait then hurry-up." If a category of appeal should be dealt with on an expedited basis, it may be appropriate to require the appellant to act quickly by imposing a shorter appeal period.[211]

POSITION OF THE COMMITTEE

[278] The Committee considers that time for filing notice of appeal should run from the date of the decision. With respect to how much time should be allowed, the Committee considers that the value of having a single standard appeal period outweighs any benefit that might be obtained by having a shorter appeal period for expedited appeals. In many instances, the circumstances of an individual case will require the appellant to file notice of appeal as soon as possible (eg. when appealing an interim ruling). In such circumstances, the appellant bears the risk of the appeal becoming moot if he or she does not act quickly to file an appeal. Consequently, the Committee considers that one month is an appropriate period of time to decide whether to appeal and to prepare, file and serve notice of appeal.

2. Leave to Appeal

ISSUE 46
Should expedited appeals be subject to a shorter notice period when leave to appeal is required?

Leave requirements & expedited appeals

[279] A first point to consider is the logic in imposing a leave requirement on an expedited appeal. If a matter should be heard on an expedited basis, imposing a leave requirement would seem to delay rather than expedite the appeal. However, leave operates not only to identify which matters warrant a hearing on the merits but also which do not. From this perspective, refusing leave to appeal will bring a matter to an

---

[211] For example, Nova Scotia allows only 10 days to appeal an interlocutory or interim order: Nova Scotia, *Civil Procedure Rules*, r. 62.02, online: <http://www.courts.ns.ca/Rules/toc.htm>. Similarly, Ontario allows a 7 day appeal period: Ontario Rules, r. 62.01(2).

end more quickly and efficiently than would an expedited hearing.[212] While appeals that warrant hearing will be delayed by a leave requirement, those that do not warrant a hearing are concluded more quickly by the leave process.

Time for preparation, filing and service

[280] For the most part, expedited appeals follow the general rule that the leave application must be filed within the appeal period. Leave applications are expedited in a few circumstances by a slight alteration of this procedures. Rather than merely filing the application, a handful of statutes require the applicant to actually make the application within the appeal period.[213] However, if strictly followed, this approach would frequently result in insufficient notice to the respondent. For example, if the applicant has 30 days to make a leave application but must give 21 business days notice to other parties and the court, conflicts are inevitable. At present, fairness to the respondent has led to extensions or adjournments being commonplace.[214] However, this approach may be seen to undermine the policy reasons for expediting the appeal.

[281] A shorter appeal period for expedited appeals would also expedite the leave application. For example, if the appeal period were reduced to 10 days the leave

---

[212] Decisions on leave applications have no further right of appeal in Alberta: *Western Securities Ltd. v. Foothills and Whycom Holdings Ltd.*, [1982] 1 W.W.R. 171 at 173 (Alta. C.A.) and *Higgins v. Camrose No. 22 (County)* (1995), 169 A.R. 16 (C.A).

[213] Provisions that require the applicant to make the application within the appeal period include: *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, s. 26; *City Transportation Act*, R.S.A. 2000, c. C-14, s. 18; *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 41; *Electric Utilities Act*, S.A. 2003, c. E-5.1, s. 70; *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 688; *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 31; *Public Utilities Board Act*, R.S.A., P-45, s. 70; and *Natural Gas Marketing Regulation*, Alta. Reg. 358/1986, s. 28.
Other provisions require the applicant to obtain leave within one month of filing the application: e.g. *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, s. 27.

[214] CPD F.6 deals specifically with the inevitable conflict between deadlines for leave applications and notice to the respondent. At time of writing, the acts list in the previous footnote were targeted for amendment by *Bill 19, Appeal Procedures Statutes Amendment Act, 2007*, 3d. Sess., 26th Leg., Alberta, 2007 (1st read 14 March 2007). The amendments address the problem of forcing applications or appeals to be heard with insufficient notice to other parties and with inadequate preparation time for the court.

application would have to be filed within 10 days.[215] Earlier filing by the appellant facilitates an earlier hearing of the leave application, even if the respondent is allowed the standard period to respond. However, the leave process could be expedited further by shortening the respondent's notice period. For example, an expedited leave process might attract the shorter notice period that generally applies to single judge applications, i.e. 5 days to reply and 5 days for court preparation.

POSITION OF THE COMMITTEE

[282] As noted earlier, the Committee considers that there is significant value in having a single standard appeal and process that would apply to both regular and expedited appeals. Thus, in keeping with the Committee's earlier proposals:

- an application for leave in an expedited appeal should be filed within the one month appeal period;
- notice of appeal should not be filed until leave to appeal is granted; and
- where leave is granted, notice of appeal should be filed within 10 days of the date of the leave decision.

However, the Committee considers that one month notice period proposed for leave applications in general appeals is too long in the context of an expedited appeal. Instead, the Committee considers that the shorter 10 day notice period for applications before a single judge is more appropriate. Within that period, the respondent would have 5 calendar days to reply, leaving 5 calendar days for court administration and preparation.

3. Appeal books, factums, & authorities

ISSUE 47
What period of time should be allowed to prepare, file and serve the main documents in an expedited appeal?

---

[215] As this example suggests, the amount of time required to prepare, file and serve a leave application is relevant to setting the length of an expedited appeal period. As leave is often required in expedited appeals, the appeal period should be long enough to accommodate filing the leave application.

[283] This section considers the deadlines for filing materials as outlined in Part J and statutory appeals.

Part J

[284] At present, Part J imposes the following time periods on the appellant: the appeal book must be filed and served within one month from filing notice of appeal and the appellant's factum and authorities must be filed and served by the earlier of 2 weeks from filing the appeal book or 6 weeks from filing notice of appeal.[216] In contrast to general appeals, expedited appeals have a fixed deadline for filing the appeal book.[217] Having two triggering events and two time periods for filing the appellant's factum may result in confusion. Moreover, as the time difference between 6 weeks and one month plus 2 weeks will vary, the dual system requires constant attention to both deadlines. The table below summarises the time periods.

[285] Once the appellant's factum and authorities are filed, the respondent has 30 days to file and serve the respondent's factum and authorities or a letter of intention not to file.[218] However, once the appellant's factum has been filed, a hearing date can be set.[219] Once a hearing date is set, the respondent is subject to a further deadline of having to file at least 15 days before the opening day of the sittings in which the appeal will be heard.[220] Hearing dates can be assigned 17 days before the opening day provided that the appellant's factum and appeal book were filed 22 days before the opening day. As a result, the respondent's position is characterised by uncertainty. The respondent cannot act solely on the basis of service of the appellant's factum but must also pay close attention to upcoming court sittings. For example, if the appellant files and serves 22 days before opening day, then the respondent must file at least 15 days

---

216 CPD J.5(b), and J.7(c).

217 See chapter 3.

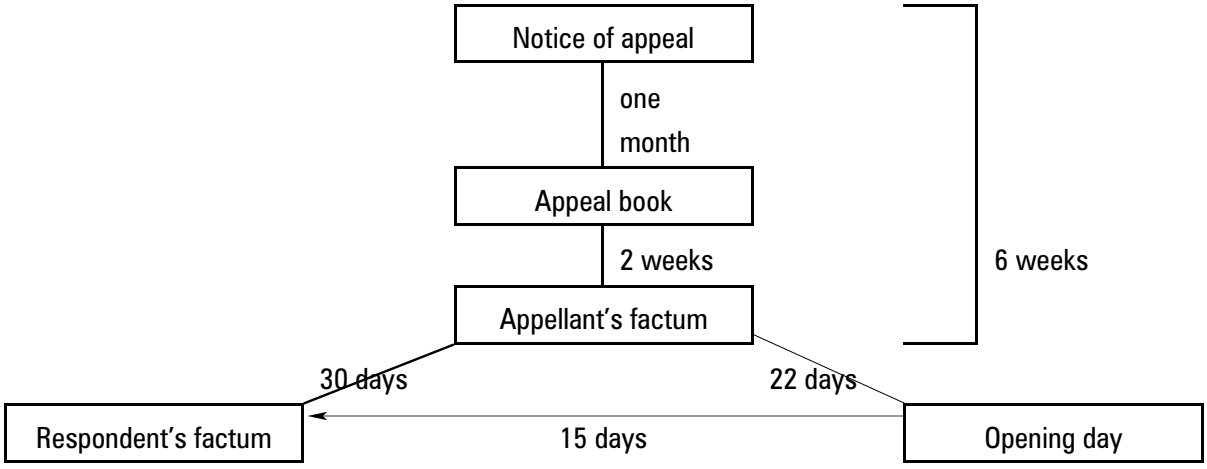
218 CPD J.7(f).

219 CPD J.4.

220 CPD J.7(f).

before opening day.[221] The net effect is that the respondent only has 7 days from service of the appellant's factum to respond – not 30.[222] This is a further example of how the procedure for an expedited appeal can favour the appellant. While the appellant is allowed up to 6 weeks to prepare a factum, the respondent may be left with only one week to reply. The fact that the respondent's time to reply will vary from 30 days to 7, will also result in appeals being expedited at different rates. Consequently, while an expedited appeal procedure might reasonably be expected to be simpler than the general appeal procedure, the variables in Part J introduce new complexities.

Table 13: Time periods in Part J



Statutory appeals

[286] Statutory appeals resemble Part J appeals both as regards the deadline for filing the record and setting the appeal down for hearing at the next sitting. In most instances the record must be filed within 30 days of obtaining leave to appeal.[223] Once the record or other required materials are received, the appeal will be set down for hearing

---

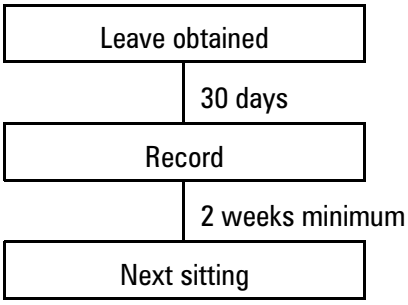
[221] CPD J.9(a) allows the respondent to request that the hearing be adjourned to a later sitting but the application must be made 20 days before opening day.

[222] Moreover, as the hearing date will not be assigned until 17 days before the opening day, the respondent may only have 2 days notice that the shorter deadline applies. Part J is also unclear as to whether or how the respondent will be notified that the hearing has been set. J.4 (a) & (e) only discusses notice to unrepresented parties.

[223] The following acts allow 30 days: *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, s. 26(6); *Energy Resources Conservation Act*, R.S.A. c. E-10, s. 41(4). The *Agricultural Operation Practices Act*, R.S.A. 2000, c. A-7, s. 27(6) allows 25 working days.

at the next sitting. In some instances, a minimum notice period is required.[224] As statutory appeals have reduced document requirements compared to general or Part J appeals, the procedure is less complicated as summarised in the table below.

Table 14: Time periods in statutory appeals



POSITION OF THE COMMITTEE

[287] The Committee considers that uncertainty of process should be reduced in both expedited and general appeals (principle 5). Indeed, it is reasonable to argue that the need for certainty is greater in an expedited appeal because the time for completing each step is greatly reduced. Accordingly, the Committee considers that an expedited process within the rules should allow the following time periods for completion.

To prepare, file and serve the appellant's materials

[288] The Committee considers that one month from filing the notice of appeal is an appropriate period of time to prepare, file and serve the appeal book, factum and authorities.

To prepare, file and serve the respondent's materials

[289] The Committee considers that time for preparing a respondent's materials should run from service of the appellant's materials. Trying to ensure that the respondent's materials will be filed by a point that dovetails with the court's sitting

---

[224] Two weeks notice prior to the hearing is required under the following acts: *Agricultural Practices Act*, R.S.A. 2000, c. A-7, s. 27(7); *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, s. 26(7); *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 41(5); *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 31(6). The following acts set the appeal down for hearing and the next sitting and require the appellant to notify other affected parties within 10 days: *Public Utilities Board Act*, R.S.A. 2000, P-45, s. 71(2); *Natural Gas Marketing Regulation*, Alta. Reg. 358/1986, s. 28(3).

schedule involves too many factors. However, the Committee recognises that the goal of expediting an appeal will be undermined if the appeal is not heard within a reasonable time after the respondent's materials have been filed. As a rough benchmark, the Committee considers that an expedited appeal should be heard within 2-3 cycles of the court's sitting schedule. Aside from the summer months, the court generally sits once every 4 weeks. Allowing the respondent 20 days to file would see an expedited appeal ready for hearing in 7-8 weeks. Allowing the respondent 10 days to file would see an expedited appeal ready for hearing in 5-6 weeks. These options are set out in the table below. On balance, the Committee considers that 20 days is an appropriate period of time to file the respondent's materials.

Table 15: Options for filing the respondent's factum in an expedited appeal

Notice of appeal	Appellant's materials	Respondent's factum	Appeal ready for hearing
Day 0	one month	10 days =	ca. 40 days (5-6 weeks)
		20 days =	ca. 50 days (7-8 weeks)

C. Penalties and Consequences for Lateness or Non-completion

ISSUE 48
What penalties or consequences should apply in an expedited appeal?

ISSUE 49
Should the time period for reinstating an expedited appeal be shortened?

Penalties or consequences

[290] At present, expedited appeals under Part J are subject to the same rules as appeals in general. The key exception is that the appeal will be struck out if the

appellant misses a deadline.[225] This exception is consistent with the Committee's proposal for general appeals. However, any problems identified among general appeals will also be relevant to expedited appeals.

Time for reinstatement

[291] At present, an appeal expedited under Part J is deemed to be abandoned if not reinstated within 3 months.[226] While general appeals are deemed abandoned after 6 months, 3 months is a comparatively long time in the context of an expedited appeal. In light of the Committee's proposal that the time for reinstatement should be reduced in general appeals it will likely be appropriate to reduce the reinstatement period for an expedited appeal.

POSITION OF THE COMMITTEE

[292] The Committee considers that the penalties and consequences of lateness should be the same as between a general appeal and an expedited appeal. For convenience, the table below summarises the Committee's proposals. The Committee considers that the period of time for reinstatement in an expedited appeal should be 20 days.

❖❖❖

[293] For convenience, the proposals regarding the deadlines completing steps in an expedited appeal and the penalties and consequences for lateness or non-completion are summarised in the table below.

---

225 CPD J.12(b).

226 CPD J.12(f).

Table 16: Overview of filing deadlines and penalties – Expedited appeals

	Triggering event	Time to prepare	Time from notice of appeal	Penalty for lateness	Consequence of late filing	Consequence of not filing
Notice of appeal Should expedited appeals be subject to a shorter appeal period?	Date of decision	one month	--	none	may lose opportunity to appeal	--
Appellant's materials What period of time should be allowed to prepare, file and serve the appellant's expedited appeal?	Notice of appeal filed	one month	one month	costs denied	struck out	deemed abandoned
Respondent's factum What period of time should be allowed to prepare, file and serve the respondent's materials in an expedited appeal?	Appellant's factum served	20 days	< 2 months	costs denied	oral argument denied	oral argument denied
Appeal ready for hearing			**< 2 months**			

D. Quality & Content of Expedited Appeal Documents

[294] Rules regarding the quality and content of expedited appeal documents are slightly relaxed under Part J.[227] In part, these changes address some of the problems identified with respect to general appeals.[228] The Committee's position on the use of prescribed forms and an abbreviated appeal book might reduce the need for separate rules for the quality and content of documents in expedited appeals.

E. Extending the Availability of Expedited Appeals

ISSUE 50
Is there a sufficient policy basis to expedite appeals in other categories of cases?

[295] As noted earlier, parties have the option to abridge time or to direct their conduct so that so that an individual appeal is ready for hearing and can be brought before the court more quickly. As such, there is no strong policy reason to adopt an "expedited track" for parties to select by consent. However, there may be other categories of cases that should be expedited for policy reasons. The CJC Report lists the following categories of civil cases that are expedited in one or more jurisdiction across Canada:[229]

- wrongful dismissal
- family matters
- extradition
- guardianship of dependent adults
- professional discipline
- land use and planning
- cases summarily dismissed in the first court
- interlocutory judgments

---

227 CPD J.6 to J.8.

228 See chapter 4.

229 CJC Report at 69.

POSITION OF THE COMMITTEE

[296] The Committee invites your comments on the categories of cases that are expedited. Should additional categories of cases be expedited in Alberta? Should some categories that are currently expedited be treated as normal appeals?

CHAPTER 8. MANAGING APPEALS

[297] The proposals advanced in this consultation memorandum reflect the view that an appeal is not an automatic stage in litigation and that, where the appellant choses to bring an appeal, there is an obligation to bring the appeal forward for hearing within a reasonable period of time (principles 1- 5). To this end, the proposals support the view that the rules should set out adequate deadlines for the completion of each step and impose automatic penalties and consequences where steps are not completed on time. This approach reduces the need for other parties or the court to police the progress of an appeal. However, a system that lacks flexibility to respond to the challenges of an individual appeal would inevitably fail to meet the underlying purpose of an appeal system (principle 2). Without flexibility, the system might compound the unjust result complained of at trial and thus fail to meet the private purpose of an appeal. Similarly, the public purpose of an appeal is put at risk if procedural rigidity precludes the court from addressing substantive errors in the law. This chapter considers the scope for flexibility in individual appeals.

A. Variation of Time Periods

ISSUE 51
How should the rules provide for flexibility to extend time?

[298] At present, the parties' ability to extend time by agreement is limited to filing or amending pleadings or other documents.[230] The Draft Rules provide a broader framework for extending time by agreement, although the court will retain a supervisory power over all time periods. At time of writing, the Draft Rules provide:

> **Variation of time periods**
>
> 12.10(1) Unless the court otherwise directs or a rule otherwise provides, the parties may agree to extend any time period specified in these rules.
>
> (2) The court may, unless a rule otherwise provides, stay, extend or shorten a time period that is

---

[230] See r. 549.

(a) specified in these rules,

(b) specified in an order or judgment, or

(c) agreed by the parties.

(3) The order to extend or shorten a time period may be made whether or not the period has expired.

[299] The ability to extend time periods by agreement raises concerns for the framework of deadlines proposed in this consultation memorandum. Firstly, taken to the extreme, parties could agree to double every time period or to delay an appeal indefinitely. This result is of particular concern where there is a power imbalance between the parties. Moreover, as noted in chapter 3, there is already scope for too much delay in the early stages of an appeal. Allowing parties to extend time by agreement would, in many cases, increase rather than reduce the problem of delay. Secondly, from the court's perspective, the Draft Rules would lead to uncertainty regarding whether the parties have extended the time periods provided in the rules and, if so, what time periods the parties have agreed to. As a result, it would be increasingly difficult for the court to determine whether an appeal was on track and moving towards hearing. Thus, a broad ability to extend time by agreement is inconsistent with the public and private objectives of resolving appeals in a timely manner. However, a system that did not allow for flexibility in individual appeals would also lead to unfair results. Thus, some means to allow parties the ability to agree on specific deadlines while retaining the court's ability to control and supervise the progress of appeals seems appropriate.

POSITION OF THE COMMITTEE

[300] The Committee considers that parties should be able to extend the time by agreement provided that the court consents.

B. Court Assistance

ISSUE 52
How should the rules facilitate court assistance for managing an appeal?

[301] At present, there is no express provision outlining the Court of Appeal's general case management powers though these surely exist by virtue of inherent jurisdiction and by analogy to trial court powers.[231] Would an express rule increase parties' awareness of the availability of court assistance? How should such assistance be described in the rules?

[302] British Columbia offers an example of how the rules might better draw parties' awareness to court assistance. The BC Appeal Rules provide:[232]

> Prehearing conference
>
> 29(1) On the request of a party made to the registrar in writing, on the request of the registrar or on a justice's own motion, the court of a justice may direct a prehearing conference.
>
> (2) If a direction for a prehearing conference is made under subrule (1), the parties or their solicitors must attend before a justice at the time and place directed to consider one or more of the following:
>
> (a) the simplification or isolation of issues on the appeal;
>
> (b) the fixing of time for the hearing of the appeal;
>
> (c) any other matter that might expedite the appeal.
>
> (3) The justice presiding at a prehearing conference may make an order or direction on any matter referred to in subrule (2)(a) to (c).

Read broadly, the "simplification or isolation of issues" and "any other matter that might expedite the appeal" offer a strong basis for the court to resolve management issues arising on appeal.

[303] Another approach to consider is whether the Draft Rules would be appropriate on appeal. Within the Draft Rules, the general principle is that court assistance may be requested by a party or undertaken at the court's initiative. The Draft Rules provide:

---

[231] Rule 4 provides:

> 4 As to all matters not provided for in these Rules the practice as far as may be shall be regulated by analogy thereto.

Specific case management powers are also set out in the following appeal rules: 530 [Contents of appeal books]; 537 [Judge may vary compliance]; 515.1 [General appeal list]; and 516 [Chambers orders].

[232] BC Appeal Rules, r. 29. Similarly, the Saskatchewan, *Court of Appeal Rules* in r. 41(3) establish a prehearing conference to consider all matters that might expedite the hearing and determination of the appeal; online: Courts of Saskatchewan <http://www.sasklawcourts.ca/default.asp?pg=ca_rules_courtrules>.

Orders to facilitate proceedings

4.11 If a party, or the court, is not satisfied that an action is being managed in accordance with rule 1.2 [*Purpose of the rules*]

(a) the party may apply for a procedural order under rule 1.5 [*Procedural orders*], an order under rule 4.13 [*Assistance by the court*] or for any other appropriate order, or

(b) the court may make a procedural order under rule 1.5 [*Procedural orders*], rule 4.13 [*Assistance by the court*] or make any other appropriate order.

The key cross-references are to Draft Rules 1.5 and 4.13 which provide:

Procedural orders

1.5(1) To implement and advance the purpose and intention of the rules described in rule 1.2 [*Purpose of the rules*], the court may, subject to any specific provision of the rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the court.

(2) Without limiting subrule (1), and in addition to any specific authority the court has under the rules, the court may, unless specifically limited by the rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) give directions or make a ruling with respect to an action, application or proceeding, or matter related;

(c) make a ruling with respect to how or if the rules apply to particular circumstances or to the operation, practice or procedure under the rules;

(d) impose terms, conditions and time limits;

(e) give consent, permission or approval;

(f) give advice, including making proposals, providing guidance, making suggestions, and making recommendations;

(g) adjourn or stay all or any part of an action, application or proceeding, extend the time for taking the next step, or stay the effect of a judgment or order;

(h) determine whether a judge is or is not seized with an action, application or proceeding;

(i) include any information in a judgment or order that the court considers necessary.

Assistance by the court

4.13(1) The court may, at any time, direct the parties and any other person to attend a conference with the court.

(2) The participants in the conference may consider

(a) dispute resolution possibilities, the process for them, and how they can be facilitated;[233]

(b) simplification or clarification of a claim, pleading, a question, issue, application or proceeding;

(c) the litigation plan for the action or modifications to a timetable;[234]

(d) case management by a judge;

(e) practice, procedural or other issues or questions and how to resolve them;

(f) any other matter that may aid in the resolution or facilitate the resolution of a claim, application or proceeding or otherwise meet the purpose and intention of the rules described in rule 1.2 [*Purpose of the rules*].

Would these provisions be appropriate in the appellate context? What changes should be considered?

[304] In addition to the general powers operating through Draft Rules 1.15, 4.11 and 4.13, the Draft Rules also outline specific case management powers. Case management may be sought at the request of a party or the court. With respect to case management, the Draft Rules provide:

Appointment of case management judge

4.16 The Chief Justice may order that an action be subject to judicial case management and appoint a judge as the case management judge for the action for one or more of the following reasons:

(a) to encourage the parties to participate in a dispute resolution process;

(b) to promote and ensure the efficient conduct and resolution of the action;

(c) to keep the parties on schedule under their litigation plan;

(d) to facilitate preparation for trial and the scheduling of a trial date.

Authority of the case management judge

4.17(1) A case management judge or if the circumstances require any other judge, may

---

[233] Dispute resolution and settlement on appeal are considered later in this chapter.

[234] On appeal, the litigation plan would be replaced by the deadlines for completing the steps in the appeal, whether determined by the rules, party agreement, or court order.

(a) order steps be taken by the parties to identify, simplify or clarify the real issues in dispute;

(b) establish, substitute or amend a litigation plan and order the parties to comply with it;

(c) make an order to facilitate an application, proceeding, questioning, or pre-trial proceeding;

(d) make an order to promote the efficient resolution of the action by trial;

(e) facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through negotiations or a dispute resolution process other than trial;

(f) make any other practice or procedural order under rule 1.5 [*Procedural orders*] that the judge considers necessary.

(2) Unless the Chief Justice or the case management judge otherwise directs, or the rules otherwise provide, the case management judge must hear every application made with respect to the action for which the case management judge is appointed.

In the appellate context, references to trial and litigation plans would require appropriate modification. But allowing for such changes, would similar provisions be appropriate for case management on appeal? Should the power to order case management be vested in the Chief Justice or a designated judge?[235] Should the registrar or other court officer be able to exercise the powers of a case management judge? What other changes should be considered?

POSITION OF THE COMMITTEE

[305] The Committee considers that both parties and the court would be best served if the rules outlined the availability of court assistance. While the brevity of the British Columbia model is appealing, the Committee considers that the broader powers expressed in the Draft Rules should be extended to the appellate context. Comparable practice between the trial and appeal courts with respect to court assistance would enhance the justice system in Alberta. The Committee invites your feedback on whether the Draft Rules are appropriate for appeals or whether substantive changes are required.

---

[235] The definition of Chief Justice at the trial level allows for this power to be delegated to another designated judge.

C. Settlement by Agreement: Judicial Dispute Resolution

[306] It has long been recognised that the vast majority of cases started will not proceed to trial, let alone appeal. Trial level estimates suggest that up to 98% of cases may not proceed to trial.[236] Data provided by the Alberta Court of Appeal indicates that more than 58% of appeals will not proceed to hearing.[237] Consequently, procedures that focus solely on preparing for a formal court process will be inappropriate in the majority of cases.

[307] Trial courts now have significant experience in the use of alternatives to the traditional mode of dispute resolution by trial. Among the measures adopted by trial court, judicial dispute resolution has been generally successful. Judicial dispute resolution is a consensual, voluntary process that allows parties to attempt to resolve their disputes with the assistance of a judge. Following its trial level success, a few appellate courts, including the Alberta Court of Appeal, now offer judicial dispute resolution.[238]

[308] It is an obvious assertion that the scope for judicial dispute resolution will be narrower on appeal than it is at the trial level. An appellate court has a reduced sphere of jurisdiction compared to a trial court and a similar reduction would also apply to settlement.[239] If this were not the case, i.e. if there were greater opportunities for

---

[236] See for example, Justice John A. Agrios & Janice A. Agrios, *A Handbook on Judicial Dispute Resolution for Canadian Lawyers* (January 2004) at 4, online: JDR Handbook <http://www.cba.org/alberta/PDF/JDR%20Handbook.pdf>.

[237] Civil appeals data 1999-2003.

[238] CPD part L outlines the court's judicial dispute resolution process. However, different courts use different terminology. The Quebec Court of Appeal offers a conciliation service and has done so since 1999, online: The Mediation Service Program of the Court of Appeal of Quebec <http://www.tribunaux.qc.ca/mjq_en/c-appel/about/fs_creation.html>. Ontario offers pre-hearing conferences, concentrating on family law appeals: Court of Appeal for Ontario, *Practice Direction Concerning Civil Appeals in the Court of Appeal* (7 October 2003), online: <http://www.ontariocourts.on.ca/court_of_appeal/notices/pd/civil2003.htm>. British Columbia offers judicial settlement conferences under a pilot project started in 2004: "Judicial Settlement Conferences," Civil Practice Directives for the Court of Appeal, c. 8, online: Act, Rules & Practice Notes <http://www.courts.gov.bc.ca/ca/act%20rules%20and%20practice%20directives/>.

[239] The Supreme Court of Canada offers an extreme example. In civil matters, the Supreme Court's role is limited to questions of public importance: *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1).

(continued...)

settlement on appeal, then the trial process risks becoming a mere formality for accessing settlement resources. However, at present in Alberta and other jurisdictions, there are few express criteria to identify which cases are appropriate for judicial dispute resolution on appeal and which are not. In other words, there is no clear distinction between the scope of judicial dispute resolution at the trial level and the scope on appeal.

[309] Where judicial dispute resolution is available on appeal, there is a general recognition that some cases are not appropriate. For example, Quebec recognises that jurisdictional issues, constitutional law, and criminal matters are inappropriate.[240] British Columbia reserves a general discretion to refuse cases that are unsuitable such as complex or legally significant cases or matters involving domestic abuse.[241] However, an effective discussion of what criteria apply should be based on an understanding of why screening criteria are necessary. The Committee considers that resource allocation and the public purpose of appeals are two compelling reasons.

Resource allocation

[310] No appellate court has infinite resources. Without appropriate screening criteria, too many appeals may end up going two rounds, i.e. an unsuccessful round of judicial dispute resolution and then formal hearing. While no criteria can guarantee that judicial dispute resolution will be successful, resources will be wasted if inappropriate cases are not screened out. Equally important, the criteria should ensure that appropriate cases are screened in. Where the parties are able to reach a settlement early on, there may be a net saving of resources.[242] Thus, appropriate screening criteria

---

[239] (...continued)
If the court were to facilitate a settlement between the parties rather than deciding and clarifying questions of public importance, the court would not be fulfilling its role.

[240] Louise Otis "The conciliation service program of the Court of Appeal of Quebec" (2000) 11 *World Arbitration and Mediation Report* at 81.

[241] British Columbia, *Civil Practice Directives for the Court of Appeal*, c. 7 at para. 7.1, online: Act, Rules & Practice Notes <http://www.courts.gov.bc.ca/ca/act%20rules%20and%20practice%20directives/>.

[242] On a mathematical model, a 90 minute hearing by three judges amounts to 4.5 judge hours. Anecdotal reports suggest that most judicial dispute resolution sessions run by a single judge last about 3 hours. There will likely be savings in preparation time as well.

will assist the court, not only in allocating resources to judicial dispute resolution but also in balancing those resources against the resources required for formal hearing.

Public purpose

[311] Principle 2 states that an appeal has both a private and a public purpose. The private purpose is to correct an error, unfairness or wrong exercise of discretion which has led to an unjust result. The resolution of an unjust result is not dependent on hearing the appeal and may equally be achieved through judicial dispute resolution. However, in comparison, the public purpose is not so easily satisfied.

[312] The public purpose of an appeal is to ensure public confidence in the administration of justice. This entails the clarification and development of the law, practice and procedure, and maintaining the standards of first instance courts and tribunals. However, judicial dispute resolution is a private process conducted within a framework of confidentiality that is necessary to encourage settlement. Thus, where an unjust result is remedied there might not be any public knowledge of this result. More importantly, judicial dispute resolution does not allow for the development of the law and maintaining the standards of lower courts. If a trial judgment contains an error of law, that error will not be corrected by judicial dispute resolution. Without such correction, the error may be repeated in other cases to the detriment of both the parties and the law. Thus, judicial dispute resolution carries a risk that the public purpose of an appeal may not be served.

[313] Can this risk be mitigated? As a starting point, it should be noted that the parties themselves are under no obligation to ensure that the public purpose is met. Even though a trial judgment contains a serious error of law, the parties may not appeal or may settle the matter on their own. In this context, the private nature of a result obtained through judicial dispute resolution can be accepted in many cases. If the parties have a good likelihood of settling with judicial assistance, why should such assistance be withheld? Ultimately, the task assigned to the court is to weigh both the private purpose and the public purpose. In some cases, especially where there are good prospects for settlement, the balance will favour the private purpose. In others, especially where the law is unclear or defective, the balance will favour the public purpose. However, both the finite nature of appellate resources and the role of the court support the need for appropriate screening criteria.

1. Screening criteria

ISSUE 53
Should there be general criteria to determine whether judicial dispute resolution is appropriate?

Trial court criteria

[314] As a starting point, screening criteria for judicial dispute resolution on appeal should take into account the criteria applied at the trial level. The Draft Rules will require the parties to engage in some manner of dispute resolution process before a trial date will be assigned. The screening criteria to exempt the parties from this requirement are:

- the parties engaged in a dispute resolution process before the action started and neither the parties nor the court consider that a further attempt would be beneficial;
- the nature of the claim is not one that is likely to result in an agreement between the parties;
- there is a compelling reason why a dispute resolution process should not be attempted by the parties;
- the court considers that engaging in a dispute resolution process would be futile; or
- the claim is of a nature that a decision by the court is necessary or desirable.

These criteria might also be adopted to screen out cases as inappropriate for judicial dispute resolution on appeal.

Appeal court criteria

[315] What criteria will facilitate the best use of resources allocated to judicial dispute resolution on appeal? For example, would any of the following criteria be useful to screen out inappropriate cases:

- the requirement to engage in a dispute resolution process was waived by the trial court;
- the parties previously engaged in a dispute resolution process and the court does not consider that a further attempt would be beneficial;
- the court considers that engaging in a dispute resolution process would be futile; or

- the appeal is of a nature that a decision by the court is necessary or desirable?

Would any of the following criteria be useful to screen in appropriate cases:

- the nature of the appeal is one that is likely to result in an agreement between the parties; or
- there is a compelling reason why a dispute resolution process should be attempted by the parties?

Should distinctions be made on the basis of the type of appeal (eg. interlocutory or procedural), the area of law (eg. criminal or constitutional), the grounds of appeal (eg. error of fact or error of jurisdiction) or on whether the court granted leave to appeal?

POSITION OF THE COMMITTEE

The Committee welcomes your comments on criteria that might be used to identify both appropriate and inappropriate cases for judicial dispute resolution on appeal. The Committee is particularly interested in the views of the court on this issue.

2. Procedure

ISSUE 54
Should parties be allowed to state a preference for a specific judge?

ISSUE 55
What effect should judicial dispute resolution have on the deadlines that normally govern the progress of an appeal?

ISSUE 56
What provision should be made with respect to other matters such as:
(a) planning a judicial dispute resolution;
(b) materials for use in the judicial dispute resolution;
(c) protecting the confidentiality of communications;
(d) recording agreement, where reached;
(e) giving effect to an agreement by the parties;
(f) conferring immunity from suit on the judge conducting the judicial dispute resolution;
(g) disqualifying the judge from hearing the appeal?

[316] While judicial dispute resolution has been successful, it has not been without problems. In response to these problems, the Early Resolution of Disputes Committee proposed the adoption of formal rules to replace the guidelines that currently govern judicial dispute resolution at the trial level.[243] The Draft Rules giving effect to that Committee's recommendations are very similar to the Court of Appeal's recent practice direction on judicial dispute resolution.[244] This section considers the appropriateness of the Draft Rules and whether further matters need to be considered in the appellate context.

Choosing a judge

[317] The Draft Rules allow the parties to request a named judge. The practice directions are silent on this point. While the availability of a particular judge cannot be guaranteed, should the parties be able to request a specific judge?[245]

Normal progress of the appeal

[318] There is a distinct difference in practice on this point across Canada. For example, Ontario practice provides:[246]

> Because the pre-hearing conference is not intended to delay the normal progress of the appeal, a request for such a conference does not operate to suspend the obligation of the parties to comply with the requirements of Rule 61 [Appeals to an appellate court].

---

[243] For an overview of the procedural problems identified at the trial level see, Alberta Law Reform Institute, *Promoting Early Resolution of Disputes by Settlement*(Consultation Memorandum No. 12.6) (Edmonton: Alberta Law Reform Institute, 2003) at 80*ff*.

[244] CPD Part L.

[245] For further discussion on this point see Alberta Law Reform Institute, *Promoting Early Resolution of Disputes by Settlement*(Consultation Memorandum No. 12.6) (Edmonton: Alberta Law Reform Institute, 2003) at 89.

[246] Court of Appeal for Ontario, *Practice Direction Concerning Civil Appeals in the Court of Appeal* (7 October 2003) at 8.3, online: <http://www.ontariocourts.on.ca/court_of_appeal/notices/pd/civil2003.htm>.

In contrast, both British Columbia and Quebec suspend the running of time once a request for judicial dispute resolution has been filed.[247] Both approaches are problematic. The Ontario approach requires the parties to prepare for settlement and hearing at the same time. The Quebec and British Columbia approach may be subject to abuse by parties wanting to delay the appeal.

[319] The problems of both approaches are reduced by the Alberta approach. The Alberta approach strikes a balance of suspending the operation of time limits but only once the judicial dispute resolution has been scheduled.[248]

Other matters

[320] Aside from choosing a judge and the effect of judicial dispute resolution on the ordinary course of the appeal, the Draft Rules offer a starting point for what needs to be addressed on appeal. As noted, the Draft Rules are very similar to the current practice directions but are more comprehensive on certain points. Are the Draft Rules appropriate for judicial dispute resolution on appeal?

[321] The Draft Rules provide:

> 4.7(2) An arrangement for a judicial dispute resolution process may only be made with the agreement of the parties in dispute, and before engaging in a judicial dispute resolution process at least the following ground rules must be agreed by the parties:
>
> (a) that every party necessary to participate in the process has agreed to do so, unless there is sufficient reason not to have complete agreement;
>
> (b) the following matters that relate to the proposed process:
>
> (i) the nature of the process;
>
> (ii) the matters to be the subject of the process;
>
> (iii) the manner in which the process will be conducted;
>
> (iv) the date on which and the location and time at which the process will occur;

---

[247] Quebec suspends the appeal proceedings pending judicial dispute resolution while British Columbia requires the parties to file a consent order suspending time limits.

[248] CPD L.8 provides:

> Once a date has been scheduled for JDR, time limits on the appeal will not apply until after the JDR meeting. If JDR is not successful, the JDR Justice will set time lines for filing materials on the appeal.

(v) the role of the judge and any outcome expected of that role;

(vi) any practice or procedure related to the process, including exchange of materials, before, at or after the process;

(vii) who will attend the process, which must include persons who have authority to agree on a resolution of the dispute, unless otherwise agreed;

(viii) any other matter appropriate to the process, the parties or to the dispute.

4.7(3) The parties who agree to the dispute resolution process are entitled to attend the process.

Documents resulting from JDR

4.8 The only documents, if any, resulting from a judicial dispute resolution process are to be

(a) an agreement prepared by the parties, and any other document necessary to implement the agreement, and

(b) any order resulting from the agreement.

Confidentiality and use of information

4.9(1) A judicial dispute resolution process is a confidential process intended to facilitate the resolution of a claim.

(2) Consequently, unless the parties otherwise agree in writing, statements made or documents generated for or in the judicial dispute resolution process with a view to resolving the dispute

(a) are privileged and are made without prejudice,

(b) must be treated by the parties and participants in the process as confidential and may only be used for the purpose of that dispute resolution process, and

(c) may not be referred to, presented as evidence, or relied on, and are not admissible in a subsequent application or proceeding in the same action or in any other action, or in proceedings of a judicial or quasi-judicial nature.

Involvement of JDR judge after process concludes

4.10(1) The judge facilitating a judicial dispute resolution process in an action cannot hear or decide any subsequent application, proceeding or trial in the action without the agreement of every party.

(2) The judge facilitating a judicial dispute resolution process must treat the judicial resolution process as confidential and all the records relating to the dispute resolution process in the possession of the judge or in the possession of the court clerk must be returned to the parties or destroyed except

(a) the agreement of the parties and any document necessary to implement the agreement, and

(b) any order resulting from the process.

(3) The judge facilitating a judicial dispute resolution process is not competent to give evidence nor compellable to give evidence in any application or proceeding relating to the judicial dispute resolution process in the same action, in any other action, or in any proceeding of a judicial or quasi-judicial nature.

POSITION OF THE COMMITTEE

[322] The Committee invites your comments on what procedural provisions should be put in place for judicial dispute resolution on appeal.

3. The spectre of dissent

[323] There is a final point to address. As at trial, judicial dispute resolution on appeal is conducted by a single judge. On an appeal panel, however, that single judge may be the dissenting voice. What is there to say that that judge does not represent a dissenting voice in the judicial dispute resolution? One answer to this concern is provided by the following extract:[249]

> The judge explores the possibilities, avoiding as much as possible expressing an opinion with regard to the judgement of the trial court. However, in some circumstances, the judge may feel at ease to express an opinion regarding a lower-court judgment. In those circumstances, the judge-conciliator may readily identify an oversight or weakness in the judgment. This, in an effort to further clarify the legal issues for the parties and to bring about a better understanding of what is at stake. However, as a general principle, the judge must abstain from giving an opinion on the validity of the judgment below and leave the merits of the appeal for the Court. The judge-conciliator must not compromise the position of the Court. As a conciliator, the judge's role is to bring the parties to focus upon resolving their differences, and not to second guess what a bench of three judges may eventually decide on the merits of the case. The judge can recommend specific solutions for settlement, but must never compel the parties to accept a settlement.

---

[249] Louise Otis "The conciliation service program of the Court of Appeal of Quebec" (2000) 11 *World Arbitration and Mediation Report* at 82.

D. Curing Irregularities

ISSUE 57
What power should the court have to cure irregularities or non-compliance with the rules?

[324] The previous section of this chapter discuss measures for addressing problems before they arise. This section considers the scope for correcting problems after the fact, i.e. the scope for curing irregularities once a rule has been breached. At present, r. 558 allows the court to address irregularities.[250] The draft rule to replace r. 558 provides:

> ***Rule contravention and non-compliance and irregularities***
>
> 1.6(1) If a person contravenes or does not comply with these rules, or if there is an irregularity in a pleading, document, affidavit or prescribed form, a party may apply to the court
>
> (a) to cure the contravention, non-compliance or irregularity, or
>
> (b) to set aside the act, application, proceeding or other thing because of prejudice to that party arising from the contravention, non-compliance or irregularity.
>
> (2) An application under this rule must be made within a reasonable time after the applicant became aware of the contravention, non-compliance or irregularity.
>
> (3) An application under this rule may not be made by a party who alleges prejudice as a result of the contravention, non-compliance or irregularity if that party has taken a further step in the action knowing of the prejudice.
>
> (4) The court must cure the contravention, non-compliance or irregularity unless the interests of justice require an act, application, proceeding or other thing to be set aside because to cure the contravention, non-compliance or irregularity would or would be likely to significantly prejudice another party.
>
> (5) This rule does not apply
>
> (a) if another rule provides a remedy for a contravention, non-compliance or irregularity, or
>
> (b) to permit a remedy to be provided if the contravention, non-compliance or irregularity relates to a period of time that the court is prohibited from extending.

---

[250] Rule 558 was considered in Alberta Law Reform Institute, *Miscellaneous Issues* (Consultation Memorandum No. 12.14) (Edmonton: Alberta Law Reform Institute, 2004) at 75-87.

(6) In making an order under this rule, the court may also impose a penalty under rule 10.48 [Penalty for contravening the rules].[251]

Is the draft rule appropriate for appeals?

[325] The draft rule allows the court the discretion to deal with irregularities, provided that an application is brought within a reasonable time and that further steps have not been taken with knowledge of the irregularity. The court currently hold such a power and there is no obvious reason to discontinue it.

[326] However, the draft rule also imposes a requirement on the court to cure irregularities in certain circumstances (r. 1.6(4)). Without modification, requiring the court to cure irregularities would work against the proposals advanced in this consultation memorandum. The proposals are intended to reduce the need for opposing parties or the court to police the progress of appeals. However, if the court is required to cure irregularities this not only reintroduces active policing of appeals but does so in a counter-productive way. While active policing is currently done to encourage compliance and progress, requiring the court to cure irregularities amounts to active policing to excuse non-compliance. Thus, while the requirement to cure irregularities is appropriate at the trial level it is out of place at the appeal level. The rationale for requiring a trial court to cure an irregularity, unless the interests of justice demand otherwise, is to prevent one party from taking advantage of another's slip in such a manner that would lead to an unjust resolution or no resolution of the dispute. That danger is not present on appeal because the trial resolution is already in place. While injustice may result if an irregularity is not cured in an appeal, this is a matter that the court can take into account in the exercise of its discretionary power to cure irregularities.

POSITION OF THE COMMITTEE

[327] The Committee considers that the court should have discretion to cure irregularities or non-compliance with the rules. However, the Committee considers that it is inappropriate to require the court to cure certain irregularities; to do so would defeat the purpose of having rules in many instances.

---

[251] Draft rule 10.48 is discussed in chapter 9.

E. Housekeeping Points

[328] In the course of its analysis, the Committee noted areas where minor improvements would additionally enhance appellate practice. These areas are more "pedestrian" in nature and do not raise significant policy issues. Accordingly, the Committee has not identified specific issues for consultation. However, the Committee welcomes comments on any of the points discussed below.

1. Stay of Execution

[329] At present, bringing an appeal does not operate as a stay of enforcement or stay of proceedings in the court below.[252] A party who wishes to stay enforcement or proceedings pending the result of the appeal must apply to the Court of Queen's Bench or, in some circumstances, to the Court of Appeal. In some jurisdictions, an appeal triggers an automatic stay for certain types of cases.[253] However, in keeping with current Alberta practice and principle 3, the Committee does not propose any change to the current situation.

2. Settlement using court process

[330] At present, the appeal rules incorporate the trial procedures for making formal settlement offers.[254] The rules regarding formal settlement offers were discussed in an earlier consultation memorandum, with the recommendation that the overall process

---

[252] Rule 508 provides:

> 508(1) Subject to subrule (3), an appeal does not operate as a stay of enforcement or of proceedings under the decision appealed from unless the Court of Queen's Bench stays enforcement or proceedings of the decision pending appeal.
>
> (2) An appeal does not invalidate any intermediate act or proceeding except as may be directed by the court that rendered the decision being appealed.
>
> (3) If an application under subrule (1) to the judge appealed from is granted, refused, made but not heard, or is impractical, a judge of the Court of Appeal may de novo stay enforcement or proceedings of the decision being appealed.

[253] For example, Ontario Rules, r. 63.01(1) imposes a stay on both final and interlocutory decisions for the payment of money except support orders. An automatic stay also applies with respect to eviction orders; see r. 63.01(3).

[254] Rule 518.1 provides:

> 518.1 Part 12 of these Rules [Compromise using court process] applies, with the necessary changes, to an offer or payment into court made between the filing of an appeal and the commencement of oral argument of an appeal.

should be retained with refinement on some specific points.[255] The Committee considers that recommendation to retain but revise this area of practice is equally appropriate for appeals.

[331] However, as the Court of Appeal has noted, settlement rules framed in trial language are difficult to apply in the appellate context.[256] Consequently, some changes will be necessary to clarify the application of settlement offers on appeal. In lieu of the leaving this task to the reader by adopting the incorporation by reference approach currently taken in r. 518.1, the Committee considers that clarification should achieved by express rules. Using the Draft Rules as a base and making the necessary changes for appeals, the Committee considers that rules comparable to the following would be appropriate on appeal:

> ***Formal offers to settle***
>
> (1) At any time after a notice of appeal is filed, but 10 days or more before the appeal is scheduled to be heard, one party may serve on the party to whom the offer is made a formal offer to settle the action or a claim in the action.
>
> (2) The formal offer to settle must be made in the prescribed form and
>
> (a) name the party making the offer;
>
> (b) state the one or more parties to whom the offer is made;
>
> (c) state what the offer is and any conditions attached to it;
>
> (d) state whether or not interest is included in the offer and, if it is, to what date and at what rate it is payable;
>
> (e) state whether or not costs and the nature of them are included in the offer and if they are, to what date;
>
> (f) describe the requirements that must be complied with to accept the offer;
>
> (g) include a form of acceptance of the offer;
>
> (h) give notice of the costs consequences specified in rule....
>
> (3) To be a valid formal offer, the offer must remain open for acceptance until whichever of the following occurs first
>
> (a) the expiry of 2 months from the date of the offer or other later period specified in the offer, or
>
> (b) the date the hearing starts, as the case may be.

---

[255] Alberta Law Reform Institute, *Costs and Sanctions* (Consultation Memorandum No. 12.17) (Edmonton: Alberta Law Reform Institute, 2005) at 89-98.

[256] *Budget Rent-a-Car of Edmonton Ltd. v. Security National Insurance Co.*, 2001 ABCA 71, at para. 5. 277 A.R. 305.

(4) If a formal offer is not stated to expire after 2 months or is not otherwise time limited after the expiry of the 2 months, and if the offer does not otherwise expire because the hearing starts, the formal offer may only be withdrawn by the party making the offer serving on the party or parties to whom the offer was made a notice of withdrawal of the offer.

The Committee considers that the proposed rules for accepting offers and other technical aspects of settlement offers need not be modified for appeal.[257] However, for reasons of clarity, the Committee considers that the consequences of formal offers should be expressly stated. Again, using the Draft Rules as a base, the Committee proposes a rule comparable to the following:

Costs consequences of formal offer to settle

(1) Unless for special reason the court otherwise orders, if an appellant makes a formal offer that is not accepted and subsequently obtains a judgment or order in the action that is equal to or more favourable to the appellant than

---

[257] At time of writing, the Draft Rules provide:

Acceptance of formal offer to settle

4.22(1) A formal offer to settle an action or a claim in an action may only be accepted in accordance with this rule.

(2) At any time before a formal offer expires or is withdrawn, a party to whom a formal offer to settle has been made may accept the offer by

(a) filing the offer to settle and the acceptance of it, and

(b) serving on the party who made the offer notice that

(i) the offer has been accepted, and

(ii) any judgment or order in the terms of the offer has been agreed to.

(3) After the filing and service, a party may

(a) apply to the court for judgment or an order in accordance with the agreement, and

(b) continue with the action in respect of any matter not covered by the judgment or order and continue the action against any party who is not a party to the settlement.

If costs are not dealt with

4.23 If a formal offer and acceptance filed under rule 4.22 [Acceptance of formal offer to settle] does not deal with costs, either party may apply to the court for an order under rule 10.28 [Court ordered costs award] , taking into account rule 4.26 [Costs consequences of formal offer to settle], if appropriate.

Status of formal offers and acceptance

4.24 Unless otherwise agreed by the parties, a formal offer under this Division

(a) is to be considered as an offer to settle that is made without prejudice, and

(b) is not an admission of anything.

Confidentiality of formal offers and acceptance

4.25(1) Subject to subrule (2), a formal offer is to be kept confidential until

(a) it is accepted, or

(b) the debt or damages in the action have been decided.

(2) Subrule (1) does not apply to an action to which a defence under section 5 of the Defamation Act is pleaded.

the formal offer, the appellant is entitled to double the costs to which they would otherwise have been entitled for all steps taken in the appeal, excluding disbursements, after service of the formal offer.

(2) Unless for special reason the court otherwise orders, if a respondent makes a formal offer that is not accepted and a judgment or order in the action is made that is equal to or more favourable to the respondent than the formal offer, the respondent is entitled to costs for all steps taken in the appeal after service of the formal offer.

3. Settlement by agreement: consent orders or judgments

[332] At present, the court has discretion to grant an order or judgment where the respondent consents.[258] The Draft Rules will require that consent be given by the defendant's lawyer of record in certain circumstances – a change intended to reduce the risk of consent being given without adequate counsel. The Committee considers that a similar safeguard is equally appropriate for the respondent in an appeal.

4. Discontinuance

[333] At present, the rules describe how to discontinue an appeal. However, as the rule is framed permissively, there is nothing to require the appellant to file a discontinuance to end an appeal.[259] Consequently, many discontinued appeals may remain on the books longer than necessary. The Committee considers that filing notice of discontinuance should be mandatory where the appellant wishes to end the appeal.[260] The Committee also affirms the current policy of allowing the appellant to discontinue at any time without the consent of the court or other parties. While conditions placed on discontinuance at the trial level are inappropriate to ensure an

---

[258] Rule 529 provides:

529 A respondent may consent to the reversal or variation of the judgment, order or proceeding appealed from by giving to the appellant a notice of his consent signed by himself or his solicitor and thereupon the court may pronounce judgment of reversal or variation accordingly.

[259] Rule 525 provides:

525(1) An appellant may discontinue his appeal by filing with the registrar and serving upon the respondent a notice signed by the appellant or his solicitor stating that he has so discontinued it and thereupon the appeal is at an end and the respondent is entitled to his costs of the appeal.

[260] For example, the BC Appeal Rules, r. 46 provides:

46 Immediately after an appeal or an application for leave to appeal is settled or abandoned, the appellant must

(a) file a Notice of Settlement or Abandonment in Form 22, and

(b) serve one filed copy of the Notice of Settlement or Abandonment on each of the other parties.

appropriate resolution to the dispute, discontinuance on appeal confirms the trial result.

CHAPTER 9. POWERS OF THE COURT AND OFFICERS

A. Jurisdiction of the Court

ISSUE 58
Should rights of appeal be stated in primary legislation?

[334] The *Judicature Act* provides a general right of appeal from Queen's Bench to the Court of Appeal. However, the Court of Appeal's jurisdiction under the *Judicature Act* is subject to the Rules of Court.[261] This delegation ostensibly places the jurisdiction of the Court of Appeal within the control of the executive branch of government. Is this result appropriate for a superior court with the constitutional status and constitutional role of the Alberta Court of Appeal?

[335] To date, changes to the court's jurisdiction made within the Rules of Court have not raised a serious conflict with the court's status and role.[262] However, that abuse has not occurred and is unlikely to occur in future does not address the question of how the court's jurisdiction should be determined.[263]

[336] It is useful to compare the Court of Appeal to other Alberta courts. Both the Court of Queen's Bench and the Provincial Court have their core jurisdiction provided in primary legislation.[264] Moreover, the rights of appeal from Provincial Court to

---

[261] *Judicature Act*, R.S.A. 2000, c. J-2, s. 3(b)(iv)(B).

[262] Appellate jurisdiction is prescribed in rr. 505 and 671.Rule 740 also prescribes a right of appeal regarding crown practice and overlaps with r. 505.

[263] The relationship between superior courts and the executive branch of government and normative standards for change are discussed in Canadian Judicial Council, *Alternative Models of Court Administration* by Karim Benyekhlaf, Fabien Gélinas, Robert Hann, Lorne Sossin, and Carl Baar (Ottawa: Canadian Judicial Council, 2006).

[264] *Judicature Act*, R.S.A. 2000, c. J-2, and *Provincial Court Act*, R.S.A. 2000, c. P-31.

Queen's Bench are also provided in primary legislation.[265] In this regard, the ability to limit rights of appeal from Queen's Bench by secondary legislation may also be inappropriate given that court's constitutional status and role as a superior court.

POSITION OF THE COMMITTEE

[337] The Committee considers that, as a superior court of appellate jurisdiction, rights of appeal to and the jurisdiction of the Court of Appeal should be stated in primary legislation. Thus, the Committee proposes that the appellate jurisdiction currently provided in r. 505 should be moved to the appropriate statute. Similarly, any changes to rights of appeal proposed in this consultation memorandum should also be made in primary legislation. Finally, the Committee considers that the Court of Appeal's jurisdiction as set out in the *Judicature Act* should be amended so that such jurisdiction is not reduced by the Rules of Court.

B. Summary Disposition of Appeals

ISSUE 59
Under what circumstances should an appeal be subject to summary disposition?

[338] As noted in the CJC Report, "Whether or not the Rules of Court say so, case law uniformly holds that a Court of Appeal has inherent power to dismiss summarily an appeal which is not arguable."[266] While Alberta is among those jurisdiction that do not have an express appeal rule on this point, by analogy, r. 129 might apply.[267] However, there may be value in having a specific rule to deal with non-meritorious

---

265 *Provincial Court Act*, R.S.A. 2000, c. P-31, ss. 46(1) & 53.

266 CJC Report at 71.

267 Rule 129 provides:

> 129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
>
> (b) it is scandalous, frivolous or vexatious, or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly.

appeals. Such a rule might be a deterrent to certain appellants and an assistant to certain respondents or the court.

[339] Circumstances that might attract an application for summary disposition include the following:

- the court has no jurisdiction;
- the appeal is moot;
- the notice of appeal or appellant's factum discloses no reasonable grounds of appeal;
- the appeal is frivolous, vexatious or improper;
- the appeal is an abuse of process.

POSITION OF THE COMMITTEE

[340] The Committee considers that there should be an appeal rule to allow for summary disposition of non-meritorious appeals. The rule should be available on application or on the court's own initiative. The Committee considers that summary disposition should be available in the circumstances set out above and that the court should have broad discretion to achieve an appropriate result in dealing with non-meritorious appeals.

C. Powers of the Registrar and Officers

ISSUE 60

What powers are appropriate for the following court officers?
(a) Registrar
(b) Deputy registrar
(c) Case management officer
(d) Clerk

Officers

[341] The *Court of Appeal Act* provides for the appointment of officers required for the business of the court.[268] The court currently has the following officers:

- registrar (Edmonton only)
- 2 deputy registrars (Edmonton and Calgary)
- 2 case management officers (Edmonton and Calgary)
- clerks (Edmonton and Calgary)

Who holds powers?

[342] Court officers' authority and powers are set out in the *Court of Appeal Act*, the *Rules of Court*, and Practice Directions. Generally speaking, powers are held by the registrar only. Very few provisions refer expressly to the deputy registrar.[269] There is no general provision that extends the registrar's powers to a deputy registrar.[270] The registrar's authority to delegate to the deputy registrar or other officer is also limited.[271] In essence, the current provisions create a situation that would not allow the court to function if the situation prescribed on paper were followed in practice. The balance of this section outlines what powers and authority are currently provided and asks who should exercise them to allow the court to properly perform its role.

Evidence

[343] The *Court of Appeal Act* gives all officers of the court the powers to administer oaths, take affidavits and statutory declarations, receive affirmations, and examine parties and witnesses as the court directs.[272] Are changes to these powers required?

---

[268] *Court of Appeal Act*, s. 13.

[269] The *Court of Appeal Act*, s. 14 and rr. 530(12) and 714 refer to both registrar and deputy registrar. In contrast, r. 530(16) refers to the deputy registrar only.

[270] In contrast, within the Court of Queen's Bench, the definition of "clerk" includes deputy clerk: r. 5(1)(c).

[271] Rule 714(1) allows the registrar to appoint another person to act in the registrar's place in the event of absence or illness. Rule 714(2) allows the registrar to designate another officer to sign or certify documents on the registrar's behalf. Although r. 713 allows the Chief Justice to designate another person to perform the registrar's duties, it too is limited to absence or illness.

[272] *Court of Appeal Act*, s. 14(1).

Filing and custody of documents

[344] The registrar is required to receive documents for filing, to retain them for the duration of the appeal, and to provide them for hearing.[273] Should these powers be extended to deputy registrars? To other officers?

Faulty documents

[345] The *Court of Appeal Act* grants the registrar, deputy registrar, and case management officer broad authority to accept faulty documents where the fault does not affect the substance of the document.[274] However, narrower provisions in the Rules of Court prevail in practice.[275] Rule 700 gives the registrar express authority to reject any document that is not legible or printed appropriately; in special circumstances, the registrar may exercise discretion to accept such documents.[276] Rule 534 gives the registrar discretionary authority to reject faulty appeal books or to

---

[273] Rule 723 provides:

> 723 A registrar of the court shall ...
> (a) receive and file notices of appeal and of motions to the Court of Appeal and all papers and documents in connection therewith;...
> (d) have control and custody of appeal books, records, exhibits, affidavits and papers relating to appeals, motions and matters before the court until the conclusion thereof;
> (e) attend with records, exhibits and papers on the court or the judges thereof ....

[274] The *Court of Appeal Act*, s. 14 provides:

> 14(2) A Registrar, Deputy Registrar or case management officer, at the direction of the Court, may assist the Court with respect to the management of matters before the Court and the business of the Court and without restricting the generality of the foregoing may, without the attendance of a judge,
> (c) subject to any conditions as appear appropriate to the Registrar, Deputy Registrar or case management officer,
> (ii) order or permit deviations in the form of appeal books, factums or other documents except where a deviation would affect the substance of an appeal book, factum or other document;

[275] See for example, the range of documents and faults covered by the checklists: Alberta Courts, online: Publications & Forms <http://www.albertacourts.ab.ca/go.aspx?tabid=240>.

[276] Rule 700 provides:

> 700(1) Unless otherwise provided, all documents shall be printed, typewritten, or reproduced legibly in a clear and legible manner upon one side of good quality paper not exceeding 8½ inches in width or 11 inches in length.
> (2) A clerk or Registrar may under special circumstances accept any document which is not in conformity with this Rule.

require that parties obtain a fiat.[277] In contrast, r. 540 leaves the registrar no discretion; faulty factums must be rejected.[278] Are these narrower provisions appropriate in light of the broad power stated in the Act? Should all documents be subject to the same discretion to accept? Or is mandatory rejection appropriate for some faulty documents? Should powers regarding faulty documents be extended to deputy registrars? To other officers?

Time for completing steps

[346] The *Court of Appeal Act* allows the registrar, deputy registrar or case management officer to fix, revise, extend or shorten the times that govern the steps of an appeal.[279] However, r. 530 leaves the registrar no discretion; an appeal must be struck if the appeal books are filed late.[280] The proposals put forward by this

---

[277] Rule 534 provides:

534 The registrar shall examine all appeal books before they are filed and if they do not comply with these Rules or are not readily legible or are slovenly or for any good and sufficient reason he may refuse to accept them for filing.

Rule 530(12) provides:

530(12) Subject to subrules (13) and (13.1)(a), an appeal book that does not conform to subrules (1) to (11) requires a fiat from a judge, the Registrar or the Deputy Registrar and the fiat must be obtained

(a) where there is consent, by providing a letter to the Registrar that sets out the discrepancies and requests that a fiat be granted;

(b) where there is no consent, by filing and serving a notice of motion, supporting affidavit and memorandum returnable before a judge.

[278] Rule 540(9) provides:

540(9) The registrar shall not accept any factum or copy which is not in accordance with these rules or which is not readily legible or is slovenly.

[279] The *Court of Appeal Act*, s. 14 provides:

14(2) A Registrar, Deputy Registrar or case management officer, at the direction of the Court, may assist the Court with respect to the management of matters before the Court and the business of the Court and without restricting the generality of the foregoing may, without the attendance of a judge,

(c) subject to any conditions as appear appropriate to the Registrar, Deputy Registrar or case management officer,

(i) fix, revise, extend or shorten the times for the filing of agreements as to contents of appeal books and factums; ...

(iii) fix, revise, extend or shorten the times for taking steps in an appeal.

Subrule (i) appears redundant in light of (iii).

[280] Rule 530 provides:

530(15) Appeal books must

(a) be prepared promptly and filed and served forthwith after they are prepared, and

(continued...)

Committee with respect to lateness would also have automatic consequences, similar to r. 530. Those proposals would be undermined and appeals would be delayed if the power to adjust time under the Act were to be used after the fact or at the last minute merely to avoid the consequences of lateness. However, if exercised proactively to assist parties in managing their appeal, the power to adjust time is consistent with the Committee's proposals. What other factors influence the power to adjust time?

Scheduling hearings

[347] The registrar is required to enter appeals and motions for hearing at each sitting of the court.[281] Should this authority be extended to deputy registrars? To other officers?

Record of proceedings

[348] The registrar is required to keep a record of proceedings.[282] Should this authority be extended to deputy registrars? To other officers?

---

[280] (...continued)

(b) in any event, unless otherwise ordered by a judge, be filed not later than 12 weeks from the date on which the agreement as to contents was filed or fixed,

or the appeal will be struck by the Registrar.

[281] Rule 723 provides:

723 A registrar of the court shall ...

(c) enter in a proper book provided for that purpose a list of appeals and motions set down for hearing at each sitting of the court; make out and post a list of the appeals and motions and furnish each judge of the court with a copy thereof;

The *Court of Appeal Act*, s. 14(2)(b) also allows the registrar, deputy registrar, and case management officer to set down and remove cases from the general appeal list. However, the Committee has proposed that calling the list be dispensed with. If so, consequential amendment of s. 14 would be appropriate.

[282] Rule 723 provides:

723 A registrar of the court shall...

(e) attend with records, exhibits and papers on the court or the judges thereof and keep a full and complete record of all proceedings before the court or the judges thereof, showing the names of the judges present, the date, the style of cause in each case, the names of counsel and for whom appearing, the particulars of the appeal or motion, the result, the judgment or judgments, if any, given, and the time occupied in hearing;

Taxation of costs

[349] The registrar is responsible for taxation of costs in an appeal.[283] Should this authority be extended to deputy registrars? To other officers?

Returning documents

[350] The registrar is responsible for the return of documents.[284] Should this authority be extended to deputy registrars? To other officers?

Additional powers

[351] Do court officers require additional powers to allow the court to function more effectively?

POSITION OF COMMITTEE

[352] The Committee invites your comments on what powers court officers need to allow the court to function most effectively. The Committee is specifically interested in the views of the court and the registry office in this regard.

---

[283] Rule 5(1) provides:

> 5(1) (s.1)"taxing officer" means ...
>
> (ii) in the taxation of costs in any appeal to the Court of Appeal, the Registrar in whose jurisdiction the proceedings are being carried on or were determined;

Rule 723 provides:

> 723 A registrar of the court shall perform such duties as may be required of him under any Rule or assigned to him by a judge of the Court of Appeal or by the Attorney General and shall ...
>
> (f) ... tax the costs of motions and appeals before the court;

[284] Rule 699 provides:

> 699(3) Where exhibits have not been applied for within two years from the date of trial, or, if an appeal has been taken, within two years of the conclusion of the appeal, the clerk or Registrar may serve notice on the solicitor for the parties that unless the exhibits are applied for in three months they will destroy or otherwise dispose of them and subject to subrule (4), unless the exhibits are applied for within that period, the clerk or Registrar may on order of a judge, destroy or otherwise dispose of them.

Rule 723 also provides:

> 723 A registrar of the court shall ...
>
> (g) unless otherwise ordered, at the conclusion of an appeal and after issue of the order of judgment and the taxation of costs; transmit to the office in which the action or proceeding was commenced all papers relating thereto except the appeal books; retain possession of the appeal books in appeals entered for hearing at the place where he has his office.

D. Settling and Signing Judgments and Orders

ISSUE 61
When should court officers be authorised to settle minutes and sign judgments and orders?

[353] At present, rules 318 to 321 provide for settling minutes and signing judgments and orders and also outline when the registrar may do these tasks instead of a judge. These rules were reviewed by the General Rewrite Committee and found to be confusing, contradictory and inappropriate. The General Rewrite Committee recommended the repeal of rules 318 to 321 for trial purposes in favour of a simpler scheme.[285] The question is whether appellate practice should follow suit.

[354] At time of writing, the Draft Rules governing the settling and signing of judgment provide as follows:

> ***Dispute over content of judgment or order***
>
> 9.3 If there is a dispute about the content of a judgment or order, the dispute must be referred to the court for resolution.
>
> ***Signing judgments and orders***
>
> 9.4(1) Unless subrule (2) applies, the judge or master who pronounces judgment or makes an order must sign it
>
> (a) on pronouncement, if the hearing was conducted without notice to any other party, or the parties in attendance at the hearing have approved the form of the judgment or order, or
>
> (b) after pronouncement, if the judgment or order has been prepared in accordance with rule 9.2 [Preparation of judgments and orders].[286]
>
> (2) Unless the court otherwise orders, the court clerk may sign the judgment or order in any of the following circumstances:
>
> (a) on an application or in a proceeding in which a party adverse in interest did not attend;
>
> (b) the party adverse in interest has approved the form of the judgment or order, or waives approval of its form;

---

[285] Alberta Law Reform Institute, *Motions and Orders* (Consultation Memorandum No. 12.10) (Edmonton: Alberta Law Reform Institute, 2004) at 66-68.

[286] The draft test of r. 9.2 is set out in footnote 88.

(c) if the court directs that approval of the form of the judgment or order by a party is not required;

(d) if the court directs the court clerk to sign the judgment or order.

The Draft Rules avoid the contradictions in the current rules and clearly outline when a court officer may sign in place of a judge. Would similar provisions be appropriate for appellate judgments and orders? Where the draft rule refers to "court clerk", is the registrar the appropriate officer to sign appeal judgment in place of a judge? Should signing authority also extend to deputy registrars?[287]

POSITION OF THE COMMITTEE

[355] The Committee considers that the Draft Rules for settling and signing judgment are an appropriate model for appeals. The Committee considers that the registrar and deputy registrars should be able to sign judgments and orders in place of a judge where the circumstances set out in draft rule 9.4(2) are met.

E. Housekeeping Points

[356] In the course of its analysis, the Committee noted areas where minor improvements would additionally enhance appellate practice. These areas are more "pedestrian" in nature and do not raise significant policy issues. Accordingly, the Committee has not identified specific issues for consultation. However, the Committee welcomes comments on any of the points discussed below.

1. Mandatory sittings

[357] The *Court of Appeal Act*, s. 17 provides that "The Chief Justice may designate the sittings of the Court." The language used is permissive. Section 17 came into effect in its current form in 1998.[288] In contrast, r. 502, which dates back to 1914, mandates that the court "shall sit at least twice a year at Edmonton and at least twice a year at Calgary".[289] The mandatory sittings required by r. 502 are inconsistent with the

---

[287] "Court clerk" in the Draft Rules refers to the court clerk appointed for a judicial centre and includes deputy clerks.

[288] *Justice Statutes Amendment Act*, 1998, S.A. 1998, c. 18, s. 6.

[289] Rule 502 provides:

502 The Court shall sit at least twice a year at Edmonton and at least twice a year at Calgary on such days as the Chief Justice of Alberta thereof appoints and at any other time and place that the judges

(continued...)

discretionary power newly established in the *Court of Appeal Act*. Rule 502 is thus superceded.

[358] Moreover, provided that facilities are available, there is little risk of the court not sitting at least twice in each of Edmonton and Calgary. The court's docket is a far greater motivator than r. 502. Further, in the unlikely event that the docket does not warrant the sittings mandated by r. 502, why should those sittings proceed? Finally, as recent events have shown, when facilities are not available, the court should be able to suspend operations until it can provide adequate service.[290] Can r. 502 be repealed?[291]

2. Discretion to adjourn sittings

[359] As noted, the Chief Justice of Alberta has the statutory power to designate sittings.[292] This statutory power and the court's inherent jurisdiction must also convey the power to adjourn sittings as temporally or geographically required. Can r. 504 be repealed?[293]

---

[289] (...continued)

> consider necessary.

Rule 502 can be traced to the Alberta Rules of Court 1914, r. 164. Prior to 1914 appellate sittings of the Supreme Court *en banc* were set by the Lieutenant Governor in Council: *Supreme Court Act*, S.A. 1907, c. 3, s. 30; also *Judicature Ordinance 1898*, C.O.N.W.T. 1898, c. 21, schedule, r. 498.

[290] Emergency Notice to the Profession (re Calgary closure) in effect 3 July 2001 to 24 January 2003. See Notice to the Profession – Rescissions (24 January 2003), online: The Court of Appeal of Alberta <http://www.albertacourts.ab.ca/ca/practicenotes/NTPJan242003.pdf>.

[291] Rule 705 would also seem to be inconsistent with the statutory power in the Act:

> 705 The judges of the Court of Queen's Bench and Court of Appeal shall appoint the days and places upon which sittings for trial of actions shall be held, but a judge may hold a special sitting at any other time or place.

[292] *Court of Appeal Act*, s. 17.

[293] Rule 504 provides:

> 504 Any sitting may be adjourned from time to time and from place to place as may be necessary.

See also r. 709.

3. Discretionary view or inspection

[360] Rule 517 allows the court to inspect property if the trial judge did.[294] It is inherent in the concept of an appeal that the court will review the evidence heard at trial. Logically, if the trial included a view or inspection the court should be able to do the same either in its inherent jurisdiction to review the evidence or as a superior court of record. Rule 518(b) also allows the court to receive further evidence. Thus, even if the trial had not included a view or inspection, the court would be able to do so as further evidence. Moreover, the jurisdiction of the court and its judges described under the *Judicature Act* must surely encompass powers to undertake a view or inspection. The Committee considers that r. 517 is redundant and can be repealed.

4. Delivery of judgment

[361] Rule 521 allows the court to deliver judgment at any time, regardless of whether the court is sitting.[295] As a superior court, the court's authority to deliver judgment is inherent. Rule 521 also allows a judge to deliver judgment when authorised by the court or, with authorisation, to deliver the judgment of another judge. There may be an issue as to whether a trial judge can authorise another to deliver judgment in his or her place,[296] however, in the collective decision-making process of an appellate court such authority must also be inherent. Moreover, in light of the court's administrative practice of issuing written reasons, the scope of r. 521 is reduced. The Committee considers that r. 521 is redundant and can be repealed.

5. Two judge panels

[362] A recent amendment to the *Court of Appeal Act* suggests that two judge panels may be adopted in the future. The Committee has two observations to make regarding this possibility.

---

[294] Rule 517 provides:
517 In appeals from judgments in actions in which an inspection of property was made by the trial judge or a view had by the jury, the court may make a similar view or inspection.

[295] Rule 521 provides:
521(1) Judgment may be delivered at any time, whether at a sitting or otherwise.
(2) Any judge may deliver the judgment of the court when authorized to do so by the judges who heard the matter and may deliver the judgment of any other judge when authorized to do so by the other judge, notwithstanding the absence of the judge or judges aforesaid.

[296] There is no comparable rule in the trial rules although the Court of Queen's Bench's inherent jurisdiction as superior court will likely be sufficient.

[363] The first observation contemplates the possibility that the two judges disagree on the matter. If one judge on a three judge panel is unable to participate in the decision, the two remaining judges must be unanimous in their decision in order to given judgment on behalf of the Court.[297] However, unanimity is not required for a panel originally constituted as two judges. How might matters be determined where the panel cannot agree? Rehearing, consultation with a third judge, or circulating the judgments to the wider court (see Notice to the Profession dated 29 March 2000) are possible options. However, both rehearing and circulation carry the disadvantage of requiring more court resources than would an initial three judge panel. Consulting with a third judge might raise natural justice concerns regarding a litigant's ability to be heard by the decision-maker; moreover, were a third judge to be brought in, he or she would be the decision-maker in a very real sense.

[364] The Committee's second observation relates to the possibility of Queen's Bench judges sitting on two judge appeal panels.[298] Where one of the original two judges is unable to participate in the decision, the remaining judge can give judgment on behalf of the Court.[299] If the remaining judge is a Queen's Bench judge sitting ex officio, this results in the awkward situation of one Queen's Bench judge having sole authority to decide an appeal from the decision of another Queen's Bench judge.

---

[297] The *Court of Appeal Act*, s. 8(1) provides:

> 8(1) If any matter before the Court has been heard by 3 or more judges and is standing for judgment and one of the judges who heard that matter
>
> (a) is transferred to any other court,
>
> (b) resigns that office,
>
> (c) dies,
>
> (d) is absent through illness or other cause, or
>
> (e) is for any other reason unable to act,
>
> then the remaining judges may, if unanimous in their decision, give judgment on behalf of the Court notwithstanding section 7.

[298] The *Court of Appeal Act*, s. 3(3) provides that "each judge of the Court of Queen's Bench of Alberta is by virtue of that office a judge of the Court of Appeal."

[299] The *Court of Appeal Act*, s. 8(2) provides:

> 8(2) If any matter before the Court has been heard by 2 judges and is standing for judgment and any of subsection (1)(a) to (e) applies to one of the judges, the remaining judge may give judgment on behalf of the Court.

6. Consent fiats

[365] As noted, the *Court of Appeal Act* allows the registrar, deputy registrar or case management officer to "order or permit deviations in the form of appeal books, factums or other documents except where a deviation would affect the substance of an appeal book, factum or other document."[300] The exercise of this discretion is subject to the direction of the court. For example, factums over 30 pages are to be refused regardless of whether the substance of the document is affected.[301] Where a faulty document falls outside a court officer's discretion, the document can only be accepted by judge's fiat.

[366] Current Alberta rules also include a hybrid form of fiat. For example, a faulty appeal book can be accepted by registrar's fiat provided that the parties consent.[302] If the parties do not consent, then the appeal book can only be accepted by judge's fiat. In this regard, consent is the determining factor in whether to issue a registrar's fiat. However, the consent requirement would appear to be superfluous where the defect in the appeal book does not affect its substance. In such cases, the registrar has discretion under the *Court of Appeal Act* to accept the document. Moreover, the fact of consent could be used to obtain a fiat and to file a document where the defect does affect the substance of the document. In this regard, the Committee considers that the practice of issuing fiats based on consent should not be continued. The test prescribed in the *Court of Appeal Act*, i.e. whether the defect affects the substance of the document, is an appropriate basis for the exercise of discretion regarding faulty documents.

---

300 *Court of Appeal Act*, s. 14(2)(c)(ii).

301 CPD C.1.

302 Rule 530(12) provides:

> 530(12) Subject to subrules (13) and (13.1)(a), an appeal book that does not conform to subrules (1) to (11) requires a fiat from a judge, the Registrar or the Deputy Registrar and the fiat must be obtained
>
> (a) where there is consent, by providing a letter to the Registrar that sets out the discrepancies and requests that a fiat be granted;
>
> (b) where there is no consent, by filing and serving a notice of motion, supporting affidavit and memorandum returnable before a judge.

Data provided by the court shows an annual average of less than 18 registrar's fiats issued in civil appeals during 1999-2003: Civil appeals data 1999-2003. Fiats based on consent are also available for sentence appeal books: CPD I.4(j).

7. Additional Sanctions

[367] Rule 599.1 allows the court to impose a penalty in the form of costs payable to the court where failure to comply interferes with the proper administration of justice.[303] Rule 599.1 has been discussed in another consultation memorandum and will not be considered further here.[304] While the Committee has proposed specific sanctions for lateness or non-completion of specific steps in an appeal, there will still be scope in certain instances to impose additional measures. As with curing irregularities, the Committee considers that the imposition of an additional sanctions is a matter properly left within the discretion of the court under a comparable rule to r. 599.1.

---

[303] At time of writing, the draft rule to replace r. 599.1 provides:

Penalty for contravening the rules

10.48(1) The court may order a party, lawyer or other person to pay to the court clerk a penalty in an amount determined by the court if

(a) the party, lawyer or other person contravenes or fails to comply with these rules, and

(b) the contravention or failure to comply has, in the opinion of the court, interfered with or may interfere with the proper or efficient administration of justice.

(2) The order applies despite

(a) a settlement of the action,

(b) an agreement to the contrary by the parties.

[304] Alberta Law Reform Institute, *Costs and Sanctions* (Consultation Memorandum No. 12.17) (Edmonton: Alberta Law Reform Institute, 2005) at 69.