ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Criminal Appeal Procedures

Court of Queen's Bench and
Court of Appeal of Alberta

Consultation Memorandum No. 12.22
December, 2010

Deadline for Comments: March 1, 2011

INVITATION TO COMMENT

Comments on the proposals and issues described in this memorandum should reach ALRI by March 1, 2011

This Consultation Memorandum contains proposals for a simplified procedure for conducting criminal appeals before the Court of Queen's Bench and the Court of Appeal of Alberta.

A review of the requirements for bringing a criminal appeal before the Alberta courts indicated that the process is complex and complicated. In addition, comments made by those involved in criminal appeals indicate that the procedures are not generally well known and that it can be difficult to determine with any certainty what is required at each stage of an appeal proceeding. Further, the requirements for taking the same step may be different depending on whether the appeal is heard by Queen's Bench or the Court of Appeal and on the geographic location of the court.

ALRI assessed the need for reform, researched the law and court practices and prepared materials. The Criminal Rules Working Committee reviewed the materials and provided the expert guidance and advice needed to accurately describe the criminal appeal process and develop consensus proposals appropriate for each stage of the process. A short summary concerning criminal trial decisions which can be appealed to Queen's Bench or the Court of Appeal was prepared to provide background to the process review and is included for information purposes only. Reform of the substantive law of criminal appeals is beyond the scope of the project.

A simple, common process, with adaptations as necessary, is proposed for criminal appeals before both Queen's Bench and the Court of Appeal. Issues and proposals related to each part of the common process and procedures for obtaining court assistance are described.

Of note, the issues and proposals contained in this Consultation Memorandum are not final and are put forward to the legal community for comment.

We encourage you to provide your thoughts, comments and suggestions concerning the general proposal for a simplified criminal appeal process, specific procedures proposed at each step of the process, the issues and any other criminal appeal matters that you think should be addressed. Please submit your comments in writing by email, fax or regular mail to:

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The process of law reform is essentially public. This said, you may provide anonymous written comments 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 comments, ALRI assumes that all ***written comments are not confidential***, and that 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.

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ALBERTA LAW REFORM INSTITUTE

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

The members of ALRI's Board are J.S. Peacock, Q.C. (Chair); N.D. Bankes; P.L. Bryden; A.S. de Villars, Q.C.; J.T. Eamon, Q.C.; The Honourable Judge C.D. Gardner; W.H. Hurlburt, Q.C.; A.L. Kirker; P.J.M. Lown, Q.C. (Director); The Honourable Justice A.D. Macleod; The Honourable Justice B.L. Rawlins; N.D. Steed, Q.C.; and D.R. Stollery, Q.C.

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This Consultation Memorandum has been prepared with the assistance of the following members of the Criminal Rules Working Committee (Committee), who were generous in the donation of their time, expert knowledge and practical suggestions:

The Honourable Justice Ronald L. Berger, Court of Appeal of Alberta,
The Honourable Justice Elizabeth A. Hughes, Court of Queen's Bench of Alberta,
The Honourable Judge Michael G. Allen, Provincial Court of Alberta,
The Honourable Judge Bascom, Provincial Court of Alberta,
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Laura K. Stevens, Q.C., Dawson Stevens Duckett & Shaigec, and
Geneviève Tremblay-McCaig, Alberta Law Reform Institute.

The Committee met six times during a one year period to review materials prepared by ALRI and to provide the expert guidance and advice necessary to accurately describe the criminal appeal process and develop consensus proposals appropriate to each stage of the process. In particular, the Committee clarified the main steps, identified practice variations, affirmed necessary differences, described common practices, and developed proposals intended to resolve appeal problems. The core process, leave, interim relief and court assistance proposals contained in this Consultation Memorandum are intended to reflect the Committee's advice.

This Consultation Memorandum was researched and written by Cheryl Hunter Loewen, Counsel and Geneviève Tremblay-McCaig, Counsel, with the editorial and analytical guidance of Sandra Petersson, Research Manager. Ilze Hobin, Administrative Secretary, coordinated the Committee meetings and produced the Consultation Memorandum. Maria Lavelle, Counsel, conducted the final editorial review. The legal research was completed with the assistance of the following law students at the University of Alberta: Lori Kennedy, Kathy Wang, Kelly Nytcha, Ryan Krushelnitzky, Jessica Bortnick, Kyla Conner, Kurtis Streeper and Anna-May Choles.

EXECUTIVE SUMMARY

Navigating the criminal justice system to appeal a trial outcome or decision is a challenging task. To further complicate matters, there is no single up to date and readily accessible guide to the procedures that govern the criminal appeal process in Queen's Bench or the Court of Appeal. Many of the requirements are either described in, or created by the courts pursuant to the powers delegated under the *Criminal Code*. Rules are found in multiple sources scattered across federal and provincial instruments and directives and these rules are different as between appeal courts and sometimes inconsistent with one another.

The objective of this Consultation Memorandum is to develop a criminal appeal process that is clear, simple, accessible, effective and timely. To this end, the Consultation Memorandum proposes a single, simple process and a series of requirements for each step of the process, all of which may form the basis for criminal appeal rules that can apply to both courts. Specific proposals generally draw on statutory provisions and current practices and are intended to eliminate process gaps, overlaps and inconsistencies.

Chapter 1 - Criminal Appeal Process - The Need for Reform describes the existing criminal appeal process and concludes that it is complex and complicated. Chapter 1 also discusses how the goal of a clear, simple, accessible, effective and timely criminal appeal process could be achieved by:

- implementing a common process for appeals to Queen's Bench and the Court of Appeal, with streamlined and standardized steps,
- relying on existing best practices,
- using clear, plain language,
- expanding the coordination and communication role of the court, and
- adopting a flexible approach to procedural requirements.

Chapter 2 - Core Process sets out a step by step core process for criminal appeals and proposes requirements for each of the actions that must be taken, start to finish, in order to exercise a right of appeal before Queen's Bench or the Court of Appeal. Chapter 2 is arranged such that appeal steps are identified, corresponding

reform considerations and issues are briefly discussed and appropriate procedures are proposed.

Chapter 3 - Leave to Appeal contains proposals for leave applications to be combined with substantive appeal hearings in cases where leave is required at first instance and conducted as a separate application proceeding when a party seeks leave to appeal the decision of an appellate court.

Chapter 4 - Interim Relief Pending Appeal describes current and proposed processes for obtaining sentence relief while an appeal is underway, including proposals for a stay application process and description of how to apply for judicial interim release.

Chapter 5 - Court Assistance identifies additional actions that may be taken during the course of an appeal to get help from the court. Chapter 5 proposes requirements for getting procedural assistance from a court officer, duty judge or the hearing judge or panel, as appropriate. The matters that each entity can help with are identified, associated issues are discussed and process proposals are made.

Appendix A - Criminal Appeal Rights and Courts contains a one page table which summarizes the criminal appeal rights, leave requirements and appeal jurisdiction of the Court of Queen's Bench and Court of Appeal.

Appendix B - Alberta Criminal Appeal Rules and Practice Directions provides a brief overview of criminal appeal rules in Alberta.

Appendix C - Criminal Appeal Rules of Canadian Province and Territories lists the statutory instruments which contain criminal appeal rules for provinces and territories other than Alberta and is provided for general information purposes.

TABLE OF ABBREVIATIONS

Charter	*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
CPD	Alberta Court of Appeal, *Consolidated Practice Directions*, online: <http://www.albertacourts.ab.ca/CourtofAppeal/PracticeNotes/tabid/86/Default.aspx#615>.
Criminal Code	*Criminal Code*, R.S.C. 1985, c. C-46.
Ewaschuk	E.G. Ewaschuk, *Criminal Pleadings and Practice in Canada,* 2nd ed., looseleaf (Aurora, Ont.: Canada Law Book).
Martin	Edward L. Greenspan & the Honourable Mr. Justice Marc Rosenberg, *2010 Martin's Annual Criminal Code - Student Edition*, (Ontario: Canada Law Book, 2009).
SCC Rules	*Rules of the Supreme Court of Canada,* SOR/2002-156 as amended by SOR/2006-203.

CRIMINAL RULES

Criminal appeal practice in Alberta is currently governed by the following rules and practice directions, all of which are treated as being in effect:

Rules of the Court of Appeal of Alberta as to Criminal Appeals, S./I. 77-147,
Rules Governing Summary Conviction Appeals [Part 61.1, Rules 860.1 - 860.9], repealed, Alta. Reg. 243/96, s. 36 and
Court of Appeal of Alberta, *Consolidated Practice Directions*.

LIST OF ISSUES

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Summary: A common set of rules, with modifications as appropriate, could apply to both courts.

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Summary: An accused appellant could file a notice of appeal in a judicial centre that is convenient for the accused, with a court officer then directing the appeal to the appropriate court, if necessary.

CORE PROCESS

ISSUE No. 3
When should a notice of appeal be filed? 14

Summary: A notice of appeal should be filed within one month after the date of conviction, acquittal, sentencing, judgment or other final decision that is the subject of the appeal.

ISSUE No.4
What information should be included in a notice of appeal? 15

Summary: A notice of appeal should include enough information to identify the appellant, specify the trial or other decision appealed, direct the appeal to appropriate court and provide notice to the respondent. See specific proposals.

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Summary: In general, personal service requirements should be replaced by less formal, effective communication methods and the court should continue to facilitate timely, accurate exchange of appeal information. The practice of the court informing the Crown respondent of a prison-filed notice should be expanded to include the court informing the Crown respondent of any notices of appeal. The requirement that a Crown appellant personally serve an accused respondent should continue to apply.

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ISSUE No. 8
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ISSUE No. 11
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ISSUE No. 13
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ISSUE No. 14
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ISSUE No. 16
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LEAVE TO APPEAL

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ISSUE No. 20
When and how should leave applications be heard for second level appeals? . . . 43

Summary: For second level appeals, the leave application should be filed within one month after the decision for which leave to appeal is sought. The leave application should be processed as a separate, distinct matter with the materials and hearing dedicated to addressing the merits of the leave application.

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Summary: An applicant may request to be present at the hearing. The duty judge may grant the request and determine the method of attendance.

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ISSUE No. 26
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ISSUE No. 27
What procedure should be used when a lawyer wishes to withdraw as appeal counsel?. 70

Summary: A lawyer of record who starts an appeal or files materials in response should apply for an order authorizing the lawyer to stop acting.

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Summary: An appeal party should apply to introduce new evidence that was not before the trial court or other decision maker. See specific proposals.

ISSUE No. 29
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Summary: A party who missed the hearing should apply within 5 days after the hearing to have the court consider the arguments he or she intended to make.

CHAPTER 1. CRIMINAL APPEAL PROCESS - THE NEED FOR REFORM

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

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

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

[3] In general, there may be nothing inherently wrong with complicated procedures. However, a criminal appeal process that is not clear and simple may not be as accessible, efficient or effective as it could be and this might have a detrimental effect

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

[2] The Right Honourable Lord Justice Auld, *A Review of the Criminal Courts of England and Wales*, (London: H.M.S.O., September 2001) at 611, online: <http://www.criminal-courts-review.org.uk>.

on the fair administration of justice and public confidence in the criminal justice system.

[4] There are two main reasons why the criminal appeal process is complicated. First, the substantive law of criminal appeals and court jurisdiction is complex. Second, there are many detailed requirements for bringing a criminal appeal before the appropriate court and these requirements are presently found in a number of sources of varying authority and currency.

[5] While changes to the substantive criminal law are beyond the scope of the project, it is substantive law that establishes and governs the criminal appeal process. Accordingly, brief descriptions of the right to appeal a criminal trial decision and the court's jurisdiction to hear an appeal are provided in the next section as background to the process discussion and proposals which follow.

A. Criminal Appeals Are Complex

1. Right to appeal - Which criminal decisions may be appealed?

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

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

[4] It should be noted that the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*] does not create a constitutional right to appeal the outcome of a criminal trial but provides grounds for challenging a decision if it can be shown that an individual's fundamental rights were violated during the course of the proceedings; see *Canada (Minister of Employment and Immigration) v. Chiarelli,* [1992] 1 S.C.R. 711 generally and at 739, *R. v. Rogers* (2006), 207 C.C.C. (3d) 489 (S.C.C.) at paras. 18-21.

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

(continued...)

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

2. Court jurisdiction - Which court hears the appeal?

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

[9] The answer to the question of which of these two courts would hear a particular appeal depends primarily on whether the offence was tried by way of summary conviction or indictment,[10] not on the nature of the offence, trial court, decision or severity of the sentence. Although there are a number of factors which determine the

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[5] (...continued)
Income Tax Act, R.S.C. 1985, c.1 (5th Supp.) and *Tobacco Act*, S.C. 1997, c. 13.

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

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

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

[7] See summary in *Appendix A - Criminal Appeal Rights and Courts*.

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

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

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

details of the trial process, summary conviction offences are generally tried in the Provincial Court and indictable offences in the Court of Queen's Bench.[11]

[10] In 2006 - 2007 there were 50,791 criminal offences tried in Provincial Court.[12] In comparison, 353 criminal offences were tried in the Court of Queen's Bench. Although there are no counts of the number of summary conviction appeals brought before Queen's Bench or of indictable offence appeals heard by the Court of Appeal, it is reasonable to assume that the majority of the criminal appeals are heard by Queen's Bench.

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

[11] Matters tried by way of summary conviction are primarily appealable to Queen's Bench.[13] Summary conviction appeals, either by the accused or Crown, are almost always as of right and not limited to particular grounds.[14]

b. Indictable offence matters - Court of Appeal

[12] Matters tried by way of indictment are appealable to the Court of Appeal.[15] In the event of mixed proceedings in which both summary and indictable offences were tried together, either party may, with leave, appeal the summary conviction matter

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

[12] Statistics Canada, *Adult Criminal Court Statistics, 2006/2007* by Michael Marth (Ottawa: Canadian Centre for Justice Statistics, 2008) at 14 Table 4 - Cases by decision, adult criminal court, Canada 2006/2007, online: Statistics Canada <http://www.statscan.gc.ca/pub/85-002-x2008005-eng.pdf> shows a total of 51,144 criminal cases tried in Alberta. The 2006/2007 data tables submitted to Statistics Canada by Alberta Justice, Court Services [unpublished] note the number of criminal cases tried in Provincial Court and Queen's Bench.

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

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

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

together with the indictable offence matter to the Court of Appeal, subject to certain conditions.[16]

[13] An accused can appeal decisions made in a trial by indictment in some situations as of right to the Court of Appeal.[17] The Crown can also appeal some indictable outcomes as of right to the Court of Appeal.[18] Other indictable offence matters can be appealed to the Court of Appeal with leave of the court or a single judge thereof.[19]

B. Criminal Appeal Process Is Complicated

[14] Having determined the substantive issues of whether there is a right to appeal and which court has jurisdiction, the next stage in launching a criminal appeal is to figure out how to bring the appeal before the appropriate court. The task of finding the requirements which apply to the criminal appeal process in Alberta is challenging as

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

[17] See *Appendix A - Criminal Appeal Rights and Courts.* For example, *Criminal Code,* ss. 675(1)(a)(i) and 675(3) provide that a person accused of an indictable offence may appeal a decision with respect to conviction or fitness to stand trial as of right, but only on a question of law alone; *Criminal Code*, ss. 675(2), 743.6 and 672.72 allow an accused to appeal a decision with respect to parole ineligibility or a disposition order on any ground; and *Criminal Code,* s. 680 provides that decisions to grant or refuse interim release can be reviewed by the Court of Appeal on application to the Chief Justice or her designate.

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

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

provisions are contained in a number of different federal, provincial and court sources, including statutes, rules, practice directions and court directives of varying currency and application.

[15] The federal government has the authority to enact "criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters" and the Alberta legislature has jurisdiction to make laws related to the "administration of Justice in the province, including the constitution, maintenance, and organization of provincial Courts, both of civil and of criminal jurisdiction."[20] Thus some of the procedural requirements for making a criminal appeal are found in the *Criminal Code* with general court organization and administrative processes described in provincial statutes.

[16] A primary source of the process requirements for making a criminal appeal are the rules of court. The authority of the federal parliament for making law concerning the procedure in criminal appeals is partially delegated to the courts in each province.[21] The rules made by courts must be consistent with federal legislation, published in the *Canada Gazette* in both English and French and otherwise comply with requirements for statutory instruments.

[17] Alberta's rules for criminal appeals were issued as provincial regulations in two parts, Part 61 included rules for appeals before the Court of Appeal and Part 61.1 provided rules for summary conviction appeals.[22] It seems that there have been few changes to the published rules since that time with one revision taking place in 1977.[23] This creates difficulty in that these rules are not up to date and do not always match provisions in the current *Criminal Code*.

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

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

[22] *Alberta Rules of Court,* Alta. Reg. 390/68.

[23] *Rules of the Court of Appeal of Alberta as to Criminal Appeals*, S.I./77-147. See *Appendix B - Alberta Criminal Appeal Rules and Practice Directions* for an overview of the regulations and instruments.

[18] In order to supplement the rules which continue to apply and reflect current criminal appeal practices, the courts issue practice directions, directives, notes and updated court forms. These materials are publicly available in a number of formats including publication by the Queen's Printer and posting on the Alberta courts website.[24] In addition, judges and court officers may adapt criminal appeal procedures in order to meet specific administrative or regional needs.

[19] Further complicating matters is the practice of applying civil rules of court when there is no criminal rule.[25]

C. Reform Objectives

[20] Given the complicated nature of the existing criminal appeal process and consistent with the overall mandate of the project, this Consultation Memorandum focusses on developing procedural proposals intended to result in a criminal appeal system that is clear, simple, accessible, effective and timely.[26]

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

[25] Rule 840(3) states "use the civil rule *mutatis mutandis* if there is no criminal rule." The practice of using civil rules in criminal proceedings no longer seems necessary or valid. See *R. v. Johnson* (2001), 92 Alta. L.R. (3d) 232 (C.A.) at para. 15 where the Court finds that the matter is "purely criminal... and the *Criminal Code*... provides the procedure for summary conviction appeals. The Rules of Court, and specifically r. 505(6) have no application." See also *Duhamel c. R.*, 2006 QCCA 1081, unofficial translation, [2006] Q.J. No. 9207 (QL) at paras. 12-13: the Court concluded that rules of criminal practice published by the Quebec Court of Appeal which incorporated civil procedures for summarily dismissing an appeal are not in agreement with *Criminal Code*, s. 685 and adversely affected the substantive right to appeal.

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

1. Clear and simple

[21] There are a number of ways that the criminal appeal process might be made clearer and simpler. First, requirements that are currently found in a number of different sources could be assembled into a single, comprehensive set of procedures.[27]

[22] Second, it does not seem necessary or desirable to construct an entirely new criminal appeal system. An enhanced process could be structured by selecting effective practices from the existing, familiar statutory provisions, rules and court directions and rewriting these as procedural requirements in clear, straightforward language.

[23] Third, it seems that most criminal appeal requirements fall into one of two categories; actions that must be done in order to exercise a right of appeal or steps that may be taken during the course of an appeal to get help from the court. It might add clarity to the appeal process if requirements were to be grouped along these lines.

2. Accessible

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

[25] Access to justice might be enhanced by reforms that make it easier for everyone to understand the rules and move through the criminal appeal process to a just conclusion. In this regard, procedural requirements might be better understood if they were logically arranged, written in simple terms, flexible and available in a single format. Further, it may clarify the criminal appeal process and make the justice system more accessible if procedural requirements were to be harmonized and simplified, as far as practical, so as to apply to both Queen's Bench and the Court of Appeal.

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

3. Effective and timely

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

4. Objectives reflected in proposals

[27] The procedural proposals put forward in this Consultation Memorandum are intended to foster an improved criminal appeal process by

- drawing on existing statutory provisions and court practices,
- streamlining and standardizing the process steps, as far as possible,
- describing requirements in clear, consistent and plain language,
- increasing the involvement of the court in terms of facilitating appeal coordination and communication,
- easing certain technical aspects of criminal appeals, such as document filing,
- optimizing the use of court resources,
- encouraging appeal participants to manage the appeal process, and
- providing procedural flexibility, subject to the requirement that such flexibility does not prejudice the rights of others or the integrity of the criminal justice system.

D. Enhanced Access to Justice

ISSUE No. 1
Can a common set of rules apply to appeals before Queen's Bench and the Court of Appeal?

[28] The criminal appeal processes of both courts are remarkably similar in a number of ways. First, criminal appeals are grounded in the same statute and subject to the same principles of fairness and proper administration of justice. Second, both Queen's Bench and the Court of Appeal are superior courts of criminal jurisdiction. Third, both

appeal processes are complicated, unclear and not accessible because the rules which govern them are drawn from the same wide assortment of sources. Finally, research showed that the basic approach and main requirements for conducting a criminal appeal are essentially the same for both courts.

[29] Given that criminal appeals involve a common subject, common problems and common practices, it seems that a common set of rules, with modifications as appropriate, could apply to criminal appeals before both Queen's Bench and the Court of Appeal. Further, access to justice would be improved if a single set of common rules were developed for criminal appeals before Queen's Bench and Court of Appeal.

ISSUE No. 2
Where can a notice of appeal be filed?

[30] The current practice is that a notice of appeal to Queen's Bench must be filed in the same judicial centre where the trial took place and that notice to the Court of Appeal in respect of a southern district trial must be filed in Calgary and notice concerning a northern trial is to be filed in Edmonton.[28] However, if an appellant is in custody and does not have a lawyer, the appellant is allowed to file notice of appeal with the institution where he or she is being held.[29] A prospective appellant needs to know all these details in order to correctly file a notice and start the appeal process.

[31] Applying accommodation and ease of access principles to the issue of filing location, allowing an accused appellant to file notice of appeal in any judicial centre would make it easier to start an appeal and enhance access to justice. In most cases, criminal appeal files can already be accessed by court officers throughout Alberta regardless of where the physical file is located. Further, the Justice Innovation and Modernization of Services (JIMS) project is examining day to day court activities as part of its mandate to improve efficiency and implement the appropriate technological

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[28] See rr. 860.2(1)(2) and 848. Appeals are currently heard in the court where the notice is filed.

[29] Rule 844(1)(i-ii), Forms A and B, online: <http://www.albertacourts.ab.ca/CourtofAppeal/PublicationsForms/tabid/87/Default.aspx

support.[30] Functional enhancements such as a centralized intake for notices of appeal and appeal coordination system could possibly be implemented in connection with other technology changes.

[32] In general, the proposal is that is that it would enhance access to justice if an accused were allowed to file a notice of appeal in any judicial centre with a court officer then directing the appeal to the appropriate court, if necessary.[31] Further, the idea of a centralized appeal coordination system should be considered.

E. Preview of Criminal Appeal Proposals

[33] With these reform objectives in mind and based on a thorough review of the existing procedures and potential best practices for bringing a criminal appeal before the court, a single, comprehensive, criminal appeal process that would apply, with appropriate adjustments, to appeals before both Queen's Bench and the Court of Appeal is recommended. Proposals to advance such a process are set out in the remaining chapters.

[34] *Chapter 2 - Core Process* contains proposals for the core steps that must be taken in order to exercise a right to appeal a criminal trial outcome or other decision. Chapter 2 includes a brief overview, which is followed by core process proposals arranged generally to follow the progress of the appeal from start to finish. Information is further arranged such that appeal steps are identified, corresponding reform considerations and issues, if any, are discussed and appropriate procedures are proposed.

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[30] See Diane L.M. Cook, "Justice Innovation and Modernization of Services", *Canadian Lawyer Magazine* (June 2010).

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

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

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

[35] *Chapter 3 - Leave to Appeal* describes the proposals for leave applications to be combined with substantive appeal hearings in cases where leave is required at first instance and conducted as a separate application proceeding for second level appeals (i.e., when a party seeks to appeal the decision of an appellate court). Chapter 3 notes the procedural policies reflected in the leave to appeal proposals, describes the leave application requirements for combining the leave and substantive appeal hearings and details the separate leave to appeal application proceeding.

[36] *Chapter 4 - Interim Relief Pending Appeal* discusses how an appellant may obtain sentence relief pending the outcome of the appeal process by making an application for a stay of order or judicial interim release, as appropriate. Chapter 4 lists the policies embedded in the interim relief processes, proposes a streamlined procedure for applying for a stay of order and describes the procedural provisions which govern an application for judicial interim release.

[37] *Chapter 5 - Court Assistance* contains proposals associated with optional processes for getting help from the court. Chapter 5 opens with a short overview and is then arranged according to whether the assistance would be sought from a court officer, duty judge or the judge or panel assigned to conduct the appeal hearing. Within each part, the matters that the court officer, duty judge or deciding judge or panel can address are identified, related reform considerations and issues, if any, are discussed and procedural requirements are proposed.

CHAPTER 2. CORE PROCESS

A. Overview of Core Process

[38] This chapter describes proposals concerning the core steps that must be taken to appeal the outcomes of a criminal trial. The following policies and principles are reflected in the proposals:

- Required steps should, as far as possible, be the same regardless of what type of decision is appealed, which court has jurisdiction to hear the appeal and whether or not a party is represented by counsel.
- A centralized appeal coordinating function should be adopted to make it easier to file a notice of appeal in the appropriate court and avoid delay.
- Time periods should be clear, standardized and easy to calculate.
- Flexibility is needed to accommodate appeals which, due to practical considerations, require shorter or longer time periods or other special measures.

[39] The proposals also incorporate two concepts recently adopted by the Alberta courts, one dealing with time and the other with court authority to address non-compliance. In particular, time periods for criminal appeals were developed with a view to providing sufficient time to complete necessary tasks in the majority of appeals and periods are calculated forward from known events.[32] Secondly, in cases where an appeal party does not comply with procedural requirements, the court may exercise discretion to set the matter aside, adjourn or make a determination despite the non-compliance, unless doing so would prejudice the rights of others or compromise the integrity of the criminal justice system.[33]

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

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

B. Starting an Appeal

[40] The following proposals are based on the idea that a notice of appeal starts the criminal appeal process, causes the court to open an appeal file and authorizes the transfer of trial decision materials related to the appeal.[34]

1. Notice of appeal - time period

ISSUE No. 3
When should a notice of appeal be filed?

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

[42] The idea of calculating the time period for filing notice from when the written order with reasons is available was considered but rejected. Not all decisions are issued this way and for those that are, the date when the written order will be available is largely unpredictable. The disadvantages of starting with an uncertain time to file the notice of appeal outweigh any potential benefits of starting with a more informed basis for the appeal.

[43] ***The proposal*** is that a notice of appeal must be filed within one month after the date of conviction, acquittal, sentencing, judgment or other final decision that is the

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[34] For matters requiring leave to appeal, see *Chapter 3 - Leave to Appeal* for proposals concerning combined and separate leave to appeal applications.

subject of appeal.[35] In the event conviction and sentence decisions are not made at the same time, the notice must be filed within one month after the sentence decision.[36]

2. Content of notice of appeal

ISSUE No. 4
What information should be included in a notice of appeal?

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

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

[45] The content proposed below reflects an effort to standardize and streamline the information requirements consistent with the purpose of the notice and to this end, some currently required items are not included in the lists.[37]

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[35] *Criminal Code*, ss. 678(1), 815(1), 830(3). See also r. 841 and Court of Appeal of Alberta Project Team, *Criminal Rules Project: Working/Discussion Paper Draft*, (2000) [unpublished] at 25, proposal 13.(1). *Chapter 3 - Leave to Appeal* contemplates that an application for leave to appeal would be filed together with the notice of appeal in some cases and separately in others. In cases where a separate leave to appeal application is made, the notice of appeal would be filed shortly after leave is granted.

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

[37] Notice components are drawn from rr. 860.2(3), 846 and from Forms A and B which are available from the Court of Appeal Registry and online: <http://www.albertacourts.ab.ca/CourtofAppeal/PublicationsForms/tabid/87/Default.aspx>. Information as to how the accused pleaded at trial, the names of the trial judge, the trial prosecutor and trial defence lawyer and the accused's mode of trial election if a new trial were to be ordered at the end of the appeal do not seem necessary to support the purposes of the notice and are not on the list.

[46] ***The proposal*** is that a notice of appeal must include the following mandatory information:

- appellant's name and date of birth (for individual accused appellants only),[38]
- name and location of the trial court or court which issued the decision appealed,
- date(s) convicted/acquitted, sentenced or matter decided,
- nature of the offence(s) (indictable offence, summary conviction or mixed offences together),
- nature of the appeal (conviction/acquittal only, sentence only, both conviction and sentence or other decision),[39]
- grounds on which the appeal is based (question of law alone, question of fact, question of mixed law and fact or other sufficient grounds),
- appellant's address or name and address of appellant's counsel as address for receiving appeal materials, if applicable
- date and location prepared, and
- signature of appellant or appellant's counsel.

[47] A copy of the judgment or decision appealed with reasons should be included with the notice of appeal, if available. If not, a copy of the decision with reasons should be filed later with the appellant's factum and other materials in support of the appeal.

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[38] It was also suggested that a person's Correctional Management Information System (CoMIS) number or Fingerprint System (FPS) number could be included as part of the notice of appeal. These identifiers may help ensure seamless processing of appeal matters for incarcerated persons, but are probably not relevant for those who are not in custody. Therefore, it is proposed that any such system identifier be used as part of an application for stay of decision or judicial interim release rather than be included in the notice of appeal.

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

[48] In order to reduce the risk of having the application dismissed or adjourned, it is strongly recommended that the notice of appeal include:

- a request for leave to appeal, if applicable, [40]
- for a second level appeal, a copy of the order granting leave to appeal,[41]
- proof that the transcript has been ordered or reasons explaining why the transcript has not been ordered.[42]

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

- address or place of incarceration of the appellant, if applicable,
- respondent's name (e.g. Alberta Justice, Public Prosecution Service of Canada, special prosecutor or accused),
- trial or decision court file number(s),
- offence(s) and section(s) of the *Criminal Code* or other statute(s) under which the appellant is convicted or acquitted,
- sentence imposed, if applicable,
- appellant's preference to be present or not at the hearing of the appeal, if applicable.

3. Filing

[50] The Committee reviewed existing filing requirements and concluded that it is fair to consider the different capabilities and circumstances of the parties in a criminal appeal and noted that accommodating an incarcerated, unrepresented appellant's need to file at a convenient location supports access to justice objectives. The Committee

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[40] See *Chapter 3 - Leave to Appeal.*

[41] For second level appeals to the Court of Appeal, a separate, distinct leave proceeding is proposed. See *Chapter 3 - Leave to Appeal.*

[42] The current practice of asking self-represented appellants to submit proof of payment for transcript has been modified to show proof of ordering or reasons for not ordering and is proposed to apply to all appellants in both courts. A notice of appeal will be received even if there is no proof that the transcript has been ordered. Proof of ordering is not intended to be an item that would prevent an appellant from filing a notice of appeal. Rather, it is included to highlight the importance the court places on the transcript and to give a heads up that if the appellant hopes to make the transcript and supporting material filing date, the transcript should be ordered as soon as possible. Proof of ordering may also be required to support an interim application, such as stay or judicial interim release application (bail) as discussed in *Chapter 4 - Court Assistance*.

considers that existing filing requirements generally work well and should be continued. However, there should be an exception to allow an accused to file a notice of appeal in a court that is convenient to his or her present location, as opposed to trial location.[43]

[51] ***The proposal*** is to adopt the following filing requirements for specific parties. An accused appellant who is not in custody or who has a lawyer must file 3 copies of the notice of appeal with a court officer[44] of the closest superior court.

[52] An accused who is in custody but does not have a lawyer may provide 3 copies of a notice of appeal to the warden of the institution where he or she is held. The warden endorses the copies, returns one to the appellant, keeps one and forwards one to the appropriate court.[45]

[53] A Crown appellant must file 2 copies of the notice of appeal with the court.[46]

4. Informing the other party - service

ISSUE No. 5
How should notice of an appeal be given to the other party?

[54] Personal service is costly and can be difficult to effect for both the accused and Crown appeal participants. Information concerning a criminal appeal can be successfully exchanged using methods less onerous than personal service. Current practice incorporates these realities to the extent that personal service of a notice of

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[43] See *Chapter 1- Need for Reform*.

[44] In this Consultation Memorandum "court officer" means the registrar, deputy registrar, case management officer or clerk of the court. References to the "registrar" should be interpreted as including not only the registrar and his or her designate, but also other court officers working under the registrar, unless otherwise provided.

[45] Rule 844(1)(i-ii), Forms A and B, online: <http://www.albertacourts.ab.ca/CourtofAppeal/PublicationsForms/tabid/87/Default.aspx>.

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

appeal seems to be required primarily for a Crown appeal.[47] Some lawyers also personally serve notices on behalf of their accused clients. In the case of an unrepresented accused in custody who files a notice of appeal with the prison warden, it seems that the Crown respondent is informed of the appeal by the court.

[55] ***The proposal***, in general, is that personal service requirements be replaced by less formal, yet effective communication methods and that the court continue to facilitate the timely, accurate exchange of appeal information throughout the appeal process.

[56] The existing practice of the court informing the Crown respondent of a prison-filed notice of appeal should be continued and considered for broader application such that if the appellant is the accused, the court sends one copy of the notice of appeal, together with the information about the appeal (i.e. appeal file number and the material filing and hearing dates) when the notice of appeal is filed to each of the Crown respondent and clerk of the court where the trial occurred.[48]

[57] The existing requirement that the respondent be personally served should continue to apply in the case of Crown filed notices of appeal. A Crown appellant must serve the accused with one copy of the notice of appeal and court information about the appeal (i.e file number and the appeal hearing date).[49]

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

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

At a minimum, the proposal should apply to the court informing the respondent in the event of a prison filed notice of appeal by an unrepresented appellant and the trial court in all appeals. For other notices of appeal, the alternate is that an accused appellant who is not in custody or who has a lawyer must provide a copy of the notice of appeal to the respondent at the same time as the accused files the notice with the court.

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

5. Administrative coordination of an appeal

ISSUE No. 6
What court measures should be triggered by filing a notice of appeal?

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

[59] One of the challenges associated with describing administrative activities is to ensure that the level of detail not preclude functional or technological court practice innovations that improve access to justice and overall efficiency. This said, the advantages of generally addressing the court's role seem to outweigh the challenges and the following proposals outline what the court does when it receives a notice of appeal.

[60] One of the main concepts reflected in the administrative proposals is that the court begins working to facilitate prompt processing of an appeal right from the start by communicating with the parties and organizing the appeal process. This approach is based on existing practices, particularly those for working with self-represented appellants in Queen's Bench and the Court of Appeal. Of note, the administrative coordination actions would be done by the court which hears the appeal, not the court where the notice of appeal might be filed consistent with the expanded filing location proposals.[50]

[61] Another concept embedded in the administrative proposals is that establishing key appeal dates early helps the court anticipate future needs for judicial and

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[50] The details of how a receiving court would forward a notice of criminal appeal or notify the appropriate appeal court if a central coordinative function were to be implemented would be developed consistent with the court's internal administrative practices.

administrative resources and encourages appeal parties to process trial information and produce appeal documents in a timely fashion. The proposals contemplate that the hearing and associated filing dates would be set by the court at the start of the appeal process and calculated by working forward in time from the date the notice of appeal is filed.[51] This means that the notice filing date drives the hearing date, with appeal materials filed so that the appeal is ready for hearing on the scheduled date.

[62] ***The proposal*** is that the court responds to a notice of appeal by[52]

- opening an appeal file,
- setting the appeal hearing date and calculating the appellant's supporting material filing date,
- informing the appellant of the
  - appeal file number,
  - appeal hearing date,
  - supporting material filing date, and
  - court rules concerning prisoner attendance and the oral and "in writing" appeal procedures, and
- contacting the trial court or decision maker whose decision is under appeal to request a copy of trial or decision materials.

[63] The court sets the appeal for hearing on a date that is not more than 5 months after the date on which the notice of appeal is filed, unless the appeal process is to be expedited or extended.[53] Sentence appeals may be brought earlier.[54]

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[51] For some courts, this would replace the existing "speak to list" proceedings used to set dates based on progress made by the appeal participants.

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

[53] A number of provisions were reviewed to develop the suggested time limit including r. 860.4(1) which states that the clerk shall schedule a summary conviction appeal hearing not more than 120 days after the filing of the notice of appeal. The period was increased by one month to address transcript production issues. It is also proposed that some appeals will be conducted on an expedited basis or an extended basis,

(continued...)

C. Materials and Evidence to Support an Appeal

1. Trial or decision file

ISSUE No. 7
When should the trial or decision file be provided to the appeal court?

[64] The court requires accurate, detailed information concerning the criminal trial or other proceeding which gave rise to an appeal. It can be challenging to identify and acquire copies of specific items given the amount and specialized nature of the information contained in a criminal trial or decision file. Current practices concerning when and how the court receives the trial or decision file[55] are mixed. In Queen's Bench the trial or decision file is acquired early in the process based on a direct request of a Queen's Bench court officer. The Court of Appeal acquires the file later when it is filed by the appellant or, occasionally, the Crown respondent. The Committee suggests that a direct, court to court request for the trial or decision file adds certainty to the appeal process and may facilitate timely processing.

[65] ***The proposal*** is that the appeal court directly request from the trial court copies of the trial or other decision materials needed for the appeal hearing as soon as a notice of appeal is filed.

[66] For appeal purposes, the trial or decision file should contain the:[56]

- information or indictment, including trial amendments, if any,

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[53] (...continued)
as described in the *Expedited* and *Extended Appeals* parts of this Consultation Memorandum. The proposal for expedited appeals of disposition orders and short sentences sets the hearing for 2 months after the notice of appeal is filed and for extended appeals, a suggested hearing date is 7 months after the notice, with material filing dates set accordingly in both situations.

[54] The Committee notes that the proposed core process time lines may be too generous for sentence appeals and suggests that sentence hearings should be conducted earlier, perhaps within 3- 4 months after a notice of appeal is filed, with filing dates for sentence appeal materials adjusted accordingly.

[55] In this Consultation Memorandum "trial or decision file" means copies of documents and other materials generated by the trial court or other decision maker in respect of the decision appealed and requested by the appeal court.

[56] Rules 854(3), 851(3) and CPD I.4(a)(i).

- formal document of judgment, order or decision appealed (i.e. certificate of conviction or acquittal, order of disposition, probation orders, weapons prohibitions, approval or denial of leave, judicial interim release order),
- reasons for judgment, order or decision, if any, and
- record of the evidence submitted during the trial proceeding, including exhibits entered.

[67] In addition, the trial or decision file should, if applicable, also contain:[57]

- the charge to the jury,
- pre or post-sentence reports,
- the report of the trial judge,
- a statement of facts as presented to the trial judge,
- the criminal record of the convicted person, if disclosed to the trial judge,
- copies of publication bans, and
- trial procedural orders.

[68] The trial or decision court returns, in a timely manner, a copy of any item in the original trial or decision file as requested by the appeal court.

[69] The criminal trial or deciding court would keep its file of the matter active for 3 months after the date of conviction, acquittal, sentencing, judgment or other final decision that may be the subject of a criminal appeal and available for viewing or copy purposes.[58]

2. Factum

ISSUE No. 8
What information should be included in a party's factum?

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[57] CPD I.4(a)(ii).

[58] A number of practices were reviewed, in particular r. 858 which states that the trial file is live for 40 days and requires the appellant to ask for a transcript. Rule 860.4(3) notes that the clerk shall obtain the relevant court file, including exhibits from the summary conviction trial court, prior to the appeal hearing, by giving prompt notice of the appeal to the court below.

[70] The proposal for factum[59] content reflects the general principle that appellants must provide some legal and record based arguments to support the appeal. Respondents are not required by law to submit anything.[60] The suggestions concerning the content of a verdict, sentence or other appeal factum reflect a streamlined approach in that information items are phrased in general, as opposed to detailed, terms and located in a single list.

[71] In addition, the requirement that a party inform the court in the factum of the amount of time needed to make oral argument is no longer listed since the court uses maximum time parameters, not party provided estimates, to schedule hearings and the amount of time that a party actually speaks is determined by the judge or panel conducting the appeal.

[72] ***The proposal*** is that the appellant must, and the respondent may, file and provide a factum ($\leq$ 20 pages) which includes the following information:[61]

- a brief statement of facts,
- reasons for granting or denying leave to appeal, if applicable,
- grounds for appeal,
- legal arguments in connection with each ground of appeal, with specific reference to the trial or decision file, transcript, authorities or digest,
- concise and precise statements of the nature of relief or specific order sought, and
- date and signature of the party or the party's counsel.

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[59] In this Consultation Memorandum "factum" means a document which describes a party's appeal position and legal arguments.

[60] Crown respondents, however, are obligated as a matter of public policy to submit a written response.

[61] The proposal is based on CPD I.5(a), (b) and (d)-(f), I.6 and I.7. The statement of facts may be an agreed statement of facts cosigned and submitted by both the appellant and respondent. The grounds for appeal must include, at a minimum, those identified in the notice of appeal.

See also *Criminal Code*, s. 830 which describes an appeal of a summary conviction based on the trial transcript or an agreed statement of facts where there is no question of fact in issue, including the fitness of sentence.

[73] The factum filed in support of a sentence appeal may include a summary of the factors which were before the court below and details of the resulting sentence.[62]

3. Transcript, evidence and authorities

ISSUE No. 9
How should transcript, evidence and authorities be presented to the court?

[74] The transcript[63] is a key source of evidence used by the appellant and respondent to make or refute an appeal case. This said, a full transcript of a criminal trial can be costly and time consuming to produce and a difficult document to work with. Although the decision as to how best to support an appeal position is up to the appeal party, the general view is that, consistent with existing practice, the appellant should file a full transcript and both parties should be prepared to address ancillary issues that may come up in oral argument.

[75] In order to facilitate prompt, effective processing of appeals by the court, parties are encouraged to reference only the evidence and authorities[64] that are relied on to

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[62] CPD I.5(a) and I.7. It seems that the detailed information required by "Form B - Sentence Questionnaire" associated with CPD I (Sentence Appeals) would only be necessary in those instances where the appeal court must at first instance set an appropriate sentence (e.g. after overturning an acquittal or a finding of not guilty). Further, there is only one other, rare situation in Queen's Bench which might warrant the current level of specificity and that is if the person convicted of a summary offence is granted an appeal *de novo* format.

The existing sentence questionnaire line items are: amount of time in custody prior to sentencing; time and terms of judicial interim release, if any; serving time for other offences; mandatory release date for previous/other offence and participation in pre-release programs; sentences given to co-accused and their records; prior criminal record of the appellant; employment history, including current job; age of appellant at time of offence and now; pre-sentence, medical or psychological reports and whether prepared for this conviction or in connection with another; evidence of effects of the offence on the victim; name of convicting court and judge; was there a trial or did the appellant plead guilty; jury trial; *Criminal Code* offence names and section numbers, including those tried by way of summary conviction; sentences imposed, total sentence and probation conditions, if any; date of sentence and date of offence.

[63] In this Consultation Memorandum "transcript" means a written record of the trial court or other decision making proceedings.

[64] In this Consultation Memorandum "authorities" means legislation, cases, publications, treaties, including excerpts from each. This definition is based on *Rules of the Supreme Court of Canada*,

(continued...)

make the appeal case and to avoid filing redundant copies of material that is in the trial or decision file or already filed by the other side. An additional benefit of filing only the amount of material necessary is that a party's costs for copying, compilation, filing and distribution may be minimized.

[76] It is clear that a general procedural requirement for using abbreviated materials could be developed.[65] The Committee considered a number of parameters such as length of trial or proceeding, quantity of transcript, nature of underlying offence and other factual bases that might serve as a procedural trigger for requiring that less material be submitted in support of an appeal. However, in order to avoid potential interpretation problems or applications for procedural relief, it is suggested that the decision as to how support an appeal position be left to the parties. This said, the concept of voluntary joint submissions is discussed briefly in the context of extended appeals.[66]

[77] ***The proposal*** is that the appellant files with the court and provides the respondent with a copy of the transcript together with the appellant's factum.[67]

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[64] (...continued)
SOR/2002-156 as amended by SOR/2006-203 [SCC Rules], r. 2.

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

[66] See *Chapter 2 - Core Process* at F. Extended Appeals.

[67] See *Criminal Code*, ss. 821(1), (3) which state that unless the rules provide or court orders, it is up to the summary conviction appellant to provide a certified transcript of the record and CPD Form J - Certificate of Trial Reporter. It should be made clear that a) the appellant is responsible to file the transcript with the court and to provide a copy to the respondent and b) for sentence only appeals, the appellant submits a partial transcript which records the sentencing arguments and decision.

[78] Each party may file a digest[68] and provide a copy to the other party. The purpose of a digest is to give the court the key evidence which supports an appeal position as described in a party's factum. The digest may include[69]

- extracts from the transcript,
- copies or extracts from the original trial file materials that are not in the appeal file,
- additional evidence, if any, authorized by the court, and
- authorities.

[79] A party should refrain from including materials in the digest that are not relevant, already before the court in the appeal file, or filed by the other party.[70]

4. Time to file appeal materials

ISSUE No. 10
How much time do the parties need to prepare appeal materials?

[80] The proposals for submitting materials in support of a criminal appeal reflect two main concepts. First, the proposals affirm the existing practice of a party filing all supporting material at the same time. This practice allows the court to prepare for the

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[68] In this Consultation Memorandum "digest" means a compilation of key materials which support a party's position and legal arguments and may include authorities, extracts from the trial or decision file or transcript, all or part of a trial exhibit or report and new evidence as may be authorized by the court.

[69] The content of a digest is derived, in part, from the definition of key evidence found in CPD I.4(a):

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

Parties are encouraged to provide lists and make use of excerpts and case head notes, as appropriate, rather than filing copies of statutes or authorities. In addition, an appeal party would continue to require an express order of the court to submit new evidence or other materials that were not before the original decision maker. Depending on the timing of an application to admit new evidence, any new materials authorized could be included in the digest.

[70] Redundant materials are similarly discouraged under for example, SCC Rules, rr. 38(2), 39(2), 44 and *Ontario Court of Appeal Criminal Appeal Rules,* S.I./93-169, r. 22(2)(5). In addition, for a cited case that is not well known, a party should consider submitting a copy of the head note and relevant portion(s) of the case rather than a copy of the entire case.

hearing in an efficient manner. Second, the deadlines for filing supporting materials are set to follow specific events so that they may be easily calculated.

[81] The proposed filing dates for appellant and respondent materials are intended to provide, on average, enough time for parties to prepare concise appeal materials and the court to review said materials prior to the hearing. The proposed material filing dates for expedited and extended appeals are different and described later in this chapter.

[82] ***The proposal*** is that the appellant's factum, transcript, a copy of the decision with reasons (if applicable and not previously filed with the notice of appeal) and a digest, if any, is to be filed with the court and provided to the respondent within 3 months after the date on which the notice of appeal is filed.[71]

[83] The respondent's factum and digest, if any, are to be filed with the court and provided to the appellant within one month after the date on which the respondent received the appellant's factum.

[84] A party must submit appeal materials in a format that is acceptable to the court which may include electronic format.[72]

[85] If a party's supporting materials are filed after the applicable filing date but before the appeal hearing, the appeal court may or may not consider the material.[73]

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

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

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

D. Appeal Hearing

[86] The proposals concerning appeal hearings incorporate a number of existing practices for arguing all related appeal matters in the same hearing, setting the argument format, proceeding on time, hearing attendance, determining speaking order and concluding the hearing. The Committee suggests that these practices make efficient use of court time and should be documented to help clarify the appeal process.

1. Single hearing

ISSUE No. 11
Should the court deal with all related appeal matters at the same hearing?

[87] A single appeal hearing makes efficient use of legal and court resources and facilitates the timely conclusion of an appeal. From a public policy perspective, the combined appeal format does not appear to prejudice the appellant in any way.

[88] ***The proposal*** is that acquittal or conviction and the associated sentence would be appealed together, as would indictable and summary matters that were decided in the same trial.[74]

2. Argument format

ISSUE No. 12
When can an appeal proceed on the basis of written argument alone?

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[74] The proposal reflects the existing practice before Queen's Bench and the approach taken by the Court of Appeal for summary conviction appeals. If adopted, the proposal would require a modification to the Court of Appeal's practice as described in CPD I.23 in that court permission would be required in order to hear matters separately, instead of together as is the current practice. This proposal is subject to *Criminal Code*, s. 675(1.1) which states that leave is required to combine summary and indictable conviction appeals.

[89] Criminal appeals generally proceed in open court on the basis of both written and oral argument. This said, there may be appeals for which it would be appropriate to have the appeal conducted solely on the basis of written submissions. The current practice is that a party who wishes to present his or her appeal case in writing only may apply to do so.[75]

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

3. Hearing proceeds on time

ISSUE No. 13
What measures are available to ensure that hearings proceed as scheduled?

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

[92] ***The proposal*** is that the oral hearing of a criminal appeal will take place at the scheduled date and time, unless otherwise ordered by the court.

[93] Oral participation in the appeal hearing may include in person, telephone, video conference or other electronic means as determined by the court.

[94] If an appellant has not submitted a factum, transcript or other materials to support the appeal before the start of the hearing, the court may dismiss the appeal,

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

reschedule the hearing or proceed on the basis of information in the appeal file, oral arguments of the appellant and the materials and arguments submitted by the respondent, if any.

[95] If the appellant does not appear at the appointed hearing time, the court decides whether to proceed or not based on considerations such as the appellant's right to be heard and whether the materials in the appeal file are sufficient to make the appellant's case.[76]

[96] An appeal hearing may be conducted by the court on the basis of appeal materials submitted and arguments made by the appellant without personal participation on the part of the respondent.[77] However, where the accused is the respondent, the court must be satisfied that proper notice has been given such that the conduct of the appeal hearing in no way violates principles of natural justice or infringes on the accused's *Charter* rights, in particular rights under section 7.

4. Appellant in custody

ISSUE No. 14
When should an appellant in custody be allowed to attend an appeal hearing?

[97] There is a statutory exclusion and it is current practice in some courts for an appellant in custody to get permission of the court to attend the appeal hearing if he or she has a lawyer.[78] The Committee considers that applying the practice more broadly may facilitate the timely conduct of appeal hearings as the logistical issues associated with prisoner location, transportation and security would be reduced. One of the

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[76] See *Chapter 5 - Court Assistance* for a proposal concerning how an appellant who misses a hearing may apply to file written arguments.

[77] The Crown is required for public policy reasons to respond, in writing, to every appeal of a criminal decision.

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

disadvantages of standardizing a non-attendance practice is that the court would have less opportunity to ask questions directly of the accused during the appeal hearing.

[98] ***The proposal*** is that an appellant in custody who is represented by a lawyer is not allowed to attend the hearing of an appeal without the permission of the court.

[99] An appellant who is in custody and not represented by a lawyer may opt to participate solely in writing or to attend the hearing to present oral argument. In the latter case, the appellant indicates in the notice of appeal that he or she wants to attend the hearing and files written arguments prior to the date of the hearing.[79]

[100] The method of hearing attendance may include in person, telephone, video conference or other electronic means and that the choice of method is at the court's discretion.[80]

5. Speaking order

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

[102] The appellant speaks first and respondent second, unless the court otherwise requires. The court may also allocate time to an intervener[81] or to the appellant for a response.

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[79] The proposal is based on r. 852 which addresses incarcerated sentence appellants.

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

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

[81] See *Chapter 5 - Court Assistance* for a discussion of how a person who is not a party may apply to intervene in a hearing.

[103] In a combined conviction/sentence appeal, the court hears and decides the conviction appeal first and then, if appropriate, hears arguments in connection with sentence and decides the sentence appeal.[82]

[104] Each party presents oral argument on conviction, sentence or other decision appealed, including responses to questions from the court, for amounts of time as the court determines appropriate.[83]

6. Concluding arguments

[105] The parties and court put considerable effort into creating and reviewing appeal materials before the hearing and clarifying appeal arguments during the hearing. This said, if the court is not satisfied that it has enough information at the end of the hearing to be able to decide the matter, the court takes steps to address the situation.

[106] ***The proposal*** is that if the court is not satisfied that oral arguments are complete at the end of the time allotted for the appeal hearing, the court may[84]

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

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

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[82] The proposal reflects the practice before Queen's Bench and is intended to shorten the timeline for appeals to the Court of Appeal. It is different than the procedure in CPD E.6(d) which adjourns the sentence appeal to a different panel sitting at a later date, unless the court otherwise agrees to hear the conviction and sentence matters together. See also CPD A.9 which stipulates that consolidated matters in the Court of Appeal are treated as one appeal. See *Chapter 3 - Leave to Appeal* for a discussion of combining a leave application with the appeal hearing.

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

[84] The proposal informs appeal participants that, in addition to the continuation practice described in CPD I. 13(a)-(b), the court may ask for final argument to be presented in writing.

E. Expedited Appeals

ISSUE No. 15
Which criminal appeals should be conducted on an expedited basis?

[108] In addition to sentence appeals which can be heard earlier than the proposed 5 months after the date the notice is filed, there are two other criminal appeal situations which require that hearings occur sooner than contemplated by the core process outlined to this point. First, if the matter appealed is a disposition order, the appeal court is required to conduct the hearing "as soon as practicable" following the notice of appeal.[85] Second, if the sentence appealed applies for a period of one year or less, it may be appropriate to expedite the appeal process.

[109] ***The proposal*** is that an appeal from a disposition order or a "short sentence" (defined as a sentence which applies for a period of one year or less) proceeds before the appeal court on an expedited basis unless otherwise ordered by the court.

ISSUE No. 16
What filing deadlines should apply to an expedited appeal?

[110] ***The proposal*** is that the notice of expedited appeal concerning a disposition order must be filed and provided or served[86] within 15 days after the date of the disposition order.[87]

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

[86] The proposal is that the personal service requirement should continue to apply only in the case of Crown filed notices of appeal and that other less formal, yet effective communication methods be used to provide copies of appeal documents as between parties to an appeal.

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

[111] The notice of appeal concerning an appeal of a short sentence must be filed and provided or served within one month of the date of sentencing, unless otherwise specified by the court.[88]

[112] The court sets an appeal hearing for an expedited appeal on a date that is not more than 2 months after the date on which the notice of appeal is filed.[89]

[113] The appellant files and provides the factum, transcript, and digest, if any, to support an expedited appeal within 20 days after the date on which the notice of appeal is filed.[90]

[114] The respondent files and provides a factum and digest, if any, to support the respondent's position on the expedited appeal within 10 days after the date on which the respondent received the appellant's factum.

ISSUE No. 17
How should the *Criminal Code* requirements for disposition order appeals be referenced in the rules?

[115] Including the *Criminal Code* provisions for disposition order appeals in court rules would help create a convenient, comprehensive set of all the requirements for appealing a disposition order and alert parties to additional steps they may want or need to take in a disposition order appeal process. The difficulties associated with

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[88] For appeals of short sentences which require leave to appeal the proposal is that the notice of appeal and leave application would be combined, see *Chapter 3 - Leave to Appeal*.

[89] A number of statutory provisions, rules and practices were reviewed to develop the proposed time limits, including: *Criminal Code*, s. 819(1) which states that if the appeal matter is a summary conviction, the appellant is in custody, more than 1 month has passed since the notice was filed and the hearing has not started, then the institution having custody of the appellant must apply for a fixed hearing date. Rule 860.4(1) which states that the clerk shall schedule a summary conviction appeal hearing not less than 60 and not more than 120 days after the filing of the notice of appeal.

[90] Based on CPD I.4(k)(iii) which states that the sentence appeal record, when the sentence is 6 months or less, must be filed with the court 6 weeks after the notice of appeal. The proposal keeps the amount of time that the court has to prepare for an expedited hearing at approximately 30 days, which is the same as under the general appeal proposals and similar to existing practices. See also r. 860.6(1)-(2) which requires materials to be filed at least 30 and 15 days before the hearing date by the appellant and respondent, respectively and r. 855 which calls for the appellant and respondent to file and serve factums 28 and 14 days, respectively before the appeal hearing.

incorporating these provisions include how to describe statutory requirements without altering their substantive meaning and how to ensure that rules remain consistent with the *Criminal Code*.

[116] Appeals of disposition orders not only invoke a statutory requirement for expeditious processing but also involve statute described materials, parties and processes. Therefore, it is suggested that the benefits outweigh the difficulties and that the *Criminal Code* requirements for appealing disposition orders should be included in rules.

[117] ***The proposals*** which follow reflect the *Criminal Code* provisions applicable to a disposition order appeal. The operation of a disposition order is automatically suspended by the filing of a notice of appeal. A judge of the appeal court may make, on application, an interim disposition order pending the outcome of the disposition appeal or order that any interim order for release or detention that was in place immediately prior to the disposition decision remain in effect until such time as the appeal is decided.[91]

[118] In a disposition order appeal, the court immediately notifies the trial court or Review Board and requests the trial court or Board to return:

- a copy of the disposition or placement decision,
- all exhibits or copies of exhibits filed with the court or Board, and
- other materials considered in connection with the disposition hearing before the date of the appeal hearing or such other time as directed by the court.

These materials, together with the notice of appeal comprise the disposition appeal source documents.[92]

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[91] *Criminal Code*, ss. 672.75, 672.76, 672.77.

[92] *Criminal Code*, ss. 672.6(1)-(3).

[119] The disposition order appellant, unless expressly relieved of the responsibility by order or rule of the court of appeal, is required to provide a certified transcript of evidence given before the trial court or Board of Review.[93]

F. Extended Appeals

ISSUE No. 18
What special measures should apply to appeals which require more time to prepare?

[120] Some appeals are complex and require more time to prepare for hearing. The Committee identified a number of complicating factors which can affect appeals in Queen's Bench and the Court of Appeal. These complicating factors include: length of trial or decision proceeding, transcript production issues, nature of the offences, number of decisions on appeal, multiple defendants who were tried together, whether the appeal is before the court for the first or second time and appeal grounds which involve constitutional arguments. Although the complicating factors are the same, the practices for extending time periods used by Queen's Bench and the Court of Appeal are different and may also vary depending on geographic location. The Committee suggests that it would help clarify the process if the practices for setting longer time periods for complicated appeals were to be standardized.

[121] One of the concepts reflected in the proposals is that either party to an appeal or the court may determine that an appeal is likely to be complicated and that the parties would benefit from having additional time to prepare materials and get ready for the hearing. For these appeal cases, the court would set a hearing date and associated filing deadlines as noted in the proposed example or otherwise so as to provide sufficient time for appeal participants to properly prepare. Other ideas reflected in the proposals are that the parties to a complicated appeal may develop, with court supervision, a timetable that is tailored to the specifics of the appeal and combine efforts to prepare a joint digest.

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

[122] One of the concepts considered by the Committee but not adopted was that all complicated appeals should be formally and directly managed by the court.[94]

[123] ***The proposal*** is that a party to a criminal appeal may request that the appeal be conducted on an extended basis by filing and providing a written summary of complications (≤3 pages) within one month after the date on which the notice of appeal is filed.

[124] The summary of complications must clearly describe each trial or decision circumstance or other factor which the party alleges makes the appeal factually, legally or logistically complicated.

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[94] Appeal management is discussed in *Chapter 4 – Court Assistance* as one of the ways that a party to an appeal may get help from the court to ensure that the appeal is processed in a timely manner.

[125] The court may, based on a filed summary of complications or its own assessment, determine that an appeal is complicated and

- schedule a meeting with the parties for the purposes of developing a tailored hearing and filing timetable, or
- recommend a hearing and material filing date scheme to the parties and request feedback on the scheme prior to setting the dates.

[126] The following is proposed as an example of a hearing and filing date scheme that may be appropriate for some complicated, extended appeals:

- the appeal hearing is set on a date that is not more than 7 months after the date on which the notice of appeal is filed,
- the appellant files and provides a factum, transcript and digest, if any, within 4 months after the date on which the notice of appeal is filed,
- the respondent files and provides a factum and digest, if any, within 2 months after the date on which the respondent received the appellant's factum.

[127] The parties to an extended appeal may jointly propose, in writing, a hearing and filing schedule that reflects the time needed to develop appropriate appeal materials in light of the complexities of the appeal. The court may set hearing and filing dates for the appeal in accordance with the parties' schedule.

[128] In order to facilitate timely processing, the extended appeal parties may jointly file a single digest in accordance with the timetable adopted for the appeal.[95] In the event of a joint digest, a party may also file and provide a supplementary digest together with the party's factum as long as the supplement does not replicate material contained in the appeal file, joint digest or filed by the other party.

G. Appeal Orders

[129] An order is the last step in the criminal appeal process. The content of an order is largely set by the *Criminal Code* based on the type of decision appealed and the

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

court's reasons for allowing, dismissing or refusing the appeal or setting aside the decision.[96] The reasons for reflecting statutory order requirements in rules include that appellants may be better informed as to the type of order they can expect if successful and that the order form and content may become more streamlined and standardized. Two of the challenges to be overcome in crafting order-making requirements are how to create provisions that do not add to or subtract from the substance of the *Criminal Code* and how to keep these procedures consistent with a statute that is amended on a regular basis.

[130] The Committee considered that the certainty of the last stage of the appeal process might be enhanced if a few order-making sections of the *Criminal Code* which generally describe timing, order content and "what happens after" the appeal order were added to the description of the core process.

[131] ***The proposals*** which follow reflect a few *Criminal Code* and other order-making provisions. A written order of the appeal court with reasons, except in the case of an order denying leave where no reasons are required, will generally be issued within 6 months after the appeal hearing, unless otherwise determined by the court.[97]

[132] If an individual judge disagrees with the majority decision of the appeal court, the order must include the grounds and reasons of the dissenting judge.[98]

[133] The appeal court may make an order as to costs in the appeal, including the amount, name of the party who is to receive the costs and time period within which costs are to be paid to the clerk of the court.[99]

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

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

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

[99] *Criminal Code*, ss. 826, 827(1), 830, 839(1), (3). See also *Charter*, s. 24(1) and judicial commentary about conditions for the award of costs against the Crown.

[134] If the decision is that a matter be retried, the person charged is deemed to be remanded to appear at the next sitting of the court from which the appeal arose.[100] A judge of the appeal court which orders a new trial may hear an application for judicial interim release pending the new trial.[101]

H. Summary Table - Core Process Steps

Appeal Materials	Time			Court Response
	Standard[1]	Expedited[2]	Extended[3]	
Notice of Appeal	Decision + 1 mo.	Decision + 1 mo.	Decision + 1 mo.	• Open appeal file • Request trial or decision file • Review type of appeal and summary of complications, if any • Set hearing and materials filing dates
Appellant's Materials • factum • transcript • digest	Notice + 3 mo.	Notice + 20 days	Notice + 4 mo.	–
Respondent's Materials • factum • digest	Appellant Factum + 1 mo.	Appellant Factum + 10 days	Appellant Factum + 2 mo.	–
Hearing	Notice + ≤ 5 mo.	Notice + ≤ 2 mo.	Notice + ≤ 7 mo.	• Conduct hearing • Decide the appeal

Notes:

1 Sentence only appeals may be heard earlier, perhaps 3 - 4 months after notice, with material filing dates set accordingly.

2 Notice of appeal of a disposition order must be filed within 15 days after the decision.

3 Time requirements for an extended appeal reflect an example of dates the court may set in the absence of any specific party requests or other needs.

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[100] CPD G.6.

[101] *Criminal Code*, ss 679(7.1), 822(3). See also r. 860B(4) and Edward L. Greenspan & the Honourable Mr. Justice Marc Rosenberg, *2010 Martin's Annual Criminal Code - Student Edition*, (Ontario, Canada Law Book, 2009) [Martin] at 1314 which notes that the appeal court has jurisdiction to hear the application until such time as the accused first appears before the trial court. After the 1st appearance, both courts have jurisdiction but the JIR application should be addressed by the trial court. Similarly, review of a JIR order may be brought before either court pursuant to *Criminal Code*, ss. 520 or 680.

CHAPTER 3. LEAVE TO APPEAL

A. Overview of Leave to Appeal

[135] Some criminal decisions require leave to appeal.[102] In order to clarify what a prospective appellant must do when leave is required, this chapter describes procedures for processing leave applications either in combination with or separate from the substantive appeal hearing. The main policy position reflected in the leave proposals is that leave proceedings should be tailored to suit the nature of the appeal, with first level appeal applications conducted on a combined basis and second level appeals (i.e. an appeal of an appellate court decision) requiring a separate application hearing process.

B. First Level Appeals - Combined

ISSUE No. 19
When and how should leave applications be heard for first level appeals?

[136] The prevailing practice for leave seems to be that the application is considered to be part of the notice of appeal, with leave being granted at the start or end of the appeal hearing.[103] Without a consistent procedure for handling leave to appeal, it may not be clear to an appellant that the first order of business is to provide reasons why an appeal should proceed.

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[102] *Criminal Code,* s. 839 (1), see also summary in *Appendix A – Criminal Appeal Rights and Courts*.

[103] See "Criminal Notice of Appeal" Forms A (Appellant not represented by Counsel) and B (filed by counsel for an Appellant or on behalf of the AG) which provide less and more descriptive check boxes, respectively, to request leave. The practice of processing leave for sentence and conviction appeals at the time of hearing is parenthetically noted, but not described, in Court of Appeal of Alberta, "Criminal Notice of Appeal" at Check Return Forms Publications, online: <http://www.albertacourts.ab.ca/CourtofAppeal/PublicationsForms/tabid/87/Default.aspx>.

The leave practice observed in one of the courts in connection with appeals as to fitness of sentence is that the substantive arguments on the merits of the appeal are heard. If the court decides to allow the appeal, it then verbally grants leave to appeal prior to issuing the decision on the merits. If the appeal is not granted, the court simply dismisses the appeal and makes no reference to leave. It is not known whether arguments concerning leave were made in the written submissions of the parties.

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

[138] The existing practice of considering leave to appeal applications together with the substantive appeal is an efficient use of legal and court resources. This said, the process for a combined leave application should be clarified to prevent the leave application being lost in the substantive argument and to ensure that the court has sufficient information to make a decision on the question of leave. In particular, the appellant's request for leave to appeal and the reasons why it ought to be granted should be clearly expressed. The following proposals for processing a leave to appeal application together with the substantive appeal are also noted in *Chapter 2 - Core Process*.

[139] ***The proposal*** is that if a party requires leave to appeal a criminal trial outcome or other decision at first instance, the question of leave should be addressed as a necessary first part of the appeal process as follows:

- the appellant must file the application for leave to appeal together with the notice of appeal within one month after the date of conviction, acquittal, sentence or other trial decision for which the appellant requires leave to appeal,[104]
- the factum filed by the appellant must include reasons for granting leave to appeal,
- the respondent's factum may include reasons for denying leave to appeal,
- all matters on appeal are to be presented at the appeal hearing, unless otherwise directed by the court, with the application for leave to appeal decided first, and

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[104] Rule 843, see also *Appendix A - Criminal Appeal Rights and Courts* for a list of criminal appeals which require leave to appeal.

- the decision of the appeal court should expressly address the application for leave to appeal.

C. Second Level Appeals - Separate

ISSUE No. 20
When and how should leave applications be heard for second level appeals?

[140] There are also benefits to processing a leave to appeal application by way of a proceeding that is distinct and precedes the substantive appeal process. These benefits include efficient, timely processing of focussed leave applications and the potential for early elimination of improper appeals before substantial amounts of legal or court resources have been expended.

[141] For second level appeals,[105] the Committee suggests that the application for leave to appeal should be processed by way of a separate, distinct proceeding with a hearing dedicated to addressing only the merits of the leave application. One of the main reasons for this position is that it is challenging to establish and argue the technical grounds on which leave to appeal the decision of an appellate court may be granted and all participants benefit from the focussed nature of a separate application proceeding. Another reason is that it is appropriate to limit the application to just the leave grounds and arguments given that significant amounts of court and legal resources have already been used to decide the criminal matter at trial and determine the first appeal.

[142] The Committee considered whether the hearing format for the separate leave application should be in person, with oral arguments based on written submissions, in writing,[106]or as decided by the duty judge on an application by application basis. Since counsel and the court are most familiar with the in person format and given the

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

[106] Leave procedures in SCC Rules and the criminal leave practice in England and Wales as described by the Right Honourable Lord Justice Auld, *A Review of the Criminal Courts of England and Wales,* (September, 2001), online: http://www.criminal-courts-review.org.uk/ at 639 both provide that leave applications are determined solely on the basis of written submissions. See also CPD F.5 which states that a leave application may proceed without oral argument.

significant efficiency and transparency benefits associated with this approach, the proposals below reflect the existing procedures for an in person format, with oral argument based on written submission applications.

[143] ***The proposal*** is that a party seeking to make a second level appeal must apply to the court for leave to appeal and that the court may grant or deny the leave request at the conclusion of the application proceeding which is separate and distinct from the appeal on the merits.[107]

[144] Leave applications for second level appeals are to be decided by a single judge,[108] on the basis of written materials and oral arguments presented at a hearing before the judge.

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

1. When and how to file the separate leave application

[146] ***The proposal*** is that an application for leave to appeal must be filed within one month after the date of the appeal court decision which the prospective appellant seeks leave to appeal.[109]

[147] If the accused applicant is not in custody or has a lawyer, 3 copies of the leave application must be filed with the registrar of the court.[110]

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

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

[109] Rule 843.

[110] Rule 844(1)(i-ii), Forms A and B, online: <http://www.albertacourts.ab.ca/CourtofAppeal/PublicationsForms/tabid/87/Default.aspx>.

[148] An accused who is in custody and does not have a lawyer may file a leave application by providing 3 copies of the application to the warden of the institution where he is held. The warden endorses the copies, returns one to the appellant, keeps one and forwards one to the registrar of the court.

[149] If the leave applicant is the Crown, 2 copies of the leave application must be filed with the court and one copy personally served on the accused.[111]

2. What to file in a separate leave application

[150] ***The proposal*** is that the leave application must include[112]

- applicant's name,
- date of the appeal court decision for which leave is sought,
- name and location of the court which issued the decision,
- applicant's address or place of incarceration,
- name and address of applicant's counsel as address for service, if applicable,
- notice to the respondent about the leave proceeding,
- signature of the applicant or the applicant's counsel,
- copy of the appeal court's decision and reasons,
- memorandum (≤5 pages) which includes
    - a concise summary of facts relevant to the leave application,
    - nature of the leave sought (leave to appeal conviction/acquittal, sentence or both conviction and sentence, other decision)
    - specific grounds (errors of law, fact or otherwise) for seeking leave and how the alleged error affected the outcome, and
    - concise reasons for granting leave, with reference to statutory and common law sources.

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[111] Rule 844(1)(iii).

[112] Leave application contents based on SCC Rules, r. 25; rr. 846, 849; Court of Appeal Forms A and B, online: <http://www.albertacourts.ab.ca/CourtofAppeal/PublicationsForms/tabid/87/Default.aspx>; CPD F.3., F.2(a), F.4.(a)(ii), (b), F.9(b); and Court of Alberta "Notice of Motion - Justice Chambers (One Justice) and "Notice of Motion - Motions Court (Panel of 3 Justices)" which require a notice to the respondent about the consequences of failing to abide by the rules of court.

[151] The leave application may also include:[113]

- a request, with reasons, that the party's arguments be submitted or the hearing conducted solely in writing,
- affidavit in support of other relief, if any, requested in connection with the leave application,
- orders concerning publication or confidentiality, if any, and
- a chronology of trial dates, orders and decisions.

3. Court response to a separate leave application

[152] ***The proposal*** is that the court responds to the leave application by opening an application file and informing the applicant of the application file number and estimated oral hearing date.[114]

[153] In terms of how the other party is informed of a separate leave application, the proposals are the same as for informing the party of a notice of appeal, that is:

- the court sends one copy of the accused's leave application, together with information concerning the application proceeding when the leave application is filed to the Crown respondent,[115] and
- if the Crown files a leave application, the Crown must personally serve the accused with one copy of the leave application and information concerning the application proceeding when the leave application is filed.

4. Respondent's role in a leave application

[154] There is practice precedent for setting short time periods between the respondent's receipt of notice of the separate leave application, filing the response and

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

[114] The proposal adapts the court response to self-represented filings found in CPD I.3 to apply to all leave applicants. It is also likely that the court would inform the parties as to the judge assigned to hear the matter.

[115] At a minimum, the proposal should apply to the court informing the respondent in the event of a prison filed leave application by an unrepresented appellant. For other leave applications, the alternate is that an accused appellant who is not in custody or who has a lawyer must provide a copy of the leave application to the respondent at the same time as the application is filed with the court.

the leave decision.[116] However, since the separate leave application process is proposed for second level appeals, which may be more technical and somewhat less time sensitive, it is suggested that more time be afforded to prepare response materials.

[155] ***The proposal*** is that the respondent may file and provide within one month[117]after the date on which the respondent receives notice of the leave application, unless otherwise ordered, a memorandum of law (≤5 pages) which should include:

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

5. Outcome of a leave application

[156] It may help clarify the criminal appeal process and assist an applicant or respondent to identify the appropriate next steps if the potential effects of the leave to appeal process were described.

[157] ***The proposals*** which follow reflect, for the most part, existing practices. If the judge assigned to decide a separate leave application finds that the application or response does not comply with requirements, the judge may[118]

- decide the application based on the materials as submitted and issue an order either granting or denying leave to appeal,

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[116] CPD F.2(a) and (c) require leave applications to be complete and respondent's documents filed 7 and 5 days before a leave hearing, respectively and r. 849(4) requires documents to be filed 2 days before the hearing. Leave decision dates can be scheduled under existing pre-booking and regularly scheduled motion court directions as contemplated in CPD F.2(e) and (f).

[117] The suggested period is consistent with SCC Rules, r. 7.

[118] The proposal allows the judge to decide whether or not the leave application contains enough information to grant or deny leave to appeal and is consistent with the court's authority for making and varying rules. This change in procedure (see CPD F.6(a)-(b) which states that the clerk will not accept non-compliant leave applications) may improve access to justice by enabling leave applications which are substantially complete to proceed.

- issue an order that the applicant provide specific additional written materials on a specific date, or
- set a date for oral argument on the leave application.

[158] The judge's decision to grant or deny leave to appeal a summary conviction or acquittal and associated sentence is final and may not be appealed.[119]

[159] A notice of appeal must be filed within 10 days after the date that leave is granted.[120]

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

[120] CPD F.9(a) and (c) provide that an appeal of a Queen's Bench appeal decision in a summary conviction matter may start in the Court of Appeal only after leave to appeal has been granted.

CHAPTER 4. INTERIM RELIEF PENDING APPEAL

A. Overview of Interim Relief Pending Appeal

[160] A person convicted of an offence and sentenced or adversely affected by some other decision in a criminal matter may seek relief from the effects of the sentence or decision while the appeal is in progress by making an application to the appeal court.[121]

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

[162] This chapter identifies and documents the existing practices and procedures for stay applications and for JIR. The Committee suggests that the practices and procedures work well and should be documented and adopted as standard procedures. A few reform issues are discussed in the context of the relief application process in which they arise.

[163] The main policy positions and principles reflected in the interim relief proposals are as follows:

- Common procedures for processing applications for interim relief might make it easier to obtain relief, regardless of which court is hearing the appeal and associated application.
- Existing practices and procedures which work well, should be affirmed, documented and consistently adopted.

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[121] An application to the criminal appeal court is currently described using a number of different terms and phrases, including "notice of motion." In order to reduce confusion, the term "application" is used in this Consultation Memorandum as it may more easily convey meaning to persons who do not have legal training or much court experience.

- A central coordinating function, if implemented, would allow an appellant to file an application for interim relief at the closest court to their home or place of incarceration, although the hearing of the application would be in accordance with current court practice.
- In order to completely describe the interim relief procedures, coordination activities of court officers are noted.
- Interim relief procedures refer to providing information instead of service in order to encourage parties and the court to use communication methods that are efficient and effective.

B. Stay of Order

ISSUE No. 21
What process should govern an application for stay of a criminal trial order or other decision?

[164] Applications for a stay are common in Queen's Bench and made by Court of Appeal appellants who seek to delay payment of a fine or a licence suspension. Each court has its own process for stay applications. The Queen's Bench stay process is based on, but less detailed than, the JIR procedure and the Court of Appeal's process is the same as the JIR procedure, modified to reflect that the appellant is not in custody.[122] The Committee suggests that it might help clarify the criminal appeal process if the steps for making a stay application were standardized and documented.

[165] The stay procedure outlined below is modelled on the existing stay application process in Queen's Bench.[123] The Committee notes that this process works well and should be continued, documented and considered as a standard procedure for criminal stay applications.

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[122] *Criminal Code*, s. 816. See also Martin at 1573 which states, with reference to *R. v. Simpson,* (1978), 44 C.C.C. (2d) 109 (Ont. Co. Ct.) that where no rules exist for a procedure for relief from summary conviction sentences, the rules for bail pending appeal of indictable matters apply. Further, with reference to *R. v. Anderson,* (1982), 70 C.C.C. (2d) 253 (Ont. Co. Ct.) Martin notes that a judge of the summary conviction appeal court has "inherent jurisdiction" to stay the terms of a probation order issued by the court below.

[123] The process was described by a court officer of the Edmonton Court of Queen's Bench.

[166] ***The proposal*** is that an accused may apply to a duty judge of the appeal court to stay the criminal conviction and sentence or other decision by filing an application for stay, together with or after the notice of appeal.[124]

[167] The stay application must include proof that the notice of appeal has been filed.

[168] The stay application, in order to avoid error or delay in processing should contain:

- applicant's name and date of birth,
- appeal or leave application file number, as applicable,
- date set for hearing the appeal or leave application, as applicable,
- name and address of applicant's lawyer, if applicable,
- applicant's address,
- summary of the reasons for granting a stay of order,
- affidavit,[125] if applicable,
- draft stay order (which may include recognizance and undertaking),
- memorandum (≤5 pages) describing the grounds for granting the stay,
- copy of appealed decision with reasons, if available, and
- proof that the appellant has ordered a transcript in support of the appeal or reasons explaining why the transcript has not been ordered.

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

- sets a hearing before a duty judge,[126]
- informs the applicant of the hearing date, place and time,
- sends a copy of the stay application and notice of the hearing particulars to the respondent, and
- prepares the stay application file for the duty judge.

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[124] An appellant does not need to immediately file for a stay of a money or property based judgment. *Criminal Code*, s. 689(1)(a) states that the period for appeal as set by the rules of court must expire without action before a trial court order for payment, restitution or forfeiture can take effect.

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

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

[170] The respondent may file materials 5 days after receiving a copy of the stay application including:

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

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

[172] An incarcerated applicant represented by counsel may ask to attend the hearing of the stay application and, if authorized by the judge, participate by way of a method of the judge's choosing.

[173] The judge, if satisfied that the stay application meets the criteria set by the *Criminal Code*, may issue the stay order and the relief is granted upon the recognizance and undertaking being entered into by the applicant before a judge or justice of the peace.[127]

[174] In the event the trial decision that is under appeal requires restitution of property, any stay issued must include an order which secures the safe custody of the property pending the outcome of the appeal.[128]

C. Judicial Interim Release (JIR)

[175] The *Criminal Code* provides that a person in custody may apply to a duty judge for JIR pending the outcome of the appeal, sets criteria for making a release decision and stipulates the type of financial and personal conditions that may be ordered in connection with the release.[129]

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

[128] Rule 860.

[129] *Criminal Code*, ss. 679(1)-(10), 816(1)-(2), 831, 832 and 834. See also CPD E.3(b)-(c), CPD I.19 and Form A, "Order for Judicial Interim Release." It should also be noted that the Crown can apply to have judicial interim release revoked.

[176] The detailed provisions in the *Criminal Code* combined with operational considerations make it difficult to describe the JIR process. In particular, the *Criminal Code* is frequently modified and the need to maintain sufficient flexibility to support administrative and technological initiatives over time.[130]

[177] One of the factors which makes it less difficult to document the JIR process is that there is only one process. Most applications for JIR are made in connection with appeals to the Court of Appeal and the Queen's Bench follows a similar procedure when processing the few JIR applications that are made pending the outcome of an appeal to that court.[131]

[178] The Committee suggests that the following benefits of describing the JIR process outweigh the challenges. Documenting the key statutory provisions for obtaining JIR release together with the other criminal appeal requirements might make it clear to appellants that although sentence relief is available pending appeal, it is not an automatic part of the appeal process and might also help appellants understand how to apply for JIR and on what terms it may be granted.

[179] The Committee reviewed the existing statutory provisions, requirements and practices which govern a JIR application and proposes that the following JIR procedures be standardized and documented.

1. When to file a JIR application

[180] An accused may file an application for JIR

- after the notice of appeal is filed,
- if leave is required, after an application for leave is filed, or

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[130] For example, the Court of Queen's Bench relies on Justices of the Peace in person, by telephone and video conference to conduct pre-trial bail (now called interim release) hearings outside of regular hours for persons charged with criminal offences who are being held in regional detention facilities. This practice effectively expands the times when bail hearings can be conducted, provides access to the release proceeding and, in all likelihood, expedites decisions concerning release pending trial.

[131] See r. 860.7(1)-(2). See also Martin at 1573 concerning *Criminal Code*, s. 816 which states that principles for release applied to indictable matters also apply to releases pending appeal from summary convictions and refers to *R. v. Simpson* (1978), 44 C.C.C. (2d) 109 (Ont. Co. Ct.) as authority for the position that if there are no specific rules of court governing judicial interim release in summary conviction matters, then the rules for indictable matters apply by analogy.

- in the case of a sentence only appeal requiring leave, after leave has been granted.[132]

2. What to file in a JIR application

ISSUE No. 22
What information is needed in a judicial interim release application?

[181] The guiding premise is that the JIR application should contain as much information as is necessary to accurately identify the appellant and appeal file, satisfy statutory requirements, give notice to the respondent and support a decision of the court.[133] A number of factors were considered in developing the proposed lists of information that may be required to support a JIR application, the main factors being the appropriateness of the item and the possibility that an applicant would be able to comply with the requirement.

[182] A duty judge may hear a JIR application on its merits even if some information items are missing, provided the requirements of the *Criminal Code* are satisfied.[134] An accused may therefore file a JIR application without including all of the items listed, as long as any mandatory information or documentation is included. However, applicants who make incomplete filings should be aware that the court may dismiss or adjourn the JIR proceeding because information is missing. For example, the Crown may object to conducting the JIR hearing until such time as the applicant's criminal record has been disclosed.

[183] To the extent information has already been filed by the appellant as part of the appeal package, it is suggested that an extra copy is not needed to complete the JIR

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

[133] The proposed JIR application content largely reflects CPD F.2(a)-(b), (e), F.3(a)-(b), and is intended to be consistent with other proposals for criminal appeal materials. The proposal does not include the requirement of a backer or specific notice/warning to the respondent.

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

application. In addition, the applicant is encouraged to make specific reference to authorities and to avoid filing copies of legislation or cases.

[184] ***The proposal*** is that the JIR application must include proof that a notice of appeal or application for leave to appeal has been filed.[135]

[185] The JIR application should include:

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

[186] It is strongly recommended that the JIR application also include the following items in order to avoid errors or delays in processing the application:

- affidavit,
- draft release order that states the recognizance and undertaking,[136]

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[135] Rule 860A(1).

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

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

In this Consultation Memorandum "undertaking" means a promise, pledge or engagement, definition based on *Black's*, *s.v.* "undertaking". The *Criminal Code*, s. 493 states that "'undertaking' means an undertaking in Form 11.1 or 12".

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

[187] The applicant's affidavit should include:[137]

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

[188] The draft JIR order should include:[138]

- mandatory undertakings to[139]
  - keep the peace,
  - report to court in person when required by the court,
  - remain in a specified location,
  - pursue the appeal with due diligence, and
  - abide by other conditions as set by the court, specified by statute or required under rules of court,
- recognizance with or without deposit of cash or valuable security or sureties, if any,
- release order requirements that
  - appellant personally attend the appeal hearing,

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[137] Rule 860B(2)A.

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

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

- show picture identification at the start of the hearing, and
- surrender themselves into custody of a peace officer, pending outcome of the appeal, and

- signature of applicant or applicant's lawyer.

[189] The applicant's memorandum (≤5 pages) should include:[140]

- concise summary of facts relevant to the application for JIR,
- statement of the relief sought,
- grounds and reasons for granting the JIR, with concise reference to statutory and common law sources,[141] and
- other materials or evidence necessary to the application, if any.

[190] The JIR application may also include an applicant's request to attend the JIR hearing.

3. Administrative coordination of JIR application

ISSUE No. 23
What does the court do to prepare for a judicial interim release hearing?

[191] In order to eliminate a number of steps and enable JIR applications to be processed more quickly, it is suggested that the court could forward copies of applicant and respondent materials, together with details concerning the JIR proceeding to the parties instead of the parties informing the other side. This court communication function, if not fully adopted, should at least be considered for cases where the JIR applicant is not represented by counsel.

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[140] The proposal is based on CPD F.1(a)-(c), F.2(a)-(c), (e), F.3(a)-(c) and 4(a)-(b), (d) as modified to conform with other proposed requirements for criminal appeal materials.

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

[192] ***The proposal*** is that, upon receipt of a JIR application, the court officer[142]

- sets a date for a hearing before a duty judge,[143]
- informs the applicant of the hearing date, location and time,
- provides a copy of the JIR application, including supporting material, and hearing particulars to the respondent, and
- prepares an application file for the duty judge.

4. Respondent's role in JIR application

[193] The respondent may file an affidavit and a memorandum 5 days after receiving notice of the JIR application.[144]

[194] The respondent's affidavit should include:

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

[195] The respondent's memorandum should include:

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

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[142] *Criminal Code*, s. 679(2) states:

> Where an appellant applies to a judge of the court of appeal to be released pending the determination of his appeal, he shall give written notice of the application to the prosecutor or to such other person as a judge of the court of appeal directs.

This section does not preclude notice of the application for release being provided to the Crown by way of court forwarding.

In addition to the proposed coordination functions of the court replacing service requirements, the suggestion differs from the practices described in CPD F.2(c) in that the court sets a hearing date going forward from the application filing date to an available hearing date.

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

[144] CPD F.2(c).

- signature of respondent or respondent's counsel.

[196] The court provides a copy of the respondent's materials to the applicant.

5. JIR hearing and order

ISSUE No. 24
Should the judicial interim release applicant be present at the hearing?

[197] Two benefits of having the applicant at the hearing are that the court may be better able to assess the applicant's understanding of release conditions and the applicant is able to immediately agree to new or modified conditions. The main barrier to personal participation is that it may not be practical to bring the applicant to court. For this reason, applicants who are represented by counsel usually do not attend the JIR hearing.[145]

[198] ***The proposal*** is that a JIR applicant may ask to attend the hearing, with the duty judge deciding whether or not to grant the request and determining the method of attendance. Attendance may be in person, by telephone, by video conference or any other electronic means as set by the duty judge.

[199] The duty judge determines the order of speaking and amount of time each side is allotted to present oral argument and, at the conclusion of the hearing, issues a decision to grant or deny the application for JIR.[146]

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

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

[200] The duty judge will not, in any event, grant JIR until the applicant shows proof that the transcripts necessary to support the appeal have been ordered, or filed, as applicable.[147]

[201] If JIR is denied in connection with an appeal of an indictable matter, the duty judge may give directions to expedite the hearing of the criminal appeal or any other related proceeding.[148]

[202] The JIR application of a person convicted of a s. 649 offence or prohibited from driving may, on application of either party and subsequent order of the Chief Justice, or her designate, be heard a second time by a single judge or panel of the Court of Appeal.[149]

[203] If JIR is denied in connection with a summary conviction appeal there is no right to appeal the JIR decision.[150]

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

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

[149] *Criminal Code*, ss. 680(1)-(3). See also Martin at 1315. This provision includes applications for JIR pending appeal to the Supreme Court of Canada.

[150] *Criminal Code*, s. 816. See also Martin at 1573. If the Court of Appeal is the appeal court of first instance by the operation of s. 830, it would seem that the decision to deny JIR would have the same outcome.

CHAPTER 5. COURT ASSISTANCE

A. Overview of Court Assistance

[204] There are a number of procedural matters that may require court assistance to ensure the just, orderly and timely conduct of the appeal. Some court assistance processes involve making a properly supported application to the court[151] and others are less formal.

[205] This chapter identifies matters that court officers, duty judges and hearing judges or panels are often asked to help with and describes how the court processes the requests. The Committee suggests that the existing methods for obtaining court assistance seem, for the most part, to be effective and efficient and proposes that these be adopted as standard procedures. There are only a few issues associated with court assistance processes.

[206] The main policy positions and principles reflected in the court assistance proposals are as follows:

- A common approach to getting court assistance should make it easier to get help, regardless of which court is hearing the appeal.
- Accessing court help may be more efficient if parties can easily know whom to ask for assistance (i.e. when to ask a court officer,[152] duty judge or the hearing judge or panel).
- A prompt resolution of process issues can help keep the main appeal on track and the time periods suggested for assistance proceedings are intended to be short, yet practical.

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[151] An application to the criminal appeal court is currently described using a number of different terms and phrases, including "notice of motion." In order to reduce confusion, the term "application" is used in this Consultation Memorandum as it may more easily convey meaning to persons who do not have legal training or much court experience.

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

- Existing practices and procedures which work well, should be affirmed, documented and consistently adopted.
- Central appeal coordination, if implemented, would allow an appellant to file an assistance application at a court that is closest to their home or place of incarceration, although the hearing of the application would be in accordance with current court practice.

ISSUE No. 25
How can a party get assistance from the court?

[207] The Committee reviewed the procedural issues regularly resolved by court officers and the judiciary with a view to distinguishing matters which could be characterized as routine administration from those which require an exercise of discretion. Since there does not appear to be a clear consensus on what is routine administration, the Committee suggests that documenting which procedural matters can be resolved by a court officer, duty judge or hearing judge or panel, respectively, would be a simple and effective way to clarify how to get court assistance without creating new interpretation issues.

[208] ***The proposal***, however, is that if it is not clear whether a matter falls within the purview of a court officer, duty judge or the deciding judge or panel, the party seeking court assistance should direct a written question to a court officer in order to find out how to obtain assistance.

B. Court Officer

[209] Access to justice and the other benefits of delegating administrative authority to court officers are well known and reflected in legislation[153] and existing practices. Court officers in both Queen's Bench and the Court of Appeal help ensure the timely, effective processing of criminal appeals by resolving issues concerning

- the appeal hearing date,
- support material filing dates, and
- appeals which are abandoned before the hearing.

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

The procedures for obtaining court officer assistance in each situation are described below and the Committee considers that these procedures work well and should be continued.

1. Changing an appeal hearing date

[210] If a party to an appeal is unable to participate in the hearing on the date the hearing is set, the party must inform the court officer, in writing, of the situation and ask that a new appeal hearing date be set.[154]

[211] If the court officer decides to set the hearing for a different date, the court officer informs the parties, in writing, of the new date.[155] If the matter has been assigned to a specific duty judge or panel, the officer also notifies the court participants.

[212] If the court officer declines to change the hearing date, the party may apply to a duty judge to change the hearing date.

2. Changing materials filing date

[213] If a party to an appeal is not able to meet the date set for filing materials, the party must inform the court officer, in writing, of the situation and request that a new filing date be set.[156]

[214] If the request for a new filing date is granted, the court officer notes the new filing date on the appeal file and notifies the other party. If the court officer denies the request for a new filing date, the party may apply to a duty judge.

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[154] Of note, a party may ask the court officer to set a later or earlier date for the hearing. See also discussion of expedited and extended appeals in *Chapter 2 - Core Process*.

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

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

3. Abandoning an appeal before the hearing date

[215] An appellant may abandon an appeal at any time prior to the start of the hearing by filing with the court officer a notice of abandonment that is signed by the appellant or the appellant's lawyer. If the notice is signed by the appellant, the signature must be verified by affidavit, witnessed by a lawyer or witnessed by an official of the institution in which the appellant is confined.[157]

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

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

C. Duty Judge

[218] The benefits of the court maintaining oversight of criminal appeal proceedings by way of duty judge involvement include increased clarity and efficiency. The main premises underlying the procedures and practices described below are that variations to court rules should be granted only on the basis of written requests and that directions and orders issued by the court should also generally be in writing and, if applicable, specify new dates or other requirements.[158]

[219] Court assistance with process issues can be obtained by submitting an application or making a request to a duty judge in a number of situations.[159]

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[157] Rule 860C(1).

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

[159] See also *Chapter 4 - Interim Relief Pending Appeal*, applications for a stay of order or judicial interim release are decided by a duty judge.

In particular, an accused or the Crown may

- request an extension of time to appeal or seek leave to appeal,
- apply for a change to a time period within an appeal proceeding in the event a court officer has refused an appeal party's request for such change,
- ask permission to submit materials that may not strictly comply with requirements,
- request guidance concerning a missing respondent,
- apply for or request appeal management assistance, or
- apply for summary dismissal of an appeal before Queen's Bench, and
- a third party may apply for intervener status.

The procedure for obtaining duty judge[160] assistance in each situation is described below and the Committee considers that these procedures work well and should be continued. One issue associated with appeal management is addressed and the Committee makes proposals in that regard.

1. Extending time to file notice of appeal or leave application

[220] If an appellant wants to file a notice of appeal or make an application for leave to appeal out of time, the appellant must get a fiat from a duty judge to do so.[161]

[221] The appellant submits a written request to file out of time with the duty judge. The request must:

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

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[160] Duty judge means a single judge in appearance, arraignment or motions court or in chambers.

[161] *Criminal Code*, ss. 815(2), 678(2). See also r. 860.8(1)(a), CPD I.24(a)-(b) and Martin at 1308 with reference to *R. v. Stokes and Stevenson* (1966), 57 W.W.R. 62 (Man. C.A.) which notes that the *Criminal Code* does not authorize the registrar of an appeal court to extend the period for commencing a criminal appeal. The proposal reflects the principle that only a judge has the authority to issue a fiat.

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

[222] The duty judge reviews the request to file out of time and may grant a fiat by signing the request.[162]

2. Changing time periods after court officer refusal

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

[224] A duty judge, on application or the court's own motion, may direct or order an extension of a time period in which a party is to submit materials in support of an appeal.[163]

[225] An application to change the date of an appeal or application hearing is to be filed and provided to the other side on a date that is not less than one month prior to the original date set for the hearing. The application includes:[164]

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

3. Filing non-compliant document

[226] A party to an appeal who submits a non-compliant document must get a fiat from a duty judge before the document can be filed.[165] The party seeking the fiat must

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

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

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

[164] *Criminal Code*, s. 824, CPD I.11, CPD F.6(c). See also CPD I.16(b) and r. 840(6.2). The proposal contemplates that hearing dates would be changed or adjourned as a result of an application proceeding, although the *Criminal Code* does not restrict the court's use of power in this manner.

[165] The proposal is based on the existing practice in Queen's Bench and the approach to non-conforming sentence appeal materials as described in CPD I.4(j) and I.5(h), modified to reflect ALRI, *Civil Appeals,*

(continued...)

submit a written description of the discrepancies between the proposed document and the requirements and request that a fiat be granted, together with the proposed document to a court officer.

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

4. Informing a missing respondent

[228] In the event the respondent to an appeal can not be located, the appellant may make a written request asking the court to set an acceptable method and time frame for communicating information to the respondent.[166]

5. Managing appeals

ISSUE No. 26
What appeal management procedures should apply to criminal appeals?

[229] The Committee reviewed existing criminal appeal management practices with a view towards identifying procedures which enhance the certainty and efficiency of the criminal appeal process.[167] The Committee considers that existing practices for getting help in order to get an appeal started and for managing progress work well and should be affirmed. Criminal appeal courts require flexibility to implement management practices that are tailored to meet the needs of appellants, respondents and the court as needs may change from appeal to appeal and over time.

[230] ***The proposal***, therefore is that only the framework for appeal management needs to be formally established in order to enhance the certainty of the appeal process.

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[165] (...continued)
Consultation Memorandum No. 12.21 (April 2007) at para. 366 which recommends that the "practice of issuing fiats based on consent should not be continued."

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

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

Specific management practices as may be appropriate to particular types of appeals should be left open for the court to determine.[168]

[231] This said, the Committee observes that duty judge involvement in appeal management proceedings seems to facilitate compliance with the directions, agreements or orders that come out of those proceedings and suggests that broader use of duty judges in appeal management processes be considered.

[232] Applications or written requests for appeal management assistance may be made to a duty judge.

[233] On the request of a party or the court's own motion, the duty judge may conduct an appeal management conference. The court officer sets the appeal management conference on a date that is convenient to the duty judge and informs both parties as to the time, place and method of participation.[169]

[234] At the conclusion of an appeal management conference, the duty judge may issue a written order or direction, or take any other action which the judge determines appropriate to expedite the conduct of the appeal, avoid unnecessary expense or prevent undue delay.[170]

6. Summary dismissal in Queen's Bench

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

- violated terms of a judicial interim release order,

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

[169] The proposal is intended to cover existing appeal management proceedings such as the use of criminal appearance court in Edmonton to discuss summary conviction appeal progress and the negotiated time table discussions of the Calgary Court of Appeal.

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

- not proceeded with the matter, or
- abandoned the appeal.[171]

[236] If the duty judge of Queen's Bench dismisses the appeal of an appellant who has been granted a stay or JIR, the court must issue a warrant for the appellant's arrest and the appellant is required to surrender into custody.[172]

7. Applying for intervener status

[237] A person who has no personal interest in a criminal appeal can not participate in the appeal process but may apply to a duty judge to intervene in the appeal.[173] The opportunity to intervene does not apply to appeals concerning findings of mental health or fitness.[174]

D. Hearing Judge or Panel

[238] Some issues that arise during the course of an appeal require the court to decide what is fair or necessary in the circumstances in order to advance principles of justice. These types of issues must be addressed or resolved by the judge or panel assigned to

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[171] *Criminal Code*, s. 825. According to Martin at p. 1580, *Criminal Code*, s.795 allows the summary conviction appeal court to compel the appearance of the appellant for a summary proceeding to dismiss a vexatious appeal. Martin at p. 1580 also cites *R. v. Clarke,* (1981), 31 A.R. 147 (C.A.) as authority for the court to find that a violation of the rules of court constitutes "not proceeding." It seems that the power of the Queen's Bench to dismiss is slightly broader in that the Court of Appeal does not have the ability to summarily dismiss an appeal for violation of JIR conditions. Of note, applications for summary dismissal of an appeal before the Court of Appeal must be decided by the panel assigned to hear the appeal.

[172] Based on the procedure in CPD I.15 and Court of Appeal of Alberta, "Judicial Interim Release (Bail) Applications - Check/Return Form" at Note, online: <http://www.albertacourts.ab.ca/CourtofAppeal/PublicationsForms/tabid/87/Default.aspx>.

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

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

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

hear the appeal because the decision has the potential to affect the outcome of the appeal. Court assistance to address the following matters may be obtained by making an application to the judge or panel assigned to hear the appeal:

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

[239] The procedures for obtaining assistance from the hearing judge or panel described below largely reflect existing practices and are expressed in common terms so as to apply to both criminal appeal courts. The Committee considers that these procedures work well and should be continued. The few reform issues are discussed in the assistance context in which they arise.

1. Withdrawal of lawyer

ISSUE No. 27
What procedure should be used when a lawyer wishes to withdraw as appeal counsel?

[240] The principles of fairness and proper administration of justice dictate that a lawyer who no longer wants to represent a criminal appeal client requires the permission of the court to withdraw.[175] Although applications for court approval to withdraw do not happen very often, outlining the requirements would likely improve the public's understanding of how the court helps ensure a fair appeal process.

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[175] The court is also concerned about legal representation in appeals where an accused has no lawyer. The *Criminal Code,* s. 684 provides that the appeal court may appoint a lawyer to act on behalf of an accused if, in the opinion of the court, it is in the interests of justice that the accused have legal assistance and it seems that the accused does not have sufficient means to obtain assistance. See also Martin at 1329-1331.This Consultation Memorandum does not describe a procedure for court appointed criminal appeal counsel as it is not known if this has ever been done in Alberta.

[241] ***The proposed*** procedure which follows reflects existing practice and is consistent with the recent decision of the Supreme Court of Canada affirming the court's role in overseeing a lawyer's decision to withdraw.[176]

[242] A lawyer of record who starts an appeal or files materials in response must make an application to the court for an order authorizing the lawyer to stop acting for the appellant or respondent, respectively.

[243] The court may authorize the lawyer to withdraw if

- the request is far enough in advance of any scheduled proceedings such that an adjournment will not be necessary,[177]
- the request is for an ethical reason (even if granting the request would delay the proceeding),[178] and
- the lawyer identifies another lawyer who has agreed to represent the client.[179]

[244] The court may deny the application to withdraw if, after consideration of all relevant factors, it determines that allowing withdrawal would cause serious harm to the administration of justice.[180]

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

[177] *Cunningham* at para. 47.

[178] *Cunningham*, at paras. 48-49 describes ethical reasons as follows:

> Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused.... If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons"... If withdrawal is sought for an ethical reason, then the court must grant withdrawal .... Where an ethical issue has arisen in the relationship, counsel may be required to withdraw in order to comply with his or her professional obligations. It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.

[179] Proposed requirement is based on CPD F.1(d)(ii) and Court of Appeal of Alberta, "Notice of Motion - Motions Court (Panel of 3 Justices) - Check/Return Form" at K. Criminal (vi) and (vii).

[180] *Cunningham*, at para. 50 discusses the factors to be considered:

> ...In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors: whether it is feasible for the accused to

(continued...)

2. Changing form of hearing - summary conviction appeal *de novo*

[245] A summary conviction decision is generally appealable on the record of the trial court. However, in the rare situations when the condition of the record is not suitable for appeal use or if interests of justice would be better served, an appeal may be conducted as a trial *de novo*.[181]

[246] An accused or crown appellant may apply to the Court of Queen's Bench, based on the condition of the summary conviction trial record or other reason, for an order authorizing the appeal to be conducted as a trial *de novo*.[182]

[247] If the court finds that the interests of justice would be better served by adopting a different form of appeal, it may order that the summary conviction appeal be determined by way of a trial *de novo* conducted consistent with the trial provisions contained in the *Criminal Code* and applicable rules of court.[183]

3. Changing format of hearing - oral or written

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[180] (...continued)

> represent himself or herself; other means of obtaining representation; impact on the accused from delay in proceedings, particularly if the accused is in custody; conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time; impact on the Crown and any co-accused; impact on complainants, witnesses and jurors; fairness to defence counsel, including consideration of the expected length and complexity of the proceedings; the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

and at para. 45 states that:

> Refusing withdrawal should truly be a remedy of last resort and should only be relied upon where it is necessary to prevent serious harm to the administration of justice.

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

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

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

[248] A party to an appeal may apply to the court to change the format of a hearing from oral to written, or for permission to participate in a manner other than that which is specified for the hearing.[184]

4. Admitting new evidence on appeal

ISSUE No. 28
What procedures should govern the admission of new evidence on appeal?

[249] The current practice for admitting new evidence on appeal is leave based, with secondary reference to rules of the Supreme Court of Canada if leave is granted.[185] Consistent with the objectives of making criminal appeal procedures clearer, simpler and more accessible, the Committee suggests that an application procedure as outlined below should replace the "leave plus" approach.

[250] ***The proposal*** is that an appellant or respondent may apply to the court to introduce new evidence at the appeal hearing that was not before the trial or other deciding court.

[251] The new evidence, in oral, affidavit, deposition or other format as directed by the court, may be admitted at the discretion of the court if special grounds can be shown.[186]

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

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

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

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

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

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

(continued...)

[252] The grounds on which an application to introduce new evidence may be approved are that the evidence[187]

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

[253] The application to introduce new evidence must be supported by an affidavit which substantiates that new facts sought to be admitted were not before the decision maker.[188]

[254] The party in opposition on appeal may be allowed to cross-examine on the affidavit supporting an application to introduce new evidence.[189]

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[186] (...continued)
See also r. 840(7).

[187] *Palmer v. R.*, [1980] 1 S.C.R. 759 at paras. 24-27.

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

[189] SCC Rules, r. 90 states:
(1) Any party may, by leave of a judge or the Registrar on motion, cross-examine the deponent of an affidavit filed with the Registrar by serving on the party who filed the affidavit a notice requiring the production of the deponent and documents for cross-examination before a commissioner for oaths designated by the judge or the Registrar.
(2) The notice required by subrule (1) shall be served within the time that the judge or Registrar may order.
(3) Any cross-examination referred to in subrule (1) shall take place before the proceeding is heard unless a judge or the Registrar otherwise orders.
(4) The transcript of a cross-examination may be filed with the Registrar within 10 days after the cross-examination.
(5) A judge or the Registrar may, on his or her own initiative, order the production of documents on a cross-examination.
(6) Where a deponent is not produced for cross-examination, the deponent's

(continued...)

[255] The court of appeal may order or admit new evidence on appeal in the interests of justice and parties are entitled to cross-examine witnesses.[190]

5. Abandoning the appeal during the hearing

[256] An appellant may apply to the court to abandon an appeal at the appeal hearing after argument in the matter has commenced and the court may[191]

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

6. Presenting argument after missing the hearing

ISSUE No. 29
What process should apply when a party who missed the hearing wants to present argument?

[257] If a party or the party's lawyer is scheduled to attend an appeal hearing and fails to do so, the court may proceed on the basis of the party's filed materials and the materials filed and orally presented by the other side, if any. In the event the court goes ahead with the hearing and the party was absent through no fault on their part, principles of fairness dictate that the party should have the opportunity to present argument.

[258] ***The proposal*** is that a party who missed the appeal hearing may apply within 5 days after the date of the hearing to have the court consider the party's oral arguments. Written materials in support of the application must include an affidavit concerning the events which caused the party to miss the hearing.[192]

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[189] (...continued)
affidavit shall be struck out unless a judge or the Registrar otherwise orders.

[190] *Criminal Code*, ss. 683(1)-(2). It should also be noted that in the event of a court ordered inquiry, parties are entitled to be present, adduce evidence and be heard during the inquiry.

[191] Rule 860C(2).

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

[259] If the court allows the application for post hearing argument, the mechanism by which the court receives the party's arguments may include in person, telephone, video conference or other electronic means as determined by the court.

7. Summary dismissal in the Court of Appeal

[260] The Court of Appeal may on application or on its own motion dismiss an appeal on the basis of failure to advance the appeal, lack of merit,[193] or abandonment.

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

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

[263] If the court dismisses the appeal of an appellant who has been granted JIR, the court must issue a warrant for the appellant's arrest and the appellant is required to surrender into custody.[194]

8. Appeal of interim decisions

[264] Most interim decisions made during the course of a criminal appeal proceeding can not be appealed. A judge's refusal to modify a time period was, at one time, something that could be appealed to a court panel by giving written notice to the registrar within 7 days of the refusal.[195] However, a recent case indicates that since this practice is not supported by the *Criminal Code*, a judge's decision not to vary a time period can not be appealed.[196]

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

[194] Based on the procedure in CPD I.15. and Court of Appeal of Alberta, "Judicial Interim Release (Bail) Applications - Check/Return Form" at Note, online: <http://www.albertacourts.ab.ca/CourtofAppeal/PublicationsForms/tabid/87/Default.aspx>.

[195] Rule 840(5).

[196] *R. v. Harness* (2005), 367 A.R. 259 (C.A.) at paras. 27-31. In *R. v. Giesbrecht* (2008), 231 Man. R. (2d) 77 (C.A.) at paras. 9-12 the court affirms *Harness* and finds that a single judge's decision denying an

(continued...)

[265] As noted in *Chapter 4 - Interim Relief Pending Appeal,* the JIR application of a person convicted of a major indictable offence or prohibited from driving may, on application of either party and subsequent order of the Chief Justice or her designate, be heard a second time by a single judge or panel of the Court of Appeal.[197] This is the only situation where an interim decision of the appeal court is subject to appeal.

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[196] (...continued)
application to extend the appeal filing deadline can not be appealed to a panel of the court because the *Criminal Code*, s. 678(2) gives concurrent jurisdiction to make the decision to the court or a single judge of the court.

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

APPENDIX A – CRIMINAL APPEAL RIGHTS AND COURTS

		What Decisions May Be Appealed?	To which court? QB*	CA	Leave required
By Accused	Summary Conviction	Conviction/Order	Not Limited to Particular Grounds**	●		
		Sentence	Not Limited to Particular Grounds	●		
		Fitness/Mental Disorder	Not Limited to Particular Grounds	●		
		Tried with Indictable?	Certain conditions		●	●
	Indictable	Conviction	Question of Law Alone 675(1)(a)(i)		●	
			Question of Fact, Mixed, or Sufficient Grounds 675(1)(a)(ii) or (iii)		●	●
		Sentence	Parole Ineligibility 675(2) and 743.6		●	
			Fitness/Legality of Sentence 675 (1)		●	●
		Fitness/ Mental Disorder (NCRMD)	Question of Law Alone 675(3)		●	
			Question of Fact, Mixed		●	●
		Disposition Orders	Not Limited to Particular Grounds 672.72		●	
		Interim Release	Review by the Court of Appeal		●	
		Cost Award/ Quantum	Not Limited to Particular Grounds 676.1		●	●
		Extraordinary Remedies	General Appeal Provisions of Part XXI of CC Apply Except Where Inconsistent with Terms of 784.		●	
By Crown	Summary Conviction	Acquittal, Stay of Proceedings, and Dismissal of Information	Not Limited to Particular Grounds	●		
		Sentence	Not Limited to Particular Grounds	●		
		Fitness/Mental Disorder	Not Limited to Particular Grounds	●		
		Disposition Orders	Not Limited to Particular Grounds	●		
		Tried with Indictable?	Certain Conditions		●	●
	Indictable	Acquittal	Question of Law Alone 676(1)(a)		●	
		Sentence	Fitness/Legality of Sentence 676(1)(b)		●	●
			Parole Ineligibility 676(4)		●	
		Quash Orders/ Stay of Proceedings	Not Limited to Particular Grounds 676(1)(b) or (c)		●	
		Interim Release	Review by the Court of Appeal 680		●	
		Cost Award/ Quantum	Not limited to Particular Grounds 676.1		●	●
		Extraordinary Remedy	General Appeal Provisions of Part XXI of CC Apply Except where Inconsistent with Terms of s. 784 CC. (*Mandamus*, *Certiorari* and Prohibition, as well as Judgment on the Return of a Writ of *Habeas Corpus*).		●	

* In some circumstances there may be a further appeal from QB to CA.

** Although the right to appeal is not limited to particular grounds, the specific complaints and arguments to support (i.e. appeal grounds) still have to be defined/confined by the appellant's appeal documents.

APPENDIX B
ALBERTA CRIMINAL APPEAL RULES AND PRACTICE DIRECTIONS

1968 - Part 60 Federal and Provincial Criminal Rules (Rules 825 - 838)

Two sets of criminal rules were issued by the judges of the Supreme Court of Alberta, Appellate and Trial Divisions, in the Canada Gazette Part I on 13 July 1968 and also in the Alberta Gazette on 15 July 1968:

- *Rules as to Cases Stated Under Section 734 of the Criminal Code* [Rules 824 - 831A] and
- *Rules Pursuant to Section 424 of the Criminal Code with Respect to Mandamus, Certiorari, Habeus Corpus and Prohibition* [Rules 832 - 844A].

It seems that only the second set, *Rules Pursuant to Section 424 of the Criminal Code* remain as Part 60 of the *Alberta Rules of Court,* Alta. Reg. 390/68 but with different numbers, Rules 825 - 838. Although both sets may still be valid, the *Rules as to Cases Stated* appear to have been superseded by procedures applicable to the current version of the *Criminal Code*. Part 60 describes procedures for obtaining extraordinary remedies but these procedures are not an integral part of the criminal appeal process. Part 60 remains in force under the *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 15.14(1).

1977 - Part 61 Criminal Appeal Rules as Federal Instrument (Rules 839 - 860E)

The Appellate Division of the Supreme Court of Alberta published *Rules of the Appellate Division of the Supreme Court of Alberta as to Criminal Appeals* [Part 61, Rules 839 - 860E], S./I. 77-174 in English and French in the Canada Gazette, Part II, Vol. 111, No. 18 on 28 September 1977. These rules took effect on 1 January 1978.

The same Part 61 was included for some time in the *Alberta Rules of Court* but was "repealed" by s. 6 of Alta. Reg. 341/77 (O.C. 1289/77) to coincide with the effective date of the 1978 federal rules. The only effect of the repeal was to remove Part 61 from the provincial rules. Part 61 rules were renamed *Rules of the Court of Appeal of*

Alberta as to Criminal Appeals, S./I. 77-147 in 2003[198] and remain valid as rules made under the federal *Criminal Code.*

1996 - Part 61.1 Rules for Summary Conviction Appeals (Rules 860.1 - 860.9)

The *Rules Governing Summary Conviction Appeals* [Part 61.1 Rules 860.1 - 860.9] were repealed by s. 36 of Alta. Reg. 243/96 (O.C.485/96) published in the Alberta Gazette, Part 2 on November 1996. Part 61.1 was repealed as a provincial regulation effective 1 January 1997.[199]

Consolidated Practice Directions

The Court of Appeal issues practice directions concerning the conduct of criminal appeals. The *Consolidated Practice Directions* are posted on the court website, <http://www.albertacourts.ab.ca/CourtofAppeal/PracticeNotes/tabid/86/Default.aspx#615>.

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[198] S.I./2003-106, S.1.

[199] According to Alan A. Fradsham, *Alberta Rules of Court Annotated, 2008* (Toronto: Thomson, 2007) at 1270, Part 61.1 rules were not published in the Canada Gazette. Further, Stevenson & Côté, *Alberta Civil Procedures Handbook 2006* (Edmonton: Juriliber, 2006) at 739 notes that Part 61.1 rules are not part of the Alberta Rules of Court.

APPENDIX C
CRIMINAL APPEAL RULES OF CANADIAN PROVINCES AND TERRITORIES

The following lists criminal appeal rules published for each Canadian province and territory and is drawn from a bibliography of materials reviewed by the Alberta Law Reform Institute in preparing CM No. 12.22 - Criminal Appeals: Court of Queen's Bench and Court of Appeal, current to August, 2010.

Alberta

- *Rules of the Court of Appeal of Alberta as to Criminal Appeals*, S.I./77-147.

British Columbia

- *British Columbia Court of Appeal Criminal Appeal Rules, 1986*, S.I./86-137.
- *Criminal Rules of the Supreme Court of British Columbia*, S.I./97-140.

Manitoba

- *Manitoba Court of Queen's Bench Rules (Criminal)*, S.I./92-35.
- *Manitoba Criminal Appeal Rules,* S.I./92-106.

Newfoundland and Labrador

- *Newfoundland Trial Division of the Supreme Court Criminal Appeal Rules*, S.I./87-28.
- *Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings*, S.I./2004-134.
- *Supreme Court of Newfoundland and Labrador - Court of Appeal Criminal Appeal Rules (2002)*, S.I./2002-96.

New Brunswick

- *New Brunswick Court of Queen's Bench Summary Conviction Appeal Rules*, S.I./80-117.
- *New Brunswick Criminal Appeal Rule 63 with Respect to Criminal Appeals to the Court of Appeal*, S.I./82-13.

- *New Brunswick Summary Conviction Appeal Rule 64 with Respect to Summary Conviction Appeals to the Court of Queen's Bench*, S.I./92-2.

Northwest Territories

- *Criminal Procedure Rules of the Supreme Court of the Northwest Territories*, S.I./98-78
- *Rules Respecting Criminal Appeals under Sections 678-689 of the Criminal Code and Bail Rules on Appeals to the Court of Appeal for the Northwest Territories*, S.O.R./78-68.

Ontario

- *Ontario Court of Appeal Criminal Appeal Rules,* S.I./93-169.
- *Ontario Court of Justice Criminal Proceedings Rules*, S.I./92-99.
- *Rules of the Ontario Court of Justice in Criminal Proceedings*, S.I./97-133.

Quebec

- *Rules of the Court of Appeal of Quebec in Criminal Matters,* S.I./2006-142.
- *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division 2002*, S.I./2002-46.

Saskatchewan

- *Saskatchewan Court of Queen's Bench Rules Respecting Pre-Trial Conferences*, S.I./86-158.
- *The Court of Queen's Bench for Saskatchewan Summary Conviction Appeal Rules*, S.I./81-97.

Yukon Territory

- *Yukon Territory Court of Appeal Criminal Appeal Rules, 1993*, S.I./93-53.