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Appellate Court Reform in Ontario: A Consultation Paper

John D. McCamus
Osgoode Hall Law School of York University, jmccamus@osgoode.yorku.ca

D. F. Bur

APPELLATE COURT REFORM IN ONTARIO
A CONSULTATION PAPER

MINISTRY OF THE ATTORNEY GENERAL

A Consultation Paper prepared for the

Ministry of the Attorney General

by

JOHN D. McCAMUS
Chair, Ontario Law Reform Commission
Professor of Law, Osgoode Hall Law School
York University

and

DONALD F. BUR
Counsel, Ontario Law Reform Commission

Written responses to the issues raised in the Paper are invited. They should be forwarded to:

Appellate Court Committee
c/o Office of the Deputy Attorney General
720 Bay Street, 11th Floor
Toronto, Ontario
M5G 2K1

The Ministry's telephone number is (416) 326-4000 and fax number is (416) 326-4016. Written submissions should be forwarded to the Ministry by May 1st, 1995.

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PREFACE

This Consultation Paper on Appellate Court Reform in Ontario has been prepared, at the request of the Deputy Attorney General, by Professor John D. McCamus, Chair, Ontario Law Reform Commission and Dr. Donald Bur, Counsel, Ontario Law Reform Commission. Although prepared by Commission personnel, the Consultation Paper has not been prepared on behalf of the Commission and does not represent the views of the Commission itself on the subjects considered in the paper.

The purposes of the Consultation Paper are to attempt to identify the need, if such exists, for reform of the appellate court structure in Ontario and, as well, to canvas a number of possible reforms to meet such needs. It is hoped that the Consultation Paper will provide a useful basis for consultations that the Ministry wishes to conduct with interested members of the bench, bar and public at large.

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John D. McCamus
Donald F. Bur

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1. INTRODUCTION

(a) BACKGROUND

The Ministry of the Attorney General is presently considering options to deal with concerns expressed by the Court of Appeal for Ontario about its heavy workload, and ever-increasing backlog. The Court has expressed two related concerns, first its inability due to the volume of cases to effectively reduce its backlog, and secondly, as a result of its backlog, its inability to adequately perform the jurisprudential function of the Court.

Although rights of appeal, either by leave or, in some cases, as of right, lie from the Court of Appeal for Ontario to the Supreme Court of Canada, very few such appeals can be heard as a practical matter in a given year. As a *de facto* court of final resort for the majority of cases in the Province of Ontario, the Court of Appeal endeavours to maintain its high quality of judgments, and leading jurisprudential role among appellate courts. The pressure of an expanded caseload, combined with the need for the appeal judgment to follow as soon as possible after the trial judgment, has caused the Court of Appeal to be increasingly troubled by the consequent effect on the consistency and quality of judgments.

These issues have been repeatedly reviewed and commented on in a number of government and court studies, such as the *Report of Royal Commission Inquiry into Civil Rights*,[1] the *Aylesworth Report*,[2] the Ontario Law Reform Commission's *Report on the Administration of Ontario Courts*,[3] the *Report on the Attorney General's Committee on the Appellate Jurisdiction of the Supreme Court of Ontario*,[4] the *Report of the Future of the Court Committee*,[5] the *Report of Ontario Courts Inquiry*,[6] a response to the Zuber

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1 Ontario, Report of Royal Commission Inquiry into Civil Rights (Toronto: Queen's Printer, 1968) (hereinafter referred to as "McRuer Report").

2 Presentation to the Law Reform Commission from The Judges of the Supreme Court of Ontario (May 31, 1971) (hereinafter referred to as "Aylesworth Report").

3 Ontario Law Reform Commission, *Report on the Administration of Ontario Courts* (Toronto: Queen's Printer, 1973).

4 Ontario, *Report on the Attorney General's Committee on Appellate Jurisdiction of the Supreme Court of Ontario* (Toronto: Ministry of the Attorney, General, 1977) ((hereinafter referred to as "Kelly Report".)

5 Ontario, *Report of the Future of the Court Committee* (1983) (hereinafter referred to as "MacKinnon Report")

6 Ontario, *Report of the Ontario Courts Inquiry* (Toronto: Queen's Printer, 1987 (hereinafter referred to as "Zuber Report").

Report prepared by the Canadian Bar Association—Ontario[7] and the Report of the Sub-Committee on Appeal Court Reform.[8] More recently, the Ministry has conducted a number of internal studies of these questions. As well, some discussion and consultation on this topic has taken place with members of the Court of Appeal for Ontario and the Ontario Court (General Division).

Most of the studies on this issue to date propose some form of change to the jurisdiction and structure of the Court of Appeal which will divert work away from the Court. Assuming that structural reform is necessary, one possible option would be the establishment of a two-tier appeal structure including a free standing intermediate Court of Appeal with broad, as of right appeal jurisdiction in criminal and civil matters. The function of the intermediate Court would focus on correcting errors committed by lower Courts and tribunals. It would be a permanent Court with its own Chief Justice and administrative staff. A final Court of Appeal, consisting of nine judges would focus on the development of jurisprudence for the province.

A second possible option would be to create an intermediate appellate court based on the present Divisional Court model. The Divisional Court would perform the function of an appellate court, but within the existing structure of the Ontario Court (General Division). The jurisdiction of the Divisional Court would be expanded to encompass more of the Court of Appeal's present error correcting functions. This appellate court would not be free standing, but like the free standing intermediate appellate court model, the Divisional Court's appellate jurisdiction would include both civil and criminal matters.

The creation of a free standing intermediate court, or the expansion of the Divisional Court's jurisdiction, raise concomitant issues that need to be addressed, such as scope of jurisdiction, size, permanence, location, regionalization, itinerancy, cost, and consistency of decisions. Any proposal advocating a shift in jurisdiction from the Court of Appeal to another level of court will require legislative enactment; specific changes to the criminal jurisdiction of the Court will require federal legislation.

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[7] Canadian Bar Association-Ontario, submission to the Attorney General for Ontario Re: Response to the Report of the Ontario Courts Inquiry (1987) (hereinafter referred to as "CBA-O submission").

[8] Ontario, Joint Committee on Court Reform, "Report of the Sub-Committee on Appeal Court Reform" (1989).

(b) Organization of Consultation Paper

This paper attempts to provide an informed basis for discussion of possible approaches to reforming the appellate structure in Ontario. The paper adopts the following format.

In the second part of this paper, an account is provided of the existing appellate structure in Ontario. The third section of the paper attempts to identify more precisely the dimensions of the current problem in the appellate process in Ontario—the increasing backlog of cases filed with the Court of Appeal and the resulting pressure on the Court's caseload. This section begins with a brief description of the error-correcting and jurisprudential functions of an appellate court, noting the potential for conflict between these two functions. The section then attempts to provide a more detailed account of the dimensions of the current problems confronting the Court of Appeal for Ontario.

In the fourth section of the paper an account is provided of various studies of this matter, conducted within the province, which have been referred to above. A review of the suggestions that previous study groups have made and the reactions to them may assist in informing the current round of discussions.

In the fifth section of the paper, experience in other jurisdictions is briefly described. The jurisdiction with the most experience of appellate court reform is, of course, the United States of America. Although the American experience, and the literature discussing it, is vast, an attempt is made to briefly summarize the main features of the American experience and to provide a basis for considering its relevance to reform in Ontario. As will be seen, the approach generally taken in U.S. state jurisdictions has been one of creating an intermediate court of appeal for the state. For comparative purposes, an account is also provided of the appellate process in England. As will be noted, the English response to increasing appellate caseload pressures has been that of simply adding to the membership of the Court of Appeal. As well, a brief account is provided of the recent Alberta experience in devising methods for coping with an increasing caseload. Finally, brief mention is made of reform proposals that have recently surfaced in the province of Quebec.

In the sixth part of this Consultation Paper, a number of reform options are set forth. The available policy choices are divided into two categories—non-structural reforms and structural reforms. In the non-structural category, consideration is given to a number of possible devices for addressing the Court's current backlog without creating an additional level of appellate decision-making. Measures considered in this discussion include

restricting or eliminating rights of appeal, administrative reforms within the existing process, the use of trial division judges on panels of the Court of Appeal on an *ad hoc* basis and the appointment of additional members to the existing Court of Appeal.

Within the category of structural reform, three basic models are considered. The first would involve establishing a new final Court of Appeal for the province, perhaps to be called the Supreme Court of Ontario, which would appear in the hierarchy of courts above the existing Court of Appeal. The second option set forth is the establishment of a new intermediate Court of Appeal to be located in the present hierarchy between the Court of Appeal and the Ontario Court (General Division). The third model discussed involves an expanded role for the existing Divisional Court. In considering these three options, arguments weighing in favour and against the particular model under discussion are set out. In some cases, suggestions are made for modifications of the model which are designed to meet the criticisms often offered of the model under discussion.

In the concluding section of the paper, a brief summary is offered of the issues with respect to which the Ministry would most appreciate an expression of views from interested members of the public and the various branches of the legal profession.

2. RIGHTS OF APPEAL IN ONTARIO: CURRENT STRUCTURE

In this section, a brief account of the existing appellate court structure in Ontario is offered. We begin with a short description of the constitutional arrangements within which this structure has been created.

Under the *Constitution Act, 1867* both the provinces and the federal Parliament have the ability to create courts and to appoint judges. In addition, both levels of law-making authority have the ability to establish rights of appeal.

In the exercise of its jurisdiction to constitute, maintain and organize courts within the province,[9] the province of Ontario established the Court of Appeal for Ontario.[10] Like all provincially constituted courts, the Court of Appeal has jurisdiction over provincial and federal laws.[11] In this capacity, the Court of Appeal for Ontario reconsiders decisions made by lower courts and decides whether to set them aside or to uphold them.

The federal Parliament has also been given the jurisdiction to create a court system,[12] but unlike the provincial legislatures it can generally only create courts to administer federal laws.[13] The one exception to this principle is the federally established Supreme Court of Canada which, it has been concluded, has jurisdiction over both federal and provincial laws.[14] Thus, federal legislation has created rights of appeal from the provincial courts of appeal to the Supreme Court of Canada. In this sense, then, the provincial courts of appeal may be characterized as intermediate courts of appeal.

The federal Parliament has jurisdiction to appoint the judges to its own courts,[15] as well as to the provincial Superior, District and County Courts.[16]

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9 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(14).

10 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 2.

11 *Constitution Act, 1867, supra*, note 9, s. 92(14) and *Courts of Justice Act, supra*, note 10, s. 2(2).

12 *Constitution Act, 1867, supra*, note 9, s. 101.

13 *Quebec North Shore Paper v. Canadian Pacific*, [1977] 2 S.C.R. 1054 and *McNamara Construction v. The Queen*, [1977] 2 S.C.R. 655.

14 *Attorney General for Ontario v. Attorney General for Canada (Privy Council Appeals)*, [1947] A.C. 127 (P.C.) essentially gave the Supreme Court of Canada ultimate jurisdiction over appeals from provincial courts of appeal.

15 *Constitution Act, 1867, supra*, note 9, s. 101.

16 *Ibid.*, s. 96.

This also includes the power to appoint judges to the provincial courts of appeal.[17] The provinces have the power to appoint judges to all lower courts. As well, of course, the provinces appoint members of provincial administrative tribunals.

Clearly, the province has no jurisdiction to provide for rights of appeal within the federal court structure, either because they are not provincial courts or because the law being administered is not provincial law. However, because the provincially constituted courts administer both federal and provincial law, rules of procedure in these courts may similarly be federal or provincial. Appeals out of the provincial court system to the Supreme Court of Canada, however, are established completely by the federal Parliament.

Although the primary task of the Court of Appeal for Ontario and the Supreme Court of Canada is to hear appeals, and the primary task of the other provincially constituted courts is to conduct trials, appeal courts and trial courts each have both original and appellate jurisdiction to some extent. However, the lower the court in the hierarchy of courts, the rarer is its appellate jurisdiction.

Even the lowest court in the judicial hierarchy, the Ontario Court (Provincial Division), has some appellate duties. For example, if, in administering the *Provincial Offences Act*, a provincial judge or a justice of the peace makes a determination, an appeal from the conviction, acquittal or sentence imposed may be made to the same court although the appeal has to be heard by a Provincial Division judge.[18]

Similarly, a judge of the Ontario Court (General Division) has the jurisdiction to hear appeals. In civil matters, the Court can hear appeals from: an order of the Ontario Court (Provincial Division) made under the *Family Law Act*,[19] the *Child and Family Services Act*,[20] and the *Change of Name Act*;[21] interlocutory orders of a master; a certificate of assessment issued in a General Division proceeding.[22] In summary conviction criminal

17 Because at the time of Confederation the judges of the Court of Queen's Bench, Chancery, and Common Pleas sat as judges of the Court of Error and Appeal, and because such judges are superior court judges, their appointment comes within s. 96 of the *Constitution Act, 1867*, *supra*, note 9.

18 *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 135.

19 *Family Law Act*, R.S.O. 1990, c. F.3, s. 48.

20 *Child and Family Services Act*, R.S.O. 1990, c. 11, s. 69.

21 *Change of Name Act*, R.S.O. 1990, c. C.7, s. 11.

22 *Courts of Justice Act*, *supra*, note 10, s. 17.

matters, the General Division is required to hear appeals from the Ontario Court (Provincial Division) on a conviction, a sentence or a verdict of being unfit to stand trial or of not being criminally responsible on account of mental disorder.[23] In addition, the General Division can hear young offenders summary conviction appeals[24] and appeals from a decision of a provincial judge under the *Provincial Offences Act*[25] including decisions involving custody.[26]

The Divisional Court, whose origins will be described later, has jurisdiction to hear appeals from a final order of the Small Claims Court for the payment of money or the recovery of possession of personal property exceeding $500.[27] In addition, an appeal can lie from a final order of the General Division, in civil matters, that involves: (1) a single payment of not more than $25,000, exclusive of costs; (2) periodic payments that amount, in the twelve months from the date of the first payment, to not more than $25,000, exclusive of costs; (3) the dismissal of a claim in categories 1 and 2 or the dismissal of a claim in respect of which the judge indicates that if the claim had been allowed, the amount awarded would not have been more than the amount set out in categories 1 and 2.[28] The Divisional Court must also hear appeals from a final order of a master[29] and may, if leave is granted, hear appeals from an interlocutory order of a General Division judge.[30] In addition, decisions from a number of administrative tribunals can be appealed to the Court[31] and, of course, the Court also exercises control over administrative tribunals through judicial review.[32]

23 *Criminal Code*, R.S.C. 1985, c. C-46, s. 813. In addition, this section gives the General Division the right to hear appeals made by the informant, the Attorney General, or his agent from an order that stays proceedings or dismisses an information.

24 *Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 27(1.1), as en. by R.S.C. 1985, c. 24 (2d. Supp.), s. 20.

25 *Provincial Offences Act*, *supra*, note 18, s. 116(2)(b).

26 *Ibid.*, s. 152. Essentially this jurisdiction involves an order for the release of a defendant from custody.

27 *Courts of Justice Act*, *supra*, note 10, s. 31.

28 *Courts of Justice Act*, *supra*, note 10, s. 19(1)(a).

29 *Ibid.*, s. 19(1)(c).

30 Ibid., s. 19(1)(b)

31 See, for example, the *Human Rights Code*, R.S.O. 1990, c. H.19, s. 42.

32 *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

The Court of Appeal for Ontario has both original and appellate jurisdiction. The Court's original jurisdiction lies primarily in references from the Lieutenant Governor in Council,[33] although it also has jurisdiction to hear stated[34] and special cases.[35] As a result of its appellate jurisdiction, the Court has jurisdiction to hear both civil and criminal appeals. With regard to civil appeals, the Court of Appeal can hear appeals from a final order of a judge of the General Division, except with regard to those appeals that go from the General Division to the Divisional Court and except with regard to an interlocutory order of a General Division judge made on an appeal from an interlocutory order of the Provincial Division[36] and a certificate of assessment of costs in a proceeding in the Court of Appeal.[37] In addition, an appeal will lie, on leave, from an order of the Divisional Court on a question that is not a question of fact alone.[38] With regard to criminal appeals, the Court of Appeal has jurisdiction to hear appeals from decisions made by the General Division on appeals in summary conviction proceedings that have been made from the Provincial Division, so long as it is on a question of law,[39] appeals from decisions in indictable offences proceedings rendered by the Provincial Division and the General Division,[40] and appeals from the Ontario Court (Provincial Division) sitting as a Youth Court in indictable matters.[41] In addition, decisions of provincial court judges under the Provincial Offences Act may, with leave of a judge of the Court of Appeal, on special grounds, be appealed to the Court of Appeal.[42]

An appeal as of right lies to the Supreme Court of Canada from the Ontario Court of Appeal on matters referred to that Court for hearing and

33 *Courts of Justice Act, supra,* note 10, s. 8.

34 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 61.01.

35 *Ibid.*, r. 22.03.

36 *Courts of Justice Act, supra,* note 10, s. 19(4).

37 *Ibid.*, s. 6(1)(b) and (c).

38 *Ibid.*, s. 6(1)(a).

39 *Criminal Code, supra,* note 23, s. 839.

40 *Ibid.*, s. 675. Appeals in this regard must, if from conviction, involve either a question of law alone or, if they involve either a question of fact or any other matters, leave must be given by the Court of Appeal. Appeals can also be from sentence, with leave of the Court of Appeal, from a decision of when a person convicted of murder is eligible for parole, and from a verdict of not criminally responsible on account of mental disorder or unfit to stand trial.

41 *Young Offenders Act, supra,* note 24, s. 27(1).

42 *Provincial Offences Act, supra,* note 18, ss. 139 and 131.

consideration by the Lieutenant Governor in Council.[43] In addition, an appeal will lie to the Supreme Court from any final judgment of the Court of Appeal, with leave of that court,[44] or any final judgment of the Ontario Court (General Division), with leave of the Supreme Court of Canada,[45] except in cases of a judgment in proceedings for or on a writ of *habeas corpus*, *certiorari* or prohibition arising out of a criminal charge or a writ of *habeas corpus* arising out of a claim for extradition.[46] With leave of the Supreme Court, an appeal will lie from any final or other judgment of the Court of Appeal.[47] While the *Supreme Court Act* also excludes from the Supreme Court's jurisdiction all appeals from judgments or orders made in the exercise of judicial discretion, except in proceedings in the nature of a suit or proceeding in equity elsewhere than in Quebec and except in *mandamus* proceedings,[48] the Act also incorporates any jurisdiction conferred on the Court by any other legislation.[49] For example, the *Criminal*

43 *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 36 and *Courts of Justice Act, supra,* note 10, s. 8(7).

44 *Supreme Court Act, ibid.*, s. 37.

45 *Ibid.*, s. 38. Although this procedure is rarely used these days, as for example in *Manitoba Government Employees Association v. The Government of Manitoba*, [1978] 1 S.C.R. 1123, it has been used much more in the past. For example, see: *DuMoulin v. Langtry* (1886), 13 S.C.R. 258; *Billette v. Vallee*, [1931] S.C.R. 314; *The Royal Trust Company v. Kennedy*, [1930] S.C.R. 602; *In re Estate of Peter Donald; Baldwin v. Mooney*, [1929] S.C.R. 306; *Minister of Customs and Excise v. The Dominion Press Limited*, [1927] S.C.R. 583; *The Dominion of Canada Guarantee and Accident Co. Ltd. v. The Housing Commission of the City of Halifax*, [1927] S.C.R. 492; *The London Guarantee and Accident Co., Ltd. v. The City of Halifax*, [1927] S.C.R. 165; *Corporation Agencies Ltd. v. Home Bank of Canada*, [1925] S.C.R. 706; *Dominion Transport Co. v. Mark Fisher, Sons & Co.*, [1925] S.C.R. 126; *Municipality of the City of Port Coquitlam v. Wilson*, [1923] S.C.R. 235; *Corporation of the District of West Vancouver v. Ramsay* (1916), 53 S.C.R. 459; *John Deere Plow Co. v. Agnew* (1913), 48 S.C.R. 208; *The Ontario Mining Company v. Seybold* (1903), 32 S.C.R. 1.

46 *Supreme Court Act, supra*, note 43, s. 39.

47 *Ibid.*, s. 40(1). Because of s. 40(3), no appeal under this section lies from a judgment of a court acquitting, convicting, setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, or an offence other than an indictable offence.

48 *Ibid.*, s. 42.

49 *Ibid.*, s. 41.

Code provides for appeals by way of leave and for appeals as of right.[50] Criminal appeals constitute a major portion of the caseload of the Court.

In describing the various avenues of appeal that exist in Ontario, and in particular appeals from the Court of Appeal for Ontario to the Supreme Court of Canada, it is useful to distinguish between appellate jurisdiction in law and that jurisdiction that is in fact exercised. As others have observed, although the Court of Appeal for Ontario is, *de jure*, an intermediate court of appeal in the sense that an appeal from its decisions typically lies to the Supreme Court of Canada, there is a practical sense in which it operates, *de facto*, as a final court of appeal for the overwhelming majority of the cases litigated within the province. Very few cases from Ontario are ultimately appealed to the Supreme Court of Canada. Fewer still are the instances in which a decision of the Court of Appeal for Ontario is reversed by the Supreme Court of Canada.

Thus, in 1990, the Supreme Court of Canada produced reported judgments in 134 cases.[51] Thirty-eight of those cases involved appeals from Ontario. In nine of them, the judgment of the Court of Appeal for Ontario was reversed. It may be argued, therefore, that the impact of the decision-making of the Supreme Court of Canada on the jurisprudence of the province is inevitably somewhat narrow. This point may be strengthened by referring to the fact that a considerable portion of the jurisprudential activity of the Supreme Court of Canada is directed to the development of constitutional law and federal law, even in cases, of course, which emanate from the province of Ontario. Thus, it may be argued rather persuasively that the jurisprudential role of the Court of Appeal for Ontario in developing the law of Ontario is inescapably an important feature of its public responsibility.

At the same time, of course, the existence of ultimate appellate review by the Supreme Court of Canada is not an irrelevant fact when considering the

[50] *Criminal Code*, *supra*, note 23, s. 691(1) wherein it is provided that a person who was convicted may appeal a question of law as of right on which a judge of the court of appeal has dissented or, by leave, if consent is granted by the Supreme Court of Canada. Subsection (2) also provides for an appeal on a question of law as of right if a person was acquitted at trial, other than by a verdict of not criminally responsible by mental disorder, and the acquittal was set aside by the court of appeal or if a person was tried jointly with such a person but that he or she was convicted at trial. In addition, pursuant to s. 93, the Attorney General may appeal the setting aside of a conviction by the Court of Appeal under s. 675, or the dismissal of an appeal under s. 676(1)(a), (b) or (c) or s. 676(3) by right if a judge of the court of appeal dissents or by leave of the Supreme Court of Canada.

[51] [1990] S.C.R. Statistical Analysis, in (1992), 30 Osgoode Hall L.J. 1001, at 1002. This appears to be an unusually high number of cases for one year. The average would be closer to one hundred *per annum*.

possibility of reform of the appellate structure in Ontario. If it is reasonable to assume that a second tier court of appeal for the province, focused on its law development function, would hear 100 appeals or so per year, it is not insignificant that something in the order of twenty-five to thirty per cent of the Supreme Court of Canada's annual caseload is likely to come from Ontario. Moreover, though it is true that the "laws of Ontario" will not occupy more than a portion of the agenda before the Court in those cases,[52] cases on appeal from other provinces will often raise questions of private or provincial public law that may be material to the law of Ontario. If it is, therefore, a slight exaggeration to describe the Court of Appeal for Ontario as a *de facto* final Court of Appeal, it nonetheless appears to be quite true that the jurisprudential function of the Court of Appeal for Ontario is an institutional characteristic of considerable importance to the administration of justice within the province.

[52] Indeed, despite the stated intentions of Chief Justice Lamer shortly after his appointment as Chief Justice (*Law Times*, July 9 - July 15, 1990), in recent years the Supreme Court's docket appears to have become increasingly preoccupied with public law issues. For example, prior to the introduction of the *Canadian Charter of Rights and Freedoms*, R.S.C. 1985, Appendix II, No. 44, the Court heard, in 1981, thirty-five private cases and seventy-three public cases (1992), 30 Osgoode Hall L.J. 808. In 1991, the Court heard nineteen private cases and eighty-nine public cases (1994), 32 Osgoode Hall L.J. 172.

3. CURRENT PROBLEM

(a) Dual Role of an Appellate Court

Before turning to an account of the current problems confronting the Court of Appeal for Ontario in the discharge of its mandate, it may be useful to dwell briefly on the nature of the institutional role performed by an appellate court. Broadly speaking, it is widely understood that an appellate court performs essentially two functions. First, an appellate court provides an "error correction" function to provide a means for ensuring that parties who believe that they have suffered an erroneous decision at first instance have an opportunity for an avenue for review and possible redress. Secondly, it is accepted that appellate courts also provide a "law development" or "jurisprudential" function in which they "announce, clarify, and harmonize the rules of decisions employed by the legal system in which they serve".[53] Although, by convention such announcements are offered in declaratory terms, it is understood that when appellate courts fill in gaps in existing doctrine and statutory schemes, iron out anomalies in the existing case law and, from time to time, adapt legal doctrine to changing social and economic conditions, they are engaged in a creative, albeit principled and disciplined, law making exercise.[54]

If it is correct to observe that appellate courts possess this duality of functions, it is also correct that these two functions place slightly different demands on the talents and energies of the members of the court. To property discharge the error correction function, the court needs sufficient time to grapple with the details of the decision under review and to prepare reasons for the result on appeal which meet the needs of the parties to receive an adequate explanation as to why the appeal has been granted or denied. Proper discharge of the jurisprudential function requires that the court is able to devote sufficient time, in a collegial fashion, to the analytical and reflective activities needed to discharge this law-making responsibility. It is also right to observe that no very bright line can be drawn between the discharge of these two functions. Although, no doubt, some cases may clearly

[53] P.D. Carrington, D.J. Meador, and M. Rosenberg, *Justice on Appeal*, (St. Paul, Minn.: West Publishing Co., 1976), at 3.

[54] There does not appear to be much doubt that a law creating function has been, and ought to be, exercised by intermediate courts of appeal such as the Court of Appeal for Ontario. In this regard, see B. Kaplan, "Do Intermediate Appellate Courts Have a Lawmaking Function?" (1986), 70 Mass. L. Rev. 10 and Hon. Mr. Justice McHugh, "Law Making in an Intermediate Appellate Court: The New South Wales Court of Appeal" (1987), 11 Syd. L. Rev. 183. Indeed, there can be no doubt that trial judges, from time to time, also discharge this function. It is not open to a trial judge, when confronted by conflicting authority or by a gap in the existing law, to decline to answer the legal question at issue.

call for the discharge of one function to the exclusion of the other, there will nonetheless be many cases in which the error correction function cannot be so easily divorced from the law development function.

While all appellate courts appear to possess this duality of function, it may also be said that the particular balance between these two functions will vary with the position of a particular appellate court in the hierarchy of appellate courts in the jurisdiction in question. Thus, one would reasonably predict that the jurisprudential function would predominate, at the expense of error correction, in the final court of appeal for a particular jurisdiction and that error correction would acquire greater significance in the functioning of an intermediate court of appeal. Thus, it is typically the case that final courts of appeal are given substantial control over their case load in order to enable them to entertain an appellate case load which, in terms both of its quantity and its type, will enable the court to most effectively discharge its jurisprudential function. At the immediate appellate level, the court is typically required to handle a much larger volume of appeals and thus endure greater pressure from its case load in attempting to strike an appropriate balance between its error correction and law development functions.

(b) Backlog and its Impact

Briefly stated, the challenge currently confronting the Court of Appeal for Ontario is the fact that its backlog of cases is currently very substantial and appears to be increasing at a predictable rate annually. This growing backlog places the Court of Appeal under considerable pressure to dispose of the matters before it in as expeditious a fashion as possible. The effect of this pressure, in turn, creates the risk, if not yet the reality, that the Court will be unable to effectively perform its jurisprudential function. At the same time, the fact that the backlog has been growing annually for some period of years and appears likely to continue to do so into the foreseeable future means that a very considerable period of delay is experienced by litigants seeking a decision concerning their appeal from the Court of Appeal.

It may be useful to attempt to portray the dimensions of this problem more precisely.[55] Historical data and projections prepared by the Registrar of the Court of Appeal strongly suggests that this problem is, under current conditions, a serious one. Moreover, it appears to be one that is likely to be

[55] For a general discussion of this problem, with some reference to statistics from other provinces, see P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (McGraw-Hill Ryerson Limited, 1987), at 294-95.

substantially aggravated in the years to come if no remedial measures are adopted. Although there seems to be considerable fluctuation in the absolute number of dispositions of civil and criminal appeals (whether by reserved judgment or by other means), the average number of annual dispositions seems to be essentially flat over a considerable period time. The Registrar's office has projected that, under current circumstances, the annual disposition of criminal appeals is likely to remain at 1,735 per year (approximately 950 judgments and 785 other dispositions).[56] The filing of new appeals, interestingly, appears to be reasonably stable and is projected by the Registrar, again under current circumstances, to remain at approximately 2,124 appeals filed per year.[57] There is thus a substantial gap between the annual filings and the total dispositions annually with resulting increase in the length of the backlog of criminal appeals. A similar pattern is repeated in the civil context. The Registrar has projected that the number of judgments is likely to remain stable at approximately 440 per year. On the civil side, however, historical experience has led the Registrar to predict a modest increase annually in the number of appeals filed, this figure being estimated at 7.5% percent per year.[58] This historical experience also suggests a likely relative increase in "other dispositions" annually with the result that it is projected that total dispositions of civil appeals will increase annually as well. On this basis, however, it is projected for 1994 that 1,289 appeals will be filed and that the total number of dispositions will be 904. Again, then, there will be a rather substantial gap between filings and dispositions with a resulting increase in the backlog of civil appeals.

Although it is possible to obtain some indication of the impact of the backlog on the delays experienced by litigants in the processing of their appeals, it is apparently difficult to obtain precise information of this kind. In 1993, it was estimated that the delay from filing to the hearing of the appeal was approximately 28.3 months in civil cases and 14.3 months in criminal cases where the accused is represented by counsel. Significant increases in these figures are anticipated annually.

It is also possible to make projections with respect to future growth in both the backlog and delay in the processing of appeals if one assumes that current conditions are likely to prevail in the foreseeable future. The Registrar has made such calculations and has estimated that by 1999, the

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[56] The "other dispositions" consist of abandonments and dismissals for delay.

[57] Since the preparation of these estimates, 1993 figures have become available indicating a modest decline in criminal appeals to 1,947 in 1993, together with a much greater than predicted rise in the filing of civil appeals.

[58] Since the preparation of these estimates, 1993 figures have become available indicating an actual increase of 17.6% (to a total of 1,328 for 1993) over the 1992 total (of 1,129).

total backlog will have more than doubled. If one assumes that the period of delay is directly related to the length of the backlog, it is possible to project that the delay experienced in 1998 in civil appeals will be 53.88 months and in criminal appeals 34.46 months. We need not belabour the point that it would simply be unacceptable to subject litigants to delays of this dimension. Indeed, the point of unacceptability, as a matter of public policy, would be reached long before such figures became a reality.

Against this background, we have no difficulty in coming to the conclusion that reform of the appellate process, whether structural or non-structural in nature, is not merely obviously necessary but is urgently necessary. In an attempt to facilitate informed discussion of the possibilities for reform, we provide, in the next two sections of this paper, an account of previous studies of appellate reform in the province of Ontario and an account of relevant experience in other jurisdictions of interest. In a further section of the paper, we describe a number of possible reform options.

4. PREVIOUS STUDIES OF APPELLATE COURT REFORM

The increase in the number of appeals in the 1960s was a cause for concern for most of the provincial courts of appeal. In many cases the increase in appeals was so great that the courts of appeal were having difficulty in handling the volume of work. In most jurisdictions the response to this problem was merely to add more judges. In the province of Ontario, however, a number of studies were undertaken to search for a more permanent solution to the problem. In this section, we provide a brief account of these prior studies in Ontario and a brief description of the "Delays Project" of the Canadian Judicial Council.

(a) McRuer Report, 1968

In 1964 the Lieutenant Governor in Council appointed the Chief Justice of the High Court of Ontario, the Honourable James C. McRuer, to examine, study and inquiry into the laws of Ontario for the purpose, *inter alia*, of determining how far there may be unjustified encroachment on the freedoms, rights and liberties of citizens by bodies administering the laws of Ontario. This study included an examination of the administration of justice within the court system. When the Commission reported in 1968, it recognized that it was "impossible for the judges of the Court of Appeal in Ontario adequately to meet their responsibility as judges of the court of last resort in the Province".[59]

Based on this premise, the McRuer Commission recommended that the appellate structure of the courts be reformed. Rejecting the possibility that rights of appeal should be restricted[60] and that more judges ought to be appointed,[61] the Commission recommended the creation of an intermediate court of appeal.

In making this recommendation the McRuer Commission indicated a

[59] McRuer Report, *supra*, note 1, at 661. In part, this conclusion was based upon the Commission's view that appeals should be decided by panels of five judges. Unlike later reports, however, there does not seem to be the assumption that the Court of Appeal should fulfill the dual function of correcting errors and developing the law.

[60] *Ibid.*, at 662. The basis for this rejection of this alternative was that it would go against the policy of protecting civil rights and that the existence of appeals had a salutary disciplinary effect on the adjudicator from whose decision the appeal lies.

[61] *Ibid.* The basis for the rejection of this alternative was that an increase in the number of judges would dilute the quality of the judges of the Court of Appeal and depreciate the prestige and authority of the Court.

concern to avoid adding another tier to the judicial structure.[62] Moreover, the Commission recognized that in reorganizing the "appellate structure of the courts a primary objective should be to reduce the expense and delay in getting a decision by more than one judge in the matter under review".[63] Accordingly, the type of intermediate court of appeal that the Commission recommended was one that could exercise a limited jurisdiction and that was composed of members of the trial division of the Supreme Court. As a result of this recommendation, the Divisional Court was formed in 1970.[64]

Even while the McRuer Commission was considering the various alternatives available to deal with the appellate process, members of the Court of Appeal were conducting their own study. After initiating studies as to how the increasing work load could best be handled, it was concluded that there were two main alternatives: to increase the number of members of the Court or to create an intermediate Court of Appeal. It was this second option that was the preferred one, and this conclusion was conveyed to the Attorney General in 1967.

(b) Aylesworth Report, 1971

When the Ontario Law Reform Commission began to prepare its *Report on the Administration of Ontario Courts*,[65] it received a presentation from the judges of the Supreme Court of Ontario[66] re-affirming their conviction as to the desirability of creating another appellate court as against the unrestricted increase in the number of the members of the Court of Appeal.[67] In addition, the judges discussed a number of other suggestions as to how the administration of justice could be made more efficient.[68]

[62] *Ibid.*, at 664.

[63] *Ibid.*, 664.

[64] *An Act to amend the Judicature Act*, S.O. 1970, c. 97.

[65] *Report on the Administration of Ontario Courts*, *supra*, note 3.

[66] Aylesworth Report, *supra*, note 2.

[67] *Ibid.*, at 29. This recommendation was made in the context of the Court's view of its own task as being solely concerned with inquiring whether the conduct of the trial has "proceeded in accordance with the accepted procedural requirements" and that the law properly applicable to the determination of the rights of the parties has been applied to the proven facts. See *ibid.*, at 2.

[68] The judges noted the need for more research assistants, *ibid.*, at 9-10; the improved training of staff was suggested (at 12); the judges discussed the idea of judicial specialization and continuing education (at 12); the judges discussed the reduction of the long vacation (at 32); the motion for leave to appeal was discussed (at 33); reserved judgments and reduction in the volume of transcripts was discussed (at 34).

(c) Report of the Ontario Law Reform Commission, 1973

In its report, the Ontario Law Reform Commission observed that the problem of backlog in the Court of Appeal had persisted. Only a small portion of civil jurisdiction, and no criminal jurisdiction, had been transferred to the Divisional Court. The pressures on the Court's caseload had become, in the Commission's view, "intolerable"[69] Nonetheless, the Commission decided not to adopt the recommendations of the Aylesworth Report. Instead, the Commission's recommended method for dealing with appellate backlog was to have a number of matters within the jurisdiction of the Court of Appeal transferred to the Divisional Court.[70] Notwithstanding this conclusion, the Aylesworth Report clearly had an effect on some of the other recommendations made by the Commission to reduce appellate delay.[71]

(d) Kelly Report, 1977

A few years after the Law Reform Commission had completed its report, the Attorney General appointed a committee to "examine the present, and explore the future needs in Ontario with respect to the present appellate jurisdiction and function of the Supreme Court of Ontario and to make recommendations as to methods of meeting and satisfying those needs". Reporting in 1977,[72] the Kelly Committee proposed a number of changes that would reduce the demands on the appellate courts.[73] However, the Committee also recognized that "the demands upon the appellate courts cannot be significantly reduced by the adoption" of any or all of these proposals.[74]

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69 *Report on the Administration of Ontario Courts*, *supra*, note 3, at 224.

70 *Ibid.*, at 241, where it was recommended that jurisdiction in the following matters be transferred from the Court of Appeal to the Divisional Court: appeals from uncontested divorce cases, jurisdiction conferred by s. 14(1) of *The County Courts Act*, R.S.O. 1970, c. 94; appeals under *The Summary Convictions Act*, R.S.O. 1970, c. 450, except for appeals on important constitutional questions; summary conviction appeals, whether on a stated case or otherwise, arising under the *Criminal Code*, R.S.C. 1970, c. C-34; and, appeals from conviction, acquittal and sentence in indictable matters from provincial judges. Appeals to the Court of Appeal from the Divisional Court in all of these areas would be by leave of the Court of Appeal on questions that are not questions of fact alone.

71 *Ibid.*, where the Commission recommended that law clerks should be appointed to provide research assistance to the Court of Appeal. Judicial specialization was only considered appropriate in the "sense that the expertise of the various members of the Court is considered by the Chief Justice in assigning them to individual cases".

72 Kelly Report, *supra*, note 4.

73 *Ibid.*, ch. 5.

74 *Ibid.*, at 17.

On the basis that the introduction of another level of appeal would involve added delay and expense, the Kelly Committee rejected the creation of a two-tiered system of appellate justice to meet this demand and, consistent with this position, recommended that the appellate jurisdiction of the Divisional Court be terminated.[75] To deal with the appellate backlog, it recommended that the court be divided, on a *de facto* basis to test the efficiencies of specialization, into civil law and criminal law panels.[76] To ensure that the Court could fulfill both its error correcting and law developing function, the Committee also recommended that the appellate court be divided into two sections—"one to be oriented to hearing appeals wherein the resolution of the disputes between the litigants does not entail any law-developing pronouncement, the other to be concerned principally with the law-developing function".[77] However, the Committee also recommended that the law-developing or "Juristic Section" be empowered to review and revise, if it so elects, decisions pronounced by the error-correcting or "General Section" in any proceedings before it.[78] For some appeals, then, a two-tier appellate process was envisaged within the single tier structure proposed in the report.

(e) MacKinnon Report, 1983

Since no legislative changes resulted from the Kelly Committee's report, the Court of Appeal established, in June of 1980, a Future of the Court Committee. Almost one year later that Committee presented the Attorney General with a copy of a report that had been unanimously adopted by the Court of Appeal.[79] Based on the conclusion that Ontario Court of Appeal judges should have "ample time for consideration, reflection and writing on the more important cases",[80] the Future of the Court Committee recommended that the Court not be further expanded as a method of dealing with its backlog.[81] Further, the Committee was of the opinion that constituting different courts for criminal and civil appeals would not resolve

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75 *Ibid.*, at 21. One of the reasons for this recommendation, in addition to the fact that the existence of the Divisional Court created a two-tiered appellate court system, was that the judges of the Divisional Court were not permanent.

76 *Ibid.*, at 31.

77 *Ibid.*, at 18.

78 *Ibid.*, at 27.

79 MacKinnon Report, *supra*, note 5.

80 *Ibid.*, at 9.

81 *Ibid.*, at 3.

this problem.[82] Instead, the Future of the Court Committee recommended that a permanent intermediate court of appeal be established, with the Divisional Court being used as the vehicle for its establishment.

(f) Zuber Report, 1987

When the Honourable T.G. Zuber was appointed in 1986 to inquire into and report on "the jurisdiction, structure, organization, sittings, case scheduling and workload of all of the courts of Ontario",[83] the inquiry into the workload of the Ontario appellate courts naturally began with the proposition that appeal courts discharge two functions: "the first is simply to correct errors in the judgment that is the subject of the appeal and resolve the dispute between the parties; the second function is to explain the law and develop the jurisprudence of the province".[84] Recognizing that the Court of Appeal was unable to fulfill the second function because of its caseload,[85] the Zuber Report concluded that substantial reforms were required. Although the Report considered the option of increasing the number of members of the Court since "a further expansion of the number of judges on the court would obviously increase the capacity to cope with the volume", this option was rejected on the grounds that it would diminish the consistency and predictability of the court.[86] Instead, drawing inspiration from the solution adopted by many states in the United States, the Zuber Report recommended that an intermediate court of appeal be created.

In making this recommendation the Report listed the benefits that would flow from this type of reorganization.

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82 *Ibid.*, at 2.

83 Zuber Report, *supra*, note 6. Order-in-Council 1438/86, the Order-in-Council, appointing this inquiry cited the "numerous submissions from judges, lawyers and the public proposing changes in the courts of Ontario" and the report of the Ontario Law Reform Commission, *supra*, note 3, as reasons why this report was necessary.

84 Zuber Report, *supra*, note 6, at 114.

85 *Ibid.*, 115: "Despite the need for the final court of appeal in Ontario to give increasing attention to developing the jurisprudence of this province, it is a matter of general agreement by the Court of Appeal and the bar that it is becoming progressively less able to do so".

86 *Ibid.*, at 117. Mr. Justice S.G.M. Grange, "National Seminar on the Future Role of Appellate Courts[:] the Ontario View" (Montreal: Canadian Institute for the Administration of Justice, 1988), at 4-6, similarly rejected this option on the grounds that more use of High Court judges is not possible since there are not enough judges in that Court; collegiality and consistency would suffer; and increasing the number of judges would dilute their quality.

> Firstly, resort to an appellate court can be made more accessible to the people of Ontario. At present, the Court of Appeal sits only in Toronto, with periodic sittings in Kingston to hear prisoner appeals. However, an enlarged intermediate court of appeal can be an itinerant court and can sit in the major population centres in Ontario as the number of cases requires. Secondly, an intermediate court can be indefinitely expanded as the caseload requires. The work of this court will no doubt make a significant contribution to the development of the law in this province but its primary function will be to cope with the caseload and resolve disputes between the parties.[87]

The creation of the intermediate court of appeal, therefore, would ensure that both of the functions of a court of appeal would be satisfied—the intermediate court of appeal could provide the error correcting function while the final court of appeal, much smaller in size, could develop the jurisprudence of the province.

(g) Responses to the Zuber Report

After the Zuber Report was released, a number of studies were undertaken to examine the implications of the report's recommendations.[88] The Canadian Bar Association—Ontario recommended that rather than having the members of the court rotated in as with the Divisional Court, the intermediate court of appeal be staffed with permanent members.[89] In a memorandum prepared for the Ministry of the Attorney General, W.J. Blacklock provided a number of criticisms of the system proposed by the Zuber Report. Some of these are:

1. that rather than dealing with delay, as the Zuber Report suggested, recommendations for an intermediate court of appeal would increase it for all cases where an appeal would lie from the court;[90]

2. that there are probably insufficient courthouse facilities for an additional court;[91]

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87 *Ibid.*, at 118.

88 In addition to the studies discussed herein, two studies were completed for the Ministry of the Attorney General, one by S.C. Hill and another by J.C. Pearson, dealing with the effect of an itinerant court of appeal, as recommended by the Zuber Report, *supra*, note 6, on the Crown Law Office–Criminal. We are not aware of a similar study being done for Crown Law Office–Civil.

89 CBA-O submission, *supra*, note 7, at 51.

90 W.J. Blacklock, "Comments on the Report of the Ontario Courts Inquiry by the Honourable T.G. Zuber" (1987), at 12.

91 *Ibid.*, at 15.

3. that an additional level of appeal would be more complex and less understandable to Ontarians;[92]

4. that the Ontario Court of Appeal does not bear primary responsibility for developing the jurisprudence in matters of federal law, including the Criminal Code;[93]

5. that there is already a mechanism within the existing court structure to permit the Court of Appeal fulfill its jurisprudential role—if the Court thinks that some matter needs particular attention, it is free to hear extensive argument, to take time to extensively consider the matter, and to provide extensive reasons; if the Court thinks that the law needs particular development and explanation, it can have the matter heard before a five person panel;[94]

6. that one of the complaints the Zuber Report had about the Divisional Court was that it was characterized by "unpredictability and inconsistency", and that while the Zuber Report attributes the reasons for this to the rotational nature of the court's duties, it may well have to do with the lack of experience in or qualifications for appellate work of some members of the Divisional Court. Yet, if an intermediate court of appeal were to be created, "many of the judges who sat there before as members of the High Court would potentially be sitting there again...."[95]

Blacklock concluded by dealing with the Zuber Report's argument against an increase in the size of the Court of Appeal. While conceding that the Report may be correct and that an increase in numbers may impact on the consistency and collegiality of the Court, Blacklock suggested "that this could be offset by a system of case conferences or regular meetings or seminars for the judges to discuss problems of administration as well as current legal issues as well as a systematic use of five person panels".[96]

Two years after the *Zuber Report* had been published, a Joint Committee on Court Reform, comprising the Advocates' Society, the Canadian Bar Association—Ontario, the County and District Law Presidents' Association, the Criminal Lawyers' Association, the Law Society of Upper Canada and

92 *Ibid.*, at 16.

93 *Ibid.*, at 38.

94 *Ibid.*, at 49.

95 *Ibid.*, at 52-53.

96 *Ibid.*, at 95.

the County of York Law Association, published their report on appeal court reform.[97] Recognizing that the Court of Appeal's backlog is primarily created by an increase in the length and complexity of appeals rather than an increase in numbers, and that the Supreme Court of Canada's role of developing jurisprudence in non-constitutional areas is shrinking,[98] the Joint Committee explored various non-structural and structural responses that may assist the Court of Appeal.

The non-structural responses considered by the Joint Committee were: a restricted right of appeal,[99] limits on oral arguments,[100] pre-appeal conferences,[101] expansion of the number of appeal judges,[102] and the rotation of trial judges into appeal courts.[103] In addition, the Joint Committee also considered a number of structural responses to deal with the backlog. These were: the creation of specialist appeal court divisions to expedite the flow of cases because of a higher degree of expertise on the part of the judges;[104] the creation of a National Court of Appeal;[105] and the creation of an intermediate court of appeal.[106] This last alternative was the one favoured by the Joint Committee.

97 Joint Committee on Court Reform, *supra*, note 8.

98 *Ibid.*, at 3.

99 *Ibid.*, at 4-5. This option, except in interlocutory matters, was rejected.

100 *Ibid.*, at 5-6. The only area where the Joint Committee was able to recommend a limitation on oral argument was with respect to sentence appeals.

101 *Ibid.*, at 6-7. Except possibility in the area of family law, the Joint Committee was of the opinion that this option would not succeed in reducing backlog.

102 *Ibid.*, at 7.

103 *Ibid.*, at 7-10. With regard to this option the Joint Committee took the position that if "the Court were substantially enlarged, by a sufficient number of judges to overcome its current problems (perhaps 8 or 10) it would be unrealistic to expect a coherent consistent philosophical approach to the development of the law. The rotating of trial judges into the Court of Appeal on an *ad hoc* basis would certainly provide additional manpower (subject to the ability of the Supreme Court to provide judges in sufficient numbers) but would work against the development of collegiality at the appellate level". Nevertheless, the Committee did recommend (at 9), that in conjunction with the appointment of additional appeal judges, there be a short term program of such rotation to alleviate the workload of the Court of Appeal.

104 *Ibid.*, at 10. This possibility was rejected on the basis of the Joint Committee's view that a lack of expertise on the part of judges was not the cause of the Court's backlog.

105 *Ibid.*, at 10. Since the constitutional implications of this had not been explored, the possibility of such a court was only raised. However, since the provincial legislature is limited under s. 91(24) of the *Constitution Act, 1887, supra*, note 9, to creating courts "[i]n each province", and because the federal Parliament's powers to create courts under s. 101 of that Act is limited to courts that administer the laws of Canada, it seems unlikely that a National Court of Appeal, with appellate jurisdiction over provincial laws in all the provinces, can be created.

106 *Ibid.*, at 11-17.

It is not entirely clear, however, why the Joint Committee favoured this option. References were made to the fact that this was the solution recommended by the Kelly Report and the Zuber Report.[107] A reference was also made to the fact that "about three-quarters of the U.S. states have one",[108] though no attempt was made, as was suggested by an internal Ministry study, "to determine what some of the state models are".[109] Finally, the Joint Committee noted that while an intermediate court of appeal would only be advantageous if "it succeeds in expediting the handling of appeals without sacrificing the quality of the decisions", it would clearly have the disadvantage that it would result in a "significant increase in expense for litigants whose cases go all the way to the highest levels".[110] However, like the Zuber Report before it, the Joint Committee also made reference to the fact that the Court of Appeal, particularly relative to the Supreme Court of Canada, has a "staggering" workload[111] and as a result is "dominated by the error-correcting function rather than the law-making function".[112] The intermediate court of appeal was the preferred solution to this problem.

(h) Ministry Studies

One year after the Joint Committee made its recommendations for structural reform of the Ontario Court of Appeal, the Ministry of the Attorney General's Court Reform Task Force issued a discussion paper on the Unified Criminal Court and Appeal Court Reform.[113] Commencing its analysis with the proposition that a new appellate structure should be designed to expeditiously produce consistent judgments of high quality, to be accessible, and to be seen to be detached from the events, emotions and persons involved in an appeal,[114] the Task Force set out to determine what structural modifications to the Court of Appeal would best allow these principles to take effect.

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107 *Ibid.*, at 11.

108 *Ibid.*

109 S.C. Hill, "Zuber Report: Crown Staffing of the New Ontario Court of Appeal", (Ontario, 1987), at 24.

110 Joint Committee on Court Reform, *supra*, note 8, at 12.

111 *Ibid.*

112 *Ibid.*, at 13.

113 Ministry of the Attorney General (Ont.), Court Reform Task Force, *Unified Criminal Court and Appeal Court Reform* (1990).

114 *Ibid.*, at 15-16.

In the paper, four different models for a reformed Court of Appeal were examined. The first two models involved an intermediate court of appeal between the trial courts and the Court of Appeal, whereas the final two models were modifications of the existing structure with appeals being made directly from the trial courts to the Court of Appeal. Naturally, each of the four models had various advantages and disadvantages.

The first model required appeals to be made from the trial courts to the intermediate court of appeal and from there to the Ontario Court of Appeal. The major disadvantage of this model, noted the Task Force, was that it was inconsistent with the major themes of court reform—"simpler, faster, less expensive justice".[115] In addition, it would probably cause poor morale on the part of the intermediate judges.[116] Finally, an elite, final court of appeal in Ontario might attain a disproportionate influence in judicial decision making and could diminish the significance of the other provincial courts of appeal.[117]

The second model, with the intermediate court of appeal being an appeals branch of the General Division, is essentially an expansion of the Divisional Court. In addition to its present functions, the Divisional Court or Appeals Branch would be given jurisdiction in all appeals up to a fixed amount of money, together with all sentencing appeals. Appeals from the trial courts in matters within the jurisdiction of the Appeals Branch would go directly to that branch. Anything outside that jurisdiction would go directly to the Court of Appeal.

The advantage of this system is that it would free up the Court of Appeal to focus on developing jurisprudence. Moreover, unlike the first model, there would be very few cases that would have to appeal to three different courts for a final decision. There are, however, a number of disadvantages. First, appeals in criminal cases could be made on conviction as well as sentence so that the matter would go to the province's highest court. Second, although there may be fewer morale problems than in the first model, some problems of this kind were expected. Third, there is the possibility that litigants may assume that they would not get a fair review of their case, since judges of the same level might be hesitant to overturn a decision of a fellow judge. Fourth, giving the rotational nature of this court, there are concerns about

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115 *Ibid.*, at 19.

116 *Ibid.*

117 *Ibid.*, at 20.

consistency. Finally, a simple monetary criterion, while administratively practical, does not accurately reflect the importance of many issues.

The third model is essentially a numerically expanded Court of Appeal. This Court, of about twenty-seven to thirty-five judges, would have a broad appeal and judicial review jurisdiction. It could sit in two person panels for straightforward cases, like sentence appeals, although the bulk of the cases would be heard by a three person panel. However, panels of five, seven or even nine appeal judges could be established for significant cases. The idea was that the size of the panel would ensure quality and consistency, and would lend more authority to a particular decision of a large appeal court even without the supervision of a final appeal court. In order to meet appropriate standards of quality and consistency, however, it would also be necessary to have effective management systems in place. Where demand required, such as in regional centres, trial court judges could sit on a panel with Court of Appeal judges.

There are a number of advantages to this model. First, since there is only one level of appeal in the province, all litigants are on the same footing. Second, there would not be the "morale problems associated with the inferior status of an intermediate appeal court".[118] The Task Force, however, noted that there may be a number of problems with this model. First, the "argument could be made that a Court of Appeal up to twice as large as the present court would lack the cohesion, the sense of collegiality, necessary for consistent appellate decision making".[119] To manage this problem, the chief justice would be required to implement an effective case screening mechanism. The Task Force noted that the U.S. 9th Circuit Court of Appeal, with a membership of twenty-seven full-time appellate judges, manages to avoid inconsistent decisions through large, randomly selected panels that consider and rule on potential and existing intra-court conflicts.

The fourth model is a variation on the third, the difference being the existence of defined, functional appeal divisions. There are a number of different divisions that can be made in such a court. The most straightforward is a court with two divisions, criminal and non-criminal. A more complex division would include panels for criminal law, family law, civil and administrative law. In each case "judges would be appointed on the understanding that they would spend most of their time in one division but would have the flexibility to sit in other divisions".[120]

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118 *Ibid.*, at 25.

119 *Ibid.*, at 26.

120 *Ibid.*, at 27.

The advantage of this model is that it recognizes the "breadth and complexity of contemporary law and the fact that judges who are expert in the major fields can provide better quality, faster and, ultimately, less expensive decision-making than generalists".[121] The possible defect is that "judges may become isolated within their speciality and lose the ability to take an overall perspective on the development of jurisprudence".[122]

In summing up, the Task Force made the following observation:

> A single-level appeal court does, however, offer many of the same advantages as the one-level trial court. The structure is easily understood by lawyers, litigants, and the public—one trial, then the right to one appeal. The morale problems among judges caused by hierarchy are avoided. The predominant use of permanent appeal judges whose expertise reflects the appellate caseload promotes high-quality judgments. Informal specialization also responds to concerns that a large court may lack consistency of decision-making. Judgments on significant issues could be delivered by panels of five or more judges which would provide an authoritative voice on important issues comparable to a final court of appeal in a two-tier structure.

The following year, the Ministry of the Attorney General produced another internal study that dealt with the issue of appellate court delay.[123] After noting that some U.S. Federal Court of Appeal circuits are very large, "including one with twenty-seven appellate judges"[124] and that the "English Court of Appeal has a complement of twenty-eight",[125] the study discusses three alternatives that may assist the Ontario Court of Appeal in dealing with its backlog. After commenting on a number of administrative improvements that may be made,[126] the study examines the possibility of increasing the complement of the court and of creating an intermediate court of appeal.

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121 *Ibid.*

122 *Ibid.*

123 M. Leach, "Discussion Paper on Ontario Appeal Courts" (1991).

124 *Ibid.*, at 4.

125 *Ibid.*

126 *Ibid.*, at 7-9, where the author discusses the possibility of time standards for the filing and serving of documents and transcripts and the means of dismissing appeals for failure to meet these standards; the adoption of monitoring systems to enable the registrar to identify and resolve problems in the preparation of transcripts; the implementation of pre-appeal conferences; the advantages of hiring of staff lawyers to screen appeals, provide support to the judges, flag potential conflicts or similar issue cases, and brief judges for oral argument; the prospect of permitting two judge panels in certain circumstances; and the feasibility of allowing trial judges on appeal panels.

With regard to the former, the study merely points out that although an increase in the number of judges would probably resolve the workload problems, the advantages of a larger court would be neutralized unless "effective administrative and caseflow control techniques are part of an expansion".[127]

Although the study's analysis of the advantages and disadvantages of an intermediate court of appeal was much more extensive, it was essentially a recapitulation of the major points raised by the previous studies—that an intermediate court could concentrate on correcting error while the final court of appeal could concentrate on developing the law,[128] but that an additional appeal stage would increase delay and expense, cause poor morale, and perhaps be a threat to other provincial appellate courts.

A further internal study was undertaken by W.J. Blacklock in 1992.[129] In addition to reviewing the arguments and analyses that had been previously raised,[130] this study considered the relationship of the Court of Appeal to the Supreme Court of Canada. The study suggested that the role that the Court of Appeal plays in relation to civil law is different from the role that it plays in relation to criminal law. Since the latter, unlike much of the former, is federal in nature and therefore uniform in application across the country, it can be argued that "the court which must perform the lion's share of the jurisprudential role in relation to the criminal law must be the Supreme Court of Canada (barring the creation of some other Federal Court) rather than a Provincial Court of Appeal".[131] With respect to civil law, however, it was argued that there could be "no objection to a Court of

127 *Ibid.*, at 9.

128 *Ibid.*, at 11. In addition, it was stated that the final court of appeal could deal with more complex cases and that by replacing the Divisional Court with an appeal court would be much less confusing to litigants.

129 W.J. Blacklock, "Issues to be Considered in Relation to an Intermediate Court of Appeal" (1992).

130 *Ibid.*, where it was argued that the creation of an intermediate court of appeal would promote added delay in the ultimate disposition of cases (at 3); that an itinerant or regionalized intermediate court of appeal would probably increase the level of inconsistency (at 4-5); that the present level of expertise, both in the Ontario Court of Appeal and in the Ministry of the Attorney General who argue cases before it, would be diluted by an intermediate court of appeal (at 5); that an itinerant intermediate court of appeal would be less accessible to the public (at 7-8); that an itinerant intermediate court of appeal would not have access to the same resources that the present Court of Appeal has (at 8-9); that the creation of an intermediate court of appeal would provide difficulties for the Crown in its attempt to have certain issues quickly resolved by the province's highest court (at 9).

131 *Ibid.*, at 2.

Appeal in the Province being structured so as to take on the jurisprudential role of a court of final resort".[132]

(i) Canadian Judicial Council

In 1992 the Appeal Courts Committee of the Canadian Judicial Council produced a "Delays Project"[133] as part of its study of the state of delay in the courts of appeal in the Canadian provinces and in the Federal Court of Appeal. Two categories of delays were addressed: those that take place before perfection of the appeal and those that take place after perfection. In the latter case, the Committee noted that the chief cause of delay "is the backlog of perfected appeals on the list waiting to be heard".[134] To deal with this type of delay the Committee considered various procedural, administrative and structural solutions.[135] Recommendations of a procedural kind included rules and practices that "facilitate the expeditious and effective processing of appeals, including provisions for effective sanctions for delay at various stages in the progress of an appeal".[136] Administrative solutions generally referred to the "management of the caseflow in such a way as to increase the efficiency and productivity of the court".[137] Substantive and structural solutions canvassed included the hearing of appeals on leave, the creation of an intermediate court of appeal, the dividing of the appeal courts according to function, and the expansion of existing courts.[138]

5. EXPERIENCE IN OTHER JURISDICTIONS

In searching for ideas for legislative reform that have already been tested, there are three sources that are typically examined—other Canadian experience, the United States and the United Kingdom. A brief account of the experience in these other jurisdictions is provided below.

132 *Ibid.*, at 1.

133 Canadian Judicial Council, Appeal Courts Committee, "Delays Project" (1992).

134 *Ibid.*, at 8.

135 *Ibid.*, at 10.

136 *Ibid.*, at 12.

137 *Ibid.*

138 *Ibid.*, at 13.

(a) UNITED STATES

Like the Canadian system described above, the judicial system in the United States is almost completely separated into two independent systems—one federal and one state court system. Federal courts derive their authority from article III of the U.S. Constitution, and all federal courts except the Supreme Court of the United States are created by federal legislation. State constitutions provide the authority for state courts, and like the Federal Constitution each of these constitutions provides for a separation of judicial, executive and legislative powers.[139] As in Canada, state courts can, and do, exercise jurisdiction over federal legislation—particularly when there is an issue of supremacy between state laws and federal law.[140] Federal courts, however, as in Canada, only have limited jurisdiction. These limitations have been set out in Article III(2) of the U.S. Constitution, the most important of which is that their jurisdiction is confined to the administration of federal laws. There are, however, important differences between the two systems that have an impact on the respective roles of state and provincial appellate courts.

One important difference between the two systems, for the purposes of the present study, is that the jurisdiction of the Supreme Court of the United States has the same limitations as the federal courts, that is, it has no jurisdiction to administer state laws. Although disputes that have started in state courts can move to the federal courts, including the Supreme Court of the United States, the jurisdiction that is exercised by such courts is that set out in Article III(2) of the U.S. Constitution. Thus, for example, if a state court rendered a decision in which a federal law or a constitutional provision was arguably in conflict with a state law, an application for review of that decision could be made to the federal courts. When the federal courts, including the Supreme Court of the United States, acquire jurisdiction over a dispute that is not governed by federal law, they defer to the law as laid down in the highest court of the state whose law is applicable.[141]

Under this constitutional structure, there was originally only one state appellate court with jurisdiction over all appeals from the state trial courts. When the number of appeals filed began to increase in the late nineteenth century, the capacity of these appeal courts was over-stretched. To deal with this problem, state legislatures began to create intermediate courts of appeal

[139] D.J. Meador, *American Courts* (West Publishing Co., 1991), at 10.

[140] *Constitution of the United States*, art. VI.

[141] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

between the trial courts and the final state court of appeal.[142] Until well into the twentieth century, only a minority of states had established such courts. After the Second World War, however, the movement to create them quickened.[143]

At present, about thirty-eight states have created intermediate courts of appeal.[144] In these states, the intermediate court of appeal acts as the "workhorse" of the appellate system, concentrating primarily on correcting the errors of the state trial courts. In contrast, the final appellate courts concentrate on the most important cases, including those where the court has an opportunity to settle the jurisprudence of the state.

Although there are a number of differences in the way the various intermediate courts of appeal are structured, essentially these can be characterized according to three models. The first, typified by the Georgia Court of Appeals, is a court of general jurisdiction with rights of appeal from the Superior Court and from a number of inferior courts.[145] The second model, typified by the California Courts of Appeal, is characterized by a court of general jurisdiction organized into geographical districts.[146] The third model, typified by the state of Alabama,[147] is characterized by the intermediate appellate tier being divided according to subject matter. In Alabama this division has been made along the same lines as the English Court of Appeal, that is between civil cases[148] and criminal cases.[149]

[142] For example, Illinois created its appellate court in 1877 pursuant to art. VI of the Constitution of 1870. At that time, intermediate courts of appeal existed in New York, Ohio, and Pennsylvania. See R.H. Mills, "The Illinois Appellate Court: A Chronicle and Breviary of Intermediate Review", [1981] 3 Southern Illinois University L.J. 373, at 379.

[143] Meador, *supra*, note 139, at 14.

[144] *Ibid.*; R.M. Novak and D.K. Somerlot, *Delay on Appeal[:] A Process for Identifying Causes and Cures* (American Bar Association, 1990), at 116. The states that have not created such a court are: Delaware, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

[145] In addition to appeals from the Superior Court, appeals can be heard from State Court, the Juvenile Court, the Municipal Court and the Civil Court for Bibb and Richmond counties. In the case of the State Court and the Juvenile Court, some matters may also be appealed directly to the Georgia Supreme Court. Only nine judges sit on the Georgia Court of Appeals.

[146] There are six Courts of Appeal in California. In total, there are eighty-eight judges sitting on these courts, making it the largest state intermediate court in the country.

[147] In addition to Alabama, Oklahoma, Pennsylvania, Texas, and Tennessee have intermediate courts of appeal divided into civil and criminal panels. Alaska's intermediate court of appeal only has criminal jurisdiction.

[148] The Court of Civil Appeals has jurisdiction over all appeals in civil matters.

[149] The Court of Criminal Appeals has jurisdiction over all appeals in criminal matters.

In addition, there are three different models for bringing appeals and for apportioning those appeals between the intermediate court of appeal and the state supreme court.[150] These are: (1) all, or most, appeals are filed initially in the intermediate court;[151] (2) appeals are filed either in the intermediate court or the supreme court depending upon the subject matter of the case;[152] (3) all, or most, appeals are filed with the supreme court which screens them out and then apportions them between the intermediate court and the supreme court.[153]

The American evidence suggests that the creation of an intermediate court of appeal reduces the backlog for the final court of appeal.[154] However, recent studies indicate that, unless access to the final appellate court is restricted, this reduction is relatively short-lived.[155] The hypothesis advanced is that because of a reduction in the backlog of appeals, due to the creation of an additional level of appeal that can deal with more appeals, an appeal becomes a more attractive option. Thus, those who would not have appealed under the old system may be encouraged, by the system itself, to

150 T.B. Marvell "Appellate Capacity and Caseload Growth" (1982), 16:1 Akron L.R. 43, at 90.

151 California, Florida, Louisiana, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, and Wisconsin have such appellate procedure. Marvell, *ibid.*, notes that this types of appellate procedure requires that a newly created intermediate court of appeal be larger than the court of appeal and that under this system more second appeals are brought.

152 Marvell, *ibid.*, at 91, indicates that "this is the most common arrangement, existing in a dozen states". The problem with this sort of appellate procedure is that, as Marvell noted, "jurisdictional alignments, although typically based on judgments about the importance of various types of appeals, can only imperfectly route the important issues, especially law-making issues, to the court of last resort". Also, typically under this system the caseload of the supreme court continues to rise until it is not longer—again—to handle the caseload.

153 Marvell, *supra,* note 150, at 92-93. The advantages of this arrangement is that the caseload of the court of appeal and supreme court can be regularly adjusted so that neither has more backlog or unused capacity than the other and that second appeals can be kept to a minimum. The disadvantage is that the supreme court may overburden the court of appeal so as to keep its own caseload light and that the screening procedures give the supreme court additional tasks to fulfill.

154 J.N. Bloodworth, "Remodelling the Alabama Appellate Courts" (1971), 23 Alabama L. Rev. 352; Currier, "The Work of the Louisiana Appellate Courts of the 1961-62 Term" (1963), 23 Louisiana L. Rev. 239; E.E. Means, "Florida District Courts of Appeal" (1959), 33 Florida B.J. 1209; and Marvell, *supra,* note 150, at 85-88.

155 C.G. Douglas III, "Innovative appellate court processing: New Hampshire's experience with summary affirmance" (1985), 69 Judicature 147, citing V.E. Flango and N.F. Blair, "Creating an Intermediate Appellate Court: Does it Reduce the Caseload of a State's Highest Court?" (1980), 64 Judicature 74, at 77.

appeal.[156] While the design of the intermediate court of appeal gives the state legislatures the power to deal with any such increase,[157] by adding more judges to the Court, in the end this may prove to be very expensive in terms of additional judicial power, additional court space and additional staff requirements.[158] One of the ways some states have avoided some of that expense, however, is to use trial court judges[159] or special commissioners.[160]

While it thus seems possible to reduce the backlog at the highest appellate level merely through the creation of an intermediate court of appeal, American experience confirms that this additional layer of appeal may itself create additional problems. Because of the increase in the levels of appeal, appellate opportunities become open to rich litigants more so than to those with less money, irrespective of the merit of their claims.[161] In addition, there are concerns about the quality of decision-making, the depreciation of the judicial currency and the loss of collegiality.[162] Finally, some authors

156 It must be noted that the increase in appeals may be explained by other causes, such as an increase in the number of litigants.

157 Note, for example, that there are eight-eight judges in the California Courts of Appeal, fifty-two judges in the Louisiana Courts of Appeals, fifty-nine in the Ohio Courts of Appeal, and eighty in the Texas Courts of Appeals. By comparison, in the federal system the largest intermediate appellate court is the 9th Circuit, which has twenty-eight judges only, with the next largest being the 5th Circuit with seventeen judges. This option does not appear to have been exercised by the provinces in this country due to the confusion over the nature of the provincial courts of appeal.

158 J.A. Parness and J.E. Reagle, "Reforms in the Business and Operating Manner of The Ohio Courts of Appeal" (1982), 16 Akron L.R. 3, at 6-10.

159 Marvell, *supra,* note 150, at 52, indicates that the use of lower court judges may be better in the state Supreme Court, using intermediate appeal court judges, than with intermediate appeal court using trial court judges. Experiments in Missouri resulted in an increased backlog, since many of the judgments written by trial judges were late in coming and most had to be redone. The Washington Supreme Court has apparently suffered from the same problem.

160 *Ibid.*, at 52-53. The Commissioners were typically trial lawyers, and their decision on the appeal would not be binding on the parties if they wanted to have the matter heard by the Court of Appeal.

161 R.L. Aynes, "Maintaining the Integrity of the Ohio Appellate System" (1982), 16 Akron L.R. 115, at 116; Marvell, *supra,* note 150, at 88.

162 Aynes, *supra*, note 161, at 117-18. Note that this comment was made in the context of the Ohio Courts of Appeal, where fifty-nine judges sit for a term of six years. Query whether this effect would still occur in a smaller court where the judges sit until a fixed retirement age. See, also, H. Friendly, *Federal Jurisdiction[:] A General View* (1973), at 45-46.

have expressed concern that the creation of an intermediate court of appeal would undermine the certainty of precedent.[163]

One of the most serious concerns—that the loss of collegiality would result in judicial decisions being rendered that are inconsistent with each other or with previous authorities—appears to have been resolved by various means in many of the U.S. intermediate courts. By putting systems in place to ensure that conflicts do not occur, and by rigidly adhering to the rule of *stare decisis* to ensure that conflicts are not created, federal[164] intermediate appellate courts[165] report that a lack of consistency is not a problem in

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163 M. Osthus, *State Intermediate Appellate Courts*, Am. Judicature (1980), at 2-3, cited in M.B. Brissette, "The Virginia Judicial Council's Intermediate Appellate Court Proposal" (1981), 16 U. Richmond L.R. 209, at 212; Marvell, *supra*, note 150, at 89.

164 In the largest United States Court of Appeal, the 9th Circuit Court, all appeal documents are scrutinized to discover all legal issues. All issues are then recorded on a computer. In addition, the computer is checked for cases with similar issues so that the judges can be advised as to how those issues were resolved. If two appeals are filed that deal with similar issues, they will both be assigned to the same panel. If that is not possible, they will be assigned to a second panel who is, at the same time, alerted that the issue is already before a panel. The second panel will thus wait to deliver their judgment until the first panel has disposed of their case. After publication of that first case, the second panel can either write brief disposition or, if they disagree with the decision of the first panel, they can ask that case be decided *en banc*. If, for some reason, a panel rendered a decision without being aware of previous decisions of the Court on the same point, the losing party can petition for re-hearing based on the case. In addition, any other judge can ask for hearing *en banc*.

A slightly different procedure is used in the Federal Circuit. There, after a panel of three have drafts of their decision they are circulated among the other members of the Court. In each case there is a fixed time for those other members to suggest revisions or point out conflicts. If the draft is acceptable or if there are no comments, the decision is filed. If it is unacceptable, a procedure can be put in place to have the decision heard *en banc*.

It is important to note that the procedures noted above merely serve to advise courts about previous or possibly conflicting decisions. Consistency, however, is achieved because the Court considers itself bound by all previous decisions of the Court, including those that have not been rendered *en banc*, even if individual judges are of the opinion that the previous decision was wrongly decided.

This situation is different in the California Courts of Appeal. The intermediate court of appeal level is actually composed of six courts, each of which provides appellate service for its particular district. Moreover, each district has one or more divisions. In this situation there is no rule that the courts, who always sit in panels, are bound to follow a previous judgment of the same district of even of the same division.

For a useful discussion of *en banc* procedures, see D.H. Ginsburg and D. Falk, "The D.C. Circuit Review September 1989 - August 1990: The Court En Banc: 1981-1990" (1991), 59 Geo. Wash. L. Rev. 1008.

165 In Oregon and Nebraska, consistency is maintained by weekly all-court conferences that consider the opinions of panels. In Florida, panel decisions that modify or that are inconsistent with previous decisions of the Court need to be brought to the attention of

their courts. In other courts, however, such as in California which is the site of the largest intermediate court of appeal, the rule of *stare decisis* neither applies among the six districts courts, among the division courts in three of the districts, nor among panels in any particular court. Nevertheless, we have been advised that consistency is either maintained through appeals to the Supreme Court of California or through more informal means.[166] Moreover, in rare cases a court which sits in a division may sit *en banc*.

Another possible strategy for increasing appellate capacity, either alone or in conjunction with the creation of an intermediate court of appeal, would be to improve judicial productivity. In order to do this, it is first necessary to identify the causes of delay. A review of the American articles written on this subject suggests that most of the delay is caused before the appeal has been perfected.[167] However, one of the major causes of post-perfection delay is the tendency of appeal judges to reserve judgments. Delay in handling reserves is likely to beget further delay. Accordingly, most states attempt to schedule only so many appeals as the judges can decide within one or two months.[168] If appellate capacity cannot be increased by such means, the only further option would appear to be a constriction on the right of access to an appeal.

American states and their courts have devised various strategies for increasing judicial productivity and/or restricting the flow of cases to the appellate courts. Some of the measures that have been experimented with and adopted are: expanding discretionary jurisdiction of the court through a

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the court's other judges and a court conference can be held to resolve the conflict. In Indiana, panel opinions are circulated to the whole court before decisions are announced. Generally, see J.A. Martin and E.A. Prescott, *Appellate Court Delay[:] Structural Responses to the Problems of Volume and Delay* (Virginia: National Center for State Courts, 1981), at 69-70.

166 We have been advised by Judge David Halperin of the First District, California Courts of Appeal, that rule 977 of California Rules of Court provides that the only decisions that can be quoted in Court are those that have been published. Since the California Supreme Court controls the publication of Court of Appeal decisions, the Court can merely decide not to publish cases it does not agree with. Although an unpublished case remains binding on the parties to the decision if they have decided not to appeal, it has no precedential value.

167 Marvell, *supra*, note 150, at 45-55. It is with regard to this type of delay that a case management system would work. However, there may be valid causes for this type of delay, as for example negotiations between the parties or attempts by lawyers to ensure that their fee on the appeal will be paid, and some care will have to be taken to ensure that people are not pushed into arguing an appeal that might otherwise not have proceeded.

168 *Ibid.*, at 45, citing Martin and Prescott, *supra*, note 165, at 92, and "Judicial Statistics of State Courts of Last Resort" (1947), 31 J. Am. Judicature Soc'y. 116, at 117-18.

leave procedure,[169] restricting the right of appeal to certain instances only,[170] implementing a case management system,[171] modifying or limiting the requirement for oral argument,[172] introducing pre-hearing settlement conferences,[173] limiting the volume of appellate papers,[174] augmenting the use of staff lawyers for research and opinion purposes,[175] reducing the size

169 Marvell, *supra,* note 150, at 71-74; Mills, *supra,* note 142, 385-92. Because of these delays, Mills notes that lawyers are seldom under pressure to file their briefs, and as a result adjournments are often given by the court.

170 Parness and Reagle, *supra,* note 158, at 11-15; Marvell, *supra,* note 150, at 70-71. In addition, Marvell suggested that one method of restricting the right of appeal would be to require agencies to appeal first to the trial court. The Court of Appeal would hear appeals from that court only when an error occurred in the first appeal.

171 Aynes, *supra,* note 161, at 118-20.

172 *Ibid.*, at 123-31; Parness and Reagle, *supra,* note 158, at 24-29 B; Marvell, *supra,* note 150, at 60-61, where the author indicates that the time saved by this method depends upon the distance the court is from the judge's offices. At 61: "If they live and work near the court seat, then the savings from oral arguments is rather slight since the time spent is mainly on the bench. In the District of Columbia, the actual time savings resulting from fewer and shorter arguments is only about two hours a week per judge".

173 Aynes, *supra,* note 161, at 120-23; Marvell, *supra,* note 150, at 77-88; Parness and Reagle, *supra,* note 157, at 16-24, referring to R. Leflar, *Internal Operating Procedures of Appellate Courts* (1976), at 31, where the author concludes that in California "more than one-third of the preheard cases are settled or withdrawn". While noting that the evidence is that pre-hearing settlement conferences may result in some settlements, there is no clear evidence as to how much time saving that amounted to since no records were kept of the time spent on settlement negotiations. Moreover, there is a concern that if mandatory settlement procedures were introduced on appeal, that appeals would increase in the hope that some benefit would be gained on settlement at relatively little cost. Finally, one has to be aware that settlement negotiations involve an expenditure of time on behalf of the mediator and other staff, sometimes on behalf of judges, and on behalf of lawyers, that in many cases that time will cost the client money, and that in all such cases the resolution of the appeal will be delayed. Note also has to be taken of the Civil Appeals Management Plan (CAMP) instituted by the Second Circuit. In this regard reference may be had to I.R. Kaufman "Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan" (1986), 95 Yale L.J. 755. This system, which gives Staff Counsel the authority to conduct pre-hearing conferences, has been reported to reduce the number of cases argued before the Court by one-sixth. It has been estimated that in fulfilling their functions, CAMP "assumes the workload of two circuit judges at approximately one-third the cost": *ibid.*, at 761. No attempt is made under this program to pressure the parties to settle, but the presence of the Staff Counsel the opportunity to comment on and assess legal argument.

174 Marvell, *supra,* note 150, at 67-68. The author lists three different ways by which this can be accomplished. First, a limit can be placed on the amount of pages filed for an appeal, with the result that in some cases only part of the transcript would be filed. Second, a system of summary affirmation or reversal could be instituted, as in New Mexico, with docket statements containing only a brief outline of the facts and issues. Finally, as in Arizona (and in England) a greater reliance can be placed on oral argument. In this case, neither transcripts nor briefs need be filed.

175 Marvell, *supra,* note 150, at 54-57. Various authorities have expressed their opinion that high volume appellate courts should have not less than one and not more than three lawyers *per* judge.

of panels in at least some instances,[176] assigning responsibility to one judge in the panel to read the briefs and record,[177] increasing the use of memorandum and unpublished opinions,[178] and imposing sanctions for frivolous appeals.[179] In addition, similar to the experience of the English Court of Appeal, discussed below, various courts 'borrow' judges to increase the complement of judicial staff.[180]

(b) ENGLAND

Unlike Canada and the United States, England is a unitary state. Thus, its courts are not required by a written constitution to adjudicate on some matters only. Nevertheless, like many other European court systems,[181] the court system in England is characterized by jurisdictions divided by areas of specialization.

The trial courts in England are divided both horizontally and vertically. The main division is between the County Courts and the High Court of Justice, which administer civil justice, and the Crown Court, which administers criminal justice. A horizontal division exists between the County Court and the High Court, the former of which has jurisdiction in less

176 Marvell, *supra,* note 150, at 66-67. While some states, notable New Jersey and Wisconsin, use two or even one judge panels for certain types of appeals, Marvel indicates that the use of smaller panels may increase the danger of inconsistent decisions.

177 Marvell, *supra,* note 150, at 68-70.

178 Aynes, *supra,* note 161, at 132-34; Parness and Reagle, *supra,* note 158, at 29-32; Marvell *supra,* note 150, at 62-65.

179 Aynes, *supra,* note 161, at 140-42.

180 Novak and Somerlot, *supra,* note 144, refers to a number of such instances. These include: Federal courts of appeal using senior, retired, or active judges from district courts or less congested circuits; in Washington, the use of supreme court justices to assist intermediate appellate courts; and, in Arizona, the use of practicing lawyers as judges *pro tempore.*

181 The difference is that in the other court systems, jurisdiction is divided among separate courts rather than within a particular court. Thus, in France there are two separate supreme tribunals, the Counseil d'Etat with authority over the administrative tribunals that resolve disputes between citizens and state agencies, and the Cour de Cassation with authority over civil and criminal matters. In this regard, see G. Kock, "The Machinery of Law Administration in France" (1960), 108 U. Pa. L. Rev. 366. The German system is even more fractured, with five jurisdictions each with its own court heirarchy. Jurisdiction is divided according to the following subject matters: civil and criminal matters, tax matters, social security and related subects, labour disputes, administrative law matters, and constitutional matters. In this regard, see, D.J. Meador, "Appellate Subject Matter Organization: The German Design From An American Perspective" (1981), 5 Hastings Int'l. & Comp. L. Rev. 27. For a general discussion of the experience that certain other countries have had with specialized courts, see R.L. Stern, *Appellate Practice in the United States* (The Bureau of National Affairs, Inc., 1989), at 51-54.

important cases usually defined by the sum of money at issue.[182] The High Court is, moreover, divided into three divisions of expertise: the Queen's Bench Division, Chancery Division and Family Division.[183]

Each of these divisions are further divided into Divisional Courts with appellate jurisdiction. Thus, the Divisional Court of the Queen's Bench Division exercises jurisdiction in respect of judicial review,[184] appeals by way of a stated case,[185] *habeas corpus*, committal for contempt committed in an inferior court, and, as part of its supervisory jurisdiction over inferior tribunals, appeals under various statutory provisions including those on planning matters.[186] The Divisional Court of the Chancery Division hears appeals from the Commissioners of Taxes and appeals in bankruptcy matters from the county courts in proceedings under the *Bankruptcy Act, 1914*. The Divisional Court of the Family Division hears appeals from magistrates' courts in a number of domestic matters.[187]

Consistent with the desire to have judgments made by judges with an expert knowledge of the area of law concerned, the Court of Appeal is also divided into two divisions: the Civil Division and the Criminal Division. Appeals from the High Court and from the County Courts go to the Civil Division of the Court of Appeal, and appeals from the Crown Court go to the Criminal Division of the Court of Appeal.[188] Appeals from both divisions of the Court of Appeal go to the House of Lords, thus making the English Court of Appeal an intermediate court of appeal. Although there have been some suggestions that a single appellate court would be satisfactory,[189] the argument traditionally made in favour of two levels of appeal is that the final appellate court, in this case the House of Lords, is able to "develop and adapt the law in the light of changing conditions" while

182 J.R. Spencer, *Jackson's Machinery of Justice* (Cambridge University Press, 1989), at 30, states that in 1986 there were 267 County Courts in the United Kingdom.

183 *Ibid.*, at 36 *ff.*

184 U.K., Lord Chancellor's Department, *Judicial Statistics[:] England and Wales* (HMSO, 1993) (hereinafter referred to as "Judicial Statistics"), notes that there were 2,439 applications for judicial review in 1992.

185 There were 189 appeals by way of stated case, primarily from the Magistrates' Courts, in 1992.

186 Spencer, *supra*, note 182, at 47-48. Although the Divisional Court used to sit with three judges, it now usually sits with two judges and sometimes only with one.

187 This Court disposed of eight-three appeals in 1992.

188 The High Court, the Crown Court, and the Court of Appeal are together known as the Supreme Court of England and Wales: see the *Supreme Court Act, 1981* (U.K.), c. 45, s. 1(1).

189 G. Gardiner and A. Martin (eds.), *Law reform now* (1963).

the intermediate court of appeal, the Court of Appeal, is able to concentrate on correcting error.[190]

At present, the Court of Appeal is comprised of the Lord High Chancellor of Great Britain, the Lord Chief Justice of England (who is the president of the Criminal Division), the Master of the Rolls (who is President of the Civil Division), the President of the Family Division, the Vice-Chancellor, and twenty-eight Lords Justices of Appeal. About twenty of these judges generally sit in the Civil Division, while the remainder sit in the Criminal Division. Because of the number of judges within the Court of Appeal, even though there were 1,646 civil cases, including interlocutory appeals, and 6,623 criminal cases, including leave for appeal, set down in 1991, the Court was able to dispose of 1,368 civil cases and 6,427 criminal cases during that year.[191]

Because of the number of appeals filed each year, the Court of Appeal nevertheless finds it difficult to ensure that appeals are quickly resolved. There are, however, a number of measures that have been taken to assist in that regard. These can be generally discussed under the headings of increasing the judicial complement and in improving their efficiency.

In order to acquire more Court of Appeal judges when the need arises, without having to maintain a larger complement after that need has been satisfied, a great deal of flexibility has been built into the English judicial system. This is apparent on a number of levels. First, although judges in the Court of Appeal can generally be characterized as sitting within the Civil or Criminal Division, members of either division can be asked to adjudicate on a matter within the other whenever the need arises. Thus, if the civil division is less burdened while the criminal division has too many cases to handle, civil division judges can be assigned to deal with criminal cases. While this process neutralizes the reason for dividing the court, the specialization of judges, it would be very unusual if judges from one division formed a majority of a panel in another division. Moreover, judges from another division would not likely be asked to sit in unusually difficult cases.

A second way that the Court of Appeal can increase the complement of judges on a temporary basis is by "borrowing" judges from other courts. Judges of the High Court, retired judges of the High Court and retired Lords

190 Spencer, *supra*, note 182, at 96.

191 The statistics for the number of appeals disposed of by the Civil and Criminal Divisions for previous years are as follows: 1990-1,600 and 6,589; 1989-1,597 and 7,023; 1988-1,573 and 8,001; 1987-1,648 and 8,218; 1986-1,546 and 7,492; 1985-1,511 and 7,921; 1984-1,520 and 7,987; 1983-1,576 and 6,482 respectively.

Justices of Appeal may be requested by the appropriate authority to sit in the Court of Appeal.[192] Pursuant to these powers, the Lord Chief Justice typically "borrows" lower court judges to assist in the Criminal Division.[193] In fact, we have been advised that there are usually more judges sitting in the Criminal Division, including judges of the High Court, than there are judges in the Civil Division. With the increase in sittings this practice permits, the Criminal Division has been able to decrease the number of outstanding cases by a quarter.[194] On the Civil side, the Lord Chancellor achieves the same effect by requesting the assistance of High Court judges, retired Lords Justices of Appeal and retired High Court judges.[195] In addition, since the Law Lords are *ex officio* members of the Court of Appeal,[196] they may from time to time help out.

Given the size of the Court of Appeal, we thought it would be of interest to conduct informal consultations with some members of the English legal profession to discover their perceptions concerning problems of inconsistency or lack of coherence in the jurisprudence of the Court of Appeal. Our brief consultations suggested that opinion about the level of consistency in the Court of Appeal is divided. Some suggest that there is no problem of this kind. Others suggest that there is. It is possible that such concerns as are present may be explained as a difference between the interpretation of the law and its application. With regard to the former, because it appears that the principle of *stare decisis* can be and is more strictly applied in the United Kingdom that it is in this country, the level of inconsistency may be very low. With regard to the application of the law, however, individual perceptions of different judges may colour their view of how the law is to be applied. The result on a particular set of facts may therefore be thought to rest, to some extent at least, on the composition of the panel. If it is this type of inconsistency that is being experienced, this may be an inescapable feature of an appellate court that sits in panels, no matter what the overall size of the court.

There are a number of methods the Court has devised to more efficiently use its resources. Traditionally, the Court relied very heavily upon the oral hearing. Under that system, the Court of Appeal judges would come to the case unprepared, in part because there was little prior paper work for them

192 *Supreme Court Act, 1981*, *supra*, note 188, s. 9.

193 Spencer, *supra*, note 182, at 199. We have also been advised that plans are underway to permit circuit court judges to sit on the Court of Appeal.

194 W. Merricks, "Briefing" (1985), 135 N.L.J. 244.

195 Spencer, *supra*, note 182, at 91.

196 *Ibid.*

to rely upon. Because people can digest information faster if they read it than if it is read to them, this was perceived as a very uneconomical use of judicial time. In 1978, Lord Scarman authored a report containing a number of recommendations for change,[197] and as a result of his report it is now the practice for each side to give to the Court, and to the other side, a skeleton argument.[198] It has subsequently been reported that the more rapid disposal of appeals has been able to reduce the backlog of appeals by five percent.[199]

Although the appellate jurisdiction of the Court of Appeal is extensive,[200] there have recently been attempts to extend the leave requirement, which is now only necessary in a few particular instances,[201] to make it a general requirement.[202] Moreover, to ensure that judges do not spend an inordinate amount of time considering leaves for appeal, a number of government lawyers are available to screen leaves to appeal in criminal cases before motions for leave are heard.[203] Further, the House of Lords has recently decided that the Court of Appeal should refuse to overturn a decision or ruling of the trial judge on an interlocutory matter, or

197 Sir John Donaldson, M.R., "New Practice and Procedure of the Court of Appeal" (1982), 132 N.L.J. 959. Some of the other recommendations made by Lord Scarman were the creation of the office of Registrar, which enabled the Court to create a flexible and co-ordinated listing system and the amendment of the law to enable a single Court of Appeal judge to deal with procedural matters.

198 Practice Notes, [1982] 1 W.L.R. 1312 and [1983] 1 W.L.R. 1055. This skeleton argument includes an account of the main facts together with the outline of the main argument.

199 Merricks, *supra*, note 194, at 244.

200 Appeals can be made to the Court of Appeal from the High Court, *Supreme Court Act, 1981*, *supra*, note 186, s. 16; the official referee on a point of law, O. 58, r. 4; from the County Courts, *County Courts Act* (U.K.), *1984*, c. 28, s. 77; from the Employment Appeal Tribunal on questions of law, *Employment Protection (Consolidation) Act, 1978* (U.K.), c. 44, s. 136(4); from the Patents Court, *Patents Act, 1977* (U.K.), c. 37, ss. 96 and 97; from Masters and District judges on an assessment of damages and on the trial of any cause or issue tried before or referred to him, O. 58, r. 2; from the Lands Tribunal by way of stated case, *Lands Tribunal Act, 1949* (U.K.), c. 42, s. 3(4); from the Social Security Commissioners on points of law, *Social Security Act, 1980* (U.K.), c. 30, s. 14; from the Restrictive Practices Court, *Restrictive Practices Court Act, 1976* (U.K.), c. 33, s. 10; and from miscellaneous tribunals such as the Transport Tribunal under the *Transport Act, 1985* (U.K.), c. 67, s. 117 and the Foreign Compensation Commission under the *Foreign Compensation Act, 1969* (U.K.), c. 20, s. 3(2)(8).

201 For example, leave is required from Official Referees on a question of fact: O. 58, r. 4.

202 Spencer, *supra*, note 182, at 93.

203 The Honourable Chief Justice N.T. Nemetz, "An Address to be Delivered...to the Canadian Institute for the Administration of Justice" (Montreal: Canadian Institute for the Administration of Justice, 1988), at 7.

any other decision made by him in the course of the trial, unless the trial decision was plainly wrong.[204]

(c) QUEBEC

As in Ontario, committees have been established in the province of Quebec to determine what can be done to ease the burdens on the Quebec Court of Appeal. As with their Ontario counterparts, these committees invariably commence their studies with the proposition that the Quebec Court of Appeal needs to fulfill two roles: to correct error and to settle and explain the law of the province.[205]

Although the Quebec Court of Appeal is in the same relationship to the Supreme Court of Canada as is the Court of Appeal for Ontario, this emphasis on the law development function of the court is perhaps more warranted in Quebec than it is in Ontario. Unless directly concerned with the interpretation of a Quebec law or statute law of other provinces that has a direct equivalent in Quebec, private law decisions of the Supreme Court of Canada do little to settle the law of Quebec. The Quebec legal system, based on codes rather than on the common law, is unique within Canada.[206] It is no doubt for this reason, rather than a comparatively worse problem with appellate court delay, that led to Quebec jurists first grappling with the issue as to whether provincial courts of appeal, in fact *de jure* intermediate courts, should be characterized according to their *de facto* status.[207]

When this issue was first dealt with, by a committee established by the Barreau de Montreal and presided over by the bâtonnier Jacques Viau, it was recommended that a new appellate level, styled the Supreme Court of

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204 *Ashmore v. Corporation of Lloyd's*, [1992] 2 All E.R. 486, at 491.

205 Barreau de Montreal, *Rapport du comité ad hoc sur la cour d'appel* (Montreal: 1982) (hereinafter referred to as the "Viau Report"), at 3, and Barreau du Quebec, *Rapport sur le fonctionnement des tribunaux judiciaires* (1990) (hereinafter the "Gilbert Report"), at 85-87.

206 Authority for the proposition that courts of appeal have two functions is taken, in both the Viau Report, *supra*, note 205, at 4, and in the Gilbert Report, *supra*, note 205, at 85-87, initially from U.S. authorities. In addition, the Gilbert Report refers to a number of Quebec judicial decisions where this same proposition was set forth. In particular see *Surprenant v. Air Canada*, [1973] C.A. 107, at 125 *per* Deschênes J.

207 The Gilbert Report, *supra*, note 205, in describing the historical context of the problem in Quebec, referred to a number of articles, beginning in 1941, that laid the foundation for this issue. Of particular note, however, is the article by P.A. Crépeau, "Les lendemains de la reforme du code civil" (1981), 59 Can. Bar Rev. 625, at 634, where the author noted that the only with the creation of a Supreme Court of Quebec could the province be sure that the interpretation of the civil law would receive its due regard.

Quebec, should be created. This court would be modelled on the Supreme Court of Canada, with a small complement of judges, with jurisdiction to hear appeals in civil law matters, as opposed to criminal law matters, only.[208] Decisions of the Supreme Court of Quebec would be in writing, with reasons, and they would clearly articulate principles of law.[209]

Within this system, it was suggested, the Quebec Court of Appeal would concentrate on correcting errors although, if the Court of Appeal erred in a judgment, an appeal would still lie to the Supreme Court of Quebec.[210] In most cases, this appeal would require leave. While appeals would generally come to the Supreme Court of Quebec from the Quebec Court of Appeal, the possibility of *per saltum* appeals, presumably when an issue required the settling of law in a particular area, was left open.[211]

In addition, the Viau Report recommended that certain other reforms be made to the Quebec Court of Appeal. In one sense, these reforms would be necessary if the report's recommendation, that there be a Quebec Supreme Court, were implemented, although the report also noted that such reforms would be useful on their own to alleviate appellate backlog.[212] Under the heading of administrative reforms, the Viau Report recommended: that the administration of the Court of Appeal be taken away from the Ministry of Justice, where those in charge of administration allegedly merely respond to problems, and give the task of administering the Court to a full time administrator;[213] that the administrator be given the power to prepare and control the Court's budget;[214] that a good registrar be appointed to ensure that appeals proceed expeditiously;[215] that the authority of the Chief Justice of the Court, in relation to the puisne judges and to the Court personnel, be specified in law;[216] and that although there should not be a specialized bench, it would be advantageous to have panels of judges with experience in the issues adjudicated.[217] In addition, the Viau Report recommended certain procedural reforms to reduce the amount of paper filed on appeal

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208 Viau Report, *supra*, note 205, at 21-22.

209 *Ibid.*, at 23-24.

210 *Ibid.*, at 27.

211 *Ibid.*, at 21.

212 *Ibid.*, at 25.

213 *Ibid.*, at 29.

214 *Ibid.*, at 30.

215 *Ibid.*

216 *Ibid.*, at 31.

217 *Ibid.*, at 31.

and to force to parties to place greater emphasize on their oral argument. The perceived advantage of such a system was that judges do not need to spend so long digesting information filed on appeal, but can rely to a larger extent on information provided to them in argument.

To date, it appears that no changes were made as a result of the Viau Report.[218] Moreover, the number and complexity of appeals filed each year continued to cause the appellate backlog to grow. In 1988, at a conference initiated by the Canadian Institute for the Administration of Justice called the "National Seminar on the Future Role of the Court of Appeal", a number of Quebec authors discussed the role of the Quebec Court of Appeal in the context of an increasing appellate backlog.[219] At least one commentator suggested that a Supreme Court of Quebec should be created to deal with that backlog.[220] The response, as in Ontario, was to have the matter considered again by another committee.

This committee, presided over by the bâtonnier Guy Gilbert, began by listing some of the causes for the increase in appellate workload. These were: the increase in the number and complexity of appeals;[221] the extensive jurisdiction of the Court of Appeal, including some instances where the Court acts as a second level of appeal court;[222] and, insufficient resources.[223]

Although, as the Gilbert Report noted, the Court of Appeal is required to correct errors,[224] it is the *de facto* final court of appeal in the province.[225] Unfortunately, because of the number of appeals filed, it is unable to adequately fulfill both tasks. The result is that a great deal of time

218 Honourable C. Vallerand, "Séminaire national sur l'avenir des cours d'appel intermédiaires" (Montreal: Canadian Institute for the Administration of Justice, 1988), at 3.

219 Vallerand, *ibid.*, and H. Reid, "Les cours d'appel intermédiaires face a l'orientation nouvelle de la Cour suprême du Canada et a l'évolution de la procédure de contrôle judiciaire" (Montreal: Canadian Institute for the Administration of Justice, 1988). The former paper noted that since the cases accepted by the Supreme Court of Canada are usually those that are of national importance, which excludes by definition most private law cases from Quebec, and since judges of the Quebec Court of Appeal do not have the time to settle the law, there is no court that is presently settling the law of Quebec. The latter article discussed certain aspects of procedure.

220 G. Gilbert, Q.C., "Le role des cours d'appel intermediaires" (Montreal: 1988).

221 Gilbert Report, *supra*, note 205, at 24.

222 *Ibid.*, at 25-42.

223 *Ibid.*, at 42-46.

224 *Ibid.*, at 85-87.

225 *Ibid.*, at 47-52.

elapses before the Court can deal with appeals[226] and this, it was said, has a resultant negative impact on the judicial process.[227]

In an attempt to provide a solution to this problem, the committee examined, and rejected, a number of alternatives. These were: a simple increase in the number of judges;[228] the creation of specialized divisions of the Court;[229] the establishment of a court of appeal or revision as part of the Superior Court;[230] and, a restriction of rights of appeal.[231] However, the Gilbert Report recommended that certain structural and non-structural improvements could improve the situation.

With regard to the suggestions for non-structural reform, the Gilbert Report recommended that the Quebec Court of Appeal initiate a scheme for "preparatory conferences", presumably equivalent to pre-hearing conferences, and mediation.[232] In addition, the report recommends that where possible, cases should be categorized and given to judges with some expertise in the area.[233]

There was only one recommendation for structural reform, and that was the creation of a second layer of appeal. Structured so as not to limit the jurisdiction of the Supreme Court of Canada, the new Court of Appeal would have the same jurisdiction as the present Quebec Court of Appeal except that all references[234] would go to the new court.[235] For other appeals, only one appeal would be allowed.[236] The consequence would be that a decision could not be appealed from the Quebec Court of Appeal to

226 *Ibid.*, at 53-57.

227 *Ibid.*, at 57-68.

228 *Ibid.*, at 105-06.

229 *Ibid.*, 107-09. This was rejected because the Committee was of the opinion that a specialized court doesn't have the collegiality and breadth of view that the present court has. Moreover, the Committee was of the view that a specialized bench would tend to maintain the *status quo* more than a non-specialized bench.

230 *Ibid.*, at 109-11.

231 *Ibid.*, at 111-13.

232 *Ibid.*, at 117-18. The Report indicates that such a programme had been used in selected cases in Quebec, with a success rate of ten percent.

233 *Ibid.*, at 119-21. The advantage of such a system over the creation of specialized divisions of the court is that it would: facilitate the integration of new judges; permit the sensible enlargement of the potential creativity of judges; and, offer the best chance for judges to produce a coherent, well document and dynamic jurisprudence.

234 *Court of Appeal Reference Act*, R.S.Q. 1977, c. R-23.

235 Gilbert Report, *supra*, note 205, at 137.

236 *Ibid.*, at 138.

the new court of appeal. Instead, the Gilbert Report recommended that all appeals be filed by the same procedure and that they be distributed between the two courts by a method of distribution. All cases that merely require an error to be corrected would be assigned to the Quebec Court of Appeal. All other cases, that is cases that required the law to be settled, would be sent to the new court.

There was one dissent from the structural recommendations made by the Gilbert Report. This dissent was based on the suggestion that an expansion of appellate capacity merely results in an expansion of appeals,[237] and on the opinion of the dissenter, Professor Glenn, that the system in the United States cannot be transplanted to the Canadian constitutional structure.[238]

Although the Gilbert Report was completed in 1990, its recommendation for structural reform has not yet been implemented. At present, however, members of the Quebec Court of Appeal are studying the issue to see whether they agree, or disagree, with this recommendation.

Notwithstanding the lack of reform of a structural nature, there have been some recent innovations that may assist in reducing appellate court backlog and delay. For example, although the time for filing a factum has been extended,[239] the rules for failing to file within the time allowed have been made more strict. In addition, instead of putting the onus on the respondent to show why an appeal should not be allowed to proceed, the onus is placed on the appellant to show the court why an appeal that has not complied with the time requirements of the rules should be allowed to proceed.[240]

(d) ALBERTA

Although it has been sometimes proposed, albeit only on an informal basis,[241] that Alberta adopt an additional level of appeal, at present there

237 *Ibid.*, at 158.

238 *Ibid.* In this regard, Professor Glenn noted that appeals in the United States from state courts cannot be appealed to the United States Supreme Court, whereas in Canada appeals from provincial courts of appeal can be appealed to the Supreme Court of Canada.

239 *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 503.

240 *Ibid.*, arts. 503.1, 503.2, and 505(2).

241 We have been advised that at least one member of the Alberta Court of Appeal has, in the past, advocated the creation of a second provincial layer of appeal. However, in a recently published paper entitled "The Creation of Provincial Supreme Courts[:] A View from Alberta," delivered to the Canadian Institute for the Administration of Justice (August 19, 1988), at 17-18, Mr. Justice W.R. Sinclair rejected this method of dealing with an increasing number of appeals in favour of the "English concept of an appeal court". We are not aware of any current proposals for reform of this kind.

does not appear to be any movement in the province in that direction. Instead, Alberta, like a number of other provinces[242] and the federal Parliament,[243] has developed a different method of dealing with the increasing number of appeals filed. This is the device of assigning trial judges to the appellate bench on an *ad hoc* and temporary basis. In Alberta, however, this method seems to be employed on a more extensive basis than in the other jurisdictions.

By law, each judge of the Court of Queen's Bench is "by virtue of his office" a judge of the Court of Appeal.[244] Similarly, each judge of the Court of Appeal is "by virtue of his office a judge of the Court of Queen's Bench".[245] While the Court of Appeal sits, typically, in panels of three, in sentence appeals two of these judges will often be Queen's Bench judges. That figure is reduced, for other appeals, to one Queen's Bench judge.

As in their intermediate counterparts in certain states of the United States, (Missouri or Washington, for example) or in England, this system of using judges from lower courts permits the complement of the Court of Appeal to be increased in order to deal with an increased flow of appeals, with, it would appear, minimal increase in expenditure. Other benefits that may flow from this approach are that appellate court judges are able to maintain access to the knowledge, experience and perspective of trial court

242 *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, s. 7(1) and (2), allowing judges of the Appeal Division to perform the work of judges of the Trial Division, and judges of the Trial Division to perform the work of judges of the Appeal Division; *Judicature Act*, R.S.N.S. 1989, c. 240, s. 23(2), permitting judges of the Trial Division of the Court to act as judge of the Appeal Division; *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 8(8), giving judges of the Queen's Bench Division jurisdiction to sit as judges of the Court of Appeal; *The Judicature Act, 1986*, S.N. 1986, c. 42, s. 9, allowing Trial Division judges to sit on the Court of Appeal, and s. 30(1), allowing judges of the Court of Appeal to sit in the Trial Division; *Courts of Justice Act*, R.S.Q. 1977, c. T-16, s. 12, giving Superior Court judges are given, under limited circumstances, the power to sit as ordinary judges of the Court of Appeal; the power of Superior Court judges to sit on the Court of Appeal appears to be enlarged by art. 514 of the *Code of Civil Procedure*, *supra*, note 237, where Superior Court judges can be asked to sit to "ensure the proper dispatch of business of the Court of Appeal"; *Courts of Justice Act*, *supra*, note 10, s. 4(2), declaring that judges of the General Division are, by their office, judges of the Court of Appeal and that, by s. 4(1) they can be assigned to perform the work of a judge of the Court of Appeal. Note that in certain of these provisions, the jurisdiction of the superior court judge is limited in that they can only sit in circumstances where a judge of the Court of Appeal is unable to sit. While these provisions do not increase the complement of the Court of Appeal, they at least allow it to be maintained at its highest complement.

243 *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 30.

244 *Court of Appeal*, R.S.A. 1980, c. C-28, s. 3(3).

245 *Court of Queen's Bench*, R.S.A. 1980, c. C-29, s. 3(3).

judges and that trial court judges are able to take back to the trial courts an appellate perspective. It may be the case that the perspective trial court judges gain from their participation in the appellate process reduces the amount of appeals going to the Court of Appeal.

As will be noted below, however, the states in the United States that use this system to increase the complement of their intermediate and final appellate courts have not always found it to be a great success. In addition, the potential for problems has been noted by the Supreme Court of Canada. In *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education*,[246] Madame Justice Wilson made the following comment:

> While there was little discussion in this case of the acceptability of either simultaneous translation or the practice mentioned in Towards Equality of the Official Languages in New Brunswick, at p. 320 of taking a bilingual judge from the trial division to sit *ad hoc* on the appellate bench, it would seem to me that such mechanisms might, from the purely language point of view, provide a more satisfactory interim measure than reliance on a judge who cannot fully participate in the proceedings. However, there may be other disadvantages to the use of trial judges sitting *ad hoc* on appeal. Counsel and the public may be concerned over the fact that appellate adjudication is significantly different from trial adjudication. They may also be under the misguided impression that trial judges will inevitably be disposed to favour the views of their colleagues in the courts below.[247]

We are not aware, however, that widespread concerns of this type exist in Alberta. Mr. Justice Sinclair, in a paper presented to the Canadian Institute for the Administration of Justice, made the following comments:[248]

> No institutional bias has in fact been observed. An analysis was done to compare the work of the "new" sentencing panel during its first six months of operation with that of the "old" sentencing panels. The number of sentence appeals allowed was to all intents and purposes the same. A study was also made of the disposition of appeals from Queen's Bench as compared with those from Provincial Court. The "new" court allowed 3% more appeals from Queen's Bench and 2% fewer appeals from Provincial Court. So much for institutional bias.
>
> As to "appellate perspective", another criticism often advanced concerning the use of trial judges to hear appeals, I have already mentioned that, in fact, only a very few Queen's Bench judges are assigned to this task. Although the work only

[246] *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549.

[247] *Ibid.*, at 644.

[248] Sinclair, *supra*, note 241, at 16-17.

> takes a quarter of their sitting time, the Queen's Bench judges are not casual or occasional participants. They bring to this important assignment a wealth of sentencing experience which is especially helpful when one remembers that sentencing guidelines are, for the most part, still to be found in the traditions of the court.

6. OPTIONS FOR REFORM

In the third section of this paper, we offered the conclusion that the current and projected future backlog of appeals filed with the Court of Appeal for Ontario creates a need, indeed a pressing need, for reform measures designed to meet the challenges posed by this increasingly heavy case load. In this section, we consider a number of possible reform measures. They are divided into two categories, non-structural reforms, or those that would not involve the creation of a new layer of appeal within the present appellate court structure and structural reforms which would involve such a change.[249]

(a) Non-Structural Reforms

(i) Restricted Rights of Appeal

While there are a number of situations where leave is necessary before an appeal can be brought to the Court of Appeal, there are many situations where an appeal can be brought as of right. The result of the latter arrangement is that the Court has no effective control over the growth of the appellate caseload. Obviously, one way to provide that control would be to restrict the rights of appeal to the Court of Appeal for Ontario. This could be accomplished, for example, by expanding the requirement of leave. One additional advantage to introducing a more comprehensive leave requirement would be that the Court could have control over the types of issues brought before it.

An alternative method of restricting rights of appeal is to re-characterize offences. This is the tack the federal Parliament is presently taking with regard to those matters that make up the bulk of appeals to the Court of Appeal—criminal appeals.[250] This re-characterization is taking two forms. First, Parliament proposes to re-characterize many offences that used to be pure indictable offences as hybrid offences.[251] Second, for hybrid offences, where the difference between an indictable offence and an offence punishable on summary conviction was the value of the property involved,

[249] For a more detailed discussion on some of these options, see Novak and Somerlot, *supra*, note 144.

[250] Bill C-42, *An Act to amend the Criminal Code and other Acts (miscellaneous matters)*, 1st Sess., Thirty-fifth Parliament, 1994.

[251] These amendments will affect the following sections of the *Criminal Code*, *supra*, note 23: s. 264.1 (causing death threats); s. 267 (assault with weapon); s. 269 (causing bodily harm); s. 403 (personation with intent).

Parliament has raised the monetary value of the property.[252] The effect of these re-characterizations will be to direct more appeals to the General Division with the result that there will be fewer appeals to the Court of Appeal and the grounds for the appeal to the Court of Appeal will be restricted to questions of law.

Although it is theoretically possible to restrict rights of appeal further by a leave component, we do not think that this suggestion is a practical one. The notion that the proper administration of justice requires access to at least one level of appeal appears to be deeply ingrained both in the public and in the professional consciousness. The 1989 report of the Sub-Committee on Appeal Court Reform observed that the right of appeal "is perceived by the Bar to have a salutary effect upon the conduct of the trial; it is viewed as necessary to assure the citizenry that justice is being done. Appellate decisions play an indispensable role in elucidating the law and giving guidance to judges at the trial level".[253] We suspect that such views are widely held and that the strength of that opinion, and the reasons underlying it, present an insurmountable obstacle to reform measures of this kind.

On the other hand, however, we are of the view that a re-characterization of criminal offences maintains this right of appeal, although not directly to the Court of Appeal where the Crown elects to proceed by summary conviction. In such cases, the General Division is able to provide much of the same role *vis à vis* the Ontario Court (Provincial Division). Further, it appears that the proposed re-characterizations will usefully reduce the caseload of the Court of Appeal.

(ii) Administrative Reforms

In our discussion of American developments, we have listed a number of measures adopted by American courts which, broadly speaking, have been designed to increase the expedition and efficiency with which appellate courts can address their case loads. In the following discussion, we will briefly discuss each of these measures with particular, reference to the recent experience of Court of Appeal for Ontario. In particular, it may reasonably be asked whether some combination of measures such as these has been or could be introduced into the operations of the Court of Appeal for Ontario

[252] These amendments will affect the following sections of the *Criminal Code*, *supra*, note 23: s. 334 (theft); s. 355 (possession of stolen property); s. 362 (false pretences); s. 380 (fraud); s. 430 (mischief).

[253] Joint Committee on Court Reform, *supra*, note 8, at 4-5.

with a reasonable prospect of reducing to an acceptable level the current backlog of pending appeals.

a. Reducing Inventory

In addition to restricting rights of appeal, there may be other ways of reducing the volume of appellate work. It would obviously be of assistance if the number of issues in individual cases could be reduced or if appeals could be settled before they need be heard by the Court of Appeal. At the trial level, the device of pre-hearing conferences has proven to be particularly useful in this regard.[254]

While there are certain differences between trial and appeals—the fact that the pre-trial conference judge or the trial judge may already have reduced the issues in dispute and the fact that by the time the parties have reached the appeal stage their positions may have become further entrenched due to the greater financial commitment—there is some evidence[255] in the United States that suggests that some reduction in the appeal list may be achieved by pre-hearing conferences.[256] Although such conferences do add an additional stage to the appeal process (and presumably additional cost and time delays), it is our view that further investigation of this possibility, perhaps by a trial project, should be undertaken.

b. Appeal Co-ordination

Not all issues before the Court of Appeal are novel ones. In many instances, previous decisions of the Court can be of assistance in determining

[254] Certain state courts in the United States make use of a case management system. However, these systems seem to be primarily useful in setting out time controls and in ensuring that counsel restrict themselves to briefing restraints. See National Center for State Courts, *Intermediate Appellate Courts: Improving Case Processing* (Williamsburg, Virginia: 1990), at 55-57.

[255] Note the discussion of pre-hearing conferences in the United States, *supra*, note 173.

[256] Unfortunately, this evidence is by no means clear. In this regard see T. Church, Jr., A. Carlson, J.L. Lee and T. Tan, *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (National Center for State Courts, 1978) and Novak and Somerlot, *supra*, note 144, at 86-88. In the latter book, while admitting that the usefulness of pre-hearing conferences has still not been settled, the authors list certain features that improve the likelihood of success of such programmes. These include: mandatory programmes; early scheduling; requiring clients to attend the conference, or to be accessible by telephone; and, orderly procedures and oversight by the chief judge to enhance lawyers's acceptance of the programme.

the law. In some instances, the Court has already made a pronouncement as to the law. It also happens, particularly with the amount of appeals that a Court has to deal with each year, that the same issue is before different panels. To reduce writing and research time, and in order to ensure as much as possible that judgments rendered by the Court are internally consistent, some procedures have to be implemented to ensure that judges will be aware of all judgments previously decided and all cases before the court that will have a bearing on an issue before them.

In this regard we have been advised that the Court has developed a computerized issue tracking program which signals when two or more appeals dealing with similar issues are before the Court and when the Court has already provided its decision on a point of law that has been raised again on appeal. The added bonus of such a system is that the Court can set down cases raising the same issues to be heard at the same time, should that be appropriate.

c. Increasing Sitting Time

If it is not advisable to reduce the number of appeals, it may be thought that another option for increasing the productivity of the Court would be to increase the time that individual judges sit. Although each member of the Court is presently required, in theory at least, to sit for two weeks and then to have two weeks during which time will be devoted to preparation of reasons for judgment and preparation for the hearing of forthcoming appeals, we have been advised that the practice is different. It is apparently a common experience that during the two non-sitting weeks, one week is likely to be taken up with further sittings as "designated judge" filling in for others on an *ad hoc* basis. This, together with the fact that sittings continue through the summer months, and that a proposal has been adopted to add an additional week of sitting for each member of the Court during the summer period, means that members of the Court serving on a full time basis commonly sit for as many as thirty or so weeks per year.

The consequence of increasing sitting time would be that judges have less time to prepare for cases and to write reasons for judgment. Inadequate preparation may lead to longer oral hearings or more reserved judgments. It is the view of members of the Court with whom we have discussed this matter that the current sitting schedule of the Court does not allow more than enough time to deal with the other responsibilities assumed by members of the Court. It appears unlikely, in our view, that further efficiencies in the organization of the Court's workload will be achieved by attempting to schedule more extended sittings of individual members of the Court.

d. Limits on Oral Argument

If increased efficiency cannot be gleaned from more extended sittings of the Court, it may that limiting the time that judges have to spend in Court on a particular case would enable each judge to hear more cases. This result could be achieved by limiting the time that counsel spends on his or her argument.

The Court does, with the aid of estimates from counsel, estimate time limits for the hearing of appeals and may, of course, exercise a jurisdiction to restrict counsel to such estimates.[257] Whether rigid time limits ought to be adopted, of course, is a more difficult question. Although some courts have apparently found this device helpful, there is a risk that abbreviated oral argument will have the effect of requiring a greater expenditure of non-sitting time to prepare written reasons.[258] It is for this reason, we understand, that the Court is currently disinclined to adopt the device of placing fixed time limits on oral arguments. We are not in a position to offer a confident opinion as to whether further efficiencies could be achieved by the adoption of this device.

e. Reducing Paper Work Requirements

An alternative way of reducing the time that a judge is required to spend to understand the case is to reduce the amount of material filed with each appeal. At present, a motion for leave to appeal must be accompanied by a motion record, a factum and the relevant portions of the transcript of the trial. Before hearing the argument on the appeal, the panel must review these materials. It is readily apparent that reviewing these materials absorbs a great deal of judicial time.

The obvious way to reduce the amount of judicial time spent in this fashion is to reduce the amount of paper produced on appeal. In Ontario, various measures have been adopted in an attempt to achieve this objective.

[257] Chief Justice Howland once reported that a lawyer requested thirty days to argue an appeal. He subsequently admonished lawyers to "be succinct and only to take such time as is absolutely necessary to present their clients' position": see W.G.C. Howland, W.D. Parker, A.F. Rodger, W.D. Lyon, F.C. Hayes, H.T.G. Andrews and S.D. Turner "Administration of Justice in Ontario on the Opening of the Courts for 198" (1986), 20 Gazette 6, at 11.

[258] D. Karlen, *Appellate Courts in the United States and England* (New York: University Press: 1963), at 150-54, and The Honourable T.J. Moyer, "Oral Argument—Let it Be" (1982), 16 Akron L. Rev. 103.

Practice directions have been issued imposing limits on the length of *facta*.[259] The rules of practice include provisions designed to ensure that only those exhibits and portions of trial transcripts that are relevant to the appeal are filed with the Court. Costs sanctions can be imposed where the evidence reproduced is unnecessary.[260] An attempt to monitor the effectiveness of these devices or to determine whether more effective means for reducing paper work could be devised is beyond the scope of the present study.

f. Reduced Panel Sizes - Using Judges from Other Courts on *Ad Hoc* Basis

Another possible strategy for increasing the productivity of the Court would be to find ways of making decisions that do not require a full panel of the court. In fact, the Court has developed proposals to increase the role of the Registrar in dealing with procedural motions of various kinds, and to confer a power on single judges to dismiss appeals on consent without the attendance of counsel.

An alternative to reducing the size of Court of Appeal panels is the adoption of a system similar to that in Alberta, England and in some American states of using judges from other courts on an *ad hoc* basis. For example, judges from the Ontario Court (General Division) could sit, with one or two judges of the Court of Appeal for Ontario, on various matters thus freeing up other Court of Appeal judges for other matters.[261] We consider this option further below in our discussion of the possibility of an "Expanded Court of Appeal for Ontario".

Some of these measures would require a statutory amendment before they could be implemented.

[259] W.G.C. Howland, Chief Justice of Ontario, "Factums in Civil Appeals in the Court of Appeal" (December 21, 1984), and "Respecting Unnecessary Evidence in Civil Appeals in the Court of Appea" (December 21, 1984).

[260] *Rules of Civil Procedure*, *supra*, note 34, r. 61.05(8).

[261] *Attorney General for Ontario v. Attorney General for Canada (Re Judicature Act)*, [1925] A.C. 750 does not provide a constitutional impediment to this option because when judges are appointed by the Governor General-in-Council to the Ontario Court (General Division), they are also given an *ad hoc* appointment to the Court of Appeal for Ontario.

g. Specialist Panels

Suggestions are made, from time to time in Ontario and elsewhere, that the division of an appellate court into specialist panels might assist in dealing with its case load more expeditiously. Such suggestions are typically resisted on the basis that the absence of specialist panels produces a useful cross-fertilization of expertise and the development of a cadre of generalist appellate judges with resulting improvement in the work product of the court. It may also be that narrow specialization would make the job of appellate judging a less attractive assignment for many potential candidates of high calibre. More to the point, for present purposes however, is the fact that we are not aware of the existence of studies which demonstrate that the creation of specialist panels does in fact have a substantial impact on the efficiency of the court. It is very likely, in any event, that some degree of specialization occurs on an informal level. It may well be, therefore, that the adoption of more formalized specialization offers little, if any, gain in efficiency.

The only apparent advantage that specialization does have, if the English experience teaches us anything, is that it conduces to increased consistency in the Court's judgments. Accordingly, it should be possible, with specialized panels, to increase the size of the Court and yet attain the same level of consistency as presently exists. Accordingly, this option would need to be considered if any substantial increase is to be made to the size of the Court.

h. Use of Brief Memorandum Judgments or Endorsements

The activity that takes up most of a judge's time, apart from preparing cases and sitting in Court hearing argument, is the preparation of written judgments. If this time could be reduced, members of the Court could spend more time sitting to reduce the appellate backlog.

We have been advised, although we have not attempted to document the frequency of this phenomenon, that in recent years the Court has utilized more frequently the technique of rendering decisions through written endorsements of varying length rather than providing fuller reasons for disposing of a particular appeal. However, not every case lends itself to this sort of treatment. Indeed, in our experience, many observers have commented on the increasing complexity of many of the matters coming before the Court. If the Court were to expand the use of this technique in order to dispose of more cases, there may well be concern that the Court is doing so at the expense of giving the requisite consideration to difficult cases, and at the expense of exploiting appropriately the precedential value of the case.

i. Use of Staff Lawyers and Law Clerks

Staff lawyers and law clerks can perform a number of tasks that judges would otherwise have to do, thus allowing judges to use their time more efficiently. The types of tasks normally assigned to staff lawyers and law clerks include summarizing appeals, engaging in research, writing memoranda and drafting opinions.

At present there are ten law clerks working for the Court of Appeal for Ontario. This number is low, compared with U.S. state appellate courts[262] and with the Supreme Court of Canada.[263] It therefore appears that increased reliance could be placed on staff lawyers and law clerks by the Court of Appeal. Nevertheless, it should be noted that there are limits to which appellate judges can rely on legal assistants to do their work.[264]

> Even a conscientious, hard-working judge who receives a staff memorandum which seems reasonable on its face may not take the time to become personally familiar with the record, the briefs, or the authorities. 'A judge with a large staff is less a professional craftsman, and more an administrator'. Though the decision will still be the judge's it may not embody the judge's personal reaction to the relevant legal and factual material presented by the parties. The judge will become more or an editor or supervisor. (Footnote references omitted)

j. Conclusion

We have come tentatively to the conclusion that while further administrative reforms may be of some assistance in dealing with the Court's caseload, it is rather unlikely, however well designed such reforms may be, that they will be able to fully address the problems created by the current backlog of pending appeals. Estimates prepared by the Registrar have attempted to project the effect on the backlog that would be achieved by increasing the number of judgments rendered by the Court annually by twenty-five percent or by fifty-percent. These projections indicate that, in the case of a twenty-five per cent increase, the number of appeals pending in 1999 would almost double that pending at the end of 1992 (4,695; 9,000), whereas a fifty per cent increase in judgments would produce merely a fifty per cent increase in the backlog by that time (6,912). These projections

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[262] Stern, *supra*, note 181, at 22, states that "every appellate court now provides each judge with from one to three law clerks...with four in the United States Supreme Court and even more in the Supreme Court of Pennsylvania".

[263] Each judge of the Supreme Court now has three clerks.

[264] Stern, *supra*, note 181, at 25-26.

strongly suggest, if they do not precisely prove, that further administrative reforms, however appropriate may they be, do not represent a long term solution to the problems posed by the increasing workload of the Court.

(iii) Expanded Court of Appeal for Ontario

A further possible non-structural solution to the backlog problem, of course, would be to simply expand the size of the Court of Appeal[265] by appointing additional full-time members or by assigning members of the General Division to sit on panels of the Court of Appeal on an *ad hoc* basis, or by some combination of these two approaches. Expansion of the court to meet an increasing case load is the solution which has been adopted in England, in some U.S. states, and elsewhere in Canada, to date. The principal advantage of this approach, of course, is to avoid the necessity of creating an additional appellate court. An additional level in the appellate hierarchy creates the prospect of a case being the subject of three appeals rather than two, although this would only be applicable to a tiny fraction of the cases litigated within the province. Expansion of the existing court would also avoid the need to establish a new administrative structure to support an additional appellate court.

The principal disadvantage of expansion as a solution to the current problem relates to the Court's ability to discharge its jurisprudential function. Arguably, the ability of an appellate court to discharge this function is directly related to its capacity to function as a collegium and to its ability to devote the time and energies necessary to the individual appeals that provide opportunities for the discharge of this responsibility. Members of the Court of Appeal whom we have interviewed are of the view that the Court's capacity to discharge this function properly is already undermined, to some extent, by the current size of the Court.[266] This view is also expressed by the members of the profession who prepared the 1989 Report of the Sub-Committee on Appeal Court Reform. The opinion was there offered that "if the court were substantially enlarged by a sufficient number of judges to

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265 In making this decision one has to be aware that there are a number of studies in the United States to attempt to determine how many judges are required in a court. In this regard, see V.E. Flango, B.J. Ostrom and C.R. Flango, "How Do States Determine the Need for Judges?" (1993), 17 State Ct. J. 3; H.E. Green, "Alternative and Innovative Resource Determination Models" (1993), 17 State Ct. J. 12; and United States General Accounting Office, *Federal Judiciary[:] How the Judicial Conference Assesses the Need for More Judges* (1993).

266 Justice John W. Morden of the Court of Appeal for Ontario has been referred to as having caclulated that with sixteen judges on the Court it is possible "to have 560 different three-judge panels and 4368 different five-judge panels". See Russell, *supra*, note 55, at 295.

overcome its current problems (perhaps 8 or 10) it would be unrealistic to expect a coherent consistent philosophical approach to the development of the law".[267]

It is difficult, of course, to provide a firm basis for predicting the extent of the diminution in the Court's law development capacity that would result from expansion. As we have indicated, opinions vary as to the extent to which the much greater size of the English Court of Appeal has generated problems of inconsistency and lack of coherence in English appellate jurisprudence. As best we can determine, however, there does not appear to be a widely held view that this is indeed a serious problem with appellate jurisprudence in England. On the other hand, to the extent that the Court of Appeal is expected to function, in effect, as a *de facto* final Court of Appeal for the province, with the jurisprudential role that expectation entails, expansion of the Court will obviously reduce the Court's ability to discharge this function in an optimal fashion. In the American context, in which the final courts of appeal for the states are, *de jure* and *de facto* final courts of appeal, it is normally expected that the final court of appeal will be, like the Supreme Court of Canada, composed of a small number of judges (nine or less) who will be able to control their case load and function in a collegial fashion.[268]

If an expansion of the size of the Court is contemplated, the choice must be made between new full time members of the court and the use of General Division judges on *ad hoc*, rotational basis. If, as appears to be the case, the annual growth in the Court's work load is a continuing trend, there are some considerations that weigh in favour of full-time rather than *ad hoc* appointments. The use of *ad hoc* appointments could further diminish the Court's capacity to discharge its responsibilities in an ongoing collaborative fashion. Further, it is unlikely, for quite understandable reasons, that judges sitting on panels of the Court of Appeal on an *ad hoc* basis will be as active as regular members of the court in writing judgments and discharging the various other responsibilities of full-time members of the court.[269] On the

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267 Joint Committee on Court Reform, *supra*, note 8, at 8.

268 See Carrington *et al.*, *supra*, note 53, at 9, where the author states that "... the functions of the appeal are adequately served only if the decision is a joint decision based on shared thinking. It is both a source of institutional coherence and an assurance of correctness that the appellate decision be the result of a collaborate effort".

269 Our review of fifty-four reported decisions from 1965 to 1992 in which members of the High Court sat, on a *ad hoc* basis, as members of a Court of Appeal panel appears to confirm this. In forty-five of the fifty-four cases, the *ad hoc* member of the panel simply concurred in an unanimous or majority opinion of the Court (in four of these cases, however, the opinion was "By the Court" and it is possible, therefore, that the *ad hoc* member of the panel participated in the writing of the opinion). Majority opinions were

other hand, there could be little objection, and we do not understand there to be any, to the use of trial judges on an *ad hoc* basis to meet short term needs. Moreover, the deployment of trial judges on panels chaired by a full-time member of the Court of Appeal in sentencing matters is a device which appears to have been used successfully in Alberta. We have outlined the alleged benefits of this device in a discussion of the Alberta experience. The use of this device in Ontario could relieve some of the current pressure on the work load of the Court of Appeal.

(b) Structural Reforms

(i) Introduction

As we have indicated, a number of previous studies conducted in Ontario have recommended the establishment of an intermediate court of appeal. Given sufficient flexibility in its design, so that its size could fluctuate as necessary to address the case load of the court from time to time, the Court could focus on correcting errors. The final court of appeal for the province would then be able to devote a greater proportion of its energies to the law development function. It would be composed of a small group of judges who would be granted some control over their case load and who would, therefore, be able to function in the collegial fashion necessary to the working of a final appellate court.

There are, of course, some disadvantages to this approach. The creation of a new layer of appellate jurisdiction, reached by leave only in all or most cases, creates the prospect a more prolix process for those cases that make their way through the entire appellate system. Of course, the final court of appeal for the province would not be the final court of appeal given that a small proportion of cases could still be the subject of a further appeal to the Supreme Court of Canada.

Further, there are a number of difficult design problems to be addressed if the intermediate court of appeal solution is to be adopted. Unless the final court of appeal for the province can control its work load, through a leave mechanism, American experience suggests that relief of the final court of appeal's workload will be short term only. As we have indicated, that experience suggest that the availability of additional appellate mechanisms is likely to produce more appeals with, eventually, similar pressures being brought to bear on the work load of the final court of appeal as exist under

written by *ad hoc* members of the panel on two occasions. There were six opinions offered in dissent, and one opinion which concurred with a majority opinion.

current circumstances. If, on the other, the final court of appeal is to be able to control its workload through a leave mechanism, substantial reform of the federal law relating to appeals in criminal matters would be necessary. If, in order to avoid this difficulty, the leave jurisdiction of the final Court of Appeal for the province was restricted to civil matters, there would be a significant risk of the final court's docket becoming preoccupied with criminal appeals, thus defeating the objective of providing an institutional means for the development of provincial law.

If an intermediate court of appeal model is to be adopted, there appear to be essentially three different models that might be employed—the establishment of a new final court of appeal for the province at the top of the provincial appellate hierarchy, the insertion of a new intermediate court of appeal in the appellate hierarchy between the existing Court of Appeal and the General Division, and the expansion of the role of the existing Divisional Court so as to enable it to function as an intermediate Court of Appeal. We briefly discuss each of these options in turn.

(ii) Model 1 - A New Superior Court of Appeal for Ontario

One possible model would be the creation of a new appellate court, perhaps to be called the Supreme Court of Ontario, which would entertain appeals from the existing Court of Appeal.[270] The court would be established, presumably, with a small number of judges who would have the capacity to control the work load of the court. The court would be able to devote its energies to identifying those cases which require the court's attention and dealing with them in an expeditious yet considered manner. The appointments to the new court could be staggered over a short period as the new members of the court, presumably smaller in number, could begin to hear motions for leave to appeal.

If this model were adopted, consideration would have to be given to the means whereby the new court controlled its caseload. Presumably, matters would typically reach the Court only with leave. The criteria for granting leave could be similar to those now in place concerning the granting of leave to appeal to the Supreme Court of Canada from decisions of the provincial

[270] While this and the subsequent option would likely mean, as a matter of practice, that even fewer appeals will proceed from Ontario courts to the Supreme Court of Canada, the *de jure* final court of appeal for the province, there is some authority that legislation effecting this result will be within the province's constitutional authority. In this regard, see *Re McNutt* (1912), 47 S.C.R. 259, at 269-70.

courts of appeal.[271] American experience suggests that it would be attractive to allow the new court also to reach down and assume jurisdiction in cases of importance in order to ensure disposition of such appeals by the higher court and expedite their handling. Consideration should also be given to permitting applications for leave directly to the new court from trial decisions in certain types of cases. By such means, the likelihood of cases being handled by both the existing Court of Appeal and the new court might be reduced though not, of course, eliminated. Presumably, references by government could be made directly to the new court.

The creation of a new superior court of appeal for the province would avoid the transitional problems which would be inherent in any model which would require the existing Court of Appeal to reduce its complement, presumably over a period of years, to a smaller number such as seven or nine. The disadvantages of this model, of course, include all of those that attach to any model involving the creation of a new level of appeal. Additionally, the creation of a new superior court of appeal may be thought to diminish the role of the current Court of Appeal and the General Division and it might logically be thought to lead a dismantling of the existing

271 Under s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-19, leave to appeal will be granted by the Court from a decision of the highest court of final resort in a province if the Supreme Court "is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it...."

arrangements concerning the Divisional Court[272] and a fusion of the existing jurisdictions of the Court of Appeal and the Divisional Court.

Fusion of the existing Court of Appeal and the Divisional Court is an exercise that would entail some difficulty. The size of the new court would be substantial. It has been estimated that it would require ten to twelve new judges to handle the current workload of the Divisional Court on a permanent assignment basis.[273] The Divisional Court sits on a regionalized basis, the Court of Appeal does not. A decision to expand or contract the regionalization of appellate work within the province would therefore be necessary. The existing caseload of the Divisional Court—currently being heard by the Court within three to four months of perfection[274]—would be submerged in the current backlog of the court of Appeal with resulting and presumably unwelcome delay in the handling of what were formerly Divisional Court cases.

272 If necessary, it appears that this dismantling could be effected by the provinces alone under the authority of s. 92(14) of the *Constitution Act, 1867, supra*, note 9. There is, however, at least one argument to the contrary, and that superior courts are defined in part by their supervisory capacity and that that capacity, presupposed by s. 96 of the *Constitution Act, 1867*, cannot be taken away. To some extent, authority for this proposition can be found in *R. v. Y.D.* (1985), 22 C.C.C. (3d) 464 (N.B.Q.B.). There are, however, a number of difficulties with this argument. First, s. 96 was designed to protect Superior, District, and County Courts from inferior courts, not to ensure that historical powers of the courts could not be interfered with. Second, the decision in *R. v. Y.D.* seems to be cast into doubt by the decision of the Supreme Court of Canada in *Re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 253, where Lamer C.J., writing for the majority, commented that section 96 'does not preclude any level of government from giving superior court judges jurisdiction which did not exist in 1867'. In this case, the jurisdiction that was being discussed was in relation to the *Young Offenders Act*, S.C. 1980-81-82-83, c. 110, and the implication that arises from this comment is that if s. 96 courts can be made to look like inferior courts through the jurisdiction they exercise, the provinces should theoretically be as able to take away power from the Superior Courts as to give them extra power. Third, it has to be realized that what is not being suggested in this report is that the supervisory capacity of the General Division, the Divisional Court, would be transferred to a non-s. 96 court, since this would be contrary to s. 96 as decided in *Attorney General of Quebec v. Farrah*, [1978] 2 S.C.R. 638. Further, the supervisory capacity of the Court would not be done away with completely. Instead, it is suggested that certain reforms might result in this jurisdiction being transferred to the current Court of Appeal. Since the Court of Appeal is a s. 96 Court, even if the General Division had no supervisory capacity there would still be a superior court with such capacity. In this regard see *Attorney General of Quebec v. Farrah, ibid.*, at 656. Finally, it would be very surprising if s. 96 were interpreted by the courts as requiring all of the courts mentioned in that section—Superior, District, and County Courts—to be in existence in each province. This is particularly so since the term District Court was probably intended to be the Quebec, or Lower Canadian, equivalent to the Ontario, or Upper Canadian, County Courts. If the section does not require all such courts to be in existence in each province, then the argument that s. 96 requires the existence of a Superior Court must fail.

273 Correspondence with the Honourable Archie Campbell, Regional Senior Justice, Ontario Court of Justice (July 14, 1994).

274 *Ibid.*

If, on the other hand, the existing arrangements concerning the Divisional Court were to remain in place in order to avoid these difficulties, consideration would have to be given to the possibility of allowing appeals directly from the Divisional Court to the new superior court of appeal in order to avoid the creation of a three-tier appellate structure. Such a move would, of course, eliminate the current level of supervision of the Divisional Court through appellate review by the Court of Appeal and replace it with the presumably more sporadic supervision of the new superior court of appeal.

(iii) Model 2 - A New Intermediate Court of Appeal

The creation of a new intermediate court of appeal, positioned between the existing Court of Appeal and the General Division, would avoid some of the difficulties inherent in creating a new superior court of appeal. This approach would, however, bring other problems in its wake.

A threshold question that would have to be addressed is whether the ultimate objective would be to shrink the existing Court of Appeal to a much smaller body of judges such as seven or nine. If this is not the ultimate objective, but rather it is envisaged that a large final court of appeal would be retained at the top of the hierarchy of provincial courts, the objective of a small *de facto* final court of appeal that could, in collegial fashion, develop the law of the province, would be defeated.

On the other hand, if the existing Court of Appeal is to be reduced in size to a much smaller court, the transitional problems would not be trivial. If the transition was to be achieved by attrition, it is likely that there would be no new appointments to the Court of Appeal for a considerable period of time—indeed, if the ultimate size of the court was to be nine and if one assumes that all current members of the court will serve until their retirement age, no new appointments would be made until the year 2008—with resulting loss of whatever advantages flow from the addition of new members to the Court from time to time. As well, the problem of devising a means to modulate the case load of the current Court of Appeal to its then current size would create some difficulty.

Further, it is possible that, once new arrangements were put in place, there would be a perceived difference in treatment between appeals currently pending under the old regime and those now pending under the new regime. Such problems would be intensified if, as would apparently need to be the case, rights of appeal to the existing Court of Appeal in criminal matters were to be restricted in some way.

Finally, with this model, as is the case with the superior court of appeal model, it is likely that the existing arrangements concerning the Divisional Court would be brought to an end with the resulting difficulties outlined in the discussion of Model 1 above.

(iv) Model 3 - An Expanded Appellate Role for the Divisional Court

The creation of an expanded appellate role for the Divisional Court would have the advantage of the being the model which is least disruptive of existing arrangements. It would appear to have the advantage, as well, that the Court's appellate role could be expanded gradually over time, until the point is reached at which a desirable equilibrium has been reached between the case load of the Divisional Court and the Court of Appeal. Thus, the monetary jurisdiction of the Divisional Court on the civil side could be increased in stages. Gradual increase of the scope of the Divisional Court's role on the criminal side may be more difficult, though, perhaps, not unachievable.

A concern that has often been expressed with respect to the Divisional Court model, however, relates to the rotational nature of the appointments to the Court. Thus, it is suggested that litigants and their counsel may not feel that the need for appellate review is fully met by a court consisting of colleagues of the trial judge. Some argue that it is inappropriate, on essentially democratic grounds, that the membership of what would be the final Court of Appeal for the vast majority of litigation within the province should, in effect, be selected by the Chief Justice of the Court that includes the trial division. Others would argue that judicial independence is compromised when an appointment to an appellate court is temporary in nature. These concerns could be met, of course, by appointing at least a core of General Division judges permanently to the Divisional Court. Notwithstanding the administrative convenience and other advantages that flow from a completely *ad hoc* panel, there appears to be considerable merit in the suggestion that the establishment of a permanent core be a feature of a plan to confer a considerably expanded appellate role on the Divisional Court.

Utilization of a Divisional Court model could bring with it the advantages (and disadvantages) that derive from regionalization of the appellate structure. Regionalization could be seen to increase the accessibility of the appellate structure. On the other hand, it is not obvious that accessibility in regional terms is a critical advantage for the appellate structure. It may be that whatever advantages may flow from regionalization may be more than

offset by increased cost and the prospect that inconsistent outcomes might be increased. Regionalization would also impose substantial costs and management problems on "repeat players" in the appellate system who would be required to diversify their efforts across the province.

A number of potential disadvantages of the Divisional Court model should be mentioned. First, as indicated in the discussion of Model 2, above, if the proposed reform envisages a large Court of Appeal on top of an expanded Divisional Court, the objective of a *de facto* final and small court of appeal that could function collegially in developing the law of the province would be defeated. Second, it has been suggested that a substantial increase in the civil jurisdiction of the Divisional Court would be necessary to achieve a significant impact on the Court of Appeal's backlog with the attendant risk that the docket of the Court of Appeal would become ever more dominated by appeals in criminal cases. Third, retention of a split between trial decisions in civil cases of a certain size which may be appealed to the Divisional Court and larger cases that may be appealed to the Court of Appeal requires the retention of a criterion for identifying such cases that is likely to lead to anomalous distinctions in the treatment cases of similar importance.[275]

[275] Thus, at the present time, appeals now lie to the Divisional Court from orders (i) for a single payment of not more than $25,000, or (ii) for periodic payments totalling not more than $25,000 in the first twelve months, or (iii), dismissing claims for not more than these amounts, or (iv), dismissing claims for larger amounts where the judge indicates that if the claim had been successful the award would not have exceeded these amounts: *Courts of Justice Act*, *supra*, note 10, s. 18(1)(a). Consider these examples. Plaintiff claims $100,000; trial judge awards $20,000. Plaintiff's appeal for the full $100,000 appears to lie to the Divisional Court. Plaintiff is awarded $26,000 at trial. Defendant's appeal to reduce the award to $20,000 lies to the Court of Appeal. Such examples, which can of course be multiplied, appear to be inherent in a line-drawing exercise of this kind.

7. ISSUES FOR CONSULTATION

The Ministry would be grateful for advice from readers of this consultation paper with respect to the general question of the need for and optimal nature of any reform that should be made to the appellate court structure in Ontario. More particularly, it would be useful to receive advice on such questions as the following:

- Is there a need for reform of the appeal process in Ontario?
- If so, should that need be met by non-structural or structural reform of the process?
- If structural reform is contemplated, which of the three models set out in this discussion paper—a new superior court of appeal, a new intermediate court of appeal or an expanded role for the Divisional Court—is the preferable model?
- Is regionalization a desirable feature of a reformed appellate process?

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