Speedy Justice for the Litigant: Sound Jurisprudence for the Province?

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SPEEDY JUSTICE FOR THE LITIGANT:  
SOUND JURISPRUDENCE FOR THE  
PROVINCE?  
By R. A. Macdonald*

The postwar years have produced an explosion of litigation in Ontario.¹ To cope with this growing reliance upon judicial settlement of disputes, the total number of High Court and County Court judges was increased from 90 in 1961 to 154 in 1976. Yet greater resort to the courts is not uniquely a trial court phenomenon; from 1967 through 1976 the number of cases heard annually by the Court of Appeal grew from about 750 to approximately 1200.² It is in the latter Court that the problem of overcrowding has become most acute.

During the course of this expansion in appellate litigation, two remedial measures were undertaken to relieve the pressure on each justice of appeal: in 1972 the Divisional Court of the High Court of Justice was created,³ and during 1973 and 1974 four additional judges were named to the Court of Appeal, bringing its total membership to fourteen. However, neither the deflection of most statutory appeals⁴ and many interlocutory appeals to the Divisional Court, nor the expansion of the Court of Appeal has succeeded in reducing the workload of each member of the latter tribunal.

The alternative to an ever increasing workload for each justice could be a greatly expanded appellate bench, but projections of future resort to the Court of Appeal indicate that by the year 2001, from twenty-five to thirty-two justices will be needed to staff the Court.⁵ Seeing a threat to the efficient functioning of the appellate process in both of these alternatives, i.e., an

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¹ This phenomenon has been well documented. It is not, however, a problem unique to Ontario. See generally the symposium of judicial opinion on appellate reform in (1976), 23 U.C.L.A. L. Rev. 419; and Symposium on Judicial Administration (1975), 3 Hofstra L. Rev. 647. For comments on the situation in Ontario, see A. Linden, The Law's Delay (1971), 5 Law Society of Upper Canada Gazette 96; J. Sopinka, The Proposed Merger of Courts (1974), 8 Law Society of Upper Canada Gazette 160; and C. Barr, Patterns and strategies of court administration in Canada and the United States (1977), 11(2) Law Society of Upper Canada Gazette 79.

² These figures are derived from a graph presented in the Report on the Attorney General's Committee on the Appellate Jurisdiction of the Supreme Court of Ontario (Toronto: Ministry of the Attorney General, 1977) at 8-9.

³ S.O. 1970, c. 97, s. 2, proclaimed in force April 17, 1972.

⁴ The Judicature Act, R.S.O. 1970, c. 228, s. 17(1)(a) provides that only those statutory appeals previously directed to the Supreme Court are to be brought before the Divisional Court. Those directed to the County Court continue before that court.

⁵ Report, supra note 2, at 10-11.
excessive workload for each member of the Court or a greatly expanded appellate bench, the Attorney General appointed a special Committee on the Appellate Jurisdiction of the Supreme Court of Ontario. On March 10, 1977 this Committee submitted its report. Several modifications to the organization and structure of Ontario courts and to the appellate process were recommended. Although many of these deserve comment (especially from those learned in Civil Procedure), this review will focus only on those fundamental proposals relating to a bifurcation of the Ontario Court of Appeal and the ancillary adjustments that such a restructuring would necessitate.

I. PRINCIPAL DELIBERATIONS AND RECOMMENDATIONS OF THE COMMITTEE

Because the Hobson's choice of intolerable workload for individual justices or a large, amorphous, disparate appellate bench does not uniquely face Ontario, the Committee undertook an extensive review of solutions considered in other common law jurisdictions and examined several palliatives that have been implemented or proposed elsewhere.

First, the Committee considered whether withdrawing the right to appeal from certain classes of cases would lead to a reduction in the number of appeals; for example, by using a monetary criterion (where the amount in dispute is less than a given amount) or a standard related to subject matter (where the litigation bears on an automobile accident) or territory (where the case originates from a judicial district or from a county of less than a

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6 The title of this comment, "SPEEDY JUSTICE for the litigant; SOUND JURIS-PRUDENCE for the province" is the subtitle to the Report, supra note 2.

The Committee was appointed in the fall of 1975 in response to a memorandum sent to the Attorney General by the Court of Appeal. The terms of reference for the Committee were "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: and without limiting the generality of the foregoing, (a) to expound acceptable principles with respect to the right to appeal from judicial decisions in litigious matters, (b) to propose lines of demarcation between the objectives and functions of such appellate courts as are recommended to be continued or established, (c) to recommend processes for maintaining the adjustment of the capacity of the appellate courts to the needs of the people of Ontario." (at v.)

Membership was composed of Robert Carter, Q.C., Brendan O'Brien, Q.C., Clay M. Powell, Q.C., James M. Tory, Q.C., and the chairman, the Hon. Arthur Kelly. In the course of its deliberations, the Committee consulted all members of the Law Society of Upper Canada as well as each of the Ontario law faculties.

7 Other recommendations include suggestions respecting the conservation of judicial time, the procedure to be followed on appeals, the Court of Appeal office, in-court operation, law clerks, oral or written argument, the provision for direct access to the Court of Appeal and the preparation and transmission of transcripts. They are summarized at pp. 73-77 of the Report, supra note 2, and represent many good ideas for improving the appellate process.

8 Members of the Committee travelled to the United Kingdom, Australia and New Zealand, and received information from most U.S. jurisdictions. See Report, supra note 2, at 3.
certain population). The opportunity to appeal, however, if not an inherent right, is certainly well entrenched in our legal values and, from a psychological standpoint, probably could not easily be removed. Moreover, such a change would serve neither of the two objectives which the Committee viewed as part of its mandate: the provision of speedy justice to the litigant and the development of sound jurisprudence for the province. Errors at first instance may be committed by all courts, at any level, and important juristic principles may flow from all types of decisions. An appellate court, therefore, ought not to be precluded, at the outset, from reviewing any particular class of disputes.

A second proposal examined and rejected by the Committee was a reduction of the time expended in the hearing of each appeal through imposition of time limits on oral argument. During the years 1973-75, however, the average time taken by each cause before the Court of Appeal has been 1 3/4 hours. This is only slightly more than the maximum time allotted by the Supreme Court of the United States (which at this time has the most restrictive limit on oral argument). Consequently, excessively long oral argument cannot be viewed as a major cause of appellate overcrowding in Ontario. Further, it is a truism that work expands to fill allotted time, so that under a regime of mandatory time limits it is possible that many appeals now terminated very briefly will drag on until the maximum allotted time has expired. Finally, some cases require more time for thorough argument; where that is the case, the court ought to be able to continue a hearing as long as necessary.

Closely allied with the idea of placing time restrictions on oral argument is the proposal to increase judicial efficiency by permitting the submission of lengthy written briefs. Yet, as has been demonstrated in the United States, any time saved by reducing oral presentation would be consumed in the digestion of written material.

A fourth proposal reviewed by the Committee involved increasing the number and/or duties of judicial clerks. Although clerks perform valuable

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10 This solution has found favour among some U.S. commentators. See J. Hopkins, Small Sparks From a Low Fire: Some Reflections on the Appellate Process (1972), 38 Brooklyn L. Rev. 551; and S. Hufstedler, New Blocks for Old Pyramids: Reshaping the Judicial System (1971), 44 S. Cal. L. Rev. 901.

11 Report, supra note 2, at 15.

12 U.S. Sup. Ct. Rule 44(3), 28 U.S.C.A. provides that unless the court orders otherwise, the maximum time permitted each side for the presentation of oral argument is thirty minutes. Even in an extremely significant case such as United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, argued July 8, 1974, the Court granted only an additional thirty minutes to each side, the proceedings lasting from 10:02 a.m. until 1:04 p.m. See L. Friedman, ed., United States v. Nixon: the President before the Supreme Court (New York: Chelsea House Pub., 1974) at 523-96.


14 Cf. A. Tate, Relieving the Appellate Court Crisis (1973), 56 Judicature 228.
bibliographical, consultative and organizational services, increasing their number of duties is not likely to significantly reduce the time expended by each judge on a case. The hearing of argument, the formation of a decision, the justification of an opinion and the drafting of a judgment are the major time consumers and the most non-delegable of judicial functions. The very use of the term “judgment” highlights the intuitu personae nature of these tasks. Better, more thoroughly researched and carefully justified opinions may result from increased use of clerks, but little time saving is likely to be achieved.

Similarly, certain procedural changes may speed-up the appellate process, may reduce backlogs, and may lead to an earlier crystallization of issues, but the primary benefit here would be to the litigant and not to the Court. In no substantial way would these modifications reduce the time required for the hearing, or the reasoning and drafting of opinions. The Committee recommends streamlining the appellate process, as it also suggests increasing the number of clerks, yet it recognizes the minimal impact that these changes will have on the workload of the Court.

A final solution considered by the Committee was to increase the jurisdiction of the Divisional Court, thereby transforming it into an intermediate quasi-appellate body. For several reasons which will be discussed in Part IV of this comment, this proposal was also rejected.

The unsuitability or ineffectiveness of the above measures, either individually or in combination, led the Committee to conclude that only by an immediate increase in the number of appellate justices and by a continued enlargement of their number could the problem of overcrowding of the Court be eliminated.

However, the most obvious mechanism for effecting this expansion (the simple continued addition of members to the Court) would create equally serious problems. First, collegiality, consistency, and disciplined creativity would be impossible in a court of twenty-five to thirty-two justices sitting concurrently in eight or ten different three-man panels. Furthermore, the decision of the Supreme Court of Canada to reduce the number of appeals it hears annually thrusts upon the highest courts of each province a greater share of the task of developing the law of that jurisdiction. A small, unified Court is a prerequisite to effective law development. Finally, the exhaustive consideration of difficult issues ought to demand the participation of more than three justices. If panels of five or seven were to become the norm for these cases, almost fifty justices would be required. In view of these drawbacks, the Committee also rejected the simple expedient of enlarging the size of the Court of Appeal. As an alternative designed specifically to reduce court overcrowding and avoid creating an amorphous appellate court, a bifurcation of the Court of Appeal is proposed.

The suggested reorganization draws principally on facets of two other models for restructuring the Court: (1) the creation of a two-tiered Court of

16 Several proposals are outlined in G. Bell, Towards a More Efficient Federal Appeals System (1971), 54 Judicature 237.
Appeal, with all causes going first to the lower level; and (2) the establishment of two or more sections of a single court, with an allocation of function between them based on a subject matter criterion. However, the simple adoption of either one of these models is rejected, the latter for reasons discussed below, and the former “because the introduction of another level of appeal universally available involves added delay and expense.”¹⁶ In their stead, the Committee suggests creating a single Court of Appeal comprised of two distinct sections having concurrent jurisdiction. One section, a General Section, would sit in panels of three or five (on special occasions) and would be increased in size as the need for more justices arose. Its membership would be permanent, in that justices from this Court would neither sit on any trial court nor be members of the other section on a rotating basis. By the year 2001, approximately twenty to twenty-five justices would be assigned to this Court. The second section, a Jurist Section, would be comprised of eight members, including the Chief Justice of Ontario, and would never be expanded in size. All appeals to this section would be by leave. The principal role of the General Section would be to speedily dispose of “ordinary” appeals, while the Jurist Section would devote its time to the resolution of causes implying some “law-developing” element. Because the sections would have concurrent jurisdiction, a litigant could either proceed directly to the Jurist Section from trial (upon obtaining leave) or present his case to this section after the General Section had already decided the matter (again after obtaining leave). At first glance, this unique proposal has much to recommend itself; in the final analysis, however, it is doubtful whether the Committee’s Report presents either a viable appellate structure for Ontario or effectively solves the problem of court overcrowding.

II. THE UNDERLYING PREMISES OF THE REPORT

Upon reading the Report, one is struck principally by the very “lawyer-like” (in the traditional sense of the term) perceptions that seem to sustain its main recommendations. Three are obvious. The reason for the Committee’s creation did not have so much to do with a re-examination of the function of appellate review of the litigation process in Ontario, as with the rather technical concern that the courts are overloaded. As a result, the Report really does not explore the former area nor investigate the causes of a greater recourse to the courts but concentrates on proposing measures designed only to alleviate this bottleneck. Secondly, in suggesting the division of the Court of Appeal, rather than the creation of a two-tiered appellate system, the Report’s prime focus seems to be merely upon keeping the delay and costs of appellate review to a minimum. Finally, the Committee seems to believe that formal, structural changes alone will accomplish its perceived objective. Consequently, it declines to examine the role of judges and lawyers in creating the problem. Very little consideration seems to have been given to how the Bench and Bar use or abuse the judicial system. More importantly, the Committee fails to review the social changes in Ontario that may have produced this increased litigation.

¹⁶ Report, supra note 2, at 18. The validity of this opinion is discussed infra, at 12-14.
Each of these perceptions can be linked to a different aspect of the Report's final recommendations, each of which is seriously open to question. A failure to consider the appellate process from the perspective of the non-lawyer may have induced the Committee to propound a distinction, which it elevates to one of crucial importance, between “ordinary” and “law-developing” cases. A failure to consider the technicalities of their new proposal seems to have misled the Committee into believing that a bifurcation of the Court of Appeal will reduce the time and expense of appellate review. A failure to investigate closely the role of judges and lawyers in this process and to root out some of the underlying reasons for increased litigiousness appears to permit the Committee to conclude that continued growth in the use of courts is irrepressible. Each of these conclusions merits a detailed examination.

The Committee articulates only two functions of appellate review: (1) the expeditious resolution of the actual dispute before the court; and (2) the development of a sound jurisprudence for the province. Even though this is a rather limited inventory of the role of appellate courts,17 it highlights the diversity of functions performed by appellate tribunals. Nevertheless, the Report evidences a fundamental misunderstanding of even these two purposes. By recommending a bifurcation of the Court of Appeal into General and Juristic Sections, the Committee seems to forget that these two functions cannot be separated.18

Speedy justice for the litigant implies a proper resolution of his case. Rarely will this occur in an unjustified or poorly justified judicial opinion. What we mean by justice is intimately connected with notions of appropriate justification.19 It follows that this justification must occur in all decisions of all courts, and that speedy justice implies the continuous, collaborative development and articulation of meaningful standards to guide conduct.20


20 See L. Fuller, Human Purpose and Natural Law (1958), 3 Natural Law Forum 68; L. Fuller, A Rejoinder to Professor Nagel (1958), 3 Natural Law Forum 83; L. Fuller, Reason and Fiat in Case Law (1946), 57 Harv. L. Rev. 376; Llewellyn, supra note 18; and Hart and Sacks, supra note 17.
Concomitant to this, of course, is that sound jurisprudence must be grounded in the optimum resolution of concrete disputes. The practice of submitting hypothetical problems to the Jurisconsults may have served the Romans well, but the common law demands that each judge focus his attention on the concrete dispute before him. The reports are replete with bad judgments resulting from overly theoretical judicial speculation. Similarly, unthinking analysis and exegesis from abstract principles without a healthy dose of the practical, or absent common sense, has resulted in legal anomalies. Contrary to popular opinion, hard cases (when properly argued, properly reasoned, and properly justified) make good, not bad law. Thus, sound jurisprudence involves the tying up of loose ends in several previous decisions, the development of new exceptions that alter previous rules, the setting of signposts for future judgments and the adjudication of conflicting precedents—all of which require a concrete instance to bring competing interests into clear perspective.

Underlying the Committee’s view that these two functions of appellate decision making are separable is an even more basic belief that a meaningful distinction can be drawn between a “policy”, “law-developing” or “juristic” case and decision on the one hand, and an “ordinary, precedent-bound” or “general” case on the other. Under this view, the task of providing speedy justice assigned to the General Section ought to be performed only in respect of “ordinary” cases, while the task of developing a sound jurisprudence assigned to the Juristic Section ought to be performed only when a “law-developing” case arises. This dichotomy simply does not exist.

Although not all lawyers would subscribe to the view that “every application of general rules to specific cases requires the making of policy choices,”


22 Cf. Hart and Sacks, supra note 17; and L. Fuller, The forms and limits of adjudication (unpub., 1959).

23 I am assuming, of course, that the dispute is one in which an appeal ought legitimately to be brought, i.e., that there is some legal issue that is genuinely in dispute. If the Committee is suggesting that the General Section should deal with these other “non-appeals,” perhaps the distinction is valid. But if that is the case (which I doubt), they are consciously making a mockery of appellate review.

24 This theme is developed in M. McDougal, Law as a Process of Decision: A Policy-Oriented Approach to Legal Study (1956), 1 Natural Law Forum 53. One of the most abused words in the legal vocabulary is “policy.” Often the word is bandied about in such a way as to suggest that “policy decisions” are capricious or arbitrary. In this context, “policy” is used simply to reflect the fact that any legal decision is a product of “non-legal” (in the purely positivistic sense) factors. In The Common Law Tradition: Deciding Appeals, supra note 18, Llewellyn uses the terms “Grand Style” and “Formal Style” to distinguish modes of decision-making, the former now usually labelled as policy decision-making. My point here is that the decision to adopt the Formal Style or the Grand Style is itself a “policy” decision.
judicial decision-making is currently viewed not as a mechanical exercise but as a creative endeavour which compels judges to consider both the internal logic as well as the external purpose of legal rules. Some cases will always appear simple; yet the process of judicial reasoning and the factors that produce good appellate judgments remain constant, regardless of whether a case, at first glance, seems simple or complex. For example, if a court chooses to dispense with an appeal summarily, i.e., without undertaking an investigation of the merits of a given legal rule to determine if the case at hand ought to be distinguished, this does not occur because such a case is inherently uncomplicated. Rather, it is because the court chooses, i.e., makes a "policy" decision, not to attach weight to inputs such as social context, history, equity, custom, morality, expediency, etc. On the other hand, if judges do consider these other criteria in deciding whether to extend a given rule or to distinguish the present case from such a rule, the relative importance they accord to each factor involves additional considerations of legal "policy." It is often impossible to know in advance which collection of factors a court will select in reaching a decision, to know whether its style will be one of legalism, or whether its style will be one of judicial creativity, to know whether it will "develop" the law by extending a rule, or "develop" the law by restricting the scope of that rule. In the best of circumstances, the analysis of whether or not a decision is one of "policy" or "law-development" is an exercise in postdiction which depends on one's political prejudices and the side of the case one argued. It is therefore meaningless to attempt to predict which cases involve enough "policy" so as to generate "law-developing" decisions in order to establish separate jurisdictions for two appellate courts.

Even if the definition of "policy" were narrowed to mean simply "a justification which overtly involves elements constituting a departure from strict legalism," any attempt to enjoin the General Section from engaging in such activity would be doomed; the nature of the appellate function and the institutional pressures weighing on all appellate justices would soon subvert this injunction.

In the first place, very few cases in relation to the total number of disputes in our society are ever taken to court, let alone appealed.25 Therefore, as a general practice, counsel must be convinced that strong legal arguments support their position before the decision to litigate is made.26 Such a situation should occur only when the facts or the applicable law are unclear. Since, in theory, appellate argument is generally restricted to questions of law, even a pro forma appellate judgment will almost never be a strictly logical piece of deductive reasoning from precise black-letter rules.27 An appellate

26 See Llewellyn, supra note 18, at 3-19.
justice who insists (in the majority of cases he hears) that the law is clear
takes the counsel who appear before him, or at least one of them, for a fool.  

Further, by refusing to justices in the General Section a power to render
"law-developing" decisions, one does not thereby change the nature of appel-
late work. Rather, one simply drives the true bases for decision underground.
Cardozo's great skill lay not so much in reworking the law as in adjusting
and reconceptualizing facts.  

By fostering excessive "fact-development" at
the appellate level, however, both speedy justice and sound jurisprudence are
compromised.

Thirdly, on a more pragmatic level, what remedies would be available
to a party in a proceeding before the General Section in the event this court
rendered a "law-developing" judgment? A simple right of appeal would ren-
der the proposed division meaningless. Moreover, there is a strong possibil-
ity that conflicting lines of jurisprudence will develop: one which purports to
be legalistic and one which purports to be idealistic. Although some minor
difficulties might arise if functionally the results of the conflicting approaches
are coincident; if they should diverge, chaos would result.

A final problem with the proposed division of jurisdiction relates more
to the use to which the practicing lawyer puts appellate decisions. When a
client walks into an office seeking legal advice, an advocate will attempt to
extract and arrange the facts related to him into a form with which he is
familiar. An automobile accident is soon reconceptualized as "negligence,
causation, damage"; a revocation of a liquor licence becomes "affects rights,
super-added duty to act judicially." In general, a lawyer will draw on three
principal sources during this process of reconceptualization: his legal educa-
tion, his digests, citators and textbooks, and his case reports. For the experi-
enced appellate practitioner, the most effective of these guides are, of course,
judicial decisions. Consequently, the form and content of every appellate
opinion is of great significance, and he carefully reads all judgments, not just
those in his particular field or relating to his present

Moreover, not only is it important to read all appellate opinions in order
to appreciate the flavour of a given court's reasoning, but also because great
policy often derives from little increments. Little increments often flow from
hints dropped in the resolution of a constant barrage of similar minor in-
equities. Appellate law-making is not always grandiose, but most frequently
occurs in the interstices of legal rules.  

28 Cf. B. Cardozo, The Paradoxes of Legal Science (New York: Columbia Univer-
sity Press, 1928).
29 See J. Frank, What the Courts do in Fact (1932), 26 Ill. L. Rev. 645; J. Frank,
Courts on Trial: Myth and Reality in American Justice (Princeton: Princeton University
Press, 1949); and C. Clark and D. Trubek, The Creative Role of the Judge: Restraint
30 The Committee, nevertheless, does recommend a procedure whereby such deci-
dions may, with leave, be appealed. Report, supra note 2, at 21.
31 This point has been most forcefully made by Llewellyn, supra note 18, at 236-55.
32 The most thorough exposition of this process can be found in Geny, supra note
236-366.
the results of ground-breaking decisions, but the rhetoric of even the most mundane cases. Almost every appeal, therefore, is important for the manner in which its outcome is justified. To restrict elaborate judicial reasoning and justification to a small number of "policy" cases would make the conscientious lawyer's now difficult task almost impossible.

Thus, because the universe of appeals cannot be divided, either in theory or practice, into "law-developing" and "ordinary" compartments, any restructuring of the appellate process predicated on such a distinction would be unfortunate. The basic recommendation of the Report as to the jurisdiction of the two Sections, consequently, ought not to be adopted.

A second concern which seems to pervade the Committee's thinking is tied to the delay and cost of litigation to the parties. In fact, the rejection of a two-tiered appellate hierarchy is premised principally on the basis that it will increase the cost of dispute resolution and will unnecessarily delay the final determination of legal issues. However, such a structure does not seem to have unduly dissuaded our litigious neighbours to the south, where the cost choice has become not "can I afford one appeal or two" but rather "do I take any appeals at all."

Moreover, the Report surprisingly considers neither other measures that might serve to reduce appellate costs nor whether their proposed structure will in fact lead to cheaper and more expeditious judicial review. For example, one of the most effective means of controlling the expense of litigation is through awards of costs. Recently, the Supreme Court of Canada has imposed upon the appellant in selected cases the burden of paying costs as a condition of leave being granted. Again, where only the amount of a judgment is in dispute, the Court could be given the power to award, on an interim basis, a portion of the judgment at trial. Such a power could also be granted in cases where the appeal is only for contribution. "Tactical appeals" by economically stronger parties can thus be discouraged.

Further, little thought seems to have been devoted to reducing appellate costs through technological innovation in the area of transcripts, appeal books, etc. In addition, no suggestion as to limiting counsel fees (or even compelling lawyers to assume their own costs if the court adjudges the appeal frivolous) was offered. Nor did the Committee consider attempting to structure a second level of the Court of Appeal as an alternative court of final resort, to be appealed to only in the event that leave from the Supreme Court of Canada was refused. Each of these mechanisms could serve to reduce the cost of appellate review.

The Committee also believes that its proposals will prove more expeditious than a two-tiered appellate structure, yet it is not clear that that would be the case. The Report recommends that all appeals to the Juristic Section be by leave. Unless a novel approach to leave granting is adopted, it is un-

\[\text{Footnotes:}\]

33 For example, see Madill v. Chu, [1977] 2 S.C.R. 400.

34 The topic of liability for costs is quite interesting; the elaboration of a workable system would, however, require a detailed study.
likely that substantial time savings will be achieved by substituting for a two-tiered system a structure whereby leave must always be obtained. In addition, the Report envisions the possibility of appeals (with leave) from the General Section to the Juristic Section. In these cases, an increased delay as well as a greater expenditure of judicial time would occur. Finally, the possibility that decisions of the Juristic Section could be appealed to the Supreme Court, again by leave only, would mean that in several cases, at least five, and sometimes six separate appellate hearings would take place.35

Consequently, although the narrow issue of time and cost saving impelled the Committee to recommend a bifurcation of the Court of Appeal rather than the creation of another appellate court, this restructuring, in fact, does not promise a cheaper or more expeditious appellate procedure. Given the confusion normally created by the introduction of novel structures or procedures, and in the absence of substantial benefits to be derived therefrom, this second proposal of the Committee also ought not to be adopted.

A third perception that underlies much of the work of the Committee appears to be that increased use of courts to solve disputes is inevitable and that, consequently, the Report need only recommend a structural change which will solve the current appellate malaise in Ontario. Although structures can often be designed to facilitate, or conversely, to impede effective litigation, they alone are not key determinants.36 Rather, it is upon two venerable institutions that the greatest responsibility for effective use of the appellate process must lie: the Bench and the Bar.

With respect to the Bar, it is obvious that the success of good counsel derives, in part, from their skill in advocacy. But knowledge of what cases ought to be appealed, of what types of arguments a particular court is likely to entertain, and when a court has been convinced are also crucial to their success. The Committee recognizes this fact in its observation that “economy in the use of the time of an appellate court requires the court to have the benefit of argument from capable and prepared counsel. This appears more likely to be achieved where the counsel appearing on an appeal is one who has chosen advocacy as a career and has accumulated some experience in that field... the unnecessary burden thrown on the appellate courts by the appearances before them of inexperienced counsel requires that serious consideration be given to establishing some standards to be met by lawyers seeking to represent their clients in a sophisticated and demanding arena such as the Court of Appeal.”37 Simply put, the best lawyers produce the best judgments and do so most efficiently.

35 For example: (i) a certiorari before the Juristic Section denied; (ii) a hearing before the General Section; (iii) a re-application for certiorari before the Juristic Section; (iv) a hearing before the Juristic Section; (v) a certiorari to the Supreme Court of Canada; (vi) a hearing before the Supreme Court. One consideration the Committee seems to have ignored is that if the General Section reverses the decision at trial, there is almost prima facie evidence of a “law-developing” need. Only where the trial judge patently “erred” in law will this not be the case.

36 Cf. Carrington, supra note 9.

There are also several other ways in which the Bar can contribute to improving the appellate process. First, it must be admitted that in several cases clients put substantial pressure on their lawyers to take appeals even when the latter recommend against such a procedure. Perhaps a system which permits advocates to discourage the prosecution of dilatory appeals, or tactical appeals by economically stronger parties should be instituted. Secondly, the time is possibly now ripe for a re-examination of the fee-for-service format of remuneration in appellate causes. It is unfortunately the case, especially where the Ontario Legal Aid Plan is involved, that some appeals are instituted for less than appropriate reasons. As long as the prosecution of certain appeals is lucrative to the advocate, the same abuse which threatens to bankrupt medicare will affect our appellate process. Finally, the Bar has an important role to play on a psychological level. The refusal to falsely hold out to clients the prospect of appellate reversal, avoidance (assuming the courts are co-operative) of the shot-gun approach to trial court error, and candour in performance of its educative role, all may serve to reduce the number of appeals.

However, probably no group bears greater responsibility for the explosion of appellate litigation than the appellate justices themselves. The mere structural division of the Court of Appeal into two panels is not likely to produce the desired results absent a continued careful selection of members of the appellate bench. More importantly, there must be a conscientious effort by the judiciary to avoid encouraging appeals through excessive sentence tinkering, damages adjustments or incomprehensible judgment justifications; furthermore, judgments must be rendered in a manner designed to facilitate future out-of-court settlements. Thus, the judiciary is seized with two devices for reducing its workload (neither of which seem to have found much favour in Ontario). First, although reversals on appeal ought to be restricted to cases where errors in principle occur at trial, our courts seem to be preoccupied with review to such a degree that their inventiveness in creating errors in principle parallels the efforts of the British House of Lords to manufacture reviewable "jurisdictional errors" in administrative law. Secondly, appeal judgments must be written in such a way as to encourage private ordering. A plethora of decisions dismissing actions on procedural grounds and avoiding the merits encourages rather than discourages litigation. Similarly, a desire to assert a supervisory jurisdiction over consensual and other non-judicial tribunals induces resort to the courts. Commercial umpires, labour arbitrators and membership boards of private clubs all can attest to this presumed judicial omniscience. Finally, a genuine concern by the judiciary to structure judgments so as to foreclose experimental litigation through the

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38 Barton, supra note 9.
39 Aldisert, supra note 17, at 456-63.
comprehensive review of alternative conceptualizations of the same issue will reduce unnecessary appeals.42

Once again, the Committee's assessment of the ills of the appellate process led it to assume that a solution lay in a simple structural reorganization of the Court of Appeal, as opposed to a re-evaluation of the institutional role played by its two principal actors, the Bench and Bar. As a result, in each of its three underlying premises, the Report seems to gloss over the real problems, or fails to advance solutions based on tenable distinctions.

III. ASPECTS OF THE APPELLATE PROCESS NOT CONSIDERED BY THE COMMITTEE

Although the Report purports to consider all aspects of the appellate process in Ontario, several major points are either not discussed or resolved in a questionable fashion. For example, the Committee does not address the issue of stare decisis; nor is the question of what criteria can be used to differentiate appeals raised. The Report simply suggests that, in time, lawyers will learn when resort ought to be had to the Juristic Section. The problem of how access to the Juristic Section is to be controlled is casually dismissed. Finally, the Report seems to suggest that the Juristic Section ought to be permitted to sit in panels, rather than en banc. These issues are important no matter what structure is adopted (that proposed by the Committee, or a two-tiered system), and they ought to have been fully canvassed.

Changes in the jurisdiction of the Supreme Court of Canada as well as the outcome of certain recent cases before that court make it imperative that all provincial appellate courts reconsider their position regarding stare decisis.43 Because the Supreme Court may now control its caseload, fewer disputes from Ontario will be decided ultimately in that forum and a greater responsibility for articulating judicial policy will be thrust upon provincial appeal courts. In addition, although the question is still very much open, recent Supreme Court decisions44 indicate the desire of at least some members of the court to follow the lead of the House of Lords and recognize a power to overrule previous decisions.

42 For a philosophical approach to this issue, see F. Northrop, *The Complexity of Legal and Ethical Experience; Studies in the Method of Normative Subjects* (Boston: Little, Brown, 1959).

43 See *An Act to amend the Supreme Court Act and to make related amendments to the Federal Court Act*, S.C. 1974-75-76, c. 18, s. 10. The Supreme Court appears jealous of this new power and has already indicated to the Ontario Court of Appeal that it will itself decide which issues to address. See *Giffels Associates Ltd. v. Eastern Construction Co.* (unreported, S.C.C., released February 7, 1978) at 2-3, where Chief Justice Laskin noted: "It is for this Court alone to determine whether it will give leave to argue here a point not taken or argued or considered by the Court appealed from. If the Ontario Court of Appeal was not prepared to rehear the appellant, there was no reason for allowing an amendment to the notice of appeal after judgment was delivered, and less reason to add the point of the amendment to the questions to be argued in this Court."

It has often been suggested that the process of restrictive distinction is a satisfactory palliative to the rigors of strict adherence to precedent.\textsuperscript{46} Many arguments can be advanced against this view, however. First, on appeal, it is often the reasons for judgment that are much more crucial than the actual disposition of the case. When courts are denied the power to articulate clearly the underlying reasons justifying a judgment (which occurs whenever the “operative facts” theory of \textit{ratio decidendi}, which, in turn, is a product of a strict view of precedent, is adopted), their jurisprudence often degenerates into a meaningless collection of single instances.\textsuperscript{48}

Secondly, the doctrine of restrictive distinction places an inordinate emphasis on the order in which cases are heard. In England, the rule of \textit{R. v. Electricity Commissioners}\textsuperscript{47} respecting \textit{certiorari} survived until \textit{Ridge v. Baldwin},\textsuperscript{48} partly because no sufficiently distinguishable case was litigated. Many courts, such as the Privy Council in \textit{Nakkuda Ali v. Jayaratne},\textsuperscript{49} followed this rule even to absurd lengths. Even though the House of Lords effectively overruled \textit{R. v. Electricity Commissioners}, Canadian courts still slavishly follow the old rule because the Supreme Court of Canada first addressed the issue prior to the decision in \textit{Ridge v. Baldwin}.\textsuperscript{50} The result is that Canadian courts adhere to a rule based on English precedent that is no longer law in England.\textsuperscript{51} This purely fortuitous order of litigation has committed Canadian courts to a position which is probably the opposite to that which they would have reached had their first opportunity to decide the issue arisen seven years later. An ability to depart from prior decisions permits a court to reduce the capriciousness of the doctrinal bridges that expand or contract the scope of a prior decision.\textsuperscript{52}

A third defect of restrictive distinguishing is its tendency to encourage rather than reduce litigation. If a rule has potentially a dozen areas into


\textsuperscript{46} Some of the most unsatisfactory areas of the law reflect this problem. For example, Robert Reid devotes more than 100 pages in his administrative law text to collecting cases on “when a hearing is required,” yet concludes that no satisfactory test has been advanced by the courts. R. Reid, \textit{Administrative Law and Practice} (Toronto: Butterworths, 1971) at 1-52, 111-58. An excellent analysis of how ad hoc decision-making can impede the development of law is found in Paul Weiler’s trenchant criticism of the Supreme Court of Canada. P. Weiler, \textit{The Supreme Court and the Law of Canadian Federalism} (1973), 23 U. of T. L. J. 306.

\textsuperscript{47} [1924] 1 K.B. 171.


\textsuperscript{49} [1951] A.C. 66.


\textsuperscript{52} The idea of a doctrinal bridge was first advanced by Lon Fuller in 1934. See L. Fuller, \textit{American Legal Realism} (1934), 82 U. Pa. L. Rev. 429 at 438-42.
which it may be extended, the process of restrictive distinguishing requires twelve cases to establish that the former rule is really an exception in a thirteenth case. Under a system where overruling is permitted, only one instance is required, and the unfortunate exception may be laid to rest at an earlier date.  

Finally, it is anomalous that an appellate court, which the Committee itself acknowledges must perform a "law-developing" role, be restricted to developing law only once. Surely the factors which make it necessary for a court to overtly recognize its creative role do not occur (with respect to the same fact situation) once and for all the first time the court addresses the problem. Experience, insight and pragmatics (as well as other factors which influence judicial policy) will always be present. Yet the face they show at any given time will be continually in flux. Such considerations cannot be dispensed with forever on the basis of one discrete, individual instance. Given these factors, the Committee ought to have considered whether or not the judicial custom of *stare decisis* should be allowed to develop in the new court.  

It has been suggested that the distinction between policy or law-developing and non-policy or ordinary decisions cannot be sustained. Because the Report elevates this non-distinction to a position of crucial importance, it ignores all other factors that may serve to guide a court in deciding whether or not a case merits review by a higher level appellate tribunal. Nevertheless, there are reasonably identifiable criteria already present within our legal tradition that may be useful to any appellate court which must decide which judicial "policy" to select in any given instance. Since a new appeal structure is being recommended, these considerations, which may be grouped under the rubric "fidelity to law", might be considered as a foundation for any future proposals respecting access to Ontario's ultimate appellate tribunal.  

A court confronted with any appeal must always be concerned with the functional effect of its decision upon the judicial system as a whole. It matters little if a judge says that he will only revise sentences where an error in principle is involved if in four or five given cases he overrules the trial court. Not only does this action open the door to increasing numbers of appeals but it may also generate feelings of inferiority, mistrust or hostility among trial judges. The simplest (although not the best) way to reduce the volume of appeals is to invariably sustain lower courts. Sometimes an appellate court ought to deny an otherwise meritorious appeal for the reason that the difference between a damages award of $1,000,000 and $800,000 is not significant when compared to the institutional consequences which such tinkering pro-

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53 For one illustration of this process and a critique of its effects, see J. Baudouin, *Les Obligations* (Montreal: Presses de l'Université de Montréal, 1970) at 62-63.

54 The best enumeration and explanation of these features may be found in Llewellyn, *supra* note 18, at 62-232. This book should be mandatory reading for all those concerned with the work of appellate courts. Paradoxically, the Committee, in another context (Chapter 14: Procedure for Direct Access to Court of Appeal), sets about trying to isolate some of these factors. *Report, supra* note 2, at 53-54.
Similarly, the prime motivation for the refusal of an appellate court to qualify, distinguish or overrule an established lower court rule may be a concern that settled expectations will be unduly compromised.

The notion of fidelity to law means, secondly, that an appellate court should be concerned not only with justifying its decision on the basis of accepted legal doctrine, but also indicating clearly and succinctly how it expects trial courts to approach such cases in the future. That is, appellate courts ought not to "develop" the law unless they are in a position to provide meaningful guidance to lower courts as to what is to be attended in the future. Some appeals do not lend themselves to such elaboration. If "law-making" is essentially the creation of a new legal rule, as opposed to the articulation of a general principle, the social and economic costs of such a move may be too great unless the court is able to justify its decision in terms that will impede further litigation and facilitate out-of-court settlements. In an era where the positivistic urge in jurisprudence is on the wane, it is distressing that the recommendations of this report hark back to a view of law as fiat which imposes itself on an inert society, and whose efficacy is believed to be independent of its utility.

A third factor to be considered by an appellate court proposing to alter the law involves a determination of the "political" consciousness of the parties to any dispute. The more cohesive each side appears, the greater the chances that a more appropriate remedy will lie in the political arena. Chief Justice Deschenes recently undertook an analysis of this nature in a Quebec Labour case. Politically organized groups should usually not be permitted to make a court into the final arbiter of the political process. On the other hand, areas such as family and contract law, for example, often provide the court with an opportunity to create meaningful guidelines for the development of human interaction in a rapidly changing world.

Clearly, the above list is only a beginning in answering the problem of

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66 For example, the difficulties in determining whether or not the Trial Division of the Federal Court has jurisdiction under s. 18 or the Federal Court of Appeal has jurisdiction under s. 28 of the Federal Court Act, S.C. 1970-71-72, c. 1, are only partly the responsibility of the legislative draftsman. The almost total lack of comprehensible justification offered by these panels has greatly contributed to this problem. See J. Evans, The Trial Division of the Federal Court: An Addendum (1977), 23 McGill L. J. 132 at 143. For a discussion of one method of minimizing the effects of such creativity, see M. Friedland, Prospective and Retrospective Judicial Law Making (1974), 24 U. of T. L.J. 170.


68 Cf. C. Wright, The Doubtful Omniscience of Appellate Courts (1957), 41 Minn. L. Rev. 751 for a different perspective.
which factors ought to compel a court to undertake a revision of existing legal rules. But it is important to emphasize that such criteria lead to a more consistent development of legal doctrines than a purported distinction between "policy" and "non-policy" appeals. The relevant factors which ought to influence a court in deciding whether to entertain a further appeal, therefore, must be attached to the "process of discovery" and not to the reasons a court might offer in the justification of its decisions.

Assuming that considerations which affect judicial "policy", such as those just outlined, can be crystallized into meaningful criteria, there still remain significant problems in deciding when and by whom these criteria ought to be applied. At least four mechanisms for restricting access to higher courts may be suggested: a statutory framework, the use of an attorney-general's certificate, the imposition of a pre-appeal certiorari procedure, or the abdication of this decision to litigants and their counsel. Without considering the merits of each of these alternatives, the committee simply recommends a combination of the third and fourth procedures. Arguments can also be advanced for each of the others, however, and perhaps some combination thereof ought to have been considered.

A first method would be to set out in the statute organizing an appellate structure certain criteria that would invariably be applied in distinguishing which cases deserve a third hearing. Yet, if such a procedure were adopted, it would have to be carefully thought out, for the traditional means of categorizing appeal rights are not based on such criteria. Surely the overall importance of legal issues is rarely tied either to the amount of money in dispute or the subject matter of the dispute. Appeals of interlocutory decisions, or from sentence in criminal matters, or quantum in damages actions, or interpretation of contracts or wills are not always simple cases. Furthermore, the difficulties that have arisen in the interpretation of sections 18 and 28 of the Federal Court Act attest to the problems involved in attempting to draft in advance the characteristics which will distinguish "important" from "run of the mill" cases. Nevertheless, it is possible to enumerate criteria such as "whenever there is a dissent at the first appellate level" or "whenever the Appeal Courts of two or more provinces are in disagreement." This would obviate the necessity of a certiorari hearing for all tertiary appeals.

A second approach to the problem of setting the criteria governing judicial policy would be to permit an attorney general’s committee to certify appeals. In the field of criminal law, however, such a proposal raises the issue of nemo iudex in causa sua. Even if the Attorney General’s appeal certification committee is independent of the Crown Attorney’s office, the appearance of bias would remain. Further, the jurisdiction of the provincial government to define the limits of criminal appeals is doubtful. In civil cases, this pro-
procedure would take control of the prosecution of a lawsuit away from the parties. It, therefore, ought not be adopted in the absence of a thorough examination of the underlying reasons for an adversarial system of adjudication. Yet there may be much merit in allowing a party who otherwise has insufficient means to apply to the Attorney General for funding in certain cases where he would be ineligible for legal aid or would receive only a partial certificate.

The suggestion that elaboration of the criteria that would affect judicial activity should be left entirely in the hands of the court itself is, at first sight, appealing. However, two facets of such an approach militate against making this mechanism the sole determinant of tertiary appeals. First, the experience of many U.S. jurisdictions (including the U.S. Supreme Court) indicates that often the most important criterion in determining whether an appeal merits consideration is the existing caseload or backlog on the docket. Second, certiorari applications often take as much time on argument as full appeals. If the requirement of a prior certiorari hearing results in only a 50 percent reduction in the number of cases heard, this approach can hardly be justified. On the other hand, allowing the court to indicate (either in its judgments, or by policy papers released in a manner similar to those of labour boards) the kinds of cases which it is predisposed to hear may sufficiently satisfy the judge's desire to exercise at least some control over their workload.

A fourth approach to the problem of defining the characteristics of a case that would call for judicial reconsideration of existing doctrine would be to leave the decision in the hands of those who were originally parties to an action. This traditional adversarial solution may not be appropriate, however, where the function of the court is conceived primarily as one of "law-developing." Under that system, the determination of when a decision calls for extensive analysis would be contingent, in many cases, upon a variety of non-legal considerations. First, the better the lawyer one could afford to hire, the greater the chances of his developing the case into one of momentous "policy." Moreover, the cost of an appeal, the possibility of passing up an attractive settlement offer and the possibility of losing might pressure some litigants into not appealing to a higher court. Third, where partial success has already been achieved, the fear of being "out-gunned" on appeal may discourage such actions, for not all litigants can afford to research and prepare extensive briefs. If an appellate court is to develop and articulate its own distinctive jurisprudence, the cases which come before it ought not to be determined predominantly by these non-legal considerations.

The above observations are intended only to indicate the significance that attaches to the question of who controls appeals when an express purpose of such appeals is to develop law for the future in addition to adjudicating disputes of the past, and to suggest the inadequate consideration the Committee appears to have given this question.

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63 Carrington, supra note 9.
64 See Bell, supra note 15, for a discussion of some of these alternatives.
A final aspect of the appellate process to which the Committee does not appear to have devoted much study relates to the issue of whether a "law-developing" court ought to sit en banc. In Canada, this practice does not seem to have developed in the past, although the Supreme Court of Canada is now adopting the procedure. Three compelling reasons why a law-developing court ought to adhere to such a practice may be advanced.

First, the more input into decision-making, the better the result likely to be achieved. Collective maturation of thought among nine judges will produce better, more balanced opinions than those of a five-man panel. In addition, only by allowing full input on every decision will diverging trends caused by differently constructed panels be avoided. One of the principal difficulties that results from an amorphous bench is the possibility of counsel "jockeying" for panels, much as some lawyers now "jockey" for certain trial judges. Furthermore, the opinions of a Court sitting en banc carry more psychological weight, both for lower courts and for the Bar. A continuing problem in the Supreme Court of Canada with civil law appeals from Quebec derives specifically from the fact that in order to maintain a majority of civilian-trained justices on the bench the Court must sit as a five-man panel, the same number of justices who sit in the Quebec Court of Appeal, where all are civilian educated. If the opinions of this new court are to carry significant institutional weight, the bench must be larger than on first appeal. Consequently, a seven-man Court, whose members always sit en banc, would probably be the optimum structure for any "law-developing" court in Ontario.

IV. SUBSIDIARY AND TRANSITIONAL RECOMMENDATIONS

Although the bifurcation of the Court of Appeal is the principal recommendation of the Committee, several other suggestions both for improving the appellate process in Ontario and for facilitating the transition to this scheme are offered. Four of these deserve comment.

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65 Given that the Committee recommends that the Juristic Section be comprised of eight members, it would seem that en banc sittings are not contemplated.

66 The "Notes of Recent Judgments in the Supreme Court of Canada," numbers 28, 29 and 30, published by the Canadian Law Information Council, indicate that of its latest 21 judgments, 14 were heard by a Bench of eight or nine and only three by a Bench of five. Four other cases from Quebec were heard by a Bench of five following the established practice of ensuring that the three civilian-trained justices form a majority.

67 For conflicting opinions in this regard, see H. Hart, The Supreme Court, 1958 Term; Forward: The Time Chart of the Justices (1959), 73 Harv. L. Rev. 84 at 100; and T. Arnold, Professor Hart's Theology (1960), 73 Harv. L. Rev. 1298. See also W. Murphy, "Marshalling the Court: The Tactic of Judicial Bargaining," in J. Fiszman, ed., The American Political Arena; Selected Readings (2d ed. Boston: Little, Brown, 1966) at 243-60.

68 For a recent criticism of the work of the Supreme Court, see J. Baudouin, L'interprétation du Code Civil Quebecois par la Cour Supreme du Canada (1975), 53 Can. B. Rev. 715 at 715-16 and nn. 1-4.

69 A dissenting view is expressed by L. Blom-Cooper and G. Drewry, The Use of Full Courts in the Appellate Process (1971), 34 Mod. L. Rev. 364.
First, with respect to venue, the Report recommends that panels of the General Section be empowered to sit in all County towns as the need may arise. While it may not be necessary to immediately extend the venue of the court this broadly, it is certainly appropriate that an appellate court not be dominated, for financial or geographic reasons, by the concerns of only one part of the province.

However, the Committee also recommends that, since the primary function of the Juristic Section is to develop jurisprudence for the province, it sit only at Osgoode Hall. The only reason advanced for this suggestion is that such a restriction would permit “counsel appearing before it . . . immediate access at the time of the hearing of the appeal to the facilities of the Great Library,” for “it would be unreasonable to expect counsel or the Court to sacrifice the physical presence of such essential material by holding sittings outside Toronto.” The latest available statistics on the holdings of Ontario law libraries indicate that the Faculty of Law at York University possesses 174,000 volumes; at the University of Ottawa, 95,000; at Queen's University, 120,000; at the University of Western Ontario, 95,000; at the University of Windsor, 90,000; and at the University of Toronto, 82,000. The collection at the Great Library totals 130,000 volumes. It is doubtful that the holdings of the Great Library are so superior as to warrant on this ground alone the Court sitting exclusively in Toronto.

It might be suggested, on the other hand, that the reason for holding sittings only in Toronto is to avoid undue delay in the hearings of appeals. Such an argument would be irrelevant if the court were to hold sittings in Ottawa and London one week per month and in Toronto the remainder of the time. In order to prevent lawyers from Ottawa or London launching appeals in Toronto, the province could be divided geographically so that all appeals from southwestern Ontario be heard in London, from eastern and northeastern Ontario in Ottawa, and from central and northwestern Ontario in Toronto. Such a system has worked well in Quebec for many years, and the benefits of having the Court spend one-half its time outside Toronto would be substantial.

A second subsidiary recommendation of the Committee relates to the fate of the Divisional Court. Although not entirely clear in the Report, it appears to be proposed that this Court be abolished. On page two, the Report

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70 Report, supra note 2, at 43.

71 These figures are taken from the Directory of Law Libraries published in June 1976 by the American Association of Law Libraries.

72 Article 25 of the Code of Civil Procedure provides: “The Court of Appeal is the general appellate tribunal for the province; it hears appeals from any judgment from which an appeal lies, failing an express provision to the contrary.” Article 30 of the same code specifies: “Appeals from Judgments rendered in the districts of Beauharnois, Bedford, Hull, Iberville, Joliette, Labelle, Montreal, Pontiac, Richelieu, St. Francis, St. Hyacinthe, Temiscamingue, and Terrebonne are brought before the Court of Appeal sitting at Montreal; those from judgments rendered in the other districts, before the court sitting at Quebec.” For an explanation of this structure, see K. Beausoleil, D. Ferland, H. Reid, Droit Judiciaire Privé: Notes de Cours (Quebec: Les Presses de l'Université Laval, 1971) at 36-43.
speaks only of “appeals from the decision of courts or judges of first instance”, while on page 21, the Committee speaks of the “appeal jurisdiction of the Divisional Court” as contrasted with its jurisdiction under The Judicial Review Procedure Act.\(^7\) This latter comment would suggest that the Committee proposes to eliminate the Divisional Court as an appellate body under sub-section 17(1)(a) as well as under sub-sections 17(1)(c),(d),(e) and (f) of the Judicature Act.\(^8\) That this is the Committee's view may ultimately be deduced from its incidental recommendation that because the judicial review papers of this court so resemble the former jurisdiction of the old Court of Queen's Bench to grant certiorari, prohibition and mandamus, that this latter power be reinvested in the High Court.

Although it is probably wise to remove much appellate jurisdiction from the Divisional Court, i.e., from judgments in excess of $200 in the Small Claims Court, from certain interlocutory orders of the County Court and Surrogate Court, from all orders of Supreme Court Masters, or the Provincial Court, Family Division, and to clarify the difficulty involving appeals from County Court trial de novo or Supreme Court “stated case decisions,” there are several good reasons why the 17(1)(a) jurisdiction of the Divisional Court should not be abolished and its judicial review jurisdiction retained. Most of these have been well argued elsewhere and need not be repeated.\(^5\)

It is true, as the Committee notes, that the Divisional Court “has failed to achieve recognition as an effective appellate court,”\(^7\) but this has been due largely to its rotating membership. Certainly, the experience of the Second Divisional Court of the Appeal Division of the Supreme Court of Ontario would confirm this.\(^7\) Permanence of tenure as Justices of Appeal is a necessity for the members of any appellate court. When its personnel are rotated on a quarterly basis, it is understandably difficult for the Divisional Court to perform a satisfactory appellate function.

Many of the difficulties inherent in the current framework of the Divisional Court could be overcome if a procedure for administrative law matters, much like that suggested for the handling of criminal appeals, were to be proposed. The Report rejects the concept of a separate Court of Criminal Appeals\(^8\) and proposes that, by administrative measures, the Chief Justice channel criminal appeals to separate panels of the General Section. Although membership in the panels would rotate, each justice would sit for a period long enough to gain expertise in the area. An administrative law panel consisting of three judges, each sitting for six terms, might be an appropriate

\(^{73}\) S.O. 1971, c. 48, s. 6, proclaimed in force April 17, 1972.

\(^{74}\) This subsection provides: “The Divisional Court has jurisdiction to hear, determine and dispose of (a) all appeals to the Supreme Court under any Act other than this Act and the County Courts Act.”


\(^{76}\) Report, supra note 2, at 19.

\(^{77}\) Id.

\(^{78}\) Id. at 28-31.
A third recommendation, incidental to, but flowing from the Committee's main proposal, concerns the issue of written opinions and law reporting. A recent study by the Canadian Law Information Council\textsuperscript{79} has commented extensively on this issue; yet the Committee restricted its remarks to certain general observations. In view of the Reporter's substantive recommendations, however, certain comments are necessary. First, all opinions of the Juristic Section should be delivered in writing after consideration, and reported in full. Secondly, most, if not all, judgments of the General Section should be reported. The motive for compelling written reasons for judgment, and for wide reporting of all appellate decision relates to comments made earlier.\textsuperscript{80} Leading cases do not arrive neatly packaged and labelled, ready for the Court of Appeal simply to decide them. Rather, they are created, both by the quality of the opinion rendered and, currently, by the luck of haphazard law reporting.

Perhaps the best justification for written decisions has been given by Lon Fuller, who notes that, in common law judicial decisions, "the rule applied to the case and the reason or justification for that rule are both stated in the opinion of the judge and are often intertwined to such a point that it is difficult to distinguish between them."\textsuperscript{81} Even our statutes recognize that decision-making will be less arbitrary and the process of justification more exact when opinions are produced in a permanent form.\textsuperscript{82}

With respect to law reporting, it should be noted that many factors other than the rank in the judicial hierarchy of the Court which gave judgment, the facts of the case, and the issues in dispute, contribute to whether a decision becomes important from a juristic point of view. Most importantly, the quality of the judgment rendered will determine a particular case's fate. For this reason, one often finds the judgments of intermediate appellate courts moulding the future of the law and dissents becoming the literary jewels of our legal tradition.\textsuperscript{83} A second factor that contributes to the future of any case relates to the vagaries of law reporting. For example, the noted case of \textit{Hadley v. Baxendale}\textsuperscript{84} comes to us principally through the coincidence that the judge who decided this case at trial was the editor of the popular practi-
tioner's manual, Smith's Leading Cases. Finally, a case may become a leading case because some author chooses to cite it, or some casebook writer or law teacher chooses to incorporate it into his materials, or because some lawyer who argued it, or judge who decided it, continues to cite it in several succeeding opinions. As a step in reducing the caprice caused by these factors, all appellate decisions should be reported. It is not suggested that complete reporting will make the law more systematic, but rather that hidden undercurrents, new developments and competing doctrines are more likely to penetrate our consciousness if all appeal cases are reported. How we eventually make use of this expanded literature depends more on historical factors than legal doctrine.

A final aspect of this report that bears examination are the transitional provisions respecting judges as envisioned by the Committee. Two schemes are suggested for staffing the new Juristic Section, yet both display a remarkable conservatism. Under both proposals, no judges who are not now members of the Court of Appeal could be named to the Juristic Section until all current Justices of Appeal have been appointed. Although it may be beneficial to staff this new Court with a majority of experienced appellate justices at the outset, there is no reason why all seven new positions must be so filled and, a fortiori, there is no reason to defer to current members of the Court of Appeal in future appointments. In fact, basing predictions on the length of time it takes eight members of the Court of Appeal to resign or retire, it seems as if it will be 1985 before anyone who is not now a member of the Court of Appeal will take a seat on the Juristic Section. The merit of this particular transitional provision is, therefore, doubtful.

V. CONCLUSION

The problem of court overcrowding is not a temporary phenomenon. Moreover, it is not related solely to the fact of an increasing population. In the last twenty years, as Canadian society has become much less homoge-

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86 A candid assessment of the role of casebook editor appears in J. Milner, Cases and Materials on Contracts (Toronto: University of Toronto Press, 1963) at x-xi.

87 My colleague, R. W. Kerr, has recently pointed out an aspect of this phenomenon. The question of the constitutionality of the Official Language Act of Manitoba, R.S.M. 1970, c. O10, which is currently before the Manitoba courts in Forest v. Registrar of the Court of Appeal, was first decided in Bertrand v. Dussault and Lavoie, an unreported County Court decision of Mr. Justice Prud'homme rendered in 1909. The latter case has been totally ignored for almost seventy years. One other example worth noting may be found in I. Macneil, Research in East African Law (1967), 3 East African L. J. 47, n. 29, where a particularly horrendous instance of incomplete reporting is documented.

88 In The Death of Contract (Columbus: Ohio State University Press, 1974), Grant Gilmore explains how Fuller and Purdue were able to discover such undercurrents by thorough case-report research.

89 Eight judges of the Court of Appeal retired during the years 1969-1977; eight others retired between 1961 and 1969; a further eight between 1949 and 1961.
nous, we have been experiencing an accelerating shift away from a social structure predominantly organized upon a principle of shared committment to one bound together by the legal principle.\textsuperscript{90} As this second organizational framework with formalized rules of duty and entitlement becomes dominant, recourse to third party adjudication increases in popularity as a mechanism for promoting an ordered society. Custom, authority, charisma, mediation, superstition and deliberate resort to change gradually come to be viewed as unimportant, or inefficacious human institutions.\textsuperscript{81}

What is particularly distressing about the Committee's Report is not the fact that its principal recommendations are based on a "non-distinction" and also probably will not achieve their desired result, but that it never attempts to understand the causes of increased litigation. It is perhaps too much to expect the Committee to undertake a social critique;\textsuperscript{92} nevertheless, a recognition of these basic issues would have, at a minimum, compelled a more thorough examination of the institutional role played by third party adjudication in Ontario. This alone would have constituted a significant contribution towards the development of a solution to the problem of court overcrowding.

\textsuperscript{90}An explanation of these terms can be found in L. Fuller, "Two Principles of Human Association," in J. Pennock and J. Chapman, eds., \textit{Voluntary Associations}, Nomos XI (New York: Atherton Press, 1969) at 3-23.

\textsuperscript{91}See Aldisert, \textit{supra} note 17; and Barton, \textit{supra} note 9.