

**BENCH/BAR APPELLATE PROCEDURES COMMITTEE ON
CRIMINAL APPEALS**

**FINAL REPORT
AS ADOPTED BY THE
NOVA SCOTIA COURT OF APPEAL ON OCTOBER 27, 2008**

Committee Members:

Justice Thomas Cromwell (Co-Chair)
Justice Jamie W.S. Saunders (Co-Chair)
Annette Boucher, Q.C.
Kenneth Fiske, Q.C.
Patrick Duncan, Q.C. (now Duncan, J.)
Walter Yeadon
Monica McQueen

I. Introduction:

[1] Can we improve our processes for handling complex criminal appeals? The Court posed this question to a Bench/Bar Special Committee in the fall of 2006 and this Report gives the Committee's answer.

[2] In brief, our answer is yes. We conclude that, for the most part, the needed changes can be made by adjusting our administrative procedures and improving communication and co-ordination with other parts of the criminal justice system, particularly Legal Aid and the correctional institutions. Many of the changes we suggest have already been implemented; this Report is mostly a record of what has been done rather than a collection of recommendations for future action.

II. Background and Terms of Reference:

[3] Three factors persuaded the Court to strike the Committee. First, there had been an increasing number of appeals in which the appellants brought applications for disclosure and/or production and these had given rise to procedural uncertainty. Second, the Court was concerned that there were certain appeals in which a very long time intervened between the filing of the notice of appeal and the hearing of the appeal. Third, two important reports relating to the conduct of appeals had recently been released. The Lamer Commission of Inquiry pertaining to the cases of Ronald Dalton, Gregory Parsons and Randy Druken addressed, among many other things, issues in relation to the eight year delay by the Newfoundland and Labrador Supreme Court Appellate Division in hearing and deciding the appeal of Ronald Dalton's appeal of his murder conviction. The Honourable Justice J.E. Côté of the Alberta Court of Appeal prepared a report for the Canadian Judicial Council entitled *Well Run Appeals*. While that report does not focus on criminal appeals specifically, the Committee thought that it would be useful to examine its findings and recommendations as they relate to complex criminal appeals.

[4] In setting up the committee, the Court recognized that several different factors, individually or in combination, may result in an appeal being complex: the size of the trial record, the number of legal issues, the need to consider one or more pre-hearing applications (such as applications to appoint counsel, produce third party records or to order additional disclosure) or the fact that one of the parties, often the appellant, is not represented by legal counsel. The Committee was asked to consider whether more effective procedures could be developed to handle these appeals.

[5] The Court was also conscious that unnecessary delay in appeals, and especially in criminal appeals, is always a concern. While the Court has enviable statistics in relation to the timely handling of appeals, a certain, small number of cases drag on inordinately. The Committee was asked to examine whether the Court could improve the timeliness of its handling of such appeals.

[6] Justices Cromwell and Saunders along with our Registrar, Annette Boucher, Q.C., were appointed as the Court's representatives. Kenneth Fiske, Q.C., Chief of the Appeals Branch, Nova Scotia Public Prosecution Service, Patrick Duncan, Q.C. (now Duncan, J.) from the defence bar, Walter Yeadon of Nova Scotia Legal Aid

and Monica McQueen, Public Prosecution Service of Canada were recruited to serve as the Bar members.

[7] Our Report begins with our analysis of the extent and causes of delay in the Court's handling of criminal appeals. We then turn to the special challenges of applications on appeal for production and disclosure, the need for case management, various issues relating to communication between the Court and correctional facilities and assistance for self-represented parties. We also completed a survey of other appellate courts and we share the results at the end of the Report.

III. Undue Delay: Why It Occurs and How to Prevent It:

[8] We looked at the extent of and the apparent causes of undue delay between the filing of a notice of appeal and the hearing of the appeal. We identified all criminal appeals from 2002 to the end of 2007 which had taken more than a year from the filing of the notice of appeal to the date of hearing. Each of those files – 29 in total – was examined to determine the cause or causes of the delay.

[9] We concluded that there were three main contributing factors. In 13 of the 29 files, difficulty and delay in obtaining counsel were significant causes of the overall delay. In five files, the length of transcript contributed significantly to delay while in a further five files, there was no application for dates until a Registrar's motion to dismiss the appeal was made even though counsel for the appellant was in place. In short, three problems were identified: getting counsel on the file, getting the transcript produced and making sure that counsel were diligent in pursuing the appeal.

[10] These findings prompted the Committee to concentrate its efforts on these three issues. We will address each in turn.

1. Difficulties in Obtaining Counsel:

[11] The Committee determined that most of the issues relating to representation by counsel could be resolved by closer monitoring and improved cooperation among all participants. As a result of discussions within the Committee, a number of initiatives have been taken.

(a.) The Registrar:

[12] The Registrar has begun a review at the end of each month of all prisoners' appeals filed with the Court during that month. The forms used for this review are attached as Appendix "A". In addition, the Registrar has prepared a letter that goes out to the prisoner - appellant, with a copy to Legal Aid and the Crown once the notice of appeal is filed. A copy of this standard letter is set out in Appendix "B". The Registrar has also revised the materials which are sent to self-represented appellants about the authority of the Court to assign counsel as provided for in s. 684 of the **Criminal Code**. That material is attached as Appendix "A".

[13] The Committee is of the view that there should be follow-up to the Registrar's letter by way of a telephone conference with a Chambers judge. It is proposed that such a conference be scheduled roughly four weeks after the filing of the notice of appeal and that a regular time for these to occur be set up in cooperation with the various institutions.

[14] Although less common, appeals with self-represented respondents also require attention. The Registrar has suggested that she should try to determine, about two weeks after the notice of appeal is filed, whether the respondent has obtained counsel and, if not, send the respondent a letter and information package about s. 684. A telephone conference with the Chambers judge could then be arranged as outlined above.

(b.) *Legal Aid:*

[15] The Legal Aid process is critical for the timely handling of appeals. Any delay in processing the legal aid application will inevitably slow down the progress of the appeal and the Court will rarely, if ever, exercise its authority under s. 684 of

the **Criminal Code** to assign counsel until attempts to obtain legal aid have finally failed.

[16] No examples of unnecessary delay in processing legal aid applications came to light during the Committee's discussions. However, the Committee did become aware of the fact that sometimes inmates report having difficulty finding a lawyer willing to take an appeal even though legal aid has been approved. To assist with this, an arrangement has been put in place with the Criminal Lawyers Association. When the Registrar becomes aware of the difficulty, she will contact Josh Arnold, Chair of the Association. He will have the information posted on the electronic bulletin board accessible only to members of the Association that a prisoner has a legal aid certificate, what the appeal is about and that a lawyer is needed to take on the appeal. Inmates who are still having trouble retaining counsel will be captured in the telephone conference one month after filing Notice of Appeal, as described above. Information about this arrangement is in the hands of the Chambers judge by inclusion in the Chambers Book.

[17] The Committee also identified some problems of effective communication with inmates which impede the inmate's ability to retain counsel. We address these points and make our recommendations in a later section of the report.

[18] In cases in which legal aid is denied and the inmate applies to have counsel assigned, it is important for the Chambers judge to know the status of the inmate's legal aid application. However, inmates will frequently provide the Court with Legal Aid's letter advising him or her that legal aid is refused because the appeal lacks merit. Material about the merits of the appeal as assessed by Legal Aid should not be placed before the Court. Legal Aid has, therefore, agreed that it will provide an unsuccessful applicant with a letter simply advising that legal aid has been denied and that all appeals have been exhausted while putting the explanation in an attached document. This will allow the inmate to simply file the refusal letter and avoid having inappropriate material placed before the Court.

2. Preparation of Transcripts:

[19] Mr. Fiske prepared a memorandum concerning preparation of transcripts. At the time of preparing that memo, the transcription service used by the Public

Prosecution Service, Verbatim, was not satisfied with the present method of certifying court transcribers. Our understanding is that this has now been resolved, that a certification process is in place and that additional reporters are being certified. However, there still seems to be delay in producing transcripts of long trials. This is a matter the Court should monitor closely. We propose that this issue be discussed by the Court at least once each year, possibly at its annual meeting in September.

[20] Mr. Fiske has also put a tracking system in place in his office to facilitate appropriate follow up if transcripts are delayed.

[21] One practical, administrative step was identified that would assist in more timely preparation of transcripts. The Registrar will send the court log from the lower Court to either the Provincial or the Federal Crown, as the case may be, upon her initial review of the new Court of Appeal file. The log is printed from NOVO when she can identify the date, time and court room in which the hearing under appeal was held. This will help ensure that all necessary parts of the transcript are prepared.

[22] On occasion, transcripts contain an unacceptable number of gaps or “inaudibles”. We suggest that parties responsible for filing transcripts check the original and ensure that the transcription is as complete as possible before making the multiple copies required for filing.

3. File Monitoring:

[23] Under the existing practice, there are two main opportunities for judicial involvement with an appeal file before the hearing of the appeal. The first occurs when the appeal is set down for hearing. This provides an opportunity for a judge to insist on the timely prosecution of the appeal and to do some “trouble shooting” if problems are detected. The second opportunity for judicial involvement arises when the Registrar, as required by **Rules** 62.17(2) and 65.03(2), brings an application before the Chambers judge to dismiss an appeal that has not been perfected within four months of the judgment appealed from. Frequently, these applications precipitate action to get the appeal on track. It is apparent that under this approach, it is possible that nothing happens on an appeal for four months after a notice of appeal is filed.

[24] Justice Côté, in his report, *Well Run Appeals*, makes a compelling case for more hands-on case management. We think that our present system, which essentially does nothing for four months, does not take a sufficiently robust approach to avoiding unnecessary delay. We have two suggestions, the second of which has already been acted on.

[25] First, as noted earlier, we propose that in all criminal appeals involving self-represented appellants, a chambers conference should be held with a judge within about a month of the filing of the notice of appeal. This may be done by telephone, or as the technology becomes available, by video conference. The main purpose of the call would be to determine whether counsel has been retained and, if not, why not. This early intervention should help ensure that any necessary communication with Legal Aid is expedited and, if a s. 684 application is to be made, it will be brought promptly.

[26] Second, we suggest that the **Rules** be amended to provide for judicial case management. This suggestion has already been adopted by the Court and the appropriate rule has been approved to come into force with the new **Civil Procedure Rules** next year. We will discuss this later in the report.

IV. Third Party Records and Fresh Evidence Applications:

[27] The Committee noted the increasing frequency of applications for third party records, for fresh evidence and for additional disclosure pending appeal. These applications are challenging because they must be heard by a panel and frequently the applications for third party records and disclosure delay the hearing of the merits of the appeal.

[28] The Committee discussed a number of possible approaches to how these applications should be handled. It was agreed that, in general, a panel should be struck early to deal with these applications and that the presiding judge should be responsible for managing the application and the appeal itself. The Committee felt that the circumstances of these applications varied too much to make a set of Rules useful. However, we thought that it would be of assistance to the Court and to counsel if a draft protocol were prepared, setting out possible approaches but which could be adapted to the particular circumstances of each application. The Committee prepared a draft protocol which was ultimately accepted by the Court. A copy is found at Appendix “C”.

V. Case Management:

[29] The Committee agreed that it was useful in complex cases to have a panel assigned at an early date and to have a designated judge available to manage the progress of the appeal. This has been the Court's informal practice for some time. The Committee proposed a case management rule which, with modifications, was ultimately incorporated into the recently approved new **Civil Procedure Rules**. The relevant provisions are attached as Appendix "D".

[30] Case management should be invoked at an early point in an appeal. The Court should act of its own motion where: (1) there is an unusually long record; (2) an unusually large number of issues; (3) the appellant is self-represented; or (4) there are applications for disclosure or production. A mechanism should be set up to monitor incoming appeals for these (or other) warning signs that could be promptly brought to the attention of the Chambers judge who, if so advised, could propose the appeal be case-managed. The Registrar or Crown counsel may often be able to identify these appeals at an early stage.

VI. Correctional Issues:

[31] The Committee identified a number of issues which underlined the need for effective communication and liaison with correctional institutions. Legal Aid needs to be able to communicate with persons in custody. Those persons need to be able to communicate with their lawyers and, if self-represented, to prepare for their appeals and communicate with the Court. On a fairly regular basis, persons in custody allege that their legal materials have been taken away or that access to resources and time to prepare their cases are inadequate. Such complaints put the Court in a very difficult position especially when faced with the prospect that further inquiry may demand an evidentiary foundation, thus leading to a formal hearing on the record. The Court and Crown counsel have difficulty reacting unless the facts can be ascertained.

[32] The Committee prepared a list of issues and invited senior correctional officials with both the provincial and federal systems to attend a meeting to discuss them. These discussions were positive and a number of administrative arrangements have been put in place to improve communication and coordination. The list of issues is attached as Appendix "E" and the meeting notes, setting out the

arrangements that have been or are in the course of being put in place are attached as Appendices “F” and “G” .

[33] Both the provincial and the federal systems are promoting video-conferencing and the facilities are quickly becoming available. This could be an invaluable tool for the Court and the chambers and case management judge in appeals with self-represented inmates. Video-conferencing would allow the self-represented inmate to take part in the setting down process and at the same time provide the Court with a useful opportunity to ensure that the inmate understands the process and to help ensure the appeal is on track. We should move to having self-represented inmates participate by video-conference in the setting down hearing when the technology is available. It will be necessary for the Court, in consultation with staff, the institutions and the Bar, to develop protocols concerning the use of video-conferencing.

VII. Assistance for Self-Represented parties:

[34] Inevitably a certain number of parties to criminal appeals will not have counsel. These parties need assistance in preparing and presenting their cases. With that in mind, the Committee reviewed the materials available at most Canadian appellate courts and reached the conclusion that our self-help information materials needed to be expanded and improved. All of the existing materials are slated for redrafting in early 2009 in light of the new Rules.

[35] In particular, the Committee suggests that the Court prepare and make available the following additional materials.

- > A new Notice of Appeal form for Prisoner appeals and appeals by litigants not represented by counsel. This should be in a more user friendly, check the boxes type format.

- > Electronic versions of all important Criminal Appeal related forms be made available on the Court's website (it is believed that most already

are), as well as in the CD-Rom form to be provided to the penal institutions for use by inmates who generally do not have access to the internet. The forms include:

- Notice of Appeal
 - Application for bail pending appeal
 - Applications for funded counsel under s. 684
 - Application for extension of time (to file an appeal or otherwise)
 - Application to set down for hearing
 - Application in respect of preparation of transcript/appeal book
 - Application to introduce fresh evidence
 - Notice of abandonment
 - Various affidavits as required for above.
- > A new information booklet specific to Criminal Appeals, which would be tailored to unrepresented litigants, and include many of the paper forms and instructions that the Registrar's office now provides as separate paperwork, as well as the forms and instructions listed above. This booklet should be in a format that can be distributed in the penal institutions, which may have special regulations, such as for

documents bound with staples. Additional subjects that might be covered in the booklet which do not directly relate to forms:

- avenues to seek counsel: legal aid, Nova Scotia Criminal Lawyers Association, etc.;
 - more detailed information about how to obtain a transcript of the trial, need to get audio tape/CD, accessing a certified court transcriber, and cost and timing thereof;
 - circumstances where fresh evidence might be necessary, and incumbent on the appellant, such as an appeal despite guilty plea, allegations surrounding competence of counsel, allegations relating to trial procedure that are not evident on the record of the trial; and
- > audio versions of information booklets and forms, for use by those with literacy problems or the disabled.

[36] Throughout its discussions, and in particular with senior correctional officials, the Committee expressed its concern with respect to the level of literacy among inmates who are not represented by counsel. Whatever self-help materials are produced by the Court will obviously be of no use to inmates who cannot read. We are assured by correctional officials that timely assistance is offered to such inmates by staff within the institution.

VIII. Other Jurisdictions:

[37] In pursuing the list of issues and inquiries our committee resolved to explore, we thought it might be useful to canvass other Canadian courts of appeal to see what if anything they were doing in managing complex criminal appeals. An email was sent to each of the representatives listed on the Canadian Judicial Council's appeal courts' communication network. Responses to those inquiries were received from:

British Columbia

Court Martial Appeal Court

Manitoba

New Brunswick

Prince Edward Island

Saskatchewan

[38] For convenience, a summary of the feedback received from each of the respondents may be found in the attached Appendix “H”. We asked each court to describe their practice or experience surrounding six discrete points:

- # 1 what level of assistance is provided to self-represented prisoners in provincial or federal institutions (access to resources such as transcripts, other materials, fax & photocopying, case law, texts, help for those who may be illiterate, outside calls to counsel, etc.) in advancing an appeal before the court;

- # 2 how the court handles complaints from a prisoner with respect to # 1, above, whether by a single judge of the court in Chambers, or following a hearing before a full panel. Further, how does one, for example, secure “evidence” of such difficulties, while at the same

time affording the offender and corrections officials the chance to be heard;

- # 3 to what extent a full panel of the court may be obliged to sit on interlocutory motions in criminal matters, or whether such might be finessed, in certain circumstances, by having the Chief Justice name the chair/president of that panel, or some other judge, to hear and rule upon such motions, e.g. disclosure, production of third party records, fresh evidence applications, and the like;
- # 4 the extent to which the court participates in case management of criminal appeals, and by what process the case management judge is assigned;
- # 5 whether the court has a kind of “early warning system” such that the Registrar, or counsel, or a judge on his/her own motion might flag the file as being sufficiently complex to warrant the court’s early intervention so as to prevent delay and ensure a fair and timely appeal;

6 whether the court has embodied such practices in the form of a Rule, a protocol, a bench memorandum, or something else, and why?

IX. Summary of Recommendations Not Yet Implemented:

1. In criminal appeals involving self-represented parties (whether as appellant or respondent), the Court should initiate a conference call with the Chambers judge one month after the filing of the notice of appeal. The purposes of the call will be to address the issues of legal representation, identify needed steps and set a timetable for them, to provide information about s. 684, if relevant, and to develop a timetable for such an application if one is to be brought. The judge should also consider whether the file should be case-managed. The Registrar will identify the files requiring this telephone conference and the Deputy Registrar will set up the call.

2. The Court, in consultation with the Crowns and the defence Bar should review, annually, the experience in the timely preparation of transcripts, especially those of long trials. Information could be sought in June and the results discussed at the Court's annual meeting in September.

3. As technology becomes available, self-represented inmates should participate in setting down hearings via video-conference. The Court should monitor the availability of this technology and begin using it for this purpose when readily available.

4. The Registrar and the Chambers judge should attempt to identify at an early stage files that would likely benefit from case management. The Chambers judge should not hesitate to act of his or her own motion when such a file is identified.

5. The Court should establish a plan to create the self-help materials identified in this Report so that they will be available over the next 18 months.

Appendix "A"

COURT OF APPEAL REGISTRAR'S REVIEW SHEET - PRISONER APPEAL

1. Appeal file name and file #:
2. Date review completed:
3. Is prisoner currently in custody? If yes, where?
4. Has prisoner been made aware that he can request legal counsel through Nova Scotia Legal Aid or on a section 684 court application? Details:
5. Date of decision under appeal, including name of court and judge?
6. Charge before lower court? Outcome at lower court?
7. Did the Crown proceed summarily or by way of indictment?
8. Grounds of appeal as set out in Notice of Appeal?
9. What is being appealed? Conviction? Sentence or both?
10. Is there a Publication Ban on the file?

NOVA SCOTIA COURT OF APPEAL

How to complete the forms for an application to appoint legal counsel pursuant to section 684 of the *Criminal Code*.

This guide provides general information only. It may not tell you all you need to know. It does not explain the law. You should speak to a lawyer for legal advice about your situation.

Attached to this guide are the following documents:

- Notice of Application
- Supporting Affidavit

What you must do in advance of making your application

- You must have filed a Notice of Appeal with the Nova Scotia Court of Appeal involving a criminal matter.
- You must have applied for and been refused legal aid through the Nova Scotia Legal Aid Commission.
- You must have exhausted all your appeal remedies within the Nova Scotia Legal Aid Commission and still be refused the services of a legal aid lawyer.

What is the basis for your application?

At the very least you must set out the following information in your Affidavit in support of your application for the appointment of legal counsel:

- Why your appeal is so complex that it requires a lawyer to advance the appeal on your behalf;
- Why you cannot represent yourself on your appeal;
- Why you believe your appeal should succeed;
- That you have exhausted all your rights to legal counsel through the process established by the Nova Scotia Legal Aid Commission and that includes all appeal steps within the Nova Scotia Legal Aid Commission;
- Do not attach any letters sent to you by the Nova Scotia Legal Aid Commission advising you that your appeal has no legal merit. You may request and the Commission

will provide you with a letter that confirms you have been denied legal aid and that you have completed all appeal steps available to you through Nova Scotia Legal Aid. You should attach that letter to your affidavit.

Steps

Follow these steps to file your application for the appointment of legal counsel:

1. Read the attached forms and this information sheet and try to understand how to make the application for the appointment of legal counsel.
2. Complete and file with the court the Notice of Application. The Notice of Application is a fill in the blank form. It must also be served on the other parties.

Your application will be heard in Court of Appeal Chambers which is held on Thursdays at 10:00 am. You must attend this court hearing. You must choose the Thursday you wish to have your application heard that allows 2 clear days (not counting weekends or holidays) for both the court and the other parties involved to receive your documentation. For example your application and supporting Affidavit would have to be filed with the Registrar of the Court of Appeal and received by the other parties to the application no later than 4:30 pm on a Monday for the following Thursday. In this example the 2 clear days are the Tuesday and Wednesday.

3. Complete and file with the court your supporting Affidavit at the same time as you file your Notice of Application. The Affidavit must also be served on the other parties with the Notice of Application. The attached Affidavit form is NOT a fill in the blank form. You must use your own sheet of paper and style it in the format provided.

Your Affidavit must be sworn before a Commissioner of Oaths or a lawyer. You must provide as much detail as possible in the Affidavit and include the information requested in the above section entitled: **What is the basis for your application?**

4. You must inform the Registrar of the Court of Appeal, Annette M. Boucher by telephone at 424-6187 if you are in custody at the time you make your application as arrangements must be made with the institution to have you brought to court for the hearing of the application.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

Appellant/Applicant

- and -

Her Majesty the Queen

Respondent

NOTICE OF APPLICATION

TAKE NOTICE that the Appellant/Applicant will make an application for the appointment of legal counsel pursuant to section 684 of the ***Criminal Code of Canada*** in Court of Appeal Chambers on Thursday, the _____ day of _____, 20____ at the hour of 10:00 AM.

In support of the application attached is the supporting Affidavit of the Appellant/Applicant.

Dated this _____ day of _____, 20_____.

Appellant/Application
(Print and sign your name)

This notice must be sent to:

- Annette M. Boucher, Registrar, Nova Scotia Court of Appeal
1815 Upper Water Street, Halifax NS B3J 1S7 (FAX # 424-0524)
- Edward Gores, NS Department of Justice (FAX # 424-1730)
- Kenneth Fiske, Public Prosecution Service (FAX # 424-0653)
- Walter Yeadon, Nova Scotia Legal Aid Commission (FAX # 420-3471)

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

Appellant/Applicant

- and -

Her Majesty the Queen

Respondent

AFFIDAVIT

I, _____, of _____, Nova Scotia, hereby
make oath and say as follows:

1. THAT I am the Appellant/Applicant on this appeal and make this Affidavit in support
of my application for the appointment of legal counsel pursuant to section 684 of the
Criminal Code of Canada.

2. THAT

3. THAT

include as many additional paragraphs as required.

SWORN TO at Halifax, in the Halifax)
Regional Municipality, Province of Nova)
Scotia, this day of _____, 20 ____)
)
)
)
)

Commissioner of Oaths

Appellant/Applicant

MEMORANDUM

To: The Superintendent of _____ Institution

Date: _____

Subject: _____
(Name of Inmate)

This inmate appeared in Court of Appeal chambers today. The Court has been advised that Nova Scotia Legal Aid is willing to provide legal assistance to this inmate if a lawyer willing to take the matter can be located and a suitable retainer negotiated. It is up to the inmate to find a lawyer willing to represent him/her on the appeal. It is important that the inmate be given every reasonable opportunity to contact lawyers by telephone and receive returning calls from legal counsel in order to assist in ensuring that counsel is located for the purposes of this appeal. The Court requests that all reasonable opportunities of this nature be provided to the inmate. **THIS IS NOT A COURT ORDER.**

This inmate's next Court date is _____.

DATED at Halifax this _____ day of _____, 20____.

Presiding Judge or Registrar

The Registrar agreed to make our information resources available to the institutions. Inmates do not have access to the internet and so our internet materials will be placed on a CD Rom and made available.

One problem that arises occasionally is that a factual dispute exists between an inmate and Correctional authorities about the inmate's treatment in relation to preparation of court documents or preparation for oral submissions to the Court. It will occasionally be desirable for the Correctional authorities to have legal representation and to place evidence before a judge or the Court. The Correctional representatives agreed to look into what steps might be taken to expedite this process in the rare occasions when it becomes necessary.

Appendix "B"

DATE

Name of prisoner
c/o Central NS Correctional Facility
90 Gloria McCluskey Avenue
Dartmouth, Nova Scotia
B3B 2B9

Dear _____,

Re: Appellant v. Her Majesty the Queen, CAC

I am writing to you to confirm that your appeal from the decision of Judge _____ has been filed with the Nova Scotia Court of Appeal on _____.

I encourage you to contact the Nova Scotia Legal Aid Commission to determine whether you qualify for legal representation on this appeal.

Once you have exhausted all your appeal remedies within the Nova Scotia Legal Aid Commission if you are still refused the services of a legal aid lawyer, you may make an application to the Nova Scotia Court of Appeal, to request the appointment of legal counsel to represent you on this appeal pursuant to section 684 of the *Criminal Code*. I enclose an information package on this process.

Yours truly,

Annette M. Boucher
Registrar

c.c. Kenneth Fiske, Public Prosecution Service
Walter Yeadon, Nova Scotia Legal Aid Commission

Appendix “C”

DRAFT - Protocol Respecting Applications for Disclosure, Production of Third Party Records and Fresh Evidence on Criminal Appeals

Introduction

- [1.] This protocol contains suggestions as to how applications for disclosure, production of third party records and for fresh evidence may be handled in the Nova Scotia Court of Appeal. The protocol is not binding on the Court or parties and the approaches suggested may either be adapted or completely reframed in light of the circumstances of a particular case.
- [2.] When an application for production of third party records, disclosure or fresh evidence is made, the Chief Justice should consider whether to appoint a case management judge and/or panel.

Applications for Third Party Production

- [3.] Generally speaking, the *Code* provisions relating to third party records should be applied, with all necessary changes, to applications for third party production on appeal which would have fallen within the ambit of the *Code* provisions had the production been sought at trial.
- [4.] If a case management judge and/or panel is appointed, the case management judge and panel will exercise the authority conferred by Rule ____.
- [5.] A case management judge and/or panel should hold a case conference to determine whether a proper application for production has been filed and to address issues relating to service of notice on all appropriate parties, the time for hearing the application by a panel, whether portions of the application must be heard *in camera* and all other preliminary procedural matters.
- [6.] In the case of a self-represented applicant, the case management judge may direct the Crown to take responsibility for ensuring that proper notice of the application has been given.

- [7.] The case management judge should take the steps necessary to ensure that third parties affected by the application have the opportunity to obtain legal representation. There is in place an understanding between Nova Scotia Legal Aid and the Crown that Nova Scotia Legal Aid will represent third parties whose medical and therapeutic records are the subject of a production application.
- [8.] In determining the timing for the application of third party records, the case management judge should consider whether there are issues on appeal which will not or are unlikely to be affected by the disposition of the third party records application.
- [9.] If there are, the case management judge should then consider whether it would be in the interests of justice to bifurcate the argument of the appeal by directing that all or some of the issues not dependent on the third party records should be argued before or at the same time as the application for production.
- [10.] In making that determination the case management judge should consider the likely outcome of the appeal if the appellant were to succeed on the issues related on the third party records as compared to the likely outcome if the appellant were to succeed on the other issues.
- [11.] Generally speaking, if success on the issues related to the third party records would be unlikely to lead to any disposition of the appeal more favourable to the appellant than success on the other issues, the application for production should be set down to be argued immediately after the argument of the other grounds of appeal or at some later date. Otherwise, a date for hearing of the application before a panel should be set and that date should be before the date set for hearing of the appeal.
- [12.] The third party records which are the subject of the application should be available for the panel on the date set for the hearing of the application so that if the panel decides to order production to the Court that may occur forthwith.
- [13.] Generally speaking, if production is ordered to the Court, counsel should be given the opportunity to make additional submissions as to whether production should be ordered to the defence and to the Crown. The case management judge may direct that such additional submissions be submitted in writing.

- [14.] If a panel orders records produced to the defence, the case management judge should consider convening a further case management conference to determine whether a fresh evidence application will be required and, if so, to give directions as to the timing and form of that application.

Application for Disclosure

- [15.] A case management judge should convene a case management conference to clarify what is being sought, what is objected to and on what basis. The applicant should prepare an itemized list and the Crown should state its position with respect to each item.
- [16.] A case management judge should establish a time for the hearing of the application for disclosure pending appeal. In deciding whether the application should be heard at the time of argument of other issues on appeal or prior to the hearing of the appeal, the case management judge should take into account the factors referred to above in the section on production.
- [17.] If a panel orders further disclosure to the defence, the case management judge should consider convening a further case management conference to determine whether a fresh evidence application will be required and, if so, to give directions as to the timing and form of that application.

Applications for Fresh Evidence

- [18.] When a fresh evidence application is made, a case management judge should consider whether it would be appropriate to convene a case management conference to clarify what is proposed by way of fresh evidence, whether the admission of the evidence is objected to and on what basis.
- [19.] The case management judge should consider whether it would be desirable to give directions as to the material to be filed for an application to adduce fresh evidence. In general, the application to adduce fresh evidence will be heard at the same time as the argument of the appeal on its merits. However, if persuaded that it would be more efficient to do so, the case management judge may direct that the fresh evidence application be dealt with before a panel prior to the date set for the hearing of the appeal on its merits.

Resolution Conferences

- [20.] At the request of a party or on the judge's own motion, a case management judge may convene a resolution conference to determine whether it may be possible to resolve any of the issues raised by an application or to refine or limit the issues to be addressed on an application or on an appeal. The Chief Justice may designate a judge to preside at the conference who will not take part in the hearing or disposition of any application related to the appeal.

APPENDIX “D”

- 21
- (1) The Chief Justice may appoint a judge of the Court of Appeal, or a panel of judges of the Court of Appeal, to assist in the management of an appeal.
 - (2) A party may request the appointment of an appeal management judge, or panel of judges, by filing a request with the registrar.
 - (3) An appeal management judge, or panel of judges, may give directions that are consistent with this Rule 91 and determine motions.
 - (4) Directions may be given and motions may be heard in conference, by correspondence, in chambers, by teleconference, or otherwise, as the appeal management judge, or panel of judges, decides.
 - (5) The following are examples of subjects that may be dealt with in judicial management of an appeal:
 - (a) setting tasks and deadlines to complete all steps to the hearing of the appeal;
 - (b) settling the order of argument;
 - (c) limiting the time allocated to each party for argument;
 - (d) settling the issues to be argued and determined;
 - (e) scheduling motions before the hearing of the appeal.
 - (6) Directions may be varied on motion.
 - (7) An appeal management judge may direct that the conference be recorded by the Court of Appeal.
 - (8) An appeal management judge or a panel may make an order after a conference that does any of the following:
 - (a) records the subjects discussed, and agreements made, at the conference;
 - (b) records directions given at the conference, or gives further directions;
 - (c) gives effect to a ruling on an issue relating to the appeal book or a factum, or procedure for an upcoming hearing submitted to the judge at the conference with the consent of the parties.

- (9) An appeal management judge who determines relief must do so by order if a party seeks relief from compliance with these Rules, and an order is required.

Appendix “E”

List of topics for discussion with representatives of correctional institutions (revised June 5, 2007)

1. Warrants to convey - any problems from the correctional institution point of view?
2. Access to counsel and co-appellants while in the Law Courts
3. Access to counsel by telephone - or access to lawyers when trying to retain counsel
4. What is the protocol for access by counsel to their clients in custody at the institution?
5. Access to telephone for telephone chambers - arrangements, scheduling, is a regular call time appropriate?
6. Communication by inmates with the Court and vice versa - access to telephone, fax, e mail?
7. Preparation time for self represented inmates - access to research materials, word processors, supplies such as paper, markers, post-its, etc to ease transcript review - what time is available within the institution
8. Transporting inmates to the Law Courts for a ½ day or full day appeal - when do they depart the institution; have they eaten etc
9. Illiteracy: how do the institutions assess that? What do they do about it whether the inmate is an appellant or a respondent? What do they do if another inmate wants to “help” in the appeal?
10. What to do if inmate complains about treatment or ability to present case etc - can we develop a protocol so facts/policies are known to the Court?
11. What information resources about appeals would the institution like to have/be willing to make available if supplied by the Court for the purpose?

Appendix “F”

Bench/Bar Appellate Procedures Committee Meeting November 26, 2007 at 1:45 pm

Present: Patrick Duncan Q.C., Kenneth Fiske Q.C., Walter Yeadon, Monica McQueen, Annette Boucher, Saunders, J.A., Cromwell, J.A. and invited guest Sean Kelly, Director, Correctional Services

1. The Committee welcomed Mr. Kelly and turned to discussion of the 11 points on the attached list of topics for discussion with representatives of correctional institutions.
 1. Warrants to convey: Very few problems have been encountered at the Court of Appeal. It was agreed, however, that there should be a designated person at the Court with whom the correctional facilities can communicate in the event that they foresee delays in getting inmates to court on time.
 2. Access to counsel and co-appellants while in the Law Courts: After considerable discussion, it was agreed that these situations had to be addressed on a case by case basis and that it was not going to be productive to develop a protocol in this area.
 3. & 4. Access to counsel by telephone and access by counsel to clients in custody in the institutions: After considerable discussion, the following points were agreed upon:
 - (i) Inmates should be able to call the Office of the Registrar of the Court of Appeal. Mr. Kelly agreed to look into the possibility that the Office of the Registrar of the Court of Appeal could be added to the list of toll free calls available to inmates.
 - (ii) The Court, in conjunction with Mr. Kelly, will design a form to be completed by a judge in circumstances in which the judge considers it important that the inmate have all reasonable opportunity to contact lawyers with a view to retaining them for representation on an appeal. Typically, this will be required when Legal Aid is willing to provide counsel for the appeal but the inmate and Legal Aid have not been able to agree on a lawyer to take the appeal. This form will indicate to the Corrections staff that there is a legitimate need for the inmate to attempt to contact lawyers with a view to retaining them. The form may also be suitable when it becomes clear, even without an appearance by the inmate, that

Legal Aid is in place but a lawyer must be found to represent the inmate. The form should also set out the next court date. A draft of the form is attached.

- (iii) It was agreed that when counsel wishes to speak to a potential client or client, it should be possible for the lawyer to book a mutually convenient time for a telephone call with the inmate. This will be particularly important where the inmate is attempting to retain counsel and a lawyer who has been contacted wishes to call the inmate back.
5. Telephone chambers: Mr. Kelly advised that other than between 12 and 1 pm, pre-booked telephone conferences with inmates do not present any problem in principle. Once again, an appropriate contact person should be found who can facilitate setting up such calls. It should also become part of the protocol that an inmate would have access to a calendar for the purposes of a telephone conference call with the Court. The Registrar and Mr. Kelly will develop a protocol and identify an appropriate designated person or persons. It was also agreed that we should further explore the possibility of video conferencing given that the equipment is now available at the Burnside Institution and the cost appears to be fairly modest (in the range of \$4,000 to \$5,000).
 6. Communication by inmates with the Court: Telephone communication has already been addressed. It was agreed that faxes should be used only for time sensitive material and that otherwise interdepartmental mail may be used and generally will result in documents being delivered the next day. It was agreed that we needed a contact person in the Institution for those situations in which faxes were necessary given the time sensitive nature of the material. It was also agreed that it might be useful if material that was faxed from the Court indicated to the correctional authorities that a response by fax should be forthcoming if possible given the urgency of the material.
 7. Preparation time and materials for self represented inmates: Mr. Kelly reported that he has had this matter under active consideration for some time. He is looking into the possibility of providing electronic law library materials. The correctional authorities find printing and photocopying to be particular challenges. The Court should look into whether it could provide a CD with macros for the required documents which the inmate could complete in electronic form and forward the CD back to the Court for printing and distribution of copies.
 8. Transporting inmates to the Law Courts: Mr. Kelly confirmed that generally inmates start to get ready about two hours ahead of departure and should be ready to go out about an hour ahead of time. Inmates heading to court are

given a bagged breakfast and if they co-operate with the timetable at the institution should have adequate opportunity to have breakfast before they come to court. If they are in the court house over the lunch hour, they are provided with a meal at that time. The busiest day for transporting inmates is Monday and it was suggested that the Court should avoid scheduling inmate appeals on Mondays.

9. Illiteracy: Mr. Kelly advised that there are resources within the institution to assist inmates in putting their thoughts on paper and in helping inmates understand material they receive in writing. It was agreed that Mr. Kelly, in co-operation with Annette Boucher, would provide something to use which would allow us to re-enforce with the particular inmate the availability of resources of this kind. It was also agreed that an Offender's Handbook which is used in the institutions would be provided to the Court.
10. Inmate complaints about treatment or ability to present his or her case: It was agreed that for each institution the Court needed a contact person and a protocol indicating that if a matter of this nature is raised, the Registrar will communicate with the named person and should expect to receive back from the institution very promptly a description of the factual situation as the institution understands it. It was also agreed that we would add to the mandate of the designated advance reading judge on self represented files the issue of adequate preparation facilities for the inmate. This would permit this issue to be flagged if there was any indication in the material that it was a problem. It was also agreed that this should be an aspect of our case management process and that it is a matter that could be dealt with by a case management judge if a problem arises.
11. Information resources about appeals: The institutions would be willing to assist in the distribution of this material and at least one institution has requested a supply of this material to have available for inmates.

DRAFT FORM CONCERNING COMMUNICATION WITH LEGAL REPRESENTATION

MEMORANDUM

To: The Superintendent of _____ Institution

Date: _____

Subject: _____
(Name of Inmate)

This inmate appeared in Court of Appeal chambers today. The Court has been advised that Nova Scotia Legal Aid is willing to provide legal assistance to this inmate if a lawyer willing to take the matter can be located and a suitable retainer negotiated. It is up to the inmate to find a lawyer willing to represent him/her on the appeal. It is important that the inmate be given every reasonable opportunity to contact lawyers by telephone and receive returning calls from legal counsel in order to assist in ensuring that counsel is located for the purposes of this appeal. The Court requests that all reasonable opportunities of this nature be provided to the inmate. **THIS IS NOT A COURT ORDER.**

The inmate's next Court date is _____.

DATED at Halifax this _____ day of _____, 20.....

Presiding Judge or Registrar

List of topics for discussion with representatives of correctional institutions (revised June 5, 2007)

1. Warrants to convey - any problems from the correctional institution point of view?
2. Access to counsel and co-appellants while in the Law Courts
3. Access to counsel by telephone - or access to lawyers when trying to retain counsel
4. What is the protocol for access by counsel to their clients in custody at the institution?
5. Access to telephone for telephone chambers - arrangements, scheduling, is a regular call time appropriate?
6. Communication by inmates with the Court and vice versa - access to telephone, fax, e mail?
7. Preparation time for self represented inmates - access to research materials, word processors, supplies such as paper, markers, post-its, etc to ease transcript review - what time is available within the institution
8. Transporting inmates to the Law Courts for a ½ day or full day appeal - when do they depart the institution; have they eaten etc
9. Illiteracy: how do the institutions assess that? What do they do about it whether the inmate is an appellant or a respondent? What do they do if another inmate wants to “help” in the appeal?
10. What to do if inmate complains about treatment or ability to present case etc - can we develop a protocol so facts/policies are known to the Court?
11. What information resources about appeals would the institution like to have/be willing to make available if supplied by the Court for the purpose?

Appendix “G”

Bench/Bar Appellate Procedures Committee Meeting June 20, 2008 at 9:30 am

Present: Kenneth Fiske, Q.C., Monica McQueen, Annette Boucher, Q.C., Gil Rhodes, Ed Muise, Saunders, J.A., and Cromwell, J.A.

The purpose of the meeting was to discuss various issues that sometimes arise with respect to inmates involved in proceedings before the Nova Scotia Court of Appeal.

The Correctional representatives agreed to provide the Registrar with an Organizational Chart, contact individuals and backup contact individuals for each of the institutions in this Region.

It is important that information sent to the Court from the Correctional facility will be provided to the inmate and the Correctional facility should bear this in mind. The Correctional authorities had no problem with this but also agreed to make that point again with staff. The Registrar also will make that explicit in her request for information from the institutions.

It was explained that some of the institutions have the technology in place for video-conferencing and that in all institutions arrangements can be made for telephone calls between the Court and inmates when necessary.

The same contact people as mentioned above could also be used to help facilitate urgent communication between the Registrar and inmates concerning court proceedings.

The institutions will also review their practices about ensuring that inmates acknowledge receipt of legal documentation. This should help avoid some of the problems that have sometimes arisen with inmates apparently not receiving or claiming not to have received legal materials essential for their court proceedings.

We were provided with a Memo prepared by Corrections Canada legal personnel outlining statutory provisions, regulations and Commissioner’s Directives relating to inmates facilities and access to the means of preparing court documents (Attached to original).

We were advised that there is no formal scheme in place to assist inmates who have literacy challenges although we were told that these challenges generally have been met either by other inmates or staff assisting the self represented inmate. All CSC institutions offer educational programs, including basic literacy, if required, via qualified teachers in

their schools. All CSC inmates do have access to computers for purposes of preparing court documents. However, the number of computers is limited and as a result the individual inmate's time with a computer will also be limited.

The Registrar agreed to make our information resources available to the institutions. Inmates do not have access to the internet and so our internet materials will be placed on a CD Rom and made available.

One problem that arises occasionally is that a factual dispute exists between an inmate and Correctional authorities about the inmate's treatment in relation to preparation of court documents or preparation for oral submissions to the Court. It will occasionally be desirable for the Correctional authorities to have legal representation and to place evidence before a judge or the Court. The Correctional representatives agreed to look into what steps might be taken to expedite this process in the rare occasions when it becomes necessary.

APPENDIX "H"

1 What level of assistance is provided to self-represented prisoners in provincial or federal institutions (access to resources such as transcripts, other materials, fax & photocopying, case law, texts, help for those who may be illiterate, outside calls to counsel, etc.) in advancing an appeal before the court?

PROVINCE	RESPONSE
Court Martial Appeal Court	Issue does not arise; soldiers in custody are usually represented by counsel. Should a problem arise, issue may be brought to Court's attention through the Registrar. Court may direct remedial measures.
British Columbia	Their impression is that the access to resources provided incarcerated persons is adequate; can't remember an appellant raising the issue; on-line resources available through Legal Services Society and on-line at http://www.lss.bc.ca/resources/pubs_subject_criminal_law.asp

Saskatchewan	<p>The Government of Saskatchewan absorbs the cost of the transcripts of all incarcerated, self-represented litigants. No fees are charged to such litigants. With respect to practical help, the Registrar guides such accused procedurally. Concrete examples are:</p> <ol style="list-style-type: none">1. sending the accused's notice of appeal to the Crown;2. if the appeal is not appreciably out of time, and it is believed that the delay could have been exacerbated by the fact of incarceration, seeking the consent of the Crown to the filing;3. if the accused is seeking some interlocutory relief, e.g., appointment of counsel or interim release, providing precedents and generally guides the accused procedurally;4. when the accused files a document or faxes something, making copies and attends to the distribution;5. assisting with respect to access to the court via video-conferencing;6. liaising with Legal Aid with respect to the appointment of counsel, and on an exceptions basis, taking an active role in securing counsel.
Manitoba	<p>Crown will typically order transcripts (mostly this occurs relative to sentence appeals); Court will provide procedural advice to self-reps.</p>

New Brunswick	Transcripts provided by the Crown pursuant to our Rules of Court; court does not directly become involved with prisoner's representation unless the case, being complex, becomes appropriate for s. 684 intervention when Legal Aid is denied; informal consultation sometime occurs between Registrar and Legal Aid.
Prince Edward Island	On "prisoner appeals" the Crown is responsible for the preparation of the Appeal Book which includes the transcript; otherwise there is no formal assistance available; Registrars do assist with some of the procedural requirements.

2 How the court handles complaints from a prisoner with respect to # 1 above, whether by a single judge of the court in Chambers, or following a hearing before a full panel. Further, how does one, for example, secure “evidence” of such difficulties, while at the same time affording the offender and corrections officials the chance to be heard?

PROVINCE	RESPONSE
Court Martial Appeal Court	<u>While such issues are usually dealt with by the Chief Justice, this particular issue has not arisen. Section 248 of the <i>National Defence Act</i> provides that an appellant who is sentenced to a period of imprisonment is usually released from detention or imprisonment until the determination of the appeal.</u>
British Columbia	Has never had such a complaint.
Saskatchewan	Complaints so far infrequent.
Manitoba	
New Brunswick	Complaints from prisoners are very infrequent.
Prince Edward Island	No experience in this regard.

3 To what extent a full panel of the court may be obliged to sit on interlocutory motions in criminal matters, or whether such might be finessed, in certain circumstances, by having the Chief Justice name the chair/president of that panel, or some other judge, to hear and rule upon such motions, e.g. disclosure, production of third party records, fresh evidence applications, and the like?

PROVINCE	RESPONSE
Court Martial Appeal Court	Chief Justice deals with case management issues (i.e., preliminary motions to disclose, complaints about failure to disclose); if he sees that a particular pre-hearing motion may be determinative, he will order that the matter be heard by a full panel; if the appeal hearing has already been scheduled, then he will direct that a panel consider the pre-hearing motion as quickly as possible.
British Columbia	In certain situations, have appointed a case management judge to address preliminary issues in a complex criminal appeal or one in which the appellant is self-represented and difficult; done informally in most cases; but do have a practice direction providing for case management in cases where an issue on appeal concerns the competency of the trial counsel. See http://www.courts.gov.bc.ca/CA/criminal%20practice%20directives/Ineffective%20Assistance%20of%20Trial%20Counsel.htm

Saskatchewan	Occasionally (but not frequently) using an appeal management judge who establishes a procedure resulting in written instructions. Examples include: counsel using a factum hyper-linked to exhibits; incompetent counsel cases; new emerging category - <i>habeas corpus</i> applications from prisoners moved from one form of custody to another; working through how to handle this.
Manitoba	
New Brunswick	No response.
Prince Edward Island	Usual practice is to have one judge hear interlocutory motions such as extension of time, release pending appeal, and appointment of counsel under s. 684. New rule will address such applications as the existing procedure thought to be somewhat fragmented. Applications to admit new evidence usually dealt with at the same time as the appeal.

4 The extent to which the court participates in case management of criminal appeals, and by what process the case management judge is assigned.

PROVINCE	RESPONSE
Court Martial Appeal Court	Case management of criminal appeals, if necessary, is dealt with informally at the request of the Chief Justice.
British Columbia	Done informally and by request from the Chief Justice.
Saskatchewan	Occasional use of an appeal management judge establishing procedures.
Manitoba	Chambers judge conducts preliminary review of new case and makes an assessment of level of complexity so as to estimate time required to hear appeal; if either party is requesting more than one day, a judge (usually the Chief) will informally hold a pre-trial conference in Chambers.
New Brunswick	Cases are managed on an individual basis rather than being categorized; no written protocols are developed but on any case identified by the Registrar as being potentially problematic, the Chief Justice will give appropriate directives.
Prince Edward Island	Members of the court do not case manage appeals. Restricted by the number of judges who sit on appeals; staff does the case management; provisions in the Rule to address appeals that languish.

5 Whether the court has a kind of “early warning system” such that the Registrar, or counsel, or a judge on his/her own motion might flag the file as being sufficiently complex to warrant the court’s early intervention so as to prevent delay and ensure a fair and timely appeal.

PROVINCE	RESPONSE
Court Martial Appeal Court	Each case is set down by the Chief Justice. Any problematic case is identified at this point.
British Columbia	“Informal early warning system” - typical that the need for a case management judge is identified by the Registrar or by the Crown respondent.
Saskatchewan	No.
Manitoba	No - other than time required to hear appeal - determined in Chambers.
New Brunswick	Registrar can identify case as being potentially problematic.
Prince Edward Island	In small community notorious cases are usually anticipated ahead of time.

6 Whether the court has embodied such practices in the form of a Rule, a protocol, a bench memorandum, or something else, and why?

PROVINCE	RESPONSE
Court Martial Appeal Court	No. It is not felt that a rule or protocol is required at this time. The matter may be referred to the Rules Committee for consideration.
British Columbia	Only the practice directive regarding the alleged incompetence of trial counsel.
Saskatchewan	
Manitoba	No.
New Brunswick	No.
Prince Edward Island	Not yet, but a committee is working on the criminal appeal rule and there are draft rules at this stage.