

Legal Research in Canada's Provincial Appellate Courts

MELANIE R. BUECKERT *

I. INTRODUCTION

Very little has been written about the legal research staff employed by Canada's provincial appellate courts. While there have been a few articles addressing the Supreme Court of Canada's clerkship program,¹ very few essays exist on the subject of the research practices of the highest courts in Canada's provinces.² While our neighbours to the south have endured the publication of several tell-all exposés published by or with the assistance of former Supreme Court clerks,³ former clerks are regularly sought out for reminiscences

* Ms. Bueckert graduated as the gold medalist from the University of Manitoba's Faculty of Law in 2003 and received her call to the Manitoba Bar in 2004. She returned to the law school to earn her Master's degree in 2008. She is Legal Research Counsel with the Manitoba Court of Appeal and a sessional lecturer with the Faculty of Law. The opinions expressed in this paper do not necessarily reflect those of her employer.

¹ See e.g. Brian Crane, "Law Clerks for Canadian Judges" (1966) 9 Can Bar J 373; Michael John Herman, "Law Clerking at the Supreme Court of Canada" (1975) 13 Osgoode Hall LJ 279; Mitchell McInnes, Janet Bolton & Natalie Derzko, "Clerking at the Supreme Court of Canada" (1994) 33 Alta L Rev 58; Julie Dagenais Blackburn et al, "Le programme de clerks à la Cour suprême du Canada" (1995) 36 C de D 763; Lorne Sossin, "The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada" (1996) 30 UBC L Rev 279. The Supreme Court's clerkship program commenced in 1967 and continues to this day. As indicated by its title, this article does not address the approaches to legal research taken by the territorial courts, federal courts or the Supreme Court, nor does it address the legal research challenges faced by lower courts across Canada.

² There are a few articles encouraging students to consider clerkships as a mechanism for fulfilling their articling requirements (see e.g. Helen Burnett, "An Insider's View" (2008) 3 Can Law 4 Stud 23). Aside from these promotional pieces, most of the existing literature relates to the Quebec Court of Appeal (see e.g. Louise Vadnais, "Le juge d'appel et son recherchiste" (2004) 34 J Barreau; Shaun Finn & Benedicte Martin, "A Passionate Appeal", online: Quebec Court of Appeal <http://www.tribunaux.qc.ca/c-appel/English/Clerkship/Lancer_l_appel_translation.pdf>).

³ Such as Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (1979) and Edward Lazarus' *Closed Chambers: The First Eyewitness Account of the Epic Struggles inside the Supreme Court* (1998). More recent books regarding the Supreme Court's clerks include Todd C Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (Stanford: Stanford University Press, 2006) and Artemus Ward & David L Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York: New York University Press,

about their clerkship experience and the judges they have clerked for⁴ or their views on various legal matters.⁵ While by no means an American-style exposé, the modest aim of this article is demystification. It is hoped that the information it contains will signal the start of increased transparency and greater dialogue within the legal profession on this important but often overlooked topic.

II. INDEPENDENT JUDICIAL RESEARCH

A preliminary matter to be considered when discussing legal research in the courts is the extent to which judges are permitted to conduct their own independent research, apart from the materials provided by the parties in the case at bar. While there may be a few individuals who would argue that judges should not conduct any independent research, and should confine themselves to the materials provided, I would suggest that most accept that judges are permitted to conduct their own legal research. It is no secret that judges often confer amongst themselves about the cases before their courts. I would characterize this as a form of judicial legal research.

The more contentious point relates to the role of independent judicial legal research post-hearing; that is, whether or not, after finding a pertinent authority, judges are required to bring it to counsel's attention and invite further submissions in light of it. Some feel counsel should be alerted and permitted to submit further argument, or that another hearing should be held. Others say counsel had their opportunity; if they missed something, it is permissible for the judge to find it and rely on it without bringing it to counsel's attention. A more moderate position would be that the court is permitted to rely on extra authorities related to points raised by counsel, but if a new line of legal reasoning is uncovered, relating to an area of law not addressed by the parties, the court should advise counsel before proceeding.⁶

There are certainly older cases which refer to judges conducting their own legal research, but there is not a great deal of case law directly on point.⁷ While some Canadian courts have made it quite clear that such research is permissible,

2006). Judges of the United States Supreme Court have employed law clerks since 1882: Justice William H Erickson, "Why an Oath for Law Clerks?" (1975) 14 Judges J 20.

⁴ For an early example, see Alfred McCormack's "A Law Clerk's Recollections" (1946) 46 Colum L Rev 710. More recently, see e.g. James S Whitehead, "Memories of a Stevens Clerkship" (2010) 24 CBA Rec 43; Robert Klonoff, "Memories of a Law Clerk" (2010) 47 Hous L Rev 573.

⁵ See e.g. Rachel Clark Hughey, "Effective Appellate Advocacy before the Federal Circuit: A Former Law Clerk's Perspective" (2010) 11 J App Pr & Pro 401; Owen Glist, "The Scales of Justice: Former Clerks Weigh in" (2011) 79 Fordham L Rev 1503.

⁶ This has been the general rule followed by the Manitoba Court of Appeal in recent years.

⁷ See e.g. *Brassard v Langevin* (1877), 1 SCR 145, 1877 CarswellQue 6 (WL Can), *George N Morang & Co v Publishers' Syndicate, Ltd.* (1900), 32 OR 393, [1900] OJ no 142 (available on QL) and *R v Mulvihill*, [1914] BCJ no 29 (available on QL) (CA).

others seem less inclined to that view. The Alberta Court of Appeal has stated quite strongly that once the hearing has been held, a judge has no duty to consult counsel for their comments if the judge's own research turns up relevant case law.⁸ The Ontario Court of Appeal has also confirmed that "There is, of course, nothing wrong in a trial judge seeking assistance on the law wherever he can find it".⁹ The Newfoundland and Labrador cases of *R v Chuett*¹⁰ and *Atlantic Auto Inc v Furey*¹¹ are to similar effect. However, in the earlier trial-level decision of *R v Barlow*, Meldrum J held that a judge may conduct independent legal research, but if he or she finds an authority overlooked by counsel, the judge has a duty to offer each side an opportunity to be heard on the point before making a decision.¹² Judges occasionally lament the lack of research assistance provided by counsel,¹³ or the difficult position into which they are placed in cases involving unrepresented litigants,¹⁴ arguing that it is not their job to conduct all of the legal research necessary to decide the case.

Oftentimes issues relating to independent judicial research overlap with the concept of judicial notice. It seems clear that the extent to which a judge may conduct their own research into facts is different, and much more limited, than the extent to which they may conduct their own legal research. The notion of judicial notice generally relates to extra-legal research, or research into facts – historical, sociological or otherwise.¹⁵ On the other hand, judicial legal research is more closely tied to the concept of judicial knowledge¹⁶ or research into ideas.¹⁷ It is generally accepted that judges "may not – apart from what is allowed by the doctrine of judicial notice – have regard to materials which are not in evidence before him [or her]. Law reports, law texts, and legal journals are the only exception."¹⁸

⁸ *R v Rhyason*, 2006 ABCA 367 at para 28, 397 AR 163. See also *R v Doz* (1985), 59 AR 185 at para 72, 19 CCC (3d) (CA).

⁹ *R v Rowbotham* (1988), 25 OAC 321 at para 116, 41 CCC (2d) 1 (CA).

¹⁰ (2002), 217 Nfld & PEIR 87 at para 52, 651 APR 87 (TD).

¹¹ 2011 NLTD 1 at para 34, 2011 CarswellNfld 3 (WL Can) (G).

¹² (1984), 57 NBR (2d) 311, 148 APR 311 (TD).

¹³ See e.g. *R v CLS*, 2009 MBQB 103 at para 40, 2009 CarswellMan 165 (WL Can).

¹⁴ See e.g. *Simpson v Trowsdale*, 2007 PESCTD 3 at paras 14-15, 264 Nfld & PEIR 1.

¹⁵ The Supreme Court had occasion to address the concept of judicial notice in the case of *R v Spence*, 2005 SCC 71, [2005] 3 SCR 458. See also Justice Binnie's article, "Judicial Notice: How Much is too Much" (2003) Spec Lect LSUC, *Montana Band v Canada*, [1994] 3 CNLR 44, [1994] 1 FC 425 (TD), *R v Hamilton* (2004), 72 OR (3d) 1, 241 DLR (4th) 490 (CA) and *Works v Holt*, [1976] OJ no 192 (available on QL), 22 RFL 1 (CA). With respect to historical facts, see *Canadian Union of Public Employees v Hachey*, 2011 NBCA 41, 2011 CarswellNB 41, and *R v Paul* (1998), 196 NBR (2d) 292, 158 DLR (4th) 231 (CA).

¹⁶ *R v Sioui*, [1990] 1 SCR 1025 at 1050, 70 DLR (4th) 427.

¹⁷ *R v Bartleman* (1984), 13 CCC (3d) 488 at para 13, 12 DLR (4th) 73 (BCCA).

¹⁸ *C v Saskatchewan* (1984), 37 Sask R 23, 43 RFL (2d) 334 (QB) at para 3.

III. THE NEED FOR LEGAL RESEARCH SUPPORT IN CANADA'S PROVINCIAL APPELLATE COURTS

Before launching into a detailed discussion about how legal research support is provided in Canada's provincial appellate courts, it seems logical to address the preliminary question of whether it is appropriate to provide any such legal research support.¹⁹ While I certainly cannot claim to be unbiased in the matter, I offer three reasons (besides my own job security) why I believe legal research support is necessary in Canada's provincial appellate courts: (a) unrepresented litigants; (b) practical limitations on counsel; and (c) the growing complexity of the law and, as a result, legal research.

A. Unrepresented Litigants

A primary reason why judges need legal research support within the courts is that the necessary research is not being completed by counsel to the parties, as many litigants are self-represented. While self-represented litigants may have a clear grasp of the facts of their cases, they are likely not trained in the art of legal research and therefore cannot be expected to complete the level of legal research required in order for the court to resolve their disputes. Even where one party to a dispute is represented, additional legal research is often required in order to ensure that no legal arguments favourable to the self-represented litigant have been overlooked.

B. Practical Limitations on Counsel

Even where all parties are represented by counsel, there are practical limitations on the legal research that counsel can complete. It is well known that litigation is becoming increasingly expensive; one way to reduce litigation costs is to spend less time and money on legal research. As well, even if counsel were willing and able to conduct extensive research, court rules generally limit the length of facta that counsel are permitted to file.²⁰ While courts will often permit

¹⁹ Of course, it could be argued that the government should not be required to provide funding for additional legal research; the parties should be content to rely on the research conducted by themselves or their counsel and bound by the result, as part of our adversarial system. However, as the courts become more involved in policy-making and as judgments are more widely distributed (without first being scrutinized by a seasoned law report editor), the fact that such judgments become precedents and may affect the course of the law's future development militate, in my mind, in favour of providing such funding.

²⁰ For example, in Manitoba, Rule 29(3) provides that judges may reject facta "on the grounds of excessive length and may give directions regarding the maximum length" (*Court of Appeal Rules*, Man Reg 555/88). The Court has released a guideline indicating that "Any factum exceeding 30 pages is subject to review" (*Court of Appeal Practice Guidelines* (July 2003), online: Manitoba Court of Appeal, <http://manitobacourts.mb.ca/pdf/practice_guidelines.pdf> at §3.5).

lengthier facts in complex cases, it is unlikely that counsel will be able to fully research all of the legal issues raised in a given case and present their findings to the court by way of written submissions.

C. The Law and Legal Research are Becoming More Complex

As the law evolves, changes and grows, the resources available to find, analyze and critique it become more and more voluminous. As a result, research becomes more time-consuming.²¹ In conjunction with the costs associated with legal research, both in terms of accessing proprietary content and the cost of paying lawyers to conduct legal research, the growth of the law and the manner in which it is recorded and evaluated makes it more difficult for counsel to adequately research their cases. As a result, judges require “in-house” legal research support in order to competently adjudicate the disputes brought before them.

A corollary to this point is that judges themselves cannot be expected to be completely familiar with all aspects of this growing and changing body of law. Especially where judges did not practice in a specialized or highly technical area, when they are faced with a complex case involving an area of law in which they have no practical experience, they may require additional research support beyond that provided by the parties or their counsel.

IV. TYPES OF LEGAL RESEARCH SUPPORT

From my review of the current approaches to legal research in Canada's provincial appellate courts, it would appear that there are three main types of legal research support needed in those courts: (a) procedural; (b) pre-hearing; and (c) post-hearing.

A. Procedural

Procedural legal research support could perhaps be characterized as a form of pre-hearing research. It might involve advising specific parties about the appropriate manner in which their appeals should be prosecuted, in terms of the filing deadlines and necessary materials, as well as rules of service and any alternative dispute resolution measures, such as mediation or judicially-assisted dispute resolution (perhaps in the nature of case or pre-appeal conferences). This type of research could also relate to the court's jurisdiction to hear certain matters, or the appropriate manner of proceeding in specific types of disputes.

²¹ There is a broader issue here regarding legal research generally: whether it is a practice area (or a potential area of specialization) in its own right or whether it is simply something all lawyers are capable of doing competently. While my views on the subject might already be apparent, a lengthy discussion of that debate is beyond the scope of this article.

B. Pre-hearing

Pre-hearing research makes appeal hearings run more smoothly. This type of research generally involves a review of the file, including all of the materials submitted by the parties on the appeal, and summarizing them for easy reference during and after the hearing. It is generally meant to focus the panel on the key issues and remind them of the leading authorities, perhaps suggesting questions to be asked of counsel during the hearing. It may even lead to a preliminary disposition or at least an opinion on the merits of the matter.

C. Post-hearing

Post-hearing research generally has less to do with the materials filed by the parties and more to do with unanswered questions remaining after the judges have reviewed all of those materials and conducted the appellate hearing. Post-hearing research can be as simple as confirming or updating the law presented by the parties, or may involve more in-depth research into points grazed by the parties or overlooked altogether. While post-hearing research does not always lead to a specific conclusion, oftentimes researchers conducting in-depth post-hearing research will provide their opinion on the merits of the case to the panel. In some courts, post-hearing research may even extend to drafting the court's decision.

V. POTENTIAL APPROACHES

There are a number of methods for fulfilling the legal research needs of an appellate court.²² The court can hire research lawyers on either a full-time or part-time basis. Alternatively, especially for extraordinarily complex or lengthy cases, lawyers can be hired on a contract basis. A popular method for providing legal research support to judges is through an articling-like clerkship program (which may or may not fulfil provincial articling requirements, either in full or in part). Perhaps the most robust approach to legal research in appellate courts involves some combination of these approaches, with more senior lawyers supervising a team of junior clerks. Of course, there is always the option of not providing any legal research support and requiring judges to conduct their own research or rely on the materials provided by the parties.²³

²² While this article focuses on the use of lawyers or law students to provide legal research support to judges, it may be possible to address a court's legal research needs by increasing its complement of judges or providing more extensive legal research training and resources to its existing members.

²³ Canada's constitution places provincial appellate courts in a rather difficult position in this regard. While the judges themselves are under federal jurisdiction (*Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, Part VII), all other court resources (from the courthouse to administrative assistants to legal research staff) are the responsibility of the provincial governments (*Constitution*

A. Staff Lawyers

A complement of staff lawyers can become a repository for a great deal of institutional knowledge. Over time, they build up significant experience in the matters that routinely come before the court. However, their salaries are generally more expensive than the cost of articling students, and there is the potential for stagnation, if no new researchers are hired for some time and continuing professional development is not encouraged. Generally, staff lawyers are more post-hearing focused, though they may also assist with procedural and pre-hearing research.

B. Hiring Lawyers on Contract Basis

Lawyers hired to assist the court on a contract basis are generally more experienced than articling students employed in a court clerkship program. However, like an articling program, there is more turn-over than with staff lawyers and thus less institutional knowledge. Lawyers hired on a contract basis can be most useful for assisting with extraordinarily long or complex matters or other major court projects. Of course, short-term contracts can provide more budgetary, human resources and workflow flexibility than a contingent of permanent staff lawyers.

C. Clerkship Programs

Given that a court's clerkship program is normally intended to act as an articling or training program for recent law school graduates, they are usually limited to a one year term. While this high turn-over rate maximizes the opportunities available for students to clerk, it also means more time is spent on training than with permanent staff. Students come away from the program with a unique experience and may bring new research techniques or practices to the court. However, as they are less experienced, they are usually not tasked with complex research matters, but instead focus on providing judges with pre-hearing research assistance. Given that the clerkship is intended to be a learning experience, judges also usually strive to acquaint their clerks with all aspects of the appellate process, both pre-hearing and post-hearing. For this reason, clerks may often be seen sitting in on appeal hearings.

D. Combination of Staff Lawyers and Clerks

In my opinion, a hybrid program involving a combination of staff or contract lawyers and recently graduated clerks represents the best of both worlds. While it is more expensive than a standalone clerkship program, it removes responsibility

Act, 1867 (UK), 30 & 31 Vict, c 3, s 92(14)). This may have ramifications with respect to judicial independence.

for supervising the clerks from the judges. While clerks can be tasked with pre-hearing research to assist the judges, staff lawyers can tackle complex post-hearing research.

E. No Research Support

In courts without any form of legal research support, the legal research burden rests solely on the judges, particularly in cases involving unrepresented litigants. While there are research resources specifically designed for judges,²⁴ judges in courts without any legal research support may need to rely more heavily on their judicial colleagues and on library staff when faced with thorny legal research problems.

VI. CROSS-CANADA SURVEY

Ironically, it does not appear that a great deal of research has previously been conducted with respect to the approaches to legal research in Canada's provincial appellate courts. An article published in 1975 lamented the "paltry" number of clerking positions then available in Canada. It noted that, at that time, the Ontario Court of Appeal employed four clerks, the British Columbia Court of Appeal employed three, the Quebec Court of Appeal employed two and the Alberta Court of Appeal had only one.²⁵ As noted in the introduction, there have not been many other articles published on the subject.²⁶

In preparing this article, I contacted my counterparts in Canada's provincial appellate courts to determine the manner in which legal research support was provided in their province. The results of this informal survey of the methods employed by appellate courts across Canada for fulfilling their research needs may be summarized as follows:

²⁴ Such as those prepared by the National Judicial Institute.

²⁵ Herman, *supra* note 1 at 291.

²⁶ *Supra* note 2.

Province	Number of Judges ²⁷	Total Number of Researchers ²⁸	Number of Research Lawyers	Number of Student or Junior Law Clerks ²⁹
British Columbia	24	14.2	2.2	12
Alberta	18	22	14	8
Saskatchewan	11	3	0	3
Manitoba	9	2	2	0
Ontario	24	26	9	17
Quebec	25	34	8	26
New Brunswick	9	2	0	2
Nova Scotia	8	3	0	3
PEI	3	0	0	0
Newfoundland & Labrador	9	2 (1 full-time + 2 part-time)	0.5	1.5

The following is a West to East jurisdiction-by-jurisdiction summary of the approach to legal research support taken in Canada's provincial appellate courts.

A. British Columbia: Court Profile and Overview of Approach to Legal Research Support

British Columbia's Court of Appeal is currently composed of twenty-four judges, of which fifteen are full-time and nine are supernumerary.³⁰ The British Columbia Court of Appeal employs one full-time law officer, who is a senior lawyer. The law officer conducts legal research and supervises the Court's twelve law clerks, who are articling students. The clerks are each assigned to one or two judges for a period of ten to twelve months.³¹ The Court also currently employs a junior lawyer, who is a former law clerk, on a full-time basis to work on a major case presently before the Court. Another senior lawyer with a background in legal publishing proofreads and edits judgments two mornings (eight hours) a week.

²⁷ Includes supernumerary judges.

²⁸ Includes both articling students and lawyers, but not university students.

²⁹ Does not include university students.

³⁰ Online: British Columbia Court of Appeal <<http://www.courts.gov.bc.ca>>.

³¹ More information about the Court's clerkship program is available online: British Columbia Court of Appeal <http://www.courts.gov.bc.ca/about_the_courts/law_clerk_program/Program%20Information.pdf>.

B. Alberta: Court Profile³² and Overview of Approach to Legal Research Support³³

The Alberta Court of Appeal consists of eighteen judges. Nine judges sit in Calgary, of which three are supernumerary. Another nine judges sit in Edmonton, of which two are supernumerary. There is currently a judicial appointment pending in Edmonton.

The Alberta Court of Appeal employs twelve staff lawyers, six in each of its two locations. One of them is hired permanently, but the rest are hired on a contract basis. Most have at least five years of experience; many have been called to the Bar for more than ten years. The staff lawyers screen incoming cases, in order to determine which to assign to the Court's eight articling students. Four students are employed in each location for a ten-month articling period.³⁴ They are primarily responsible for pre-hearing research and case preparation. The Court also employs two other lawyers, one in each location, as case management officers. These lawyers are primarily tasked with ensuring appeals are placed in the appropriate track and assessing limitation period issues on incoming appeals. They do legal research with respect to appeal processes and initial jurisdictional matters, but not on substantive issues for cases before the Court.

The Court has also partnered with the University of Alberta to provide a program to third year law students where they can clerk with the court for school credit. This year, the Court also employed two summer students (one in each location) who had completed first or second year law school.

C. Saskatchewan: Court Profile and Overview of Approach to Legal Research Support³⁵

The Saskatchewan Court of Appeal consists of eleven judges, six of which are full-time and five of which are supernumerary.³⁶ The Saskatchewan Court of Appeal currently employs three articling students as law clerks, which are each assigned to three or four judges. The clerks are hired for a one year term, though the *Rules of The Law Society of Saskatchewan* require that a judicial clerk article for a

³² Online: Alberta Court of Appeal <<http://www.albertacourts.ab.ca/ca/>>.

³³ The information in this section was gathered from an interview of Laurel Watson, Legal Counsel to the Alberta Court of Appeal (July 2011).

³⁴ More information about the Court's articling program is available online: Alberta Court of Appeal <<http://www.albertacourts.ab.ca/CourtOfAppeal/ArticlingProgram/tabid/289/Default.aspx>>.

³⁵ The information in this section was gathered from an interview of Marlene Rodie, Executive Officer to the Chief Justice of Saskatchewan and the Provincial Judicial Council (July 2011).

³⁶ Online: Saskatchewan Court of Appeal <<http://www.sasklawcourts.ca/>>.

period of two months outside the Court with a qualified principal.³⁷ The Court Registrar is also a lawyer, responsible for special legal projects for the Court, but not for any research regarding specific cases before the Court. As such, the registrar is not included in the above comparison chart.

D. Manitoba: Court Profile and Overview of Approach to Legal Research Support

The Manitoba Court of Appeal is currently comprised of eight full-time judges and one supernumerary.³⁸ As described in greater detail below, the Court employs two staff research lawyers on a permanent, full-time basis. The Court has also partnered with the University of Manitoba to provide a clerkship program (presently for two students in each of the fall and winter semesters) that third year law students may undertake for academic credit.

E. Ontario: Court Profile and Overview of Approach to Legal Research Support.³⁹

The Ontario Court of Appeal is currently comprised of twenty-four judges,⁴⁰ of whom twenty-two are full time and two are supernumerary⁴¹. The Court employs one senior legal officer, who is responsible for overseeing the Court's other research lawyers. He also serves as the contact person for case management issues and as secretary of the Civil Rules Committee for the Court. In addition, the Court employs eight full-time legal research lawyers with at least five years' experience. They review all cases once the appeals are perfected prior to their hearings. They flag exceptional cases, such as those involving major jurisprudential issues, a huge volume of trial materials or those that involve interesting issues not fully canvassed by counsel. They may also complete more in-depth post-hearing research at the judges' request. The Court is also assisted by seventeen articling students, who work directly with the judges to whom they are assigned.⁴² The students are primarily tasked with preparing pre-hearing "bench memos", that is, a one to three page summary of each case, outlining the facts,

³⁷ More information regarding the Court's clerkship program is available online: Saskatchewan Court of Appeal <http://www.sasklawcourts.ca/default.asp?pg=ca_articling>.

³⁸ Online: Manitoba Court of Appeal <http://www.manitobacourts.mb.ca/ca/ca_judges.html>.

³⁹ The information in this section was gathered from an interview of John Kromkamp, Senior Legal Officer of the Ontario Court of Appeal (July 2011).

⁴⁰ Online: Ontario Court of Appeal <<http://www.ontariocourts.on.ca/coa/en/judges/>>.

⁴¹ Online: Ontario Court of Appeal <<http://www.ontariocourts.on.ca/coa/en/>>

⁴² More information regarding the Court's clerkship program is available online: Ontario Court of Appeal <<http://www.ontariocourts.on.ca/coa/en/lawclerkprogram/>>. The Ontario Court of Appeal is one of the few Canadian courts to post pictures of and contact information for their law clerks on their website.

issues and the parties' positions. They may also complete additional post-hearing legal research at the judges' request.

F. Quebec: Court Profile and Overview of Approach to Legal Research Support⁴³

The Quebec Court of Appeal currently consists of twenty-five judges, of whom twenty are full-time and four are supernumerary.⁴⁴ The Court employs twenty-six articling student law clerks, seventeen in Montreal and nine in Quebec City.⁴⁵ The clerkships are generally for a two-year term, though they may be extended for an additional year. The first six months of the clerkship program fulfill the province's articling requirements. The clerkship may also be used to fulfill certain requirements for a Master's degree from Laval University or the University of Montreal. Each clerk is assigned to a specific judge. The clerks undertake mostly pre-hearing research, though they also attend hearings and prepare memoranda for the judges, including their opinions on the merits of the cases. This clerkship program has been in operation since 1995.⁴⁶

The clerks are overseen by a clerkship program coordinator, who is also a research lawyer. The clerkship program coordinator oversees the clerk selection process, organizes clerk training and provides research support to the clerks. The Court also employs seven other lawyers (five in Montreal and two in Quebec City) to assist with procedural matters. They provide information to lawyers and unrepresented litigants regarding court rules and procedure. They also prepare files for mediation and, to that end, prepare summaries of those cases.

G. New Brunswick: Court Profile and Overview of Approach to Legal Research Support⁴⁷

The New Brunswick Court of Appeal currently consists of nine judges, of whom six are full-time and three are supernumerary.⁴⁸ The Court is assisted by two articling student law clerks, one bilingual (French and English) and one Anglophone.⁴⁹ As with the courts in Alberta and Manitoba, the Court has

⁴³ The information in this section was gathered from an interview of Pascal Pommier, Clerkship Program Coordinator and Legal Officer to the Chief Justice of Quebec (July 2011).

⁴⁴ Online: Quebec Court of Appeal <<http://www.tribunaux.qc.ca/c-appel/English/About/judges/current/currentj.html>>.

⁴⁵ More information regarding the Court's clerkship program may be found online: Quebec Court of Appeal <<http://www.tribunaux.qc.ca/c-appel/English/Clerkship/clerkship.html>>.

⁴⁶ Finn & Martin, *supra* note 2 at 3.

⁴⁷ The information in this section was gathered from an interview of Dominique Harvey, Deputy Registrar of the New Brunswick Court of Appeal (July 2011).

⁴⁸ Online: New Brunswick Court of Appeal <<http://www.gnb.ca/cour/03COA1/judges-e.asp>>.

⁴⁹ More information regarding the Court's clerkship program may be found online: New Brunswick Court of Appeal <<http://www.gnb.ca/cour/03COA1/articlingprogram-e.asp>>.

partnered with the University of New Brunswick to provide a judicial internship program for law students to clerk with the Court for credit.⁵⁰ As there are no full-time research lawyers on staff, judges complete a lot of their own research.

H. Nova Scotia: Court Profile and Overview of Approach to Legal Research Support⁵¹

The Nova Scotia Court of Appeal is currently comprised of eight judges.⁵² The Court's legal research needs are addressed by three law clerks, who are either articling students or junior lawyers.⁵³ Like the courts in Alberta, Manitoba and New Brunswick, the Court has partnered with Dalhousie University to provide a program where law students clerk with the Court for academic credit. Two students usually participate in the program each term.

I. Prince Edward Island: Court Profile and Overview of Approach to Legal Research Support

The Prince Edward Island Supreme Court Appeal Division consists of three judges.⁵⁴ The judges of the Court complete their own legal research.⁵⁵

J. Newfoundland & Labrador: Court Profile and Overview of Approach to Legal Research Support⁵⁶

The Newfoundland and Labrador Court of Appeal is comprised of nine judges, of whom six are full-time and three are supernumerary.⁵⁷ The Court employs one permanent senior research lawyer on a part-time basis, along with one full-time and one part-time clerk. The clerks are junior lawyers who are hired on annual contracts for a maximum two year term.

⁵⁰ More information regarding this course is available online: New Brunswick Court of Appeal <<http://www.gnb.ca/cour/03COA1/internship-e.asp>>.

⁵¹ The information in this section was gathered from an interview of Carol Moulaison, Judicial Assistant to Justice Beveridge (July 2011).

⁵² Online: Nova Scotia Court of Appeal <http://www.courts.ns.ca/appeals/ca_judges.htm>.

⁵³ More information regarding the Court's clerkship program may be found online: Nova Scotia Court of Appeal <http://www.courts.ns.ca/appeals/nsca_clerkship_program.htm>.

⁵⁴ Online: Prince Edward Island Courts <<http://www.gov.pe.ca/courts>>.

⁵⁵ This information was provided by the Supreme Court Appeal Division court office.

⁵⁶ The information in this section was gathered from an interview of André Clair, Law Clerk with the Newfoundland and Labrador Court of Appeal (July 2011).

⁵⁷ Online: Newfoundland and Labrador Court of Appeal <<http://www.court.nl.ca/supreme/appeal/judiciary.html>>.

K. Summary of Approaches Taken

1. *Staff Lawyers*

As described above, research lawyers are on staff on a permanent basis, either full-time or part-time, in British Columbia, Alberta, Manitoba, Ontario, Quebec and Newfoundland and Labrador.

2. *Contract Lawyers*

Research lawyers have been hired on a contract basis by the appellate courts in British Columbia and Alberta. Manitoba has also, in the past, hired legal research lawyers on a short-term basis through a secondment arrangement with the Federal Department of Justice. It is interesting to note that the only jurisdictions that appear to have taken advantage of hiring legal research lawyers on a contract basis are those who also employ full-time legal research lawyers.

3. *Clerkship Programs*

Clerkship programs for articling students or junior lawyers are in place in British Columbia, Alberta, Saskatchewan, Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland and Labrador.⁵⁸ As such, clerkship programs are clearly the frontrunner in terms of the approaches to legal research taken by Canadian provincial appellate courts. The program in Quebec is the only one that boasts a one-to-one ratio between students and judges, though the large program in Ontario comes close. The programs in British Columbia and Alberta provide closer to a two-to-one ratio between judges and students. As well, introductory clerkship opportunities are available to law school students in the courts in Alberta, Manitoba, New Brunswick and Nova Scotia.

4. *Hybrids*

The courts in British Columbia, Alberta, Ontario, Quebec and Newfoundland and Labrador have opted to fulfill their legal research support needs through a combination of lawyers and articling students.

5. *No Research Support*

Prince Edward Island's Supreme Court Appeal Division is the only provincial appellate court without legal research support. However, this may be explained by the Court's small size and, perhaps, because there is no law school on the Island.

⁵⁸ Perhaps it would be simpler to say that only the courts in Manitoba and Prince Edward Island do not have an articling student clerkship program.

VII. CASE STUDY: MANITOBA

A. Composition and Operation of the Court

As noted above, the Manitoba Court of Appeal is currently comprised of eight full-time justices and one supernumerary.⁵⁹ In order to understand the role of its two permanent full-time legal research lawyers, it may be useful to briefly review the Court's internal procedures regarding appeals.⁶⁰ Appeal materials are filed by the parties or their counsel with the court office, which is overseen by the Court's Registrar. Each week, one judge is assigned the role of "duty judge". If the Court is in session, that judge will also act as the Chambers judge for any necessary motions or other Chambers matters. The other main role of the duty judge is to prepare summaries of any new appeals perfected during their week. The judge will review the Notice of Appeal and facts and prepare a brief summary of the case, sometimes including an initial view of its merits. The judge also gives the case a ranking, from one to five, with one being a relatively straightforward appeal and five being extremely complex or time-consuming (such as where there is a large volume of transcripts or other evidence to review). This ranking is used for court scheduling purposes, and may be used to ensure that no judge is burdened with too many "fives" in a given week, or at least, back-to-back. However, it should be understood that the Court's rota (that is, the schedule of which judges are assigned to which panels) is computer-generated. Except where changes need to be made to accommodate a judge's holiday plans or to avoid a conflict of interest, this computerized assignment prevails, as it is programmed to assign all judges to an equal number of cases in a given term.⁶¹

As a general rule, the Manitoba Court of Appeal sits a panel of three judges for each appeal; however, the Court will sit a panel of five judges in extraordinary cases, particularly when they are being asked to overturn a prior decision of the Court. It is unusual for any pre-hearing research to be conducted, or for a staff researcher to sit in on Court hearings.

After the appeal hearing has been held, the panel generally caucuses for a few minutes afterwards in order to discuss their initial impressions of the case. If there is unanimity, one judge volunteers to write the decision. However, if a member of the panel intends to dissent, they will obviously prepare their own reasons. It is at

⁵⁹ *Supra* note 38.

⁶⁰ Much of the following material has been the subject of various oral presentations by members of the Court. See e.g. Madam Justice Barbara Hamilton's comments at "How to Avoid Rejection in the Court of Appeal: Current and Upcoming Rules and Practice Directions" (Presentation to the Manitoba Bar Association's Civil Litigation Section, 2 June 2009) [unpublished]. See also Chief Justice Richard J Scott & Michael E. Rice's paper from the 2006 Isaac Pitblado Lectures.

⁶¹ With the exception of supernumerary judges, who are obviously assigned less cases, in accordance with their "part-time" status. As well, the Chief Justice is not generally assigned as many cases as the other members of the Court, in light of his many administrative duties.

this stage that one of the Court's two staff research lawyers will be approached, if any research is required. Research is not requested in all cases, though the percentage of cases where research is required does appear to be increasing (at least anecdotally). The judge who will be writing the decision meets with the researcher to outline the research assignment. The matter is then placed on the research list and will be addressed in turn, unless some special factor (such as an appellant in custody) warrants moving it up to the top of the list.

The senior research lawyer employed by the Court graduated from the University of Manitoba's Faculty of Law in 1983 and has been on staff since 1990. As noted above, I am the Court's second research lawyer; I graduated from the University of Manitoba's Faculty of Law in 2003 and joined the Court in 2006. We are both practising members of the Law Society of Manitoba; both of our careers have been primarily focused on conducting legal research. We have offices down the hall from the judges in the Old Law Courts building. We have free access to a number of online database services, in addition to the resources housed in the Judges' Library, the Great Library and the Attorney General's Library across the street. We also frequently consult the Legislative Library and the E.K. Williams Library at the University of Manitoba's Faculty of Law.

While the complexity of the research assigned varies from case to case, by and large the research assignments are lengthy and extremely complex. As a result, they can sometimes take more than a month to complete. As stated above, most members of the Court are of the view that the Court is permitted to rely on additional authorities related to points raised by counsel, but if a new line of legal reasoning is uncovered by the research undertaken by their staff – relating to an area of law not addressed by the parties – the Court will advise counsel and seek further submissions before reaching its decision.

Once the research memorandum has been prepared, it is circulated to all members of the Court. While portions of the memorandum might appear in the final judgment, it is extremely rare that members of the research staff would be asked to assist with decision drafting, though they may be asked to comment on a draft decision prior to its circulation amongst the Court. Once the decision is in final form, it is provided to the parties and case law publishers.

B. The History of Legal Research Support in the Manitoba Court of Appeal

The Court has not always had two full-time legal research lawyers at its disposal. While an exhaustive catalogue of the development and expansion of the Court and its research contingent is beyond the scope of this paper,⁶² the

⁶² For more information about the history of Manitoba's Court of Appeal, see Frederick Read, "Early History of the Manitoba Courts" (1937) 10 Man Bar N Nos 1 & 2 and Dale Brawn, *The*

following brief chronology illustrates the manner in which research has been conducted by the Court in the recent past.

The earliest records I have been able to obtain regarding research staff at the Court pertain to an experimental articling program launched in 1982.⁶³ Five students were hired to serve both of Manitoba's superior courts. It appears that they may also have participated in certain Legal Aid projects.⁶⁴ While both the students and the judges were highly complimentary of the program,⁶⁵ it was discontinued after a year when government funding was withdrawn.⁶⁶

It would appear that, after a brief hiatus, the Court's articling program was revamped in 1986. Two students were hired to complete a portion of their articles with the Court; the rest of their articling year was spent at private firms. However, one of the students left the province part-way through his articling year, so only one student actually articulated with the Court in 1986, receiving his call to the Bar in 1987. The program was not part of the articling match,⁶⁷ and because of the logistical difficulties it presented, was perhaps not as popular as might have been expected.⁶⁸

The program was expanded for 1987-1988, with four students being hired to complete a portion of their articles with the Court.⁶⁹ Two students articulated with the Court in the fall of 1987 and two in the winter and spring of 1988. The Law Society extended the students' articling period to accommodate the program and the manner in which the students' articles were split between the Court and other law offices. The students recall conducting legal research, reviewing transcripts

Court of Queen's Bench of Manitoba 1870-1950: A Biographical History (Toronto: Osgoode Society for Canadian Legal History, 2006).

⁶³ Law Society of Manitoba, Minutes of the Meeting of the Admissions and Education Committee (11 March 1982) [unpublished, archived at the Law Society of Manitoba]. I have heard rumours that at least one of the Court's judges personally hired students to assist with research matters in the early 1980s, but I have not been able to locate any concrete information regarding this matter.

⁶⁴ Law Society of Manitoba, Minutes of the Meeting of the Admissions and Education Committee (25 May 1982) [unpublished, archived at the Law Society of Manitoba].

⁶⁵ Law Society of Manitoba, Minutes of the Meeting of the Admissions and Education Committee (4 November 1982) [unpublished, archived at the Law Society of Manitoba].

⁶⁶ Law Society of Manitoba, Minutes of the Meeting of the Admissions and Education Committee (15 March 1983) [unpublished, archived at the Law Society of Manitoba]. In fact, the Court's current senior legal research counsel was offered an articling position for 1983-1984, but was informed shortly before his articles were scheduled to commence that funding was no longer available, so the program would not be offered.

⁶⁷ The mandatory articling student hiring process utilized at that time.

⁶⁸ The information in the foregoing paragraph was obtained from a telephone interview of William Emslie (29 July 2011).

⁶⁹ Once again, the program was not formally part of the articling match process, though the Hon. Mr. Justice Huband (now retired) attended the "mass interviews". As no interviews had been scheduled in advance, students simply dropped by with their résumés and went through a brief interview.

and assisting with decision drafting. They were encouraged to sit in on appellate hearings and even attend some lower court trials.⁷⁰

While the program worked well, the Court realized that its legal research support needs could be better met by a full-time legal research lawyer. In 1990, the government was persuaded to allocate funding for such a position, and the Court's current senior legal research lawyer was hired. In 1991, his three year contract was converted to a permanent position. In the mid-1990s, a second legal research lawyer was hired. A third research lawyer was seconded from the Federal Department of Justice on a contract basis in 2009 for just over a year.⁷¹

As noted above, the Court has also cultivated a relationship with the University of Manitoba's Faculty of Law through the latter's clerkship course for third year law students. The program commenced in January 2004 with two students. Two clerks participated in the program in 2005, 2006 and 2007. The course then moved to the fall term, with two more students entering the program in the fall of 2007 and two more in 2008. In 2009-2010, two students were hired for each of the fall and winter terms. The clerkship program was suspended for the 2010-2011 school year, but will be offered again in the fall of 2011, with openings for two students in each semester.⁷² The student clerks are assigned to sit in on several cases. They meet with a judge from the panel before each hearing, review the materials and sit in on the hearing. They meet with the judge after the hearing and may be assigned some research in connection with the file. Any research conducted by the students is overseen by the staff research lawyers.

C. Current Situation

As set out in detail above, the Court currently employs two full-time research lawyers. While some small research projects are completed by third year students through the University's clerkship course, the vast bulk of the Court's research needs must be met by their two full-time staff lawyers. At present, the Court's staff lawyers cannot keep up with the Court's research demands. As a result, research takes longer to complete and decisions are therefore delayed. In recent years, the Court has found itself in breach of the Canadian Judicial Council's guidelines for the timeliness of decisions more and more frequently.⁷³ As the Manitoba Court of

⁷⁰ The information in the foregoing paragraph was gleaned from interviews and correspondence with the Hon. Charles Huband, John Stefaniuk, Herbert Rempel and Lesley Tough (July 2011). One student recalled that another student was hired to article with the Court in the fall of 1988, but I have been unable to confirm that recollection.

⁷¹ The information in the foregoing paragraph was obtained from interviews and correspondence with the Hon. Charles Huband and Michael Rice (July 2011).

⁷² The information in the foregoing paragraph was obtained from an interview of the Hon. Madam Justice Steel (July 2011).

⁷³ The Canadian Judicial Council passed a resolution in September 1985 stating that judgments should be delivered within six months after hearings, except in special circumstances: "Ethical Principles for Judges", online: Canadian Judicial Council <<http://www.cjc-ccm.gc.ca/cmslib/>>

Appeal is the court of last resort for almost all of the cases heard by Manitoba courts,⁷⁴ “getting it right” aided by adequate research is extremely important. Furthermore, given the legal research support available to other provincial appellate courts across the country, as well as the Supreme Court of Canada, the Court has an obligation to release decisions that meet or exceed the current expectations regarding research thoroughness for decisions from the provinces’ highest courts.

D. The Future of Legal Research Support in the Manitoba Court of Appeal

Given the current research backlog and the trend toward more difficult and therefore lengthy research assignments, it is hoped that additional government funding will be provided for at least one, if not two, additional full-time staff research lawyers. This would bring the Court’s research complement closer to a one-to-two lawyer-to-judge ratio. However, if funding at this level is not available, in my opinion the next best solution would be a move to a hybrid system involving staff research lawyers and an articling student clerkship program. Manitoba’s law students do not currently have an opportunity to complete their articles by clerking with a Manitoba court.⁷⁵ As such, many of our province’s best and brightest students seek clerkships in other provinces, or at the federal courts or Supreme Court in Ottawa.

If a clerkship program were implemented, a system of pre-hearing research conducted by articling students could be implemented (perhaps similar to the one used in Ontario), in order to streamline the appeal process and make appeal hearings more efficient. In fact, such rigorous pre-hearing research could decrease the number of post-hearing research projects assigned to staff lawyers. Articling students could also address the relatively simple research questions that arise from time to time, and provide other administrative support to the Court’s judges. Regardless of the approach adopted, it is my opinion that additional legal research support resources need to be made available to the Court in order to allow it to consistently meet the CJC’s guidelines for the release of timely decisions.

At present, it does not appear that any procedural legal research support is required in Manitoba, though having a legally trained court officer available to assist with certain applications for leave to appeal from administrative tribunals

general/news_pub_judicialconduct_Principles_1998_en.pdf> at 21.

⁷⁴ In 2010, the Court issued approximately 115 judgments, of which approximately 30 were Chambers decisions issued by a single judge. In 2010, nine applications for leave to appeal were filed with the Supreme Court relating to decisions made by the Manitoba Court of Appeal. Only three applications for leave were granted, and only two Manitoba appeals were heard by the Supreme Court in 2010.

⁷⁵ Aside from a short secondment program currently in place in connection with Manitoba’s Provincial Court.

(which tend to be prosecuted by unrepresented litigants, such as residential tenancies matters) could potentially reduce the time spent by judges hearing such applications in Chambers.

VIII. CONCLUSION

As documented herein, all but one of Canada's provincial appellate courts have hired staff to provide them with legal research support. While the majority of the courts rely on year-long clerkship programs involving articling students, some have hired full-time senior research lawyers to assist them in reviewing, refining and shaping Canadian law. As the courts of last resort for the vast majority of cases across the country, it is hoped that the disclosure of the foregoing information regarding these courts' approaches to legal research will bring the matter the attention it deserves. While counsel's first reaction might be that additional research should not be conducted post-hearing, given the increasing number of self-represented litigants appearing before appellate courts, the issue is no longer whether post-hearing research should be conducted by judges but how that research is going to be conducted. With the help of qualified legal research specialists, our provinces' highest courts can more efficiently and more effectively dispense justice. However, a lack of appropriate legal research support can result in decisions taking longer to write, causing lengthy delays between the hearing of an appeal and its disposition. For this reason, lawyers appearing before Canada's provincial appellate courts would do well to understand the nature of the legal research support available to their court and the role it may play in the decisions rendered by that court. It is hoped that this article will pave the way for further discussions regarding the approaches adopted by Canada's provincial appellate courts with respect to legal research and how those approaches may be refined or redesigned in the future.