Practice Direction Concerning

Criminal Appeals at the Court of Appeal for Ontario

Effective: 1 March 2017

TABLE OF CONTENTS

1. EFFECTIVE DATE AND APPLICATION

1. This Practice Direction Concerning Criminal Appeals at the Court of Appeal for Ontario revokes and replaces all of the Court of Appeal's previously issued Practice Directions, Administrative Guidelines, Administrative Advisories, and Notices to the Profession concerning criminal appeals.

This Practice Direction applies to solicitor appeals, motions and applications, including limited retainers, s. 684 appointments, and Crown appeals. It was made

pursuant to the court's rule-making powers in sections 482 and 482.1 of the *Criminal Code*. It is effective as of 1 March 2017.

This Practice Direction does not apply to duty counsel, *amicus curiae*, or inmate appeals.

Note that for mental health appeals under Part XX.1 of the *Criminal Code*, the practices in this Practice Direction apply except as specified in section 18 below.

2. APPLICATION OF THE CRIMINAL APPEAL RULES

When bringing a criminal appeal or motion in the Court of Appeal, parties must consult the *Criminal Appeal Rules*, SI/ 93-169, 1993 *Canada Gazette*, Part II.

Practice Directions supplement the *Criminal Appeal Rules* and provide guidance and direction about matters not covered by the *Rules.*

Unless otherwise defined in this Practice Direction, the definitions of terms in the *Criminal Code* and/ or the *Criminal Appeal Rules* apply here.

3. FRENCH OR BILINGUAL MOTIONS OR APPEALS

1. Motions and appeals may be brought in English or French, or in both languages.

2. Parties proceeding in French, or in both English and French, should note this in their correspondence.

3. The staff of the Court of Appeal is pleased to serve the public in English and French. Staff will direct French inquiries to bilingual staff members.

4. CORRESPONDENCE

4.1 Providing a Copy of all Correspondence to Opposing Parties

1. Any correspondence addressed to the Court of Appeal in relation to a court file must be copied to the lawyer of record for all parties to the proceeding. This requirement applies, without limitation, to any correspondence addressed to the Registrar, Deputy Registrar, Senior Legal Officer, the Appeal Scheduling Unit and/or the motions clerk. All such correspondence must contain the Court of Appeal file number and title of proceeding.

2. In the event that correspondence addressed to the Court of Appeal or any of its staff is not copied to the lawyer of record for all parties to the proceeding, it will not be received by the court or reviewed for response.

4.2 Correspondence to a Judge Must be addressed to the Registrar of the Court of Appeal

1. All parties must consent to out-of-court communications with a judge about a court proceeding unless the court directs otherwise.

2. All correspondence intended to be reviewed by a judge or judges must be addressed to the Registrar and copied to the lawyer of record for all parties to the proceeding. The Registrar will consult with the judge(s) to whom the correspondence is directed for directions as to whether the judge(s) will receive the correspondence.

3. In the event that correspondence intended to be reviewed by a judge or judges is not addressed to Registrar or is not copied as set out above, it will not be received by the court or reviewed for response.

4.3. Restrictions on Sending Correspondence by Email

1. The Court of Appeal E-filing address, COA.E-file@ontario.ca, must only be used to deliver electronic versions of factums, transcripts and other documents specified in this Practice Direction and in the Guidelines for Filing Electronic Documents at the Court of Appeal for Ontario. This email address is not designed or intended to receive any inquiries or other communications about court proceedings. Communications which should not be directed to this email address will not be acknowledged or responded to.

2. General inquiries about proceedings in the Court of Appeal, including case searches, status inquiries, or inquiries about filing requirements, may be made by telephone by calling 416-327-5020, toll free at 1-855-718-1756, or by fax to (416) 327-5032. The court's website also contains information about where inquiries may be directed:

http://www.ontariocourts.ca/coa/en/about/information.htm

5. SERVICE AND FILING

5.1 Time for Commencing an Appeal and Serving and Filing Materials

1. A party must serve a notice of appeal within 30 days after the day of the making of the order sought to be appealed (or 30 days after the day of the sentence in the case of a conviction appeal), pursuant to s. 678(1) of the *Criminal Code* and Rules 4 (1) to (3) of the *Criminal Appeal Rules*. Where the appellant is an Attorney General, the notice of appeal, together with proof of service on the respondent, must be filed in the Registrar's Office in person or by mail within 10 days after service.

2. The lawyer acting for a party who wishes to appeal from conviction, sentence, or any other order from which an appeal lies, as of right or with leave, shall commence the appeal by filing three copies of a notice of appeal (or notice of application for leave to appeal) within 30 days after the date of the order or the imposition of sentence, pursuant to Rule 4 of the *Criminal Appeal Rules*.

3. If the Attorney General wishes to appeal, the Attorney General shall commence the appeal by serving one copy of a notice of appeal within 30 days after the date of the order, acquittal, or the date of the imposition of sentence, and filing three copies with proof of service within 10 days of the expiration of the 30 day appeal period.

4. All documents other than an accused's notice of appeal must be served on the opposing party or, where the party is represented, on the party's counsel, before being filed with the court (or at the same time in the case of e-mails).

5. The Registrar will accept copies of affidavits of service. The court staff will address any issues associated with proof of service as necessary.

6. A notice of appeal must be filed together with a Certificate of Ordering of an authorized court transcriptionist (formerly called a court reporter), confirming that the transcripts have been ordered (Rule 8(2) of the *Criminal Appeal Rules*). If the certificate is not available on the date the notice of appeal is filed, the certificate may be filed within 15 days after the filing of the notice of appeal, as provided by Rule 8(3). Counsel filing a notice of appeal in a Legal Aid appeal should consult Rule 8(5) regarding extending the time to file the Certificate of Ordering before the retainer is finalized. See section 9.2 of this Practice Direction for more

information regarding applications for extensions of time specific to delays in ordering transcripts.

5.2 Manner of Service

1. Rule 5 describes the manner in which service of a notice of appeal against conviction, dismissal, or sentence is made. Other than in appeals by the Attorney General, delivering or mailing a notice of appeal to the Court of Appeal within the prescribed time constitutes both service and filing. The Court of Appeal will forward the notice of appeal to the appropriate respondent Attorney General forthwith, by electronic or other means. Please note that the notice of appeal is the only document that is automatically forwarded by the court to the Attorney General.

2. Where the Attorney General is the appellant and the respondent was represented by trial counsel, the Attorney General may effect service by serving counsel for the respondent, if that counsel confirms that he or she has instructions to accept service. In the case of service on a self-represented party, originating processes such as notices of appeal or notices of application for leave to appeal must be served on the respondent in person. However, where a respondent cannot be found after reasonable efforts have been made to serve the respondent, s. 678.1 of the *Criminal Code* and Rule 5(b) provide that a judge may direct service to be effected substitutionally. Substituted service may be ordered in indictable or in summary conviction appeals.

3. No document other than a notice of appeal need be served personally, unless the court so orders. Any document not required to be served personally may be served by: service on a lawyer who represents the party being served; or in the case of self-represented respondents, by registered mail; courier; email; fax; or regular mail to the last known address. If service is by courier, the deponent of the affidavit of service must indicate the date when the document was provided to the courier.

4. The Court of Appeal requests that counsel file electronic versions of factums in criminal appeals, as well as the paper versions required by the *Criminal Appeal Rules*. Materials may be filed electronically by e-mailing them to COA.E-file@ontario.ca. If the electronic files are too large to be transmitted by e-mail (i.e. 10 MBs or greater), they may be served and filed on a USB Key or CD-ROM.

Please consult the Guidelines for Filing Electronic Documents at the Court of Appeal for Ontario for further information on electronic filing.

6. NOTICE OF APPEAL IN CRIMINAL APPEALS

6.1 Extensions of Time

1. A party may bring a motion for an order to extend or abridge the time for appeal and for doing any other act in connection with an appeal for which a time is prescribed. A motion for an order extending time may be made before or after the expiration of the time prescribed: s. 678(2) of the *Criminal Code*, and Rule 7(1). See sections 7.2.4 and 7.2.11 of this Practice Direction for more information on seeking an abridgement of time.

2. Generally speaking, an extension is more likely to be granted if a motion is brought within the time prescribed. Consent to an extension should always be sought before bringing a motion for an extension. If consent is given, it should be provided in writing and filed with the notice of appeal, the draft order extending time, any other relevant document.

3. The draft order must state the date to which the extension of time is consented to, no later than 30 days from the date the order is to be signed. Consent motions may be filed and signed by a judge without the need for counsel to attend.

4. If consent is not given, then the motion must be argued before a single judge. If the notice of appeal is not filed during the 30 day extension, then the party wishing to appeal must again seek consent and the permission of a judge for a further extension of time.

6.2 Title of Proceeding

The title of a proceeding should set out the parties in the same order as they appear in the title of proceeding in the court appealed from. The appellant, respondent, and any interveners must be clearly identified. The names of the accused must appear in the order in which they appeared on the Indictment. Interveners who are not parties should not appear in the title of proceeding.

6.3 Additional Information to Provide to the Court

1. On all documents filed with the court, parties shall include their telephone number, fax number, mailing address, email address and, Law Society numbers of all lawyers.

2. Counsel should promptly advise the court and the other parties of any changes to their mailing or email address by emailing the Registrar's Office at COA.E-file@ontario.ca or by fax to 416-327-5032. Please include in the subject line of the email: the title of proceeding; the court file number; and the nature of the information being provided.

7. APPLICATIONS AND MOTIONS IN THE COURT OF APPEAL IN CRIMINAL MATTERS

7.1 General

7.1.1 Notice of Motion or Application

1. The terms "motion" and "application" are often used interchangeably in criminal appeals. A motion or application to the Court of Appeal shall be made by notice of motion or application and formatted in accordance with Form 1 of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, SI/2012-7, March 1, 2012, *Canada Gazette*, Part II, Vol. 146.

2. Section 7.2.4 of this Practice Direction discusses the deadlines for filing a notice of motion and motion record.

3. The notice of motion must contain an estimated length of time for the oral argument of the motion. The default time for oral argument on panel motions is 25 minutes for the moving party and 15 minutes for the responding party. The default time for oral argument on single judge motions is 15 minutes for the moving party and 10 minutes for the responding party, subject to the discretion of the presiding judge.

4. If the hearing of a motion is expected to take more than 30 minutes, the moving party is strongly encouraged to contact the motions clerk at (416) 327-5020 (select language of choice, followed by option 3) to determine the current status of the list before selecting a hearing date and service and filing the motion material.

7.1.2 Formatting and Binding of Motion or Application Material

1. With the exception of motions to file fresh evidence, motion records shall have a white front cover and a light blue back sheet. Responding motion records, if any, shall have a green front cover and a light blue back sheet. The moving party's factum shall be bound in white covers and the responding party's factum shall be bound in green covers.

2. The Court requires the use of 12-point or larger font and encourages the use of Arial or Times New Roman for all text in factums. All text in factums must be double-spaced, except quotations longer than four lines and footnotes. Factums should be printed on only one side of the page with 2.5 cm margins on all sides.

3. The Registrar may refuse to accept documents or materials for filing if they do not comply with the *Rules* and/or this Practice Direction, or if they are not legible.

7.1.3 Abandoning and Reinstating a Motion or Application

1. In order to abandon a motion or application to be heard by a single judge or by a panel, the party must send a letter addressed to the Registrar advising that the matter is to be abandoned. The letter should be copied to all parties and be sent by email to COA.E-file@ontario.ca (please include "Notice of Abandonment of a Motion/ Application" and the court file number and title of proceeding in the subject line of the email) or by fax to (416) 327-5032. The form should be based on Form 9 of the *Criminal Proceedings Rules* and modified to state that the case is in the Court of Appeal.

2. If a motion to be heard by a single judge is withdrawn or abandoned within two days of the scheduled hearing date, the moving party must advise the motions desk that the motion will not be proceeding by calling 416-327-5020 (select language of choice, followed by option 3).

3. If a panel motion is abandoned after it has been listed for hearing, the moving party must promptly advise the Appeal Scheduling Unit in writing by fax (416-327-6256) or e-mail, COA.Criminal.Scheduling@ontario.ca.

4. A party may seek to reinstate a motion that was abandoned with or without a Notice of Abandonment, if the motion was not heard on its merits. A single judge or a panel may reinstate such a motion, if it is in the interests of justice to do so.

7.2 Motions or Applications to a Single Judge

7.2.1 General

1. A single judge of the Court of Appeal hears motions and applications Monday through Friday in chambers court at Osgoode Hall. From September to June, motions court starts at 10 a.m., unless the court orders otherwise. In July and August, motions court starts at 9:30 a.m., unless the court orders otherwise.

2. Lawyers do not need to wear gowns when they appear on motions before a single judge in chambers.

7.2.2 Scheduling Motions or Applications

1. Please note that on Wednesdays and Thursdays, civil and family motions brought by or against self-represented parties receive priority on the motions list.

2. As noted in section 7.1.1.4 of this Practice Direction, if the hearing of a motion is expected to take more than 30 minutes, the moving party is strongly encouraged to contact the motions desk at (416) 327-5020 (select language of choice, followed by option 3) to determine the current status of the list before selecting a hearing date and serving and filing the motion materials. This will ensure that the motion is scheduled on a date when the court has enough available time.

3. Applications for bail pending appeal may be heard on the same day as the sentence is imposed by the trial court, with advance communication to the court and opposing counsel. These applications should be made returnable at 2:30 p.m., but if the parties are ready to proceed earlier in the day, they may inquire of the motions clerk as to whether there is room on the morning motions list to accommodate the matter, by e-mail or by calling (416) 327-5020 (select language of choice, followed by option 3). If the parties are not ready to proceed until after 2:30 p.m., they may still contact the motions clerk to see whether the court can accommodate the matter on the same day.

7.2.3 Motions or Applications on Consent

1. Except for an order for release from custody under s. 679 of the *Criminal Code* (which require the attendance of counsel), where all parties consent to an order,

the order may be granted by the motions judge without the attendance of counsel.

2. The moving party should file a notice of motion or application, two copies of the draft order, and a document indicating the parties' consent to the order. This document must be signed by all parties or their lawyers and contain the relevant court file number(s) and the title of proceeding. Parties are advised to include an affidavit or covering letter, addressed to the Registrar's Office, containing sufficient information to justify the granting of the order.

3. If a judge considering the proposed consent order is satisfied that it should issue, the order will be issued without the attendance of the parties, usually within 2-3 business days.

4. If a judge considering the proposed order is not satisfied that it is appropriate or that it should issue, the parties will be advised and will be given an opportunity to provide oral or written argument.

7.2.4 Requirement to Deliver a Motion Record and the Time Limits for Service and Filing

1. A moving party or applicant must file a notice of motion or application and a motion record, together with proof of service, at least seven business days before the hearing date. In the case of an application for bail pending appeal, three clear days' notice is required (absent written consent and permission of a judge or the Registrar), pursuant to Rule 37.

2. The motion record should include:

> (i) a table of contents describing each document by its nature and date, and in the case of an exhibit, by exhibit number or letter;
>
> (ii) a copy of the notice of motion;
>
> (iii) a copy of the notice of appeal (or proposed notice of appeal where the moving party is seeking an extension of time);
>
> (iv) any previous court order(s) made in the proceeding that is (are) relevant to the issues on the motion, together with the court's reasons for the prior order(s);

(v) a copy of all affidavits and other material served by any party for use on the motion;

(vi) a list of any relevant transcripts of evidence, where available, in chronological order, and any transcripts necessary for the judge to decide the motion;

(vii) a current copy of the Information or Indictment, including endorsements, where available;

(viii) a copy of the pre-trial and/ or pre-sentence judicial interim release order, where relevant; and

(ix) a copy of any other original papers or material in the court file that is necessary for the hearing of the motion.

3. The moving party or applicant may seek to obtain court approval dispensing with the requirement to file a motion record. To obtain such approval, the moving party should send a letter to the attention of the Registrar setting out the reasons for the request. The letter should be copied to the responding party(ies) and be sent by email to COA.E-file@ontario.ca or by fax to 416-327-5032, with the subject line "Request re: motion record". The request and any response by the responding party(ies) will be placed before a judge of the Court of Appeal in advance of the hearing. The judge's directions will be communicated to the parties.

4. When a party seeks an abridgement of the time to serve and/or file motion materials, the notice of motion should include in the relief sought a request for an abridgement of the time limits for serving and/or filing the relevant motion material. The request for an abridgement of time should be supported by a letter or affidavit explaining the reason for the request and whether consent has been sought and obtained. The moving party shall deliver the letter or affidavit and accompanying motion materials to the court's Registry Office. If there is no consent to the abridgment of time, the Registrar will present the materials to a judge to determine whether the material may be filed and the motion may be heard on the date requested, and the parties will be promptly advised of the outcome.

5. The respondent shall e-mail all parties and the motions clerk (at COA.E-file@ontario.ca, with “attention Motions Clerk” in the subject line) to indicate its position on the motion, and shall serve and file any additional materials which may assist the judge in deciding the motion, by 12:00 noon the day before the motion.

6. The parties may provide the motions clerk with a draft order. If the parties choose to provide a draft order for bail pending appeal, the draft order shall include a term that the party seeking release shall surrender into custody by 6:00 p.m. on the day before the judgment will be released. If this term is not appropriate in the circumstances, counsel may make submissions to the court as to why it should be removed or modified.

7.2.5 Including Materials from the Court File in the Motion Record

1. If the parties wish to refer at the hearing of the motion to any material from the court file that is associated with the appeal, or if they wish to refer to any material from a prior motion, the moving party must submit a letter addressed to the motions clerk asking for the specified material to be placed before the motions judge. The letter should be submitted at the same time that the motion materials are filed.

7.2.6 Factums for Use on Motions

1. Written arguments greatly assist the judges in hearing and deciding motions. At the same time, it is understood that the filing of factums in some relatively simple motions may not be necessary. Therefore factums are optional on criminal single judge motions.

2. When a factum is filed on a motion, the party is requested to submit an electronic copy of the factum to the court. For details on the procedures for filing electronic material, please consult the Guidelines for Filing Electronic Documents at the Court of Appeal for Ontario.

3. In the majority of motions, the length of the factums should be 10 pages or less. Factums shall not be more than 30 pages without a court order authorizing the filing of a longer factum. For details on bringing a motion to file a long factum, please refer to section 9.6 of this Practice Direction.

4. The time for oral argument on single judge motions will generally be 15 minutes for the moving party and 10 minutes for the responding party, subject to the discretion of the presiding judge.

7.2.7 Motions to Expedite

1. Motions to expedite the production of transcripts must be served on the opposing party and the authorized court transcriptionist.

2. Fees for expedited transcripts are prescribed by regulation: O. Reg. 94/14.

3. Motions to expedite appeals may be brought to a judge in chambers. For more information on expedited appeals, see section 10.2 of this Practice Direction.

7.2.8 Motions to Stay or Suspend Orders of the Trial Court Pending Appeal

1. Motions may be brought before a single judge to stay or suspend orders of the trial court pending an appeal. These include orders for:

(i) compensation or restitution under s. 689 of the *Criminal Code*;

(ii) forfeiture under s. 462.37(1);

(iii) a driving prohibition pursuant to s. 261;

(iv) orders relating to offence-related property made under s. 490.7; and

(v) forfeiture orders relating to proceeds of crime referred to in s. 462.45.

2. Pursuant to 683(5), a judge or the court may suspend a fine, order of forfeiture or disposition of forfeited property, restitution order made under ss. 738 and 739, victim fine surcharge under s. 737, a probation order under s. 731, or a conditional sentence order under s. 742.1. Therefore these motions may be brought before a single judge or a panel.

3. Motions for stays of driving prohibitions in summary conviction appeals must be brought at the same time as the motion for leave to appeal. See section 16 of this Practice Direction for the procedure to follow in these cases.

7.2.9 Ex Parte Motions (Motions Without Notice to the Other Party)

When a party seeks to bring a motion without serving the notice of motion on the opposing party(ies), the moving party must indicate in the notice of motion the reasons for seeking to bring the motion without notice. A judge of the court will

review the notice of motion and may grant the request to move without notice if the judge is satisfied that the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary.

7.2.10 Motions to Intervene in an Appeal

1. Motions to intervene in a criminal proceeding in the Court of Appeal are determined by the Chief Justice or the Associate Chief Justice or a panel of the court, pursuant to Rule 23(1).

2. The parties should consult with each other to obtain mutually agreeable dates for hearing the motion and present these dates to the court through correspondence addressed to the court's Senior Legal Officer. The written request should attach a draft Notice of Motion and should be sent to the Senior Legal Officer. E-mails should include the subject line "Motion to Intervene under the Criminal Appeal Rules", along with the court file number.

3. If the parties cannot agree on suitable dates, the court will fix the date of the hearing. The moving party will be advised of the hearing date selected by the court and will be responsible for notifying the other parties.

4. After the date for the hearing of the motion to intervene is confirmed, the moving party must file a notice of motion, motion record, factum, and other material for use by the court.

5. The parties may request that the motion for intervener status be heard by teleconference call. This request should be included in correspondence addressed to the Senior Legal Officer, who will put the request to the judge assigned to hear the motion.

6. Parties should provide the court with a draft order granting leave to intervene, including the proposed terms such as the scope of the argument and the time allocation for oral argument of the intervener.

7.2.11 Applications for Bail Pending Appeal and Variation of Bail Orders

1. Counsel bringing an application for bail pending appeal should refer to the court's jurisdiction, powers, and procedures under s. 679 of the *Criminal Code*. In order to file an application, in the case of an appeal against conviction, the appellant must already have filed a notice of appeal, or, where leave is required,

notice of application for leave to appeal pursuant to s. 678. Three clear days' notice of the application must be provided to the Crown, pursuant to s. 679(2) and Rule 37, absent written consent and permission of a judge or the Registrar to file the materials on fewer days' notice.

2. In appeals from sentence only, leave to appeal must be granted before an application for bail pending appeal may be considered: s. 679(1)(b) of the *Criminal Code*; Rule 31. The motions for leave and bail pending appeal may be brought at the same time, before a single judge, or the motion for leave may be submitted first in writing.

3. Rule 32 provides for the contents of the appellant's affidavit on an application for bail pending appeal, and for the dispensing with compliance with this requirement when appropriate.

4. Once a release order has been made under s. 679, the order may be varied on consent without the attendance of counsel, pursuant to Rule 34. The content of the material to be filed on an application to vary a release order on consent is set out at Rule 34(3).

7.2.12 Motions to Seek a Review of a Decision pursuant to s. 680 of the Code

1. Section 680 of the *Criminal Code* provides that a decision made by a judge under s. 522 or sub-ss. 524(4) or (5) or a decision made by a judge of the court of appeal under ss. 261 or 679 may be reviewed by the court, on the direction of the chief justice, acting chief justice, or (on consent) a judge of the court of appeal.

2. A party seeking such a panel review should send a letter by e-mail to the Senior Legal Officer to schedule the request for a review. The letter must include a list of dates and times within a two or three week period when all parties are available to argue the motion, and must have a draft Notice of Motion attached. If the party wishes to have the matter dealt with by teleconference or videoconference, they should indicate this in the letter. E-mails must include the subject line "Section 680 application", along with the court file number.

7.3 Motions before Three Judges

7.3.1. Panel Motions (Except for Motions for Leave to Appeal in Summary Conviction Appeals)

A three-judge panel of the Court of Appeal holds oral hearings on the following types of motions ("panel motions"), which include motions requesting the exercise of the court's powers under s. 683 of the *Criminal Code*:

(i) Motions for sealing orders or to continue a sealing order from the lower court; to have an appeal heard "*in camera*", motions ordering a person to be cross-examined; orders in relation to exhibits which may or may have not been filed in the trial court; motions to suspend a sentencing order pursuant to s. 683(5);

(ii) Motions for the consent disposition of appeals;

(iii) Motions to quash an appeal on the grounds that there is no statutory right of appeal: see s. 674 of the *Criminal Code*; and

(iv) Motions for review of a decision of a single judge, if directed pursuant to s. 680 of the *Criminal Code*.

7.3.2 Notice of Motion

1. The notice of motion must contain a statement outlining the jurisdiction of a panel to hear the motion and to grant the relief requested.

2. The notice of motion should state that the moving party will make a motion to the court on a date to be fixed by the Appeal Scheduling Unit.

7.3.3 Scheduling Panel Motions

1. Except in cases of urgency, panel motions will not be scheduled for hearing until the moving party has filed the motion record, factum and transcript, if any.

2. The oral argument for panel motions shall be limited to 25 minutes for the moving party and 15 minutes for the responding party, unless the court grants permission for more time. Requests for additional time for oral argument may be made by e-mail to the Criminal Appeal Coordinator.

7.3.4 Factums for use on Panel Motions

1. In the majority of panel motions, the length of the factums should be 10 pages or less. Factums shall not be more than 30 pages without a court order authorizing the filing of a longer factum. For details on bringing a motion to file a long factum, please refer to section 9.7 of this Practice Direction.

2. If the factum refers to information that is subject to a publication ban imposed by a court in the proceedings, or contains information the release of which would violate a legislative provision, then the party must include a prominent reference to the terms of the applicable order or legislative provision on the front cover of the factum.

3. If the factum refers to information that is subject to a sealing order imposed by a court in the proceedings, then the factum itself must be sealed.

4. The court requests that the parties file an electronic copy of any factum or transcript filed on a motion before a panel. For details on the procedures for filing electronic material, please consult the Guidelines for Filing Electronic Documents at the Court of Appeal for Ontario.

7.3.5 Motions to Introduce Fresh Evidence

1. The Court of Appeal may receive fresh evidence to enable the court to determine the appeal. The court has broad discretion to receive further evidence on appeal when the court considers it in the interest of justice to do so: *Criminal Code,* s. 683. Such motions are heard by a three-judge panel of the court at the time the appeal is heard.

2. Where the fresh evidence sought to be admitted raises a claim of ineffective assistance of counsel, section 17 of this Practice Direction applies.

3. An appellant who seeks leave to introduce fresh evidence at the hearing of any appeal to which this Practice Direction applies, but has not sought leave to do so in any notice of appeal or supplementary notice of appeal filed with the Court, shall serve and file a Notice of Motion immediately upon making the decision to seek to introduce fresh evidence. The Notice of Motion shall describe the nature of the proposed evidence, the ground or grounds of appeal to which it relates and the persons from whom the evidence will be obtained.

4. Once the court receives the Notice of Motion, an appeal management judge will be assigned to supervise the collection and assembly of the material that will comprise the fresh evidence record to be placed before the panel hearing the appeal.

5. The appeal management judge will establish a timetable to ensure that the fresh evidence record is completed expeditiously so that the perfection, listing and hearing of the appeal are not delayed. Among other things, the appeal management judge may give directions and make orders concerning, but not limited to:

(i) the form in which the fresh evidence will be tendered;

(ii) the contents of the record on the motion;

(iii) the time within which the various steps necessary to complete the record will be completed;

(iv) the dates, manner and order in which any cross-examinations shall take place, including whether the cross-examinations will be videotaped and presided over by a member of the court or other judicial officer;

(v) the length of the factums that may be filed in connection with the fresh evidence application; and

(vi) the manner in which the completed fresh evidence record is to be kept in advance of hearing.

6. Subject to the direction of the appeal management judge, the completed record compiled in support of the application for leave to introduce fresh evidence on appeal, including any factums filed in connection with the application, shall be sealed when filed with the court. The party seeking to adduce fresh evidence at the hearing of the appeal shall affix to the outside of the sealed packet a copy of the Notice of Application to Introduce Fresh Evidence that shall describe:

(i) the nature of the proposed fresh evidence;

(ii) the ground or grounds of appeal to which the proposed fresh evidence relates;

(iii) the person or persons from whom the evidence will be obtained;

(iv) the basis upon which the evidence is said to be admissible;

(v) whether the opposing party consents to the receipt of the fresh evidence on appeal (if the opposing party's position is known).

7. Subject to the order or direction of the appeal management judge, appeals involving applications to introduce fresh evidence shall not be listed for hearing until the fresh evidence application record is complete and filed with the Court.

8. Subject to the order or direction of the appeal management judge, the motion to introduce fresh evidence does not relieve counsel of the obligation to perfect the appeal, apart from the fresh evidence material, in accordance with the *Criminal Appeal Rules*.

7.3.6 Applications for Leave to Appeal in Summary Conviction Appeals

1. This section of the Practice Direction applies to applications for leave to appeal under s. 839(1) of the *Criminal Code*. This section does not apply to applications for leave to appeal under ss. 675(1.1) and 676(1.1). The procedure for combined leave and driving prohibition stay applications is set out in section 16 of this Practice Direction.

2. Counsel of record in appeals to which s. 839 of the *Criminal Code* applies are to perfect their appeal in accordance with Rule 18, but must perfect within 60 days after the filing of the Notice of Appeal. Counsel shall serve and file a combined notice of application for leave to appeal and notice of appeal. This notice will not need to be re-filed if leave is granted.

3. In addition to its usual contents, the Appeal Book shall include the notice of appeal and the factums filed in the Superior Court of Justice.

4. At the outset of the Issues and Law portion of the Appellant's Factum in Part III, the appellant shall include the questions of law on which leave to appeal is sought (as in Rule 16(3)(c)), as well as the factors relied upon to justify granting leave to appeal.

5. The respondent's factum shall be filed within 60 days of the date that the appellant's factum was filed, absent permission to extend time.

6. At the outset of Part II of the Respondent's Factum, Response to Appellant's Issues, counsel for the respondent shall state the respondent's position and the factors relevant to the issue of whether leave to appeal should be granted.

7. After addressing leave to appeal issues at the outset of the relevant parts of their factums, in the same parts of their factums, counsel should then include a statement of the issues raised (appellant) or their position with respect to those issues (respondent), immediately followed by a concise statement of the law and the authorities relating to those issues. The balance of each factum should comply with Rule 16.

8. Parties shall serve and file their Books of Authorities no later than five business days after the date on which the factum is filed. Books of Authorities should provide the relevant authority on the leave test as well as on the merits, and shall be prepared in accordance with the practices set out in section 9.7.4 of this Practice Direction.

9. Within 30 days of receipt of all materials relating to the appeal, the materials shall be forwarded to a panel of the court assigned to hear criminal appeals during the week the materials are forwarded. The panel shall decide whether to grant or to refuse leave to appeal based on the written material without the attendance of counsel and cause the parties to be notified of their decision. The court will generally not provide reasons for granting or refusing leave to appeal.

10. Where leave to appeal is granted, no further materials need to be filed by the parties. The Criminal Appeal Coordinator will contact counsel to set a date, and the appeal shall be scheduled for hearing at an early date convenient to the parties. The standard time for oral argument will be 30 minutes for the appellant and 15 minutes for the respondent. Parties requesting more time should follow the procedure in section 10.1 of this Practice Direction.

8. APPEAL MANAGEMENT

1. In complicated appeals, such as appeals involving multiple parties, grouped appeals, applications for restrictions on public access, or appeals in which it is not reasonably anticipated that the transcripts will be completed or the appeal perfected within the time limits prescribed by the *Criminal Appeal Rules*, any party may request, or the Court may order, the assignment of an appeal management judge.

2. Requests for the assignment of an appeal management judge should be made to the Criminal Appeal Coordinator and contain enough information to satisfy the court that such an appointment is appropriate.

3. In all cases in which an appellant alleges ineffective assistance of trial counsel, or where any party seeks to introduce fresh evidence on an appeal from conviction, a verdict of not criminally responsible on account of mental disorder or unfit to stand trial or a decision under Part XXIV of the *Criminal Code*, an appeal management judge shall be assigned.

4. Appeal management conferences are held to deal with issues that are governed by the *Criminal Appeal Rules* as well as with issues about which the *Criminal Appeal Rules* make no specific provision. The appeal management judge's directions may include, but are not limited to matters concerning:

(i) the timely production of the transcript of trial proceedings;

(ii) the timely production of the appeal books;

(iii) schedules for service and filing of transcripts, appeal books, factums and compendiums;

(iv) schedules for the completion of any fresh evidence materials to be tendered for admission on appeal;

(v) the timeliness of the hearing of the appeal on a record that is sufficient to permit a just determination of the issues in dispute; and

(vi) the manner in which any evidence is called in the Court of Appeal.

5. The appeal management conferences, scheduled by the Criminal Appeal Coordinator, may be conducted in person or by teleconference.

6. The parties shall comply with directions given by the appeal management judge, which the Criminal Appeal Coordinator will communicate to the parties and to the members of the panel hearing the appeal. Counsel for the appellant is responsible for communicating the schedule for transcript production to the authorized court transcriptionist.

9. PERFECTING AN APPEAL

9.1 Perfection: Steps Required

1. The appellant is responsible for taking the steps prescribed by Rule 18 of the *Criminal Appeal Rules* for perfecting an appeal. The appellant must file a certificate of perfection with the Registrar before an appeal is deemed to be perfected. After an appeal is perfected, the Appeal Scheduling Unit will assign a date for hearing the appeal, in consultation with the parties.

2. Some or all of the contents of the appeal book required by Rule 14(1)(h) and (i) may be omitted from the appeal book with the consent of the respondent or as directed by a judge, as indicated in Rule 14(2).

3. Rule 19 permits an appellant to bring a motion to a single judge of the Court of Appeal for directions to vary the rules governing the material that must be served and filed to perfect an appeal.

4. When counsel is retained on an appeal which originated as an inmate or in person appeal, counsel shall file a new notice of appeal in Form B, within 15 days of the granting of the certificate, as required by Rule 8(6). Counsel must file proof that a transcript has been ordered (or already filed) with the Form B. The court will then automatically transfer the contents of the inmate appeal court file to the solicitor appeal court file.

9.2 Transcripts of Evidence: Proof of Ordering & Consequences of Delays

1. As noted in section 6 of this Practice Direction, Rule 8 of the *Criminal Appeal Rules* requires that in most cases the appellant file, at the time the notice of appeal is filed, a Certificate of Ordering of an authorized court transcriptionist, stating that a transcript of the proceedings in the court below has been ordered. Rules 8(3) and 8(5) provide for certain limited exceptions, when a certificate cannot be obtained during the appeal period or counsel has not received approval from Legal Aid for the transcript disbursements.

2. When an authorized court transcriptionist sends a certificate to an ordering party, by e-mail or other means, the authorized court transcriptionist shall also send a copy of the certificate to the opposing party, if known.

3. Pending formal amendment of Rule 8, where the Certificate of Ordering cannot be obtained after the additional 15 days following the filing of the notice of appeal, the appellant shall file a letter to the Registrar explaining why the transcript has not been ordered and providing a reasonable timeline for ordering.

4. When proof of ordering has not been filed within 30 days after the filing of the Notice of Appeal, the court may require the attendance of counsel in Status Court to explain the reasons for the delay and to set a schedule for the ordering and completion of the transcript. This appearance may be by telephone: see section 9.11 of this Practice Direction.

5. The court may deem an appeal abandoned if:

(i) the transcript is not ordered during the period prescribed by the Rules, and the time is not extended by a judge of the court; or

(ii) a judge extends the time for ordering transcripts, but the transcript is not ordered within that extended time period.

6. The appellant shall pay for or arrange for payment of the transcripts necessary for an appeal, except where the Attorney General, as respondent, agrees to assume responsibility for payment.

9.3 Contents of Transcripts

1. Pending formal amendment of Rule 8(8), the court finds it helpful for transcripts to include the entire trial proceeding, except the jury selection and the opening addresses of counsel (unless there is a ground of appeal relating to those parts of the trial).

2. When a lawyer who acted at trial is not acting on the appeal, the court encourages the trial lawyer to provide timely assistance to the appellate lawyer, by identifying the necessary transcripts, and/ or in making an agreement respecting evidence pursuant to Rule 8(18).

9.4 Timely Preparation of Transcripts and Communication by Authorized Court Transcriptionists

1. Authorized court transcriptionists shall notify the court when a transcript is ordered (by e-mailing COA.E-file@ontario.ca, including the case name and Court of Appeal file number (when available), and attaching the Certificate of Ordering

if possible). After a transcript has been ordered for a criminal appeal, the completion of the transcript is not to be suspended without an order of a judge or the Registrar of the Court of Appeal or the receipt of a notice of abandonment of the appeal and notification by counsel or the court to the authorized court transcriptionist: Rule 8(15).

2. This instruction does not apply to appeals where the Area Committee has not yet decided whether to grant a Legal Aid certificate to cover the client's appeal. To ensure the timely determination of Legal Aid applications, trial lawyers are reminded of their primary responsibility to prepare an opinion letter for use on the application for Legal Aid. Every effort should be made to prepare and submit this opinion letter to Legal Aid within 30 days of the filing of the notice of appeal.

3. Lawyers are reminded that interim payments for transcripts may be obtained from Legal Aid Ontario in cases where a Legal Aid certificate has been issued.

4. The authorized court transcriptionist is required to file a Certificate/Notification of Completion (in Form 0551, e-mailed to COA.E-file@ontario.ca) when the transcript has been completed, and to copy the ordering party (and the opposing party if known). This requirement is in addition to any obligation imposed on the parties by Rule 8(16).

5. On an appeal from the decision of "a judge of the Superior Court of Justice not sitting as a trial judge" (for example a summary conviction appeal judge or a judge on a motion for relief by way of *certiorari*) where no transcript is required other than that filed in the Superior Court of Justice, the appellant shall file an undertaking to file transcripts within 30 days of filing the notice of appeal, as required by Rule 8(7). This undertaking shall be in Form C.

6. An authorized court transcriptionist's Certificate of Completion must be filed by the estimated completion date of the transcript (90 days from the certificate of ordering, or in the case of summary conviction appeals, 30 days after the notice of appeal is filed). If a transcript has not been completed within 90 days, the authorized court transcriptionist shall notify the ordering party, the opposing party (if known to the authorized court transcriptionist), and the Court of Appeal (by e-mailing COA.E-file@ontario.ca, and including the case name, Court of Appeal file number, and estimated completion date).

7. Counsel are expected to keep the court informed as to the status of transcript preparation, particularly when the transcriptionist falls behind schedule. The court may also inquire about the status of the transcript and take steps to ensure its timely completion, such as placing the matter on the status court list: see section 9.11 of this Practice Direction.

9.5 Instructions for Filing Transcripts

1. The appellant is required to order, serve and file with proof of service a searchable electronic version of the transcript with the court, as well as to file three paper copies. The line and page numbering of the transcript in electronic form must correspond with that in the hard copy. E-mail is an acceptable form of service and filing electronic transcripts, where file size permits.

2. For details on the proper formatting and procedures for filing electronic documents in the Court of Appeal, please consult the Guidelines for Filing Electronic Documents at the Court of Appeal for Ontario.

9.6 Appeal Books and Optional Compendiums

1. Rule 14 of the *Criminal Appeal Rules* requires the appellant to file three copies of an appeal book, together with the factum in order to perfect an appeal. The contents of an appeal book are set out in Rule 14.

2. In complicated appeals, the court finds it very helpful for the parties to also file compendiums, consisting of a table of contents and excerpts from the record, the case law, and other secondary material to which they intend to refer in oral argument. The appellant's compendium shall be bound front and back in yellow covers. The respondent's compendium shall be bound front and back in pink covers.

3. The Court of Appeal encourages parties to submit electronic copies of appeal books and compendiums by USB Key, in addition to serving and filing paper copies of these materials. For details on the procedures for filing electronic documents, please consult the Guidelines for Filing Electronic Documents at the Court of Appeal for Ontario.

4. The date for filing compendiums shall be one week prior to the hearing date.

9.7 Factums

1. Rule 16 of the *Criminal Appeal Rules* deals with the requirement to deliver factums. A factum shall include a concise summary of the relevant facts, a concise argument of the law relating to each issue, and, where relevant, references to the transcripts, appeal book and/or compendium: see Rule 16(3).

2. If the factum refers to information that is subject to a publication ban imposed by a court in the proceedings, or contains information the release of which would violate a legislative provision, then the party must include a prominent reference to the terms of the applicable order or legislative provision on the front cover of the factum.

3. If the factum refers to information that is subject to a sealing order imposed by a court in the proceedings, then the factum itself must be sealed.

4. The Court of Appeal requires the use of 12-point or larger font and encourages the use of Arial or Times New Roman for all text in factums. All text in factums must be double-spaced, except quotations longer than four lines and footnotes. Factums should be printed on only one side of the page with 2.5 cm margins on all sides.

5. The appellant's factum shall be bound with blue covers while the respondent's factum shall be bound with green covers. The Registrar may refuse to accept materials for filing if they do not comply with the *Rules* and/or this Practice Direction, or if they are not legible.

6. In the majority of appeals, the length of the factum should be 30 pages or less. The Registrar will refuse to accept factums that use smaller fonts, reduced margins, insufficient line spacing, or excessive footnotes to meet the 30-page limit.

7. To file a factum of longer than 30 pages, a party must obtain permission of the court by bringing a motion to a single judge. On any such motion, the moving party must, other than in exceptional cases, include a copy of the proposed factum in the motion record.

8. Although Rule 21(3) provides that the respondent's factum shall be served and filed not later than 10 days before the week in which the appeal is to be heard, the court requests that the respondent serve and file its factum not later than 17

days before the week in which the appeal is to be heard, in order to permit the court to prepare more effectively for the hearing.

9. The court requests that counsel file an electronic copy of all factums for use on appeals. For details on the proper formatting and procedures for preparing electronic documents for filing at the Court of Appeal, please consult the Guidelines for Filing Electronic Documents at the Court of Appeal for Ontario for details.

10. The Court of Appeal strongly encourages the use of hyperlinks to case law referred to in electronically-filed factums. Parties may hyperlink authorities to the websites that are not password-protected, such as judgments databases found on the websites of Canadian courts, or www.canlii.org/en/index.html.

11. Parties are encouraged to consult the Reference Guide for Citation Practices at the Court of Appeal for Ontario for assistance in preparing their factums and other appeal material. This reference guide is for information purposes only.

12. Rule 17 provides that a factum on a sentence appeal must be in Form D, and that the default times for oral argument are 15 minutes for the appellant, 10 minutes for the respondent, and 5 minutes for the appellant's reply. The application for leave to appeal is heard at the same time as the sentence appeal, unless an application for bail pending appeal is brought prior to the hearing of the appeal.

9.8 Books of Authorities

1. Rule 22 of the Criminal Appeal Rules requires the filing of books of authorities intended to be referred to in oral argument. The court requests that the book of authorities also include copies of the cases and relevant extracts from authorities cited in each party's factum, subject to the exception in paragraph 4(ii), below.

2. Although Rule 22(1) provides that Books of Authorities should be filed no later than Thursday in the week before the week in which the appeal is scheduled to be heard, it would be of much greater assistance to the opposing party and the panel hearing the appeal if parties were to file their Books of Authorities no later than five business days after the date when the factum is filed.

3. Parties are encouraged to file joint Books of Authorities whenever possible.

4. The following practices should be followed when preparing, serving and filing Books of Authorities, pending formal amendment of the *Criminal Appeal Rules* for any discrepancies:

(i) Include the cases and extracts from secondary authorities that are referred to in oral or written argument, subject to the exception noted next;

(ii) The Court of Appeal has adopted a List of Frequently Cited Criminal Authorities. Authorities on this list do not need to be included in the books of authorities. Instead, when a party's factum refers to an authority on this list, the book of authorities should only include the headnote and particular passage(s) from the authority being relied on. A complete version of the authorities on this list is available on the court's website for the parties, and internally for the judges' use;

(iii) Separate the authorities in the book of authorities with a tab (either numerical or alphabetical) and include a table of contents listing where to find each authority. The authorities may be printed on both sides of the page;

(iv) Authorities cited by one party shall not be duplicated by another: Rule 22(5); and

(v) Joint book of authorities should be bound front and back in yellow covers and marked "Joint Book of Authorities". A book of authorities filed only by the appellant should be bound front and back and marked "Appellant's Book of Authorities". A book of authorities filed only by the respondent should be bound front and back and marked "Respondent's Book of Authorities". As required by Rule 22(6), a book of authorities filed by only one party should be bound in coloured stock the same colour as the party's factum.

5. The order of the court's preference for which print version of a case for parties to include in the book of authorities is as follows:

(i) the decision as posted on the relevant court's website, preferably using the PDF format;

(ii) the decision as posted on CanLII (www.canlii.org), preferably using the PDF format;

(iii) the decision as it appears in an official or semi-official reporter (e.g., Supreme Court of Canada Reports, Ontario Reports, and other provincial reporter series such as the B.C.L.R.'s, etc.);

(iv) the decision as it appears in an unofficial reporter (e.g., Canadian Criminal Cases, Criminal Reports, etc.);

(v) the decision as posted on subscription-based databases (e.g., WestlawNext Canada, LexisNexis Quicklaw, etc.).

9.9 Materials for Grouped Appeals

1. When two or more appeals are to be heard together because the appeals are from the same or related court orders, they are referred to as "grouped" appeals. In appeals with an assigned appeal management judge, that judge will be available for counsel to consult regarding how best to prepare and file the materials in a manner that would be useful to the court. For information about requesting the assignment of an appeal management judge, see section 8 of this Practice Direction.

2. If all parties consent to filing consolidated material for grouped appeals, then the parties may file a letter of consent together with the consolidated material, including appeal books and compendiums, factums and books of authorities for use on all the appeals.

3. If the parties in grouped appeals are unable to agree on the use of consolidated material, they may bring a motion for directions or seek the assistance of an appeal management judge, if necessary.

4. The material filed in grouped appeals should include the court file number of each appeal that is being heard.

9.10 Failure to Perfect an Appeal

1. Where an appellant fails to perfect an appeal within the time limits set out in Rule 18 of the *Criminal Appeal Rules*, the Registrar may proceed under Rule 20(1) to serve notice to place the appeal before the Court of Appeal to be dismissed as abandoned, unless the appeal is perfected within ten days after the service of the notice. The court expects the parties to notify it and the authorized court transcriptionist immediately of any appeal that is abandoned.

9.11 Status Court and Purge Court

1. The Court of Appeal has two forms of criminal status courts to ensure the timely perfection of appeals: Perfection Status Court and Transcript Status Court.

2. Criminal status court is held once per month before a single judge. Criminal status court commences at 8:30 a.m. The judge may adjourn some perfection status court matters to transcript status court and vice versa, depending on timing or underlying issues.

3. The court may refer the issue of a transcript that has not been filed in accordance with the 90 day deadline (for indictable appeals) for the 30 day deadline (for summary conviction appeals) to a status court hearing before a judge of the Court of Appeal. The ordering party must attend the hearing, and the other parties may choose to attend in order to make submissions. The parties may attend either by way of teleconference or in person. At the hearing, the judge may order the authorized court transcriptionist to appear or participate in order to explain the delay and to provide a plan for the timely completion of the transcript. The authorized court transcriptionist may participate in the hearing by telephone, if so permitted by the court.

4. The status court judge may direct that an appeal be scheduled in purge court to be addressed by a three judge panel of this court. Purge court hearings are scheduled every other month on either a Tuesday or Wednesday of that month. Purge court hearings commence at 9:30 a.m.

5. Counsel may request that a matter be spoken to in status court or purge court, by e-mailing the Criminal Appeal Coordinator. The correspondence must be copied to opposing counsel and should provide mutually convenient appearance dates. This is not a substitute for filing proper motion materials when required. The Criminal Appeal Coordinator will confirm the date with all counsel by e-mail.

10. APPEAL SCHEDULING PROCEDURES

10.1 Process for Determining Time for Oral Argument

1. Counsel for the appellant must provide the Court of Appeal with a reasonable time estimate for their oral argument in “Part IV: Order Requested” in the appellant’s factum. Counsel for the respondent may provide their estimated time for oral argument to the Criminal Appeal Coordinator. The court will then review

the requested time for oral argument and assign time for both parties' oral submissions.

2. The Criminal Appeal Coordinator will contact counsel by email or by phone (when necessary) informing them of the time assigned for oral argument and providing a number of possible dates when the appeal may be scheduled. Counsel are to consult with each other and then advise the Criminal Appeal Coordinator of the agreed-upon date. **Counsel should not copy the Criminal Appeal Coordinator on the correspondence between themselves leading up to choosing a mutually convenient date.**

3. Appeals are scheduled on a first come first served basis. It is up to the parties to respond to the Criminal Appeal Coordinator as soon as possible with their suggested date(s) to ensure that the date(s) selected is(are) still available.

4. If the parties cannot agree on a hearing date, or if a party is requesting additional time for oral argument in excess of the time allocated by the court, then they must make a request by e-mail to the Criminal Appeal Coordinator, for a conference call to be arranged with the Criminal List Judge. The Criminal List Judge will determine the hearing date and/or the time allocation for oral argument.

5. The time assignments are provided to the panel hearing the appeal. The court expects the parties to adhere to their time assignments. The time for the appellant's reply, if any, is in the discretion of the panel hearing the appeal.

10.2 Expedited Appeals

1. Most criminal appeals will be heard within four to six months of perfection. However, it is recognized that some appeals may need to be heard more quickly. For example, s. 679(10) of the *Criminal Code* states that where bail pending appeal is refused, a judge of the Court of Appeal may give directions expediting the hearing of the appeal.

2. The court automatically expedites the following types of appeals:

(i) appeals involving young persons;

(ii) appeals in extradition matters;

(iii) appeals involving orders made under Part XX.1 of the *Criminal Code* (Mental Disorder);

(iv) appeals where the hearing of the appeal is delaying the progress of an ongoing court proceeding; and

(v) appeals against sentence only.

3. Such appeals will be heard at the earliest practicable date, usually within three months of perfection.

4. Appeals other than those listed in paragraph 2 may be expedited by bringing a motion to a judge of the Court of Appeal for an order expediting the appeal. The judge must be satisfied that the urgency of the matter requires an earlier hearing date.

10.3 Request to Reconsider a Previous Decision of the Court of Appeal

1. When a party wishes to ask the court to decline to follow a prior precedential decision of the Court of Appeal for Ontario, the party should send a letter to the attention of the Senior Legal Officer requesting that the court convene a five-judge panel to hear the appeal. The letter should explain why there is reason to think that the court's prior precedential decision should not be followed. The letter should be copied to all parties and be submitted not later than the time for filing the requesting party's factum.

2. Any party to the proceeding in the Court of Appeal may file a letter responding to the request to convene a five-judge panel to hear the appeal.

3. The Chief Justice or the Associate Chief Justice, or a judge designated by them, will review a party's request for a five-judge panel, and his or her decision on the matter is final.

10.4 Adjournment Requests

1. If a hearing date for an appeal or a panel motion is more than three weeks away, and if all parties are prepared to consent to an adjournment, then the appellant should send an e-mail to the Criminal Appeal Coordinator, copied to all parties advising of the adjournment request. The e-mail should include "Adjournment Request" and the court file number and title of proceeding in the subject line. Such requests may also be sent by fax, to 416-327-6256. The

Appeal Scheduling Unit will confirm if the matter will be adjourned and if so, will advise the parties of the new hearing date.

2. If a hearing date for an appeal or a panel motion is more than three weeks away, and if the adjournment request is opposed by one or more of the parties, then the party seeking the adjournment must make the adjournment request to a judge of the court who has been designated by the Chief Justice to serve as the List Judge.

3. If the hearing date for an appeal or a panel motion is three weeks or less away, any adjournment request – whether on consent or opposed – must be submitted by e-mail to the Criminal Appeal Coordinator, with "Adjournment Request" and the court file number and title of proceeding in the subject line of the email, or by fax to 416-327-6256. The request will be forwarded to the president of the panel for review and his or her determination will be communicated to the parties by the Criminal Appeal Coordinator.

10.5 Appeals without Oral Argument

1. Pursuant to s. 688(3) of the *Criminal Code*, the court may decide appeals without oral argument. Parties who seek to have an appeal decided without oral argument are required to follow the procedure set out in Rule 24(1) of the *Criminal Appeal Rules*.

10.6 The Composition of the Panel

The parties may consult the Court of Appeal's website at http://www.ontariocourts.ca/coa/en/caselist/ to see the weekly hearings lists and the composition of the panel for their appeal. The weekly hearing lists are posted on Friday at noon on the week prior to the next week's hearings.

11. ABANDONING AN APPEAL

1. If an appeal is abandoned, the relevant party is required to promptly file a notice of abandonment in accordance with Rule 30. The form (based on Form 9 of the *Criminal Proceedings Rules* and modified to state that the case is in the Court of Appeal) shall be served in the manner provided by Rule 5.

2. Where a respondent cannot be found after reasonable efforts have been made to serve the respondent with a notice of abandonment, service of the notice of

abandonment may be effected substitutionally in the manner and within the period directed by a judge of the court of appeal.

3. If an appeal is abandoned after it has been listed for hearing, the relevant party must promptly advise the Criminal Appeal Coordinator, and copy the opposing party and the authorized court transcriptionist on the correspondence.

4. An appeal that was dismissed as abandoned without a hearing on the merits may be reinstated on a motion before a panel, if it is in the interests of justice to do so.

12. COURTROOM DECORUM

12.1 Addressing the Court

Members of the Court of Appeal should be addressed as “Chief Justice”, “Associate Chief Justice”, “Justice” or “Justice (Surname)” as appropriate, and not as Madam Justice, My Lady, My Lord, Your Ladyship, Your Lordship or Your Honour.

12.2 Courtroom Attire

Lawyers do not need to wear gowns when they appear on motions before a single judge in chambers.

Counsel who are pregnant when appearing before a panel in the Court of Appeal for Ontario are free to modify their traditional court attire in order to accommodate their pregnancy as they see fit, including dispensing with a waistcoat and tabs.

12.3 Use of Electronic Communication Devices in the Courtroom

1. Unless a judge orders otherwise, electronic communication devices including cell phones and laptop computers may be used in the courtroom in a manner that is not disruptive of the proceedings.

2. Anyone using an electronic communication device to transmit information about a court hearing has the responsibility to identify and comply with the terms of any applicable publication ban, sealing order, or other restriction on publication that has been imposed by court order or by statute. (For example, a ban under the Criminal Code of Canada, R.S.C. 1985, c. C-46, ss. 486, 486.4-486.6, 517, 539; Youth Criminal Justice Act, S.C. 2002, c. 1, ss. 110, 111).

3. Photography, audio and video recording of a court hearing or of any person entering or leaving a court hearing, without the authorization of a judge, is prohibited by s. 136(1) of the *Courts of Justice Act*, subject to the exceptions in s. 136(2) and (3). Anyone who uses an electronic communication device in a way that violates s. 136 may be ordered to turn off the device, leave the device outside the courtroom, leave the courtroom, abide by any other court order, and may also be subject to prosecution pursuant to s. 136(4) of the *Courts of Justice Act*.

13. ELECTRONIC DELIVERY OF REASONS FOR JUDGMENT

1. The court will send an HTML and PDF copy of the signed judgment by email to those lawyers and parties who have provided an email address on their materials filed with the court. Paper copies of judgments are also available at the court's registry office to those parties who do not have an email address, and to members of the public (who must pay the prescribed fee).

2. Judgments are posted on the court's website shortly after release at http://www.ontariocourts.ca/decisions_index/en/.

The court provides advance notice of release of its reserved decisions at http://www.ontariocourts.ca/decisions_index/notice.htm.

14. DIGITAL AUDIO RECORDINGS

1. The Court of Appeal is not a "court of record". Its oral hearings are not monitored or transcribed as a matter of routine. However, the Court of Appeal records all hearings that are held in open court through the use of digital audio recording. Unless a judge orders otherwise, a copy of a digital audio recording is available upon request, provided that the proceedings are not subject to a statutory publication ban or other court order that prevents the release of the digital audio recording.

2. Requests for access to digital audio recordings should be made in the Registrar's Office. Such recordings are to supplement or replace handwritten notes of the court proceeding, and will not be released unless the person requesting the recording pays the regulated digital recording copy fee and signs an undertaking agreeing to respect the statutory limits on the permitted uses of the recording.

3. If a person wishes to have a transcript of a hearing made, he or she must first bring a motion for permission to do so before a single judge. Once the order is obtained, the person may have the recording transcribed at her or her own expense.

4. The publication, broadcasting, reproduction or other dissemination of an audio recording of a court hearing is prohibited unless expressly authorized by a court order.

15. POST-HEARING SUBMISSIONS

1. Parties are expected to fully argue all issues on an appeal in the factum and in oral submissions at the hearing of the appeal.

2. On occasion, after the hearing of an appeal, the court may wish to receive further submissions from the parties in respect of one or more issues. The Senior Legal Officer will advise the parties of any request by the court for further submissions and will give a timetable within which to serve and file this material.

3. The parties may become aware of a newly-decided authority that might have an impact on a reserved appeal. The authority may be sent by e-mail or fax, without submissions, to the attention of the Senior Legal Officer, who will ensure that the material is transmitted to the panel that heard the appeal.

4. If a party wishes to make submissions concerning the impact of a new authority, a request to do so should be included in a covering letter addressed to the Senior Legal Officer and copied to the other parties. The Senior Legal Officer will advise the parties whether the court is prepared to entertain such submissions and, if necessary, will give a timetable for serving and filing submissions.

5. In exceptional circumstances, a party may seek to make additional submissions to the court while an appeal is under reserve. The request, outlining the essentials of the argument and the reasons the argument was not made at the hearing of the appeal, should be made in writing to the attention of the Senior Legal Officer. Opposing parties may respond, in writing, to the request. The Senior Legal Officer will advise the parties whether the panel will receive further submissions. This process is not to be viewed as a substitute for properly preparing the factum and fully arguing the issues at the hearing of the appeal.

6. After a panel has released its reasons for judgment, the decision of the court is final. The normal recourse for a party who objects to the court's decision is by way of an application for leave to appeal to the Supreme Court of Canada.

7. If there are concerns about the content of a judgment, for example a publication ban issue, counsel should contact the Registrar of the Court of Appeal.

16. APPLICATIONS TO STAY A DRIVING PROHIBITION IN SUMMARY CONVICTION PROCEEDINGS

1. Where an applicant seeks an order staying the operation of a driving prohibition under s. 261 of the *Criminal Code* imposed in summary conviction proceedings, the process for obtaining leave is different than that for other summary conviction appeals.

2. Leave to appeal must be granted under s. 839(1) of the *Criminal Code* on a question of law alone before an order staying the driving prohibition may be made. A single judge of the Court of Appeal will hear the application for leave to appeal and for an order staying the operation of the driving prohibition at the same time in writing, in chambers.

3. The timelines and procedures for other single judge motions, set out in in section 7 of this Practice Direction, apply.

4. On the joint applications for leave and a stay, the applicant shall serve and file, with proof of service, one copy of:

(i) an application record containing, in consecutively numbered pages arranged in the following order:

(a) a table of contents describing each document, including each exhibit, by its nature and date, and in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of application for leave to appeal and for a stay of the driving prohibition pending appeal;

(c) a copy of the proposed notice of appeal (in the event leave is granted);

(d) a copy of the information;

(e) a copy of the reasons for judgment of the court from which leave to appeal is sought with a further typed or printed copy if the reasons are handwritten;

(f) a copy of the Notice of Appeal from the Superior Court of Justice proceedings;

(g) copies of the factums from the Superior Court of Justice proceedings;

(h) any affidavit of the applicant that may be relied on, which shall address matters relevant to the application for leave to appeal and/or the application for a stay of the driving prohibition pending appeal;

(i) a copy of all material relevant to the applications for leave to appeal and for a stay of driving prohibition pending appeal that was before the court from which leave to appeal is sought;

(j) any additional material relied on in support of the application to stay the driving prohibition pending appeal; and

(k) relevant excerpts of transcripts of evidence.

(ii) a factum consisting of a concise statement of the facts and law relied on by the applicant.

5. The respondent shall e-mail all parties and the motions clerk (at COA.E-file@ontario.ca, with "attention Motions Clerk" in the subject line) to indicate its position on the application, and shall serve and file any additional materials which may assist the judge in deciding the application, by 12:00 noon the day before the motion. Responding materials on the appeal proper need only be filed if leave is granted.

6. The court will e-mail all parties a scanned copy of the endorsement disposing of the application.

7. Whether or not the stay is granted, if leave to appeal is granted, the applicant shall perfect the appeal within 30 days of the order granting leave to appeal. The appellant shall serve and file one electronic copy and three paper copies of a factum on the appeal proper, in compliance with Rule 16. In addition to the contents set out in Rule 14, the appeal book shall include the notice of appeal and factums filed in the Superior Court of Justice.

8. Parties shall serve and file their Books of Authorities no later than five business days after the date on which the factum is filed. Books of Authorities shall be prepared in accordance with the practices set out in section 9.7.4 of this Practice Direction.

9. Once the appeal is perfected, the Criminal Appeal Coordinator will contact counsel to set a date, and the appeal shall be scheduled for hearing at an early date convenient to the parties. The standard time for oral argument will be 30 minutes for the appellant and 15 minutes for the respondent. Parties requesting more time should follow the procedure in section 10.1 of this Practice Direction.

17. ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

1. This section of the Practice Direction applies to appeals to the Court of Appeal for Ontario in which an appellant proposes to allege that trial counsel provided ineffective assistance to him or her or otherwise caused or contributed to a miscarriage of justice.

2. For the purposes of this section, the following definitions apply:

(i) “appeal counsel” means a defence lawyer who is retained to represent an appellant on any appeal against conviction and/or sentence to the Court of Appeal for Ontario;

(ii) “appellant" means a person who has been convicted of a criminal offence and has launched an appeal against that conviction and/or sentence to the Court of Appeal for Ontario;

(iii) “appeal management judge" means the judge of the Court of Appeal who is responsible for managing the perfection of the appeal;

(iv) "Court" means the Court of Appeal for Ontario or a panel thereof;

(v) "file" means all of the pleadings, disclosure, documents, memoranda, records, instructions, transcripts, journals, correspondence of all kinds, whether written or electronic, that were kept or used by trial counsel in respect of criminal proceedings against an appellant;

(vi) “record” means all evidence and submissions filed with respect to the fresh evidence application;

(vii) "respondent" means counsel for the Crown (either from the Crown Law Office - Criminal or the Federal Department of Justice) assigned to respond to the appellant's appeal; and

(viii) “trial counsel" means any defence lawyer who was retained to act on behalf of any appellant in criminal proceedings at trial.

3. Before appeal counsel decides whether to advance an allegation of ineffective assistance of trial counsel as a ground of appeal, appeal counsel shall, as soon as possible:

(i) satisfy him or herself, by personal investigation or inquiries, that some factual foundation exists for this allegation apart from the instructions of the appellant;

(ii) provide trial counsel with informal notice of the general nature of the potential allegation of ineffective assistance;

(iii) provide trial counsel with a copy of this section of the Practice Direction, or a link to the court’s website where it can be found; and

(iv) provide trial counsel with a reasonable opportunity to respond to the allegations.

When provided with informal notice of the potential allegations, trial counsel shall acknowledge receipt of the notice in writing to appeal counsel as soon as reasonably possible.

4. In any case in which appeal counsel decides to pursue an allegation of ineffective assistance of trial counsel as a ground of appeal, appeal counsel shall:

(i) provide trial counsel with a copy of a supplementary notice of appeal in which the allegation of ineffective assistance of counsel is described with reasonable particularity, together with any subsequent documents that provide any further details of the claim;

(ii) serve a copy of the supplementary notice of appeal and any subsequent documents that provide further details of the claim on the respondent;

(iii) file a supplementary notice of appeal with the Court; and

(iv) serve and file with the supplementary notice of appeal a cover letter stating that the matter concerns an allegation of ineffective assistance of counsel, and providing the court with the address, telephone number, and e-mail address of the trial or appellate counsel alleged to have provided ineffective assistance.

5. Upon receipt of a supplementary notice of appeal or other document alleging ineffective assistance of trial counsel, a judge of the court will be appointed appeal management judge to supervise the collection and assembly of materials that will become the record for the advancement and determination of the allegation of ineffective assistance of trial counsel. There is no need for counsel to request appeal management in these cases.

6. As soon as reasonably possible after receiving a written request from appeal counsel and a written direction from the appellant or a supplementary notice of appeal that contains an allegation of ineffective assistance, whichever is first to occur, trial counsel shall forthwith transfer the entire file to appeal counsel. If trial counsel has any objection to the transfer of the file, he or she may bring an application for directions to the appeal management judge as soon as possible.

7. If trial counsel wants to, or is professionally obligated to, keep a copy of any portions of the trial file before transferring the file to appeal counsel, trial counsel may, at his or her expense, make copies of those documents she or he wishes to retain from the file. Further, if trial counsel wants access to the file in connection

with the appellant's case after its transfer to appeal counsel, appeal counsel must:

(i) facilitate trial counsel's access to the entire file within a reasonable time; and

(ii) permit trial counsel to make copies of those documents she or he wishes from the file at trial counsel's own expense.

8. As soon as reasonably possible after being served with a notice of appeal, supplementary notice of appeal or other document alleging ineffective assistance of trial counsel, the responsible Director of the Crown Law Office – Criminal or the Public Prosecution Service of Canada shall:

(i) assign counsel to respond to the appeal and to deal with any issues that may arise concerning the claim of ineffective assistance of trial counsel; and

(ii) advise the Criminal Appeal Coordinator of the name of counsel assigned to respond to the appeal. An e-mail to this effect is sufficient.

9. Starting from 30 days after appeal counsel's receipt of the appellant's file from trial counsel, appeal counsel shall permit counsel for the respondent to have access to this file, except for any materials over which the appellant claims solicitor-client privilege.

Where the appellant does not assert any claim of solicitor-client privilege with respect to any material in the file, the respondent may make copies of any or all of those materials at the respondent's expense.

10. Where the appellant asserts a claim of solicitor-client privilege with respect to any materials in the file, appeal counsel shall forthwith provide the respondent with:

(i) an inventory identifying the materials alleged to be privileged, to the extent it is possible to do so without compromising the privilege; and

(ii) a brief written statement of appeal counsel's position on the basis of the claim of the solicitor-client privilege and the extent or scope of any waiver of the privilege arising from the allegation of ineffective assistance at trial.

Where the respondent takes issue with the applicability of solicitor-client privilege as advanced by appeal counsel, the respondent may apply to the appeal management judge for directions about the determination of the issue, in accordance with para. 11, below.

11. As soon as practicable and not later than 45 days from the date on which counsel for the respondent has been assigned to the appeal, appeal counsel shall complete, serve on the respondent and file with the Court a document in Schedule 'A' Word, PDF, available on the court's website. Within the same time period, appeal counsel and counsel for the respondent shall arrange a meeting or a conference call with the appeal management judge regarding:

(i) the specific nature of the allegation of ineffective assistance;

(ii) any issues arising from the assertion of solicitor-client privilege and the extent of any waiver of that privilege;

(iii) any issues arising out of access to the trial file by trial counsel or the respondent;

(iv) a timetable for the appellant's perfection of the appeal, including the filing of material to comprise the record on the claim of ineffective assistance of counsel; and

(v) any other issues relating to the perfection, listing and argument of the appeal.

12. Appeal counsel shall file with the court an inventory of all material that they propose to have constitute the record in connection with the claim of ineffective assistance of trial counsel not later than the deadline imposed by the appeal management judge. To the extent that the respondent knows at this stage of any materials to be filed, they may be included in a joint record to avoid duplication.

13. As soon as possible after the inventory of proposed contents of the record has been filed, appeal counsel, the respondent and the appeal management judge shall meet in person or by conference call to discuss and for the appeal management judge to provide directions about:

(i) the order and timetable for cross-examination on the materials filed by appeal counsel and the respondent;

(ii) the timetable for cross-examination of trial counsel on his or her affidavit, or if trial counsel has not filed an affidavit, for examination of trial counsel on his or her professional performance at trial; and

(iii) the resolution of any outstanding or potential issues of solicitor-client privilege before the examination or cross-examination of trial counsel takes place.

14. When the record for the claim of ineffective assistance of counsel at trial has been completed, appeal counsel and the respondent shall meet in person or by conference call with the appeal management judge regarding:

(i) filing the record compiled in connection with the claim of ineffective assistance of trial counsel;

(ii) filing any additional factums relating to this ground of appeal;

(iii) determining the time to be allotted for oral argument;

(iv) a timetable for the filing of material to be filed on behalf of the respondent;

(v) a timetable for any remaining cross-examinations;

(vi) setting a date for the hearing of the appeal; and

(vii) any other issue relating to the perfection, listing or hearing of the appeal, including whether any further appeal management conference calls are necessary.

15. Where the advancement of ineffective assistance of trial counsel as a ground of appeal involves an application by appeal counsel to introduce fresh evidence on the hearing of the appeal, the record shall be sealed when filed with the court in accordance with section 7.3.5 of this Practice Direction. Absent direction or an order from the appeal management judge to the contrary, the parties may make detailed reference in their respective factums to the content of the material

included in the record completed for the purposes of advancing this ground of appeal. The court may read the sealed materials in advance of the hearing of the appeal. Any factums relating to the fresh evidence shall also be sealed.

16. Where the alleged ineffective assistance was by appellate counsel and not trial counsel, this counsel may be referred to as “first appellate counsel”, and the rest of this section applies with the appropriate modifications.

17. The procedure described in this section of the Practice Direction does not relieve appeal counsel of the obligation to perfect the appeal in accordance with the *Criminal Appeal Rules*. The appeal management judge may give directions or make orders relieving appeal counsel or the respondent of strict compliance with this Practice Direction or the *Criminal Appeal Rules*.

18. APPEALS UNDER PART XX.1 OF THE *CRIMINAL CODE*

18.1 Application of this Part of the Practice Direction

1. This part of the Practice Direction applies to appeals under Part XX.1 of the *Criminal Code*. Parties should refer to the *Criminal Appeal Rules* governing appeals under Part XX.1 – Mental Disorder. In particular, please note that Form E of the *Criminal Appeal Rules* is the proper Form for a Notice of Appeal under Part XX.1, regardless of whether the appellant is the accused, the Crown, or the person in charge of the hospital where the accused is in custody or to which the accused reports.

2. The rest of this Practice Direction applies to appeals under Part XX.1 unless specifically altered in this part of the Practice Direction.

18.2 Service and Filing of Court Documents in Part XX.1 appeals

1. The parties should be aware of special considerations when serving court documents on accused people in Part XX.1 appeals, such as Notices of Appeal pursuant to Rule 39 of the *Criminal Appeal Rules*. Where possible, the Attorney General or the person in charge of the hospital should effect service on counsel for an accused. Where the Rules require that the accused be served personally, the Attorney General and the person in charge of the hospital should make best efforts to effect service in a manner that is sensitive to the accused’s needs and circumstances, including the time of day, and whether service is delivered by an officer in uniform or plainclothes. The Attorney General or the person in charge of

the hospital may also wish to deliver a copy of the notice of appeal to the accused's counsel from the Ontario Review Board as a courtesy, whether or not that counsel is retained for the appeal.

2. Pending formal amendment of the *Criminal Appeal Rules*, and having consulted with the Bar, the following filing deadlines apply to appeals under Part XX.1. Once a hearing date is set, the appellant's factum shall be filed no later than the Friday which falls six weeks before the week of the hearing date. The Respondent's factum shall be filed no later than the Friday which falls three weeks before the week of the hearing date. If the Attorney General and the Person in Charge of the Hospital are both respondent, the Person in Charge of the Hospital is not required to file a factum. If the Person in Charge of the Hospital chooses to file a factum, that factum is due no later than the Friday which falls two weeks before the week of the hearing date.

18.3 Hearings for Part XX.1 Appeals

1. The Rules do not require the filing of a certificate of perfection in appeals under Part XX.1 of the *Criminal Code*. An appeal under this Part may be listed for hearing as soon as the Notice of Appeal, transcript, and appeal book have been filed.

Parties wishing to schedule an appeal should follow the same steps as set out in section 10 of this Practice Direction with any necessary modifications to accommodate the accused.

2. Appeals under Part XX.1 are expedited by the Court of Appeal. Counsel accepting retainers in these cases are expected to make themselves available to argue the appeal within 4-6 months of the filing of the Notice of Appeal. All counsel are urged to accept the earliest possible dates offered by the court.

3. Time for oral argument will be 40 minutes for the appellant and 20 minutes for the respondent, unless more time is requested in the appellant's factum and granted by the court.

4. Where an appellant accused in custody is represented by counsel, pursuant to s. 688(2), the appellant is not entitled to be present at the oral hearing without leave of the court or a judge. If the appellant wishes to attend, this request must be made through counsel at the time the hearing is scheduled. Counsel are

encouraged to discuss with their clients the option for the appellant to attend by means of any suitable telecommunication device satisfactory to the court, including by video or telephone. Attendance by telecommunication device may be appropriate where personal attendance would be disruptive or distressing to the accused. The Attorney General may make arrangements to have the necessary orders signed if personal attendance is required.

5. Hearings for Part XX.1 appeals may be scheduled later in the day than 10:00 a.m., where a party must travel from an institution to attend.

19. CONTACT INFORMATION FOR THE COURT'S REGISTRAR

The office of the Registrar may be contacted at COA.Registrar@ontario.ca, or at (416) 327-5101.

20. CONTACT INFORMATION FOR THE COURT'S SENIOR LEGAL OFFICER

The office of the Senior Legal Officer may be contacted at COA.SeniorLegalOfficer@ontario.ca, or at (416) 327-5101.

21. CONTACT INFORMATION FOR THE COURT'S CRIMINAL APPEAL COORDINATOR

The office of the Criminal Appeal Coordinator may be contacted at COA.Criminal.Scheduling@ontario.ca, or at (416) 327-5101.

January 30, 2017

Chief Justice George R. Strathy — Date