Interlocutory and Third Party Appeals

Issues and Options
For
Uniform Law Conference of Canada 2003

Interlocutory and Third Party Appeals

Issues and Options

Table of Contents

Foreword

The Department of Justice contracted with Professors Alan Manson and Gary Trotter, Queen's University to examine whether the *Criminal Code* should be amended to provide for interlocutory appeals and, if so, in what circumstances. The Discussion Paper was submitted to the Department of Justice in May 2002 and was the basis for discussion at a Roundtable hosted by the Department of Justice in June 2002. The participants at the roundtable included Judges, Crown Attorneys, Defence Counsel, representatives of provincial Ministries of the Attorney General and representatives of the Canadian Bar Association, Canadian Council of Criminal Defence Lawyers and Barreau du Quebec.

The Discussion Paper was also submitted to the Uniform Law Conference of Canada (ULCC), Criminal Section in August 2002.

Based on the comments provided at the Roundtable and ULCC, Professors Manson and Trotter made minor revisions to the paper and developed a Model for statutory reform.

The revised Discussion Paper and Model are submitted to ULCC 2003 to follow up on the resolution passed in 2002 to consider codification of third party / interlocutory appeals.

The Discussion Paper and Model represent the views of the authors, Professors Manson and Trotter.

Questions and Issues for further consideration are set out below to guide the current discussion at ULCC and to inform the Department of Justice in the further development of reform options.

Introduction

In Canada, all appeal rights are statutory and all appellate courts are statutory, with their powers and jurisdiction defined and limited by the governing statute.

The *Criminal Code* sets out the procedure for appeals to the courts of appeal of the provinces for the Crown and accused against verdict and sentence and addresses the right to appeal, the grounds for appeal and the procedure and route for appeals.

Orders made in the course of criminal proceedings, which are not determinative of the ultimate verdict are considered to be interlocutory orders. Such orders have also been referred to as ancillary orders. Some orders are also referred to as "third party" orders because the impact of the order is felt by a third-party – not the accused or the Crown – for example, the media, a complainant or other witness, or a record holder.

The *Criminal Code* does not provide for appeals of interlocutory orders.

Where third parties (persons other than the accused or Crown) have rights or interests determined by rulings or orders made in the course of a trial, the order is final from their perspective although the order is not final from the perspective of the accused or Crown because it does not determine the outcome or verdict. The only avenue of appeal for the third party, therefore, lies in the *Supreme Court Act*, s. 40 (1).

As more fully described in the Discussion Paper prepared by Professors Manson and Trotter, the Supreme Court of Canada has clarified and amplified their jurisdiction to hear such appeals over the last decade in cases including *Dagenais v. CBC* (1994), *R v. McLure* (2001), *R v. Mentuk* (2001) and *R v. Benson and Brown* (2002). Section 40 has been relied on to deal with a range of third party orders including publication bans, production of solicitor client records, production of personal records of sexual offence complainants, a parole eligibility determination and orders for the exclusion of the public.

In *Dagenais*, the Supreme Court of Canada noted that the existing appeal mechanisms were unsatisfactory and called on Parliament to provide a right of appeal for third parties seeking to challenge publication bans under the common law or statutory authority. In subsequent cases, the Supreme Court reiterated their call for codification of a third party appeal process – not limited to publication bans – that would ensure a role for Provincial Courts of Appeal.

It should also be noted that in *R v. Mentuk*, the Supreme Court of Canada stated that neither the Crown nor accused were precluded from relying on section 40 to seek to appeal an interlocutory order.

The Department of Justice has reviewed the law in other countries to determine whether and how interlocutory orders are appealed to higher courts. Appeals of interlocutory orders in criminal proceedings are very limited in the United States, Australia, New Zealand and the United Kingdom. As in Canada, there is a general common law principle that criminal proceedings should not be fragmented by interlocutory proceedings and as a result, there should be no appeal of interlocutory orders.

The review of the law in other countries including Italy, Sweden, the Netherlands, Austria, Denmark, Finland, Norway, Switzerland, Spain and Portugal did not reveal any criminal procedures similar to appeals of interlocutory orders. [Note, however, that there may be analogous procedures and issues that were not apparent due to the challenges of conducting research on the legal systems of other countries.]

In the United Kingdom, the *Criminal Justice Act* and *Criminal Procedure and Investigations Act* provide for interlocutory appeals of specified rulings made at "preparatory hearings" where leave is granted. The issues that may be determined at a preparatory hearing, before a jury is sworn, are set out in the statutes and include, for example, any question as to the admissibility of evidence or any question of law related to the case.

An appeal lies to the Court of Appeal from these particular rulings with leave of the judge or the Court of Appeal. The preparatory hearing may continue notwithstanding that leave to appeal has been granted, but the jury cannot be sworn until the appeal has been determined or abandoned. The Court of Appeal may confirm, reverse or vary the decision appealed against.

In New South Wales, Australia, the *Criminal Appeal Act* provides for appeals to the Court of Criminal Appeal of interlocutory judgements or orders with leave of that court or where a judge of the trial court certifies that the order is a "proper one for determination on appeal". There is no definition of "interlocutory order" provided or list of orders in the statute and the case law continues to evolve regarding the type of orders that are considered to be "interlocutory".

In the United States, the "rule of finality" is well settled and entrenched in the *US Code* (Federal) title 1291. This provides that Courts of Appeal may hear an appeal of a district courts "final" decision, defined to be a decision that ends the litigation on the merits. However, there are limited exceptions to the rule of finality. Title 1292 permits a district court to certify an order "not otherwise appeal able" to the Court of Appeal. The order must involve "a controlling question of law to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation …".

In addition to the statutory exception, the collateral order doctrine was developed at common law, first in the context of civil proceedings, to permit appeals of other orders. Three criteria must be met: the order or ruling must conclusively determine the disputed question; the order must resolve an important issue separate from the merits of the action; and the order must be effectively unreviewable on appeal from a final judgement. The application of the collateral order doctrine in criminal proceedings appears to be very limited.

The review of the law in other countries did not provide any additional guidance or models for an interlocutory appeal regime in Canada.

It is suggested that as a result of *Charter* jurisprudence, the evolution in the recognition of "third party" interests and the orders that engage or affect these interests, and the Supreme Court's jurisprudence on their jurisdiction under section 40 of the *Supreme Court Act*, the situation in Canada is unique. As a result, a regime to govern the appeal of third party orders in Canada should reflect and respond to these factors.

The model developed by Professors Manson and Trotter seeks to do so.

Consultations to Date

At the Roundtable hosted by the Department of Justice in June 2002, the majority of participants agreed that a third party appeal process should be codified. The implications of various options were debated but did not lead to a clear consensus on a specific option or model. Of those who supported codification, the need to carefully craft and limit the appeal process was emphasized.

The discussion at the 2002 Uniform Law Conference also highlighted the implications of codification of an appeal process including a possible increase in appeals, delays in trials and increased costs to parties and third parties. Representatives of the defence bar cautioned against options that would limit the appeal to third parties or the Crown, leaving the accused to await the final verdict.

The Uniform Law Conference, Criminal Section, passed two related resolutions in 2002. Manitoba's resolution called for consideration of an appeal process for publication bans. The Canadian Council of Criminal Defence Lawyers called for consideration of amendments to permit appeals of interlocutory orders in general to Provincial and Territorial Courts of Appeal.

The ULCC and other stakeholders should consider the proposed Model and the questions that follow.

Questions for Consideration

The Discussion Paper prepared by Professors Trotter and Manson, Interlocutory and Third-Party Appeals in the Criminal Process – A Discussion of Reform Options, poses the key or threshold question; whether to provide a statutory right of appeal for third party or interlocutory orders or continue to rely on section 40 of the *Supreme Court Act* as it may evolve at common law.

While there is no clear consensus among stakeholders consulted to date that the *Code* should be amended to address third party appeals, there is considerable support to do so. Moreover, the Supreme Court of Canada has emphasized the need for and benefits of a statutory scheme that provides a role for provincial courts of appeal.

If the answer to the threshold question is that the *Code* should be amended to provide for appeals of interlocutory orders, several other questions or issues require consideration. Several are noted and explored in the Discussion Paper and Model. These and others are set out below.

- Should all third party orders be subject to the appeal procedure or should only specified orders or rulings be subject to the appeal procedure?
  The Model proposed by Professors Trotter and Manson provides for an appeal to the Court of Appeal with leave for particular types of orders and orders made under particular *Code* provisions. While this list is quite comprehensive and includes the types of orders that the Supreme Court of Canada has dealt with, it does not include every possible third party order.

  If the statutory regime does not apply to all possible third party orders, section 40 may continue to be relied on in some circumstances.

- Should the statutory regime specify and limit who may appeal the order or rather specify only the type of order that may be appealed? For example, the Model proposes in section 1 (1) (b) that a complainant may seek to appeal an order made under section 278.3 (production of records). However, the record holder required to produce the record may wish to appeal the order. The accused may also want to appeal an adverse ruling. Should the accused be able to seek leave to appeal such rulings rather than be limited to responding to the complainant's appeal or waiting until the verdict (if convicted) to appeal? Should any party or third party be able to appeal a publication ban order?

- Should leave to appeal to the Court of Appeal be provided by a judge of the Provincial / Territorial Court of Appeal or by the Chief Justice of that Court? Or should both options be provided?

- Should a distinction be made between decisions or rulings made by provincial courts and superior courts? A ruling made by a provincial court can be reviewed by *certiorari*.

  The Model proposed by Professors Trotter and Manson suggests that all provincial court interlocutory decisions be subject to the same appeal regime as orders made by the superior court. The same interests may be at stake for third parties whether the offence is tried in provincial court or superior court. On the other hand, if the appeal of a third party order made by a provincial court is heard by the Provincial Court of Appeal, the appeal of the final verdict may proceed to a lesser court (Superior Court) and this creates an anomaly.

- Should appeals to the Supreme Court of Canada pursuant to s. 40 (1) of the *Supreme Court Act* continue to be an option (with leave) for appeal decisions of the Provincial Court of Appeal? While it is expected that the Supreme Court of Canada will continue to carefully scrutinize applications for leave to appeal and such appeals may be limited, the resulting delays in the trial (if the trial can not proceed until the issue is finally resolved) may be significant. On the other hand, the jurisprudence of the Supreme Court of Canada's confirms that they welcome the record provided and input of the Provincial Court of Appeal on the third party interests at stake. The Supreme Court of Canada therefore appears to be of the view that section 40 would still be relied upon to ensure the highest level of review for third party orders.

  Comments on these issues and more general comments on the proposed Model are encouraged and will assist the Department of Justice in developing appropriate amendments.

Model for Third Party and Interlocutory Appeals

By

Professors Allan Manson and Gary Trotter
Faculty of Law
Queen's University

1. Introduction

The following Model is based on a discussion paper prepared earlier this year[1] and on a roundtable discussion held in Ottawa on June 21, 2002. We have built on the original paper and incorporated ideas raised at the roundtable to present a Model of an interlocutory appeal process for certain issues.

The Model is drafted in broad terms to incorporate numerous interlocutory issues that arise. Paragraph 1(1) is structured like a menu that includes virtually all rulings orders and decisions raised in the Discussion Paper and at the Round Table. Because of the menu-like structure, future decisions to remove a particular decision, ruling or order from the ambit of interlocutory review will not affect the model as a whole. Paragraphs 1(1)(a) (publication bans), (b) (third party records) and (d) (solicitor-client privilege) relate to aspects of the criminal process where the Supreme Court has specifically called for legislative intervention in the form of an appeal route.[2] Paragraphs 1(1)(c) (prior sexual history) and (e) (other privileges) might be said to be suitable for an interlocutory appeal by implication from the Supreme Court judgments.[3] Paragraphs (f) (constitutional validity) and (g) (stays or proceedings) contemplate a broader, and perhaps more controversial, approach to interlocutory appellate review. Given the

---

[1] See Allan Manson and Gary Trotter, *Interlocutory and Third-Party Appeals in the Criminal Process – A Discussion of Reform Options* (hereafter "Discussion Paper").

[2] See *Discussion Paper*, pp.11-22.

[3] *Ibid*.

specified factors for granting leave to appeal proposed in s. 1(3) of the Model, it is anticipated that leave would rarely be granted in this type of case, and only when potential savings to the administration of justice markedly outweighs the effect of fragmentation of the trial process.

2. The Model

s.1(1) An appeal lies to the court of appeal with leave of a judge[4] of that court:

(a) from an order, ruling or decision permitting or refusing a ban on the publication or broadcast of all or any part of a proceeding;
(b) by a complainant, from an order, ruling or decision made under s.278.3 of the *Criminal Code*;[5]
(c) by a complainant, from an order, ruling or decision made under s.276 of the *Criminal Code*;[6]
(d) from any order, ruling or decision that violates or jeopardizes solicitor client privilege;
(e) from any order, ruling or decision that violates or jeopardizes a recognized privilege or a substantial privacy or confidentiality interest;[7]
(f) from any order, ruling or decision that denies a challenge to the constitutional validity of the statutory provision which creates the offence being tried;
(g) from any order, ruling or decision that refuses an application for a stay of proceedings based on alleged violation of the Canadian Charter of Rights and Freedoms or an alleged abuse of process.

---

[4] An alternative for consideration is to stipulate the Chief Justice or Acting Chief Justice as the judge responsible for granting leave, as is done under s. 680 of the *Criminal Code*, in respect of certain bail decisions. This feature would have the advantage of providing some degree of consistency in leave decisions. As well, given the administrative responsibilities of the Chief Justice, it would ensure substantial input by the Chief Justice into decisions that have docket and resource implications.

[5] This is the provision that deals with the production of third-party records. In this model, leave applications can be brought only by a complainant. Below, under "Points for Discussion", we raise the question of whether the procedure should be expanded to included other parties in some circumstances.

[6] This provision deals with evidence of the complainant's prior sexual history. Below, under "Points for Discussion", we raise the question of whether the procedure should be expanded to included other parties in some circumstances.

[7] For example, the kinds of interests that might be captured by the four-fold confidentiality test: see *Regina v. Gruenke* (1991), 67 C.C.C. (3d) 289 (S.C.C.).

s.1(2) Leave to appeal shall only be granted where the interests of justice require a review prior to the termination of the trial.

s.1(3) For the purposes of ss.(2), in determining the "interests of justice," the court shall consider:

(a) the expected duration of the trial;
(b) the adequacy of the record necessary for the determination of the appeal;
(c) the likelihood, and extent, of irreparable harm to any individual if leave is not granted;
(d) the likely impact of granting leave to appeal on the conduct of the trial; and
(e) the impact of the order, ruling or decision on the integrity of any privilege, privacy or confidentiality interest of any person.[8]

s.1(4) After an application for leave to appeal has been filed under this section, the judge deciding the leave application may make an order:

(a) staying the prosecution on an interim basis or pending the determination of the appeal, if leave is granted, on the grounds that:
(i) the interests of justice require it; or
(ii) immediate continuation of the trial will irreparably harm a significant right or interest.
(b) expediting the leave application, or if leave is granted, the appeal, on prescribed terms;
(c) Requiring the applicant to pay the appeal costs of a responding third party.

s.1(5) On the hearing of an appeal under this section, the court may:

(a) dismiss the appeal:
(b) allow the appeal, and quash or vary the original order;
(c) order costs against the appellant if it concludes that the appeal was without merit, ought not to have been brought, and unduly delayed the prosecution.

---

[8] Here, we are concerned with the general impact of orders on recognized privileges, beyond the facts of the case before the court. For example, with solicitor-client privilege, how will the impugned order affect the manner in which lawyers discharge their duties: see the comments of the Supreme Court in *Regina v. McLure* (2001), 151 C.C.C. (3d) 321 (S.C.C.) and *Regina v. Brown* (2002), 162 C.C.C. (3d) 257 (S.C.C.). Similar observations might be made in respect of confidentiality in the medical and other professional contexts. It would be open to Parliament to restrict its consideration of impact to the specific privilege or interest holders and leave the question of general impact to be developed by the judiciary. Of course, if Parliament wishes to leave room for the judicial amplification of the "interests of justice", then the criteria in this subsection cannot be exhaustive.

3. **Contingent Appeal Rights**

One particular issue, not represented in the model above, warrants separate consideration. Paragraphs 1(1)(b) (third-party records) and (c) (prior-sexual history) only provide third-parties with appeal rights. Restricting review access to third-parties is supportable because an accused person will be able to appeal an adverse finding on these issues if and when a conviction is entered. For the third-party, any harm will come immediately with the order of the court and will not be amenable to meaningful review at a later time.

At the Roundtable discussion on June 21, 2002, the possibility of a case of partial relief from a third-party records application was discussed (i.e., when the trial judge orders only partial production of the materials sought by the accused). In these circumstances, the complainant would have a right of appeal under s.1(1)(b) of the Model. But what about the accused? If leave to appeal is granted, the general issue of production will be before an appellate court. In these circumstances, should the accused not be able to appeal from the failure of the judge to order further production? More importantly, if the matter will be examined by a Court of Appeal, should the Court not be able to order, after inspecting the relevant documents, that the trial judge was indeed correct to have ordered production, but that further documentation ought to have been ordered produced as well?

The question is whether the production order is reviewable at large, or only that part presented to the Court of Appeal through the complainant's appeal. This may be a matter that the courts of appeal will themselves develop answers to as they gain experience with the new appeal provisions. This might be achieved through the remedial part of the model, s.1(5)(b), which gives a court of appeal the power to "allow the appeal and quash or *vary* the original

order." This form of drafting contemplates a power similar to that which the courts of appeal have when dealing with appeals against sentence.[9] Courts of appeal have appeal have recognized that an appellate court has the power to increase a sentence on appeal against sentence by the accused,[10] although this power is used extremely rarely.[11]

[9] *Criminal Code*, s. 687.

[10] See *Regina v. Hill* (No. 2) (1977), 25 C.C.C. (2d) 6 (S.C.C.). Out of a concern for fairness, courts have required some form of written notice of an intention to seek an increased penalty in these circumstances.

[11] See *Regina v. Murray* (1994), 75 O.A.C. 10 (C.A.).

Interlocutory and third-Party Appeals in the Criminal Process
A Discussion of Reform Options

Prepared by

Professors Allan Manson and Gary Trotter

Faculty of Law
Queen's University
Kingston, Ontario

October 2002

Table of Contents

1. **Background**

In Canada, all appellate courts are statutory. Their powers and jurisdiction are defined and constrained by the statutory framework that establishes and governs them; they have no inherent jurisdiction. While this has always been the case, the situation has become dramatically apparent in the past two decades. Its relevance is largely attributable to the *Charter*.

First, the entrenchment of the *Canadian Charter of Rights and Freedoms* has introduced a number of opportunities for litigants in the criminal process to challenge not only the constitutional validity of the charging provision that underlies the information or indictment, but also the constitutionality of various procedural incidents and rulings. Secondly, the advent of the *Charter* has empowered people other than the accused and the prosecutor to come forward with various claims for standing, rights of participation, access to material, or protection from the disclosure of private material. These, and related issues, have encouraged counsel and litigants to consider an expanded set of strategies within the criminal process.

This expansion of the set of litigious issues has resulted in various applications to trial courts. Applications produce rulings and, whenever there is a formal ruling, there will invariably be someone who is unhappy with it. An appeal will be considered. But where should an appeal be brought? If one waits until the end of the trial, the *Criminal Code* prescribes an appeal route. However, there are many reasons why a party may be reluctant to wait through the time and expense of the trial to come to a conclusion. As well, there are some issues that cannot wait. When the issue is publication, there may be some situations in which an order can be delayed. However, when the issue involves the choice between bringing personal, privileged or

confidential material into the trial process, or protecting it from disclosure, a resolution cannot be meaningfully postponed. If the ruling favours access, then without an immediate appeal, any privacy or confidentiality interest will be lost and subsequent review will be moot.

But how do interlocutory appeals fit into the appellate framework of the Criminal Code? For now, the answer is clear: not easily and not fairly. If the trial court is not a superior court, the party can seek to review a ruling by way of an application for *certiorari*. Through this relatively expeditious route, the party can move for an order quashing[12] the original ruling. The grounds, however, may be limited by the law of extraordinary remedies. If the trial court is a superior court, then there is no opportunity for a prerogative remedy and no appeal directly to the court of appeal. All that is available is an application for leave to appeal to the Supreme Court of Canada pursuant to s.40 of the *Supreme Court Act*. This is expensive and perhaps unduly complex.

The view has been expressed by some, including by the Supreme Court of Canada, that it would be in the best interests of the criminal process if more expeditious and local appeal routes were established. In this paper, we evaluate this viewpoint and, after canvassing the current legal context, offer a number of structural models for potential new appeal routes to deal with interlocutory and third party issues. We examine each model and discuss its advantages and disadvantages.

---

[12] For some purposes, the remedial scope of *certiorari* has been expanded. See the discussion in *Dagenais v. C.B.C.* (1994), 94 C.C.C. (3d) 289 (S.C.C.), *infra*.

2. **The Statutory Framework**:

(a) **Criminal Code**: In indictable cases, the ability of parties to appeal is set out in the following provisions:

> s.674. No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences.
>
> s.675. (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> (a) against his conviction
>
> (i) on any ground of appeal that involves a question of law alone,
> (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or
> (iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or
>
> (b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.
>
> (1.1)[13] A person may appeal, pursuant to subsection (1), with leave of the court of appeal or a judge of that court, to that court in respect of a summary conviction or a sentence passed with respect to a summary conviction as if the summary conviction had been a conviction in proceedings by indictment if
> (a) there has not been an appeal with respect to the summary conviction;
> (b) the summary conviction offence was tried with an indictable offence; and
> (c) there is an appeal in respect of the indictable offence.

[13] Added by S.C. 1997, c.18, s.92, proclaimed in force June 16, 1997 (see SI/97-68).

(2) A person who has been convicted of second degree murder and sentenced to imprisonment for life without eligibility for parole for a specified number of years in excess of ten may appeal to the court of appeal against the number of years in excess of ten of his imprisonment without eligibility for parole.

(2.1)[14] A person against whom an order under section 741.2[15] has been made may appeal to the court of appeal against the order.

(2.2)[16] A person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and sentenced to imprisonment for life without eligibility for parole until the person has served the period specified by the judge presiding at the trial may appeal to the court of appeal against the number of years in excess of the minimum number of years of imprisonment without eligibility for parole that are required to be served in respect of that person's case.

(3)Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of a person, that person may appeal to the court of appeal against that verdict on any ground of appeal mentioned in subparagraph (1)(a)(i), (ii) or (iii) and subject to the conditions described therein.

(4) Where a judge of the court of appeal refuses leave to appeal under this section otherwise than under paragraph (1) (b), the appellant may, by

---

[14] Added by S.C. 1995, c.42, s.73, in force January 24, 1996, (see SI/96-10)

[15] It seems quite clear that this reference was to the sentencing provision dealing with a trial judge's power in certain cases to increase parole ineligibility which was previously number as s.741.2 but is now s.743.6. Appellate courts have recognized the ability of the parties to appeal such decisions on the basis that they fall within the definition of "sentence" in s. 673(b).

[16] Originally enacted by S.C. 1997, c.18, ss.92, and number subsection (2.1) in force June 16, 1997 (see I/97-68) but renumbered as subsection (2.2) by S.C. 1999, c.31, s.68, in force June 17, 1999.

filing notice in writing with the court of appeal within seven days after the refusal, have the application for leave to appeal determined by the court of appeal.

676. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone[17];

(b) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on indictment;

(c) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or

(d) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

(1.1)[18] The Attorney General or counsel instructed by the Attorney General may appeal, pursuant to subsection (1), with leave of the court of appeal or a judge of that court, to that court in respect of a summary conviction or a sentence passed with respect to a summary conviction as if the summary
conviction had been a conviction in proceedings by indictment if

(a) there has not been an appeal with respect to the summary conviction;

(b) the summary conviction offence was tried with an indictable offence; and

(c) there is an appeal in respect of the indictable offence.

---

[17] Amended by S.C. 1997, c.18, s.93, in force June 16, 1997 (see SI/97-68).

[18] Enacted by S.C. 1997, c.18, s.93 in force June 16, 1997 (see SI/97-68)

> (2)[19] For the purposes of this section, a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged where the accused has, on the trial thereof, been convicted or discharged under section 730 of any other offence.
>
> (3) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against a verdict that an accused is unfit to stand trial, on any ground of appeal that involves a question of law alone.
>
> (4) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal in respect of a conviction for second degree murder, against the number of years of imprisonment without eligibility for parole, being less than twenty-five, that has been imposed as a result of that conviction.
>
> (5)[20] The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against the decision of the court not to make an order under section 741.2.

(b) Commentary: Within the past decade, Parliament has been concerned to ensure the existence of appellate routes to provincial appellate courts. A number of the provisions listed above have been added or amended within this period to achieve this objective. Certainly, this has been the case with respect to orders or sanctions that are part of the sentencing process. The definition of "sentence" has been amended numerous times within the past decade to ensure full appellate access[21]. At the same time, some of the new kinds of orders encompassed by the Code

---

[19] Enacted by S.C.1995, c.22, s.10 in force September 3, 1996 (see SI/96-79, Sch I, Item 27)

[20] Enacted by S.C.1995, c.42, s.74, in force January 24, 1996 (see SI/96-10). It seems quite clear that this reference was to the sentencing provision dealing with a trial judge's power in certain cases to increase parole ineligibility which was previously number as s. 741.2 but is now s.743.6. Appellate courts have recognized the ability of the parties to appeal such decisions on the basis that they fall within the definition of "sentence" in s. 673(b).

[21] See S.C. 1995, c.22, s.5(1) in force September 3, 1996 (see SI/96-79); S.C. 1996, c.19, s.74, in force May 14, 1997 (see SI/97-47); S.C. 1995, c.39, s.155, in force December 1, 1998 (see SI/98-95); S.C. 1995, c.39, s. 190(a), in force December 1, 1998; S.C. 1999, c.5, s. 25, in force July 1, 1999 (see SI/99-24); S.C. 1999, c.25, s.31(5), in force December 1, 1999 (see SI/99-135).

provisions have been accompanied with statements as to appellate remedies even if the routes are not exactly clear.

For example, consider the 1997 amendments to the process that governs whether a prisoner serving a life sentence for first-degree murder can go forward, after serving fifteen years, with an application to reduce the 25-year period of parole ineligibility. The Chief Justice is now given preliminary jurisdiction to determine whether there is a reasonable prospect of success. This finding can be appealed to the Court of Appeal by the prisoner or by the Attorney General.[22] Parliament not only was clear in stipulating the route of appeal, which given the status of the decision-maker left little choice, but also ensured that the scope of appeals covered "any question of law or fact or mixed law and fact", and that the full panoply of appellate powers applied.

In contrast, consider the new DNA warrant procedure[23] which, as far as an appeal is concerned, is accompanied simply by the provision that:

> The offender or the prosecutor may appeal from a decision of the court made under subsection 487.051(1) or 487.052(1).[24]

---

[22] See s. 745.62 (1). This route of appeal explicitly encompasses all usual appellate powers: see s.745.62(3). This is especially curious since s.745.6 hearings are not themselves amenable to appeal to the provincial appellate court: See *R. v. Vaillancourt* (1989), 49 C.C.C.(3d) 544 (Ont.C.A.); leave to appeal to the S.C.C. refused.

[23] See ss.487.04 to 487.091.

[24] See s. 487.054, enacted by S.C.1998, c.37, s.17.

This provision makes no mention of the route or grounds of appeal. Courts of appeal have concluded that, for applications which follow convictions for indictable offences, the appeal is to the Court of Appeal.[25] In *Regina v. Hendry*, Rosenberg, J.A. reasoned:

> Section 487.054 of the Criminal Code provides that the offender or the prosecutor may appeal from a decision of the court made under subsection 487.051(1) or 487.052(1). The wording of the section is somewhat unusual in that it does not clearly specify the route of the appeal. However, it was common ground among the parties that the only sensible construction of the section was that the appeal route follow the scheme in the Criminal Code generally. That is, in indictable proceedings the appeal from the making or refusal to make the order should lie to the court of appeal as defined in s. 673 of the Criminal Code in accordance with Part XXI of the Criminal Code. Similarly, where the case has proceeded as a summary conviction matter, the appeal should be taken in accordance with Part XXVII of the Criminal Code. This will mean that the appeal lies initially to the appeal court as defined in s. 812 or s. 829, as the case may be. Since none of these cases involved summary conviction proceedings, it is unnecessary to decide whether a further appeal lies with leave to the court of appeal, as defined in s. 673, under s. 839 on a question of law alone. I note, however, that the Crown appellant conceded that such an appeal would be available. A resolution of that issue can await a case where it is clearly raised.[26]

The DNA issues discussed above arose almost immediately after a conviction. However, the DNA warrant process can also apply to persons who are serving a sentence of imprisonment which commenced before the regime was enacted[27]. These applications are made to a Provincial Court Judge and no mention is made of an appeal, leaving the parties with *certiorari* as the only response.

---

[25] See *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A). Also see the Nova Scotia Court of Appeal decision in *R.v.. Murrin*, [2002] N.S.J. No. 21 (QL), released on January 22, 2002 where the Court said only that "the parties to this appeal agreed that an appeal of this decision, being one in relation to an indictable offence, should lie to this court of appeal, pursuant to Part XXI of the Code".

[26] See *Hendry, ibid,* at p.283.

[27] See s.487.055.

Two other additions to the Code within the past decade are worthy of note. Sections 276 to 276.5[28] provide the procedural framework for determining whether, in a sexual assault prosecution, evidence can be adduced of previous sexual conduct of the complainant. Also, after the decision in *R.v. O'Connor,*[29] Parliament established a procedure for determining if private personal information[30] of a complainant or a witness can be disclosed[31]. Both of these procedures were accompanied by an identical provision which implicates appeal issues:

> s. 276.5 For the purposes of sections 675 and 676, a determination made under section 276.2 shall be deemed to be a question of law.
>
> s. 278.91 For the purposes of sections 675 and 676, a determination to make or refuse an order pursuant to subsection 287.5(1) or 278.7(1) is deemed to be a question of law.

These provisions limit the scope of a Crown appeal after conviction, but they do not address the issue of whether an appeal from an order under ss. 276.2, 278.5(1), or s. 278.7(1), can be dealt with at an interlocutory stage. Perhaps, this was a considered attempt to avoid interlocutory appeals. Subsequently, we have seen an unsuccessful challenge to the constitutional validity of

---

[28] Enacted S.C. 1992, c.38, s.2, following the decision in *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.) which ruled that the predecessor provisions violated s.7 of the *Charter*. For a discussion of these provisions, and a confirmation of their constitutional validity, see *R. v. Darrach*, [2000] 2 S.C.R. 443.

[29] (1995), 103 C.C.C.(3d) 1 (S.C.C.)

[30] Section 278.1 defines this category as "personal information for which there is a reasonable expectation of privacy and includes...medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoptions and socials services records, personal journals and diaries, an records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature..."

[31] See ss. 278.1 to 278.91.

the disclosure of private records regime that went on an interlocutory basis to the Supreme Court via leave under s.40 of the *Supreme Court Act.*[32]

(c) **Supreme Court Act**:

If there is no interlocutory route to a provincial appellate court, all that remains available to a party is an appeal, with leave, to the Supreme Court:

> s.40(1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.
>
> (3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

---

[32] See *R.v Mills* (1999), 28 C.R. (5th) 207 (S.C.C.), which confirmed the constitutionality of these provisions.

(d) **Commentary**:

This is the only option now available for interlocutory and third party issues emanating from prosecutions conducted in the superior courts. For the Supreme Court, Iacobucci J. in *R. v. Mentuck*,[33] a case dealing with a publication ban, offered the following explanation of the existing appellate jurisdiction:

> The Supreme Court Act was passed to allow this Court to serve as a "general court of appeal for Canada", and s. 40 must be read in light of the purpose of the Court's enabling legislation. Unless the Court is specifically prohibited from entertaining appeals by s. 40(3) of the Act, it may grant leave to hear any appeal from the decision of any "court of final resort" in Canada. Parliament has seen fit to provide generally for rational routes of appeal in criminal cases. In these cases, we cannot take jurisdiction, nor would we wish to. But a purposive approach to s. 40 requires the Court to take jurisdiction where no other appellate court can do so, unless an explicit provision bars all appeals. Section 40(1) ensures that even though specific legislative provisions on jurisdiction are lacking, this Court may fill the void until Parliament devises a satisfactory solution. Concomitantly, s. 40(3) ensures that this Court is not overrun by a large volume of appeals on interim and interlocutory orders made in the context of a criminal proceeding, where Parliament has decided it best that such appeals be conducted in an orderly fashion at the conclusion of the trial and in accordance with the procedures provided in the Criminal Code.
>
> The situations in which this Court has jurisdiction under s.40 of the Supreme Court Act over direct appeals from the court of first instance are, therefore, appeals where (a) an order deals with issues ancillary, or not integrally related, to the guilt or innocence of the accused; and (b) where there is no other available right of appeal or any explicit bar to appeal….The harm caused by the issue or refusal of the ban could not be cured by the outcome of the trial, making this interlocutory order "final". No appeal was available under s.676(1) of the Criminal Code, and neither the Code nor s. 40(3) of the Supreme Court Act bars the appeal. I therefore conclude that this Court has jurisdiction to hear the appeal under s. 40 of the Supreme Court Act. [34]

---

[33] (2001), 158 C.C.C. (3d) 449 (S.C.C.).

[34] *Ibid*, pp.461-462.

(e) Conclusion: The lesson to be learned is that Parliament seems inclined to ensure that appeals are available, but it does not always take care to stipulate the route. New processes seem to be captured somewhere in the appellate structure, without forcing the parties to resort to s.40 of the *Supreme Court Act.* The procedure for the disclosure of private records is an exception. Similarly, no interlocutory avenue is stipulated for dealing with the admissibility of previous sexual conduct evidence. Whether courts would entertain this issue at the interlocutory stage, either by leave to appeal or *certiorari*, was left to be determined.[35]

3. **The Case Law**:

(a) **The Statutory Nature of Appellate Jurisdiction**: The statutory nature of appellate jurisdiction has long been accepted. It has been confirmed in the post-*Charter* era in a number of contexts. The most significant arises from a challenge to the constitutionality of the charging provision, as was demonstrated in the case of *R. v. Morgentaler, Smolling and Scott.*[36] The three physicians were charged with conspiring "with each other, with intent to procure the miscarriage of female persons, to use an induced suction method for the purpose of carrying out that intent, thereby committing an offence contrary to s. 251(1) and s. 423(1)(d) of the Criminal Code". Before the trial commenced, the accused applied to the trial judge for a ruling that s.251, the abortion provision, was unconstitutional on various Charter grounds. Associate Chief Justice Parker rejected the Charter argument and the accused physicians appealed immediately to the

---

[35] Note that *Regina v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.) held that all interlocutory third party issues may be pursued by a leave application under s.40 of the *Supreme Court Act.*

[36] (1984), 16 C.C.C. (3d) 1 (Ont. C.A.).

Ontario Court of Appeal. A unanimous court quashed the appeal holding that there was no jurisdiction to entertain the issue at that stage of the proceeding. It observed:

> The Court of Appeal has been held to have no inherent jurisdiction to entertain an appeal in criminal cases. In *Welch v. The King*, [1950] S.C.R. 412, 97 C.C.C. 177, [1950] 3 D.L.R. 641, Fauteux J. writing for the majority said at p. 428 S.C.R., p. 192 C.C.C., pp. 654-5 D.L.R.:
>
> > The right of appeal is an exceptional right. That all the substantive and procedural provisions relating to it must be regarded as exhaustive and exclusive need not be expressly stated in the statute. That necessarily flows from the exceptional nature of the right[37].

The Court concluded that the jurisdictional issue had already been decided:[38] there was no statutory jurisdiction to hear the appeal. It added that it would be premature to consider the "very interesting point" at this stage. Counsel argued that since the *Charter* was the source of the challenge, the *Charter* could provide the remedy as well. However, the Court concluded:

> Section 24(1) does not purport to create a right of appeal or bestow appellate powers on this or any other court. Rather it authorizes those courts which have statutory appellate jurisdiction independent of the Charter to exercise the remedial power in s. 24(1) in appropriate cases when disposing of appeals properly brought before the court[39].

Accordingly, while Associate Chief Justice Parker was a court of competent jurisdiction to hear the arguments and potentially issue a s.24 remedy, the Court of Appeal was not. Neither could

---

[37] *Ibid*, p.5.

[38] Relying on *R. v. Kennedy*, [1972] 2 O.R. 754, 6 C.C.C. (2d) 564 (Ont. C.A.).

[39] *Supra*, note 25, at p.7.

s.52 of the *Constitution Act* provide a source of appellate jurisdiction. These constitutional arguments would have to wait until after the jury returned a verdict. Eventually, the physicians were acquitted at trial and the case made its way through the appellate process resulting in a decision by the Supreme Court that s.251 was unconstitutional.

While the ruling in *Morgentaler* dealt specifically with applications to quash an indictment on the basis of alleged constitutional invalidity, the reasoning applies to other interlocutory applications brought in superior courts. First, unless the Code is amended or Part XXI, which provides for avenues of appeal, is extended to embrace interlocutory issues, there is no statutory jurisdiction (apart from s.40 of the *Supreme Court Act*) to deal with interlocutory rulings. Secondly, even if the particular claim arises from the *Charter*, the *Charter* provides no appellate remedial jurisdiction.

(b) **The Discretion to Reserve a Ruling on Constitutional Validity**:

Within the trial context, the timing of applications presents another issue. Specifically, it is a serious question whether it is desirable for a trial judge to rule on pre-trial constitutional challenges since, by definition, the issue will be decided without a full factual context. In *R. v. DeSousa*[40], the Supreme Court considered a case in which the accused had challenged the constitutionality of s.269, "unlawfully causing bodily harm". The trial judge, a judge of the District Court, ruled that it was unconstitutional because "unlawful" might include an absolute liability offence. This was reversed on appeal requiring a re-trial. The accused appealed to the

Supreme Court. Although that Court dismissed the appeal, its decision included an interesting discussion of pre-trial applications challenging constitutional validity.

Justice Sopinka for the Supreme Court recognized that the trial judge had jurisdiction to decide the issue of constitutional validity but questioned whether it was prudent to decide it at the pre-trial stage. He offered important comments on when a ruling should be reserved until evidence was heard:

> The decision whether to rule on the application or reserve until the end of the case is a discretionary one to be exercised having regard to two policy considerations. The first is that criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own. This policy is the basis of the rule against interlocutory appeals in criminal matters. See *Mills v. The Queen*, [1986] 1 S.C.R. 863. The second, which relates to constitutional challenges, discourages adjudication of constitutional issues without a factual foundation....In exercising the discretion to which I have referred the trial judge should not depart from these policies unless there is a strong reason for so doing. In some cases the interests of justice necessitate an immediate decision.[41]

Aside from noting the two applicable principles, avoiding fragmentation and providing a factual context, Sopinka J. gave examples of the kinds of situations that would justify a pre-trial ruling:

- cases in which the trial court itself is implicated in a constitutional violation[42];
- where substantial on-going constitutional violations require immediate attention[43]; or

---

[40] (1996), 76 C.C.C. (3d) 124 (S.C.C.).

[41] *Ibid*, at p.132.

[42] As in *R. v. Rahey*, [1987] 1 S.C.R. 588.

[43] As in *R. v. Gamble*, [1988] 2 S.C.R. 595.

- where it will be economical to decide the constitutional question before proceeding to trial on the evidence, especially where the challenge is apparently meritorious and does not appear to be dependent on facts that will be elicited during the trial.

In articulating the constraints on the trial judge's discretion, the decision in *DeSousa* may limit interlocutory rulings on constitutional validity. However, they will still occur. What is particularly valuable about the late Sopinka, J.'s analysis is the statement of principles and the examples of exceptions. These may be helpful in ensuring that any new appellate structures are fair and practicable.

(c) ***Dagenais*** **and Publication Bans**:

There are a growing number of situations where third parties, whose interests are not necessarily identical to the accused or the prosecution, may have an interest in challenging an interlocutory ruling. Given the nature of some third-party interests, appellate review of orders affecting these interests will be ineffectual, and sometimes highly prejudicial, if review must wait until the end of the trial. In other words, with some interests, the genie cannot be put back into the bottle. Prejudice is immediate and perhaps irremediable. This is certainly the case when the issue involves compellability, or protecting privacy, privilege or confidentiality.[44]

[44] Here, we are distinguishing between recognized claims of privilege, and claims of confidentiality as may arise pursuant to *Regina v. Gruenke*, [1991] 3 S.C.R. 263.

The leading case in this area is the Supreme Court decision in *Dagenais v. Canadian Broadcasting Corporation (C.B.C.).*[45] Four men who were current or former members of a religious order known as the Christian Brothers had been charged with various offences of physical and sexual abuse allegedly committed against young boys in their care. Their trials had already commenced or were scheduled to commence in a superior court when the C.B.C. announced that it was planning to broadcast "The Boys of St. Vincent". This four-hour mini-series was described as "a fictional account of sexual and physical abuse of children in a Catholic institution". The accused men applied to a judge of the General Division for an interlocutory injunction prohibiting the broadcast of this show anywhere in Canada until their trials had been completed. The judge of first instance issued an order restraining the C.B.C. from "broadcasting the program *Boys of St. Vincent* and from publishing in any media any information relating to the proposed broadcast of the program until the completion of the four criminal trials of the four applicants but not extending to any appeals there from." On appeal by the C.B.C. to the Ontario Court of Appeal, the order was varied but only geographically, to restrict its ambit to the Province of Ontario and a television station in Montreal. The C.B.C. appealed to the Supreme Court of Canada where Lamer, C.J.C. described the central jurisdictional issues as:

> .....what court(s) have jurisdiction to hear a third party challenge to a publication ban order sought by the Crown and/or the defendant(s) in a criminal proceeding and made by a provincial or superior court judge under his or her common law or legislated discretionary authority? This case also turns in part on the issue of publication bans - on what grounds should a publication ban be ordered by a

---

[45] (1994), 94 C.C.C.(3d) 289 (SCC).

> judge under his or her discretionary authority and on what grounds should it be altered or set aside by a higher court?[46]

In other words, the case involved not only questions about how to apply for a publication ban but also about the jurisdiction to review a decision granting or refusing to grant a ban. For Lamer, C.J.C., with Justices Sopinka, Cory, Iacobucci and Major concurring, the first set of general principles dealing with the initial application was clear:

> To seek a ban under a judge's common law or legislated discretionary authority, the Crown and/or the accused should ask for a ban pursuant to that authority. This request should be made to the trial judge (if one has been appointed) or to a judge in the court at the level the case will be heard (if the level of court can be established definitively by reference to statutory provisions such as ss. 468, 469, 553, 555, 798 of the Criminal Code, R.S.C., 1985, c. C-46, and s. 5 of the Young Offenders Act, R.S.C., 1985, c. Y-1). If the level of court has not been established and cannot be established definitively by reference to statutory provisions, then the request should be made to a superior court judge (i.e., it should be made to the highest court that could hear the case, in order to avoid later having a superior court judge bound by an order made by a provincial court judge).[47]

While this part of the decision was predictable, the landscape became murky when consideration moved to the issue of appellate review. Certainly, the Crown and the accused had the "regular avenues of appeal" available to them pursuant to Parts XXI and XXVI of the *Criminal Code*. However, those provisions have their own inherent limitations, especially arising from the principle against interlocutory appeals in criminal matters. Moreover, this situation is different for third parties, specifically the media, who are not expressly included in the Code's procedure. The media argued that they had a broad range of remedies available to them. Lamer, C.J.C.

---

[46] *Ibid*, at 301.

[47] *Ibid*, at 302.

recognized that none of the existing jurisdictional paths was "absolutely satisfactory" but that it was necessary to find the "least unsatisfactory of an unsatisfactory set of options"[48].

He canvassed the various routes potentially available to third parties to challenge a publication ban and concluded:

- the *Criminal Code* provides no direct appeal to the media;
- the Supreme Court can grant leave to appeal pursuant to s.40 of the *Supreme Court Act*;
- civil appellate jurisdiction is not appropriate for a variety of reasons including the fact that the order involves essentially a criminal not a civil matter, plus the concern over the potential pitfalls of mixing federally and provincially articulated procedural systems;
- extraordinary remedies, at common law, do not lie in respect of decisions of superior courts;
- although there cannot be *Charter* rights without a remedy, there was no need to consider whether s. 24(1) provides a remedy since *certiorari* and the Supreme Court Act are available.

After commenting on each of the above routes, Lamer, C.J.C. for the majority produced a pragmatic resolution to the problem. For indictable offences being tried in a superior court, a challenge to a publication ban, including an attempt to enlarge or reduce one, could only be brought by application for leave to the Supreme Court under s.40 of the *Supreme Court Act*:

> The advantage of this avenue is that it uses established procedures and is not inconsistent with previous Supreme Court of Canada case law. This may be thought to be problematic on the grounds that it is expensive and time-consuming. However, a direct appeal to the Supreme Court of Canada can be faster than an appeal to most courts of appeal in the

[48] *Ibid*, at 303.

> country. In addition, it is less expensive to come directly to the Supreme Court of Canada than it is to go through a court of appeal before getting to the Supreme Court of Canada. Concerns about cost and delay are, therefore, misplaced. This avenue is problematic in so far as it provides for an appeal only by leave of the Supreme Court of Canada. It therefore does not provide optimal protection for important rights (e.g., freedom of expression). It also could result in an increased number of applications for leave coming before this Court and an increased number of cases needing to be heard by this Court -- all cases involving individuals charged with indictable offences and publication bans made by superior court judges could potentially seek leave and, depending upon the length and breadth of the bans, a number of these applications could raise issues of national importance (significant publication bans arguably go beyond the interest of the immediate litigants to the interests of Canadians generally).
>
> However, despite the difficulties, I find that this is the least unsatisfactory avenue and I therefore adopt it for third party challenges to publication ban orders made by superior court judges under their common law or legislated discretionary authority in the context of criminal proceedings[49].

For offences tried in provincial courts, where the decisions on the questions relating to publication bans are not made by superior court judges, the appropriate review avenue is by way of a *certiorari* application to the superior court, with its concomitant consequential appeal avenues. Here, Lamer C.J.C. recognized that the traditional limitations on *certiorari* would preclude an applicant from seeking an enlarged or alternative order since the scope is restricted to quashing an inferior order. Again, in pragmatic fashion, he expanded the traditional scope to ensure that additional or alternative remedies could be sought on review, where appropriate:

> However, it is open to this Court to enlarge the remedial powers of *certiorari* and I do so now for limited circumstances. Given that the common law rule authorizing publication bans must be consistent with Charter principles, I am of the view that the remedies available where a judge errs in applying this rule should be consistent with the remedial powers under the Charter. Therefore, the remedial powers of *certiorari*

[49] *Ibid*, at 305.

> should be expanded to include the remedies that are available through s. 24(1) of the Charter. It should be emphatically noted that it is not necessary in this case for this Court to decide whether or not the Charter applies directly to court orders. I am simply saying that when a judge exceeds his authority under the common law rule governing publication bans, then the remedies available through a *certiorari* challenge to the judge's action should be the same as the remedies that would be available under the Charter.
>
> Despite the difficulties with this avenue, I find that it is the least unsatisfactory avenue and I therefore adopt it for third party challenges to publication ban orders made by provincial court judges under their discretionary authority in the context of criminal proceedings[50].

After setting this framework, the majority went on to consider the dimensions of the publication ban decision and its subsequent variation. In the end, it allowed the appeal finding both that the Court of Appeal had no jurisdiction to consider and reduce the original order, and that the original order did not conform with the common-law rule governing the issuance of publication bans[51] as just articulated by the Court.

Subsequently, the rationale of *Dagenais* has been used in a number of publication ban cases. It has also been applied in other contexts: challenge by complainant to an order for disclosure of private records about her, pursuant to ss.278 to 278.91[52]; application by a non-accused target for access to a sealed wiretap authorization packet[53]; third party challenge to an

---

[50] *Ibid*, at 308 -309.

[51] *Ibid*, at 327.

[52] *R. v. Mills* (1999), 28 C.R.(5th) 207 (SCC)

[53] *Michaud v. Attorney General of Quebec* (1996), 109 C.C.C. (3d) 289 (SCC).

order for production of records pursuant to O'Connor decision[54]; challenge to the issuance of subpoenas[55]; and the issue of piercing solicitor-client privilege based on the decision in *R. v. McLure*.[56]

Recently, *Dagenais* was applied again by the Supreme Court in *R. v. Mentuck* where the accused was charged with second degree murder after allegedly confessing to undercover officers who had been masquerading as a "fictitious criminal organization". The Crown sought an order prohibiting the publication of the identity of the undercover officers and the methodology of the undercover operation. The trial judge refused to order the ban on the publication of the operational methodology but granted a one year ban on the publication of the identities. A leave application was brought in the Supreme Court. At that time, the Court granted a stay of the judge's order along with a full publication ban pending hearing of the appeal. During the interim, after three jury trials, the accused was acquitted.

When the appeal of the publication ban decision was eventually considered, the case once again required the Supreme Court to examine its s. 40(1) *Supreme Court Act* jurisdiction. On this point, Iacobucci, J. summarized the impact of *Dagenais* and its jurisprudential progeny:

> The reasoning in *Dagenais* and *Adams* should be read together in order to define this Court's jurisdiction under s. 40(1) in cases such as the instant one where no statutory appeal lies. It remains true that the Crown and the accused have, in most

---

[54] *L.L.A. et al v. Behariell* (1995), 103 C.C.C.(3d) 92 (SCC)

[55] *R. v. Jobin* (1995), 97 C.C.C.93d) 97 S.C.C.); *R. v. Primeau* (1995), 97 C.C.C.(3d) 1 (SCC).

[56] (2001), 151 C.C.C. (3d) 321 (S.C.C.), discussed recently in *R. v. Brown* [2002] S.C.J. No. 35

> cases, "established avenues to follow when seeking or challenging a ban". *Dagenais*, supra, at p. 857. But since *Dagenais* dealt only with the process to be followed by appellants who are third parties to the criminal process giving rise to such a ban, it should not be taken as foreclosing this Court's jurisdiction where s. 40 of the Act can be read to allow it. The direction that the Crown and accused follow the ordinary routes of appeal available in the Criminal Code is obviously restricted to cases where there is an available avenue of appeal.
>
> In *Adams*, Sopinka J. applied the reasoning in *Dagenais*. Having found that a publication ban order had no statutory appeal process under the Criminal Code, he concluded that such an order by a superior court judge was an order by the "court of final resort". He also concluded that s. 40(3) of the Act precluded appeals to this Court of both those matters set out in the Criminal Code and those matters that are an integral part of any judgment convicting or acquitting the accused. The section thereby prevents a multiplicity of appeals from the "vast array of interlocutory orders and rulings made at trial with respect to the conduct of the proceedings"... However, the section does not preclude appeals from orders that are ancillary, or not integrally related, to the process of conviction or acquittal of the accused.[57]

4. **Threshold Issues**:

(a) *Status Quo* or Statutory Reform:

The statutory framework and case law explained above demonstrates that the courts have ensured that in most cases a remedy is available to a party, including a third party, who feels aggrieved by an interlocutory decision. However, the existing scheme presents some obvious problems. First, there is the issue of disparate review avenues depending on whether the issue emanates from a provincial or superior court even though the interests at stake may be identical. Secondly, the use of s.40 of the Supreme Court Act carries with it inherent costs, delay, and complexities. These potential obstacles create the spectre of a remedy which only “deep pocket” litigants like large media operations can effectively pursue.

---

[57] *Regina v. Mentuck* (2001), 158 C.C.C. (3d) 449 (S.C.C.), at p.461.

Certainly, the position of the Supreme Court is clear. In *R. v. Mentuck*, Iacobucci, J. commented:

> It remains the case that Parliament has not seen fit to amend the Criminal Code to provide for clear avenues of appeal in publication bans, for the Crown, the accused, or interested third parties such as the media. Faced with this continuing "jurisdictional lacuna," as Lamer C.J. put it in Dagenais, the reasoning in Dagenais and in Adams governs the appeal process to be followed in publication ban cases. I would here reiterate Lamer C.J.'s observation that the current situation, which fails to provide satisfactory routes of appeal despite the fundamental rights at stake, is "deplorable", and again express the hope that Parliament will soon fill this necessary and troublesome gap in the law. In that respect, I should like to emphasize that our Court and our judicial system generally greatly benefits from the role of the courts of appeal, and to eliminate their input on these important questions is most regrettable.[58]

More recently, in *R. v. Benson and Brown*,[59] the Court said:

> The administration of justice would greatly benefit if the jurisdiction of the provincial appellate courts were broadened to permit parties the easier access to those courts. The Supreme Court of Canada would also have the fuller record, and valuable input, of the provincial courts of appeal if further appeals to this Court were taken.
>
> This anomaly in the Criminal Code is an unnecessary encumbrance and its serious defects have been repeatedly noted by this Court with the accompanying request for legislative amendment by Parliament. That request is made here once again, in the strongest possible terms.[60]

The Supreme Court of Canada has been the most vocal proponent of change with respect to the s.40 *Supreme Court Act* procedure. Perhaps one could debate the propriety, from an

---

[58] At pp.460-461.

[59] *Supra*, note 44.

[60] *Ibid.*, paras. 109-110.

institutional_perspective, of the Supreme Court making such direct and repeated requests of Parliament for legislative intervention. This is, however, an issue of procedure that implicates appellate capability. Suffice it to say, the adequacy of present appeal routes has been brought into sharp focus by evolving *Charter* jurisprudence and the Court's own attempts to provide standing and meaningful *Charter* protection for third-parties in the criminal process. However, the Supreme Court has expressed concerns that go beyond any issue of burdens to its own dockets. Its remarks encompass the true nature of the current situation:

- cost, delay, and complexity that not only prolong the process but can also discourage the pursuit of a remedy by aggrieved parties; and
- the absence of a considered decision of an appellate court to provide a foundation for the Supreme Court's consideration of the issue.

Unfortunately, it is impossible to determine whether the *status quo* and its inherent costs have actually discouraged legitimate claims from going forward.

While we do not favour retention of the *status quo*, we do not wish to leave the impression that the s. 40 procedure is completely without value. The s. 40 procedure strikes a compromise of sorts. With no statutory appeal to the provincial courts of appeal, s. 40 provides a safety valve for the adjudication of atypical appeals in the criminal process. It might be said that the time and cost associated with s.40 discourages litigants from pursuing their interests to the fullest extent possible. However, historically, the criminal process has discouraged interlocutory appeals due to their disruption of the criminal trial process. While not without its costs, resort to s.40 perpetuates this important theme of the criminal process. Moreover, it is far from clear that the present s.40 process places an undue burden on the work of the Supreme Court given that

there are no statistics on the frequency with which s.40 claims are pursued for interlocutory or third-party appeals.

It cannot be denied that appeals to the Supreme Court tend to be more costly and time-consuming. This in itself does not necessarily command structural changes. It is possible for the Court to streamline its own process and amend its rules in order to address the exigencies of interlocutory and third-party appeals. Loosened perfection requirements, shorter time-lines, dispensation with oral hearings and using video-hearings are all ways of alleviating the drawbacks to the present procedure. Again, while we think that change is indicated, the present s.40 process could be improved to accommodate these interlocutory and third-party appeals.

(b) Statutory Reform: Should All Issues Be Treated the Same?

There seems to be three kinds of issues which might generate resort to s. 40 of the *Supreme Court Act*: constitutional issues; issues of privilege, confidentiality or privacy; and applications dealing with publication or access. By discussing each of these groups of potential issues individually, we can sort out the factors that are most relevant to the larger issue of interlocutory appeals. It will also permit us to compare and distinguish specific issues.

(i) Constitutional Issues: At an interlocutory stage, a variety of constitutional issues can arise. However, we are only concerned here with those issues that can potentially end a proceeding. This means either a challenge to the constitutionality of a charging provision or a Charter claim that could lead to a stay. Obviously, if an accused succeeds on either kind of issue, the Crown can

appeal that finding. The question is whether, when, and how, an accused should be able to seek appellate review if unsuccessful at the interlocutory stage.

After *DeSousa*, discussed above, reviewing a decision on the constitutionality of a charging provision at an interlocutory stage raises both the question of proceeding without an adequate factual context and the potential problem of fragmentation of the criminal process. Applying the dicta of Sopinka, J. in *DeSousa*, a judge should reserve her ruling until after the evidence has been led unless the interests of justice compel an immediate decision. Accordingly, an interlocutory ruling should only be made if there is both a constitutional violation that compels immediate attention and an adequate evidentiary context. If subjecting the accused to the trial without a ruling on constitutionality will be unfair because of the expected burdens of the trial process, an immediate ruling may also be warranted. This might be satisfied by the prospect of a complex and costly trial that will carry on for a protracted period of time.

If a trial judge has ruled on the merits of an interlocutory application challenging constitutional validity, rather than considering it premature, one can assume that there was an adequate evidentiary context and that some case-specific factor satisfied the "interests of justice" requirement supporting the need to decide the matter at that time. Whether that case-specific factor would also justify fragmenting the process pending appeal is another matter. Stay applications, for example those based on excessive delay contrary to s. 11(b) of the *Charter*, are similar to the extent that there must be an adequate evidentiary record. Whether they are subject to the "interests of justice" caveat at the interlocutory stage is unclear. However, with respect to seeking immediate

review, the same kinds of issues arise. That is, there may be circumstances that warrant an immediate review, notwithstanding the obvious disadvantages of fragmentation and delay. Given these considerations, constitutional issues that might warrant immediate review represent only a small subset of cases and may not present any special burden, whether one is using the s.40 leave process, or some new avenue of review.

(ii) Privilege, Privacy and Confidentiality: The second kind of issue is one in which the applicant is seeking either production of a document or viva voce testimony from a witness which, if allowed, will arguably violate a recognized privilege, or a substantial privacy or confidentiality interest. Here, we necessarily include claims based on solicitor-client privilege. However, the group is broader. We also include claims based on confidential relationships as, for example, exist between psychiatrist and patient, and attempts to obtain access to documents and records that contain personal information that the subject would want to keep private. In thinking about this kind of issue, it is clear that some rulings can have irrevocable effects if there is no immediate avenue of review. That is, the genie will be out of the bottle and cannot be returned. While the category is not entirely homogeneous, and may permit some distinctions based on significance of the interest at stake, the desire to keep matters confidential is a common thread that flows through these issues. Some of these claims are matters of private interest while others like solicitor-client privilege are matters of public interest. The question for the entire group is when does a claim warrant protection within the criminal process and, if so, how can an interlocutory ruling best be reviewed to ensure that necessary or justifiable protections are not lost.

(iii) Publication and Access: The third kind of issue also raises an important public interest and arises in the context of claims for access to court proceedings and challenges to publication bans. Certainly, there is a public interest in learning about criminal proceedings. This is an aspect of constitutionally protected freedom of expression which underlies applications for access by the media. Also, a fair and impartial trial should usually occur entirely in public. However, many cases in this category are different from the "privilege, privacy and confidentiality" group. Here, especially with respect to publication bans, most interlocutory rulings limit or ban publication only for a period of time, or in a geographical area. Accordingly, it may be argued that they do not have the same irrevocable potential. The counter argument is that, both for the media and the public, timeliness is everything. It is not necessary to resolve this dispute but it is important to note that some issues will be more urgent and pressing than others. Again, this suggests that claims for immediate appellate review may sometimes be justified and sometimes not, depending on the nature of the interlocutory order and the context.

(iv) Conclusion: The above discussion canvassed three types of issues: (a) constitutional issues; (b) privilege, privacy and confidentiality issues; and (c) publication and public access issues. This typology would include the following specific interlocutory decisions:

a. Constitutional

1. Challenge to constitutionality of charging provision;
2. Charter claim seeking a stay;

b. Privilege, Confidentiality and Privacy

3. Disclosure of private records;

4. Disclosure of privileged or confidential documents;

5. Compulsion to testify in face of claim of privilege or confidentiality;

6. Rulings regarding the admissibility of prior sexual activity under s.276;

c. Publication and Public Access

7. Public access to evidence or proceedings through broadcast and publication; and

8. Exclusion of the public from the courtroom.

These are the principal issues that need to be encompassed by a new appellate scheme.

For all these applications, there is, arguably, an important interest at stake that may either be protected or may be subordinated to other interests. The accused, the state, specific third parties, and the media all may have interests to assert, and the matrix of interests can raise some complicated conflicts. For example, it is easy to see how a third party interest based on privilege, confidentiality or privacy, can conflict with both the fair trial rights of an accused and with the media's claims to access.

It would seem that a strong argument may be made in support of immediate review when a decision can produce irrevocable harm to an important interest. This quality of "irrevocability" will likely be the result of an order that pierces privilege, privacy or confidentiality, since these are the

"genie out of the bottle' cases. However, even in these cases not all interests may be considered important. For the other two kinds of issues, continuing without immediate review can also present significant consequences which have qualities akin to "irrevocability" but this needs to be assessed in the particular circumstances, including the interests at stake, and the complexity and expected duration of the trial. For third party issues, it is also noteworthy that if the interlocutory ruling supports the claim for privacy or confidentiality, or otherwise considers the application misconceived, no permanent harm is caused to the third party. Any error can be corrected in a post-verdict appeal. In other words, an accused who is convicted can challenge the interlocutory ruling on appeal; an accused who is acquitted will no longer have an interest in challenging it. Of course, compelling an accused to continue facing the rigours of prosecution after an interlocutory ruling that affects the right to make full answer and defence or another fair trial dimension can present considerable prejudice. Proceedings that are expected to be protracted can fit into this category. They pose the same argument that was recognized in *De Sousa*: do the interests of justice may compel an immediate review? However, a decision about the constitutionality of a charging provision cannot be equated to an interlocutory ruling that is basically procedural or evidentiary, and depends on its own fact-specific context.

It is important to recognize that there is, conceivably, any number of issues that can result in interlocutory rulings and can generate a question about a possible appeal. The above typology is limited to three basic groups, where claims will be based on whether an important interest is irrevocably at risk, or whether correction can wait until the post-verdict stage. It does not include the myriad evidentiary and procedural rulings that occur during a trial even if these might have

substantial implications for the eventual outcome. It seems to us that what is necessary is not to develop a broad-ranging vehicle for all interlocutory appeals but to attempt to carve out the set of cases which, by definition, warrant some scrutiny and perhaps an interlocutory appeal.

The issue of a new review avenue raises a number of questions. Later, in this paper we offer some structural models that consider where, within the court structure, a new avenue might be placed. However, there are other questions that need to be addressed. For example, the discussion above makes it clear that any new model should include a stipulation of which kinds of issues would be covered. This can be done by referring to specific statutory applications or by defining in generic terms the underlying issues that can support an immediate review, like "orders determining an issue of privilege or confidentiality". As well, a new review vehicle should address who has access to it. That is, whether access would be limited to the third party or whether the accused or Crown would also be able to seek an immediate review of an interlocutory decision. For the most part, the claims of the accused and the Crown are weaker since they will have a post-verdict appeal opportunity to argue that the interlocutory decision was erroneous. The claims of third parties are strongest when the issue involves an interest that cannot be restored once violated. There may also be situations where who can appeal depends on the original order and what appellate review will entail. For example, issues of disclosure can involve arguments that support disclosure, non-disclosure, or partial disclosure. One can easily imagine a case where the original ruling provides partial disclosure and the third party wants to challenge the ruling by asserting a privilege or related interest. At the same time, the accused would want to argue for fuller disclosure. While one may not want to recognize a discrete appeal right in the accused, if the third party exercises a route of

appeal, then surely the appellate tribunal ought to be able to entertain the entire issue including the accused's claim for fuller disclosure.

5. The Models for Appellate Review

On the basis of the discussion above, we have formulated the following models for consideration. In assessing the suitability of these models, we have created yardsticks for evaluation based on the problems identified by the Supreme Court in its recent decisions. Major markers for consideration include the ***cost*** associated with the proposed avenue of appeal. This has been identified as one of the main problems with the current situation that requires litigants to seek leave to the Supreme Court under s. 40 of the *Supreme Court Act*. Cost has two dimensions in this context. First, there is the ***individual costs*** to the litigants. With institutional litigants such as press or media organizations, this may not be a concern. However, the issue is more pressing with respect to individual litigants, like third-parties in records or privilege cases. There are other ***systemic costs*** that must be borne by the criminal justice system. These are the institutional costs associated with court resources in assigning a judge or judges to hear these types of third-party appeals. Of course, any expansion of appeal routes also presents potential implications for provincial legal aid plans, which are notoriously under funded. ***Systemic cost*** analysis engages a comparison of the institutional costs of an appeal before a single judge as opposed to a model that engages more judicial and administrative resources.

Closely related to the issue of cost is the question of ***delay***. One of the main complaints with the *status quo* is that the bifurcated process (leave to appeal and the appeal proper) in the

Supreme Court is that it is time-consuming and that it unduly fragments trial proceedings. Thus, in evaluating each of the following models, the question of delay and fragmentation are important considerations.

The following models also engage a consideration of institutional/administration of justice considerations that transcend issues of ***cost*** and ***delay***. Inherent in our conception of reviewability, at least in the criminal context, are expectations about the composition of the reviewing tribunal. Appellate review typically[61] entails scrutiny by a higher tribunal in the judicial hierarchy and, to a lesser extent, a tribunal comprised of a greater number of judges than the tribunal appealed from. Thus, the discussion of the following models takes into account notions of ***judicial hierarchy*** and ***tribunal composition***.

In our discussion, we assume that local practices will prevail in tandem with our models. We assume that local rules and practices about materials to be filed on appeals and reviews may vary but can be adapted to the particular model. Further, we do not attempt to gauge the economic implications for legal services in the provinces, such as the impact on the Crown, or the cost to legal aid plans. These economic considerations may be important but they are beyond the scope of this paper.

One final observation. The following models are recommended without the benefit of statistical information on the present frequency of applications to the Supreme Court under s. 40

of the *Supreme Court Act* on interlocutory matters. Similarly, it is not known how any of the proposed models will impact on the frequency of these types of applications to the Supreme Court. We make the tentative assumption that, by creating a route of appeal that makes interlocutory appeals more accessible for third-parties, the number of litigants accessing the new appeal route will likely be higher than the present number of appeals taken pursuant to s.40. However, it is difficult to predict whether the addition of a new avenue of appeal for interlocutory issues will decrease the frequency of *Supreme Court Act* applications, although we suspect that it might.

Model #1: ***Appeal to a Panel of Three Superior Court Judges***

Three judges of the provincial superior court would hear an appeal from the superior court trial judge's decision on the interlocutory matter in question. This model mimics the structure of the Divisional Court in the Province of Ontario. The Divisional Court, which is comprised of panels of three judges of the Superior Court of Justice, generally reviews decisions of administrative tribunals, not other judicial decisions. Thus, at least in Ontario, this model is familiar.

Cost: Compared to applications under s.40 of the *Supreme Court Act*, this model offers lower institutional and individual costs. It is anticipated that the panel of three judges would be comprised of three relatively local judges, permitting the application to be made in the same territorial division as the trial, or one that is close. By virtue of the geographical advantage,

---

[61] The exception, of course, is summary conviction appeals, that are heard by a single judge.

individual costs are reduced. Because a maximum of three judges are involved in this appeal, compared to a potentially greater number in the Supreme Court of Canada, institutional costs will be reduced.

Delay: For the same reasons, and mainly focusing on the local nature of the proposed procedure, delay ought to be abridged with this model. Depending on the burdens presently resting on the provincial superior courts, it is anticipated that these types of applications can be determined much quicker than s.40 applications.

Institutional Considerations: This model does not have the feature of judicial hierarchy because judges of concurrent jurisdiction (to the trial judge) would conduct the appeal. However, this is compensated for by the composition of the tribunal (three judges). Moreover, it is anticipated that the three local judges would have some trial experience and be familiar with the types of issues raised by these applications. One potential problem with this type of model is judge availability. That is, in smaller jurisdictions, it may be difficult to regularly assemble three superior court judges for this type of appeal. Thus, delay may be incurred in scheduling this type of appeal, or costs may be increased by the need to bring in a judge from another territorial division.

Further Appeals: By locating this appeal in the provincial Superior Courts, the question of further avenues of appeal remains. If it is determined that there ought to be a further appeal to the Court of Appeal (with or without leave), then costs and delay will be increased substantially by this type of procedure. If Parliament were to provide for a further appeal, this model would

essentially create an intermediate appeal procedure, which would defeat some of the anticipated benefits of creating a new appeal procedure in the first place. If Parliament does not provide an avenue for a further appeal, the question of access to the Supreme Court of Canada under s.40 is still a possibility that cannot be foreclosed. However, it is anticipated that, with a new appeal procedure designed to accommodate this type of appeal, the Supreme Court of Canada is far less likely to intervene in this type of case. Nevertheless, institutional litigants (like the media) are likely to seek leave to the Supreme Court of Canada and take advantage of every possible appeal route.

Model #2: ***Appeal to a Single Judge of the Court of Appeal***

This model contemplates an appeal to a single judge of the Court of Appeal, sitting In Chambers. There is precedent for single judges of a Court of Appeal to carrying out myriad tasks, especially in terms of granting extensions of time to appeal[62] and bail pending appeal.[63] However, in criminal matters, single Judges of the Court of Appeal rarely become involved in interlocutory matters in trial issues.[64]

Cost: The costs associated with this model are certainly less than the s. 40 procedure, both individually and systemically. However, individual costs will be higher with this Model as

---

[62] See s.678(2).

[63] See s.679.

[64] One exception is found in s. 8(6) of the *Young Offenders Act*, which provides for a unique avenue for reviewing bail decisions: "An application under section 520 or 521 of the *Criminal Code* for a review of an order made in respect of a young person by a youth court judge who is a judge of a superior, country or district court shall be made to a judge of the court of appeal."

access to justice will in many cases not be local. That is, unless the trial takes place in the same jurisdiction as the Court of Appeal sits, there will be additional costs involved in invoking this appellate procedure. Systemic costs are likely reduced by virtue of the involvement of only a single judge.

Delay: It is anticipated that, apart from geographical considerations, this Model will produce shorter delays than Model #1. Usually, Courts of Appeal provide liberal access to Chambers judges on most juridical days. Thus, the procedure contemplated by this Model can be easily grafted onto established practices. Applications could likely be heard on two or three days' notice, assuming available court time. Delay may be occasioned in those cases where the Court of Appeal does not sit in the same jurisdiction as the trial court. However, this delay may well be off-set by the easier access to a single Chambers judge. This assessment of cost and delay will depend on how local rules and practices determine the materials to be used in the original application. If the record in the court below is complete, and facta are already prepared, and assuming that a transcript is not required, then it would seem adequate to re-format and re-file this material for the purposes of the review. This will depend on the requirements of local rules of practice.

Institutional Considerations: This model achieves a level of hierarchy not reflected in Model #1. By definition, it removes the proceeding into the Court of Appeal directly. This feature is offset by the fact that appeals under this model will be conducted by a single judge, as opposed to a panel of three Court of Appeal judges, which is the usual way that business is

conducted in the appellate courts. This may be a significant drawback because a judge of a Court of Appeal, sitting alone, may be reluctant to second-guess the decision of a single judge of the trial court. This concern may be intensified given the fact that the Chambers judge will be reviewing an interlocutory matter moving through the trial court. There would be good reason for the reviewing judge to defer to the advantageous position of the trial judge whose decision was presumably made in the context of the dynamics of an ongoing trial.

Further Appeals: Concerns similar to those expressed with respect to Model #1 apply to this model. If Parliament creates a further avenue of appeal to a panel of the Court of Appeal, the procedure entailed in this model becomes an intermediate step, resulting in potentially longer delays and further costs. However, and as discussed below, the bail pending appeal decisions of Chambers judges (s.679) are subject to review by the full panel of the Court of Appeal, but only upon the direction of the Chief Justice or Associate Chief Justice (s.680). This requirement of leave or obtaining a direction from the Chief Justice has typically functioned as an effective gate-keeping function, generally limiting the attention of the full panel to serious meritorious appeals only.

Model #3: ***Appeal to a Panel of Three Judges of the Court of Appeal***

This model utilizes the traditional structure of the provincial Courts of Appeal in the criminal process as set out in the Criminal Code.

Cost: While less expensive than applications under s.40 of the Supreme Cour*t Act*, this model is likely to be the most expensive of those we have proposed. It is likely that, with this model, appellate review will not be local for many litigants, thereby increasing individual costs. Systemically, this model is in some ways more costly than Model #1 because it requires the involvement of three judges from courts with fewer judges. Thus, its impact on the reviewing court will be more significant (subject to our comments about the use of *ad hoc* judges below). This cost factor might be addressed by a leave to appeal process, similar to that involved in either appeals against sentence[65] or somewhat like the requirement of obtaining a direction from the Chief Justice or Associate Chief Justice before a full panel of the Court of Appeal hears a bail review application (from a trial court, or a decision of a single Justice of Appeal.[66]

There is further potential for economizing with this Model. In some Courts of Appeal, most notably the Alberta Court of Appeal and the Court of Appeal for Ontario, judges of the Superior Court sometimes sit on appeals to the Court of Appeal as "*ad hoc*" judges.[67] With

---

[65] See s.687.

[66] See s.680.

[67] In Ontario, this is accommodated by s.4 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 which provides:

> s.4. (1) The Chief Justice of Ontario, with the concurrence of the Chief Justice of the Ontario Court, may assign a judge of the Superior Court of Justice to perform the work of a judge of the Court of Appeal.
> (2) A judge of the Superior Court of Justice is, by virtue of his or her office, a judge of the Court of Appeal and has all the jurisdiction, power and authority of a judge of the Court of Appeal.

interlocutory or third-party appeals, the possibility of creating panels of a single Court of Appeal judge along with two *ad hoc* Superior court judges ought to be considered.

Delay: Because of geographical considerations, it is anticipated that this Model will create additional delay not experienced with Models #1. Moreover, depending on the docket of the Court of Appeal in question, it may take longer to find a convenient time for the hearing of applications before three judges of a Court of Appeal, as opposed to three Superior Court judges. Of course, the delay in this model will be greater than Model #2 (appeal to a single judge of the Court of Appeal).

Institutional Considerations: This model has the advantages of both judicial hierarchy and court composition. It casts the provincial Court of Appeal in its traditional role in reviewing the decisions of trial courts in criminal matters. For this reason, its familiarity makes it a natural development for both error correction purposes, and for the purposes of developing principles for the future determination of these types of issues by trial judges. Because the present and anticipated volume of interlocutory appeals is an unknown variable, it is difficult to assess the impact of this model on the work of the provincial appellate courts. It may well be that a leave-type of process might best address these concerns. Given the interlocutory nature of this appeal, there appears to be little point in creating a leave to appeal process that mimics the procedure for sentence appeals (whereby the full panel determines whether leave should be granted and then hears the appeal). Practice among the provinces varies as to whether this is done at one sitting,

or in a bifurcated manner. If a leave procedure is developed, it should be to a single judge with some statutory clarification as to the criteria for authorizing interlocutory appellate review.

Further Appeals: This model leaves fewer questions about further appeals. By directing the case directly to the Court of Appeal, the only possible avenue for relief is an application under s.40 of the *Supreme Court Act*. In the face of a considered judgment by a panel of the Court of Appeal on an interlocutory matter, it is anticipated that the Supreme Court will rarely grant leave to appeal under s. 40 of the *Supreme Court Act* on these types of appeals. Therefore, further delay and fragmentation of proceedings against an accused are minimized by this model. As discussed earlier, the frequency of continued applications for leave to appeal to the Supreme Court of Canada following an appeal to the Court of Appeal is a matter of speculation. It may be that, by providing an intermediate route of appeal, applications under the *Supreme Court Act* might decline.

6. The Nature of a New Appeal/Review Vehicle

The previous section dealt with the institutional situation and composition of available models for appellate review of interlocutory decisions. Here, we want to give some brief consideration to the nature of potential review processes: their scope, the grounds for review, and the standard of review.

In Canadian criminal procedure, we have three examples of review mechanisms:

1. Full Review: This is basically a de novo process in which all factual and legal aspects can be re-considered by the reviewing court. New material bearing on relevant issues is easily admitted and the remedies are as broad as the decision of first instance.

> ***2. Jurisdictional Review***: This is what traditionally was encompassed by *certiorari* in respect of inferior tribunals and is limited both in terms of scope and remedial powers. The reviewing court is empowered to examine errors of jurisdiction, or errors of law that can be described as having a jurisdictional dimension[68]. The remedial scope[69] is limited to quashing the original decision or remitting the matter back.
>
> ***3. Appellate Review***: The basic function of this category is to correct errors that may have affected the decision. Appeals are argued on the record[70], and parties can be restricted by a stipulated grounds threshold: question of law, question of fact, and mixed question of fact and law. Successful appeals depend not only on the identification of an error, or unreasonable verdict, but also on persuading the appellate tribunal that the error might likely have had some effect on the verdict[71]. Remedial scope usually involves not only reversing or confirming the earlier decision, but substituting another decision if the evidentiary basis is available to support that result without needing more facts.

This only a rough sketch. However, it outlines the various issues that need to be considered to complete a review model.

---

[68] As compared to being an error "within" the tribunal's jurisdiction (infra-jurisdictional error) which is generally not reviewable. A good example of infra-jurisdictional error is an erroneous evidentiary ruling by a justice at a preliminary inquiry that is usually insulated from review: see, for example, *Attorney General of Quebec v. Cohen*, [1979] 2 S.C.R. 305.

[69] Subject to refinements or enlargements as occurred in *Dagenais*, *supra*.

[70] Subject to a stringent test for the admission of "new and fresh evidence": see *R. v. Warsing*, [1998] 3 S.C.R. 579 and *R. .v Palmer and Palmer*, [1980] 1 S.C.R. 759.

[71] See s. 686(1)(b)(iii) known as the "proviso" which permits an appellate court to dismiss an appeal notwithstanding error if it concludes that the error caused no "substantial wrong or miscarriage of justice." This has been interpreted by the Supreme Court of Canada as giving the court the job of determining whether there is any reasonable possibility that the verdict would have been different had the error at issue not been made. That is, there are trivial errors which can have no effect on the verdict, and serious errors of law which can taint the conviction. In the recent Supreme Court of Canada decision in *R. v. Hibbert*, released April 25, 2002 dealing with an erroneous charge on a rejected alibi defence, Arbour, J. commented that proviso can readily be applied to trivial errors but for serious errors, it should not be applied unless the evidence of guilt is so overwhelming that any other reasonable jury would inevitably convict.

Given that the traditional approach has not favoured interlocutory review primarily because of concerns about delay and a fragmentation, there is little reason to support a full de novo review. As well, using a statutory form of the "*certiorari*" review model is unsatisfactory without some refinements, as Lamer, C.J.C. noted in *Dagenais*. This leads to the appellate review model. However, as the sketch above indicates, there are some problems that currently apply to that model. First, there is an ongoing controversy about the difference between a question of law and mixed law and fact. The distinction is used in the *Criminal Code* to limit the ability of the Crown to appeal a decision unless it can demonstrate an error that is purely one of law[72]. The difficulty, however, lies in making the distinction. There is a flotilla of cases that leave an unclear demarcation line in their wake.[73] This is a general problem, one that extends beyond interlocutory and third party appeals.

Beyond the issue of *availability*, defining the *scope* of review is an equally thorny question. Here, there are two issues. First, there is the very live question of the applicable standard of review. Recently, more decisions are being placed in the "deference" category[74] where appellate courts are expected to defer to the decision of first instance and only intervene if there is a palpable error of principle. In other words, disagreement does not determine the issue;

---

[72] See s.676(1)(a) which provides that the Attorney general "may appeal" to the Court of Appeal "against a judgment or verdict of acquittal....in proceedings by indictment on any ground of appeal that involves a question of law alone."

[73] See the discussion of this point in relation to a trial judge's appreciation of facts in *R. v. Morin*, [1992] 3 S.C.R. 286.

[74] For example, this is the prevailing approach to sentence appeals; see *R. v. Shropshire*, [1995] 4 S.C.R. 227; *R. v . C.A.M.*,[1996] 1 S.C.R. 500; *R. v. McDonnell*, [1997] 1 S.C.R. 948.

it depends on the nature of the disagreement. The deferential standard of review may be entirely justified in those cases where the judge of first instance has some real advantage over a distant appellate court. However, this may not always be the case. Moreover, deference can mask disagreements about how to interpret facts. Some decisions involve simple principles but complex and subtle facts. Some decisions involve an assessment of credibility or an appreciation of the dynamics of a process. Other decisions can be distilled into a concise factual summary that is easily accessible to an appellate court. Secondly, there is the question of whether an "unreasonable" decision can be reversed on this basis alone. Certainly, this is the case with respect to criminal appeals after verdict[75]. It would make sense to extend this evaluative standard to an interlocutory decision since, assuming there is a route of appeal, it is hard to argue that a finding of unreasonableness should not reverse a lower-court decision.

The existence of these problems of grounds and scope only means that any legislative move in this direction should, at the very least, consider the anticipated breadth of appellate review in light of two factors:

- the interlocutory nature of the issue at stake; and
- most decisions will have been made by the trial judge who should have been sensitive to the issue as it relates to the dynamic of the trial

Decisions about grounds for appeal and standard of review can be difficult. They can either enlarge or constrain the review process. Regardless of choices about status quo, statutory

[75] See s.686(1)(a)(i) which encompasses a decision which a jury acting judicially and properly instructed could not have made: see *R. v. Biniaris*, [2000] 1 S.C.R. 381.

reform, or new review models, the central issue should always be to ensure that a fair and effective vehicle exists to question a decision of first instance that may dramatically and irrevocably diminish an important interest.

7. Distinctions Between Decisions Emanating from Superior and Provincial Judges:

Currently, the *Dagenais* rationale creates two different avenues of review based on whether the original decision comes from a provincial or territorial court, or a superior court. *Certiorari* is available for the former group, s. 40 and a leave application in the Supreme Court is the only route for the latter group. If a new statutory avenue is established for decisions emanating from superior courts, should the provincial court decisions be left with *certiorari* or integrated into the new statutory appeal regime?

This depends to some extent on what model is preferred and how it is structured. *Certiorari* has the apparent advantage of being relatively local and quick. However, and notwithstanding the expansion of its scope in *Dagenais*, it still is principally a vehicle for jurisdictional review. It does not have the full scope of review for questions of fact and mixed fact and law which a new statutory vehicle could include.

Is there a substantial difference in the kinds of cases heard by superior and provincial/territorial courts? Now, interlocutory decisions by provincial or territorial judges involve both summary and indictable prosecutions, and both are now reviewed by *certiorari*. However, the nature of the proceeding does not determine the nature of the interests at stake:

privacy, confidentiality, compellability, and public access. Granted, the public interest in access through publication and broadcast may vary with the seriousness of the offence but the individual interest in privacy, confidentiality, and protection from compellability may be no different.

If one considers establishing a new statutory avenue of appeal for cases from provincial/territorial courts, the list of available models discussed above should be increased to include because there is the prospect of an appeal to a single judge of a superior court from a decision from a provincial/territorial court. This is the current model for appeals in summary conviction cases. This would likely keep the caseload similar to what occurs now but would open the question of a further route of appeal since an appeal to the provincial appellate court. Currently, this is the case since an appeal to the court of appeal is available after a *certiorari* application.

It is also worth noting that all conviction appeals in indictable cases go the Court of Appeal regardless of the level of court where the trial was held. While summary conviction appeals go to a single judge of the superior court, this is not always the case. If the summary conviction matter was heard with an indictable offence which is under appeal, both matters go to the Court of Appeal.[76] In our view, it is more important to focus on the source of the decision and the mode of procedure than the category of offence. All this suggests that there is merit in expanding a new appellate regime to encompass provincial/territorial interlocutory decisions.

However, there may be little merit in distinguishing between indictable and summary conviction offences for this purpose. All reviews should go down the same path.

8. Conclusion

We have attempted to explain the current legal situation and offer a discussion of available models for a new statutory appeal avenue. Which model is most appropriate involves a consideration of a broad range of systemic and policy issues. Moreover, in a federal jurisdiction like Canada, there may well be resource and geographical distinctions that make some models more or less attractive as one moves from sea to sea to sea. We have not attempted to canvass all of these issues. However, one conclusion seems clear – there is a strong case for statutory reform.

On balance, we favour a model that involves the intervention of the provincial courts of appeal. Given concerns about trial fragmentation, an appellate model with a leave to appeal component would best achieve the needs of the parties, third-parties and the administration of justice as a whole. We construct such a procedure in an accompanying document, entitled "Model for Third Party and Interlocutory Appeals.

---

[76] See ss. 675(1.1) and 676(1.1).