# What I want from the Court of Appeal

WILLIAM G. HORTON

I was intrigued and daunted by Mr. Justice Laskin's suggestion that I address appellate judges on the subject of "What I want from the Court of Appeal." Intrigued, because no counsel who has practised in the courts for close to three decades can be without views on the subject. Daunted, because there must be a reason why such views are so infrequently voiced by the practising bar.

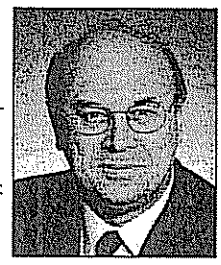
When counsel say "May it please the court," they are expressing no idle sentiment. Dr. Samuel Johnson once said: "Those who live to please must please, to live." As counsel, we aim to please and we hope to persuade, but "the best laid schemes o' mice and men gang aft a-glay," and we have all fallen short of that objective from time to time.

## The losing perspective

Robbie Burns's famous words from his poem "Ode to a Mouse" remind us that we can learn a lot about justice by looking at the world from the loser's point of view.

The prompt and cost-effective vindication of rights must be the paramount objective of any legal process. Much attention is focused on getting the winners what they deserve. Those who succeed in a lawsuit might complain that it took too long or cost too much to prove that they were right. But rarely do winners complain about the quality of the judging. To get that kind of comment, you have to talk to the losers. And there are lots of them – at least half of all those who come before the courts – although you might not guess that from reading *Lexpert* magazine!

The problem is that when losers say they wish that the court had done something differently, it is often explained away as sour grapes. And lawyers as a group are reluctant to draw attention to cases they have lost, even if the context is improvement of the adjudicative process. When counsel do talk to each other about what they would like to see judges do differently, they say very similar things. Inevitably, when pressed for examples, the examples are drawn from cases they have lost. I must confess that this applies to many of my own comments.



William G. Horton, *Blake, Cassels & Graydon LLP*, Toronto. This article is an edited version of a presentation made at the Appellate Courts Judgment Writing Seminar, organized by the National Judicial Institute in Toronto in April 2004.

Yet, ultimately, it is the peaceable acceptance of judicial decisions by losers that defines the rule of law and makes our judicial system work. The dangers to the reputation of the administration of justice therefore are most present in the *valid* criticisms of losers.

I suggest that the guiding concept should be that judicial decision making is a service provided to winning and losing parties alike, as well as to the public at large. Every party before the court in civil disputes should be treated as a customer whose business is valued. If that sounds like an impossible ideal or even a naïve precept, I can only point to the judicial careers of the Honourable Peter Cory and many other judges of a similar mould who have combined intellectual rigour and an absolute sense of justice with an ability to listen to what the losing side has to say and let it down gently.

## The hearing

An open-minded hearing is what counsel are most entitled to expect from judges. In the context of the Court of Appeal, that begins with the reading of the facta and other material filed on the appeal. I understand that in some appellate courts the workload of the courts has led to allocation of responsibility for the appeal record among the panel of judges. Occasionally, counsel may conclude that this has taken place even though it only reflects an independent choice made by each of the judges. In a perfect world, all judges on an appeal panel will have a good basic understanding of the appeal record.

The fact that one judge has spent significantly more time studying the record can create a flawed dynamic at the hearing and, I suspect, at the decision-making phase. It would be perfectly understandable, if a judge who has invested more time in a case feels that his or her views should receive deference. Sometimes one has the impression that this draws a judge who has a substantially greater knowledge of the record into more of an adversarial role with counsel and perhaps even with other panel members. There is also the reality that another panel member must expend more work at the conclusion of a hearing to come to or defend a different point of view. Since all of these dynamics occur outside the view of counsel, no real evidence to prove or disprove these concerns is likely to be forthcoming. However, I have little doubt that, if asked the question, most counsel would say they want a panel in which all judges feel an equal responsibility to be familiar with the record.

All counsel want a fair opportunity to make their submissions as well as to answer questions and comments that highlight the substantive concerns of the court. Unfortunately, the limits on the length of *both* facta and oral submissions can create real difficulties with achieving these objectives, especially in complex cases. My own experience is that experienced counsel and the court co-operate well to address these challenges. However, I do worry that the "sound bite" is becoming the standard unit of measure in advocacy and ultimately the measure by which judicial decisions themselves are evaluated by the media and the public. We can only hope that the "sound bite" standard does not promote simplistic legal outcomes in the complex world in which we live.

In terms of the oral hearing, all good counsel know that the time spent addressing the concerns raised by the court is time well spent. The corollary principle for the court is that questions should actually probe for new information or justifications, so that the limited time available is well used. In my respectful opinion, repetitive questions and comments that do no more than express the disagreement of a particular judge with a particular submission or position are not a good use of the time that has been strictly allocated to counsel. Frankly, experience has made me just as skeptical about the value of comments from the bench *agreeing* with my submissions. So put me down for the old-fashioned notion that judges should withhold expressions of agreement or disagreement until the case has been fully argued.

**The law**

The most characteristic and essential function of a court of appeal is the development, expression, and application of the law. This function has recently been highlighted by a number of decisions of appellate courts (especially the Supreme Court of Canada) that would appear to severely limit access to appellate review in cases that do not raise a pure question of law. Of course, this does not mean that other kinds of errors (e.g., errors of mixed fact and law) will not be made by courts of first instance; it just means that they will be harder to correct on appeal. In the absence of an intermediate court of appeal, a higher standard of review may be viewed as a lower standard of service. Fettering a right to appeal on anything other than a pure question of law may be viewed as a denial of a *meaningful* right to appeal in the vast majority of cases.

Given the increased focus of appellate jurisdiction on pure questions of law, it continues to perplex me that courts of appeal balk at telling the parties what the law is at an early stage of legal proceedings. For example, if there is an independent duty of good faith in contract that is capable of adding substantive terms to an agreement, why does it not make sense for the court to say so when the issue is squarely raised in the action, say on a pleadings motion or a motion for summary judgment?

One would imagine that a law is most useful when it is known to exist before the parties have embarked upon potentially infringing behaviour and certainly before they have committed to prosecute or defend an expensive lawsuit. Whatever the justifications for the current approach in the history of the common law, the idea that the law will be or may be revealed by the court of appeal at the *end* of the lawsuit makes little sense to me.

On the other hand, the fact that the court may ultimately produce breathtaking new law and a hitherto surprising result gives hope to every litigator who labours in a "lost cause."

This combination of a judicial reluctance to state the law at an early stage of an action but willingness to dramatically alter the law at the end of a lawsuit puts me in mind of the lines by Ogden Nash:

> Shake and shake the ketchup bottle.
> First nothing will come out, and then
> A lot'll.

I would humbly suggest that the whole process by which our courts, particularly our courts of appeal, create law is long overdue for a major rethink. The lawmaking role of the courts has always been an integral part of the common law, but the courts have never seemed to embrace their legislative powers so frankly or freely as they do today. Although the courts have shown a great willingness to reform the content of judge-made law, there does not seem to be the same interest in addressing the process by which judge-made law is created, except possibly in the field of Charter of Rights litigation. The idea that good law can be made on the basis of the expertise of a particular panel of judges and the submissions of partisans in specific cases is very much open to question. Any example is likely to create a debate of its own, but I would cite the enforcement of foreign judgments as an example of judicial legislation that might have been significantly improved by a more rational and better-informed judicial legislative process.

Perhaps the time has come to consider bold reforms:

- a published list of issues on which the court is considering changes to the law;
- invitations from the public and profession to make submissions on those issues regardless of whether or not they have a case before the courts;
- judicial law reforms being subject to the same principles of non-retroactivity as parliamentary legislation, and so on.

Another related issue in terms of the legal basis on which the courts decide cases is judicial minimalism. As I understand it, this is the desire of the court in some cases to decide a case on the narrowest grounds possible. If we as counsel could predict the cases in which the court might want to take that approach or if we could predict the precise narrow grounds on which the court is going to decide the case, the litigation process would be a lot more efficient. Not having that information in advance, it is often necessary for us to argue all of the narrow grounds on which the ultimate decision might be based as well as the sweeping principles on which the court might decide to change the law.

The other point to be made about judicial minimalism is that often the parties' substantive dispute is inextricably intertwined with the grounds on which it might be decided. In one case of which I am aware, the court believed that the narrow grounds on which it was deciding the case resolved all issues. Because that

was not in fact the case, the winning party consented to the application for leave to appeal to the Supreme Court of Canada. In another case, the court based its judgment in the main action on a peripheral issue, with the result that the whole issue of apportionment of fault to certain third parties was avoided.

Where the dispute that the parties think they have is finessed by a judicial decision based on a different or marginal issue, the result may be correct in theory but risks leaving the losing party with a sense that the court dodged the real issue. In these circumstances, judicial minimalism might be mistaken for judicial abstract expressionism.

**The decision**

For the parties to a lawsuit, the most important service the court provides is the decision that finally resolves the dispute. The long-term impact on the law is usually (though not always) less important to the immediate parties. However, the perception that the decision was based on a fair and objective consideration of all-important issues is vital.

A judicial decision (like a well-written novel) defines its own reality. The ability to select facts, arguments, and authorities and to emphasize some considerations over others gives every judge the advantage of writing a decision in which the result may appear inevitable. One is often left wondering how any competent counsel may have actually argued for a different result. It is an unavoidable feature of our system that, however objective a judge may have been in the process leading up to making a decision, he or she may tend to become an advocate for the winning side in the writing of the decision itself. While we might agree that this should not happen in a perfect world, it is not realistic to expect a judge to do otherwise than to put his or her decision in the best possible light.

However, I do think it is reasonable to expect that all important facts and arguments advanced by the losing side are identified and addressed in a judgment. It is an issue of fundamental justice, in my opinion, that key arguments and authorities cited by the losing party be set out accurately and fairly and dealt with in the judgment, however briefly. When cases cited by counsel as being determinative are simply ignored, when positions taken by counsel are not stated correctly by the court, both counsel and their clients can be left asking the musical question (with apologies to Noel Coward): "What is this thing called law?"

The common law has more flexibility than the civil law because it is not an immutable set of *a priori* rules. However, too much judicial creativity and selectivity in addressing arguments made by the parties can create the impression that the law is merely a language of *ex post facto* rationalization used to explain decisions arrived at by other means.

A related concern is the question of the accessibility of the decision itself. Often the actual disposition of the case is buried deep within the reasons. The old trick of looking at the last paragraph to see who got costs does not always work. I know of one case where a lawyer was in the process of phoning a client to say that the case had been won only to glance at another passage in the middle of the lengthy decision which revealed a more depressing conclusion.

This is not just a question of lawyers being too lazy to read an entire decision. In this day of instantaneous communications, our clients expect to know exactly what happened the moment the decision is released. There may be an actual need to deal instantly with the markets, regulators, or the press. From a purely human perspective, no losing party wants to first hear about the result from the other side because their own lawyer happened to be in court or on holiday when the decision was released.

This leads me to make two suggestions:

First, *all* decisions should be released on a pre-announced schedule, as is done in the Supreme Court of Canada. This allows the parties to arrange to receive the decision at the same time and deal immediately with all the consequences.

Second, all decisions should contain an overview section. By "overview" I do not mean the kind of overview that places the case in the context of the universal struggle of good against evil. Nor do I mean the kind of overview that merely describes "the story so far." I mean an overview that summarizes the ultimate conclusions the court has reached on each of the main issues before it.

Ideally, the overview should be in the same place for all

decisions issued by the court so that it can be quickly turned up by anyone reading the decision for the first time.

The proliferation, length, and indeterminacy of judicial decisions represent a major access to justice issue. All of those judicial decisions must be sorted and read and analyzed and argued. There is a huge cost to the system in dealing with case law – and more so now that *all* cases are "reported," in some sense of the word – and only those that are formally reported have headnotes.

Anything the court can do to reduce the length of its decisions and make its conclusions more explicit and readily accessible will go a long way to reducing the cost and length of litigation, thereby improving access to justice. But the overview is the best available tool to bridge the gap between what judges need to write to support their decisions and what the parties and the public need to understand what has been decided.

## A judicious approach

The Biblical admonition "Judge not lest ye be judged" obviously cannot have been intended to apply to judges – at least not the first part. Judging is the stock in trade of judges. But is there a line between judging and being judgmental?

In criminal cases, the public is reassured (although not necessarily better informed) by words of condemnation addressed to the accused who has been convicted of some heinous crime. The court expresses the reaction of the public to the behaviour that has just been established in the legal proceeding. Even though the decision may be overturned on appeal, our entire system depends on the assumption that the conclusions the court reaches on the evidence before it are an accurate reflection of reality. This assumption rests on the further assumption that the evidence brought before the court is sufficient to determine that reality. These assumptions may be well warranted in criminal cases, where the standard of proof is high, the rules of evidence are strictly applied, and everything is presumed in favour of the accused. In civil cases these assumptions are still necessary, but they are more open to question.

A judicious approach takes account of the possibility that the assumptions about the correspondence between reality and that which is established in court proceedings may not be correct. It takes into account the fact that the information or record upon which the court bases its decision is filtered by many screens: the availability of witnesses and records, the competence of investigators, rules of evidence, standards of proof, matters of which the court can or thinks it can take judicial notice, tactics and personalities of counsel, subjective judgments about credibility, time limitations on argument, and innumerable other factors. Even the court's perception of the conduct of a case by counsel is subject to matters outside the court's field of vision: gaps in instructions, witnesses who change their story, opponents who overreach in settlement discussions, the degree of adversity with which the proceedings are conducted, and a myriad of other factors.

The court cannot be deterred by such doubts and must act decisively in making its determinations. However, I would suggest that comments that call into question the honour, integrity, or good faith of a party or counsel should be made rarely and only when strictly necessary to deciding an issue before the court.

At a minimum, perhaps the court should say: "I find you and your client to have acted in complete bad faith. Of course, that is just on a balance of probabilities!"

There is a tendency in some judges to reinforce the judicial outcome with comments that seem to suggest that the losing party "had it coming" in some sense or that this is the best the court can do, given the level of competence of the losing party's lawyer. It is usually done with more finesse, but that is the gist of the comments. Sometimes this type of remark is just a carry-over from the adversarial contentions in the proceedings leading up to the judicial decision. However, a gratuitously critical comment in a judgment may cause great distress long after the losing party has come to terms with the actual decision.

It is important to strive to avoid the appearance of "taking sides," as opposed to just deciding the case. I suggest that judges serve their function best when they rise above the adversarial process in which we as counsel are obliged to operate.

## Conclusion

I would like to close these remarks with a comment that judges can never use to end one of their judgments. It is, however, used by the comedian Dennis Miller, who says at the end of each of his comic rants: "But that's just my opinion. I could be wrong."