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# THE ORAL JUDGMENT PRACTICE IN THE CANADIAN APPELLATE COURTS

J.E. Côté\*

## I. INTRODUCTION

It is traditional that British and Canadian appeal courts render many judgments orally, in open court. Although this format may seem foreign to American judges and jurists, it is a practical and efficient tool for rendering decisions and disposing of cases. The American legal system would fare well to consider the advantages of oral judgments.

## II. HISTORY

Oral judgments are not foreign to the American legal system. They are the traditional common-law way to render judgment. Virtually all of the English court decisions commonly referred to in law school are reports of oral judgments.<sup>1</sup> Many are not even verbatim reports.<sup>2</sup> Until recent years, most English reasons for judgment, even long important ones, were delivered orally in court.<sup>3</sup> Although some were drafted in writing first, many were *ex tempore*.<sup>4</sup>

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1. See e.g. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854); see also Sir William Holdsworth, *A History of English Law*, vol. 12, at 102 (Little, Brown & Co. 1938).

2. Holdsworth, *supra* n. 1, at 111-12.

3. See Sir Jeffery Bowman *et al.*, *Review of the Court of Appeal (Civil Div.): Report to The Lord Chancellor* 90 (Sept. 1997).

4. *Id.*

Early American law reports contain oral appellate judgments.<sup>5</sup> In its early years, the Supreme Court of the United States received only oral argument without written briefs, and it appears to have given oral judgments.<sup>6</sup> Eventually, however, American appeal courts began to offer more and more written judgments, until oral judgments became almost extinct. Isolated modern attempts to reintroduce oral judgments into a few American appellate courts have not taken root.<sup>7</sup> But the glories of American appellate practice are adaptability, experimentation, pragmatism, and constant improvement. With such an open-minded approach, the American legal system might consider breathing new life into the practice of oral judgments, which serves not simply as an exotic toy, but as a useful tool.

### III. THE SUCCESS OF ORAL JUDGMENTS

British and Canadian appeal courts achieve four basic goals with oral judgments: timeliness, clarity, efficiency, and fine-tuning.

#### A. *Timeliness*

With oral judgments, the parties get an instant answer to their appeal. This eliminates any delay at the critical stage of the appeal, when the lawyers and clients are most dependent on the court for timely and responsive conclusions. This is particularly important in urgent matters. If the court affords instant judgment in matters of high profile, the public and the media are apt to view the court in a positive light.

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5. See Lawrence M. Friedman, *A History of American Law* 323 n. 55 (2d ed., Simon & Schuster 1985).

6. See *id.* at 323. Review of all briefs filed with the Supreme Court of the United States shows that only from the very early days are they missing and, instead, supplied by the notes of oral argument from the law reports.

7. For a time, the U.S. Second Circuit gave oral reasons. Daniel J. Meador, *Appellate Case Management and Decisional Processes*, 61 Va. L. Rev. 255, 277 (1975); Harold Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. Rev. 432, 440-41 (1976).

### *B. Clarity*

In the appeal process, the most critical time to avoid delay is the interval between argument and judgment.<sup>8</sup> This is especially so when some of the judges live in other cities.<sup>9</sup> Oral judgments allow judges to give their reasons while their memories are fresh and uncontaminated. Courts usually hear argument on several appeals, then wait until the end of the morning (or even later) to confer. But the passage of time can make a judge forget the nuances of competing issues or make her unsure whether factual details come from another similar case argued the same day. Often the difficult decision is not whether to affirm or reverse a decision; it is what ground to choose. Delaying the judgment may cause the judge's memory of details on which a judgment is based to become vague or even inaccurate. In turn, this would require the judge to recheck court documents or get a detailed draft from a law clerk or staff lawyer. Oral judgments avoid this time-consuming process by affording accuracy and clarity.

### *C. Efficiency*

Oral judgments are efficient in two respects. First, oral judgments leave the judges no further work to do. There is nothing more to draft, circulate, check, or proofread. No one has to refresh his or her memory of anything. No judge or clerk needs to segregate or send papers to any judge's office or home city.

Second, the judge can save oral argument time before judgment. By employing oral judgments, a court that is not persuaded by the appellant may opt not to hear any oral argument from the appellee. (Of course, the court has already read the appellee's brief.) The court may retire briefly after the appellant's oral argument. It then may reconvene, tell the appellee's counsel that he or she need not argue, and at once give brief oral reasons affirming the trial judgment. This practice

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8. See George Rose Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 Ark. L. Rev. 197, 201-03 (1967).

9. See *id.* at 203.

is very common in British or Canadian courts, where most appeals end in this manner.<sup>10</sup>

Conversely, the briefs may make the appeal sound persuasive. Then the court may begin oral argument by calling on counsel for the appellee to argue first. The court may direct counsel to a particular ground of appeal. If counsel does not persuade any of the three judges, the court may forego oral argument by the appellant. The court then may reverse the trial judgment, with oral reasons.

Rarely have British and Canadian appellate courts formally screened appeals in advance by creating different argument tracks, such as appeals with no oral argument. It is equally uncommon for British and Canadian courts to impose in advance differing time limits for oral argument. However, the practice of oral judgment accomplishes these same results by eliminating oral argument from the winning side. This technique can be employed quite flexibly because the court can adopt it immediately at hearing. A party that files a written brief but is denied oral argument cannot and does not complain because it wins the appeal. The losing party presents full oral and written argument and has no ground to complain.

The efficiency afforded by oral judgment is real. The Ontario Court of Appeal is probably the busiest Court of Appeal in Canada. In recent years, it cleared a backlog of cases largely by increased use of oral judgments.<sup>11</sup>

#### *D. Fine-Tuning*

Oral judgments allow the court to fine-tune the remedy at once. In British or Canadian courts, one ancillary question that is often raised is: "What costs will be payable by the losing party to the winning party?" Though American appellate law infrequently awards attorney's fees, many other remedial questions can arise. For example:

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10. In England, sixty-five to seventy-five percent of appeals in the 1990s produced an immediate oral judgment. See Bowman *et al.*, *supra* n. 3, at 90. In the province of Québec, two-thirds of appeals end in this manner.

11. See Carl Baar, Ian Greene, Martin Thomas & Peter McCormick, *The Ontario Court of Appeal and Speedy Justice*, 30 Osgoode Hall L. J. 261, 266, 268 (1992).

- Was there some relief sought which the court has not expressly dealt with, such as a cross appeal?
- If there is to be an injunction, what are its precise terms? And when is it effective?
- If there has been bail or a stay of execution pending appeal, does it end? If so, when? If it continues, on what terms will it continue? Was security given? If so, who gets the security now?
- How will interest be calculated?
- Is there some practical aspect of the judgment just delivered that is not clear to either lawyer?
- If the case is sent back to the trial court to rehear, must dates or places be fixed?

With oral judgments, counsel can raise such questions as soon as the result is announced, and the court can address such questions immediately. Without such fine-tuning, the parties need a later motion to rehear or revise the judgment. These motions are uncommon in Canada. It is inefficient to rule on a motion after one's memory has faded and the papers for the appeal have all been sent back, especially if not all the judges who heard this appeal have offices in the same city, or if a judge is out of town. An immediate oral judgment largely obviates such problems.

#### IV. WHEN IS AN ORAL JUDGMENT SUITABLE?

Many appeals are suitable for immediate oral judgment. In all instances, a court does not have to decide before a hearing whether to employ oral judgment in a given case. Oral judgment is a technique that can be used spontaneously. This is useful when the appeal turns out to be simpler in scope or more one-sided than it seemed when reading the briefs before the hearing.

Immediate oral judgment is useful in an appeal that is clearly doomed or clearly irresistible, such as when a simple

flaw emerges which dooms the appeal or condemns the trial judgment and mandates reversal. High-volume intermediate appeal courts see a lot of these cases, but they cannot always be screened out at earlier stages. Once it appears that the trial court clearly must be affirmed, listening to oral argument for the appellee wastes time and energy. Instead, this time should be used to craft the reasons for judgment. (Also, eliminating oral argument by the appellee obviates any need for reply by the appellant.)

A brief oral judgment is fit for appeals with no new law, with no possibility of creating a precedent, and with no one affected by the court's reasons except the parties. It is also appropriate in an appeal that may be disposed of on some short, simple ground. For example, either the appeal or the trial appealed from contravenes a clear statutory bar. It takes only a few words to say this and to cite the statute and section number. The same is true of a simple factual appeal that founders on the standard of review.

Oral judgment is also suitable when the appeal court should say little about the merits of the lawsuit or prosecution, such as when the appeal court reverses a lower court decision and orders a new trial. This may also be the case when the appeal court holds that the summary judgment (or summary disposition) sought by one party is improper, so that the case should go to a full trial. If the appeal court said much about the merits, it might prejudice (or seem to prejudge) the upcoming trial.

Immediate oral judgment is also apt where one of the judges foresees the likely result of the appeal and has some tentative reasons drafted beforehand. After argument, the other two judges can agree with those reasons and make minor editions if necessary.

Finally, sometimes the judge appealed from has given full, well-written reasons for his decision. If the appeal has no merit and simply is based on topics the trial judge has already covered, why rebuild the Taj Mahal? The Supreme Court of Canada has many careful advance screening methods. Yet, from time to time, it affirms an intermediate appeal court or restores a trial judgment orally. Often, it does this in one sentence, for example:

“The appeal is dismissed, substantially for the reasons given by Mme. Justice Martin in the Superior Court.”<sup>12</sup>

In any of these situations, nothing would be gained by delaying a decision, delaying redrafting, or waiting to revise or reprint the reasons that support a judgment. This would only multiply work and inconvenience and frustrate everyone concerned in the matter, especially the parties.

## V. HOW TO PREPARE AN ORAL JUDGMENT

When giving oral judgment, the judges do not need to leave the bench when a simple sentence will suffice to explain the result of the appeal. The presiding judge can whisper to each of his or her colleagues, get their agreement to one sentence, and then render it to the lawyers. However, if counsel for only one side has argued orally before judgment is made, it is desirable that the judges withdraw for a few minutes and confer privately.

Even within the last generation, English appellate judges have given individual *ex tempore* oral reasons, one judge after the other.<sup>13</sup> Today, few judges would be capable of that, and it is better to agree on a single set of reasons for the entire court than to provide varying reasons by each judge. This set of reasons could be orally agreed upon and then orally delivered.

If the judgment is to be more than two sentences long, it is safer for one judge to write it out in the judges' private retiring room, and then share it with the other two judges. Usually the three can agree on wording by making a few additions or changes to the draft. In Canada, this process takes from two to twenty minutes, but is usually completed within ten minutes.

The draft can be hand-written. After it is approved, the judge who drafted it can read it in open court after the judges return to the bench. This will be the judgment of the court.

If one of the judges types readily, the draft can be quickly prepared and corrected on a computer or laptop in the retiring room. The retiring room may contain a printer; some have a projector to make it easier for three judges to read the computer screen at once.

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12. For a recent, slightly longer, example, see Appendix, *infra*.

13. See Bowman *et al.*, *supra* n. 3, at 90.



If one of the judges does not completely agree with the proposed oral judgment, she can either ask to have judgment deferred until it can be put in writing, or she can prepare an immediate oral dissent or concurrence based upon other grounds. If she chooses the latter, she will then read her minority judgment orally, in open court, immediately after the majority judgment.

If the proposed resolution of the appeal is simple, this process of crafting an oral judgment is easy. If the case is more complex, one of the judges can prepare a proposed draft judgment some days before the oral argument. After oral argument, if the panel does not wish to pronounce judgment that way, little has been lost, and the case can proceed to written judgment. However, very often, the judges can amend the draft judgment, agree to it, and then read it in court as the court's unanimous judgment. This is particularly suitable where the appeal is to be decided upon some fairly narrow or technical ground. This drafting process is much like the work of the U.S. Ninth Circuit's screening panels.

It is not a good idea for each judge to give a separate oral judgment that has not been agreed upon previously by the other two judges. The other members of the panel may have had suggestions for additions or qualifications to the judgment, which could have been sorted out previously in three or four minutes in the retiring room.

## VI. RECORDING THE JUDGMENT

Once an oral judgment is rendered, the lawyers will tell their clients who won, and the appeal court's Clerk or Registrar will record that fact. Typically, a formal judgment recording the outcome will be printed and filed. Recording the oral reasons in support of the judgment may be left to the discretion of the judges who rendered the judgment. Appellate courts that have a practice of giving some oral judgments usually create some kind of record of the reasons. This can be done with a digital sound recording system, a tape recorder, or a court reporter with a stenotype (shorthand) machine. The Supreme Court of Canada

has all of its oral judgments transcribed and released to the parties and the public.<sup>14</sup>

The Court of Appeal of Alberta uses a microphone and digitally records all oral reasons. If either party requests it, the oral judgment (including oral reasons) is transcribed. Even where neither party has made such a request, the court will sometimes order transcription because it may be useful to the trial judge who has been reversed. Transcription also affords an opportunity to make minor editing improvements, if necessary. A long, awkward sentence can be split or rearranged. In the unlikely event that something clearly incorrect or inaccurate had been said orally, it could be edited out or revised. Any legal restrictions on publishing names of minors or details about victims can be checked at this editing stage. Many American courts have a policy that forbids citing a certain class of judgment.<sup>15</sup> Such courts could address whether such a policy would be applicable for oral judgments. It is almost impossible for anyone to cite an oral judgment that was never transcribed. Even if a statute directs the appeal court to give written reasons, a written transcript of oral reasons made, endorsed, and filed by the court might comply with such a requirement.

## VII. CONCLUSION

Giving a brief oral judgment at once can save the judges, counsel, and parties time and work, and give the court greater control over what is cited. Oral judgments are worth a try.

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14. See the Supreme Court of Canada's web site, [http://www.scc-csc.gc.ca/judgments/index\\_e.asp](http://www.scc-csc.gc.ca/judgments/index_e.asp) (English), and [http://www.scc-csc.gc.ca/judgments/index\\_f.asp](http://www.scc-csc.gc.ca/judgments/index_f.asp) (French) (both sites accessed Dec. 2, 2003) (copies on file with the Journal of Appellate Practice and Process). For an example, see Appendix, *infra*.

15. See J. Clark Kelso, *A Report on the California Appellate System*, 45 Hastings L.J. 433, 488-89 (1994); Thomas E. Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* 126 (West 1994); Daniel John Meador & Jordana Simone Bernstein, *Appellate Courts in the United States* 87-88 (West 1994).

## APPENDIX

R.R., appellant;  
v.  
Her Majesty the Queen, respondent.

Supreme Court of Canada  
2003: February 11

The judgment of the Court was delivered by

1 IACOBUCCI J. (orally):—This is an appeal as of right that comes to the Court as a result of the dissenting judgment of Feldman J.A. in the Ontario Court of Appeal on the issue of necessity regarding the admissibility of hearsay evidence of the complainant in a sexual assault case. Feldman J.A. reasoned that the trial judge erred in law because, although the complainant was unavailable to attend on the trial date, she may have been available in a few weeks and so an adjournment was in order to safeguard the rights of the accused.

2 Neither party requested an adjournment. Viewed narrowly, the trial judge was required to determine, on the issue of necessity, whether the complainant was available to testify on the date all parties agreed to proceed. The evidence was clear and uncontradicted that for medical reasons she could not testify on that date.

3 Viewed more broadly, although we share the concerns identified by Feldman J.A. on the matter, particularly in cases of this kind, we are of the view that when one considers all the circumstances and evidence before the trial judge, there is no reason to interfere with his discretionary decision to find necessity and admit the statement.

4 In particular, there was evidence before the trial judge on which he could conclude that there was no reasonable possibility that the complainant would be available to testify within an acceptable period of time. Accordingly, the appeal is dismissed.