A Passionate Appeal

By Shaun E. Finn* and Benedicte Martin**

> *There are four qualities required in a judge – to hear courteously, to answer wisely, to consider soberly and to decide impartially*
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> - Socrates
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> *Justice is at once an idea and a fire within the soul*
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> - Camus

1. Introduction

Gathered in a small chamber, they pass away their time in perfect stillness. The hallways are largely silent, save for the echo of footfalls on the stone floors or the sound of the occasional voice, half lost amongst the soaring domes and the quiet breeze that haunts the building like a whisper. Frozen in an ephemeral pose, captured, detained, they constitute a unique group of individuals. These faces, which see without looking and communicate without speaking, are distinct - like characters etched in marble. Some display patrician solemnity, others equanimity, others still a genuine good nature that pierces through the thin layer of glass which separates them from us. Some, less sociable perhaps, appear immersed in their own thoughts. They are the past chief justices of the Court of Appeal of Québec; or rather, their photographs. In its entirety, the gallery depicts over 150 years of legal tradition. Before Canadian Confederation, even before the first codification of

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* Lawyer and former articling student at the Court of Appeal of Québec. Please note that this text is a translation of an earlier article first written and published in 2005, when the Ernest-Cormier Building was inaugurated as the new home of the Court of Appeal. The author wishes to thank all those who participated in this project. Their generosity, patience, and dedication were greatly appreciated. This article is dedicated to the Honourable Justice Louise Mailhot, to the judicial clerks of the Court of Appeal (past, present and future) and to Maître Teresa Carluccio, formerly the guiding soul of this wonderful team of articling students. A special mention must be extended to Maître Mariève Lacroix. In order to prepare this article in its original form, questionnaires were distributed to several people including the Court of Appeal's judges, former judicial clerks and current members of the research service. Many people were also interviewed. Neither the research methodology nor the results are scientifically accurate. Rather, it is a census of diversified opinions. Any errors are those of the author only.

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1866,[1] Québec's magistrates were already hearing appeals and fashioning our civil law.[2] Collectively, this *ad hoc* bench has witnessed many important events: constitutional projects, legal reforms, passionate and innovative disputes... But it is surely with some satisfaction that these men of law now find themselves at 100 Notre-Dame Street East – the new home to the Court of Appeal in Montreal. This happy moment is one more increment in the long progression of Québec's legal history.

On May 6, 2005 the Ernest-Cormier Building was officially inaugurated as the seat of this province's highest Court.[3] The splendid neo-classical structure, which previously housed all of Montreal's criminal proceedings, has become a veritable '*palais* de justice.'[4] It was therefore with great pride and grand ceremony that the appellate judges, along with the Court's staff and Québec's entire legal community, marked the occasion. Canada's Chief Justice,[5] magistrates of all levels, ministers, delegates and lawyers witnessed the unveiling of the fruits of a lengthy restoration process. All expressed their appreciation for the elegant structure.[6] Some even gave voice to a feeling of disbelief. "How were you able to realize such a project?" asked a former provincial Premier. "This must have required an enormous amount of time and vision of a kind that is rarely seen these days."

But 2005 was a pivotal year for yet another reason: it marked the 10th anniversary of the articling program at the Court of Appeal. It was a happy conjunction of events which made for these parallel celebrations. Although this 10th anniversary did not receive

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[1] The first codification of Québec civil law, the *Civil Code of Lower Canada*, was modeled after the *Code Napoléon* (or *Code civil des Français*) of 1804. Before this major juridical work, Québec had a regime of customary law, similar to that which prevailed in Northern France.

[2] The first Chief Justice was Sir James Stuart, named in 1848.

[3] More precisely, it is where the ourt sits in Montreal. Recall that the Court of Appeal of Québec is situated in both Montreal and Québec.

[4] See monography entitled *L'édifice Ernest-Cormier – Siège de la Cour d'appel du Québec à Montréal* (2005), Ministère de la Culture et des Communications, Collection Patrimoines: Lieux et traditions 10. See also articles published under the rubric "Plein feu sur la *nouvelle* Cour d'appel du Québec à Montréal" *Le monde juridique* (vol. 15 number 7). A synopsis of its inauguration was written by Me Louise Vadnais in her article "Inauguration du nouveau siège de la Cour d'appel du Québec à Montréal" *Journal du Barreau* (vol. 37 – number 10 – June 1, 2005).

[5] The Right Honourable Beverly McLachlin.

[6] In fact, the building's interior (and particularly the grand hall boasts an art deco style. An artistic movement which emerged between the two world wars, art deco embodies conceptual simplicity, straight lines and geometric precision. Ernest Cormier, both engineer and architect, was adept at this style.

public attention, it remained a proud moment in the Court of Appeal's history. This article will attempt to shine some light on the people who work within the walls of the Court. Recognised as clerks, researchers or juridical auxiliaries,[7] they serve one principal function: to nourish the thought process of the judges. Above all, they are jurists who participate in the ongoing evolution of our society's fundamental rules. Devoted to the administration of justice, they chose to begin their career in the very place where law, doctrine and facts blend together. Erased from the foreground, their voices are soft, but discernable. And the judges – those men and women whom we see, read and cite – are indeed listening.

2. The Court of Appeal of Québec

The Court of Appeal's history is inseparable from the epic tale of French civilization in America. When the banner of the Bourbon kings was first planted by Samuel de Champlain and a European community had established itself on Québec soil, the customs and habits of the mother country were passed down to its colonies. This was clearly the case in the legal sphere. Crime, contracts, successions and nuisance were part and parcel of the societies which sprang up in the New World. In fact, during the French Regime, citizens of the American territories were subject to the *Coutume de Paris*, a system of legislation which prevailed in the Île-de-France region. The king's ordinances and the edicts of the Sovereign Council completed this legal system, which would gradually evolve in response to the colonies' new demands. Yet with the Seven Years War – an Anglo-French conflict stretching from India to the Appalachians, from the waters of the Caribbean to the cliffs of the St.-Lawrence – a new era quickly came into being. Following the Cession of 1763,[8] the United Kingdom attempted to introduce the common law into its new Empire in both the public and private spheres. Unable to alter the traditions of its French subjects so easily, however, the British Parliament decreed the

[7] In fact, the French terminology is not without a certain ambiguity and controversy. The author decided to use the term "clerk," although it is not recognized unanimously. In one of its original meanings, "clerk" simply signifies a person of letters who is granted expertise in a particular domain. It also applies specifically to articling students seeking to adhere to a professional association. See *Le Grand Robert: dictionnaire de la langue française* (Paris & Montreal: Les dictionnaires Robert, 1992).

[8] The cession of Québec was a crucial element of the *Treaty of Paris*, signed February 10, 1763.

Québec Act[9] in 1774. This beneficial legislation granted, among other things, formal recognition to the civilian legal system in private matters. It also ensured the survival of Québec's judicial institutions.[10]

The courts, like Québec's civil law, have changed a great deal over time. At first, French and British governors were responsible for the administration of justice. As the need arose, civil courts were established throughout the colony, although they were only courts of first instance. Montreal, at that time the largest metropolis of British North America, only obtained its first courthouse in 1800 – 158 years after being founded. Until the beginning of Queen Victoria RI's long reign,[11] appeals were heard before the Governor and his Council. This procedure was officially abolished in 1849, with the decree of l'*Acte pour établir une cour ayant juridiction en appel et en matière criminelle pour le Bas-Canada.*[12] The Act conferred upon the Court of Queen's Bench – a tribunal composed of four magistrates including one chief justice – the jurisdiction to hear civil appeals as well as criminal trials at first instance. Because this Court fell under articles 92 and 96 of the *Constitution Act, 1867,*[13] its judges were named and remunerated by the federal government. In 1974, the Court of Queen's Bench was renamed the Court of Appeal of Québec, a familiar title which it still bears today. The nomination process, remuneration and dismissal of judges, however, remain the same.[14]

The Court of Appeal has undergone major changes since its inception. As with other segments of society, it had to contend with technological, economic and cultural revolutions. Contemporary Québec bears little resemblance to the world of farmers, lumberjacks, carpenters and fisherman who populated the province once upon a time. Numerous, complex, uncommon, uncertain – the cases which find themselves before appellate courts push jurisprudence toward new horizons. At the same time, the Court of Appeal's mandate has also evolved. Instead of devoting itself to questions of law and

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[9] *Act which more solidly regulates the government of the province of Québec in northern America*.
[10] It also guaranteed the right to practice the Catholic religion, to maintain French public institutions and to preserve the seigneurial system.
[11] *Regina Imperatrix*: Queen and Empress of the Indies (1819-1901, r. 1837-1901).
[12] See Louise Mailhot and Daniel Arseneau, *L'Appel*,(Cowansville: Les éditions Yvon Blais, 2001) at 1,2.
[13] 30 & 31 Victoria, ch. 3 (U.-K.). Previously the *British North America Act (1867)*.
[14] See the website of the Court of Appeal of Québec for additional information (www.tribunaux.qc.ca).

fact alike, it orients itself more towards cases which raise legal questions. Guardian of the law, the Court of Appeal of Québec will only intervene in a question of fact if the lower court is found to have committed an "overriding and palpable error." This was explained by the Supreme Court of Canada in two important cases, *Schwartz v. R.*[15] and *Housen v. Nikolaisen*[16].

How Québec's Court of Appeal diverges from other Canadian tribunals – with which it fashions the country's constitutional, administrative and criminal norms – dates back to its French origins. Since private law in Québec is civilian, the Court is responsible for guiding the development of this unique legal tradition. Despite the Supreme Court's ultimate authority, it hears only a limited percentage of appeals originating from Québec. Judges of Québec's highest tribunal must manage their cases, conscious that they have the power to modify the state of the law. Note that in 2004, there were 1995 applications for leave to appeal yet only 930 were heard.[17] Of those, the vast majority (about 80%) consisted of civil appeals. The Supreme Court heard only 83 appeals, 30 of which came from Québec.[18]

The Court of Appeal is composed of a chief justice – who is charged with administering and directing the Court – of roughly 20 associate justices and of a fluctuating number of supernumerary and *ad hoc* justices. The associate justices are magistrates who sit full time. The supernumerary members are senior justices who no longer sit regularly during the judicial year but work as requested with a lightened case load. Finally, *ad hoc* justices are designated to fulfil a temporary mandate.[19] During their delegation, they exercise all the powers and privileges of appellate judges. At the Court, a bench will group together different categories of justices and ordinarily be composed of three magistrates. A bench of five members can be summoned in exceptional circumstances.[20]

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[15] [1996] 1 S.C.R. 254.
[16] [2002] 2 S.C.R. 235.
[17] Comparative report of 2002, 2003, 2004 for the registries of Québec and Montreal (Court of Appeal of Québec).
[18] Supreme Court of Canada (2005), Bulletin of Procedure: Special Edition (Statistics 1994 until 2004).
[19] A judge's designation as *ad hoc* is made jointly by the Chief Justices of the Court of Appeal and the Superior Court.
[20] Article 513(1) of *Code of Civil Procedure* (R.S.Q. c. C-25.) [the C.P.C.].

An appeal is a mechanism which is based on natural law and traces its origins back to our most ancient judicial practices. It is well accepted that courts can get it wrong. As rigorous and diligent as they usually are, judges are not perfect. Their application of the law can therefore be revised. In the preliminary note to his *Manuel de la Cour d'appel*, Justice Rivard writes:

> "All justice being fallible, it is not surprising that its decisions can inspire in the unfortunate pleader a natural feeling of defiance. To protect parties against potential errors, the legislator has established various means to contest judicial decisions.
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> The ordinary way to attack a judgment is by way of an appeal."[21] (Our translation)

Unlike superior courts, however which are the modern incarnation of the old English courts, the Court of Appeal exercises no inherent jurisdiction. Its powers are derived not from the Canadian Constitution,[22] but directly from the legislator. It is therefore a statutory and not a common law court. It can nevertheless hear the appeal of any judgment "failing an express provision to the contrary."[23]

From an institutional perspective, the Court of Appeal can be distinguished clearly from courts of first instance in that it does not oversee, manage and decide trials. The examination of witnesses, voire dire, the filing of evidence, interlocutory judgments - and all the other elements that we ordinarily associate with courtroom practice – are not part of the appellate process. An appeal is not the launching of a second action; a second kick at the proverbial can. Rather, it is the enlightened examination of a decision which aims to reveal an error of law, a mixed error of law and fact or, more rarely, an error of fact.[24] An appellate judge must perform a very delicate task. He must show deference to the court of first instance, which is presumed to have mastered the facts of the case, while at

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[21] Adjutor Rivard, *Manuel de la Cour d'appel : juridiction civile*, (Montréal : Les Éditions Variétés, 1941) at 1.
[22] Article 96, *Constitution Act, 1867*.
[23] Article 25 C.C.P. For a discussion of the appeal procedure, see Denis Ferland and Benoît Emery, *Précis de procédure civile*, vol. I, 4th ed. (Cowansville: Les éditions Yvon-Blais, 2003) at 56 and following. See also Louise Mailhot, *supra* note 12.
[24] There can also be a "mixed" question of law and fact.

the same time examining carefully the principles of law that the lower court invoked. Without trying to replicate the process, members of the bench must study the argument and evidence submitted, while considering previous jurisprudence, social realities and the principles of equity that inform our legal system. This difficult mission is also shared by the judicial clerk, who must continuously retrace the steps of previous judges and rethink their learned comments.

When beginning his or her career at the Court, the judicial clerk is integrated into a tradition which transcends the walls of marble and travertine, the courtrooms and even the men and women who compose the Court of today. The clerk discovers a rich and evolving system of justice, a heritage which belongs to all those who devote themselves to the legal profession. In addition to the cultivation of professional abilities, the judicial clerk can throw himself into a process whose ultimate objective is civic order and intellectual cohesion.

3. The Programme

Clerkship programmes have existed for a long time in the United States, where they continue to be sought after by graduates from law faculties across the country. Whether it be the Supreme Court, federal or state courts of appeal or various courts of first instance, practical training in any of these institutions has become an imprimatur. Not only does it permit clerks to stand out once they enter the job market, but it also opens to door to different possibilities, from holding public office to advocacy to teaching. In Canada, however, clerks are new to the legal scene. The Supreme Court of Canada inaugurated its programme only in 1968.[25] Since then, provincial courts of appeal, as well as both levels of the Federal Court, have developed similar programmes. Note that this has also occurred in other jurisdictions, such as the Superior Court of Québec, the Court of Québec and the Tax Court of Canada. Unlike other jurisdictions, however,

[25] See Julie Dagenais Blackburn et al., "Le programme de clercs à la Cour suprême du Canada" (1995) 36 *C. de D.* 763, at 765 and following.

applicants are only admitted into Québec's articling programme *after* they have been accredited by the Québec Bar School.[26]

The Court of Appeal of Québec initiated its articling programme in 1995, with the arrival of former Chief Justice Pierre A. Michaud.[27] Many Bar School graduates who have worked at the Court did so after concluding individual contracts on an *ad hoc* basis. Considering the increasing number of disputes being brought before the Court, however, Justice Michaud was able to institutionalize a new tool which would allow judges to render decisions in a larger number of files – a research service consisting entirely of articling students. Instead of conducting their own research, the justices could from then on concentrate on the most difficult questions and devote themselves to the advancement of the law. This harmonized well with the goal of shortening the period between the moment when the case is placed on the roll and when the hearing actually takes place. According to Chief Justice Michaud, the clerkship programme was conceived to provide "essential assistance in order to maximize the Court of Appeal's output and minimize delay."[28] (Our translation)

The practical training offered by the Court of Appeal in many ways resembles those of other Canadian courts. It allows graduates of Bar School to register in the '*Ordre Provinciale*', is characterised by intensive research and writing and opens a window on the internal life of the judiciary. But contrary to other North American programmes which have a maximum duration of one year, the one organised by the Court of Appeal of Québec can extend to 24 months. While certain students decide to shorten the length of their stay, this allows others to finish a Master of Laws degree, to draft legal articles or to further their knowledge of the appellate process. It must also be noted that each clerk is assigned to a particular judge, with whom they work throughout the duration of their contract. Instead of using a 'student pool' rotation system, this structure allows students

[26] The Supreme Court of Canada and the Federal Court permit those who have completed their articling elsewhere to integrate themselves into the research programme.
[27] For more details, see "Stages à la Cour d'appel et la Cour supérieure du Québec," *L'Apprenti Sage* (vol. 6 – number 2 –December 2002).
[28] See Louise Vadnais «Le juge d'appel et son recherchiste» *Journal du Barreau* (vol. 34 –number 1, January 1, 2004).

to develop a more intimate relationship with 'their' judge, who acts simultaneously as a supervisor, a boss, a teacher and an invaluable mentor.

4. Why Complete Your Articling Requirements at the Court?

> *The clerks are a precious resource; they provide help that is often essential to the judges and have increased the quality of the judgments which are rendered by the Court of Appeal.*
>
> - The Honourable Chief Justice Michel Robert

The traditional task of a lawyer is to represent his client with intellectual rigour, good faith and in full conformity with the ethical requirements of the Bar.[29] A lawyer who practises in a private law firm must listen to and counsel his client, explain the state of the law and formulate an opinion on the questions that are asked of him. When necessary, he or she must also deal with fellow lawyers or plead before different tribunals, whether civil, criminal or administrative. To do this, the lawyer will have to draft the necessary proceedings. If there is an appeal, he will also have to prepare a factum to demonstrate in writing that his submissions are well-founded. In this situation, an articling student usually helps his more senior colleagues to develop certain elements of the appeal and perhaps to begin drafting the pleadings. Nonetheless, his involvement in the litigation will only be partial – there will necessarily be gaps in the student's understanding of the case. Usually, it will only be after a probationary period that a student or newly called attorney will be asked to master a file in its entirety.[30] This is particularly true in the context of an appeal.

If the work of an articling student at a large law firm can be described as incremental and specific in nature, the task of a judicial clerk is systematic and comprehensive. The analysis of an appeal does not simply mean reading allegations. It requires a deeper understanding of the facts and of all the proceedings submitted to the Court. The history of a dispute, which can extend over several years, is scrutinized to better understand the

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[29] See the "Recueil de documentation professionnelle" published annually by the Barreau du Québec and the *Code de déontologie professionnelle* adopted in 1987 by the Canadian Bar Association's Council.

[30] Only a member of the "Ordre des avocats" can act before civil tribunals as a judicial representative (*Loi sur le Barreau*, L.R.Q., c. B-1, article 128, paragraphe 2). However, even new practitioners must often follow several preliminary steps before being entrusted with a complete dossier.

scope of the relevant questions. Consequently, the judicial clerk can simultaneously witness the progression of the conflict, the different strategies employed by the lawyers and the way in which key arguments are elaborated. Finally, like the judge, the judicial clerk enjoys a more remote perspective which enables him or her to define the major aspects of the judicial debate. More than colours, forms and textures, it is the legal tapestry as a whole that he or she gets to appreciate. This privileged point of view allows the clerk to observe the unfolding of a case and enables a more objective evaluation of legal problems. When faced with a new brief, a judicial clerk must be the model objectivity, just like his or her judge. Although it is never clerks who make final decisions, they must still act as if the case assigned were their own, and exercise a comparable degree of prudence, diligence and impartiality.

This aptitude for critical analysis, cultivated throughout the articling period, is a precious asset that permits a clerk – once he becomes a practitioner – to manage his mandates more effectively and to develop more convincing arguments. Here are the comments of a former judicial clerk, who now practises in Montreal:

> "The main advantage that I got from articling here was to be directly involved in the decision-making process, to have a better understanding of the issues and legal questions that a file can give rise to. How many times have I seen a lawyer exhausting himself to sway an unreceptive audience? Articling at the Court allowed me to identify the key elements of a file and to better understand what will catch the attention of a judge. In other words, how to better separate the wheat from the chaff."[31] (Our translation)

The cases brought before a clerk are also very diversified. Since the Court is a general court of appeal,[32] it hears cases relating to all matters under the jurisdiction of the Superior Court[33] and the Court of Québec. As a result, it deals with "classical" issues of private law such as persons, civil liability, contractual obligations and property law. This juridical quartet, essential to the daily life of a society, is the regime of common law ("*droit commun")* which is regulated by the *Civil Code of Québec*.[34] The Court also

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[31] Written answer to a questionnaire addressed to former members of the court.
[32] Article 25 C.C.P. The Court can hear the appeal of any judgement, except those prohibited by a legislative disposition or a special reference.
[33] "The court of original jurisdiction."
[34] S.Q. 1991, c. 64.

renders decisions in the public and penal spheres, adjudicating decisions which touch on criminal, tax, municipal and administrative law. Due to this extensive jurisdiction, the work of clerks is necessarily varied. Throughout their articling period, they learn to chart a course through the complex landscape of Québec's legal regime. The training is general and comparative,[35] reflecting the complexity of the norms which govern modern societies. This represents both an important challenge and a unique opportunity:

> "[…] We touch on every area of practice, the files handled by the Court being extremely varied. This is a real opportunity at the beginning of one's career as it helps the clerk to discover what he or she is most interested in. I believe this form of articling is an excellent transition between the purely theoretical nature of university studies and the practice of law."[36] (Our translation)

For many judicial clerks, this ability to explore the law in its purest form is the most fascinating part of their mandate. Confronted with a precise set of facts, clerks must study the jurisprudence in order to find the provisions, decisions or doctrinal authority which will help them to propose a solution. The methodology resembles research conducted in university, grounded simultaneously in synthesis and analogical reasoning. But unlike the famous 'fact patterns' of law school fame (or infamy), the cases involve concrete rights, interests and disputes between actual parties. In this sense, an articling position at the Court bridges academia and the agora – the public place – where citizens come to meet and interact.

By beginning his or her career at the Court, the judicial clerk is immediately initiated into its internal workings. The mystery which seems to surround the courthouse quickly dissipates. Reviewing pleadings, attending hearings, preparing draft opinions and finalizing judgments come to form a familiar and reassuring cycle. At the same time, appellate judges morph into distinct personalities. Once this threshold is crossed, the decision-making process becomes much less abstract. By observing the justices closely, working with them, attending hearings and developing analytical skills, clerks are introduced to the inner life of the Court. A dialogue is established between the justice

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[35] Think of the *Criminal Code*, which is applied across all Canadian provinces and territories. Note also that a dialogue exists between Québec law and the common law of Canada and England, as well as with civilian systems overseas.

[36] Written response to a questionnaire addressed to former judicial clerks of the court.

and his or her judicial clerk, who both try to achieve the same goal: the satisfactory resolution of a conflict. Articling principal and mentor, the justice shares his ideas, worries and reactions with his novice, who in turn benefits from the judge's wealth of experience. "These men and women have the civil law of Québec, justice itself, in their hands" explains a current clerk.[37] "It is extraordinary that these same judges are prepared to listen to us and that our thoughts can affect the decisions which they make." (Our translation)

In addition to the benefits which flow directly from the articling programme, the Court of Appeal opens the door to other opportunities as well. An interesting initiative is the protocol agreement which was established in 2002 with Université Laval's Faculty of Law.[38] This agreement allows clerks to register, and automatically be accepted into, a Master of Laws programme with thesis. Clerks can also obtain the equivalent of nine credits by having three written assignments evaluated. Each of these texts must be 20 to 25 pages in length, and be completed during the clerk's internship at the Court. The only obligatory course is an introduction to advanced research methodologies, which takes place in the Ernest-Cormier Building in Montreal. Because the students cannot easily go to Québec City, a professor travels to the courthouse to teach five or six intensive lessons. The largest part of the work (reading, bibliographies, drafting and editing) is done independently, under the supervision of a thesis advisor. "The protocol agreement allows the articling students to specialize. As the mandate of these clerks is generalist in nature, this accommodation allows them to become experts in the legal field of their choice" explains Pierre Rainville, former Assistant Dean. (Our translation)

The judicial clerks can also participate in lunchtime conferences hosted by a judge from the Court of Appeal and, on occasion, an external guest.[39] Former guests include justices from the Supreme Court as well as other magistrates and jurists from different milieus.

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[37] Maître Lacroux.

[38] This agreement, which also applies to clerks of the Superior Court of Québec, is unique to Canada. For further details, consult the faculty's website (www.fd.ulaval.ca).

[39] During the 2004-2005 year guests included, Judges Dalphond, Deschamps, Rayle and L'Heureux-Dubé, as well as the Assistant Dean Rainville. In Québec City, the clerks participate in four seminars organised by Université Laval's Faculty of Law, as well as other conferences pertaining to other subjects of judicial interest.

Lasting about one hour and a half, a variety of subjects can be discussed – from new trends in the jurisprudence, to the legal world to the guest's professional endeavours. The discussions are always open, which allows the judicial clerks to ask questions freely and in an intimate environment. These conferences aim to broaden the knowledge base of the clerks and, more generally, to expose them to legal culture, which is not simply limited to research, reading and drafting.

Finally, the Court also offers training courses, including language courses, for those who seek to improve their English. These programmes are designed to provide clerks with additional skills which will help them not only during the articling period, but also throughout their professional careers.

5. The Candidate

Just like the magnificent stained-glass windows of the Middle Ages, which filter light through a mosaic of colours, public institutions also seek to achieve harmony through diversity. The incarnation of our social conscience, courts are no exception to this rule. Although excellence and probity are essential characteristics for prospective candidates, there are few official prerequisites. There is no mould that students must fit in order to be selected. The biographies of the judicial clerks reveal a myriad of backgrounds, interests and accomplishments. Without a doubt, diversity adds dimension and richness to this team of future jurists. Each clerk is responsible for his or her own files, but nothing prevents legal clerks from discussing issues and cases amongst themselves. There is a spirit of collegiality – and not competition – among the clerks at the Court of Appeal. Talent and meticulousness[40] are reflected in the quality of the work done by the clerks, who are encouraged to test different perspectives, reach the limits of their own understanding and approach the law with a spirit of creative rigour.

Despite the Court's open-minded approach to the selection of candidates, the nature of the position requires certain fundamental abilities. First, candidates must have a solid academic record. Since the clerks' tasks will involve research, writing, synthesizing and

[40] Several candidates have completed previous studies, obtained a master's in law or are in the process of completing one.

communicating, the candidate must demonstrate that he or she took his or her studies seriously and is prepared to fulfil all of the duties that go along with the position.[41] The more students apply for a position at the Court of Appeal, the more grades become a key factor during recruitment. But the evaluation process always extends beyond mere numbers. A candidate's personal and professional experiences, as well as his or her interest in working at the Court, are also considered. "A student can be an interesting candidate even if he is not at the top of his year. As the application is considered in its entirety, other qualities can influence the Committee's decision."[42]

Besides good grades, candidates must demonstrate that they can adapt to the demanding life of a judicial clerk. Candidates must be confident in expressing their opinions and have strong analytical abilities, even when the legal issues are ambiguous. They must also be ready to invest the time and energy needed to complete the mandates that will be assigned to them. "We are looking for a person who is competent from a legal standpoint," explains Justice Jean-Louis Baudouin, "with a pleasant personality and who is able to work in a focused and punctual manner." (Our translation)

Having a fondness for conducting work independently is also very important, adds Justice Rousseau-Houle. In preparing a memorandum or conducting research, judicial clerks cannot constantly turn to their articling principals with questions: everyone at the Court of Appeal is expected to manage his or her own hefty workload. The articling student must conduct due diligence of the file, research the applicable law and propose a solution. He cannot panic in the face of uncertainty, as grey areas (alas) are common to many an appeal! A judicial clerk's discussions with the judge should be reserved for the most salient elements of the case. These conversations consist of an open dialogue which is normally natural and cordial. In short, candidates must be prepared to assume fully their professional responsibilities.

Candidates must have successfully completed their studies at the Bar School and be eligible to satisfy their articling requirement. Their stay at the Court of Appeal can extend to two years in total, the first six months of which fulfils the practical

[41] See comments made under previous rubric.
[42] Me Carluccio, former coordinator of the research service.

requirements needed to be called to the Québec Bar. Although articling students officially become lawyers during their clerkship, their main responsibilities remain the same. They do, however, obtain a salary increase every six months.

During their third or fourth year of university,[43] students considering a position at the Court of Appeal prepare their applications. They must submit a *curriculum vitae*, a cover letter, an official transcript and letters of reference. If the person is selected for an interview, the application package will be transferred to the Recruitment Committee operating in either Montreal or Québec City. The informal style of the interview to which the candidates will be invited aims to determine whether they possess an analytical spirit, the quintessential quality of any efficient judicial clerk. The objective is not to place the candidate in an awkward or difficult position. Rather, the Committee simply wants to make sure that the student has a solid grounding in the law and that he or she is sufficiently articulate and reflexive.

Most appeals are brought in French. It is therefore essential that the clerk be able to work in a francophone environment – knowing the language of Molière is a prerequisite. Yet it is worth noting that Anglophones[44] and Allophones join the team of judicial clerks each year. Bilingualism is a definite asset in the context of civil law, where parties can prepare their proceedings, draft their factums and plead their appeal in either of Canada's two official languages.[45]

6. The Judicial Clerk

The modern era – urban, multiform and litigious – is very different from both the 19th century and even the 1940's and 1950's. In a society which revolved around agriculture, courts were considered a forum of last resort. Disputes between neighbours were rare and often resolved informally. Serious injuries resulted from either accidents or farming-related activities. It is therefore not surprising that old case reports, from all levels, reflected this social reality. In time, however, the industrial revolution disturbed the

[43] Those who have already completed l'École du Barreau follow the same procedure.
[44] Which the author can, himself, confirm.
[45] Bilingualism is also useful for completing research on comparative law.

constants of rural life. When exposed to a new universe replete with risks, the relationships between citizens quickly became more complex. With a growing urban class in Québec and elsewhere, disagreements increasingly devolved into litigation. Confronted with these changes, courts were required to hear a greater number of cases, render more decisions and rethink the law. The consequences of this revolution are still being felt today. Recall that the number of appeals launched in Québec remains significant[46] and that judges must master legal problems which are heterogeneous in nature and often extremely narrow in scope. The clerk's role is to facilitate the task of the judge. He or she distils the salient aspects of a file to delineate the true judicial debate. In so doing, he or she saves the judge time and energy, which can be used to concentrate on the critical questions and achieve the correct outcome. In a sense, judicial clerks are the gardeners of the Court of Appeal. They help to weed out the erroneous, the uncertain and the superfluous.

Once a case is registered on the Court's roll, the judicial clerk will be able to learn which judges will hear the case and which judge will be assigned to draft the appellate judgment. For each file assigned to his or her judge, the clerk must read the factum and draft a bench memorandum which is generally given to all three judges who will hear the case. Each judge has his own work method, which will impact the way his clerk proceeds.

The factum is a written analysis of the facts, allegations and arguments which must conform to the *Rules of the Court of Appeal of Québec in Civil Matters*.[47] It explains why the decision of first instance must be overturned or varied (in the Appellant's case) or confirmed (in the Respondent's case).[48] The parties describe the relevant facts which led to the litigation. They explain the contents of the judgment of first instance and invoke their reasons for modifying or overturning the decision. The issues can be of law, fact or mixed law and fact. Usually, arguments are based on jurisprudence and doctrine. Copies of these sources are included in the parties' books of authorities. The Appellants

[46] *Supra* note 17.
[47] S.R.Q., c.-25 (civil matters). See articles 15 to 25.
[48] The Appellant must demonstrate that the contested judgment is poorly founded.

must include the decision they seek to appeal, the inscription,[49] the procedural history and all evidence relevant to the conclusions sought.

Clerks must read the documents which form the basis of the appeal. It is crucial that they understand how and why the litigation came about and be able to identify the underlying debate. Moreover, the clerks must dissect the reasoning of the judge of first instance. Why did the judge find in favour of a given party? What reasons are outlined in support of the decision? What principle or authority are these reasons based on? These questions are unavoidable. Finally, the clerk must decide if – in his or her opinion and considering the written arguments – the judgment should be reversed. It is this third step which requires exhaustive reasoning. Even though the parties buttress their arguments with authorities, the cases cited often only provide part of the answer. To elaborate a complete analysis, the clerk will conduct research which extends beyond the cases cited by the parties. Clerks sometimes discover that legal rules are applied more subtly than how the parties suggest and must dig deeper into questions which are not clearly addressed in the written submissions. A judicial clerk's research duties are therefore not limited to the authorities cited in the pleadings.

Once the judicial clerk has completed his research and arrived at a tentative disposition, he or she must draft a memorandum. Sometimes referred to as a "summary" ("*sommaire*" in French), this document will serve to assist the judges in deciding whether the appeal is well-founded. The memo is modeled on a typical appellate decision. It must be lucid, methodical and organised.[50] The goal is not to write an essay. Rather, it is to resolve a problem which requires a cogent decision. The length of the memo will depend on the case's complexity. In fact, it is not the memo's length or style which matters most – it is its ability to provide a critical opinion that counts. "The researcher must understand that it is useless to return to the Flood," affirms Justice Baudouin. "He must, in his own mind, take into account that the judge needs more than a basic analysis." (Our translation)

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[49] Or application for appeal where applicable.

[50] On this subject, see Louise Mailhot, *Écrire la décision,* 2e éd. (Cowansville : Éditions Yvon Blais, 2004). See also, by the same author and James D. Carnwath, *Decisions, Decisions…A Handbook for Judicial Writing* (Cowansville : Éditions Yvon Blais, 1998).

Certainly, the judicial clerk hopes to see his or her approach reflected in the Court's ultimate decision. But it is important to avoid thinking that there is always one "right answer" to legal problems. While it is true that one conclusion may seem obvious, there is rarely an absolute truth behind every judicial conflict. Complex facts can potentially lead to multiple solutions. If the clerk is able to present the most important facts, explain the legal questions in issue and draw from the best sources, he will have proven his diligence as a researcher. It is worth remembering that the fate of a case is not always decided unanimously and that appeals, by their very nature, demonstrate that different points of view can be maintained.

Here is an outline of a generic memo with a few helpful reminders.[51]

A) The Facts

Include a summary of the relevant facts. *Drafted in the present tense, the facts grasp the reader's attention. They should not weigh down the text. After all, like a decision, the summary is a legal narrative.*

B) The Judgment of First Instance

A synthesis of the reasons set out by the judge of first instance. *Often, a decision of first instance will be lengthy and have many dimensions to it. The judicial clerk cannot merely repeat everything. He or she must focus on the essential aspects of the reasoning. Usually, these are the passages that the clerk has underlined during his or her initial reading of the judgment.*

C) The Appellant's Arguments

The arguments invoked by Appellant to overturn or reverse in part the decision in first instance. *This is also a qualitative task. Reproducing all of the Appellant's allegations would be a waste of time. An overview will suffice. The judicial clerk must emphasise the argument's most important elements. This means that if 15 pages are devoted to one argument and 10 pages are devoted to two others, the main argument will normally take precedence. This principle applies to the Respondent's arguments as well, which can also be included depending on the judge's instructions.*

D) The Issues

The legal issues which must be resolved to decide the appeal's outcome. *The clerk should specify whether the parties agree on the main issues. If not, this should be*

[51] This model of opinion can be adapted, as needed, to a given case or as requested by the supervising judge.

mentioned. It is also possible that the litigation contains other related questions which are not invoked directly. If so, the judicial clerk should highlight these questions.

E) The Applicable Law

Include the provision(s) under consideration. *If the litigation relates to the interpretation or application of a legal text, it is always useful to cite it. This will better prepare the reader for the discussion that follows*.

F) The Discussion

A critical analysis of the Appellant and Respondent's reasoning. *If there are multiple lines of reasoning, the discussion will be divided into several stages to study each issue individually. The only fundamental rules are the following: ensure that the most important aspects of the litigation are addressed and that a critical opinion is expressed. A general discussion of legal principles will not suffice. The judicial clerk must offer a logical, balanced and appropriate solution to the problem*.

G) The Disposition

Set out all of the conclusions. *If the appeal seeks more than one conclusion, each conclusion must be addressed. The disposition must be complete and reflect the discussion adequately.*

Despite the intense preliminary steps undertaken to prepare a file, the importance of the hearing should not be underestimated. As the oral stage of argument, the hearing is critical insofar as it allows the judge to make his or her decision. That is when the parties exercise their right to express themselves and to persuade the justices[52]. Although the hearing largely involves addressing the arguments raised in the parties' pleadings, it can nevertheless serve to shed light on ambiguities, fill in gaps and distinguish the authorities cited.[53] It is therefore often crucial that the judicial clerk be present during hearings to take detailed notes. These notes may serve to modify the memo's conclusions, nuance or complete them. The hearing also allows judges to ask questions in order to better understand and weigh the arguments. The clerk has the opportunity to watch lawyers plead – lawyers with different levels of experience, specialisations, styles and approaches.[54] He or she can also observe the interaction between the justices and the

[52] A right which flows from the famous Latin maxim *audi alteram partem*.
[53] Or, in certain cases, a hearing is an opportunity to examine new pertinent decisions rendered by the Supreme Court of Canada, which were only issued after the judgment of first instance.
[54] Note that there is much to be learned from both the best pleaders and the worst.

lawyer. In short, the clerk's duty of assisting the justice extends beyond merely preparing bench memoranda.

Once the hearing has finished, the justices can immediately render a decision. This often occurs when a case is relatively simple, and the panel agrees on the outcome. For some time now, 60% of the decisions rendered on the merits are recorded after the hearing. If the case is more difficult to resolve, however, if it is likely to have broader consequences or if the decision is not unanimous, the justices will deliberate. It is at this point that the clerk will be called upon to conduct more specific research. He will also have to work more closely with the justice assigned to draft the decision. The points of view expressed by the other justices will also need to be considered. In certain cases, the clerk will be asked to write a preliminary draft of the opinion. In other cases, the justice will want to develop his or her reasoning alone. Regardless of the method preferred, the judgment must clearly explain its underlying reasoning to the parties and to the public. The facts, the law and the logic must clearly and rigorously set out the justice's analysis. It is therefore imperative that the judicial clerk and the justice communicate freely. The more frank their relationship, the greater the quality of the decisions that will be rendered.

7. The Beginning of a Promising Career

There are certain events in the life of a lawyer, certain opportunities, which can only take place once. One of these is the chance to article at a court. Once a lawyer decides to begin his career elsewhere, he usually cannot return to square one and apply to become a judicial clerk. It is unfortunate that such an important decision must be made at the beginning of the often long and difficult journey that begins with law school. Personal enrichment, success and happiness can manifest themselves in many different ways. One path is not necessarily better than another and the options available are virtually limitless. Nevertheless, no one can contest the value of an internship the Court of Appeal of Québec. It is a unique way of launching one's career and opens the door to several fascinating destinations. Whether you are interested in private practice, a public career, teaching or graduate studies, the Court's articling programme offers a unique initiation to the legal foundations that underpin our society. The many skills acquired during a

judicial clerk's mandate – skills in the areas of research, drafting and appellate procedure - will be useful regardless of what your ultimate goals might be. An articling position at the Court of Appeal is more than a way of satisfying a formal requirement to be called to the Bar. It prepares the student for a long, ongoing voyage of discovery.

Courts are the homes of tradition. The image of the quintessential courthouse, as well as its rules, its customs and the unusual garb of the professionals who inhabit it, clearly illustrate that it is steeped in the ways of the past. The gallery of Québec's chief justices,[55] who are now, ironically, compelled to observe an eternal silence, are but a visual representation of the long chain which unites the present to the past. In donning their sombre gowns, today's judges fulfil a duty which dates to the time of the Romans, when magistrates, half jurists and half priests, invoked the sacred name of Justice. By working within the Court itself, judicial clerks have the chance to participate in civic rites which animate our fundamental institutions and safeguard the liberties of us all citizens. It is an auspicious beginning for someone embarking on profession that requires and gives so much, one that offers a unique perspective on that living heritage of which he or she will always be a part.

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[55] See the section of this article entitled "Introduction."