

Everything old is new again: the proliferation of case law and whether there is a remedy

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Introduction

In the current explosion of legal information, lawyers are required to wade through vast amounts of mostly inconsequential decisions in order to ensure they have considered all potentially relevant authorities. The courts are subjected to excessive citation of authorities in the arguments of counsel, while leading cases are sometimes neglected.

These are not new issues, and a review of past attempts to grapple with this problem in Canada and elsewhere is instructive. Themes running throughout include the tension between publishing inconsequential cases and losing access to important decisions; whether a "no-citation" rule should apply to cases not selected for publication or to certain categories of decisions; the precedential value of unreported, unpublished and summary decisions; and a reluctance to give any particular group—whether the judiciary, the bar, the government or legal publishers—the power to decide which cases can be published and cited in the courts.

This article considers whether the proliferation of case law and the problems caused by it are insoluble, or whether steps can be taken to address the concerns of the bar and the judiciary.

Is the standard required by the courts too high?

The British Columbia Court of Appeal set out the standard it expects of counsel in *Lougheed Enterprises Ltd. v. Armbruster* (1992), 63 B.C.L.R. (2d) 316 (C.A.).¹ That appeal was from a petition to the Supreme Court of British Columbia under the *Partition Act* where the respondent was unrepresented. The petition was granted by Drost J., and his decision was appealed. A 1978 decision of the B.C. Supreme Court had held that the *Partition Act* did not give any power to grant the order sought. This decision was not brought to the attention of Drost J., or to the B.C. Supreme Court or the Court of Appeal in a subsequent application.

The Court of Appeal brought the 1978 case to the attention of the parties and requested a factum addressing the jurisdictional issue fully. Counsel then argued that the panel was biased and had descended into the arena by raising the jurisdictional issue. The Court of Appeal responded by setting out its view that counsel's role is to assist the court by bringing before it all the relevant authorities on points deserving of consideration. The court described its expectations as follows:

The term "relevant" in the context of the case before us means that counsel has a duty to be aware of all cases in point decided within the judicial hierarchy of British Columbia which consists of the Supreme Court of Canada, this Court and the Supreme Court of British Columbia, and where applicable, one of its predecessor courts, the County Court, and to refer the court to any on which the case might turn.

It is not necessary in these reasons to go into the exceptions to this duty. It is not the same as the duty to one's client to be persuasive which often requires counsel to produce authorities outside the hierarchy of British Columbia.

¹ The bench was comprised of Southin, Goldie and Taylor JJ.A., with reasons given by the court.

But these points must be made:

1. We do not expect counsel to search out unreported cases, although if counsel knows of an unreported case² in point, he must bring it to the court's attention.
2. "On point" does not mean cases whose resemblance to the case at bar is in the facts. It means cases which decide a point of law.
3. Counsel cannot discharge his duty by not bothering to determine whether there is a relevant authority. In this context, ignorance is no excuse.

The court referred to *Glebe Sugar Refining Co. v. Greenock Harbour Trustees*, [1921] 2 A.C. 66 (H.L. Sc.), where Lord Chancellor Birkenhead stressed the importance of bringing the authorities which bear one way or another upon the matters under debate to the attention of the court. In that case, neither party had referred the court to a statutory provision that governed the point in issue.

The central point in both *Glebe Sugar* and *Lougheed v. Armbruster* is that counsel owes a duty to the court to make it aware of relevant adverse authority, even though this duty may conflict with counsel's duty to the client. However, the statement of the court in *Lougheed v. Armbruster* goes further. Clearly the court does not want to be referred to every case from this jurisdiction that decided the point of law, although it expects counsel to have reviewed all of those cases. However, the court wants to be referred to any case on the legal point from within the British Columbia hierarchy that could influence the court's decision, whether or not the authority is binding on the court.

Given these expectations, the concern expressed by practitioners regarding the difficulty and expense of meeting their duty to the court and their clients in the current legal information explosion is understandable. The proliferation of reported cases, and the loss of any real distinction between reported and unreported cases, makes this obligation difficult if not impossible to meet.

England: a restrictive approach to the growth and citation of case law

Creation of the Law Reports

The rationale and discussions leading up to the creation of the Law Reports are set out by W.T.S. Daniel, in *The History and Origin of the Law Reports*.³ Daniel was one of the prime movers behind this endeavour, through the Special Committee on Law Reporting formed in 1849 by the Society for Promoting the Amendment of the Law. At that time, English cases were reported by numerous private

² An unreported case has traditionally been viewed as a case that is not selected for publication because it does not meet certain editorial standards. However, it can also refer to cases not readily available because they were not published. *Lougheed v. Armbruster* was decided before the B.C. Superior Courts started to publish their decisions on the Internet in July 1996, and before their accessibility through CanLII commencing in 2001. A 2002 Practice Direction from Chief Justice Brenner indicates that the definition of an unreported case is shifting. The Practice Direction deals with the obligation to provide a copy of unreported reasons for judgment to the opposing party, and states that "Reasons for Judgment published on the British Columbia Superior Court's website, other court websites or other widely available electronic databases such as Quicklaw and eCarswell are considered to be reported decisions for the purposes of this directive." Query whether the reference to unreported cases in *Lougheed v. Armbruster* should now be read to mean this narrower group of decisions that are not widely available. The only reference to a distinction between reported and unreported cases in the Court of Appeal's current *Practice Directive on Citation of Authorities* is the requirement that "Where a decision is reported, the law report reference shall be given. Any other reference to the decision in electronic form may also be given." This usage is more consistent with the traditional distinction between reported and unreported decisions.

³ W.T.S. Daniel, in *The History and Origin of the Law Reports* (London: Wildy & Sons Ltd., 1884).

reporters, often resulting in different versions of the same case and significant delays in publication of cases.

After an abortive attempt by the Committee in 1853 to convince the government that it should be publishing case law,⁴ using the rationale that the common law governs the people just as the statutes do,⁵ a new approach was proposed. The Committee recommended that the legal profession would fund and oversee publication of case law, with the cost to be recovered from subscriptions. Daniel set out his proposal to the Solicitor General in a letter dated September 12, 1863 on "The Present System of Law Reporting, Its Evils, and the Remedy":

The evils of the regular or authorized Reports, as they form part of the present system of Law Reporting, may be thus summed up:

1. Enormous expense.
2. Prolixity.
3. Delay and irregularity in publication.
4. Imperfection as a record, for want of continuity.

To these I will add, further, an evil not, like the others, inherent in the system, but occasioned by the nature of the competition to which the regular Reports are exposed,--which, however, has become a serious evil,--namely, that of reporting cases indiscriminately and without reference to their fitness or usefulness as precedents, merely because, having been reported by rivals, the omission of them might prejudice circulation, and consequently diminish profit.⁶

He proposed in his letter that the Bar undertake the preparation and publication of law reports; that arrangements be made for the proper appointment of reporters, to be approved by the judges; and that no reports but the Bar Reports should thenceforth be allowed to be cited as authority.⁷ The purpose was to replace commercial profit as the motive behind case publication with a purpose to serve the needs of the profession and the public.⁸

Although much of Daniel's original vision was embodied in the creation in 1865 of the Council of Law Reporting, his proposal that only the cases published in the Law Reports should be permitted to be cited as authority was not accepted. A majority of the Committee also decided that their report would not include a recommendation that cases reported in the Law Reports must be quoted from those reports. However, several of the Committee members viewed this as a very desirable restriction.⁹ It was the intention of many of those involved that the authenticity and quality of the Law Reports would eventually result in the discontinuance of all other report series.

Although the desire for exclusivity was not expressly addressed in the Committee's report, the possibility that the Law Reports would become a monopoly was a matter of great controversy, with some committee members voting against the adoption of the report on the basis of this issue.

⁴ *Ibid.* at 26.

⁵ *Ibid.* at 21.

⁶ *Ibid.* at 37.

⁷ *Ibid.* at 57.

⁸ Paul Magrath of the Incorporated Council of Law Reporting at <http://www.lawreports.co.uk/Publications/siforward.htm>.

⁹ Daniel, *supra* note 3 at 151.

George Denman,¹⁰ a member of the Committee, spoke against any move to exclusivity in a general meeting of the Bar held on December 2, 1863 which ultimately adopted the report of the Committee:

It has been assumed that it would be of great advantage to have this selection of cases. I do not agree to that. I think that one of the advantages of free trade is that we should have every case on what can be called "a point of law", reported, and that the Judges should not exercise too much discretion as to what will ultimately be the value of one case or another. [*Hear! hear!*] Some of the most valuable cases are cases that, at the time, could not have appeared to be of any importance to anybody but the parties, and those cases are now the very cases which are appealed to as enunciating great principles which are acted upon by Judges afterwards and become the foundation of solid and good Law. I believe, if Reporters and Editors were to have too much discretion in selecting cases, the public would not have half that knowledge they have at present under the Free Trade system, by which each Reporter keeps the other in check and so gets each case reported.¹¹

The Committee recommended that:

The Reports shall be prepared by Reporters under the supervision of Editors, and the cases to be reported shall be carefully selected upon the principle of rejecting all cases useless as precedents, and the copyright shall be vested in the Council, or in trustees to be named by them.

The reporters and editors were to be chosen by the Council of Law Reporting and approved by the judiciary.

A *Paper on Legal Reports* by Nathaniel Lindley¹² set out guidelines accepted at that time regarding selection of cases to be reported:

With respect to subjects reported, care should be taken to exclude—

1. Those cases which pass without discussion or consideration, and which are valueless as precedents.
2. Those cases which are substantially repetitions of what is reported already.

On the other hand, care should be taken to include—

1. All cases which introduce, or appear to introduce, a new principle or a new rule.
2. All cases which materially modify an existing principle or rule.
3. All cases which settle, or materially tend to settle, a question upon which the law is doubtful.
4. All cases which for any reason are peculiarly instructive.¹³

¹⁰ Denman was appointed to the Queen's Bench in 1872, serving until his death in 1896. He was the son of Baron Denman, who served as Lord Chief Justice of the King's (and later the Queen's) Bench from 1832 until 1850.

¹¹ Daniel, *supra* note 3 at 211.

¹² Later to become Lord Lindley, Master of the Rolls.

¹³ Daniel, *supra* note 3 at 64, citing from *A Paper on Legal Reports* by Nathaniel Lindley.

These guidelines have continued as the basis for selection of cases to be reported in the Law Reports.¹⁴ Out of a potential pool of approximately 5,000 decisions each year, the Law Reports publish only 150 cases.¹⁵ The Council also publishes 350 cases per year in the Weekly Law Reports, which includes the 150 eventually published in the Law Reports.

English practitioners now have access to the full range of English case law through various commercial reports and electronic research databases. However, the status of the Law Reports as authorized reports, and this long-standing desire for rigorous control over the volume and quality of published case law, has influenced case reporting in England and the attitude of the judiciary towards citation of case law in the courts.

The Judiciary and Practice Directions

In recent years, the judiciary has played an active role in controlling the citation of case law before the English courts. In 1983, three years after Lexis started to electronically publish transcripts of unreported decisions of the Court of Appeal, the House of Lords expressed its view that if a civil judgment of the Court of Appeal had not found its way into the generalised series of law reports or one of the specialised series, it was most unlikely to be of any assistance to the House of Lords. Their Lordships adopted the following rule:

My Lords, in my opinion, the time has come when your Lordships should adopt the practice of declining to allow transcripts of unreported judgments of the civil division of the Court of Appeal to be cited upon the hearing of appeals to this House unless leave is given to do so; and that such leave should only be granted upon counsel giving an assurance that the transcript contains a statement of some principle of law, relevant to an issue in the appeal to this House, that is binding upon the Court of Appeal and of which the substance, as distinct from the mere choice of phraseology, is not to be found in any judgment of that court that has appeared in one of the generalised or specialised series of reports.¹⁶

This rule was strongly criticized by academics and the English bar.¹⁷ Regardless of that, it was formalised in a Practice Direction that applied to other levels of court as well, as set out in Appendix A. However, this did not solve the problem. Laddie J. in *Michaels v. Taylor Woodrow Developments Ltd.*, [2001] Ch. 493 (ChD) included a postscript to his judgment, in which he once again raised problems with citation of unreported judgments:

Now there is no preselection. Large numbers of decisions, good and bad, reserved and unreserved, can be accessed. Lawyers frequently feel that they have an obligation to search this material. Anything which supports their clients' case must be drawn to the attention of the court. A poor decision of, say, a court of first instance used to be buried silently by omission from the reports. Now it may be dug up and used to support a cause of action or defence which, without its encouragement, might have been allowed to die a quiet death. Thirdly, it is a common experience that the courts are presented with ever larger files of copied law reports, thereby extending the duration and cost of trials, to the disadvantage of the legal system as a whole. It seems to me that the common law system,

¹⁴ <http://www.lawreports.co.uk/Publications/siforward.htm>.

¹⁵ *Ibid.*

¹⁶ *Roberts Petroleum Ltd. v. Bernard Kenny Ltd.*, [1983] 2 A.C. 192 (H.L.) at 201-202 per Lord Diplock.

¹⁷ Michael Zander, *The Law-Making Process*, 6th ed. (Cambridge University Press, 2004) at 321-323.

which places such reliance on judicial authority, stands the risk of being swamped by a torrent of material, not just from this country but from other jurisdictions, particularly common law ones.

He noted that the restriction on citation of unreported judgments had not solved the problem for several reasons:

- It would not exclude from consideration a decision which is clearly wrong but which, as a result, is the only one to support an untenable proposition.
- Given the proliferation of law reports and the large increase in reported decisions, a rule dealing only with unreported cases may be insufficient to limit the flood of case law.
- The requirement to seek leave is cumbersome and may consume more time than permitting the case to be cited.
- It is problematic for a lower court to refuse to allow citation of an unreported decision of a higher court, since *stare decisis* makes the decision binding on the lower court.
- Counsel must still search through this body of law to see if there is something which helps their clients.

Later in 2001, a new Practice Direction was introduced on the citation of authorities, attached as Appendix B. This Practice Direction applies to all courts apart from criminal courts, and includes the following restrictions and requirements:

- Counsel may not cite before any court judgments where only one party attended the application, the application was for permission to appeal, or the application only decided that the matter was arguable. An exception is where the judgment clearly indicates that it purports to establish a new principle or extend the present law. For judgments decided after the Practice Direction came into effect, the court must expressly state in its reasons that the judgment falls within this exception and may be cited in future cases.
- Courts will pay particular attention to any indication by the court in a judgment that it was seen by that court as only applying decided law to the facts of the particular case, or otherwise as not extending or adding to the existing law. Counsel who seek to cite one of these judgments must justify their decision.
- If it is sought to cite more than one authority in support of a given proposition, counsel must give written reasons why.
- Citation of law from other jurisdictions is restricted. Before it can be cited, counsel must state in writing what that authority adds that is not found in English authority, or the justification for adding to English authority.
- Any list of authorities must be certified by counsel to be in compliance with these requirements.

Despite these restrictions, counsel are still obligated to draw to the attention of the court adverse authority not cited by opposing counsel.

Practice Direction 52, supplemental to Part 52 of the *Civil Procedure Rules*, includes at para. 5.10 the requirement that written explanation must be given for citing more than one authority in the skeleton

argument in support of a given proposition, and that compliance must be certified by counsel. If the skeleton argument does not comply with the requirements of para. 5.10, the cost of preparing the argument will not be allowed on assessment except as otherwise directed by the court.¹⁸ Para. 15.11 of Practice Direction 52 provides that the bundle of authorities prepared by counsel should not include authorities for propositions not in dispute, and should not contain more than 10 authorities unless the scale of the appeal warrants more extensive citation.

In a series of three articles published after introduction of the 2001 Practice Direction,¹⁹ Dr. Roderick Munday of the University of Cambridge described the Practice Direction and the comments of Laddie J. as betraying "a professional unease at the bulk of materials now available for citation" and revealing "the law's comparative helplessness in the face of what appears to be an impending crisis, in the main provoked by the advent of the information technology age."²⁰ Dr. Munday sets out the following criticisms of the Practice Directions:

- The requirement that counsel state the proposition of law underlying each case cited, and explain why more than one case needs to be cited in support of the proposition, paints an unsophisticated picture of legal argument. Often it is a cluster of cases rather than isolated authorities that enable jurists to define and apply the rules.²¹
- The power of the court to expressly declare which of its decisions are to be treated as precedents extends the lawmaking role of the courts, and makes inroads into counsel's duty (and right) to bring before the court all relevant cases. Similar concerns arise regarding restrictions on citation of unreported cases. However, that is even more troublesome because in effect the editors of the law reports are given a form of lawmaking authority.²²
- The requirement to seek leave before citing unreported cases is impractical and consumes more judicial time than simply allowing the unreported case to be cited. Furthermore, how can this function effectively where the unreported case is a decision of an appellate court? Are the lower courts to take no notice of it?²³

Implementation of the 2001 Practice Direction has not been free from difficulty. The Court of Appeal has periodically brought it to the attention of counsel, stating that counsel appeared to be unfamiliar with its requirements and that ignorance or deliberate disobedience were making things unnecessarily burdensome for the court.²⁴ Counsel have also begun to use the restrictions as a tool in argument, challenging authority cited by opposing counsel on the basis that it is not permitted to be cited under the Practice Direction.

In one case, counsel cited a passage from a leading text that relied on an *ex parte* decision to support the proposition cited. The court allowed an exception to be made, permitting citation from "an eminent textbook upon the subject" even though it relied on an *ex parte* decision for the principle stated.²⁵ It is ironic that the passage from the text could be cited, whereas the decision of the court could not be cited. In another case, a leave to appeal decision by the Court of Appeal was permitted to be cited in a proceeding before the Queen's Bench despite the Practice Direction. However, the Queen's Bench treated the decision as persuasive rather than as binding authority.²⁶ In a third case, the Chancery Division

¹⁸ This is intended to underscore the need to take the requirements of the Practice Direction very seriously, as stated in *Scribes West Ltd. v. Anstalt*, [2004] EWCA Civ 835 at paras. 21-22 per Brooke L.J.

¹⁹ R. Munday, "Over-Citation: Stemming the Tide" (2002) 166 *Justice of the Peace* 6-9 (Part 1), 29-32 (Part 2), 83-87 (Part 3).

²⁰ *Ibid.*, at 6.

²¹ *Ibid.*, at 8.

²² *Ibid.* at 8-9.

²³ *Ibid.* at 32.

²⁴ *Harvey Shopfitters Limited v. ADI Limited*, [2003] EWCA Civ 1757 at paras. 11-13 per Brooke L.J.

²⁵ *Eliades v. Lewis*, [2005] EWHC 2966 (QB).

²⁶ *Mohammed v. Secretary of State for the Home Department*, [2002] EWHC 57 (Admin). This is consistent with the previous practice of the court as set out in *Clark v. University of Lincolnshire and Humberside*, [2000] EWCA Civ 129, where counsel

declined to permit citation of a decision of the Court of Appeal on leave to appeal, even though it had been reported, on the basis of the 2001 Practice Direction.²⁷ Some of these difficulties are less likely to arise for cases decided after adoption of the Practice Direction, as the Practice Direction requires the court to state expressly in its reasons whether the decision can be cited.²⁸

The adoption of a no-citation rule in England for some categories of cases can be contrasted with current developments in the United States.²⁹

United States: the rise and fall of the no-citation rule

The move to unpublished opinions, summary dispositions and no-citation rules

Case law publishing in the United States has been based on comprehensive coverage of appellate level decisions, though the West series of reporters. Sophisticated tools were developed to deal with this massive body of jurisprudence, such as the *Decennial Digest* with its key number system, the *Corpus Juris* and *AmJur* legal encyclopaedias, the *Restatements of the Law*, and the *American Law Reports* with their extensive annotations of leading cases.

The growing volume of case law during the 20th century resulted in a 1964 recommendation by the Judicial Conference³⁰ that “the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct.”³¹

This recommendation was not immediately adopted, but a 1973 report entitled *Standards for Publication* commissioned by the Federal Judicial Center expressed concern about the time required to write judgments, concluding that if a determination could be made at an early stage of deciding a case that it did not warrant a published opinion, then this would greatly reduce the time required to write the judgment.³² It proposed that all circuits adopt plans to limit the number of judgments prepared for publication. In order to level the playing field between those litigants with access to the unpublished decisions and other litigants without access, the report recommended that citation of unpublished opinions be prohibited.³³ In response to these recommendations, the circuit courts each adopted no-publication and no-citation rules but they varied from one circuit to another. Over time, most of the state courts adopted similar rules. As of 2001, 38 of the states restricted citation to unpublished opinions to some degree, and 35 of those had a mandatory prohibition.³⁴

argued that a decision of the Court of Appeal regarding permission to appeal should have binding effect. The court rejected this argument at paras. 40-43, stating reasons why these decisions should be given little weight, and ruling that they are at best only of persuasive weight.

²⁷ *Mandrake Holdings Limited v. Countrywide Assured Group Plc*, [2005] EWHC 311 (Ch) at paras. 12-13 per Lightman J.

²⁸ For example, see *Irving v. Penguin Books Ltd.*, [2001] EWCA Civ 1197 where the court stated in its reasons that “Pursuant to paragraph 6.1 of *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001, we indicate that the judgment may be cited on the question of the approach of the Courts to expert evidence.”

²⁹ See the detailed comparison by Lee F. Peoples, “Controlling the common law: a comparative analysis of no-citation rules and publication practices in England and the United States” (2007) 17 *Indiana International & Comparative Law Review* ____.

³⁰ The Judicial Conference of the United States is the principal policy-making body for the federal court system. The Chief Justice serves as the presiding officer of the Conference, which is comprised of the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade.

³¹ *Judicial Conference of the United States Report 11* (1964).

³² *Limiting publication of judicial opinions*. United States. Commission on Revision of the Federal Court Appellate System. Committee on Use of Appellate Court Energies. (1973) at 5.

³³ J. Lyn Entrikin Goering, “Legal fiction of the ‘unpublished’ kind: the surreal paradox of no-citation rules and the ethical duty of candor” (2005) 1 *Seton Hall Circuit Review* 27, 38.

³⁴ Stephen R. Barnett, “No-citation rules under siege: a battlefield report and analysis” (2003) 5 *The Journal of Appellate Practice and Process* 473, 478.

Under these rules, the judge assigned to write the decision (or in some jurisdictions the whole panel) would determine at an early stage of the decision-making whether the opinion would be published. If not, it was designated unpublished and could be cited only in very limited circumstances. In the most restrictive jurisdictions, an unpublished opinion could be cited only in *res judicata* and collateral estoppel arguments. In more permissive jurisdictions an unpublished opinion could be cited as persuasive authority if there was no published decision on point. It was considered an ethical breach for a lawyer to cite an unpublished opinion in circumstances not permitted by the court's rules.³⁵

These citation restrictions on unpublished appellate opinions pose particular problems for trial courts, who may wish to consider unpublished appellate rulings on the issue before them.³⁶

Some jurisdictions set out the circumstances in which an appellate opinion will be designated as unpublished. As an example, the Rules of the Kansas Supreme Court provide that opinions shall be published in the official reports only when they satisfy the standards set out in Rule 7.04. Disposition by memorandum, without a formal published opinion, is the required form of disposition unless a majority of the justices participating in the decision find that the opinion satisfies one of these standards:

- (1) Establishes a new rule of law or alters or modifies an existing rule;
- (2) Involves a legal issue of continuing public interest;
- (3) Criticizes or explains existing law;
- (4) Applies an established rule of law to a factual situation significantly different from that in published opinions of the courts of this state;
- (5) Resolves an apparent conflict of authority; or
- (6) Constitutes a significant and non-duplicative contribution to legal literature (i) by a historical review of law; or (ii) by describing legislative history.

Rule 7.04 goes on to provide that unpublished memorandum opinions are not binding precedents and are not favoured for citation. However, they can be cited if they have persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court and they would assist the court in its disposition. This is only one example of the wide range of rules adopted by American courts regarding unpublished opinions. In many state jurisdictions, the rules of court prohibit citation of unpublished opinions altogether except in *res judicata* and collateral estoppel arguments.

In addition to written unpublished opinions, there is also a category of decision commonly referred to as summary disposition. This is typified by an oral ruling or a very short written statement, such as "affirmed". The precedential value of this type of ruling has been controversial given the lack of reasons for the court's decision.³⁷ In most jurisdictions the rules of the court specifically state either that this type of ruling is unpublished and cannot be cited, or that it has only persuasive value.

³⁵ A formal ethics advisory opinion issued by the American Bar Association held that it was ethically improper for a lawyer to cite to a court an unpublished opinion where the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked "not for publication" by the issuing court. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995).

³⁶ J. Thomas Sullivan, "Unpublished opinions and no citation rules in the trial courts" (2005) 47 Ariz. L. Rev. 419.

³⁷ *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913 (1976) per Brennan J. dissenting. See also Martha Dragich, "Will the federal courts of appeals perish if they publish? Or does the declining use of opinions to explain and justify judicial decisions pose a greater threat?" (1995) 44 *Am U.L. Rev.* 757, at 763, 792-793.

Some jurisdictions set out the circumstances in which a summary disposition can be made. For example, Rule 47.6 of the 5th Circuit of the United States Court of Appeals provides as follows:

Affirmance Without Opinion. The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. See 5th Cir. R. 47.6." or "ENFORCED. See 5th Cir. R. 47.6."

Statistical studies indicate that by 2000, the rules regarding summary dispositions and unpublished opinions had resulted in 80% of Federal Court of Appeal decisions being unpublished and therefore subject to no-citation rules.³⁸ In California in 2003, 93% of the California Court of Appeals decisions were designated by the judges as unpublished and therefore not permitted to be cited.³⁹

Despite these decisions being designated as unpublished, many of them have been obtained and published electronically by Lexis and Westlaw, with a notice that they were unpublished decisions and not to be cited. In 2001, West started publication of a new print series called the *Federal Appendix*, which contained unpublished federal decisions. In December 2004, the *E-Government Act of 2002*⁴⁰ came into effect. It requires all federal circuits to establish a website which publishes or links to all written opinions issued by the court, regardless of whether the opinions are to be published in the official court reporter.

As a result of these initiatives, there are no longer barriers to obtaining access to these unpublished decisions and the original justification for the no-citation rule has vanished. However, the rule continues to be justified in many jurisdictions on the basis of judicial economy and also to keep the law from becoming "cluttered" by routine cases that add little to the development of precedent. One commentator states that the presence of unpublished dispositions mixed in with published ones in the online services "undermines the cleanliness of the case law", arguing that:

The decision to dispose of a case as an unpublished disposition may at first appear to be merely an issue of efficiency – a judge who wishes to avoid the difficult task of justifying a result in a detailed, published account. Judges with whom I spoke, however, had a different and more subtle view of the process. Unpublished dispositions serve to avoid cluttering the case law with numerous ordinary cases that merely repeat the rule and that may run the risk of confusing the rule with seemingly contrary statements that an attorney might mistake for a revocation of precedent. By limiting publication to instances where the published opinion adds some significant aspect to the case law, the rules also limit

³⁸ Administrative Office of the United States Courts, Judicial Business of the United States Courts 44 tbl. S-3 (2000), quoted in *Hart v. Massanari*, 266 F. 3d 1155, 1177 (9th Cir. 2001).

³⁹ Cal. Judicial Council, *2003 Court Statistics Report* 31, tbl. 9 (Admin. Off. of Cts. 2003) at <http://www.courtinfo.ca.gov/reference/documents/csr2003.pdf>.

⁴⁰ Pub. L. No. 107-347, § 205(f), 116 Stat. 2899, 2915 (2002).

maverick judges' and lawyers' ability to create exceptions to a doctrinal rule that the panel had no intention of suggesting or allowing.⁴¹

Federal abolition of no-citation rules

In 1998, the Advisory Committee of the Judicial Conference of the United States voted unanimously to remove abolition of the no-citation rule from its agenda, in light of the strong opposition of the chief judges. It was considered a dead issue.⁴²

The tide started to turn in 2001, following the decision of Circuit Judge Richard S. Arnold for a unanimous three judge panel of the United States Court of Appeal, 8th Circuit, in *Anastasoff v. United States*.⁴³ That circuit permitted unpublished decisions to be cited if there was no published decision on point, but its rules provided that the decision was persuasive only and not binding on the court. An unpublished decision directly on point had been decided earlier by the 8th Circuit, but was not binding on the court under its rules because it was unpublished. Judge Arnold held that the court was bound by the earlier decision, and declared at 900 that the no publication rule was unconstitutional "insofar as it would allow us to avoid the precedential effect of our prior decisions".⁴⁴ He based his reasoning on the importance of the binding force of precedent as a limit on judicial discretion.⁴⁵

Then came a decision from Judge Kozinski of the 9th Circuit, firmly in favour of the no publication rules, and critical of the constitutional ruling in *Anastasoff*.⁴⁶ He took the position that judges themselves give decisions precedential value through the crafting of their opinions, and that one important aspect of the judicial function is separating the cases that should be precedent from those that should not.

Although concerns had been raised about the no-citation rules for decades, the debate gained a new intensity. The American Bar Association House of Delegates declared in 2001 that no-citation rules are "contrary to the best interests of the public and the legal profession" and called on the federal appellate courts to permit citation to relevant unpublished opinions.⁴⁷

In 2003, the matter was again put on the agenda of the U.S. Judicial Conference's Advisory Committee on Appellate Rules. After considering and debating this issue, the Advisory Committee proposed adoption of a rule that would abolish the no-citation rule and published a proposed rule for comments.⁴⁸ The proposal attracted a record number of comments. Over 500 public submissions were received. The best summary of the issues raised in the debate is an article by Patrick J. Schiltz, who served as Reporter to the Advisory Committee.⁴⁹

Judges opposing the new rule argued that they would be overwhelmed if all of their judgments were available for publication and citation. They submitted that unpublished opinions generally take very little time to prepare:

⁴¹ J.M. Cohen, *Inside Appellate Courts: The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals* (Ann Arbor: University of Michigan Press, 2002) at 75, 81.

⁴² Patrick J. Schiltz, "Response: The Citation of Unpublished Opinions in the Federal Courts of Appeals" (2005) 74 *Fordham Law Review* 23 at 65.

⁴³ 223 F.3d 898 (8th Cir. 2000), vacated as moot en banc, No. 99-3917, 2000 WL 183092 (8th Cir. Dec. 18, 2000).

⁴⁴ The underlying dispute between the parties in that case was settled pending further appeal, with the result that the Court of Appeal ruling was vacated.

⁴⁵ See Bradley S. Shannon, "May Stare Decisis Be Abrogated by Rule?" (2006) 67 *Ohio State Law Journal* 645 for consideration of whether *stare decisis* can be abrogated by the courts themselves through their rule-making power.

⁴⁶ *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001).

⁴⁷ Am. Bar Ass'n, Sections of Litig., Criminal Justice, Tort and Ins. Practice, and Senior Lawyers Div., Report to the House of Delegates (2001) (Resolution No. 01A115).

⁴⁸ Memorandum from Judge Samuel A. Alito, Jr., Chair of Advisory Comm. on App. Rules, to Judge Anthony J. Scirica, Chair of Standing Comm. on Rules of Prac. & Proc., *Report of Advisory Committee on Appellate Rules* 27-36 (May 22, 2003).

⁴⁹ Schiltz, *supra* note 42.

They are written quickly by court staff or law clerks, and judges give them only cursory attention – precisely because judges know that the opinions need to function only as explanations to those involved in the cases and will not be cited to future panels or to lower courts within the circuit.⁵⁰

They argued that if the proposed rule were adopted, judges would have less time available to devote to published decisions and parties would have to wait even longer to get reasons for judgment. Those opposing the rule change also argued that lawyers support no-citation rules because otherwise the body of case law to be researched would be vastly increased and the cost of litigation would increase.⁵¹

The strongest opposition to the new rule came from the 9th Circuit. The no-citation rule originated in California, and the judges from that state strongly favoured its retention based on judicial economy.

Those in favour of the new rule argued that the no-citation rules were profoundly antithetical to American values and First Amendment rights, and prevented lawyers from being free to make the best arguments available.⁵² The no-citation rules failed to recognize that lawyers and judges regularly read and relied on unpublished decisions and even cited them, despite the prohibition. The proponents noted that it is difficult for a court to predict when a case is being decided whether it will have precedential value, arguing that it is better to let the “market” determine the value of judicial opinions. Problematic instances were mentioned, such as when the 4th Circuit declared an act of Congress unconstitutional in an unpublished opinion, and when twenty inconsistent unpublished opinions were rendered by the 9th Circuit on the same unresolved and difficult question of law before a citable decision settled the issue.⁵³ The proponents argued that no-citation rules lead to inefficiencies, arbitrariness and injustice and militate against the notion that like cases should be decided in a like manner. They undermine judicial accountability and confidence in the judicial system. They create the appearance – if not the reality – of two classes of justice.⁵⁴

The members of the Advisory Committee were persuaded by the comments of those in favour of the proposed rule, but the Standing Committee referred it back for further study in June 2004. The Standing Committee wanted empirical evidence that the abolition of the no-citation rule would not wreak havoc on the judicial system, as was argued by many opponents of the rule change. Judges and attorneys were surveyed regarding the likely impact of the proposed change.⁵⁵ The survey results taken as a whole did not support the main contentions of opponents to the rule change, and to some extent actually refuted those contentions. A study was also conducted in those circuits that had liberalized or abolished their no-citation rule to ascertain the impact on case disposition times and on the number of cases decided by summary disposition. The study found “little or no evidence that the adoption of a permissive citation policy impacts the median disposition time in either direction”, and “little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions”.⁵⁶

Based on the results of these studies, the rule change was approved⁵⁷ in the following form, to come into force as Fed. R. App. P. 32.1 on January 1, 2007:

⁵⁰ *Ibid.* at 35.

⁵¹ *Ibid.* at 37-39.

⁵² *Ibid.* at 43, 50-51.

⁵³ *Ibid.* at 44-46.

⁵⁴ *Ibid.* at 48-49.

⁵⁵ Robert Timothy Reagan, *Citing Unpublished Opinions in Federal Appeals*. Federal Judicial Center (2005). Available online at [http://www.fjc.gov/public/pdf.nsf/lookup/citatio3.pdf/\\$file/citatio3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/citatio3.pdf/$file/citatio3.pdf).

⁵⁶ Schiltz, *supra* note 42 at 64.

⁵⁷ The Advisory Committee approved the rule change after considering the study results and sent it on to the Standing Committee. The Standing Committee approved it unanimously. In September 2005 the Judicial Conference of the United States approved Rule 32.1, after amending the rule so that it would apply only to unpublished opinions issued after the rule’s effective date. The rule change was approved by the U.S. Supreme Court in April 2006.

Citation Permitted. A court may not prohibit or restrict the citation of federal opinions, orders, judgments, or other written dispositions that have been:

- (i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and
- (ii) issued on or after January 1, 2007.⁵⁸

The note accompanying the rule emphasizes that the rule has a limited effect. It does not forbid courts from issuing unpublished opinions, and says nothing about what effect a court must give to unpublished opinions. For example, are they binding or merely persuasive? The note states that under the new rule, a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may the court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

A review of the rule changes introduced by the various federal circuits to comply with abolition of the no-citation rule discloses that many of these jurisdictions now provide that unpublished opinions and orders are not binding precedent, but will be treated as having only persuasive value. Other jurisdictions simply reproduce the new Fed. R. App. P. 32.1 and do not address the issue of precedential value.

State courts are not affected by this rule change, which applies only to US Federal Courts. However, the tide is also turning in the state courts, with many jurisdictions abolishing their no-citation rule or making it more permissive.⁵⁹

Australia and New Zealand: a variety of approaches

There is a range of approaches taken to this issue in the Australian courts. Most of the federal and state courts have not taken any particular measures to restrict citation of judgments or taken other measures to deal with the proliferation of case law. However, some courts have been more active in this respect.

Categorisation of judgments

The Australian Institute of Judicial Administration, an association affiliated with the University of Melbourne that conducts courses for the judiciary and research into aspects of judicial administration, published the *Guide to Uniform Production of Judgments* in 1992. A second edition was published in 1999⁶⁰ following consultation with judiciary and court staff. Both reports were written by Mr. Justice Olsson of the Supreme Court of South Australia.

The 2nd edition suggested a possible scheme for categorisation of judgments as follows:

Category A: Those of significance and/or recurrent interest by virtue of their discussion/application of legal principle.

Category B: Those which are more routine in nature because they are either essentially decisions on discrete fact situations or are fairly routine examples of the application of well known and understood principles. Such judgments would not normally warrant reporting or uploading into a national database.

⁵⁸ Cited as Fed. R. App. P. 32.1.

⁵⁹ Stephen R. Barnett, “No-Citation Rules Under Siege: A Battlefield Report and Analysis” (2003) 5 *The Journal of Appellate Practice and Process* 473. See also the November 2006 Report and Recommendations of the California Supreme Court Advisory Committee on Rules of Publication of Court of Appeal Opinions at <www.courtinfo.ca.gov/courts/supreme/comm/#opin>.

⁶⁰ <aija.org.au/online/judguide.htm>

Category C: Those which contain data indicating current levels of assessment of damages either generally or in discrete classes of cases. It is to be expected that these will give rise to catchwords containing ALMD like summaries⁶¹ which would be uploaded but later would periodically be purged from a national database as no longer current.

This proposal was discussed at a symposium of the Australian Law Librarians Group held in 2000, in a session entitled "Access to case law in a healthy common law system".⁶² It was suggested that a fourth category be added for sentencing decisions, and that Category A be refined to apply criteria closer to those used by law reporting bodies in the selection of reported cases. It was also recommended that the categorisation assigned be published with the judgment. It was hoped that the following benefits would accrue:

Preservation of this information will assist researchers to quickly distinguish between cases with precedent value and those that do not. Researchers can then decide how to efficiently apply their research time. It will promote consistency in use of reported decisions and provide maximum benefits from the reporting process.

In July 2001 the Supreme Court of Western Australia adopted the practice of judgment categorisation for all judgments of the court, in Practice Direction No. 1 of 2001. It required that the court's judgments include a Category field which would be assigned one of four categories. The fourth category was for sentencing decisions and the other three were based on the categories recommended in the *Guide to Uniform Production of Judgments*. A copy of the Practice Direction is attached as Appendix C. There is no indication in the Practice Direction that decisions have any different precedential value based on the category assigned.

The *Proposed XML Schema Definition of Supreme Court Judgments*, Ver. 2.0 (August 2, 2006),⁶³ prepared by the Supreme Court of Western Australia in partnership with the Department of the Attorney General, Government of Western Australia, describes the function of the Category field at 3.17:

Judgment categorisation was suggested to be introduced to allay concerns as regards the overuse of the large number of unreported judgments, which are electronically available. Anecdotal evidence had suggested that practitioners frequently conducted electronic searches of large volumes of unreported material in order to ensure that all recent, and potentially useful, statements or applications of relevant law have been located and examined. The process of searching through unnecessary material adds significantly to the cost of litigation.

The document set out the categories adopted by the Supreme Court of Western Australia, and acknowledged that each court will decide whether they use judgment categorisation and will define their own categories. This latter comment is inconsistent with the original intention of the *Guide to Uniform Production of Judgments*, to promote uniformity regarding the publication of judgments.

So far as I am aware, a similar scheme to categorise judgments is not employed by the courts in other Australian states, nor by the federal courts in Australia.

⁶¹ The Australian Legal Monthly Digest provides a monthly summary of recent cases.

⁶² <www.elkera.com/cms/fileadmin/user_upload/Presentations/Access_to_case_law_2000.pdf>

⁶³ <www.justicexml.justice.wa.gov.au/documents/Judgments_Version2.pdf>

Short form of reasons for judgment

In 1995, the Full Court of the Supreme Court of Western Australia adopted a practice regarding the issuing of a short form of reasons for judgment. The Full Court may give this form of judgment in cases where:

- (a) The judgment or order of the court or tribunal below is upheld;
- (b) The judgment or order of the court or tribunal below is based on findings of fact which are not erroneous;
- (c) There is no error of law on the part of the court or tribunal below;
- (d) Public interest does not require full reasons;
- (e) The judgment of the Full Court is unanimous.⁶⁴

This is similar to the practice of rendering decisions by summary disposition used in American jurisdictions. Unlike the American approach, there is nothing in the Practice Note to indicate that this type of decision has a lesser precedential status.

Restrictions on citation

In Practice Note No. 4 of 1986, the Supreme Court of Victoria imposed restrictions on citation of unreported cases very similar to those adopted in England. It provided that unreported judgments could not be cited unless leave was first obtained, and that an application for leave would ordinarily only be entertained if counsel gave an assurance that the unreported judgment contained some statement of principle relevant to an issue in the matter before the court that was either binding on the court or entitled to special consideration and of which the substance, as opposed to the mere choice of phraseology, was not to be found in any reported judgment.

The 1986 Practice Note was revoked in Practice Note No. 1 of 2006. The new Practice Note simply states that reported judgments should be cited wherever possible, and requires counsel to bring an unreported decision to the attention of opposing counsel and the court prior to the proceeding.

The Supreme Court of Western Australia, in Practice Direction No. 5 of 1997, requires that unreported decisions should not be cited if there is a more recent reported authority.

A restriction on citation of unreported judgments continues to apply to the Family Court of Australia, in No. 7 of 2004 – Appeals – Family Law Rules 2004. This rule provides that unreported judgments may be cited in the Full Court only with permission. Permission will be given only if the court is satisfied that the unreported judgment contains a relevant statement of principle not available in any reported decision which is binding on the court or of persuasive authority.

Lists of authorities

The Australian courts generally require counsel to separate out their authorities into two groups. In several jurisdictions, the first group is to include only those authorities from which counsel expects to read during argument.⁶⁵ Authorities relied on but from which counsel do not expect to read are put into the second group. A variation on this is that only leading authorities are to be included in the first group,

⁶⁴ Notice to Practitioners: Short Form of Reasons for Judgment, dated October 13, 1995.

⁶⁵ Supreme Court of Australian Capital Territory, Supreme Court of Queensland, Supreme Court of South Australia, Supreme Court of Western Australia, Federal Court of Australia, Supreme Court of Tasmania.

not cases in which they have been followed or applied at first instance.⁶⁶ In some jurisdictions, only the authorities in the first group are copied for the hearing.⁶⁷ There is also a practice in some jurisdictions that the court provides the judges with copies of the most important authorities – as designated by counsel – and the cost of reproducing the other authorities falls on the party.⁶⁸

The New Zealand Supreme Court Rules 2004 and the Court of Appeal (Civil) Rules 2005 provide that the bundle of authorities filed should consist only of the authorities that the party considers essential to its case.

These measures reveal attempts to restrict the amount of case law put before the courts.

Canada: the journey from edited report series to comprehensive coverage, with no limits on citation

Law reports and the law societies

In several jurisdictions, the law society was the body that initially funded and promoted publication of cases.⁶⁹ As a result, the law societies played a large role in selecting cases for publication and in this way controlled to some extent which cases would be available for citation to the courts. Commercial publishers entered the field early on, and also played a role in determining which cases would be published and therefore available for research and citation.

Quebec jurisprudence and SOQUIJ

The Quebec bar embarked on an organized plan to publish case law in 1892, through *Les rapports judiciaires officiels de Québec*, with the goal of avoiding duplication of cases and eliminating other reports. These goals were not entirely met, as commercial publishers re-entered the field in 1895. However, the Quebec bar continued financing this publication and its successor R.J.Q. through member levies for the next eighty years, with minimal government support.⁷⁰

Financial problems surfaced in the 1960's, with the Quebec bar finding that it was unable to competently carry out this task because of the proliferation of legislation and case law. There were numerous complaints in the early 1970's about the limited publication of Quebec case law through the Barreau, including that it took too long to publish the cases, the selection process was inadequate, too few judgments were published, and there were insufficient finding tools to access the decisions.⁷¹ The Barreau studied these problems, and recommended that significant changes be made to address them.⁷²

In 1974 an agreement was reached between the Quebec bar, the provincial Ministry of Justice and the Queen's Printer for publication of judicial decisions of Quebec courts and tribunals through an entity called SOQUIJ, to which the bar would contribute an annual lump sum payment.

⁶⁶ Supreme Court of the Northern Territory of Australia.

⁶⁷ High Court of Australia, Supreme Court of Queensland.

⁶⁸ Supreme Court of New South Wales (up to 5 authorities), Federation Court of Australia (up to 10 authorities).

⁶⁹ V. Denton, "Canadian law publishers: a look at the development of the legal publishing industry in Canada" in M. Foote, ed., *Law Reporting and Legal Publishing in Canada: A History*, (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 16 at 18.

⁷⁰ Tanguay and Boyer, "Annals of Quebec case law reporting" in M. Foote, ed., *Law Reporting and Legal Publishing in Canada: A History*, (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 92, at 96.

⁷¹ Léon Bédard, "Petite histoire de l'information juridique au Québec" (July 2006) *Le Journal Barreau du Québec* 9.

⁷² In addition to the creation of SOQUIJ, other projects started during the 1970's were DATUM (computer indexation of the previous 20 years of Quebec jurisprudence) and Jurisprudence Express (digests of current case law).

Legislation required that the court clerks send SOQUIJ a copy of every judicial decision delivered with reasons, and established selection criteria for publication in R.J.Q. which required that the decision contain one of the following: (1) a new point of law; (2) a new departure in case law; (3) unusual facts; (4) substantial documentary information; or (5) a discussion of a specific social problem.⁷³ Every June SOQUIJ would discard any decisions which were not selected for publication.

In 1998 a court challenge was mounted by a commercial publisher regarding the barriers to its ability to access and publish those cases not selected by SOQUIJ for publication. The publisher lost at trial, but on appeal⁷⁴ the court held that the barriers to obtaining the full body of case law had the effect of restricting access by the public to the primary material. The court held that:

In a state of law, where each individual is subject to and governed by statutes, regulations and, it must be admitted, precedent, it is essential that citizens be able to discuss and criticize these rules freely. Since the establishment of a true democracy requires that citizens be able to express their opinions and freely criticize the institutions governing them, and thereby participate in their evolution, it seems to us obvious that such discussion and criticism must also apply to the products of these institutions. In this case, this clearly refers to judicial decisions. [translation]⁷⁵

The court found that SOQUIJ had been established with a clear, legislative mandate to guarantee access to Quebec jurisprudence. It received all of the decisions and the government had delegated to it the role of distributing Quebec jurisprudence.

The court found that the access of the plaintiff publisher to the whole of Quebec jurisprudence was more theoretical than real, defeating the objective of establishing SOQUIJ. SOQUIJ published only about 20 per cent of the judgments it received from the courts based on its selection criteria, and threw away the rest. Although the court acknowledged that selection and cataloguing of the judgments by SOQUIJ facilitated their distribution, comprehension and study, the fact that SOQUIJ did not place the total body of judgments at the disposal of other publishers restricted access to this raw material. This was contrary to the purpose for which SOQUIJ was created. The court therefore ruled that SOQUIJ was required to give the plaintiff publisher electronic copies of all the judgments which SOQUIJ received from the courts, at the real cost of reproduction plus any delivery and storage costs.

SOQUIJ has continued to distribute and publish Quebec case law, as required by statute. It publishes case law and case summaries electronically, and also publishes several case law reporters including the *Recueil de jurisprudence du Québec* (R.J.Q.). However, SOQUIJ is one of several organizations that a 2005 Quebec government task force recommended be abolished. The *Rapport du Groupe de travail sur l'examen des organismes du gouvernement* recommended that the Ministry of Justice meet the need to make Quebec case law accessible by publishing it on the Ministry of Justice site, and expressed the view that the value-added case selection and editorial functions performed by SOQUIJ were more properly a private sector activity.⁷⁶ The Quebec bar is strongly opposed to this recommendation.

Ontario and the use of endorsements

R. 59.02 of the Ontario *Rules of Civil Procedure* requires that:

⁷³ *Ibid.*, at 100.

⁷⁴ *Wilson Lafleur Inc. v. SOQUIJ*, [2000] R.J.Q. 1086 (C.A.).

⁷⁵ At para. 27. Translated text from Daniel Poulin, "CanLII: How Law Societies and Academia Can Make Free Access to the Law a Reality" (2004) JILT. <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/poulin/>.

⁷⁶ <http://www.tresor.gouv.qc.ca/fr/publications/modernisation/rapp_60org.pdf> at 45.

An endorsement of every order shall be made on the appeal book and compendium, record, notice of motion or notice of application by the court, judge or officer making it, unless the circumstances make it impractical to do so.

The endorsement is simply a notation indicating the ruling of the court. Where written reasons are delivered in an appellate court, an endorsement is not required. Where written reasons are delivered in any other court the endorsement may consist of a reference to the reasons, and a copy of the reasons is put in the court file.

Rendering a decision by endorsement is similar to the practice of summary disposition followed in many American jurisdictions. As discussed above, those jurisdictions often set out in the court rules the circumstances in which summary disposition will be appropriate. The court rules in many American jurisdictions also address whether summary dispositions can be cited, and whether they have any precedential value.

The precedential effect of the endorsement in *R. v. Grant Paving & Materials Ltd.*, 1996 CarswellOnt 3996 (C.A.) became an issue on the appeal in *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (C.A.). *Grant Paving* was concerned with whether the employer had violated the workplace safety requirements of the *Occupational Health and Safety Act* (Ont.). The trial court in *Grant Paving* granted the defence motion for a directed verdict on the basis that there was nothing before the court to show that a worker was exposed to the hazard, and also because "the accused has to knowingly be responsible for circumstances to be held liable by law". On appeal, the judge found that the trial court erred in considering "factors that properly should have gone to the defence of due diligence" and he overturned the directed verdict. On further appeal, the Court of Appeal issued an endorsement as follows:

The appeal court justice was wrong to characterize the justice of the peace's finding as dependant on considerations of due diligence. The justice of the peace looked at whether there was evidence of exposure and found none. We do not think this finding should be set aside.

Therefore, the appeal is allowed, the order of Carr J. is set aside and the order of the justice of the peace is reinstated.

Grant Paving was later cited as authority in *R. v. Timminco* for the proposition that the Crown is required to prove that the employer had knowledge of an alleged workplace hazard in a prosecution under the *Occupational Health and Safety Act* (Ont.). The court in *Timminco* held that given the manifestly limited scope of the endorsement in *Grant Paving*, that case was not authority for this general proposition. The court went on at para. 36 to comment on the precedential value of endorsements generally:

Reasons of this court given by "endorsement" are mainly directed to the immediate parties. Endorsements, like all judgments of this court, have precedential value but they should not be construed to support broad overarching principles which are not specifically addressed in them. Thus, this court's judgment in *Grant Paving* should be taken as authority only for the proposition that the appeal judge erred in not deferring to the trial judge's finding of fact that there was no evidence that Grant Paving's employee was exposed to a hazard. *Grant Paving* has no further precedential value.

In *R. v. Duoug*, 2003 CarswellOnt 3232 (Ont. C.J.), the Crown based its argument on a number of endorsements from the Court of Appeal regarding conditional sentences in marijuana production cases. However, Kenkel J. referred to *Timminco* and stated at para. 46 that while the endorsements cited

provided guidance, they were by no means conclusive. In addition, he noted the limited scope of review in sentencing appeals.

The reasoning in *R. v. Duoug* is consistent with the approach taken in *R. v. Pierce* (1997), 32 O.R. (3d) 321 (C.A.) in a conditional sentencing appeal. Both counsel had referred to an endorsement issued in *R. v. Scidmore* (1996), 3 C.R. (5th) 280 (Ont. C.A.). However, the court in *Pierce* noted at para. 43 that the *Scidmore* endorsement did not purport to analyze the issues in any comprehensive way, nor to set any binding precedent. *Scidmore* was characterized in this way even though it was a case of first impression regarding a new section of the *Criminal Code*, it set out the court's opinion regarding legislative intent and interpretation of the section, and one judge dissented regarding how the section should be interpreted and applied.

There are two discrete but related principles arising from these cases. The first, exemplified by *Timminco*, is that the courts will be reluctant to draw principles of law from an endorsement unless those principles are explicitly stated in the endorsement. The second principle, arguably emerging from *R. v. Pierce* and *R. v. Duoug*, is that cases decided by endorsement are persuasive rather than mandatory authority. However, the approach taken in these two decisions may be limited to sentencing appeals, where appellate review is limited.

My review of the Ontario jurisprudence indicates that there is no general rule that decisions by endorsement are persuasive rather than mandatory. For example, in *Guarantee Company of North America v. Mercedes-Benz Canada Inc.*, 2006 CanLII 19485 (Ont. C.A.) the Court of Appeal agreed with the lower court that the lower court was bound by *Karakas v. General Motors of Canada Ltd.* (2004), 74 O.R. (3d) 273 (S.C.), aff'd. [2005] O.J. No. 24621 (C.A.), even though the appellate decision in *Karakas* was rendered by a one-sentence endorsement, agreeing with the motions judge for the reasons he gave.

The Ontario Court of Appeal held in *Laredo Construction Inc. v. Sinnadurai* (2005), 78 O.R. (3d) 321 (C.A.) that a one-line decision made by one judge of the Court of Appeal in chambers on an unopposed application was binding on the Divisional Court, stating as follows at para. 19:

... I know of no authority to support the proposition that an order of a high court made "without opposition and without opposing argument" or "made without reasons and without explicit indication that it was made after specific consideration of" a section of an act is a lesser type of order that can be overturned by a lower court.

The Court of Appeal in *Laredo Construction* also rejected the narrow interpretation given by the Divisional Court to the endorsement. The endorsement simply ordered that the motion was dismissed. The Court of Appeal held that the endorsement could not be construed in a vacuum. Rather, the question must be asked "What is being dismissed?" to determine what was actually decided.

The Ontario Court of Appeal requires a panel of five judges to hear an appeal in which the court is being asked to overrule one of its previous decisions.⁷⁷ In *Hill v. Hamilton-Wentworth Regional Police Services Board* (2005), 76 O.R. (3d) 481 (C.A.) a five judge panel was convened to consider whether *Beckstead v. Ottawa (City)* (1997), 37 O.R. (3d) 62 (C.A.) should be overruled. The decision in *Beckstead* had been rendered by endorsement. Presumably, if decisions by endorsement were only persuasive, it would not have been necessary to convene a five judge panel.

These recent decisions indicate that rulings made by endorsement in Ontario are binding for purposes of *stare decisis* and not merely treated as persuasive authority. This is consistent with the statement in *Timminco* that these decisions are precedential. What remains unclear is the extent to which an

⁷⁷ *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*, 2005 CanLII 21093 (Ont. C.A.) at para. 5.

endorsement dismissing an appeal gives the rulings of the trial judge appellate approval. *Timminco* indicates that the endorsement is authority only for the principles actually set out in the endorsement. However, *Laredo Construction* requires that the endorsement not be construed in a vacuum.

It would be preferable if the circumstances when it is appropriate to decide a case by endorsement were codified, as has been the practice regarding summary dispositions in American jurisdictions. It would also be useful if the precedential status of cases decided by endorsement was more clearly established in the Ontario jurisprudence.

Alberta and Reasons for Judgment Reserved

The Alberta Court of Appeal has a practice of circulating certain judgments to the whole court for comment on legal points prior to publication. Those judgments are labelled Reasons for Judgment Reserved. There has been some dispute regarding whether these judgments have a higher precedential value than other judgments, issued as a Memorandum of Judgment.

In *R. v. Bonneteau* (1995), 24 Alta. L.R. (3d) 153 (C.A.), Heatherington J.A. writing for the court stated that a reserved judgment sets out views accepted by a majority of the members of the court, and therefore has substantial weight as precedent. The view that this type of judgment enjoys a higher precedential value was also put forward by Russell J.A. in *R. v. Beaudry*, 2000 ABCA 243, 100 Alta. L.R. (3d) 259 (WeC). She acknowledged that Memoranda of Judgment bind the Court of Appeal and lower courts. However, she commented that Memoranda of Judgment are not circulated to all members of the court, are often rendered from the bench after minimal reflection and without the careful collective consideration of the full court, and usually deal with well established points of law. She held that all decisions do not have the same jurisprudential value for all purposes, stating as follows at para. 113:

The important distinction between Memoranda of Judgments and Reasons for Judgment (or Reasons for Judgment Reserved) is that Reasons for Judgment generally enjoy a higher precedential value before this court and thus, in the event of a conflict between the two, generally Reasons for Judgment govern. In addition, whether a judgment was a memorandum or circulated reserve potentially affects the court's willingness to reconsider it. Generally speaking, the court is more willing to reconsider Memoranda of Judgment as opposed to circulated reserves. But any reconsideration of either type of judgment will only be given in accordance with the procedure set out in section 3 of the Consolidated Practice Directions.

Berger J.A. expressed a different view, stating at para. 37 that Memoranda of Judgment and judgments labelled Reasons for Judgment Reserved must be accorded equal precedential value. He held that jurisprudential value should not depend on the label given to a decision. He also noted that simply because a judgment has been circulated does not give rise to the inference that it sets out the views of a majority of the members of the court.

This disagreement within the Alberta Court of Appeal reflects a larger disagreement across common law jurisdictions regarding whether a court can decide by practice direction that certain types of decisions will have a lesser precedential value.

British Columbia and an unsuccessful proposal to limit citation

Proliferation of case law

The Law Society published case law from British Columbia covering the period 1867 to 1947 in the *British Columbia Reports*, discontinuing publication in 1948. It was not until 1976, with the introduction of the *British Columbia Law Reports* by Carswell, that there was another reporter series dedicated to reporting British Columbia cases. Other Canadian regional reporters were created by Carswell and later by Maritime Law Books, and Carswell developed topical reporters as well.⁷⁸ The number of Canadian case reporters grew exponentially.

This development overlapped with a venture commenced in 1972 by the Law Society and the Attorney-General at the urging of Jack Cram, and with assistance from the Law Foundation, to digest and index all typescript decisions issued by the British Columbia courts.⁷⁹ The result was to increase the number of accessible British Columbia cases from approximately 100 to 1,000 cases a year. The experiment was considered a success and developed into *B.C. Decisions*, published by Western Legal Publications.⁸⁰

The courts took the addition of unreported judgments in stride, with Chief Justice Nemetz requiring by Practice Direction in 1978 that counsel who wish to cite unreported cases as part of their submission in argument must give prior notice to the other side so that they have an opportunity to read the case before argument is heard.⁸¹

Proposed solutions and the reaction

The increase in reported cases and the new availability of unreported cases through the digest services led to concern about the cost of purchasing the various reporter services, the amount of duplication between them, and the new burden of reviewing the unreported cases as well. A return to reporting only the most important cases was advocated by some. This debate was captured in *The Advocate*.⁸² It reflected a broader debate within the Canadian legal community that led to an extensive study by the Canadian Law Information Council ("CLIC")⁸³ on case reporting in Canada.

A draft report produced by CLIC in 1980 regarding judgment handling in British Columbia proposed to centralize control over the production, dissemination and storage of judgments in the Ministry of the Attorney General, which would be charged with providing "the philosophical and operating objectives for the system as well as the organization." The draft report proposed a selection committee that would apply established dissemination criteria to decide which judgments should be indexed, digested, and stored. Only those judgments selected under these criteria would be permitted to be cited in future court cases. From that body of case law the selection committee would decide which judgments warranted full text publication. The dissemination and publication criteria would be developed by an advisory committee

⁷⁸ This was partially in response to a 1972 report funded by the federal Department of Justice and the Canadian Bar Association called *Operation Compullex: Information Needs of the Practicing Lawyer* (Ottawa: Department of Justice, 1972) that identified a need for better access to case law and resulted in the creation of CLIC. Publishers saw the opportunity to expand their markets by adding topical and regional reporters.

⁷⁹ The impetus for this endeavour was an appearance of Jack Cram before the Court of Appeal where opposing counsel relied on an unreported case that was not known to Mr. Cram and that could not have been located using any standard research tools. He decided to find a way to make these decisions accessible so that there would be a more even playing field.

⁸⁰ J. Fraser, "Case law reporting in British Columbia" in M. Foote, ed., *Law Reporting and Legal Publishing in Canada: A History*, (Kingston, Ont.: Canadian Association of Law Libraries, 1997) 43 at 49.

⁸¹ (1978) 36 *The Advocate* 475.

⁸² R.M.J. Hutchinson, "Law Reports" (1973) 31 *The Advocate* 85-86; J.N. Cram, "In Answer to Law Reports" (1973) 31 *The Advocate* 183-184; L. Getz, "The State of Law Reporting in Canada" (1979) 37 *The Advocate* 243-246.

⁸³ CLIC was later renamed the Canadian Legal Information Council. Each Deputy Attorney General from across Canada was appointed as a member of CLIC.

comprised of representatives of the judiciary, the bar, the publishers, law librarians and other potential users. The 1980 draft report was heavily influenced by the American and Quebec approaches.

The most controversial part of this proposal was the recommendation that only those cases selected for dissemination could be cited to the courts. R.M. Dick, appointed by the Canadian Bar Association to a committee assigned to comment on the draft report, criticized this part of the proposal.⁸⁴ Richard Vogel, then Deputy Attorney General, also expressed his concern about the "no publication – no citation" rule recommended in the draft report, stating in a letter dated December 12, 1980⁸⁵ that he agreed with the following statement by Chief Justice Bora Laskin:

To forbid the reporting of decided cases or certain classes of them is unimaginable; they are public records, entitled to be recognized as such; and their authority is no less if they are unreported, but disinterred from the court registry. What judicial screening can do is discourage over-publication of cases that have no precedent value. I need not be told that evaluation on this basis also has its risks.⁸⁶

CLIC produced a report in 1982 entitled *Case Law Reporting in Canada* that differed considerably from the 1980 British Columbia draft report in its conclusions and recommendations. The 1982 report noted the problems with the no-citation rules and also retreated from the plan for case law selection to be done under the auspices of government. It recommended selective full text reporting by the commercial publishers, based on visible criteria developed with the participation of the broader legal community. In effect, it recommended a continuation of the status quo, but with more transparency and participation regarding selection criteria for reported cases.

These events occurred before electronic publication of comprehensive collections of full text judgments dramatically changed the landscape of legal publishing.

Impact of electronic access to judgments

Moving to the present, lawyers have full access to Canadian case law, without the restrictions of selective reporting, through commercial services such as Quicklaw and WestlaweCARSWELL, as well as free access to current case law through court-operated websites and the Canadian Legal Information Institute (CanLII).⁸⁷ Although the historical depth is not great, these free sites publish a fairly comprehensive collection of current Canadian case law, including British Columbia case law from 1990 and Supreme Court of Canada cases from 1984.⁸⁸

Complaints about the cost of purchasing multiple law reports, and the duplication of case reporting, are irrelevant in this new electronic environment. However, the flood of information continues to be a real problem for counsel and the courts; particularly with no selection mechanism to separate the important

⁸⁴ R.M. Dick, "Law Reporting in B.C.: A Review of the Recent Proposal" (1981) 29 *The Advocate* 197-204.

⁸⁵ R.M. Dick, at 199.

⁸⁶ Chief Justice Bora Laskin, "The Institutional Character of the Judge", in Glenn R. Winters (ed.), *Handbook for Judges: An anthology of inspirational and educational writings for members of the judiciary* (Chicago: The American Judicature Society to Promote Effective Administration of Justice: 1975) at 36.

⁸⁷ CanLII is a cooperative venture of all the law societies across Canada, and is funded primarily by lawyers through their annual law society dues. It publishes Canadian case law and legislation, as well as the decisions of some administrative tribunals.

⁸⁸ The current policy of the British Columbia courts as posted on the Superior Courts website regarding which decisions are released for publication (subject to publication bans and privacy considerations) is as follows:

- for the Court of Appeal all reserve reasons from court and chambers, all oral court judgments, and selected oral chambers reasons for judgment
- for the Supreme Court, all written reasons from court and chambers, but only those oral court and chambers decisions where publication is requested by a judge or master. Under this latter practice, approximately 70 per cent of the Supreme Court decisions are not published.

cases from the unimportant ones and reduce the volume of material which must be reviewed and which can potentially be cited on any point of law. In recent years, approximately 2,500 decisions from British Columbia are published electronically each year. About 400 of these are published in the British Columbia Law Reports.

Traditional case-finding and indexing tools are inadequate to deal with this information explosion. Electronic keyword searching is of great assistance in locating factually similar decisions in this large body of information. However, full text electronic research in primary sources is less useful for researching abstract concepts and legal rules.⁸⁹

In print research, the researcher must first identify legal categories and principles, and then look for individual cases that support the principles. By contrast, full text electronic research moves from specific to general and tends to be more fact-oriented.⁹⁰ A legal researcher who relies exclusively on keyword searches in electronic databases of case law will end up with a collection of individual cases to be weighed, reviewed and analyzed and from which principles must be drawn. The researcher will not have a broad overview of the subject area and may be unaware of important policy considerations, or of leading authorities that did not contain the specific keywords used.⁹¹

These drawbacks to electronic research can be remedied by using secondary sources in conjunction with full text research of the primary sources. Affordable access to secondary sources has become an important issue. Some are available electronically, such as full text law journal articles, the Irwin Law series on Quicklaw, the treatises included in WestlaweCARSWELL and Quicklaw topical products, and the *Canadian Abridgment* and *Canadian Encyclopedic Digest* on LawSource. However, most secondary sources are available only in print. The cost of secondary source publications precludes most practitioners and smaller courthouse libraries from purchasing them, and consumes a significant amount of the library budget in large law firms and the main courthouse libraries. Copyright restrictions preclude the courthouse libraries from circulating more than a small excerpt from these publications to their users.

Potential solutions by the courts

The electronic publication of most Canadian court decisions, the negative reaction to the 1980 draft CLIC report, the 1998 court ruling regarding SOQUIJ, and the recent abolition of no-citation rules in the United States Federal Court system, all bring into question the wisdom of limiting publication of cases or imposing any absolute prohibition on citation of certain categories of cases. Other solutions must be found. There are several approaches that could be taken by the courts, either individually or cumulatively, to help address this problem.

Principles of *stare decisis*

Any discussion of these potential solutions involves consideration of the power of the courts to control their process, and in particular to effect changes to the rules of *stare decisis*.

Many of the approaches discussed above result in statements of legal principle, which otherwise would have been binding, becoming persuasive authority or having no authority at all. In American jurisdictions, this is specifically provided for in the court rules of many jurisdictions with respect to judgments delivered by the courts as unpublished opinions or by summary disposition. Under the 2001

⁸⁹ Lee F. Peoples, "The Death of the Digest and the Pitfalls of Electronic Research: What is the Modern Legal Researcher to do?" (2005) 97 *Law Libr. J.* 661 at 663-668.

⁹⁰ Bast and Pyle, "Legal Research in the Computer Age: A Paradigm Shift?" (2001) 93 *Law Libr. J.* 285.

⁹¹ For a discussion of the impact of computers on legal research methods and legal reasoning, see Elizabeth McKenzie, "Computers in Law: Changing the Way Lawyers Think" [2006] *Suffolk University Law School Faculty Publications*, Paper 34. <<http://lsr.nellco.org/Suffolk/fp/papers/34>>

English Practice Direction, particular categories of English Court of Appeal judgments in civil matters can no longer be cited and therefore have no precedential effect. Other decisions, such as unreported judgments, can be cited only if there is no reported authority on point.

The question arises whether the courts can establish these rules by issuing a practice direction. This is discussed in Cross and Harris, *Precedent in English Law*, 4th ed. (Oxford: Clarendon Press, 1991) as follows at 105:

Precedent rules confer authority on the *rationes decidendi* of various courts; but they derive their authority, not from such *rationes*, but from a more widely diffused judicial practice which transcends the outcome of particular cases. To the extent that this practice is settled, they are conceived of as imposing obligations which are as peremptory as any other legal obligations, and in that sense they constitute rules of law. However, they dwell at a higher level than ordinary rules of substantive case-law whose authenticity they control. There is consequently no problem of self-reference.

The constitutional propriety of the Practice Statement presents more difficulty. Cross asked rhetorically: 'but can there be any doubt that it owes its validity to the inherent power of any court to regulate its own practice?' There are two problems with this suggestion. First it may prove too much. It suggests that rules governing the precedential status of the decisions of a particular court must necessarily include a power in that court to change the rules; whereas there could be a settled practice which excluded such power. As we shall see in the next section, the view that the Court of Appeal has the power to change the rules concerning the bindingness of its own decisions, though asserted by some, has not been generally accepted.

Secondly, Cross's suggestion appears to rely on an inappropriate analogy between precedent rules and ordinary procedural practice rules. There is no doubt that any superior court may from time to time issue practice directions concerning procedural steps to be taken in litigation before that court. It does not follow, merely because precedent rules derive from practice, that they also embody a similar freedom. The word 'practice' can be overplayed.

The authors discuss this issue in the context of the 1966 Practice Statement of the House of Lords regarding the circumstances in which it could overrule its previous decisions, and what occurred when the English Court of Appeal tried to adopt a similar rule. Lord Denning argued in *Davis v. Johnson* [1979] A.C. 264, 281 that the 1966 Practice Statement:

... shows conclusively that a rule as to precedent (which any court lays down for itself) is not a rule of law at all. It is simply a practice or usage laid down by the court itself for its own guidance: and, as such, the successors of that court can alter that practice or amend it or set up other guide lines, just as the House of Lords did in 1966.

However, Viscount Dilhorne took a contrary view at 336:

In 1966 consideration was given to whether as a matter of law this House was bound to follow its earlier decision. After considerable discussion it

was agreed that it was not, and so the announcement ... was made This House is not bound by any previous decision to which it may have come. It can, if it wishes, reach a contrary conclusion. ... It is not a ground available to any other court and the fact that this House made that announcement is consequently no argument which can properly be advanced to support the view that the Court of Appeal or any other court has similar liberty of action.

Lord Salmon expressed the opinion that the 1966 Practice Direction was effective because the announcement was made with the unanimous approval of all of the Law Lords. He stated that until such time as all of the members of the Court of Appeal agree that the court may depart from its own decisions, then the existing rule must continue to apply. Lord Salmon was the only Law Lord to express this view. However, it provides some useful guidance regarding the practice to be followed where a change in the rules of *stare decisis* is being considered.

There are several recognized exceptions to the general rule of *stare decisis*, particularly as it applies to an appellate court following its own decisions. First, the court is entitled to decide which of two conflicting decisions of its own it will follow. Second, the court is bound to refuse to follow a decision of its own which has been impliedly overruled by a higher court. Third, the court is not bound to follow a decision of its own if it was given *per incuriam*, defined as decided without reference to an inconsistent statutory provision or an authority binding on the court.⁹²

Boys v. Chaplin, [1968] 2 Q.B. 1 (C.A.) recognized an exception to *stare decisis* for interlocutory orders made by a two judge panel of the Court of Appeal. Lord Denning M.R. noted that these interlocutory decisions should not be binding because:

Such questions are dealt with expeditiously – I might almost say summarily – because they do not usually raise points of great moment. ... I cannot regard such a decision as a binding precedent. There is no case in the books where a decision of two lord justices has been held to be binding when it is afterwards discovered to be wrong.

Diplock L.J. agreed, noting that in interlocutory appeals the court does not usually have the benefit of a reasoned judgment by the judge against whose order the appeal is brought. The appeal may be heard by two judges rather than three. He noted that lengthy and detailed argument in interlocutory appeals is discouraged and leave to appeal from interlocutory orders is seldom obtained. He held that these differences in practice detracted from the weight to be attached to the reasons given for an interlocutory order of the Court of Appeal, holding that the Court of Appeal could therefore decline to follow the *ratio decidendi* of a previous interlocutory order if the court thought it was wrong.

This ruling was followed until recently, when changes in English civil procedure required a restatement of the rule. The distinction between interlocutory and final appeals has now been abolished, and the use of two-judge panels has been expanded. The authority of a two-judge court regarding a substantive appeal is now regarded as the same as that of a three-judge court. However, the Court of Appeal has recognized that the “modern equivalent of the *Boys v. Chaplin* paradigm of a decision reached under time constraints and on the basis of brief argument is the decision of a Lord Justice or Lords Justices upon an oral application for leave to appeal. In that respect, the court recognises that such a decision is not to be regarded as authority binding on the court in relation to substantive appeals (or indeed later applications for leave).”⁹³ The decision which the court was being urged not to follow had been rendered *ex tempore*. However, the court declined to treat it differently on that basis, stating at para. 25 that the judgment was

⁹² *Young v. Bristol Aeroplane Co.*, [1944] K.B. 718 (C.A.).

⁹³ *Cave v. Robinson, Jarvis & Rolf*, [2002] 1 W.L.R. 581 (C.A.) at para. 24.

plainly carefully considered and no doubt the oral argument before the court had been the subject of careful skeleton arguments, properly submitted in advance.

The fact that a judgment was rendered *ex tempore* is argued by some to be a basis for lessening or disregarding its precedential value. Michael Zander, in *The Law-Making Process*, 6th ed. (Cambridge University Press, 2004) states at 288 that it is rare for practitioners or academics to make anything of whether a judgment was oral or written in evaluating its weight as a precedent, but refers to a 1969 lecture by Lord Justice Russell as suggesting that more attention should be paid to the distinction. Lord Justice Russell described the process by which an *ex tempore* decision of the English Court of Appeal is often reached, and concluded with the warning that:

In particular in the case of unreserved judgments weight should be attributed only to pronouncements that in express terms approve of other pronouncements, and with particularity rather than generality. All else should be suspect in point of value⁹⁴

A formulation of the bases for a trial judge declining to follow a judgment by another judge of the same court was set out by Wilson J. in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.) and is still the leading Canadian authority regarding trial decisions and judicial comity:

... I will only go against a judgment of another judge of this Court if:

- (a) Subsequent decisions have affected the validity of the impugned judgment;
- (b) It is demonstrated that some binding authority in case law or some relevant statute was not considered;
- (c) The judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

This latter exception supports the proposition that judgments rendered quickly in circumstances where full argument has not occurred will have less precedential value. However, this proposition is stated in the context of not following a judgment rendered by another trial judge.

Another relevant exception from *stare decisis* is the general principle described as follows in Cross and Harris at 158-159:

It seems always to have been accepted that if a proposition of law, though implicit in a decision, was never expressly stated either in argument or in the judgment, the decision constitutes no binding authority for it, whether on the ground that there is here an exception to *stare decisis*, or for the reason that such a proposition is not truly part of the ratio.

Unlike the *per incuriam* rule, this applies to all levels of court. For example, the Privy Council held in *Baker v. The Queen*, [1975] A.C. 774 that inferior courts were not bound by propositions of law incorporated into the *ratio decidendi* which had merely been assumed to be correct without argument. Cross and Harris state at 161 that the result of this exception is that:

⁹⁴ Sir Charles Russell, "Behind the Appellate Curtain", Holdsworth Club Lecture, 1969, at 8.

... the doctrine of *stare decisis* ... does not encompass *rationes decidendi* where it can be inferred that the deciding court did not address its mind to a proposition of law, even if that proposition was essential to its decision; and that inference can be easily drawn from the absence of any (or even any adequate) argument on the point in question.

This exception is easier to apply to English cases, where the arguments of counsel are often summarised in the report of the case. It is rare for this to occur in Canadian case reports, leaving one to infer from the judgment itself whether a particular point was argued before the court.

There is room within the established exceptions to *stare decisis* for challenging brief or poorly reasoned decisions. The brevity of the reasons will severely restrict the ratio of the decision and therefore its precedential effect, as was explained in *R. v. Timminco* regarding decisions by endorsement. Furthermore, the court can rely on the exception for statements of law made without argument on the legal issue, to depart from a ruling containing little or no legal reasoning or reference to authorities. Where there are conflicting decisions on a point of law by the same level of court, the circumstances in which the decision was made are relevant, such as whether the law on the point was fully argued and considered, and whether written reasons were given after due consideration or rendered quickly by oral judgment. The *per incuriam* exception will also apply in this circumstance.

These exceptions to the rules of *stare decisis* ensure that the courts are free to depart from poor precedent. However, they do not reduce the volume of case law confronting the courts and counsel, unless applied to entire categories of cases such as leave to appeal rulings or decisions made by endorsement.

Despite the efficacy of a rule that would restrict the body of applicable case law, either by removing the precedential value of certain decisions or establishing a no-citation rule for them, such a rule would constitute a significant change in the traditional rules of *stare decisis* and would be controversial among both bench and bar. The controversial nature of this type of approach is clear from the negative reaction to the ban on citation of unreported cases in England, the heated debate over no-citation rules in the United States,⁹⁵ the dispute within the Alberta Court of Appeal regarding the precedential weight of reserved reasons versus memoranda of judgment, and the uncertainty in Ontario regarding the precedential weight of reasons by endorsement. Any such change is more likely to be accepted if it can be viewed as an incremental development in the principles of *stare decisis*.

Categorization of judgments

Can the volume of case law be reduced by eliminating those decisions less likely to be of value or interest, reducing the precedential value of those decisions, or simply making it easier to find the more important decisions? Various approaches have been tried, as discussed above. These approaches require the courts to categorize their decisions in some way, or to recognize external categorization by legal publishers.

The traditional method, based on whether the case has been reported and therefore determined to represent an important contribution to jurisprudence on a point of law, is of less practical importance in today's world. The immediate availability of case law before there is even the opportunity for it to be reported militates against restricting research to reported cases. Furthermore, the extent to which unreported cases are regularly cited in court decisions indicates that this body of jurisprudence is often relevant. Lastly, so many cases are now reported that this status is not a reliable indication of the importance of a case.

⁹⁵ See Shannon, *supra* note 45, where the author concludes that a rule treating unpublished opinions as persuasive rather than binding exceeds the rule-making power of the United States Court of Appeals.

Whether a case has been reported should not determine whether it can be cited, whether it should constitute binding precedent, or whether it should be brought to the court's attention. Otherwise, legal publishers would have something akin to law-making power. Selection for reporting can still be relied on as some indication of the importance of a case, assuming that the reporter series applies the traditional criteria for selecting reported cases. However, in my view more useful information about the value of particular cases can be obtained from citation data, as discussed further below at page 31.

Another functional way to categorise judgments is by the manner in which the judgment is delivered. Were the reasons given orally or were they reserved? Were the reasons given by brief endorsement or fully reasoned? Should a decision receive different precedential treatment based on these differences?

Another functional category covers those types of matters which tend to be less fully argued and considered, such as interlocutory rulings. Similarly, *ex parte* decisions by definition are less fully argued since one party is not before the court. Leave to appeal decisions may also be treated differently, as they are typically heard by less than a full quorum without full argument. The English courts have chosen these categories of cases as ones that should be treated differently, but allow for the court to make an exception for decisions falling within these categories that contribute to the further development of the law.

Another approach is for the court to indicate on a case by case basis whether a decision should be treated as binding or persuasive, or precluded from citation, based on published criteria. The American courts have largely embraced this approach, although it is controversial whether the criteria have been consistently followed when deciding whether an opinion should be published. One benefit of this approach is that the less important rulings are labelled as "unpublished" by the courts, making it easier to locate the smaller body of important rulings.

Is the proliferation problem lessened where it is easier to determine which decisions are important, even if the actual body of potentially applicable case law is not reduced by a no-citation rule?

The categorisation of judgments scheme adopted by the Supreme Court of Western Australia is a simple model that requires the court to designate each judgment as falling within one of four categories. Basically, Category A judgments are important, Category B judgments are routine, Category C judgments deal with damage assessments, and Category D judgments deal with sentencing. There is no explicit difference in the precedential treatment afforded to each of these categories of judgments. However, the result is a simple mechanism whereby the more important decisions can easily be separated out from the rest.

This system triggers debate regarding who is in a better situation to value case law: the judge deciding it or the "market". Some judges may feel that all their decisions are important and others may be more modest and rarely put their decisions in Category A. Concerns have been raised about the impact on litigants who find that the judgment about their dispute has been characterized by the court as "routine" rather than "important".

If such a categorisation system were to be adopted, clear criteria must be established for which judgments are in Category A and which are in Category B. The system could be used to designate Category A judgments as binding and Category B judgments as persuasive, similar to the American model. Or the categorisation could simply be another tool to enable counsel and the courts to more quickly locate the most important cases on a point of law.

Expectations regarding case citation

There is a significant difference between the limits on citation imposed in the 2001 English Practice Direction and the expectations regarding citation in *Lougheed v. Armbruster*. The limits on citation imposed by the English courts in civil matters warrants serious consideration.

Where a legal principle is well established then it should be necessary to cite only a leading authority on the point. The court does not need to be referred to an entire line of authority, or to subsequent cases that have simply applied the leading authority. However, where the law is unclear, or counsel is arguing that the law should be changed, then it becomes necessary to rely on a broader range of authorities. A court imposing such a limitation would have to recognize these circumstances as good reasons for citing additional authorities. Disincentives by way of costs could be used where counsel has disregarded the restrictions.

One of the reasons for over-citation of authorities is the fear of not putting all the relevant authorities before the court. An explicit direction from the court requiring counsel to provide only the most important or essential authorities on each point should reduce this fear and in turn lessen the number of authorities cited.

If a categorization scheme is adopted by the court, then counsel can canvass the Category A judgments to ensure that all important rulings on the point have been reviewed.

Other potential solutions

Using case citation data to identify the leading cases

The use of case citation data to identify the most important cases is the subject of considerable academic research in the information technology field, and sophisticated applications of it are being studied and developed. One example is the current research by Professor Thomas Smith of the University of San Diego.⁹⁶ He studied case law citation patterns using the Lexis database of American case law. He restricted his work to decisions released for publication. In other words, “unpublished decisions” were not included in the study. He measured the frequency of citation of cases, and concluded that precedential authority is concentrated in a relatively small core of cases, comprising about twenty per cent of the cases released for publication. The other eighty per cent of the published cases he characterized as dead, because they had no further life after they were decided.

Google is able to pull up the most relevant and authoritative web pages using an algorithm based in part on how heavily linked to other authoritative pages each page is. Professor Smith has been exploring the possibility of using case citation data to rank cases using this “link popularity” concept:

In theory, something similar [to the link popularity ranking employed by Google] could be done with legal network searching. Legal search results could be ranked by citation frequency The key to Google’s powerful results, however, comes not from counting all links equally, but from scoring them according to how authoritative (or heavily linked) the linking sites are. In the legal network, a similar approach could be implemented in various ways. The most straightforward would be to score citations depending on how many cites the citing cases themselves had. ... Because law is hierarchical, it might prove useful to use scoring algorithms based on the level of the court citing a case It seems

⁹⁶ Thomas A. Smith, “The Web of Law” (Spring 2005). San Diego Legal Studies Research Paper No. 06-11 Available at SSRN: <http://ssrn.com/abstract=642863>.

likely legal search algorithms would be more powerful if relevance scores based on links were discounted for the freshness of links. So, a case that was cited by a federal circuit court five times in the last two years might rank more highly, all other things equal, than a case cited ten times by the same court, but ten years ago.

This type of technology is still some time away from implementation in the legal context,⁹⁷ but it has the potential to be enormously useful in developing ranking methods that would help users to quickly identify the most important cases.

Increased use of secondary sources

Secondary sources are underused, particularly by junior lawyers. The case method of instruction often results in students not appreciating the usefulness of legal treatises. Authors of secondary sources have already spent time identifying and evaluating the leading cases on particular points of law, and summarizing the legal principles. In this universe of unselectively published case law, these resources are an increasingly useful tool for practitioners. The English Court of Appeal commented on the importance of secondary sources in *CEL Group Ltd. v. Nedlloyd Lines UK Ltd.*, [2003] EWCA Civ 1716:

One of the curses of the common law method in the 21st century is unlimited accessibility to authorities, reported and unreported, and apparently unlimited resources for copying them. (See the Practice Direction on Citation of Authorities [2001] 1 WLR 2001) On the other hand, one of the blessings is the availability of up to date and authoritative textbooks on almost every relevant subject, in which the material cases have been sorted out and digested. For my part, at least where I am concerned with common law rather than statute, I find it most helpful to start by looking for a succinct statement of the relevant principle: either in a recent binding decision of the high courts, if there is one; or, if not, in a leading textbook (or, where available, a Law Commission report). Of course, that is only the starting point.⁹⁸

There is a growing body of Canadian secondary sources, many of very high quality and some cited frequently by the Supreme Court of Canada.⁹⁹ One significant gap has been the lack of an authoritative encyclopaedia of Canadian law. The *Canadian Encyclopedic Digest* is of uneven quality and is not considered authoritative. The recent introduction of *Halsbury's Laws of Canada* by LexisNexis Butterworths is a welcome development.

Consideration should be given to developing something similar to the American Law Institute's *Restatements of the Law* in the Canadian context. The *Restatements* are prepared by noted academics, judges and lawyers in various fields of law. They attempt to state the legal rules that govern the common law in a particular area, and are one of the most highly regarded types of secondary authority. Modern collaborative writing technologies would enable national cooperation on a project of this nature.

Law libraries should build their secondary source collections and develop ways to provide access to these resources for remote users.

⁹⁷ Professor Smith has combined with others to create the Precedent Search Engine, which they are marketing to legal publishers. A prototype is available at www.precyden.com.

⁹⁸ Per Carnwath L.J. at para. 25.

⁹⁹ Black and Richter, "Did she mention my name? Citation to Academic Authority by the Supreme Court of Canada 1985-1990" (1993) 16 *Dalhousie L.J.* 377; McCormick, "Do judges read books too?: Academic citations by the Lamer Court 1992-96" (1998) 9 *Supreme Court Law Review* 463.

Legal research training and improvements to electronic research tools

Studies have documented that lawyers conducting electronic research retrieve far less of the relevant case law than they think.¹⁰⁰ Law students and lawyers need more training in effective research methods to help them navigate the large body of case law and efficiently find the most relevant cases.¹⁰¹ Few lawyers know the search syntax for the services they use,¹⁰² or how to get the most out of the features available. Law school and bar admission curricula should be reviewed to ensure that sufficient instruction and assignments are given in legal research. Instruction should also be made available to the practising bar, through courthouse librarians and continuing legal education programs.

Enhancements to electronic legal research products, such as natural language searching,¹⁰³ better relevancy ranking, the ability to easily refine search results and change ranking methods, and integration of primary sources with secondary sources, must continue. Many of these features are included to some extent in existing products, but under-utilized. For example, WestlaweCARSWELL offers an excellent natural language search engine as an alternative to Boolean searching, and integrates secondary sources such as the *Canadian Encyclopedic Digest* and *Canadian Abridgment Case Digests* with primary sources. Its KeyCite results include secondary source references as well as citing cases. Quicklaw has applied a taxonomy to its case law collection that enables the user to restrict a case law search by topic, and to sort search results by topic. Westlaw (US) has valuable enhancements that are not included in the Canadian product, such as Results Plus¹⁰⁴ and depth of treatment codes.¹⁰⁵ Both WestlaweCARSWELL and CanLII allow the user to search within note-up results, to find which citing cases deal with a particular legal issue. This is a valuable feature in the Canadian context, where the Shepard's point of law system is not used for identifying specific legal issues in note-up results.

An important addition to this range of enhancements would be a ranking method based on the significance of the retrieved cases using their citation history and other relevant factors.

Conclusion

The proliferation of case law and the difficulties it poses for both bench and bar is an ongoing dilemma. Complaints about this issue that were made over 150 years ago could have been written today. Limiting citation of cases to those selected for publication by the judiciary, government or legal publishers has largely been rejected as an acceptable solution to the problem.

Some solutions, such as increased development and use of secondary sources, training lawyers to make better use of electronic research tools, and developing sophisticated case ranking technologies based on

¹⁰⁰ Blair & Maron, "An Evaluation of Retrieval Effectiveness for a Full-Text Document Retrieval System", (1985) 28 *Com. ACM* 289; Dabney, "The Curse of Thamus: An Analysis of Full-Text Legal Document Retrieval" (1986) 78 *Law Libr. J.* 5; Berring, "Full-Text Databases and Legal Research: Backing into the Future" (1986) 1 *High Technology L.J.* 27. Cf. Burson, "A Reconstruction of *Thamus*: Comments on the Evaluation of Legal Information Retrieval Systems" (1987) 79 *Law Libr. J.* 133.

¹⁰¹ Spencer, Spencer and Kent, "Practitioners' use of online law reports: Implications for law schools", [2002] 2 *Web JCLI*. Available online at <<http://webjcli.ncl.ac.uk/2002/issue2/spencer2.html>>.

¹⁰² As an example, each of the leading Canadian research services uses a different default connector. WestlaweCARSWELL uses OR, LexisNexis treats two adjacent words as a phrase, and CanLII uses AND.

¹⁰³ Natural language searching allows queries without Boolean connectors or search templates. This apparent simplicity on the surface is supported by sophisticated programming underneath. The program automatically identifies phrases or legal concepts in the query, removes common words, and applies word stemming technology to identify linguistic variants of the search terms. It then carries out a statistical analysis based on the importance of these concepts in the database, and uses relevancy ranking algorithms to determine which documents in the database provide the best statistical correlation with the concepts.

¹⁰⁴ This service automatically runs your case law search query against leading secondary source materials, such as ALR annotations, and entries from *AmJur2d* and *Corpus Juris Secundum*, to augment your case law search with relevant secondary sources.

¹⁰⁵ The depth of treatment codes indicate the extent to which a cited case is discussed in a citing case, and whether a direct quotation from the cited case is included in the citing case.

case citation data, can be implemented without any radical changes to the legal system. These solutions will help lawyers determine what the law is more definitively and efficiently.

Other solutions lie with the courts. The American no-citation rule, or the more limited no-citation restrictions in the 2001 English Practice Direction, may cause more problems than they solve. However, serious consideration should be given to whether certain types of decisions should have persuasive rather than precedential status. The courts should consider the best way to change expectations regarding the volume of material put before them by counsel. One method is to place restrictions on the number of cases that can be cited on a point of law. Categorization of cases by the courts would assist counsel to identify the more important decisions. Whichever of these approaches is chosen by a particular court, clear guidelines governing its application and effect should be adopted by the court and published to the profession.

Appendix A

Practice Statement by The Lord Chief Justice Royal Courts of Justice: Judgments 22 April 1998

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8. Citation of Authorities in Court

For citation of authorities in court, the practice set out in the Practice Notes on Citation of Authorities (Court of Appeal (Civil Division) [1995] 1 WLR 1096; [1995] 3 All ER 256 and [1996] 1 WLR 854; [1996] 3 All ER 382 are now to be followed in all courts to which this Practice Statement applies. For convenience of reference, the relevant parts of these Practice Notes read:

"When authority is cited, whether in written or oral submissions, the following practice should in general be followed.

If a case is reported in the official Law Reports published by the Incorporated Council of Law Reporting for England and Wales, that report should be cited. These are the most authoritative reports; they contain a summary of argument; and they are the most readily available.

If a case is not (or not yet) reported in the official Law Reports, but is reported in the Weekly Law Reports or the All England Law Reports, that report should be cited.

If a case is not reported in any of these series of reports, a report in any of the authoritative specialist series of reports may be cited. Such reports may not be readily available: photostat copies of the leading authorities or the relevant parts of such authorities should be annexed to written submissions; and it is helpful if Photostat copies of the less frequently used series are made available in court.

It is recognised that occasions arise when one report is fuller than another, or when there are discrepancies between reports. On such occasions, the practice outlined above need not be followed. It is always helpful if alternative references are given. Where a reserved written judgment has not been reported, reference should be made to the official transcript (if this is available) and not to the handed down text of the judgment.

Leave to cite unreported cases will not usually be granted unless counsel are able to assure the court that the transcript in question contains a relevant statement of legal principle not found in reported authority and that the authority is not cited because of the phraseology used or as an illustration of the application of an established legal principle."

Appendix B

Practice Direction on the Citation of Authorities, [2001] 1 W.L.R. 1001

Introduction

1. In recent years, there has been a substantial growth in the number of readily available reports of judgments in this and other jurisdictions, such reports being available either in published reports or in transcript form. Widespread knowledge of the work and decisions of the courts is to be welcomed. At the same time, however, the current weight of available material causes problems both for advocates and for courts in properly limiting the nature and amount of material that is used in the preparation and argument of subsequent cases.

2. The latter issue is a matter of rapidly increasing importance. Recent and continuing efforts to increase the efficiency, and thus reduce the cost, of litigation, whilst maintaining the interests of justice, will be threatened if courts are burdened with a weight of inappropriate and unnecessary authority, and if advocates are uncertain as to the extent to which it is necessary to deploy authorities in the argument of any given case.

3. With a view to limiting the citation of previous authority to cases that are relevant and useful to the court, this Practice Direction lays down a number of rules as to what material may be cited, and the manner in which that cited material should be handled by advocates. These rules are in large part such as many courts already follow in pursuit of their general discretion in the management of litigation. However, it is now desirable to promote uniformity of practice by the same rules being followed by all courts.

4. It will remain the duty of advocates to draw the attention of the court to any authority not cited by an opponent which is adverse to the case being advanced.

5. This Direction applies to all courts apart from criminal courts, including within the latter category the Court of Appeal (Criminal Division).

Categories of judgments that may only be cited if they fulfil specified requirements

6.1 A judgment falling into one of the categories referred to in paragraph 6.2 below may not in future be cited before any court unless it clearly indicates that it purports to establish a new principle or to extend the present law. In respect of judgments delivered after the date of this Direction, that indication must take the form of an express statement to that effect. In respect of judgments delivered before the date of this Direction that indication must be present in or clearly deducible from the language used in the judgment.

6.2 Paragraph 6.1 applies to the following categories of judgment:

Applications attended by one party only

Applications for permission to appeal

Decisions on applications that only decide that the application is arguable

County Court cases

unless

(a) cited in order to illustrate the conventional measure of damages in a personal injury case; or

(b) cited in a County Court in order to demonstrate current authority at that level on an issue in respect of which no decision at a higher level of authority is available.

6.3 These categories will be kept under review, such review to include consideration of adding to the categories.

Citation of other categories of judgment

7.1 Courts will in future pay particular attention, when it is sought to cite other categories of judgment, to any indication given by the court delivering the judgment that it was seen by that court as only applying decided law to the facts of the particular case; or otherwise as not extending or adding to the existing law.

7.2 Advocates who seek to cite a judgment that contains indications of the type referred to in paragraph 7.1 will be required to justify their decision to cite the case.

Methods of citation

8.1 Advocates will in future be required to state, in respect of each authority that they wish to cite, the proposition of law that the authority demonstrates, and the parts of the judgment that support that proposition. If it is sought to cite more than one authority in support of a given proposition, advocates must state the reason for taking that course.

8.2 The demonstration referred to in paragraph 8.1 will be required to be contained in any skeleton argument and in any appellant's or respondent's notice in respect of each authority referred to in that skeleton or notice.

8.3 Any bundle or list of authorities prepared for the use of any court must in future bear a certification by the advocate responsible for arguing the case that the requirements of this paragraph have been complied with in respect of each authority included.

8.4 The statements referred to in paragraph 8.1 should not materially add to the length of submissions or of skeleton arguments, but should be sufficient to demonstrate, in the context of the advocate's argument, the relevance of the authority or authorities to that argument and that the citation is necessary for a proper presentation of that argument.

Authorities decided in other jurisdictions

9.1 Cases decided in other jurisdictions can, if properly used, be a valuable source of law in this jurisdiction. At the same time, however, such authority should not be cited without proper consideration of whether it does indeed add to the existing body of law.

9.2 In future therefore, any advocate who seeks to cite an authority from another jurisdiction must

- i. comply, in respect of that authority, with the rules set out in paragraph 8 above;
- ii. indicate in respect of each authority what that authority adds that is not to be found in authority in this jurisdiction; or, if there is said to be justification for adding to domestic authority, what that justification is;
- iii. certify that there is no authority in this jurisdiction that precludes the acceptance by the court of the proposition that the foreign authority is said to establish.

9.3 For the avoidance of doubt, paragraphs 9.1 and 9.2 do not apply to cases decided in either the European Court of Justice or the organs of the European Convention of Human Rights. Because of the status in English law of such authority, as provided by, respectively, section 3 of the European Communities Act 1972 and section 2(1) of the Human Rights Act 1998, such cases are covered by the earlier paragraphs of this Direction.

The Lord Chief Justice of England and Wales
9th Day of April 2001

Appendix C

PRACTICE DIRECTION NO. 1 OF 2001

JUDGMENT CATEGORISATION

Supreme Court of Western Australia

PRACTICE DIRECTION No 1 of 2001

JUDGMENT CATEGORISATION

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1. The Supreme Court of Western Australia has adopted the practice of judgment categorisation in all judgments of the Court.

2. All judgments of the Court published on and after 1 August 2001 shall have the heading "Category" field which will appear after the heading "Result" on the judgment.

3. There will be four categories of judgments as follows:

Category A - Those of significance and/or of current interest by virtue of their discussion or application of legal principle

Category B - Those which are more routine in nature, either because they turn on their own facts or are routine examples of the application of well known and understood principles. Judgments of this kind would not normally warrant reporting or uploading into a national database.

Category C - Those containing data indicating current levels of assessment of damages, either generally or in particular categories of cases.

Category D - Those which contain data indicating current levels of sentence for offences generally or in particular categories of cases.

4. The applicable category will be identified adjacent to the category field.

Dated the 25th day of July 2001.

D K Malcolm

CHIEF JUSTICE
OF WESTERN AUSTRALIA