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The Filing of Additional Reasons in Canada

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The *Criminal Code of Canada*, R.S.C. 1985, requires a Canadian judge to provide "reasons" for any sentence imposed (see section 762.2). The *Criminal Code* does not require that reasons be provided for conviction or acquittal, but the Supreme Court of Canada has created a common-law requirement that reasons be provided when such decisions are rendered (see ***R. v. Sheppard***, [2002] 1 S.C.R. 869). In ***R. v. M.(R.E.)***, [2008] 3 S.C.R. 3, the Supreme Court indicated that the "basis for [a] trial judge's verdict must be 'intelligible,' or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent" (at paragraph 43).

Neither section 762.2 of the *Criminal Code* nor the Supreme Court's rulings require that reasons be in writing. As a result, it is quite common and legitimate for Canadian trial judges to render oral judgments. But what happens if the trial judge wishes to subsequently "edit" those oral reasons when a transcript of them is requested or to subsequently file written reasons to expand upon the oral decision rendered? As will be seen, it is well accepted in Canada that a trial judge has the discretion to subsequently edit the transcription of a judgment rendered orally and to subsequently file written reasons. However, as will also be seen, the discretion is a limited one, and a number of recent Court of Appeal decisions have indicated that Canadian trial judges must be cautious in adopting either approach after oral reasons have been provided.

In this column, I intend to consider the law in Canada that applies to filing additional reasons after an oral judgment has been rendered. I intend to start with an outline of a judge's authority to subsequently edit the transcription of an oral judgment rendered at the time of decision.

EDITING THE TRANSCRIPTION OF ORAL REASONS:

There will be occasions when an oral judgment will be transcribed. This can occur, for instance, as a result of an appeal being filed. In addition, one of the parties to a proceeding may request a transcript of an oral decision for a number of reasons (to use as a precedent, for instance). When such a situation occurs, what scope does a Canadian judge have to edit the oral reasons provided at the time the decision was rendered? This issue was recently considered by the British Columbia Court of Appeal.

In ***R. v. Veeken***, 2020 BCCA 54, the accused was convicted of the offence of sexual interference. The reasons for convicting were delivered orally. The accused appealed from conviction and argued that the judge erred by "editing the oral reasons for judgment after they were delivered." The Court of Appeal noted that "the judge amended his oral reasons for judgment by deleting from the transcribed version words said in court" (at paragraph 11).

The British Columbia Court of Appeal indicated that the "appeal raises an important question of practice concerning the extent to which trial judges are entitled to edit reasons given orally" (at paragraph 8).

The Court of Appeal concluded that it was "unnecessary for [it] to address the extent to which trial judges can edit their oral reasons for judgment to properly dispose of this appeal. In these circumstances, the issue is best left to be explored another day" (at paragraph 13). However, despite saying this, the Court of Appeal went on to consider the issue. It pointed out that it has "consistently held that while trial judges cannot edit or change their oral reasons 'in an attempt to defeat an appeal,' judges are entitled to edit their reasons 'to a degree' as, for example, where words have been misspoken or some clarification is necessary" (at paragraph 8).

The Court of Appeal did not explain what it meant by "clarification" and the use of this terminology could be interpreted as providing trial judges with a broad scope for post-decision editing. In addition, what do the words "to a degree" mean? In ***R. v. Schell***, 2004 ABCA 143, the Alberta Court of Appeal adopted a broad approach to this question, holding that the test to determine if the editing of the transcription of an oral judgment was appropriate involves a consideration of whether the edited version deviated "from the general thrust of their oral predecessor" (at paragraph 42).

In ***R. v. Desmond***, 2020 NSCA 1, the Nova Scotia Court of Appeal indicated that a trial judge "has limited authority to modify or change a transcript of oral reasons rendered in court. Judges often reserve to themselves the right to edit the transcripts of oral decisions for syntax or spelling or to rectify any errors in transcription that may have been made by a court reporter. The right to edit decisions is not without limit" (at paragraph 8).

The Court of Appeal also indicated that a judge's "right to make limited editorial corrections" to the transcription of an oral judgment is "not a second chance to fill in any obligatory blanks that were missed the first time around.…It would undermine the administration of justice if decisions could be altered in substance, especially after a Notice of Appeal has been filed. This is to be distinguished from the situation where a court may indicate the result 'with reasons to follow.' In such cases a court is entitled to deliver the reasons as promised but it cannot alter the outcome as initially indicated" (at paragraphs 17 and 18).

A more restrictive approach than that suggested in ***Veeken*** and ***Schell*** was adopted by the Ontario Court of Appeal in ***R. v. Wang***, 2010 ONCA 435.

In ***Wang***, the accused was acquitted of operating a motor vehicle while impaired by alcohol. On appeal to the summary conviction appeal court, the acquittal was set aside. The appeal court judge rendered an oral decision, which she subsequently

edited when a transcript of her reasons was prepared for the appeal to the Ontario Court of Appeal. The Ontario Court of Appeal noted that "[w]hile the changes did not modify the decision nor the basis for the decision, they expanded to a significant degree on the reasoning used by the summary conviction appeal judge to reach her decision" (at paragraph 8).

The Ontario Court of Appeal indicated that the appeal raised "the issue of the propriety of judges editing the transcripts of oral reasons for judgement after they are delivered" (at paragraph 1).

The Ontario Court of Appeal cautioned against a trial judge modifying, changing or adding to a transcript of oral reasons rendered in court except to correct "punctuation, grammatical errors and the like" (at paragraph 9). The Court of Appeal indicated that reasons for judgment are not meant to be "tentative" and that counsel who receive a transcript of oral reasons should not "be left to wonder whether it in fact reflects what was said in the court, or rather constitutes a version of the reasons as later modified by the judge" (at paragraph 11).

The Court of Appeal also held that editing an oral decision "is not an opportunity to revise, correct or reconsider the words actually spoken and no changes of substance are to be made. It must be recalled that the transcription of oral reasons rendered in court is exactly that, a transcript of what occurred in court. The reporter preparing the transcript is called upon to certify that the transcript is a true and accurate transcription of my recordings, to the best of my skill and ability" (at paragraph 9).

Finally, the Court of Appeal suggested that the "integrity" of the trial process could be undermined by inappropriate post-decision editing of an oral decision (at paragraph 10):

> The integrity of the trial record and of in court proceedings is fundamental to the judicial system and to the transparency of those proceedings. Counsel who are present when oral reasons are delivered in court should have confidence that the decisions they make with their client based on these oral reasons will not be undermined by alterations that represent something substantially different from what in fact occurred in the courtroom. Nor should counsel, upon receiving a transcript of the oral reasons, be left to wonder whether it in fact reflects what was said in the court, or rather constitutes a version of the reasons as later modified by the judge. It is even a greater concern when the alterations to the transcript of the reasons are made after a notice of appeal has been filed.

A SUMMARY:

In summary, it is clear that a Canadian judge can edit the transcription of an oral judgment she or he rendered. It is also clear that any editing should be limited to punctuation or grammatical errors. Such an editing process should not be used to enhance the quality of the oral decision by, for instance, improving the reasoning illustrated or the choice of language utilized.

Though this type of editing has received appellate approval, in my view no judicial editing should take place. I do not believe that a judge should be reviewing a transcript of her or his oral decision when a request for a transcription has been prepared. The court reporter preparing the transcription must certify its accuracy and we have no role in making changes or corrections. A party to a proceeding or an appellate court will understand that the language or grammar utilized in an oral judgment will often not match that utilized in a written judgment.

"[E]diting an oral decision 'is not an opportunity to revise, correct or reconsider the words actually spoken [in an oral ruling]...'"

What happens if a Canadian trial judge wishes to provide an immediate decision, but also wishes to place their reasons in writing? In Canada, this is commonly referred to as "reasons to follow."[1]

WRITTEN REASONS TO FOLLOW:

There are many instances in which a trial judge may feel compelled to provide an immediate oral decision though she or he intends to subsequently file more detailed reasons in writing. In ***R. v. Teskey***, [2007] 2 S.C.R. 267, the Supreme Court of Canada provided the following examples (at paragraph 17):

> ...it is often necessary in the interests of achieving trial efficiency for a trial judge to announce promptly the disposition on an evidentiary ruling or on a motion, with reasons to follow at a later date. In particular circumstances, there may also be good reason for announcing the verdict in a criminal case prior to delivering the reasons that led to it. For example, the prompt delivery of a verdict of acquittal may allow an accused to be immediately released from custody. Or it may be desirable to announce a verdict of guilty at the conclusion of the hearing so as to secure an earlier date in the court's schedule for the subsequent sentence proceedings.

In ***Teskey***, the Supreme Court held that a trial judge "is not precluded from announcing a verdict with 'reasons to follow'" (at paragraph 16). Similarly, in ***R. v. Czibulka***, [2011] O.J. No. 372, the Ontario Court of Appeal indicated that "trial judges are entitled in appropriate instances to deliver summary rulings with further reasons to follow" (at paragraph 39). More recently, the Nova Scotia Court of Appeal indicated in ***Desmond*** that in "some cases a judge may find it necessary to indicate they are providing a brief explanation or even just a bottom line in terms of a decision. When that is done the judge should make it clear that more detailed reasons are to follow" (at paragraph 10).

In ***Teskey***, the accused was convicted of the offence of aggravated assault. The Supreme Court of Canada noted that the trial judge provided "brief oral reasons… essentially saying only that

Footnotes

1. Sometimes referred to in New Zealand as a "result judgment" with reasons to follow (see ***P v R CRI*** [2010] NZHC 1008).

"In summary, a Canadian judge Is not precluded from announcing a judgment with written reasons to follow and then subsequently filing written reasons. However, ..."

the Crown had proved all the essential elements of the offence beyond a reasonable doubt" (at paragraph 5). More than eleven months later, the trial judge filed extensive written reasons.

The Supreme Court of Canada noted in ***Teskey*** that the filing of additional reasons after a verdict has been rendered "may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it.…It is in this sense that the trial judge who appears to have already committed to a verdict of guilt before completing the necessary analysis of the evidence may cause a reasonable person to apprehend that he or she has not kept an open mind" (at paragraph 18).

THE EFFECT OF A DELAY IN FILING THE WRITTEN REASONS:

In ***R. v. Cunningham***, [2011] O.J. No. 3546, the Ontario Court of Appeal held that "reasons, even if released long after the decision, are presumed to reflect the reasoning that led him [the trial judge] to his decision" (at paragraph 13). The Court of Appeal also held that there "is no time limit on the delivery of reasons," but that the longer the passage of time between the decision and the reasons for the decision, the "greater the concern that the requisite link between the two does not exist" (at paragraph 37). The Court of Appeal noted that the presumption of integrity can be displaced "by 'cogent' evidence that would lead a reasonable person to apprehend that the written reasons are not the road map to the decision" (at paragraph 34):

> The presumption of integrity can only be displaced by "cogent" evidence that would lead a reasonable person to apprehend that the written reasons are not the road map to the decision, but are instead an after-the-fact justification for the decision. That distinction can be hard to discern. Decisions are naturally made before the reasons are fully formulated much less articulated.

In ***Teskey***, the Supreme Court ordered that a new trial be held, concluding that it "could not reasonably be confident that the written reasons, delivered more than 11 months after the announcement of the verdicts of guilt, reflected the reasoning that led the trial judge to his decision" (at paragraph 23).

FILING WRITTEN REASONS AFTER A NOTICE OF APPEAL HAS BEEN FILED:

In ***Crocker v. Sipus***, (1992), 9 O.R. (3d) 713, the Ontario Court of Appeal held that the "mere filing of a notice of appeal after the disposition has been announced does not bar the consideration on appeal of the reasons released subsequently" (at page 1).

The Ontario Court of Appeal held in ***Cunningham*** that there were "several features" of that case which convinced it that a "reasonable observer would not see the written reasons as reflective of the actual reasoning path taken to the decision announced two years earlier." This included the "trial judge's knowledge that the Crown had launched an appeal and the grounds for that appeal." In ***Teskey***, the Supreme Court pointed out that if an appeal from the verdict has been launched and "the reasons deal with certain issues raised on appeal, this may create the appearance that the trial judge is advocating a particular result rather than articulating the reasons that led him or her to the decision" (at paragraph 18).

THE FILING OF MULTIPLE REASONS:

In ***Desmond***, the accused was convicted of the offence of criminal negligence causing bodily harm. The sentencing judge rendered three decisions on sentencing. She filed an oral decision at the time of sentencing; she edited a transcript of the oral decision; and then she filed a written decision. The written decision was provided to counsel after the Notice of Appeal was filed in the Court of Appeal. The Nova Scotia Court of Appeal noted that the appeal involved "consideration of the issue of when, and to what extent, a judge may provide written reasons after delivering an oral decision on the record."

The Court of Appeal held that in this case the written decision "was not simple editing of the original transcript. It did more than add references to case law or expand on reasons apparent in the original decision. The written decision provided an analysis that did not exist in the first decision. The sentencing judge was precluded from doing an analysis that was not done in the first instance. The March 12, 2019 decision will not be considered for purposes of this appeal" (at paragraph 24).

A SUMMARY:

In summary, a Canadian trial judge is not precluded from announcing a judgment with written reasons to follow and then subsequently filing written reasons. However, if this approach is adopted, the written reasons should be filed very shortly afterward and certainly before any appeal is filed. This illustrates the danger of adopting the reasons-to-follow approach. A notice of appeal may be filed shortly after an oral decision is rendered and before written reasons can be prepared. This leaves a trial judge in the unenviable position of filing their reasons after a party has indicated how they have purportedly erred.

One exception to the Canadian allowance of reasons to follow may be in relation to reasons for sentence.

REASONS-TO-FOLLOW SENTENCING:

As noted earlier, section 762.2 of the *Criminal Code of Canada* requires a Canadian judge to provide reasons for the imposition of sentence. It states as follows:

> When imposing a sentence, a court shall state the terms of the sentence imposed, and the reasons for it, and enter those terms and reasons into the record of the proceedings.

In ***R. v. Jimenez***, 2020 YKCA 5, the accused was convicted of the offence of possession of cocaine for the purposes of trafficking. At the sentence hearing, the trial judge provided brief oral reasons for the sentence imposed. They consisted of the following:

> I am going to do written reasons. There is a co-accused coming up for sentencing. I think that it would be more responsible of me to provide written reasons. I am not going to explain why I am doing what I am doing now because that will all be explained properly in the written reasons. I am just going to impose the sentence and it will be explained later.
>
> I am going to suspend the passing of sentence and I am going to place you on probation for a period of two years.

The Crown filed a Notice of Appeal, arguing that the judge erred by "failing to comply with section 726.2 of the *Criminal Code* by pronouncing sentence without providing reasons." Four days after the Notice of Appeal was filed, the trial judge filed written reasons.

The Yukon Court of Appeal indicated that one of the purposes of section 726.2 "is to facilitate appellate review of sentencing decisions." In addition, "it also affirms that, when a sentence is imposed, both the offender and the community are entitled to know why it was imposed and thus whether the 'punishment fits the given crime.'" The Court of Appeal indicated that the section "advances the fundamental purpose of sentencing expressed in section 718 of the *Criminal Code*, namely, to contribute to respect for the rule of law and the maintenance of a just, peaceful and safe society by imposing just sanctions" (at paragraph 29).

The Court of Appeal pointed out in ***Jimenez*** that some of "these purposes are served equally by oral reasons or written reasons... the sentencing process involves an important human element whereby the judge imposes sentence in the presence of the offender and those gathered in open court, some of whom may have been affected by the offence personally.…As a matter of transparency and fairness, all concerned are entitled to know the reasoning that led to the sentence, explained by the decision-maker, immediately and with certainty, in a formal public setting. This is why section 726.2 requires a judge to 'state' the reasons for a sentence 'when' imposing sentence" (at paragraph 31).

The Court of Appeal suggested that when written reasons are filed in this manner "the appearance of fairness in the administration of justice is compromised" (at paragraph 34):

> …if reasons are not stated when a sentence is imposed and an appeal is filed, a risk arises that written reasons issued later may appear to respond to the appeal rather than articulate the reasoning that led to the determination. In other words, delaying reasons may create an apprehension that they do not reflect the real basis for the sentence. Judges benefit from the presumption of integrity, but when reasons are divorced from the delivery of a decision the presumption may be displaced and the requisite link between the decision and the reasoning that led to it may be broken. In such cases, the appearance of fairness in the administration of justice is compromised.

The Court of Appeal held that trial judges should not provide "brief oral reasons when imposing sentence and issue comprehensive written reasons later" because this "would result in two separate sets of sentencing reasons being produced, which, in turn, may undermine certainty and finality, cause confusion as to which are the 'real' reasons and create the risk of apparent *ex post facto* justification" (at paragraph 40).

"[W]hen written reasons are filed [after an oral ruling,] 'the appearance of fairness in the administration of justice is compromised.'"

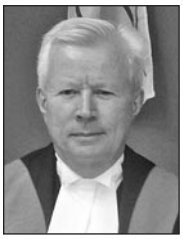
WHAT IS REQUIRED?

The Court of Appeal suggested in ***Jimenez*** that in "most cases, the requirements of section 726.2 can be met reasonably easily. Reasons for sentence are not usually lengthy and, where necessary, an adjournment to facilitate their preparation will cause little, if any, difficulty for anyone concerned. On occasion, however, exigent circumstances may render compliance unusually challenging or inconvenient. Nevertheless, the proper administration of justice trumps challenge and convenience and non-compliance with section 726.2 is not an available option" (at paragraph 42).

CONCLUSION:

Jimenez does not appear to entirely preclude reasons to follow in sentencing, but it does suggest that the initial decision should be sufficiently detailed so as to comply with the requirements set out by the Supreme Court of Canada for the content of a judgment (as referred to at the beginning of this column).

As has been shown, a Canadian judge has the discretion to edit a transcribed oral judgment and to file written reasons after a decision has been rendered orally. Though this discretion exists, it does not have to be utilized. There are dangers involved in both approaches to rendering judgment that can be easily avoided. As pointed out by the Yukon Court of Appeal in ***Jimenez***: "Announcing a decision with reasons to follow is permissible for trial rulings and verdicts in the interests of achieving trial efficiency, although the practice can be risky" (at paragraph 35).



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