

**COURT OF APPEAL RULES
PRACTICE NOTE – CIVIL PROCEEDINGS**

CAPN No. 2018-04

**CONSTITUTION OF FIVE-JUDGE PANEL FOR POSSIBLE
RECONSIDERATION OF PREVIOUS COURT DECISION**

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The following Practice Note was filed with the registrar of the Court of Appeal and is published under rule 4 of the *Court of Appeal Rules*.

Background

The *Court of Appeal Act* allows three judges to exercise all of the powers of the Court: SNL 2017, c. C-37.002, s. 15. However, the Chief Justice may designate a larger number of judges to sit as a panel in a particular case.

The practice has developed of constituting a panel of five judges where it is apparent that counsel will submit as part of their argument that a previous decision or legal principle stated by the Court should be reconsidered or reversed in accordance with the limited grounds, as discussed in the case law, upon which reconsideration or reversal is permitted.

Counsel do not always make their position with respect to reconsideration or reversal clear in the written argument which they file. Furthermore, argument is sometimes stated in a way that does not expressly invite the Court to reconsider or reverse a previous decision or legal principle, though the result being argued for implicitly would lead to that result.

So that an appropriate panel may be struck, it is important for the Court to know well in advance of the hearing date that reconsideration or reversal of a previous decision or legal principle may be engaged, either expressly or implicitly.

Practice Note

1. When crafting their written submissions, counsel should be alert to the possibility that their arguments, either expressly or implicitly, may involve asking the Court to reconsider or reverse a previous decision or legal principle stated by the Court.
2. At the time of filing their factum, counsel must advise the Court and other parties in writing if they believe that their submissions, including submissions in the alternative, may involve submitting that a previous decision or legal principle stated by the Court should be reconsidered or reversed (rule 12(1)).
3. Where the Chief Justice directs that the appeal will be heard by a panel of 5 judges, every party must file 6 copies of every document (rule 12(2)).
4. Failure to advise the Court and other parties as required by rule 12 may result in a scheduled appeal being delayed until a panel of appropriate size can be constituted and the additional panel members, if any, can familiarize themselves with the appeal materials. In that case, the Court may make an order regarding costs, or a party adversely affected by the failure of a party to notify the Court or the other parties may, on taxation, be able to claim (or offset) the additional costs occasioned by that failure.
5. Where notice of an intention to ask the Court to reconsider or reverse a previous decision or legal principle is given and other parties go to extra expense in filing material with respect to that issue or are required to file additional copies of material and it ultimately appears that it was not appropriate for the Court to address reconsideration or reversal of the previous decision or legal principle in question, that fact may be taken into account on the issue of costs.

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